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[B-218624; B-218880]

Environmental Protection and Improvement—Waste—Disposal

Since Solid Waste Disposal Act requires federal agencies to comply with local requirements respecting the control and abatement of solid waste generated by federal facilities in the same manner and extent as any person subject to such requirements, those federal facilities located within the city of Monterey must comply with a city requirement that all inhabitants of the city have their solid waste collected by the city's franchisee. Therefore, federal solicitations seeking bids for these services should be canceled and the services of the city or its franchisee should be used instead.

Matter of: Monterey City Disposal Service, Inc., September 3, 1985:

Monterey City Disposal Service, Inc. (MCDS), protests the issuance by the Departments of the Navy and the Army of invitations for bids (IFB) No. N62474-84-C-5427 (Navy) and DAKF03-85-B-0022 (Army) for the collection and disposal of solid waste at the Naval Postgraduate School, the Presidio of Monterey and Fort Ord.

MCDS has an exclusive franchise from the city of Monterey for the collection and disposal of solid waste. The city of Monterey code requires that inhabitants of the city utilize the solid waste disposal service provided by the city or its franchisee. The Solid Waste Disposal Act, 42 U.S.C. § 6961 (1982) (SWDA), provides:

> Each department * * * of the executive branch * * * of the Federal Government * * * engaged in any activity resulting, or which may result, in the disposal or management of solid waste * * * shall be subject to, and comply with, all Federal, State, interstate, and local requirements, both substantive and procedural (including any requirement for permits * * *), respecting control and abatement of solid waste * * * in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges.

MCDS contends that section 6961 requires the Navy and the Army, to the extent that their responsive IFB's concern services to be performed within the city limits, to utilize its services because of its exclusive franchise with the city.

After protesting to our Office, MCDS filed suit in the United States District Court, Northern District of California, San Jose (District Court) *(Gary Parola and Monterey City Disposal Service, Inc.* v. *Casper Weinberger, et al.*, No. C-85-20303WAI). The city of Monterey, a party to the suit, supports the plaintiff's action. The District Court issued an interim order on June 24, 1985, granting a preliminary injunction pending our decision on whether the Navy and the Army are required to utilize MCDS's services.

We find that the Navy and Army are required to use the services of the city or its franchisee and the protests are sustained.

The legislative history of section 6961 reveals that its purpose is to require Federal agencies to provide leadership in dealing with solid waste and hazardous waste disposal problems by having them comply not only with federal controls on the disposal of waste, but

also with state and local controls as if they were private citizens. S. Rep. No. 94-985, 94th Cong., 2d Sess. 23-24.

Both the Army and the Navy point to two recent court cases, *California* v. *Walters,* 751 F. 2d 977 (9th Cir. 1984), and *Florida* v. *Silvex Corp.,* No. 83-926-CIV-J-14, slip. op. (M.D. Fla. Jan. 28, 1985), as indicating that the type of requirement they must comply with does not include local provisions such as the solid waste collection provision of the Monterey code.

In *California* v. *Walters,* the city of Los Angeles initiated a criminal prosecution against the Veterans Administration because of its alleged disposal of hazardous medical waste, citing section 6961 as a waiver of sovereign immunity by the United States. The court disagreed, holding that while state waste disposal standards, permits and reporting duties were "requirements" applicable to federal agencies under section 6961, state criminal sanctions were not. The court stated that sanctions are rather the means by which standards and reporting duties are enforced and, as such, are not clearly within the scope of the waiver of sovereign immunity under section 6961.

Florida v. *Silvex Corp.* involved a state statute that holds a party strictly liable for removal costs and damages for releasing a hazardous waste. A Navy contractor responsible for removing hazardous waste spilled the waste, and the state sought to hold the Navy liable for damages, citing section 6961. As in the California case, the court reasoned that liability requirements under state statutes were not within the coverage of section 6961.

Sanctions are not being sought in this case. Rather the protester is seeking to require the Army and the Navy to use its solid waste collection services just as any other person in the city of Monterey would be required to do. *California Reduction Co.* v. *Sanitary Reduction Works,* 199 U.S. 306 (1905). The city code provision in question clearly is designed to permit the city to control the disposal of solid waste within city limits in a safe and efficient manner.[1] The protester and the city point out that, by requiring that all solid waste be collected by the city's exclusive franchisee, the city is better able to assure that its rules and regulations regarding solid waste disposal are followed. See also, *Strub* v. *Deerfield,* 167 N.E.

[1] The California Plan (Oct. 1981) as approved by the Environmental Protection Agency (EPA), 47 Fed. Reg. 6834 (1982), delegated to local government the responsibility for establishing collection standards of local concern. Consistent with the Plan the California Code provides that local government shall determine:

> Whether such services are to be provided by means of nonexclusive franchise, contract license, permit, or otherwise, either with or without competitive bidding, or if in the opinion of its governing body, the public health, safety and well-being so require, by partially exclusive or wholly exclusive franchise, contract license, permit, or otherwise, either with or without competitive bidding. Such authority to provide solid waste handling services may be granted under such terms and conditions as are prescribed by the governing body of the local governmental agency by resolution or ordinance.

Cal. Gov't. § 66757(b) (Deering Supp. 1985) (enacted in 1980).

2d 178, 180 (Ill. 1960), 83 ALR2d 795. The city further points out that until now the Navy has used its services (the Army has always competed for these services) and that if the Navy now withdraws, the city's ability to provide adequate service to the entire community at a reasonable price may be impaired.

The Navy argues, however, that federal procurement statutes require that its services and purchases be obtained on a competitive basis, and that the recently enacted Competition In Contracting Act of 1984 (CICA) 10 U.S.C.A. § 2301 (West Supp. 1985), reinforces the requirement for competition in contracting. The Navy argues that in the absence of an express congressional intent to permit sole source contracting under section 6961, we should not read the section as requiring sole source instead of competitive contracting.

We note that, while CICA requires that federal agencies use competitive procedures, the act recognizes as an exception when:

> A statute expressly authorizes or requires that the procurement be made * * * from a specified source. 10 U.S.C.A. § 2304(c)(5) (West Supp. 1985).

Under section 6961, federal agencies are required to comply with local requirements respecting the control and abatement of solid waste, "in the same manner, and to the same extent, as any person is subject to such requirements, including the payment of reasonable service charges." This language expressly requires federal agencies to obtain waste disposal services from local government where the local government requires that its waste disposal services be used. In short, we think the exception provision of CICA is applicable here.

Finally, the Navy expresses concern that it could find itself at the mercy of expensive or unscrupulous contractors if it has to use the local franchises. In this case, for example, Navy notes that it received three bids under its solicitation, a low bid of $107,400, a second low bid of $129,000, and a third bid from the protester of $250,432. Further, Navy notes that its current contract with the protester provides a price of $175,000.

We would share the Navy's concern, but for the fact that the record indicates that solicitation's statement of work exceeds the statement of work of the current contract. Moreover, MCDS has filed an affidavit showing that it bid using "the standard rates which the Company's franchise agreement with Monterey requires us to charge all customers within the City." Affidavit of Gary Parola, May 14, 1985, p.4. In view of MCDS's status as a public utility under California law, *United States* v. *Scavengers Protective Ass'n.*, 105 F. Supp. 656 (N.D. Cal. 1952), we find that MCDS's rates are reasonable under the circumstances since they are subject to local government regulation and judicial review. See *Ex parte Zhizhuzza*, 81 P. 955, 957 (Cal. 1905); see also *City of Glendale* v. *Trondsen*, 308 P.2d 1, 6 (Cal. 1957).

Therefore, we find that, in accordance with section 6961, the Navy should use the services of the city's franchisee to collect its solid waste. We recommend that the Navy solicitation be canceled and the Navy's collection requirements be met by using the services of the city or its franchisee.

In the case of the Army, we reach a similar conclusion with regard to Presidio. The Army's solicitation covers both Fort Ord, which is located outside the city, and Presidio, which is located within the city. As indicated by the Army solicitation, most of the solid waste will be generated outside the city (estimated 127.5 tons per week at Fort Ord compared to an estimated 30 tons per week at the Presidio). The Army has not presented any reasons why it can not obtain services for Presidio apart from the solid waste collection services it obtains for Fort Ord. Since the Fort Ord facility is outside the city limits of Monterey, the Army of course need not comply with the city code provision for its Fort Ord collection requirement. We therefore recommend that the Army delete the Presidio requirement from the Fort Ord solicitation. We further recommend that the Presidio requirement be met by using the services of the city or its franchisee.

The protests are sustained.

[B-219781]

Debt Collections—Administrative Action—Procedural Requirements

Agencies are entitled to a reasonable time in which to promulgate regulations to implement the administrative offset authority of section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716. During the interim period, agencies should provide debtors with the rights specified in section 10 or their substantial equivalent. If agency provides these rights, offset under section 10 is not precluded solely because of absence of final agency regulations.

Matter of: Need for Regulations Under 31 U.S.C. 3716, September 3, 1985:

The Acting General Counsel of the United States Department of Education (USDE) has requested our opinion concerning whether Government agencies may take administrative offset under section 10 of the Debt Collection Act of 1982, 31 U.S.C. § 3716 (1982), before they have issued their final regulations to implement that act. For the reasons given below, we conclude that agencies are entitled to a reasonable period of time in which to promulgate the regulations required by section 10 of the act, and that so long as a debtor is afforded the substantial equivalent of the procedural rights conferred by section 10, an agency may take administrative offset prior to finalizing these regulations.

BACKGROUND

According to USDE, repeated attempts to collect a debt which arose under the Federal Insured Student Loan Program, 20 U.S.C. §§ 1071 *et seq.* (1982), have proven unsuccessful.[1] However, USDE has now learned that its debtor has entered into a number of "large procurement contracts" with the Department of Defense (DOD). It appears that, under these DOD contracts, the debtor is regularly receiving payments that exceed the amount of its debt to USDE. USDE proposes to have DOD collect the debt pursuant to section 10 of the Debt Collection Act of 1982 (DCA), 31 U.S.C. § 3716(a) by taking offset against the DOD contract payments.[2]

USDE notes that section 10 appears to require agencies to promulgate regulations before taking offset. 31 U.S.C. § 3716(b). Section 10 also requires agencies to afford debtors certain procedural rights before taking offset. 31 U.S.C. § 3716(c). Neither USDE nor DOD have promulgated final regulations to implement section 10. USDE says that both agencies are diligently working to do so. However, USDE observes that the development of regulations to implement the Debt Collection Act of 1982 has proved to be a complex and time-consuming task. USDE recognizes that section 10 may be read strictly and literally to prohibit offset under it prior to the issuance of final regulations. Nevertheless, USDE argues that, so long as an agency accords its debtors the prescribed procedural protections and is diligently working to promulgate the required regulations, the agency should be allowed to take offset before those regulations have been finalized.

DISCUSSION

The Debt Collection Act of 1982 amended the Federal Claims Collection Act of 1966. Both acts have been codified in title 31 of the U.S. Code, chapter 37. According to its legislative history, the DCA was intended to "put some teeth into Federal [debt] collection efforts" by giving "the Government the tools it needs to collect these debts, while safeguarding the legitimate rights of privacy and due process of debtors." 128 Cong. Rec. S12328 (daily ed. Sept. 27, 1982) (statement of Sen. Percy). Section 10 of the DCA provides that agencies may collect claims owed to the United States by means of

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[1] The amount of the debt and the identity of the debtor were not specified, and are not relevant for purposes of our decision.

[2] USDE seeks to use section 10 because the statutes and regulations which govern the Federal Insured Student Loan Program do not address the use of offset against payments made by other agencies of the Government to collect debts arising under this program. See 20 U.S.C. §§ 1071 *et seq.;* 34 C.F.R. pt. 682 (1984). *Cf.* 34 C.F.R. § 682.711(c) (authorizing USDE to take offset against "any benefits or claims due the lender [from USDE].") In addition, we have been informally advised by USDE that the relevant contractual agreements neither permit nor prohibit offset actions. *Cf.* B-214679, Apr. 29, 1985, 64 Comp. Gen. 492.

administrative offset, after the debtor has been accorded certain procedural rights. 31 U.S.C. § 3716(a). Section 10 also provides that:

> Before collecting a claim by administrative offset under * * * this section, the head of an executive or legislative agency must prescribe regulations on collecting by administrative offset based on—
>
> (1) The best interests of the United States Government;
>
> (2) The likelihood of collecting a claim by administrative offset; and
>
> (3) for collecting a claim by administrative offset after the 6-year period for bringing a civil action on a claim under section 2415 of title 28 has expired, the cost effectiveness of leaving a claim unresolved for more than 6 years. 31 U.S.C. § 3716(b).

In addition to this requirement for regulations, the Federal Claims Collection Act of 1966 (which section 10 amended) provides that agency regulations concerning debt collection, including those pursuant to section 10, must be consistent with the Federal Claims Collection Standards (FCCS), 4 C.F.R. ch. II, which are joint regulations issued by GAO and the Department of Justice under the 1966 act. 31 U.S.C. § 3711(e) (1982). Agency regulations to implement section 10 could not be finalized until the joint regulations had been revised to reflect the 1982 act. Those revisions were published on March 9, 1984, with an effective date of April 9, 1984. 49 Fed. Reg. 8889 (1984).

Under a strict, literal interpretation of section 10, no agency of the Government could use administrative offset to collect debts until it has published the final regulations required by section 10. This interpretation, in our opinion, is an unduly technical reading of the law, and produces a result which is inconsistent with the stated purposes of the act.

It is fundamental that statutes are to be construed so as to give effect to the intent of the legislature. E.g., *United States* v. *American Trucking Ass'ns,* 310 U.S. 534 (1940); 2A Sutherland, *Statutes and Statutory Construction,* § 45.05 (Sands ed. 1973); 55 Comp. Gen. 307, 317 (1975). It is also fundamental that statutory constructions which produce absurd or unreasonable results should be avoided when they are at variance with the purpose and policy of the legislation as a whole. E.g., *Perry* v. *Commerce Loan Co.,* 383 U.S. 392 (1966); 2A Sutherland, *supra,* §§ 45.12, 47.38; 61 Comp. Gen. 461, 468 (1982). In our opinion, the administrative turmoil and financial losses that might result from the summary suspension of all offset activities pending promulgation of individual agency regulations could not have been intended by the Congress.

The DCA made many sweeping, complicated changes in the Government's basic claims collection authority, including its longstanding common law authority to take administrative offset. Those changes reflected congressional balancing of conflicting policies and purposes, including the desire to substantially improve and accelerate the collection process, yet simultaneously protect the legitimate privacy and due process rights of debtors. S. Rep. No. 378, 97th Cong., 2d Sess. 32 (1978). The Congress was alarmed at the

"substantial losses" being suffered in the Government's claims collection programs. *E.g.,* S. Rep. No. 378, *supra,* at 2-4. Indeed, the legislative history states that the "major purpose of this legislation is to facilitate substantially improved collection procedures in the federal government." S. Rep. No. 378, *supra.* at 1. At the same time, however, it does not appear that Congress expected the sweeping changes made by the act to take place overnight. *See* 128 Cong. Rec. H8052-53 (daily ed. Sept. 30, 1982) (remarks of Reps. Kindness and Conable); 128 Cong. Rec. S12334 (daily ed. Sept. 27, 1982) (remarks of Sen. Sasser). We find it difficult to believe that the Congress intended to further exacerbate the "substantial losses" being suffered in the Government's claims collection programs by requiring collection to halt until lengthy, complicated regulations could be formulated, proposed, and finalized—first by GAO and the Justice Department (since the Statute requires individual agency regulations to be consistent with these joint standards), and then by each agency.

It seems far more likely that Congress expected the agencies to develop implementing regulations as quickly as reasonably possible. During the interim period prior to the finalization of those regulations, the Congress must have intended that the agencies proceed with collection under their common law authority but adding the substantive and procedural protections for debtors added by the new amendments. In this regard, we refer to the *Energy Action Educational Foundation* litigation which reflects the judicial view of the effect of delayed regulations in similar circumstances.

That litigation concerned the 1978 amendments to the Outer Continental Shelf Lands Act, 43 U.S.C. § 1331 *et seq.,* which required the Department of the Interior to promulgate regulations reforming the way in which Interior awarded leases for the exploration and development of oil and natural gas deposits on the outer continental shelf (OCS). After the act passed, Interior continued to award leases for oil and gas exploration under an awards process which reflected some, but not all, of the reforms mandated by Congress. In addition, Interior had not yet promulgated the regulations required by the act. A lawsuit was instituted to enjoin Interior from awarding any further leases until it promulgated the required regulations.

The district court ruled that Interior's 9-month delay in promulgating the regulations necessary to implement the statutorily mandated reforms "although lengthy, is not arbitrary and capricious in light of the complexity and sensitivity involved in preparation of such regulations." *Energy Action Educational Foundation* v. *Andrus,* 479 F. Supp. 62, 63 (D.D.C. 1979). Therefore, the court denied the request for a preliminary injunction. The lower court's decision was affirmed by the D.C. Circuit Court of Appeals. *Energy Action Educational Foundation* v. *Andrus,* 631 F.2d 751 (D.C. Cir. 1979). A concurring opinion stated:

> * * * [The Government's] immediate responsibility is to promulgate the necessary regulations as rapidly as possible in order to implement Congress' reform goals.
>
> * * * * * * *
>
> * * * At this point, on this record, the delay is not clearly unreasonable, but the more sales of leases which are held without promulgation of the new regulations which are necessary before the congressionally-mandated program of reform can get under way, the more unreasonable the delay appears.* * * 631 F.2d at 762 (Wald, J., concurring) (footnote omitted).

A year later, this matter again came before the appeals court, but this time with a slightly different result. *Energy Action Educational Foundation* v. *Andrus,* 654 F.2d 735 (D.C. Cir. 1980), *rev'd on other grounds, sub nom. Watt* v. *Energy Action Educational Foundation,* 454 U.S. 151, 160 n.11 (1981). The issue before the court was summarized as follows:

> Having found in the language and history of the Act a Congressional imperative to promulgate regulations, as a necessary prelude to [implementation of the reforms mandated by the Act], the critical question is when does such an obligation become due. 654 F.2d at 754.

The court agreed with Interior that "Congress did not intend to hold up all OCS leasing and development until all the regulations are promulgated. To do so would be to undervalue the stated statutory objectives of expediting development of the OCS and mitigating this nation's energy problems." 654 F.2d at 755 n.96. Nevertheless, the court found that:

> * * * given the absence of significant progress * * * the day has arrived when the [Government's] continued delay [of over 2 years] is unreasonable and frustrates the essential purposes of [the act]. 654 F.2d at 737.

We think these cases support the proposition that agencies are entitled to a reasonable period of time in which to promulgate regulations required by statute. The statute is violated when the delay results in frustration of the statute's "essential purposes." We are in no way suggesting that agencies may continue to use offset without regard to section 10 for an indefinite period. What we are saying is that, if an agency provides the protections required by section 10, and if it is making reasonable progress toward the issuance of its regulations, then we think the "essential purposes" of section 10 are being satisfied and that the agency may continue to exercise administrative offset during the interim period prior to the finalization of those regulations.

Procedural rights of debtors, including notice and an opportunity for administrative review, are specified in 31 U.S.C. § 3716(a). As noted earlier, regulations are required by 31 U.S.C. § 3716(b), and are to be based on the best interests of the United States, the likelihood of collecting claims by administrative offset, and the cost effectiveness of leaving claims unresolved for more than 6 years. The regulations appear designed to assure consideration of these three factors, rather than advancing the rights specified in subsection (a). Presumably, the regulations will also address the subsection (a) procedural rights, and thus might be said to help in protecting

those rights by assuring uniformity and certainty of procedure. Nevertheless, those rights derive from the statute itself. Lack of regulations would not excuse failure to provide them. Therefore, agencies should provide those rights or their substantial equivalent without awaiting the finalization of regulations.

CONCLUSION

Based on the foregoing analysis, we conclude that the Government it entitled to a reasonable period of time in which to promulgate regulations to implement section 10 and that, so long as debtors are accorded the substantial equivalent of the procedural rights specified in 31 U.S.C. § 3716(a), agencies are not precluded from taking administrative offset under section 10 prior to finalization of their regulations. Accordingly, USDE is authorized to pursue its offset remedy in accordance with 31 U.S.C. § 3716 and 4 C.F.R. § 102.3.

[B-216529]

Travel Expenses—Military Personnel—Change of Station Status—Temporary Duty en Route

A member of the Reserve components returning home from ordered active duty for training for over 20 weeks at one location was directed to perform additional duty for less than 20 weeks at two temporary duty points en route home. Since travel incident to duty at a single location for 20 weeks or more is considered permanent-change-of-station travel, the member was entitled to permanent-change-of-station travel allowances for such travel, including the travel to the temporary duty points en route.

Matter of: Lieutenant Mark C. Crocker, AFNG, September 4, 1985:

The question in this case is whether Lieutenant Mark C. Crocker, a member of the Air National Guard, returning to his home after attending two courses of instruction that lasted more than 20 weeks, is entitled to permanent-change-of-station travel allowances under Chapter 4, Part D, or temporary duty travel allowances under Chapter 4, Part E, of Volume 1 of the Joint Travel Regulations (1 JTR) for his return travel, which included two other duty stations en route to home.[1] We conclude that Lieutenant Crocker is entitled to permanent-change-of-station travel allowances under Chapter 4, Part D, 1 JTR, for his return travel.

Facts

Lieutenant Crocker was ordered to active duty in December 1981 from his home in Kenmore, New York, to attend two courses of in-

[1] This action is in response to a request for a decision received from Captain E.R. Cortes, Chief, Accounting and Finance Branch, Comptroller Division, Griffiss Air Force Base, New York. The Per Diem, Travel and Transportation Allowance Committee has assigned the request Control Number 84-16.

struction at Mather Air Force Base, California, of approximately 36 weeks duration, and to return home at the conclusion of the courses. He drove from New York to Mather in his privately owned automobile. After he had nearly completed his schooling at Mather in August 1982, his original orders were amended to include three additional courses of instruction at different military installations—each less than 20 weeks duration—and a training period of a little over a month at his regular National Guard unit. Pursuant to the amended orders and upon completion of his schooling at Mather, Lieutenant Crocker drove to Fairchild Air Force Base, Washington, and then to Homestead Air Force Base, Florida, where he completed two of the additional courses. Then he drove from Florida to home, arriving October 3, 1982. He reported for training at his regular National Guard unit in Niagara Falls, New York, the next morning and remained in a training status until he departed by airplane on November 14, 1982, for his last course of instruction under the amended orders at Holloman Air Force Base, New Mexico. At Holloman his orders were further amended to direct another training session at his regular National Guard unit upon return from Holloman until another course of instruction could be announced. Lieutenant Crocker departed Holloman by privately owned automobile on December 14, 1982, and arrived for training at his regular National Guard unit on December 20. His original orders were amended there for the last time to include a course of instruction lasting more than 20 weeks at McConnell Air Force Base, Kansas. He departed for McConnell by privately owned automobile on January 20, 1983, and returned home on June 17 the same way after completing the course and being released from active duty.

Issue

Since the two courses of instruction at Mather Air Force Base lasted a total of 36 weeks (more than 20 weeks), the original orders effected a simple permanent change of station from Lieutenant Crocker's home to Mather and would have effected another simple permanent change of station upon release from active duty at Mather upon the conclusion of the courses and return to home. See 1 JTR, App. J. Although these orders were amended several times to include additional courses of instruction and periods of training duty at his regular unit location, which extended the period of continuous active duty to approximately 1½ years, the permanent change of station under his amended orders upon his return from Mather by way of Fairchild Air Force Base and Homestead Air Force Base to his home is the only part of Lieutenant Crocker's travel in question. The permanent-change-of-station travel allowance when Lieutenant Crocker traveled at his personal expense by privately owned automobile for official travel was a mileage allowance of 13 cents per mile for the official distance plus a flat rate

per diem of $50 per day in whole-day increments for each 300 miles of travel.[2] Lieutenant Crocker was paid mileage and per diem upon the change of station from his home to Mather, and he argues that these allowances are also payable for his automobile travel from Mather by way of Fairchild Air Force Base and Homestead Air Force Base to his home in New York. His claim is based on specific authorization for such permanent-change-of-station allowances to be paid for travel by way of temporary duty points (Fairchild and Homestead) incident to a permanent change of station. 1 JTR, paragraph M4151 (Change No. 352, June 1, 1982), Chapter 4, Part D. However, Chapter 6, Part A, subparagraph M6000-1 (Change No. 352, June 1, 1982), which applied to travel of members of the Reserve components in Lieutenant Crocker's situation, appears to conflict with Chapter 4, Part D, because Chapter 6 appears to mandate only temporary duty travel allowances under Chapter 4, Part E, for such travel which results in a lesser entitlement to Lieutenant Crocker. The issue is whether Chapter 6, Part A, subparagraph M6000-1, does in fact mandate temporary duty travel allowances for the questioned travel, which would preclude the application of the permanent-change-of-station mileage and per diem allowances.[3]

Analysis and Discussion

The permanent-change-of-station allowances authorized to all members of the uniformed services under 1 JTR, paragraph M4151, Chapter 4, Part D, applied to Lieutenant Crocker's automobile travel from Mather Air Force Base by way of Fairchild Air Force Base and Homestead Air Force Base to his home unless that paragraph was superseded by subparagraph M6000-1, Chapter 6, Part A, which pertained specifically to travel of members of the Reserve components. However, our analysis of subparagraph M6000-1 indicates that it was written to complement the rules pertaining to permanent changes of station found in Chapter 4, Part D, for all members of the uniformed services and that there is only an apparent rather than an actual conflict between subparagraph M6000-1 and Chapter 4, Part D. Subparagraph M6000-1 literally does not apply to the disputed part of Lieutenant Crocker's travel. There-

[2] 1 JTR, paragraphs M4150 (Change No. 352, June 1, 1982), and M4151, Chapter 4, Part D, and Joint Determination No. 28-81, July 29, 1981, reprinted in the Table of Contents, 1 JTR, Chapter 4.

[3] The temporary duty travel allowance for Lieutenant Crocker traveling by privately owned automobile under 1 JTR, Chapter 4, Part E, would amount to 16 cents per mile for the distance of the ordered travel but a per diem allowance computed only for the constructive traveltime that a commercial airplane would require to travel the ordered distance, since his orders did not state the use of an automobile to be advantageous to the Government. See 1 JTR, paragraphs M4203-4(a) and M4204-5(c) (Change No. 352, June 1, 1982). The temporary duty allowances for automobile travel are considerably lower than the mileage plus per diem and the traveltime allowed is restricted to the constructive air traveltime.

fore, when a member of the Reserve components makes a permanent change of station, he is subject to the rules and allowances in 1 JTR, Chapter 4, Part D.

In demonstrating that subparagraph M6000-1 does not apply to Lieutenant Crocker's questioned travel, we will summarily dispose of the provisions clearly not involved and fully address only the ones that arguably are involved. Subparagraph M6000-1 is composed of subparts a through d. Subparts a, d, and subparts c(1) and (2) concern travel situations that do not apply to the questioned travel. And since subpart b(1) concerns only travel from home to the first duty station or from the last duty station to home for situations not involved here, it does not apply either. The provisions of subpart c(3) and subpart b(2) remain to be addressed.

Subpart b(2), paragraph M6000-1, provides:

(2) *Travel Between Duty Stations.* Members of the reserve components coming within the purview of subpar. c(1) and (2) who are ordered to perform duty at more than one duty station will be entitled to travel and transportation allowances as for temporary duty travel under Chapter 4, Part * * * E * * * for travel between such duty stations.

Significantly, subpart b(2) is the only part of subparagraph M6000-1 specifically applying to travel between duty stations, such as between Mather, Fairchild, and Homestead. Although temporary duty travel allowances rather than permanent-change-of-station allowances are prescribed for the travel, the travel is limited to situations "* * * coming within the purview of subpar. c(1) and (2) * * *." Since subparts c(1) and (2) describe situations where the total amount of active duty performed is for less than 20 weeks in the considered period, performing travel between duty stations as described in subparagraph b(2) within a 20-week period does not apply to Lieutenant Crocker's questioned travel because that travel occurred during a period of duty that was greater than 20 weeks, involving a permanent change of station. Subparagraph b(2) could apply only if the character of Lieutenant Crocker's entire travel is ignored and certain segments of the questioned travel are isolated and examined.

Subpart c(3), paragraph M6000-1, provides:

(3) *Active Duty for 20 Weeks or More.*

(a) *General.* When a member is called to active duty for 20 weeks or more, no per diem or actual expense allowances are payable at any location where the duty to be performed is for 20 weeks or more regardless of the availability of Government quarters and Government mess.

(b) *Active Duty at More Than One Location.* When the active duty is to be performed at more than one location, per diem, travel and transportation allowances, including miscellaneous reimbursable expenses, are payable at any location where the duty to be performed is for less than 20 weeks at the same rates and subject to the same provisions and deductions as are provided for temporary duty in Chapter 4, Parts * * * E * * * .

Note that in subpart c(3)(b) there is no language similar to that found in subpart b(2), which describes the allowances as applying "* * * for travel between such duty stations." And both subparts

describe situations where members are ordered to perform duty at more than one duty station. Nowhere in subparagraph M6000-1 is there a specific provision for travel between permanent duty stations or to or from a temporary duty station en route to or from a permanent duty station during a permanent change of station. We believe that the reason is because of the complementary nature of subparagraph M6000-1 to the normal permanent-change-of-station rules including temporary duty en route, found in 1 JTR, Chapter 4, Part D. Under Chapter 4, Part D, permanent-change-of-station allowances are payable for travel directed via temporary duty points en route. 1 JTR, paragraph M4151, as provided at the time of this travel.

Conclusion

Accordingly, Lieutenant Crocker is entitled to reimbursement for the travel in question under 1 JTR, Chapter 4, Part D. The voucher is being returned for payment on this basis.

[B-217383]

Subsistence—Per Diem—Purpose

A Forest Service firefighter was authorized reimbursement on an actual subsistence expense basis in lieu of a per diem rate of $5. The firefighter argues that the Federal Travel Regulations, para. 1-8.1c, authorize reimbursement on an actual subsistence basis only where unusual circumstances exist. The Forest Service believes that unusual circumstances exist because the firefighters were working in remote areas where food and lodging is not normally available and is provided by the Forest Service. It believes that reimbursement on an actual subsistence expenses basis would ensure that only those employees that actually incurred expenses would be reimbursed and cited further administrative savings realized by a reduction in the number of travel vouchers that would have to be processed. The Forest Service may not authorize the firefighters actual subsistence expenses since FTR para. 1-8.1c provides that actual subsistence expenses may be authorized where the authorized per diem would be insufficient to cover expected expenses. Therefore, the firefighter may be paid the claimed per diem.

Matter of: Frank C. Sanders, September 5, 1985:

The issue presented is whether an agency may authorize actual subsistence for employees in a travel status where the per diem would be adequate to cover expected expenses.[1] We read the applicable regulations and the legislative history as intending that actual subsistence expenses be authorized only when the employee travels to a high-cost geographic area or where due to the unusual circumstances of the travel per diem would not be sufficient to cover expected expenses. Therefore, we hold that the agency may not authorize reimbursement of actual subsistence expenses in these circumstances.

The Forest Service states that several of its regions have authorized reimbursement on an actual subsistence basis instead of on a

[1] The request was submitted by C.E. Tipton, an authorized certifying officer of the Forest Service, United States Department of Agriculture.

per diem basis whenever an employee is assigned to firefighting duties. The Forest Service believes that this is proper because most fires occur in remote areas where commercial lodging and meals are not available. Thus, the Forest Service provides lodgings and meals to most of the firefighters. The Forest Service indicates that a cost savings results from reimbursing only actual expenses because only those employees who have out-of-pocket expenses are paid. Finally, the Forest Service indicates that administrative benefits accrue to the agency because it is required to process a smaller number of claims since many firefighters have no out-of-pocket expenses. The use of a special per diem rate under paragraph 1-7.3 of the Federal Travel Regulations (May 1973) *incorp. by ref.,* 41 C.F.R. § 101-7.003 (1980), was considered and rejected because it would either increase administrative costs or not fairly reimburse employees for incurred expenses in all situations.

The Forest Service forwarded a voucher submitted by one of the firefighters, Mr. Frank C. Sanders, Smokejumper Superintendent. Mr. Sanders reads FTR paragraph 1-8.1 as authorizing actual subsistence expenses only when the agency determines that the per diem otherwise allowable is inadequate—i.e., less than sufficient to cover expenses incurred. It does not in his opinion authorize actual subsistence for the purpose of reducing administrative costs. Mr. Sanders has submitted four vouchers totaling $174.50, representing his entitlements computed under the rules applicable to paying the per diem allowance. He indicates that if he is entitled to reimbursement only on an actual expenses basis, he will obtain information with respect to such expenses including the meals he was required to purchase.[2]

The conditions under which an agency may authorize actual subsistence expenses are set forth in paragraph 1-8.1 of the Federal Travel Regulations, *supra.* An employee's entitlement to actual subsistence expenses is normally contingent upon entitlement to per diem and an agency determination that the authorized maximum per diem allowance would be inadequate to cover the actual and necessary expenses of the traveler. FTR para. 1-8.1a. It is in this context that subparagraph 1-8.1c authorizes actual subsistence expenses due to "unusual circumstances of the travel assignment." That subsection reiterates that actual subsistence expenses may be authorized "when it is determined that the maximum per diem allowance * * * would be inadequate * * *." The clear intent of this phrase is reinforced by subsequent rules. One such rule states that actual subsistence may not be authorized where the expected expenses exceed the authorized per diem by only a small amount or where inflated costs are common to all travelers. Additional exam-

[2] The Forest Service states that computed under the standard per diem rate, Mr. Sanders' daily entitlement would be $5 (zero lodging costs plus $23, minus $6 for each meal provided by the Government).

ples of unusual circumstances are provided in subparagraph 1-8.1c(3). The common thread in all of the examples is that the cost of lodging absorbs practically all of the authorized per diem.

The plain meaning of this regulation is that the term "unusual circumstances" covers only certain situations where the authorized per diem is not sufficient to cover expected expenses. Reducing administrative costs is not one of the examples listed as an "unusual circumstance." Further, in view of the legislative history of the statute authorizing reimbursement of actual subsistence expenses, as discussed below, we do not believe the statute contemplated payment of actual subsistence expenses instead of per diem in these circumstances.

The regulatory provision discussed above implements 5 U.S.C. § 5702(c) (1982). That subsection provides:

> Under regulations prescribed under section 5707 of this title, the Administrator of General Services, or his designee, may prescribe conditions under which an employee may be reimbursed for the actual and necessary expenses of official travel when the maximum per diem allowance would be less than these expenses, except that such reimbursement shall not exceed $75 for each day in a travel status within the continental United States when the per diem otherwise allowable is determined to be inadequate (1) due to the unusual circumstances of the travel assignment, or (2) for travel to high rate geographical areas designated as such in regulations prescribed under section 5707 of this title.

The language of this subsection is straightforward. Actual subsistence may be authorized only where the per diem is determined to be inadequate for one of the two prescribed reasons—travel in a high-rate geographical area or where the travel assignment involves unusual circumstances. Concerning the latter, the legislative history shows that Congress was concerned only about situations requiring expenditures well in excess of an employee's per diem entitlements. For example, the House Report accompanying the bill states that the authority to authorize actual subsistence in unusual circumstances is intended to be used "in a very limited number of situations," noting that occasionally employees are required to travel on assignments that require "personal expenditures well in excess of the reimbursement which would be obtained at the [authorized] per diem rates." H.R. Rep. No. 604, 89th Cong., 1st Sess. (1955), *reprinted in* 1955 U.S. Code Cong. & Ad. News 2547, 2549-2550.

On the basis of the above analysis, we find that the regulations do not provide and the statute does not contemplate reimbursement of actual subsistence expenses where the expected expenses would be far less than the otherwise authorized per diem. Accordingly, the Forest Service may not authorize reimbursement of actual subsistence expenses under FTR paragraph 1-8.1 in this situation. Since the Forest Service did not fix a per diem rate for firefighters, the travel vouchers of Mr. Sanders should be processed as submitted using the rules applicable to payment of per diem when lodging costs are not incurred and meals are furnished by the Gov-

ernment. In that connection it should be noted that in addition to meals and lodging the per diem allowance is intended to cover miscellaneous expenses not specifically identified. While it may be that firefighters do not incur the usual miscellaneous expenses this element of cost should not be overlooked in fixing a specific per diem rate.

[B-219345.3]

Contracts—Protests—General Accounting Office Procedures—Piecemeal Development of Issues by Protester

Where protester raises broad ground of protest in initial submission but fails to provide any detail on this protest ground until it comments on the agency report, so that a further response from the agency would be needed for an objective review of the matter, the protest, filed in a piecemeal fashion, will not be considered.

Contracts—Protests—Burden of Proof—On Protester

A protester alleging disclosure of its confidential information to its competitors by agency personnel bears the burden of proving the improper conduct, and absent any probative evidence of actual disclosure, the allegation must be viewed as speculative and the burden has not been met. Moreover, General Accounting Office will not conduct investigations to establish the validity of the protester's statements.

Freedom of Information Act—General Accounting Office Authority

GAO has no authority to determine what information must be disclosed by another agency in response to a Freedom of Information Act request.

Matter of: LaBarge Products, B-219345.3, September 5, 1985:

LaBarge Products (LaBarge) protests the award of any contract under invitation for bids (IFB) No. DAAJ10-85-B-A089 issued by the Army for the procurement of a minimum of 20 and a maximum of 62 tactical water distribution sets and spare/repair parts. LaBarge asserts that it submitted the only responsive bid, and that the Army released confidential information to certain other bidders. We dismiss the protest in part and deny it in part.

The IFB was issued on March 29, 1985, and bid opening was on May 28. Of the five bids received, Engineered Air Systems, Inc. (EASI) was low bidder; Angus Fire Armour Corp. (Angus) was second low; and LaBarge was third. LaBarge protested to our Office on June 28.

The Army, in reporting on LaBarge's protest, states that all five bidders were responsive to the solicitation. The agency also contends there was no disclosure of confidential data to bidders by any procurement personnel. Any changes to the solicitation, the Army states, were issued by amendment, and any answers to questions concerning the solicitation were circulated to all bidders. Finally, the Army argues that LaBarge has failed to present any specific evidence of the alleged disclosure of confidential information.

In its response to the agency report, LaBarge argues that neither EASI nor Angus provided an overpack list for the pump and engine they offered in their bids, as required by Amendment 3 to the solicitation. Such failure, LaBarge contends, amounts to a material bidding deficiency and warrants a finding of nonresponsiveness by our Office. Further, LaBarge believes its confidential pricing information is being released to its competitors by Army personnel. The firm cites, to support its position, a protest which we dismissed earlier this year, *Victaulic Company of America,* B–217129, May 6, 1985, 85–1 C.P.D. ¶ 500, involving another contract with the Army; many of the same Army personnel, according to LaBarge; and an allegation that pricing data was disclosed improperly. Apparently, LaBarge is suggesting that the disclosure allegation in *Victaulic* supports LaBarge's allegation in this case. LaBarge informs us of an investigation of the alleged activity in the *Victaulic* procurement that is being conducted by the Army Criminal Investigation Division (CID), and states that it has sought information concerning this investigation pursuant to the Freedom of Information Act (FOIA). Because it has received no response, LaBarge asks that our Office investigate the allegations independently.

We will not review LaBarge's responsiveness argument as it was detailed insufficiently as initially filed and, as a piecemeal presentation, is untimely. In its initial protest submission, LaBarge failed to indicate why it thought it was the only responsive bidder, or how the other bidders were nonresponsive. Thus, the firm failed to comply with section 21.1(c)(4) of our Bid Protest Regulations, which requires a protest to include "a detailed statement of the legal and factual grounds of protest including copies of relevant documents." *Datametrics Corp.,* B–219617, Aug. 1, 1985, 85–2 C.P.D. ¶ 122.

In its comments on the agency report LaBarge, for the first time, presented specific details on this issue by raising EASI's and Angus' failures to provide overpack lists. We will not review the merits of the specifics noted in LaBarge's comments, however.

The protest system endorsed by the Competition in Contracting Act of 1984 (CICA), implemented by our Regulations, is designed to provide for the expeditious resolution of protests with only minimal disruption to the orderly process of government procurement. *See* 31 U.S.C. § 3554 (West Supp. 1985). To that end, CICA requires, generally, the agency to withhold contract award or, if a contract was awarded within 10 days prior to protest, to direct the contractor to cease performance while the protest is pending. The agency is required to report within 25 working days from its receipt of notice of the protest from our Office, 31 U.S.C. § 3553, and the protest must be resolved by our Office within 90 working days. 31 U.S.C. § 3554. This process does not contemplate a piecemeal development of protest issues, since that would enable a protester to delay our decision and jeopardize our ability to meet the CICA re-

quirement for a decision within 90 days, thereby undermining the objectives of the process by delaying an award that otherwise could have been effected earlier. Protesters therefore must assert and substantiate all of their grounds of protest as promptly as possible, and a failure to do so may result in portions of a protest being dismissed. 4 C.F.R. § 21.1(f).

It is clear from LaBarge's comments that the basis for the initial assertion that LaBarge was the only responsive bidder was that the other bidders did not include overpack lists. Yet LaBarge withheld this argument until the Army, absent any detail from LaBarge, made a general response. As a result, we are left with a protest that was not substantiated until after the agency response, leaving us with no basis for objective review absent a supplemental report from the agency. We therefore will not consider this protest ground.

LaBarge's protest that its confidential information is being released to its competitors by Army personnel is denied. The protester has the burden of proving improper conduct on the part of government officials. See *Davey Compressor Co.*, B-215028, Nov. 30, 1984, 84-2 C.P.D. ¶ 589. Absent any probative evidence of the actual disclosure, the allegation must be viewed as speculative only, because the protester's burden would not be met. See *Energy and Resource Consultants, Inc.*, B-205636, Sept. 22, 1982, 82-2 C.P.D. ¶ 258. Here, LaBarge provides nothing more than its belief that information is being released based on the protest submission in *Victaulic*. Without probative evidence, LaBarge's allegations do not provide a basis for our Office to object to the award. *Id.*

Moreover, our Office will not conduct investigations to establish the validity of a protester's speculative statements. *Lion Brothers Company, Inc.*, B-212960, Dec. 20, 1983, 84-1 C.P.D. ¶ 7. As to the protester's FOIA request to the Army, we point out that we do not have authority to determine what information must be disclosed by another agency in response to a FOIA request. A firm's recourse in this respect is to pursue the disclosure remedies under the procedures provided by the statute itself. *Id.*

The protest is dismissed in part and denied in part.

[B-219619]

Bids—Mistakes—Correction—Low Bid Displacement

Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid.

Bids—Responsiveness—Pricing Response—Minor Deviation From IFB Requirements

Where the bidder, by entering a bid price for every item, offered to perform as required under the solicitation and at a price apparent on the face of the bid, the fail-

ure to enter a total price did not render the bid nonresponsive and, instead, may be considered an informality and waived.

Matter of: OTKM Construction Incorporated, September 5, 1985:

OTKM Construction Incorporated (OTKM) protests the determination by the Forest Service, Department of Agriculture, to permit correction of the bid submitted by Marvin L. Cole General Contractor, Inc. (Cole), in response to invitation for bids No. R6-85-27C. OTKM alleges that there is insufficient evidence of the intended bid price to permit correction and argues that, in any case, Cole's bid is nonresponsive. We deny the protest.

The solicitation was for the construction of the Mount St. Helens Visitor Center in the Gifford Pinchot National Forest, Washington. The solicitation schedule included 33 items divided among five groups: (1) building and site; (2) sewerage; (3) segment I of road A; (4) segment II of road A; and (5) road B. For some items, such as excavation, bidders were to enter unit and extended prices based upon the estimated quantity involved; other items were bid on a "lump sum" or on an "each" basis. At the foot of each of the five groups of items a blank was provided for the entry of a subtotal. These blanks were in the same column as the prices bid for each item. At the bottom of the last page of the four-page Schedule was another blank for "TOTAL ALL ITEMS—BUILDING, SITE, SEWERAGE AND ROAD." This blank was followed by a notice cautioning all bidders to "[b]e sure to enter TOTAL BID PRICE IN ITEM (Block) 17 on back of Standard Form 1442," the standard form for the solicitation, offer and award of construction, alteration or repair contracts.

Of the six bids received, OTKM submitted the apparent low bid of $2,924,409.90, while Cole submitted the apparent second low bid of $2,953,350.

Upon examining Cole's bid, the Forest Service noted that the unit prices were properly extended, except for the rounding off of some item prices and a $1 error in one extension. The subtotals of all five groups also were the correct mathematical totals of the item prices. The only discrepancy was between the amount Cole entered for "TOTAL ALL ITEMS"—$2,953,350—and the correct mathematical total of the subtotals for the five groups—$2,890,987—a difference of $62,363. In view of the consistency of the rest of the bid, contracting officials determined that Cole had made an apparent clerical error in calculating the stated total bid price for all items. Accordingly, they determined that Cole's bid was subject to correction to reflect an intended bid price of $2,890,985.16, which is the correct mathematical total of all the items when the extended prices are not rounded off. When contacted to verify its bid price, Cole confirmed that the mistake occurred

in adding the item prices rather than in calculating the item prices themselves.

OTKM, however, then protested to the Forest Service against permitting correction of Cole's bid and making award to Cole. When that protest was denied, OTKM filed this protest with our Office.

OTKM alleges that although it is apparent that there is a mistake in Cole's bid, the bid may not be corrected because the intended bid price is not apparent on the face of the bid. Moreover, OTKM points out that Cole failed to enter a total bid price in block 17 of Standard Form 1442, as instructed, and argues that this rendered Cole's bid nonresponsive.

The Forest Service and Cole, on the other hand, maintain that the consistency of the item prices and of the subtotals indicates that the item prices—the individual pay items—were the prices intended, not the stated total price. Cole, moreover, also contends that it is apparent from the bid how the $62,363 discrepancy occurred.

Pages 1 through 3 of the IFB Schedule were arranged as follows:

Page 1—unit prices and subtotal, building and site.

Page 2—headed "Sewerage and Road," subheaded "Sewerage," unit prices and subtotal for sewerage.

Page 3—headed "Road," unit prices and subtotal for road A, segment I.

Page 4, as bid by Cole, appears as follows:

SCHEDULE OF ITEMS

Page 4 of 4

ROAD A SEGMENT II	
Construction Staking	$1,452
Clearing and Grubbing, Slash Treatment	10,973
Excavation	5,880
Screened Aggregate, Grading, Compaction	30,147
SUBTOTAL ROAD A SEGMENT II	$48,452
ROAD B	
Construction Staking	$968
Clearing and Grubbing, Slash Treatment	4,268
Excavation	1,177

SCHEDULE OF ITEMS—Continued

Screened Aggregate, Grading, Compaction	8,098
SUBTOTAL SEWERAGE AND ROAD	[1] $14,511
TOTAL ALL ITEMS—BUILDING, SITE, SEWERAGE AND ROAD	$2,953,350

[1] Unlike the other four groups, no blank was provided for the subtotal for road B only, an apparent oversight. The abstract of bids, however, shows that consistent with the structure of the rest of the Schedule, all bidders other than OTKM interpreted this blank as the subtotal for Road B only rather than what it literally was—the subtotal for all sewerage work plus all road work.

Cole explains that as a result of the fact that two groups appeared on page 4 of the Schedule, and that the blanks for the subtotals were placed in the same column as the item prices, it inadvertently added the item prices *and* the two subtotals on page 4 in arriving at its total price—thus overstating that price by $62,963.

Cole further explains that in adding the item prices under road B it inadvertently included a price of $363 for construction staking instead of the intended price of $968. This had the effect of understating its intended total bid price by $605. The figure $363 does appear on Cole's bid for this item, but it is lined through, the alteration is initialed and the figure $968 is written above it. Likewise, the correct mathematical total for the group if $363 was the intended price for construction staking appears on Cole's bid, but it is lined through, the alteration is initialed and the correct mathematical total for the group if $968 was the intended bid price for construction staking is written above it.

Finally, Cole states that the total it thus mistakenly calculated—$2,953,345—was rounded up by $5 to arrive at the total of $2,953,350 stated in its bid.

As a general rule, where, as here, a bid contains a price discrepancy and the bid would be low on the basis of one price but not the other, then correction is not allowed unless the asserted correct bid is the only reasonable interpretation ascertainable from the bid itself or on the basis of logic and experience. The bid cannot be corrected if the discrepancy cannot be resolved without resort to evidence that is extraneous to the bid and has been under the control of the bidder, see *Frontier Contracting Co., Inc.*, B-214260.2, July 11, 1984, 84-2 C.P.D. ¶ 40; *Harvey A. Nichols Co.*, B-214449, June 5, 1984, 84-1 C.P.D. ¶ 597, such as worksheets and sworn statements. See *SCA Services of Georgia, Inc.*, B-209151, Mar. 1, 1983, 83-1 C.P.D. ¶ 209.

We have previously considered whether a bid may be corrected so as to displace an otherwise low bidder where there is a discrepancy between the correct mathematical total of lump sum and extended price items and the stated total of such items. In *DeRalco,*

Inc., B-205120, May 6, 1982, 82-1 C.P.D. ¶ 430, we sustained a protest against the agency's determination to correct such a discrepancy as an apparent clerical error where neither the nature of the alleged mistake nor the bid actually intended could be determined without benefit of advice from the bidder. We noted that there was no one obvious or apparent explanation for the discrepancy. The difference did not suggest where the mistake might have been made and the stated total was not so grossly out of line with the other bid or with the government's estimate as to be patently erroneous. We found that the discrepancy could reasonably be attributed either to a mistake in totaling the items or to an incorrectly stated item.

By contrast, in *Patterson Pump Co.; Allis-Chalmers Corp.*, B-200165, B-200165.2, Dec. 31, 1980, 80-2 C.P.D. ¶ 453, we denied a protest against the agency's determination to permit correction of such a discrepancy as an apparent clerical error. As we stated in *DeRalco, Inc.*, B-205120, *supra*, 82-1 C.P.D. ¶ 430 at 5, we permitted correction because:

> the only reasonable interpretation of the discrepancy was that the bidder had added one of the items as though it were $315,000 instead of the 31,500 stated. This interpretation was based on three factors: (1) the stated figure of $31,500 was misaligned, (2) the difference between the stated total and the true total exactly equal to the difference between $315,000 and $31,500, and (3) the stated extended price of $31,500 was consistent with the range of extended prices of the nine other bids received. In light of these three factors, it was apparent * * * not only that a mistake had been made, but also what the nature of that mistake had been. It was therefore possible for the contracting officer to ascertain the intended bid without benefit of advice from the bidder.

We conclude that the circumstances here are more analogous to those in *Patterson Pump* than to those in *DeRalco*. Not only are the unit prices generally properly extended here, but, most significantly, the subtotal for each group is also the correct mathematical total of the item prices in that group. Given this internal consistency in Cole's bid, we are unwilling to question the Forest Service's determination that the only reasonable interpretation of the discrepancy is that Cole intended its bid price to be the correct, mathematical total of the item prices rather than the figure entered opposite the description, "TOTAL ALL ITEMS."

Moreover, the nature of the mistakes can be determined without benefit of advice from the bidder. As indicated above, the cause of $605 of the discrepancy, *i.e.*, the confusion between the price of $363 initially entered for the construction staking and the intended price of $968 subsequently entered, is apparent on the face of the bid. In addition, all but $5 of the remaining discrepancy can be explained by the addition of the item prices and the two subtotals on page 4 in arriving at the total bid price. As for the remaining $5 of the discrepancy, not only do we consider this *de minimis* in a total bid of nearly 3 million dollars, but, in addition, we note that the rounding off of Cole's total price is consistent with Cole's rounding off of its extended item prices.

As for Cole's failure to enter a "TOTAL BID PRICE" in Block 17 of Standard Form 1442, we note that the test for responsiveness is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the IFB, so that upon acceptance, the contractor will be bound to perform in accordance with all the terms and conditions of the IFB. See *Hild Floor Machine Company, Inc.*, B-217213, Apr. 22, 1985, 85-1 C.P.D. ¶ 456. Since Cole, by entering a bid price for every item, offered to perform as required under the solicitation, its failure to enter a total price in Block 17 did not render its bid nonresponsive and the failure instead may be considered an informality and waived. See also *R.R. Gregory Corporation,* B-217251, Apr. 19, 1985, 85-1 C.P.D. ¶ 449; *cf. Telex Communications, Inc.; Mil-Tech Systems, Incorporated,* B-212385; B-212385.2, Jan. 30, 1984, 84-1 C.P.D. ¶ 127 (omitted item price may be corrected after bid opening).

Accordingly, Cole's bid may be corrected to reflect as its intended bid price the correct mathematical total of all items and award, if otherwise proper, may be made to Cole as the low bidder.

The protest is denied.

[B-218840]

Appropriations—Availability—Medical Fees—Physical Examinations

Billings for the costs of comprehensive physical fitness evaluations and laboratory blood tests, administered to employees as part of the National Park Service, Alaska Regional Office, physical fitness program may be certified for payment. Section 7901 of Title 5, U.S.C., which authorizes heads of agencies to establish health service programs providing examinations and preventive programs, and the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, permit the use of appropriated funds for the testing, education, and counseling parts of the fitness programs.

Appropriations—Availability—Health Services for Employees

Billings for employees' use of a private health club for physical exercise, as part of the National Park Service, Alaska Regional Office, physical fitness program may not be certified for payment. Although 5 U.S.C. 7901 authorizes agency heads to establish health service programs providing preventive programs relating to employee health, the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, limit the scope of these programs for executive branch agencies. These regulations do not authorize use of appropriated funds for physical exercise as part of health service programs.

Payments—Prompt Payment Act—Applicability—Determination

Late payment penalties, under the Prompt Payment Act, must be paid for allowable billings for the National Park Service, Alaska Regional Office, physical fitness program. Under the Prompt Payment Act, and implementing regulations issued by the Office of Management and Budget, an agency must pay late payment penalties if it has not made payment within 45 days of the receipt of a proper invoice. Neither the Act nor the regulations provide for any exception for the time during which the General Accounting Office is considering a certifying officer request for an advance decision on whether the invoice should be certified for payment.

Leaves of Absence—Administrative Leave—Physical Exercise

The National Park Service, Alaska Regional Office may not grant employees excused absence for participation in an agency-sponsored physical fitness program. Agency discretion to excuse employees from work without charge to leave must be exercised within the bounds of statutes and regulations and guidance provided in General Accounting Office decisions. Office of Management and Budget, Office of Personnel Management, and General Services Administration regulations, which exclude physical exercise from the health services which agencies may provide their employees, should also be interpreted as excluding physical exercise from the purposes for which agencies may grant excused absences.

Matter of: National Park Service—Physical Fitness Program, September 6, 1985:

An authorized certifying officer of the National Park Service, Department of the Interior, has requested an advance decision on whether he should certify for payment four billings arising from the operation of a physical fitness program by the Park Service's Alaska Regional Office. He also asks whether, assuming we answer his first question in the affirmative, late payment penalty charges may be paid on the billings under the Prompt Payment Act, 31 U.S.C. §§ 3901-06 (1982). Finally, he asks whether it is proper for the Regional Office to grant up to 3 hours per week of excused absence to employees for the purpose of participating in physical exercise programs.

For the reasons indicated below, we conclude that:

1. All billings connected with the Park Service's physical fitness program may be properly certified, except those for the use of the facilities of a health club by employees.

2. Late payment penalties under the Prompt Payment Act must be paid on these billings.

3. The Park Service may not grant excused absences to employees for the purpose of physical exercise.

BACKGROUND

In November 1980, the Director of the National Park Service issued a memorandum encouraging Regional Directors and park managers to develop voluntary health and physical fitness programs for their employees. In the same memo, the Director indicated that mandatory physical fitness standards existed or were soon to be implemented for certain Park Service positions, including firefighters, SCUBA divers, search and rescue, law enforcement, and other related emergency services.

In response to the memorandum, the Alaska Regional Office began planning a physical fitness program for its employees. In doing so, it sought advice both from the President's Council on Physical Fitness and the Department of Labor. By memorandum of November 16, 1983, the Alaska Regional Director announced to employees the establishment of a physical fitness program. The program was to be available to all employees in the region on a volun-

tary basis. The program was to include a health risk analysis, health and fitness education, testing to determine the employee's physical condition, use of Government-contracted physical exercise facilities on a 50/50 cost sharing basis between the Park Service and the employee, and up to 3 hours per week of administrative leave for exercise.

On February 27, 1984, the Alaska Regional Director wrote to York E. Onnen, Director of Program Development for the President's Council on Physical Fitness and Sports. In his letter, the Regional Director described the program, and asked for assistance in finding facilities for the exercise part of the program. On March 13, 1984, Mr. Onnen wrote to the Regional Director, informing him that the President's Council approved the region's physical fitness program. On the same date, Mr. Onnen wrote to the Director of the Space Management Division of the General Services Administration requesting that assistance be provided to the Alaska Regional Office in implementing the program.

By memorandum of January 30, 1985, the Regional Director announced to all employees that he had entered into a contract with the Greatland Golden Health Club in Anchorage to provide the exercise portion of the fitness program. Under the contract, all participants in the program were entitled to use the health club facilities. The memorandum indicated that employees would not be billed for the use of the facilities, but requested that each employee make a monthly contribution to the Alaska Regional Employees Association. It is our understanding that the Alaska Regional Office will pay the full amount of the monthly bills from the health club. It is hoped, however, that in the future the employees association will be able to contribute funds to the Regional Office to partially offset these costs.

The certifying officer has submitted four bills for our review. One is in the amount of $1,890 to cover the cost of administering comprehensive physical fitness evaluations to 63 Park Service employees. The bill indicates that the evaluations included physical fitness and health questionnaires; coronary risk appraisals; tests for cardiovascular fitness, muscular endurance, strength and flexibility; and measurements of blood pressure and body composition. A second bill is in the amount of $630 to cover the cost of blood tests for the employees. The third and fourth bills, in the amounts of $1,060 and $1,020, are for the use of the health club by Park Service employees for the months of February and March 1985. The certifying officer also submitted a purchase order for administering health hazard appraisals to all employees participating in the program. As of the time of the submission there had been no billing for these services.

DISCUSSION

Statutory and Regulatory Provisions

Generally, the costs of medical or health care or treatment for civilian Government employees are personal to the employees, and appropriated funds may not be used to pay them, unless provided for by statute or in the contract of employment. *E.g.*, 57 Comp. Gen. 62, 63 (1977); 22 Comp. Gen. 32 (1942). However, the Congress has provided statutory authority for the use of appropriated funds for employee health in certain circumstances.

Section 7901(a) of title 5 of the United States Code provides:

> (a) The head of each agency of the Government of the United States may establish, within the limits of appropriations available, a health service program to promote and maintain the physical and mental fitness of employees under his direction.

Subsection (c) of the section provides:

> (c) A health service program is limited to—
>
> (1) treatment of on-the-job illness and dental conditions requiring emergency attention;
>
> (2) *preemployment and other examinations;*
>
> (3) referral of employees to private physicians and dentists; and
>
> (4) *preventive programs relating to health.* [Italic supplied.]

In our opinion, the second and fourth categories, emphasized in the above quote, are sufficiently broad to encompass the physical fitness program operated by the Alaska Regional Office. However, regulations issued under section 7901, applying to all executive branch agencies, and which we will discuss below, further limit the parameters of health service programs.

Under 5 U.S.C. § 7901(b)(1), heads of agencies are required to consult with and consider the recommendations of the Secretary of Health and Human Services (HHS) before establishing a health service program. Executive Order 12345, 47 Fed. Reg. 5189 (1982), extended the President's Council on Physical Fitness and Sports as an advisory committee to the Secretary of HHS on matters pertaining to ways and means of enhancing opportunities for participation in physical fitness and sports activities. (The existence of the Council was continued through September 30, 1985, by Executive Order 12489, 49 Fed. Reg. 38927 (1984).) In our opinion, the Regional Director's consultation with the President's Council amounts to compliance with the requirement of 5 U.S.C. § 7901(b)(1).

OMB Circular:

The first of the executive branch regulations issued under section 7901 is OMB Circular No. A-72, June 18, 1965, which establishes criteria to be followed by agency heads in establishing health service programs. The Circular, in section 2, "authorizes and encourages" agency heads "to establish an occupational health program to deal constructively with the health of the employees of [their]

department or agency in relation to their work." Section 4 of the Circular, however, limits Federal employee health services to the following six categories:

1. Emergency diagnosis of injury or illness during work hours;
2. Preemployment physical examinations;
3. In-service physical examinations;
4. Administration of prescribed treatments;
5. Preventive services to appraise the work environment, provide health education, and to provide disease screening; and
6. Referral of employees to private physicians.

In our opinion, the health hazard appraisals, physical fitness evaluations, and blood tests administered as parts of the Alaska Region physical fitness program fall within one or more of these categories. However, we see no way in which the exercise portion of the program is covered by any of the six categories of permitted health services.

Federal Personnel Manual:

In the Federal Personnel Manual, the Office of Personnel Management (OPM) has provided more detailed instructions to agencies for employee health programs. FPM, ch. 792 (Inst. 261, December 31, 1980). Section 1-3.c. limits the health services which agencies are permitted to provide to the same six categories as in the OMB Circular. Further, section 4-3 sets out the objectives of employee health programs, two of which are to provide health education and encourage personal health maintenance, and to provide medical services such as voluntary examinations and preventive programs to avoid large scale absences. The activities specified to achieve these objectives include periodic health examinations and health education and counseling, but not physical exercise. FPM, ch. 792, § 4-4.

As in the case of the OMB Circular, we are of the opinion that the Federal Personnel Manual authorizes the testing, educational, and counseling activities of the Alaska program. It does not, however, authorize physical exercise programs.

General Services Administration Regulations:

In the Federal Property Management Regulations, the General Services Administration (GSA) has provided for the establishment of facilities for Federal employee health services in buildings it manages. These regulations do not, of course, apply to the portions of the Alaska program, such as exercise activities, which do not take place in Federal buildings. However, even if the Alaska Regional Office were to attempt to set up its own physical fitness facility, rather than using a private health club, the GSA regulations would not authorize such activity because they specifically limit the scope of permissible programs to the same six categories contained in OMB Circular A-72. FPMR, 41 C.F.R. § 101-5.304 (1984).

GSA has also issued "Guidelines for Establishment of Physical Fitness Facilities in Federal Space." Public Buildings Service, Notice 6820-23-M, 43 Fed. Reg. 56733 (1978). These guidelines contain criteria for the establishment of "various types of physical fitness facilities for Federal agencies." However, even if the Alaska Regional Office were to attempt to establish its own facilities, the guidelines do not authorize the use of appropriated funds for these purposes. Rather, they merely set forth criteria for establishing these facilities assuming funds are authorized for that purpose.

Executive Order 12345:

On February 2, 1982, President Reagan issued Executive Order 12345 "in order to expand the program for physical fitness and sports * * *" 47 Fed. Reg. 5189 (1982). In addition to extending the life of the President's Council on Physical Fitness and Sports, the executive order directed the Secretary of Health and Human Services to "develop and coordinate a national program for physical fitness and sports." Among the activities which the Secretary was instructed to carry out were the following:

> (c) Strengthen coordination of Federal services and programs relating to physical fitness and sports participation and invite appropriate Federal agencies to participate in an interagency committee to coordinate physical fitness and sports activities of the Federal establishment.
>
> * * * * * * *
>
> (j) Assist business, industry, government, and labor organizations in establishing sound physical fitness programs to elevate employee fitness and to reduce the financial and human costs resulting from physical inactivity.

In our opinion, the executive order, although designed to encourage physical fitness in Federal employees, as well as others, does not authorize the use of appropriated funds to pay the costs of physical exercise activities.

Based on 5 U.S.C. § 7901 and the executive branch regulations issued to promulgate that statute, we conclude that the certifying officer may certify for payment the billings for physical fitness evaluations and laboratory tests, and any future billings for health hazard appraisals. He may not certify the billings for use of the health club because the regulations do not permit the use of appropriated funds to pay for employee physical exercise activities.

Special Physical Fitness Needs

As we indicated above, the Director of the National Park Service is establishing—or has established—mandatory physical fitness standards for certain especially strenuous positions in the Service such as firefighters, divers, search and rescue, and law enforcement. In a memorandum dated May 18, 1984, the Acting Director announced that a new Service-wide health and fitness program would include "job related fitness tests which must be passed prior

to allowing individuals to perform certain hazardous or arduous activities."

In our decision published at 63 Comp. Gen. 296 (1984), we considered whether the Bureau of Reclamation, Department of the Interior, could use appropriated funds to purchase exercise equipment for use in a mandatory physical fitness program for firefighters at the Grand Coulee Project in the State of Washington. In the submission in that case, we were told:

—Physical fitness is a requirement of the firefighters' job as mandated by position description. The program is monitored by supervisors.
—Specific levels of physical fitness for each firefighter are identified and evaluated in an ongoing program relative to established performance standards. *Id.* at 297.

In approving the expenditure for the equipment, we said:

Due to the nature of their job, firefighters must maintain an unusually high level of physical strength and endurance to perform satisfactorily. The exercise equipment in question appears to be reasonably calculated to maintain that high level of fitness. The equipment will be available to all firefighters. It appears that the Government, rather than the firefighters, receives the principal benefit from the equipment, in the form of improved physical capabilities on the part of the firefighters. *Id.* at 298.

Based on that decision we would approve the use of appropriated funds to pay the costs of physical exercise, whether for use of private health clubs or purchase of equipment, for those employees of the Park Service for which the Director has established special physical fitness standards, if a physical fitness program was mandatory for all employees in the designated positions. We would approve the expenditure not as part of an employee health program under 5 U.S.C. § 7901, but rather as a necessary expense of carrying out the activities of the National Park Service.

Late Payment Penalties

As we have indicated, the certifying officer has asked, with respect to those billings which he may certify for payment, whether late payment penalty charges may be paid under the Prompt Payment Act, 31 U.S.C. §§ 3901-06 (1982).

The relevant provisions of the Act provide:

§ 3902 Interest Penalties

(a) Under regulations prescribed under section 390 of this title, the head of an agency acquiring property or service from a business concern, who does not pay the concern for each complete delivered item of property or service by the required payment date, shall pay an interest penalty to the concern on the amount of the payment due. * * *
(b) * * * However, a penalty may not be paid if payment for the item is made—

* * * * * * *

(3) * * * before the 16th day after the required payment date.

§ 3903 Regulations

The Director of the Office of Management and Budget shall prescribe regulations to carry out section 3902 of this title. The regulations shall—
(1) provide that the required payment date is—

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(A) The date payment is due under the contract for the item of property or service provided; or
(B) 30 days after a proper invoice for the amount due is received if a specific payment date is not established by contract;

* * * * * * *

(5) require that, within 15 days after an invoice is received, the head of an agency notify the business concern of a defect or impropriety in the invoice that would prevent the running of the time period specified in clause (1)(B) of this section.

The statute is written in mandatory terms. Under section 3902 an agency must pay an interest penalty if it does not pay the contractor before the 16th day after the required payment date. Under section 3903, if the contract does not provide a date of payment, the required payment date is 30 days after the receipt of a proper invoice.

The Director of the Office of Management and Budget (OMB) has issued Circular No. A-125, August 19, 1982, to implement the Act. The Circular is also written in mandatory terms. Paragraph 8 of the Circular states:

8. Interest Penalty Requirement
a. An interest penalty will be paid automatically when all of the following conditions are met:
—There is a contract or purchase order with a business concern.
—Federal acceptance of property or services has occurred and there is no disagreement over quantity, quality, or other contract provisions.
—A proper invoice has been received * * * or the agency fails to give notice that the invoice is not proper within 15 days of receipt of an invoice * * *.
—Payment is made to the business concern more than 15 days after the due date * * *.

From the record we have received, it appears that all of these conditions have been met with respect to the billings for the physical fitness evaluations and the blood tests. There was a purchase order for each service. The Alaska Regional Office has accepted the services, as verified by receiving reports in each case. It appears that proper invoices have been received in each case. Payment will not be made within 15 days after the due date for either billing.

There is some question of whether the National Park Service should pay interest for the period this Office has been considering the certifying officer's request for advance decision. By statute, certifying officers are pecuniarily liable if they certify an unauthorized payment. 31 U.S.C. § 3528 (a)(4) (1982). Therefore, a certifying officer is entitled to a decision from the Comptroller General before certifying a questionable voucher. 31 U.S.C. § 3529. To require an agency to pay an interest penalty for the period vouchers were submitted for our review would penalize the agency for its certifying officer exercising his statutory rights.

Both the Prompt Payment Act and Circular No. A-125 contain exceptions to the requirement for late payment penalties. Section 3906(c) provides:

(c) * * * this chapter does not require an interest penalty on a payment that is not made because of a dispute between the head of an agency and a business concern over the amount of payment or compliance with the contract. A claim related

to the dispute, and interest payable for the period during which the dispute is being resolved, is subject to the Contract Disputes Act of 1978 * * *.

Likewise, paragraph 8(c) of the Circular states:

c. Interest penalties are not required when payment is delayed because of a disagreement between a Federal agency and a business concern over the amount of the payment or other issues concerning compliance with the terms of the contract; * * * claims concerning disputes, and any interest that may be payable with respect to the period while the dispute is being settled, will be resolved in accordance with the provisions in the Contract Disputes Act of 1978 * * *

The only legislative history we were able to find for the statutory provision does little more than paraphrase it. *See* H.R. Rep. No. 461, 97th Cong., 2d Sess. 15.

In our opinion, the statutory and regulatory exceptions do not apply to situations such as this one, in which a certifying officer requests a decision from this Office on the propriety of a voucher. This situation does not involve a dispute between an agency and its contractor over the amount of payment or compliance with the contract. Rather, it is an internal mechanism whereby a certifying officer may seek assurance that he may properly certify a voucher.

Under the Prompt Payment Act and Circular A-125, both of which mandate interest penalties for late payment, and neither of which provides an exception for a certifying officer seeking an opinion of the Comptroller General, we conclude that the Alaska Regional Office must pay late payment charges on the two billings which we have approved for payment from the required payment date until actually paid.

Excused Absences for Physical Exercise

As we have indicated, the Director of the Alaska Regional Office has authorized up to 3 hours per week of excused absence for each employee participating in the program to engage in physical exercise. The certifying officer questions whether this action is proper.

The question of an agency's authority to grant excused leave to employees without charge to leave (commonly called administrative leave) is dealt with neither in statute nor in general regulations. However, OPM does discuss this matter in the Federal Personnel Manual (FPM) Supplement 990-2, Book 630, Subchapter S11. For example, Subchapter S11-1 defines an excused absence as:

[A]n absence from duty administratively authorized without loss of pay and without charge to leave. Ordinarily, excused absences are authorized on an individual basis, except where an installation is closed or a group of employees is excused from work for various reasons.

Further, paragraph a of Subchapter S11-5 states:

With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may by administrative regulation place any limitations or restrictions they feel are needed. * * *

Over the years we have recognized that in the absence of a statute an agency may, at its discretion, excuse employees for brief pe-

riods of time without charge to leave or loss of pay. *E.g.*, 64 Comp. Gen. 171 (1984); 63 Comp. Gen. 542, 544 (1984); 54 Comp. Gen. 706, 708 (1975). However, agency discretion is not unlimited. It must be exercised within the bounds of statutes and regulations, and the guidance provided in decisions. 63 Comp. Gen. at 545. The FPM provisions referred to above list several instances in which excused absences have been permitted. *See* 63 Comp. Gen. at 544; see also 55 Comp. Gen. 510, 512 (1975). These examples have general applicability to employees and are either work-related or civic in nature.

As we indicated above, in implementing 5 U.S.C. § 7901, OMB, OPM, and GSA have chosen not to include physical exercise programs among the health services that agencies may provide their employees. In our view, the executive branch regulations must be interpreted as also excluding physical exercise from the purposes for which agencies may grant excused absences. We therefore conclude that the Alaska Regional Director may not grant excused absences to employees for purposes of participating in physical exercise.

This conclusion does not apply to those instances, which we discussed on page 8 and 9 above, in which a mandatory physical fitness program is established for employees serving in especially strenuous positions. Under such a mandatory program, physical exercise would be a required part of the employee's job, and it would not be necessary to grant administrative leave to allow employees to participate in the activities.

[B-214203]

Officers and Employees—Promotions—Retroactive—Administrative Delay

An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized official had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy.

Matter of: Agnes Mansell—Retroactive Promotion and Backpay, September 12, 1985:

This decision is in response to a request from the Civilian Personnel Officer, Fort Ord, California, Department of the Army, concerning the entitlement of one of its employees to receive a retroactive promotion and backpay. This matter was submitted under procedures for handling labor-management relation matters. See 4 C.F.R. Part 22 (1985). We conclude that the employee is not so entitled for the following reasons.

BACKGROUND

The employee, Ms. Agnes Mansell, a clerk-stenographer, grade GS-4, was selected for promotion to secretary, grade GS-5, within the U.S. Army MEDDAC unit at Fort Ord, California. Her selection from the register was approved by the designated selecting official on October 13, 1983, and she was orally notified by a Civilian Personnel Office (CPO) representative on the same date. Ms. Mansell was thereafter informed by her supervisor that she should report to her new position on October 31, 1983. She did so, but as of that date she had not received any formal, written notification of her promotion.

On November 21, 1983, upon receiving her first paycheck while in her new position, Ms. Mansell discovered that it failed to reflect her expected pay increase. She immediately brought the matter to the attention of the CPO staffing specialist who handled the matter. She was informed that due to understaffing in the office, the staffing specialist had been unable to complete the necessary paperwork so that her promotion could be effected. According to the submission, if there had been no processing delay on the part of the staffing specialist, the approving official would have effected the promotion as originally intended, i.e., on October 30, 1983. After the staffing specialist completed all the necessary paperwork, it was sent to the authorized approving official for signature. That official, Mr. Bruce Dillingham, Chief, Technical Services Office, was the only person who had been delegated the authority to approve or disapprove promotion actions. Upon receipt of the necessary forms in Ms. Mansell's case on November 23, 1983, he exercised his delegated authority and approved her promotion, effective November 27, 1983.

The claim being made by Ms. Mansell is for the difference between her pay as a grade GS-4, step 1, and as a grade GS-5, step 1, for the period October 30, 1983, to November 26, 1983.

DECISION

An employee of the Federal government is entitled only to the salary of his or her appointed position regardless of the duties actually performed. *Dianish* v. *United States,* 183 Ct. Cl. 702 (1968); *Thomas Davis,* B-189673, February 23, 1978. Also, the granting of promotions is a discretionary matter primarily within the province of the administrative agency concerned. 54 Comp. Gen. 263 (1974). The effective date of a change in salary resulting from a promotion is the date action is taken by the administrative officer vested with promotion approval authority, or a subsequent date specifically fixed by him. 21 Comp. Gen. 95 (1941). However, backpay may be awarded under the authority of 5 U.S.C. § 5596 (1982) as a remedy where unjustified and unwarranted personnel actions affecting pay or allowances have been taken.

Our decisions have held that, as a general rule, a personnel action may not be made retroactive so as to increase the rights of an employee to compensation. We have made exceptions to this rule where administrative or clerical error (1) prevented an approved personnel action from being effected as originally intended, (2) violated nondiscretionary administrative regulations or policies, or (3) deprived the employee of a right granted by statute or regulation. See *Douglas C. Butler,* 58 Comp. Gen. 51 (1978), and decisions cited therein.

As we stated in *Butler* with respect to delays or omissions in the processing of promotion requests which would permit a promotion to become effective on an earlier date, our decisions have drawn a distinction between errors that occur prior to promotion approval by the properly authorized official and errors that occur after such approval, but before the acts necessary to effect promotions have been fully carried out. Thus, where the delay or omission occurs before that authorized official has exercised his discretionary authority with respect to approval or disapproval of the promotion, administrative intent to promote at a particular time other than the date of the approval cannot be established. On the other hand, if, after the authorized official has exercised his discretionary authority and approved the promotion request, all that remains to effect that promotion is a series of ministerial acts which could be compelled by a *writ of mandamus,* any administrative or clerical errors which delay or prevent a promotion from occurring after such approval, do come within the exceptions outlined above so as to permit a retroactive promotion. *John Cahill,* 58 Comp. Gen. 59 (1978); *Janice Levy,* B-190408, December 21, 1977.

In our decision, *Esther Prosser,* B-194989, August 8, 1979, we considered a claim for a retroactive promotion where the administrative delay occurred before the promotion request documents were forwarded to the authorized official for approval. Citing to our analysis in *Bulter,* we concluded that the delay in processing the claimant's promotion prior to final approval did not constitute administrative error so as to permit a retroactive promotion, since there was no nondiscretionary regulation or policy otherwise requiring the promotion.

It has been suggested in the submission that, while there are no local merit promotion regulations or a labor agreement establishing when promotions are to become effective, there is a local regulation and general practice which when considered in combination may qualify as the requisite nondiscretionary policy. The local regulation provides, generally, that employees selected for promotion, detail, or reassignment are to be released from their old positions to report to their new positions no later than the beginning of the second pay period after the CPO representative has officially notified the employee of selection. Additionally, it is asserted that it is

the general practice at Fort Ord to use the release date as the effective date on the SF-50 Notification of Personnel Action.

We do not consider the local regulation and general practice as establishing a nondiscretionary policy. As noted, promotions may not intentionally be made retroactive (*Butler,* above). By using the release date as the effective date for employee promotion purposes, it would appear to suggest that the action by the selecting official constitutes the true determiner of the validity of a promotion and its effective date, since all actions (release/effective date) occur thereafter. However, it is stated unequivocally that the Chief, Technical Services Office, not the selecting official, is the only person within the CPO vested with the discretionary authority to approve or disapprove all promotions. Therefore, any delays which antedate such discretionary action are not administrative errors which qualify under the exceptions stated in *Butler,* above.

Also, it appears that the purpose of the regulation is to provide a reasonable lead time to complete the necessary paperwork and grant the authorized official the opportunity to exercise his discretionary authority to approve promotions before the employee is released, thereby permitting the release date to be used as the effective date for SF-50 purposes. However, if, as in this case, such final action cannot be accomplished within that time, the release date may not be used as the effective date for promotion and pay purposes. Until an official vested with discretionary authority acts, a promotion has not occurred. See *Prosser,* above.

Accordingly, Ms. Mansell's claim for a retroactive promotion with backpay is denied.

[B-219263]

Officers and Employees—Transfers—Real Estate Expenses—Relocation Service Contracts

Transferred employee, who has been unable to sell residence at old duty station for period in excess of 3 years, requests that government purchase it. Although provisions of 5 U.S.C. 5724c (1982) and FTR, paras. 2-12.1 *et seq.*, (Supp. 11, Nov. 14, 1983), provide each agency with discretionary authority to enter into contracts with private firms to provide relocation services to employees, including arranging for purchase of a transferred employee's residence, they do not authorize purchase of employee's residence by the government. In any event, FTR Supplement 11 only applies to employees whose effective date of transfer is on or after Nov. 14, 1983. Since claimant transferred on Nov. 29, 1981, the statute and regulations are not applicable to his claim.

Matter of: George Boeringa—Real Estate Expenses—Inability to Sell Residence, September 17, 1985:

This decision is in response to a request by Mr. Virgil D. Elliott, Controller, Medical Center for Federal Prisoners, Bureau of Prisons, United States Department of Justice, for a decision as to whether Mr. George Boeringa, an employee of the agency, is entitled to have his residence at his old duty station, which he has

been unable to sell for a period in excess of 3 years, purchased by the government. For the following reasons, the claimed benefit may not be granted.

Mr. Boeringa was transferred from Terre Haute, Indiana, to Springfield, Missouri. He reported for duty at his new permanent duty station on November 29, 1981. He listed his residence for sale with a realtor who has been unable to sell it for a period in excess fo 3 years due to a depressed real estate market.

Mr. Boeringa has been granted two extensions of time in which to sell his residence, the last extension expiring on November 27, 1984. He requests that the government purchase his residence under the authority of 5 U.S.C. § 5724c (1982). The claimant contends that this is proper inasmuch as he did not apply for his current position, but was reassigned to it by the Bureau of Prisons. He also states that the extension granted to sell his residence was still in effect when Public Law 98-151, November 14, 1983, 97 Stat. 978, which purportedly permits the claimed benefit, was enacted.

The statute in question, 5 U.S.C. § 5724c provides that each agency is authorized to enter into contracts to provide relocation services to agencies and employees, including, but not limited to, arranging for the purchase of a transferred employee's residence.

The implementing Federal Travel Regulations [1] prohibit payment for market losses and do not authorize the purchase of the employee's residence by the government. Further, the provisions of Supplement 11 are effective only for employees whose effective date of transfer is on or after November 14, 1983, the date of enactment of Public Law 98-151, cited earlier. The supplement specifically states that the effective date of transfer is the date on which the employee reports for duty at the new official station.

Inasmuch as Mr. Boeringa reported for duty at his new official station, Springfield, Missouri, on November 29, 1981, prior to the effective date of Public Law 98-151, neither its provisions nor those of the implementing regulations are applicable to him. See *James J. O'Meara, Jr.*, B-191485, November 21, 1978.

Accordingly, the request by Mr. George Boeringa, that the government purchase his residence at his old duty station, may not be granted.

[B-219444]

Bids—Invitation for Bids—Defective—Evaluation Criteria

Where evaluation method in invitation for bids is structured so as to encourage unbalanced bidding, the invitation is defective, *per se*, and no bid can be evaluated properly because there is insufficient assurance that award will result in the lowest ultimate cost to the government.

[1] Federal Travel Regulations, para. 2-12.1 *et seq.*, (Supp. 11, July 25, 1984, *incorp. by ref.*, 41 C.F.R. § 101-7.003 (1984).

Matter of: T.L. James & Company, Incorporated, September 17, 1985:

T.L. James & Company, Incorporated (TLJ), protests the proposed award of a contract to North American Trailing Company (NATCO) under invitation for bids (IFB) No. DACW60-85-B-0016 issued by the United States Army Corps of Engineers for maintenance dredging in the Charleston Entrance Channel, Charleston, South Carolina. TLJ contends that its low bid was improperly rejected as being materially unbalanced.

We believe that award under this IFB would be improper, but for a different reason, as explained below.

The bidding schedule in the IFB called for bids on mobilization and demobilization and dredging of an estimated 426,000 cubic yards (cu. yds.) of material. The IFB indicated that the contractor was required to remove 162,000 cu. yds. of the material available to be dredged, with the remaining 264,000 cu. yds. representing overdepth dredging. Overdepth dredging is the additional amount of dredging allowed because the dredging operation is incapable of precise performance.

TLJ and NATCO were the only bidders. The bids and government estimate (Govt. Est.) were as follows:

	Mobilization and Demobilization	Dredging		Total
		Unit Price (per cu. yd.)	Ext. Price (426,000 cu. yds.)	
TLJ	$725,000	$0.40	$170,400	$895,400
NATCO	45,000	2.00	852,000	897,000
Govt. Est	200,000	3.20	1,363,200	1,563,200

After bid opening, NATCO protested to the Corps that TLJ's low bid should be rejected as materially unbalanced. The Corps sustained the protest. It first determined that TLJ's bid was mathematically unbalanced because its bid price for mobilization and demobilization was more than three times greater than the government estimate and 16 times greater than NATCO's bid.[1] Further, TLJ indicated to the agency that the two dredges it intended to use for this project were located in Jacksonville, Florida, and Norfolk,

[1] The entire lump sum price for mobilization and demobilization is not required to be paid before the dredging work starts. The contract provides that only 60 percent of the lump sum price will be paid upon completion of the mobilization unless the contracting officer considers the payment excessive for mobilization, in which event the payment will be limited to actual mobilization costs with the remainder being paid in the final payment under the contract, *Cf. Riverport Industries, Inc.*, B-216707, Apr. 1, 1985, 64 Comp. Gen. 441, 85-1 C.P.D. ¶ 364, affirmed, B-218656.2, July 31, 1985, 85-2 C.P.D. 108.

Virginia, and the agency estimated the mobilization and demobilization cost of these two dredges would be only $334,000. On the other hand, the unit price for dredging bid by TLJ was extremely low, being only 12.5 percent of the government estimate and 20 percent of NATCO's bid.

The Corps then analyzed four possible situations, none of which was the stated method of evaluation in the solicitation, in which less than the estimated maximum amount of material is removed in order to determine the true cost impact of the bids and whether TLJ's bid was materially unbalanced. It determined that in each situation, NATCO's bid would be low. Consequently, the Corps concluded that TLJ's bid would not result in the lowest ultimate cost to the government, and it intends to award the contract to NATCO.

TLJ argues that rejection of its bid was improper because unbalanced bids on dredging projects are frequently accepted by the Corps. It also asserts that an unbalanced bid is acceptable if it results in the lowest cost to the government and, since it is the low responsive bidder, it is entitled to award.

While TLJ and the Corps have correctly categorized this protest as one involving the alleged unbalancing of TLJ's bid, we believe the circumstances require the cancellation of the IFB rather than the rejection of TLJ's bid.

First, where an IFB fails to include a clause warning bidders of the possible rejection of unbalanced bids as nonresponsive, the appropriate action ordinarily is to cancel the IFB rather than to reject the unbalanced bid. *Lear Siegler, Inc.,* B-205594.2, June 29, 1982, 82-1 C.P.D. ¶ 632.

Second, the evaluation method used in an invitation must comport with the statutory requirement for free and open competition. This requirement means that any bid evaluation basis must be designed so as to assure that a reasonable expectation exists that an award to the lowest evaluated bidder will result in the lowest cost to the government in terms of actual performance. *Low Enterprises,* B-182147, Dec. 13, 1974, 74-2 C.P.D. ¶ 340. Thus, our Office has held that an evaluation basis which encourages the submission of unbalanced bids, i.e., bids based on speculation as to which items are purchased infrequently or frequently, is inappropriate. *Global Graphics, Inc.,* 54 Comp. Gen. 84 (1974), 74-2 C.P.D. ¶ 73; 47 Comp. Gen. 748 (1968); 44 Comp. Gen. 392 (1965).

It is clear that the method of evaluation used here encouraged the unbalanced bidding to the extent that there is doubt that an award to the apparent low bidder would result in the lowest ultimate cost to the government. Under the evaluation scheme, bidders furnished a unit price for dredging, and that unit price was multiplied by 426,000 cu. yds., the estimated maximum amount of material available for dredging. The Corps indicated by its analysis of TLJ's bid that the estimate of 426,000 cu. yds. is out of line with the agency's experience with dredging projects and the anticipated

overdepth dredging for this project. For example, the agency advises that, in the three previous dredging operations in Charleston, the quantity of material actually removed equaled 76.5 percent of the government's advertised estimate of available material. While TLJ's bid, if accepted, would be low if the entire estimate of available materia' was removed, it would not be low if only that percentage was emoved. It appears that TLJ intentionally prepared an unbalanced bid, and its apparent low bid would not result in the lowest cost to the government if the amount of material actually dredged is less than 95 percent of the amount used for evaluation purposes, since so much of its bid price is for mobilization and demobilization. We note that the agency states in its report responding to the protest that 426,000 cu. yds. was "only an estimate which, based on historical data from previous contracts, is not sufficiently accurate to permit a determination that [a] bid is actually the lowest." Thus, this evaluation method does not provide for bids to be evaluated on the basis of the government's best estimate.

The evaluation method incorporates more work than is expected to be performed in the selection of the lowest bidder and, therefore, it does not obtain the benefits of full and free competition required by the procurement statutes. See *Chemical Technology, Inc.*, B-187940, Feb. 22, 1977, 77-1 C.P.D. ¶ 126. Where, as here, the evaluation method in an IFB is structured so as to the encourage unbalanced bidding, the invitation is defective, *per se*, and no bid can be properly evaluated because there is insufficient assurance that any award will result in the lowest cost to the government. *Allied Container Manufacturing Corp.*, B-201140, Mar. 5, 1981, 81-1 C.P.D. ¶ 175; *Southeastern Services, Inc., and Worldwide Services, Inc.*, 56 Comp. Gen. 668 (1977), 77-1 C.P.D. ¶ 390. Further, revised evaluation criteria, such as the agency chose to use here in determining TLJ's bid to be materially unbalanced, may not be used after bid opening to determine award, because bidders have not had an opportunity to compete on that basis. *Southeastern Services, Inc., et al., supra; Edward B. Friel, Inc.*, 55 Comp. Gen. 231 (1975), 75-2 C.P.D. ¶ 164.

Since the Corps did not obtain a true and realistic picture of the actual cost sufficient to assure award to the lowest responsible bidder, we recommend that the Corps cancel the IFB and resolicit its requirement on the basis of an evaluation method which reflects its best estimate of the actual work to be performed.

[B-217845]

Leaves of Absence—Court—Jury Duty—Entitlement

Employee who commutes to work from a residence in Virginia and maintains another residence in New Jersey was called upon to serve as a juror in New Jersey. The employee is entitled to court leave under 5 U.S.C. 6322 even though he might have been excused from jury duty. When properly summoned to serve as a juror, employee's failure to advise the court of facts that would have exempted or excused

him from jury service does not defeat his entitlement to court leave. 27 Comp. Gen. 83, 89 (1947).

Leaves of Absence—Court—Jury Duty—Traveltime—Between Duty Station and Court

Employee whose permanent duty station was Washington, D.C., was summoned to jury duty in New Jersey for a one-week period beginning on a Monday. Employee is entitled to court leave for the Friday he was excused from jury duty under holding in 26 Comp. Gen. 413 (1946). In view of the substantial distance involved, it would have imposed a hardship to have required the employee to return to his permanent duty station following a day of jury service on Thursday to report for duty on Friday.

Matter of: C. Robert Curran, September 18, 1985:

This action is in response to a request for a decision concerning a Federal employee's entitlement to court leave for a period of jury service. The request is submitted by the American Federation of Government Employees and the Veterans Administration under the procedures provided in 4 C.F.R. §§ 22.1-22.9 (1985).[1] We find that the employee is entitled to court leave for the period he was summoned to jury duty in New Jersey even though he did not advise the court of facts that might have excused him from jury service.

Mr. C. Robert Curran is an employee of the Veterans Administration, Washington Regional Office, Washington, D.C. In September 1984, Mr. Curran informed the agency that he was required to serve on jury duty in New Jersey for a one-week period commencing September 17, 1984, and requested that he be granted court leave.

Because Mr. Curran had a residence in Woodbridge, Virginia, the agency contacted the Clerk of the Court of Monmouth, New Jersey, and ascertained that an individual from New Jersey who is now living in Virginia, could be excused from jury duty. Based on its understanding that Mr. Curran was not required to serve as a juror, but did so by choice, the agency denied his request for court leave. Mr. Curran was charged 32 hours of leave without pay for the Monday through Friday he served as a juror, and 8 hours of annual leave for the Friday following his last day of jury service. His claim is for 40 hours of court leave in lieu of these charges for annual leave and leave without pay.

Mr. Curran asserts that although he had a local address and commutes to Washington from his Virginia residence, he is a resident of New Jersey. As evidence of his residency, he has provided copies of his New Jersey driver's license and New Jersey vehicle and voter registration cards all indicating an address in Long Branch, New Jersey. The agency has not questioned Mr. Curran's claim that he maintains a New Jersey residency. Its position is that Mr. Curran was not required to serve as a juror in New Jersey since he

[1] The request for a decision was made by M.J. McGowan, Director, Finance, Service, Office of Budget and Finance, Veterans Administration, Washington, D.C.

has a Virginia residence and may be called upon to serve as a juror in Virginia.

Court leave is the authorized absence of an employee from work without loss of or reduction in pay or benefits, for jury duty or as a witness for a State or local government in a nonofficial capacity. Authority for granting court leave is found at 5 U.S.C. § 6322 (1982) which provides in pertinent part:

> § 6322. Leave for jury or witness service; official duty status for certain witness service
>
> (a) An employee as defined by section 2105 of this title (except an individual whose pay is disbursed by the Secretary of the Senate or the Clerk of the House of Representatives) or an individual employed by the government of the District of Columbia is entitled to leave, without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance of efficiency rating, during a period of absence with respect to which he is summoned, in connection with a judicial proceeding, by a court or authority responsible for the conduct of that proceeding, to serve—
>
> (1) as a juror * * *

Under the statute, an employee is entitled to leave without reduction in pay or benefits for a period of absence during which he is (1) summoned, (2) in connection with a judicial proceeding by a court, (3) to serve as a juror. Therefore, it appears that when an individual is so summoned, the statute entitles him to court leave, regardless of whether he may be excused from the jury duty because of the distance he must travel or for some other reason. We have recognized that an employee's failure to advise the court of an applicable exemption from the requirement to perform jury service does not defeat his entitlement to court leave. 27 Comp. Gen. 83, 89 (1947). A review of the relevant legislative history shows that the statute was meant to encourage participation in the judicial process. It does not limit court leave to jury service in the vicinity of one's permanent duty station but authorizes leave for jury service in connection with any judicial proceeding.

The guidelines issued by the Office of Personnel Management[2] indicated that court leave should be granted to an "employee who is under proper summons from a court to serve on a jury." Federal Personnel Manual, Chapter 630, Subchapter S10-2(e). The submission indicates that there is some question on the part of the agency as to the propriety of the summons issued by the New Jersey court in view of the fact that Mr. Curran maintains a Virginia residence. The qualifications for jury service in New Jersey include the requirement that the person summoned as a juror be a resident of the county from which he shall be taken.[3] The qualifications for jury service in the State of Virginia similarly require that the employee have been a resident of the Commonwealth for 1 year and of

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[2] While implementing regulations have not been promulgated, the Office of Personnel Management has issued guidelines for the granting of court leave. See Federal Personnel Manual (FPM), Chapter 630, Subchapter S10 (Inst. 168, March 15, 1972) and FPM Supplement 990-2, Book 630, Subchapter S10 (Inst. 43, March 15, 1972).

[3] New Jersey Statutes Annotated 2A:69-1.

the county, city or town for 6 months.[4] As the agency has noted, it is possible that Mr. Curran may be summoned as a juror by both jurisdictions since it appears that he maintains a place of residence in both states.

The concept of residency is not exclusive and one may have more than one residence. 25 Am. Jur. 2d *Domicil* 4 (1974). Where, as here, there is evidence that an employee maintains more than one residence, he should be granted court leave for jury duty performed pursuant to a summons issued by any jurisdiction in which he maintains a residence. Because the standards vary from jurisdiction to jurisdiction, an employee's qualification as a juror is a matter for judicial determination.

Since Mr. Curran was issued a proper summons and performed jury duty from Monday through Thursday, September 17-20, 1984, he is entitled to 32 hours of court leave for his absence on those days. We have held that an agency should require an employee to return to duty or be charged annual leave if he is excused from jury service for all of a substantial part of a day. However, where hardship would result, the employee may not be required to return to duty and should be granted court leave. 26 Comp. Gen. 413 (1946); see also *Nora Ashe*, 60 Comp. Gen. 412 (1981). Mr. Curran was summoned to jury duty for a one-week period beginning Monday, September 17, 1984, and he was released after performing jury duty on Thursday, September 20, 1984. Since the distance from the Monmouth County Courthouse to Washington, D.C., is in excess of 200 miles, it would have imposed a hardship on Mr. Curran to have required him to return to his duty station Thursday night to report for duty on Friday, September 21, 1984. Accordingly, he should be granted court leave for this day even though he was excused from jury duty.

Accordingly, Mr. Curran is entitled to court leave for the 40 hours for which he was charged leave without pay or annual leave.

[B-219407]

Contracts—Protests—Authority to Consider—Invitation for Bids Cancellation

Protest challenging cancellation of an invitation for bids (IFB), where the contracting agency plans to award a contract under the IFB when reissued in amended form, falls within the definition of protest in the Competition in Contracting Act, and General Accounting Office review of such a protest is consistent with congressional intent to strengthen existing GAO bid protest function.

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

Contracting agency had a compelling reason for canceling IFB for public works services where, because of provisions setting minimum performance deadlines for fewer than 100 percent of repair service calls, agency could not ensure that all service

[4] Code of Virginia, Section 8.01-345.

calls would be performed in a timely manner, as required to meet the agency's minimum needs.

Matter of: Alliance Properties, Inc., September 18, 1985:

Alliance Properties, Inc. protests the cancellation of invitation for bids (IFB) No. N62470-84-B-5593, issued by the Navy for public works services at Fort Story, Virginia. The protester maintains that the Navy lacked an adequate basis for canceling the solicitation. We deny the protest.

The IFB calls for maintenance repair and minor construction work for various facilities at Fort Story. The contractor is to provide a comprehensive range of services, including pest control, waste collection, plumbing and electrical work, and work on heating and air-conditioning equipment. The IFB provides for both maintenance and repair of the equipment included in the scope of work.

The IFB, part of a cost comparison under Office of Management and Budget Circular A-76, was issued on August 14, 1984, with bid opening on January 18, 1985. The protester was the low bidder; its bid price for the base year and 2 option years ($2,985,000) was $619,135 lower than the government's estimate of performing the work in-house.

On April 17, 1985, the Navy canceled the IFB on the ground that it contained defective provisions which could have a significant impact on the Navy's ability to acquire timely and effective services. Specifically, according to the Navy's report, two provisions were considered defective: (1) the IFB did not require the contractor to respond to and complete all repair service calls; and (2) because of dollar limits in the IFB on the contractor's liability, the Navy could not ensure that the contractor would not simply allow equipment to deteriorate to a point beyond which the contractor would not be liable for the cost of repair. The protester disagrees with the Navy's position, arguing that the two provisions are clear and that performance under the IFB will satisfy the Navy's needs.

Jurisdiction

As a preliminary matter, the Navy maintains that our Office lacks jurisdiction to decide a protest such as this which involves a challenge to cancellation of a solicitation. As support for its position, the Navy relies on a narrow reading of the Competition in Contracting Act, which defines a "protest" as:

> * * * a written objection by an interested party to a solicitation by an executive agency for bids or proposals for a proposed contract for the procurement of property or services or a written objection by an interested party to a proposed award or the award of such a contract. 31 U.S.C. § 3551(1), as added by section 2741 of the Competition in Contracting Act of 1984, Pub. L. No. 98-369, title VII, 98 Stat. 1175, 1199.

In the Navy's view, a protest challenging cancellation of a solicitation concerns only the failure to award a contract, and thus does not fall within the statutory definition.

We believe that, in enacting the bid protest provisions of the Competition in Contracting Act, Congress intended that our Office continue to decide protests involving cancellations. As explained in the conference report on the Act, the purpose of the Act's bid protest provisions was to strengthen our existing bid protest function in order to ensure an effective enforcement mechanism for the Act's mandate for competition. H.R. Rep. No. 861, 98th Cong., 2d Sess. 1435 (1984). Before enactment of the Competition in Contracting Act, our Office routinely reviewed bid protests involving cancellations. See, e.g., *Scotts Graphics, Inc., et al.,* 54 Comp. Gen. 973 (1975), 75-1 CPD ¶ 302. In view of the continuing potential for adverse impact on the competitive system as a result of the unwarranted use of the authority to cancel solicitations[1], it is consistent with the Act's goal of strengthening our preexisting bid protest function for us to continue to review protests involving cancellation of solicitations.

Moreover, in our view, a protest against cancellation of a solicitation where, as here, the contracting agency plans to reissue the solicitation in an amended form, in effect concerns the proposed award of a contract under the new solicitation. Thus, even under the Navy's narrow interpretation of the Act, a protest concerning cancellation of a solicitation falls within our bid protest jurisdiction as defined in the Competition in Contracting Act.

Cancellation of the IFB

Although a contracting officer has broad discretion to cancel an IFB, he must have a compelling reason to do so after bid opening because of the potential adverse impact on the competitive bidding system of cancellation after bid prices have been exposed. *Electric Maintenance & Installation Co., Inc.,* B-213005, Mar. 13, 1984, 84-1 CPD ¶ 292. As a general rule, changing the requirements of a procurement after the opening of bids to express properly the agency's minimum needs constitutes such a cogent and compelling reason. *Dyneteria, Inc.,* B-211525.2, Oct. 31, 1984, 84-2 CPD ¶ 484. In this case, the cancellation was based on the Navy's determination that the contractor's performance may not meet its minimum needs because of two defective provisions in the IFB, discussed in detail below. Since we agree that one of the provisions is defective, and as a result the Navy's needs will not be met by award under the IFB, we find that the contracting officer had a compelling reason to cancel the IFB.

[1] An unwarranted cancellation results in bidders incurring the unnecessary expense of preparing bids only to have all the bids rejected and the bid prices exposed.

Section 00005, para. 4 of the IFB requires the contractor to perform service calls to repair equipment as needed between scheduled maintenance work. The IFB establishes three types of service calls—emergency, urgent, and routine—classified according to the nature of the repair problem. In the Navy's view, the IFB is defective with regard to the time requirements for responding to and completing urgent and routine service calls. Section 00005, para. 4.2.1 of the IFB establishes response and completion times for all emergency service calls. With regard to urgent and routine calls, however, the IFB does not specify response and completion times for all calls: for urgent calls, section 00005, para. 4.2.2 requires 90 percent of the calls to be responded to in 24 hours and 75 percent to be completed in 48 hours; for routine calls, while response time is specified for all the calls, para. 4.2.3 specifies a completion time (from 4 to 14 days) for only 92 percent of the calls.

The Navy maintains that the IFB can be interpreted to relieve the contractor of the obligation to respond to or complete that percentage of the total service calls for which no response or completion time is specified. Under this interpretation, for urgent calls, 10 percent would not have to be responded to and 25 percent would not have to be completed; for routine calls, 8 percent would not have to be completed. As a result, the Navy argues, there is no assurance that the contractor will perform 100 percent of the repair service calls, as is required to meet the Navy's needs.

The thrust of the protester's argument is that, despite the fact that not all service calls are subject to specific time limits, the contractor in fact is obligated to respond to and complete all the calls. While we agree with the protester's basic position, we do not believe that that conclusion resolves the defect in the service call provisions.

The clear intent of the IFB is to acquire comprehensive services for continuing maintenance and repair of facilities at Fort Story. While a certain percentage of calls is not subject to the specific response and completion time limits, there is no indication in any other IFB provision that the contractor is not obligated ultimately to perform all the service calls placed by the Navy. *See, e.g.,* section 00005, para. 4.2.4 ("rework calls" requiring performance or reperformance of all service calls not satisfactorily performed); Attachment I, para. 5 (requiring contractor to perform service calls on all buildings listed in exhibit 1-A). The service call provisions in particular contemplate repair of equipment on an as-needed basis, and we think that the only reasonable interpretation of the IFB is that all service calls must be responded to and completed. See *Dyneteria, Inc., et al.,* B-210684, *et al.,* Dec. 21, 1983, 84-1 CPD ¶ 10.

While the contractor thus would be required to perform all the service calls placed by the agency which fall within the scope of work of the IFB, we agree with the Navy that the provisions nevertheless are defective because, by not specifying response and com-

pletion times for all urgent and routine service calls, there is no way to ensure that they will be completed in a timely manner, as required to meet the Navy's needs. As defined in section 00005, para. 4.2.2 of the IFB, service calls are designated as urgent when the underlying problem "would soon inconvenience and affect the health or well-being of personnel or disrupt operational missions." Without specific response or completion times for a certain percentage of urgent calls, neither the Navy nor the contractor can be sure that the contractor's performance time will be adequate to meet the Navy's needs. Similarly with routine calls, the IFB does not indicate how the adequacy of the contractor's performance in terms of completion time will be measured for those calls not covered by the specific time limits. Further, the IFB at paragraph 2 of section 00004 establishes a scheme for penalizing the contractor for failure to perform or late performance of the specified tasks. The lack of standards for all urgent and routine calls would render this scheme ineffective for a significant portion of such calls, and could give rise to disputes during contract performance.

The protester suggests that the percentage of urgent calls not covered by specific time limits should be regarded as subject to the time limits for routine calls. There are two flaws in this approach, however; first, urgent calls by definition require a quicker response and completion time than routine calls; and, second, as noted above, 8 percent of routine calls themselves are not subject to specific completion times.

Based on our finding that the IFB provisions regarding response and completion times for service calls are defective, and, as a result, award under the IFB would not meet the Navy's needs, we conclude that the contracting officer had a compelling reason for canceling the IFB. In view of our conclusion that the initial deficiency cited by the Navy justifies the cancellation, we need not consider whether the second provision was in fact defective.

The protest is denied.

[B-216517]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—Initial Adverse Agency Action—Solicitation Improprieties

Bid opening is not initial adverse agency action on a protest to an agency where the agency advises the protester that it will consider the protest notwithstanding bid opening, that it will cancel the solicitation if the protest is upheld, and that the procurement will not proceed until the protest is decided. A protest filed with General Accounting Office within 10 days after the agency decision is therefore timely.

Bids—Invitation for Bids—Specifications—Restrictive—Burden of Proving Undue Restriction

A solicitation specifying corrugated metal pipe for a closed conduit waterway, thereby excluding an offer for concrete pipe, is not unduly restrictive where the contract-

ing agency establishes a *prima facie* case that the requirement is reasonable, based upon a comparative cost analysis, and the protester, although questioning the agency's method of projecting and comparing costs, fails to show that the method is unreasonable.

Contracts—Protests—General Accounting Office Procedures—Timeliness of Protest—New Issues—Unrelated to Original Protest Basis

Where a protester initially filing a timely protest later supplements it with new grounds of protest, the new grounds must independently satisfy GAO timeliness requirements.

Matter of: Centurial Products, September 19, 1985:

Centurial Products protests the award of a contract to the Beaver Excavating Company under invitation for bids (IFB) No. SCS-16-WV-84, issued August 7, 1984 by the Soil Conservation Service, Department of Agriculture. The IFB called for the installation of a closed conduit waterway on 3,500 feet of tributaries to Pond Run Channel in Wood County, West Virginia. Centurial contends that a requirement for the use of corrugated metal pipe in this project is unduly restrictive and that concrete pipe would be more cost effective.

We deny Centurial's protest in part and dismiss it in part.

Centurial protested to the Soil Conservation Service before bid opening on September 7, 1984, contending that the comparative cost analysis upon which the agency largely based its determination to use corrugated metal pipe was in error. Centurial claimed that the Soil Conservation Service used the wrong method to compare the cost of concrete and corrugated metal pipe, overestimated the cost of concrete pipe, calculated certain fixed costs as variable costs, omitted costs associated with replacing corrugated metal pipe at the end of its service life, and overestimated that service life.

Following receipt of a September 12, 1984 letter denying its protest to the agency, Centurial protested to our Office, again challenging the Soil Conservation Service's method for comparing the relative costs of concrete and corrugated metal pipe. According to Centurial, a proper cost comparison establishes that concrete pipe would be less expensive over the life of the project. By excluding concrete pipe from the Pond Run project, the protester alleges, the Soil Conservation Service unreasonably restricted competition.

As a threshold issue, the agency claims that Centurial's protest to our Office is untimely, since it was not filed until September 24, 1984, more than 10 working days after the September 7 bid opening. The agency relies upon the rule that if a protest is filed initially with the contracting agency, any subsequent protest to our Office must be filed within 10 working days of initial adverse agency action. 4 C.F.R. § 21.2(b)(2) (1984). An agency's opening of bids without correcting allegedly restrictive specifications generally

constitutes initial adverse agency action. *Silent Hoist & Crane Co., Inc.*, B-216826, Oct. 29, 1984, 84-2 CPD ¶ 477.

We believe the protest is timely. The record shows that on September 7, the contracting officer told Centurial that he would not delay bid opening while the agency considered the protest because, if it were sustained, the agency would cancel the IFB and redesign the project. He also indicated that bidders would be told that the procurement would not proceed until the Soil Conservation Service had decided Centurial's protest. Giving this strong indication from the agency that bid opening would not be an indication that the procurement was proceeding in a way inimical to Centurial's interest, we think Centurial did not have to view bid opening as adverse action on its protest. Therefore, we will consider the matter, since Centurial filed its protest with our Office within 10 days of the actual formal denial.

Turning to the merits of the protest, we note that when a specification is challenged as unduly restrictive of competition, the procuring agency must establish *prima facie* support for its contention that the restrictions it has imposed are reasonably related to its needs. Once the agency establishes this support, the burden then shifts back to the protester to show that the requirements complained of are clearly unreasonable. *Amray, Inc.*, B-208308, Jan. 17, 1983, 83-1 CPD ¶ 43. Thus, our inquiry is whether Centurial has met its burden of establishing that the agency's cost-effectiveness determination—and resulting decision to specify corrugated metal pipe—was clearly unreasonable.

The dispute over cost comparison methodologies in this protest arises from the fact that, while corrugated metal pipe is generally less expensive to install than concrete pipe, its service life is substantially less than that of concrete pipe. Because of soil acidity and resistivity and other environmental factors present in the Pond Run project, the Soil Conservation Service estimates that corrugated metal pipe will have a service life of 50 years, compared with 100 years for concrete pipe. Thus, in determining which type of pipe was the most cost effective, the agency not only considered the initial purchase price and operation and maintenance expenses, but the additional cost or replacing corrugated metal pipe in 50 years.

The protester and the Soil Conservation Service agree that a proper comparison requires that these costs be expressed in terms of their "present value." A present value analysis, which is based on the fact that it is generally beneficial to defer spending, expresses projected future expenditures in terms of current dollars. Its use provides agencies such as the Soil Conservation Service with a common basis for comparing projects that will require spending at different times in the future.

In this case, the agency argues that the method it used to determine present value is required by the guidelines implementing the

Water Resources Planning Act of 1965, as amended, 42 U.S.C.A. § 1962a-2 (West Supp. 1984-85).[1] This Act requires the Water Resources Council to establish principles, standards, and procedures for the formulation and evaluation of federal water resources projects. The guidelines are expressly applicable to Soil Conservation Service projects.

A major aspect of evaluating water resources projects is determining the present value of (1) deferred installation costs, and (2) operation and maintenance costs. For this purpose, the Water Resources Council has established a discount rate to be used in present value calculations that is based on the interest rate of certain United States securities, as determined annually by the Secretary of the Treasury. *See* 18 C.F.R. § 704.39 (1984). The Water Resources Development Act of 1974, 42 U.S.C. § 1962d-17 (1982), made this discount rate mandatory in the formulation and evaluation of federal water resources projects.[2]

To determine the present value of the cost of replacing corrugated metal pipe in 50 years, the Soil Conservation Service discounted the cost of replacing the pipe (estimated to be the cost at the time of analysis $242,175) using the applicable discount rate (7⅝ percent) established by the Water Resources Council. It also discounted future operation and maintenance costs of both types of pipe. The agency concluded that the cost of concrete pipe (installation plus operation and maintenance over 100 years), expressed in present value terms, was $293,423, while the cost of corrugated metal pipe (installation, operation and maintenance, and replacement after the first 50 years) was $267,426.

In its initial protest to our Office, Centurial contended that the agency had improperly used a "sinking fund analysis" to arrive at the present value for replacement of the corrugated metal pipe. This refers to a present value analysis that assumes that portions of the replacement cost will be paid in advance (placed in a sinking fund at specified intervals), rather than paid at the time of replacement. It is not clear from the record that the agency assumed the use of a sinking fund in its calculations, and Centurial has not suggested how such an assumption would change a present value analysis of replacement costs. In any event, in its report on the protest, the Soil Conservation Service provided a present value analysis justifying the exclusion of concrete pipe that was based on a single

[1] U.S. Water Resources Council, "Economic and Environmental Guidelines for Water and Related Land Resources Implementation Studies" (March 10, 1983) [guidelines].

[2] Although the protester and the Soil Conservation Service consider the guidelines and the specified discount rate binding, the guidelines by their own terms do not apply to procurement decisions such as the one at issue here. Nevertheless, we believe it is reasonable for an agency to adopt the same method for comparing the cost of materials to be used in a water resources project that it used to obtain authorization for the project in the first place.

payment for replacement in 50 years. It therefore is unnecessary for us to consider Centurial's protest on this basis.

Centurial next argues that the Water Resources Council guidelines require that agency to determine the average annual equivalent cost for future expenditures. We agree. The guidelines provide that, after an agency determines the total present value of the cost of a project, it should convert that value to an annual equivalent cost over the period of analysis.[3] The Soil Conservation Service calculates an annual equivalent cost of $22,388 for concrete pipe and a similar cost of $20,405 for corrugated metal pipe. Centurial argues that the annual equivalent cost of corrugated metal pipe is actually $29,373, almost $7,000 higher than that of concrete pipe. The difference between the figures arrived at by Centurial and by the agency results primarily from the fact that, in its calculations for metal pipe, Centurial did not first determine the present value of the replacement cost of the pipe. Rather, the protester converted the replacement cost of $242,175 to an annual equivalent cost by treating replacement cost as if it were already expressed in current dollars. The guidelines clearly require that agencies determine the present value of future expenditures before converting them to an annual equivalent cost,[4] and we believe that the Soil Conservation Service properly did so in this case and that Centurial's calculations are incorrect.

Centurial's remaining objection to the Soil Conservation Service's present value analysis is that the agency allegedly neglected to take inflation into account in determining the replacement cost for corrugated metal pipe. Centurial would estimate the replacement cost by increasing the current cost of installation by 5 percent annually. The protester would then determine the present value of this inflated figure. Using this method, Centurial calculates the replacement cost for corrugated metal pipe as $2,777,118 ($242,175 inflated at the rate of 5 percent a year). The protester argues that this method is required by the guidelines and that, if it is not required, the guidelines are unreasonable.

The guidelines direct agencies to:

> Base all [National Economic Development] costs on current costs adjusted by the project discount rate to the beginning of the period of analysis * * *. Compute all costs at a constant price level and at the same price level as used for the computation of benefits. Base current costs on the price level at the time of the analysis.[5]

The protester argues that, in this context, "current costs" means costs adjusted for inflation, so that the guidelines require an adjustment for inflation before discounting. However, this interpretation ignores the last two sentences quoted above, which clearly define "current costs" in terms of the price level at the time of

[3] Guidelines, §§ 2.1.3 and 2.12.4(b).
[4] *Id.* §§ 2.1.3 and 2.12.4(b).
[5] *Id.* § 2.12.4.

analysis and require the use of a constant price level for computing costs and benefits. This approach is consistent with the Office of Management and Budget's instructions to executive agencies to use constant dollars in determining the present value of future costs for projects not subject to the guidelines. OMB Circular No. A-94 (March 27, 1972); see also *City of Nenana*, B-214269, June 21, 1985, 85-1 CPD ¶ 708 (interpretation of OMB Circular No. A-104 (June 14, 1972), governing comparative cost analyses for decision to lease or purchase general purpose real property).

The Soil Conservation Service, as stated above, estimated the replacement cost for corrugated metal pipe to be what it would pay for installation today, then discounted this amount without an increase for inflation during the next 50 years. The agency states that this method accounts for inflation by assuming that the resources of the purchaser, in this case the sponsor of the Pond Run project, will increase, at about the same rate as inflation. We note that there are also assumptions about inflation in the particular discount rate selected for use in evaluation of water resources projects. Economists may differ regarding the proper discount rate and other aspects of present value analysis,[6] but in this case Centurial has the burden of establishing, not that a different method of comparing the cost of the two types of pipe might be reasonable, but that the method used by the Soil Conservation Service was unreasonable and thus unduly restricted competition. In our opinion, Centurial has not done so, and we deny the protest on this basis.

In its comments on the agency report, Centurial raises a number of new issues, several of which had been included in its initial protest to the agency. The protester contends that the agency failed to take into account the effects of eliminating concrete pipe on the local economy, omitted costs associated with replacing corrugated metal pipe after 50 years, overestimated the size and cost of concrete pipe required for the project, and should have solicited offers to supply concrete pipe irrespective of estimated costs in order to obtain actual bid prices for comparison.

When a protester initially files a timely protest and later supplements it, the new grounds of protest must independently meet our timeliness requirements. *GEO-CON, Inc.*, B-214503, July 3, 1984, 84-2 CPD ¶ 13. Here, Centurial was aware of the additional grounds for protest at least by the time it reviewed the Soil Conservation Service's September 12 letter denying its protest to the agency. The additional grounds were not presented to our Office until more than 5 months later, rather than within the 10 days required by 4 C.F.R. § 21.2. These grounds of protest, therefore, are untimely.

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[6] Our Office has suggested to the Office of Management and Budget that an approach different from that established by the guidelines might generally be more useful. *See* "Improved Analysis Needed to Evaluate DOD's Proposed Long-Term Leases of Capital Equipment" at 23, 35-37 (PLRD-83-84, June 28, 1983).

We deny the protest in part and dismiss it in part.

[B-218933]

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

Protest alleging that fuel oil suppliers were improperly excluded from competing for agency's requirement for heat for family housing units is untimely where protester is aware of agency's determination to satisfy its heating needs through natural gas and did not protest within 10 working days.

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

General Accounting Office will not consider the merits of an untimely protest nor invoke "significant issue" exception to timeliness requirements where untimely protest does not raise issue of first impression which would have widespread significance to the procurement community.

Contracts—Protests—Interested Party Requirement—Protester Not in Line for Award

Where agency determination to convert family housing units from oil to natural gas is not subject to question, protester, an oil supplier, is not an interested party to question the funding of the contract awarded to a natural gas company since protester would not be eligible for any award.

Matter of: Griffin Galbraith, September 19, 1985:

Griffin Galbraith protests the award of contract No. DAKF57-85-C-0019 to Washington Natural Gas (WNG) by the Department of the Army for natural gas service for heating family housing units at Fort Lewis, Washington. Griffin Galbraith, a fuel oil supplier, argues that award to WNG was improper since fuel oil could also be utilized to satisfy the Army's needs. Griffin Galbraith contends that the Army should have conducted a formal competitive procurement before deciding which fuel alternative to use. Also, Griffin Galbraith alleges that the fuel study performed by the Army which determined that the natural gas alternative was more advantageous contained several errors. In addition, Griffin Galbraith contends that the Army has no authority to enter into this contract because no appropriations have been made available by Congress for this purpose nor has the Army properly advised the appropriate congressional committees concerning this contract. Finally, Griffin Galbraith argues that the contract violates the Anti-Deficiency Act.

We dismiss the protest.

In September 1983, WNG submitted an unsolicited proposal to the Army for the conversion of family housing heating from oil to natural gas at Fort Lewis. Thereafter, the Army conducted a fuel study to determine whether oil or natural gas was the more eco-

nomical heating alternative. That study indicated that conversion to natural gas would be more economical. In April 1984, the Oil Heat Institute commented on the fuel study and in July 1984 Griffin Galbraith and one other oil supplier submitted proposals to the Army for the continued use of fuel oil. Although the Army revised the fuel study, the determination to convert the furnaces to natural gas never changed and on November 9, 1984, the Army approved the conversion.

A utility services contract was executed with WNG on December 20, 1984. This contract was for a 10-year period and was subject to the approval of the Deputy Army Power Procurement Officer, which was obtained on March 11, 1985. However, further action on the contract was withheld, and on March 18 a meeting was held concerning the proposed Fort Lewis fuel conversion. Griffin Galbraith submitted a written response to that meeting questioning several aspects of the fuel study, and on April 24, 1985, the Army prepared a detailed response to the specific issues which were raised. On May 2, a meeting was held between Army officials and fuel oil representatives, including the protester, and the Army states that at that time it again affirmed the validity of the fuel study and its intention to go forward with the Fort Lewis conversion. Subsequently, a modification to WNG's contract was issued on May 13, 1985, which established the effective date of the contract as May 1, 1985. Under the terms of the contract, WNG is responsible for supplying Fort Lewis with natural gas and is also required to install connecting gas lines to the family housing units.

Griffin Galbraith's protest was filed with our Office on May 20, 1985, and the Army argues that the protest is untimely since the grounds for protest were known at a much earlier date. Griffin Galbraith argues that the protest should not be dismissed since it was filed within 10 days of the date it was notified of the contract award to WNG.

We find Griffin Galbraith's protest to be untimely. Under our Bid Protest Regulations, a protest must be filed with our Office within 10 working days of the date the protester was aware or should have been aware of the basis for protest. 4 C.F.R. § 21.2(a)(2) (1985). We have recognized that oral notification of the basis for protest is sufficient to start the 10-day period running and that a protester may not delay filing its protest until receipt of the written notification which merely reiterates the basis for protest. *Koenig Mechanical Contractors, Inc.*, B-217571, Apr. 4, 1985, 85-1 CPD ¶ 389.

Here, it appears that Griffin Galbraith was aware of the Army's intention to go forward with the Fort Lewis conversion after meeting with the Army on May 2. The basis for this protest is that Griffin Galbraith was improperly excluded from competing for this requirement. Therefore, once Griffin Galbraith knew that the Army would proceed with the conversion to gas and therefore not consid-

er a proposal submitted by the firm or any other oil supplier, it was required to protest within 10 working days. *Morrison-Knudsen Co.,* B-209609, Mar. 10, 1983, 83-1 CPD ¶ 245. Griffin Galbraith's protest, filed more than 10 days after May 2, was not so filed. We further note that Griffin Galbraith's initial submission filed on May 20 did not question the fuel study relied upon by the Army in making its determination to convert to natural gas. It was not until Griffin Galbraith submitted its comments to the agency report on July 9 that it challenged the accuracy of the Army's fuel study findings. The record shows that the particular issues raised at that time are the same issues that Griffin Galbraith raised previously in its response to the March 18 meeting with the Army. Griffin Galbraith has provided no explanation, and we see nothing in the record, which justifies Griffin Galbraith waiting until July 9 before seeking to dispute specific aspects of the fuel study.

Griffin Galbraith argues that even if untimely, its protest should be considered under the significant issue exception to our timeliness rules. *See* 4 C.F.R. § 21.2(c). We will review an untimely protest under this exception only where it involves a matter of widespread interest or importance to the procurement community that has not been considered on the merits in a previous decision. *McCabe, Hamilton and Renny Co., Ltd.,* B-217021, Mar. 15, 1985, 85-1 CPD ¶ 312. The exception is strictly construed and sparingly used to prevent our timeliness rules from being rendered meaningless. *Dixie Business Machines, Inc.,* B-208968, Feb. 7, 1983, 83-1 CPD ¶ 128.

Griffin Galbraith contends that 15 other installations are being considered for conversion and that resolution of the issues raised here is necessary in order to permit an orderly treatment of those conversions. Also, Griffin Galbraith argues that the Army's actions here violate the specific requirements of the Competition in Contracting Act of 1984 (CICA), Pub. L. No. 98-369, 41 U.S.C. 251 note, concerning sole-source awards, and points out that we have not previously considered the application of those CICA requirements. Finally, Griffin Galbraith argues that a notice requirement in 10 U.S.C. § 2394 (1982) has not been complied with and this also raises a significant issue.

First, we note that CICA is not applicable here. The substantive provisions of that law apply to solicitations issued on or after April 1, 1985. The contract with WNG was signed on December 20, 1984, and approved on March 11, 1985. Modification 1, dated May 13, 1985, only changed the effective date of the contract. Therefore, the requirements of CICA are not relevant. See *Johnson Controls, Inc.,* B-218316.2, Apr. 10, 1985, 85-1 CPD ¶ 411. Furthermore, the fact that the Army is conducting feasibility studies at other locations for possible conversions does not make this matter one of widespread interest to the procurement community at large. The issue

can be timely raised if, indeed, it comes up again. See *Manville Building Materials Corp.*, B-210414, Mar. 15, 1983, 83-1 CPD ¶ 258.

Finally, we point out that 10 U.S.C. § 2394 does not apply to the present procurement. That law provides in relevant part that:

> (a) Subject to subsection (b), the Secretary of a military department may enter into contracts for periods of up to 30 years—
> (1) under section 2689 of this title;
> (2) for the provision and operation of energy production facilities on real property under the Secretary's jurisdiction or on private property and the purchase of energy produced from such facilities.

Section 2394(b)(2) does require that certain congressional committees to be provided notice of these types of contracts; however, the provision applies to energy production facilities. *See* B-214876, Sept. 4, 1984. The Army is neither building nor operating any facility which will produce energy and the protester's assertion that this provision is applicable is without merit.

For the above reasons, we see no reason to consider the issues raised by this protest under the significant issue exception.

Griffin Galbraith also questions the Army's funding for this contract. The Army will use Operation and Maintenance funds to pay WNG, and Griffin Galbraith asserts that use of these funds is improper. Griffin Galbraith argues that the contract is for the conversion of the furnaces from oil to natural gas and that this constitutes a construction project for which specific appropriations are required. Since no specific appropriation was made available for this purpose, Griffin Galbraith argues that the Army has no authority to enter into this contract. Also, because no funds are available, Griffin Galbraith contends that an Anti-Deficiency Act violation will occur.

Initially, we note that a conversion contract is not involved here. The contract is only for the provision of natural gas and for building a distribution system at Fort Lewis for the delivery of the gas. The Army indicates that the conversion of the furnaces from oil to gas will be subsequently completed and accomplished at a future date. Consequently, the lack of a specific appropriation for the conversion effort does not indicate a violation of the Anti-Deficiency Act. Moreover, there is no evidence which suggests that the Army's Operation and Maintenance account contains insufficient funds to cover the obligation incurred; we note that 40 U.S.C. § 481(a)(3) (1982) specifically authorizes contracts of up to 10 years for public utility services.

In any event, we find that Griffin Galbraith is not an interested party to raise these issues. While we agree with the protester that it has been adversely affected by the Army's decision to switch from oil to natural gas, since its protest of the Army's determination to do so is untimely and we are not considering it for that reason, we have no basis to question the Army's determination. Under our Bid Protest Regulations, a party must be an actual or

prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or failure to award a contract. 4 C.F.R. § 21.0(a); *ADB-ALNACO, Inc.,* B-218541, June 3, 1985, 64 Comp. Gen. 577, 85-1 CPD ¶ 633. Since Griffin Galbraith would not be eligible for any award because it is an oil supplier, we find that it is not sufficiently interested to challenge the funding for this contract. *Eagle Research Group Inc.,* B-213725, May 8, 1984, 84-1 CPD ¶ 514.

The protest is dismissed.

[B-219021]

Bids—Responsiveness—Brand Name or Equal Procurement

Protest is sustained where the contracting agency concedes that the awardee's bid for an "equal" product should have been rejected as nonresponsive for failing to meet precise dimensions specified in a brand name or equal purchase description. Where solicitation includes precise performance or design characteristics, "equal" product must meet them exactly, and mere functional equivalency will not do.

Bids—Preparation—Costs—Recovery

When, in view of the extent of performance and need for interchangeability, it is not feasible for an agency to terminate an improperly awarded contract for the convenience of the government, the protester is entitled to recover both its bid preparation costs and its costs of filing and pursuing the protest at the General Accounting Office.

Matter of: American Sterilizer Company, September 20, 1985:

American Sterilizer Company protests the award of a contract to Space Designs, Inc., under invitation for bids (IFB) No. 640-30-85, issued by the Veterans Administration Medical Center, Palo Alto, California.

On July 19, 1985, while American Sterilizer's protest was pending in our Office, the company filed a complaint seeking injunctive and declaratory relief in the United States District Court for the District of Columbia. See *American Sterilizer Co.* v. *Harry N. Walters,* Civil Action No. 85-2310. This decision responds to the court's request for our advisory opinion.

We sustain the protest, but do not find it in the best interest of the government to recommend termination of the contract. We find, however, that American Sterilizer is entitled to recover its reasonable costs of bid preparation and of filing and pursuing its protest at our Office.

The IFB solicited bids for modular units to be used for the storage and handling of medical supplies, equipment, and linens. The specifications called for the "Unicell System," manufactured by American Sterilizer, or equal. Precise exterior dimensions, based on Unicell specifications, were included for various line items including the overall modules and mobile storage and work units. Space Designs offered units manufactured by the Herman Miller Company at a total price of $296,052.18, while American Sterilizer offered its Unicell System at $350,285.53. The contracting officer

awarded the contract to Space Designs on April 22, 1985, after concluding that the Herman Miller-built units were "equal" to the Unicell System. American Sterilizer disagreed with this finding and protested to the agency and then to our Office, arguing that because the units provided substantially less storage capacity, they did not conform to the salient characteristics of the brand name system, and Space Designs' bid therefore should have been rejected as nonresponsive. (The protester also alleged that certain units are not molded in one piece and lack "stops" to prevent drawers from being pulled too far out. These allegations, however, are not repeated in the complaint filed with the District Court.)

In its report to our Office, the VA concedes that in the absence of any other listed salient characteristics, the specific dimensions of the storage units must be regarded as such. It also concedes that the Herman Miller-built units are smaller than those specified. The agency therefore agrees that it should have rejected Space Designs' bid as nonresponsive. However, although the agency issued a stop work order on June 12, Space Designs has already made an initial shipment that constitutes more than 50 percent of the contract. In addition, after discussions with Space Designs, the agency estimates that termination costs might run as high as $57,400. The VA concludes, therefore, that termination for convenience, at this stage of performance, would not be practicable or in the best interest of the government. As an alternative, the agency offers to reimburse American Sterilizer for its bid preparation costs.

American Sterilizer, however, believes that the VA offer is inadequate. In the protester's opinion, the agency has violated the procurement statutes and regulations, improperly deprived American Sterilizer of an award, and compromised the integrity of the federal procurement system. It urges that the agency find the awardee in default on the grounds that Space Designs has delivered goods that do not comply with specifications. According to the protester, this would allow the agency to return the noncompliant storage units to Space Designs, at Space Designs' expense, and then award a contract to American Sterilizer.

If termination for default is not deemed appropriate, then American Sterilizer urges that the VA terminate Space Designs' contract for the convenience of the government, again returning the noncompliant storage units to Space Designs and awarding a contract to American Sterilizer. Since the storage units are off-the-shelf items, the protester believes that the expense to the government of a termination for convenience will be limited to the costs of shipment, approximately $4,860.

At the outset, we agree with the VA's conclusion that Space Designs' bid should have been rejected as nonresponsive. When, in a brand name or equal purchase description, an agency expresses its requirements in terms of very precise performance or design characteristics, any "equal" product must meet those characteristics ex-

actly. See *Cohu, Inc.*, B-199551, Mar. 18, 1981, 81-1 CPD ¶ 207, and cases cited therein. Since the VA used this type of specification, mere functional equivalency of the "equal" storage units offered by Space Designs was not sufficient, and it was improper for the contracting officer to accept the bid. We therefore must determine what corrective action, if any, is possible at this time.

Whether a contract should be terminated for default is a matter cognizable by the contracting officer, not our Office. We point out, however, that it is not clear that the agency could find the awardee in default, as American Sterilizer urges, since it accepted Space Designs' bid and has since accepted units delivered under the contract. By doing so, the VA arguably has waived or modified the specifications. Cf. *Astubeco, Inc.*, Armed Services Board of Contract Appeals Nos. 8,727, 9,084, Oct. 31, 1963, *reprinted in* 1963 BCA ¶ 3,941 (CCH 1963) (action under default clause is no longer available to government when defective goods have been accepted and paid for).

As for termination for the convenience of the government, in determining whether to recommend such action, we consider, among other things, the seriousness of the procurement deficiency, the degree of prejudice to other bidders or to the integrity of the competitive procurement system, the good faith of the parties, the extent of performance, the cost to the government, the urgency of the procurement, and the impact of termination on the procuring agency's mission. *Vulcan Engineering Co.—Request for Reconsideration*, B-214595.2, Feb. 27, 1985, 85-1 CPD ¶ 243.

After reviewing the facts of this case, we do not believe that it is in the best interest of the government to recommend termination. As stated above, more than 50 percent of the storage units have already been delivered to the VA. In our opinion, the cost to the government of reprocuring less than half the original requirement is likely to be disproportionate in relation to the seriousness of the contracting agency's error. Although the Herman Miller-built storage units do not meet all the salient characteristics set forth in the IFB, the agency concedes that they satisfy its minimum needs. In addition, since the contracting officer's report stresses that the VA seeks interchangeability of shelves, drawers, and accessories, it appears that delivery of the remaining Herman Miller-built units under the contract is necessary to meet this objective. Finally, even though the contracting officer wrongly concluded that the Herman Miller units were equal to American Sterilizer's Unicell System, there is no evidence that he acted in bad faith when he made this determination. Viewed as a whole, then, we do not believe that the facts of this case justify the added costs and administrative inconvenience that are likely to result from a recommendation that Space Designs' contract be terminated for the convenience of the government.

In its court suit, the protester also seeks attorney's fees and bid preparation costs. Our Bid Protest Regulations provide that when an award is contrary to statute or regulation, protesters may recover reasonable costs of (1) filing and pursuing a protect, including attorney's fees, and (2) preparing a bid or proposal. 4 C.F.R. § 21.6(d) (1985). The former are recoverable when the agency has unreasonably excluded the protester from a procurement unless, pursuant to our recommendation, the protester has received an award; the latter are recoverable when the agency has unreasonably excluded the protester from a procurement and other remedies are not appropriate. *Id.* § 21.6(e)

Since we have found that it is not feasible to recommend any corrective action, and since American Sterilizer's case otherwise falls within the ambit of our Bid Protest Regulations, we find that the protester is entitled to reasonable bid preparation costs and the costs of filing and pursuing the protest at our Office. Should the court find that some other remedy is appropriate, recovery of these costs would, of course, not be appropriate.

For the VA's guidance in future procurements, we point out that it appears the agency's requirement for the Unicell System or equal was unduly restrictive of competition. Although with less capacity than the Unicell system and apparently bonded, rather than molded in one piece, and without drawer and tray stops, the Herman Miller-built units delivered by Space Designs admittedly satisfy the VA's needs for storage units. This means, therefore, that the specifications did not accurately reflect the agency's minimum needs. In any similar procurement, the agency should use more carefully drafted specifications, and any salient characteristics should be clearly identified and distinguished from features of the brand name equipment that are merely desirable.

The protest is sustained.

[B-216543]

Contracts—Negotiation—Sole-Source Basis—Procedures—*Commerce Business Daily* Notice Procedures

Prohibition in Pub. L. 98-72 against commencing negotiations for the award of a sole-source contract until at least 30 days have elapsed from the date of publication in the Commerce Business Daily of a notice of intent to contract refers to the date of actual publication, and may not be negated by a regulatory provision, section 5.203 of Department of Defense Federal Acquisition Regulation Supplement, establishing a presumption that a synopsis electronically transmitted to the CBD has been published 2 days thereafter. *Harris Corp.*, B-217174, Apr. 22, 1985, 64 Comp. Gen. 480, 85-2 C.P.D. 455 clarified.

Contracts—Negotiation—Sole-Source Basis—Procedures—*Commerce Business Daily* Notice Procedures—Failure to Follow-Not Prejudical

Contracting agency's failure to timely publish a synopsis in the Commerce Business Daily concerning its proposed sole-source procurement as required by Pub. L. 98-72

does not require cancellation of the procurement where it has not been shown that the agency acted to deliberately deny the protester the opportunity to submit a proposal or that the protester was prejudiced by the lack of timely notice, because the record indicates that the protester could not have met the agency's delivery requirements.

Contracts—Awards—Separable or Aggregate—Single Award—Propriety

Agency is not required to have separately purchased panel assemblies for multiplexers, where the agency concluded that its needs could best be met through a "total package" procurement approach. Protester has not shown that the agency decision to use a single procurement was improper.

Matter of: AUL Instruments, Inc., September 24, 1985:

AUL Instruments, Inc. (AUL), protests the sole-source award of contract No. DAAB07-84-C-C096 to Bammac, Inc. (Bammac) by the United States Army Communications Electronics Command, Fort Monmouth, New Jersey, for the supply of 17,458 panel assemblies, No. 11A23 through 11A29, for the TD-660 B/G multiplexer. The protest is based on the failure of the agency to timely publish in the Commerce Business Daily (CBD) a synopsis of its proposed sole-source procurement from Bammac as required by Pub. L. 98-72 and the implementing regulations set forth in the Department of Defense (DOD) Federal Acquisition Regulation (FAR) Supplement. Accordingly, AUL requests that the award to Bammac be terminated and that the procurement be resolicited.

The protest by AUL is denied.

The agency advises that the TD-660 B/G multiplexer has been procured by the Army since 1966; that successful production of the subassemblies (assembly panels) for the TD-660 requires the availability of numerous integrated circuit devices (IC's); and that the availability of some of these IC's has been a problem for several current manufacturers. Although a technology insertion program had been adopted to upgrade the TD-660 with parts representing current technology, Army officials determined that an urgent "stop gap" procurement of panel assemblies for the TD-660 using the older IC's was needed. In anticipation of this procurement, in April 1984, the Army sent a letter of inquiry to current producers of the TD-660, including AUL, and producers of TD-660 internal components, including Bammac. In its letter, the Army stated that it anticipated purchasing approximately 18,000 subassemblies for the TD-660; outlined the proposed delivery schedule; expressed concern about the continued availability of the IC devices needed to manufacture the units; stated that its intent was "to ascertain prior to contract solicitation that sufficient quantities of all the required IC's will be available to complete the contract"; listed all the IC's required and their current or prior source; and asked each company to submit, in confidence, with respect to each IC device: (1) the identity of its proposed vendor/manufacturer; (2) the quantities available from each proposed vendor/manufacturer; (3) vendor's or

manufacturer's lead time from receipt of purchase orders to delivery; (4) length of time available from vendors/manufacturers; (5) detailed reasons for the unavailability of any IC; and (6) any proposed exceptions to the device requirements shown on applicable drawings together with details sufficient to demonstrate that the device, with exceptions, would operate properly in the TD-660 B/G. The Army requested that responses be submitted in 30 days, but AUL was permitted until June 5—almost 2 months—in which to reply.

In its June 4, 1984, response to the agency inquiry, AUL advised that there appeared to be only one or no known source for several of the IC's identified by the Army and that AUL's experience indicated that there was a high risk of nonconforming units and production variations as to performance characteristics which may not be consistent with TD-660 specifications. AUL further advised that because of sporadic demand there was a risk that production of additional IC's were on "engineering hold" because the manufacturer had encountered technical problems. Lastly, AUL indicated that delivery time from the manufacturer of one of the IC's probably would exceed 20 weeks. Although, as we indicated above, the agency had requested specific information concerning each company's sources of supply for the IC's and the quantities and delivery schedules available from each, as well as any proposed exceptions to the required IC's, AUL did not provide any specific information in its reply as to the available quantities of IC's. Bammac, on the other hand, had shown that it already had in its inventory or on order substantial quantities of all of the IC's required for panel assemblies 11A23 through 11A29 and indicated that with respect to most of these IC's the number already on hand or ordered met or exceeded the quantities required by the agency. Bammac further advised that it did not expect to encounter any difficulties in obtaining the remaining number of IC's required by the agency. The only other potential offeror to respond to the agency survey, Emerson Electric Co., indicated considerable difficulty in obtaining many of the required IC's, several of which it referred to as "obsolete." In addition, Emerson indicated delivery dates for some IC's of up to 40 weeks and characterized these estimates as "optimistic."

Based on the results of its survey, the agency determined that the panel assemblies for the TD-660 should be obtained on a sole-source basis from Bammac. In its justification for the sole-source award to Bammac, the agency stated that seven panel assemblies would be in a critical need status by February 1985; that based on the availability of IC's only Bammac would be in a position to begin delivery of the subassemblies within 7 months; and that Bammac even would be able to accelerate the beginning of deliveries to 3 months of award. The head of the contracting activity approved the proposed sole-source procurement of the TD-660 panel assemblies from Bammac on July 21, 1984.

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On September 15, 1984, the synopsis of the Army's proposed sole-source procurement was published in the CBD and the contract to Bammac was awarded on September 21, 1984.

AUL has protested the sole-source award to Bammac on the basis that the agency violated the provisions of Pub. L. 98-72 and the implementing regulations in the DOD FAR Supplement which set forth certain requirements for advance publication in the CBD of sole-source procurements. AUL asserts that as a result of this statutory violation, it was prejudiced. AUL also questions whether Bammac in fact was in a unique position to supply these items and maintains that, at best, only one of the seven assemblies may have been appropriate for a sole-source procurement.

Under Pub. L. 98-72 an agency shall not commence negotiations for the award of a sole-source contract until at least 30 days have elapsed from the date of publication in the CBD. *See* 15 U.S.C. § 637(e)(2)(c) (Supp. I, 1983). Furthermore, Pub. L. 98-72 requires that the notice of intent to contract on a sole-source basis contain a statement that interested parties are invited to identify their interest and capability to respond to the procurement requirement or may submit proposals in response to the CBD notice within the 30-day notice period. *See* 15 U.S.C. § 637(e)(3)(c) (Supp. I, 1983). We note that the agency has not claimed that this procurement was of "such unusual or compelling urgency" that it was exempt from the requirement that it be synopsized. *See* 15 U.S.C. § 637(e)(1)(b) (Supp. I, 1983).

The facts before us show that the agency issued the sole-source solicitation of Bammac on August 3, 1984, and received Bammac's proposal on August 14. The solicitation required initial delivery of the panels 120 days after the date of contract award. On August 9, the agency electronically transmitted the synopsis of the proposed sole-source procurement from Bammac to the CBD for publication. However, due to an apparent backlog at the CBD the notice of the proposed sole-source procurement was not published until September 15, 6 days prior to the date of award to Bammac on September 21, 1984. AUL states that it did not receive the September 15 issue of the CBD until September 25, some 4 days after the contract was awarded.

AUL asserts that if the requirements of Pub. L. 98-72 had not been violated, AUL would have been interested in competing for the procurement of the panel assemblies. AUL states that since it has been prejudiced by the agency's violation of the notice requirement of Pub. L. 98-72, the sole-source award to Bammac should be terminated and the procurement resolicited.

In response to AUL's protest, the agency asserts that it made every attempt to comply with the notice requirements of Pub. L. 98-72 and that its failure to provide timely notice in the CBD of the proposed sole-source procurement was not deliberate. The agency in part points out that section 5.203 DOD FAR Supplement,

48 C.F.R. § 205.203 (1984), provides in pertinent part that contracting officers may presume publication in the CBD 2 days after electronic transmittal of the synopsis. Thus, the agency states that it presumed that the synopsis of the proposed sole-source procurement was published on August 11. The agency states that it had been unaware that the synopsis had not been timely published until AUL brought the matter to its attention.

Although we agree with the agency that the record does not establish that it sought to deliberately exclude AUL from consideration, we believe that the agency failed to comply with the requirements set forth in Pub. L. 98–72 for the advance notice in the CBD of proposed sole-source procurements. As stated above, that statute specifically provides that the agency shall not commence negotiations for the award of a sole-source contract until at least 30 days have elapsed from the "date of publication" of the synopsis of the proposed procurement. Given the express language of Pub. L. 98–72 specifying "publication" in the CBD, we do not believe that the presumptions of publication in the CBD contained in section 5.203 of the DOD FAR Supplement (1984) operated to satisfy the requirements of CBD publication where the synopsis had not in fact been timely published. Thus, in the matter before us, the date of actual publication of the synopsis in the CBD, September 15, and not the presumed date of publication, August 11, was the pertinent date for the purpose of determining whether the advance notice requirements of Pub. L. 98–72 were met. In any event, since the agency issued the sole-source solicitation to Bammac 6 calendar days *prior* to the agency's transmittal of the synopsis to the CBD, the agency would not have complied with the statutory 30-day requirement even if the synopsis had been published promptly upon receipt.

We recognize that our decision in *Harris Corp.,* B–217174, Apr. 22, 1985, 64 Comp. Gen. 480, 85–2 C.P.D.¶ 455, may be read as providing support for the view that the presumption of publication which was set forth in section 5.203 of the DOD FAR Supplement was proper, because we cited that provision without criticism. However, in *Harris, supra,* our Office did not expressly consider the validity of the presumption of publication contained in section 5.203 since the agency made a sole-source award on a date which was prior to the expiration of the mandatory 30-day CBD notice requirement even if the presumed date of publication had been the actual date of publication.

Although statutory and regulatory changes have occurred since the procurement which is the subject of AUL's protest, there remains a basic conflict between statutory notice requirements founded upon actual publication and regulatory provisions establishing a presumption of publication within a certain period after a synopsis has been transmitted by the procuring agency to the CBD. The provisions of Pub. L. 98–72 as set forth in 15 U.S.C. § 637(e) (Supp. I, 1983) have been superseded by the provisions added by

sections 303 and 404 of Pub. L. 98-577. The new provisions, effective with regard to solicitations issued after March 31, 1985, provide for advance "publication" in the CBD of certain procurement actions and direct the Secretary of Commerce to "publish promptly" the required CBD notices. We further note that effective with respect to solicitations issued after March 31, 1985, the FAR provides that unless they have evidence to the contrary, contracting officers may presume that notice has been published 10 days—6 days if electronically transmitted—following transmittal of the synopsis to the CBD. *See* section 5.203(f) of the FAR, 50 Fed. Reg. 1726, 1728-9 (1985) FAR Circular 84-5 (April 1, 1985) (to be codified at 48 C.F.R. § 5.203(f).[1] Since Pub. L. 98-577 expressly requires publication in the CBD (as did Pub. L. 98-72), we believe that the presumption in the FAR, to be codified at 48 C.F.R. § 5.203(f) is inconsistent with the statutory requirement of actual publication. While we are aware of the burden which the lack of a presumption of CBD publication would place on contracting officers, the statutory requirements concerning publication are clear and must be followed. We urge the Director of the FAR Secretariat and the Secretary of Commerce to develop procedures which would ensure the prompt publication of procurement synopses in the CBD.

Although the agency's actions violated the requirements of Pub. L. 98-72, we do not believe that the agency's violation of the statute requires termination of its contract with Bammac since the record before us shows that AUL was not prejudiced by the agency's failure to follow the statute's requirements.

Pub. L. 98-72 contains no expression of a congressional intent to require agencies to terminate otherwise proper awards or to cancel otherwise valid procurements and reprocure in every instance where the exact letter of the applicable notice requirement is not met and there is no indication that this was Congress' intent. *See Morris Guralnick Assoc., Inc.*, B-214751.2, Dec. 3, 1984, 84-2 C.P.D. ¶ 597. Furthermore, we have held that the contracting agency's failure to properly publish a synopsis in the CBD concerning an intended procurement, as required by Pub. L. 98-72, does not require a cancellation of the solicitation and resolicitation where the protester has not been prejudiced by the failure to give proper notice in the CBD. See *Tri Com, Inc.*, B-214864, June 19, 1984, 84-1 C.P.D. ¶ 643.

The agency asserts that AUL was not adversely affected by the failure to timely publish a synopsis of the sole-source procurement in the CBD since AUL's response to the agency's April inquiry as to the availability of IC's required for the TD-660 panel assemblies indicated that AUL would be unable to timely deliver the panel as-

[1] The presumption of CBD publication in section 5.203 of the DOD FAR Supplement (1984) was deleted effective with regard to solicitations issued after March 31, 1985.

semblies due to the unavailability of certain needed IC's. Furthermore, the agency has advised that as of the time of its report, AUL was approximately 1 year behind on its current contract for the production of the TD-660.

Although AUL states in general terms that it would have been interested in competing for this procurement had it been properly synopsized, AUL has not stated how it would have met the agency's urgent delivery requirements despite its June reply to the agency that there appeared to be some difficulties with obtaining some of the IC's needed for the panel assemblies. Furthermore, AUL has not disputed the agency's statement that it was about 1 year behind in delivery under its existing contract for the production of the TD-660.

In support of its position, AUL has cited the decision in *Tri-Com, Inc.*, v. *National Aeronautics and Space Administration*, Civ. Act. No. 84-1058 (D.D.C. Oct. 31, 1984) (Memorandum of Findings and Conclusions) wherein the court disagreed with our decision in *Tri-Com*, B-214864, *supra*, 84-1 C.P.D. ¶ 640, in which we held that the contracting agency's failure to publish a synopsis in the CBD required by Pub. L. 98-72 had not prejudiced the protester where the protester became aware of the procurement some 17 days prior to award. The court found that testimony presented by Tri-Com at an evidentiary hearing showed that it was likely that Tri-Com would have prepared a responsive proposal and would have been entitled to the contract if notice of the procurement had been published in the CBD at least 30 days prior to award as was required by Pub. L. 98-72.

We do not view the court's decision in *Tri-Com* as supporting AUL's position that it was prejudiced by the lack of timely publication of the synopsis of the sole-source procurement. The court did not hold that the failure to publish a timely CBD notice by itself constituted prejudice to Tri-Com, but held that evidence presented by Tri-Com demonstrated a likelihood that Tri-Com would have submitted a responsive proposal if it had the additional time in which to prepare it, which publication in the CBD would have provided.

Here, AUL was permitted almost 2 months in which to reply to a letter in which the Army (1) stated the approximate number of panel assemblies it anticipated purchasing; (2) set forth its proposed delivery schedule; (3) expressed its concern about the availability of certain key components necessary for the manufacture of these items and stated that its intent was to ascertain whether enough of these components were available to complete the contract; (4) identified each of these components and its current or prior source; and (5) requested each addressee to provide specific information which would establish whether that firm would have available to it those quantities of the necessary components in time to meet the proposed delivery schedule. Although a proper CBD

synopsis was not provided, the Army's letter of inquiry would appear to have provided an equivalent opportunity for interested firms to demonstrate their "capability to respond" to the Army's needs.[2] AUL, however, has not presented any evidence to show that it could have been responsive to the Army's urgent "stop-gap" procurement of the TD-660 panel assemblies even if it had received timely notice of the procurement pursuant to the requirements of Pub. L. 98-72. Therefore, we cannot conclude that AUL was prejudiced by the lack of a proper synopsis.

AUL also challenges the propriety of the sole-source award to Bammac, alleging that the difficulties which AUL cited in its June 1984 response to the agency's inquiry would apply to any prospective contractor, including Bammac. The protester points out that there is no indication that the Army independently verified whether Bammac in fact had the unique ability to perform the contract which it claimed.

The Army disputes AUL's assertion that all prospective contractors would be in the identical position with respect to the supply of IC's available to them. The contracting officer states that as of the time of her report on the protest Bammac was producing the panel assemblies in question, under an existing contract, on a timely basis. AUL has presented no evidence which indicates that Bammac could not perform on schedule; in fact, the Army advises that Bammac has accelerated delivery. Since the record does not support AUL's assertion that Bammac was in the same position as any other prospective contractor with respect to its supply of IC's, this aspect of the protest is denied.

AUL also asserts that Bammac had rejected large quantities of parts, IC's SM-B-525283-2 and SM-B-525283-3, which are used in subassemblies 11A23 and 11A28, due to nonconformance and that Bammac provided the manufacturer with a waiver of this nonconformance in October 1984. AUL points out that the two IC's in question are those which it advised the agency in its June 4 letter were on "engineering hold" by the manufacturer because of technical problems. The agency denies AUL's assertions and advises that Bammac has neither accepted any defective parts nor issued a waiver for the acceptance of nonconforming parts. The Army advises that Bammac had resolved the problem of the availability of the IC's by means of an engineering change proposal. Once a contract has been awarded the matter as to whether the awardee in fact supplies items conforming to the terms of the contract specifications is a matter of contract compliance and administration which are the responsibility of the contracting agency and not our Office. *MKC Electronics Corp.*, B-216584, Oct. 22, 1984, 84-2 C.P.D. ¶ 438. We note that the agency has advised that Bammac has not

[2] It does not appear that the CBD synopsis stimulated any response other than AUL's protest.

only indicated that it would meet the contract's delivery schedule but that Bammac has accelerated the delivery schedule by up to 3 months on most panel assemblies and is planning to maintain this accelerated delivery schedule throughout the contract.

Finally, AUL asserts that in its letter of June 4, it clearly indicated that four of the seven panel assemblies, which were eventually procured from Bammac, were readily available and that two other subassemblies, panel assemblies which required IC's SM-B-525283-2 and SM-B-525283-3, allegedly were on "engineering hold" because of technical problems. Thus, AUL asserts that only one panel assembly, 11A25, which requires IC-SM-B-525291, might have been properly procured on a sole-source basis from Bammac if that firm had this subassembly in stock, since AUL had indicated in the June 4 letter that this particular IC had been discontinued. AUL contends that there was no proper basis upon which to include the other panel assemblies in the sole-source procurement. We disagree.

AUL's June 4 response to the agency's inquiry of availability of IC's does not clearly indicate that AUL could provide four of the panel assemblies without any difficulty. Furthermore, as stated above, AUL omitted in its response to the agency's survey much of the specific information which had been requested by the agency, including information on the quantities of IC's available to it. In addition, as set forth above, the agency has advised that Bammac has successfully resolved the potential problems with the "engineering hold" on IC's SM-B-525283-2 and SM-B-525283-3.

Moreover, the agency advises that it is using competitive procedures to procure these items to the extent feasible. It advises that the 17,458 panel assemblies required under the current contract with Bammac represent less than half of the total government requirement of 38,292 assemblies. Of the remaining 20,834 assemblies, 20,076 have been "broken out" for the Technology Insertion Program, which will be competitively procured, and AUL has submitted a proposal to supply the remaining 758 Filter Assemblies. In addition, the agency states that it issued a single solicitation for all the panel assemblies needed under the "stop-gap" procurement since the majority of the required IC's are utilized on more than one assembly.

AUL has cited our decision in *Intermem Corp.*, B-212964, July 31, 1984, 84-2 C.P.D. ¶ 133, in support of its position that panel assemblies 11A23 through 11A29 should have been procured through separate solicitations. Our decision in *Intermem, supra,* is clearly distinguishable from the situation before us. In Intermem, the agency not only did not offer any basis for its total package procurement but in effect agreed that a divisible component of the equipment being purchased should be procured competitively.

We consistently have held that it is for the contracting agency to determine whether to procure by means of a total package ap-

proach or to break out divisible portions of the total requirement for separate procurements. In such cases, we will not disturb the agency's decision to procure on a total package basis unless the protester shows by convincing evidence that the agency's approach is clearly unreasonable. *J&J Maintenance, Inc.*, B-214209, Nov. 2, 1984, 84-2 C.P.D. ¶ 488. Since AUL has not presented evidence which would show that the agency's total package approach to the procurement of the panel assemblies is clearly improper, we will not object to the agency's use of a single solicitation for this "stop-gap" procurement.

[B-217211]

Advertising—Advertising *v.* Negotiation—Mess Attendant Services

Agency decision to use a cost-type, negotiated contract in lieu of a fixed-price, formally advertised contract in procuring mess attendant services is not justified by variations in meal counts and attendance, the lack of a contractual history, or the need for managerial and technical expertise. Although the Competition in Contracting Act of 1984 eliminates the preference for formally advertised procurements (now "sealed bids"), and would apply to any resolicitation, the implementing provisions of the Federal Acquisition Regulation (FAR) do provide criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals. General Accounting Office recommends that contracting agency not exercise contract renewal options, and instead conduct a new procurement according to the applicable FAR provisions.

Contracts—Negotiation—Cost-Plus-Award-Fee Contracts

Cost-plus-award-fee contract, authorized under the FAR, is not a prohibited cost-plus-a-percentage-of-cost contract where the award fee, while based on a percentage of costs, depends on government's subjective assessment of performance, with entitlement decreasing as costs increase, and is subject to a ceiling on fees to be paid.

Matter of: United Food Services, Inc., September 24, 1985:

United Food Services, Inc. (United) protests request for proposals (RFP) No. DABT47-85-R-0010, issued by the Army as a small business set-aside for staffing, managing and operating 33 food service and dining facilities at the Army's training base at Fort Jackson, South Carolina. The solicitation requested pricing proposals, for a base year and 4 option years, for each of the 33 food facilities on a cost per month basis. Unlike a fixed-price, formally advertised contract where award is based on lowest price, here, award was based on an evaluation of both the technical acceptability and cost realism of the proposals. Payments under the contract include reimbursements for allowable costs. The contract has been awarded. United contends that: (1) the services should have been procured through fixed-price, formal advertising rather than through negotiation of a cost-type contract; (2) payment under the contract is on a prohibited "cost-plus-a-percentage-of-cost" basis; and (3) certain minimum manning requirements contained in the RFP were excessive.

We sustain the protest as to the first allegation, deny it as to the second, and dismiss it as to the third.

United contends that the food services should have been procured by formal advertising with an invitation for bids (IFB) for a fixed-price contract. United argues that the government has procured such services, on a fixed-price basis, through formal advertising in the past, and cites a recent IFB for food and dining services issued by the Army at Fort Knox, Kentucky. United points out that both Fort Knox and Fort Jackson are under the same Army command and contends that if it was practicable to formally advertise for the services at Fort Knox, it is inconceivable that formal advertising could not have been used at Fort Jackson.

The Army responds that the services required could not practicably be obtained through formal advertising on a fixed-price basis and that a cost-type, negotiated procurement was therefore appropriate. The Army points to the existence of variable factors and unknown risks, based in part on the lack of a contractual history, such as the number and type of meals to be served and attendance at the facilities in light of unpredictable recruitment results and personnel deployment. The Army reports that Fort Jackson has previously contracted for food services at only 7 of its facilities and that the instant contract for 33 facilities is significantly more complex. In addition, the Army maintains that the level of managerial and technical competence required to meet the base's food service needs could not be adequately described in an IFB.

We cannot agree that Fort Jackson's needs reasonably required the use of a cost-type contract which in turn justified the use of negotiation. A cost-reimbursement contract is to be used only where "uncertainties involved in contract performance do not permit costs to be estimated with sufficient accuracy" to permit fixed-price contracting. Federal Acquisition Regulation (FAR), 48 C.F.R. § 16.301-2 (1984). The contracting officer argues that the variations in meal counts and attendance pose too great a risk to be borne by the contractor, and concludes that a cost-reimbursement contract was therefore justified. We have held, however, that bidders for military food services or so-called "mess attendant" services contracts can take such risks into account when computing their bids, and submit fixed-price bids on the basis of costs of individual meals or hourly rates of service to be provided. *Palmetto Enterprises,* 57 Comp. Gen. 271 (1978), 78-1 CPD ¶ 116; *Space Services International Corp.,* B-207888.4, *et al.,* Dec. 13, 1982, 82-2 CPD ¶ 525; *Logistical Support, Inc.,* B-197488, Nov. 24, 1980, 80-2 CPD ¶ 391.

Moreover, we have generally rejected the argument that variations in meal requirements and attendance justify the use of negotiation instead of formal advertising, *ABC Management Services, Inc., et al.,* 53 Comp. Gen. 656 (1974), 74-1 CPD ¶ 125; *Ira Gelber Food Services, Inc., et al.,* 54 Comp. Gen. 809 (1975), 75-1 CPD ¶186,

and all three military departments routinely have been able to procure these mess attendant services through the use of formal advertising. See *J.E.D. Service Co.*, B-218228, May 30, 1985, 85-1 CPD ¶ 615 (Army [Fort Knox]); *Military Services, Inc. of Georgia*, B-218071, May 21, 1985, 85-1 CPD ¶ 577 (Navy); *Kime-Plus*, B-215979, Feb. 27, 1985, 85-1 CPD ¶ 244 (Air Force). Here, although we recognize that the Army was expanding the food services under contract at Fort Jackson, the Army does not explain why its own prior experience in manning the facilities and in contracting for mess attendant services, see *Space Services International Corp., supra,* along with recruitment and training goals that presumably are established and budgeted for, is not sufficient to enable it to prepare specifications and structure a contract suitable for formal advertising. Finally, we also cannot accept the Army's position that the level of managerial and technical expertise required precludes adequate specification description, justifying the use of negotiation, because the Army has only offered its unsupported conclusion on this matter; it has failed to show that its management requirements are so unique or complex that they are incapable of description. We therefore agree with United that Army's use of a cost-type, negotiated contract does not appear justified.

United also alleges that the cost-plus-award-fee method of reimbursement described in the solicitation is in fact an improper cost-plus-a-percentage-of-cost method.

The solicitation directs offerors to include in their cost proposals a proposed "total available fee amount," the sum of a base fee amount and a maximum award fee amount. These fees are to be expressed in terms of percentages of the estimated costs of the contract, which cannot exceed either the percentage limitations set forth in applicable regulations (FAR, 48 C.F.R. § 15.903; Department of Defense Supplement, 48 C.F.R. § 216.404-2(b) (1984)), or the offeror's proposed total dollar fee amount.

Contract payments of the fee amounts, while based on a percentage of costs incurred under the contract, are to be determined by the contracting officer in light of recommendations from a performance evaluation board consisting of agency technical and administrative personnel. The amount will depend upon the board's subjective evaluation of the contractor's performance, with higher awards to be made for the most efficient and economical performance, but subject to the contractor's proposed total dollar fee amount.

First, we note that a cost-plus-award-fee type of contract is authorized under the FAR, 48 C.F.R. §§ 16.305 and 16.404-2. It is distinguished from a prohibited cost-plus-a-percentage-of-cost contract, as the latter automatically allows the contractor a fee based on a fixed percentage with increases unchecked as costs increase, thus providing an incentive for inefficient performance. United has offered no evidence that this would be the case under the Army's proposed cost-plus-award-fee method of reimbursement. To the con-

trary, as discussed above, the award fee rewards efficient performance and so, while with increased costs the base for the fee calculation will be higher, the amount of fee to which the contractor will be entitled will decrease as contractor costs increase. Also, the total fee is subject to a fixed dollar ceiling. Accordingly, we do not believe this payment scheme violates the statutory prohibition of cost-plus-a-percentage-of-cost contracting.

Finally, we dismiss as academic United's allegation regarding the minimum manning requirements, as the Army reports these requirements were in fact deleted by a subsequent amendment to the solicitation.

While we sustain the protest against the use of a cost-type, negotiated contract, we note that the Competition in Contracting Act of 1984 (CICA) eliminates the statutory preference for formally advertised procurements (now "sealed bids"). 10 U.S.C. § 2304, as amended by Pub. L. No. 98-369, § 2723(a)(1), 98 Stat. 1175, 1187. However, the provisions of the FAR, which have been revised to implement CICA (Federal Acquisition Circular 84-5, Dec. 20, 1984, effective for solicitations issued after March 31, 1985), do provide criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals (FAR, § 6.401(a)). We are therefore recommending that the Army not exercise any options to renew the contract and instead conduct a new procurement according to the applicable FAR provisions.

By letter of today, we are advising the Army of our recommendation.

[B-219434]

Contractors—Responsibility—Determination—Review by GAO—Nonresponsibility Finding

Protester fails to meet its burden of demonstrating that nonresponsibility determination lacked a reasonable basis or was made in bad faith where the contracting officer based the determination on what he reasonably perceived to be protester's history of significant problems in meeting the delivery obligations under prior contracts.

Contractors—Responsibility—Determination—Factors for Consideration—Previous Ratings, etc.

Since a prime contractor is responsibile for all the work performed under its contract with the government, even that performed by a subcontractor, a delinquency under a prior contract for which the contractor utilized the services of one subcontractor may properly be considered by the contracting office in determining the responsibility of the contractor even though the contractor proposes to utilize a different subcontractor in performing the proposed contract.

Contractors—Responsibility—Determination—Review by GAO—Nonresponsibility Finding

The fact that a contractor has been found responsible in other procurements does not demonstrate that a nonresponsibility determination lacked a reasonable basis or was made in bad faith. This is true even where one of the prior affirmative determi-

nations of responsibility was made, without a preaward survey by the same contracting officer who, after a preaward survey, found the protester to be nonresponsible here.

Contracts—Protests—Allegations—Bias—Unsubstantiated

Protester alleging that contracting officials acted in bad faith to eliminate the protester from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys does not meet its burden of showing by virtually irrefutable proof that the officials had a specific and malicious intent to injure the protester where the protested procurement was not set aside for small business concerns and a preaward survey was requested because of the protester's unfavorable procurement history.

Matter of: NJCT Corporation, September 26, 1985:

NJCT Corporation (NJCT) protests the Defense Logistics Agency's (DLA) award of a contract to Globe Slicing Machine Co. (Globe), under invitation for bids No. DLA400-85-B-6233 for the supply of meat slicing machines. NJCT contends that DLA improperly determined that NJCT was not a responsible prospective contractor. We deny the protest.

DLA received two bids in response to the solicitation. NJCT submitted the low bid, offering to supply meat slicers manufactured by Lan Electric, Limited (Lan), in the United Kingdom.

At the request of contracting officials, the cognizant Defense Contract Administration Services Management Area (DCASMA) conducted a preaward survey of NJCT's responsibility as a prospective contractor under this solicitation. DCASMA concluded that the firm's performance record, "although improved during the past year," was nevertheless unacceptable. In particular, the survey indicated that of the 16 bilateral contracts completed by NJCT during the preceding 6 months, 5 were in a delinquent status as the result of vendor-caused delay. In addition, the survey indicated that NJCT was delinquent on 5 of the 21 bilateral contracts under which it was currently performing and attributed 4 of the delinquencies to vendor-caused delay. Finally, the survey indicated that NJCT had been delinquent on 3 of 5 contracts for "RELATED PREVIOUS PRODUCTION (Government)," including one contract for a meat slicing machine manufactured by Lan. DCASMA therefore recommended that, "based solely on the firm's performance record," no award be made to NJCT under the solicitation.

Based upon the negative preaward survey and upon a "working knowledge of a history of delinquencies on contracts performed by NJCT," knowledge acquired through consultation with other contracting officials, examination of government records and personal knowledge, the contracting officer found NJCT to be nonresponsible. Since NJCT, although certifying itself to be a small business concern, offered to supply a product not produced or manufactured in the United States, DLA did not refer the matter to the Small Business Administration for possible issuance of a certificate of competency. 13 C.F.R. §§ 121.5(b)(2)(iv), and 125.5(c) (1985); Federal Acquisition Regulation § 19.102-3, 48 C.F.R. § 19.102-3 (1984).

NJCT challenges DLA's determination that it was nonresponsible, contending that it was based upon erroneous and incomplete information and made in bad faith.

The determination of a prospective contractor's responsibility is the duty of the contracting officer who is vested with a wide degree of discretion and business judgment. Accordingly, our Office will not question a contracting officer's nonresponsibility determination unless the protester, who bears the burden of proof, demonstrates bad faith by the agency or the lack of any reasonable basis for the determination. See *Lithographic Publications, Inc.*, B-217263, Mar. 27, 1985, 85-1 C.P.D. ¶ 357.

NJCT argues that the preaward survey does not accurately reflect the firm's performance record. Regarding the three contracts for "RELATED PREVIOUS PRODUCTION" identified in the survey as having been delinquent, NJCT alleges (1) that the delinquency under contract No. DLA400-84-M-BA99, for the supply of a Lan meat slicer, was caused by the agency's failure to allow sufficient time for the approval and distribution of the required commercial manuals and by a change in the place of inspection and in the shipping point, (2) that NJCT in fact met the revised, delayed delivery schedule adopted under contract No. DLA400-84-C-0123 when the item description was changed, and (3) that the delinquency under contract No. DLA400-84-C-1535 was caused by DLA's rejection of a component during a quality review.

We note, however, that in the apparently contemporaneous government records documenting these delinquencies, the delinquency under contract No. -BA99 was attributed to "vendor production scheduling problems (Lan Electric)." In addition, DLA reports that NJCT was on notice as to the required delivery schedule for the commercial manuals since the schedule was set forth in the unilateral purchase order accepted by the firm. DLA also questions whether changing the place of inspection and the shipping points could have caused the delinquency since production allegedly was not completed until after the scheduled delivery date. Likewise, the delay in performance of contract No. -0123 is attributed in the apparently contemporaneous government records to "scheduling deficiencies and lack of timely vendor follow-up." DLA reports that the change in the specifications cited by NJCT as necessitating a delayed delivery schedule was in fact requested by the contractor. As for the delinquency under contract No. -1535, government records confirm NJCT's admission that perceived deficiencies in production caused the delay.

Moreover, we also note that NJCT, while generally observing that "50-75% of contract delays have government caused contributory reasons," has not offered any specific evidence directly refuting DCASMA's conclusions that vendor-caused delay resulted in NJCT being delinquent on 31 percent of the bilateral contracts it completed during the preceding 6 months and 19 percent of the bilateral

contracts it was currently performing. Further, even if we consider NJCT's general observation to be an allegation that the government contributed to 50-75 percent of the delinquencies under NJCT's contracts with the government, this does not explain the remaining 25-50 percent of the delinquencies nor exclude the possibility that the firm also contributed to some of the delinquencies for which government action was a contributory cause.

We note that NJCT, which attributes its prior delinquencies to reliance on subcontractors other than Lan, argues that such delinquencies therefore are irrelevant here since NJCT is offering meat slicers manufactured by Lan. Since, however, a prime contractor is responsible for all the work performed under its contract with the government, even that performed by a subcontractor, see *Arvol D. Hays Construction Company,* ASBCA No. 25,122, 84-3 BCA ¶ 17,661; *San Francisco Bay Marine Research Center,* ENG BCA No. 4,787, 84-2 BCA ¶ 17,502; *Dick Olson Constructors, Inc.,* ASBCA No. 19,843, 76-1 BCA ¶ 11,812; *Lombard Corporation,* ASBCA Nos. 18,206, 18,207, 75-1 BCA ¶ 11,209, we believe that a delinquency under a prior contract for which the contracter utilized the services of one subcontractor may properly be considered by the contracting officer in determining the responsibility of the contractor even though the contractor proposes to utilize a different subcontractor in performing the proposed contract. In any case, we also note that one of the contracts on which NJCT was considered delinquent was the contract pursuant to which NJCT supplied a meat slicer manufactured by Lan, the proposed subcontractor here.

Accordingly, we conclude that NJCT has not demonstrated that the contracting officer lacked a reasonable basis for finding that the firm had experienced significant problems in meeting its delivery obligations under prior contracts. See *Lithographic Publications, Inc.*, B-217263, *supra*, 85-1 C.P.D. ¶ 357 at 3; *C.W. Girard, C.M.,* 64 Comp. Gen. 175 (1984), 84-2 C.P.D. ¶ 704; *Arrowhead Linen Service,* B-194496, Jan. 17, 1980, 80-1 C.P.D. ¶ 54; *Howard Electric Company,* 58 Comp. Gen. 303 (1979), 79-1 C.P.D. ¶ 137 (nonresponsibility determination may be made on the basis of what the government reasonably perceives to be the proposed contractor's prior inadequate performance even if the contractor disputes the government's interpretation).

We recognize that NJCT believes that the contracting officer failed to take into account other information relevant to the firm's responsibility. Thus, NJCT points out that the preaward survey apparently was limited to a consideration of bilateral contracts.

DLA, however, reports that the contracting officer considered the firm's performance record as it relates to both unilateral and bilateral contracts. Moreover, we note that not only has NJCT failed to provide our Office with any comprehensive figures indicating that the firm's performance record as it relates to unilateral contracts was substantially better than its performance record as it relates to

bilateral contracts, but, in addition, NJCT's performance on the contract specifically identified here as unilateral, i.e., unilateral purchase order No. -BA99 for the supply of the Lan meat slicer, was considered by DLA to have been delinquent.

NJCT points out that DLA has recently awarded other contracts to the firm, including one award made by the contracting officer here several months prior to this procurement.

The fact that NJCT has recently been found responsible in other procurements does not, however, indicate the unreasonableness of the determination here, which was based upon a clear history of significant problems in performing prior contracts. Responsibility determinations are based upon the circumstances of each procurement which exist at the time the contract is to be awarded. These determinations are inherently judgmental and the fact that different conclusions may be reached as to a firm's responsibility does not demonstrate unreasonableness or bad faith. See *S.A.F.E. Export Corporation,* B-208744, Apr. 22, 1983, 83-1 C.P.D. ¶ 437; *Amco Tool & Die Co.*, 62 Comp. Gen. 213 (1983), 83-1 C.P.D. ¶ 246; *GAVCO Corporation—Request for Reconsideration,* B-207846.2, Sept. 20, 1982, 82-2 C.P.D. ¶ 242. This is true even where the same contracting officer has made an earlier affirmative determination of responsibility. See *S.A.F.E. Export Corporation—Request for Reconsideration,* B-209491.2, B-209492.2, Oct. 4, 1983, 83-2 C.P.D. ¶ 413. Moreover, we note that DLA informs us that the contracting officer here made the earlier affirmative determination of responsibility without benefit of a preaward survey due to the small amount of the procurement.

NJCT further points out that the preaward survey indicated that NJCT's performance had "improved during the past year." We note, however, that the same survey also recommended against award to NJCT based upon the firm's overall recent performance record. Given the significant problems apparent in that record, we believe that there was sufficient evidence for the contracting officer to conclude that, despite some unspecified "improvement," there remained a substantial risk that NJCT would be unable to meet the required delivery schedule, Cf. *S.A.F.E. Export Corporation,* B-208744, *supra,* 83-1 C.P.D. ¶ 437 at 4 (sufficient evidence to reasonably anticipate deficiencies even though other evidence favorable to prospective contractor).

NJCT alleges that contracting officials, acting in bad faith, have undertaken a concerted effort to eliminate NJCT from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys on NJCT. By way of example, NJCT notes that a preaward survey was conducted here on NJCT but not on the awardee.

A protester bears a heavy burden of proof when alleging bad faith on the part of government officials. It must show by virtually irrefutable proof, not mere inference or supposition, that these offi-

cials had a specific and malicious intent to injure the protester. See *Ebonex, Inc.*, B-213023, May 2, 1984, 84-1 C.P.D. ¶ 495.

NJCT has not made the required showing. Not only was this procurement not set aside for small business concerns, but, in any case, NJCT certified itself to be a small business concern and presumably could have offered a product manufactured or produced by a small business concern.

Moreover, DLA indicates that a preaward survey was conducted on NJCT because NJCT, unlike Globe, had an unfavorable procurement history. We have previously held that contracting officers have broad discretion regarding whether to conduct surveys. See *Carolina Waste Systems, Inc.*, B-215689.3, Jan. 7, 1985, 85-1 C.P.D. ¶ 22; *PAE GmbH,* B-212403.3, *et al.*, July 24, 1984, 84-1 C.P.D. ¶ 94. Neither the fact that an agency may have conducted an unnecessary preaward survey, see *Ebonex, Inc.*, B-213023, *supra*, 84-1 C.P.D. ¶ 495 at 4, nor the failure to conduct a survey on a firm whose record of satisfactory preformance is known to the contracting officer demonstrates bias, see *PAE GmbH,* B-212403.3, *et al., supra,* 84-2 C.P.D. ¶ 94 at 4.

Accordingly, we conclude that NJCT has failed to meet its burden of demonstrating that the nonresponsibility determination lacked a reasonable basis or was made in bad faith.

The protest is denied.

[B-213205.2, et al.]

Contracts—Negotiation—Offers or Proposals—Evaluation—Method—Not Prejudicial

Protest of use of normalized price scoring is denied where record shows protesters were not prejudiced by the use of this technique.

Contracts—Negotiation—Offers or Proposals—Evaluation—Price Consideration

Agency did not act improperly in assigning technical scores for past performance based on prior demonstrated aircraft availability rates. Offerors were aware of agency's need for best possible availability and Request for Proposals indicated that performance of less than 90 percent availability would not be acceptable under the contracts to be awarded. Apportioning scores as suggested by protesters so that 90 percent availability would be awarded 90 percent of available points would dilute importance assigned to past performance by RFP.

Contracts—Negotiation—Offers or Proposals—Evaluation—Criteria—Experience

Contention that agency should not have taken into consideration past performance for subcontracted work is denied. Record does not show that protester was released from its obligation as the government's prime contractor to furnish aircraft in accord with its prior contract which, for a period of time it did not do.

Contracts—Negotiation—Offers or Proposals—Evaluation—Criteria—Experience

Contention that government was required to obtain and consider records of past performance for other government agencies is denied. The protesters were on notice that the agency did not construe the RFP as requiring such action.

Contracts—Negotiation—Offers or Proposals—Evaluation—Errors—Not Prejudicial

Where impact on scoring would be minimal, possible defective screening of accident and incident data by agency was not prejudicial.

Contracts—Negotiation—Awards—Not Prejudicial to Other Offerors

Where agency had contractual right to allow substitution of aircraft, decision to make substitution at time of award was not objectionable because record clearly shows that protesters were not prejudiced.

Contracts—Negotiation—Awards—Propriety

Fact that minimum quantity was not ordred from protester does not entitle that firm to receive additional orders required to make up minimum. Rather, firm is not entitled to any awards unless it would be entitled to award of its specified minimum quantity.

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

Matters relating to agency's affirmative determination of awardees' responsibility are not for consideration by General Accounting Office.

Matter of: Douglas County Aviation, Inc., Hawkins & Powers Aviation, Inc., Hemet Valley Flying Service, September 27, 1985:

Douglas County Aviation, Inc., Hawkins & Powers Aviation, Inc., and Hemet Valley Flying Service protest the award of all line items not awarded to themselves under Forest Service request for proposals (RFP) 49-83-05 for air tanker services. Under the RFP, offerors are to provide aircraft which are specially modified and used to aid in controlling forest fires during the fire season, at which time the aircraft are assigned to bases established for this purpose by the government. The aircraft are dispatched, as needed, by the National Fire Center at Boise, Idaho to meet the combined fire fighting requirements of several government agencies.

The protested procurement, conducted by the Forest Service, was for the combined needs of several agencies over a 3-year period. Offerors were permitted to propose aircraft to meet any of the 42 line items set out in the RFP; each line item represented one airplane as well as crew and maintenance support for the airplane. Contracts were awarded for 40 line items.[1]

[1] Two line items were canceled after the Forest Service decided they were not needed; one of the two was later reinstated. None of the protesters offered aircraft under either of the canceled line items.

Collectively, the protesters received four awards. Douglas County, which offered aircraft under numerous combinations of 39 possible line items, was awarded 2 line items. Hawkins & Powers offered 11 aircraft for possible use under 12 line items and received 2 awards. Hemet Valley offered 8 aircraft under 19 line items, but received no award. The three protesters received a much greater number of awards under prior Forest Service solicitations and contend that the Forest Service improperly denied them awards under the current solicitation. In part, the protesters assert that the Forest Service's actions were intended to force them out of the air tanker business.

Based on a thorough review of the record, including an extensive examination of Forest Service contracting records at the its Boise Office, we deny the protests.

Issues Concerning Scoring Methodology

The RFP stated that price and technical merit were to be accorded weights of one-third and two-thirds, respectively. The agency was to evaluate technical merit by considering support capability, past performance, management effectiveness, aircraft fleet, flight crews and accident/incident experience. The RFP further stated that support capability and past performance would be given greater weight than management effectiveness and aircraft fleet. Flight crews and accident/incident experience were to be given less weight. Multiple subcriteria were listed under several of the principal technical criteria.

The protesters contend that the Forest Service's evaluation of proposals was fundamentally flawed. They say the agency did not properly weigh price and technical factors as demonstrated, they state, by the fact that price was not given a weight of one-third, or technical merit two thirds, because the lowest priced offer for each line item was given 900 points while the maximum of 1700 points allowed for technical merit was not actually awarded to any firm.

Price proposals were scored by using a price normalization method. The lowest price for any line item was assigned 900 points. Higher prices were assigned points in inverse proportion to the low price, that is the low price was divided by the price offered and the result was multiple by 900. Scores for technical merit were assigned, in part, by scaling statistical data derived from each vendor's past contract performance and accident/incident experience. Other technical factors were scored by assigning points in direct proportion to the evaluators' perception of the merit of the proposals.

The Forest Service had intended to compute a total score for each vendor by adding the offeror's composite technical score to its price score and by then selecting the highest scored proposal under each line item. In practice, the problem turned out to be much more complex than anticipated. Twelve offerors submitted propos-

als, all of which were included in the competitive range; collectively, the aircraft offered comprised most of the domestic air tanker fleet. Offerors were free to propose multiple types of aircraft to meet any combination of the 42 line items they choose. They were free to offer special combination packages, such as price discounts that varied with the number of aircraft for which they received awards. They did so, leaving the Forest Service with the task of picking the best combination—a nearly impossible undertaking given the huge number of possible combinations from which to choose.

The Forest Service, recognizing the magnitude of the task, used a linear programming mathematical model running at its Fort Collins Computer Center to select a combination of offers. The model maximized the composite score of the combination of line items chosen. Eight computer runs were performed to test the assumptions on which the model was based.

After reviewing the results of these runs, the Forest Service concluded that the run it has called "Alternate 4" was most appropriate and made the awards on that basis. As the Forest Service points out, Hawkins & Powers was the prospective awardee in all runs for the two items it was awarded and was not the prospective awardee on any other items on any run. Douglas County was the prospective awardee for one of the items it was awarded (Item 38) on all eight runs. That firm was in line for award of the other item which made up its actual award (Item 18), only under Alternatives 3 or 4. Hemet Valley was not in line for an award under any of the runs.

Agencies must evaluate proposals in accordance with the criteria established in the RFP. *Telecommunications Management Corp.*, 57 Comp. Gen. 251 (1978), 78-1 CPD ¶ 80. Recognizing that proposal evaluation involves subjective judgments, our Office has not favored the use of precise numerical formulas in selecting awardees in negotiated procurements, preferring instead to encourage their use merely as aids in assessing the importance of significant differences between proposals. *Grey Advertising, Inc.*, 55 Comp. Gen. 1111 (1976), 76-1 CPD ¶ 325. While agencies may use a variety of methods, including methods similar to those used here in which the lowest priced proposal is awarded the maximum number of possible points, *Francis & Jackson, Associates*, 57 Comp. Gen. 244 (1978), 78-1 CPD ¶ 79, we have cautioned agencies that some of the methods in common use, such as the price normalization method used here can produce distorted scores. *Design Concepts, Inc.*, B-186125, Oct. 27, 1976, 76-2 CPD ¶ 365. In this regard, we have pointed out that evaluators must avoid misleading results. *Umpqua Research Co.*, B-199014, Apr. 3, 1981, 81-1 CPD ¶ 254.

Here, we have analyzed the Forest Service's scoring using methods other than those used by the agency. Our analysis indicates that, regardless of the Forest Service's choice of price scoring

method, in no instance do any protesters' offers displace any of the awardees' offers.

The protesters further contend that the scoring system used to evaluate past performance was improper because the Forest Service scaled the assigned scores. Past performance was calculated by computing the time each offeror's aircraft was actually available for use under prior contracts and dividing the result by the time the firm was required to have aircraft available. Points were assigned based on the resulting "availability rate," expressed as a percentage, above 90 percent. Extra points were given for availability rates near 100 percent. According to the protesters, offerors should have received points in direct proportion to their availability rates, *i.e.*, a firm which had an availability rate of 95 percent should be entitled to 95 percent of the total past performance points. (In fact, a 95 percent availability rate received about a quarter of such points.)

We disagree. Had the Forest Service applied the method proposed by the protesters, it would not have evaluated the proposals in accordance with the RFP. The RFP ranked past performance as the second most important technical factor (after capability). If the protesters' scoring method were applied, all offerors would receive high scores under past performance, because all of the offerors had availability rates in the 90 percent range, even though their prior contract performance varied considerably. Moreover, the significance of the point spread adopted is emphasized by the fact that the RFP stated that an availability rate of less than 90 percent would be a ground for contract default. Thus, an availability rate only slightly above 90 percent indicates performance that would be only marginally acceptable.

Consideration and Exclusion of Data

The protesters also raise several issues concerning the Forest Service's inclusion and exclusion of data in compiling availability rates and accident/incident experience. We consider first their contentions concerning data used to compile availability rates.

Hawkins & Powers argues that the Forest Service improperly included, in its evaluation of that firm's proposal, data relating to a 1981 crash of a tanker assigned to a base known as Goleta. While the contractor for that base at that time was Hawkins & Powers, it had subcontracted the operation to Hemet Valley. Neither Hemet Valley nor Hawkins & Powers provided a replacement aircraft immediately following the crash, with the result that an air tanker was not available for an extended period of time. This loss of available time was charged to Hawkins & Powers in evaluating its offer.

According to Hawkins & Powers, the loss of availability should not have been charged to it because it had subcontracted the operations at Goleta and because, it claims, the Forest Service agreed that the aircraft was not needed pending its repair. Thus, the pro-

tester says, it did not believe the aircraft had to be replaced. Hemet Valley supports Hawkins & Powers position and cites the alleged agreement to repair rather than replace the aircraft in arguing that it, also, should not be charged with the loss.

We think that the Forest Service's decision to include this data was reasonable. The Forest Service concedes that it accepted Hawkins & Powers choice of a subcontractor. It does not agree that it released Hawkins & Powers from its contractual obligations. The protester does not claim and has not established that it was formally released. Moreover, the record does not support the protester's contention that it was relieved of its obligation pending repair of the damaged aircraft.

The protesters also contend that the Forest Service should have considered performance experience data from other government agencies. They contend the RFP, which stated that evaluation of this item would be based on data "taken from Forest Service and other agency records" required the Forest Service to consider records of other agencies that would have improved their scores. According to Hawkins & Powers, for example, its availability rate would have been increased considerably had its experience with the Bureau of Land Management (BLM) in Alaska been included.

In our view, the RFP language can be interpreted as merely placing offerors on notice that other agencies' records could be considered. The protesters, moreover, appear to have acquiesced in this construction. The protesters were given the Forest Service's availability calculations prior to the closing date for receipt of proposals. The data given Hawkins & Powers, for example, shows annual availability rates of 97.44, 89.88 and 99.06 percent for the prior 3 years. In view of the data furnished, the protesters knew or should have known that the data they were given were lower than the figures they claim their records support.

The protesters also complain that the Forest Service improperly deducted points for accidents/incidents that did not occur. In the protesters' view, they should be awarded the full number of points allowed for this factor.

The record shows that the Forest Service assigned scores by counting the number of accident/incident reports contained in its files for the prior contract period and by normalizing the results to take differences in flight time into account. Accident/incident reports are filed by Forest Service field personnel when they deem such action to be appropriate. Although it appears that the reports were screened to eliminate duplication before they were counted, it is not clear how they were screened for substantive content.

For example, our review of the Forest Service records in Boise disclosed a number of reported instances where the alleged incident had no bearing on the contractor's ability to carry out its mission. We found other instances in which it appeared on the face of the report that the contractor was not at fault.

While we believe the Forest Service should make sure that any evaluation of accident/incident reports in connection with future procurements reflects meaningful differences among offerors, we do not find that its handling of accident/incident reports in this instance affected the selection process. Accidents/incidents were allocated 150 out of 1700 possible technical points, with incidents allocated less points than accidents. Since all three protesters received a portion of the points allowed, any correction of scoring under this evaluation criterion, would be small. Our evaluation of the Forest Service's selection process indicates that a shift in accident/incident scores would not have altered the selections.

Acceptability of Specific Aircraft

The protesters contend that the Forest Service improperly accepted several aircraft for award. They contend, for example, that the agency knew that the DC-4 aircraft offered by Ardco, Inc. were overweight and operate under Federal Aviation Administration restricted airworthiness certificates that do not permit cargo to be carried. They say that these aircraft should not have been considered without first determining that they could operate legally as 2000 gallon tankers and that they should not have been awarded any line items requiring incidental cargo hauling.[2]

The protesters also argue that the Forest Service improperly awarded one line item to TBM, Inc. for a C-123 aircraft. They argue that the C-123 should not have been considered because it was not a type of aircraft listed in the RFP and because it cannot qualify as a 2000 gallon tanker.

We disagree with the protesters that the Forest Service improperly qualified the C-123 as a 2000 gallon tanker. Essentially, the protesters view the C-123 as less capable of meeting the Forest Service's needs based on theoretical requirements they posit that, however, go beyond the literal requirements of the RFP.

While it is true that the RFP did not include the C-123 in its list of acceptable aircraft, the record shows that the C-123 was accepted only after the Forest Service determined that TBM was in line for award based on a DC-6 under the item in question. The C-123 was designated *in lieu* of the DC-6, which was not the subject of any other award. Under the contract terms, the Forest Service may allow contractors to substitute aircraft where it finds that the substitute is capable of meeting its needs.

[2] Two other arguments raised by the protesters require only brief comment. The protesters state that certain DC-6s do not qualify as 3000 gallon tankers because they might not be capable of carrying 3000 gallons from some bases. This assertion is unsupported by the record, which indicates the subject aircraft can operate from the bases to which they are to be assigned. Likewise, an assertion, that DC-6s and KC-97s should not have been considered for assignment to bases requiring a 2000 gallon capacity is without merit because the solicitation did not preclude offers of aircraft with excess capacity.

We recognize that an award must be based on the requirements stated in the solicitation. See *International Business Machines Inc.*, B-194365, July 7, 1980, 80-2 CPD ¶ 12. We will not, however, object to an award if the record clearly shows that a protester was not prejudiced by an agency's failure to amend the RFP to allow competition on its changed requirements. *Aul Instruments, Inc.*, B-199416.2, Jan. 19, 1981, 81-1 CPD ¶ 31.

Here, we find that the protesters were not prejudiced by the C-123 award. The C-123 substitution does not appear to constitute a relaxation of the RFP requirements to any significant degree since, in the particular circumstances of this RFP, allowing a C-123 award involved only the qualification of a type of aircraft, the C-123, not listed in the RFP and had no impact on most of the evaluation.[3]

With regard to the Ardco DC-4s, we are unaware of any indication in Ardco's proposal that it intended to furnish aircraft that were overweight or were inappropriately certified. The record does show that Ardco's flight manuals state that cargo is not to be carried, language the agency construes as precluding carriage of cargo other than that normally required in connection with air tanker operations. The Forest Service has also submitted an analysis showing that the aircraft are not overweight.

Issues Concerning Douglas County Aviation

Douglas has raised issues of unique concern to it. The first involves the awarding of line items for DC-7 aircraft. Douglas received one such award and believes it should have received at least three more because, it says, it proposed DC-7 aircraft only on the basis that at least four such aircraft be hired.

We agree with Douglas that it did not propose to furnish less than four DC-7s. Douglas' best and final price proposal included prices for four, five or six DC-7s only. There was no price proposal for less than four aircraft, a fact that the Forest Service appears to have overlooked.

We do not agree with Douglas, however, that it is therefore entitled to awards for four DC-7s. Rather, Douglas was entitled to no DC-7 awards because our analysis indicates it was in line for only one DC-7 award. Even if we were to agree with Douglas that it was entitled to some adjustment in its technical scores there is no pros-

[3] As indicated, most of the technical evaluation dealt with evaluating each offeror's capability and demonstrated performance in supporting air tanker operations. The evaluation of aircraft was given only limited weight and concerned principally, their condition. The record indicates the differences in point scores that could have resulted from listing of the C-123 would not have been substantial. Likewise, the impact on cost is limited. Much of the government's cost is fixed because the government specified rates in the RFP to be paid for flight time depending on the amount of fire retardant (here 2000 gallons) the tanker was required to carry and on fuel price. Offerors' price proposals were based on a quoted daily price for making an aircraft of the required capacity available and were heavily dependent on fixed costs regardless of the type of aircraft offered.

pect that it would be entitled to three additional awards. In view of the advanced stage of performance under these contracts we do not believe it would be appropriate for us to recommend any corrective action in connection with the improper award of the single DC-7 line item to Douglas.

Miscellaneous Issues

The protesters have presented a number of other issues we can dispose of summarily.

The protesters complain that one firm received two line item awards employing the same airplane. As the Forest Service explains, the period of required availability for the two line items do not overlap. Moreover, we find nothing in the RFP precluding two awards under such circumstances.

The protesters also contend that the Forest Service should have reevaluated all proposed awards before making them to assure that each offeror selected would be able to handle the awards made to it. The protesters say that an offeror's ability to perform safely will decline as the number of aircraft it places increases. While we agree with the protesters that the Forest Service was required to consider each offeror's ability to perform the contract awarded, we also agree with the Forest Service that this is a matter of responsibility which our Office will not consider absent circumstances that have not been alleged. *Central Metal Products, Inc.,* 54 Comp. Gen. 64 (1974), 74-2 CPD ¶ 64.

Finally, the protesters have suggested that the Forest Service has deliberately excluded C-119 aircraft in favor of aircraft not previously outfitted for air tanker use and thus has sought to drive them out of business. The record contains no support for this contention. While no C-119s were the subject of award, this was because the offerors whose proposals were based on furnishing C-119s were less competitive than other offerors.

The protests are denied.

[B-219353]

Bids—Responsiveness—Failure to Furnish Something Required—Delivery Information, Prices, etc.

When low bid does not specify shipping point and information is necessary to determine transportation costs in evaluation of bids on an f.o.b. origin basis, the agency may properly reject the bid as nonresponsive. An exception for bids where the shipping point can be ascertained by reading the bid as a whole does not apply where there is no other place designated in the bid from which the protester would legally be bound to ship.

Contracts—Performance—Suspension—Pending Final Resolution of Protest

Agency head's failure to make required Competition in Contracting Act determination for continued contract performance during pendency of protest does not provide a basis to upset an award.

Matter of: InterTrade Industries Ltd., September 27, 1985:

InterTrade Industries Ltd. protests the rejection of its low bid as nonresponsive to invitation for bids (IFB) No. N00244-85-B-0510, issued by the Naval Supply Center, San Diego, California, for 10 large, cylindrical fenders to be used for mooring ships. In a supplemental protest, the firm additionally alleges that the Navy violated the Competition in Contracting Act of 1984, 31 U.S.C.A. § 3553(d) (West Supp. 1985), by not suspending performance of a contract awarded to Seaward International, Inc.

We deny the protests.

The IFB, issued March 29, 1985, required bidders to offer fixed prices for shipment of the fenders to San Diego on an f.o.b. origin basis. The bidding form included a space under clause 6(b) for the bidder to enter the shipping point and cautioned that bids submitted on any basis other than f.o.b. origin would be rejected as nonresponsive. Amendment No. 0004, dated May 9, 1985, added an evaluation provision from the Federal Acquisition Regulation (FAR), 48 C.F.R. § 52.247-47 (1984), indicating that the cost of transporting the fenders between the shipping point and the destination would be considered in determining the overall cost of the fenders to the government.

The procuring activity received three bids at bid opening on May 17, 1985. InterTrade was the low bidder ($132,500), and Seaward International, Inc. was second-low ($134,032). Because InterTrade's bid failed to identify a shipping point, the contracting officer rejected it as nonresponsive and made award to Seaward on May 22, 1985.

In its protest, InterTrade contends that although it failed to include the required information under clause 6(b), its bid—when read as a whole—reflects its intent to designate Huntington Beach, California as its shipping point. InterTrade argues that since it designated Huntington Beach as its place of performance, and since this is its only place of business, the contracting officer should have used Huntington Beach to evaluate costs on an f.o.b. origin basis. The protester also maintains that because its bid stated that the firm was a small business, the contracting officer had no reason to believe that the shipping point would be other than the firm's place of business. According to the protester, the Navy had only to check on previous ship fender contracts, performed by InterTrade and listed in its bid, to discover that all items had been shipped from the Huntington Beach plant. InterTrade emphasizes that it

did not take exception to the 60-day delivery requirement or impose a different term than f.o.b. origin.

Further, the protester argues that the government was required by a mandatory FAR provision, 48 C.F.R. § 52.247-46, which was not included in the solicitation, to use InterTrade's place of performance for evaluation purposes. That regulation provides that in certain cases where a bidder does not state a shipping point, the government must evaluate the bid on the basis of shipment from the place where the offer indicates that the contract will be performed.

InterTrade also questions the agency's assertion that the shipping point is a matter of responsiveness. The protester contends that the information is not material unless the lowest ultimate cost to the government cannot be determined with certainty. According to the protester, since it was clear that InterTrade's only place of business was in California, and since the awardee, Seaward, is located in Virginia, there was little if any possibility that award to InterTrade would result in higher costs to the government. Finally, InterTrade argues that even if the omission of the shipping point was a matter of responsiveness, it should be waived as a minor irregularity that can be corrected or waived without prejudice to other bidders.

The Navy responds that although InterTrade designated Huntington Beach as its place of performance, the bid failed to evidence a firm commitment to ship the fenders from any specific place. According to the Navy, in descriptive literature submitted with the bid, InterTrade represented that it had provided marine fenders to the Canadian Navy and to commercial users nationwide. The contracting officer therefore thought it was foreseeable that the firm might ship from a warehouse or other facility in the Canadian Maritime Provinces, Maine, Florida, or another location. In that case, transportation costs could displace the firm's standing as low bidder, since its bid was only $1,532 less than that of the second-low bidder.

Additionally, the Navy contends that the place of performance designated in InterTrade's bid cannot serve to provide the requested information, because the place of performance may legally be changed after opening of bids, citing 48 Comp. Gen. 593 (1969).

The issue for resolution is whether InterTrade's bid manifested a firm offer to tender delivery to the government at a particular shipping point, namely its Huntington Beach plant. We are unable to conclude that a reading of InterTrade's bid in its entirety evidences such an offer.

We have held that if a bidder fails to designate an f.o.b. point of origin where one is required by an IFB, it may, in the proper circumstances, be ascertained from a reading of the bid as a whole. B-155429, Nov. 23, 1964; *see also* 49 Comp. Gen. 517 (1970); *The R.H. Pines Corp., et al.,* B-209458, *et al.,* Sept. 2, 1983, 83-2 CPD ¶ 290.

This case, however, is distinguishable from that line of cases, where we held the failure of the bidder to insert a shipping point in the space provided did not render the bid nonresponsive. For example, in 49 Comp. Gen. 517, there were multiple places in the bid for a bidder affirmatively to show compliance with the f.o.b. origin requirement and thus create a legal obligation to utilize a specific shipping point. Here, there was only one place for a bidder affirmatively to show compliance with the f.o.b. origin requirement.

We think this case is more like 48 Comp. Gen. 593 (1969), *aff'd.* 48 Comp. Gen. 689. (1969), where the bidder left an IFB provision similar to the one here blank and inserted information as to the location of its plant only in connection with the "inspection and acceptance" clause. Since the latter entries were subject to change at the bidder's option after bid opening, we held that failure to designate a shipping point in the only place provided rendered the bid nonresponsive.

InterTrade did not, in our opinion, show compliance with the f.o.b. origin requirement elsewhere in its bid. The insertion of Huntington Beach under place of performance (producing facilities location) had no bearing on delivery and was subject to change at the bidder's option. We therefore do not believe that the place of performance entry can be substituted for the missing information. Without this information, the ultimate cost to the government cannot be determined.

Even though InterTrade did not take exception to the 60-day delivery requirement, we have held that where an IFB requires an insertion of material information (such as price, descriptive data, or point of origin) relating to responsiveness, the failure of the bidder to provide the information must be treated as if the bidder had taken exception to a material provision of the IFB, thereby rendering its bid nonresponsive. 48 Comp. Gen. at 692-3. Accordingly, we find no merit to the argument that the failure to indicate the shipping point was a minor irregularity that could be waived without prejudice to other bidders. We have consistently held that the waiver of deviations that affect price or go to the substance of the bid is prejudicial to the other bidders and the competitive system. 48 Comp. Gen. at 598, *aff'd.* 48 Comp. Gen. 689.

InterTrade relies on our decision in B-155429, *supra,* in which we held that it was fair to assume that a small business bidder intended to designate its only plant in Saratoga Springs, New York as its shipping point for purposes of evaluation on an f.o.b. origin basis. Although InterTrade states that it also is a small business, we view this case as distinguishable from the Saratoga case because InterTrade represented in its descriptive literature that it provided ship fenders to national and Canadian points. We agree with the Navy that, given the scope of the protester's business, it was reasonable to think that InterTrade might ship the fenders from a location

other than Huntington Beach and thus might not remain the low bidder.

Further, we find no merit to the protester's argument that the contracting officer should have known from InterTrade's previous contracts that the firm's shipping point was Huntington Beach. A bid's responsiveness must be determined from the bid itself. *Le Prix Electrical Distributors, Ltd.,* B-206552, July 6, 1982, 82-2 CPD ¶ 18. The contracting officer could not presume an intention on the bidder's part with respect to a material term that was not reflected in the bid. *Id.*

Additionally, we do not view the alleged mandatory provision, 48 C.F.R. § 52.247-46, as in fact mandatory. The provision is required when an agency contemplates evaluation of shipments from various shipping points. 48 C.F.R. § 47.305-3(b)(4)(ii). Read as a whole, the regulation appears to refer to shipments by one offeror from various shipping points, which was not the case here. In any event, as the Navy states, a mandatory provision that has been omitted from an IFB may not be constructively read into the solicitation. *Rainbow Roofing, Inc.,* 63 Comp. Gen. 452 (1984), 84-1 CPD ¶ 676.

For the foregoing reasons, InterTrade's protest regarding rejection of the bid as nonresponsive is denied.

On August 21, 1985, InterTrade supplemented its protest, alleging that it had just learned, as a result of a Freedom of Information Act request, that the Navy violated the Competition in Contracting Act of 1984 (CICA) by not suspending performance of the contract pending our decision on the protest, and that the head of the procuring activity had not made the required determination that performance should proceed.

The CICA requirements for suspension of award or performance pending a protest are among provisions of the Act that currently are the subject of a constitutional dispute. Initially, the Attorney General refused to recognize the "stay" provisions on the ground that they violated the separation of powers doctrine; he advised executive branch agencies not to comply with the provisions. However, on May 28, 1985 in *Ameron, Inc.* v. *U.S. Army Corps of Engineers,* 610 F. Supp. 750 (D. N. J. 1985), the court held the disputed CICA provisions constitutional and directed government-wide compliance with CICA. In response to that decision, on June 3 the Attorney General issued a press release stating that he would advise executive branch agencies to comply with the "stay" provisions pending an appeal of *Ameron.* Notice of the revised Department of Justice guidance appeared as an amendment to the FAR in the Federal Register on June 20, 1985. *See* Federal Acquisition Circular 84-9, 50 Fed. Reg. 25,680 (1985).

It appears from documents that InterTrade submitted in connection with its supplemental protest that the Navy attempted to comply with the CICA "stay" provisions 1 day after the Federal Register notice was published, since it requested the awardee to

suspend performance in a letter dated June 21, 1985. However, it also appears that when the letter was received by the awardee on June 27, 1985, the fenders already had been delivered.

Although the CICA "stay" provisions went into effect on January 15, 1985, we have noted previously that pursuant to the Attorney General's view, executive agencies were not complying with the stay provisions and that the matter was the subject of litigation. See *Lear Siegler, Inc.*, B-218188, Apr. 8, 1985, 64 Comp. Gen. 452, 85-1 CPD ¶ 403; *IBI Security Services, Inc.*, B-218565, July 1, 1985, 85-2 CPD ¶ 7. While it appears performance would have been suspended here had the Navy earlier sought to comply with the CICA, an agency's faulure to delay award or, as in this case, to suspend performance prior to final resolution of a protest, traditionally does not constitute a basis for upsetting an otherwise proper award. See *PNM Construction, Inc.*, B-215973, Nov. 30, 1984, 84-2 CPD ¶ 590; *M.C. Hodom Construction Co., Inc.*, B-209241, April 22, 1983, 83-1 CPD ¶ 440.

The protests are denied.

[B-213530]

Appropriations—Fiscal Year—Availability Beyond—Travel and Transportation Expenses

Reimbursable expenses due to extension of up to 60 days of temporary quarters subsistence expenses should be charged against the appropriation current when valid travel orders are issued. *See* 64 Comp. Gen. 45 (1984).

Matter of: Recording of Obligations for Extensions of Temporary Quarters Subsistence Expenses, September 30, 1985:

An official of the Drug Enforcement Administration, Department of Justice, requests our opinion on whether the expenses incurred by a transferred employee under a 60 day extension of temporary quarters subsistence expenses should be charged against the appropriation current in the fiscal year in which the travel is ordered or the fiscal year in which the expenses are incurred. As will be explained below, the expenses should be charged against the appropriation current in the fiscal year in which the travel is ordered.

BACKGROUND

In 64 Comp. Gen. 45 (1984), we overruled a long line of cases holding that the expenses of relocation were to be charged against the appropriation current when the expenses were incurred by the transferred employee. In that decision we ruled "that for all travel and transportation expenses of a transferred employee, an agency should record the obligation against the appropriation current when the employee is issued travel orders."

The submission asks whether this holding in 64 Comp. Gen. 45 is applicable to the situation in which a transferred employee receives an extension of temporary quarters subsistence expenses (TQSE) in the fiscal year following that in which his move took place. A transferred employee is allowed up to 60 days of TQSE upon his or her relocation. Federal Travel Regulations (FTR) Para. 2-5.2a(1) (Supp. 10, March 13, 1983), *incorp. by ref.*, 41 C.F.R. § 101-7.003. Under certain conditions, the transferred employee may receive up to an additional 60 days of TQSE. *See* FTR, Para. 2-5.2a(2) (Supp. 10, March 13, 1983). The extension of TQSE may cause a problem in regard to recording an obligation, since, as illustrated by the submission, a transferred employee may receive travel orders in the fiscal year preceding that in which the employee requests and receives an extension of TQSE. Furthermore, the extension cannot be approved prior to the employee's occupancy of temporary quarters since an extension may only be authorized "due to circumstances which have occurred during the initial 60 day period of temporary quarters occupancy and which are determined to be beyond the employee's control and acceptable to the agency." *Id.*

ANALYSIS

We do not consider an extension of TQSE as falling outside our recently announced rule. Our decision at 64 Comp. Gen. 45 relied heavily on a basic principle of law which mandates the result here. That principle, the so-called bona fide needs rule, supported our conclusion since "it is clear that the need for the relocation of the employee and the resulting benefits and entitlements arises when the employee is transferred * * *." 64 Comp. Gen. at 47. Thus, the bona fide need for the relocation expenses is in the fiscal year in which the employee is transferred and not when the employee incurs the expense. *Id.*

An extension of TQSE flows directly from the transfer of an employee and the resulting initial entitlement to TQSE. Under these circumstances, any extension of TQSE relates back to the original issuance of transfer orders and is a bona fide need of the year in which the orders were issued. Therefore, the cost should be charged to the fiscal year in which the transfer order was issued.

[B-215502]

Subsistence—Per Diem—Temporary Duty—At Place of Family Residence

An employee who was transferred from Chicago to Springfield, Ill., thereafter performed temporary duty travel on an "as required" basis throughout Ill., including Chicago, where his family continued to reside. His subsistence expenses while staying with his family in Chicago were administratively disallowed since he stayed at his family's residence. Since Springfield was the employee's permanent duty station, the fact that he stayed with his family while on temporary duty does not bar reimbursement of his travel expenses.

Subsistence—Per Diem—Temporary Duty—Computation

An employee performed temporary duty travel to a high rate geographical area (HRGA) and stayed with his family while there. He was authorized reimbursement on an actual expense basis, but claims reimbursement of one-half of the actual expense rate, as authorized by agency regulations. Paragraph 1-8.1b of the Federal Travel Regulations (FTR) grants an agency head discretionary authority to authorize special per diem in lieu of actual expenses in HRGA's under certain circumstances. Where the agency has established a special per diem rate for non-commercial quarters in HRGA's, that special rate satisfies the requirements of the FTR. The determination to apply that rate need not be made on a case-by-case basis. *Jack O. Padrick*, B-189317, November 23, 1977, and similar cases will no longer be followed to the extent that they require a separate determination to apply a preestablished fixed rate for each individual case.

Matter of: Algie Horton, Jr.—Temporary Duty Travel—Non-Commercial Quarters, September 30, 1985:

This decision is in response to a request from the Regional Administrator, Region 5, Federal Highway Administration, Department of Transportation, Homewood, Illinois. It concerns the entitlement of an employee to be paid a special per diem rate while performing temporary duty in a designated high rate geographical area (HRGA) during March-April 1984. For the reasons set forth below, we conclude that he is entitled to be paid at the special per diem rate.

BACKGROUND

The claimant, Mr. Algie Horton, Jr., is a Safety Investigator with the Federal Highway Administration. His permanent duty station at the time his claim arose was the Federal Highway Administration's Region 5 Headquarters, Springfield, Illinois. By blanket travel authorization, dated April 2, 1984, Mr. Horton and about 20 others were authorized to perform travel on an "as required" basis from that headquarters to various locations in the State of Illinois and return, during the period April 1, 1984, to June 30, 1984. This travel authorization specified various per diem and HRGA rates, but it did not specifically incorporate the terms of Department of Transportation Notice N 1500.46, March 21, 1984, which is discussed below.

One of the points to which Mr. Horton traveled was Chicago, a designated HRGA. In his initial travel voucher, Mr. Horton asserted that he made three separate trips from Springfield to Chicago, and return. He claimed entitlement to a flat rate per diem of $37.50, which was ½ of the $75 per day maximum daily actual subsistence rate authorized for the Chicago area. He noted on that travel voucher that he did not incur any lodging cost because he stayed with his family in Chicago. His claim was administratively disallowed. The reason given was that since Mr. Horton had a residence in Chicago, no temporary duty living expenses were payable unless he could show that he incurred expenses in excess of compa-

rable expenses he would otherwise have incurred at his duty station in Springfield.

On reclaim, Mr. Horton contends that the basis for the administrative disallowance of his claim implies that the Chicago residence was his official residence. He asserts that such was not the case. He states that, prior to April 1983, his official permanent duty station was the Region 5 office in Homewood, Illinois (a suburb of Chicago), and that he commuted to that duty station from his Chicago residence. In April 1983, about 1 year before his travel expense claim arose, he was transferred to the agency's Illinois Division Office in Springfield, Illinois. Incident to that transfer, he moved to an apartment in Springfield and maintained it thereafter as the residence from which he commuted to his permanent duty station. Mr. Horton adds that neither his wife nor his children accompanied him to Springfield. They remained in the Chicago residence for family reasons.

Subsequent to our receipt of this claim from the agency, Mr. Horton informally requested that we consider the possible applicability of decision *Durel R. Patterson*, B-211818, February 14, 1984, to his situation.

DECISION

The provisions of law governing the entitlement of Federal employees to be reimbursed the cost of meals, lodging and other miscellaneous expenses incident to official travel are contained in 5 U.S.C. § 5702 (1982) and implementing regulations. Under that Code provision and paragraphs 1-7.6a and 1-8.1a of the Federal Travel Regulations (September 1981), *incorp. by ref.*, 41 C.F.R. Part 101-7 (1983) (FTR), an employee's basic entitlement is reimbursement for expenses incurred during periods he is performing official travel away from his permanent duty station and away from his place of abode from which he commutes to that duty station.

Eligibility for Reimbursement

The threshold question for resolution is whether Mr. Horton may be reimbursed for his expenses (other than lodging expenses for which no claim is made) while staying at his family residence during his temporary duty assignment in the Chicago area.

In our decision *Durel R. Patterson*, B-211818, February 14, 1984, *affirmed on reconsideration*, B-211818, November 13, 1984, we considered the case of an employee who sought reduced per diem (no lodging cost) while staying at his family residence which was near Baton Rouge, Louisiana, one of his temporary duty locations. The facts in that case showed that the employee's duties were as an itinerant with many temporary duty locations. However, when he performed duties at his official permanent station he stayed at his in-laws' house and commuted from that location. Citing to the case

of *Daisy Levine*, 63 Comp. Gen. 225 (1984), we ruled that since he was an itinerant employee, so long as he performed *some* duties at his official duty station, he could be paid per diem for duty performed at various temporary duty points. We further ruled that he was entitled to per diem (other than lodging) when temporary duty was performed in the area of his family domicile based on an agency regulation similar to the DOT regulation involved in Mr. Horton's case.

In the present case, while Mr. Horton is not an itinerant employee as in *Patterson*, the issue regarding residence location for travel expense reimbursement purposes is similar. Mr. Horton has asserted that at the time of his permanent change of station to Springfield from the Chicago area in April 1983, he left his family residence in Chicago and leased an apartment in Springfield, which he used to commute to his Springfield duty station. There is nothing in the record which shows that this was not the case. Therefore, it is our view that, for the purposes of Mr. Horton's travel entitlements, his apartment in Springfield was his residence at the times in question.

Per Diem Versus Actual Subsistence

Paragraph 1-7.1 of the FTR provides that per diem allowances shall be paid for official travel except when an agency determines that reimbursement should be on the basis of actual subsistence expenses as provided in Part 8 of Chapter 1, FTR. Paragraph 1-8.1 of the FTR provides in part:

a. *General.* * * * A traveler may be reimbursed for the actual and necessary expenses * * * for travel to high rate geographical areas. * * *

b. *Travel to high rate geographical areas (HRGA's).* Actual subsistence expense reimbursement shall normally be authorized or approved whenever temporary duty travel is performed to or in a location designated as a high rate geographical area * * *. Agencies may, however, authorize other appropriate and necessary reimbursement as follows:

(1) A per diem allowance under 1-7.3 if the factors cited in 1-7.3a would reduce the travel expenses of an employee provided the agency official designated under 1-8.3a(1) determines the existence of such factors in a particular travel assignment and authorizes an appropriate per diem rate * * *

The Department of Transportation in DOT Notice N 1500.46, March 21, 1984, which supplements the FTR, has provided for special per diem rates where needed. That notice provides, in paragraph 6(c):

c. *Lodging Obtained from Noncommercial Sources. Employees on official travel who obtain lodging from noncommercial sources, such as when they stay with friends or relatives, will be authorized a flat per diem rate. The flat per diem rate will be equal to* 50 percent of the locality per diem rate, or *50 percent of the actual expense maximum if travel is in a high rate geographical area.* Travel authorizing officials may recommend lesser flat rates of per diem in individual cases where the costs of subsistence are known in advance of travel and are anticipated to be significantly less than the 50-percent rates. These lesser rates must be approved at the Deputy Assistant Secretary or Deputy Administrator level. [Italic supplied.]

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The general travel order issued to Mr. Horton and other employees incorporated DOT Notice N 1500.46 by reference. Item 10 of the travel order states that "Per Diem is Authorized as Provided in the DOT Travel Manual unless a specific per diem rate is indicated hereon." The travel order contains a listing in Item 13 of the applicable per diem rates and actual expense rates for various locations in Illinois and does not specifically refer to the 50 percent rate for non-commercial lodgings. However, this listing merely sets forth the otherwise applicable rates for convenient reference and does not indicate any intent to provide a special rate for these travelers. Since the DOT Notice N 1500.46 expressly requires a 50 percent rate for employees staying at non-commercial lodgings, there was no need to specifically refer to it in the travel order, and its absence from Item 13 does not render it inapplicable.

The question remaining is whether the DOT notice is valid. As noted previously, paragraph 1-8.1 of the FTR authorizes a per diem rate for HRGA travel if the factors cited in paragraph 1-7.3a would reduce the employee's travel expenses, provided that a designated agency official "determines the existence of such factors in a particular travel assignment and authorizes an appropriate per diem rate * * *."

We do not find the DOT regulation objectionable. Use of non-commercial lodgings is one of the factors reducing travel expenses covered by paragraph 1-7.3a of the FTR.[1] We have recognized the appropriateness of establishing a fixed per diem rate for general application where non-commercial lodgings are used, so long as that rate is not arbitrary or unreasonable. See, e.g., *Clarence R. Foltz,* 55 Comp. Gen. 856 (1976); *Durel R. Patterson, supra; Jack O. Padrick,* B-189317, November 23, 1977. The *Padrick* decision, discussed hereafter, specifically approves establishing such a rate for general application to HRGA travel. Thus, DOT can make a general determination, as it has in Notice N 1500.46, that a fixed reduced per diem rate is appropriate when an employee uses non-commercial lodgings. Further, we find no basis to object to fixing this rate at 50 percent of the full per diem or the maximum actual expense allowance, depending on which method of reimbursement would otherwise apply.[2]

It could be argued that paragraph 1-8.1 of the FTR literally requires that a separate decision of whether or not to apply the fixed rate must be made each time an employee uses non-commercial lodgings; indeed, our *Padrick* decision, *supra,* does interpret the

[1] In this regard, paragraph 1-7.3a refers to "[k]nown arrangements at temporary duty locations where lodging and meals may be obtained without cost or at prices advantageous to the traveler * * *."

[2] Cf., *Harry G. Bayne,* 61 Comp. Gen. 13 (1981); *Robert P. Trent,* B-211688, October 13, 1983; *Social Security Administration Employees,* B-208794, July 20, 1983. These decisions approve agency regulations which established general limitations on reimbursement for meals and miscellaneous expenses alone of 45 to 46 percent of the applicable per diem or maximum actual expense allowance.

FTR as requiring such case-by-case determinations. However, on reflection, we do not regard this interpretation as reasonable and will no longer follow it. Requiring a separate determination in each individual case largely defeats the purpose of having a fixed rate for general application to use of non-commercial lodgings. Further, it is significant that the DOT notice provides for departures from the 50 percent rate to account for the circumstances of particular travel. In effect, therefore, the notice establishes a presumption that the 50 percent rate is appropriate, but permits exceptions to be made in individual cases. We believe that this approach adequately serves both the objective of administrative efficiency and the need to accommodate the circumstances of particular travel.

Thus, we hold that DOT Notice N 1500.46 March 21, 1984, is a valid exercise of agency authority to provide per diem rates in a HRGA. Its terms were incorporated by reference in Item 10 of Mr. Horton's travel order. Hence, his travel to Chicago is governed by paragraph 6(c) of the DOT Notice and he is entitled to be reimbursed at the 50 percent rate of the actual expense rate for Chicago.

[B-217274]

Debt Collections—Debt Collection Act of 1982—Applicability

Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against payments from Civil Service Retirement and Disability Fund (Retirement Fund). The Office of Personnel Management regulations implementing section 5 (5 U.S.C. 5514) and the regulations issued jointly by GAO and the Department of Justice implementing section 10 (31 U.S.C. 3716) both provide for offsets against Retirement Fund payments to be governed by administrative offset provisions of 31 U.S.C. 3716. This is a continuation of long-standing interpretation and there is no indication that Act was intended to change it. Therefore, administrative offset provisions of section 10 apply to payments from Retirement Fund.

Debt Collections—Debt Collection Act of 1982—Applicability

Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against former federal employee's final salary check and lump-sum leave payment, unless they represent the continuation of an offset against current salary initiated under section 5. In regulations (5 C.F.R. Part 550, Subpart K) issued by Office of Personnel Management implementing section 5 (5 U.S.C. 5514), it is specifically stated that section 10 (31 U.S.C. 3716) applies to offsets against employee's final salary check and lump-sum leave payment. Historically both of these payments have been treated differently than employee's current pay account and both have been available for involuntary offset for debt collection. This interpretation of statute by agency charged with its administration is not unreasonable. Therefore, offsets against employee's final salary check and lump-sum leave payment are governed generally by 31 U.S.C. 3716. In any event, the 15 percent limitation of 5 U.S.C. 5514 does not apply.

Matter of: Veterans Administration—Debt Collection by Offset Against Retirement Fund, Final Salary Check, and Lump-Sum Leave Payments, September 30, 1985:

We have been asked by the Administrator of Veterans Affairs, Veterans Administration (VA), to issue a decision concerning the

application of the Debt Collection Act of 1982, Pub. L. 97-365, October 25, 1982, 96 Stat. 1749 (Act or Debt Collection Act), to the collection of debts owed to the United States by offset against a former employee's final salary check, lump-sum leave payment, and Civil Service Retirement and Disability Fund (Retirement Fund) payments. Specifically, we have been asked whether section 5 of the Act, codified as 5 U.S.C. § 5514, or section 10 of the Act, codified as 31 U.S.C. § 3716, governs the procedures to be used in effecting offsets against the above funds.

For the reasons set forth below, we hold that, with one qualification, section 10 of the Act, 31 U.S.C. § 3716, governs in effecting offsets against an employee's final salary check, lump-sum leave payment, and Retirement Fund payments. The qualification is that any offset from the final salary check or lump-sum leave payment which represents a continuation of an offset against current salary initiated under 5 U.S.C. § 5514 remains subject to section 5514.

BACKGROUND

Section 5 of the Debt Collection Act of 1982 amended and expanded 5 U.S.C. § 5514, dealing with the collection of debts by offset from the salaries of federal employees, i.e., "salary offset." In addition to its considerably broader scope, the amended version of section 5514 imposes certain procedural requirements. Among other things, employees are granted an opportunity for a pre-offset hearing conducted by an individual who is not under the supervision or control of the agency head, to result in a final decision within 60 days. See 5 U.S.C. § 5514(a)(2).

Section 10 of the Act enacted a new provision of law, 31 U.S.C. § 3716, captioned "administrative offset," which affords federal agencies a general right to collect by offset debts owed to the United States by any person. While section 3716 also imposes certain procedural requirements, it does not include the specific requirements noted above governing pre-offset hearings under 5 U.S.C. § 5514. Thus, the statutory source for a particular offset affects the specific procedures required. In addition, separate regulations have been issued under each of these two statutory provisions. The Office of Personnel Management has published final regulations implementing 5 U.S.C. § 5514 at 49 Fed. Reg. 27470 (July 3, 1984), codified as 5 C.F.R. Part 550, Subpart K. The General Accounting Office and the Department of Justice have jointly published final regulations implementing 31 U.S.C. § 3716 at 49 Fed. Reg. 8889 (March 9, 1984), as amendments to the Federal Claims Collection Standards, codified at 4 C.F.R. Parts 101 through 105 (1985).

We have previously discussed the legislative history and intent of the Debt Collection Act in our decision 64 Comp. Gen. 143 (1984). There we described the intent of the Act as follows:

According to its legislative history, the Debt Collection Act of 1982 (DCA) was intended to "put some teeth into Federal [debt] collection efforts" by giving the Government "the tools it needs to collect those debts, while safeguarding the legitimate rights of privacy and due process of debtors." 128 Cong. Rec. S12328 (daily ed. Sept. 27, 1982) (remarks of Sen. Percy). * * *

The questions presented here have arisen because 5 U.S.C. § 5514(a)(1) is not absolutely clear as to what payments are covered by its procedural requirements. That section provides, in part:

(a)(1) When the head of an agency or his designee determines that an employee, member of the Armed Forces or Reserve of the Armed Forces, is indebted to the United States for debts to which the United States is entitled to be repaid at the time of the determination by the head of an agency or his designee, or is notified of such a debt by the head of another agency or his designee the amount of indebtedness may be collected in monthly installments, or at officially established pay intervals, by deduction from the current pay account of the individual. *The deductions may be made from* basic pay, special pay, incentive pay, *retired pay,* retainer pay, or, in the case of an individual not entitled to basic pay, other authorized pay. The amount deducted for any period may not exceed 15 percent of disposable pay, except that a greater percentage may be deducted upon the written consent of the individual involved. *If the individual retires or resigns, or if his employment or period of active duty otherwise ends, before collection of the amount of the indebtedness is completed, deduction shall be made from subsequent payments of any nature due the individual from the agency concerned.* [*Italic supplied.*]

The VA questions whether the phrase "retired pay" as used in section 5514 includes payments from the Civil Service Retirement and Disability Fund or if it simply retains its usual meaning of payments to retired military members. The VA also questions the meaning of the last sentence of section 5514(a), and whether offsets against a former employee's final salary check or lump-sum leave payment, both of which are made to employees after their separation, are governed by the procedures contained in section 5514 or by the procedures contained in 31 U.S.C. § 3716. We will consider the questions in the order presented.

OFFSETS AGAINST THE CIVIL SERVICE RETIREMENT FUND

Section 5514 refers to "retired pay" as one source against which a setoff may be made. As VA points out, "retired pay" is generally understood to mean benefits received by members or former members of the uniformed services. For example, "retired pay" is defined by 5 U.S.C. § 8311(3) as follows:

retired pay means retired pay, retirement pay, retainer pay, or equivalent pay, payable under a statute to a member or former member of a uniformed service, and an annuity payable to an eligible beneficiary of the member or former member under chapter 73 of title 10 or section 5 of the Uniformed Services Contingency Option Act of 1953 (67 Stat. 504), * * *

In contrast, payments from the Retirement Fund are made to former civilian employees of the Federal Government and are distinct from retired pay.

While "retired pay" is not defined with specific reference to 5 U.S.C. § 5514, we find nothing to suggest that Congress intended to depart from the customary meaning of this term for purposes of salary offset. We note, in this regard, that offset under 5 U.S.C.

§ 5514 applies fundamentally to payments made directly by a particular agency to its employees or former employees. The various forms of "retired pay" as usually understood fit this description; however, payments from the Retirement Fund do not since they are made by OPM, rather than the former employee's agency.

Further, we note that treating offsets from Retirement Fund payments as subject to 31 U.S.C. § 3716 instead of 5 U.S.C. § 5514 is consistent with the administrative regulations issued under both of these statutory provisions. Under 4 C.F.R. §§ 102.3 and 102.4, offsets against the Retirement Fund are specifically stated to be governed by the procedures set out in 31 U.S.C. § 3716. Moreover, under 5 C.F.R. § 550.1104(m), an agency's regulations governing debt collection through offset must include within their provisions the following:

(m) *Recovery from other payments due a separated employee.* Provide for offset under 31 U.S.C. 3716 from later payments of any kind due the former employee from the United States, where appropriate, if the debt cannot be liquidated by offset from any final payment due the former employee as of the date of separation. (See 4 CFR 102.3)

Finally, neither the former nor present versions of section 5514 specifically included payments from the Retirement Fund as a source for offset for debt collection purposes. We held, prior to the passage of the Debt Collection Act, that payments from the Retirement Fund were available for offset for the collection of debts due the government by virtue of the government's common law rights as a creditor. See 58 Comp. Gen. 501 (1979) and cases cited therein. We find nothing in the Debt Collection Act or its legislative history that indicates any intent to change this long-standing interpretation or to include payments from the Retirement Fund within the scope of salary offset under section 5514. Thus we believe that offsets against payments from the Retirement Fund are properly governed by 31 U.S.C. § 3716.

FINAL SALARY CHECK AND LUMP-SUM LEAVE PAYMENT

There are no provisions in the regulations implementing 31 U.S.C. § 3716 that specifically deal with offsets against final salary checks and lump-sum leave payments. However, the OPM regulations implementing 5 U.S.C. § 5514 require that an agency's offset regulations must include the following provision:

(1) *Liquidation from final check.* Provide for offset under 31 U.S.C. 3716, if the employee retires or resigns or if his or her employment or period of active duty ends before collection of the debt is completed from subsequent payments of any nature (e.g., final salary payment, lump-sum leave, etc.) due the employee from the paying agency as of the date of separation to the extent necessary to liquidate the debt. 5 C.F.R. § 550.1104(1).

The supplementary information that accompanied the publication in the Federal Register of the final regulations provides some amplification of this provision:

(1) Paragraph 550.1104(1) requires paying agencies to provide for collecting an employee's debt from any final payments due from their agency. Paragraph 550.1104(m) requires agencies to provide for collecting an employee's debt from any subsequent payments due from other government agencies. Two commenters requested guidance on the application of § 5514 to collections from a former employee. We amended the language in both of the paragraphs to show such collections will come under 31 U.S.C. 3716. Collections under § 3716 are not subject to the 15 percent limitation. 49 Fed. Reg. 2747 (1984)

As we interpret it, the OPM regulation is consistent with the language of 5 U.S.C. § 5514. The last sentence of 5 U.S.C. § 5514(a)(1), quoted previously, provides that if an employee ceases active duty with an agency "before collection of the amount of the indebtedness is completed," deduction shall be made "from subsequent payments of any nature due the individual from the agency concerned." Clearly, this language means that where offset has been initiated under section 5514 against the current salary of an employee, that same offset may reach subsequent final salary and lump-sum leave payments if necessary to complete the collection action. In this limited circumstance, an employee's final salary and lump-sum leave payments may be regarded as subject to offset under section 5514.[1] On the other hand, where there has been no antecedent offset against current salary, nothing in the language of section 5514 requires that section to apply. Instead, an offset against final salary or lump-sum leave payments here may be treated as an administrative offset under 31 U.S.C. § 3716, as provided by the OPM regulation.

The approach taken in the OPM regulation also conforms to the practice which preceded enactment of the Debt Collection Act. The final salary check has historically been distinguished from current pay. Prior to the enactment of the Debt Collection Act, general debts could not be offset against a federal employee's current pay account. 29 Comp. Gen. 99 (1949). However, a different rule was applied to the final salary check and lump-sum leave payment, that is, general debts could be setoff against both types of payments. 26 Comp. Gen. 907, 909 (1947) (final salary check); 24 Comp. Gen. 522, 525 (1945) (lump-sum leave payment).

As stated above, the purpose of the Debt Collection Act was to put teeth into federal debt collection efforts and to provide the tools needed for that effort, while safeguarding the due process rights of debtors. Based upon all of the above, we believe that the OPM regulation placing setoffs against final salary checks and lump-sum leave payments under the authority of 31 U.S.C. § 3716 is proper. It is a well-established rule that regulations implement-

[1] The OPM regulation essentially tracks the language of section 5514 in this respect and thus is consistent with it. In any event, the source of offset makes no practical difference in this circumstance. No additional hearing would be required to extend the section 5514 offset to final salary or lump-sum leave payments. Moreover, we view the 15 percent limitation on periodic deductions from disposable pay as applicable only to offset against current salary; thus, this limitation would not apply to the final salary and leave payments.

ing a statute that are issued by the agency charged with administering that statute are presumptively valid, unless they are unreasonable or plainly inconsistent with the intent of the statute. *Rockville Reminder, Inc.* v. *United States Postal Service,* 480 F.2d 4, 7 (2nd Cir. 1973). Agency regulations will be sustained where the statutory language is reasonably susceptable to more than one interpretation. *Udall* v. *Tallman,* 380 U.S. 1 (1965), rehearing denied 380 U.S. 989 (1965).

We believe that OPM's interpretation of the statute, restricting the scope of 5 U.S.C. § 5514 to deductions from current pay and other deductions which are necessary to complete a section 5514 offset, is consistent with the statutory scheme of the Debt Collection Act which evidences an intent to treat separately offsets against current pay accounts, and thus provides dual offset procedures under section 5514 and 3716.

To summarize, offsets from Retirement Fund payments, and offsets first initiated against final salary payments and lump-sum leave payments fall under the authority of 31 U.S.C. § 3716, and the applicable procedures are those of the Federal Claims Collection Standards. Accordingly, agencies must provide the individuals, prior to offset, with the opportunity to obtain review within the agency. 4 C.F.R. § 102.3(b)(2). In some cases an oral hearing will be required; in others a "paper hearing" will be sufficient. See 4 C.F.R. § 102.3(c). However, these hearings need not be conducted by an administrative law judge or individual not under the supervision or control of the head of the agency.

[B-217403]

Compensation—Prevailing Rate Employees—Wage Schedule Adjustments—Statutory Limitation—Applicability

The cap on salary rate increases for prevailing rate employees during fiscal year 1980 and succeeding years does not restrict the pay changes required to adjust the appropriate rate of pay for prevailing rate employees who were "transferred in place" between the Chicago and Rock Island Districts of the Corps of Engineers as a result of a realignment of District boundaries on June 29, 1980. These adjustments did not result from a wage survey and are, therefore outside the scope of the pay cap legislation.

Matter of: Corps of Engineers—Prevailing Rate Employees—Effect of Pay Cap on Pay Changes Resulting From Reassignment Between Wage Areas, September 30, 1985:

The issue here is whether the statutory pay cap on the salary rates of prevailing rate employees in effect for fiscal year 1980 and succeeding years applies to pay adjustments for prevailing rate employees of the Army Corps of Engineers who were "transferred in place" on June 29, 1980, from the Chicago District to the Rock Island District as a result of a realignment of district boundaries. This adjustment places such employees on the same wage sched-

ules applicable to the rest of the employees in their new district.[1] For the reasons set forth below, we hold that the pay cap does not apply to the adjustments in question.

The National Federation of Federal Employees, as the representative of prevailing rate employees in the Rock Island District, Corps of Engineers, Rock Island, Illinois, contends that those prevailing rate employees who were "transferred in place" from the Chicago District to the Rock Island District on June 29, 1980, as a result of a realignment of district boundaries were and continue to be erroneously denied their proper rates of pay since the date of the transfer. This results from the Corps of Engineers' refusal to apply the wage schedules pertaining to the Rock Island District to these employees.

During fiscal years 1980 through 1984 there were caps enacted on the pay increases which could be allowed prevailing rate employees.[2] The pay increase cap in effect for fiscal year 1980, and effective at the time the employees in question were transferred to the Rock Island wage area, provided:

(a) No part of any of the funds appropriated for the fiscal year ending September 30, 1980, by this Act or any other Act, may be used to pay the salary or pay of individual in any office or position in an amount which exceeds the rate of salary or basis pay payable for such office or position on September 30, 1979, by more than the overall average percentage increase in the General Schedule rates of basic pay, as a result of any adjustments which take effect during such fiscal year under section 5343 of title 5, United States Code, *if such adjustment is granted pursuant to a wage survey* (but only with respect to prevailing rate employees described in section 5343(a)(A) of that title)." Section 613(a), Treasury, Postal Service, and General Government Appropriation Act, 1980, Public Law 96-74, September 29, 1979, 93 Stat. 559, 576. [Italic supplied.]

Similar restrictions on increases in wage rates of prevailing rate employees were enacted each year since fiscal year 1979. The legislative history of the first of these caps on wage increases for prevailing rate employees, which was for fiscal year 1979, shows that the cap was enacted so that all federal employees, including prevailing rate employees and General Schedule employees, would be treated equally. See S. Rep. No. 939, 95th Cong., 2d Sess. 55-56 (1978).

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[1] This matter has been presented by Mr. James M. Peirce, President, National Federation of Federal Employees, under our procedures set forth at 4 C.F.R. Part 22 for decisions on appropriated fund expenditures which are of mutual concern to agencies and labor organizations. The Commanding Officer, Rock Island District Corps of Engineers, submitted comments for that agency.

[2] For fiscal year 1984, see section 2202 of the Deficit Reduction Act of 1984, Public Law 98-369, July 18, 1984, 98 Stat. 494, 1058; section 202(b) of the Omnibus Budget Reconciliation Act of 1983, Public Law 98-270, April 18, 1984, 98 Stat. 157, 158; and section 110 of Public Law 98-107, October 1, 1983, 97 Stat. 733, 741. For fiscal year 1983, see section 107 of Public Law 97-377, December 21, 1982, 96 Stat. 1830, 1909; and section 109 of Public Law 97-276, October 2, 1982, 96 Stat. 1186, 1191. For fiscal year 1982, see section 1701(b) of the Omnibus Budget Reconciliation Act of 1981, Public Law 97-35, August 13, 1981, 95 Stat. 357, 754. For fiscal year 1981, see section 114 of Public Law 96-369, October 1, 1980, 94 Stat. 1351, 1356. For fiscal year 1980, see section 613 of the Treasury, Postal Service, and General Government Appropriations Act, 1980, Public Law 96-74, September 29, 1979, 93 Stat. 559, 576.

The Office of the District Engineer, Rock Island District, contends that section 613 of Public Law 96-74, set forth above, prevents the reassignment of the transferred employees to the Rock Island District wage schedule as would normally be the practice under Federal Personnel Manual Supplement (FPM) 532-1, (Inst. 17 April 14, 1980). Specifically, section S11-10, "Special Pay Plan For Corps of Engineers, U.S. Army Navigation Lock and Dam Employees," of FPM Supplement 532-1 provides as follows:

a. Pay policy. Nonsupervisory, leader, and supervisory prevailing rate employees of the Corps of Engineers, U.S. Army, who are engaged in operating navigation lock and dam equipment, or who repair and maintain navigation lock and dam operating machinery and equipment, are subject to one of the following pay provisions.

* * * * * * *

(2) If navigation lock and dam installations under a District headquarters office are located in more than one FWS wage area, the operating and repair employees are paid from a special schedule having rates identical to the regular FWS wage schedule authorized for the headquarters office.

The Commanding Officer explains that on June 29, 1980, as a result of a realignment of District boundaries, eight locks and dams on the Illinois Waterway were "transferred in place" from the Chicago District to the Rock Island District. Under the FPM Supplement provision quoted above, when employees under a District headquarters office are located in more than one federal wage schedule wage area, as is the case here, the employees all should be paid on the wage schedule for the wage area containing the Headquarters. The District Corps of Engineers contends that it was unable to reassign the transferred employees to the Rock Island District wage schedule, as would be normal practice pursuant to the cited FPM guidance, because in changing from one wage schedule to another the employees would receive a pay increase in excess of that allowed under the pay cap legislation quoted above. The District Engineer agrees with the National Federation of Federal Employees that the situation created is inequitable in that employees are performing similar work within the Rock Island District, but are receiving substantially different wage rates for the performance of that work.

We note that in addition to section S11-10 of FPM Supplement 532-1, cited by the District Engineer as providing applicable guidance for applying proper pay schedules, section S8-8 of the same FPM Supplement is also relevant. That paragraph deals with employees who are in wage areas or parts of wage areas that are consolidated with other wage areas. When that occurs, the employee is placed in the same grade and step on the new wage schedule as he was in on the old wage schedule, unless that would result in a lower rate of pay. The paragraph goes on to set out the rules to follow when there would be a lower rate of pay in the new wage schedule. Thus, under both of these provisions of the FPM Supplement, if the pay caps had not been enacted, there is no question

that the employees who were "transferred in place" would have been placed on the new wage schedules.

The Office of Personnel Management issued FPM Bulletin 532–52, December 22, 1983, to provide agencies with guidance in applying the fiscal year 1984 limitations on appropriated and nonappropriated fund wage schedule pay increases for the Federal Wage System. As noted earlier, the fiscal year 1984 limitation is substantively the same as that pertaining for fiscal year 1980. The FPM Bulletin states at paragraph 5 as follows:

> Other Actions Not Affected
>
> It should be noted that this [fiscal year 1984] pay increase limitation under Public Law 98–151 does *not* restrict other pay changes, such as promotions, step increases, transfers or reassignments between wage areas, and reclassifications. [Italic in original.]

All of the above sources deal with pay changes that arise for reasons other than wage surveys, for example, area consolidations or realignments, step increases, transfers, or reassignments. We believe that the "transfer in place" that occurred here is more analogous to these actions than it is to a wage survey change in salary rates. The legislative pay cap applies to salary rate changes arising from a wage survey. We recently reviewed the application of pay cap legislation to the initial establishment of a new wage schedule under the provisions of the Monroney Amendment, 5 U.S.C. § 5343(d). In that case, 64 Comp. Gen. 227 (1985), we held that the pay cap applied because the new wage schedule was the direct result of a wage survey. Here, the "transfer in place" of the employees from one district to another led, under provisions of the FPM Supplement 532-1, to application of a different, but existing wage schedule. Any increase in pay rates because of the use of the "new" (for these particular employees) wage schedule is the result of the "transfer in place," not a wage survey.

There is nothing in the express language of the pay caps or in their legislative histories which would require or support the view that the restriction on increases in wage rates of prevailing rate employees contained in the Treasury, Postal Service, and General Government Appropriations Act of 1980, prohibits the application of the wage schedules in effect for the Rock Island District to the prevailing rate employees transferred into that District from the Chicago District on June 29, 1980. The pay cap language contained in the appropriations acts is specifically self-limiting to pay increases ("adjustments") "granted pursuant to a wage survey." The wage adjustments required in the circumstances of this case are the result of a transfer or realignment of wage districts and not as a result of any particular wage survey. Therefore, the maximum salary increase restriction for prevailing rate employees is not applicable to the employees in question.

In view of the above, the pay caps do not serve as a bar to applying the applicable wage rate schedules for the Rock Island District to the employees transferred thereto on June 29, 1980, and the Corps of Engineers may legally institute the necessary wage adjustments and make retroactive pay adjustments effective as of June 29, 1980.

[B-219348 & .2]

Bids—Invitation for Bids—Cancellation—Erroneous—Reinstatement Recommended

Contracting officer's determination to cancel an IFB based on speculation that a modification which made the protester's bid low may not have been mailed when a certified mail receipt shows it was mailed lacks a reasonable basis since the Postal Service found no evidence of irregularities.

Matter of: Reyes Industries, Inc., September 30, 1985:

Reyes Industries, Inc. (Reyes), protests the Defense General Supply Center's (DGSC) cancellation of invitation for bids (IFB) No. DLA400-85-B-5244, on May 29, 1985, and its resolicitation of the requirement.

DGSC canceled the solicitation because of its doubt concerning the authenticity of evidence submitted by the protester to establish the date of mailing a price modification to its bid. The agency concluded that, in view of its doubt, the integrity of the competitive system would be better served by canceling the solicitation than by an award to the protester. Reyes, on the other hand, argues that the cancellation is arbitrary.

We sustain the protest.

At bid opening, on March 21, 1985, the low bidder was Sierra Corporation at $34.17 per unit, f.o.b. destination, for 55,000 folding cots. Reyes was second low at $34.60 per unit, f.o.b. destination (Reyes also submitted an f.o.b. origin bid). A few hours after bid opening, Reyes called the DGSC buyer to advise that on March 12 it had sent a bid modification which lowered its price. On March 26, the contracting officer received Reyes' certified letter of March 12, wherein Reyes lowered its f.o.b. destination price from $34.60 per unit to $33.95 per unit. Reyes also submitted a receipt for certified mail with a postmark date of March 12, 1985.

Under the IFB late bid clause, a late bid or late bid modification may be considered, provided it is received prior to award and it was mailed by registered or certified mail at least 5 days prior to the bid opening. The clause further provides that the date of mailing of a late bid or bid modification sent by registered or certified mail is the postmark on the envelope or on the original receipt.

Although the Reyes' bid modification qualified for consideration under the late bid clause, the contracting officer became suspicious of the circumstances surrounding its submission. He noted that the March 12 modification apparently took 14 days to arrive from

Texas to DGSC Headquarters at Richmond, Virginia, in contrast to the Reyes bid itself, which took only 3 days to arrive. He further noted that the postage meter impression on the envelope was from Irving, Texas, dated March 12, while the receipt showed a Richardson, Texas, postmark dated March 12.

As a result of these suspicions, the DGSC buyer called the Irving, Texas Post Office, and reports being advised by a Postal Service employee that a letter metered in Irving and later certified in Richardson should have been remetered in Richardson.

In addition, the contracting officer noted that a similar situation involving Reyes and the DGSC installation arose in June 1984 (IFB No. DLA400-84-B-5824). In that case, when bids were opened on June 6, 1984, Sierra was low for the same item at $36.53, and Reyes was second low at $36.60. Both bidders claimed preference as labor surplus area (LSA) concerns. On June 13, Reyes called the agency to report that its bid had been revised before bid opening to $36.40, in a bid modification letter dated May 31. In a confirming letter, Reyes forwarded a copy of its May 31 letter and a copy of a certified mail receipt dated June 1, from Richardson, Texas. DGSC never received the original May 31 bid modification letter. As it turned out, however, it did not matter. DGSC determined that Sierra did not qualify as an LSA concern for that procurement, so that its bid of $36.53 was evaluated at $37.33, using the 2.2 percent factor for non-LSA bidders. This left Reyes the low bidder at $36.60, and its price reduction was then accepted.

Because of his concerns, the contracting officer asked the Postal Service to examine Reyes' bid modification mailing to determine if any irregularities existed. An examination was conducted, and essentially the Postal Service reported that it did not find any irregularities.

Nevertheless, the contracting officer remained suspicious. He felt that, in light of all the circumstances, a serious question arose as to where or when the Reyes bid modification was actually mailed. He decided to cancel the solicitation and resolicit the requirement under negotiated procedures.

In its protest to our Office, Reyes states that the facts surrounding the March 12 mailing are not unusual. It explains that its March 12 bid modification was metered at a private meter machine in Irving and then delivered to, and certified at, a United States Post Office in Richardson, Texas, when Reyes' president dropped the letter off on his way to take care of other business.

As for the alleged failure of the Richardson Post Office to have remetered the letter, Reyes has submitted a statement dated July 11, 1985, cosigned by Mr. Rod Currey, the Irving Postal Service employee who was called by the DGSC buyer, and by Reyes' president. The statement indicates that the DGSC buyer misunderstood Mr. Currey's response, which concerned the use of a postage meter for a letter at one post office and then having the letter certified and

mailed at another post office. According to the statement, Mr. Currey responded that such a letter should have been certified and mailed at the same post office. The statement concludes that in the case of a letter metered by a private meter machine, remetering is not required and that it is "not uncommon for a piece of mail which is metered in the city to be certified and mailed at a post office in another city."

A decision to cancel an IFB after bid opening will not be disturbed unless the decision lacks a reasonable basis. *Jackson Marine Companies,* B-218882, *et al.,* April 10, 1984, 84-1 CPD ¶ 402. We think the decision to cancel this IFB lacked a reasonable basis.

There is absolutely no evidence of any irregularities connected with the mailing of Reyes' March 12 bid modification. While Sierra in its comments to the protest has suggested that it is relatively easy for a bidder to buy a postmark stamp or to mail a certified letter to itself and reuse the envelope, the Postal Service investigated these possibilities and found that the Reyes bid modification envelope had not been previously used and that the postmark on the Reyes receipt appears to have been made by a Richardson Post Office stamp.

Specifically, the Postal Service Criminal Laboratory report of May 3, 1985, concluded that the postmark on Reyes' certificate is generally consistent with the hand stamps used at the Richardson Post Office, but that variations do exist which require further examination prior to any positive finding. The contracting officer reported to us that the laboratory was asked to conduct this examination. DGSC has not reported to us any further on the matter, but Reyes reports that the Postal Service investigation was completed and no irregularity in the postmark was found.

Moreover, Reyes has refuted the agency's position that the March 12 envelope should have been remetered at the Richardson Post Office. Thus it appears that the letter was properly handled at the post office.

DGSC's refusal to make award to Reyes under the IFB boils down to the fact that Reyes was involved in a similar bid modification situation last year. In the agency's opinion, it is extremely unlikely that Reyes would have mailed a bid modification that was not delivered in 1984, and then have mailed another bid modification that was delivered 14 days after mailing in 1985, both of which resulted in Reyes offering the lowest apparent bid prices. The agency therefore questions whether Reyes' bid modification was actually mailed on March 12.

We can understand the agency's initial concern with the mailing of Reyes' bid modification, and its request for an investigation by the Postal Service. Once the Postal Service completed its investigation and found no irregularities, the agency's concern should have been resolved in favor of considering the modification. DGSC's refusal to accept Reyes' modification at this point is based solely on

speculation and suspicion. Since Reyes has submitted the requisite evidence of timely mailing, the bid should be considered as modified.

Accordingly, we recommend that the resolicitation be canceled, that the IFB be reinstated, and that an award be made to Reyes, if otherwise proper.

[B-220572.2]

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

Protest against agency use of allegedly proprietary data in competitive solicitation, not filed until after proposal due date, is dismissed as untimely since protest basis was apparent from the face of the solicitation. 4 C.F.R. 21.2(a)(1) (1985).

Matter of: Firearms Training Systems, Inc., September 30, 1985:

Firearms Training Systems, Inc. (FTS), protests the disclosure by the United States Army of allegedly proprietary data in solicitation No. DABT60-85-R-0155.

FTS contends that in late 1984, it had discussions with Army personnel and, in December 1984, submitted an unsolicited proposal containing proprietary data. On August 6, 1985, the above solicitation was issued and FTS submitted a proposal in response. FTS states that the Army intends to award the contract to another firm.

We dismiss FTS's protest as untimely under 4 C.F.R. § 21.2(a)(1) (1985), since it was not filed prior to the closing date for receipt of proposals and is based on an alleged impropriety which was apparent prior to the closing date. Upon review of the solicitation, FTS should have known that its allegedly proprietary data was being used, but participated in the procurement before filing its protest.

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ACCOUNTABLE OFFICERS

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Embezzlement, loss, etc.

Liability

Accountable officer who embezzled collections is liable only for the actual shortage of funds in her account. Although her failure to deposit the funds in a designated depository caused the Government to lose substantial interest on the funds, the lost interest should not be included in measuring her pecuniary liability as an accountable officer 303

Liability

Generally

Accountable officer who embezzled collections is liable only for the actual shortage of funds in her account. Although her failure to deposit the funds in a designated depository caused the Government to lose substantial interest on the funds, the lost interest should not be included in measuring her pecuniary liability as an accountable officer 303

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Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 (1982) and in accordance with the requirements of 5 U.S.C. 5512 (1982), General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer 606

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Orders under ADP schedule
Unreasonable
Less costly alternative
Contracting agency's decision to issue a delivery order for automatic data processing (ADP) equipment and "technical support services" to a nonmandatory ADP Schedule contractor is improper where a response to a Commerce Business Daily notice of the agency's intention to place the order would have indicated a less costly alternative but for the agency's unreasonable evaluation of the costs for the support services 11
Failure to synopsize procurement
Incomplete synopsis
A protest is sustained where the agency rejected a potential source of supply for failure to demonstrate compliance with a requirement which was neither set forth in a CBD "source sought" synopsis nor otherwise made known to the vendor 118
Negotiated procurement
Sole-source basis
General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked 620
Prohibition in Pub. L. 98-72 against commencing negotiations for the award of a sole-source contract until at least 30 days have elapsed from the date of publication in the Commerce Business Daily of a notice of intent to contract refers to the date of actual publication, and may not be negated by a regulatory provision, section 5.203 of Department of Defense Federal Acquisition Regulation Supplement, establishing a presumption that a synopsis electronically transmitted to the CBD has been published 2 days thereafter. *Harris Corp.*, B-217174, Apr. 22, 1985, 64 Comp. Gen. 480, 85-2 C.P.D. 455 clarified 871
Publication requirement
Prior to ordering under basic ordering agreement
Spare parts procurement
General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indi-

ADVERTISING—Continued Page
Commerce Business Daily—Continued
Publication requirement—Continued
Prior to ordering under basic ordering agreement—Continued
Spare parts procurement—Continued
cates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked 620
Submission of synopsis
General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked 620
Urgency of procurement
General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked 620

AGENCY FOR INTERNATIONAL DEVELOPMENT
Advance of funds
Interest
As belonging to United States v. others
Advances in excess of immediate cash needs to a subgrantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a) 96
Foreign aid programs. (*See* **FOREIGN AID PROGRAMS**)
Loan agreements, etc.
Cancellation
Contractor's claim
A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from the noncombat activities of the United States Armed Forces or its members or civilian employees, is not cognizable under the Military Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Office's general claims settlement authority, 31 U.S.C. 3702, had not the 6-year statute of limitations specified in that section run 155

AGREEMENTS
Interagency
Transactions between Government agencies and nonappropriated fund instrumentalities
Propriety
Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements

AGREEMENTS—Continued Page
Interagency—Continued
Transactions between Government agencies and nonappropriated fund instrumentalities—Continued
Propriety—Continued
are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

AGRICULTURE DEPARTMENT
Agriculture Graduate School. (*See* AGRICULTURE GRADUATE SCHOOL)
Forest Service
Fees
Collection by contractor employees
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. 339 408

AGRICULTURE GRADUATE SCHOOL
Nongovernmental instrumentality
Transactions with Government agencies
Interagency agreements
Propriety
Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

ALLOWANCES
Basis Allowance for quarters. (*See* QUARTERS ALLOWANCE, Basic Allowance for quarters (BAQ))
Military
Quarters allowance. (*See* QUARTERS ALLOWANCE)
Military Personnel
Basic Allowance for quarters (BAQ). (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ))
Quarters allowance. (*See* QUARTERS ALLOWANCE)
Relocation
Persons Displaced by Federal Programs
The change-of-station allowances authorized by 5 U.S.C. 3375 are payable upon relocation to, as well as return from, an Intergovernmental Personnel Act assignment. The fact that an employee's family was residing at the location of his assignment and that the full range of allowances, therefore, was not authorized when the em-

ALLOWANCES—Continued Page
Relocation—Continued
Persons Displaced by Federal Programs—Continued
ployee reported to the university does not preclude payment of any or all of those allowances incident to the employee's return following completion of the assignment. There is no statutory or regulatory requirement that the employee be authorized or incur specific expenses in reporting to the Intergovernmental Personnel Act assignment as a condition to paying those expenses upon its termination 665
Station. (*See* STATION ALLOWANCES)
Temporary duty all allowances
Per diem. (*See* SUBSISTENCE, Per diem, Temporary duty)
Temporary lodging allowance
Civilian employees upon transfer. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

ANTI-DEFICIENCY ACT. (*See* APPROPRIATIONS, Deficiencies, Anti-Deficiency Act)

APPROPRIATIONS
Anti-Deficiency Act. (*See* APPROPRIATIONS, Deficiencies, Anti-Deficiency Act)
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 370
Services between agencies
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 370
Authorization
Deviations
The National Endowment for Democracy, a private non-profit organization, was authorized to receive $31.3 million in fiscal year 1984 in grant moneys, 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

APPROPRIATIONS—Continued Page

Availability

Air purifiers (Ecologizers)

Smoke-eaters that would be placed on the desk of Federal employees who smoke can be purchased with appropriated funds where they are intended to and will provide a general benefit to all employees working in the area 789

Art objects

GAO has no objection to purchase by U.S. Tax Court of paintings and other art objects for individual judges' offices and chambers, provided that each purchase "is consistent with work-related objectives and the agency mission, and is not primarily for the personal convenience or personal satisfaction of a Government officer or employee." 63 Comp. Gen. 110, 113 796

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 382

Contract services

Consultant firms

Restriction

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

Contracts

Research and development

Small Business Innovation Development Act

Operational *v.* R&D Activities

Under the Small Business Innovation Development Act, the Department of Agriculture must obligate a certain portion of its extramural research and research and development (R&D) budget to fund small business participation under the Small Business Innovation Research (SBIR) Program. The fiscal year 1985 appropriation for the Department of Agriculture includes $5 million for external research for foreign market development to be paid for in foreign currencies. The Act, which does not require that every eligible research or R&D Program participate in the SBIR Program, provides no authority to pay for foreign market development research in U.S. currency or, absent specific authority, to use any appropriated funds other than in accord with the terms of the applicable appropriation 711

Entertainment. (*See* **ENTERTAINMENT**)

APPROPRIATIONS—Continued Page

Availability—Continued

Expenses incident to specific purposes

Necessary expenses

GAO has no objection to purchase by U.S. Tax Court of paintings and other art objects for individual judges' offices and chambers, provided that each purchase "is consistent with work-related objectives and the agency mission, and is not primarily for the personal convenience or personal satisfaction of a Government officer or employee." 63 Comp. Gen. 110, 113 796

Government corporations

Pennsylvania Avenue Development Corporation

Pennsylvania Avenue Development Corporation (PADC) may install a memorial plaque and designate a site within an area under its jurisdiction and control in honor of a deceased former chairperson of the PADC using funds donated to it. PADC has been vested with authority to determine the character of and necessity for its obligations and expenditures and to accept gifts of financial aid from any source and comply with the terms thereof. These authorities are sufficient to free PADC from restriction otherwise imposed upon Government agencies in the expenditure of appropriated funds except where a statutory restriction expressly applies to Government corporations. No law expressly precludes proposed expenditure by PADC. Furthermore, no law precludes PADC from designating property under its control in honor of deceased former chairperson of PADC 124

Health services for employees

Billings for the costs of comprehensive physical fitness evaluations and laboratory blood tests, administered to employees as part of the National Park Service, Alaska Regional Office, physical fitness program may be certified for payment. Section 7901 of Title 5, U.S.C., which authorizes heads of agencies to establish health service programs providing examinations and preventive programs, and the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, permit the use of appropriated funds for the testing, education, and counseling parts of the fitness program 835

Billings for employees' use of a private health club for physical exercise, as part of the National Park Service, Alaska Regional Office, physical fitness program may not be certified for payment. Although 5 U.S.C. 7901 authorizes agency heads to establish health service programs providing preventive programs relating to employee health, the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, limit the scope of these programs for executive branch agencies. These regulations do not authorize use of appropriated funds for physical exercise as part of health service programs 835

Medical Fees

Authorization requirement

No authority exists for the use of appropriated funds to pay for a smoker rehabilitation program for Federal employees who wish to stop smoking. Such medical care and treatment are personal to the individual employee and payment therefore may not be made from

APPROPRIATIONS—Continued Page
Availability—Continued
Medical Fees—Continued
Authorization requirement—Continued
appropriated funds unless provided for in a contract of employment or by statute or valid regulation 789
Physical examinations
Billings for the costs of comprehensive physical fitness evaluations and laboratory blood tests, administered to employees as part of the National Park Service, Alaska Regional Office, physical fitness program may be certified for payment. Section 7901 of Title 5, U.S.C., which authorizes heads of agencies to establish health service programs providing examinations and preventive programs, and the implementing regulations issued by the Office of Management and Budget, the Office of Personnel Management, and the General Services Administration, permit the use of appropriated funds for the testing, education, and counseling parts of the fitness programs 835
Necessary expenses. (*See* APPROPRIATIONS, Availability, Expenses incident to specific purposes, Necessary expenses)
Personal furnishings, etc. for employees
Art objects
GAO has no objection to purchase by U.S. Tax Court of paintings and other art objects for individual judges' offices and chambers, provided that each purchase "is consistent with work-related objectives and the agency mission, and is not primarily for the personal convenience or personal satisfaction of a Government officer or employee." 63 Comp. Gen. 110, 113 796
Handicapped employees
Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost beneficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. 5727(a) 30
Specially equipped automobile, (*See* APPROPRIATIONS, Availability, Specially equipped automobile
Plaques
Pennsylvania Avenue Development Corporation (PADC) may install a memorial plaque and designate a site within an area under its jurisdiction and control in honor of a deceased former chairperson of the PADC using funds donated to it. PADC has been vested with authority to determine the character of and necessity for its obligations and expenditures and to accept gifts of financial aid from any source and comply with the terms thereof. These authorities are sufficient to free PADC from restriction otherwise imposed upon Government agencies in the expenditure of appropriated funds except where a statutory restriction expressly applies to Government corporations. No law expressly precludes proposed expenditure by PADC. Further-

APPROPRIATIONS—Continued Page
Availability—Continued
Plaques—Continued
more, no law precludes PADC from designating property under its control in honor of deceased former chairperson of PADC 124
Promoting public support or opposition
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
Publicity and propaganda
Lobbying. (*See* LOBBYING)
Political activities
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
Refugee assistance
The Office of Refugee Resettlement (ORR) did not impound funds under the fiscal year 1984 continuing resolution so long as it made available for obligation the full $585,000,000 appropriated for the refugee and entrant assistance account. The continuing resolution appropriated a lump-sum amount for the refugee and entrant assistance account, rather than specific amounts for the various programs funded by that account. Allocations specified in the congressional committee reports were not binding on the ORR and it could allocate funds differently so long as it did not withhold any of the total $585,000,0000 appropriation 21
The Office of Refugee Resettlement, in allocating funds appropriated for refugee and entrant assistance under the fiscal year 1984 continuing resolution, misinterpreted earlier decisions of this Office. "Current rate" as used in continuing resolutions refers to a definite sum of money rather than a program level. The different result reached in B-197636, Feb. 25, 1980, was limited to the unusual facts in that case 21
Unobligated fiscal year 1984 carryover funds should not be deducted from the sum appropriated for refugee and entrant targeted assistance by the Fiscal Year 1985 Continuing Resolution. The general rule set forth in 58 Comp. Gen. 530 (1979) on which the Office of Refugee Resettlement (ORR) relied is distinguished. The result is also supported by strong expressions of congressional intent in the legislative history 649
Specially equipped automobile
Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost beneficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. 5727(a) 30

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Claims

Personal property losses

Amount 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

Continuing resolutions

Availability of funds

Unobligated fiscal year 1984 carryover funds should not be deducted from the sum appropriated for refugee and entrant targeted assistance by the Fiscal Year 1985 Continuing Resolution. The general rule set forth in 58 Comp. Gen. 530 (1979) on which the Office of Refugee Resettlement (ORR) relied is distinguished. The result is also supported by strong expressions of congressional intent in the legislative history..... 649

Current rate of program operations

The Office of Refugee Resettlement, in allocating funds appropriated for refugee and entrant assistance under the fiscal year 1984 continuing resolution, misinterpreted earlier decisions of this Office. "Current rate" as used in continuing resolutions refers to a definite sum of money rather than a program level. The different result reached in B-197636, Feb. 25, 1980, was limited to the unusual facts in that case..... 21

Expiration

Unobligated balance availability

Unobligated fiscal year 1984 carryover funds should not be deducted from the sum appropriated for refugee and entract targeted assistance by the Fiscal Year 1985 Continuing Resolution. The general rule set forth in 58 Comp. Gen. 530 (1979) on which the Office of Refugee Resettlement (ORR) relied is distinguished. The result is also supported by strong expressions of congressional intent in the legislative history..... 649

Impoundment of funds

Recession *v.* resolutions

Temporary resolutions

Rationale for deferral

Although General Accounting Office differs from the ORR in arriving at the amount made available in Fiscal Year 1985 by the Continuing Resolution for refugee and entrant targeted assistance, we do not consider ORR to have violated the Impoundment Control Act, 2 U.S.C. 681 et seq. (1982). This case involves a good faith disagreement regarding the total amount of funds available for a particular program. There is no evidence that any agency official determined that the funds in question should not be spent for fiscal policy or other reasons..... 649

Refugee assistance programs

The Office of Refugee Resettlement (ORR) did not impound funds under the fiscal year 1984 continuing resolution so long as it made

APPROPRIATIONS—Continued Page
Continuing resolutions—Continued
Refugee assistance programs—Continued
available for obligation the full $585,000,000 appropriated for the refugee and entrant assistance account. The continuing resolution appropriated a lump-sum amount for the refugee and entrant assistance account, rather than specific amounts for the various programs funded by that account. Allocations specified in the congressional committee reports were not binding on the ORR and it could allocate funds differently so long as is did not withhold any of the total $585,000,000 appropriation 21
Contracts
Amounts recovered under defaulted contracts
Disposition
Funding replacement contracts
A performance bond, forfeited to the Government by a defaulting contractor, may be used to fund a replacement contract to complete the work of the original contract. The performance bond constitutes liquidated damages which may be credited to the proper appropriation account in accordance with analysis and holding in 62 Comp. Gen. 678 (1983). 46 Comp. Gen. 554 (1966) is modified to conform to this decision. Requirements for documentation of the accounting transactions are set forth in the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies 625
Deficiencies
Anti-Deficiency Act
Violations
Not established
ICC actions did not violate the Anti-deficiency Act, 31 U.S.C. 1341 (1982) because it never expended funds or incurred obligations in excess or advance of available appropriations as apportioned by OMB. Actions taken by the ICC demonstrate that from the point at which the Congress and the President approved legislation that would cause their spending level to exceed budgetary limits, every decision related to expenditures, furloughs and RIFS were made to avoid violation of the objectives of both maintaining essential services and staying within budgetary limits 728
Overobligations
Expenditures by SBA in 1984 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 Anti-deficiency Act since such expenditures would exceed available appropriations as that term is used in the Anti-deficiency 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 Anti-deficiency Act if it exceeded the statutory ceiling on 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
Possibility
Underestimating obligations
Although not expressly stated in the statutory language, we have held that the Anti-deficiency Act requires heads of Federal agencies

APPROPRIATIONS—Continued Page
Deficiencies—Continued
Anti-Deficiency Act—Continued
Violations—Continued
Possibility—Continued
Underestimating obligations—Continued
to expend fiscal year appropriation so as to prevent the necessity for supplemental or deficiency appropriation and to avoid exhausting the funds before the end of the period for which they are appropriated. ICC met this requirement by adopting an operating plan for fiscal year 1985.
The apportionment provisions of the Anti-deficiency Act are violated if only a drastic curtailment of activity will allow an agency to get through the year without exhausting its appropriations. Therefore, should there be no supplemental, the ICC will be forced to take more drastic action than its original furlough plan to avoid violating the Anti-deficiency Act. If the Commission does not act soon, it may be unable to avoid violating the Act. *Cf.* 36 Comp. Gen. 699 that while including a request for a supplemental appropriation also included an emergency plan which would enable the ICC to operate for the entire fiscal year even without a supplemental 728
Statutory restrictions
Violation
Expenditures by SBA in 1984 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 Anti-deficiency Act since such expenditures would exceed available appropriations as that term is used in the Anti-deficiency 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 Anti-deficiency Act if it exceeded the statutory ceiling on 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
Department of Health and Human Service
Office of Community Services
The Department of Health and Human Service did not act improperly in fiscal year 1983 in teminating 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 has 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 370
Fiscal year
Availability beyond
Travel and transportation expenses
Reimbursable expenses of an employee transferred in the interest of the Government must be charged against the appropriation current when valid travel orders are issued. B-122358, August 4, 1976 and 35 Comp. Gen. 183 (1955) and other cases inconsistent with this decision are overruled 45

APPROPRIATIONS—Continued Page
Fiscal year—Continued
Availability beyond—Continued
Travel and transportation expenses—Continued
Reimbursable expenses due to extension of up to 60 days of temporary quarters subsistence expenses should be charged against the appropriation current when valid travel orders are issued. *See* 64 Comp. Gen. 45 (1984) 901
Health and Human Services Department. (*See* APPROPRIATIONS, Department of Health and Human Services)
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 410
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 410
Impounding
Executive Branch's failure to expend appropriate 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..... 359
Expenditure by the Dept. of Health and Human Services of $1.7766 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 370
Although General Accounting Office differs from the ORR in arriving at the amount made available in Fiscal Year 1985 by the Continuing Resolution for refugee and entrant targeted assistance, we do not consider ORR to have violated the Impoundment Control Act, 2 U.S.C. 681 et seq. (1982). This case involves a good faith disagreement regarding the total amount of funds available for a particular program. There is no evidence that any agency official determined that the funds in question should not be spent for fiscal policy or other reasons 649

APPROPRIATIONS—Continued Page
Impounding—Continued
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 specifically differentiating between "program" appropriations and "salaries and expense" appropriations 370
Continuing resolutions. (*See* APPROPRIATIONS, Continuing resolutions, Impoundment of funds)
Deferral
What constitutes
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..... 359
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Lump-sum appropriation
Full amount available
Allocation
The Office of Refugee Resettlement (ORR) did not impound funds under the fiscal year 1984 continuing resolution so long as it made available for obligation the full $585,000,000 appropriated for the refugee and entrant assistance account. The continuing resolution appropriated a lump-sum amount for the refugee and entrant assistance account, rather than specific amounts for the various programs funded by that account. Allocations specified in the congressional committee reports were not binding on the ORR and it could allocate funds differently so long as it did not withhold any of the total $585,000,000 appropriations 21
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Judgments. (*See* COURTS, Judgments, decrees, etc., Payment)
Permanent indefinite appropriation availability. (*See* COURTS, Judgments, decrees, etc., Payment, Permanent indefinite appropriations availability)

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APPROPRIATIONS—Continued Page

Limitations

Authorization limitation

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 provision 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

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. 98-619, 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. 55 Comp. Gen. 307, 319, 325-326 359

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

Expenditures beyond

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

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Allocation

The Office of Refugee Resettlement (ORR) did not impound funds under the fiscal year 1984 continuing resolution so long as it made available for obligation the full $585,000,000 appropriated for the refugee and entrant assistance account. The continuing resolution appropriated a lump-sum amount for the refugee and entrant assistance account, rather than specific amounts for the various programs funded by that account. Allocations specified in the congressional committee reports were not binding on the ORR and it could allocate

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Obligation
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"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements 163
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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
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Unobligated fiscal year 1984 carryover funds should not be deducted from the sum appropriated for refugee and entrant targeted assistance by the Fiscal Year 1985 Continuing Resolution. The general rule set forth in 58 Comp. Gen. 530 (1979) on which the Office of the Refugee Resettlement (ORR) relied is distinguished. The result is also supported by strong expressions of congressional intent in the legislative history 649
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"*Bona fide* needs"
"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements 163
Although sufficient lump-sum missile procurement funds were appropriated in FYs 1984 and 1985 for this purpose, Army cannot rely on fact that cognizant congressional committees were aware of its intent to exercise options for advance procurement of EOQ items for 6th and 7th year end items. It cannot be said that the Congress as a whole intended to provide an exception to the *bona fide* needs statute in addition to the limited exception for 5-year multiyear contracts in 10 U.S.C. 2306(h) where this purpose was never stated in the legislation itself or in the committee reports, and where the reports themselves created the impression that the funds were to be used for an existing multiyear contract 163
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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
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Expenditures for hiring extra waiters and busboys to serve at official functions at foreign posts must be charged to the State Department representational allowance appropriation. The allotment for official residence expenses, derived from the lump sum appropriations for salaries and expenses, covers household servants who maintain the official residence. State Department regulations do not appear to include temporary help hired for specific events as household servants. 138
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Even if expenses for temporary help could be considered generally to be covered under regulations governing the appropriation allotment for official residence expenses, such expenses should only be paid from the representational allowance appropriation. Long-standing Comptroller General decisions prescribe the use of an appropriation specifically available for a purpose to the exclusion of a more general appropriation that could encompass the same purpose. Moreover, section 454 of the State Department Standardized Regulations forbids the use of official residence expense allotments if there is any other appropriation that covers the same purpose 138
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Contract Work Hours and Safety Standards Act
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The Department of Labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, and failed to pay its employees overtime compensation. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act 591
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The Department of Labor (DOL) recommended debarment of a contractor for violations of the Davis-Bacon Act constituting a disregard of its obligations to employees under the Act, and both parties reached an agreement in an administrative law proceeding stipulating to the contractor's debarment. Accordingly, where the contractor specifically stipulates to debarment, after being granted due process by DOL in the form of an administrative law proceeding, we will accept DOL's findings as evidence of a violation of the Davis-Bacon Act. Therefore, the contractor is hereby debarred under the Act 637
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Debarment required
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The Department of Labor recommended debarment of a contractor for violations of the Davis-Bacon Act because the contractor had underpaid employees and maintained payroll records that were not complete as required. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was grossly careless, coupled with an indication of bad faith. Therefore, the contractor will be debarred under the Act 589
Evidence
The Department of Labor (DOL) recommended debarment of a contractor for violations of the Davis-Bacon Act constituting a disregard of its obligations to employees under the Act, and both parties reached an agreement in an administrative law proceeding stipulating to the contractor's debarment. Accordingly, where the contractor specifically stipulates to debarment, after being granted due process by DOL in the form of an administrative law proceeding, we will

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accept DOL's findings as evidence of a violation of the Davis-Bacon Act. Therefore, the contractor is hereby debarred under the Act 637
Wage underpayments
Debarment required
The Department of labor recommended debarment of a contractor under the Davis-Bacon Act because the contractor had falsified certified payroll records, and failed to pay its employees overtime compensation. Based on our independent review of the record in this matter, we conclude that the contractor disregarded its obligations to its employees under the Act. There was a substantial violation of the Act in that the underpayment of employees was intentional. Therefore, the contractor will be debarred under the Act 595
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Walsh-Healey Act purpose
Prior decision, which held that a small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healey Public Contracts Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. the Department of labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a representation by a small business bidder that it is a manufacturer of the supplies being procured is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern 748
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Failure of bidder to complete
Minor informalities
Waiver
A bidder's failure to complete the contingent-fee and affiliation certifications in the Standard Form 33 is a minor informality that can be waived since completion of these certifications is not necessary to determine the responsiveness of a bid 8

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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 384
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All or none
Award propriety
Agency may properly award to "all or none" bidder notwithstanding invitation for bids provision that award will be by individual items 265
Ambiguous
Acceptance
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 425
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Where firm submits three copies of its bid, each with a total price of $820,000; prices masonry work at $495 on two copies and $4,495 on

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the third; and claims that $495 was intended and that the total bid should be $816,000 ($820,000 incorporates the $4,495 figure), it is not clear what the bid actually intended was, particularly since $4,495 is consistent with the other four bidders' prices for the work 561
A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be subject of award 628
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
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A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by a subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be subject of award 628
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
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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 425
Nonresponsive 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 325
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
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Where firm submits three copies of its bid, each with a total price of $820,000; prices masonry work at $495 on two copies and $4,495 on the third; and claims that $495 was intended and that the total bid

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should be $816,000 ($820,000 incorporates the $4,495 figure), it is not clear what the bid actually intended was, particularly since $4,495 is consistent with the other four bidders' prices for the work 561

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 reasonable 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 325

What constitutes an ambiguity

Where firm submits three copies of its bid, each with a total price of $820,000; prices masonry work at $495 on two copies and $4,496 on the third; and claims that $495 was intended and that the total bid should be $816,000 ($820,000 incorporates the $4,495 figure), it is not clear what the bid actually intended was, particularly since $4,495 is consistent with the other four bidders' prices for the work 561

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Buy American Act. (*See* **BUY AMERICAN ACT**)

Bonds (*See* **BONDS, Bid**)

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Equal bidding basis for all bidders

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That requirement for contractor to respond to emergency service calls within 3 hours and agency refusal to pay travel expenses to and from the place of performance may leave some potential bidders at a competitive disadvantage vis-a-vis competitors located closer to the place of performance does not in itself render the solicitation unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders 528

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That requirement for contractor to respond to emergency service calls within 3 hours and agency refusal to pay travel expenses to and from the place of performance may leave some potential bidders at a competitive disadvantage vis-a-vis competitors located closer to the place of performance does not in itself render the solicitation unduly restrictive of competition. A contracting agency is under no obligation to compensate for the advantages enjoyed by some firms, advantages which are not the result of preferential or unfair government action, in order to equalize the competitive position of all potential bidders 528
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quire contracting agency to provide in a formally advertised invitation for bids for the payment of travel expenses to and from the place of performance. 528
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A bank or credit union check submitted with a bid as a bid guarantee is not an acceptable substitute for a cashier's check, since such checks may be subject to a stop payment order and therefore are not in the form of the firm commitment required of a bid guarantee at the time of bid opening 770

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Materiality determination
An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived. Modifies 62 Comp. Gen. 111 189
Wage determination changes
A bidder's failure to acknowledge a Davis-Bacon Act wage rate amendment may be treated as a minor informality in the bid, thus permitting correction after bid opening, if the effect on price is clearly *de minimis,* and the bidder affirmatively evinces its acknowledging the amendment as soon as possible thereafter, but always prior to award. Modifies 62 Comp. Gen. 111 189
Bid which failed to acknowledge amendment requiring upward wage rate revision was properly rejected as nonresponsive. Failure to acknowledge amendment could not be waived as a minor informality because the effect of the amendment on bid price cannot be said to be clearly *de minimis* 780
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A bidder's failure to acknowledge a Davis-Bacon Act wage rate amendment may be treated as a minor informality in the bid, thus

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permitting correction after bid opening, if the effect on price is clearly *de minimis,* and the bidder affirmatively evinces its acknowledging the amendment as soon as possible thereafter, but always prior to award. This decision modifies 62 Comp. Gen. 111 189
An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived. This decision modifies 62 Comp. Gen. 111 189
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Effect on competition
An amendment which imposes no different or additional legal obligations on the bidders from those imposed by the original invitation is not material, and thus failure to acknowledge receipt of such an amendment may be waived. This decision modifies 62 Comp. Gen 111 189
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After bid opening
Contracting officer's determination to cancel an IFB based on speculation that a modification which made the protester's bid low may not have been mailed when a certified mail receipt shows it was mailed lacks a reasonable basis since the Postal Service found no evidence of irregularities 916
Contracting agency had a compelling reason for canceling IFB for public works services where, because of provisions setting minimum performance deadlines for fewer than 100 percent of repair service calls, agency could not ensure that all service calls would be performed in a timely manner, as required to meet the agency's minimum needs 854
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 425
Contracting agency had a compelling reason for canceling IFB for public works services where, because of provisions setting minimum performance deadlines for fewer than 100 percent of repair service calls, agency could not ensure that all service calls would be performed in a timely manner, as required to meet the agency's minimum needs 854
Defective solicitation
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

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Invitation for bids—Continued
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Defective solicitation—Continued
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 425
Justification
Inaccurate specifications
Contracting agency had a compelling reason for canceling IFB for public works services where, because of provisions setting minimum performance deadlines for fewer than 100 percent of repair service calls, agency could not ensure that all service calls would be performed in a timely manner, as required to meet the agency's minimum needs 854
Low bid in excess of Government estimate
Agency's rejection of only bid received on the basis of unreasonable price, resulting in cancellation of solicitation, is proper when the bid price is approximately 27 percent higher than the government estimate 810
Issuance of a request for proposals after cancellation of invitation for bids on the basis of price unreasonableness, instead of negotiation with sole bidder responding to the invitation, is proper, since regulations permit but do not require such negotiation and since cancellation determination does not authorize negotiation on this basis 810
Erroneous
Reinstatement recommended
Contacting officer's determination to cancel an IFB based on speculation that a modification which made the protester's bid low may not have been mailed when a certified mail receipt shows it was mailed lacks a reasonable basis since the Postal Service found no evidence of irregularities 916
Justification
Since Solid Waste Disposal Act requires federal agencies to comply with local requirements respecting the control and abatement of solid waste generated by federal facilities in the same manner and extent as any person subject to such requirements, those federal facilities located within the city of Monterey must comply with a city requirement that all inhabitants of the city have their solid waste collected by the city's franchisee. Therefore, federal solicitations seeking bids for these services should be canceled and the services of the city or its franchisee should be used instead 813
Unreasonableness of prices bid. (*See* **BIDS, Invitation for bids, Cancellation, After bid opening, Low bid in excess of Government estimate**)
Reinstatement
Recommended by GAO
Factors considered
Contracting officer's determination to cancel an IFB based on speculation that a modification which made the protester's bid low may not have been mailed when a certified mail receipt shows it was mailed lacks a reasonable basis since the Postal Service found no evidence of irregularities 916

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Invitation for bids—Continued
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Resolicitation
Negotiated Procurement
Issuance of a request for proposals after cancellation of invitation for bids on the basis of price unreasonableness, instead of negotiation with sole bidder responding to the invitation, is proper, since regulations permit but do not require such negotiation and since cancellation determination does not authorize negotiation on this basis 810
Validity
Contracting officer's determination to cancel an IFB based on speculation that modficiation which made the protester's bid low may not have been mailed when a certified mail receipt shows it was mailed lacks a reasonable basis since the Postal Service found no evidence of irregularities 916
Clauses
Liquidated damages
Legality
Protester, alleging a liquidated damages provision imposes a penalty, must show that there is no possible relationship between the liquidated damages rate and reasonably contemplated losses. A solicitation provision shown to authorize deductions for an entire lot of custodial services, based on the contractor's unsatisfactory performance of only a portion of the tasks, imposes a penalty if it authorizes deductions without regard to what proportion of the services renders the entire lot unsuitable for the government's purpose 54
Specifications
Adequacy
Protest in which protester argues for more restrictive specifications—that a safety observer be present whenever maintenance or repair work is performed on refrigeration equipment—is denied where protester fails either to present evidence of fraud or willful misconduct by government officials or to point to a particular regulation which clearly requires the presence of a safety observer under the circumstances 528
Scope of work
Sufficiency of detail
Where performance-type specifications adequately inform bidders of government's requirements for sound level audibility of fire alarm system in all building areas, fact that contractor is responsible for providing speakers in the quantities and locations necessary to satisfy the specified performance requirements does not make specifications insufficient to permit bidding on an intelligent and equal basis .. 511
Ambiguity
What constitutes
Where performance-type specifications adequately inform bidders of government's requirements for sound level audibility of fire alarm system in all building areas, fact that contractor is responsible for

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What constitutes—Continued
providing speakers in the quantities and locations necessary to satisfy the specified performance requirements does not make specifications insufficient to permit bidding on an intelligent and equal basis.. 511
Brand Name
Consideration of "Equal" bid
Propriety
Protest is denied where protester fails to demonstrate that brand other than that specified in contracting agency's solicitation would satisfy agency's solicitation would satisfy agency's needs or that agency's brand name requirement is unreasonable 756
Reasonableness
Protest is denied where protester fails to demonstrate that brand other than that specified in contracting agency's solicitation would satisfy agency's needs or that agency's brand name requirement is unreasonable. 756
Defective
Allegation not sustained
Where performance-type specifications adequately inform bidders of government's requirements for sound level audibility of fire alarm system in all building areas, fact that contractor is responsible for providing speakers in the quantities and locations necessary to satisfy the specified performance requirements does not make specifications insufficient to permit bidding on an intelligent and equal basis.. 511
Protester has not met burden of proving that specification for janitorial services is deficient because estimated quantities or "mandays" needed to clean certain buildings are consistent with sizes of buildings 593
Evaluation criteria
Where evaluation method in invitation for bids is structured so as to encourage unbalanced bidding, the invitation is defective, *per se*, and no bid can be evaluated properly because there is insufficient assurance that award will result in the lowest ultimate cost to the government 848
Responsiveness. (*See* **BIDS, Responsiveness**)
Specifications
Brand name or equal
"Equal" product evaluation
Salient characteristics not met
Protest is sustained where the contracting agency concedes that the awardee's bid for an "equal" product should have been rejected as nonresponsive for failing to meet precise dimensions specified in a brand name or equal purchase description. Where solicitation includes precise performance or design characteristics, "equal" product must meet them exactly, and mere functional equivalency will not do 868

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Invitation for bids—Continued
Specifications—Continued
Defective
Not prejudicial
A contract awarded on the basis of defective specifications should not be terminated and the requirement resolicited where no competitive prejudice to any bidder is apparent and the government met its minimum needs at reasonable prices after adequate competition 482
Minimum needs requirement
Administrative determination
Reasonableness
In the absence of a specific statute or regulation mandating the establishment of geographic regions, an agency generally must show that its minimum needs define the scope of a geographic restriction in a contract 160
Protest that specifications are in excess of contracting agency's minimum needs and unduly restrictive of competition is denied where there is no showing that agency lacked a reasonable basis for requiring contractor (1) to respond to request for emergency service on refrigeration equipment at commissary store within 3 hours, and with the tools the agency considered minimally necessary for prompt and efficient service, in order to avoid spoilage of perishable refrigerated food items, and (2) to schedule routine preventive maintenance when the commissary store is closed so as to minimize disruption of commissary operations 528
Minimum needs requirement
Administrative determination
Reasonableness
Protest in which protester argues for more restrictive specifications—that a safety observer be present whenever maintenance or repair work is performed on refrigeration equipment—is denied where protester fails either to present evidence of fraud or willfull misconduct by government officials or to point to a particular regulation which clearly requires the presence of a safety observer under the circumstances 528
Restrictive
Burden of proving undue restriction
Protest that specifications are in excess of contracting agency's minimum needs and unduly restrictive of competition is denied where there is no showing that agency lacked a reasonable basis for requiring contractor (1) to respond to request for emergency service on refrigeration equipment at commissary store within 3 hours, and with the tools the agency considered minimally necessary for prompt and efficient service, in order to avoid spoilage of perishable refrigerated food items, and (2) to schedule routine preventive maintenance when the commissary store is closed so as to minimize disruption of commissary operations 528
A solicitation specifying corrugated metal pipe for a closed conduit waterway, thereby excluding an offer for concrete pipe, is not unduly restrictive where the contracting agency establishes a *prima facie* case that the requirement is reasonable, based upon a comparative cost analysis, and the protester, although questioning the agency's

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Invitation for bids—Continued
Specifications—Continued
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Burden of proving undue restriction—Continued
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Late
Modification
Rejection
A late modification of a bid may not be accepted if the bid as originally submitted is nonresponsive 768
Mistakes
Allegation after award. (*See* **CONTRACTS, Mistakes**)
Allegation by other than bidder involved
Protester
Protest that competitor's bid may be mistaken because it seems too low is dismissed since only the contracting parties may assert rights and bring forth all necessary evidence to resolve mistake in bid questions. Moreover, submission of bid considered by another firm as too low does not constitute a legal basis for precluding award 265
Clerical errors
Unit quantities
Bid, which quoted monthly unit prices instead of the requested man-hour unit prices on an invitation for bids for janitorial services, may be corrected as a clerical error obvious from the face of the bid, where the unit prices quoted are one-twelfth of the extended yearly prices and the man-hour unit prices are easily ascertainable by dividing the total yearly prices by the estimated man-hour quantities stated in the invitation for bids 593
Correction
After bid opening
Rule
A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by a subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be subject of award 628
Clerical error
Bid, which quoted monthly unit prices instead of the requested man-hour unit prices on an invitation for bids for janitorial services, may be corrected as a clerical error obvious from the face of the bid, where the unit prices quoted are one-twelfth of the extended yearly prices and the man-hour unit prices are easily ascertainable by dividing the total yearly prices by invitation for bids 593
Evidence of error
Worksheets
Agency acted reasonably in allowing correction of a mistake in bid where the bidder's worksheets show an inadvertent error in failing to add a $7.00 item, thus clearly establishing that a mistake was made, how the mistake occurred, and the amount of the intended bid 441

BIDS—Continued Page
Mistakes—Continued
Correction—Continued
Intended bid price
Established in bid
Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid 830
Establishment required
Agency acted reasonably in allowing correction of a mistake in bid where the bidder's worksheets show an inadvertent error in failing to add a $7.00 item, thus clearly establishing that a mistake was made, how the mistake occurred, and the amount of the intended bid 441
In deciding cases involving bid correction which displace the low bidder, the critical element is that the intended bid price be ascertainable from the bid itself 809
Low bid displacement
In deciding cases involving bid correction which displace the low bidder, the critical element is that the intended bid price be ascertainable from the bid itself 809
Agency improperly premitted awardee to correct unit bid, displacing protester's lower bid, where the awardee's unit bid, extended bid and total bid were in agreement and existence of error was not otherwise discernable from face of bid. General Accounting Office recommends that awardee's contract be terminated for convenience and that award be made to protester 698
Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid 830
Prejudical to other bidders
Agency improperly permitted awardee to correct unit bid, displacing protester's lower bid, where the awardee's unit bid, extended bid and total bid were in agreement and existence of error was not otherwise discernable from face of bid. General Accounting Office recommends that awardee's contract be terminated for convenience and that award be made to protester 698
Price reduction
Agency improperly permitted awardee to correct unit bid, displacing protester's lower bid, where the awardee's unit bid, extended bid and total bid were in agreement and existence of error was not otherwise discernable from face of bid. General Accounting Office recommends that awardee's contract be terminated for convenience and that award be made to protester 698
Propriety
Agency acted reasonably in allowing correction of a mistake in bid where the bidder's worksheets show an inadvertent error in failing to add a $7.00 item, thus clearly establishing that a mistake was made, how the mistake occurred, and the amount of the intended bid 141

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Agency improperly permitted awardee to correct unit bid, displacing protester's lower bid, where the awardee's unit bid, extended bid and total bid were in agreement and existence of error was not otherwise discernable from face of bid. General Accounting Office recommends that awardee's contract be terminated for convenience and that award be made to protester 698
Evidence of error
Correction authorized. (*See* **BIDS, Mistakes, Correction**)
Sufficiency
Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid 830
Low bid displacement (*See* **BIDS, Mistakes, Correction, Low bid displacement**)
Nonresponsive bids
Correction improper
A late modification of a bid may not be accepted if the bid as originally submitted is nonresponsive 768
Waiver, etc. of error
Where the bidder, by entering a bid price for every item, offered to perform as required under the solicitation and at a price apparent on the face of the bid, the failure to enter a total price did not render the bid nonresponsive and, instead, may be considered an informality and waived 830
Modification
After bid opening
Mistake correction. (*See* **BIDS, Mistakes, Correction**)
Before bid opening
Ambiguity allegation
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be non-responsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by a subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be subject of award 628
Negotiated procurement (*See* **CONTRACTS, Negotiation**)
Nonresponsive to invitation (*See* **BIDS, Responsiveness**)
Omissions
Prices in bid
Bidders may elect not to charge the government for certain services, and when they have indicated that they are aware of and will-

BIDS—Continued Page

Omissions—Continued

Prices in bid—Continued

ing to commit themselves to furnishing the item in question—as by inserting a zero, "no charge," or "not separately priced,"—the bid is responsive and the bidder may be considered for award notwithstanding agency's desire for dollar amount entry to serve as incentive to perform the service 553

Essentiality of omission

Failure to provide a price for a bid item as requested by an amendment may be waived as a minor informality where bidder acknowledged receipt of the amendment, the change effected by the amendment was immaterial, and waiver would not be prejudicial to other bidders. *E. H. Morrill Company,* 63 Comp. Gen. 348 (1984), 84-1 C.P.D. 508; *Goodway Graphics of Virginia, Inc.,* B-193193, Apr. 3, 1979, 79-1 C.P.D. 230. This decision modifies 63 Comp. Gen. 348 and B-193193, Apr. 3, 1979 279

Options. (*See* **CONTRACTS, Options**)

Prices

Below cost

Not basis for precluding award

Protest that competitor's bid may be mistaken because it seems too low is dismissed since only the contracting parties may assert rights and bring forth all necessary evidence to resolve mistake in bid questions. Moreover, submission of bid considered by another firm as too low does not constitute a legal basis for precluding award 265

Escalation

Provision

Where an invitation for bids for janitorial services requires bidders to submit with their bids a base rate necessary for the operation of the Economic Price Adjustment clause, which provides for upward and downward price adjustments based on fluctuations from a based rate quoted in the successful bid, bids not quoting this rate must be rejected as nonresponsive. Failure to provide such information at bid opening is material because the legal rights of the contractor and government are affected 593

Propriety

An Economic Price Adjustment clause in an invitation for bids for janitorial services which provides for price adjustments based on fluctuations from a base rate quoted in the successful bid may not adequately protect the government's legal rights. Although this base rate is supposed to be based on labor rates on which the bid price is based, there is an economic incentive for a bidder to submit a base rate less than that on which it based its bid price to enhance the possibility of an upward price adjustment and minimize the possibility of a downward price adjustment. In this case, the bid base rate of the low responsive bidder is significantly lower than next low bidder although the difference between the bids is not significant; consequently, verification of this base rate should be made before award 593

Excessive

Cancellation of invitation. (*See* **BIDS, Invitation for bids, cancellation, After bid opening Low bid in excess of Government estimate**)

BIDS—Continued Page
Omissions—Continued
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 evaluate for award, bid was properly rejected for failure to offer firm, fixed price.. 355
A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by a subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be subject of award 628
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
Not offered
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 355
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
Item omission
Failure to provide a price for a bid item as requested by an amendment may be waived as a minor informality where bidder acknowledged receipt of the amendment, the change effected by the amendment was immaterial, and waiver would not be prejudicial to other bidders. *E. H. Morrill Company*, 63 Comp. Gen. 348 (1984), 84-1 C.P.D. 508; *Goodway Graphics of Virginia, Inc.*, B-193193, Apr. 3, 1979, 79-1 C.P.D. 230. This decision modifies 63 Comp. Gen. 348 and B-193193, Apr. 3, 1979 279
Level pricing clause
Bid responsiveness
In a situation where a bidder violates an invitation for bids' level pricing provision, the determinative issue as to the responsiveness of the bid is whether or not this deviation worked to the prejudice of other bidders. Therefore, an unlevel low bid will not be found to be nonresponsive where it cannot be shown that the second low bidder conceivably could have become low if it had been permitted to unlevel its bid in the same manner as did the offending bidder. B-206127.2, Oct. 8, 1982; 60 Comp. Gen. 202; B-195520.2, Jan. 7, 1980; 54 Comp. Gen. 967; and 54 Comp. Gen. 476, are distinguished 48
Omissions. (*See* **BIDS, Omissions, Prices in bid**)

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Prices—Continued

Pricing response nonresponsive

A bid is nonresponsive, and the bidder submitting it thus is not eligible for award, where the intended total bid price cannot be determined from the bid documents submitted at the time of bid opening... 639

Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702

Reasonableness

Imbalance in pricing

The apparent low bid on a contract for a 1-year base period and two 1-year options is materially unbalanced where there is reasonable doubt that acceptance of the bid will result in the lowest ultimate cost to the government. Such doubt may exist where the bid has a substantially front-loaded base period and does not become low until well into the last option year 519

Preparation

Costs

Recovery

When, in view of the extent of performance and need for interchangeability, it is not feasible for an agency to terminate an improperly awarded contract for the convenience of the government, the protester is entitled to recover both its bid preparation costs and its costs of filing and pursuing the protest at the General Accounting Office 868

Prices

Conflicting

Bid Acceptance

Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid 830

Discrepancies

Discrepancy in bid between stated total of lump sum and extended price items and the correct mathematical total of such items may be corrected so as to displace another, otherwise low offer where both the intended bid price and the nature of the mistake are apparent on the face of the bid 830

Protests (*See* **CONTRACTS, Protests**)

Rejection

Nonresponsive. (*See* **BIDS, Responsiveness**)

Propriety

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

BIDS—Continued Page
Rejection—Continued
Propriety—Continued
charge or providing the required materials only to the extent they could be supplied from pan stock 325
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 355
A nonresponsive bid may not be accepted even though it would result in monetary savings to the government since acceptance would be contrary to the maintenance of the integrity of the competitive bidding system 768
Agency's rejection of only bid received on the basis of unreasonable price, resulting in cancellation of solicitation, is proper when the bid price is approximately 27 percent higher than the government estimate 810
Responsiveness
Amendments to invitation
Failure to acknowledge. (*See* BIDS, Invitation for bids, Amendment, Failure to acknowledge)
Bid guarantee requirement
A bid bond is defective when no penal sum has been inserted on the bond, either as a percentage of the bid amount or as a fixed sum. Prior General Accounting Office cases to the contrary, including 51 Comp. Gen. 508 (1972), are hereby overruled 505
Brand name or equal procurement
Protest is sustained where the contracting agency concedes that the awardee's bid for an "equal" product should have been rejected as nonresponsive for failing to meet precise dimensions specified in a brand name or equal purchase description. Where solicitation includes precise performance or design characteristics, "equal" product must meet them exactly, and mere functional equivalency will not do 868
Determination
On Basis of bid as submitted at bid opening
A late modification of a bid may not be accepted if the bid as originally submitted is nonresponsive 768
Exceptions taken to invitation terms
Use of bid bond form other than required Standard Form 24 is not objectionable where intent of surety and principal to be bound and identity of United States as intended and true obligee is clearly shown by bond itself. Contrary interpretation of regulation by protester is inconsistent with underlying concept of responsiveness, rejected 474
Failure to acknowledge amendment. (*See* BIDS, Invitation for bids, Amendments, Failure to acknowledge)
Failure to furnish something required
Bid signature
An agency may waive a bidder's failure to sign its bid as a minor informality, thus obviating rejection of the bid as nonresponsive, when the bid is accompanied by other documentation signed by the

BIDS—Continued Page
Responsiveness—Continued
Failure to furnish something required—Continued
Bid signature—Continued
bidder which clearly evinces the bidder's intent to be bound, such as an acknowledged amendment 233
Delivery Information, Prices, etc.
When low bid does not specify shipping point and information is necessary to determine transportation costs in evaluation of bids on an f.o.b. origin basis, the agency may properly reject the bid as nonresponsive. An exception for bids where the shipping point can be ascertained by reading the bid as a whole does not apply where there is no other place designated in the bid from which the protester would legally be bound to ship 896
Prices
Failure to provide a price for a bid item as requested by an amendment may be waived as a minor informality where bidder acknowledged receipt of the amendment, the change effected by the amendment was immaterial, and waiver would not be prejudicial to other bidders. *E. H. Morrill Company*, 63 Comp. Gen. 348 (1984), 84-1 C.P.D. 508; *Goodway Graphics of Virginia, Inc.*, B-193193, Apr. 3, 1979, 79-1 C.P.D. 230. This decision modifies 63 Comp. Gen. 348 and B-193193, Apr. 3, 1979 279
Bidders may elect not to charge the government for certain services, and when they have indicated that they are aware of and willing to commit themselves to furnishing the item in question—as by inserting a zero, "no charge," or "not separately priced," —the bid is responsive and the bidder may be considered for award notwithstanding agency's desire for dollar amount entry to serve as incentive to perform the service 553
Where an invitation for bids for janitorial services requires bidders to submit with their bids a base rate necessary for the operation of the Economic Price Adjustment clause, which provides for upward and downward price adjustments based on fluctuations from a based rate quoted in the successful bid, bids not quoting this rate must be rejected as nonresponsive. Failure to provide such information at bid opening is material because the legal rights of the contractor and government are affected 593
Standard representations and certifications
Waiver
As minor informality
A bidder's failure to complete the contingent-fee and affiliation certifications in the Standard Form 33 is a minor informality that can be waived since completion of these certifications is not necessary to determine the responsiveness of a bid 8
Subcontractor Listing
Fact that bid package did not include a form for listing subcontractors, nor highlight requirement for subcontractor listing, does not render improper an agency's rejection of bid for failure to include subcontractor listing required by IFB to prevent bid shopping 768
Identity of bidder ambiguous
Bids must adequately establish who the true bidding entities are to insure that bids are not submitted through irresponsible parties

BIDS—Continued Page
Responsiveness—Continued
Identity of bidder ambiguous—Continued
whose principals then could avoid or support the bids as their interests might dictate 8
"No-charge," etc. notations
Bidders may elect not to charge the government for certain services, and when they have indicated that they are aware of and willing to commit themselves to furnishing the item in question—as by inserting a zero, "no charge," or "not separately priced,"—the bid is responsive and the bidder may be considered for award notwithstanding agency's desire for dollar amount entry to serve as incentive to perform the service 553
Offer of compliance after bid opening
Acceptance not authorized
A late modification of a bid may not be accepted if the bid as originally submitted is nonresponsive 768
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 425
Minor deviation from IFB requirements
Where the bidder, by entering a bid price for every item, offered to perform as required under the solicitation and at a price apparent on the face of the bid, the failure to enter a total price did not render the bid nonresponsive and, instead, may be considered an informality and waived 830
Pricing response nonresponsive to IFB requirement
Failure to bid firm, fixed price
A bid is nonresponsive, and the bidder submitting it thus is not eligible for award, where the intended total bid price cannot be determined from the bid documents submitted at the time of bid opening... 639
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
Level pricing clause. (*See* BIDS, Prices, Level pricing clause, Bid responsiveness)
Solicitation requirements not satisfied
Conformability of equipment, etc. offered
Protest is sustained where the contracting agency concedes that the awardee's bid for an "equal" product should have been rejected as nonresponsive for failing to meet precise dimensions specified in a brand name or equal purchase description. Where solicitation includes precise performance or design characteristics, 'equal" product must meet them exactly, and mere functional equivalency will not do .. 868

BIDS—Continued Page
Responsiveness—Continued
Test to determine
Unqualified offer to meet all solicitation terms
Blanket offer to meet all specifications is not legally sufficient to make a nonresponsive bid or offer responsive, and it is not enough that the bidder or offeror believes that its product meets specifications. GAO therefore will deny a protest against rejection of an offer from an unqualified source when the protester has not supplied evidence such as test reports that it can meet extremely precise specifications and has not demonstrated the existence of quality assurance procedures 194
Signatures
Bid unsigned
An agency may waive a bidder's failure to sign its bid as a minor informality, thus obviating rejection of the bid as nonresponsive, when the bid is accompanied by other documentation signed by the bidder which clearly evinces the bidder's intent to be bound, such as an acknowledged amendment 233
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 384
Telegraphic submissions
Error in transmission
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
Establishment
A garbled telegraphic modification increasing the bid price in an uncertain amount which was received prior to bid opening may not be ignored, nor may it be corrected by a subsequent message which arrived late. Since the garbled telegram made the bid price uncertain and not fixed, that bid could not be subject of award 628
Unbalanced
Bid evaluation formula
Defective
Where evaluation method in invitation for bids is structured so as to encourage unbalanced bidding, the invitation is defective, *per se*, and no bid can be evaluated properly because there is insufficient assurance that award will result in the lowest ultimate cost to the government 848
Evaluation
Where evaluation method in invitation for bids is structured so as to encourage unbalanced bidding, the invitation is defective, *per se*, and no bid can be evaluated properly because there is insufficient assurance that award will result in the lowest ultimate cost to the government 848

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small business' bonding capacity where 12 bids were received on the IFB 593
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Protests that Miller Act performance and payment bond requirements are inapplicable to a Department of Transportation contract for the conversion of a government-owned vessel is denied where the statute, by specifically providing that the Secretary of Transportation may waive such bonding requirements with respect to contracts for the construction, alteration, or repair of vessels of any kind or nature, clearly indicates that vessels owned by the government are "public works" and therefore embraced by the Miller Act 714
An agency was fully justified in requiring a performance bond to protect the government's interest where the contract involved the extensive utilization by the contractor of a government-furnished vessel in performing conversion work, and where the contractor was to assume an existing contract for the construction of ship cranes to be incorporated into the vessel, the amount of which represented nearly half of the total contract price 714
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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 384

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Transportation matters. (*See* TRANSPORTATION, Carriers)

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CHECKS

Date of payment

Fiscal Year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award generally is considered paid on the date of the Treasury check. In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. 62 Comp. Gen. 675 distinguished 114

Substitute

Interest payment

Not authorized

Since the government made payment by issuing a check within 30 days after the contracting agency received a proper invoice, payment of interest is not authorized under the Prompt Payment Act even though the contractor did not receive the payment until a substitute check was issued where the failure to receive the initial payment was outside the control of the contracting agency 32

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Travel advances

Blank travelers checks obtained by the Government for issuance to its employees in lieu of cash travel advances do constitute official Government funds, the physical loss or disappearance of which would entail financial liability for the accountable officer involved. That liability may be relieved by General Accounting Office, under 31 U.S.C. 3527 (1982), in the same manner as liability for a loss involving cash or other Government funds 456

CIVIL RIGHTS ACT

Title VII

Discrimination complaints

Equal Employment Opportunity Commission authority. (*See* EQUAL EMPLOYMENT OPPORTUNITY COMMISSION, Authority, Title VII discrimination complaints)

Informal agency settlement

Without discrimination finding

Backpay

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 discrimi-

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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..... 349

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A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from the noncombat activities of the United States Armed Forces or its members or civilian employees, is not cognizable under the Military Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Office's general claims settlement authority, 31 U.S.C. 3702, had not the 6 year statute of limitations specified in that section run..... 155

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Military Claims Act

Combat activities

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A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from the noncombat activities of the United States Armed Forces or its members or civilian employees, is not cognizable under the Military

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Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Office's general claims settlement authority, 31 U.S.C. 3702, had not the 6 year statute of limitations specified in that section run 155
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A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from the noncombat activities of the United States Armed Forces or its members or civilian employees, is not cognizable under the Military Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Office's general claims settlement authority, 31 U.S.C. 3702, had not the 6 year statute of limitations specified in that section run 155
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Meritorius Claims Act
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a personal expense. The instant case does not present any special circumstances that warrant a departure from this general rule 6

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Employee of the Department of Health and Human Services claims reimbursement for the cost of renting a tuxedo for the purpose of accompanying the Secretary of the Department to a function where formal attire was required. The claim may not be allowed since ordinarily payment by employees for formal attire is considered a personal expense. The instant case does not present any special circumstances that warrant a departure from this general rule 6

COMPENSATION

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Supervision of employees

Negotiated agreements

Civil Service Reform Act, 1978, effect

Prevailing wage practice consideration

Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusions from the limitation. 60 Comp. Gen. 58 (1980) is distinguished 100

Additional

Travel, per diem, etc.

An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per deim or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances 70

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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) 419

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Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusions from the limitation. 60 Comp. Gen. 58 (1980) is distinguished..... 100
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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 office is an apparent violation of a statutory prohibition, 5 U.S.C. 5536..... 395
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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 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 395
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Two-thirds rule application
The "two-thirds rule" permits an agency to compensate employees under 5 U.S.C. 5542(a) for only 16 hours of a 24-hour tour of duty which includes substantial time in standby status, based on a presumption that the remaining 8 hours represent sleep and mealtime. However, this presumption, and hence the two-thirds rule, does not apply to shifts of less than 24 hours. Therefore, Federal firefighters who work an irregular on occasional overtime shift of 12 hours cannot be paid less than 12 hours of overtime compensation based on the two-thirds rule. However, bona fide meal periods may be excluded from compensable overtime hours 1
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The "two-thirds rule" permits an agency to compensate employees under 5 U.S.C. 5542(a) for only 16 hours of a 24-hour tour of duty

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Irregular, unscheduled—Continued

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Meal time. (*See* COMPENSATION, Overtime, Meal time)

Meal time

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Panama Canal

Commission employees

Pay increases

Firefighters

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Panama Canal employees

Panama Canal Commission employees. (*See* **COMPENSATION, Panama Canal Commission employees)**

Periodic step-increases

Eligibility

Army employee, a former local hire with the United States Government in the Philippine Islands, appeals a decision of our Claims Group disallowing his claim for salary adjustment based on the highest previous rate rule. Employee contends that he should be placed at grade and step that are equivalent in authority to grade and step he held in Philippines. However, highest salary rate earned in prior employment with Government, when converted to United States dollars, was less than grade GS–1, step 1. Employee's claim is denied because employees's Army salary exceeds the highest rate he previously earned. The highest previous rate rule applies only to the salary rate earned by the employee, not to his level of job responsibility 17

Premium pay

Holidays (*See* **COMPENSATION, Holidays, 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) 419

Prevailing rate employees

Negotiated agreements. (*See* **COMPENSATION, Collective bargaining agreements)**

Wage schedule adjustments

Statutory limitation

Applicability

Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusions from the limitation. 60 Comp. Gen. 58 (1980) is distinguished 100

The cap on wage increases for prevailing rate employees during fiscal year 1982 and similar provisions for fiscal years 1983 and 1984 are applicable to prevailing rate employees at Barksdale A.F.B., Louisiana, even though that wage area was initially covered by the Monroney Amendment, 5 U.S. Code 5343(d), in fiscal year 1982. Higher wage rates which resulted from considering wage rates from another area as required by the Monroney Amendment must not be implemented to the extent that they exceed the statutory increase cap. There is nothing in either the language or the legislative history of the Monroney Amendment or the pay increase cap provisions which would support the view that the pay increase caps are not applicable to the initial establishment of wages under the provisions of the Monroney Amendment 227

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Wage schedule adjustments—Continued

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Applicability—Continued

The cap on salary rate increases for prevailing rate employees during fiscal year 1980 and succeeding years does not restrict the pay changes required to adjust the appropriate rate of pay for prevailing rate employees who were "transferred in place" between the Chicago and Rock Island Districts of the Corps of Engineers as a result of a realignment of District boundaries on June 29, 1980. These adjustments did not result from a wage survey and are, therefore outside the scope of the pay cap legislation 912

Mandatory

The cap on wage increases for prevailing rate employees during fiscal year 1982 and similar provisions for fiscal years 1983 and 1984 are applicable to prevailing rate employees at Barksdale A.F.B., Louisiana, even though that wage area was initially covered by the Monroney Amendment, 5 U.S. Code 5343(d), in fiscal year 1982. Higher wage rates which resulted from considering wage rates from another area as required by the Monroney Amendment must not be implemented to the extent that they exceed the statutory increase cap. There is nothing in either the language or the legislative history of the Monroney Amendment or the pay increase cap provisions which would support the view that the pay increase caps are not applicable to the initial establishment of wages under the provisions of the Monroney Amendment 227

Promotions

Delayed

"Backpay" claim

An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized official had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy 844

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Highest previous rate

Applicability

Foreign Service salary rates

Army employee, a former local hire with the United States Government in the Philippine Islands, appeals a decision of our Claims Group disallowing his claim for salary adjustment based on the highest previous rate rule. Employee contends that he should be placed at grade and step that are equivalent in authority to grade and step he held in Philippines. However, highest salary rate earned in prior employment with Government, when converted to United States dol-

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An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper 86

Retirement and tax adjustments

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Retirement contributions which previously had been refunded to the employee were properly deducted from backpay because his retroactive reinstatement and receipt of backpay removed the legal basis for the refund. Net indebtedness resulting from deduction of the refund from backpay may not be waived by this Office under 5 U.S.C. 5584, since the refund did not constitute an erroneous payment of "pay or allowances." Under 5 U.S.C. 8346(b), Office of Personnel Management has sole authority to waive erroneous payments from the Civil Service Retirement Fund 86

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An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper 86

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Senior Executive Service. (*See* **OFFICERS AND EMPLOYEES, Senior Executive Service**)

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An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper 86

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Housing and Urban Development Department

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GAO investigations raised questions about the legality of seven loan applications conditionally or finally approved by the Department of Housing and Urban Development under the Housing for the Elderly and Handicapped program authorized by 12 U.S.C. 1701q. Prohibited identity of interests was involved in six of the seven projects; a serious question about the financial responsibility of the seventh borrower was also raised. HUD certifying officials are advised that no exceptions will be taken by GAO to past or future disbursements under these loans if HUD takes the actions it proposes to cure the conflict of interest deficiencies and to verify financial responsibility of the seventh borrower before final loan approval 38

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The Office of Refugee Resettlement (ORR) did not impound funds under the fiscal year 1984 continuing resolution so long as it made available for obligation the full $585,000,000 appropriated for the refugee and entrant assistance account. The continuing resolution appropriated a lump-sum amount for the refugee and entrant assistance account, rather than specific amounts for the various programs funded by that account. Allocations specified in the congressional committee reports were not binding on the ORR and it could allocate funds differently so long as it did not withhold any of the total $585,000,000 appropriations..... 21

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Where time permits, an agency should undertake further consideration of its determination of an offeror's nonresponsibility where it is notified of a material change in a principal factor on which the determination was based. Administrative inconvenience is not sufficient reason to ignore a firm's financial resources at time of contract award even in negotiated procurement conducted in conjunction with a cost comparison review 19
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Where contracting agency (1) failed to hold discussions with three architect-engineer (A-E) firms as to anticipated concepts and the relative utility of alternative methods of approach, as required under the Brooks Act, 40 U.S.C. 541-544 (1982), (2) may have ranked the firms in order of preference based upon out-of-date or misleading information, and (3) improperly requested firms to submit cost proposals prior to selecting for negotiations the most highly qualified firm, agency's post-award decision to conduct discussions with the three A-E firms initially evaluated as most highly qualified and to reevaluate their qualifications based upon updated information is not objectionable 772

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Where contracting agency (1) failed to hold discussions with three architect-engineer (A-E) firms as to anticipated concepts and the relative utility of alternative methods of approach, as required under the Brooks Act, 40 U.S.C. 541-544 (1982), (2) may have ranked the firms in order of preference based upon out-of-date or misleading information, and (3) improperly requested firms to submit cost proposals prior to selecting for negotiations the most highly qualified firm, agency's post-award decision to conduct discussions with the three A-E firms initially evaluated as most highly qualified and to reevaluate their qualifications based upon updated information is not objectionable 772
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Contracting agency which found the two top-ranked architect-engineer (A-E) firms to be "equally preferred," acted improperly when it thereupon requested the firms to submit cost proposals prior to selecting for negotiations the most highly qualified firm. Under the Brooks Act, 40 U.S.C. 541-544 (1982), which governs the procurement of A-E services, contracting officials may not consider the proposed fees in ranking the professional qualifications of A-E firms 772
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A performance bond, forfeited to the Government by a defaulting contractor, may be used to fund a replacement contract to complete the work of the original contract. The performance bond constitutes liquidated damages which may be credited to the proper appropriation account in accordance with analysis and holding in 62 Comp. Gen. 678 (1983). 46 Comp. Gen. 554 (1966) is modified to conform to this decision. Requirements for documentation of the accounting transactions are set forth in the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies 625
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An agency which is a mandatory user of a multiple-award federal supply schedule (FSS) contract may purchase lower priced non-FSS items which are identical (in terms of make and model) to those included on the FSS contract from the schedule contractor that submitted the low quote under the original request for quotations. There is nothing in the Federal Acquisition Regulation which would compel the agency to recompete the non-FSS items 239

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Protest by incumbent contractor providing laundry services from its own facility is denied where the protester has not shown that the procuring agency has unreasonably understated the cost to the Government of making an award on the basis of using a Government-owned facility 179
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Davis Bacon Act

Applicability

Since the owner-operator laborers performing work on a Federal contract have been paid, and the question of priority of payment of remaining contract proceeds held by Federal contracting agency does not depend on determining whether the laborers are covered by the Davis-Bacon Act, 40 U.S.C. 276a, the question of whether they are covered by the Act is moot and need not be answered..... 763

Owner/operators

An owner/operator of earth moving equipment who files a claim under the Davis-Bacon Act is entitled to payment since the Act's minimum wage provisions apply to owner/operators of equipment who are employed as laborers or mechanics on federal construction sites. Where there is no evidence of a subcontract our office will not defer consideration of the Davis/Bacon Act claim of an owner/operator who meets the statutory and regulatory criteria for payment..... 792

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An owner/operator of earth moving equipment who files a claim under the Davis-Bacon Act is entitled to payment since the Act's minimum wage provisions apply to owner/operators of equipment who are employed as laborers or mechanics on federal construction sites. Where there is no evidence of a subcontract our Office will not defer consideration of the Davis-Bacon Act claim of an owner/operator who meets the statutory and regulatory criteria for payment..... 792

Work performance *v.* contractual relationship

An owner/operator of earth moving equipment who files a claim under the Davis-Bacon Act is entitled to payment since the Act's minimum wage provisions apply to owner/operators of equipment who are employed as laborers or mechanics on federal construction sites. Where there is no evidence of a subcontract our Office will not defer consideration of the Davis-Bacon Act claim of an owner/operator who meets the statutory and regulatory criteria for payment..... 792

Minimum wage determinations

A bidder's failure to acknowledge a Davis-Bacon Act wage rate amendment may be treated as a minor informality in the bid, thus permitting correction after bid opening, if the effect on price is clearly *de minimis*, and the bidder affirmatively evinces its acknowledging the amendment as soon as possible thereafter, but always prior to award. Modifies 62 Comp. Gen. 111 189

Wage underpayments

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Debarment warranted. (*See* **BIDDERS, Debarment, Labor stipulation violations**)

Employee remedies

Owner/operator of earth moving equipment is not entitled to the full amount of his claim since the payment from the General Accounting Office that is due an employee underpaid in violation of the Davis-Bacon Act is limited to the amount properly withheld and payable under that Act. The General Accounting Office may disburse to such underpaid employees no more than the difference between the

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Debarment of contractor. (*See* BIDDERS, Debarment, Labor stipulation violations)
Minimum age guarantees
Owner/operator of earth moving equipment is not entitled to the full amount of his claim since the payment from the General Accounting Office that is due an employee underpaid in violation of the Davis-Bacon Act is limited to the amounts properly withheld and payable under that Act. The General Accounting Office may disburse to such underpaid employees no more than the difference between the prevailing wage rate applicable and the amount of payment already received 792
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Walsh-Healey Act
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Prior decision, which held that a small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healey Public Contracts Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. The Department of Labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a representation by a small business bidder that it is a manufacturer of the supplies being procured is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern. 748
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Life cycle costs
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Allegation after award
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
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Additional Work or Quantities
Sole-Source Procurement Result
Where a contract as modified is materially different from the original contract, the subject of the modification should be competitively procured unless a sole-source award is appropriate. A modification

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consisting of a new agreement to deliver, among other things, manufacturing and production machinery and equipment to expand the government's in-house production capabilities under an original contract for supplies and technical assistance exceeds the contract's scope and cannot be justified on a sole-source basis where both the modification and the original contract should have been competed..... 578
Within scope of contract requirement
Where a contract as modified is materially different from the original contract, the subject of the modification should be competitively procured unless a sole-source award is appropriate. A modification consisting of a new agreement to deliver, among other things, manufacturing and production machinery and equipment to expand the government's in-house production capabilities under an original contract for supplies and technical assistance exceeds the contract's scope and cannot be justified on a sole-source basis where both the modification and the original contract should have been competed..... 578
Administrative Function
While contract modifications generally are the responsibility of the procuring agency in administering the contract, the General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes..... 578
Beyond scope of contract
"Cardinal change" doctrine
Protest contending that a contract modification was beyond the scope of the contract and thus improperly suppressed competition is sustained where the modification resulted in the procurement of services materially different from that for which the competition was held 460
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While contract modifications generally are the responsibility of the procuring agency in administering the contract, the General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes..... 578
Mutual mistake
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Reformation may be permitted on a case-by-case basis of fixed-price contracts between Veterans Administration (VA) and Washington State construction contractors which purported to include in contract price all applicable state taxes but did not include state sales and use taxes where both parties thought, due to erroneous assumptions of law, that these taxes which were not applicable at the time the contract was signed could not be imposed retroactively at a later time..... 718

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Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes 718
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Reformation may be permitted on a case-by-case basis of fixed-price contracts between Veterans Administration (VA) and Washington State construction contractors which purported to include in contract price all applicable state taxes but did not include state sales and use taxes where both parties thought, due to erroneous assumptions of law, that these taxes which were not applicable at the time the contract was signed could not be imposed retroactively at a later time 718
Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes 718
Propriety
Protest contending that a contract modification was beyond the scope of the contract and thus improperly suppressed competition is sustained where the modification resulted in the procurement of services materially different from that for which the competition was held 460
While contract modifications generally are the responsibility of the procuring agency in administering the contract, the General Accounting Office will consider a protest that a modification went beyond the contract's scope and should have been the subject of a new procurement, since such a modification has the effect of circumventing the competitive procurement statutes 578
Reformation
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Subsequent court decision
Reformation may be permitted on a case-by-case basis of fixed-price contracts between Veterans Administration (VA) and Washington State construction contractors which purported to include in contract price all applicable state taxes but did not include state sales and use taxes where both parties thought, due to erroneous assumptions of law, that these taxes which were not applicable at the time the contract was signed could not be imposed retroactively at a later time 718
Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes

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retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes 718
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Reformation may be permitted on a case-by-case basis of fixed-price contracts between Veterans Administration (VA) and Washington State construction contractors which purported to include in contract price all applicable state taxes but did not include state sales and use taxes where both parties thought, due to erroneous assumptions of law, that these taxes which were not applicable at the time the contract was signed could not be imposed retroactively at a later time 718
Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes 718
Multi-year procurement
Appropriations. (*See* APPROPRIATIONS, Obligation, Contracts, Multi-year procurements)
Appropriations availability. (*See* APPROPRIATIONS, Obligation, Contracts, Multi-year procurements)
Five year limitation
Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated, unless it obtains specific statutory authority to do so 163
Although sufficient lump-sum missile procurement funds were appropriated in FYs 1984 and 1985 for this purpose, Army cannot rely on fact that cognizant congressional committees were aware of its intent to exercise options for advance procurement of EOQ items for 6th and 7th year end items. It cannot be said that the Congress as a whole intended to provide an exception to the *bona fide* needs statute in addition to the limited exception for 5-year multiyear contracts in 10 U.S.C. 2306(h) where this purpose was never stated in the legislation itself or in the committee reports, and where the reports themselves created the impression that the funds were to be used for an existing multiyear contract 163
"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Au-

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Multi-year procurement—Continued
Five year limitation—Continued
thorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurment of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is in applicable to multiple or "investment type" procurements 163
Negotiated procurements. (*See* **CONTRACTS, Negotiation**)
Negotiation
Administrative determination
Finality
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
Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)
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Agency is not required to have separately purchased panel assemblies for multiplexers, where the agency concluded that its needs could best be met through a "total package" procurement approach. Protester has not shown that the agency decision to use a single procurement was improper 871
Initial proposal basis
Propriety
Protest that agency conducted discussions with offerors, thus rendering the award on the basis of initial proposals improper, is denied where contracting agency either withdrew request to offerors for additional information before they had an opportunity to respond or protester was not competitively prejudiced by any discussions it may have had with agency 245
Award on the basis of initial proposals is not appropriate where contracting officer has cost concerns regarding all offerors' proposals. 700
Not prejudicial to other offerors
Where agency had contractual right to allow substitution of aircraft, decision to make substitution at time of award was not objectionable because record clearly shows that protesters were not prejudiced 888
Propriety
Fact that minimum quantity was not ordered from protester does not entitle that firm to receive additional orders required to make up minimum. Rather, firm is not entitled to any awards unless it would be entitled to award of its specified minimum quantity 888

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Upheld
Where agency had contractual right to allow substitution of aircraft, decision to make substitution at time of award was not objectionable because record clearly shows that protesters were not prejudiced 888
Single *v.* Multiple Basis
Agency is not required to have separately purchased panel assemblies for multiplexers, where the agency concluded that its needs could best be met through a "total package" procurement approach. Protester has not shown that the agency decision to use a single procurement was improper 871
Basic Ordering Agreements
Propriety
General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98-72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked 620
Competition
Adequacy
Although negotiations for an additional requirement may have been conducted informally because of the contracting agency's belief that it was only exercising an option, no prejudice resulted where the only eligible offerors were both afforded equal information and an equal opportunity to compete for the requirement 290
In the absence of any law or regulation indicating a contrary policy, unrestricted competition on all government contracts between commercial concerns and nonprofit educational institutions is required by the statutes governing federal procurement 653
Award under initial proposal
Award on the basis of initial proposals is not appropriate where contracting officer has cost concerns regarding all offerors' proposals. 700
Effect of negotiation procedures
Not prejudicial
Athough negotiations for an additional requirement may have been conducted informally because of the contracting agency's belief that it was only exercising an option, no prejudice resulted where the only eligible offerors were both afforded equal information and an equal opportunity to compete for the requirement 290
Equal bidding basis for all offerors. (*See* CONTRACTS, Negotiation, Competition, Equality of competition)
Equality of competition
As a general rule, offerors must be given sufficient detail in a request for proposals to enable them to compete intelligently and on a relatively equal basis 273
Protest contending that a contract modification was beyond the scope of the contract and thus improperly suppressed competition is sustained where the modification resulted in the procurement of

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In the absence of any law or regulation indicating a contrary policy, unrestricted competition on all government contracts between commercial concerns and nonprofit educational institutions is required by the statutes governing federal procurement 653
Not denied to protester
Competitive advantage allegedly enjoyed by a mobilization base producer because of award of a prior contract at a high unit price is not improper since it was statutorily permissible and did not result from unfair government action 290
Offeror's superior advantages
Government equalizing differences
The government is not required to eliminate any competitive advantage that a firm might have as a result of federal, state or local programs unless the advantage is the result of unfair government action 8
Competitive advantage allegedly enjoyed by a mobilization based producer because of award of a prior contract at a high unit price is not improper since it was statutorily permissible and did not result from unfair government action 290
Indefinite, etc. specifications
When a protester alleges that specifications are excessively general and vague so as to prevent the submission of an intelligent proposal, General Accounting Office will not only analyze the specifications to see if they adequately detail the agency's requirements, but will also consider whether other proposals were received in order to determine whether the level of uncertainty and risk in the solicitation was acceptable 273
Prior decision, which held that an agency's request for proposals was inadequate to promote effective competition and resulted in a *de facto* sole-source award to the incumbent, is affirmed where the request for reconsideration fails to indicate that material errors of fact or of law exist in the prior decision to warrant its reversal or modification 704
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Although negotiations for an additional requirement may have been conducted informally because of the contracting agency's belief that it was only exercising an option, no prejudice resulted where the only eligible offerors were both afforded equal information and an equal opportunity to compete for the requirement 290
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In the absence of a specific statute or regulation mandating the establishment of geographic regions, an agency generally must show that its minimum needs define the scope of a geographic restriction in a contract 160

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Restrictive
Undue restriction
Not established
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
Conflict of interest prohibitions
Organizational
An allegation of a conflict of interest is denied where the record contains no evidence that physicians, employees of both the contracting agency and proposed awardee, would improperly refer the agency's patients to the awardee. 653
Cost, etc. data
Cost analysis
Protest contending that agency failed to conduct proper cost realism analysis resulting in defective evaluation and improper award to technically inferior, but 23-percent lower cost, proposal, is sustained where: (1) agency was concerned above the realism of the awardee's cost; (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 cost 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 343
Disclosure
Where agency error may have resulted in disclosure of portion of one offeror's proposal to second offeror, but second offeror was not selected for award, first offeror was not prejudiced by the error in present procurement and we know of no remedy for future procurments 700
"Realism" of cost
Award of a cost-plus-award-fee contract at proposed estimated cost plus 10 percent award fee does not violate regulatory limitation on award fee, even where the government's cost realism analysis indicates that actual cost of performance will be $920,000 less than proposed cost. Cost realism analysis is only an evaluation and selection tool, and award fee must the based on the amount specified in the contract. This decision modifies 64 Comp. Gen. 71 439
Cost-plus-award-fee contracts
Cost-plus-award-fee contract, authorized under the FAR, is not a prohibited cost-plus-a-percentage-of-cost contract where the award fee, while based on a percentage of costs, depends on government's subjective assessment of performance, with entitlement decreasing as costs increase, and is subject to a ceiling on fees to be paid 880

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Award fees
Negotiation propriety
Award of cost-plus-award-fee contract at proposed cost plus 10 percent award fee violates regulatory limit on award fee where government evaluation of costs was that they should be $920,000 (5.5 percent) less than proposed costs because award fee is then 10.6 percent of government evaluated reasonable cost of awardee's proposal 71
Regulatory limit
Award of cost-plus-award-fee contract at proposed cost plus 10 percent award fee violates regulatory limit on award fee where government evaluation of costs was that they should be $920,000 (5.5 percent) less than proposed costs because award fee is then 10.6 percent of government evaluated reasonable cost of awardee's proposal 71
Award of a cost-plus-award-fee contract at proposed estimated cost plus 10 percent award fee does not violate regulatory limitation on award fee, even where the government's cost realism analysis indicates that actual cost of performance will be $920,000 less than proposed cost. Cost realism analysis is only an evaluation and selection tool, and award fee must be based on the amount specified in the contract. This decision modifies 64 Comp. Gen. 71 439
Evaluation
Protest that proposed award fee should have been considered in probable cost evaluation of proposals on cost-plus-award-fee contract, where such evaluation is award determinative, is not meritorious, where protester submitted proposal after being fully informed that this was the way that proposals would be evaluated. Agency had reasonable basis for not evaluating proposed award fee and this evaluation did not violate any legal requirement 42
Award of a cost-plus-award-fee contract at proposed estimated cost plus 10 percent award fee does not violate regulatory limitation on award fee, even where the government's cost realism analysis indicates that actual cost of performance will be $920,000 less than proposed cost. Cost realism analysis is only an evaluation and selection tool, and award fee must be based on this amount specified in the contract. This decision modifies 64 Comp. Gen. 71 439
Cost-reimbursement basis
Evaluation factors
Lowest estimated costs and fees not controlling
Award on cost-reimbursement contract made at proposed cost amount, without further discussions, where cost analysis of successful proposal shows realistic cost of proposal is $920,000 (5.5 percent) less than proposed amount, is unusual and poor business practice, although adjustments in cost analysis and evaluation that awardee's proposal was lowest are not found unreasonable. Since protest is sustained on other grounds, discussions concerning evaluated overstated or excessive costs should be conducted 71
Determination and findings
Finality
General Accounting Office (GAO) will not disturb determination and findings justifying negotiation for purchase of mobilization base

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Determination and findings—Continued
Finality—Continued
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
Disclosure of price etc.
Inadvertent
Where agency error may have resulted in disclosure of portion of one offeror's proposal to second offeror, but second offeror was not selected for award, first offeror was not prejudiced by the error in present procurement and we know of no remedy for future procurements. 700
Evaluation. (*See* CONTRACTS, Negotiation, Offers or proposals, Evaluation)
Evaluation factors. (*See* CONTRACTS, Negotiation, Offers or proposals, Evaluation)
Leases. (*See* LEASES, Negotiation)
National emergency authority
Expansion of mobilization base
GAO will deny protest against sole source award for mobilization base item when it is based on assessment of defense agency's requirements, amount needed to support producer's capability, and other factors particularly within the agency's expertise 260
Sole source negotiation
GAO will deny protest against sole source award for mobilization base item when it is based on assessment of defense agency's requirements, amount needed to support producer's capability, and other factors particularly within the agency's expertise 260
Offers or proposals
All or none
Fact that minimum quantity was not ordered from protester does not entitle that firm to receive additional orders required to make up minimum. Rather, firm is not entitled to any awards unless it would be entitled to award of its specified minimum quantity 888
Deficient proposals
Blanket offer of compliance
Blanket offer to meet all specifications is not legally sufficient to make a nonresponsive bid or offer responsive, and it is not enough that the bidder or offeror believes that its product meets specifications. GAO therefore will deny a protest against rejection of an offer from an unqualified source when the protester has not supplied evidence such as test reports that it can meet extremely precise specifications and has not demonstrated the existence of quality assurance procedures 194
Discussions. (*See* CONTRACTS, Negotiation, Offers or proposals, Discussion with all offerors requirement)

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Discussion with all offerors requirement
Failure to discuss
Situation not requiring discussion
Where a solicitation provides that award will be made to the technically acceptable offeror offering the lowest price and the protester's proposal is technically acceptable, the procuring agency properly may conduct detailed technical discussions with a technically deficient offeror while only affording the protester an opportunity to furnish a best and final offer; an agency need conduct detailed discussions only with offerors whose proposals contain technical uncertainties 524
Government estimate of costs
Award on cost-reimbursement contract made at proposed cost amount, without further discussions, where cost analysis of successful proposal shows realistic cost of proposal is $920,000 (5.5 percent) less than proposed amount, is unusual and poor business practice, although adjustments in cost analysis and evaluation that awardee's proposal was lowest are not found unreasonable. Since protest is sustained on other grounds, discussions concerning evaluated overstated or excessive costs should be conducted 71
Initial proposal basis—solicitation provision
Protest that agency conducted discussions with offerors, thus rendering the award on the basis of initial proposals improper, is denied where contracting agency either withdrew request to offerors for additional information before they had an opportunity to respond or protester was not competitively prejudiced by any discussions it may have had with agency 245
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A statement from the procuring agency to the low offeror following submission of best and final offers does not constitute improper discussions where award is to be made to the low technically acceptable offeror; the offeror already had been found technically acceptable; and the statement thus was not part of an effort to determine the acceptability of the offeror's proposal 524
Varying degrees of discussions
Propriety
Where a solicitation provides the award will be made technically acceptable offeror offering the lowest price and the protester's proposal is technically acceptable, the procuring agency properly may conduct detailed technical discussions with a technically deficient offeror while only affording the protester an opportunity a furnish a best and final offer; an agency need conduct detailed discussions only with offerors whose proposals contain technical uncertainties 524
What constitutes discussion
A statement from the procuring agency to the low offeror following submission of best and final offers does not constitute improper discussions where award is to be made to the low technically acceptable offeror; the offeror already had been found technically acceptable;

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and the statement thus was not part of an effort to determine the acceptability of the offeror's proposal 524
Essentially equal technically (*See* CONTRACTS, Negotiation, Offer, or proposals, Evaluation, Technically equal proposals)
Evaluation
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Cost/pricing evaluation
Although 69-percent upward adjustment in cost realism analysis, primarily due to evaluated increase in staffing levels, on technically acceptable and equal low offer is unusual, the technical evaluation was done pursuant to evaluation criterion in request for proposals which did not give great weight to staffing levels. Cost analysis can be function entirely separate and not related to outcome of technical evaluation 71
Protest of use of normalized price scoring is denied where record shows protesters were not prejudiced by the use of this technique 888
Agency adjustment of proposal
Propriety
Although cost evaluation document seems inconsistent with subsequent Navy explanation of cost evaluation, upward adjustment in cost realism analysis of 69 percent over proposed costs of technically acceptable and equal low offeror, primarily because of evaluated low staffing levels—a deficiency which was repeatedly pointed out in discussions—was not unreasonable in view of broad agency discretion, despite low offeror's disagreement with government assessment of its staffing levels 71
Upward cost adjustment of 69-percent of proposal in cost realism analysis, primarily due to evaluated increase in staffing levels, did not amount to rewriting proposal since agency only determined for evaluation purposes what probable and realistic cost of contracting with that offeror would be 71
Basis for evaluation
Undisclosed
When telex request for prices for movement of military air cargo does not indicate how prices will be evaluated, protester is not free to make assumptions as to method that will be used. Rather, it has a duty either to inquire or to file a bid protest before submitting its prices 128
Competitive range exclusion
Reasonableness
Agency's failure to include protester's proposal in the competitive range, based upon the evaluation of proposals and revised technical scores reflecting projected improvement in proposals if discussions were held, was not unreasonable or in violation of applicable statutes and regulations 540

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Cost realism
Function
Although 69-percent upward adjustment in cost realism analysis, primarily due to evaluated increase in staffing levels, on technically acceptable and equal low offer is unusual, the technical evaluation was done pursuant to evaluation criterion in request for proposals which did not give great weight to staffing levels. Cost analysis can be function entirely separate and not related to outcome of technical evaluation 71
Award of a cost-plus-award-fee contract at proposed estimated cost plus 10 percent award fee does not violate regulatory limitation on award fee, even where the government's cost realism analysis indicates that actual cost of performance will be $920,000 less than proposed cost. Cost realism analysis is only an evaluation and selection tool, and award fee must be based on the amount specified in the contract. This decision modifies 64 Comp. Gen. 71 439
Cost realism analysis
Adequacy
Although cost evaluation document seems inconsistent with subsequent Navy explanation of cost evaluation, upward adjustment in cost realism analysis of 69 percent over proposed costs of technically acceptable and equal low offeror, primarily because of evaluated low staffing levels—a deficiency which was repeatedly pointed out in discussions—was not unreasonable in view of broad agency discretion, despite low offeror's disagreement with government assessment of its staffing levels 71
Protest contending that agency failed to conduct proper cost realism analysis resulting in defective evaluation and improper award to technically inferior, but 23-percent lower cost, proposal, is sustained where: (1) agency was concerned about the realism of the awardee's cost; (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 343
Reasonableness
Contrary to the protester's contention that the agency improperly "normalized" proposed levels of effort in cost realism evaluation, the agency reviewed offerors' individual approaches and made its own assessment of the level of effort, using the government estimate as a guide 71
Although cost evaluation document seems inconsistent with subsequent Navy explanation of cost evaluation, upward adjustment in cost realism analysis of 69 percent over proposed costs of technically acceptable and equal low offeror, primarily because of evaluated low

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staffing levels—a deficiency which was repeatedly pointed out in discussions—was not unreasonable in view of broad agency discretion, despite low offeror's disagreement with government assessment of its staffing levels 71
Upward cost adjustment of 69-percent of proposal in cost realism analysis, primarily due to evaluated increase in staffing levels, did not amount to rewriting proposal since agency only determined for evaluation purposes what probable and realistic cost of contracting with that offeror would be 71
Agency erroneously added personnel as direct charge in probable realistic cost analysis of offeror's cost proposal. Offeror was covered by cost accounting standards (CAS) and proposed personnel as part of indirect charge. Under CAS part 402, offeror must account for costs incurrred for same purposes in like circumstances as direct costs only or as indirect costs only. Since offeror indicates that it always charged offered personnel as indirect charge and since government cannot legally dictate how offeror should establish accounting system, further discussions should be held to verify offeror's accounting practice and to clarify government requirements 71
Protest contending that agency failed to conduct proper cost realism analysis resulting in defective evaluation and improper award to technically inferior, but 23-percent lower costs, proposal, is sustained where: (1) agency was concerned about the realism of the awardee's cost; (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 veiw 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 343
Criteria
Administrative determination
Protest that proposed award fee should have been considered in probable cost evaluation or proposals on cost-plus-award-fee contract, where such evaluation is award determinative, is not meritorious, where protester submitted proposal after being fully informed that this was the way that proposals would be evaluated. Agency had reasonable basis for not evaluating proposed award fee and this evaluation did not violate any legal requirement 71
Administrative Discretion
Protest that request for proposal product testing requirements are inadequate is denied. Responsibility for establishment of tests necessary to determine product acceptability is within ambit of cognizant technical activity, and protester's disagreement with agency's engineers over adequacy of tests is not sufficient to carry protester's heavy burden of proof 691

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Application of criteria
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 415
Where solicitation indicated that each technical evaluation element would be considered on a "responsive/nonresponsive" basis to determine technical acceptability without relative ranking of offers on each such element, and protester and awardee were both judged technically acceptable for all requirements and therefore essentially equal, agency properly did not consider whether protester in fact was technically superior in any evaluation element, instead making award on the basis of price 688
Changed
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
Cost
Protest contending that agency failed to conduct proper cost realism analysis resulting in defective evaluation and improper award to technically inferior, but 23-percent lower costs, proposal, is sustained where: (1) agency was concerned about the realism of the awardee's cost; (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 veiw of RFP provision which gives the awardee the right to reject, negotiate and dispute specific task orders leaving open the possibility that a contactor unable to perform within the confines of the cap will use its rights under the provision to excuse nonperformance 343
Experience
Protest that agency improperly considered whether personnel proposed by offerors had experience in breakout reviews when evaluating proposals in procurement for breakout reviews is denied where solicitation listed personnel qualification as an evaluation criterion and requested offerors to submit in this regard information concerning the experience of proposed personnel. Although solicitation did not identify experience with breakout reviews as an evaluation criterion, agencies need not identify the various aspects of stated evaluation criteria which may be taken into account if, as here, such aspects are reasonably related to the stated criteria 245

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Protest that in evaluating proposals agency improperly considered whether proposals indicated experience with certain types of spare parts which the agency expected to ask the contractor to evaluate under any contract is denied where solicitation listed personnel qualifications as an evaluation criterion and requested offerors to submit in this regard information about the experience of the proposed personnel and where the solicitation also set forth the types of spare parts expected to be evaluated under the contract 245
Contention that agency should not have taken into consideration past performance for subcontracted work is denied. Record does not show that protester was released from its obligation as the government's prime contractor to furnish aircraft in accord with its prior contract which, for a period of time it did not do 888
Contention of that agency should not have taken into consideration past performance for subcontracted work is denied. Record does not show that protester was released from its obligation as the government's prime contractor to furnish aircraft in accord with its prior contract which, for a period of time it did not do 888
Contention that government was required to obtain and consider records of past performance for other government agencies is denied. The protesters were on notice that the agency did not construe the RFP as requiring such action 888
Contention that agency should not have taken into consideration past performance for subcontracted work is denied. Record does not show that protester was released from its obligation as the government's prime contractor to furnish aircraft in accord with its prior contract, which, for a period of time it did not do 888
Nondisclosure allegation
When telex request for prices for movement of military air cargo does not indicate how price will be evaluated, protester is not free to make assumptions as to method that will be used. Rather, it has a duty either to inquire or to file a bid protest before submitting its prices 128
Speculative
The evaluation of offers, or responses to a contracting agency's announced intention to place an order with a nonmandatory Automatic Data Processing Schedule contractor, should not include the consideration of speculative advantages to the government, but should be confined to matters that are reasonably quantifiable 11
When telex request for prices for movement of military air cargo does not indicate how prices will be evaluated, protester is not free to make assumptions as to method that will be used. Rather, it has a duty either to inquire or to file a bid protest before submitting its prices 128
Subcriteria—reasonably related to criteria
Protest that agency improperly considered whether personnel proposed by offerors had experience in breakout reviews when evaluat-

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ing proposals in procurement for breakout reviews is denied where solicitation listed personnel qualification as an evaluation criterion and requested offerors to submit in this regard information concerning the experience of proposed personnel. Although solicitation did not identify experience with breakout reviews as an evaluation criterion, agencies need not identify the various aspects of stated evaluation criteria which may be taken into account if, as here, such aspects are reasonably related to the stated criteria 245

When telex request for prices for movement of military air cargo does not indicate how prices will be evaluated, protester is not free to make assumptions as to method that will be used. Rather, it has a duty either to inquire or to file a bid protest before submitting its prices 132

Errors
Not prejudicial

Where impact on scoring would be minimal, possible defective screening of accident and incident data by agency was not prejudicial... 888

Experience rating

Protest that in evaluating proposals agency improperly considered whether proposals indicated experience with certain types of spare parts which the agency expected to ask the contractor to evaluate under any contract is denied where solicitation listed personnel qualifications as an evaluation criterion and requested offerors to submit in this regard information about the experience of the proposed personnel and where the solicitation also set forth the types of spare parts expected to be evaluated under the contract 245

Based on its predecessor's production history, successor corporation to a government contractor properly was found to meet a solicitation requirement that the items to be offered must have been previously produced and sold commercially or to the government, where there have been no substantial changes in the product, manufacturing process, or staff 507

Agency did not act improperly in assigning technical scores for past performance based on prior demonstrated aircraft availability rates. Offerors were aware of agency's need for best possible availability and Request for Proposals indicated that performance of less than 90 percent availability would not be acceptable under the contracts to be awarded. Apportioning scores as suggested by protesters so that 90 percent availability would be awarded 90 percent of available points would dilute importance assigned to past performance by RFP 888

Contention that government was required to obtain and consider records of past performance for other government agencies is denied. The protesters were on notice that the agency did not construe the RFP as requiring such action 888

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General Accounting Office review
In reviewing an agency's technical evaluation, General Accounting Office will not evaluate the proposal *de novo,* but will instead examine the evaluation to ensure that it had a reasonable basis. Protest against agency evaluation is denied where the protester failed to carry its burden of showing that the evaluation was unreasonable 245
Level of effort
Contrary to the protester's contention that the agency improperly "normalized" proposed levels of effort in cost realism evaluation, the agency reviewed offerors' individual approaches and made its own assessment of the level of effort, using the government estimate as a guide 71
Life-cycle costing
Solicitation's listed method for evaluating the residual-value element of typewriters' life cycle costs, by surveying sellers of used typewriters to determine the current trade-in value of models and then discounting that amount to represent a reduction in value for each year of the machines' useful lives, is reasonable 132
Method
Not Prejudicial
Protest of use of normalized price scoring is denied where record shows protesters were not prejudiced by the use of this technique 888
Not for SBA review
Agency's determination that it is unable to evaluate an offer because of lack of technical information and test data need not be referred to Small Business Administration, since in rejecting the offer, the agency has not reached the question of the offeror's responsibility 194
Personnel
Protest that agency improperly considered whether personnel proposed by offerors had experience in breakout reviews when evaluating proposals in procurement for breakout reviews is denied where solicitation listed personnel qualification as an evaluation criterion and requested offerors to submit in this regard information concerning the experience of proposed personnel. Although solicitation did not identify experience with breakout reviews as an evaluation criterion, agencies need not identify the various aspects of stated evaluation criteria which may be taken into account if, as here, such aspects are reasonably related to the stated criteria 245
Protest that in evaluating proposals agency improperly considered whether proposals indicated experience with certain types of spare parts which the agency expected to ask the contractor to evaluate under any contract is denied where solicitation listed personnel qualifications as an evaluation criterion and requested offerors to submit in this regard information about the experience of the proposed personnel and where the solicitation also set forth the types of spare parts expected to be evaluated under the contract 245

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Point rating
Propriety of evaluation
Protest against assigning four times as many evaluation points to technical factors as to cost factors is denied where protester fails to show that agency's conclusion that the higher cost of a technically superior offer would be more than offset by the increased savings expected from such an offer lacked a reasonable basis 245
Significance of difference
Protest that agency misled offerors by stating in the solicitation that cost was an important factor which should not be ignored when undisclosed evaluation scheme assigned only 20 percent of available evaluation points to cost and when 25 percent was assigned to only one of the technical factors is denied. Solicitation need only advise offerors of the broad scheme of scoring to be employed and give reasonably definite information concerning the relative importance of evaluation factors. Here, solicitation listed the technical factors in descending order of relative importance and indicated that cost, while significant, nevertheless was of secondary importance to the technical factors 245
Price consideration
Protest of use of normalized price scoring is denied where record shows protesters were not prejudiced by the use of this technique 888
Relative importance
Where solicitation indicated that each technical evaluation element would be considered on a "responsive/nonresponsive" basis to determine technical acceptability without relative ranking of offers on each such element, and protester and awardee were both judged technically acceptable for all requirements and therefore essentially equal, agency properly did not consider whether protester in fact was technically superior in any evaluation element, instead making award on the basis of price 688
Although solicitation indicated that technical specifications and delivery were more important than price, where competing proposals for a fixed-price contract were rated essentially equal in accordance with evaluation method stipulated in the solicitation, price properly became the determinative factor for award 688
Propriety
Where solicitation indicated that each technical evaluation element would be considered on a "responsive/nonresponsive" basis to determine technical acceptability without relative ranking of offers on each such element, and protester and awardee were both judged technically acceptable for all requirements and therefore essentially equal, agency properly did not consider whether protester in fact was technically superior in any evaluation element, instead making award on the basis of price 688
Computer, etc. procurement
Contracting agency's decision to issue a delivery order for automatic data processing (ADP) equipment and "technical support services" to a nonmandatory ADP Schedule contractor is improper where a re-

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sponse to a Commerce Business Daily notice of the agency's intention to place the order would have indicated a less costly alternative but for the agency's unreasonable evaluation of the costs for the support services 11
Reasonable
Contracting agency's decision to issue a delivery order for automatic data processing (ADP) equipment and "technical support services" to a nonmandatory ADP Schedule contractor is improper where a response to a Commerce Business Daily notice of the agency's intention to place the order would have indicated a less costly alternative but for the agency's unreasonable evaluation of the costs for the support services 11
Although 69-percent upward adjustment in cost realism analysis, primarily due to evaluated increase in staffing levels, on technically acceptable and equal low offer is unusual, the technical evaluation was done pursuant to evaluation criterion in request for proposals which did not give great weight to staffing levels. Cost analysis can be function entirely separate and not related to outcome of technical evaluation 71
A protester's disagreement with an agency's evaluation of its proposal does not of itself render the evaluation objectionable in the absence of a showing that the evaluation was unreasonable, arbitrary or unlawful 681
Technical acceptability
Administrative determination
Agency did not act improperly in assigning technical scores for past performance based on prior demonstrated aircraft availability rates. Offerors were aware of agency's need for best possible availability and Request for Proposals indicated that performance of less than 90 percent availability would not be acceptable under the contracts to be awarded. Apportioning scores as suggested by protesters so that 90 percent availability would be awarded 90 percent of available points would dilute importance assigned to past performance by RFP 888
Technical superiority *v.* cost
Protest against assigning four times as many evaluation points to technical factors as to cost factors is denied where protester fails to show that agency's conclusion that the higher cost of a technically superior offer would be more than offset by the increased savings expected from such an offer lacked a reasonable basis 245
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Technical superiority *v.* cost—Continued
Solicitation provisions
Where the solicitation, in describing the relative importance of cost vis-a-vis technical factors, in effect notified offerors that the agency had predetermined the tradeoff between technical merit and price, then the evaluation point scores were to be controlling unless selection officials determined that, notwithstanding a difference in the technical scores of the proposals, there were no significant differences in their technical merit, in which event price would become the deciding factor 245
Technically equal proposals
Price determination factor
Where the solicitation, in describing the relative importance of cost vis-a-vis technical factors, in effect notified offerors that the agency had predetermined the tradeoff between technical merit and price, then the evaluation point scores were to be controlling unless selection officials determined that, notwithstanding a difference in the technical scores of the proposals, there were no significant differences in their technical merit, in which event price would become the deciding factor 245
Where solicitation indicated that each technical evaluation element would be considered on a "responsive/nonresponsive" basis to determine technical acceptability without relative ranking of offers on each such element, and protester and awardee were both judged technically acceptable for all requirements and therefore essentially equal, agency properly did not consider whether protester in fact was technically superior in any evaluation element, instead making award on the basis of price 688
Although solicitation indicated that technical specifications and delivery were more important than price, where competing proposals for a fixed-price contract were rated essentially equal in accordance with evaluation method stipulated in the solicitation, price properly became the determinative factor for award 688
Offeror
Qualification. (*See* **CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors**)
Prequalification of offerors
Restrictive of competition
When services being procured are of a critical nature and the agency has only a short timeframe in which to award a new contract, General Accounting Office (GAO) cannot object on any legal basis to an award to the incumbent contractor, the only qualified source, even though the solicitation induced nonapproved sources such as the protester to compete 658
Qualifications of offerors
Based on its predecessor's production history, successor corporation to a government contractor properly was found to meet a solicitation requirement that the items to be offered must have been previously

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produced and sold commercially or to the government, where there have been no substantial changes in the product, manufacturing process, or staff 507
Where solicitation required contractor to have host country approval for installation of its telecommunications equipment and offeror's proposal indicated that such approval would be obtained, agency acted properly in accepting the proposal since the solicitation did not require submission of evidence of having that approval prior to award 691
"Approved source" requirement
When services being procured are of a critical nature and the agency has only a short timeframe in which to award a new contract, General Accounting Office (GAO) cannot object on any legal basis to an award to the incumbent contractor, the only qualified source, even though the solicitation induced nonapproved sources such as the protester to compete 658
Prequalification. (*See* CONTRACTS, Negotiation, Offers or proposals, Prequalification of offerors)
Rejection
Failure to meet solicitation requirements
Blanket offer to meet all specifications is not legally sufficient to make a nonresponsive bid or offer responsive, and it is not enough that the bidder or offeror believes that its product meets specifications. GAO therefore will deny a protest against rejection of an offer from an unqualified source when the protester has not supplied evidence such as test reports that it can meet extremely precise specifications and has not demonstrated the existence of quality assurance procedures 194
Improper
A protest is sustained where the agency rejected a potential source of supply by making award on a sole-source basis prior to the expiration of the mandatory 30-day Commerce Business Daily (CBD) publication requirement outlined in the Small Business Act, as amended by Pub. L. 98–72, and where the protester's offered products comply with the requirements of the procurement as outlined in the CBD synopsis 480
Time limitation for submission
Effect of competition
Contracting officer's failure to extend the closing date for proposal receipt which allegedly precluded a potential offeror from competing effectively does not render the procurement improper where adequate competition was obtained and there is no showing that the price at which the contract was awarded is unreasonable or that the agency was deliberately attempting to prevent the firm from competing 4
Refusal to extend date
There is nothing *per se* improper in a contracting officer refusing, after issuing a solicitation amendment, to extend the closing date for submission of initial proposals in a negotiated procurement; the de-

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termination whether an extension of the closing date is necessary is largely within the discretion of the contracting officer 4
Options
Generally. (*See* CONTRACTS, Options)
Pricing data (*See* CONTRACTS, Negotiation, Cost, etc. data)
Protests
Generally. (*See* CONTRACTS, Protests)
Requests for proposals. (*See* CONTRACTS, Protests)
Qualification of new sources
Evidence
Adequacy
Protester's contention that at the time of award of negotiated contract, the awardee's product was not qualified for listing on a required qualified products list is denied since the product had successfully completed all tests in accordance with the specification and the contracting officer had been so notified 752
Sufficiency at time of initial proposal submission
Protester's contention that at the time of award of negotiated contract, the awardee's product was not qualified for listing on a required qualified products list is denied since the product had successfully completed all tests in accordance with the specification and the contracting officer had been so notified 752
Spare parts, etc. procurement
Recommendations to military departments
Although denying a protest against rejection of a proposal from a nonapproved source, GAO recommends that the agency take immediate and vigorous steps to qualify any new source that may wish to participate in future competitive procurements. The agency should only consider exercising an option under the current contract if no additional sources become qualified 658
Time qualify as "approved source"
When services being procured are of a critical nature and the agency has only a short timeframe in which to award a new contract, General Accounting Office (GAO) cannot object on any legal basis to an award to the incumbent contractor, the only qualified source, even though the solicitation induced nonapproved sources such as the protester to compete 658
Requests for proposals
Amendment
Equal competitive basis for all offerors
In a negotiated procurement, any information that is given to a prospective offeror must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial 273
Propriety
Protests that Army should amend solicitation to restrict eligibility for award to offerors which have marketed product commercially in

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significant numbers for at least 1 year are denied. While Competition in Contracting Act of 1984 and relevant Army regulation state that it is the government's policy to promote the use of commercial products whenever practicable, nothing in the act or regulation requires that any particular procurement be restricted to offers of commercial products 691

Protest

Protests that Army should amend solicitation to restrict eligibility for award to offerors which have marketed product commercially in significant numbers for a least 1 year are denied. While Competition in Contracting Act of 1984 and relevant Army regulation state that it is the government's policy to promote the use of commercial products whenever practicable, nothing in the act or regulation requires that any particular procurement be restricted to offers of commercial products 691

Required for changes in RFP

In a negotiated procurement, any information that is given to a prospective offeror must be promptly furnished to all other prospective offerors as a solicitation amendment if the information is necessary in submitting proposals, or if the lack of such information would be prejudicial 273

Construction

Reasonable interpretation

Where solicitation required contractor to have host country approval for installation of its telecommunications equipment and offeror's proposal indicated that such approval would be obtained, agency acted properly in accepting the proposal since the solicitation did not require submission of evidence of having that approval prior to award 688

Deficient

Minimum standards

As a general rule, offerors must be given sufficient detail in a request for proposals to enable them to compete intelligently and on a relatively equal basis 273

Prior decision, which held that an agency's request for proposals was inadequate to promote effective competition and resulted in a *de facto* sole-source award to the incumbent, is affirmed where the request for reconsideration fails to indicate that material errors of fact or of law exist in the prior decision to warrant its reversal or modification 704

Evaluation

Criteria

Administrative discretion

Protest that request for proposal product testing requirements are inadequate is denied. Responsibility for establishment of tests necessary to determine product acceptability is within ambit of cognizant technical activity, and protester's disagreement with agency's engi-

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neers over adequacy of tests is not sufficient to carry protester's heavy burden of proof 691
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Relative importance
Where solicitation indicated that each technical evaluation element would be considered on a "responsive/nonresponsive" basis to determine technical acceptability without relative ranking of offers on each such element, and protester and awardee were both judged technically acceptable for all requirements and therefore essentially equal, agency properly did not consider whether protester in fact was technically superior in any evaluation element, instead making award on the basis of price 688
Although solicitation indicated that technical specifications and delivery were more important than price, where competing proposals for a fixed-price contract were rated essentially equal in accordance with evaluation method stipulated in the solicitation, price properly became the determinative factor for award 688
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"Off-the-shelf" end product requirement
Protests that Army should amend solicitation to restrict eligibility for award to offerors which have marketed product commercially in significant numbers for at least 1 year are denied. While Competition in Contracting Act of 1984 and relevant Army regulation state that it is the government's policy to promote the use of commercial products whenever practicable, nothing in the act or regulation requires that any particular procurement be restricted to offers of commercial products 691
Protests under (*See* CONTRACTS, Protests)
Qualified offerors list
When services being procured are of a critical nature and the agency has only a short timeframe in which to award a new contract, General Accounting Office (GAO) cannot object on any legal basis to an award to the incumbent contractor, the only qualified source, even though the solicitation induced nonapproved sources such as the protester to compete 658
Requirements statement sufficiency
As a general rule, offerors must be given sufficient detail in a request for proposals to enable them to compete intelligently and on a relatively equal basis 273
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When a protester alleges that specifications are excessively general and vague so as to prevent the submission of an intelligent proposal, General Accounting Office will not only analyze the specifications to see if they adequately detail the agency's requirements, but will also consider whether other proposals were received in order to deter-

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Conformability of equipment, etc. offered
Commercial product requirement
Protests that Army should amend solicitation to restrict eligibility for award to offerors which have marketed product commercially in significant numbers for at least 1 year are denied. While Competition in Contracting Act of 1984 and relevant Army regulation state that it is the government's policy to promote the use of commercial products whenever practicable, nothing in the act or regulation requires that any particular procurement be restricted to offers of commercial products. 691
General requirements
Not preconditions to award
Where solicitation required contractor to have host country approval for installation of its telecommunications equipment and offeror's proposal indicated that such approval would be obtained, agency acted properly in accepting the proposal since the solicitation did not require submission of evidence of having that approval prior to award 688
Minimum needs
Administrative determination
A contracting agency may impose a restriction on the competition only if it can be shown that the restriction is deemed necessary to meet its actual minimum needs 273
An agency is responsible for determining its minimum needs and the best way of accommodating those needs, and we will not question that determination absent a clear showing that it is unreasonable. Once an agency establishes *prima facie* support for its position, the burden shifts to the protester to show such determination is clearly unreasonable. The protester has not carried its burden here 653
Detailed requirements
In the absence of a specific statute or regulation mandating the establishment of geographic regions, an agency generally must show that its minimum needs define the scope of a geographic restriction in a contract 160
When a protester alleges that specifications are excessively general and vague so as to prevent the submission of an intelligent proposal, General Accounting Office will not only analyze the specifications to see if they adequately detail the agency's requirements, but will also consider whether other proposals were received in order to determine whether the level of uncertainty and risk in the solicitation was acceptable 273

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Qualified products
Time for determination
Protester's contention that an RFP to which was attached a specification stating that award would be made only for products qualified for listing on the appropriate qualified products list at time of bid opening should be interpreted as requiring qualification at the time set for receipt of initial proposals is denied since, in a negotiated procurement, award can be made to an offeror whose product is qualified at the time of award 752
Restrictive
Parts, etc. procurement
General Services Administration's decision to limit its Federal Supply Service requirements contracts for typewriters to models with 15-inch carriages based on anticipated savings from efficiency of acquisition and allowing suppliers to realize the economies of scale and larger production runs, is not a proper reason to restrict competition similarly in other typewriter procurements where there is no evidence that anticipated savings from standardization would not be offset by lower prices obtained through competition and other models would meet the user agency's needs 132
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Decision to limit procurement of typewriters to models that previously had undergone a lengthy life-cycle-cost (LCC) analysis was reasonable where the procurement's urgency did not permit an LCC analysis of other models 132
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Sufficiency
As a general rule, offerors must be given sufficient detail in a request for proposals to enable them to compete intelligently and on a relatively equal basis 273
Prior decision, which held that an agency's request for proposals was inaedquate to promote effective competition and resulted in a *de facto* sole-source award to the incumbent, is affirmed where the request for reconsideration fails to indicate that material errors of fact or of law exist in the prior decision to warrant its reversal or modification 704
Tests
First article
Waiver
A company may qualify for waiver of first article testing and product approval on the basis of the contract and production history of its predecessor company when the facilities, personnel, assets and products of the two companies are similar or identical 507
Requests for quotations. (*See* CONTRACTS, Requests for quotations)
Responsibility of offerors. (*See* CONTRACTORS, Responsibility)
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Sole-source basis
Authority
Awards in interest of national defense
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
GAO will deny protest against sole source award for mobilization base item when it is based on assessment of defense agency's requirements, amount needed to support producer's capability, and other factors particularly within the agency's expertise 260
Competition availability
Where the Small Business Administration, after initially agreeing to accept a janitorial services contract under section 8(a) of the Small Business Act, decided to reject the contract only 3 days before the existing one expired, the procuring agency was not justified in negotiating a sole-source contract with the 8(a) firm without soliciting an offer from the incumbent, since a sole-source contract is improper even in an urgent situation where there is more than one source capable of meeting the agency's needs 565
Justification
Inadequate
Where the contracting agency concluded that a vendor's software was not acceptable but found that the vendor's hardware was acceptable, and there was no requirement for obtaining the hardware and software from one vendor, a sole source award for the hardware was unreasonable 118
Where the Small Business Administration, after initially agreeing to accept a janitorial services contract under section 8(a) of the Small Business Act, decided to reject the contract only 3 days before the existing one expired, the procuring agency was not justified in negotiating a sole-source contract with the 8(a) firm without soliciting an offer from the incumbent, since a sole-source contract is improper even in an urgent situation where there is more than one source capable of meeting the agency's needs 565
An agency may not decide to forego soliciting an offer from the incumbent for the next contract period, and instead award a sole-source contract to another firm, based on its view that deficient past performance indicates the incumbent is not responsible, since a nonresponsibility determination should follow, not precede, a competition and, in the case of a small business like the incumbent, by law is subject to review by the Small Business Administration 565
Where a contract as modified is materially different from the original contract, the subject of the modification should be competitively procured unless a sole-source award is appropriate. A modification consisting of a new agreement to deliver, among other things, manufacturing and production machinery and equipment to expand the government's in-house production capabilities under an original con-

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A protest is sustained where the agency rejected a potential source of supply by making award on a sole-source basis prior to the expiration of the mandatory 30-day Commerce Business Daily (CBD) publication requirement outlined in the Small Business Act, as amended by Pub. L. 98–72, and where the protester's offered products comply with the requirements of the procurement as outlined in the CBD synopsis 480
Prohibition in Pub. L. 98–72 against commencing negotiations for the award of a sole-source contract until at least 30 days have elapsed from the date of publication in the Commerce Business Daily of a notice of intent to contract refers to the date of actual publication, and may not be negated by a regulatory provision, section 5.203 of Department of Defense Federal Acquisition Regulation Supplement, establishing a presumption that a synopsis electronically transmitted to the CBD has been published 2 days thereafter, *Harris Corp.*, B–217174, Apr. 22, 1985, 64 Comp. Gen. 480, 85–2 C.P.D. 455 clarified 871
Failure to follow-not prejudicial
General Accounting Office denies protest alleging that agency failed to comply with Pub. L. No. 98–72 requirement that intent to place noncompetitive orders under a basic ordering agreement be synopsized in the Commerce Business Daily where a spot check indicates that the orders were in fact synopsized except in cases where the urgency exception was properly invoked..... 620
Contracting agency's failure to timely publish a synopsis in the Commerce Business Daily concerning its proposed sole-source procurement as required by Pub. L. 98–72 does not require cancellation of the procurement where it has not been shown that the agency acted to deliberately deny the protester the opportunity to submit a proposal or that the protester was prejudiced by the lack of timely notice, because the record indicates that the protester could not have met the agency's delivery requirements..... 871
Incomplete synopsis
A protest is sustained where the agency rejected a potential source of supply for failure to demonstrate compliance with a requirement which was neither set forth in a CBD "source sought" synopsis nor otherwise made known to the vendor 118
Propriety
Where the contracting agency concluded that a vendor's software was not acceptable but found that the vendor's hardware was acceptable, and there was no requirement for obtaining the hardware and software from one vendor, a sole source award for the hardware was unreasonable 118

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A protest is sustained where the agency rejected a potential source of supply by making award on a sole-source basis prior to the expiration of the mandatory 30-day Commerce Business Daily (CBD) publication requirement outlined in the Small Business Act, as amended by Pub. L. 98-72, and where the protester's offered products comply with the requirements of the procurement as outlined in the CBD synopsis 480
Solicitation cancelled
Subsequent award to another contractor on sole-source basis
Where the Small Business Administration, after initially agreeing to accept a janitorial services contract under section 8(a) of the Small Business Act, decided to reject the contract only 3 days before the existing one expired, the procuring agency was not justified in negotiating a sole-source contract with the 8(a) firm without soliciting an offer from the incumbent, since a sole-source contract is improper even in an urgent situation where there is more than one source capable of meeting the agency's needs 565
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Although denying a protest against rejection of a proposal from a nonapproved source, GAO recommends that the agency take immediate and vigorous steps to qualify any new source that may wish to participate in future competitive procurements. The agency should only consider exercising an option under the current contract is not additional sources become qualified 658

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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 355
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Agency properly awarded a small business set-aside contract to firm determined to be small by a Small Business Administration (SBA) Regional Office where the award was made after the Regional Office's decision but prior to the agency's notification that the protester appealed to the SBA's Office of Hearings and Appeals for a final ruling. Whether options under this contract should be exercised is a matter to be resolved by the agency in accordance with applicable regulations 242
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Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated, unless it obtains specific statutory authority to do so 163
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Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for the needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated, unless it obtains specific statutory authority to do so 163
"*Bona fide* needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements 163
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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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Where a contracting agency determined to fill an additional requirement by option exercise at a reduced price, with changed delivery terms, it was required to negotiate with both contractors eligible for award 290
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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 355
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Protester's decision to bring suit in court after filing a bid protest constitutes an election of remedies that bonds the protester, even though the protester believed it was compelled to take such action in an attempt to stop award or performance. Consequently, the protester's offer to withdraw its suit from the court and reopen the protest at GAO, made after the court has refused to grant the protester's motion seeking an extended briefing schedule until GAO issues an advisory opinion, will not be considered 786
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Unsubstantiated
Protester fails to prove bias against it in evaluation of proposals where it advances no more than supposition in support of the allegation and where the evaluations were either reasonable or, if unreasonable, any errors were in the protester's favor and protester thereby suffered no competitive prejudice as a result 245
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. 355
Where bias is alleged, protester has 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. 681
Protester alleging that contracting officials acted in bad faith to eliminate the protester from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys does not meet its burden of showing by virtually irrefutable proof that the officials had a specific and malicious intent to injure the protester where the protested procurement was not set aside for small business concerns and a preaward survey was requested because of the protester's unfavorable procurement history 883
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A protester alleging disclosure of its confidential information to its competitors by agency personnel bears the burden of proving the improper conduct, and absent any probative evidence of actual disclosure, the allegation must be viewed as speculative and the burden has not been met. Moreover, General Accounting Office will not conduct investigations to establish the validity of the protester's statements 828
Unsubstantiated
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. .....

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Protester alleging that contracting officials acted in bad faith to eliminate the protester from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys does not meet its burden of showing by virtually irrefutable proof that the officials had a specific and malicious intent to injure the protester where the protested procurement was not set aside for small business concerns and a preaward survey was requested because of the protester's unfavorable procurement history 883
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Competition in Contracting Act of 1964, Pub. L. No. 98-369, sec. 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), provides for the consideration of protests filed with General Accounting Office (GAO) by an interested party to a solicitation issued by a "federal agency" for the procurement of property or services. Since the District of Columbia, which by definition is not a federal agency, has informed GAO of its decision that GAO no longer consider protests concerning procurements by the District, protest concerning solicitation issued by the District and which is filed after the Jan. 15, 1985, effective date of the provisions of the act pertaining to bid protests submitted to GAO is dismissed. 488
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Protest challenging cancellation of an invitiation for bids (IFB), where the contracting agency plans to award a contract under the IFB when reissued in amended form, falls within the definition of protest in the Competition in Contracting Act, and General Accounting Office (GAO) review of such a protest is consistent with congressional intent to strengthen existing GAO bid protest function 854
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Where protester raises broad ground of protest in initial submission but fails to provide any detail on this protest ground until it comments on the agency report, so that a further response from the agency would be needed for an objective review of the matter, the protest, filed in a piecemeal fashion, will not be considered 828
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On protester
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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 355

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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. 384
Protester has not met burden of proving that specification for janitorial services is deficient because estimated quantities or "mandays" needed to clean certain buildings are consistent with sizes of buildings. 593
An agency is responsible for determining its minimum needs and the best way of accommodating those needs, and we will not question that determination absent a clear showing that it is unreasonable. Once an agency establishes *prima facie* support for its position, the burden shifts to the protester to show such determination is clearly unreasonable. The protester has not carried its burden here. 653
Where bias is alleged, protester has 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. 681
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Protester alleging that contracting officials acted in bad faith to eliminate the protester from competition by setting aside procurements for small business concerns and by conducting repeated preaward surveys does not meet its burden of showing by virtually irrefutable proof that the officials had a specific and malicious intent to injure the protester where the protested procurement was not set aside for small business concerns and a preaward survey was requested because of the protester's unfavorable procurement history 883
A protester alleging disclosure of its confidential information to its competitors by agency personnel bears the burden of proving the improper conduct, and absent any probative evidence of actual disclosure, the allegation must be viewed as speculative and the burden has not been met. Moreover, General Accounting Office will not conduct investigations to establish the validity of the protester's statements 828
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Failure specifically to request a ruling by the Comptroller General or to state the remedy desired, as required by General Accounting Office Bid Protest Regulations, is a minor procedural defect which does not require dismissal of the protest when the protest otherwise clearly indicates the desire for a ruling and the requested remedy 641
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General Accounting Office (GAO) regulations provide that protests are to be dismissed unless the protester submits either comments on the agency report or a statement requesting GAO to decide the matter on the existing record within 7 days after receiving the

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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 429
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Protest dismissed
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 429
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General Accounting Office (GAO) will not consider a protest where the issues presented are before a court of competent jurisdiction, despite the court's indication that it is willing to consider an advisory GAO decision. The court has also indicated that it intends to rule on the merits in advance of the date when it can be reasonably expected that GAO will be in a position to issue a decision, given the statutory time period for the agency to file its report on the protest and for the parties to comment on that report 647
Footnote in a court order, indicating that the court will not object to a GAO opinion, does not constitute a request for such an opinion where the court has neither granted the protester's motion for an extension of the hearing date nor take any other action that would enable GAO to issue a timely decision 786
Protester's decision to bring suit in court after filing a bid protest constitutes an election of remedies that binds the protester, even though the protester believed it was compelled to take such action in an attempt to stop award or performance. Consequently, the protester's offer to withdraw its suit from the court and reopen the protest at GAO, made after the court has refused to grant the protester's motion seeking an extended briefing schedule until GAO issues an advisory opinion, will not be considered 786
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Protest challenging cancellation of an invitation for bids (IFB), where the contracting agency plans to award a contract under the IFB when reissued in amended form, falls within the definition of protest in the Competition in Contracting Act, and General Accounting Office (GAO) review of such a protest is consistent with General Accounting Office congressional intent to strengthen existing GAO bid protest function 854
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Protest challenging cancellation of an invitation for bids (IFB), where the contracting agency plans to award a contract under the IFB when reissued in amended form, falls within the definition of protest in the Competition in Contracting Act, and General Accounting Office (GAO) review of such a protest is consistent with General Accounting Office congressional intent to strengthen existing GAO bid protest function 854

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Where protester raises broad ground of protest in initial submission but fails to provide any detail on this protest ground until it comments on the agency report, so that a further response from the agency would be needed for an objective review of the matter, the protest, filed in a piecemeal fashion, will not be considered 828
Reconsideration requests
Additional evidence submitted
Available but not previously provided to GAO
Analyses presented by an agency in its request for reconsideration of a decision sustaining a protest against the determination of the agency to continue to perform services in-house rather than by contracting out for the services will not be considered since the agency declined to present any comments or analyses at the time of the protest and the information which forms the basis for the analyses was available at that time 64
Error of fact or law
Established
Where a garbled telegraphic modification increasing the bid price in an uncertain amount causes the bid price to be uncertain, the bid was properly found to be nonresponsive, even if, as the bidder now shows, statement in prior decision indicating that the modification also acknowledged two material amendments to the solicitation was erroneous 702
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Protester requesting reconsideration of a General Accounting Office decision must present a detailed statement of the factual and legal grounds warranting reversal or modification, specifying any

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General Accounting Office will not reopen a case which was closed because the protester did not send a timely indication of its continued interest in the protest to GAO, where the failure to timely indicate continued interest was caused by counsel's moving offices 172
Where protester's statement that written protest to procuring agency, initially viewed by General Accounting Office as untimely, was merely confirmation of timely oral protest is unquestioned by agency, it established that protest to GAO was timely 540
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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 the proceedings 259
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General Accounting Office (GAO) regulations provide that protests are to be dismissed unless the protester submits either comments on the agency report or a statement requesting GAO to decide the matter on the existing record within 7 days after receiving the report. If a conference is held, the protester must submit either comments or a similar request for a decision on the existing record within 5 working days after the conference 515

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Where protester's statement that written protest to procuring agency, initially viewed by General Accounting Office as untimely, was merely confirmation of timely oral protest is unquestioned by agency, it establishes that protest to GAO was timely 540
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Protest that agency's specifications for equipment are unduly restrictive is untimely under General Accounting Office's (GAO) Bid Protest Procedures where the protester filed a timely protest with the contracting agency before responses to the specifications were due, but waited almost 4 months to file with GAO after the agency received responses from vendors without taking the action requested in the protest to the agency 484
General Accounting Office Bid Protest Procedures encourage protesters to seek resolution of their complaints initially with the contracting agency. Where protest was timely filed initially with the contracting agency and subsequent protest to GAO was filed within 10 working days of the contracting agency's initial adverse action on the protest, protest to GAO is timely 553
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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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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 the proceedings 259
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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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Bid opening is not initial adverse agency action on a protest to an agency where the agency advises the protester that it will consider the protest notwithstanding bid opening, that it will cancel the solicitation if the protest is upheld, and that the procurement will not

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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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General Accounting Office will not reopen a case which was closed because the protester did not send a timely indication of its continued interest in the protest to GAO, where the failure to timely indicate continued interest was caused by counsel's moving offices 172
Failure to diligently pursue protest
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 the proceedings 259
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Bid opening is not initial adverse agency action on a protest to an agency where the agency advises the protester that it will consider the protest notwithstanding bid opening, that it will cancel the solicitation if the protest is upheld, and that the procurement will not proceed until the protest is decided. A protest filed with General Accounting Office within 10 days after the agency decision is therefore timely 858

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Where a protester initially filing a timely protest later supplements it with new grounds of protest, the new grounds must independently satisfy GAO timeliness requirements 858
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Untimely protest against the evaluation of the cost of "technical support services" in reviewing responses to the agency's announced intention to place an order with a nonmandatory Automatic Data Processing Schedule contractor will be considered on the merits as a significant issue, since the matter is one of widespread interest that General Accounting Office has not considered before 11
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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 331
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To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A manufacturer which supplies equipment to potential bidders or offerors in a federal procurement, but which is not a potential bidder or offeror in its own right, is not an interested party 577
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To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A manufacturer which supplies equipment to potential bidders or offerors in a federal procurement, but which is not a potential bidder or offeror in its own right, is not an interested party 577
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A potential subcontractor complaining about definitive responsibility criteria that a bidder would have to meet as a prerequisite to award of the prime contract is not an interested party since to be an interested party under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract 500
To be considered an interested party so as to have standing to protest under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract. A potential subcontractor on a direct federal procurement cannot be considered an actual or prospective bidder or offeror 523

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A potential subcontractor complaining about definitive responsibility criteria that a bidder would have to meet as a prerequisite to award of the prime contract is not an interested party since to be an interested party under the Competition in Contracting Act of 1984 and the General Accounting Office implementing Bid Protest Regulations, a party must be an actual or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract or by the failure to award a contract 500
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er's offer to withdraw its suit from the court and reopen the protest at GAO, made after the court has refused to grant the protester's motion seeking an extended briefing schedule until GAO issues an advisory opinion, will not be considered 786

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Bid protest procedures (*See* **CONTRACTS, Protests, General Accounting Office procedures, Reconsideration requests**)
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Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes..... 718

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Recovery of quotation preparation costs may be allowed where the contracting agency unreasonably excluded the protester from the procurement, and other remedies are not appropriate. Recovery of

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costs of filing and pursuing the protest, including attorney's fees, may also be allowed where the agency unreasonably excluded the protester from the procurement and General Accounting Office does not recommend that the protester be awarded the contract. 672
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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 355
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Certificate of Competency
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

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referred to SBA for review under the SBA's Certificate of Competency procedures 355
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Prior decision, which held that a small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healey Public Contracts Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. The Department of Labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a representation by a small business bidder that it is a manufacturer of the supplies being procured is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern 748
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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 Office's decision but prior to the agency's notification that the protester appealed to the SBA's Office of Hearings and Appeals for a final ruling. Whether options under this contract should be exercised is a matter to be resolved by the agency in accordance with applicable regulations 242
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Agency properly awarded a small business set-aside contract to a firm determined to be small by a Small Business Adminstration (SBA) Regional Office where the award was made after Regional Office's decision but prior to the agency's notification that the protester appealed to the SBA's Office of Hearings and Appeals for a final ruling. Whether options under this contract should be exercised is a matter to be resolved by the agency in accordance with applicable regulations 242
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Prior decision, which held that a small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healy Public Contracts Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. The Department of Labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a repre-

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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 Office's decision but prior to the agency's notification that the protester appealed to the SBA's Office of Hearings and Appeals for a final ruling. Whether options under this contract should be exercised is a matter to be resolved by the agency in accordance with applicable regulations 242
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Prior decision, which held that small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healey Public Contract Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. The Department of Labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a representation by a small business bidder that it is a manufacturer of the supplies being procured is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern 748

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Prior decision, which held that small business bidder's representation of itself as a manufacturer of the offered supplies for purposes of the Walsh-Healey Public Contract Act created a binding obligation to furnish supplies manufactured or produced by a small business concern, is reversed, and other decisions to the same effect are expressly modified. The Department of Labor interprets the Walsh-Healey Act as not prohibiting a qualified manufacturer from subcontracting the manufacture of the offered supplies. Therefore, a representation by a small business bidder that it is a manufacturer of the supplies being procured is not equivalent to a certification that all supplies to be furnished will be manufactured or produced by a small business concern 748

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Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes 718
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Reformation may be permitted on a case-by-case basis of fixed-price contracts between Veterans Adminstration (VA) and Washington State construction contractors which purported to include in contract price all applicable state taxes but did not include state sales and use taxes where both parties thought, due to erroneous assumptions of law, that these taxes which were not applicable at the time the contract was signed could not be imposed retroactively at a later time .. 718
Even though some contractors may have executed a general release of all claims against the VA, based on the same mutual mistake of law, the release too may be reformed on a case-by-case basis to permit VA to reimburse contractors for state sales and use taxes retroactively assessed against them where it is clear that both parties expected VA to assume the costs of all applicable taxes 718
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A contract awarded on the basis of defective specifications should not be terminated and the requirements solicited where no competitive prejudice to any bidder is apparent and the government met its minimum needs at reasonable prices after adequate competition 482
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Agency's competitive selection of a contractor to make travel arrangements for federal employees is exempt from the procurement statutes since the contractual arrangement is only a management vehicle to obtain travel services which themselves are exempt from procurement procedures 670

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Pennsylvania Avenue Development Corporation (PADC) may install a memorial plaque and designate a site within an area under its jurisdiction and control in honor of a deceased former chairperson of the PADC using funds donated to it. PADCA has been vested with authority to determine the character of and necessity for its obligations and expenditures and to accept gifts of financial aid from any source and comply with the terms thereof. These authorities are sufficient to free PADC from restriction otherwise imposed upon Government agencies in the expenditure of appropriated funds except where a statutory restriction expressly applies to Government corporations. No law expressly precludes proposed expenditures by PADC. Furthermore, no law precludes PADC from designating property under its control in honor of deceased former chairperson of PADC 124

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The Bankruptcy Amendments and Federal Judgeship Act of 1984, Pub. L. No. 98-353, establishes a bankruptcy court as a unit of the district court, in each judicial district. The bankruptcy judges may appoint clerks of bankruptcy courts. Amendment of 28 U.S.C. 1930 providing that bankruptcy filing fees are to be paid to "the clerk of the court" does not exclude payment to the bankruptcy clerk as the accountable officer for the funds. Incident to his office, the bankruptcy clerk also is the accountable officer for registry funds entrusted to the bankruptcy court 535
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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 429
Payment
Appropriation chargeable
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 349
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 349

COURTS—Continued Page

Tax Court of United States

Court of record status of procurement

U.S. Tax Court, a legislative court of record, is not bound by GSA regulation on personal convenience items (41 C.F.R. 101-26.103-2) which applies only to executive branch agencies, nor by an Administrative Office of the United States Courts regulation (Title VIII of the "Guide to Judiciary Policies and Procedures") since the Tax Court is not part of the judicial branch. Nevertheless both regulations, as well as GAO decisions, can provide useful guidance for Tax Court in developing its own regulation on the expenditure of its appropriations for art objects..... 796

Regulations

Procurement

U.S. Tax Court advised to develop internal regulations governing purchase of decorative items for individual judges' offices and chambers which provide adequate administrative controls to assure that purchases are not made solely to please the individual judges involved. Present Tax Court policy or allocating fixed sum of money to each judge and allowing him or her to select the objects to be procured does not provide such controls..... 796

CREDIT CARDS

Fraudulent use

Government liability

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.. 337

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 compa-

CREDIT CARDS—Continued Page
United States Government National—Continued
Liability of government—Continued
nies 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.. 337

DAMAGES
Contracts. (*See* CONTRACTS, Damages)
Liquidated Contracts. (*See* CONTRACTS, Damages, Liquidated)

DAVIS-BACON ACT. (*See* CONTRACTS, Labor Stipulations, Davis-Bacon Act)

DEBT COLLECTIONS
Administrative Action
Procedural Requirements
Agencies are entitled to a reasonable time in which to promulgate regulations to implement the administrative offset authority of section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716. During the interim period, agencies should provide debtors with the rights specified in section 10 or their substantial equivalent. If agency provides these rights, offset under section 10 is not precluded solely because of absence of final agency regulations. 816
By Government employees requirement
GSA proposal to sell used Government vehicles on consignment through private sector auction houses is not objectionable. The proposal does not provide for an improper delegation of the inherent Government function of fee setting since the Government will set a minimum bid price on each vehicle and the final sales price will be determined by the market. The security of Government funds is assured by a contractor guarantee and bonding. 62 Comp. Gen. 339 (B-207731, Apr. 22, 1983), is distinguished. 149
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. 408
Debt Collection Act of 1982
Applicability
Sections 5 and 10 of the Debt Collection Act of 1982, codified at 5 U.S.C. 5514, and 31 U.S.C. 3716 (1982), respectively, provide generalized authority to take administrative offset to collect debts owed to the United States. Their passage did not impliedly repeal 5 U.S.C.

DEBT COLLECTIONS—Continued Page

Debt Collection Act of 1982—Continued

Applicability—Continued

5522, 5705, or 5724 (1982), or other similar preexisting statutes which authorize offset in particular situations. This is because a statute dealing with a narrow, precise, and specific subject is not submerged or impliedly repealed by a later-enacted statute covering a more generalized spectrum, unless those statutes are completely irreconcilable. 142

Section 5 of the Debt Collection Act of 1982, 5 U.S.C. 5514, as implemented in 49 Fed. Reg. 27470-75 (1984) (to be codified in 5 C.F.R. 550.1101 through 550.1106), authorizes and specifies the procedures that govern all salary offsets which are not expressly authorized or required by other more specific statutes (such as 5 U.S.C. 5522, 5705, and 5724). Any procedures not specified in that statute and its implementing regulations should be consistent with the provisions of the Federal Claims Collection Standards, 49 Fed. Reg. 8898-8905 (1984) (to be codified in 4 C.F.R. ch. II) 142

Except as provided in section 101.4 of the Federal Claims Collection Standards (FCCS), when taking administrative offset under 5 U.S.C. 5522, 5705, or 5724, or other similar statutes, or the common law, agencies should follow the procedures specified in section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716 (1982), as implemented by section 102.3 of the FCCS, 49 Fed. Reg. 8889, 8898-99 (1984) (to be codified in 4 C.F.R. ch. II) 142

Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against former federal employee's final salary check and lump-sum leave payment, unless they represent the continuation of an offset against current salary initiated under section 5. In regulations (5 C.F.R. Part 550, Subpart K) issued by Office of Personnel Management implementing section 5 U.S.C. 5514), it is specifically stated that section 10 (31 U.S.C. 3716) applies to offsets against employee's final salary check and lump-sum leave payment. Historically both of these payments have been treated differently than employee's current pay account and both have been available for involuntary offset for debt collection. This interpretation of statute by agency charged with its administration is not unreasonable. Therefore, offsets against employee's final salary check and lump-sum leave payment are governed generally by 31 U.S.C. 3716. In any event, the 15 percent limitation of 5 U.S.C. 5514 does not apply. 907

Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against payments from Civil Service Retirement and Disability Fund (Retirement Fund). The Office of Personnel Management regulations implementing section 5 (5 U.S.C. 5514) and the regulations issued jointly by GAO and the Department of Justice implementing section 10 (31 U.S.C. 3716) both provide for offsets against Retirement Fund payments to be governed by administrative offset provisions of 31 U.S.C. 3716. This is a continuation of long-standing interpretation and there is no indication that Act was intended to change it. Therefore, administrative offset provisions of section 10 apply to payments from Retirement Fund. 907

DEBT COLLECTIONS—Continued Page
Debt Collection Act of 1982—Continued
Applicability—Continued
Agencies are entitled to a reasonable time in which to promulgate regulations to implement the administrative offset authority of section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716. During the interim period, agencies should provide debtors with the rights specified in section 10 or their substantial equivalent. If agency provides these rights, offset under section 10 is not precluded solely because of absence of final agency regulations. 816
Installment Payments
Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative offset is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 C.F.R. ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative offset under section 5512 should proceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or during the pendency of litigation does not present the courts with a moot issue since the issue at trial concerns the original amount asserted against the officer, not the balance remaining to be paid. 606
Officers and Employees of U.S.
Debts to Government. (*See* OFFICERS AND EMPLOYEES, Debts to U.S., Liquidation)
Procedure for collection and accounting
Justice Department referrals. (*See* DEBT COLLECTIONS, Referral to Justice, Procedure)
Miscellaneous receipts *v.* special account
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
Waiver, alteration, etc.
Debtor may contractually agree to procedures different from those specified in 31 U.S.C. 3716(a), or may completely waive entitlement to those procedures, as long as the variance or waiver is made voluntarily, knowingly, and intelligently 493
Work-out agreement
Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt,

DEBT COLLECTIONS—Continued Page
Procedure for collection and accounting—Continued
Work-out agreement—Continued
not just the installments that were past due under the work-out agreement. ... 492
Referral to Justice
Debtor's request for court of law determination
Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 and in accordance with the requirements of 5 U.S.C. 5512, General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer. ... 605
Pursuant to the request of an accountable officer for whom relief was denied under 31 U.S.C. 3527 (1982), and in accordance with the requirements of 5 U.S.C. 5512 (1982), General Accounting Office reports the balance claimed due against the accountable officer to the Attorney General of the United States in order that legal action be instituted against the officer. ... 606
Procedure
Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative offset is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 C.F.R. ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative offset under section 5512 should proceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or durng the pendency of litigation does not present the courts with a moot issue since the issue at trial concerns the original amount asserted against the officer, not the balance remaining to be paid ... 606
Set-off propriety
Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative offset is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 C.F.R. ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative offset under section 5512 should proceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or during the pendency of litigation does not present the courts with a moot issue since the issue at trial concerns

DEBT COLLECTIONS—Continued Page
Referral to Justice—Continued
Set-off propriety—Continued
the original amount asserted against the officer, not the balance remaining to be paid. 606
Retirement set-off
Civilian employees. (*See* RETIREMENT, Civilian, Deductions for debt liquidation)
Set-off. (*See* SET-OFF)
Waiver
Civilian employees
Compensation overpayments
Employee unaware of overpayment
An employee, who received severance pay following separation due to a reduction in force, was later granted a retroactive disability retirement. Payment of the retroactive retirement annuity resulted in an erroneous overpayment of the severance pay. Repayment of the total amount of severance pay is waived under 5 U.S.C. 5584 (1982) where there is no evidence the employee knew or should have known of the overpayment either when he received the severance payments or when he received the retroactive annuity payment. B–166683, May 21, 1969 is distinguished 15
Severance pay
An employee, who received severance pay following separation due to a reduction in force, was later granted a retroactive disability retirement. Payment of the retroactive retirement annuity resulted in an erroneous overpayment of the severance pay. Repayment of the total amount of severance pay is waived under 5 U.S.C. 5584 (1982) where there is no evidence the employee knew or should have known of the overpayment either when he received the severance payments or when he received the retroactive annuity payment. B–166683, May 21, 1969 is distinguished 15
An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper 86
Leave payments
Lump-sum leave payment
An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper 86

DEBT COLLECTIONS—Continued Page

Waiver—Continued

Civilian employees—Continued

Retirement contributions

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Retirement contributions which previously had been refunded to the employee were properly deducted from backpay because his retroactive reinstatement and receipt of backpay removed the legal basis for the refund. Net indebtedness resulting from deduction of the refund from backpay may not be waived by this Office under 5 U.S.C. 5584, since the refund did not constitute an erroneous payment of "pay or allowances." Under 5 U.S.C. 8346(b), Office of Personnel Management has sole authority to waive erroneous payments from the Civil Service Retirement Fund 86

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. The employee must pay retirement fund contributions for the period of separation in order to receive service credit for that period. Although backpay awarded to the employee is insufficient to cover the amount of contributions he must pay, collection of that amount is not subject to waiver under 5 U.S.C. 5584 since there has been no erroneous payment of pay 86

Severance pay. (*See* **DEBT COLLECTIONS, Waiver, Civilian employees, Compensation overpayments, Severance pay)**

Military personnel

Dual compensation

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 395

Effect of member's fault

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 395

Pay, etc.

Overpayment

Holding two offices

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

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Military personnel—Continued
Pay, etc.—Continued
Overpayment—Continued
Holding two offices—Continued
waived, in the absence of clear and convincing evidence that he performed the civilian Govt. services in good faith 395

DEFENSE DEPARTMENT
Procurement
Without open and competitive bidding
Sole-source negotiation
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

DEFENSE ACQUISITION REGULATION
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
Interagency agreements. (*See* AGREEMENTS, Interagency)
Services between
Appropriation obligation
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 370
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
Reimbursements
Appropriation availability
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

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Services between—Continued
Reimbursements—Continued
Appropriation availability—Continued
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 370
Not required
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
Required
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 370
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
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 370
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
Reimbursement
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

DETAILS—Continued Page
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Reimbursement—Continued
a loaning agency may not be used in support of programs for which its funds have not been appropriated 370
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
Propriety
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 370
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

DISBURSING OFFICERS
Relief
Foreign currency devaluation
GAO specifically finds that the term "agency" as used in 31 U.S.C. 3342 includes legislative as well as executive branch agencies of the Federal Government. Therefore, disbursing officers of the Library of Congress whose accounts are diminished solely by foreign currency devaluations in the course of authorized currency exchanges may seek restoration of the accounts from the Department of the Treasury pursuant to 31 U.S.C. 3342. To the extent that they are inconsistent with this decision, B-174244, Dec. 8, 1971, and B-174244, Dec. 17, 1974, will no longer be followed 152

DISTRICT OF COLUMBIA
Contracts
Awards
Applicable law
District of Columbia statutes
Competition in Contracting Act of 1984, Pub. L. No. 98-369, sec. 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), provides for the consideration of protests filed with General Accounting Office (GAO) by an interested party to a solicitation issued by a "federal agency" for the procurement of property or services. Since the District of Columbia, which by definition is not a federal agency, has informed GAO of its decision that GAO no longer consider protests concerning procurements by the District, protest concerning solicitation issued by the District and which is filed after the Jan. 15,

DISTRICT OF COLUMBIA—Continued Page
Contracts—Continued
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District of Columbia statutes—Continued
1985, effective date of the provisions of the act pertaining to bid protests submitted to GAO is dismissed 489

DONATIONS
Acceptance
Officers and employees
Travel expenses. (*See* TRAVEL EXPENSES, Contributions from private sources, Acceptance by employees)

EQUAL EMPLOYMENT OPPORTUNITY
Commission
Authority
Title VII discrimination complaints
Informal agency settlement
Remedial actions
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

ECONOMY ACT
Authority for interagency agreements. (*See* ECONOMY ACT, Orders)
Leases
Rent limitation. (*See* LEASES, Rent, Limitation, Economy Act restriction)
Orders
Limitations
Authority for interagency agreements
Nonappropriated fund activities excluded
Graduate School of Department of Agriculture, as a nonappropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

ELDERLY POPULATION
Housing assistance programs
Housing and Urban Development Department. (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Housing assistance programs, Handicapped persons)

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ENERGY
Energy Policy and Conservation Act
Environmental Protection Agency responsibilities
Environmental Protection Agency (EPA) is responsible for designing and administering fuel economy performance test and computing Corporate Average Fuel Economy (CAFE) ratings for auto makers. Request questioned EPA's handling of CAFE tests and ratings in three specific areas. Findings are: 1) EPA has broad statutory authority to refine test procedures, even if harder tests have the effect of raising CAFE standards slightly; 2) EPA's use of informal Advisory Circulars instead of rulemaking procedures to effect test changes is improper unless test changes are "technical and clerical amendment[s]" exempted from rulemaking by statute, or unless one of the Administrative Procedure Act exceptions applies; and 3) Rulemaking proposing adjustments to CAFE ratings is a legally adequate response to a court order to address discrepancies resulting from test changes EPA made in 1979. To Rep. Dingell 570

ENLISTMENTS
Expiration
Pay. (*See* PAY, After Expiration of Enlistment)

ENTERTAINMENT
Appropriation availability
Equal Employment Opportunity Programs
Army may not use appropriated funds to pay for meals of handicapped employees attending a luncheon in honor of National Employ the Handicapped Week 802
Specific statutory authorization requirement
Army may not use appropriated funds to pay for meals of handicapped employees attending a luncheon in honor of National Employ the Handicapped Week 802

ENVIRONMENTAL PROTECTION AGENCY. (*See* ENVIRONMENTAL PROTECTION AND IMPROVEMENT, Environmental Protection Agency)

ENVIRONMENTAL PROTECTION AND IMPROVEMENT
Environmental Protection Agency
Authority
Fuel Economy Performance Agency
Environmental Protection Agency (EPA) is responsible for designing and administering fuel economy performance test and computing Corporate Average Fuel Economy (CAFE) ratings for auto makers. Request questioned EPA's handling of CAFE tests and ratings in three specific areas. Findings are: 1) EPA has broad statutory authority to refine test procedures, even if harder tests have the effect of raising CAFE standards slightly; 2) EPA's use of informal Advisory Circulars instead of rulemaking procedures to effect test changes is improper unless test changes are "technical and clerical amendment[s]" exempted from rulemaking by statute, or unless one of the Administrative Procedure Act exceptions applies; and 3) Rulemaking proposing adjustments to CAFE ratings is a legally adequate

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ENVIRONMENTAL PROTECTION AND IMPROVEMENT—Continued Page
Environmental Protection Agency—Continued
Authority—Continued
Fuel Economy Performance Agency—Continued
response to a court order to address discrepancies resulting from test changes EPA made in 1979. To Rep. Dingell 570
Waste
Disposal
Since Solid Waste Disposal Act requires federal agencies to comply with local requirements respecting the control and abatement of solid waste generated by federal facilities in the same manner and extent as any person subject to such requirements, those federal facilities located within the city of Monterey must comply with a city requirement that all inhabitants of the city have their solid waste collected by the city's franchisee. Therefore, federal solicitations seeking bids for these services should be canceled and the services of the city or its franchisee should be used instead 813

EQUIPMENT
Automatic data processing systems
Acquisition, etc.
Evaluation
Reasonableness
Contracting agency's decision to issue a delivery order for automatic data processing (ADP) equipment and "technical support services" to a nonmandatory ADP Schedule contractor is improper where a response to a Commerce Business Daily notice of the agency's intention to place the order would have indicated a less costly alternative but for the agency's unreasonable evaluation of the costs for the support services 11
In reviewing an agency's evaluation of written responses to a Commerce Business Daily notice of intent to place an order against a particular vendor's nonmandatory automated data processing equipment schedule contract, GAO's role is to ascertain whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking a competitive solicitation, if possible, of the agency's requirements 484
Reasonably quantifiable factors
The evaluation of offers, or responses to a contracting agency's announced intention to place an order with a nonmandatory Automatic Data Processing Schedule contractor, should not include the consideration of speculative advantages to the government, but should be confined to matters that are reasonably quantifiable 11
Requirements
Evaluation propriety
In reviewing an agency's evaluation of written responses to a Commerce Business Daily notice of intent to place an order against a particular vendor's nonmandatory automated data processing equipment schedule contract, GAO's role is to ascertain whether there was a reasonable basis for the evaluation and whether the evaluation was consistent with seeking a competitive solicitation, if possible, of the agency's requirements 484

EQUIPMENT—Continued Page
Automatic data processing systems—Continued
Computer service
Evaluation propriety
Contracting agency's decision to issue a delivery order for automatic data processing (ADP) equipment and "technical support services" to a nonmandatory ADP Schedule contractor is improper where a response to a Commerce Business Daily notice of the agency's intention to place the order would have indicated a less costly alternative but for the agency's unreasonable evaluation of the costs for the support services 11
Replacement
Trade-in allowances
Where agency seeks to acquire new items and plans to solicit trade-in allowances for the items being replaced, the agency must solicit offers for the old items on an exchange (trade-in) basis and/or a cash basis, unless circumstances indicate that permitting both types of offers will not result in a better price than allowing one type 132

ESTOPPEL
Against Government
Not established
Prior erroneous advice, contract action, etc.
Employees who were permanently transferred from Miami to Orlando, Fla., seek reimbursement for several househunting trips. The claims are denied since each employee may be reimbursed travel and transportation expenses for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. 5724a(a)(2)(1982). The fact that the employees may have been given erroneous advice does not create a right to reimbursement where the expenses claimed are precluded by law 472

FEDERAL ACQUISITION REGULATION
Small business certification requirement
Eligibility for award
Bidder which certifies that it is not a small business was eligible for award of the contract under an invitation for bids not set aside for small business 84

FEDERAL ADVISORY COMMITTEE ACT
Advisory committees
Per diem payable to members
Members of the Cultural Property Advisory Committee may not be reimbursed for actual subsistence expenses exceeding the maximum amount of $75 per day, as limited by 5 U.S.C. 5702(c). The Federal Advisory Committee Act, Public law 92-463, incorporated by reference in the Advisory Committee's enabling legislation, provides that advisory committee members are to be paid the same travel expenses as authorized under 5 U.S.C. 5703 for intermittent employees. Under 5 U.S.C. 5703 and the Federal Travel Regulations, intermittent employees serving as experts or consultants may not be reimbursed for actual subsistence expenses exceeding the maximum rate, absent specific statutory authorization for the payment of a higher rate. We

FEDERAL ADVISORY COMMITTEE ACT—Continued Page
Advisory committees—Continued
Per diem payable to members—Continued
find that no such specific statutory authority is included in the Advisory Committee's enabling legislation 34

FEDERAL GRANTS, ETC.
Generally. (*See* **GRANTS, Federal**)
Grantee contracts. (*See* **CONTRACTS, Grant-funded procurements**)

FEDERAL PROPERTY MANAGEMENT REGULATIONS
Applicability
Legislative Courts
U.S. Tax Court, a legislative court of record, is not bound by GSA regulation on personal convenience items (41 C.F.R. 101-26.103-2) which applies only to executive branch agencies, nor by an Administrative Office of the United States Courts regulation (Title VIII of the "Guide to Judiciary Policies and Procedures") since the Tax Court is not part of the judicial branch. Nevertheless both regulations, as well as GAO decisions, can provide useful guidance for Tax Court in developing its own regulation on the expenditure of its appropriations for art objects 796

FEDERAL TRAVEL REGULATIONS. (*See* **REGULATIONS, Travel, Federal**)

FEES
Parking
Privately owned vehicle
Common carrier terminal
An employee, in computing constructive travel by common carrier, claims mileage and parking as if his spouse drove the employee to and from the airport. However, for computing constructive travel costs, only the usual taxicab or airport limousine fares, plus tip, should be used for comparison purposes 443
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. 339 408

FOREIGN AID PROGRAMS
Grant agreements with foreign governments
Interest earned on grant funds
Retention
United States *v.* foreign government
The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds award-

FOREIGN AID PROGRAMS—Continued Page
Grant agreements with foreign governments—Continued
Interest earned on grant funds—Continued
Retention—Continued
United States *v.* foreign government—Continued
ed by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we believe that the disbursement of the grant funds by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds 103

FOREIGN GOVERNMENTS
Donations, grants, loans, etc.
Egyptian Basic Village Services project
Agency for International Development grants
Retention of interest
The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds awarded by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we believe that the disbursement of the grant funds by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds 103

FOREIGN MATTERS GENERALLY
Claims. (*See* CLAIMS, Foreign)

FOREIGN SERVICE
Travel expenses
Foreign vessel use
Reimbursement. (*See* TRANSPORTATION, Vessels, Foreign, Reimbursement)

FOREST SERVICE
Other than timber sales. (*See* AGRICULTURE DEPARTMENT, Forest Service)

FRAUD
By Military personnel
Unlawfully acquired funds
An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments 67

FRAUD—Continued Page

False claims

Forfeiture

Paid claims, vouchers, etc.

An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments 67

FREEDOM OF INFORMATION ACT

Disclosure requests

Records of agencies, etc. other than GAO

Authority of GAO to require disclosure

GAO has no authority to determine what information must be disclosed by another agency in response to a Freedom of Information Act request 828

General Accounting Office

GAO has no authority to determine what information must be disclosed by another agency in response to a Freedom of Information Act request 828

FUNDS

Advance

Travel expenses

Accountability

Blank travelers checks obtained by the Government for issuance to its employees in lieu of cash travel advances do constitute official Government funds, the physical loss or disappearance of which would entail financial liability for the accountable officer involved. That liability may be relieved by General Accounting Office, under 31 U.S.C. 3527 (1982), in the same manner as liability for a loss involving cash or other Government funds 456

Foreign

Exchange rate

Repayment of funds advanced

Deficiencies in the Library of Congress imprest funds used for foreign currency exchange transactions authorized by 31 U.S.C. 3342(a) and (b) and which are attributable solely to currency devaluations may be restored by the Department of the Treasury as authorized by 31 U.S.C. 3342(c) and implementing regulations. It is not necessary or appropriate for Government agencies to seek relief for a physical loss pursuant to 31 U.S.C. 3527. 61 Comp. Gen. 132 (1981). To the extent that they are inconsistent with this decision, B-174244, Dec. 8, 1971, and B-174244, Dec. 17, 1974, will no longer be followed 152

FUNDS—Continued Page
Imprest
Losses
Employee liability
Deficiencies in the Library of Congress imprest funds used for foreign currency exchange transactions authorized by 31 U.S.C. 3342(a) and (b) and which are attributable solely to currency devaluations may be restored by the Department of the Treasury as authorized by 31 U.S.C. 3342(c) and implementing regulations. It is not necessary or appropriate for Government agencies to seek relief for a physical loss pursuant to 31 U.S.C. 3527. 61 Comp. Gen. 132 (1981). To the extent that they are inconsistent with this decision, B-174244, Dec. 8, 1971, and B-174244, Dec. 17, 1974, will no longer be followed 152
GAO specifically finds that the term "agency" as used in 31 U.S.C. 3342 includes legislative as well as executive branch agencies of the Federal Government. Therefore, disbursing officers of the Library of Congress whose accounts are diminished solely by foreign currency devaluations in the course of authorized currency exchanges may seek restoration of the accounts from the Department of the Treasury pursuant to 31 U.S.C. 3342. To the extent that they are inconsistent with this decision, B-174244, Dec. 8, 1971, and B-174244, Dec. 17, 1974, will no longer be followed 152
Miscellaneous receipts. (*See* MISCELLANEOUS RECEIPTS)

GENERAL ACCOUNTING OFFICE
Authority
Generally
Our Office has no basis on which to determine whether smoking can legally be prohibited in all work areas of a Federal office. The General Services Administration (GSA) has promulgated regulations set forth at 41 C.F.R. 101.20.109 which govern smoking in GSA-controlled buildings 789
Contracts
Protests. (*See* CONTRACTS, Protests)
Jurisdiction
Administrative agencies *v.* General Accounting Office
Dispute as to jurisdiction
Tennessee Valley Authority (TVA) Act, 16 U.S.C. 831 et seq. (1982), sets sufficient parameters for the collection and use of TVA power program funds so as to constitute a continuing appropriation; TVA's power program is not a nonappropriated fund activity beyond the protest jurisdiction of the General Accounting Office 756
Bids
Protests generally
Protest challenging cancellation of an invitation for bids (IFB), where the contracting agency plans to award a contract under the IFB when reissued in amended form, falls within the definition of protest in the Competition in Contracting Act, and General Accounting Office (GAO) review of such a protest is consistent with General Accounting Office congressional intent to strengthen existing GAO bid protest function 854

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Civil service matters
Retirement
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
Claims
Settlement
Authority
The 6-year period of limitations in 31 U.S.C. 3702 was not tolled for the 4 years that claimant was living in Socialist Republic of Vietnam and may have been prevented from bringing suit. Consistent with the Supreme Court's construction of the Court of Claims 6-year statute of limitations, *Soriano* v. *United States,* 352 U.S. 270, 273 (1975), this Office should construe the 6-year period of limitation in section 3702 strictly 155
Contracts
Agency actions
Competition in Contracting Act of 1984, Pub. L. No. 98-369, sec. 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), provides for the consideration of protests filed with General Accounting Office (GAO) by an interested party to a solicitation issued by a "federal agency" for the procurement of property or services. Since the District of Columbia, which by definition is not a federal agency, has informed GAO of its decision that GAO no longer consider protests concerning procurements by the District, protest concerning solicitation issued by the District and which is filed after the Jan. 15, 1985, effective date of the provisions of the act pertaining to bid protests submitted to GAO is dismissed 488
Disputes
Between private parties
Allegation of possible conflict of interest by an offeror's former employee who aided in preparation of a competitor's proposal involves a dispute between private parties and is not a basis for GAO to object to an otherwise valid award 681
Protest that a former employee of the protester participated in a procurement on behalf of both the protester and a competitor at the same time is dismissed since the allegation involves either a dispute between private parties, an issue to be considered by the contracting officer in determining the awardee's responsibility, or a matter for the Department of Justice 258
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,

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Disputes—Continued
Contract Disputes Act of 1978—Continued
which requires that all such claims be filed with the contracting officer for decision ... 330
District of Columbia procurements
Competition in Contracting Act of 1984, Pub. L. No. 98-369, sec. 2741, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), provides for the consideration of protests filed with General Accounting Office (GAO) by an interested party to a solicitation issued by a "federal agency" for the procurement of property or services. Since the District of Columbia, which by definition is not a federal agency, has informed GAO of its decision that GAO no longer consider protests concerning procurements by the District, protest concerning solicitation issued by the District and which is filed after the Jan. 15, 1985, effective date of the provisions of the act pertaining to bid protests submitted to GAO is dismissed ... 488
Grants-in-aid. (*See* CONTRACTS, Grant-funded procurements, General Accounting Office review)
In-house performance *v.* contracting out
Cost comparison
Adequacy
Neither Office of Management and Budget (OMB) Circular No. A-76 nor agency regulations preclude a protest to General Accounting Office from an agency's administrative review of a contractor's appeal of an in-house cost estimate ... 64
Mistakes
Allegation after award
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
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
Protests generally. (*See* CONTRACTS, Protests)
Scope of review
Protest against denial of application for a Master Agreement for Repair and Alteration of Vessels is not for consideration under GAO's bid protest function since protester's objections do not pertain to a particular solicitation or to the proposed award or award of a particular contract and thus are not within the scope of the bid protest provisions of the Competition in Contracting Act of 1984, Pub. L.

GENERAL ACCOUNTING OFFICE—Continued Page
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Scope of review—Continued
No. 98-369, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556) ... 755
Cooperative agreements
Awards
Protests against the procurement procedures being used to award cooperative agreements, not significantly controlled by procurement statutes and regulations, will not be considered where company has neither alleged nor shown that contracts rather than cooperative agreements should have been used or that conflict of interest was involved ... 669
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
Grants-in-aid
Grant procurements. (*See* CONTRACTS, Grant-funded procurements, General Accounting Office review)
Maritime
Protest against denial of application for a Master Agreement for Repair and Alteration of Vessels is not for consideration under GAO's bid protest function since protester's objections do not pertain to a particular solicitation or to the proposed award or award of a particular contract and thus are not within the scope of the bid protest provisions of the Competition in Contracting Act of 1984. Pub. L. No. 98-369, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556) ... 755
Policy determinations
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
Postal matters
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

GENERAL ACCOUNTING OFFICE—Continued Page
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Postal matters—Continued
our rules are followed, agency heads must determine that it is not proper to mail holiday greetings as penalty mail 382
Protests generally. (*See* CONTRACTS, Protests)
Protests
Contracts (*See* CONTRACTS, Protests)
Recommendations
Contracts
Broadening competition
Although denying a protest against rejection of a proposal from a nonapproved source, GAO recommends that the agency take immediate and vigorous steps to qualify any new source that may wish to participate in future competitive procurements. The agency should only consider exercising an option under the current contract if no additional sources become qualified 658
In-house performance *v.* contracting out
Cost comparison
Recalculation of Government's cost
The provision in OMB Circular No. A-76 concerning independent preparation and confidentiality of government in-house cost estimate does not preclude GAO from recommending, pursuant to a protest, that the agency recalculate the cost of in-house performance 64
Options
Not to be exercised
Although denying a protest against rejection of a proposal from a nonapproved source, GAO recommends that the agency take immediate and vigorous steps to qualify any new source that may wish to participate in future competitive procurements. The agency should only consider exercising an option under the current contract if no additional sources become qualified 658
Procurement deficiencies
Correction
Where the contracting agency, although receiving notice of a protest within 10 days of contract award, nevertheless allows contract performance to continue on the basis that directing the contractor to cease performance would not be in the best interests of the United States, then GAO, in the event that it determines that the award did not comply with statute or regulation, must recommend corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract 772
Although denying a protest against rejection of a proposal from a nonapproved source, GAO recommends that the agency take immediate and vigorous steps to qualify any new source that may wish to participate in future competitive procurements. The agency should only consider exercising an option under the current contract if no additional sources become qualified 658
Recompetition of procurement
Administrative difficulties no deterrent
Where the contracting agency, although receiving notice of a protest within 10 days of contract award, nevertheless allows contract performance to continue on the basis that directing the contractor to

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Recommendations—Continued
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Recompetition of procurement—Continued
Administrative difficulties no deterrent—Continued
cease performance would not be in the best interests of the United States, then GAO, in the event that it determines that the award did not comply with statute or regulation, must recommend corrective action without regard to any cost or disruption from terminating, recompeting or reawarding the contract 772

GENERAL SERVICES ADMINISTRATION
Authority
Government occupied buildings
Our Office has not basis on which to determine whether smoking can legally be prohibited in all work areas of a Federal office. The General Services Administration (GSA) has promulgated regulations set forth at 41 C.F.R. 101.20.109 which govern smoking in GSA-controlled buildings 789
Contracts
Between GSA and GSI
Review
The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S. Code 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S. Code 303b (1982) because of the historically unique nature of the GSA-GSI agreement. Distinguishes 35 Comp. Gen. 113 217
Federal Property
Management regulations (FPMR)
Personal convenience items
U.S Tax Court, a legislative court of record, is not bound by GSA regulation on personal convenience items (41 C.F.R. 101-26.103-2) which applies only to executive branch agencies, nor by an Administrative Office of the United States Courts regulation (Title VIII of the "Guide to Judiciary Policies and Procedures") since the Tax Court is not part of the judicial branch. Nevertheless both regulations, as well as GAO decisions, can provide useful guidance for Tax Court in developing its own regulation on the expenditure of its appropriations for art objects 796
Motor pool vehicles
GSA proposal to sell used Government vehicles on consignment through private sector auction house is not objectionable. The proposal does not provide for an improper delegation of the inherent Government function of fee setting since the Government will set a minimum bid price on each vehicle and the final sales price will be determined by the market. The security of Government funds is assured by a contractor guarantee and bonding. 62 Comp. Gen. 339 (B-207731, Apr. 22, 1983), is distinguished 149

GENERAL SERVICES ADMINISTRATION—Continued Page

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 366

GOVERNMENT PRINTING OFFICE

Contracts

Geographic restrictions

Test purposes

General Accounting Office has no objection to the Government Printing Office's continued use of geographic restrictions in two Washington, D.C. area contracts for an additional 6 months, since the sole purpose is to gather data and to compare the results with unrestricted procurements. If the results do not provide justification for limiting contracts to particular geographic regions, the restrictions should be removed entirely 160

GRANTS

Federal

Administration of

grant programs

United States Information Agency (USIA), in providing statutory grant funds to National Endowment for Democracy, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. General Accounting Office finds that language and legislative history of authorizing legislation do not support Endowment's view that USIA was not intended to have any substantial role in seeing that grant monies are expended for authorized purposes..... 582

Federal

Advance payments

Propriety

Advances in excess of immediate cash needs to a sub-grantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a) 96

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

GRANTS—Continued Page
Federal—Continued
Earmarked authorization—Continued
authorization was binding on the Endowment, and that the Endowment must comply with earmark requirements in future grant awards 388
Grant-funded procurements. (*See* CONTRACTS, Grant-funded procurements)
To foreign governments
Interest on grant funds. (*See* FOREIGN AID PROGRAMS, Grant agreements with foreign governments, Interest earned on grant funds)
To other than states
Interest earned
Advance funds
Advances in excess of immediate cash needs to a sub-grantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a) 96

HANDICAPPED PERSONS
Facilities, etc.
Appropriation availability. (*See* APPROPRIATIONS, Availability, Personal furnishings, etc. for employees, Handicapped employees)
Handicapped employees
Subsistence reimbursements. (*See* SUBSISTENCE)
Housing assistance programs
Housing and Urban Development Department. (*See* HOUSING AND URBAN DEVELOPMENT DEPARTMENT, Housing assistance programs, Handicapped persons)

HEALTH AND HUMAN SERVICES DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Department of Health and Human Services)
Office of Community Services
Regional office
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) 370

HOLIDAYS
Compensation. (*See* COMPENSATION, Holidays, Premium pay)
Inauguration Day
Employees stationed in the City of Fairfax, Virginia, request holiday premium pay for the work they performed on Monday, Jan. 21, 1985, the day selected for the public observance of the inauguration

HOLIDAYS—Continued Page
Inauguration Day—Continued
of the President. The employees may be allowed premium pay because the legislative history of 5 U.S.C. 6103(c) shows that the statute was intended to authorize the inaugural holiday for employees working in the geographical locale of the City of Fairfax 679

HOUSING
Government furnished quarters
Personal property loss, damage, etc.
Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote ranger station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e)..... 93

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, Housing and Urban Development Department)
Housing assistance programs
Elderly persons
GAO investigations raised questions about the legality of seven loan applications conditionally or finally approved by the Department of Housing and Urban Development under the Housing for the Elderly and Handicapped program authorized by 12 U.S.C. 1701q. Prohibited identity of interests was involved in six of the seven projects: a serious question about the financial responsibility of the seventh borrower was also raised. HUD certifying officials are advised that no exceptions will be taken by GAO to past or future disbursements under these loans if HUD takes the actions it proposes to cure the conflict of interest deficiencies and to verify financial responsibility of the seventh borrower before final loan approval 38
Handicapped persons
GAO investigations raised questions about the legality of seven loan applications conditionally or finally approved by the Department of Housing and Urban Development under the Housing for the Elderly and Handicapped program authorized by 12 U.S.C. 1701q. Prohibited identity of interests was involved in six of the seven projects; a serious question about the financial responsibility of the seventh borrower was also raised. HUD certifying officials are advised that no exceptions will be taken by GAO to past or future disbursements under these loans if HUD takes the actions it proposes to cure the conflict of interest deficiencies and to verify financial responsibility of the seventh borrower before final loan approval 38
Loans and grants
Elderly and handicapped housing
Conflict of interest provisions
Violations
Cure by HUD
GAO investigations raised questions about the legality of seven loan applications conditionally or finally approved by the Department of Housing and Urban Development under the Housing for the Elderly and Handicapped program authorized by 12 U.S.C. 1701q.

HOUSING AND URBAN DEVELOPMENT DEPARTMENT—Continued Page
Loans and grants—Continued
Elderly and handicapped housing—Continued
Conflict of interest provisions—Continued
Violations—Continued
Cure by HUD—Continued
Prohibited identity of interests was involved in six of the seven projects; a serious question about the financial responsibility of the seventh borrower was also raised. HUD certifying officials are advised that no exceptions will be taken by GAO to past or future disbursements under these loans if HUD takes the actions it proposes to cure the conflict of interest deficiencies and to verify financial responsibility of the seventh borrower before final loan approval 38
Financial responsibility of borrower
Deficiencies
Cure by HUD
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Review by GAO
GAO investigations raised questions about the legality of seven loan applications conditionally or finally approved by the Department of Housing and Urban Development under the Housing for the Elderly and Handicapped program authorized by 12 U.S.C. 1701q. Prohibited identity of interests was involved in six of the seven projects; a serious question about the financial responsibility of the seventh borrower was also raised. HUD certifying officials are advised that no exceptions will be taken by GAO to past or future disbursements under these loans if HUD takes the actions it proposes to cure the conflict of interest deficiencies and to verify financial responsibility of the seventh borrower before final loan approval 38

HUSBAND AND WIFE
Dependents
Quarters Allowance. (*See* QUARTERS ALLOWANCE, Dependents)
Divorce
Military Personnel
Quarters Allowance. (*See* QUARTERS ALLOWANCE, Basic Allowance for Quarters (BAQ))
Separation Agreements
Status
Members with dependents
Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother

HUSBAND AND WIFE—Continued Page

Separation Agreements—Continued

Status—Continued

Members with dependents—Continued

and ordered the father to make monthly child-support payments of $100. The regulations required monthly support payments of at least $113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance 609

Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance 121

IMPOUNDMENT. (*See* APPROPRIATIONS, Impounding)

INTEREST

Advance payments

As belonging to United States *v.* others

Advances in excess of immediate cash needs to a sub-grantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a) 96

Contracts

Delayed payments by Government

Since the government made payment by issuing a check within 30 days after the contracting agency received a proper invoice, payment of interest is not authorized under the Prompt Payment Act even though the contractor did not receive the payment until a substitute check was issued where the failure to receive the initial payment was outside the control of the contracting agency 32

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Interest earned by sub-grantees on loans made as part of authorized program efforts is program income and can be used to further program objectives 96

Grantee *v.* United States

Advances in excess of immediate cash needs to a sub-grantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a) 96

Operating costs

Interest earned by sub-grantees on loans made as part of authorized program efforts is program income and can be used to further program objectives 96

Grants

To others than states

Retention of interest earned

Advanced funds

Advances in excess of immediate cash needs to a sub-grantee of an assistance award are not expenditures for grant purposes, and, under the terms of the agreement, interest earned on these funds prior to their expenditure for allowable costs must be paid to AID unless exempt under 31 U.S.C. 6503(a) 96

Grants to foreign governments

The United States cannot recover interest earned by local and provincial elements of the Egyptian Government on grant funds awarded by the Agency for International Development (AID) to the Government of Egypt in the Basic Village Services Project (BVSP). Since the statutory provision under which the BVSP was funded contains broad program authority and since the stated purpose of the grant was to support Egypt's policy of decentralizing authority for development activities, we believe that the disbursement of the grant funds by the Egyptian Government to the lower governmental levels was a legitimate and proper purpose of the grant entitling them to retain interest earned on the grant funds 103

Loss

Accountable officer's delay in depositing funds

Accountable officer who embezzled collections is liable only for the actual shortage of funds in her account. Although her failure to deposit the funds in a designated depositary caused the Government to lose substantial interest on the funds, the lost interest should not be included in measuring her pecuniary liability as an accountable officer 303

Payment delay

Contracts

Since the government made payment by issuing a check within 30 days after the contracting agency received a proper invoice, payment of interest is not authorized under the Prompt Payment Act even though the contractor did not receive the payment until a substitute check was issued where the failure to receive the initial payment was outside the control of the contracting agency 32

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Payment of past due contract accounts. (*See* INTEREST, Payment delay, Contracts)

INSURANCE
Civilian employees
Life insurance. (*See* OFFICERS AND EMPLOYEES, Life insurance)

INTERGOVERNMENTAL PERSONNEL ACT
Assignment of Federal employees
Long-term assignment
Per Diem not Appropriate
An employee may not elect to receive per diem for the duration of an Intergovernmental Personnel Act assignment where his agency's determination to authorize change-of-station allowances is reflected in his travel orders and his Intergovernmental Personnel Act Agreement. Under 5 U.S.C. 3375, an agency may authorize change-of-station allowances or per diem, but not both, and we have held that per diem would ordinarily be inappropriate for Intergovernmental Personnel Act assignments of 2 years 655
Per Diem *v.* Station Allowances
An employee may not elect to receive per diem for the duration of an Intergovernmental Personnel Act assignment where his agency's determination to authorize change-of-station allowances is reflected in his travel orders and his Intergovernmental Personnel Act Agreement. Under 5 U.S.C. 3375, an agency may authorize change-of-station allowances or per diem, but not both, and we have held that per diem would ordinarily be inappropriate for Intergovernmental Personnel Act assignments of 2 years 665
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The change-of-station allowances authorized by 5 U.S.C. 3375 are payable upon relocation to, as well as return from, an Intergovernmental Personnel Act assignment. The fact that an employee's family was residing at the location of his assignment and that the full range of allowances, therefore, was not authorized when the employee reported to the university does not preclude payment of any or all of those allowances incident to the employee's return following completion of the assignment. There is no statutory or regulatory requirement that the employee be authorized or incur specific expenses in reporting to the Intergovernmental Personnel Act assignment as a condition to paying those expenses upon its termination 665
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or all of those allowances incident to the employee's return following completion of the assignment. There is no statutory or regulatory requirement that the employee be authorized or incur specific expenses in reporting to the Intergovernmental Personnel Act assignment as a condition to paying those expenses upon its termination 665

LABOR-MANAGEMENT RELATIONS
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Request for GAO decisions, etc.
The cap on wage increases for prevailing rate employees during fiscal year 1982 and similar provisions for fiscal years 1983 and 1984 are applicable to prevailing rate employees at Barksdale A.F.B., Louisiana, even though that wage area was initially covered by the Monroney Amendment, 5 U.S. Code 5343(d), in fiscal year 1982. Higher wage rates which resulted from considering wage rates from another area as required by the Monroney Amendment must not be implemented to the extent that they exceed the statutory increase cap. There is nothing in either the language or the legislative history of the Monroney Amendment or the pay increase cap provisions which would support the view that the pay increase caps are not applicable to the initial establishment of wages under the provisions of the Monroney Amendment 227
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 year 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). 419

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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
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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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Repairs and improvements

The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S. Code 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S. Code 303b (1982) because of the historically unique nature of the GSA-GSI agreement. Distinguished 35 Comp. Gen. 113 217

Limitation

Economy Act restriction

The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S. Code 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S. Code 303b (1982) because of the historically unique nature of the GSA-GSI agreement. Distinguishes 35 Comp. Gen. 113 217

LEAVES OF ABSENCE

Adjustments

Unjustified or unwarranted personnel action

An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Deductions from backpay for payments of severance pay and a lump-sum leave payment resulted in a net indebtedness which is subject to waiver under 5 U.S.C. 5584. Waiver is appropriate because, at the time the erroneous payments were made, the employee neither knew nor should have known that his separation was improper. 86

Administrative leave

Administrative determination

On Dec. 23, 1982, the last workday before Christmas, the Installation Commander of Fort Sheridan, Illinois, released the Installation's civilian employees for the afternoon as a "holiday good-will gesture." On Feb. 11, 1983, the Civilian Personnel Officer found the action to be a humbug stating that the Commander had no authority to release employees as a holiday good-will gesture. We are upholding the Installation Commander's exercise of the discretionary authority to grant excused absences in the circumstances as a lawful order under existing entitlement authorities. It follows that the employees in question are entitled to administrative leave—every one of them..... 171

Last workday before holiday

On Dec. 23, 1982, the last workday before Christmas, the Installation Commander of Fort Sheridan, Illinois, released the Installation's civilian employees for the afternoon as a "holiday good-will gesture." On Feb. 11. 1983, the Civilian Personnel Officer found the action to

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The National Park Service Alaska Regional Office may not grant employees excused absence for participation in an agency-sponsored physical fitness program. Agency discretion to excuse employees from work without charge to leave must be exercised within the bounds of statutes and regulations and guidance provided in General Accounting Office decisions. Office of Management and Budget, Office of Personnel Management, and General Services Administration regulations, which exclude physical exercise from the health services which agencies may provide their employees, should also be interpreted as excluding physical exercise from the purposes for which agencies may grant excused absences 835
Propriety
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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
Civilians on military duty
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Civilian employees who are reservists of the uniformed service or are National Guardsmen who perform active duty for training are charged military leave on a calendar-day basis, and there is no authority for allowing the charging of military leave in increments of less than 1 day, regardless of the type of schedule the employee may work. 154

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Civilians on military duty—Continued

Leave, etc., status

Civilian employees who are reservists of the uniformed service or are National Guardsmen who perform active duty for training are charged military leave on a calendar-day basis, and there is no authority for allowing the charging of military leave in increments of less than 1 day, regardless of the type of schedule the employee may work. 154

Court

Entitlement

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

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.). Although each judge is a member of the Association, none of them is an individual plaintiff nor is the lawsuit maintained as a class action. The Judges are not precluded from court leave under our decisions holding that such leave is not available to an employee who is a party to the lawsuit 200

Jury duty

Entitlement

Employee who commutes to work from a residence in Virginia and maintains another residence in New Jersey was called upon to serve as a juror in New Jersey. The employee is entitled to court leave under 5 U.S.C. 6322 even though he might have been excused from jury duty. When properly summoned to serve as a juror, employee's failure to advise the court of facts that would have exempted or excused him from jury service does not defeat his entitlement to court leave. 27 Comp. Gen. 83, 89 (1947) 851

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Between duty station and court

Employee whose permanent duty station was Washington, D.C., was summoned to jury duty in New Jersey for a one-week period beginning on a Monday. Employee is entitled to court leave for the Friday he was excused from jury duty under holding in 26 Comp. Gen. 413 (1946). In view of the substantial distance involved, it would have imposed a hardship to have required the employee to return to his permanent duty station following a day of jury service on Thursday to report for duty on Friday 851

Witness

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

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Administrative determination
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In response to congressional request on legality and propriety of ICC decision to furlough its employees for 1 day per week from April 15 through June 15 to meet unexpected cut by continuing resolution of $6.55 million from amount reported by House Appropriations Committee in 1985 year appropriation, GAO concludes that while the furlough appears to have had a deleterious effect on the work of the ICC, it was legal and fully within the administrative discretion of the Commission. While more timely action could possibly have lessened the severity of the furlough, the use of that method to meet budgetary restrictions appears preferable to other alternatives available 728
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In response to congressional request on legality and propriety of ICC decision to furlough its employees for 1 day per week from April 15 through June 15 to meet unexpected cut by continuing resolution of $6.55 million from amount reported by House Appropriations Committee in 1985 year appropriation, GAO concludes that while the furlough appears to have had a deleterious effect on the work of the ICC, it was legal and fully within the administrative discretion of the Commission. While more timely action could possibly have lessened the severity of the furlough, the use of that method to meet budgetary restrictions appears preferable to other alternatives available 728
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A handicapped employee arrival 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
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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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Army may not use appropriated funds to pay for meals of handicapped employees attending a luncheon in honor of National Employ the Handicapped Week 802

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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 meeting took place during the luncheon meals. B-198471, May 1, 1980, explained. This decision distinguishes B-198882, Mar. 25, 1981 406

Authorization requirement

Army may not use appropriated funds to pay for meals of handicapped employees attending a luncheon in honor of National Employ the Handicapped Week 802

An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per diem or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances 70

Reimbursement

Expenses incident to official duties

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

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No authority exists for the use of appropriated funds to pay for a smoker rehabilitation program for Federal employees who wish to stop smoking. Such medical care and treatment are personal to the individual employee and payment therefore may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation 789
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No authority exists for the use of appropriated funds to pay for a smoker rehabilitation program for Federal employees who wish to stop smoking. Such medical care and treatment are personal to the individual employee and payment therefore may not be made from appropriated funds unless provided for in a contract of employment or by statute or valid regulation 789

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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
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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

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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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
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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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
Travel by privately owned automobile
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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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
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When use of a privately owned vehicle for the performance of official duties is determined to be advantageous is 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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
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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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
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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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234

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

Waiver of Overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)

MILITARY PERSONNEL AND CIVILIAN EMPLOYEE'S CLAIMS ACT. (*See* **PROPERTY, Private, Damage, loss, etc., Personnel property**)

MISCELLANEOUS RECEIPTS

Agency appropriation *v.* miscellaneous receipts

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 366

Amounts recovered under defaulted contracts

Disposition

Funding replacement costs

A performance bond, forfeited to the Government by a defaulting contractor, may be used to find a replacement contract to complete the work of the original contract. The performance bond constitutes liquidated damages which may be credited to the proper appropriation account in accordance with analysis and holding in 62 Comp. Gen. 678 (1983). 46 Comp. Gen. 554 (1966) is modified to conform to this decision. Requirements for documentation of the accounting transactions are set forth in the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies..... 625

Insurance, etc. collection

Prior reimbursement by agency

Refunds

Personal property loss/damage

Amounts recovered by Government agency from private party or insurer representing liability for damage to Government 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

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Debt collections

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

The term "collection services," used in 31 U.S.C. 3718(a), does not include the servicing of non-delinquent accoun 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 non-delinquent accounts 366

Rental collections

The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S. Code 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S. Code 303b (1982) because of the historically unique nature of the GSA-GSI agreement. Distinguishes 35 Comp. Gen. 113 217

Special account *v.* miscellaneous receipts

Proceeds for sales, etc.

The concession contract between the General Services Administration and Guest Services Inc. (GSI), which includes a clause requiring that a percentage of GSI's gross profits be credited to a reserve to be used by GSI for the replacement of Government property, does not violate 31 U.S. Code 3302(b) (1982), because the reserve is not "money for the Government." Further, the contract does not violate 40 U.S. Code 303b (1982) because of the historically unique nature of the GSA-GSI agreement. Distinguishes 35 Comp. Gen. 113 217

MOBILE HOMES

Transportation

Damages, loss, etc.

Carrier's liability

Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

Military personnel. (*See* **TRANSPORTATION, Household effects, Military personnel, Trailer shipment**)

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

NATIONAL ARCHIVES
Document reproduction fees
Where neither National Archives and Records Administration (NARA) nor its predecessor National Archives and Records Service (NARS) of the General Services Administration has requested or received appropriations for the purpose of reproducing documents for other agencies, NARA (and NARS) may charge all agencies for the cost of reproducing documents on their behalf under authority of 44 U.S.C. 2116 since this is the most equitable way of allocating costs in performing this activity 724

NATIONAL GUARD
Civilian employees
Technicians
Leave status
Civilian employees who are reservists of the uniformed service or are National Guardsmen who perform active duty for training are changed military leave on a calendar-day basis, and there is no authority for allowing the charging of military leave in increments of less than 1 day, regardless of the type of schedule the employee may work 154

NONAPPROPRIATED FUND ACTIVITIES
Transactions with Government agencies
Interagency agreements
Property
Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

OFFICE OF MANAGEMENT AND BUDGET
Circulars
No. A-76
Application matters. (*See* CONTRACTS, In-house performance *v.* contracting out)
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

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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
Procurement matters
General Accounting Office review. (*See* GENERAL ACCOUNTING OFFICE, Jurisdication, Contracts, In-house performance *v.* contracting out)

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
Accountable officers. (*See* ACCOUNTABLE OFFICERS)
Administrative leave. (*See* LEAVES OF ABSENCE, Administrative leave)
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Removals, Suspensions, etc.
Generally. (*See* COMPENSATION, Removals, suspensions, etc., Backpay)
Compensation. (See COMPENSATION)
Contributions from sources other than United States
Travel expenses. (*See* TRAVEL EXPENSES, Contributions from private sources, Acceptance by employees)
Debt collections. (*See* DEBT COLLECTIONS)
Debts to U.S.
Liquidation
Payment required
Former air traffic controller violated his relocation service agreement when he was fired for participation in a strike. Waiver of the service agreement depends on a determination that the separation was beyond the employee's control and acceptable to the agency. That determination is primarily for the agency to decide, and our Office will not overrule absent evidence it was arbitrary or capricious. 643
Retirement set-off. (*See* RETIREMENT, Civilian, Deductions for debt liquidation

OFFICERS AND EMPLOYEES—Continued Page
Debts to U.S.—Continued
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
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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 395
Compensation
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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 395
Discrimination alleged
Civil Rights Act
Title VII. (*See* **CIVIL RIGHTS ACT, Title VII, Discrimination complaints**)
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Status
In response to congressional request on legality and propriety of ICC decision to furlough its employees for 1 day per week from April 15 through June 15 to meet unexpected cut by continuing resolution of $6.55 million from amount reported by House Appropriations Committee in 1985 year appropriation, GAO concludes that while the furlough appears to have had a deleterious effect on the work of the ICC, it was legal and fully within the administrative discretion of the Commission. While more timely action could possibly have lessened the severity of the furlough, the use of that method to meet budgetary restrictions appears preferable to other alternatives available 728
Agencies have broad authority to furlough any or all of their employees if there are legitimate management reasons for doing so. The statute controlling such actions, 5 U.S.C. 7513 (1982) states that furloughs can be required "only for such cause as will promote the efficiency of the agency." The ICC furlough appears to have met the legal requirements in every regard. A situation in which a deficiency in an appropriation is expected is recognized by the statutory definition of a furlough to be of sufficient cause 728

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Highest previous rate. (*See* COMPOSITION, Rates, Highest previous rate)
Household effects
Transportation. (*See* TRANSPORTATION, Household effects)
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Life. (*See* OFFICERS AND EMPLOYEES, Life insurance)
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Accountable officers. (*See* ACCOUNTABLE OFFICERS)
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Insurance coverage is determined on the basis of the election of the employee. Administrative errors in processing forms do not alter the rights and liabilities of the employee. Therefore, when the agency reimburses an employee for backpay for a period he was improperly separated and retired, the computation of his insurance deductions should be made on the basis of the insurance coverage actually elected. 435
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Promotions
Procedures
An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion

OFFICERS AND EMPLOYEES—Continued Page
Promotions—Continued
Procedures—Continued
may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized official had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy 844

Retroactive
Administrative Delay
An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized official had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy 844

Retroactive
Administrative error
Lacking
An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized officical had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy 844

Entitlement
Administrative error
An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized official had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy 844

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Relocation expenses

Transferred employees

Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses**)

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Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)

Life insurance during period of suspension. (*See* **OFFICERS AND EMPLOYEES, Life insurance, Coverage during periods of suspension**)

Retirement. (*See* **RETIREMENT, Civilian**)

Senior Executive Service

Bonuses, awards, etc.

Fiscal Year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award generally is considered paid on the date of the Treasury check. In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. 62 Comp. Gen. 675 distinguished. 114

Senior Executive Service

Compensation

Aggregate limitation

Inclusions

Bonus payments

Fiscal Year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during a fiscal year, an SES award generally is considered paid on the date of the Treasury check. In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. 62 Comp. Gen. 675 distinguished. 114

Service agreements

Failure to fulfill contract

Indebtedness upheld

Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee

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Failure to fulfill contract—Continued
Indebtedness upheld—Continued
is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms 647
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Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms 643
Former air traffic controller violated his relocation service agreement when he was fired for participation in a strike. Waiver of the service agreement depends on a determination that the separation was beyond the employee's control and acceptable to the agency. That determination is primarily for the agency to decide, and our Office will not overrule absent evidence it was arbitrary or capricious 643
Strikes
Effect on travel and transportation expenses
Former air traffic controller violated his relocation service agreement when he was fired for participation in a strike. Waiver of the service agreement depends on a determination that the separation was beyond the employee's control and acceptable to the agency. That determination is primarily for the agency to decide, and our Office will not overrule absent evidence it was arbitrary or capricious 643
Subsistence
Per diem. (*See* SUBSISTENCE, Per diem)
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 intermediate 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

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5724a, travel and transportation rights for long-term training are specifically governed by 5 U.S.C. 4109. Hence, an employee's entitlements 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 not for expenses of sale of residence 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

Government Employees Training Act
Authority for interagency agreements
Nonappropriated fund activities excluded
Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

Transfers
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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

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An agency questions whether an employee can be reimbursed attorney's fees and costs incident to litigation to settle an unexpired lease. The employee may be reimbursed the litigation costs since the Federal Travel Regulations do not preclude such expenses incurred incident to settling an unexpired lease, the amounts claimed are rea-

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sonable, and the potential liability of the Government was considerably greater than the amount settled on. To the extent that B-175381, Apr. 25, 1972, is inconsistent, it will no longer be followed..... 24
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Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms..... 643
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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
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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
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An agency questions whether an employee can be reimbursed attorney's fees and costs incident to litigation to settle an unexpired lease. The employee may be reimbursed the litigation costs since the Federal Travel Regulations do not preclude such expenses incurred incident to settling an unexpired lease, the amounts claimed are reasonable, and the potential liability of the Government was considerably greater than the amount settled on. To the extent that B-175381, Apr. 25, 1972, is inconsistent, it will no longer be followed..... 24

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Litigation expenses reimbursement
An agency questions whether an employee can be reimbursed attorney's fees and costs incident to litigation to settle an unexpired lease. The employee may be reimbursed the litigation costs since the Federal Travel Regulations do not preclude such expenses incurred incident to settling an unexpired lease, the amounts claimed are reasonable, and the potential liability of the Government was considerably greater than the amount settled on. To the extent that B-175381, Apr. 25, 1972, is inconsistent, it will no longer be followed..... 24
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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 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
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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
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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
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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

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Operating and maintenance expenses—Continued
Residence—Continued
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A transferred employee attempted to personally sell his residence at his old duty station and incurred advertising expenses. Because he was unsuccessful, he placed the sale in the hands of a real estate agent who did sell the property. A commission paid to the agent on that sale was reimbursed to the employee, but prior advertising costs were disallowed. On reclaim, the disallowance is sustained. When a separate advertising cost is incurred which does not result in the sale of a residence, para. 2-6.2 of the Federal Travel Regulations (FTR) precludes reimbursement 58
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Employee exchanged residence at old duty station for another residence in the vicinity of the old duty station incident to a change of official station. Employee may be reimbursed under 5 U.S.C. 572a(a)(4) for real estate broker's commission and other allowable expenses incurred as "seller" in the exchange of residences since the assumption of the balance of the employee's mortgage loan is tantamount to a cash payment. Amount of broker's commission which is reimbursable is governed by the Federal Travel Regulations, para. 2-6.2a, as amended, and is limited by the amount generally charged for such services by the broker or by the brokers in the locality where the residence is located 557
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A transferred employee owned a residence on a 10-acre tract at his old duty station. In order to facilitate sale, the property was divided into two parcels and sold to two separate buyers. Real estate expenses of the parcel containing the residence were reimbursed to employee, but expenses associated with the parcel not containing the residence were disallowed. On reclaim, the disallowance is sustained. When separate purchasers of divided property are involved, a parcel of land other than that upon which the residence is situated is not considered as being reasonably related to the residence as required by FTR para. 2-6.1f 58
Finance charges
Reimbursement prohibition
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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

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fee, since it involves charges for services similar to those otherwise covered by a loan origination fee 296
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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 266
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***Pro rata* expense reimbursement**
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
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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
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Real estate expenses—Continued
Insurance—Continued
ble. 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. 2-6.2(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 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
Employee of the IRS was denied reimbursement for owner's title insurance in connection with purchase of residence at his new duty station. The Federal Travel Regulations (FTR) allow reimbursement for owner's title insurance if the insurance is a prerequisite to financing or transferring the property. Where the insurance is recommended by seller's attorney, and is not required to finance or transfer the property, insurance costs are not reimbursable 674
Loan assumption fee
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 covererd by a loan origination fee 296
Loan discount fees
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
Loan origination fee
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

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
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Loan origination fee—Continued
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

A transferred employee purchased a 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

Refinancing
A transferred employee refinanced his residence at the old duty station in order to obtain assumable financing for the purchaser. The expenses involved in refinancing are reimbursable to the extent such costs are reasonable and customary in the area and otherwise allowable under the Federal Travel Regulations 568

Reimbursement
An employee was transferred back to a former duty station after a 12-year absence. He temporarily occupied a residence at that station which he had purchased 14 years before, but had rented out during most of that time. He then purchased another residence there and claims real estate expenses for this purchase. The agency disallowed his claim based on *Warren L. Shipp.* 59 Comp. Gen. 502 (1980), which held that, once an employee is officially notified of retransfer to a former duty station, reimbursement of real estate expenses is limited to those already incurred or which cannot be avoided. *Shipp* is hereby limited to situations where the employee is notified of retransfer to a former duty station before expiration of the time allowed for reimbursement of real estate expenses incident to the original transfer. Since this time period had expired years before the retransfer in the present case, *Shipp* does not apply and the claim is allowed. This decision modifies 59 Comp. Gen. 502 476

Employee exchanged residence at old duty station for another residence in the vicinity of the old duty station incident to a change of official station. Employee may be reimbursed under 5 U.S.C. 5724a(a)(4) for real estate broker's commission and other allowable expenses incurred as "seller" in the exchange of residences since the assumption of the balance of the employee's mortgage loan is tantamount to a cash payment. Amount of broker's commission which is reimbursable is governed by the Federal Travel Regulations, para. 2-6.2a, as amended, and is limited by the amount generally charged for

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses—Continued
Reimbursement—Continued
such services by the broker or by the brokers in the locality where the residence is located 557
Relocation service contracts
Transferred employee, who has been unable to sell residence at old duty station for period in excess of 3 years, requests that government purchase it. Although provisions of 5 U.S.C. 5724c (1982) and FTR, paras. 2-12.1 *et seq.*, (Supp. 11, Nov. 14, 1983), provide each agency with discretionary authority to enter into contracts with private firms to provide relocation services to employees, including arranging for purchase of a transferred employee's residence, they do not authorize purchase of employee's residence by the government. In any event, FTR Supplement 11 only applies to employees whose effective date of transfer is on or after Nov. 14, 1983. Since claimant transferred on Nov. 29, 1981, the statute and regulations are not applicable to his claim 847
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 a 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
An employee was transferred back to a former duty station after a 12-year absence. He temporarily occupied a residence at that station which he had purchased 14 years before, but had rented out during most of that time. He then purchased another residence there and claims real estate expenses for this purchase. The agency disallowed his claim based on *Warren L. Shipp.* 59 Comp. Gen. 502 (1980), which held that, once an employee is officially notified of retransfer to a former duty station, reimbursement of real estate expenses is limited to those already incurred or which cannot be avoided. *Shipp* is hereby limited to situations where the employee is notified of retransfer to a former duty station before expiration of the time allowed for reimbursement of real estate expenses incident to the original transfer. Since this time period had expired years before the retransfer in the present case, *Shipp* does not apply and the claim is allowed. This decision modifies 59 Comp. Gen. 502 476
Mandatory
An employee entered into a "land sale agreement" in order to sell his former residence at his previous permanent duty station. Claim is

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Real estate expenses—Continued
Time limitation—Continued
Mandatory—Continued
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
Title insurance policy
Employee of the IRS was denied reimbursement for owner's title insurance in connection with purchase of residence at his new duty station. The Federal Travel Regulations (FTR) allow reimbursement for owner's title insurance if the insurance is a prerequisite to financing or transferring the property. Where the insurance is recommended by seller's attorney, and is not required to finance or transfer the property, insurance costs are not reimbursable 674
Relocation expenses
Appropriation charged. (*See* **APPROPRIATIONS, Fiscal year, Availability beyond, Travel and transportation expenses)**
Attorney fees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Attorney fees)**
Finance charges. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses, Finance charges)**
House purchase. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses, Finance charges)**
House Sale. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)**
Leases. (*See* **OFFICERS AND EMPLOYEES, Transfers, Leases)**
Miscellaneous expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Miscellaneous expenses)**
Nonreimbursable. (*See* **OFFICERS AND EMPLOYEES, Transfers, Nonreimbursable expenses)**
Overseas employees
Transfered to U.S.
Employee stationed in Rome, Italy, was transferred to the United States and later discharged for failure to report for duty in the United States. Notwithstanding the Merit Systems Protection Board order requiring her reinstatement, she may not be reimbursed for travel from Rome to the United States on the basis of her transfer since she never reported for duty in the United States 631
Real estate expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Real estate expenses)**
Temporary quarters. (*See* **OFFICERS AND EMPLOYEES, Transfer, Temporary quarters)**
Truth in Lending Act effect
What constitutes a finance charge
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

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Truth in Lending Act effect—Continued
What constitutes a finance charge—Continued
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
Service agreements
Administrative determination
Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms 643
Failure to fulfill
Involuntary separation
Former air traffic controller violated his relocation service agreement when he was fired for participation in a strike. Waiver of the service agreement depends on a determination that the separation was beyond the employee's control and acceptable to the agency. That determination is primarily for the agency to decide, and our Office will not overrule absent evidence it was arbitrary or capricious 643
Transfers within U.S.
Former air traffic controller challenges indebtedness for relocation expenses paid incident to his transfer from Alaska to California where he failed to complete the 12-month service agreement he signed pursuant to agency regulations. Although a service agreement is not required by statute for a transfer from Alaska to the 48 States, our decisions have held that an agency may require a service agreement before paying such relocation expenses and that the employee is bound by the terms of the agreement. Since the former employee signed a service agreement, he is bound by its terms 643
Temporary quarters
Entitlement
Employee of the Internal Revenue Service (IRS) is not entitled to temporary quarters subsistence expenses while renting and occupying the house he purchased as his family's residence at his new duty station. His intent during the period for which he claims temporary quarters subsistence expenses was to occupy the house permanently. The fact that its purchase was subject to approval of financing and satisfaction of outstanding liens does not change its character as the employee's permanent quarters 674
Permanent dwelling occupancy
Employee of the Internal Revenue Service (IRS) is not entitled to temporary quarters subsistence expenses while renting and occupying the house he purchased as his family's residence at his new duty

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Transfers—Continued
Temporary quarters—Continued
Permanent dwelling occupancy—Continued
station. His intent during the period for which he claims temporary quarters subsistence expenses was to occupy the house permanently. The fact that its purchase was subject to approval of financing and satisfaction of outstanding liens does not change its character as the employee's permanent quarters 674
Subsistence expenses
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
Employee of the Internal Revenue Service (IRS) is not entitled to temporary quarters subsistence expenses while renting and occupying the house he purchased as his family's residence at his new duty station. His intent during the period for which he claims temporary quarters subsistence expenses was to occupy the house permanently. The fact that its purchase was subject to approval of financing and satisfaction of outstanding liens does not change its character as the employee's permanent quarters 674
Transportation for house hunting
Disallowance
Employees who were permanently transferred from Miami to Orlando, Fla., seek reimbursement for several househunting trips. The claims are denied since each employee may be reimbursed travel and transportation expenses for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. 5724a(a)(2) (1982). The fact that the employees may have been given erroneous advice does not create a right to reimbursement where the expenses claimed are precluded by law. But see 47 Comp. Gen. 189 472
Erroneous agency authorization
Employees who were permanently transferred from Miami to Orlando, Fla., seek reimbursement for several housetunting trips. The claims are denied since each employee may be reimbursed travel and transportation expenses for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. 5724a(a)(2) (1982). The fact that the employees may have been given erroneous advice does not create a right to reimbursement where the expenses claimed are precluded by law. But see 47 Comp. Gen. 189 472
Transportation of automobile. (*See* TRANSPORTATION, Automobiles)
Transportation of household goods, etc.
Accessorial charges
A transferred employee shipped household goods under the actual expense method. The goods weighed in excess of the maximum allowable. Under FTR para. 2-8.3b(5), the employee is liable for excess

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Transportation of household goods, etc.—Continued
Accessorial charges—Continued
weight and delivery costs as a percentage of the total expenses associated with that shipment, based on the ratio of the excess weight to the total weight of the goods shipped. These regulations have the force and effect of law and may not be waived or modified, regardless of circumstances. 58
Travel expenses. (*See* **TRAVEL EXPENSES, Transfers**)
Travel by privately owned automobile
Mileage. (*See* **MILEAGE, Travel by privately owned automobile**)
Travel Expenses. (*See* **TRAVEL EXPENSES**)

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

ORDERS
Interagency. (*See* **AGREEMENTS, Interagency**)
Permissive *v.* mandatory
Travel
Travel allowances authorized by statute for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with travel requirements imposed on them by the needs of the service over which they have no control. Expenses of temporary duty travel performed in whole or in part for personal benefit or convenience under permissive orders are thus nonreimbursable, notwithstanding that the Government may derive some benefit from the optional duty undertaken. Hence, two Navy officers who traveled to their home towns to perform temporary recruiting duty under orders clearly stating that the duty was permissive rather than directive in nature and that no travel allowances were authorized for such duty are not entitled to reimbursement of the travel expenses involved. 489
There is nothing inherently objectionable about directive military and naval travel orders which contain separate provisions for the performance of permissive temporary duty for which travel allowances will not be paid. The Bureau of Naval Personnel therefore acted properly in issuing directive change-of-station orders to two Navy officers with provisions authorizing them while en route to undertake permissive temporary recruiting duty assignments in their home towns. The officers' travel allowance entitlements are for computation on the basis of constructive travel performed over a direct route in compliance with the directive change-of-station provisions of the orders. 489

PANAMA CANAL COMMISSION
Employees
Compensation. (*See* **COMPENSATION, Panama Canal Commission employees**)

PAY
Additional
Aviation duty. (*See* **PAY, Aviation duty**)
Flight pay. (*See* **PAY, Aviation duty**)

PAY—Continued Page
Additional—Continued
Overpayments
De facto rule
An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments. 67
After expiration of enlistment
Courts-martial proceedings
Awaiting proceedings
An enlisted marine who was placed on administrative hold and prevented from completing his processing out after he had been given his certificate of discharge claims pay for the period after that date during which he remained at the marine base on administrative hold pending court-martial charges. The court held that since he had been given his discharge before court-martial charges were brought he was not subject to its jurisdiction. The handling over of the discharge certificate was equally effective for administrative purposes and the individual's status as a member and right to further pay ended at that time..... 629
Aviation duty
Overpayment
Collection action warranted
An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be applied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments. 67
Suspension from flying duty
Physical incapacity
An Army officer, who was found to have fraudulently qualified for flight pay and Aviation Career Incentive Pay by submitting falsified flight physical examination records, is not entitled to such pay under applicable statutes and regulations. The *de facto* rule will not be aplied to allow retention of flight pay and Aviation Career Incentive Pay received by an officer who fraudulently qualified for such pay. Therefore, collection action should be taken to recover these payments. 67
Civilian employees. (*See* COMPENSATION)
Retired
Survivor benefit plan
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 in-

PAY—Continued Page
Retired—Continued
Survior Benefit Plan—Continued
Social security offset—Continued
tended 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
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
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel, Pay, etc.**)
Withholding
Debt liquidation
Persons subject to current pay withholding
Generally
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. 395

PAYMENTS
Absence or unenforceability of contracts, Quantum meruit/valebant basis. (*See* **PAYMENTS, Quantum meruit/valebant basis, Absence, etc. of contract, Government acceptance of goods/service**)
Advance Contracts. (*See* **CONTRACTS, Payments, Advance**)
Contracts. (*See* **CONTRACTS, Payments**)

PAYMENTS—Continued Page

Date made

Fiscal Year 1982 presidential rank awards were paid to members of the Department of Energy Senior Executive Service on November 22, 1982, although the checks were dated September 29, 1982. Under 5 U.S.C. 5383(b), the aggregate amount of basic pay and awards paid to a senior executive during any fiscal year may not exceed the annual rate for Executive Schedule, Level I, at the end of that year. For purposes of establishing aggregate amounts paid during fiscal year, an SES award generally is considered paid on the date of the Treasury check. In this case, however, since the agency can conclusively establish the actual date the employee first took possession of the check, the date of possession shall govern. 62 Comp. Gen. 675 distinguished. 114

Prompt Payment Act

Applicability

Determination

Late payment penalties, under the Prompt Payment Act, must be paid for allowable billings for the National Park Service, Alaska Regional Office, physical fitness program. Under the Prompt Payment Act, and implementing regulations issued by the Office of Management and Budget, an agency must pay late payment penalties if it has not made payment within 45 days of the receipt of a proper invoice. Neither the act nor the regulations provide for any exception for the time during which the General Accounting Office is considering a certifying officer request for an advance decision on whether the invoice should be certified for payment 835

Interest payment

Since the government made payment by issuing a check within 30 days after the contracting agency received a proper invoice, payment of interest is not authorized under the Prompt Payment Act even though the contractor did not receive the payment until a substitute check was issued where the failure to receive the initial payment was outside the control of the contracting agency. 32

Quantum meruit/ valebant basis

Absence, etc. of contract

Authority to pay lacking

Bank of Bethesda is not entitled to be reimbursed for purchase of vault and related equipment for branch office on Navy installation. Bank sought payment under Navy regulations authorizing such equipment to be furnished at Government expense to bank offices certified as "nonself-sustaining." General Accounting Office agrees with Navy, however, that there is no basis to authorize payment where purchases were made prior to certification, and where authorizing regulation is clear on its face that benefits thereunder are available only after certification. Bank, as voluntary creditor of the Government, is not authorized to recover cost of goods allegedly purchased on behalf of the Government where direct expenditure by the Navy would not have been authorized 467

Government acceptance of goods/services

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

PAYMENTS—Continued Page
Quantum meruit/ valebant basis—Continued
Absence, etc. of contract—Continued
Government acceptance of goods/services—Continued
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.. 337

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..... 395

Benefit to Government requirement

Company that provided unauthorized services to Government on emergency basis to restore telephone service due to power outage at missile testing range may be paid on *quantum meruit* basis because services constituted a permissible procurement, Government received and accepted their benefit, company acted in good faith, and amount claimed represents reasonable value of benefit received. 727

No basis for payment

Bank of Bethesda is not entitled to be reimbursed for purchase of vault and related equipment for branch office on Navy installation. Bank sought payment under Navy regulations authorizing such equipment to be furnished at Government expense to bank offices certified as "nonself-sustaining." General Accounting Office agrees with Navy, however, that there is no basis to authorize payment where purchases were made prior to certification, and where authorizing regulation is clear on its face that benefits thereunder are available only after certification. Bank, as voluntary creditor of the Government, is not authorized to recover cost of goods allegedly purchased on behalf of the Government where direct expenditure by the Navy would not have been authorized..... 467

Price reasonableness

Company that provided unauthorized services to Government on emergency basis to restore telephone service due to power outage at missile testing range may be paid on *quantum meruit* basis because services constituted a permissible procurement, Government received and accepted their benefit, company acted in good faith, and amount claimed represents reasonable value of benefit received 727

Transportation charges

The Navy contracted with a specialized motor carrier to transport a ship's propeller from Virginia to California from where it was to be

PAYMENTS—Continued Page
Quantum meruit/ valebant basis—Continued
Absence, etc. of contract—Continued
Transportation charges—Continued
transported by the Air Force to the Philippines. Upon arrival in California, rather than unload the propeller from the tractor-trailer, the Navy borrowed the carrier's tractor and trailer, equipped with a fixture specially designed for ship's propellers, and one driver for 20 days, all of which were then flown by Air Force cargo plane from California to the Philippines, and returned to California transporting a damaged propeller for repair. The carrier is entitled to payment on a *quantum meruit* basis, in the absence of an agreement as to the charges for the services performed between California and the Philippines. Where the carrier fails to show that the Government ordered or received certain services, received a benefit for certain services allegedly provided, or where charges for certain services are duplicative of other charges paid, the General Services Administration's disallowance of the carrier's claim for charges for such services is sustained 612
Voluntary
No basis for valid claim
Bank of Bethesda is not entitled to be reimbursed for purchase of vault and related equipment for branch office on Navy installation. Bank sought payment under Navy regulations authorizing such equipment to be furnished at Government expense to bank offices certified as "nonself-sustaining." General Accounting Office agrees with Navy, however, that there is no basis to authorize payment where purchases were made prior to certification, and where authorizing regulation is clear on its face that benefits thereunder are available only after certification. Bank, as voluntary creditor of the Government, is not authorized to recover cost of goods allegedly purchased on behalf of the Government where direct expenditure by the Navy would not have been authorized 467

PER DIEM. (*See* SUBSISTENCE, Per diem)

PERSONAL FURNISHING. (*See* CLOTHING AND PERSONAL FURNISHINGS, Special clothing and equipment)

PERSONAL SERVICES
Contracts
Mess attendant services
Agency decision to use a cost-type, negotiated contract in lieu of a fixed-price, formally advertised contract in procuring mess attendant services is not justified by variations in meal counts and attendance, the lack of a contractual history, or the need for managerial and technical expertise. Although the Competition in Contracting Act of 1984 eliminates the preference for formally advertised procurements (now "sealed bids"), and would apply to any resolicitation, the implementing provisions of the Federal Acquisition Regulation (FAR) do provide criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals. General Accounting Office recommends that contracting agency not exercise

PERSONAL SERVICES—Continued Page
Contracts—Continued
Mess attendant services—Continued
contract renewal options, and instead conduct a new procurement according to the applicable FAR provisions 880
Private contract *v.* Government personnel
Legality
Allegation that solicitation will create an illegal personal services contract is denied where protester fails to demonstrate that government employees will actually supervise the contractor's personnel so as to create an employer-employee relationship between the government and contracting personnel 528
Rule
Policy and not positive law
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

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 expressed intention of Congress to prevail over the erroneous language of a statute. See court cases cited 221
Mails
"Penalty" mail
Jurisdiction
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 382

PROCUREMENT
In-house *v.* commercial sources
Neither Office of Management and Budget (OMB) Circular No. A-76 nor agency regulations preclude a protest to General Accounting

PROCUREMENT—Continued Page

In-house *v.* commercial sources—Continued

Office from an agency's administrative review of a contractor's appeal of an in-house cost estimate 64

PROMPT PAYMENT ACT. (*See* PAYMENTS, Prompt Payment Act)

PROPERTY

Private

Damage, loss, etc.

Carrier's liability

Burden of proof

Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126

Household effects. (*See* PROPERTY, Private, Damage, loss, etc., Household effects, Carrier liability)

Notice

Timeliness

Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126

Preexisting damage

Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

Prima facie case

Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

Government liability

Personal property. (*See* PROPERTY, Private, Damage, loss, etc., Personal property)

Household effects

Carrier liability

Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

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Damage, loss, etc.—Continued
Household effects—Continued
Carrier liability—Continued
Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126
Burden of proof
Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126
House trailers
Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117
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Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126
Personal property
Claims Act of 1964
Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote range station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e) 93
Government liability
Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote ranger station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e) 93
Public
Automobiles. (*See* **VEHICLES, Government**)
Damage, loss, etc.
Debt collection
Disposition. (*See* **DEBT COLLECTIONS, Procedure for collection and accounting, Miscellaneous receipts.** *v.* **special**

PROPERTY—Continued Page
Public—Continued
Damage, loss, etc.—Continued
Debt collection—Continued
account)
Government vehicles
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
Exchange or sale for similar items
Where agency seeks to acquire new items and plans to solicit trade-in allowances for the items being replaced, the agency must solicit offers for the old items on an exchange (trade-in) basis and/or a cash basis, unless circumstances indicate that permitting both types of offers will not result in a better price than allowing one type..... 132
Private use
Leases
Protest against the terms of agency's solicitation of offers for the lease of government-owned space is not for consideration under GAO's bid protest function since it does not concern a procurement by a federal agency of property or services within the scope of the bid protest provisions of the Competition in Contracting Act of 1984, Pub. L. 98-369, 98 Stat. 1175, 1199-1203 (to be codified at 31 U.S.C. 3551-3556), and the agency has not agreed in writing to have GAO decide such protests under the provisions of our Bid Protest Regulations providing for the consideration of non-statutory protests, 4 C.F.R. 21.11 (1985)..... 697
Surplus
Disposition
Sale
Vehicles. (*See.* **SALES, Vehicles, Government owned, Automobiles)**
Vehicles. (*See* **VEHICLES, Government)**

PROTESTS
Contracts. (*See* **CONTRACTS, Protest)**

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..... 395

PUBLIC HEALTH SERVICE—Continued Page
Commissioned personnel—Continued
Dual employment—Continued
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

PURCHASES
Small
Competition
Adequacy
An agency which is a mandatory user of a multiple-award federal supply schedule (FSS) contract may purchase lower priced non-FSS items which are identical (in terms of make and model) to those included on the FSS contract from the schedule contractor that submitted the low quote under the original request for quotations. There is nothing in the Federal Acquisition Regulation which would compel the agency to recompete the non-FSS items 239
Small business concerns
Certificate of Competency procedures under SBA
Applicability
Protester's challenge to the agency's withdrawal of COC referral is denied where the withdrawal was made at the SBA's suggestion, based on an SBA regulation which leaves to the discretion of the contracting officer whether to refer the negative determination of responsibility to the SBA when the contract value will be less than $10,000. Further, the SBA Administrator was authorized by statute to make such regulations as he deemed necessary to carry out his authority, and there has been no showing that the regulation was not reasonably related to the SBA's statutory authority 175

QUARTERS
Government furnished
Housing. (*See* **HOUSING, Government furnished quarters**)

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 333

QUARTERS ALLOWANCE—Continued Page

Basic allowance for quarters (BAQ)—Continued

Dependents—Continued

Children—Continued

Dependency status

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

In mother's custody

Both parents service members

Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother and ordered the father to make monthly child-support payments of $100. The regulations required monthly support payments of at least $113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance 609

Husband and wife both members of armed services

Divorce effect

Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance 121

Rate Payable

Child support payments by separated or divorced member

Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother and ordered the father to make monthly child-support payments of $100. The regulations required monthly support payments of at least $113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying

QUARTERS ALLOWANCE—Continued Page
Basic allowance for quarters (BAQ)—Continued
Rate payable—Continued
Child support payments by separated or divorced member—Continued
amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance 609
With dependents rate
Child support payments by divorced member
Both parents service members
Dual payment prohibition for common dependents
Two Air Force members divorced from each other claim basic allowance for quarters at the "with dependent" rate based on their one child as a dependent. A court awarded child custody to the mother and ordered the father to make monthly child-support payments of $100. The regulations required monthly support payments of at least $113.40 to qualify the non-custodial parent for the increased allowance. The non-custodial member voluntarily offered to supplement the court-ordered amount to meet the regulation's qualifying amount. The custodial member attempted to reject the excess. The regulations do not give the non-custodial member power to alter, unilaterally, the obligations of the members established by the court; therefore, in the absence of a court decree ordering him to pay at least the monthly qualifying amount, or the custodial member's voluntary acceptance of the extra amount, the non-custodial member is not entitled to the increased quarters allowance, while the custodial member may be paid the increased allowance 609
Eligibility
Separation of husband and wife
Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance 121
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QUARTERS ALLOWANCE—Continued Page
Dependents
Children
Adopted. (*See* QUARTERS ALLOWANCE, Basic allowance for quarters (BAQ), Dependents, Children, Adopted)
Husband and wife both members of armed services
Where two military members are divorced, or legally separated, the children of the marriage are in the legal custody of a third party, and each member is required to pay child support to the third party, only one of the members may receive the increased basic allowance for quarters ("with-dependent" rate) based upon these common dependents. If the members are unable to agree as to which should claim the children as dependents, the parent providing the greater or chief support should receive the increased allowance, unless both members provide the same amount of support, in which case the senior member should receive the increased allowance 121
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Entitlement
Sharing arrangements
When two members entitled to and receiving housing allowances share a residence, their "rent plus" housing allowance must be paid at the sharer's rate regardless of the financial arrangements between the members. Although the regulations were not entirely clear in defining a sharer's entitlement, the fact that the Government is paying each member a housing allowance, although of different types, supports the conclusion that sharing arrangements should be taken into account even though costs may not, in fact, be shared so that sharers cannot manipulate the allowances to their advantage 501

REFUGEES
Assistance programs
Appropriations availability. (*See* APPROPRIATIONS, Availability, Refugee assistance)

REFUGEES—Continued Page
Assistance programs—Continued
Indochinese
Appropriations availability. (*See* APPROPRIATIONS, Availability, Refugee assistance)

REGULATIONS
Authority
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
Conflicting
Statutory *v.* administrative
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. Therefore, to the extent that such publication may be inconsistent with provisions of the FTR it is not binding on the Government 306
Consistency with law requirements
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
Defense Acquisition Regulation. (*See* DEFENSE ACQUISITION REGULATION)
Federal Property Management Regulations. (*See* FEDERAL PROPERTY MANAGEMENT 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 re-

REGULATIONS—Continued Page

Force and effect of law—Continued

Federal travel regulations—Continued

imbursement 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. Therefore, to the extent that such publication may be inconsistent with provisions of the FTR it is not binding on the Government..... 306

Travel regulations

Federal. (*See* **REGULATIONS, Force and effect of law, Federal travel regulations)**

Implementing procedures

Propriety

Environmental Protection Agency (EPA) is responsible for designing and administering fuel economy performance test and computing Corporate Average Fuel Economy (CAFE) ratings for auto makers. Request questioned EPA's handling of CAFE tests and ratings in three specific areas. Findings are: 1) EPA has broad statutory authority to refine test procedures, even if harder tests have the effect of raising CAFE standards slightly; 2) EPA's use of informal Advisory Circulars instead of rulemaking procedures to effect test changes is improper unless test changes are "technical and clerical amendment(s)" exempted from rulemaking by statute, or unless one of the Administrative Procedure Act exceptions applies; and 3) Rulemaking proposing adjustments to CAFE ratings is a legally adequate response to a court order to address discrepancies resulting from test changes EPA made in 1979. To Rep. Dingell..... 570

Legality

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 provision for unaccompanied personal baggage shipments, so that there is no objection

REGULATIONS—Continued Page
Legality—Continued
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 319
Promotion procedures
Approval authority
An employee was selected from a selection register for promotion and was orally so notified. She reported to her new position, but was not actually promoted until 1 month later due to administrative delays in processing the necessary paperwork. The claim for retroactive promotion and backpay is denied. In the absence of a nondiscretionary agency regulation or policy, the effective date of a promotion may not be earlier than the date action is taken by an official authorized to approve or disapprove the promotion. The delays here all occurred before the authorized official had the opportunity to act. Further, the failure to promote the employee at an earlier date did not violate a nondiscretionary agency policy 844
Travel
Federal
Regulation Z
Finance charges
Loan origination
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
Subsistence
Per diem
"Lodgings-plus"
The Department of Housing and Urban Development (HUD) requests a decision on whether HUD employees escorting foreign delegations may be paid subsistence expenses at their official duty stations. The Federal Travel Regulations provide that an employee may not be paid per diem or actual subsistence expenses at his or her permanent duty station. There are certain exceptions, but we find no exception that would apply in this case. Therefore, employee escorts at their permanent duty stations may not be paid subsistence expense.... 447
REHABILITATION ACT OF 1973
Handicapped employees
"Reasonable accommodation" policy
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

REHABILITATION ACT OF 1973—Continued Page
Handicapped employees—Continued
"Reasonable accommodation" policy—Continued
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
Special equipment, etc.
Appropriation availability
Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost beneficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. 5727(a) (1982) 30

RELOCATION EXPENSES
Transfers
Officers and employees. (*See* OFFICERS AND EMPLOYEES, Transfers)

REPORTS
Administrative
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

RETIREMENT
Civilian
Annuities
Jurisdiction
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
Backpay claim
Reinstated employees who elected to retire when improperly removed from the Forest Service may be reimbursed for life insurance premiums deducted from their annuities during the period of erroneous retirement. However, in computing the backpay due the employees there must be deducted premiums for the same insurance coverage applicable to them as employees for the erroneous retirement

RETIREMENT—Continued Page
Civilian—Continued
Backpay claim—Continued
period. Thus, they will be in the same financial position they would have been in absent the improper personnel action 435
Contributions
Backpay award
Period of separation
An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. The employee must pay retirement fund contributions for the period of the separation in order to receive service credit for that period. Although backpay awarded to the employee is insufficient to cover the amount of contributions he must pay, collection of that amount is not subject to waiver under 5 U.S.C. 5584 since there has been no erroneous payment of pay 86
Waiver of debt collection
An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. Retirement contributions which previously had been refunded to the employee were properly deducted from backpay because his retroactive reinstatement and receipt of backpay removed the legal basis for the refund. Net indebtedness resulting from deduction of the refund from backpay may not be waived by this Office under 5 U.S.C. 5584, since the refund did not constitute an erroneous payment of "pay or allowances." Under 5 U.S.C. 8346(b), Office of Personnel Management has sole authority to waive erroneous payments from the Civil Service Retirement Fund 86
Deductions for debt liquidation
Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against former federal employee's final salary check and lump-sum leave payment, unless they represent the continuation of an offset against current salary initiated under section 5. In regulations (5 C.F.R. Part 550, Subpart K) issued by Office of Personnel Management implementing section 5 (5 U.S.C. 5514), it is specifically stated that section 10 (31 U.S.C. 3716) applies to offsets against employee's final salary check and lump-sum leave payment. Historically both of these payments have been treated differently than employee's current pay account and both have been available for involuntary offset for debt collection. This interpretation of statute by agency charged with its administration is not unreasonable. Therefore, offsets against employee's final salary check and lump-sum leave payment are governed generally by 31 U.S.C. 3716. In any event, the 15 percent limitation of 5 U.S.C. 5514 does not apply 907
Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against payments from Civil Service Retirement and Disability Fund (Retirement Fund). The Office of Personnel Management regulations implementing section 5 (5 U.S.C. 5514) and the regulations issued jointly by GAO and the Department of Justice implementing section 10 (31

RETIREMENT—Continued Page
Civilian—Continued
Deductions for debt liquidation—Continued
U.S.C. 3716) both provide for offsets against Retirement Fund payments to be governed by administrative offset provisions of 31 U.S.C. 3716. This is a continuation of long-standing interpretation and there is no indication that Act was intended to change it. Therefore, administrative offset provisions of section 10 apply to payments from Retirement Fund 907
Deductions for pay adjustments
An employee who was separated from his position pursuant to a reduction-in-force was retroactively reinstated and awarded backpay when it was determined that his position had been transferred to another agency. The employee must pay retirement fund contributions for the period of the separation in order to receive service credit for that period. Although backpay awarded to the employee is insufficient to cover the amount of contributions he must pay, collection of that amount is not subject to waiver under 5 U.S.C. 5584 since there has been no erroneous payment of pay 86
Effective date
Changes in separation date
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

SALES
Surplus vehicles. (*See* SALES, Vehicles)
Vehicles
Government owned
Automobiles
GSA proposal to sell used Government vehicles on consignment through private sector auction houses is not objectionable. The proposal does not provide for an improper delegation of the inherent Government function of fee setting since the Government will set a minimum bid price on each vehicle and the final sales price will be determined by the market. The security of Government funds is assured by a contractor guarantee and bonding. 62 Comp. Gen. 339 (B-207731, Apr. 22, 1983), is distinguished 149

SET-OFF
Authority
Generally
Except as provided in section 101.4 of the Federal Claims Collection Standards (FCCS), when taking administrative offset under 5 U.S.C. 5522, 5705, or 5724, or other similar statutes, or the common law, agencies should follow the procedures specified in section 10 of

SET-OFF—Continued Page
Authority—Continued
Generally—Continued
the Debt Collection Act of 1982, 31 U.S.C. 3716 (1982), as implemented by section 102.3 of the FCCS, 49 Fed. Reg. 8889, 8898-99 (1984) (to be codified in 4 C.F.R. ch. II) 142
Section 5 of the Debt Collection Act of 1982, 5 U.S.C. 5514, as implemented in 49 Fed. Reg. 27470-75 (1984) (to be codified in 5 C.F.R. 550.1101 through 550.1106), authorizes and specifies the procedures that govern all salary offsets which are not expressly authorized or required by other more specific statutes (such as 5 U.S.C. 5522, 5705, and 5724). Any procedures not specified in that statute and its implementing regulations should be consistent with the provisions of the Federal Claims Collection Standards, 49 Fed. Reg. 8898-8905 (1984) (to be codified in 4 C.F.R. ch. II) 142
Sections 5 and 10 of the Debt Collection Act of 1982, codified at 5 U.S.C. 5514, and 31 U.S.C. 3716 (1982), respectively, provide generalized authority to take administrative offset to collect debts owed to the United States. Their passage did not impliedly repeal 5 U.S.C. 5522, 5705, or 5724 (1982), or other similar preexisting statutes which authorize offset in particular situations. This is because a statute dealing with a narrow, precise, and specific subject is not submerged or impliedly repealed by a later-enacted statute covering a more generalized spectrum, unless those statutes are completely irreconcilable 142
Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement 492
Agencies are entitled to a reasonable time in which to promulgate regulations to implement the administrative offset authority of section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716. During the interim period, agencies should provide debtors with the rights specified in section 10 or their substantial equivalent. If agency provides these rights, offset under section 10 is not precluded solely because of absence of final agency regulations 816
Compensation, etc. due to civilian employees
Accountable officers, etc., debts
Mandatory set-off
Accountable officers are automatically and strictly liable for public funds entrusted to them. When a loss occurs, if relief pursuant to an applicable statute has not been granted, collection of the amount lost by means of administrative off-set is required to be initiated immediately in accordance with 5 U.S.C. 5512 (1982) and section 102.3 of the Federal Claims Collection Standards, 4 C.F.R. ch. II (1985). Should the accountable officer request it, GAO is required by section 5512 to report the amount claimed to the Attorney General, who is required to institute legal action against the officer. There is no discretion to not report the debt or to not sue the officer; the act is mandatory. Collection by administrative off-set under section 5512 should pro-

SET-OFF—Continued Page

Compensation due to civilian employees—Continued

Accountable officers, etc., debts—Continued

Mandatory set-off—Continued

ceed during the pendency of the litigation, but may be made in reasonable installments, rather than by complete stoppage of pay. Collection of the debt prior to or during the pendency of litigation does not present the courts with a moot issue since the issue at trial concerns the original amount asserted against the officer, not the balance remaining to be paid 606

Retirement deductions

Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against former federal employee's final salary check and lump-sum leave payment, unless they represent the continuation of an offset against current salary initiated under section 5. In regulations (5 C.F.R. Part 550, Subpart K) issued by Office of Personnel Management implementing section 5 (5 U.S.C. 5514), it is specifically stated that section 10 (31 U.S.C. 3716) applies to offsets against employee's final salary check and lump-sum leave payment. Historically both of these payments have been treated differently than employee's current pay account and both have been available for involuntary offset for debt collection. This interpretation of statute by agency charged with its administration is not unreasonable. Therefore, offsets against employee's final salary check and lump-sum leave payment are governed generally by 31 U.S.C. 3716. In any event, the 15 percent limitation of 5 U.S.C. 5514 does not apply 907

Section 10 (administrative offset) of Debt Collection Act of 1982, rather than section 5 (salary offset) is applicable to offsets against payments from Civil Service Retirement and Disability Fund (Retirement Fund). The Office of Personnel Management regulations implementing section 5 (5 U.S.C. 5514 and the regulations issued jointly by GAO and the Department of Justice implementing section 10 (31 U.S.C. 3716) both provide for offsets against Retirement Fund payments to be governed by administrative offset provisions of 31 U.S.C. 3716. This is a continuation of long-standing interpretation and there is no indication that Act was intended to change it. Therefore, administrative offset provisions of section 10 apply to payments from Retirement Fund 907

Debt Collections

Debts to U.S.

Agencies are entitled to a reasonable time in which to promulgate regulations to implement the administrative offset authority of section 10 of the Debt Collection Act of 1982, 31 U.S.C. 3716. During the interim period, agencies should provide debtors with the rights specified in section 10 or their substantial equivalent. If agency provides these rights, offset under section 10 is not precluded solely because of absence of final agency regulations 816

Civilian personnel

Compensation offset. (*See* **SET-OFF, Compensation, etc. due civilian employees**)

Military personnel

Pay withholding. (*See* **PAY, Withholding, Debt liquidation**)

SET-OFF—Continued Page

Debtor-creditor

Relationship

Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement 492

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. 395

SEVERANCE PAY

Officers and employees. (*See* **COMPENSATION, Severance pay**)

SMALL BUSINESS ACT

Applicability

Technically unacceptable offer or proposal

When an offer from a small business concern is not technically acceptable because, for example, the officer is not an approved source, the Small Business Act does not apply 658

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 provision 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 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.

SMALL BUSINESS ADMINISTRATION—Continued Page
Loans—Continued
Appropriation obligation—Continued
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 on 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

SMALL BUSINESS INNOVATION DEVELOPMENT ACT
Research and development
Small business set-asides
Appropriation availability. (*See* APPROPRIATIONS, Availability, Contracts, Research and development, Small Business Innovation Development Act)

STATE DEPARTMENT
Appropriations. (*See* APPROPRIATIONS, State Department)

STATE LAWS
Federal programs, etc. effect
Where applicable federal law exists, General Accounting Office will not look to state law to determine the validity of a bid bond submitted for a federal procurement 474

STATES
Taxes. (*See* TAXES, States)

STATION ALLOWANCES
Intergovernmental Personnel Act assignments
An employee may not elect to receive per diem for the duration of an Intergovernmental Personnel Act assignment where his agency's determination to authorize change-of-station allowances is reflected in his travel orders and his Intergovernmental Personnel Act Agreement. Under 5 U.S.C. 3375, an agency may authorize change-of-station allowances or per diem, but not both, and we have held that per diem would ordinarily be inappropriate for Intergovernmental Personnel Act assignments of 2 years 665
Temporary lodgings
Civilian employees upon transfer. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

STATUTES OF LIMITATION
Claims
Claims settlement by GAO
Six years after date of accrual
The 6-year period of limitations in 31 U.S.C. 3702 was not tolled for the 4 years that claimant was living in Socialist Republic of Vietnam and may have been prevented from bringing suit. Consistent with the Supreme Court's construction of the Court of Claims 6-year statute of limitations, *Soriano v. United States,* 352 U.S. 270, 273 (1975), this Office should construe the 6-year period of limitation in section 3702 strictly 155
A claim which arises from an action taken by the Agency for International Development during a time of combat, and not from

STATUTES OF LIMITATION—Continued Page

Claims—Continued

Claims settlement by GAO—Continued

Six years after date of accrual—Continued

the noncombat activities of the United States Armed Forces or its members or civilian employees, is not cognizable under the Military Claims Act, 10 U.S.C. 2733, or the Foreign Claims Act, 10 U.S.C. 2734. However, it would be cognizable under General Accounting Office's general claims settlement authority, 31 U.S.C. 3702, had not the 6 year statute of limitations specified in that section run 155

Debt collections

Military personnel

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 limitations 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

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

STATUTORY CONSTRUCTION

Administrative construction not changed by statute

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 319

Administrative construction weight

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

STATUTORY CONSTRUCTION—Continued Page

Administrative construction weight—Continued

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

Court interpretation

Effect

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

General and specific statutes

Precedence

Sections 5 and 10 of the Debt Collection Act of 1982, codified at 5 U.S.C. 5514, and 31 U.S.C. 3716 (1982), respectively, provide generalized authority to take administrative offset to collect debts owed to the United States. Their passage did not impliedly repeal 5 U.S.C. 5522, 5705, or 5724 (1982), or other similar preexisting statutes which authorize offset in particular situations. This is because a statute dealing with a narrow, precise, and specific subject is not submerged or impliedly repealed by a later-enacted statute covering a more generalized spectrum, unless those statutes are completely irreconcilable 142

Inconsistencies

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

Intent

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

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Intent—Continued

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Legislative history, title, etc.

Effect of members colloquy on administrative authority

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. 98-619, 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. 55 Comp. Gen. 307, 319, 325-326 (1975) 359

Inconsistencies with enacted law

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

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 provision 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

Words and phrases

Under the Competition in Contracting Act of 1984 (CICA), GAO's bid protest authority extends to any "federal agency" as that term is used in the Federal Property and Administrative Services Act of 1949 (FPASA), including wholly owned government corporations. Notwithstanding provisions of CICA which defines "protest" with reference to "executive agency," 31 U.S.C. 3551(1), proper interpretation effectively substitutes the term "federal agency." Rules of statutory

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Legislative history, title, etc.—Continued
Words and phrases—Continued
construction permit such a substitution where supported by legislative intent as evidenced in language of CICA protest provisions as a whole and in legislative history of CICA 756
Legislative intent
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
Conflicting provisions
Appropriation *v.* authorization
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 provision 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
General Accounting Office duties
Under the Competition in Contracting Act of 1984 (CICA), GAO's bid protest authority extends to any "federal agency" as that term is used in the Federal Property and Administrative Services Act of 1949 (FPASA), including wholly owned government corporations. Notwithstanding provision of CICA which defines "protest" with reference to "executive agency," 31 U.S.C. 3551(1), proper interpretation effectively substitutes the term "federal agency." Rules of statutory construction permit such a substitution where supported by legislative intent as evidenced in language of CICA protest provisions as a whole and in legislative history of CICA 756
Statute as a whole
Omnibus Reconciliation Act of 1981 language established a new subchapter to ch. 45 of title 5, U.S.C. (5 U.S.C. 4511—4515). 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

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Legislative intent—Continued

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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

Under the Competition in Contracting Act of 1984 (CICA), GAO's bid protest authority extends to any "federal agency" as that term is used in the Federal Property and Administrative Services Act of 1949 (FPASA), including wholly owned government corporations. Notwithstanding provision of CICA which defines "protest" with reference to "executive agency," 31 U.S.C. 3551(1), proper interpretation effectively substitutes the term "federal agency." Rules of statutory construction permit such a substitution where supported by legislative intent as evidenced in language of CICA protest provisions as a whole and in legislative history of CICA 756

Repeals

Implied

Avoidance

Sections 5 and 10 of the Debt Collection Act of 1982, codified at 5 U.S.C. 5514, and 31 U.S.C. 3716 (1982), respectively, provide generalized authority to take administrative offset to collect debts owed to the United States. Their passage did not impliedly repeal 5 U.S.C. 5522, 5705, or 5724 (1982), or other similar preexisting statutes which authorize offset in particular situations. This is because a statute dealing with a narrow, precise, and specific subject is not submerged or impliedly repealed by a later-enacted statute covering a more generalized spectrum, unless those statutes are completely irreconcilable. 142

Special statute as affected by later general statute

Section 5 of the Debt Collection Act of 1982, 5 U.S.C. 5514, as implemented in 49 Fed. Reg. 27470-75 (1984) (to be codified in 5 C.F.R. 550.1101 through 550.1106), authorizes and specifies the procedures that govern all salary offsets which are not expressly authorized or required by other more specific statutes (such as 5 U.S.C. 5522, 5705, and 5724). Any procedures not specified in that statute and its implementing regulations should be consistent with the provisions of the Federal Claims Collection Standards, 49 Fed. Reg. 8898-8905 (1984) (to be codified in 4 C.F.R. ch. II). 142

SUBSISTENCE

Actual expenses

Determination

A Forest Service firefighter was authorized reimbursement on an actual subsistence expense basis in lieu of a per diem rate of $5. The firefighter argues that the Federal Travel Regulations, para. 1-8.1c, authorize reimbursement on an actual subsistence basis only where unusual circumstances exist. The Forest Service believes that unusual circumstances exist because the firefighters were working in remote areas where food and lodging is not normally available and is provided by the Forest Service. It believes that reimbursement on an actual subsistence expenses basis would ensure that only those employees that actually incurred expenses would be reimbursed and

SUBSISTENCE—Continued Page

Actual expenses—Continued

Determination—Continued

cited further administrative savings realized by a reduction in the number of travel vouchers that would have to be processed. The Forest Service may not authorize the firefighters actual subsistence expenses since FTR para. 1-8.1c provides that actual subsistence expenses may be authorized where the authorized per diem would be insufficient to cover expected expenses. Therefore, the firefighter may be paid the claimed per diem 825

High rate area

Entitlement

An employee performed temporary duty travel to a high rate geographical area (HRGA) and stayed with his family while there. He was authorized reimbursement on an actual expense basis, but claims reimbursement of one-half of the actual expense rate, as authorized by agency regulations. Paragraph 1-8.1b of the Federal Travel Regulations (FTR) grants an agency head discretionary authority to authorize special per diem in lieu of actual expenses in HRGA's under certain circumstances. Where the agency has established a special per diem rate for non-commercial quarters in HRGA's, that special rate satisfies the requirements of the FTR. The determination to apply that rate need not be made on a case-by-case basis. Jack O. Padrick, B-189317, November 23, 1977, and similar cases will no longer be followed to the extent that they require a separate determination to apply a preestablished fixed rate for each individual case 902

Maximum rate

The Department of Housing and Urban Development (HUD) requests a decision on whether foreign delegations on invitational travel and their official HUD escorts may be paid subsistence expenses exceeding the statutory limitation for Federal travel reimbursement. We find no basis to make an exception to the statutory limitation in this case. *United States Information Agency,* B-219375, December 7, 1982, is distinguished 447

Intermittent employees

Federal Advisory Committee members

Members of the Cultural Property Advisory Committee may not be reimbursed for actual subsistence expenses exceeding the maximum amount of $75 per day, as limited by 5 U.S.C. 5702(c). The Federal Advisory Committee Act, Public Law 92-463, incorporated by reference in the Advisory Committee's enabling legislation, provides that advisory committee members are to be paid the same travel expenses as authorized under 5 U.S.C. 5703 for intermittent employees. Under 5 U.S.C. 5703 and the Federal Travel Regulations, intermittent employees serving as experts or consultants may not be reimbursed for actual subsistence expenses exceeding the maximum rate, absent specific statutory authorization for the payment of a higher rate. We find that no such specific statutory authority is included in the Advisory Committee's enabling legislation 34

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Actual expenses—Continued
Maximum rate—Continued
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
Meals
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
Meals furnished civilian employees
Authorizations requirement
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
Headquarters. (*See* SUBSISTENCE, Per diem, Headquarters)
Per diem
Actual expenses. (*See* SUBSISTENCE, Actual expenses)
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
Delays
Personal convenience
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

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Per diem—Continued
Delays—Continued
Weather conditions
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
Early arrival
Personal convenience. (*See* SUBSISTENCE, Per diem, Hours of departure, Personal convenience)
Foreign national invitee to U.S.
The Department of Housing and Urban Development (HUD) requests a decision on whether foreign delegations on invitational travel and their official HUD escorts may be paid subsistence expenses exceeding the statutory limitation for Federal travel reimbursement. We find no basis to make an exception to the statutory limitation in this case. *United States Information Agency,* B–219375, December 7, 1982, is distinguished 447
Headquarters
Authority
An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per diem or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances..... 70
Permanent or temporary
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
Criteria
Employee of the Internal Revenue Service (IRS) is not entitled to temporary quarters subsistence expenses while renting and occupying the house he purchased as his family's residence at his new duty station. His intent during the period for which he claims temporary quarters subsistence expenses was to occupy the house permanently. The fact that its purchase was subject to approval of financing and satisfaction of outstanding liens does not change its character as the employee's permanent quarters..... 674

SUBSISTENCE—Continued Page
Per diem—Continued
Prohibitions against payment
An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per diem or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances..... 70
The Department of Housing and Urban Development (HUD) requests a decision on whether HUD employees escorting foreign delegations may be paid subsistence expenses at their official duty stations. The Federal Travel Regulations provide that an employee may not be paid per diem or actual subsistence expenses at his or her permanent duty station. There are certain exceptions, but we find no exception that would apply in this case. Therefore, employee escorts at their permanent duty stations may not be paid subsistence expenses.. 447
Weather conditions causation
An employee stationed at Fort George G. Meade, Maryland, returning from a temporary duty assignment obtained a meal and rented a motel room near his residence when a snowstorm and icy roads prevented him from continuing to his home. The claim for reimbursement must be denied since an employee may not receive per diem or subsistence in the area of his place of abode or his official duty station, regardless of unusual circumstances..... 70
Hours of departure, etc.
Personal convenience
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
Premature travel
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
Lodging costs. (*See* SUBSISTENCE, Per diem, Rates, Lodging costs)
Meals
Purchases when not on per diem. (*See* SUBSISTENCE, Actual expenses, Meals)
Premature travel. (*See* SUBSISTENCE, Per diem, Hours of departure, Premature travel)

SUBSISTENCE—Continued Page

Per diem—Continued

Purpose

A Forest Service firefighter was authorized reimbursement on an actual subsistence expense basis in lieu of a per diem rate of $5. The firefighter argues that the Federal Travel Regulations, para. 1-8.1c, authorize reimbursement on an actual subsistence basis only where unusual circumstances exist. The Forest Service believes that unusual circumstances exist because the firefighters were working in remote areas where food and lodging is not normally available and is provided by the Forest Service. It believes that reimbursement on an actual subsistence expenses basis would ensure that only those employees that actually incurred expenses would be reimbursed and cited further administrative savings realized by a reduction in the number of travel vouchers that would have to be processed. The Forest Service may not authorize the firefighters actual subsistence expenses since FTR para. 1-8.1c provides that actual subsistence expenses may be authorized where the authorized per diem would be insufficient to cover expected expenses. Therefore, the firefighter may be paid the claimed per diem 825

Rates

Lodging costs

Employee of the Internal Revenue Service (IRS) is not entitled to temporary quarters subsistence expenses while renting and occupying the house he purchased as his family's residence at his new duty station. His intent during the period for which he claims temporary quarters subsistence expenses was to occupy the house permanently. The fact that its purchase was subject to approval of financing and satisfaction of outstanding liens does not change its character as the employee's permanent quarters 674

Maximum limitation

The Department of Housing and Urban Development (HUD) requests a decision on whether foreign delegations on invitational travel and their official HUD escorts may be paid subsistence expenses exceeding the statutory limitation for Federal travel reimbursement. We find no basis to make an exception to the statutory limitation in this case. *United States Information Agency,* B-219375, December 7, 1982, is distinguished 447

Temporary duty

At place of family residence

An employee who was transferred from Chicago to Springfield, Ill., thereafter performed temporary duty travel on an "as required" basis throughout Ill., including Chicago, where his family continued to reside. His subsistence expenses while staying with his family in Chicago were administratively disallowed since he stayed at his family's residence. Since Springfield was the employee's permanent duty station, the fact that he stayed with his family while on temporary duty does not bar reimbursement of his travel expenses 902

SUBSISTENCE—Continued Page
Per diem—Continued
Temporary duty—Continued
Computation
An employee performed temporary duty travel to a high rate geographical area (HRGA) and stayed with his family while there. He was authorized reimbursement on an actual expense basis, but claims reimbursement of one-half of the actual expense rate, as authorized by agency regulations. Paragraph 1-8.1b of the Federal Travel Regulations (FTR) grants an agency head discretionary authority to authorize special per diem in lieu of actual expenses in HRGA's under certain circumstances. Where the agency has established a special per diem rate for non-commercial quarters in HRGA's, that special rate satisfies the requirements of the FTR. The determination to apply that rate need not be made on a case-by-case basis. Jack O. Padrick, B-189317, November 23, 1977, and similar cases will no longer be followed to the extent that they require a separate determination to apply a preestablished fixed rate for each individual case 902
Headquarters determination. (*See* SUBSISTENCE, Per diem, Headquarters, Permanent or temporary)
Intergovernmental Personnel Act Assignments
An employee may not elect to receive per diem for the duration of an Intergovernmental Personnel Act assignment where his agency's determination to authorize change-of-station allowances is reflected in his travel orders and his Intergovernmental Personnel Act Agreement. Under 5 U.S.C. 3375, an agency may authorize change-of-station allowances or per diem, but not both, and we have held that per diem would ordinarily be inappropriate for Intergovernmental Personnel Act assignments of 2 years 665
Length of assignment
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
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

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Per diem—Continued
Temporary duty—Continued
Long-term assignments—Continued
temporary duty allowances in Washington until the day he received definite notice of his transfer there 205

Return to headquarters for weekends
Payment basis
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

Station later designated as permanent
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

Transferred employees
Delay
An employee who is delayed by a breakdown of his automobile en route to a new duty station may be allowed travel time and be reimbursed for an additional day of per diem where the agency determines that the reason for delay was beyond the employee's control and was acceptable to the agency 173

SUNSHINE ACT
Applicability
Public notice provisions
We also feel that while the new Commission rules comply with the Government in the Sunshine Act and represent considerable improvement over prior practice, more could probably have been done to comply fully with the Act. While the Government in the Sunshine Act does not bar use of notation voting and meetings should not be required for routine or trivial agency actions, we are concerned that only a small number of meetings have been held to consider cases that the ICC identifies as "significant" 728

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

TAXES
State
Constitutionality
Assessment *v.* service charge
Texas 9-1-1 Emergency Number Act authorizes establishment of communication districts to process calls to public safety agencies from residents of each district in large metropolitan areas for emergency aid, accessed by dialing 911. Each district is governmental entity performing a municipal service and is permitted by Texas law to assess service fees to recoup operating costs. The fee assessed by the districts amounts to a tax from which Federal entities are constitutionally immune 655
While 9-1-1 service fee appears as a separately stated item on monthly telephone bills of district customers, telephone company is only collection agent for district and is not itself the service provider. Legal incidence of the tax is directly on telephone service customers, or "vendees," including GSA. Direct taxes on U.S. as vendee are unconstitutional; therefore 9-1-1 fee must be withheld from payment..... 655
Government immunity
Assessment for local improvements
Texas 9-1-1 Emergency Number Act authorizes establishment of communication districts to process calls to public safety agencies from residents of each district in large metropolitan areas for emergency aid, accessed by dialing 911. Each district is governmental entity performing a municipal service and is permitted by Texas law to assess service fees to recoup operating costs. The fee assessed by the districts amounts to a tax from which Federal entities are constitutionally immune 655
Government function, etc.
Texas 9-1-1 Emergency Number Act authorizes establishment of communication districts to process calls to public safety agencies from residents of each district in large metropolitan areas for emergency aid, accessed by dialing 911. Each district is governmental entity performing a municipal service and is permitted by Texas law to assess service fees to recoup operating costs. The fee assessed by the districts amounts to a tax from which Federal entities are constitutionally immune 655
Taxes imposed on other than government
Incidence of tax on vendor
While 9-1-1 service fee appears as a separately stated item on monthly telephone bills of district customers, telephone company is only collection agent for district and is not itself the service provider. Legal incidence of the tax is directly on telephone service customers, or "vendees," including GSA. Direct taxes on U.S. as vendee are unconstitutional; therefore 9-1-1 fee must be withheld from payment..... 655
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Texas 9-1-1 Emergency Number Act authorizes establishment of communication districts to process calls to public safety agencies from residents of each district in large metropolitan areas for emer-

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Telephone service—Continued
gency aid, accessed by dialing 911. Each district is governmental entity performing a municipal service and is permitted by Texas law to assess service fees to recoup operating costs. The fee assessed by the districts amounts to a tax from which Federal entities are constitutionally immune 655
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TENNESSEE VALLEY AUTHORITY
Appropriations
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
Tennessee Valley Authority (TVA) Act, 16 U.S.C. 831 et seq. (1982), sets sufficient parameters for the collection and use of TVA power program funds so as to constitute a continuing appropriation; TVA's power program is not a nonappropriated fund activity beyond the protest jurisdiction of the General Accounting Office 756
Contracts
Review by General Accounting Office. (*See* CONTRACTS, Protests, Authority to consider, Tennessee Valley Authority procurements)

TRANSPORTATION
Automobiles
Authority
Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost beneficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. 5727(a) (1982) 30
Specially equipped
Handicapped employee
Transfer
Employee without use of her arms who shipped her specially equipped automobile between duty stations within the continental United States may be reimbursed for shipping costs. The agency found, pursuant to the Rehabilitation Act of 1973, that employee was a qualified handicapped employee, that reimbursement was cost ben-

TRANSPORTATION—Continued Page
Automobiles—Continued
Specially equipped—Continued
Handicapped employee—Continued
Transfer—Continued
eficial, that it constituted a reasonable accommodation to the employee, and that such reimbursement did not impose undue hardship on the operation of the personnel relocation program. Authorization under the Rehabilitation Act satisfies the "except as specifically authorized" language in 5 U.S.C. 5727(a) (1982) 30
Bills
Payment
Delivery carrier
The Navy contracted with a specialized motor carrier to transport a ship's propeller from Virginia to California from where it was to be transported by the Air Force to the Philippines. Upon arrival in California, rather than unload the propeller from the tractor-trailer, the Navy borrowed the carrier's tractor and trailer, equipped with a fixture specially designed for ships' propellers, and one driver for 20 days, all of which were then flown by Air Force cargo plane from California to the Philippines, and returned to California transporting a damaged propeller for repair. The carrier is entitled to payment on a quantum meruit basis, in the absence of an agreement as to the charges for the services performed between California and the Philippines. Where the carrier fails to show that the Government ordered or received certain services, received a benefit for certain services allegedly provided, or where charges for certain services are duplicative of other charges paid, the General Services Administration's disallowance of the carrier's claim for charges for such services is sustained 612
***Quantum Meruit* Basis**
The Navy contracted with a specialized motor carrier to transport a ship's propeller from Virginia to California from where it was to be transported by the Air Force to the Philippines. Upon arrival in California, rather than unload the propeller from the tractor-trailer, the Navy borrowed the carrier's tractor and trailer, equipped with a fixture specially designed for ships' propellers, and one driver for 20 days, all of which were then flown by Air Force cargo plane from California to the Philippines, and returned to California transporting a damaged propeller for repair. The carrier is entitled to payment on a quantum meruit basis, in the absence of an agreement as to the charges for the services performed between California and the Philippines. Where the carrier fails to show that the Government ordered or received certain services, received a benefit for certain services allegedly provided, or where charges for certain services are duplicative of other charges paid, the General Services Administration's disallowance of the carrier's claim for charges for such services is sustained 612
Carmach Amendment of 1906
Damage to mobile home shipments
Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a

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Carmach Amendment of 1906—Continued

Damage to mobile home shipments—Continued

combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

Carriers

Liability

Evidence

Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126

Limitation

Military-Industry Memorandum of Understanding

Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126

Dependents

Children

School

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 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 319

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Separate travel
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
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Military personnel
Children
Attending school
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
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companied 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 319
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
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Drayage
Reimbursement basis
An Internal Revenue Service employee moved from leased premises at one location to another residence in the vicinity of his Canadian post of duty when his landlord refused to renew or extend his 1-year lease. The employee's claim for reimbursement of drayage expenses cannot be allowed as an administrative expense of the agency involved since his move was not the result of any official action. 52 Comp. Gen. 293 (1972) 517
Freight
Charges
Unearned
Military-Industry Memorandum of Understanding
Presumption of correct delivery after 45 days
Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to

TRANSPORTATION—Continued Page
Freight—Continued
Charges—Continued
Unearned—Continued
Military-Industry Memorandum of Understanding—Continued
Presumption of correct delivery after 45 days—Continued
a government claim for unearned freight charges as well as a claim for loss or damage 126
Household effects
Damage, loss, etc.
Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126
Drayage
Between non-Government quarters overseas
An Internal Revenue Service employee moved from leased premises at one location to another residence in the vicinity of his Canadian post of duty when his landlord refused to renew or extend his 1-year lease. The employee's claim for reimbursement of drayage expenses cannot be allowed as an administrative expense of the agency involved since his move was not the result of any official action. 52 Comp. Gen. 293 (1972) 517
House trailer shipments
Damage en route
Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117
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Household effects damaged or lost in transit
Military-Industry Memorandum of Understanding
Presumption of correct delivery after 45 days
Loss or damage not discovered within 45 days after delivery is presumed, under the terms of a Military-Industry Memorandum of Understanding, not to have occurred in the possession of the carrier in the absence of evidence to the contrary. This presumption applies to a government claim for unearned freight charges as well as a claim for loss or damage 126
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Damage, loss, etc.
Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

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Overseas employees
Local movement
An Internal Revenue Service employee moved from leased premises at one location to another residence in the vicinity of his Canadian post of duty when his landlord refused to renew or extend his 1-year lease. The employee's claim for reimbursement of drayage expenses cannot be allowed as an administrative expense of the agency involved since his move was not the result of any official action. 52 Comp. Gen. 293 (1972) 517
Temporary station subsequently made permanent
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
Weight limitation
Excess cost liability
Actual expense shipment
Computation formula
A transferred employee shipped houshold goods under the actual expense method. The goods weighed in excess of the maximum allowable. Under FTR para. 2-8.3b(5), the employee is liable for excess weight and delivery costs as a percentage of the total expenses associated with that shipment, based on the ratio of the excess weight to the total weight of the goods shipped. These regulations have the force and effect of law and may not be waived or modified, regardless of circumstances 58
Waiver
Propriety
A transferred employee shipped household goods under the actual expense method. The goods weighed in excess of the maximum allowable. Under FTR para. 2-8.3b(5), the employee is liable for excess weight and delivery costs as a percentage of the total expenses associated with that shipment, based on the ratio of the excess weight to the total weight of the goods shipped. These regulations have the force and effect of law and may not be waived or modified, regardless of circumstances 58
Military personnel
Dependents. (*See* **TRANSPORTATION, Dependents, Military personnel**)
Motor carrier shipments
Mobile homes
Carmach Amendment to ICC Act
Damage in transit to a mobile home caused by the combination of a rust-weakened frame and flexing of the frame over the axle, aggravated by an unbalanced load in the mobile home, resulted from a combination of defects which are exceptions to common carrier liability for the damage. This decision reverses B-193432, B-211194, Aug. 16, 1984 117

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Procurement matters

The Navy is not required to follow procurement procedures to establish a scheduled airline traffic office (SATO) through which to acquire travel services, since establishment of a SATO does not involve a procurement of services within the meaning of the Competition in Contracting Act of 1984 551

Procurement practices

Agency's competitive selection of a contractor to make travel arrangements for federal employees is exempt from the procurement statutes since the contractual arrangement is only a management vehicle to obtain travel services which themselves are exempt from procurement procedures 670

Travel agencies

Airlines office on Government property

The Navy is not required to follow procurement procedures to establish a scheduled airline traffic office (SATO) through which to acquire travel services, since establishment of a SATO does not involve a procurement of services within the meaning of the Competition in Contracting Act of 1984 551

Use Approved

Agency's competitive selection of a contractor to make travel arrangements for federal employees is exempt from the procurement statutes since the contractual arrangement is only a management vehicle to obtain travel services which themselves are exempt from procurement procedures 670

Vessels

Foreign

American vessel availability

Prohibition on use of foreign vessel

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

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

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

TRAVEL ALLOWANCES
Military personnel
Mileage. (*See* MILEAGE, Military personnel)

TRAVEL EXPENSES
Actual expenses
Reimbursement basis
Criteria

A Forest Service firefighter was authorized reimbursement on an actual subsistence expense basis in lieu of a per diem rate of $5. The firefighter argues that the Federal Travel Regulations, para. 1-8.1c, authorize reimbursement on an actual subsistence basis only where unusual circumstances exist. The Forest Service believes that unusual circumstances exist because the firefighters were working in remote areas where food and lodging is not normally available and is provided by the Forest Service. It believes that reimbursement on an actual subsistence expenses basis would ensure that only those employees that actually incurred expenses would be reimbursed and cited further administrative savings realized by a reduction in the number of travel vouchers that would have to be processed. The Forest Service may not authorize the firefighters actual subsistence expenses since FTR para. 1-8.1c provides that actual subsistence expenses may be authorized where the authorized per diem would be insufficient to cover expected expenses. Therefore, the firefighter may be paid the claimed per diem 825

Advances
Accountability

Blank travelers checks obtained by the Government for issuance to its employees in lieu of cash travel advances do constitute official Government funds, the physical loss or disappearance of which would entail financial liability for the accountable officer involved. That liability may be relieved by General Accounting Office, under 31 U.S.C. 3527 (1982), in the same manner as liability for a loss involving cash or other Government funds 456

Advisory committee members
Cultural Property Advisory Committee
Reimbursement basis
Intermittent experts or consultants

Members of the Cultural Property Advisory Committee may not be reimbursed for actual subsistence expenses exceeding the maximum amount of $75 per day, as limited by 5 U.S.C. 5702(c). The Federal Advisory Committee Act, Public Law 92-463, incorporated by reference in the Advisory Committee's enabling legislation, provides that advisory committee members are to be paid the same travel expenses as authorized under 5 U.S.C. 5703 for intermittent employees. Under 5 U.S.C. 5703 and the Federal Travel Regulations, intermittent em-

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Advisory committee members—Continued
Cultural Property Advisory Committee—Continued
Reimbursement basis—Continued
Intermittent experts or consultants—Continued
ployees serving as experts or consultants may not be reimbursed for actual subsistence expenses exceeding the maximum rate, absent specific statutory authorization for the payment of a higher rate. We find that no such specific statutory authority is included in the Advisory Committee's enabling legislation 34
Constructive travel
Computation
An employee, in computing his constructive travel claim, claims parking fees at the temporary duty location. Paragraph 1-4.3 of Federal Travel Regulations provides a limit on reimbursement based on the constructive cost of traveling to and from the temporary duty area. Thus, local travel costs at the temporary duty area are separate from constructive travel costs to and from the temporary duty area. The employee should be reimbursed for only those local travel costs actually incurred without limitation by constructive cost 443
Constructive travel costs
Computation
An employee, in computing constructive travel by common carrier, claims mileage and parking as if his spouse drove the employee to and from the airport. However, for computing constructive travel costs, only the usual taxicab or airport limousine fares, plus tip, should be used for comparison purposes 443
An employee and his agency disagree over the proper computation of the cost of a Government vehicle in determining the employee's constructive travel claim between his headquarters and temporary duty station. However, for the purposes of the constructive cost of common carrier transportation, the cost of a Government vehicle may not be used since it is defined in the Federal Travel Regulations as a special conveyance and not a common carrier 443
Limited to cost of common carrier
An employee, in computing constructive travel by common carrier, claims mileage and parking as if his spouse drove the employee to and from the airport. However, for computing constructive travel costs, only the usual taxicab or airport limousine fares, plus tip, should be used for comparison purposes 443
An employee and his agency disagree over the proper computation of the cost of a Government vehicle in determining the employee's constructive travel claim between his headquarters and temporary duty station. However, for the purposes of the constructive cost of common carrier transportation, the cost of a Government vehicle may not be used since it is defined in the Federal Travel Regulations as a special conveyance and not a common carrier 443
Military personnel. (*See* TRAVEL EXPENSES, Military personnel, Constructive travel costs)

TRAVEL EXPENSES—Continued Page
Contributions from private sources
Acceptance by employees
Tax exempt organizations
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
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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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved ... 234
Fares
Taxicabs
Between residence and terminal
Privately owned vehicle in lieu
An employee, in computing constructive travel by common carrier, claims mileage and parking as if his spouse drove the employee to and from the airport. However, for computing constructive travel costs, only the usual taxicab or airport limousine fares, plus tip, should be used for comparison purposes ... 443
First Duty Station
Manpower
Shortage
Relocation expenses
Travel and transportation expenses for new appointees to manpower shortage positions in the Federal service are authorized by law and the Federal Travel Regulations. Claimant was selected for appointment to such a position in Ashville, N.C., and signed a 12-month service agreement. Agency issued a travel order and advanced funds to claimant for travel expenses, but withdrew offer of employment prior to reporting date due to budget constraints. Claimant is not liable for portion of travel advance paid by agency relating to relocation travel since failure to fulfill service agreement was for reasons beyond her control. There is no authority to allow remainder of expenses. However, since Ms. Randall acted in good faith reliance on her selection for appointment and representations of agency officials, we conclude the equities of the case warrant our reporting this matter to Congress under the Meritorious Claims Act ... 617
Reimbursement
Travel and transportation expenses for new appointees to manpower shortage positions in the Federal service are authorized by law and the Federal Travel Regulations. Claimant was selected for appointment to such a position in Ashville, N.C., and signed a 12-month service agreement. Agency issued a travel order and advanced funds to claimant for travel expenses, but withdrew offer of employment

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First Duty Station—Continued
Reimbursement—Continued
prior to reporting date due to budget constraints. Claimant is not liable for portion of travel advance paid by agency relating to relocation travel since failure to fulfill service agreement was for reasons beyond her control. There is no authority to allow remainder of expenses. However, since Ms. Randall acted in good faith reliance on her selection for appointment and representations of agency officials, we conclude the equities of the case warrant our reporting this matter to Congress under the Meritorious Claims Act 617
Foreign vessel use. (*See* **TRANSPORTATION, Vessels, Foreign**)
Leaves of absence
Temporary duty
After departure on leave
Payment basis
A vacationing employee whose leave is interrupted by orders to perform temporary duty at another location, and who afterwards returns to his permanent duty station at Government expense, is not entitled to be reimbursed for the cost of a personal return airline ticket that he could not use because of the cancellation of his leave. As the Government has paid the cost of his return, employee's claim is comparable to that for the lost value of a vacation, and may not be reimbursed 28
During period of leave
A vacationing employee whose leave is interrupted by orders to perform temporary duty at another location, and who afterwards returns to his permanent duty station at Government expense, is not entitled to be reimbursed for the cost of a personal return airline ticket that he could not use because of the cancellation of his leave. As the Government has paid the cost of his return, employee's claim is comparable to that for the lost value of a vacation, and may not be reimbursed 28
Manpower shortage category personnel
First duty station. (*See* **TRAVEL EXPENSES, First Duty Station, Manpower Shortage**)
Military personnel
Change of station status
Temporary duty en route
A member of the Reserve components returing home from ordered active duty for training for over 20 weeks at one location was directed to perform additional duty for less than 20 weeks at two temporary duty points en route home. Since travel incident to duty at a single location for 20 weeks or more is considered permanent-change-of-station travel, the member was entitled to permament-change-of-station travel allowances for such travel, including the travel to the temporary duty points en route 821
Constructive travel costs
Computation
There is nothing inherently objectionable about directive military and naval travel orders which contain separate provisions for the performance of permissive temporary duty for which travel allowances will not be paid. The Bureau of Naval Personnel therefore

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
Constructive travel costs—Continued
Computation—Continued
acted properly in issuing directive change-of-station orders to two Navy officers with provisions authorizing them while en route to undertake permissive temporary recruiting duty assignments in their home towns. The officers' travel allowance entitlements are for computation on the basis of constructive travel performed over a direct route in compliance with the directive change-of-station provisions of the orders 489
Delays
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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
Dependents
Miscellaneous expenses (*See* **TRAVEL EXPENSES, Military personnel, Miscellaneous expenses, Dependents**)
Transportation. (*See* **TRANSPORTATION, Dependents, Military personnel**)
Miscellaneous expenses
Dependents
Travel to overseas station
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 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 319

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Mode of travel

Automobile

Privately owned

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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234

Official business requirement

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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234

Travel allowances authorized by statute for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with travel requirements imposed on them by the needs of the service over which they have no control. Expenses of temporary duty travel performed in whole or in part for personal benefit or convenience under permissive orders are thus nonreimbursable, notwithstanding that the Government may derive some benefit from the optional duty undertaken. Hence, two Navy officers who traveled to their home towns to perform temporary recruiting duty under orders clearly stating that the duty was permissive rather than directive in nature and that no travel allowances were authorized for such duty are not entitled to reimbursement of the travel expenses involved 489

Temporary duty

Authorization requirement

Travel allowances authorized by statute for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with travel requirements imposed on them by the needs of the service over which they have no control. Expenses of temporary duty travel performed in whole or in part for personal benefit or convenience under permissive orders are thus nonreimbursable, notwithstanding that the Government may derive some benefit from the optional duty undertaken. Hence, two Navy officers who traveled to their home towns to perform temporary recruiting duty under orders clearly stating that the duty was permissive rather than directive in nature and that no travel allowances were authorized for such duty are not entitled to reimbursement of the travel expenses involved 489

Travel orders. (*See* **ORDERS, Travel, Military**)

TRAVEL EXPENSES—Continued Page

Modes of travel

Advantageous to Government

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

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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234

Official business

Military personnel

Requirement. (*See* **TRAVEL EXPENSES, Military personnel, Official business requirement**)

Participation in private conventions, etc.

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

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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234

Overseas employees

Return for other than leave

Transfer

Payment basis

The record does not provide an adequate basis for determining the location of the employee's permanent duty station at the time of her discharge. Accordingly, payment for return travel from Rome to the United States cannot be authorized pursuant to para. 2-1.5a(a)(b) of the Federal Travel Regulations, FPMR 101-7 (September 1981) 631

Transfers

Failure to report at new duty station

Employee stationed in Rome, Italy, was transferred to the United States and later discharged for failure to report for duty in the

TRAVEL EXPENSES—Continued Page
Overseas Employees—Continued
Transfers—Continued
Failure to report at new duty station—Continued
United States. Notwithstanding the Merit Systems Protection Board order requiring her reinstatement, she may not be reimbursed for travel from Rome to the United States on the basis of her transfer since she never reported for duty in the United States..... 631
Parking fees. (*See* **FEES, Parking**)
Per diem. (*See* **SUBSISTENCE, Per diem**)
Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers**)
Prudent person rule
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
Return to official station on nonworkdays
Per diem. (*See* **SUBSISTENCE, Per diem, Temporary duty, Return to headquarters for weekends**)
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
Temporary duty
Commuting expenses
Constructive per diem *v.* mileage reimbursement
An employee, in computing his constructive travel claim, claims parking fees at the temporary duty location. Paragraph 1-4.3 of the Federal Travel Regulations provides a limit on reimbursement based on the constructive cost of traveling to and from the temporary duty area. Thus, local travel costs at the temporary duty area are separate from constructive travel costs to and from the temporary duty area. The employee should be reimbursed for only those local travel costs actually incurred without limitation by constructive cost..... 443
Return to official station on nonworkdays. (*See* **TRAVEL EXPENSES, Return to official station on nonworkdays**)

TRAVEL EXPENSES—Continued Page
Temporary duty—Continued
Commuting expenses—Continued
Administrative determination
Cost analysis
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
Vehicle rental. (*See* **VEHICLES, Rental, Temporary duty**)
Transfers
Employee return to old duty station
To complete moving arrangements
Transferred employee who reported for duty at his new official station in January 1984 may not be paid for his travel expenses for a subsequent trip in July 1984 to fly his privately owned aircraft from his old to his new duty station. Employee's travel expense entitlement became fixed at the time he reported to his new post of duty in January 1984. Hence, he is entitled to payment for his own travel expenses from his old to his new duty station when he reported for duty, but not for his subsequent trip 801
House-hunting travel
Reimbursement
Employees who were permanently transferred from Miami to Orlando, Fla., seek reimbursement for several househunting trips. The claims are denied since each employee may be reimbursed travel and transportation expenses for only one round trip of employee and spouse between the localities of the old and new duty stations for the purpose of seeking residence quarters. 5 U.S.C. 5724a(a)(2)(1982). The fact that the employees may have been given erroneous advice does not create a right to reimbursement where the expenses claimed are precluded by law. But see 47 Comp. Gen. 189 472
Personal travel
Transferred employee who reported for duty at his new official station in January 1984 may not be paid for his travel expenses for a subsequent trip in July 1984 to fly his privately owned aircraft from his old to his new duty station. Employee's travel expense entitlement became fixed at the time he reported to his new post of duty in January 1984. Hence, he is entitled to payment for his own travel expenses from his old to his new duty station when he reported for duty, but not for his subsequent trip 801

TRAVEL EXPENSES—Continued Page

Transfers—Continued

Reimbursement

Approval

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 intermediate location en route. Employee claims travel and relocation expenses to the training location under 5 U.S.C. 5724 and 5724a. Although PCS 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 entitlements 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. See decisions cited 268

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers)**

Vehicles

Use of privately owned

Between residence and terminal

Mileage reimbursement claim. (*See* **MILEAGE, Travel by privately owned automobile, Between residence and terminal)**

Breakdown, etc. delay

When use of a privately owned vehicle for the performance of official duties is determined to be advantageous to the government, a

TRAVEL EXPENSES—Continued Page

Vehicles—Continued

Use of privately owned—Continued

Breakdown, etc. delay—Continued

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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234

Mileage reimbursement claim. (*See* **MILEAGE, Travel by privately owned automobile)**

Witness *v.* Complainant

Administrative Proceedings

Employees who are ordered reinstated may be reimbursed for travel to attend their hearing. However, an employee's travel while in annual leave status 5 months prior to the hearing, over 2 months prior to the effective date of discharge, and over 3 weeks prior to issuance of a notice of a proposed adverse action cannot be equated with travel to attend a hearing. Such travel is governed by the rule which applies to travel away from an employee's permanent duty station while on approved leave. Under this rule, the Government is responsible only for the cost of travel from the leave location to the location of the hearing. The claim for travel to the leave location is denied 631

TREASURY DEPARTMENT

Secret Service

Accountable officers

Relief. (*See* **ACCOUNTABLE OFFICERS, Relief)**

UNIONS

Agreements

Wage increases

Supervisory employees entitlements

Supervisors of prevailing rate employees who negotiate their pay increases are subject to statutorily imposed pay limitation which applies to most prevailing rate employees. These supervisors are within the express terms of the pay increase limitation and are not covered by the specific exclusions from the limitation. 60 Comp. Gen. 58 (1980) is distinguished 100

UNITED STATES INFORMATION AGENCY

Grants

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 and that the Endowment must comply with earmark requirements in future grant awards 388

UNITED STATES INFORMATION AGENCY—Continued Page
Grants—Continued
United States Information Agency (USIA), in providing statutory grant funds to National Endowment for Democracy, has essentially the same oversight rights and responsibilities as any other Federal grantor agency. General Accounting Office finds that language and legislative history of authorizing legislation do not support Endowment's view that USIA was not intended to have any substantial role in seeing that grant monies are expended for authorized purposes..... 582

VEHICLES
Breakdown, etc. delay
Official business
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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved..... 234
Government
Damages
Recovery
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
Home to work transportation
Government employees
GAO has identified for Senator Proxmire, the Director of OMB and his Deputy as individuals at OMB who have received home-to-work transportation. Since White House did not respond to our inquiries, we cannot verify whether incumbents of the same four positions reported to Senator Proxmire 3 years ago are still using home-to-work transportation..... 782
Prohibitions
No person at the Office of Management and Budget (OMB) or on the White House staff may properly receive Government home-to-work transportation. Such transportation is prohibited by 31 U.S.C. 1344, which exempts only a small group of high officials, not including any person at OMB or on the White House staff. Specific home-to-work prohibition included in HUD appropriation act does not indicate congressional intent to exempt OMB officials. Assertion of "security grounds" by OMB, without further explanation of the specific nature of the threat and the added protection afforded by Government transportation, does not establish circumstances warranting home-to-work transportation. If security grounds are asserted by White House Staff, similar justification must be provided. OMB Director is not entitled to home-to-work transportation as the head of an agency listed in 5 U.S.C. 101. Penalty for violation of 31 U.S.C. 1344 is provided in 31 U.S.C. 1349(b)..... 782

VEHICLES—Continued Page
Government—Continued
Motorpool vehicles
GSA proposal to sell used Government vehicles on consignment through private sector auction houses is not objectionable. The proposal does not provide for an improper delegation of the inherent Government function of fee setting since the Government will set a minimum bid price on each vehicle and the final sales price will be determined by the market. The security of Government funds is assured by a contractor guarantee and bonding. 62 Comp. Gen., 339(B-207731, Apr. 22, 1983), is distinguished. 149
Privately owned
Official use
Government contribution to cost
When use of a privately owned vehicle for the performance of official duties is determined to be advantageous to the government, a breakdown and the 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 traveler is acting under administrative approval or the actions of the traveler are subsequently approved 234
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
Official and personal use
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
Personal convenience
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

VEHICLES—Continued Page
Rental—Continued
Personal convenience—Continued
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
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
Long-term basis. (*See* **VEHICLES, Rental, Long-term basis, Temporary duty**)
Unauthorized
Constructive cost basis of reimbursement
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

VOLUNTARY SERVICES
Personal funds for unauthorized obligations. (*See* **PAYMENTS, Voluntary**)
Personal funds in interest of Government (*See* **PAYMENTS, Voluntary**)
Reimbursement entitlement
Rule
Bank of Bethesda is not entitled to be reimbursed for purchase of vault and related equipment for branch office on Navy installation. Bank sought payment under Navy regulations authorizing such equipment to be furnished at Government expense to bank offices certified as "nonselfsustaining." General Accounting Office agrees with Navy, however, that there is no basis to authorize payment where purchases were made prior to certification, and where authorizing regulation is clear on its face that benefits thereunder are available only after certification. Bank, as voluntary creditor of the

VOLUNTARY SERVICES—Continued Page
Reimbursement entitlement—Continued
Rule—Continued
Government, is not authorized to recover cost of goods allegedly purchased on behalf of the Government where direct expenditure by the Navy would not have been authorized 467

WITNESSES
Court leave. (*See* LEAVES OF ABSENCE, Court, Witness)

WORDS AND PHRASES
"Assigned" Government quarters
Claim under the Military Personnel and Civilian Employees' Claims Act of 1964, as amended, 31 U.S.C. 3721, for loss of Forest Service employee's personal property due to burglary in rented Government housing at remote ranger station is cognizable under the statute, since housing may be viewed as "assigned" for purposes of 31 U.S.C. 3721(e) 93
"*Bona fide* needs"
"Bona fide needs" statute, 31 U.S.C. 1502(a), provides that an appropriation may only be used to pay for program needs attributable to the year or years for which the appropriation was made available, unless the Congress provides an exception to its application. The only exception for advance procurement of EOQ items is found in 10 U.S.C. 2306(h) but the exception is limited to procurement of items needed for end items procured by means of a multiyear contract. Authorized multiyear contracts may not cover more than 5 program years. 10 U.S.C. 2306(h)(8). Therefore, exercise of an option for advance procurement of EOQ items for a 6th or 7th program year is unauthorized. General Accounting Office does not accept Army contention that *bona fide* needs statute is inapplicable to multiple or "investment type" procurements 163
"Current rate" as used in continuing resolutions
The Office of Refugee Resettlement, in allocating funds appropriated for refugee and entrant assistance under the fiscal year 1984 continuing resolution, misinterpreted earlier decisions of this Office. "Current rate" as used in continuing resolutions refers to a definite sum of money rather than a program level. The different result reached in B-197636, Feb. 25, 1980, was limited to the unusual facts in that case 21
"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
Drayage
An Internal Revenue Service employee moved from leased premises at one location to another residence in the vicinity of his Canadian post of duty when his landlord refused to renew or extend his 1-year lease. The employee's claim for reimbursement of drayage expenses cannot be allowed as an administrative expense of the agency

WORDS AND PHRASES—Continued Page

Drayage—Continued
involved since his move was not the result of any official action. 52 Comp. Gen. 293 (1972) 517

Economic order quantity (EOQ)
Advance procurement of economic order quantity (EOQ) materials and components is authorized only to support end items procured through authorized 5-year multiyear contract. Army improperly exercised option for procurement of EOQ items for needs of a 6th year and is cautioned not to exercise an option for the needs of a 7th year as presently contemplated unless it obtains specific statutory authority to do so 163

"Executive Agency"
Under the Competition in Contracting Act of 1984 (CICA), GAO's bid protest authority extends to any "federal agency" as that term is used in the Federal Property and Administrative Services Act of 1949 (FPASA), including wholly owned government corporations. Notwithstanding provisions of CICA which defines "protest" with reference to "executive agency," 31 U.S.C. 3551(1), proper interpretation effectively substitutes the term "federal agency." Rules of statutory construction permit such a substitution where supported by legislative intent as evidenced in language of CICA protest provisions as a whole and in legislative history of CICA. 756

"Federal Agency"
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Interagency agreements
Graduate School of Department of Agriculture, as a non-appropriated fund instrumentality (NAFI), is not a proper recipient of "interagency" orders from Government agencies for training services pursuant to the Economy Act, 31 U.S.C. 1535, or the Government Employees Training Act, 5 U.S.C. 4104 (1982). Interagency agreements are not proper vehicles for transactions between NAFIs and Government agencies. Overrules, in part, 37 Comp. Gen. 16 110

Level pricing clause
In a situation where a bidder violates an invitation for bids' level pricing provision, the determinative issue as to the responsiveness of the bid is whether or not this deviation worked to the prejudice of other bidders. Therefore, an unlevel low bid will not be found to be nonresponsive where it cannot be shown that the second low bidder conceivably could have become low if it had been permitted to unlevel its bid in the same manner as did the offending bidder, B-206127.2, Oct, 8, 1982; 60 Comp. Gen. 202; B-195520.2, Jan 7, 1980; 54 Comp. Gen. 967; and 54 Comp. Gen. 476, are distinguished. 48

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 state. See court cases cited 221

"Title"

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Work-out agreement

Unless parties expressly agree to the contrary, a creditor's acceptance of a work-out agreement from the debtor does not discharge the pre-existing debt, unless and until the work-out agreement itself is completely paid. If the work-out agreement is breached, the creditor may proceed on the original debt as if the work-out agreement had not existed, and may use offset to collect the entire pre-existing debt, not just the installments that were past due under the work-out agreement 492

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