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TABLE OF DECISION NUMBERS

B–153331, Sept. 26 983
B–161180, Sept. 30 1015
B–182105, Sept. 21 963
B–184194, Sept. 19 958
B–187053, Sept. 30 1018
B–187723, Sept. 22 976
B–187968, Sept. 28 1005
B–188369, Sept. 27 989
B–188971, Sept. 27 1003
B–188983, Sept. 28 1008
B–189014, Sept. 21 971
B–189037, Sept. 30 1022
B–189145, Sept. 9 953
B–189211, Sept. 8 943
B–189307, Sept. 29 1011
B–189721, Sept. 29 1014
B–189806, Sept. 23 982
B–189865, Sept. 22 980

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

[B-189211]

Statutory Construction—Language of Statute Unambiguous—Plain Meaning *v.* Administrative Regulations

Where a statute is unambiguous and its directions specific, its plain meaning may not be altered or extended by administrative regulations, nor may administrative regulations be formulated in an attempt to add to the statute something which is not there.

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

The receipt of information, later established to be erroneous, by one dealing with a Government official which was relied upon by the recipient to his detriment does not afford a legal basis for a payment from appropriated funds since it has long been held that in the absence of specific statutory authority the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties.

Pay—Entitlement—Based on Applicable Law

A service member's entitlement to military pay is dependent upon a statutory right, and neither equitable considerations nor the common law governing private employment contracts has a place in the determination of entitlement to military pay.

Pay—Additional

There is currently no statutory authority for the payment of special professional pay to Reserve veterinary and optometry officers of the uniformed services who entered on active duty after June 30, 1975; hence, such officers are not entitled to special pay notwithstanding any administrative regulations or recruiters' promises to the contrary. 37 U.S.C. 302a and 303 (Supp. III, 1973).

Pay—Service Credits—Health Professions Scholarship Program

By statute, Reserve service performed by members participating in the Armed Forces Health Professions Scholarship Program may not be counted in computing years of service creditable for basic pay, except as may otherwise be provided for certain physicians and dentists; hence, veterinary officers who participated in the program may not receive longevity credit for time spent in professional school in the computation of their active duty basic pay despite any promises to the contrary that may have been made to them. 10 U.S.C. 2126 (Supp. II, 1972).

Debt Collections—Waiver—Military Personnel—Effect of Member's Fault

Reserve veterinary and optometry officers of the uniformed services, who were wrongly advised about their basic and special pay entitlements and who were then mistakenly overpaid, may receive favorable consideration under the statute authorizing waiver of claims arising out of such erroneous payments; however, overpayments received by an officer after he received notice of the error may not properly be waived, since upon notice the officer would become partially responsible for correcting the error, at least to the extent of setting aside subsequent overpayments for eventual return to the Government. 10 U.S.C. 2774 (Supp. II, 1972).

In the matter of veterinary and optometry officers of the uniformed services, September 8, 1977:

This action is in response to questions recently brought to our attention regarding basic pay and special pay entitlements of certain veterinarians and optometrists who are commissioned officers in the uniformed services.

It is indicated the Department of Defense has determined that Reserve veterinary and optometry officers who were on active duty prior to July 1, 1975, are entitled to receive special pay of $100 per month, but that such officers who entered active duty on or after July 1, 1975, are not entitled to special pay in any amount. The correctness of this determination has been questioned. In addition, it is said many of the members, who participated in and were commissioned through the Armed Forces Health Professions Scholarship Program, were advised that their time spent as commissioned reservists while attending professional school would be creditable for purposes of longevity in the computation of active duty basic pay, but it was later determined that time spent in professional school was not creditable in computing basic pay. The correctness of that determination is also questioned. Finally, it is indicated that through administrative errors, many of the members may have received overpayments of basic and special pay, and they may have, as a result, become indebted to the United States. Their eligibility to obtain waivers of the claims against them is questioned.

The cases of three of the officers affected have been presented in specific detail:

1. Lieutenant Robert E. Titcomb, USNR, 352–34–8626, received the degree of doctor of optometry in June 1975 and accepted an appointment as an optometry officer, Navy Reserve, on June 10, 1975. However, he did not enter on active duty as an optometry officer until July 5, 1975. He was paid special pay as an optometrist at the rate of $100 per month for the period July 5, 1975, through February 15, 1977, in a total amount of $1,936.67. In February 1977, he was advised that a mistake had been made, that he had never been entitled to special pay, that such pay was being terminated, and that he was indebted to the United States in the amount of $1,936.67. He has questioned the propriety of action taken to terminate special optometry pay to him and has also, in effect, requested that his indebtedness, if any, be waived.

2. Captain David F. Thompson, USAR, 238–80–2137, received the degree of doctor of veterinary medicine in June 1975 and accepted an appointment as a Reserve commissioned officer of the Veterinary Corps of the Army on June 26, 1975. However, apparently he did not enter

on active duty with the Army until September 1975 and was then advised that he was not entitled to special pay as a veterinarian. He has never received special pay and has suggested that the withholding of such pay from him is improper.

3. Captain Samuel P. Galphin, Jr., USAFR, 247–84–2575, was commissioned a Reserve second lieutenant in the Air Force effective February 12, 1973, through the Armed Forces Health Professions Scholarship Program while he was attending veterinary school. He received the degree of doctor of veterinary medicine in 1975, was appointed a Reserve veterinary officer of the Air Force effective June 14, 1975, and was ordered to extended active duty effective July 4, 1975, in the grade of captain. Special pay was withheld from him after he entered on active duty, but he did receive basic pay as a captain with over 2 years of service, with a pay date of February 12, 1973. However, on May 5, 1976, he was notified that a mistake had been made in the computation of his basic pay and that he should have been paid as a captain with less than 2 years of service, since the time spent in the scholarship program was not creditable in computing basic pay. Air Force authorities have advised that he received overpayments of basic pay in an amount of $1,189.27 between July 4, 1975, and May 5, 1976, and received additional overpayments of basic pay thereafter in an amount of $171.30, until his pay records were adjusted effective May 31, 1976. Captain Galphin has questioned the propriety of withholding special pay from him and has also requested waiver of the claim of the Government against him for $1,360.57, the total amount of apparent overpayments of basic pay received by him.

In addition to these three members, it is reported that other veterinary and optometry officers similarly situated have expressed dissatisfaction due to the withholding of special pay from them. Also, it is reported that other Air Force and Army veterinary officers, aside from Captain Galphin, who were commissioned through the Armed Forces Health Professions Scholarship Program were mistakenly credited with time spent in professional school for basic pay purposes, and have expressed an interest in obtaining waivers of the claims against them arising from the overpayments of basic pay they received; however, the particular facts and circumstances of their cases have not been presented.

The service members affected contend, first of all, that the withholding of special pay from them is inequitable and contrary to regulation. It is asserted that they were promised by military authorities prior to their entry on active duty that they would receive special pay, and that the denial of such pay constitutes both a breach of their contracts with the Government and a broken promise made by re-

cruiting officials that they relied upon to their detriment. It is further asserted that it is inequitable to deny them special pay simply because they happend to enter on active duty on or after July 1, 1975, while other officers similarly qualified who were on active duty before that date were given and continue to receive special pay. It is also suggested that Table 1–5–1 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) authorizes the payment of special professional pay to them, since they were appointed and designated as veterinary and optometry officers prior to July 1, 1975, even though they were not called to active duty until a later date.

Secondly, several of the officers who participated in the Armed Forces Health Professions Scholarship Program state that they were promised by military authorities that their time spent as reservists during professional school would count for longevity purposes in the computation of their active duty basic pay. They say that they relied upon such promises when they entered the program and thus obligated themselves to enter on extended active military service. They contend it is inequitable for the Government to renege on the promises made to them by military officials while still holding them to perform active duty in accordance with their agreements.

Third, several of those officers against whom claims have been brought due to apparent erroneous overpayments of basic pay and special pay state that, in general, they did not know they were being overpaid, and they had established their personal financial planning and budgeting in accordance with the pay they were given and to which they believed they were entitled. They have expressed the belief that recoupment of the apparent overpayments they received would be unjust and would cause them to suffer unreasonable personal financial hardship.

I. Special Pay Entitlement of Optometry and Veterinary Officers

With respect to the statutory authority governing the eligibility of optometry officers to receive special pay, 37 U.S.C. 302a (Supp. III, 1973) provides in pertinent part that:

> (a) In addition to any other basic pay, special pay, incentive pay, or allowances to which he is entitled, each of the following officers is entitled to special pay at the rate of $100 a month for each month of active duty:
>
> (1) a commissioned officer—
>
> (A) of the *Regular* Army or the *Regular* Navy who is designated as an optometry officer;
>
> (B) of the *Regular* Air Force who is designated as an optometry officer; or
>
> (C) who is an optometry officer of the *Regular* Corps of the Public Health Service;
>
> who was on active duty on the effective date of this section; who retired before that date and was ordered to active duty after that date and before July 1, 1975; or *who was designated as such an officer* after the effective date of this section and *before July 1, 1975;*

(2) a commissioned officer—
(A) of a *reserve* component of the Army or Navy who is designated as an optometry officer;
(B) of a *reserve* component of the Air Force who is designated as an optometry officer; or
(C) who is an optometry officer of the *Reserve* Corps of the Public Health Service;
who was on active duty on the effective date of this section as a result of a call or order to active duty for a period of at least one year; or who, after that date and *before July 1,1975, is called or ordered to active duty* for such a period; * * * [Italic supplied.]

And with respect to the statutory authority for the entitlement of veterinary officers to special pay, 37 U.S.C. 303 (Supp. III, 1973) provides in pertinent part:

(a) In addition to any other basic pay, special pay, incentive pay, or allowances to which he is entitled, each of the following officers is entitled to special pay at the rate of $100 a month for each month of active duty:
(1) a commissioned officer—
(A) of the *Regular* Army who is in the Veterinary Corps;
(B) of the *Regular* Air Force who is designated as a veterinary officer; or
(C) who is a veterinary officer of the *Regular* Corps of the Public Health Service;
who was on active duty on June 29, 1953; who retired before that date and was ordered to active duty after that date and before July 1, 1975; or *who was appointed or designated as such an officer after June 29, 1953, and before July 1, 1975;*
(2) a commissioned officer—
(A) of a *reserve* component of the Army who is in the Veterinary Corps of the Army;
(B) of a *reserve* component of the Air Force, of the Army or the Air Force without specification of component, or of the National Guard, who is designated as a veterinary officer of the Army or the Air Force, as the case may be; or
(C) who is a veterinary officer of the *Reserve* Corps of the Public Health Service;
who was on active duty on June 29, 1953, as a result of a call or order to active duty for a period of at least one year; or who, after that date and *before July 1, 1975, was called or ordered to active duty* for such a period; * * * [Italic supplied.]

It appears that all of the optometry and veterinary officers in question here are members of Reserve components of the uniformed services. Hence, their entitlement to additional special pay of $100 per month is dependent upon their having been "called or ordered to active duty" before July 1, 1975.

Special pay for veterinary officers was originally authorized by section 8 of the act of June 29, 1953, ch. 158, 67 Stat. 86, 89–90 (50 U.S. Code App. 454). The legislative history of the act indicates the purpose of this authorization was to help equalize the position of veterinarians with that of physicians and dentists, who had previously been authorized special pay, since veterinarians were also subject to the so-called "doctors draft" existing at the time. In addition, it appears a shortage of Reserve veterinary officers had arisen then. See *Doctors Draft Law Amendments: Hearings on H.R. 4495 (S. 1531) Before the Senate Comm. on Armed Services*, 83rd Cong. 1st Sess.

130–135 (1953) (statement of Dr. James A. McCallam). The 1953 legislation authorized special pay for veterinarians called or ordered to active duty "prior to July 1, 1955." Subsequent legislation periodically extended entitlement to special pay for veterinarians entering on active duty thereafter, up until 1975.

Special pay for optometry officers was originally authorized by section 202 of the act of September 28, 1971, Public Law 92–129, 85 Stat. 348, 357–358 (50 U.S. Code App. 451). The legislative history of that act indicates it was then determined that optometrists should receive special pay at the same flat rate as veterinarians, since both health professional groups had about the same educational requirements and comparable civilian incomes, and draft calls for optometrists and veterinarians had been about the same. See Senate Report No. 92–93, 92d Cong., 1st sess. (1971). The 1971 act authorized special pay for optometrists called or ordered to active duty "before July 1, 1973."

Sections 202 and 203 of the act of July 9, 1973, Public Law 93–64, 87 Stat. 147, 149, extended the eligibility date for both groups from July 1, 1973, to July 1, 1975. It was the last such extension. Concerning the purpose of that extension, Senate Report No. 93–235, 93d Cong., 1st sess. (1973), contains the following comments:

> The bill as reported continues until July 1, 1975, the special pay provision for physicians, dentists, veterinarians, and optometrists. Under existing law health professionals in these categories *on active duty or entering on active duty* before July 1, 1973, receive special pay as authorized in Sections 302, 302a, and 303 of Title 37 of the United States Code. Unless the authority for this special pay is continued, those physicians, dentists, veterinarians, and optometrists *entering on active duty* on or after July 1, 1973, would not be entitled to receive this special pay but those who have *entered on active duty* before July 1, 1973 would continue to receive such pay.
>
> * * * * * * *
>
> The committee believes that it would be inequitable to cut off arbitrarily special pay for the health professionals in question who happened to have entered service after June 30, 1973.
>
> The committee notes, however, that in all probability, the entire matter of special pays and bonuses for health professionals will be given further consideration in the not too distant future. [Italic supplied.]

It thus appears that this legislation was intended to extend special pay eligibility to those optometry and veterinary officers who "entered on active duty" before July 1, 1975. Therefore, it is our view that 37 U.S.C. 302a and 303 in authorizing special pay for Reserve optometry and veterinary officers "called or ordered to active duty" before July 1, 1975, requires such officers to have entered on active duty before that date as a prerequisite to special pay entitlement.

With regard to the suggestion that Defense Department regulations may provide authorization for special pay to the three particular officers in question, Note 2 referred to in Rules 6 and 10 of Table 1–5–1

of the DODPM purports to authorize special pay for Reserve optometry and veterinary officers "who were designated, appointed, or called to active duty under these rules on or before 30 June 1975, and who otherwise qualify." This regulatory provision, if effective, would appear to grant the members entitlement to special pay, since they were designated and appointed Reserve optometry and veterinary officers prior to June 30, 1975, although they did not enter on active duty until a later date. However, Note 2 applies to both Regular and Reserve officers, and in view of the specific language of 37 U.S.C. 302a and 303 quoted above, apparently the terms "designated" and "appointed" on or before June 30, 1975, refer only to Regular officers, while the term "called to active duty" on or before June 30, 1975, apparently refers to Reserve officers. The statutory provisions of 37 U.S.C. 302a and 303 and their legislative history make it clear that a Reserve optometry or veterinary officer must have been called to active duty, that is, entered on active duty, before July 1, 1975, as a prerequisite to special pay entitlement. The statute does not extend entitlement to a reservist who may have been designated or appointed an optometry or veterinary officer but not called to active duty prior to July 1, 1975. It is a settled rule of law that where a statute is unambiguous and its directions specific, its plain meaning may not be altered or extended by administrative regulations, nor may administrative regulations be formulated in an attempt to add to the statute something which is not there. See *Koshland* v. *Helvering*, 298 U.S. 441, 447 (1936); *United States* v. *Calamaro*, 354 U.S. 351, 357–359 (1957); *Ruiz* v. *Morton*, 462 F. 2d 818, 822 (1972); *Bank of New York* v. *United States*, 526 F. 2d 1012, 1018 (1975); 53 Comp. Gen. 547 (1974). Hence, the cited regulatory provision is ineffective to the extent that it purports to authorize special pay to members appointed or designated as Reserve optometry and veterinary officers prior to July 1, 1975, but not called to active duty before that date. We are advised that the military authorities have become aware of this discrepancy, and that action has been initiated to clarify the regulation in order to make it consistent with the statute. Accordingly, it is our view that the regulation does not furnish a basis for special pay entitlement to the three members specifically identified in this decision or others who may be similarly situated.

It has been further suggested that the members in question were improperly misled by recruiters to believe they would receive special pay and that they were led to believe that such pay may have been a part of their contracts with the Government. In addition, it is suggested that it is inequitable to withhold special pay from them, since other optometry and veterinary officers who happened to have entered on active duty

before July 1, 1975, have continued to draw special pay. However, the receipt of information, later established to be erroneous, by one dealing with a Government official, which was relied upon by the recipient to his detriment, does not afford a legal basis for a payment from appropriated funds. It has long been held that in the absence of specific statutory authority, the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties. See *Federal Crop Insurance Corporation* v. *Merrill*, 322 U.S. 380 (1947); *Posey* v. *United States*, 449 F. 2d 228, 234 (1971); and *Parker* v. *United States*, 198 Ct. Cl. 661 (1972). The rule is also well established that a service member's entitlement to pay is dependent upon a statutory right, and that equitable considerations and the common law governing private employment contracts have no place in the determination of entitlement to military pay. See *Bell* v. *United States*, 366 U.S. 393, 401 (1961); *United States* v. *Williams*, 302 U.S. 46 (1937); and 52 Comp. Gen. 506 (1973). Therefore, since 37 U.S.C. 302a and 303, and other statutory provisions concerning military pay, provide no authority for granting the members special pay by virtue of their being Reserve optometry and veterinary officers entering active duty after June 30, 1975, they are not entitled to such pay; and while it is regrettable that they may have received erroneous advice or information from recruiters regarding their entitlements, such circumstances do not afford a legal basis upon which special pay may be allowed to them. Accordingly, it is our view that the three members referred to above, and others similarly situated, are ineligible for special professional pay, in the absence of further legislation to extend eligibility to them.

II. Longevity Credit for Basic Purposes under the Armed Forces Health Professions Scholarship Program

Under the Armed Forces Health Professions Scholarship Program, 10 U.S.C. 2120–2127 (Supp. II, 1972), students following courses of education in designated health professions may be commissioned in Reserve components of the Armed Forces and receive scholarships provided by the Department of Defense, thereby incurring active duty obligations. Section 2126, 10 U.S.C., directs that service performed while a member of the program shall not be counted in computing years of service creditable under 37 U.S.C. 205 (service creditable for basic pay), except as may be provided for under 37 U.S.C. 205(a)(7) and (8), that is for officers of the Medical Corps or Dental Corps of the Army or Navy, officers designated as medical or dental officers of the Air Force, or officers commissioned as medical or dental officers in the Public Health Service (physicians and dentists). Hence, veterinary students participating in the program may not receive longevity credit

for time spent in professional school in the computation of their active duty basic pay.

Despite this provision of the law, Captain Galphin was apparently advised that his time as a reservist in veterinary school would be creditable as service time for purposes of computing basic pay, and upon entering on extended active duty he began receiving basic pay at the enhanced rate of a captain with over 2 years of creditable service. Statements contained in the file indicate that the Air Force Assistant Surgeon General for Veterinary Services has confirmed that many veterinary officers were given service credit for veterinary school in the same circumstances, and that several Air Force and Army veterinary officers aside from Captain Galphin feel they were improperly misled in the matter. Again, however, as in the question of special pay entitlement, the fact that the members in question may have received erroneous advice concerning their basic pay entitlements does not afford a basis for concluding they may as a matter of law receive service credit for their time in professional school. Accordingly, those veterinary officers who participated in the Armed Forces Health Professions Scholarship Program are not entitled to receive credit for service performed in the program in computing years of service creditable for basic pay. Any erroneous overpayments of basic pay they received are subject to recoupment, if not waived.

III. Waiver of Erroneous Overpayments of Basic and Special Pay

Subsection 2774(a) of title 10, United States Code (Supp. II, 1972), provides in pertinent part that a claim of the United States against a person arising out of an erroneous payment of pay or allowances, to or on behalf of a member or former member of the uniformed services, the collection of which would be against equity and good conscience and not in the best interest of the United States, may be waived in whole or in part. However, subsection (b) provides in pertinent part that the Comptroller General or the Secretary concerned, as the case may be, may not exercise his authority to waive any claim—

> (1) if, in his opinion, there exists, in connection with the claim, an indication of fraud, misrepresentation, fault, or lack of good faith on the part of the member or any other person having an interest in obtaining a waiver of the claim; * * *

The word "fault," as used in this subsection, has been interpreted by our Office as including something more than a proven overt act or omission by a member. Thus, fault is considered to exist if it is determined that the member should have known that an error existed and should have acted to have it corrected. The standard employed by this Office is whether a reasonable person should have been aware that he was receiving payment in excess of his proper entitlements. See 4 C.F.R. § 91.5 (1977) and B-188107, February 16, 1977.

In the case of Captain Galphin, it appears that he and other veterinary officers similarly situated were mistakenly advised by military authorities that service performed while attending school under the Armed Forces Health Professions Scholarship Program would be creditable for purposes of computing basic pay, and it further appears that those authorities mistakenly assigned to the veterinary officers pay dates coinciding with their dates of commissioning under the program. Hence, it is apparent that the member could not reasonably have been expected to know or realize he was being overpaid until he was actually notified of the mistake on May 5, 1976. In these circumstances it is our view that it would be against equity and good conscience to require collection of the $1,189.27 erroneously overpaid to him for service prior to that date, since until that time he was not at fault in the matter and had no responsibility to correct the mistake made.

However, when the member was made aware of the fact that he was being overpaid, he then became partially responsible for correcting the error, at least to the extent of setting aside subsequent overpayments received by him for eventual repayment to the Government. We are advised that the member received additional overpayments of basic pay in the amount of $171.30 after May 5, 1976. It is, therefore, our view that the member may properly be required to repay that amount. Accordingly, we waive the claim of the United States against Captain Galphin in the amount of $1,189.27 which arose out of overpayments of basic pay to him during the period July 4, 1975, to May 5, 1976. However, we do not waive the claim against him for $171.30 arising from overpayments received by him for service between May 5 and 31, 1976.

In the case of Lieutenant Titcomb, documentation in the file indicates he was initially advised by Navy disbursing officers in July 1975 that he was not entitled to special pay, but that he was later advised he was entitled by regulation to such pay on the basis of his having been designated an optometry officer before July 1, 1975. He then received erroneous overpayments of special pay in a total amount of $1,936.67 until the mistake was eventually corrected. Since it does not appear that he knew or should have known that any portion of the payments of special pay were actually erroneous when he received them, we waive the claim of the United States against him in the total amount of $1,936.67.

Appropriate officials of the Air Force and the Navy should advise Captain Galphin and Lieutenant Titcomb, respectively, of this waiver action and their right to apply for refund of any of the waived amounts which have been refunded by them.

While we understand that other optometry and veterinary officers have raised similar questions concerning their basic and special pay entitlements, and have expressed an interest in receiving waivers of the claims against them arising out of erroneous overpayments, the particular circumstances of their cases are not before us. Accordingly, such cases when brought to the attention of the proper authorities should be treated in conformity with the views expressed here.

[B–189145]

Contracts—Protests—Timeliness—Significant Issue Exception—Restrictions on Competition

Untimely protest involving challenge to on-going procurement policy which requires pre-qualification of bidders and excludes from competition an entire class of business firms, raises an issue significant to procurement practices and will be considered notwithstanding untimeliness.

Bidders—Qualifications—Manufacturer or Dealer—Walsh-Healey Act Purpose

Questions relating to bidder's standing as a "manufacturer or regular dealer" under criteria of the Walsh-Healey Act are not germane to issues presented in protest, since protest involves contracts under $10,000.

Bidders — Qualifications — Prequalifications — Requirements — Restrictive of Competition

Although procedures for pre-qualification of bidders are restrictive of competition, they are based on agency's reasonable and longstanding interpretation of Joint Committee on Printing regulation and therefore are not subject to legal objection. However, the matter is referred to Committee for determination concerning efficacy of interpretation.

In the matter of Southwest Forms Management Services, September 9, 1977:

Southwest Forms Management Services (Southwest) protests the procurement policy of the Government Printing Office (GPO) which excludes non-manufacturers from participating in GPO procurements for printed products for the Federal Government.

Southwest bases its protest on the refusal of the GPO Dallas Regional Printing Procurement Office to permit it to bid on various requirements for business forms. Although the protest is not "timely" under our Bid Protest Procedures in that such GPO refusals occurred more than 10 days prior to the time the protest was filed, *see* 4 C.F.R. 20.2(b)(2) (1977), and notwithstanding GPO's expressed reservation over our "jurisdiction" in this case because of the timeliness question, we will consider the matter because the protest, involving an on-going

GPO procurement policy which in effect requires pre-qualification of bidders and excludes from competition an entire class of business firms, raises issues significant to procurement practices and procedures. *See* 4 C.F.R. 20.2(c).

Southwest represents itself as a "business forms and systems dealership representing manufacturers who have no direct sales force and therefore are not able to sell direct to the Government Printing Office." Southwest states that membership in the National Business Forms Association consists of 662 distributors [brokers] and 199 independent manufacturers.

The GPO considers non-manufacturers who act in their own names as brokers, and those who act as representatives of printing manufacturers as agents, since bids would be submitted in the name of the manufacturer. In the latter case, the contract would be awarded to the manufacturer, while in the former, the broker, if permitted to bid, would be the prime contractor. Southwest fits into the GPO "broker" category and is thus excluded from GPO contract participation. Southwest has expressed interest in bidding only on contracts less than $10,000.

In its report to this Office, GPO states that the Walsh-Healey Public Contracts Act, 41 U.S.C. 35–45 (1970), prohibits award of contracts for supplies and equipment to other than "manufacturers or regular dealers," and points out that our Office has "consistently denied jurisdiction in this area since such determinations [under the Act's criteria] rest with the contracting officer subject to the final review by the Department of Labor." The protest, however, involves only purchases of less than $10,000 which, as noted by GPO, are specifically excluded from the coverage of the Act. We are therefore not called upon to consider the protester's status as a "manufacturer or regular dealer" under the Act, although we do agree that we would decline to do so were that an issue. *Products Engineering Corporation; Lutz Superdyne, Inc.*, B–187790, March 8, 1977, 77–1 CPD 170.

GPO also refers to several factors, relating to the establishment of bid lists, to determinations of responsibility, and to contract administration, which purportedly support its exclusionary policy.

As an example, GPO states that contractors desiring to do business with the agency are required to complete an "equipment questionnaire" containing, among other things, information on the location of the production facilities, the type of production equipment, and the types and categories of work for which the firm desires to compete. GPO maintains that its bid lists are developed from such questionnaires and that the information also serves as an aid for determining contractor responsibility. GPO asserts that it would be unable to categorize

brokers' product lines in a similar fashion and that the brokers would gain an unfair competitive advantage because they own no production eqiupment of their own. GPO also claims that in the absence of a questionnaire specifying the bidder's available production equipment, the agency would be required to perform a "full preaward survey of the contractor's plant and financial standing" prior to award. GPO also perceives difficulty in administering prime contracts where production is performed by a subcontractor because of delays in dealing "through an intermediary, especially on jobs with short schedules." GPO states it would be difficult to "fix responsibility in cases involving defaults or rejections."

GPO's bid list preparation procedures admittedly exclude nonmanufacturers from GPO printing procurement bid lists, and we have been informally advised that a known broker who requested an invitation to bid would be advised that award would not be made to him if a bid were submitted in the name of the broker. Thus, the procedures obviously result in a pre-qualification of bidders.

We have held that any system for pre-qualification of offerors is to some degree in derogation of the principal tenet of the competitive system that bids or proposals be solicited in such a manner as to permit the maximum amount of competition consistent with the nature and extent of the services or items to be procured. *METIS Corporation*, 54 Comp. Gen. 612 (1975), 75–1 CPD 44. The validity of the prequalification system depends not on whether it restricts competition *per se*, however, but whether it *unduly* restricts competition. 53 Comp. Gen. 209 (1973).

We have held that procedures designed to pre-qualify bidders/offerors merely for the purpose of limiting the required number of solicitation documents was not a legitimate restriction on competition. 53 Comp. Gen. 209, *supra*. We have also held that restricting bidders on procurements for QPL (qualified products list) products to manufacturers and authorized distributors, because of the agency's greater confidence that manufacturers and authorized distributors will offer the required qualified product, was overly restrictive. *D. Moody & Co., Inc., et al.*, 55 Comp. Gen. 1 (1975), 75–2 CPD 1. *See also Department of Agriculture's Use of Master Agreements*, 54 Comp. Gen. 606 (1975), 75–1 CPD 40.

We have, on the other hand, approved proposed use of Basic Ordering Agreements when limited to exigency situations and when a noncompetitive award might otherwise be made, *Department of Health, Education and Welfare's use of basic ordering type agreement procedures*, 54 Comp. Gen. 1096 (1975), 75–1 CPD 392, and have upheld the proposed use of a qualified products list for microcircuits by the

National Aeronautics and Space Administration in view of the extremely high level of quality and reliability required and the impossibility of testing before acceptance or use. 50 Comp. Gen. 542 (1971). We also approved a modified plan for use of master agreements by the Department of Agriculture which incorporated procedural safeguards designed to enable small firms to compete. *Department of Agriculture's Use of Master Agreements*, 56 Comp. Gen. 78 (1976), 76-2 CPD 390.

In general, we have sustained pre-qualification in cases where no supplier was necessarily precluded from competing for a procurement. Accordingly, we would be inclined to question the GPO approach since it obviously does automatically exclude an entire class (brokers) of potential suppliers. However, we are also advised by GPO that it is precluded from dealing with printing brokers because of the regulations of the Congressional Joint Committee on Printing (JCP) promulgated pursuant to the authority currently set forth in 44 U.S.C. 103 (1970). The JCP regulation referred to was issued on July 1, 1942, and provides in pertinent part:

> *Questionnaire for contract printing.*—The Government Printing Office, *in an endeavor to mobilize the printing industry for assisting in the prosecution of the war, and to secure information on printing facilities in the furtherance of competition* has sent out questionnaire forms to commercial printers. The questionnaire requests among other information: (a) The name and location of the printing establishment; (b) the volume and type of business transacted; * * * (d) size of the plant and receiving and shipping facilities; (e) details regarding numbers of employees and types of equipment in the composing, platemaking, press, and bindery units; * * *. The information obtained in the questionnaire permits the selection for circularization of invitations to bid of firms which have the necessary printing facilities in any particular area.
>
> *File of commercial printing establishments.*—A file of questionnaires shall be maintained in * * * the Government Printing Office * * *. The file shall afford convenient reference with suitable classifications of printing facilities as disclosed in the questionnaires, to the end that appropriate selections may be made for circularizing commercial printing establishments * * *.
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> * * * * * * *
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> *Preparation of lists for circularizing bidders.*—Invitations to bid * * * shall be sent to companies falling within a selected classification. * * * The system shall be operated in such manner to afford equal opportunity to all qualified commercial printers recorded in the file to bid on successive job circulars.
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> * * * * * * *
>
> Specifications [invitations to bid] are submitted for bids on the facilities within individual plants for the purposes of economy, speed, quality and the fixing responsibility. The proposal [invitation] must not be transferred to another source. [Italic supplied in narrative.]

The regulation, issued during the earliest stages of World War II "in an endeavor to mobilize the printing industry * * * for the prosecution of the war;" to secure information on printing facilities in furtherance of competition; and "to afford equal opportunity to qualified commercial printers * * * to bid," apparently has been consist-

ently interpreted to exclude firms other than manufacturers from bidding on GPO printing contracts. Although we are not convinced that the cited JCP regulation is a clear statement of that Committee's intention to exclude non-manufacturers, we note, for example, that the regulation does not prohibit the solicitation of bids for printing from non-manufacturing sources as it only deals with the establishment of bid lists for commercial printers and the solicitation of bids from those sources, that interpretation has been followed for 35 years.

For example, Article 3, GPO Contract Terms No. 1 (1970) (the "boilerplate" included in GPO printing contracts) entitled "Subcontracts," provides in pertinent part that:

> No * * * [subcontract] shall be made by the contractor with any other party for furnishing any of the completed, or substantially completed, articles or work herein contracted for without the written approval of the contracting officer * * *. Procurement of typesetting, engraving, plates (offset and letterpress), negatives or positives, binding, and distribution are excepted from the provisions of this Article.

According to GPO, the foregoing "effectively prohibits the subcontracting of the actual printing (presswork) of the ordered product." The provision, however, does not prohibit the owner of the press from subcontracting virtually, *every other* aspect of the manufacturing process, which, except for contracts requiring only printing (presswork), can be more costly than the presswork itself. In addition, Article 3 virtually eliminates any probability of the award of a prime contract in which presswork is involved to any other printing establishment (binderies or compositors as examples).

Under the circumstances, we cannot say that GPO's 35-year interpretation of the regulation is unreasonable. The Joint Committee on Printing could, if it considered such restrictions as "necessary to remedy neglect, delay, duplication or waste in the public printing," 44 U.S.C. § 103 (1970), set the limitations complained of here, and we have been advised that the regulation has not been rescinded, updated or further clarified with respect to the portions with which we are concerned. Consequently, we cannot object to GPO's current approach and the protest is therefore denied.

However, inasmuch as GPO's interpretation of the regulation has the effect of totally excluding an otherwise eligible class of bidders (brokers) and all printing establishments which do not perform the actual presswork on contracts where presswork is required, we are referring the matter to the Joint Committee for its determination as to whether GPO's current policies are in keeping with the Committee's interpretations of its regulation or if those policies should be continued.

[B-184194]

Contracts—Negotiation—Offers or Proposals—Best and Final—Discussions—All Offerors Requirement

After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers—resulting in changes to offeror's proposed cost and fee—General Accounting Office recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date.

In the matter of the University of New Orleans, September 19, 1977:

The Center for Bio-Organic Studies, University of New Orleans (UNO), has protested concerning the proposed award of a contract under request for proposals (RFP) No. WA 75-R148, issued by the U.S. Environmental Protection Agency (EPA).

Background

This is our third decision involving the present procurement. The RFP was originally issued in December 1974. In 1975 proposals were received and evaluated, and EPA rejected UNO's proposal. In *University of New Orleans*, B-184194, January 14, 1976, 76-1 CPD 22, we sustained a protest by UNO and recommended that EPA reopen negotiations with the six offerors which had submitted proposals. EPA then proposed to cancel the RFP and conduct a resolicitation, and UNO objected. In *Environmental Protection Agency—request for modification of GAO recommendation*, 55 Comp. Gen. 1281 (1976), 76-2 CPD 50, we expressed doubts about several of EPA's justifications for canceling the RFP, and recommended that the EPA Administrator review and reconsider the proposed cancellation. EPA then decided to amend the RFP and reopen negotiations as our January 14, 1976, decision had recommended. The present protest involves this latest phase of the procurement.

Over the course of this lengthy procurement a substantial amount of information has become public concerning the offerors' identities and the contents of their proposals, and our discussion of the issues reflects this fact.

Current Phase of Procurement

Amendment No. 2 to the RFP, November 12, 1976, clarified the RFP Scope of Work in certain respects and invited the offerors to submit revised proposals. Of the six offerors, only UNO and Research Triangle Institute (RTI) submitted revised proposals. These were

technically evaluated, and RTI's proposal was rated at 764 points (out of a possible 1,000), while UNO's was rated at 631. RTI's proposed cost-plus-fixed-fee was $524,339 while UNO's was $645,743.

By letter dated March 21, 1977, EPA advised UNO that its proposal was technically acceptable and that "The technical review panel did not find any ambiguities in your proposal which would necessitate further clarification." At the same time, both offerors were requested to submit their best and final offers by April 1, 1977, and both did so. EPA reports that RTI made no changes in its proposal. UNO made technical changes and reduced its proposed cost-plus-fixed-fee to $510,456.

The best and final offers were evaluated by EPA. The contracting officer states that "touch-up" negotiations were then conducted with RTI which resulted in a reduction of RTI's proposed cost-plus-fixed-fee from $524,339 to $521,390. By letter dated May 6, 1977, EPA informed UNO as follows:

> This is to inform you that negotiations for award of a contract for a preliminary assessment of halogenated organic compounds in man and environmental media are being conducted with Research Triangle Institute * * *
> The determination to award the contract to the above firm was made in accordance with the Federal Procurement Regulations, and award will be made to that firm which proposed to perform the effort in a manner most advantageous to the Government.

Protester's Position

After receiving EPA's May 6, 1977, letter, UNO protested. Mainly, UNO alleges that because its proposal was technically acceptable and lowest in cost, it should receive the award. The protester challenges EPA's conclusion that UNO's best and final offer made undue reductions in the proposed technical effort. In this regard, UNO questions the technical qualifications of one member of the EPA technical evaluation panel. Also, the protester expresses serious reservations as to whether RTI can perform the work given its proposed cost.

UNO also contends that EPA's conducting preaward negotiations only with RTI makes a sham out of the competitive negotiation process. In this connection, UNO alleges the contracting officer advised it that the cost of the contract could go considerably higher as a result of the preaward negotiations with RTI. Finally, the protester believes that EPA's contracting procedures are questionable in view of the inordinate amount of time involved in this procurement.

Agency's Position

The contracting officer states that his notes concerning the procurement give no indication that he advised UNO the cost of the RTI contract might be increased dut to the touch-up negotiations. In this re-

gard, he points out that the touch-up negotiations actually resulted in a decrease in RTI's proposed cost-plus-fixed-fee. As for UNO's objections concerning the evaluation of proposals, the contracting officer's position, in brief, is that the detailed record of the evaluation substantiates EPA's conclusions (1) that UNO's best and final offer made major and unsupported reductions in its proposed technical effort, and (2) that RTI's proposal realistically showed it can perform the work called for. The contracting officer points out that the difference in the technical scoring was a 21-percent advantage in favor of RTI (RTI—764; UNO—631) whereas the difference in cost was only a 2-percent advantage in favor of UNO (RTI—$521,390 final negotiated cost; UNO—$510,456 proposed cost-plus-fixed-fee in best and final offer). He concluded that this computation convincingly illustrates that the technical superiority of the RTI proposal more than offset the relatively minor cost savings that might be realized should award be made to UNO. Finally, the contracting officer agrees with the protester that the procurement has been long and difficult but notes that not all of the delay is attributable to EPA.

Discussion

The basic issue in this case relates to the fact that the offerors at EPA's request submitted best and final offers by April 1, 1977, and EPA then conducted further negotiations with RTI alone. We have obtained from EPA a document entitled "Summary of Negotiations," dated May 11, 1977, which indicates that EPA conducted negotiations with RTI by telephone on May 2, 1977. The negotiations resulted in changes in three elements of cost in the RTI proposal as well as in the proposed fee. As already noted, the net effect was a reduction in RTI's proposed cost-plus-fixed-fee.

The requirements concerning the conduct of negotiated procurements by most of the nonmilitary agencies of the Federal Government, including EPA, are set forth in Federal Procurement Regulations (FPR) § 1-3.000, *et seq.* (1964 ed. as amended). These regulations require, among other things, that a common cutoff date be established for the closing of negotiations through the offerors' submission of their "best and final" offers. See 50 Comp. Gen. 117 (1970) where we stated at pages 124-125:

> [The contracting agency's] report of May 21 states that all offerors were given an equal time to revise their proposals but that a common cutoff date for negotiations was not prescribed since the promulgation of such a date would have allowed some concerns more time to prepare revisions than other offerors. It also expresses the view that "In any event, the requirement for a common cutoff date should be considered *de minimis*." In this connection FPR 1-3.805-(b) provides, in pertinent part:
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> "Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in

such negotiations (see § 1-3.805-1(a)) shall be offered an equitable opportunity to submit such price, technical or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals should be submitted by that date."

We have held that a similar provision in ASPR 3-805.1(b) requires the establishment of a common cutoff date to properly close negotiations. 48 Comp. Gen. 536. Any suggestion that a common cutoff date for all offerors concerns a trivial matter should be dispelled by the holding in our recent decision of July 2, 1970, 50 Comp. Gen. 1.

The report of May 21 also indicates that a proposal revision favorable to the Government should be considered even if submitted after the common cutoff date. If such action were permitted, without opening up new negotiations for all offerors in the competitive range, it is apparent that the purposes for establishing a common cutoff date for the close of negotiations would be frustrated. In this connection our Office has held that to properly terminate the close of negotiations all offerors must be advised that negotiations are being conducted; that offerers are being asked for their "best and final" offer, and not merely to confirm their prior submission; and that any revision to their proposal *must* be submitted by the common cutoff date. B-167417, September 12, 1969. [Italic in original.]

It is true that after the common cutoff date, the Government may accept a late modification to an otherwise successful proposal which makes the terms of the proposal more favorable to the Government. See the late proposal clauses in FPR §§ 1-3.802-1 and 1-3.802-2 (1964 ed. amend. 118). However, we have held that this exception contemplates a voluntary, unsolicited modification by an offerer whose proposal has been determined to be "otherwise successful." See 50 Comp. Gen. 739, 746-748 (1971). In the present case, the record indicates that the May 2, 1977, telephone negotiations were conducted with RTI because the contracting officer—based on an audit of RTI's cost proposal—had questions concerning some of the cost elements of the proposal as well as RTI's proposed fee. By letter to EPA dated May 3, 1977, RTI confirmed the negotiations and made certain changes in its cost proposal, including the reduction of total cost-plus-fixed-fee to $521,390. Moreover, the record indicates that the final determination that award to RTI would be in the best interests of the Government was not made until May 11, 1977.

It is not proper for the Government to continue discussions with only one of the offerors in the competitive range after best and final offers have been received. If negotiations are reopened with one offeror, they must be reopened with all of the other offerors in the competitive range, and a new round of best and final offers requested. See, in this regard, 50 Comp. Gen. 117, *supra; Elgar Corporation*, B-186660, October 20, 1976, 76-2 CPD 350; *cf. Occan Technology, Inc.*, B-183749, October 29, 1975, 75-2 CPD 262.

In this regard, there is no indication in the record that EPA at any time determined that UNO's proposal was not within the competitive range. The contracting officer does state that the reductions in technical effort in UNO's best and final offer "may affect" its technical acceptability. Also, one of the technical evaluators concluded that in

the absence of a more detailed program plan, the reductions lessened the technical quality of an already marginally acceptable proposal. On the other hand, the numerical scoring of the best and final offers was unchanged from the scoring of the initial proposals—i.e., RTI—764, UNO—631. Also, the contracting officer's statement clearly indicates that RTI's proposal was selected for award based upon a determination that it was more advantageous than UNO's proposal—not on a determination that UNO's proposal had become unacceptable and that RTI's proposal was therefore the only proposal remaining within the competitive range.

Thus, the present situation is distinguishable from cases such as 52 Comp. Gen. 198 (1972), where an agency in selecting a proposal for award in effect determined that the protester's revised proposal was no longer within the competitive range because of an unrealistically low price and an unacceptably high risk of adverse impacts on contract performance.

In light of the foregoing, it is apparent that EPA's conducting negotiations solely with RTI after the receipt of best and final offers was not proper. In regard to the impact of the improper discussions on the relative standing of the offerors and the prejudicial effect on UNO, see *PRC Information Sciences Company*, 56 Comp. Gen. 768 (1977), 77-2 CPD 11. In that decision, which involved a situation where improper post-selection discussions were conducted with only one of two offerors competing for an award, we stated:

> If discussions have been conducted with one offeror, it is required that discussions be conducted with all offerors within the competitive range, including an opportunity to submit revised offers. See FPR § 1-3.805-1, *supra*; 50 Comp. Gen. 202 (1970); 51 *id.* 102 (1971); *id.* 479 (1972); *Burroughs Corporation*, 56 Comp. Gen. 142 (1976), 76-2 CPD 472; *Airco, Inc. v. Energy Research and Development Administration*, 528 F. 2d 1294 (7th Cir. 1975). The competition should generally be reopened, even when the improper post-selection negotiations do not directly affect the offerors' relative standing, because all offerors are entitled to equal treatment and an opportunity to revise their proposals. See 49 Comp. Gen. 402 (1969), modified on other grounds in *Donald N. Humphries and Associates et al.*, 55 Comp. Gen. 432 (1975), 75-2 CPD 275; 50 Comp. Gen., *supra*; *Corbetta Construction Company of Illinois, Inc.*, 55 Comp. Gen. 201 (1975), 75-2 CPD 144, affirmed 55 Comp. Gen. 972 (1976), 76-1 CPD 240; *Airco*, *supra*. In this regard, although it has been argued that PRC was not prejudiced if discussions were in fact conducted with Rehab, the point is that every offeror within a competitive range has the right to change or modify its proposal, including price, for any reason whatever, so long as negotiations are still open; and that Rehab, but not PRC, was afforded this opportunity. * * *

Conclusion

In view of the foregoing, the protest is sustained. We recommend that EPA reopen negotiations so as to allow UNO and RTI a reasonable opportunity to submit new best and final offers, and that the negotiations be properly terminated upon the receipt of those offers by a common cutoff date.

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

This disposition of the protest makes it unnecessary to consider the other issues raised by UNO.

[B-182105]

Contracts—Privity—Subcontractors—Liability for Contract Overpayments

Privity of contract doctrine does not bar claim by Government for overpayments against subcontractor where subcontractor billed and ultimately received from Government substantially all of the contract payments.

Debt Collections—Referral to Justice—Contract Matters—Set-Off

Where amount of claim asserted by agency against subcontractor for recovery of overpayments is based on statistical sampling of 5.6 percent of orders under contract rather than on an audit of each contract order, claim is not so certain in amount as to warrant setoff by General Accounting Office. However, because liability exists, matter is referred to Department of Justice for appropriate action.

In the matter of the Artech Corporation, September 21, 1977:

The Artech Corporation (Artech), a subcontractor, has appealed our Claims Settlement of January 18, 1977 (DW-2-2521738), that Artech is indebted to the United States in the sum of $146,390.00 as a consequence of its involvement with Educational Learning Systems, Inc. (ELS), the prime contractor, and the General Services Administration (GSA) in the performance of GSA Contract Number GS-01S-4640.

The contract, awarded on August 23, 1970, to ELS, called for the supply of six classifications of books at Publishers' List Prices less the discounts bid in each offer. ELS bid discounts which varied by classification and quantity as follows:

Classification	Special Number	Discount
Technical	36-7	24 to 30%
Text	36-8	15 to 20%
Trade	36-9	37 to 40%
Paper Bound	36-10	25 to 31%
Miscellaneous	36-11	10 to 18%
Library Bound	36-12	13%

The contract term began on October 1, 1970 and ended September 30, 1971. Audits conducted after completion of the contract indicated that most of the books shipped had been improperly categorized, with the result that the Government received lower discounts than those to

which it was entitled. The principal reported misclassification occurred in the library bound classification where the Government received the lowest discount (13 percent). Based on a statistical sampling, GSA has determined that the Government was overcharged in the amount of $146,390.

The file shows that from October 1, 1970 to January 23, 1971, ELS had sales under the contract totaling $28,539. On January 23, 1971, ELS and Artech entered into an agreement captioned "SUBCONTRACT," pursuant to which Artech was to perform, on behalf of ELS substantially all of ELS' duties under contract No. GS-01S-4640. The document provided that ELS personnel would reasonably assist Artech "in the performance of this contract." It further provided that ELS, upon request of Artech, would cooperate with Artech so as to enable Artech to "qualify and perform as a substitute contractor or the equivalent, with Government approval, in the event of ELS insolvency, bankruptcy, dissolution or other occurrence which might or does result in a default termination" of the ELS contract. The agreement also provided that ELS would assign monies due under the contract to a financing institution as might be designed by Artech.

ELS then requested that the GSA contracting officer modify the contract by changing the name and address of the contractor to read "Educational Learning Systems/Artech Division, Artech Corp." at Artech's address. The contracting officer advised ELS that "this contract cannot be assigned as proposed," but did issue a contract modification changing the mailing address of the contractor to that of Artech. Artech completed performance of the contract, with contract sales of $808,967. Pursuant to the terms of the subcontract Artech received a power of attorney which enabled it to cash Government checks representing contract payments made out to ELS. Artech continued to receive and cash the Government checks until June 1971 when payments were diverted to ELS' assignee for the benefit of creditors. However in August 1971 pursuant to a court order Artech once again began to receive the proceeds flowing from its performance of the subcontract.

In the interim, in June 1971, ELS executed an assignment for the benefit of creditors and ceased operations as a viable concern. At about that time, Artech and the ELS assignee, believing that the GSA contract was in danger of termination for default and in order to resolve disputes concerning the subcontract, which had risen between Artech and ELS, entered into a compromise agreement which was ratified by the Circuit Court of Montgomery County, Maryland, on August 4, 1971. Pursuant to the agreement and the court's order, Artech waived

all claims it might have against ELS arising out of the January 22, 1971 subcontract, agreed to faithfully perform under the terms of the subcontract, agreed "to honor its commitments for payment of prime contract payables assumed under the Subcontract * * * as the same are properly presented to it," and agreed "to idemnify and hold harmless" the assignee and estate of ELS "from any liability arising out of acts or failures to act on the part of Artech Corp. in connection with its performance under the said Subcontract of January 22, 1971."

GSA's April 1, 1974 audit of the contract disclosed that in only 35 orders, out of the statistical sample of 120 orders examined (a total of 2,136 orders were placed), did the federal ordering agency specify the classification of the books sought. Thus it appears that in numerous instances Artech selected the discount rate which would be applied to a particular order.

GSA has taken the position that Artech in many instances selected the wrong discount and that the Government is entitled to a refund from Artech for the resulting overcharges. It believes that Artech became, in effect, the prime contractor and that the Government is entitled to recover from Artech based on the theory of equitable estoppel or on a theory of agency. Our Claims Division agreed with GSA, stating that the particular relationship between Artech/ELS and the United States gives rise to a direct liability of Artech based on a third party beneficiary theory along with an agency theory. Citing *Kern-Limerick* v. *Scurlock*, 347 U.S. 110 (1954); *Deltec Corp.* v. *United States*, 326 F. 2d 1004, 164 Ct. Cl. 432 (1964); and 21 Comp. Gen. 682 (1942) our Claims Division concluded that the circumstances of this case "clearly give rise to these extraordinary theories of liability."

Artech disagrees with the legal theory that Artech, a subcontractor, is liable to the Government for any overcharges under the prime contract. It argues that throughout performance of the contract GSA insisted that Artech was only a subcontractor and that the Government's dealings must be with ELS. Therefore, Artech argues, "on the facts it must be determined that the Government negated any third-party beneficiary or agency relationship with Artech."

Moreover, Artech argues that even if the GSA/GAO Claims Division theory of liability is correct, Artech could not be held liable to the Government for any overcharges prior to August 1971, "when the Montgomery County Circuit Court first ordered that sales on this contract were not to be run through the receipts of the Assignee for the Benefit of Creditors of ELS."

As Artech points out, recovery under a contract is generally limited to parties in privity with each other and normally there is no privity of contract between the Government and subcontractors. *Merritt* v.

United States, 267 U.S. 338 (1925). The absence of privity, however, will not defeat recovery if the circumstances indicate that the relationship between the parties was something other than the normal Government-subcontractor relationship. See *Kern-Limerick* v. *Scurlock*, *supra; Deltec Corp.* v. *United States*, *supra;* and 21 Comp. Gen. 682, *supra* (where the prime contractor acted as agent of the Government); *United States* v. *Huff*, 165 F. 2d 720 (5th Cir. 1948) and *Maneely* v. *United States*, 68 Ct. Cl. 623 (1929) (where the subcontractor was considered to be a third party beneficiary of the Government contract); *United States* v. *Georgia Marble Co.*, 106 F. 2d 955 (5th Cir. 1939) and B–175550, June 14, 1973 (where the Government's actual or implied promise to pay results in subcontractor performance). That an agency relationship may exist between a prime contractor and another party, even though that party is referred to as a subcontractor, has been recognized by both the courts and the boards of contract appeals. *Hunt* v. *United States*, 257 U.S. 125 (1921); *Glens Falls Insurance Co.* v. *Newton Lumber & Mfg. Co.*, 388 F. 2d 66 (10th Cir. 1967); *Appeal of Central Machine & Tool Co.*, ASBCA No. 837, June 13, 1952. Finally, where all the essential elements to establish equitable estoppel are present, see *United States* v. *Georgia-Pacific Co.*, 421 F. 2d 92, 96 (9th Cir. 1970), a subcontractor may be estopped from denying that it was the prime contractor.

Artech maintains that the cases support its position of no legal liability to the Government and it specifically cites *Hunt* v. *United States*, *supra*, and *Gray & Co.* v. *United States*, 79 Ct. Cl. 117 (1934) in this regard. In *Hunt* the Supreme Court held that a prime contractor could recover from the Government for extra services performed although the services had been performed by a subcontractor. We do not read this case as support for Artech's position; in fact the Court recognized that the relationship between the prime and subcontractor was treated by them as one of agency. *Gray* involved a case where the Government terminated a contract for convenience and in connection with the termination settlement paid the prime contractor and then mistakenly paid the subcontractor for the same material which had been furnished by the prime to the subcontractor to perform the contract. The Government attempted to recover the double payment from the prime contractor, the subcontractor having gone out of existence. The court denied recovery, stating that while the Government paid twice for the same material, "this does not justify the recovery of the amount from the wrong party, or the innocent party, and the only one from whom collection can be made." In our opinion, this case supports the GSA view that where an erroneous payment is made by the Gov-

ernment to a subcontractor, recovery should be sought from the subcontractor and not from the prime contractor.

Here, Artech, although denominated a subcontractor, was essentially authorized by ELS to take over the GSA contract, to perform it in accordance with the contractual provisions and applicable laws and regulations and, by virtue of the power of attorney executed subsequent to the subcontract agreement, to accept contract payments made in the name of ELS. Moreover, the record indicates that Artech retained all monies it received pursuant to the contract, including overpayments. We believe that the Government has a valid legal claim against Artech for any and all overpayments which were received by Artech. We think it is clear from the cases that the "no privity" rule will not stand in the way of recovery, by either the Government or by a subcontractor against the Government, where the circumstances justify recovery.

In this connection, we do not agree with Artech that it should not be held accountable for overpayments received prior to August 1971. While Artech reports that contract sales receipts received after the June 1971 assignment for the benefit of creditors and prior to the August 1971 court order were turned over to the assignee, GSA states that the overcharge was computed on the basis of sales for which payment was ultimately received by Artech. It reports that after ELS had made an assignment for the benefit of creditors, checks in the amount of $10,587.36 were received by ELS and turned over to the assignee, who kept 10 percent, or $1,058.74, and transmitted the balance to Artech. Thus, GSA states that if an adjustment for any receipts not given to Artech by the assignee is required, then 18.0959 percent (the overcharge rate determined by GSA) of $1,058.74, or $191.59 should be deducted, leaving $146,198 ($146,390 less $191.59) as the overcharge. We see no reason to disagree with this analysis.

Artech also attacks the GSA finding as to the amount of the overcharges. Artech points out that the question of amount owed was determined in this case by the classification, of the books ordered, and that classifications were "not easy to determine because of the overlapping descriptions in the specifications." It points out, for example, that the recent best seller, "Roots," could conceivably be classified as a technical book, due to its technical or scientific nature, a text book, because it is educational, a trade book, because it does have general interest and biographical matter, and the discount would vary depending upon the classification. It argues that the "contract does not have a clause akin to a Warranty clause which binds the contractor to a reevaluation three years after delivery and acceptance of books by so-

called 'library experts'—which is what the 1974 [GSA] audit is based on."

Moreover, Artech objects to the "statistical sample" approach used by GSA to determine the extent of overcharges. It notes that out of a total of 2,136 orders, 120 were examined and all results were extrapolated from this sample. Yet, Artech states, the orders were "neither tangible nor identical units," since each order varied substantially in terms of volumes and titles. Artech argues that while the GSA sample represents about 5.6 percent of the orders placed, "the number of volumes on those orders could theoretically have been less than 1 percent of all volumes ordered, and certainly not exceeding 2 percent." In fact Artech states that it re-examined three of the 120 orders covered in the GSA sample, and it found only minor overcharges, much less than the amounts determined in the GSA audit.

The record shows that GSA performed two audits of the contract. The first audit report, dated January 22, 1973, focused on the failure of the Federal agencies to clearly state their requirements when ordering under the contract. The ordering activities often did not designate the classification of the books sought when placing their orders. This left the contractor at liberty to designate the classifications which classifications in turn determined the discounts applicable to the respective orders. In order to ascertain the impact on contract performance, the GSA auditors attempted to relate the types of books the contractor was purchasing from the various publishers with the types of books being delivered to the agencies. They discovered that orders were placed with approximately 1,200 different publishers without reference to type of clothbound book being ordered and that of a sample of publishers' invoices from 43 of the larger orders only six indicated the type of book being supplied. The auditors were therefore uncertain as to the exact nature of the books which the publishers had furnished the contractor.

Similar attempts were made to relate publishers' invoices to the Federal agency orders which were placed with the contractor but this proved fruitless because the contractor's accounting system did not cross-reference the publishers' order files to the agency order files. Finally the auditors computed an estimated amount of overcharge by comparing the prior sales history of different classifications of books, as reported by prior contractors, to the sales history which the contractor claimed to have experienced. On this basis the auditors found an indicated overcharge of $87,948.

The second GSA audit report of April 1, 1974, used the following methodology in obtaining an estimate of the amount the Government had been overcharged:

We obtained technical assistance from Librarians in the National Archives Library, National Archives and Records Service. We learned that generally publishers do not use Library Binding on the majority of their technical, text, or trade books. Some publishers do not offer any Library Bound books. * * *

We determined that there were 2,136 ordered books received under the contract. We obtained a statistical sample of 120 order numbers and extracted those files for review. The NARS librarians examined the invoices and the agencies' orders. They determined which books were included on the invoices and then verified the classifications of those books. We recomputed the invoices to provide for the correct discounts based on the librarians' classification of the books. We found that the invoices examined totalled $56,836.63 and were overstated by $10,285.09 due to the contractor's failure to allow the correct discounts.

Using this methodology, the auditors concluded, "with a 90 percent confidence level, that the total overcharge amounted to $146,390.00 plus or minus $22,121.20."

Based on the foregoing we cannot agree with Artech that the GSA audit findings were invalid. GSA reports that for the majority of books ordered only a 13 percent discount was allowed. This is the discount rate applicable to library bound books. The January 1973 GSA audit report estimated that about 71 percent of the books ordered during the entire contract period were classified as being library bound. Yet, according to GSA, many of these books were not even offered in library bound editions by the publishers. Moreover, GSA states that based on prior contract orders only about 6.5 percent of the total books ordered were library bound.

We note that library bound refers to the physical nature of the book itself, unlike most of the other classifications. Thus a book can have a trade subject matter entitling the Government to a 37 to a 40 percent discount and at the same time be library bound, which only entitles the Government to a 13 percent discount. While the contract itself had no provision to cover such overlapping classification, we think it is reasonable to conclude that the contractor may classify a book as library bound in the situation described above.

In this connection, library binding, as we understand it, means a binding stronger than that which would ordinarily be furnished. Webster's Third New International Dictionary, Unabridged, 1966 ed., defines "library binding" as "an esp. strong durable cloth book binding suitable for use by a circulating library * * *." In an otherwise unrelated portion of the solicitation (which ELS did not bid), reference is made to "trade books to be library bound." That section of the solicitation sought bids for rebuilding and upgrading books (originally issued with a trade or edition binding) to the status of library bound books. The referenced portion of the solicitation further indicates that the restoration work was to meet the standards set by the Library Binding Institute of Boston, Massachusetts (LBI). LBI has advised this Office that its specification for Class A binding, or library bind-

ing, originated with librarians' desires for bindings which were more durable than the publisher's trade bindings. The libraries purchased trade bound editions which were then circulated up to ten times before being sent to be rebound in a stronger or "library binding." Certain publishers then began the practice of "prebinding" their books, especially children's books. According to LBI the term prebinding or prebound is applied to new books bound according to the Class A standard. It thus appears that when the contract specified a certain discount for library bound books it indicated that such discount would apply to books which were in some way held out to the public by the publishers as being a reinforced version of the usual trade bound book.

Artech argues that the GSA statistical sample was not representative. On the strength of its own examination of "three randomly-selected orders" Artech finds that, at most, "the Government has a maximum overcharge of about $16,000 and not $143,000." The $16,000 overcharge, Artech states, is based on the difference between the 13 percent discount applicable to library bound books and the discount applicable to each book ordered under one sample order examined by Artech (Clark AFB Order No. 1680). Since only a "majority" of the books ordered allegedly were misclassified, Artech states that the total overcharge should be even less than $16,000.

We note that in sample order No. 1680, Artech classified "Cuba Socialism & Development," "Exotic Fantasies," "Short History of Chinese Art," and "Agricultural Foresting in Ocean Technology," as all being *text books*, subject to a 15 percent discount rate since only one volume of each was ordered. The contract defined *text books* as educational, school or reference books, and a discount of 15 to 20 percent was applicable to such books, depending upon the volume of the order. *Trade books* were defined as books of general interest, including works of fiction, biographies and general titles widely read by the general public. A discount of 37 to 40 percent was applicable for these books. *Technical books* were those designated by publishers as hand books and other practical works of a technical, scientific or business nature, and were subject to discounts of 24 to 30 percent. While Artech has categorized the aforementioned four titles as text books (educational) we think these books could more reasonably be classified by GSA as being other than text books, such as trade or technical books, and thus subject to the larger discounts. Also we note that order 1680 only entitled the Government to the minimum discount for each classification since only one or two volumes of each title were ordered. In this respect we cannot say that the order was typical of the other orders. In short, the evidence furnished by Artech does not show that the GSA statistical sampling of 120 orders was not representative of all 2,136 orders.

Finally, Artech argues that GSA's method of estimating the amount of the asserted overpayment is legally improper. It maintains that the overcharge determination properly must be based on an audit of every single order under the contract and not on a projection of a statistical sample of 5.6 percent of the total orders. We find that precedent does exist for the use of sample data as evidence before administrative tribunals as well as in court proceedings. Apparently courts alternative method of proof and there is precedent for the use of such may accept valid sample evidence as to objective facts if there is no evidence in the particular field in question. See *Sprouls*, "The Admissibility of Sample Data Into a Court of Law. A Case History," 4 U.C.L.A. L. Rev. 222, 223 (1957). As that article and a companion article indicate, "the courts are not unwilling to make some use of sampling techniques" but are hesitant "to extend the use of such technique beyond the very simplest samples of tangible objects." See *McCoid*, "The Admissibility of Sample Data Into a Court of Law: Some Further Thoughts," 4 U.C.L.A. L. Rev. 233, 247 (1957). Professor McCoid believes, however, that statistical analysis will be of most use in the complex type cases, such as those involving antitrust problems or cases involving determination of average prices over long periods of time, and he hopes that the courts can be persuaded that "random sampling techniques are relatively trustworthy, provided an approximately large sample is selected." Be that as it may, we can find no clear precedent analogous to the present situation where sample data was used for the purpose of projecting the amount of overpayments under a contract; nor has GSA cited any precedent in its report. Indeed GSA acknowledges the conjectural nature of its calculation.

Therefore, we cannot say that the Government's claim is so certain in amount as to warrant setoff. 4 C.F.R. § 102.3 (1977). However, for the reasons indicated, we think liability exists and we are therefore referring this matter to the Department of Justice for appropriate action.

[B-189014]

Bids—Two-Step Procurement—Second Step—Two Invitations—Not Objectionable

Use of two invitations for bids (IFB) as second step of two-step formally advertised procurement where, due to size of project, neither acceptable offeror could obtain adequate bonds is not objectionable. Fact that second phase of second-step procurement was limited only to successful offerors under first step did not restrict any other firm's ability to compete as first step was open to competition from industry.

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Bids—Two-Step Procurement—Second Step—Deviating From First Step

Second-step IFB, under two-step formally advertised procurement, which contained greater quantity of construction than was included in scope of work under first step because final size of project was not known at time first step was issued due to continuing exploratory drilling, is not objectionable. IFB did not alter technical specifications contained in first step and successful offerors' proposals, but merely added additional quantity of wall to be constructed. Additional quantity would not have affected technical acceptability of rejected first-step proposals.

In the matter of the Bencor Corporation of America, September 21, 1977:

Bencor Corporation of America (Bencor) has protested the award of a contract to ICOS Corporation of America (ICOS) under invitation for bids (IFB) No. DACW62–77–B–0074, issued by the Department of the Army, Corps of Engineers.

A statement of the history of the procurement is necessary for an understanding of the protest. In 1967, seepage problems were discovered in the limestone foundation for the earth embankment of Wolf Creek Dam, Russell County, Kentucky. From 1968 to 1970, the Corps of Engineers undertook exploration and remedial grouting to determine the extent of the seepage and what measures were necessary to correct the problem and insure the integrity of the dam. In January 1972, the Corps submitted the results of its 2-year exploration to a board of consultants composed of engineers and geologists for review. The consultants concluded, in August 1972, that serious defects existed in the foundation and that remedial grouting would not result in a safe solution to the problem. The construction of a positive cutoff in the form of a concrete diaphragm wall was recommended by the board as the most practicable solution.

Based on the consultants' report and a further report from the Corps itself, the Director of Civil Works in the Office of the Chief of Engineers, in January 1973, authorized the construction of the wall and approved the use of two-step formal advertising procedures as the contracting method. The Corps chose this method of contracting because there were not sufficiently definite or adequate specifications for the project and the two-step method permitted technical discussions with offerors under the first step to assure an acceptable technical approach and an understanding of the work.

On May 21, 1974, the Corps issued request for technical proposals (RFTP) No. DACW62–74–R–0104 as step one of the two-step procedure. The RFTP requested proposals for the construction of a diaphragm wall from station 35+11L to station 55+00L. Seven proposals

were received on August 15, 1974, in response to the RFTP. The proposals of ICOS and ECI–Soletanche, Inc. (ECI), were found to be technically acceptable. Bencor's proposal was found to be unacceptable and it was notified of this finding in January 1975.

During the time the proposals were being evaluated, and until March 1975, the Corps continued exploratory drilling along the length of the Wolf Creek Dam to determine how far the diaphragm wall would have to extend. Based on the results of this exploration, it was found necessary to extend the length of the diaphragm wall from station 35+11L to station 55+00L to station 35+11L to station 55+50L. It was also concluded that the switchyard was in need of further protection and a 580-foot section of wall had to be constructed there.

However, both acceptable offerors, ICOS and ECI, advised the Corps of the difficulty in obtaining the necessary bonds for the entire project and, therefore, the Corps determined to only advertise for the construction of the wall from station 35+11L to station 45+00L and the switchyard area. On May 2, 1975, invitation for bids (IFB) No. DACW62–75–B–0036 for the above requirement was issued to ICOS and ECI.

ICOS submitted the low bid of $49,959,900 and on June 25, 1975, was awarded the contract. ECI's bid was $69,940,500 but it failed to submit the required bid bond.

In April 1977, the Corps issued another IFB, No. DACW62–77–B–0074, for the construction of the remaining portion of the wall. The exploratory drilling had now been completed and it was found that the wall would have to extend to station 57+50L rather than 55+00L as contemplated when the RFTB was issued. Therefore, IFB–0074 was for constructing the wall from station 45+00L to station 57+50L.

Bencor requested an opportunity to participate in this IFB but was advised by the contracting officer that the IFB for the second phase of construction was restricted to ICOS and ECI because of their acceptable technical proposals under the RFTP. Upon receipt of this advice, Bencor protested the procurement to our Office.

Bencor's protest is based on the premise that the Corps' procurement of the concrete diaphragm wall violated the pertinent provisions of the Armed Services Procurement Regulation (ASPR) dealing with two-step formally advertised procurements. Bencor argues that ASPR §§ 2–501 to 2–503 (1976 ed.), containing the procedures for two-step procurements, do not permit two second step procurements after only one first step nor the addition of additional work not contained in the scope of work in the RFTP as first step. Bencor states that through the addition of the switchyard area and extending the wall through station 57+50L, the Corps increased the scope of work

41 percent because the RFTP contemplated a wall 2,000 feet long and the above change added an additional 830 feet to the project.

The Corps, in response to the protest, contends that the additional work was contemplated in the RFTP and only constituted an additional quantity and not a change in the method of construction proposed by the offerors under the RFTP. The RFTP in paragraph 6 stated:

> 6. *THE CONSTRUCTION PERIOD* will be a maximum of 730 calendar days for the installation of the diaphragm wall between station 35+11L and station 45+00L after receipt of notice to proceed. An additional maximum of 730 calendar days will be allowed for the installation of the wall between station 45+00L and station 55+00L if included in Step Two.

The Corps contends this paragraph shows that until the exploratory drilling was completed it was not known how long the diaphragm wall would have to extend.

Also, the Corps states that it would have taken an additional 8 to 10 months to evaluate the proposals submitted under another step-one RFTP and that time is a critical factor in the completion of the project because of the possibility of a failure of the embankment with resulting loss of life and property downstream.

From our review of the entire record before our Office, we cannot, for the reasons that follow, conclude that the Corps acted improperly in its handling of this procurement.

The Corps' use of the two-step formally advertised procedure to maximize competition was proper under the circumstances of the instant case. Those firms in this segment of the construction industry who wished to compete submitted proposals, two of which were found acceptable.

While the Corps did add various quantities to the scope of work in the two second steps, we do not find that this worked to any of the five unacceptable offerors' competitive disadvantage. We have reviewed the technical evaluations of the proposals and we find that the quantity of work was not a factor in the rejection of any offeror's proposal. All of the rejected proposals were found unacceptable due to the proposed methodology of construction. Therefore, even if the final length of the wall had been known at the time the RFTP was issued, it would not have affected the evaluation of the proposals.

As to the division of the second step into two phases in order that the bidders could meet the bonding requirements, while being an unusual procedure, we find nothing illegal in the approach. Bencor argues that the Government cannot conduct a second step IFB without a corresponding first step. While this is the procedure set forth by ASPR, we do not believe the regulations contemplated a situation, such as here, where due to the size of the project bonding difficulties

are experienced. Through the conduct of the first step, the Corps complied with the intent and spirit of the ASPR provisions and all parties competed on an equal basis.

Bencor has cited our decision B–173665, April 4, 1972, for the proposition that where an original step-one solicitation is so substantially amended as to constitute a new procurement, all interested parties should be given notice and an opportunity to compete, not just those who submitted acceptable proposals under the first step. We assume Bencor is referring to our reconsideration of the above decision dated July 13, 1972, which contained the above statement. We do not find that decision applicable to the instant facts. The cited decisions involved a negotiated procurement, not a two-step. There the change affected the competition, in this case, we have concluded it did not.

Bencor also contends that the Corps' argument that an additional 8–10 months would be needed to conduct another RFTP and that urgency is needed due to the condition of the embankment is inconsistent with the determination to employ two-step formal advertising. Bencor cites ASPR § 2–502(a)(iv) (1976 ed.) which states two-step formal advertising will be used when sufficient time is available rather than negotiation. Therefore, Bencor argues, by deciding that two-step was a feasible procurement approach, the Corps necessarily determined there was sufficient time available. However, we believe this rationale must be tempered by the fact that the decision to use two-step formal advertising was made over 4 years prior to the issuance of the IFB now under protest and when the determination was made, it was not known that the bonding difficulties would be experienced necessitating a two-phase, second step.

Finally, Bencor contends that if we permit the procedure followed by the Corps, it will have far-reaching implications in Government procurement. Bencor foresees that a contracting officer could draft an RFTP for such a large project that only a small number of firms are in a position to compete and then reduce the size of the project by proceeding in small phases, limited to those successful firms under step one. We do not see this as a logical extension of this decision. The procedure of a two-phase, second step utilized here was necessitated by the size of the bonds required and the fact that the additional quantities were added because of the continuing exploratory drilling to determine the extent of the damage to the dam.

In light of all the unusual circumstances, we cannot conclude that the original purpose of the project was so changed here as to require a conclusion that an entirely new step-one solicitation needed to be issued. However, since we perceive few instances where two phases of a second step would be required to fulfill an agency's initial needs,

procuring activities should carefully weigh their employment of such a procurement method.

Accordingly, the protest is denied.

[B-187723]

Advertising—Advertising *v.* Negotiation—Reprocurement

Although statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, when contracting officer conducts new competition for reprocurement, defaulted contractor may not automatically be excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility. B-175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified.

Contractors—Defaulted—Reprocurement—Standing

Right of defaulted contractor to be solicited upon reprocurement is limited by rule that repurchase contract may not be awarded to such contractor at price greater than terminated contract since award would be tantamount to modification of existing contract without consideration. B-175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified.

In the matter of PRB Uniforms, Inc., September 22, 1977:

PRB Uniforms, Inc. (PRB), whose contract to supply durable press shirts to the Defense Logistics Agency's Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania, was terminated for default, has protested that agency's failure to solicit it for repurchase of the shirts and subsequent refusal to accept its late offer which, although lower than that of any other offeror, was higher than the terminated price.

PRB's contract was partially terminated on September 17, 1976, for failure to deliver; the balance was terminated on March 28, 1977. Request for proposals No. DSA100-76-R-1500 for 337,920 shirts, the initial quantity terminated, was issued by DPSC on September 21, 1976, and synopsized in the Commerce Business Daily on September 28, 1976; closing date was October 8, 1976. DPSC subsequently revised its delivery requirements and requested best and final offers by October 26, 1976.

Although it was on the qualified bidders list, PRB was not among the 55 firms solicited or 7 firms responding by that date. PRB subsequently learned of the solicitation and on October 28, 1976, it submitted an offer of $6.28 each FOB origin; its unit prices on the terminated contract had ranged from $4.46 to $4.94. PRB also protested the award of the repurchase contract to any other firm at a price higher than $6.28.

DPSC treated the offer as late and refused to consider it. After determining, pursuant to Armed Services Procurement Regulation

(ASPR) § 2-407.8(b)(3) (1976 ed.), that award should be made despite the protest, DPSC awarded the repurchase contract to Lankford Manufacturing Company, Inc. (Lankford) on January 6, 1977, at unit prices of $7.23 and $7.25.

PRB argues that it should not have been excluded from competition and that the Government's duty to mitigate damages required acceptance of its offer since excess costs (based on a unit price of $4.46 for the terminated contract) would have been $321,024 less if the repurchase contract had been awarded to PRB at $6.28 instead of to Lankford at $7.23.

In not soliciting PRB, DPSC claims reliance on the many decisions of this Office in which it was said that when a procurement is for the account of a defaulted contractor, the statutes governing procurements by the Government are not applicable, *see Allied Research Associates, Inc.*, B-183420, July 15, 1975, 75-2 CPD 38; *International Harvester Company*, B-181455, January 30, 1975, 75-1 CPD 67; *Decatur-Wayne, Inc.*, B-181366, October 9, 1974, 74-2 CPD 200; *Aerospace America, Inc.*, 54 Comp. Gen. 161 (1974), 74-2 CPD 130; *Charles Kent*, B-180771, August 7, 1974, 74-2 CPD 84; B-178885, November 23, 1973; B-176070, December 7, 1972; B-171659, November 15, 1971; B-154650, August 12, 1964; 42 Comp. Gen. 493 (1963), and that the defaulter contractor may be disregarded as a source of supply. *See* B-175482, May 10, 1972; B-171636, January 17, 1972; B-165884, May 28, 1969; B-159575, August 31, 1966.

These decisions were based on the premise that the defaulted contractor would be liable for and would ultimately fund the reprocurment costs in excess of the defaulted contract price. We understand, however, that excess costs are recovered from defaulted contractors in a relatively small number of cases (primarily as a result of insolvency or bankruptcy) and that repurchase contracts, including the excess costs thereof, more often than not involve the expenditure of appropriated funds. In any event, those decisions were never meant to imply that contracting officials are free to proceed in whatever manner they see fit when awarding a reprocurement contract. In *Charles Kent*, *supra*, we pointed out while "considerable latitude is given the contracting officer * * * his actions must be reasonable in deciding what form the relet contract should take, and must be consistent with his duty to mitigate damages." *See also* B-175482, *supra*. Furthermore, it has been held that when formal advertising procedures are utilized in connection with a reprocurement, the Government "has the obligation to maintain the integrity of the bidding system by applying the regulations relevant to that procedure." *Royal-Pioneer Paper Box Manufacturing Co., Inc.*, ASBCA No. 13059, April 10, 1969, 69-1 BCA 7631. Applicable procurement regulations also provide that repurchases

"shall be at as reasonable a price as practicable considering the quantity required by the Government and the time within which the supplies or services are required." ASPR § 8-602.6 (1976 ed.); Federal Procurement Regulations (FPR) § 1-8.602-6 (1964 ed.).

What we glean from these decisions and provisions is that while the statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, *see* 42 Comp. Gen. 493, *supra*, once the contracting officer decides that it is appropriate to conduct a new competition for the reprocurement, he may not automatically exclude the defaulted contractor from that competition nor choose to ignore the regulatory provisions applicable to competitive procurements. Our prior cases stating that the defaulted contractor could be disregarded as a source of supply either arose out of a proper sole-source reprocurement, B-175482, *supra*, or essentially were predicated on the nonresponsibility of the defaulted contractor for the repurchase contract. *See*, e.g., B-171636, *supra;* B-165884, *supra.*

Responsibility determinations, however, may not be made in advance of the receipt of a bid or proposal. *See*, in this regard, *Plattsburgh Laundry and Dry Cleaning Corp.; Nu Art Cleaners Laundry*, 54 Comp. Gen. 29 (1974), 74-2 CPD 27, in which we pointed out that an agency's deliberate refusal to furnish a copy of a solicitation to a would-be bidder "was an improper and premature nonresponsibility determination." We have also noted that default is only one factor to be considered in determining responsibility. *See* B-165884, *supra*, and cases cited therein. Moreover, the boards of contract appeals do not regard a defaulted contractor as *per se* nonresponsible for the reprocurement contract, *see Churchill Chemical Corporation*, GSBCA Nos. 4321, 4322, 4346, 4353, January 24, 1977, 77-1 BCA 12, 318; *Woodrow P. Hudson d/b/a San Diego Concrete Disposal*, ASBCA No. 21044, October 7, 1976, 76-2 BCA 12, 182 and cases cited therein, and we have expressly upheld award to a defaulted contractor on the repurchase contract after the contractor was determined to be responsible. *See R. H. Pines Corporation*, 54 Comp. Gen. 853 (1975), 75-1 CPD 224.

The fact that the defaulted contractor has a right to be solicited, however, does not necessarily entitle him to have his low bid or offer considered for award. The right is limited by the long established rule that a repurchase contract may not be awarded to the defaulted contractor at a price greater than the terminated contract price, because this would be tantamount to modification of the existing contract without consideration. *See Vulcanite Portland Cement Co.* v. *United States*, 74 Ct. Cl. 692 (1932); *F & H Manufacturing Corporation*, B-184172, May 4, 1976, 76-1 CPD 297; *Allied Research Associates, Inc., supra; R. H. Pines Corporation, supra; Western Filament, Inc.*, B-181558, December 10, 1974, 74-2 CPD 320; *Decatur-Wayne, Inc., supra; Aerospace America, Inc., supra;* B-171659, *supra;* B-165884, *supra;* 27

Comp. Gen. 343 (1927); *H & S Oil Company, Inc.*, ASBCA No. 16321, June 9, 1972, 72-2 BCA 9520; *P. L. Andrews Corp.*, ASBCA No. 5722, August 31, 1960, 60-2 BCA 2787.

Turning to the facts of this case, we find that while PRB was entitled to compete for this procurement, it was not entitled to have its late offer considered. In the first place, although the contracting officer failed to solicit PRB, the procurement was duly synopsized in the *Commerce Business Daily* and we believe therefore that PRB was on notice of the pending repurchase despite the contracting officer's failure to solicit a proposal from it. *See Southeastern Carbonics, Inc.*, B-187476, November 12, 1976, 76-2 CPD 406; *Del Norte Technology, Inc.*, B-182318, January 27, 1975, 75-1 CPD 53; *see also Scott Graphics, Incorporated*, 54 Comp. Gen. 973 (1975), 75-1 CPD 302. Secondly, PRB's offer was at a price in excess of the defaulted contract price, thereby precluding its acceptance in any event.

In so concluding, we have considered PRB's contention that "the government had a duty to consider [its] offer in mitigation of damages" notwithstanding the higher offered price. PRB states that it will "vigorously contest" both the validity of the termination for default and the excess cost assessment before the Armed Services Board of Contract Appeals, and urges that this Office "take into consideration" various Board decisions regarding the Government's duty to mitigate damages. PRB particularly refers to *Wear Ever Shower Curtain Corporation*, GSBCA No. 4360, December 16, 1975, 76-1 BCA 11, 636, which PRB states stands for the proposition "that the mere fact that a defaulted contractor bid on the repurchase at a price higher than that of the defaulted contract was not a basis for rejection of that bid in meeting the Government's duty to mitigate damages," and which contains dicta to the effect that "a quasi-reformation of the original contract" resulting from the acceptance of the defaulted contractor's higher price "could have been avoided by assertion of the Government's right to excess reprocurement costs under the defaulted contract." In this regard, PRB asserts that the Government could withhold or set off against amounts due under the reprocurement contract the difference between the reprocurement price and the original price "so that the net amount actually paid to the defaulted contractor would be no higher than the original terminated contract price."

The question of whether the Government met its duty to mitigate damages in this case is a matter for resolution by the Board pursuant to the Disputes clause of the defaulted contract. *Kaufman De Dell Printing, Inc.*, B-186158, April 8, 1976, 76-1 CPD 239; *International Harvester Company, supra.* We cannot agree, however, that it would have been proper for the Government to accept PRB's offer at a price higher than those contained in the defaulted contract. While it may be

possible to contractually provide that acceptance of a defaulted contractor's higher priced offer will not operate as a modification of the defaulted contract (a matter on which we express no opinion at this time), no such provision was contained in the original PRB contract, in the repurchase solicitation, or in PRB's offer in response thereto. Thus, under well-established Government contract principles, acceptance of PRB's offer would have legally constituted a modification of the original contract, notwithstanding any accompanying assertion by the Government of its right to excess reprocurement costs. Moreover, the Government's set-off rights are limited by the Assignment of Claims Act of 1940, as amended, 31 U.S.C. 203, 41 U.S.C. 15 (1970), which would preclude the Government's setting off excess costs in the event of a valid assignment of the repurchase contract to a financing institution. Although PRB argues that the "no set off" provisions of the Act would not apply to the repurchase contract, because "the rules regarding the repurchase solicitation are different than would normally apply," we are aware of no authority supporting the proposition that the Act does not apply to repurchase contracts.

In light of the above, the protest is denied. To the extent that our prior decisions are inconsistent with this decision, they are modified in accordance with the views expressed herein.

[B–189865]

Government Printing Office—Invoices—Prompt Payment Requirement

44 U.S.C. 310 (1970) requires prompt payment by Executive departments and independent establishments of bills rendered by the Public Printer for supplies ordered from the Government Printing Office, in advance of work if so requested, and exempts these bills from audit or certification prior to payment. General Services Administration, to comply with statute, must pay such bills without prepayment audit if audit would delay payment.

In the matter of the requirement for prompt payment of bills rendered by the Public Printer, September 22, 1977:

This decision is in response to a request by Larry S. Golden, Authorized Certifying Officer, Region 6, General Services Administration (GSA) for a decision with respect to the payment of Government Printing Office (GPO) invoices without prepayment audit.

GSA receives the invoices in question from GPO on GPO Form 400 (R–11–75). The statement, "Prompt settlement by check, payable to the Public Printer is required (44 U.S.C. 310)," appears on the invoice. 44 U.S.C. § 310 (1970) provides:

An executive department or independent establishment of the Government ordering printing and binding or blank paper and supplies from the Government Printing Office shall pay promptly by check to the Public Printer upon his written request, either in advance or upon completion of the work, all or part of the estimated or actual cost, as the case may be, and bills rendered by the Public Printer are not subject to audit or certification in advance of payment. Adjustments on the basis of the actual cost of delivered work paid for in advance shall be made monthly or quarterly and as may be agreed by the Public Printer and the department or establishment concerned.

The Certifying Officer expresses doubt as to the legality of paying GPO invoices prior to audit because they do not identify the commodities or services for which GSA is being billed, the unit price of the item, the shipping destination, or the customer purchase order number, although he recognizes that 44 U.S.C. § 310 (1970) expressly exempts bills submitted by the Public Printer from audit or certification in advance of payment.

The statutory exemption of GPO bills from prepayment audit mandates prompt collection of accounts receivable established on the basis of bills to other Government agencies. Indeed, the Public Printer is entitled to payment not only prior to audit of his bill but, upon his written request, prior to completion of the work. Accordingly, written requests by the Public Printer for payment must be honored by GSA. Payment of an acceptable invoice may not be delayed in order to complete a prepayment audit.

We note in this connection that the invoices appear to contain sufficient information to identify the items for which GSA is being billed, the quantity, and the unit price. For example, the copies of the two GPO invoices provided by the Certifying Officer specify the customer's order number, which in both cases correctly corresponds to the numbers of the GSA requisitions being filled (copies of which were also provided). By referring back to the requisitions, GSA can determine the nature of the order and the intended shipping destinations. The total quantity and total price are given on the invoices. Unit price can be determined from that information. Thus, the invoices in question would appear to constitute acceptable invoices for purposes of payment prior to audit.

Once payment has been made, as required by the statute, any deficiency or discrepancy which GSA may discover in the course of verifying receipt of goods or services from GPO may be adjusted either by agreement with the Public Printer pursuant to 44 U.S.C. § 310 (1970) in the case of advance payments or, in the case of a disputed bill, by submitting the bill together with the applicable documents and reports to the Claims Division, United States General Accounting Office, Washington, D.C. 20548, for settlement in accordance with 7 GAO § 8.4(1)(c) (October 1, 1967).

[B-189806]

Details—Extensions—Civil Service Commission Approval—Schedule C Positions

Federal Trade Commission (FTC) questions whether it may grant a retroactive temporary promotion for an extended detail of a GS–14 competitive service employee to a GS–15 Schedule C position where an extension of the detail was not obtained. Since General Schedule position at grade GS–15 and below in both the competitive service and excepted service are covered by our *Turner-Caldwell* decision, 55 Comp. Gen. 539 (1975), FTC has authority to grant the employee a retroactive temporary promotion and backpay pursuant to the conditions set forth in that decision.

In the matter of Leonard J. McEnnis, Jr.—Federal Trade Commission—extended detail to Schedule C position, September 23, 1977:

This action involves a request for an advance decision from Mr. James A. Williams, Director, Division of Budget and Finance, Federal Trade Commission (FTC), as to whether a retroactive temporary promotion authorized by our *Turner-Caldwell* decision, 55 Comp. Gen. 539 (1975), and our *Reconsideration of Turner-Caldwell* decision, 56 Comp. Gen. 427 (1977), may be granted to Mr. McEnnis, a grade GS–14 civilian employee in the competitive service, who served in an acting capacity for an extended period in a grade GS–15 Schedule C position in the excepted service.

On January 8, 1976, the grade GS–15 position, Director of Public Information, designated a Schedule C exception from the competitive service in 5 C.F.R. § 213.3334(b), became vacant by resignation of the incumbent. Mr. McEnnis, a grade GS–14 employee in the competitive service, was designated Acting Director by competent authority on January 12, 1976, and he served in that position until April 23, 1977, and performed the full range of duties of the higher grade position. No extension of the detail was ever obtained. The FTC questions whether it has authority to grant the retroactive temporary promotion with backpay claimed by Mr. McEnnis. In this connection, the record shows that the Civil Service Commission (CSC) authorized the continuation of the GS–15 position in the excepted service if it was filled by March 8, 1976. The position was not filled on a permanent basis by the specified date and FTC requested a 60-day extension to continue the exception on March 24, 1976. The record does not show whether the extension was granted by the Commission.

Our *Turner-Caldwell* line of decisions holds that employees detailed to higher grade positions for more than 120 days, without CSC approval, are entitled to retroactive temporary promotions with backpay for the period beginning with the 121st day of the detail until the detail is terminated. The rationale of those decisions is that an agency has

no discretion to continue employee details beyond 120 days without CSC's approval. When an agency continues a detail without authority, corrective action in the form of a retroactive temporary promotion with backpay is required as of the 121st day of the detail, for the employee, provided the employee was otherwise qualified and could have been temporarily promoted into the position at that time.

The Commission has promulgated implementing guidance for our *Turner-Caldwell* line of decisions in CSC Bulletin No. 300–40 dated May 25, 1977, Subject: GAO Decision Awarding Backpay for Retroactive Temporary Promotions of Employees on Overlong Details to Higher Graded Jobs (B–183086). Paragraph 8B of CSC Bulletin No. 300–40 is relevant to the issue before us and provides as follows:

> B. Scope of Commission instruction. The Commission's instruction for securing prior approval for continuation of details beyond 120 days relates only to details within the same agency of employees serving in competitive positions and, in the excepted servce, positions under the General Schedule. Since the GAO decision follows the Commission's instruction, it would not apply to positions beyond that scope, e.g., Postal Service jobs.

Inasmuch as the Schedule C position here involved was in the excepted service under the General Schedule, our *Turner-Caldwell* line of decisions would be apposite. However, the record indicates there is a question whether the GS–15 position was in the excepted service because there is no evidence of CSC approval of FTC's request to continue the excepted status of the position. In this connection, 5 C.F.R. § 213.3301b states that the exception from the competitive service for certain Schedule C positions, including the position involved here, is revoked when the position has been vacant for 60 calendar days or more. When the exception is revoked, the position merely reverts to the competitive service. Accordingly, the revocation would not have effected Mr. McEnnis' entitlement to a retroactive temporary promotion with backpay since General Schedule positions at GS–15 and below of both the competitive service and excepted service are covered by our *Turner-Caldwell* decisions.

Consequently, FTC has authority to grant Mr. McEnnis a retroactive temporary promotion to grade GS–15 for the period indicated above. Backpay should be computed in accordance with instructions contained in 5 C.F.R. Part 550, subpart H.

[B–153331]

Pay—Additional—Hazardous Duty Generally—More Than One Duty

A member of the uniformed services is entitled to dual payments of hazardous duty incentive pay, provided he is required to perform specific multiple hazardous duties in order to carry out his assigned mission and otherwise meets the criteria established by departmental regulations. 37 U.S.C. 301(e) (1970) and

Executive Order No. 11157, June 22, 1964, as amended. However, such duties need not be performed simultaneously or in rapid succession as was stated in 44 Comp. Gen. 426 and 43 *id.* 667 which, to that extent, will no longer be followed.

Pay—Additional—Parachute Duty—Pararescue

Air Force pararescue team members may qualify for hazardous duty incentive pay as aerial crewmembers, provided they are an integral part of an aircrew contributing to the safe and efficient operation of an aircraft, and their flight duties are not merely incidental to their duties involving parachute jumping. 37 U.S.C. 301(a) (1970).

Pay—Aviation Duty—Double Incentive Pay

While the Department of Defense Military Pay and Allowances Entitlements Manual currently prohibits dual payment of hazardous duty incentive pay to pararescue team members who perform aircrew duties and no other hazardous duty in addition to flying and parachute jumping, those regulations may be amended to authorize dual incentive payments to them; however, whether the regulations should be so amended is ultimately a matter for evaluation and determination by appropriate Defense Department authorities.

In the matter of the Department of Defense Military Pay and Allowance Committee Action No. 533, September 26, 1977:

This action is in response to a letter dated January 17, 1977, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the entitlement of Air Force pararescue members to dual hazardous duty incentive pay (HDIP), in the circumstances described in Department of Defense Military Pay and Allowance Committtee Action No. 533, enclosed with the submission.

The discussion in the Committee Action indicates that 37 U.S.C. 301(a) authorizes incentive pay for the performance of hazardous duty, including the performance of parachute jumping as an essential part of military duty and the performance of frequent and regular participation in aerial flights as an enlisted crewmember. It is also indicated that while 37 U.S.C. 301(e) permits dual entitlement to HDIP, the Department of Defense has taken the position that pararescue members are not entitled to dual payment because their duties (crewmember and parachutist) are not regarded as being interdependent.

In the Committee Action discussion it is stated that because of the Southeast Asia conflict, many unit operational changes in the mission of rescue and recovery were adopted. These changes, in the opinion of the Secretary of the Air Force, necessitated a reevaluation of the duties performed by pararescue members. As a result of these changes and the reevaluation of the role of pararescue members, it is said the Secretary of the Air Force exercised the authority granted him to designate pararescue members as "primary" crewmembers. Accordingly, pararescue members are now being placed on permanent aero-

nautical orders as "primary" crewmembers in accordance with Air Force Regulations 35–13, 10–7, and 60–1 to fill authorized positions which require them to perform certain described flight duties. They are also placed on orders as qualified Air Force parachutists under Air Force Regulations 35–5, 10–7, and 60–1, as a prerequisite to filling authorized pararescue positions. The duties performed by pararescue members are said to be those of crewmembers and parachutists. Both duties, the Air Force asserts, are interdependent and essential to accomplishing the mission of search and rescue.

The discussion in the Committee Action indicates Air Force authorities believe pararescue personnel perform two distinct yet interdependent hazardous duties in rapid succession, thus meeting the requirements for entitlement to dual HDIP. However, the Committee expresses doubt as to whether the duties performed by such personnel are crewmember duties which would qualify for HDIP and if so, whether they are sufficiently interdependent with parachuting so as to qualify such members for dual HDIP in light of previous decisions of this Office, citing 43 Comp. Gen. 667 (1964); 44 Comp. Gen. 426 (1965); and 47 Comp. Gen. 728 (1968).

Based on the foregoing, the following question is presented:

Are Air Force pararescue personnel, who are designated as both crewmembers and parachutists under regulations prescribed by the Secretary of the Air Force, performing two hazardous duties for the purpose of entitlement to dual Hazardous Duty Incentive Pay (HDIP) under 37 U.S.C. 301(e) and Section 112 of Executive Order 11157, as amended?

Section 301 of title 37, United States Code (Supp. IV, 1974), provides in pertinent part that:

(a) Subject to regulations prescribed by the President, a member of a uniformed service who is entitled to basic pay is also entitled to incentive pay, in the amount set forth in subsection (b) or (c) of this section, for the performance of hazardous duty required by orders. For the purposes of this subsection, "hazardous duty" means duty—

(1) as an enlisted crewmember, as determined by the Secretary concerned, involving frequent and regular participation in aerial flight;

* * * * * * *

(6) involving parachute jumping as an essential part of military duty;

* * * * * * *

(e) A member is entitled to not more than two payments of incentive pay, authorized by this section, for a period of time during which he qualifies for more than one payment of that pay.

Executive Order No. 11157, June 22, 1964, as amended, provides in pertinent part as follows:

Sec. 112. Under such regulations as the Secretary concerned may prescribe, a member who performs multiple hazardous duties under competent orders may be paid not more than two payments of incentive pay for a period of time during which he qualifies for more than one such payment. Dual payments of incentive pay shall be limited to those members who are required by competent orders to perform specific multiple hazardous duties in order to carry out their assigned missions.

Sec. 113. The Secretaries concerned are hereby authorized to prescribe such supplementary regulations not inconsistent herewith as they may deem necessary or desirable for carrying out these regulations, and such supplementary regulations shall be uniform for all the services to the fullest extent practicable.

Various regulations and policy statements initially issued by the Secretaries of the military departments concerning entitlement to dual payment of hazardous duty pay have been compiled in and superseded by paragraph 20305 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM), which provides in pertinent part that:

Members who qualify for incentive pay for more than one type of hazardous duty may receive no more than two payments for the same period. Dual incentive pay is limited to those members required by orders to perform specific multiple hazardous duties necessary for successful accomplishment of the mission of the unit to which assigned. A member who is under competent orders to perform more than one hazardous duty, but is entitled to only one type of incentive pay, may receive payment for the hazardous duty for which the higher rate of incentive pay is authorized, even though that hazardous duty is not the primary duty of his current assignment.

a. *Conditions of Entitlement.* The hazardous duties for which dual incentive pay is made must be interdependent and performed either simultaneously or in rapid succession while carrying out the duties required to accomplish the mission of the unit involved. Members must meet minimum requirements for each of the hazardous duties, except when injury or incapacity as the result of performance of hazardous duty is involved.

* * * * * * *

c. *Types of Duties That Do Not Qualify Members for Dual Payment of Incentive Pay.* The following are examples of duties not performed interdependently and for which dual incentive payments are not authorized.

* * * * * * *

(3) Pararescue team members who perform aircrew duties and no other hazardous duty in addition to flying and parachute jumping.

Since paragraph 20305, DODPM, expressly provides that pararescue team members, who perform aircrew duties and no other hazardous duty in addition to flying and parachute jumping are unqualified for dual HDIP, such dual payments to the members in question are clearly prohibited by the current regulations. We therefore regard the question presented in this case as being whether the pararescue personnel performing the duties described may be classified as both primary aircrew members and primary parachutists under 37 U.S.C. 301(a), and if so, whether the DODPM may be amended under 37 U.S.C. 301(e) to permit the dual payment of HDIP to them.

With regard to the eligibility of pararescue personnel to qualify as aircrew members as well as parachutists under 37 U.S.C. 301(a), we have previously expressed the view that in order to be entitled to incentive pay for hazardous duty as an enlisted crewman involving frequent and regular participation in aerial flight, a member must actually perform the duties of a crewmember, whose regular flight duties contribute to the safe and efficient operation of an aircraft. If he is flying as a passenger or as a person being transported to an air posi-

tion from which he may perform his assigned duties as observer, parachutist, high altitude tester of aviation equipment, etc., a right to flying pay is not established. See 47 Comp. Gen. 728, *supra;* B–164186, August 15, 1969.

Clearly, members whose primary duties involve parachute jumping must necessarily participate in aerial flights. It may reasonably be expected of them that during such flights they will not be passive passengers only, but rather will lend such assistance to the crew as they can (in guiding the aircraft to the jump zone, etc.) and also will be prepared for emergency situations. It is, therefore, apparent that some of the described in-flight duties of pararescue team members are primarily incidental to preparing for a successful pararescue jump and are insufficient in themselves to justify crewmember status.

However, 37 U.S.C. 301(a)(1) grants the service Secretary concerned the discretionary authority to determine who shall be classified as an enlisted crewmember. If these individuals are, in fact, acting as an integral part of an aircrew in accomplishing assigned pararescue missions, we believe that payment of HDIP as crewmembers is appropriate.

With respect to the matter of amendment of the DODPM to permit dual payments of HDIP to these members, it is to be noted that 37 U.S.C. 301(e) and Sections 112 and 113 of Executive Order No. 11157 give the service Secretaries broad discretion in the promulgation of regulations. The sole restriction, contained in Section 112 of the Executive order, is that dual payments of incentive pay shall be limited to those members who are required by competent orders to perform specific multiple hazardous duties to carry out their assigned missions.

In our decision 43 Comp. Gen. 667, *supra*, involving the position of Forward Air Controller, we observed that departmental regulations had at that time not yet been promulgated, and we stated on page 669, that:

> * * * Since neither the law nor the Executive order fixed when, in an otherwise proper case, dual incentive pay should commence, when it should terminate, the amount of the required dual hazardous duty that must be performed in carrying "out their assigned missions," the type of orders requiring such dual hazardous duty and who may issue them, etc., the absence of explicit and comprehensive administrative regulations leaves uncertain many basic matters which necessarily would be for consideration in acting on any claim for dual incentive pay.

We then expressed the view that in the absence of such regulations, forward air controllers were not entitled to dual HDIP as pilots and parachutists, particularly since no explanation had been furnished as to how parachute jumping was necessary to maintain a forward air position.

In our decision 44 Comp. Gen. 426, *supra*, we considered a case involving a Marine Corps member who performed two hazardous duties

(aircrewman and pressure chamber observer) at separate times and concluded that he did not qualify for dual HDIP under the Executive order and then existing Navy directives, which made dual HDIP entitlement contingent upon the multiple hazardous duties being "interdependent." We noted therein that since the Navy directives did not cover the particular situation presented, it was our view that the regulatory provisions, interpreted in light of the legislative history of 37 U.S.C. 301(e), required the "interdependent" hazardous duties be performed concurrently or in rapid succession, thus precluding payment of dual HDIP to the member in that particular case under the regulations then in effect.

In our decision 47 Comp. Gen. 728, *supra*, we expressed the view that parachutists, who performed minor in-flight duties incidental to their primary duties involving parachute jumping, were not entitled to dual HDIP, since their in-flight duties were insufficient to justify entitlement to flight pay in addition to parachute pay and they were not actually performing multiple hazardous duties.

Taken together, these decisions cited in the Committee Action demonstrate only, that under 37 U.S.C. 301(e) and the Executive order, a member is entitled to dual HDIP, provided he is required to perform specific multiple hazardous duties in order to carry out his assigned missions and otherwise meets the criteria established by implementing administrative regulations. It is to be further noted that when decisions 43 Comp. Gen. 667, *supra*, and 44 Comp. Gen. 426, *supra*, were rendered, the implementing regulations were either nonexistent or were vague and nondefinitive, and we had little alternative but to place heavy reliance on the legislative history of 37 U.S.C. 301(e) in our decisions concerning dual HDIP entitlement in those particular cases. That legislative history indicates Department of Defense authorities assured Congress that the statutory provision would be implemented by regulation in such a way as to prevent any possible abuses, and the examples given as illustrative of the type of multiple hazardous duties which would give rise to entitlement to dual incentive pay suggested that dual payments would be authorized only in certain limited cases. However, as previously indicated, the law and Executive order give Department of Defense authorities and not this Office the broad discretionary responsibility for formulating appropriate regulations concerning dual HDIP entitlement.

Situations in which dual HDIP payments are authorized must be limited to those in which the multiple hazards are required in the performance of the member's assigned mission. However, we do not now

believe that 37 U.S.C. 301(e) must be so strictly interpreted as to limit payment of dual HDIP to situations in which both hazardous duties are performed simultaneously or in rapid succession if both duties are an integral part of the member's assigned mission. To the extent that the views expressed in 44 Comp. Gen. 426, *supra*, are inconsistent with this determination, that decision will no longer be followed.

In the present case, while current regulatory provisions prohibit dual payment of HDIP to the members performing the duties described, it is our view that if such members are required to carry out specific multiple hazardous duties in order to accomplish their assigned pararescue missions, as a result of which they incur an increased risk in the course of those missions, the DODPM may be amended under the law and Executive order to authorize dual payments of hazardous duty incentive pay to them. Whether or not the regulations should be so amended is, however, ultimately a matter for evaluation and determination by the appropriate Department of Defense authorities.

The question is answered accordingly.

[B-188369]

Contracts—Procurements—Procedures—"Four-Step" Source Selection

Since Department of Defense special test, "four-step" source selection procedures are comparable to source selection procedures of National Aeronautics and Space Administration (NASA), General Accounting Office (GAO) precedent derived from protests involving NASA's prior negotiated procurements is of aid in resolving issues under contested "four-step" procurement.

Contracts—Protests—Procedures—Bid Protest Procedures—Time for Filing—Date Basis of Protest Made Known to Protester

Protest against Army's interpretation of "four-step" selection procedure and evaluation of proposals is timely under Bid Protest Procedures since protest was filed within 10 days from date protester learned of grounds giving rise to protest.

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement—Actions Not Requiring

Based on review of areas of weaknesses and deficiencies in protester's proposal, GAO cannot conclude that failure to probe areas resulted in noncompliance with statutory mandate for discussions since discussions in areas might have led to improper leveling of merit of technical proposals, especially as concerns design weaknesses and deficiencies which are clearly within offerors' "competence, diligence, engineering and scientific judgment."

Contracts—Negotiation—Offers or Proposals—Prices—Fixed—Technical Risk

Based on review of voluminous record of technical evaluation, including assessment of technical risk associated with protester's fixed-price proposal, GAO concludes Army technical assessments are rationally founded.

Contracts—Negotiation—Fixed-Price—Technically Superior *v.* Lower-Priced Offer

Fixed-price contract may be awarded to higher-priced, but technically superior, offeror. Since agency's position that higher-priced offerors' proposals are technically superior is supported, awards to offerors cannot be questioned.

In the matter of the AiResearch Manufacturing Company of Arizona, September 27, 1977:

AiResearch Manufacturing Company of Arizona, a division of The Garrett Corporation, has protested the award of contracts to AVCO Lycoming, Inc., and Detroit Diesel, Allison Division, Inc., under Department of the Army request for quotations (RFQ) DAAJ02-76-Q-0144.

The United States Army Air, Mobility Research & Development Laboratory, Eustis Directorate, issued the RFQ in June 1976 for "experimental, development, research, design, fabrication and test of an 800 Shaft Horsepower Advanced Technology Demonstrator Engine." The RFQ informed offerors that a firm, fixed-price contract type was contemplated for the work and that two contracts might be awarded.

The procurement was selected for "evaluation and contractor award" under "four step source selection test procedures," described below. Appropriate notice of the selection of this procurement for the "four step" process was set forth in the amended RFQ, as follows:

> The evaluation of all quotations received will be accomplished in accordance with the principles of proposal evaluation and "four-step" source selection procedures.

The RFQ further informed offerors that proposals would be evaluated in two major areas: (1) Technical and (2) Financial and Management, with the Technical area considered to have the predominant weight. Under the "Technical" standard offerors were informed that quotations would be scored on the basis of "merit, general quality, responsiveness to RFQ, technical approach, substantiating data, contractor's statement of work, and adequacy of facilities." Offerors were further informed that the "technical risk" of all proposed components would be evaluated.

Five proposals, including one from AiResearch, were received on August 17, 1976. Army evaluators conducted a detailed analysis of the proposals. One offeror was found to be outside the competitive range for the procurement and was so informed. Financial proposals

were then obtained from the remaining offerors in the competitive range.

The Army informs us that "meaningful discussions" were then held with the remaining four offerors—including AiResearch. The Army further informs us:

> * * * Questions were discussed with offerors. Upon receipt of the offerors' response to these discussions the evaluation process continued.
>
> The Procurement Advisory Board met and was satisfied with the results of the "meaningful discussions" with the four contractors, and concluded that no further discussions (with exception of one offeror not relevant here) were needed prior to requesting "Best and Final offers." "Best and Final offers" were requested with a closing date of 13 December 1976. Upon receipt the proposals were evaluated in accordance with Step 3 procedures. AiResearch was advised on 20 December 1976 of its non-selection for final negotiations under Step 4. The PAB concluded that the AiResearch proposal program was considered one of very high technical risk.
>
> Negotiations (Step 4) commenced with the remaining two offerors and awards were made after extensive review of AVCO Lycoming and Detroit Diesel Allison on 28 January 1977, with effective date of contracts 1 February 1977.
>
> AiResearch requested and was granted a debriefing at the Eustis Directorate, USAAMRDL on 2 February 1977. * * *

The reasons why the Army selected AVCO and Detroit Diesel—notwithstanding the companies' higher (an average of 11 percent) proposed prices compared to AiResearch's proposed price—are contained in various documents in the Army reports. The contracting officer informs us that "AiResearch was judged to have lower engine performance with a higher risk of achieving this performance than either of the two successful offerors." By contrast, "both AVCO and Detroit Diesel," the contracting officer continues, "were evaluated to have less risk, with better engine performance in terms of horsepower and fuel consumption." The Army's counsel has also informed us that the "proposals of AVCO and Detroit Diesel were considered technically superior to the protester's" and that the "final conclusion of the Government evaluators was that the protester's lower price did not justify the high technical risk and [that] * * * he would be unable to meet program objectives within the contemplated time schedule."

Subsequent to the February 2 debriefing we received (on February 11) AiResearch's protest. AiResearch's initial grounds of protest were:

> The contracting agency failed to properly evaluate AiResearch's proposal by neglecting its duty to conduct meaningful discussions in all areas in which AiResearch received less than maximum credit.
>
> The contracting agency assigned "weaknesses" and "deficiencies" to AiResearch's proposal in an arbitrary manner.
>
> The contracting agency placed undue emphasis on its subjective judgment of potential technical risk, even though AiResearch's proposal must have been considered technically acceptable since AiResearch was solicited for a "best and final offer." It is pointed out that the solicitation contemplated a firm fixed price contract under which the contractor would assume full cost responsibility and a legal contractual obligation to perform as proposed.
>
> The contracting agency, as a result of failing to properly evaluate AiResearch's offer, abused its administrative discretion by awarding subject contracts at prices $1,500,000 (13.3%) and $1,170,000 (9.9%) higher than that proposed by

AiResearch, either of which represents a material increase in direct cost to the Government for this procurement.*

AiResearch was told at the debriefing that its proposal, while considered to be in the competitive range, was not selected for award "due to the cumulative impact of a number of 'molehills' [weaknesses] rather than for any single compelling reason." AiResearch criticized in detail the Army's technical evaluation. The criticism contested the Army's assignment of deficiencies and weaknesses ratings given to various parts of AiResearch's proposal. These contested ratings and the Army's reply (as developed in subsequent reports submitted by the Department) to the criticisms are summarized under the captioned headings listed below: (A considerable amount of documentation submitted by the Army may not be discussed in this decision because it is classified; however, we have reviewed all the material in developing this decision.)

Deficiencies

AiResearch	Army
(1) inlet particle separator—AiResearch should not have been criticized for lack of previous separator experience because the company's proposal clearly stated that it had the required experience.	(1) The Department insists that AiResearch has not designed, fabricated, and tested the separator for a turbine engine.
(2) combustor—AiResearch's combustor design, contrary to the Army's view that it is undeveloped and would require further development for acceptance, was adequately demonstrated in the company's proposal and derived from a highly developed similar combustor.	(2) Notwithstanding the company's attempts to justify its design by restating much of the information previously submitted in the proposal, the Army is still of the opinion that the proposed design is undeveloped.

*The Army argues that the protest is untimely filed under our Bid Protest Procedures (4 C.F.R. § 20.2(b)(1) (1977)) because the Army views the protests as one against the propriety of the "four step process." Since the four-step process was announced in the solicitation, the Army is of the view that AiResearch's protest should have been filed prior to the closing date for proposals rather than after award. We disagree. The protest is not one against the propriety of the process as such but against the way the Army interpreted the process and evaluated proposals. These bases of protest were not known until the February 2 debriefing. Since the protest was filed within 10 days of that debriefing, the protest is timely. 4 C.F.R. § 20.2(b)(2) (1977).

Deficiencies—Continued

AiResearch	Army
(3) bearings, seals, shafting—Even if the Army's finding that seal buffering recovery pressure is not effective, adequate pressures can be achieved by other means as shown in the proposal. Pressure for effective buffering appears to be a difference of opinion.	(3) Reaffirms position that component is not shown to be effectively buffered.
(4) engine design—Contrary to the Army's view that the design was deficient because of a large number of cross-excitations in turbine and generator shafts, AiResearch's design either controlled cross-excitations by damping, where possible, or properly accommodated cross-excitations which are inevitable.	(4) The Army has information which indicates that the design of bearing mounts in AiResearch's proposal is unpredictable and, therefore, causes concern as compared with a design which does not have a large number of cross-excitations.
(5) engine performance—Although the Department insists that the engine will not meet the "600 SHP" requirement, AiResearch's calculations show that engine will produce "614 SHP." Further, the Army's estimate of compressor efficiency is in error.	(5) The Government extrapolation method used to get from the evaluated sea level performance to the test condition was exactly that ratio as proposed by AiResearch. AiResearch's approach will not meet the SHP requirement.
(6) development plans—Although the Army faulted AiResearch's failure to specifically schedule a "gas generator test" during the engine test, AiResearch promised the test, if needed, would be conducted.	(6) Neither the final statement of work nor the development plan states that gas generator testing would be continued after engine tests begin. Any verbal understandings were required to be included in the resubmission as was explained to AiResearch.
(7) engine cost—Army erroneously projected (by 43 percent) certain elements of AiResearch's engine	(7) No new information was furnished which would change the original deficiency.

Deficiencies—Continued

AiResearch	Army
costs beyond the 100th unit. AiResearch is correct in saying that there are little changes in cost between the 100th and 300th unit.	The Government cost evaluation method was applied universally to all offerors.
(8) management structure/qualifications—Contrary to the Army's view that AiResearch's Rotary wing environment experience is limited, AiResearch does have adequate experience.	(8) The Army affirms its previous position as to AiResearch's lack of experience.
(9) "Personnel"—Contrary to the Army's view that AiResearch's IPS individual has no IPS experience, AiResearch's proposed employee is qualified and experienced.	(9) Affirms judgment that individual does not have any IPS experience.

Weaknesses

AiResearch	Army
(1) compressor—Contrary to the Army's view that AiResearch's compressor design is "high risk" even though "new and attractive," AiResearch insists that it has demonstrated the design as shown in its proposal.	(1) Affirms judgment that use of preswirl nozzles, instead of inlet guide vanes, to raise flight idle speed appears to be high risk.
(2) impeller performance — The proposed performance does not exceed demonstrated performance contrary to the Army's view that proposed performance is considered optimistic.	(2) The company possibly misunderstands the evaluation. Weakness is related to sea level static condition rather than evaluation while operating at the 4,000 ft., 95° condition.
(3) diffuser performance — Contrary to the Army's view that insufficient data was provided and that the performance is not with-	(3) No additional data has been provided to substantiate the proposed diffuser performance.

Weaknesses—Continued

AiResearch	Army
in the "state-of-the-art," AiResearch's proposal lists diffuser tests which substantiate the capability proposed.	
(4) gas generator turbine—Although the Army believes the assumed pumping losses due to cooling flow are optimistic, the AiResearch data establishes the validity of approach. The experience documented in the AiResearch proposal confirms that no additional performance penalties are justified.	(4) The weak point stemmed largely from the axial turbine experience offered as substantiation for the radial turbine. No new information was offered to change the weak point.
(5) power turbine—Notwithstanding Army's evaluation that off-design performance was optimistic, AiResearch has demonstrated the high probability of attaining the proposed performance objective. Therefore, prediction of the off-performance of the proposed turbine is well justified using AiResearch's calculation method.	(5) The issue is that the off-design performance of a fan turbine does not directly apply to the off-design performance characteristics of a power turbine for a turboshaft engine. The constant mechanical speed operation of the power turbine spool of a turboshaft engine requires a different turbine operating line as compared to a turbofan engine where the fan spool operates free of RPM governing.
(6) bearings, seals, shafting—Notwithstanding the Army's findings that cavity leakages are not developed and that one bearing's life is marginal, AiResearch's design is sound. The potential for flow reversals has been anticipated. The bearing life meets RFP requirements and is not marginal.	(6) The proposed technique of pressure/flow control in the seal cavity was judged to be undeveloped. AiResearch had originally stated the pressure to be 150 psia and subsequently changed this to 86 psia without any clear explanation of how the pressure drop would be accomplished. In addition, the

Weaknesses—Continued

AiResearch	Army
	downstream flow paths described by AiResearch created a potential for flow reversals in opinion of the evaluators. The point now being made by AiResearch, that the evaluators misunderstood the method of pressure reduction, has little bearing on the original weak point. AiResearch disagrees with the method used by the Government for bearing life calculation. The method used is widely accepted and was used universally with all proposers using the bearing loads proposed. All bearings except for the No. 3 bearing were calculated to have adequate life using the Government calculation techniques.
(7) engine design and controller memory—Notwithstanding that the Army felt there was weakness in the proposed excited modes and controller memory, the design is judicious. The system permits effective use of hydraulic mounts and does not include a volatile memory. The volatile memory weakness could have been clarified in discussions. The Army's concern with nonfundamental modes is not supported by AiResearch experience.	(7) AiResearch confirms that certain portions of the engine performance and mechanical condition information would be lost upon shutdown. This loss of information was the basis of the weak point. Although multishaft engine designs with vibration modes in the operating range are an accepted practice, the weak points were assigned due to the recognized difficulty in predicting bearing mount characteristics which could cause these self-excited modes to be of considerable concern later. A design which had no vibration modes within the operation range is desirable, particularly in a helicopter installation.

Weaknesses—Continued

AiResearch	Army
(8) development plans—Since the RFP defines performance points at which performance data will be taken and the Army will approve test plans, the Army's criticism that AiResearch's proposal failed to specify demonstration at specific power points lacks credibility.	(8) For the inlet thermal distortion and heat rejection tests, the engine development plan does not specify demonstration at specific power points over a suitable range of interest. The final Statement of Work or Development Plan does not address this specific area of concern. Any verbal understandings were required to be included in the resubmission as was explained to AiResearch.
(9) engine cost—Although the Army criticized the proposal for providing a material list for the 300th engine rather than data on the 100th engine, the RFQ did not clearly define the base quantity for the table. Further—contrary to the Army's view—the submission of two cost reduction targets was appropriate. Sufficient supporting cost information was also provided.	(9) The Design Monitoring Material List (DMML) is given for the 300th production engine, whereas the RFQ requests this data for the 100th engine. Although the RFQ did not specifically speak to the DMML, all other cost information was requested for the 100th engine. AiResearch recommended that two DTUPC targets be established, one for low-risk, near-term production and one for a production period using technologies yet to be developed. It was felt by the Government that the use of two targets would have been confusing. The RFQ specified the use of one target based on the engine design proposed for the ATDE program. The Preliminary Parts List (PPL) proposed for use in DTUPC tracking does not contain sufficiently detailed information on the elements that make up the reported costs in terms of labor and material. The

Weaknesses—Continued

AiResearch	Army
	use of the PPL was proposed as a technique to assist in tracking the engine cost during the course of the ATDE program. Failure to break out the items on the list as to labor and material was considered a weak point in that less visibility would be available to the analyst using the PPL during the course of the program. Information referenced in the offeror's Supplement 2 has to do with the estimated cost of the proposed engine, not techniques to be used for cost tracking during the program.
(10) management structure/qualifications—Army's criticism that the decision maker in the project organization has not been identified is not well founded. The proposal clearly shows the project engineer as the decision-maker.	(10) The original concern was that it was not clearly indicated who had authority to make program decisions and major commitments. AiResearch states that the Government was assured that the Project Engineer had primary technical responsibility for the program, during the discussions of 3 Nov 76. No written clarification of the Management Proposal was made. Any verbal understandings were required to be included in the resubmission as were explained to AiResearch.
(11) personnel — Contrary to Army's view, the proposed key combustion man is well qualified and should not be seen as having only minimum qualifications.	(11) Most of the information given expanded on the background of the proposed "key combustor man," over and above the proposal resume.

Weaknesses—Continued

AiResearch	Army
	The basis of the weak point is that the originally submitted resume reflects that the proposed individual has minimum qualifications to act as the keyman in development of the ATDE combustor.

"FOUR STEP" PROCEDURES

The "four step" procedures referenced in the RFP and applied in the subject procurement were set forth in Defense Procurement Circular #75–7, February 27, 1976, as follows:

> The Department of Defense is testing a new method of source selection for advanced, engineering, and operational systems development contracts on a selected number of procurements in each Military Department.
>
> This test is being conducted pursuant to instructions outlined in Section III.-D.5 of the attached DOD Directive 4105.62, "Selection of Contractual Sources for Major Defense Systems," dated January 6, 1976 (Pages 20 thru 32 of this DPC).
>
> The following *special test ASPR 3–805.3 language* [Duplication of certain key provisions of the directions] is applicable only to those procurements involved in the test.
>
> 3–805.3 *Discussions With Offerors.*
>
> (a) Except as provided in (b) below, all offerors selected to participate in discussions shall be advised of deficiencies in their proposals and shall be offered a reasonable opportunity to correct or resolve the deficiencies and to submit such price or cost, technical or other revisions to their proposals that may result from the discussions. A deficiency is defined as that part of an offeror's proposal which would not satisfy the Government's requirements.
>
> (b) In discussing technical proposals for procurements involving advanced, engineering or operational systems development (see 4–101), contracting officers shall apprise offerors selected to participate in discussions of only those identified deficiencies in their proposals that lead to a conclusion that (i) the meaning of the proposal or some aspect thereof is not clear, (ii) the offeror has failed to adequately substantiate a proposed technical approach or solution, or (iii) further clarification of the solicitation is required for effective competition. Technical deficiencies clearly relating to an offeror's management abilities, engineering or scientific judgment, or his lack of competence or inventiveness in preparing his proposal shall not be disclosed. Meaningful discussions shall be conducted with the respective offerors regarding their cost/price proposals. Such discussion may include:
>
> (i) cost realism;
>
> (ii) mathematical errors or inconsistencies;
>
> (iii) correlation between costs and related technical elements, and other cost/price factors necessary for complete understanding of both the Government requirement and the proposal for meeting it, including delivery schedule, other contract terms, and trade-off considerations (with supporting rationale) among such elements as performance, design to cost, life cycle cost, and logistic support. Offerors shall be afforded a reasonable opportunity to correct or resolve deficiencies and submit revisions to either their technical or cost/price proposals. * * *

The genesis of DOD's "four step" procedures lies in similar procedures adopted several years ago (and used, with slight modification,

to the present time) by the National Aeronautics and Space Administration (NASA). (See, for example, NASA Procurement Regulation Directive 70–15, December 3, 1975, currently in effect.) In both procedures there are statements as to the need to allow competitive-range offerors the opportunity for discussions of technical proposals to clarify or substantiate the proposal (or clarify the solicitation meaning when needed). Both procedures specifically prohibit discussions of technical weaknesses (NASA's term) or deficiencies (DOD's term) relating to an offeror's lack of competence, diligence, inventiveness, or lack of management abilities, engineering or scientific judgment.

Since the DOD procedures are, in the main, comparable to the NASA procedures, our decisions involving contested NASA procurements will be of aid in resolving the issues raised here.

NASA's procedures were initially reviewed in our decision in B–173677, March 31, 1972 (summarized in 51 Comp. Gen. 621 (1972)). We recognized that, although the provisions of 10 U.S.C. § 2304(g) (1970) do not define the nature, scope or extent of the discussions required by the statute, it was our view that the legislative history of the law evidenced a congressional intent that negotiations be conducted under competitive procedures to the extent practicable and that they be "meaningful by making them discussions in fact and not just lip-service."

We further observed:

> The many decisions cited by the parties to this protest, as well as others dealing with the matter of "discussions," were not decided in a vacuum or intended to be merely abstract statements of law. They involved actual disputes concerning the conduct of negotiations for various services and supplies, ranging from maintenance services to sophisticated electronic equipment; the justifications for negotiation involved many of the 17 exceptions to formal advertising, including public exigency, research and development, and property or services for which it was impracticable to obtain competition; and the methods of contracting including fixed price and one of several cost reimbursement types. Necessarily, these varied procurements involved different considerations, requiring judgments as to the methods and techniques utilized in consummating the contracts. In recognition of these facts, we have not construed the requirement for "written or oral discussions" as an inflexible, stereotyped mandate unrelated to the particular procurement involved. Thus, in many cases we have found that deficiencies had to be pointed out in order to have meaningful discussions. On the other hand, in other cases, the facts ond circumstances called for a different conclusion. For example, in 50 Comp. Gen. 202 (1970), which NASA has cited as an instance where we held that the mere acceptance, in effect, of a late revision constituted discussions under 10 U.S.C. 2304(g), the issue was whether the other offerors should also be given an opportunity to revise their initial proposals. We stated that since "discussions" had been conducted with one offeror, discussions must be conducted with all offerors within the competitive range. In B–170297, May 26, 1971, also cited by NASA, the procurement called for a quantity of generators on a firm fixed-price basis. Additional tests were required after the initial proposals were received, and the offerors were requested to submit revised prices to reflect these additional tests. Award was made after receipt of the revised prices. It was contended in part that these proceedings did not constitute "oral or written discussions" but rather the acceptance of an initial proposal without discussions. We disagreed with this contention but stated that, "we do not mean to discourage more extensive negotiations of price in similar situations nor to

imply that they would be inappropriate." Thus, we have attempted to resolve these disputes not only in light of the circumstances of the particular procurement, but in recognition of the clear congressional mandate as evidenced by the legislative history of 2304(g), for *competitive* negotiations designed to obtain for the Government the most advantageous contract.

Therefore, it is our view that whether the statutory requirement for discussions must include the pointing out of deficiencies, and the extent thereof, is a matter of judgment primarily for determination by the procuring agency in light of all the circumstances of the particular procurement and the requirement for *competitive* negotiations, and that such determination is not subject to question by our Office unless clearly arbitrary or without a reasonable basis. However, the statute should not be interpreted in a manner which discriminates against or gives preferential treatment to any competitor. Any discussion with competing offerors raises the question as to how to avoid unfairness and unequal treatment. Obviously, disclosure to other proposers of one proposer's innovative or ingenious solution to a problem is unfair. We agree that such "transfusion" should be avoided. It is also unfair, we think, to help one proposer through successive rounds of discussions to bring his original inadequate proposal up to the level of other adequate proposals by pointing out those weaknesses which were the result of his own lack of diligence, competence, or inventiveness in preparing his proposal.

We think the propriety of the prohibition in NASA Procurement Directive 70–15 against discussing "deficiencies" must be considered in the light of these problems. We think certain weaknesses, inadequacies, or deficiencies in proposals can be discussed without being unfair to other proposers. There well may be instances where it becomes apparent during the course of negotiations that one or more proposers have reasonably placed emphasis on some aspect of the procurement different from that intended by the solicitation. Unless this difference in the meaning given the solicitation is removed, the proposers are not competing on the same basis. * * *

Despite our feeling that the Directive needed to be clarified, we were unable to conclude—based on analysis of the particular facts involved—that the negotiations had with the protester did not comport with the statutory mandate for oral or written discussions. Particular facts entering into this conclusion were:

(1) The protester had considerable "informal and formal contact" regarding technical requirements of the procurement for a 1-year period prior to submitting a proposal;

(2) The procurement was for research and development and requested *independent* approaches substantiated by extensive data;

(3) Many of the protester's weaknesses resulted from failure to submit backup data;

(4) Written and oral discussions were in fact conducted although they did not include pointing out of deficiencies as such;

(5) Many of the technical questions asked did relate to areas later judged weak, although they were framed in the context of clarifications;

(6) The protester did submit substantial revisions to its proposals;

(7) Although some informational deficiencies in one area of the protester's proposal might have been the subject of "fruitful discussions," any possible upgrading of the protester's proposal in this one area would have been insignificant because the source selection official's award decision was based primarily on a proper consideration—confidence in engine design—not involving this one area;

(8) The weaknesses in the protester's proposal were deficiencies only in comparison with relative strengths of the selected company; therefore, discussions concerning deficiencies in comparative weaknesses would inevitably have involved technical "leveling" and "transfusion."

The observations made in B–173677, *supra*, have been used as guiding principles in deciding several other NASA protests. See, for example, *Lockheed Propulsion Company; Thiokol Corporation*, 53 Comp. Gen. 977 (1974), 74–1 CPD 339; *Sperry Rand Corporation and others*, 54 Comp. Gen. 408 (1974), 74–2 CPD 276; *Dynalectron Corporation, Lockheed Electronics Company, Inc.*, 54 Comp. Gen. 562 (1975), 75–1 CPD 75; *Management Services, Inc.*, 55 Comp. Gen. 715 (1976), 76–1 CPD 74; *Union Carbide Corporation*, 55 Comp. Gen. 802 (1976), 76–1 CPD 134.

The procurement involved here contains similar facts to the circumstances in B–173677, *supra*, namely: (1) both procurements were for research and development; (2) independent technical approaches to be substantiated by extensive data were sought; (3) discussions were in fact conducted although they did not include the pointing out of deficiencies as such; and (4) many of the protester's weaknesses resulted from failure to submit backup data and were only weaknesses in relation to the contents of other superior proposals. Reviewing the areas of weaknesses and deficiencies, we cannot conclude that the failure to probe the areas resulted in a failure to comply with the statutory mandate for discussions. Specifically, we cannot fault the position implicit in the Army's report that discussions in the areas might have led to an improper "leveling" of the merit of technical proposals, especially insofar as relates to design criticisms, which are clearly within the realm of an offeror's "competence, diligence, engineering and scientific judgment." Moreover—to use one of the tests for the absence of meaningful discussions mentioned in B–173677, *supra*—there is no indication that discussions should have been conducted to correct reasonable, albeit erroneous, interpretations of the company of some part of the solicitation.

TECHNICAL ISSUE

We have reviewed the Army's technical evaluation of AiResearch's proposal. Contrary to AiResearch's view, we think the voluminous record of technical evaluation supports a conclusion that the Army fairly and impartially assigned ratings for the proposals involved. Although AiResearch obviously disagrees with the Army's judgments on these complicated technical issues, we conclude that the Army assessments are rationally supported—including the assessment of technical risk associated with the AiResearch proposal. The mere fact that

AiResearch's technically risky proposal was on a fixed-price basis—while fixing the immediate price of the work—does not eliminate the real possibility of needed adjustments in contract price that might be required by contract amendment to cure the performance problems associated with acceptance of a technically "risky" proposal.

AWARDS AT PRICES HIGHER THAN THAT OF AIRESEARCH

AiResearch's final ground of protest relates to the Army's determination to award contracts at prices nearly 10 percent higher than AiResearch's proposed price. AiResearch also says that the Army ignored its lower life-cycle costs compared to costs proposed in the successful quotations. We have held, however, that a fixed-priced contract may be awarded to a higher-priced, but technically superior, offeror. *Bell Aerospace Company*, 55 Comp. Gen. 244 (1975), and cases cited in text. Since we have not questioned the technical superiority of the selected offerors based on our review of the record, we cannot take exception to the higher prices contained in the awarded contracts. Moreover, contrary to AiResearch's understanding, its proposed and evaluated life-cycle costs were not low in comparison to the selected offerors' life-cycle costs.

Protest denied.

[B-188971]

Compensation — Promotions — Retroactive — Administrative Error—Action Contrary to Agency Regulations

Department of Labor seeks a ruling on legality of employee retroactive temporary promotion that it effected when its intent to permanently promote and reassign a GS-3 employee to a GS-4 position effective on August 4, 1975, was frustrated through improper merit staffing procedures. Personnel actions may not be made retroactively effective absent an unjustified or unwarranted personnel action that deprived employee of vested right. Because employee had no vested right to a promotion, action was improper; however, erroneous payments may be waived under 5 U.S.C. 5584.

In the matter of the Department of Labor, Employment Training Administration—retroactive temporary promotion, September 27, 1977:

This action involves a request from Mr. Albert J. Angebranndt, Administrator, Administration and Management, Employment and Training Administration (ETA), Department of Labor, Washington, D.C., for a ruling on the legality of a retroactive temporary promotion that ETA made on September 24, 1975, retroactive to August 4, 1975.

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The legality of the retroactive temporary promotion was originally questioned by the Civil Service Commission (CSC) in its report on a review of ETA merit staffing actions in which it advised ETA to obtain a determination from this Office.

The factual situation of the case is relatively uncomplicated. In early June 1975, a certain ETA office requested the personnel office to fill an entry level grade GS–4 clerical position. Several applications for the position were referred to that office for review, which resulted in the selection of a grade GS–3 employee. The Personnel Specialist who was servicing the request, reviewed the applications to insure that qualification requirements had been satisfied and then contacted the employee's office and negotiated a release date of August 4, 1975. This action was erroneous in that agency merit staffing procedures had not been complied with as required by regulations. The error, however, was not recognized by the Personnel Specialist, who subsequently went on emergency leave in late July 1975 for several days. Several weeks had elapsed when the agency detected the error.

To correct this error, the personnel office formally announced the position under merit staffing procedures. It was decided to give the employee who had been erroneously placed in the position a retroactive temporary promotion to grade GS–4 effective as of August 4, 1975, to compensate her for not having been promoted when she was erroneously placed into the position. As a result of questions raised by CSC concerning the legality of this action, a ruling is being requested from our Office.

Our decisions have generally held that personnel actions, including promotions, may not be made retroactively effective absent an unjustified or unwarranted personnel action that deprived an employee of a vested right granted by mandatory provision of law, regulation, or agreement. See 55 Comp. Gen. 42 (1975) and decisions cited therein. In the instant case, there does not appear to have been a mandatory provision of law, regulation, or agreement that required the promotion of the employee in question on August 4, 1975, or on any other specific date. Accordingly, we have concluded that there was no authority under the Back Pay Statute, 5 U.S.C. § 5596 for the retroactive temporary promotion of the employee.

However, in order to avoid undue hardship and inequity, erroneous overpayments made in connection with this retroactive temporary promotion may be considered for waiver under the provisions of 5 U.S.C. § 5584 and 4 C.F.R. §§ 91.4 and 91.5, governing the standards for waiver of claims for erroneous payment of pay and allowances.

[B-187968]

Contracts—Negotiation—Basic Ordering Agreements—Exclusion of Surplus Spare Parts

Basic Ordering Agreements cannot be used to exclude surplus spare parts once procuring activity has been made aware of potential source of supply, especially where surplus parts are acceptable from item manufacturer.

Contracts—Negotiation—Competition—Impracticable to Obtain—Surplus Spare Parts

While Government may not have adequate data rights in parts to obtain competition from other manufacturers, assigned part number is sufficient to procure part from item manufacturer as well as surplus parts dealers.

Advertising—Commerce Business Daily—Publication Requirement—Prior to Ordering Under Basic Ordering Agreement

Publication of synopsis in Commerce Business Daily must precede ordering under basic ordering agreement so as to allow potential bidders an opportunity to compete. Armed Services Procurement Regulation 1-1003.2.

In the matter of D. Moody & Company, Inc., September 28, 1977:

D. Moody & Co., Inc. (Moody), protests the procurement policies and procedures employed by the Department of the Army, United States Army Aviation Systems Command, in placing delivery order No. 3285 under Basic Ordering Agreement (BOA) No. DAAJO1-71-A-0303 with Sikorsky Aircraft, Division of United Technologies Corp. (Sikorsky).

The synopsis of the proposed procurement appeared in the Commerce Business Daily (CBD) on November 11, 1976. However, the award had been made on November 5, 1976. Moody contends it was wrongfully excluded from competition in two ways: (1) award before publication in the CBD precluded Moody from submitting a bid; and (2) sole-source procurement under the BOA avoided competition from surplus dealers. The parts Moody contends it would offer are new, unused, nondeteriorable surplus parts manufactured by Sikorsky and carrying the same part number as those ordered under the BOA.

The Army has questioned the timeliness of the protest with regard to the allegation that the sole-source procurement under the BOA was improper as a restriction on competition. The Army contends that Moody's original protest to it of November 11, 1976, complained only of the CBD synopsis procedure, while the protest of December 6, 1976, to this Office raised new issues. The interpretation the Army applies to Moody's protest is overly narrow. Since Moody protested to this Office within 10 working days from receipt of the Army's response

(received November 23, 1976), we consider the protest to have been timely filed on both issues.

The essence of Moody's protest is that where surplus dealers can provide the requested part from the same item manufacturers, an order against a BOA violates Armed Services Procurement Regulation (ASPR) § 3-410.2(c) (1976 ed.). It reads:

(c) *Limitations.*

(1) Basic ordering agreements shall not in any manner provide for or imply any agreement on the part of the Government to place future orders or contracts with the contractor involved, nor shall they be used in any manner to restrict competition.

(2) Supplies or services may be ordered under a basic ordering agreement only under the following circumstances:

(i) *If it is determined at the time the order is placed that it is impracticable to obtain competition by either formal advertising or negotiation for such supplies or services;* * * * [Italic supplied.]

Here, the procuring agency determined that Sikorsky was the only manufacturing source of supply, since adequate data or specifications were not available to compete the items from other manufacturing sources. The negotiation authority for the sole-source procurement was 10 U.S.C. § 2304(a)(10) as implemented by ASPR § 3-210.2 (xiii) (1976 ed.). The determinations and finding supporting the negotiation authority states that the spare parts can only be identified by manufacturer's part number since design data available is incomplete to permit advertised bidding. This, of course, excludes surplus dealers, similar to Moody, from being considered as a source of supply even though the part proffered was manufactured by Sikorsky and is new, unused, nondeteriorable surplus. The anomaly occurs when the agency elects to procure surplus property only from the item manufacturer (Sikorsky). We view the Army's justification of excluding surplus dealers, in this instance, by asserting that the fact that parts bear the same number does not mean the parts are exactly the same, as unmeritorious. The assignment of part numbers sold to the Army is governed by Military Specification MIL-STD-100B dated October 5, 1975. The Army contends that under paragraph 402-14 of MIL-STD-100B it would be possible to change the manufacturing process of a part or material without necessitating the assignment of a new part number. Sections 402.14 and 402.15 thereof differentiate changes requiring a new part number from those which do not as follows:

402.14 *Changes requiring new identification.* Items shall be assigned new design activity numbers different from the original identifying numbers under the following conditions:

a. When an item(s) has been submitted. a new drawing number or part number as described in paragraph 402.10 shall be assigned when a part or assembly is changed in such manner that any of the following conditions occur:

Condition 1. Performance or durability is affected to such an extent that superseded items must be discarded for reasons of safety or malfunctioning.

Condition 2. Parts, subassemblies, or complete articles are changed to such an extent that the superseded and superseding items are not interchangeable.

Condition 3. When superseded parts are limited to use in specific articles or models of articles and the superseding parts are not so limited to use.

Condition 4. When an item has been altered or selected (see paragraphs 201.4.4 and 201.4.5).

Condition 5. When interchangeable* repairable* assemblies contain a non-interchangeable part, the part number re-identification of the non-interchangeable part, of its next assembly and all the progressively high assemblies shall be changed up to and not including the assembly where interchangeability is re-established.

b. When an item* is changed in such a way that it necessitates a corresponding change to an operational, self-test or maintenance test computer program the part number identification of the item and its next assembly and all progressively higher assemblies shall be changed up to and including the assembly where computer-programs are affected.

402.15 *Changes not requiring new identification.* When a part* or assembly is changed in such a manner that conditions of paragraph 402.14 do not occur the part number shall not be changed. Under no condition shall the number be changed only because a new application is found for an existing part. When an item* has been furnished to the Government the applicable part number shall not be changed unless conditions in paragraph 402.14 apply. However, when a design activity desires to create a tabulated listing or a standard because of a multiple application of an item the foregoing need not apply. The superseded drawing will identify the document which superseded it.

Any change which did not require a new part number would, by definition, be *de minimus* and not in and of itself require the purchase of the newer part. Here, the part has not been changed without being assigned a new part number. Based on the above it is clear that a part from an item manufacturer may be procured by the part number only—just as the Army did in placing the order under the BOA.

The Army's real concern appears to be over accepting surplus property without being capable of inspecting the parts so as to insure quality and conformance. The case at hand is somewhat unique. Here, Moody can offer a new, unused, nondeteriorable part from Sikorsky, identified by the same part number. While the Army has a legitimate concern relative to what, where, when, why and how an item became surplus, such concern without more is not sufficient to preclude procurement of surplus parts from surplus dealers. With regard to the effect which limited data rights bear on inspection, Sikorsky is required by the BOA to establish and maintain a quality control program to assure adequate quality throughout all stages of manufacture. Sikorsky is also required to maintain records of all inspection work. The Navy has the responsibility to assure that Sikorsky's quality control program meets the requirements. The Navy's inspection, in accordance with NAV AIR FIELD Administration MANUAL 4330.16, includes spot checking the product, auditing inspection records and visual checking of the manufacturing process. The Navy does not inspect an item after delivery from Sikorsky, although a limited visual inspection is made by field maintenance personnel prior to installation. Accordingly, the only distinction between surplus parts

from Moody's shelves, as opposed to Sikorsky's, is the necessity to update the historical data on the item since it left Sikorsky's plant. Once this data has been supplied there is no distinction. Here, the part Moody would offer was purchased from the Government as surplus. Therefore, the part has passed all the inspection procedures the Army alleges must be performed prior to acceptance of the item.

At the very heart of the controversy is the question whether the Government, after it has determined only one manufacturer can produce the part, then, must search surplus sources in order to satisfy 10 U.S.C. § 2304(g) and APSR § 3-210.2. Based on the information the Army had at the time the order was placed, the determination that it was impracticable to obtain competition was reasonable. It would be overly burdensome on the procurement system to require the procurement activity to ascertain in every instance the existence of a surplus dealer (assuming surplus parts were acceptable) before using a BOA. Such a procedure would contravene the very purpose of a BOA. See ASPR § 3-410.2(b).

The problem encountered by Moody occurred when the synopsis of the order was published in the CBD after award. Timely synopsis is required by ASPR § 1-1003.2 (1976 ed.) so as to allow potential bidders an opportunity to compete. The publishing of a *fait accompli* does not allow alternate sources to bring their existence to the attention of the Government. This, in effect, was in contravention of ASPR § 3-410(c)(1) which prohibits using BOA's to restrict competition.

In the future the Army should timely publish the synopsis in the CBD in accordance with ASPR § 1-1003.2. If an alternate source offers the same item being procured under the BOA, free and open competition requires the Government to include the source, if surplus parts are determined to be acceptable. We can appreciate the legitimate concern of the Government in accepting surplus parts which have been outside the control of the manufacturer or the Government, which may have been abused or improperly stored. However, the procurement statutes and regulations generally contemplate obtaining maximum competition consistent with the Government's actual needs.

For the reasons stated above, we sustain the protest of Moody. However, since the orders under the BOA have been substantially completed, no remedial action is appropriate.

[B-188983]

Freedom of Information Act—Disclosure Requests—Contract Protests

Propriety of disclosing contents of operating manuals prepared under earlier contracts is for resolution under Freedom of Information Act, 5 U.S.C. 552 *et seq.* (Supp. V, 1975).

Contracts—Negotiation—Competition—Incumbent Contractor—Competitive Advantage

Protest based on competitive advantage enjoyed by incumbent contractors must fail where record indicates that basis for that advantage is prior development of operating procedures. There is nothing inherently objectionable in requiring offerors to explain their business approach to satisfying the solicitation's requirements merely because this will be less difficult for those who have performed similar, or even identical, work in the past.

Contracts—Data, Rights, etc.—Security Manuals

Allegation that contracting agency should not have required security manuals because it lacks authority to approve contractors' security manuals must fail in absence of basis for concluding that contracting agency may not evaluate and monitor compliance with established security requirements.

In the matter of the Field Maintenance Services Corporation, September 28, 1977:

Field Maintenance Services Corporation (FMSC) protests the award of any contract under Request for Proposals No. F34601–77–R–0971, issued by Tinker Air Force Base, Oklahoma, on the ground that the Government has not furnished non-incumbent offerors with data allegedly acquired by the Government under earlier contracts and which is necessary to the submission of competitive technical proposals.

This solicitation involves the procurement of "Field Team Services" and such materials as are necessary to perform maintenance and modification of certain weapon systems and support equipment throughout the world. The solicitation contemplates contract awards to two offerors, based on an evaluation of proposals in three principal areas, the most important being the offeror's management capability. Attachment A of the solicitation states, in part:

MANAGEMENT CAPABILITIES

The offerors must submit sufficient detailed information concerning management capability and experience. In so doing the following data should be provided:

* * * * * * *

B. Detailed and complete operating procedures (manuals) which will be implemented for each of the following areas: Quality Assurance, Production Planning and Control, Safety and Security, and Control of Costs, such as non-productive time, travel, per diem, direct labor and material acquisition (which may in turn result in potential lower costs to the Government).

FMSC contends that the Air Force has been furnished similar contractor operating manuals under previous contracts and has acquired unlimited rights in these manuals under Armed Services Procurement Regulation (ASPR) § 7–104.9(b)(vii), which gives the United States unlimited rights in manuals "prepared or required to be delivered" in connection with certain Government contracts. FMSC believes that,

unless these allegedly Government-owned manuals are made available to all offerors, the two incumbent contractors will have a substantial advantage in preparing their technical proposals.

We understand that the propriety of turning these contractor manuals over to prospective contractors is being resolved under the Freedom of Information Act (FOIA), 5 U.S.C. § 552 *et seq.* (Supp. V, 1975). A request by FMSC for the Quality Assurance Manual of one of the incumbent contractors was denied by the Air Force (except for Department of Defense Forms 48 and 49) because:

> With the exception of these Government publications [Forms 48 and 49], the Manual contains exclusively [contractor] documents that detail the business practices of [the contractor] in the performance of Air Force Field Team Contracts. The Manual is divided into four sections which contain the Standard Operating Practices, Personnel and Security Practices, Production Controls and Quality Assurance and Inspection Procedures of [the contractor]. Each section contains detailed operating instructions to [the contractor's] employees for their performance of field team contracts, and as such, qualifies as that type of confidential commercial information that is exempted from disclosure by 5 U.S.C. 552(b)(4).

The Air Force has advised the protester that judicial review of its denial is available under the FOIA and, in view of the fact the information sought by the protester appears to relate solely to the proposed manner of performance (i.e., offeror's business practices), we find no basis for concluding that disclosure of contractor manuals, prior to resolution of possible FOIA litigation, would be appropriate.

Furthermore, as we have indicated in the past, the fact that a firm may enjoy a competitive advantage by virtue of its status as an incumbent is not, in itself, grounds for objecting to a contract award to that firm. *Houston Films, Inc.*, B-184402, December 22, 1975, 75-2 CPD 404. There is nothing inherently objectionable in requiring offerors to explain their business approach to satisfying the solicitation's requirements merely because this will be less difficult for those who have performed similar, or even identical, work in the past.

Finally, the protester contends:

> The U.S. Air Force has no authority to request submission of security manuals for their approval. This task is performed by the Defense Contract Administration Services District in which the contractor is located.

The Air Force advises us that the manuals required by the solicitation do not create new requirements but merely explain how the offeror's personnel will satisfy existing requirements for the handling of, in the case of security manuals, classified information. The protester provides no legal basis for its objection and we know of no reason to conclude that the Air Force is barred from requiring offerors to indicate their intended method of complying with security requirements. Furthermore, ASPR § 1-406(c)(li) contemplates that contract administration offices will perform contract administration functions in con-

nection with classified contracts. Under the circumstances, we conclude that the Air Force acted reasonably in requiring the submission of operating manuals for the purposes of evaluating the offerors' management capabilities and of monitoring the performance of the awardees in accordance with their proposals.

Accordingly, the protest is denied.

[B-189307]

Contracts—Protests—After Bid Opening—Timeliness

While protest concerning failure to solicit bid from previous supplier was filed after bid opening, protest is considered timely because procurement was not properly categorized in Commerce Business Daily and it would not be fair to impose burden of discovering that fact within time constraints of General Accounting Office Bid Protest Procedures.

Bids—Invitation for Bids—Cancellation—Resolicitation—Not Required

In view of broad discretion permitted contracting officer in deciding whether to cancel invitation after opening, omission of bidder from bidder's mailing list does not require cancellation and resolicitation of procurement where there is no evidence of conscious or deliberate effort by procurement activity to preclude bidder from competing. Significant effort to obtain competition was made and award will be made at reasonable price.

Advertising—Commerce Business Daily—Procurement Not Properly Categorized—Bid Opening Date Omitted

Contention of protester concerning fact that synopsis of procurement in Commerce Business Daily (CBD) did not include bid opening date is academic because protester did not rely on CBD synopsis.

In the matter of Culligan Incorporated, Cincinnati, Ohio, September 29, 1977:

Culligan Incorporated, Cincinnati, Ohio (Culligan) protests the proposed award of demineralizers by the Naval Sea Systems Command (Navy) under Invitation for Bids (IFB) No. N00024-77-B-4285.

Only one bid was received in this procurement which the Navy considers reasonable and which it proposes to accept. The procurement was synopsized in the Commerce Business Daily (CBD) on March 15, 1977, under CBD category 41 for "Refrigeration and Air Conditioning Equipment." The protester claims that category 46 "Water-Purification and Sewage Treatment Equipment" is a more appropriate category than refrigeration and air conditioning equipment. Culligan states that this misclassification prevented the firm from bidding in that it was unaware of the existence of this procure-

ment. Culligan maintains that only two of the suppliers on the bidders list are small businesses and that the remaining four firms on the list are either large businesses or do not manufacture or supply demineralizer equipment. Culligan questions whether the eight other firms requesting solicitations represent the water treatment industry. Therefore Culligan contends that a representative cross section of the industry was not obtained, that the Navy failed to solicit a known supplier and that an up-to-date bidders list was not maintained. Culligan requests that the Navy cancel the IFB and readvertise the procurement.

Culligan was a previous supplier of this equipment. However, through an oversight the Navy did not include Culligan on the bidders list. Rather, Culligan, Inc. of Northbrook, Illinois was listed and solicited by the Navy. In this connection the Navy's report states that the Illinois firm is believed to be the franchiser of the protester. While the protester's attorney asserts that the protester is a "completely separate, independent and wholly distinct corporate entity," we note that the bidder's mailing list application submitted to Navy in August 1975 lists the Illinois firm as an affiliate of the applicant.

Initially the Navy argues that the protest is untimely, citing 4 C.F.R. § 20.2(b)(1) (1977 ed.) of our Bid Protest Procedures which provides that protests against "alleged improprieties in any type of solicitation which are apparent prior to bid opening * * * shall be filed prior to bid opening." The Navy states that notice of intent to procure in the CBD amounts to constructive notice to all parties who may be interested in the proposed procurement, even if the listing in CBD is incorrect. Apparently, the Navy believes that the misclassification is a defect of the solicitation which should have been raised prior to bid opening.

Publication of a proposed procurement in the CBD generally constitutes notice of such fact for the purpose of satisfying the timeliness requirements of section 20.2(a) of our Bid Protest Procedures, 4 C.F.R. § 20 *et seq.*, *Non-Linear Systems, Inc.*, B–182636, February 12, 1975, 75–1 CPD 91. However, the procurement was not properly categorized and we could not fairly impose the burden of discovering that fact within the time constraints of our protest procedures even though others may have discovered it.

The instant procurement was a 100 percent small business set-aside. The Navy admits that the procurement may have been mistakenly classified in CBD and that it inadvertently failed to include Culligan on the bidders list or send Culligan an IFB. Copies of the solicitation were sent to the six companies on the bidders list. Contrary to the contention of Culligan, the Navy believes that all of the firms listed either

manufacture or supply demineralizing equipment. In any event, the protester admits that at least two were potential suppliers. Furthermore, eight other potential suppliers requested copies of the solicitation. The Navy has advised us that three of these firms also have demineralizing equipment. The protester, however, contends that none is a regular industry supplier. Navy proposes to acept the only bid received rather than resolicit for additional bids because it believes the bid received is reasonably priced.

The authority vested in the contracting officer to decide whether or not to cancel an invitation and readvertise is extremely broad. *Scott Graphics, Inc., et al.*, 54 Comp. Gen. 973 (1975), 75–1 CPD 302. However, in exercising such authority the impact upon the integrity of the competitive bidding system must be considered and cancellation is permitted only for compelling reasons. Armed Services Procurement Regulation 2–404.1 (1976 ed.). Generally, the propriety of a particular procurement must be determined from the Government's point of view on the basis of whether adequate competition and a reasonable price were obtained, not upon whether every prospective bidder was afforded an opportunity to bid. 50 Comp. Gen. 565, 571 (1971). In the absence of probative evidence of a conscious or deliberate intent to impede the participation of a prospective bidder, the failure to receive a copy of the solicitation must be viewed as an inadvertence which generally does not provide a basis to cancel an invitation. 49 Comp. Gen. 707, 709 (1970).

The requirement that there be adequate competition normally is satisfied if competitive bids are received. However, we are aware of no legal requirement that no less than two bids must be received to permit a contract award. In our opinion there may be sufficient justification for award to the only bidder if there is a significant effort to obtain competition (*cf. DeWitt Transfer and Storage Co.*, B–182635, March 26, 1975, 75–1 CPD 180), a reasonably priced bid is received and there is no deliberate attempt to exclude a particular firm. Although the receipt of only one bid and the failure to solicit the protester in this case could justify a resolicitation, we cannot conclude that a contrary conclusion is an abuse of discretion.

Here, the contracting officer determined that the only bid submitted was reasonable as to price. We understand that the price is in line with the prior contract price, allowing for inflation. Moreover, the record shows that the contracting officer had reason to anticipate that competitive bids would be received as a result of the fourteen solicitation packages furnished. Although the CBD synopsis was not properly categorized, it nevertheless generated inquiries from potential suppliers of the equipment. The public advertising together with the

solicitation of all firms on the bidder's list was a significant effort to obtain competition and weighs heavily against any inference of an attempt to exclude the protester. Accordingly, we find no abuse of discretion in this case.

In its comments on the agency report, Culligan also argues that the synopsis appearing in the March 15, 1977 CBD was deficient because it failed to state the bid opening date. The synopsis indicated that the bid opening date was "not furnished." Inasmuch as Culligan did not rely on the CBD synopsis it was not prejudiced by this defect and its protest in this regard is academic.

Nevertheless, we believe that the misclassification of this procurement in CBD and the failure to provide all relevant information warrants attention. Therefore we recommend that the Navy improve its CBD listing procedures to insure that procurements are properly synopsized in the future.

For the reasons stated, the protest is denied.

[B–189721]

Leaves of Absence—Annual—Substitution for Restored Leave

Employee with restored annual leave requested that absence be charged to restored leave account. Absence was instead charged to annual leave and employee forfeited restored leave at end of 2 years. Agency erred in failing to charge restored leave account and should correct its records by substituting restored leave for annual leave.

In the matter of Robert D. McFarren—failure to charge restored leave account, September 29, 1977:

This action is in response to a request for an advance decision from Matilda T. Morton, Chief, Payroll Operations, Federal Energy Administration (FEA), regarding the restoration of forfeited leave to Robert D. McFarren, an FEA employee.

The record indicates that due to the exigencies of public business, Mr. McFarren had forfeited annual leave which was restored under the provisions of 5 U.S.C. 6304(d) (Supp. V, 1975). This leave was placed in a restored leave account and was to be used by the end of leave year 1976. See 5 C.F.R. 630.306 (1977). The record indicates further that prior to taking an extended vacation in July and August of 1976, Mr. McFarren asked his timekeeper to charge his restored leave account (146 hours) during his absence with the remainder of his vacation (30 hours) to be charged to annual leave. Mr. McFarren signed the SF 71 Application for Leave Forms under the assumption that his restored leave balance would be charged. When it appeared later that the entire 176 hours had been charged to annual leave, Mr. McFarren re-

quested a clarification and later an audit of his leave account. The audit was not completed until February 1977, at which time FEA determined that his restored leave account had not been charged and Mr. McFarren had forfeited 146 hours of restored leave. Mr. McFarren's request for restoration was denied administratively.

With the enactment of Public Law 93-181, 87 Stat. 706 (1973), 5 U.S.C. 5551, annual leave which is forfeited under certain conditions may be restored to the employee and placed in a separate leave account. The Civil Service Commission guidelines for the implementation of Public Law 93-181 are contained in Federal Personnel Manual Letter No. 630-22, January 11, 1974, and those guidelines provide that each agency shall establish recordkeeping and administrative procedures for restored leave accounts. The record before us indicates that, although FEA had established procedures for recording charges against restored leave accounts, Mr. McFarren's timekeeper was unaware of the procedures and asssumed that the proper charges would be made during Mr. McFarren's absence in July and August of 1976. We have found nothing which would indicate that Mr. McFarren knew or should have known of the error since there is no specific category on FEA's time and attendance reports or leave and earnings statements for restored leave. Accordingly, we conclude that the agency erred in failing to properly charge Mr. McFarren's restored leave account and that the agency should correct its records by substituting restored leave for annual leave for the absence in question. This corrective action would cause Mr. McFarren to forfeit excess annual leave in leave year 1976, but we note that he requested 114 hours of annual leave in November and December, 1976, and was denied such leave due to the exigencies of public business. Annual leave which would now be considered forfeited in light of this decision would appear to be subject to restoration under 5 U.S.C. 6304(d)(1)(B) (Supp. V, 1975).

[B-161180]

Regulations—Retroactive—Administrative Error Correction

Where a regulation was based upon clearly erroneous information and did not represent a judgment arrived at upon a consideration of the actual circumstances involved, an exception to the general rule prohibiting retroactive adjustment or application of a regulation may be allowed. Therefore, where station allowances are erroneously reduced due to a devaluation of the Spanish peseta for a station where housing costs are based on United States dollars, not pesetas, the allowances may be retroactively corrected.

In the matter of station housing allowances, September 30, 1977:

This action is in response to a letter dated January 24, 1977, from the Acting Assistant Secretary of the Air Force (Manpower and

Reserve Affairs), requesting our opinion as to whether the rates of station housing allowances payable to members assigned to Rota, Spain, may be amended retroactively to correct an administrative error made in computing those rates. The request was forwarded to this Office by letter dated January 28, 1977, from the Per Diem, Travel and Transportation Allowance Committee (Control No. 77-3).

It is asserted in the submission that on February 10, 1976, the Chief of the Joint United States Military Group, Madrid, Spain, who is charged with the responsibility of monitoring all housing allowance reports for members of the uniformed services in Spain, advised the Per Diem, Travel and Transportation Allowance Committee (PDTATAC) that the Spanish peseta had been devalued by 10.5 percent on February 9, 1976, and recommended a corresponding decrease in the station housing allowance for all locations in Spain to reflect the improved position of the United States dollar. This report was made pursuant to Appendix D, paragraph 5e(2), Volume 1, Joint Travel Regulations (1 JTR). Acting upon that report the PDTATAC reduced the existing allowances for all locations in Spain effective February 27, 1976 (change 279, 1 JTR). The delay in the reduction was due to administrative processing and approval by the Secretaries concerned. Subsequent to the reduction, it was reported to the PDTATAC that the change in the peseta exchange rate had no effect on members residing in rental guarantee housing at Rota, Spain, since these members paid their rent and utilities, except for electricity, in United States dollars. This fact had not been considered by the PDTATAC staff in computing and recommending reduced station allowances at Rota, Spain. Accordingly, effective March 17, 1976 (change 280, 1 JTR), the PDTATAC reestablished the allowances previously applicable to members in "Rental Guarantee Housing" at Rota. It is asserted that the allowances should not have been reduced for the 19 days involved and that the members concerned should not be required to bear the financial loss caused by administrative error. Doubt has been expressed by the PDTATAC as to whether the reduction of February 27, 1976, could be set aside or the restoration order of March 17, 1976, applied retroactively in view of the decision of this Office in 32 Comp. Gen 315 (1953). In view of the doubt the Acting Assistant Secretary asks the following:

> An expression of your views as to whether a retroactive adjustment in this case is permissible is requested. If a retroactive adjustment is not permissible may the reduction order of 27 February 1976 and the restoration order of 17 March 1976 for Rental Guarantee Housing at Rota, Spain be canceled, thus allowing the original allowance of 16 December 1975 to stand unchanged.

This Office has long and consistently adhered to the rule that when regulations are properly issued, rights thereunder become fixed and,

although such regulations may be amended prospectively to increase or decrease rights given thereby, they may not be amended retroactively except to correct obvious errors. 32 Comp. Gen. 315 (1953); 32 *id.* 527 (1953); 33 *id.* 174 (1954); 40 *id.* 242 (1960); and 47 *id.* 127 (1967). *Cf.* 33 Comp. Gen. 505 (1954). *Cf. Friedlander* v. *United States*, 120 Ct. Cl. 4 (1951). Also, where it is shown that a determination made was based on erroneous information or observation and thus did not represent a judgment arrived at upon a consideration of the actual circumstances involved, a retroactive adjustment or application has been allowed. See B-154781, August 12, 1964, and B-157955, December 10, 1965.

Station housing allowances are authorized under 37 U.S.C. 405 (1970) for members on duty outside of the United States or in Hawaii or Alaska. These allowances were designed to defray the high cost of living experienced by certain members of the uniformed services while on permanent duty in high cost areas overseas. Prior to October 22, 1970, the statute made no specific provision for the method of computing the station housing allowances. However, on that date 37 U.S.C. 405 was amended adding the following language concerning computation of station allowances:

> A station housing allowance may be prescribed under this section without regard to costs other than housing costs and may consist of the difference between basic allowance for quarters and applicable housing cost. Housing cost and allowance may be disregarded in prescribing a station cost of living allowance under this section. Public Law 91-486, October 22, 1970, 84 Stat. 1085.

In 32 Comp. Gen. 315, *supra*, to which the submission refers, there was considered a somewhat similar situation in which station allowances were established at higher rates for Manila, than for the rest of the Republic of the Philippines, based on cost-of-living data erroneously assumed to relate only to Manila. Subsequently, it was learned that such data also related to adjoining suburbs and that the living costs in both areas were virtually identical. Therefore, it was proposed to retroactively designate the higher Manila rates as applicable to the suburbs also.

In rejecting that proposal, we stated that the regulations issued were complete and unambiguous on their face when issued and, while the committee charged with their preparation "may not have made as comprehensive an analysis of the cost of living data * * * as might have been desirable" their action did not appear to result in obvious error which could be retroactively corrected. That decision was based on the broadly worded statute as it existed prior to the 1970 amendment.

In the present case, the reduction of the housing allowance for members in Rota, Spain, in change 279, 1 JTR, was based upon a devaluation of the Spanish peseta upon the erroneous assumption that the rent

for the "Rental Guarantee Housing" in Rota was paid in Spanish pesetas where in fact the rent was a United States dollar obligation unaffected by changes in the currency exchange market of the Spanish peseta. As is indicated above, the current more specific language of 37 U.S.C. 405 provides that the housing allowance may consist of the difference between basic allowance for quarters and "applicable housing costs." Since the applicable costs for "Rental Guarantee Housing" at Rota are calculated in dollars, the reduction of the station housing allowance based on a devaluation of the peseta was an obvious administrative error which would result in a substantial loss to the members involved, contrary to the purpose of the law. Therefore, the error in this case, unlike 32 Comp. Gen. 315, is not merely one involving an inadequate analysis of cost data. Instead, it involves a substantial administrative error in the basic computation upon which the allowance is based.

Accordingly, it is our view that the adverse effect arising through oversight or misinformation in the promulgation of change 279, 1 JTR, reasonably may be viewed as obvious error which may be administratively corrected retroactively.

In view of the foregoing, this Office would interpose no objection to a retroactive adjustment or an appropriate cancellation of the erroneous rate changes as requested in the submission, whichever is more administratively feasible. The questions are answered accordingly.

[B-187053]

Contracts—Awards—Small Business Concerns—Size—Eligibility Determination Date

Contract for guard services awarded to self-certified small business firm under small business set-aside was justified where award was made on basis of Regional Office Small Business Administration (SBA) determination that contractor was small and before Size Appeals Board determined that contract was large. However, on basis of SBA report indicating that SBA District office erroneously failed to consider awardee's size at time of bid opening, SBA is instructed to take action to insure consistent application of size standards in future.

In the matter of Sentinel Protective Services, Inc., September 30, 1977:

Sentinel Protective Services, Inc. (Sentinel) protests the award of a contract for guard services at Fort Rucker, Alabama to Transco Security, Inc. (Transco) based on the alleged bad faith small business size certification of Transco.

Invitation for Bids No. DABT 01-76-B-0085, was issued by the Department of the Army, Fort Rucker, Alabama, as a small business set-aside. A bid dated April 19, 1976 was submitted by "Transco Security, 7710 Reading Road, Cincinnati, Ohio 45237." In its bid, Transco

certified that it was a small business concern, was incorporated in Illinois, and was not owned or controlled by a parent company. The bid was signed by "Raymond Spivey, Vice President" and contained a certification by the secretary/treasurer of the corporation in section B17 stating that:

> * * * Mr. Raymond Spivey, who signed this contract on behalf of the Contractor, was then Vice President of said corporation; that said contract was duly signed for and in behalf of said corporation by authority of its governing body, and is within the scope of its corporate powers.

To this certification was affixed a corporate seal stating "Transcontinental, Inc., Illinois."

At the April 26, 1976 bid opening, Transco was the sixth lowest bidder. On July 27, 1976, the incumbent contractor and seventh lowest bidder, Sentinel, was advised that Transco was being considered for award. By letter of July 28, 1976, Sentinel protested the proposed award to the contracting officer, contending that Transco was an affiliate of Transcontinental Corporation, Chicago, Illinois and was not a small business concern. The contracting officer subsequently referred the matter to the District Office of the Small Business Administration (SBA) in Columbus, Ohio, which requested Transco to submit a completed SBA Form 355. By letter of August 19, 1976, the District Director of the Columbus, Ohio, office notified the contracting officer that, based on information submitted by Transco Security, Inc., that firm was determined to be a new corporation whose annual receipts did not exceed the solicitation's limitation for small business concerns.

On August 24, 1976, Sentinel appealed the District Director's size determination to the SBA Size Appeals Board. On September 3, 1976, while this matter was before the Size Appeals Board for consideration, the contracting officer notified Sentinel that award would be made under the instant solicitation because a prompt award was deemed to be advantageous to the Government under ASPR § 2-407.8(b)(3)(iii). The contract was awarded for a nine month period running from October 1, 1976 to June 30, 1977.

On December 27, 1976, the SBA Size Appeals Board released its "Findings and Decision" holding that Transco was other than a small business. In pertinent part, that decision stated:

> Transco is 90% owned by Raymond Spivey and 10% by Fred Gaviglia. On the Form 355, Mr. Gaviglia is listed as President and Director. Mr. Spivey is listed only as a Director; however, Mr. Spivey signed the bid sheet for this procurement as Vice President of Transco. The Attorney for Transco stated that Mr. Spivey is actually the Secretary-Treasurer of Transco. Transco's receipts since July 28, 1976, the date of incorporation, have been $21,533.
>
> Sentinel alleged that Transco is affiliated with the following concern:
>
> Transcontinental Cleaning Co., Inc., a/k/a Transcontinental, Inc., 21 N. Skokee Highway, Lakebluff, Illinois.

Raymond Spivey worked for this concern 12 years and allegedly ceased association with it in May 1976.

The Officers of Transcontinental, Inc. are:

William P. Spivey- -President
Byron D. Santachi—Vice President
Mary Ann Kaiser - Secretary/Treasurer

Transcontinental Cleaning Co. (Transcontinental, Inc.), was found to be other than small by SBA Chicago in August 1975, October 16, 1975, and October 21, 1975. A letter dated August 20, 1976, from Raymond Spivey for Transco stated that Transco is a division of Transcontinental, Inc.

* * * * * * *

The Board concludes that Transco and Transcontinental are controlled by the same third parties, Raymond and William Spivey, who are brothers. Therefore, the concerns are affiliated due to the "identity of interest" of Raymond and William Spivey in Section 121.3(a) (ii) of the SBA Regulations. * * *.

Transco filed a petition for reconsideration of the Board's decision and on March 11, 1977 the Board sustained its initial decision.

Sentinel has recognized that the possibility of remedial action in the instant case was substantially reduced by the short contract term remaining after the SBA Size Appeals Board's March 11, 1977 ruling, affirming its earlier decision that Transco was not a small business concern. Nevertheless, Sentinel believes that evidence of bad faith on the part of Transco is manifest here and that, unless our Office addresses the question of what constitutes bad faith, "there will be no end to such actions that can be taken by contractor's concerning their size status in the future."

In support of its contention that Transco's self-certification as a small business was made in bad faith, Sentinel points out that Transco Security, Inc. was incorporated in Delaware on July 28, 1976, three months after Transco Security submitted a bid certifying itself to be an existing Illinois corporation. Sentinel contends that the referenced Illinois corporation was Transcontinental, Inc. whose corporate seal and identification number were used in the Transco bid and whose secretary/treasurer signed the corporate certificate in the Transco bid. Furthermore, although in its bid Transco certified that is was not owned or controlled by a parent company, the September 3, 1976 letter accepting award on behalf of Transco (signed by the company's president) states:

Transco Security Service, 7710 Reading Road, Cincinnati, Ohio 45237, Division of Transcontinental, Inc.

Transco's post-bid opening efforts to qualify as a small business and its failure to state in its bid its affiliation with Transcontinental, Inc., are clearly pertinent to the question concerning whether Transco submitted its self-certification in bad faith. However, performance having been completed under the contract, we consider the more significant problem to be the prevention of a recurrence of a situation in which

award is made on the basis of an SBA District office decision which is subsequently reversed by the SBA Size Appeals Board at a time when remedial action is either impracticable or impossible. Consequently, on June 29, 1977, we wrote to the SBA stating, in part:

> The initial SBA size determination indicates that Transco's affiliation with a large business concern was not apparent to the District office at the time of its determination. However, a Form 355 [Application for Small Business Size Determination] was required to be submitted by Transco and this document should have revealed the affiliations upon which the Size Appeals Board's decision was based. We would like to know whether the Appeals Board had information available to it which was not available to the District office and, if so, the nature of the information and why it was not available to the District office.

In its response, the SBA stated, in part:

> The difficulty in our Columbus District Office decision probably arose out of the distinction between size status at the time of bid opening and size status at the time of award. Although the general position of the Size Appeals Board is that the concern in question must be small at both of the relevant times, a field office might fail to consider appropriately size status at time of bid opening. In this case, at the time of bid opening, the bid document had the corporate seal of TI, the President indicated that the corporation was not organized at the time of bid, and the file shows that the company was organized shortly after it was notified it would receive award. Also, the President of Transco indicated that Transco was receiving financial backing from TI in order to submit the bid.
>
> On the other hand, after Transco was organized the bank providing the financing indicated that Transco was a separate corporation with no control by TI. Apparently the Columbus District Office considered the size status of Transco only after it was organized in arriving at its conclusion that Transco was small.

In view of the fact that, under Armed Services Procurment Regulation (ASPR) § 1-703(d)(3), award may be made on the basis of the small business size status determination of the SBA District office, it is essential to the integrity of the small business size self-certification procedure that SBA insure consistent application of the existing standards based on a thorough review of all the relevant information available. Consequently, we are recommending to the SBA that it take appropriate action, including amendment of its regulations, to insure that all SBA District offices are aware that, to be eligible for award as a small business, the prospective contractor must be small both at the time of bid opening and at the time of award, based on the standard applicable at the time of award. *Cf.* 42 Comp. Gen. 219 (1962).

Finally, Sentinel has objected to the Army's decision to make award prior to final resolution of the question of Transco's size. In this regard, the Army contends that Sentinel "contributed in large measure" to its difficulties in the matter. Specifically, the Army states that the contracting officer in August 1976 did consider delaying the award pending a determination of Sentinel's appeal by the Size Appeals Board. Although Sentinel's contract had expired on June 30, 1976, the services in question were still being secured through Sentinel on a monthly basis. According to the Army, Sentinel was agreeable to these exten-

sions only at a monthly price of $100,911.00 compared to its monthly price under the previous contract of $94,025.00 and its bid price under the instant solicitation of $93,446.67.

Thus, faced with Sentinel's high interim price, a bid price of $90,417.00 per month from Transco, a decision from the SBA District Office that Transco was small, and the contracting officer's inability to obtain assurance from the Size Appeals Board of an early decision on the Sentinel appeal, she concluded that a prompt award to Transco for the remaining 9-months of the contract period was in the Government's interest. The Army states that "If Sentinel had not been overreaching in the price demands it placed on the Army during the 3-month interim period, it apparently would have been the successful contractor under the solicitation. There would not have been an award to Transco prior to resolution of the outstanding protests."

For the reasons set forth by the Army, we believe that the contracting officer was justified in making award to Transco.

[B–189037]

Pay—Retired—Survivor Benefit Plan—Spouse—Eligible Beneficiary

The meaning of the phrase "eligible spouse beneficiary" as used in 10 U.S.C. 1452(a), as amended by section 1(5)(A)(ii) of Public Law 94-496, is to be defined in terms of the definition of "widow" or "widower" contained in 10 U.S.C. 1447, for the purpose of entitlement to 10 U.S.C. 1450(a) benefits; that is, that in order to receive a survivor annuity as an eligible widow or widower beneficiary on the death of the member in retirement, they must be an eligible spouse beneficiary immediately before that death.

Pay—Retired—Survivor Benefit Plan—Remarriage of Member—Annuity Deductions—Resumption After Post-Election Marriage

Since section 1(5)(A)(ii) of Public Law 94-496 authorizes that reduction in retired pay for Survivor Benefit Plan (SBP) spouse coverage purposes is no longer required for any month in which there is no eligible spouse beneficiary, resumption of such reduction in retired pay for spouse coverage in the case of post-election remarriages would not occur until the spouse on remarriage qualifies as an eligible spouse beneficiary by the happening of the earlier of the two requirements stipulated in 10 U.S.C. 1447(3)(A) and (B) and (4)(A) and (B).

Pay—Retired—Survivor Benefit Plan—Retired Prior to Effective Date of SBP—Divorce and Remarriage—Children's Annuity Eligibility

Where a pre-SBP effective date retiree, who had a spouse and dependent children on or before March 21, 1974, elects to participate in the Plan under subsection 3(b) of Public Law 92-425, for his spouse but does not choose coverage for his dependent children, upon the close of the 18-month period authorized for such election, the member is thereafter precluded from electing dependent children coverage in the absence of additional legislation to reopen the Plan to him.

In the matter of Master Sergeant Paul J. Metzler, USMC, Retired, September 30, 1977:

This action is in response to a letter dated January 11, 1977, from Lieutenant Colonel W. S. Moriarty, USMC, Centralized Pay Division, Marine Corps Finance Center, requesting an advance decision concerning reductions in the retired pay of Master Sergeant Paul J. Metzler, USMC, 437–16–3949, to provide annuity coverage for his new spouse and newly acquired dependent stepchildren under the Survivor Benefit Plan (SBP), 10 U.S.C. 1447–1455, as amended by Public Law 94–496, approved October 14, 1976, 90 Stat. 2375. The request was forwarded here from Headquarters United States Marine Corps by letter dated May 4, 1977, and has been assigned Control No. DO–MC–1265, by the Department of Defense Military Pay and Allowance Committee.

The member, who transferred to the Fleet Marine Corps Reserve on January 31, 1962, was retired on August 1, 1972, at which time he had a wife and dependent children. On February 6, 1973, the member elected to participate in the SBP under the authority of section 3(b) of the act of September 21, 1972, Public Law 92–425, 86 Stat. 706, 711 (10 U.S. Code 1448 nt.), choosing coverage for his wife, but not for his dependent children. Appropriate reduction of his retired pay for such coverage was begun effective March 1, 1973. On October 18, 1976, the member received a divorce from that wife and married his present wife the following day. On December 6, 1976, the member notified the Marine Corps of his desire to participate in the SBP on behalf of his present wife and his stepchildren—her two dependent children by a former marriage.

Two questions are presented for resolution in this case. The first question concerns the proper date which is to be used for the purpose of resuming reduction of retired pay in view of the recent amendments to SBP by Public Law 94–496, *supra*. The second question involves whether the member, having initially elected spouse only coverage, may amend that election to provide coverage for his newly acquired dependent children.

With regard to the first question, the submission states that neither Public Law 94–496, nor previous legislation concerning the SBP, specifically defines the term "eligible spouse beneficiary" as used in 10 U.S.C. 1452(a), as amended. The submission goes on to state, however, that 10 U.S.C. 1447(3) as amended by section 1 of Public Law 94–496, defines "widow" to include a surviving spouse, who, if not married to the military member at the time he became eligible for retired or retainer pay, "was married to him for at least one year immediately before his death." Inasmuch as the amendment provided by section 1(5)(A)(ii) of Public Law 94–496, *supra*, makes the reduction in retired or

retainer pay not applicable "during any month in which there is no eligible spouse beneficiary," it is suggested in the submission that resumption of reduction in retired pay in this case may depend upon whether his present wife qualifies as an eligible spouse beneficiary prior to the passage of the 1-year period.

Prior to the enactment of Public Law 94–496, *supra*, 10 U.S.C. 1452 (a) provided for reduction of a member's retired pay for spouse coverage, but did not provide for termination of such reduction in case the member's spouse predeceased him or the marraige was otherwise terminated. In other words, an SBP participating member, if he had a spouse, not only was required to elect such coverage, but was faced with the prospect of having to "pay forever" for that coverage.

Section 1(5)(A)(ii) of Public Law 94–496, eliminated that "pay forever" provision by adding the following new sentence to the end of 10 U.S.C 1452(a):

> The reduction in retired pay prescribed by the first sentence of this subsection shall not be applicable during any month in which there is no eligible spouse beneficiary.

In 10 U.S.C. 1450, entitled "Payment of annuity: beneficiaries," clause (1) of subsection (a) provides in part that a monthly annuity shall be paid to "the eligible widow or widower." Under 10 U.S.C. 1447, as amended, as it relates to the present case, "widow" is defined in subsection (3) to mean:

> * * * the surviving wife of a person who, if not married to the person at the time he became eligible for retired or retainer pay—
>
> (A) was married to him for at least one year immediately before his death; or
>
> (B) is mother of issue by that marriage.

Basically, the spouse of a member who elects to participate in SBP and who was married at retirement (or who was retired prior to the SBP effective date and was married before March 21, 1974), would immediately qualify as an eligible widow or widower under 10 U.S.C. 1450(a) as those terms are defined in 10 U.S.C. 1447, in the event of the retired member's death. We have held that the restrictive language contained in 10 U.S.C. 1447 is only applicable to surviving spouses of post-SBP, post-retirement marriages. See 53 Comp. Gen. 470 (1974); *id.* 818 (1974); and 54 Comp. Gen. 266 (1974).

It is clearly evident from the foregoing that spouses, by virtue of that status alone, are not considered to be on equal footing for SBP purposes. The legislative history shows that Congress sought to prevent spouse surviviors, who acquire such status only by virtue of a "death bed" marriage, from automatically receiving the annuity upon the death of the member. This category of spouses is required by Congress to satisfy either of the two conditions stipulated in 10 U.S.C.

1447(3)(A) and (B) or (4)(A) and (B) in order to be eligible to receive a survivor annuity under 10 U.S.C. 1450(a).

It is our view, therefore, that in order to become an eligible widow or widower beneficiary upon the death of an SBP participant then at least immediately before his death, such widow or widower must have qualified as an eligible spouse, having satisfied the requirements of 10 U.S.C. 1447, that is, if not married to the member at the time of initial election into the Plan, he or she must have been married to the member for at least 1 year immediately before the member's death or be the parent of issue born of that marriage.

It follows that since the member's new spouse on remarriage was not married to the member on or before March 21, 1974, she could not become his eligible spouse beneficiary unless and until she had satisfied either of the other two requirements stipulated in 10 U.S.C. 1447. Therefore, under the amendment to 10 U.S.C. 1452(a), retired pay reductions for spouse coverage in this case would not resume until the earlier of those two conditions has been met by the spouse after the remarriage. The first question is answered accordingly.

The second question asked is whether the member, who had a spouse and dependent children when he originally elected into the SBP, but elected spouse coverage only, may amend his coverage on remarriage to include the dependent children of his new spouse (his stepchildren).

Under the provisions of subsection 3(b) of Public Law 92–425, a pre-SBP effective date retiree who had a spouse or dependent child or children on the effective date of the Plan (September 21, 1972), was given the option of electing to participate in the Plan and had 18 months thereafter to elect. For those pre-SBP effective date retirees who had no spouse or dependent child or children, the fourth sentence of subsection 3(b) provides:

> A person who is not married or who does not have a dependent child on the first anniversary of the effective date of this Act, but who later marries or acquires a dependent child may elect to participate in the Plan under the fourth sentence of section 1448(a) of that title.

The fourth sentence of 10 U.S.C. 1448(a) provides that:

> * * * a person who is not married when he becomes entitled to retired or retainer pay but who later marries, or acquires a dependent child, may elect to participate in the Plan but his election must be written, signed by him, and received by the Secretary concerned within one year after he marries, or acquires that dependent child * * *.

Thus, it is to be observed that the basic law governing SBP participation established a clear distinction between those pre-SBP effective date retired members who had spouses or dependent children and those who did not, specifically reserving to the latter category eligibility to initially participate in the Plan after the subsection 3(b) participation period closed.

In 53 Comp. Gen. 393 (1973), as modified by 55 Comp. Gen. 15[illegible] (1975), it was held that once a pre-SBP effective rate retiree had positively elected into the SBP, such election was irrevocable, but that a positive statement of nonparticipation could be revoked and that such a member would have the remainder of the 18-month option period to elect to receive the coverage or coverages authorized but previously declined.

In B–187179, dated November 30, 1976, we considered the effect of a pre-SBP effective date retiree's failure to elect into the Plan within the prescribed time limit during which time he could have elected, where he thereafter changed his mind and desired to participate. We stated in that decision that since the law assimilated pre-SBP effective date retirees with a spouse or dependent children into the Plan on the same general basis as post-SBP effective date retirees, the rules regarding basic entry into the Plan are to be consistently applied. We concluded therein that a member, who could have participated in the Plan and failed to timely elect coverage otherwise available, is precluded from participating thereafter in the absence of additional legislation to reopen the Plan to him.

In the present case, the member elected into the Plan during the 18-month period permitted him. In spite of the fact that he had a spouse and dependent children at the time, he chose to reject dependent children coverage. The clear language of section 3(b) quoted above is clearly not applicable to him because he was married and did have a dependent child for purposes of election of SBP benefits. Therefore, since the member had the opportunity to elect for dependent children during the 18-month period authorized by subsection 3(b), and failed to do so before March 21, 1974, when his election period for the Plan closed, he is precluded from thereafter amending his coverage to include dependent children. Accordingly, the second question is answered in the negative.

TABLE OF DECISION NUMBERS

	Page
A-13067, Oct. 20, 1976	28
B-73005, Jan. 28, 1977	310
B-114806, Feb. 18, 1977	375
B-114839, Aug. 12, 1977	900
B-114841, Feb. 9, 1977	351
B-114868, Dec. 6, 1976	123
B-127474, Mar. 2, Apr. 19, 1977	393, 551
B-136318, Jan. 21, 1977	275
B-137762, B-143673, May 16, 1977	615
B-138942, May 19, 1977	629
B-138942(1), Jan. 3, 1977	209
B-138942(2), Jan. 3, 1977	216
B-138942(3), Jan. 3, 1977	219
B-139703, Dec. 3, 1976	111
B-149685, Oct. 19, 1976; Feb. 3, 1977	23, 323
B-151087, Oct. 20, 1976	31
B-153331, Sept. 26, 1977	983
B-153751, Oct. 14, 1976	18
B-158810, Oct. 22, 1976	36
B-159633, May 4, 1977	572
B-159715, May 2, 1977	567
B-161180, Sept. 30, 1977	1015
B-162471, Aug. 2, 1977	855
B-163084, June 27, 1977	754
B-164031(2), Aug. 31, 1977	928
B-164031(4), Mar. 11, 1977	398
B-164105, Aug. 10, 1977	889
B-168661, Dec. 15, 1976	180
B-170686, July 27, 1977	817
B-177617, Nov. 16, 1976	90
B-180010.01, Nov. 5, 1976	57
B-180010.03, Oct. 7, 1976	8
B-180010.09, Dec. 9, 1976	131
B-180084, B-183174, Aug. 1, 1977	847
B-180257, Jan. 6, 1977	225
B-180391, Oct. 29, 1976	46
B-180617, Feb. 9, 1977	353
B-180769, Jan. 6, 1977	230
B-182105, Sept. 21, 1977	963
B-182337, Nov. 9, 1976	78
B-183012, Dec. 9, 1976; June 29, 1977	137, 761
B-183086, Mar. 23, 1977	427
B-183784, Jan. 24, 1977	279
B-183903, June 22, 1977	732
B-184194, Sept. 19, 1977	958
B-184782, Mar. 18, 1977	414
B-184785, Nov. 19, 1976	102
B-184849, Aug. 11, 1977	898
B-184947, Aug. 9, 1977	870
B-185064, Feb. 10, 1977	357
B-185199, Apr. 1, 1977	459
B-185302, Jan. 26, 1977	296
B-185544, Mar. 18, 1977	419
B-185655, Feb. 7, 1977	340
B-185827, Nov. 1, 1976	53
B-185948, May 13, 1977	604
B-185955, B-186168, Dec. 15, 1976	183
B-185976, Apr. 27, 1977	561
B-186001, Dec. 22, 1976	188
B-186008, Dec. 22, 1976	199
B-186064, Mar. 23, 1977	432
B-186129, Nov. 17, 1976	96
B-186218, Nov. 10, 1976	85
B-186233, Dec. 3, 1976; May 24, 1977	115, 649
B-186248, Dec. 30, 1976	201
B-186313, Dec. 9, 1976; Apr. 13, 1977	142, 505
B-186315, Nov. 8, 1976	62
B-186334, Nov. 17, 1976	98
B-186348, July 18, 1977	791
B-186359, Jan. 12, 1977	239
B-186373, May 26, 1977	655
B-186386, Dec. 9, 1976	160
B-186504, Apr. 6, 1977	482
B-186545, B-187413, Apr. 13, 1977	513
B-186547, Dec. 14, 1976	172
B-186550, Feb. 17, 1977	369
B-186598, May 26, 1977	661
B-186655, Jan. 18, 1977	271
B-186657, Nov. 30, 1976	107
B-186737, Feb. 4, 1977	334
B-186761, Apr. 5, 1977	481
B-186770, Mar. 18, 1977	425
B-186771, Nov. 3, 1976	55
B-186826, Oct. 28, 1976	40
B-186830, Nov. 5, 1976	60
B-186847, Oct. 6, 1976	1
B-186848, Oct. 6, 1976	4
B-186858, Jan. 14, 1977; June 13, 1977	245, 694
B-186867, Oct. 29, 1976	50
B-186895, Apr. 15, 1977	531
B-186932, July 29, 1977	829
B-186940, Dec. 9, 1976	167
B-186977, May 18, 1977	624
B-186984, Mar. 1, 1977	381
B-186990, Jan. 26, 1977	298
B-186998, Nov. 9, 1976	81
B-187003, Jan. 24, 1977	289
B-187008, Oct. 28, 1976	43
B-187010, May 13, 1977	606
B-187051, Apr. 15, 1977	537
B-187053, Sept. 30, 1977	1018
B-187060, Oct. 15, 1976	20
B-187076, Feb. 8, 1977	345
B-187079, Oct. 7, 1976	15

	Page
B-187082, Dec. 14, 1976	178
B-187104, Apr. 1, 1977	470
B-187116, Jan. 31, 1977	312
B-187128, Nov. 16, 1976	93
B-187129, Jan. 4, 1977	223
B-187177, Mar. 1, 1977	388
B-187186, Nov. 23, 1976	104
B-187193, Mar. 16, 1977	411
B-187205, B-187999, May, 4, 1977	575
B-187229, Aug. 1, 1977	850
B-187231, Feb. 8, 1977	346
B-187250, B-187254, B-187256, B-187257, Apr. 25, 1977	556
B-187252, May 10, 1977	596
B-187278, Mar. 28, 1977	437
B-187288, Nov. 9, 1976	83
B-187325 May 20, 1977	635
B-187367, Jan. 26, 1977	300
B-187375, June 24, 1977	745
B-187395, June 8, 1977	675
B-187396, July 28, 1977	824
B-187435, Mar. 15, 1977; June 2, 1977	402, 663
B-187489, Mar. 29, 1977	448
B-187509, July 11, 1977	786
B-187547, Jan. 25, 1977	291
B-187552, July 21, 1977	811
B-187560, Aug. 31, 1977	934
B-187571, Feb. 23, 1977	378
B-187587, June 20, 1977	725
B-187604, Apr. 8, 1977	497
B-187617, Apr. 7, 1977	487
B-187624, Mar. 24, 1977	434
B-187627, Jan. 14, 1977	264
B-187645, June 15, 1977	712
B-187683, June 23, 1977	740
B-187687, June 14, 1977	709
B-187720, Aug. 9, 1977	875
B-187723, Sept. 22, 1977	976
B-187742, Feb. 3, 1977	328
B-187756, May 5, 1977	580
B-187802, July 27, 1977	820
B-187805, Mar. 29., 1977	454
B-187808, Jan. 26, 1977	307
B-187811, July 29, 1977	835
B-187814, Feb. 14, 1977	364
B-187824, Dec. 15, 1976	187
B-187833, July 6, 1977	767
B-187865, May 5, 1977	587
B-187872, June 3, 1977	668
B-187876, Apr. 14, 1977	525
B-187912, Aug. 17, 1977	912
B-187934, July 15, 1977	788
B-187968, Sept. 28, 1977	1095
B-187978, Jan. 31, 1977	321
B-187982, Apr. 4, 1977	473
B-187997, Apr. 11, 1977	499
B-188035, Apr. 7. 1977	494
B-188043, Mar. 7, 1977	397
B-188047, May 13, 1977	608
B-188052, Apr. 14, 1977	529
B-188094, Feb. 11, 1977	360
B-188275, June 9, 1977	689
B-188305, July 7, 1977	768
B-188363, May 23, 1977	645
B-188369, Sept. 27, 1977	989
B-188385, Aug. 9, 1977	878
B-188399, Aug, 4, 1977	860
B-188444, June 17, 1977	721
B-188455, June 28, 1977	757
B-188458, July 29, 1977	841
B-188461, July 19, 1977	805
B-188481, Aug. 10, 1977	894
B-188516, B-188517, B-188656, Aug. 26, 1977	924
B-188533, June 24, 1977	750
B-188542, Aug. 16, 1977	905
B-188611, June 6, 1977	671
B-188654, May 6, 1977	592
B-188665, June 22, 1977	737
B-188794, July 19, 1977	807
B-188916, Aug. 9, 1977	882
B-188959, June 20, 1977	730
B-188971, Sept. 27, 1977	1003
B-188983, Sept. 28, 1977	1008
B-189014, Sept. 21, 1977	971
B-189037, Sept. 30, 1977	1022
B-189113, Aug. 2, 1977	858
B-189145, Sept. 9, 1977	953
B-189211, Sept. 8, 1977	943
B-189307, Sept. 29, 1977	1011
B-189439, Aug. 8, 1977	865
B-189487, Aug. 5, 1977	862
B-189721, Sept. 29, 1977	1014
B-189806, Sept. 23, 1977	982
B-189865, Sept. 22, 1977	980

LIST OF CLAIMANTS, ETC.

	Page
ABS Duplicators, Inc	497
Abu-Ghazaleh, Faye	199
Adams, Bruce	425
Agriculture, Dept. of	78, 104, 223, 500, 606, 863
Air Force, Acting Asst. Secretary of	1015
Air Force, Dept. of	55, 624, 767, 805, 855
AiResearch Manufacturing Co. of Arizona	990
American Federation of Government Employees	963
American Management Systems, Inc	8
Amram Nowak Associates, Inc	389
Anderson, Kirk	448
Applied Materials, Inc	863
A.R.F. Products, Inc	93
Army, Acting Asst. Secretary of	201
Army, Asst. Secretary of	181
Army, Dept. of	588
Artech Corp	437, 646
Ashe, C. G., Enterprises	963
Attorney General, The	397
Bailey, Robert A	415
Bancroft Cap Company, Inc	593
Base Information Systems, Inc	297
Batchelor's Building Maintenance Service, Inc	830
Bayshore Systems Corp	123
BBR Prestressed Tanks, Inc	83
Bemidji State University	576
Bencor Corp. of America	382
Blodgett Keypunching Co	972
Borg-Warner Health Products, Inc	18
Boston Pneumatics, Inc	812
Broken Lance Enterprises, Inc	690
Brown Boveri Corp	1
Brown, John H	597
Bunker Ramo Corp	57
Burks, Jesse A	712
Burroughs Corp	604
Caldwell, David L	144
Cascade Reforestation, Inc	427
Chandler Trailer Convoy, Inc	500
Checchi and Co	358
Cheyenne River Sioux Tribe	474
Civil Service Commission, Chairman	655
Civil Service Commission, General Counsel	394
Clark, Donald E	427
Coast Guard, United States	750
Collins, John F	807
Commerce Dept., Asst. Secretary for Administration	661
Commerce, Dept. of	275
Commerce, Dept. of, National Oceanic and Atmospheric Admin	661
Computer Network Corp	870
Consolidated Diesel Electric Co	246, 695
Consolidated Elevator Company, Inc	340
Coughlin, The Honorable Lawrence	435
Crisp, Robert C	889
Culligan, Inc., Cincinnati, Ohio	855
Curtis and Davis Architects	1011
Dana, Michael	289
Davis Construction Co	471
Day, Richard S	179
Defense, Acting Asst. Secretary of	60
Defense, Asst. Secretary of	850
Defense, Dept. of	483, 741, 895, 984
Defense Supply Agency	899
Defense Supply Agency, Office of Comptroller	297, 308
Delcher Intercontinental Moving Service, Inc	199
DeLille, Lamoyne J	820
Development Associates, Inc	824
Dikewood Services Co	581
Domar Industries	188
Dominion Road Machinery Corp	924
Drug Enforcement Administration	334
Educational Learning Systems, Inc	53
Educational Projects, Inc	963
Elder, William J	381
Elec-Trol, Inc	85
Eluhow, Raymond	730
Engineering Research Inc	345
Environmental Protection Agency	364
Farm Credit Administration, General Counsel of	593
Federal Aviation Administration	375
Federal Contracting Corp	859, 865
Federal Energy Administration	738
Federal Insurance Administrator	1014
Federal Labor Relations Council	137
Federal Labor Relations Council, Executive Director of	57, 732, 824
Federal Power Commission	131
Federal Trade Commission	29
Field Maintenance Services Corp	982
Flo Tek, Inc	1009
Food and Drug Administration, Acting Commissioner of	378
Foster, Ezra	111
Foulks, Donald R	767
Fuller, William E	624
Galbraith-Pilot Marine Corp	807
Galphin, Jr., Samuel P	184
Geiser, Louis R	945
Genasys Corp	758
General Exhibits, Inc	836
General Kinetics, Inc	883
General Services Administration	346
Globe Air, Inc	289, 980
Goodyear, David C	671
	710

	Page
Government Printing Office, General Counsel of	90
Grills, Joseph T	53
Hadra, Michael E	805
Health, Education and Welfare, Dept. of	399
Health, Education and Welfare, Secretary of	928
High Voltage Maintenance Corp	160
Holley, Henry F	298
Honeywell Information Systems, Inc	167, 506
Hoppmann Corp	364
House of Representatives	31, 889, 900
Housing and Urban Development, Dept. of	279, 345
Housing and Urban Development Dept., Secretary of	137, 762
Hudgins & Co., Inc	44
Informatics, Inc	389, 402, 663
Interior, Acting Secretary of	351
Interior, Dept. of	16, 96, 298, 506, 751
Interior, Secretary of	124, 817
Internal Revenue Service	432, 758
Internal Revenue Service, Commissioner of	37
International Business Machines Corp	875
International Computaprint Corp	663
Justice, Dept. of	471
Justice, Dept. of, Asst. Attorney General	20
Joanell Laboratories, Inc	291
Joffe, Nicolai, Corp	230
Kappa Systems, Inc	676
Kassel, Jeffrey S	20
Kaufman DeDell Printing, Inc	497
Keco Industries, Inc	878
Labor, Dept. of	481
Labor, Dept. of, Administrator	1003
Law Enforcement Assistance Administration, Asst. Administrator	471
Lay, George W	562
LectroMagnetics, Inc	51
Lutz Superdyne, Inc	841
Macnab, Donald	310
Marine Corps, United States	525, 1023
McCarthy Manufacturing Co	370
McClory, Robert, The Honorable	31
McEnnis, Jr., Leonard J	982
McFarren, Robert D	1014
McKenna Surgical Supply, Inc	532
Means Construction Co	179
Melton, John W	8
Metcalfe, The Honorable Ralph H	900
Metzler, Paul J	1023
Minnesota, University of	382
Modjeska, Gerald L	481
Moody, D., & Co., Inc	1005
Moorehead, William C	606
Morris, Burrell, *et al*	786
Morton, Henry S	98
MRI Systems Corp	102
Murphy, E. L., Trucking Co	529
National CSS, Inc	389
National Federation of Federal Employees	361, 786
National Labor Relations Board	41
Nationwide Building Maintenance, Inc	123, 556
Naval Supply Systems Command	695
Navy, Asst. Secretary of	8, 46, 226, 551
Navy, Dept. of	85, 321, 425
New Orleans, University of	958
North Carolina, State of, Secy. of Human Resources	567
O'Connor, Michael, Inc	108
Oklahoma of Chromalloy American Corp	538
Oneida Chemical Company, Inc	123
Optimum Systems, Inc	934
Owen, Stephen M	85
Pacific Architects & Engineers, Inc	494
Palmer, James L	41
Parker, Eric	859
Pereira, A. C	8
Perex, August, & Associates, Inc	289
Peterman, Windham & Vaughn, Inc	239
Peters, Gene	460
P&N Construction Co., Inc	329
Powercon Corp	913
Pradarits, Joseph	131
PRB Uniforms, Inc	976
PRC Information Sciences Co	779
Progressive Security Agency, Inc	226
Propper International, Inc	297
Pure Air Filter International	609
QUAD Corp	745
Rankin, William Jr	432
Raye Limited, Inc	187
Raymond Corp	514
Record Electric Inc	4
Robinson, Charles D	525
Rockwell International Corp	905
Rohr Industrial Systems, Inc	454
Schreck Industries	514
Sea-Land Service, Inc	265
Sentinel Protective Services, Inc	1018
Sigma Data Computing Corp	830
Silver, Sanford O	223
Silver Spring Blueprinting Co	497
Singer Co	173
Small Business Administration, Administrator of	28, 323
Smith, Annette, et al	732
Social Security Administration	399
Society Brand, Inc	297
Southeastern Services, Inc	668
Southern California Ocean Studies Consortium	725
Southwest Forms Management Services	953
Sperry Rand Corp	313
SRG Partenship, PC	721
Standard Conveyor Co	454
State, Dept. of	216, 629
Stepan, Joesph B	16
Storage Technology Corp	880
Stratton, Dene B	321
Teledyne Ryan Aeronautical	635
Thermal Control, Inc	609
Thompson, Arthur R	209
Thompson, David F	944
Tidewater Protective Services, Inc	117, 659
Titcomb, Robert E	944
TM Systems, Inc	501
TOTAL Leonard, Inc	308

	Page
Tracor, Inc	64
Transportation, Dept. of	81, 353, 824, 865
Trataros Painting and Construction Corp	271
Treasury, Asst. Secretary of	615
Treasury, Dept. of	758, 792
Turner, Everett	427
Tymshare, Inc	246, 695
Union Carbide Corp	487
United Office Machines	411
United States Courts, Administrative Office	788
United States Information Agency	786
United States Information Agency, Assistant Director of	361
Urban Mass Transportation Administration, Acting Chief Counsel of	353
Veterans Administration, Administrator	754
Veterans Administration, Veterans Affairs Administrator	551
Wellington Apartment Hotel	572
Wilke, William F., Inc	419

TABLE OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page
1875, Mar. 3, 18 Stat. 371	139
1892, July 13, 27 Stat. 88	439
1912, July 25, 37 Stat. 201	438
1916, July 27, 39 Stat. 391	439
1945, June 30, 59 Stat. 304	871
1950, July 1, 64 Stat. 1270	931
1954, Sept. 3, 68 Stat. 1191-1194	657
1954, Sept. 3, 68 Stat. 1193	655
1954, Sept. 3, 68 Stat. 1194	657
1958, July 25, 72 Stat. 407	61
1958, July 25, 72 Stat. 408	61
1958, Aug. 21, 72 Stat. 689	26
1958, Sept. 2, 72 Stat. 1762	659
1958, Sept. 2, 72 Stat. 1766	659
1958, Sept. 2, 72 Stat. 1773	659
1960, June 11, 74 Stat. 196	26
1962, Sept. 25, 76 Stat. 598	660
1962, Oct. 3, 76 Stat. 698	660
1962, Oct. 3, 76 Stat. 704	660
1965, Sept. 9, 79 Stat. 667	141
1965, Sept. 9, 79 Stat. 668	139
1965, Oct. 29, 79 Stat. 1111	752
1967, Oct. 11, 81 Stat. 268	25
1970, Oct. 22, 84 Stat. 1085	1017
1970, Dec. 31, 84 Stat. 1818	446
1973, Dec. 24, 87 Stat. 774	901
1973, Dec. 24, 87 Stat. 784	902
1973, Dec. 24, 87 Stat. 787	902
1973, Dec. 24, 87 Stat. 788	903
1973, Dec. 24, 87 Stat. 791	902
1973, Dec. 24, 87 Stat. 814	902
1973, Dec. 24, 87 Stat. 819	902
1973, Dec. 24, 87 Stat. 820	902
1974, Mar. 7, 88 Stat. 14	446
1974, Sept. 3, 88 Stat. 1036	902
1975, Aug. 9, 89 Stat. 441	890
1975, Aug. 9, 89 Stat. 443	38
1975, Oct. 21, 89 Stat. 611	415
1975, Oct. 21, 89 Stat. 641	376
1976, June 30, 90 Stat. 785	904
1976, July 12, 90 Stat. 851	376
1976, July 12, 90 Stat. 889	446
1976, July 14, 90 Stat. 937	415
1976, July 14, 90 Stat. 963	890
1976, July 31, 90 Stat. 1043	819
1976, Oct. 1, 90 Stat. 1446	377
1976, Oct. 1, 90 Stat. 1490	903
1976, Oct. 4, 90 Stat. 1699	94

UNITED STATES CODE

See, also U.S. Statutes at Large

	Page
5 U.S. Code Ch. 51	376
5 U.S. Code Ch. 53	361, 376
5 U.S. Code Ch. 63	828
5 U.S. Code 61a-1 (1946 ed.)	856
5 U.S. Code 61a-1 (1964 ed.)	857
5 U.S. Code 61a-1(a) (1964 ed.)	858
5 U.S. Code 503(b)(2)	37
5 U.S. Code 552	783, 1010
5 U.S. Code 552a	262, 698
5 U.S. Code 552a(e)(10)	262
5 U.S. Code 3101 note	431
5 U.S. Code 3106	623
5 U.S. Code 3108	226
5 U.S. Code 3324	431
5 U.S. Code 3324(a)	433
5 U.S. Code 3324(b)	433
5 U.S. Code 3341	430
5 U.S. Code 3345-3349	763
5 U.S. Code 3346	763
5 U.S. Code 3348	763
5 U.S. Code 3349	763
5 U.S. Code 4109	86
5 U.S. Code 4109(a)	89
5 U.S. Code 4501-06	58
5 U.S. Code 4503	58
5 U.S. Code 4506	58
5 U.S. Code 5102(c)(7)	628
5 U.S. Code 5108(a)	433
5 U.S. Code 5308	375
5 U.S. Code 5334	61
5 U.S. Code 5337	199
5 U.S. Code 5341	874

	Page
5 U.S. Code 5342(b)(3)	874
5 U.S. Code 5343	626, 874
5 U.S. Code 5343 note	362
5 U.S. Code 5343(b)	363
5 U.S. Code 5343(c)	363, 625
5 U.S. Code 5343(c)(4)	12, 626
5 U.S. Code 5343(f)	625
5 U.S. Code 5348	870
5 U.S. Code 5363	870
5 U.S. Code 5534a	856
5 U.S. Code 5535	736, 787
5 U.S. Code 5541	310
5 U.S. Code 5542(b)(2)	222
5 U.S. Code 5542(b)(2)(B)	223
5 U.S. Code 5543	222
5 U.S. Code 5544	223
5 U.S. Code 5545	553
5 U.S. Code 5545(c)(1)	551
5 U.S. Code 5546	859
5 U.S. Code 5546(a)	859
5 U.S. Code 5551	1015
5 U.S. Code 5584	827, 875, 1004
5 U.S. Code 5584(a)	829
5 U.S. Code 5595	752
5 U.S. Code 5595(a)(2)	753
5 U.S. Code 5595(a)(2)(ii)	752
5 U.S. Code 5596	15, 201, 431, 735, 788, 1004
5 U.S. Code 5701 note	661
5 U.S. Code 5701-5709	105
5 U.S. Code 5702	224
5 U.S. Code 5702(a)	135, 575
5 U.S. Code 5702(c)	41
5 U.S. Code 5703	661
5 U.S. Code 5703(c)	661
5 U.S. Code 5704(a)	135
5 U.S. Code 5707	135
5 U.S. Code 5724a	563
5 U.S. Code 5724a(a)(3)	16
5 U.S. Code 5724a(a)(4)	299, 566, 863
5 U.S. Code 5724a(b)	53
5 U.S. Code 6101(b)(2)	217, 221, 848
5 U.S. Code 6104	395
5 U.S. Code 6301	826
5 U.S. Code 6304(d)	1014
5 U.S. Code 6304(d)(1)	471
5 U.S. Code 6304(d)(1)(A)	473
5 U.S. Code 6304(d)(1)(B)	472, 1015
5 U.S. Code 6304(d)(2)	472
5 U.S. Code 6305	826
5 U.S. Code 6305(a)	826
5 U.S. Code 6311	472
5 U.S. Code 6322	867
5 U.S. Code 7153	662
5 U.S. Code 8301	99
7 U.S. Code 1932	326
10 U.S. Code Ch. 61	743
10 U.S. Code Ch. 137	121, 654
10 U.S. Code 576 (1925 ed.)	856
10 U.S. Code 637	588
10 U.S. Code 687(d)	589
10 U.S. Code 842 (1940 ed.)	856
10 U.S. Code 973	856
10 U.S. Code 973(b)	855
10 U.S. Code 1201	99, 745, 810

	Page
10 U.S. Code 1201(c)	99
10 U.S. Code 1202	99, 810
10 U.S. Code 1204	810
10 U.S. Code 1205	808
10 U.S. Code 1208	99
10 U.S. Code 1221	99
10 U.S. Code 1331	810
10 U.S. Code 1401	99, 743, 808
10 U.S. Code 1401a	742
10 U.S. Code 1401a(f)	741
10 U.S. Code 1447	1024
10 U.S. Code 1447-1455	1023
10 U.S. Code 1447(3)	1023
10 U.S. Code 1447(3)(A)	1025
10 U.S. Code 1447(3)(B)	1025
10 U.S. Code 1447(4)(A)	1025
10 U.S. Code 1447(4)(B)	1025
10 U.S. Code 1448 note	1023
10 U.S. Code 1448(a)	1025
10 U.S. Code 1450	484, 1024
10 U.S. Code 1450(a)	1024
10 U.S. Code 1450(c)	485
10 U.S. Code 1450(e)	483
10 U.S. Code 1452(a)	483, 1023
10 U.S. Code 1552	589
10 U.S. Code 2120-2127	950
10 U.S. Code 2126	950
10 U.S. Code 2304(a)	121
10 U.S. Code 2304(a)(1)-(17)	121
10 U.S. Code 2304(a)(2)	516
10 U.S. Code 2304(a)(10)	118, 650, 1036
10 U.S. Code 2304(g)	717, 1008, 1009
10 U.S. Code 2305	205
10 U.S. Code 2305(c)	421
10 U.S. Code 2307	570
10 U.S. Code 2667	655
10 U.S. Code 2774	589
10 U.S. Code 2774(a)	591, 951
10 U.S. Code 2774(b)	951
10 U.S. Code 3544	856
10 U.S. Code 3544(b) (1956 ed.)	856
10 U.S. Code 6323	100
10 U.S. Code 6330	743
10 U.S. Code 6379	101
10 U.S. Code 7304(c)(1)	288
10 U.S. Code 7572(b)	808
10 U.S. Code 8544	856
10 U.S. Code 8544(b) (1956 ed.)	856
11 U.S. Code 96(a)	504
11 U.S. Code 108	288
11 U.S. Code 108(a)	282
12 U.S. Code 1703	280
12 U.S. Code 1703(a)	283
12 U.S. Code 1703(f)	283
12 U.S. Code 1715(t)	284
12 U.S. Code 1730	286
12 U.S. Code 2001	375
12 U.S. Code 2241	375
12 U.S. Code 2245	375
12 U.S. Code 2247	375
12 U.S. Code 2250	376
12 U.S. Code 2250(b)	376
12 U.S. Code 2601 note	564
14 U.S. Code 787a	809
15 U.S. Code 636(a)	323

	Page
15 U.S. Code 637(a)	228
15 U.S. Code 637(b)(7)	81
15 U.S. Code 661	323
15 U.S. Code 683(b)	23
15 U.S. Code 684	24
15 U.S. Code 684(a)	323
15 U.S. Code 684(b)	24
15 U.S. Code 685	24
15 U.S. Code 685(a)	323
15 U.S. Code 685(b)	323
15 U.S. Code 685(e)	27
15 U.S. Code 1601 note	564
16 U.S. Code 460d	655
16 U.S. Code 460*l*-4	32
16 U.S. Code 460*l*-4 note	35
16 U.S. Code 460*l*-4 to 460*l*-11	32
16 U.S. Code 460*l*-7(a)	32
16 U.S. Code 460*l*-8(a)	32
16 U.S. Code 460*l*-8(c)	32
16 U.S. Code 460*l*-8(d)	32
16 U.S. Code 460*l*-8(e)	32
16 U.S. Code 476	463
18 U.S. Code 201	584
18 U.S. Code 281	197
18 U.S. Code 1913	890
18 U.S. Code 3651	788
18 U.S. Code 3651 note	789
18 U.S. Code 3655	789
19 U.S. Code 267	310
19 U.S. Code 1451	310
22 U.S. Code 2354	533
25 U.S. Code 2	126
25 U.S. Code 13	128
25 U.S. Code 47	179
25 U.S. Code 175	124
26 U.S. Code 104(a)(4)	744
26 U.S. Code 6103	616
26 U.S. Code 6103(b)(4)	617
26 U.S. Code 6103(i) (1954 ed.)	617
26 U.S. Code 6103(j) (1954 ed.)	617
26 U.S. Code 6103(*l*) (1954 ed.)	617
26 U.S. Code 6321	503
26 U.S. Code 7602	37
26 U.S. Code 7604	37
26 U.S. Code 7604(b)	37
28 U.S. Code 515-519	623
28 U.S. Code 1346	102
28 U.S. Code 1491	102
28 U.S. Code 1498	186
28 U.S. Code 1503	269
28 U.S. Code 1821	37
28 U.S. Code 2041-2042	790
28 U.S. Code 2414	595
28 U.S. Code 2415(f)	270
29 U.S. Code 791	662
29 U.S. Code 791(b)	402
29 U.S. Code 792	400
29 U.S. Code 792(d)	400
30 U.S. Code 721-740	817
30 U.S. Code 734	818
30 U.S. Code 801	818
30 U.S. Code 801-960	817
30 U.S. Code 801(g)	818
30 U.S. Code 811(a)	818
30 U.S. Code 952	818
30 U.S. Code 954	818
31 U.S. Code 11(d)	445
31 U.S. Code 52c note	529
31 U.S. Code 53	576
31 U.S. Code 54	576
31 U.S. Code 71	269
31 U.S. Code 71a	428
31 U.S. Code 74	15
31 U.S. Code 82a-1	792
31 U.S. Code 200	352, 773
31 U.S. Code 200(a)(1)	416, 442, 775
31 U.S. Code 200(d)	418
31 U.S. Code 203	503, 980
31 U.S. Code 240-243	31
31 U.S. Code 427	796
31 U.S. Code 483a	277
31 U.S. Code 484	278
31 U.S. Code 492a	798
31 U.S. Code 492a-492c	793
31 U.S. Code 492b	793
31 U.S. Code 529	115, 181, 567
31 U.S. Code 628	38, 570, 719, 890, 931
31 U.S. Code 665	438
31 U.S. Code 665(a)	153, 170, 205, 443, 861
31 U.S. Code 679	767
31 U.S. Code 680a	29
31 U.S. Code 686	276
31 U.S. Code 686(a)	276
31 U.S. Code 686(b)	278
31 U.S. Code 701-708	352
31 U.S. Code 712a	153, 170, 418, 861
31 U.S. Code 724a	595, 619
31 U.S. Code 725v	790
31 U.S. Code 1176	122, 159, 166, 172, 264, 393, 402, 411, 437, 453, 458, 499, 537, 668, 671, 675, 709, 785
31 U.S. Code 1201	789
31 U.S. Code 1201(c)	789
31 U.S. Code 1301 note	445
31 U.S. Code 1302(a)(2)	445
31 U.S. Code 1322(a)(1)-(2)	445
31 U.S. Code 1351	445
33 U.S. Code 579	447
33 U.S. Code 621	438
33 U.S. Code 701c	646
33 U.S. Code 1251	576
33 U.S. Code 1281	487
33 U.S. Code 1284	577
33 U.S. Code 1284(a)(6)	577
37 U.S. Code 101(25)	48
37 U.S. Code 205	950
37 U.S. Code 205(a)(7)	950
37 U.S. Code 205(a)(8)	950
37 U.S. Code 206(a)	590
37 U.S. Code 232 note	48
37 U.S. Code 301	985
37 U.S. Code 301(a)	984
37 U.S. Code 301(a)(1)	987
37 U.S. Code 301(e)	984
37 U.S. Code 302a	946
37 U.S. Code 303	947
37 U.S. Code 401	806, 897

	Page
37 U.S. Code 403	48, 851
37 U.S. Code 403(a)	851, 896
37 U.S. Code 403(b)	851, 896
37 U.S. Code 403(c)	896
37 U.S. Code 403(e)	851
37 U.S. Code 403(j)	851
37 U.S. Code 404(b)(1)	181
37 U.S. Code 405	182, 526, 1017
37 U.S. Code 406	806
37 U.S. Code 407(a)	47
37 U.S. Code 420	897
37 U.S. Code 427	806
37 U.S. Code 427(a)	806
37 U.S. Code 501	857
37 U.S. Code 501(a)(1)(B)	590
37 U.S. Code 501(f)	590
37 U.S. Code 801(c)	198, 898
37 U.S. Code 1006(b)	183
37 U.S. Code 1009(a)	895
37 U.S. Code 1009(b)	895
37 U.S. Code 1009(c)	896
37 U.S. Code 1009(c)-(f)	895
37 U.S. Code 1009(d)	896
38 U.S. Code Ch. 51	486
38 U.S. Code 211(a)	591
38 U.S. Code 3010(d)	486
38 U.S. Code 5011	755
40 U.S. Code 34	573
40 U.S. Code 285	931
40 U.S. Code 289	931
40 U.S. Code 304c	931
40 U.S. Code 304d	932
40 U.S. Code 327	501
40 U.S. Code 471	119, 557, 756
40 U.S. Code 483(a)	757
40 U.S. Code 485(a)	757
40 U.S. Code 485(c)	757
40 U.S. Code 486	931
40 U.S. Code 486(c)	932
40 U.S. Code 490	931
40 U.S. Code 490 note	931
40 U.S. Code 490(f)(6)	931
40 U.S. Code 490(j)	931
40 U.S. Code 603 note	931
41 U.S. Code 10(a)-(e)	533
41 U.S. Code 10a-d	18, 597
41 U.S. Code 11	153, 170, 861
41 U.S. Code 11(a)	438
41 U.S. Code 12	438
41 U.S. Code 15	503, 980
41 U.S. Code 35-45	954
41 U.S. Code 252(c)(1)	557
41 U.S. Code 252(c)(1)-(15)	119
41 U.S. Code 252(c)(10)	556
41 U.S. Code 253	672
41 U.S. Code 255	570
41 U.S. Code 255(b)	571
41 U.S. Code 255(c)	571
41 U.S. Code 351	19, 161
42 U.S. Code 210-1(c)	857
42 U.S. Code 659	594
42 U.S. Code 2897-4	475
42 U.S. Code 1301(a)(1)	595
42 U.S. Code 2751	567
42 U.S. Code 2753	567
42 U.S. Code 2754	567
42 U.S. Code 3533a	137, 762
42 U.S. Code 3535(c)	140
42 U.S. Code 3535(d)	764
42 U.S. Code 4151	399
42 U.S. Code 4152	399
42 U.S. Code 4156	400
42 U.S. Code 4201(2)	354
42 U.S. Code 4201(3)	354
42 U.S. Code 4213	353
42 U.S. Code 4651	352
42 U.S. Code 5301	646
42 U.S. Code 5303(a)(9)	648
42 U.S. Code 5305(a)	648
42 U.S. Code 5305(a)(2)	649
44 U.S. Code 103	956
44 U.S. Code 310	980
44 U.S. Code 504	81
44 U.S. Code 722	91
44 U.S. Code 733	91
44 U.S. Code 910(b)	91
44 U.S. Code 1102	81
44 U.S. Code 1702	90
44 U.S. Code 1706	91
46 U.S. Code 864	231
46 U.S. Code 865	231
46 U.S. Code 1158	231
46 U.S. Code 1300-1315	270
49 U.S. Code 66	270
49 U.S. Code 66(a)	761
49 U.S. Code 66(b)	529, 820
49 U.S. Code 316	760
49 U.S. Code 317	760
49 U.S. Code 317(b)	761
49 U.S. Code 1517	209, 216, 220, 631
49 U.S. Code 1601	44
50 U.S. Code 1431	241
50 U.S. Code App. 451	948
50 U.S. Code App. 454	947

CONSTITUTION OF THE UNITED STATES

	Page
Art. II, sec. 2	138
Art. II, sec. 2, cl. 2	762

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL

	Page
1 Comp. Gen. 442	40
2 Comp. Gen. 477	439
2 Comp. Gen. 821	618
3 Comp. Gen. 433	400
4 Comp. Gen. 1024	774
6 Comp. Gen. 214	624
6 Comp. Gen. 619	38
8 Comp. Gen. 19	40

	Page
8 Comp. Gen. 654	155
10 Comp. Gen. 487	312
10 Comp. Gen. 514	903
11 Comp. Gen. 336	96
13 Comp. Gen. 181	150
13 Comp. Gen. 207	395
15 Comp. Gen. 1136	451
16 Comp. Gen. 481	97
16 Comp. Gen. 569	777
16 Comp. Gen. 620	220
16 Comp. Gen. 757	312
16 Comp. Gen. 803	157
16 Comp. Gen. 806	394
17 Comp. Gen. 147	904
17 Comp. Gen. 554	491
17 Comp. Gen. 636	38
17 Comp. Gen. 664	352
18 Comp. Gen. 206	396
20 Comp. Gen. 95	157
20 Comp. Gen. 310	187
20 Comp. Gen. 436	352
21 Comp. Gen. 682	965
22 Comp. Gen. 74	277
22 Comp. Gen. 462	930
22 Comp. Gen. 1063	822
23 Comp. Gen. 821	401
23 Comp. Gen. 831	400
24 Comp. Gen. 140	312
25 Comp. Gen. 377	858
25 Comp. Gen. 601	903
25 Comp. Gen. 677	856
25 Comp. Gen. 798	853
26 Comp. Gen. 463	867
27 Comp. Gen. 12	856
27 Comp. Gen. 148	312
27 Comp. Gen. 245	17
27 Comp. Gen. 343	979
27 Comp. Gen. 391	930
27 Comp. Gen. 655	312
27 Comp. Gen. 767	344
28 Comp. Gen. 543	282
29 Comp. Gen. 335	774
29 Comp. Gen. 363	855
29 Comp. Gen. 419	38
30 Comp. Gen. 158	871
30 Comp. Gen. 356	871
30 Comp. Gen. 443	97
30 Comp. Gen. 457	608
31 Comp. Gen. 163	903
31 Comp. Gen. 191	903
31 Comp. Gen. 246	618
31 Comp. Gen. 308	33
31 Comp. Gen. 340	466
31 Comp. Gen. 603	853
31 Comp. Gen. 613	774
32 Comp. Gen. 315	426, 1016
32 Comp. Gen. 479	276
32 Comp. Gen. 527	1017
32 Comp. Gen. 565	352
33 Comp. Gen. 174	1017
33 Comp. Gen. 423	930
33 Comp. Gen. 499	333
33 Comp. Gen. 505	1017
34 Comp. Gen. 7	592
34 Comp. Gen. 221	595, 618
34 Comp. Gen. 454	930
34 Comp. Gen. 515	853
35 Comp. Gen. 554	224
35 Comp. Gen. 655	827
35 Comp. Gen. 701	930
35 Comp. Gen. 710	551
36 Comp. Gen. 27	243
36 Comp. Gen. 62	397
36 Comp. Gen. 683	154, 170
36 Comp. Gen. 809	80
37 Comp. Gen. 155	154, 170
37 Comp. Gen. 224	797
37 Comp. Gen. 318	503
37 Comp. Gen. 368	180
37 Comp. Gen. 550	832
37 Comp. Gen. 688	665
37 Comp. Gen. 786	243
37 Comp. Gen. 861	419
38 Comp. Gen. 5	101
38 Comp. Gen. 470	899
38 Comp. Gen. 531	527
38 Comp. Gen. 532	491
38 Comp. Gen. 734	276
39 Comp. Gen. 312	101
39 Comp. Gen. 369	853
39 Comp. Gen. 409	61
39 Comp. Gen. 546	777
39 Comp. Gen. 570	491
39 Comp. Gen. 611	96
39 Comp. Gen. 659	182
39 Comp. Gen. 796	46
40 Comp. Gen. 77	182
40 Comp. Gen. 95	616
40 Comp. Gen. 106	885
40 Comp. Gen. 242	1017
40 Comp. Gen. 249	810
40 Comp. Gen. 321	349
40 Comp. Gen. 356	756
40 Comp. Gen. 387	744
40 Comp. Gen. 502	592
40 Comp. Gen. 508	436
40 Comp. Gen. 615	33
40 Comp. Gen. 679	491
40 Comp. Gen. 704	135
41 Comp. Gen. 47	22
41 Comp. Gen. 70	600
41 Comp. Gen. 134	419
41 Comp. Gen. 148	540
41 Comp. Gen. 178	282
41 Comp. Gen. 203	451
41 Comp. Gen. 306	560
41 Comp. Gen. 337	743
41 Comp. Gen. 529	82
41 Comp. Gen. 784	899
41 Comp. Gen. 799	198, 899
41 Comp. Gen. 819	228
42 Comp. Gen. 19	82
42 Comp. Gen. 52	899
42 Comp. Gen. 87	198, 899
42 Comp. Gen. 96	697
42 Comp. Gen. 203	531
42 Comp. Gen. 219	1021
42 Comp. Gen. 236	198, 899

	Page
42 Comp. Gen. 272	153
42 Comp. Gen. 346	540
42 Comp. Gen. 383	491
42 Comp. Gen. 426	555
42 Comp. Gen. 493	765
42 Comp. Gen. 495	977
42 Comp. Gen. 508	739
42 Comp. Gen. 617	590
42 Comp. Gen. 626	401
43 Comp. Gen. 110	40
43 Comp. Gen. 193	540
43 Comp. Gen. 209	491
43 Comp. Gen. 217	180, 464
43 Comp. Gen. 235	590
43 Comp. Gen. 332	807
43 Comp. Gen. 353	121
43 Comp. Gen. 408	899
43 Comp. Gen. 425	99
43 Comp. Gen. 474	49
43 Comp. Gen. 525	528
43 Comp. Gen. 663	777
43 Comp. Gen. 667	985
43 Comp. Gen. 742	101
44 Comp. Gen. 312	38, 618
44 Comp. Gen. 353	290
44 Comp. Gen. 426	985
44 Comp. Gen. 463	623
44 Comp. Gen. 564	228
44 Comp. Gen. 572	806
44 Comp. Gen. 595	29
44 Comp. Gen. 626	853
44 Comp. Gen. 643	868
44 Comp. Gen. 830	855
45 Comp. Gen. 215	401
45 Comp. Gen. 221	84
45 Comp. Gen. 291	394
45 Comp. Gen. 299	345
45 Comp. Gen. 312	610
45 Comp. Gen. 347	853
45 Comp. Gen. 365	667
45 Comp. Gen. 417	178
45 Comp. Gen. 515	33
45 Comp. Gen. 658	104
45 Comp. Gen. 682	333
46 Comp. Gen. 34	456
46 Comp. Gen. 98	623
46 Comp. Gen. 337	859
46 Comp. Gen. 379	574
46 Comp. Gen. 392	742
46 Comp. Gen. 425	107, 848
46 Comp. Gen. 730	59
46 Comp. Gen. 784	599
46 Comp. Gen. 869	853
47 Comp. Gen. 21	599
47 Comp. Gen. 29	256
47 Comp. Gen. 72	753
47 Comp. Gen. 84	482
47 Comp. Gen. 127	1017
47 Comp. Gen. 233	237
47 Comp. Gen. 314	82
47 Comp. Gen. 336	479
47 Comp. Gen. 475	290
47 Comp. Gen. 616	244
47 Comp. Gen. 716	809
47 Comp. Gen. 728	985
47 Comp. Gen. 732	242
47 Comp. Gen. 778	492
48 Comp. Gen. 40	853
48 Comp. Gen. 97	37
48 Comp. Gen. 239	100
48 Comp. Gen. 291	923
48 Comp. Gen. 314	679
48 Comp. Gen. 384	600
48 Comp. Gen. 469	564
48 Comp. Gen. 494	353
48 Comp. Gen. 497	158, 170, 861
48 Comp. Gen. 536	512, 686, 782
48 Comp. Gen. 605	185, 492
48 Comp. Gen. 612	185
48 Comp. Gen. 659	230
48 Comp. Gen. 748	4
48 Comp. Gen. 757	349, 379
48 Comp. Gen. 782	49
49 Comp. Gen. 9	731
49 Comp. Gen. 28	540
49 Comp. Gen. 32	923
49 Comp. Gen. 80	100
49 Comp. Gen. 124	549
49 Comp. Gen. 156	892
49 Comp. Gen. 191	52
49 Comp. Gen. 211	274
49 Comp. Gen. 224	186
49 Comp. Gen. 305	574
49 Comp. Gen. 347	499
49 Comp. Gen. 395	777
49 Comp. Gen. 402	780
49 Comp. Gen. 530	470
49 Comp. Gen. 548	526
49 Comp. Gen. 577	312
49 Comp. Gen. 656	591
49 Comp. Gen. 666	37
49 Comp. Gen. 697	52
49 Comp. Gen. 707	1013
49 Comp. Gen. 761	470
49 Comp. Gen. 782	344
49 Comp. Gen. 851	397
49 Comp. Gen. 867	806
50 Comp. Gen. 8	398
50 Comp. Gen. 66	626
50 Comp. Gen. 71	52
50 Comp. Gen. 93	873
50 Comp. Gen. 94	179
50 Comp. Gen. 117	71, 990
50 Comp. Gen. 137	610
50 Comp. Gen. 193	534
50 Comp. Gen. 202	780
50 Comp. Gen. 222	512, 686, 783
50 Comp. Gen. 246	680
50 Comp. Gen. 332	625
50 Comp. Gen. 337	456
50 Comp. Gen. 390	838
50 Comp. Gen. 534	38, 933
50 Comp. Gen. 542	80, 956
50 Comp. Gen. 565	477, 888, 1013
50 Comp. Gen. 589	418
50 Comp. Gen. 610	574
50 Comp. Gen. 674	218
50 Comp. Gen. 679	887

	Page
50 Comp. Gen. 697	536
50 Comp. Gen. 726	752
50 Comp. Gen. 739	961
50 Comp. Gen. 788	838
51 Comp. Gen. 85	456
51 Comp. Gen. 102	780
51 Comp. Gen. 195	600
51 Comp. Gen. 251	56
51 Comp. Gen. 272	69
51 Comp. Gen. 315	921
51 Comp. Gen. 377	496
51 Comp. Gen. 397	477
51 Comp. Gen. 423	510
51 Comp. Gen. 431	479
51 Comp. Gen. 476	703
51 Comp. Gen. 479	151, 697, 778
51 Comp. Gen. 481	685
51 Comp. Gen. 494	772
51 Comp. Gen. 503	2
51 Comp. Gen. 541	268
51 Comp. Gen. 543	84
51 Comp. Gen. 621	1000
51 Comp. Gen. 645	237
51 Comp. Gen. 727	218, 222
52 Comp. Gen. 3	899
52 Comp. Gen. 11	299
52 Comp. Gen. 20	162
52 Comp. Gen. 63	343
52 Comp. Gen. 64	47
52 Comp. Gen. 78	322
52 Comp. Gen. 161	386
52 Comp. Gen. 196	343
52 Comp. Gen. 198	962
52 Comp. Gen. 285	367
52 Comp. Gen. 312	540
52 Comp. Gen. 346	436
52 Comp. Gen. 358	74
52 Comp. Gen. 382	295
52 Comp. Gen. 458	121
52 Comp. Gen. 466	479
52 Comp. Gen. 506	950
52 Comp. Gen. 549	790
52 Comp. Gen. 558	648
52 Comp. Gen. 653	186
52 Comp. Gen. 686	76, 192, 716
52 Comp. Gen. 718	295, 888
52 Comp. Gen. 730	42
52 Comp. Gen. 732	109
52 Comp. Gen. 748	626
52 Comp. Gen. 764	91
52 Comp. Gen. 773	540
52 Comp. Gen. 854	888
52 Comp. Gen. 860	827
52 Comp. Gen. 870	644
52 Comp. Gen. 874	490
52 Comp. Gen. 920	428, 736
52 Comp. Gen. 987	436
53 Comp. Gen. 47	456
53 Comp. Gen. 51	496
53 Comp. Gen. 119	82
53 Comp. Gen. 148	897
53 Comp. Gen. 161	540
53 Comp. Gen. 167	343
53 Comp. Gen. 209	81, 955
53 Comp. Gen. 232	2
53 Comp. Gen. 253	369, 512
53 Comp. Gen. 270	654, 887
53 Comp. Gen. 299	591
53 Comp. Gen. 301	623
53 Comp. Gen. 351	38
53 Comp. Gen. 382	479
53 Comp. Gen. 393	1026
53 Comp. Gen. 470	1024
53 Comp. Gen. 487	374
53 Comp. Gen. 502	275
53 Comp. Gen. 513	22
53 Comp. Gen. 518	305
53 Comp. Gen. 547	949
53 Comp. Gen. 582	868
53 Comp. Gen. 586	367, 491, 919
53 Comp. Gen. 593	685
53 Comp. Gen. 620	310
53 Comp. Gen. 730	489, 773
53 Comp. Gen. 780	512
53 Comp. Gen. 782	617
53 Comp. Gen. 800	69, 250, 477
53 Comp. Gen. 810	845
53 Comp. Gen. 818	1024
53 Comp. Gen. 860	685
53 Comp. Gen. 882	218, 847
53 Comp. Gen. 895	256, 317
53 Comp. Gen. 977	645, 1002
54 Comp. Gen. 6	44, 490
54 Comp. Gen. 29	978
54 Comp. Gen. 44	316
54 Comp. Gen. 66	367, 693
54 Comp. Gen. 145	367
54 Comp. Gen. 161	977
54 Comp. Gen. 169	294, 316, 602, 644
54 Comp. Gen. 237	255, 927
54 Comp. Gen. 242	158, 273
54 Comp. Gen. 266	1024
54 Comp. Gen. 305	871
54 Comp. Gen. 312	8, 59, 735
54 Comp. Gen. 345	349
54 Comp. Gen. 363	316
54 Comp. Gen. 375	162, 177
54 Comp. Gen. 403	735
54 Comp. Gen. 408	479, 1002
54 Comp. Gen. 416	350
54 Comp. Gen. 421	749
54 Comp. Gen. 435	735
54 Comp. Gen. 468	175, 582
54 Comp. Gen. 483	250
54 Comp. Gen. 527	467
54 Comp. Gen. 530	69
54 Comp. Gen. 538	735
54 Comp. Gen. 545	241
54 Comp. Gen. 562	479, 696, 1002
54 Comp. Gen. 593	535
54 Comp. Gen. 606	78, 955
54 Comp. Gen. 612	295, 478, 912, 955
54 Comp. Gen. 661	768
54 Comp. Gen. 662	551
54 Comp. Gen. 665	46
54 Comp. Gen. 706	868
54 Comp. Gen. 747	827
54 Comp. Gen. 760	736

	Page
54 Comp. Gen. 764	182
54 Comp. Gen. 767	598
54 Comp. Gen. 775	293
54 Comp. Gen. 783	912
54 Comp. Gen. 791	490
54 Comp. Gen. 830	230
54 Comp. Gen. 853	978
54 Comp. Gen. 869	49
54 Comp. Gen. 890	586
54 Comp. Gen. 896	74, 294, 723, 727
54 Comp. Gen. 967	491
54 Comp. Gen. 973	979, 1013
54 Comp. Gen. 999	6, 739
54 Comp. Gen. 1009	696
54 Comp. Gen. 1021	421, 453
54 Comp. Gen. 1035	476
54 Comp. Gen. 1042	566
54 Comp. Gen. 1055	574
54 Comp. Gen. 1096	79, 955
54 Comp. Gen. 1100	709
55 Comp. Gen. 1	186, 550, 955
55 Comp. Gen. 42	1004
55 Comp. Gen. 60	69, 262, 385, 464, 510, 703, 749
55 Comp. Gen. 97	165, 881
55 Comp. Gen. 109	766
55 Comp. Gen. 113	592
55 Comp. Gen. 130	853
55 Comp. Gen. 139	490
55 Comp. Gen. 158	1026
55 Comp. Gen. 201	151, 254, 314, 780
55 Comp. Gen. 220	738
55 Comp. Gen. 231	109, 273, 670, 927
55 Comp. Gen. 244	76, 717, 887, 910, 1003
55 Comp. Gen. 262	490
55 Comp. Gen. 374	256, 315, 654, 702
55 Comp. Gen. 390	45, 490, 917
55 Comp. Gen. 397	382
55 Comp. Gen. 408	623
55 Comp. Gen. 413	489
55 Comp. Gen. 432	780
55 Comp. Gen. 499	294, 723
55 Comp. Gen. 502	881
55 Comp. Gen. 510	633, 868
55 Comp. Gen. 517	594
55 Comp. Gen. 539	427, 432, 732, 982
55 Comp. Gen. 571	413
55 Comp. Gen. 590	847
55 Comp. Gen. 617	383, 731
55 Comp. Gen. 629	735
55 Comp. Gen. 656	691
55 Comp. Gen. 658	279
55 Comp. Gen. 693	118, 556, 651
55 Comp. Gen. 715	165, 1002
55 Comp. Gen. 779	868
55 Comp. Gen. 785	428, 737
55 Comp. Gen. 787	192
55 Comp. Gen. 802	391, 1002
55 Comp. Gen. 833	343
55 Comp. Gen. 839	587
55 Comp. Gen. 856	321
55 Comp. Gen. 859	452
55 Comp. Gen. 864	165, 512, 783, 832
55 Comp. Gen. 911	749, 941
55 Comp. Gen. 932	768
55 Comp. Gen. 958	531
55 Comp. Gen. 972	151, 297, 695, 780
55 Comp. Gen. 1040	540
55 Comp. Gen. 1043	403
55 Comp. Gen. 1051	436
55 Comp. Gen. 1066	369, 512, 782
55 Comp. Gen. 1107	604
55 Comp. Gen. 1111	76, 476, 645, 717
55 Comp. Gen. 1151	150, 251, 679, 697, 781
55 Comp. Gen. 1188	297
55 Comp. Gen. 1230	630
55 Comp. Gen. 1234	802
55 Comp. Gen. 1281	958
55 Comp. Gen. 1295	496
55 Comp. Gen. 1311	430
55 Comp. Gen. 1315	69, 780, 838
55 Comp. Gen. 1340	6
55 Comp. Gen. 1351	784
55 Comp. Gen. 1362	549, 600, 773
55 Comp. Gen. 1412	297
55 Comp. Gen. 1432	485
55 Comp. Gen. 1443	430
55 Comp. Gen. 1467	683
55 Comp. Gen. 1472	226
56 Comp. Gen. 4	739
56 Comp. Gen. 18	103
56 Comp. Gen. 62	724, 747
56 Comp. Gen. 78	956
56 Comp. Gen. 115	650
56 Comp. Gen. 137	762
56 Comp. Gen. 142	170, 506, 697, 780, 861
56 Comp. Gen. 167	151, 861
56 Comp. Gen. 172	584
56 Comp. Gen. 188	840
56 Comp. Gen. 216	633
56 Comp. Gen. 219	629
56 Comp. Gen. 245	695
56 Comp. Gen. 291	478, 941
56 Comp. Gen. 381	731
56 Comp. Gen. 388	832
56 Comp. Gen. 402	603, 674
56 Comp. Gen. 427	433, 732, 982
56 Comp. Gen. 432	431
56 Comp. Gen. 505	782, 861
56 Comp. Gen. 561	864
56 Comp. Gen. 575	918
56 Comp. Gen. 629	868
56 Comp. Gen. 694	778
56 Comp. Gen. 768	962
56 Comp. Gen. 896	727

DECISIONS OF THE COMPTROLLER OF THE TREASURY

	Page
10 Comp. Dec. 506	82
12 Comp. Dec. 11	439
26 Comp. Dec. 43	719

DECISIONS OVERRULED OR MODIFIED

	Page
2 Comp. Gen. 477	437
13 Comp. Gen. 206	394
13 Comp. Gen. 207	394
16 Comp. Gen. 807	394
18 Comp. Gen. 206	394
22 Comp. Gen. 462	934
27 Comp. Gen. 391	934
31 Comp. Gen. 308	33
33 Comp. Gen. 423	934
34 Comp. Gen. 454	934
35 Comp. Gen. 554	224
35 Comp. Gen. 701	934
35 Comp. Gen. 710	553
40 Comp. Gen. 95	615
40 Comp. Gen. 615	33
42 Comp. Gen. 493	976
43 Comp. Gen. 332	807
43 Comp. Gen. 667	984
44 Comp. Gen. 353	289
44 Comp. Gen. 426	984
44 Comp. Gen. 595	29
45 Comp. Gen. 291	394
45 Comp. Gen. 515	33
47 Comp. Gen. 475	289
48 Comp. Gen. 469	562
49 Comp. Gen. 305	572
52 Comp. Gen. 11	298
53 Comp. Gen. 782	615
54 Comp. Gen. 161	976
54 Comp. Gen. 661	768
54 Comp. Gen. 662	553
54 Comp. Gen. 830	236
54 Comp. Gen. 1055	572
55 Comp. Gen. 658	289
55 Comp. Gen. 859	448
55 Comp. Gen. 932	768
55 Comp. Gen. 1412	296
55 Comp. Gen. 1472	225
56 Comp. Gen. 115	649
56 Comp. Gen. 142	513
56 Comp. Gen. 219	629
56 Comp. Gen. 245	694
56 Comp. Gen. 402	663
A-71315, Feb. 28, 1936	33
B-27024, July 7, 1942	934
B-86457, June 3, 1949	934
B-92288, Feb. 19, 1976	113
B-114868, May 30, 1975	131
B-115511, July 3, 1953	29
B-118803, Feb. 24, 1954	934
B-127828, May 22, 1956	224
B-141573, Jan. 5, 1960	768
B-142250, May 2, 1961	655
B-143673, Nov. 11, 1976	615
B-152216, Aug. 20, 1963	224
B-154650, Aug. 12, 1964	976
B-159575, Aug. 31, 1966	976
B-159633, Sept. 10, 1974	572
B-161891, Aug. 21, 1967	562
B-163203, Mar. 24, 1969	562
B-164908, July 7, 1972	158
B-165280, Dec. 31, 1969	562
B-165733, Jan. 23, 1969	224
B-165884, May 28, 1969	976
B-168211, Dec. 30, 1969	615
B-171636, Jan. 17, 1972	976
B-171659, Nov. 15, 1971	976
B-173141, Oct. 14, 1971	397
B-174428, Apr. 17, 1972	224
B-174722, Jan. 20, 1972	224
B-175482, May 10, 1972	976
B-176070, Dec. 7, 1972	976
B-178885, Nov. 23, 1973	976
B-180771, Aug. 7, 1974	976
B-181366, Oct. 9, 1974	976
B-181455, Jan. 30, 1975	976
B-181675, Mar. 3, 1975	397
B-183420, July 15, 1975	976
B-185952, Feb. 11, 1976	397
B-185553, May 3, 1976	397
B-186311, Aug. 26, 1976	448

OPINIONS OF THE ATTORNEYS GENERAL

	Page
Ops. Atty Gen. 881 (1841)	290
15 Op. Atty. Gen. 3	139
18 Op. Atty. Gen. 98	139
18 Op. Atty. Gen. 409	139
21 Op. Atty. Gen. 379	439
32 Op. Atty. Gen. 139	766

DECISIONS OF THE COURTS

	Page
Adelhardt Construction Co. *v.* United States, 123 Ct. Cl. 456	470
Airco Inc. *v.* Energy Research and Development Administration, 528 F. 2d 1294	687, 780
Airco, Inc. *v.* United States, 504 F. 2d 1133; 205 Ct. Cl. 493	469
Alabama Shirt & Trouser Co. *v.* United States, 121 Ct. Cl. 313	244
Alcoa Steamship Co. *v.* United States, 338 U.S. 421	270, 822
Amell *v.* United States, 182 Ct. Cl. 604	873
American Renaissance Lines, United States *v.*, 494 F. 2d 1059; cert. denied, 419 U.S. 1020	775
American Surety Co. of N.Y., United States *v.*, 158 F. 2d 12	269
Andrews, P. L., Corp., ASBCA No. 5722, 60-2 BCA 2787	979
Armstrong & Armstrong, Inc. *v.* United States, 356 F. Supp. 514	207
Baker *v.* Prolerized Chicago Corporation, 335 F. Supp. 183	760
Beatty *v.* United States, 144 Ct. Cl. 203	466

	Page
Bell *v.* United States, 366 U.S. 393	950
Berg, Chris, Inc., *r.* United States, 426 F. 2d 314	3
Best *v.* Polk, 85 U.S. 112 (1873)	187
Bianco *v.* United States, 171 Ct. Cl. 719	136
Bielic *v.* United States, 197 Ct. Cl. 550	736
Blaha *v.* United States, 511 F. 2d 1165; 206 Ct. Cl.	871
Blass, Gus, Co. *v.* Powell Bros. Truck Lines, 53 M.C.C. 603	183
Bolling *v.* Howland, 398 F. Supp. 1313	760
Bornhoft *v.* United States, 137 Ct. Cl. 134	594
Boys Market *v.* Retail Clerks Union, 398 U.S. 235	225
Brock & Blevins Co., Inc. *v.* United States, 170 Ct. Cl. 52	431
Burlington Northern, Inc. *v.* United States, 462 F. 2d 526; 199 Ct. Cl. 143	290
Calamaro, United States *v.*, 354 U.S. 351	270
California-Pacific Utilities Co., *v.* United States, 194 Ct. Cl. 703	949
Camp Sales Corp. *v.* United States, 77 Ct. Cl. 659	157
Cannon Construction Co. *v.* United States, 162 Ct. Cl. 94	466
Catalanello *v.* Cudahy Packing Co., 27 N.Y.S. 2d 637; aff'd, 34 N.Y.S. 2d 37; appeal denied, 35 N.Y.S. 2d 726	290
Central Machine & Tool Co., Appeal of, ASBCA No. 837, June 13, 1952	658
Christian, G. L. & Associates *v.* United States, 160 Ct. Cl. 1; cert. denied, 375 U.S. 954	966
Churchill Chemical Corp. GSBCA Nos. 4312, 4322, 4346, 4353, Jan. 24, 1977, 77-1 BCA 12,318	157
Cities Service Helex, Inc. *v.* United States, 543 F. 2d 1306	978
Civil Aeronautics Board, United States *v.*, 510 F. 2d 769	469
Continental Bank & Trust Co., United States *v.*, 503 F. 2d 45	56
Continental Business Enterprises, Inc. *v.* United States, 452 F. 2d 1016; 196 Ct. Cl. 627	39
Corbetta Construction Co., Inc., ASBCA No. 6290, 1964 BCA 4386	422
Costin *v.* Hollywood Credit Clothing Co., 140 A. 2d 696	466
Cromp *v.* United States, 216 U.S. 494	594
Cumberland Portland Cement Co. *v.* Reconstruction Finance Corp., 140 F. Supp. 739	290
Darrow *v.* Hanover Township, 58 N.J. 410; 278 A. 2d 200	504
Davey, United States *v.*, 404 F. Supp. 1283	565
Davey, United States *v.*, 426 F. 2d 842	39
Dauphin Deposit Trust Co., United States *v.*, 385 F. 2d 129; cert. denied, 390 U.S. 921	39
Davis *v.* Cornwell, 264 U.S. 560	40
Davis *v.* Henderson, 266 U.S. 92	760
Delaware, The, 81 U.S. (14 Wall.) 579 (1871)	760
Deltec Corp. *v.* United States, 326 F. 2d 1004; 164 Ct. Cl. 432	822
Descomp, Inc. *v.* Sampson, 377 F. Supp. 254	965
Diamond Door Co. *v.* Lane-Stanton Lumber Co., 505 F. 2d 1199	19
	504

	Page
East Texas Motor Freight Lines *v.* United States, 239 F. 2d 417	822
Emeco Industries, Inc. *v.* United States, 202 Ct. Cl. 1006	274
Emery Air Freight Corp. *v.* United States, 499 F.2d 1255; 205 Ct. Cl. 49	531
Employers Casualty Co. *v.* Holm, 393 S.W. 2d 363	359
Equitable Lumber Corp. *v.* I.P.A. Land Development Corp., 381 NYS 2d 359	468
Everett Plywood and Door Corp. *v.* United States, 419 F. 2d 425; 190 Ct. Cl. 80	467
Excavation Construction, Inc. *v.* United States, 494 F. 2d 1289; 264 Ct. Cl. 239	422
Farmers & Merchants Bank, United States *v.*, 397 F. Supp. 418	39
Federal Crop Ins. Corp. *v.* Merrill, 332 U.S. 380	89, 595, 950
Federal Savings and Loan Insurance Corp. *v.* Edison Savings and Loan Association, 83 F. Supp. 1007	286
Federal Savings and Loan Insurance Corp. *v.* Grand Forks Building and Loan Association, 85 F. Supp. 248	287
Ferroline Corp. *v.* General Aniline & Film Corp., 207 F. 2d 912	541
Fontaine Truck Equipment Co., Inc., ASBCA No. 1690, 6 CCF 61, 517	345
Freeman Coal Mining Co. *v.* Interior Board of Mine Operations Appeals, 500 F. 2d 772	819
Friedlander *v.* United States, 120 Ct. Cl. 4	1017
Friedman *v.* United States, 532 F. 2d 928	39
Frontiero *v.* Richardson, 411 U.S. 677	47
Ganse *v.* United States, 180 Ct. Cl. 183	736
Georgia Marble Co., United States *v.*, 106 F. 2d 955	966
Georgia-Pacific Co., United States *v.*, 421 F. 2d 92	966
Gibney *v.* United States, 114 Ct. Cl. 38	274, 966
Glens Falls Insurance Co. *v.* Newton Lumber & Mfg. Co., 388 F. 2d 66	442
Goldfarb *v.* Virginia State Bar, 421 U.S. 773	965
Goodyear Tire and Rubber Co. *v.* United States, 276 U.S. 287	565
Gottlieb *v.* Sandia American Corp., 452 F. 2d 510	153, 170, 861
Grace Line *v.* United States, 255 F. 2d 810	502
Gray & Co. *v.* United States, 79 Ct. Cl. 117	268
Great Northern Ry. Co. *v.* United States, 178 Ct. Cl. 226	966
Grismac Corp. *v.* United States, 22 CCF para. 80252 (Ct. Cl. No. 4-72, 1976)	531
Gulf Oil Corp. *v.* American Louisiana Pipe Line Co., 282 F. 2d 401	548
Gulf Puerto Rico Lines, Inc., United States *v.*, 492 F. 2d 1249	823
H&S Oil Co., Inc., ASBCA No. 16321, 72 BCA 9520	270
Hadden *v.* United States, 132 Ct. Cl. 529	979
Hamilton *v.* Rathbone, 175 U.S. 414 (1899)	502
Hartford Accident & Indemnity Co. *v.* United States, 130 Ct. Cl. 490	903
Hartsville Oil Mill *v.* United States, 271 U.S. 43	470
	466

Page

Heyer Products Co., Inc. *v.* United States, 140 F. Supp. 409; 135 Ct. Cl. 63 422
Hi-Ridge Lumber Co. *v.* United States, 443 F.2d 452 464
Hopkins *v.* United States, 513 F. 2d 1360 88
Husdon, Woodrow P., d/b/a San Diego Concrete Disposal, ASBCA No. 21044, Oct. 7, 1976, 76-2 BCA 12,182 978
Huff, United States *v.*, 165 F.2d 720 966
Hunt *v.* United States, 257 U.S. 125 966
Illinois Central R.R. *v.* Ready-Mix Concrete, 323 F. Supp. 609 760
Imperial Chemical Industires Limited *v.* National Distillers and Chemical Corp., 342 F. 2d 737 547
Isthmian Steamship Co., United States *v.*, 359 U.S. 314 268
Jones *v.* Star Credit Corp., 298 NYS 2d 264 468
Jones, United States *v.*, 351 F. Supp. 132 40
Keco Industries, Inc. *v.* United States, 428 F. 2d 1233; 192 Ct. Cl. 733 422
Keco Industries, Inc. *v.* United States, 492 F. 2d 1200; 203 Ct. Cl. 566 ..... 205, 452, 604
Kempinski *v.* United States, 164 Ct. Cl. 451; cert. denied, 377 U.S. 981 59
Kern-Limerick *v.* Scurlock, 347 U.S. 110 965
Kesl's Estate, In Re, 117 Mont. 377; 161 P.2d 641 658
Kewanee Oil Co. *v.* Bicron Corp., 416 U.S. 470 541
Kiewit, Peter, Son's Co. *v.* Summit Construction Co., 422 F.2d 242 469
Konigsberg *v.* Hunter, 308 F. Supp. 1361 624
Koshland *v.* Helvering, 298 U.S. 441 949
Koss *v.* United States, U.S.D.C.D. S.C., Civ. Action No. 73-1121 (dec. June 3, 1974) 89
Leavell, C. H. and Co. *v.* United States, 530 F.2d 878 441
Leiter *v.* United States, 271 U.S. 204 ..... 153, 170, 861
Leitman *v.* U.S., 60 F. Supp. 218; 104 Ct. Cl. 324 333
Ling-Temco-Vought, Inc. *v.* United States, 475 F. 2d 630; 201 Ct. Cl. 135 469
Little Rock Packing Co. *v.* Chicago, B & Q RR., 116 F. Supp. 213 359
Local 783, Allied Industrial Workers *v.* General Electric, 471 F. 2d 751 787
Mackey *v.* United States, 197 F. 2d 241 822
Maneely *v.* United States, 68 Ct. Cl. 623 966
Manloading & Management Associates, Inc. *v.* United States, 461 F. 2d 1299; 198 Ct. Cl. 628 706
Martilla *v.* United States, 118 Ct. Cl. 177 59
Maryland Bank & Trust Co., United States *v.*, 76-1 USTC 83 40
Matzer, Rudolph F. & Associates, Inc. *v.* Warner, 348 F. Supp. 991 422
Mayeri *v.* Glens Falls Ins. Co., 85 N.Y.S. 2d 370 359
McCarty Corporation *v.* United States, 499 F. 2d 633; 204 Ct. Cl. 768 ..... 207, 421, 452
McKee *v.* United States, 12 Ct. Cl. 504 (1876) 290
Merrill-Stevens Dry Dock & Repair Co. *v.* United States, 119 Ct. Cl. 310 469
Merritt *v.* United States, 267 U.S. 338 965

Page

Metro Novelty Manufacturing Co., United States *v.*, 125 F. Supp. 713 242
Mexican Light & Power Co. *v.* Pennsylvania R.R., 33 F. Supp 483 822
Mississippi Valley Barge Line Co., United States *v.*, 285 F. 2d 381 822
Missouri Pacific R.R. *v.* Elmore & Stahl, 377 U.S. 134 358
Missouri Pacific Railroad Co. *v.* Slayton, 407 F. 2d 1078 502
Montilla *v.* United States, 457 F. 2d 978 89
Morrison-Knudsen Co. *v.* United States, 427 F. 2d 1181; 192 Ct. Cl. 410 345
Morton *v.* Ruiz, 415 U.S. 199 129
Munsey Trust Co., United States *v.*, 332 U.S. 234 ..... 269, 501
Myers, United States *v.*, 320 U.S. 561, modified 321 U.S. 750 311
National City Bank of Evansville *v.* United States, 143 Ct. Cl. 154; 163 F. Supp. 846 502
New Mexico, State of *v.* Aamodt, 437 F. 2d 1102 125
New York Airways, Inc. *v.* United States, 369 F. 2d 743; 177 Ct. Cl. 800 442
New York, Bank of *v.* United States, 526 F. 2d 1012 949
New York and Puerto Rico Steamship Co., United States *v.*, 239 U.S. 88 470
Nickelson *v.* General Motors Corp., 361 F. 2d 196 547
O'Rourke *v.* United States, 109 Ct. Cl. 33 311
Paccon, Inc., ASBCA No. 7890, 1963 BCA 3659 466
Palmore *v.* United States, 411 U.S. 388 595
Parker *v.* United States, 198 Ct. Cl. 661 950
Paul *v.* United States, 371 U.S. 245 470
Pearlman *v.* Reliance Insurance Co., 371 U.S. 132 502
Penn Central Co. *v.* General Mills, Inc., 439 F. 2d 1338 531
Pernell *v.* Southall Realty, 416 U.S. 363 595
Peters *v.* United States, 208 Ct. Cl. 373 431
Pettit *v.* United States, 203 Ct. Cl. 207 15
Pollard *v.* Vinton, 105 U.S. 7 (1881) 822
Posey *v.* United States, 449 F. 2d 228 950
Potter *v.* United States, 167 Ct. Cl. 28; cert. denied, 382 U.S. 817 136
Practices of Motor Carriers of Household Goods, 126 M.C.C. 250 823
PRC Information Sciences Co. *v.* Roderick M. Hills, *et al.*, Civ. Action No. 77-0527 773
Propeller Niagara *v.* Cordes, 62 U.S. (21 How.) 7 (1858) 267
Pueblo of Picuris in State of New Mexico *v.* Abeyta, 50 F. 2d 12 128
Rainier *v.* Champion Container Co., 294 F. 2d 96 823
Royal-Pioneer Paper Box Mfg. Co., Inc., ASBCA No. 13059, 69-1 BCA 7631 977
Ruiz *v.* Morton, 462 F.2d 818 949
Russell Electric Co., United States *v.*, 250 F. Supp. 2 470
S&E Contractors, Inc. *v.* United States, 406 U.S. 1 342

	Page
Scarborough *v.* Berkshire Fine Spinning Associates, 128 F. Supp. 948	504
Schmidt *v.* United States, 192 Ct. Cl. 420	590
Schnell *v.* The Vallescura, 293 U.S. 296	267, 359
Scully *v.* United States, 193 F. 185	138
Seatrain Lines, Inc. *v.* United States, 99 Ct. Cl. 272	442
Seeds & Durham *v.* United States, 92 Ct. Cl. 97	291
Serbin and Stedman *v.* United States, 168 Ct. Cl. 934	59
Shaller *v.* United States, 202 Ct. Cl. 571; cert. denied, 414 U.S. 1092	59
Sheets *v.* Selden's Lessee, 69 U.S. 177 (1864)	187
Shipman *v.* United States, 18 Ct. Cl. 138 (1883)	442
Simmons, Robert F. & Associates *v.* United States, 360 F. 2d 962; 175 Ct. Cl. 510	208
Smith, A.O., Corp. *v.* Petroleum Iron Works Co. of Ohio, 73 F.2d 531	547
Smith *v.* Dravo Corp., 203 F.2d 369	541
Sommer Corporation *v.* Panama Canal Company, 475 F.2d 292	760
So-Sew Styles, Inc., ASBCA No. 15476, 71-1 BCA 8844	343
South Side Bank & Trust Co. *v.* United States, 221 F.2d 813	503
Speers, Trustee in Bankruptcy, United States *v.*, 382 U.S. 266	504
States Marine Corp. of Delaware *v.* Producers Coop. Packing Co., 310 F.2d 206	267
Strickland Transportation Co., Inc., United States *v.*, 200 F.2d 234	531
Strickland Transportation Co., Inc. *v.* United States, 223 F.2d 466	822
Sutton *v.* United States, 256 U.S. 575	438
Tedford *v.* Peabody Coal Co., 533 F.2d 952	787
Terry *v.* United States, 120 Ct. Cl. 315	856
Testan, United States *v.*, 424 U.S. 392	430
Udall *v.* Tallman, 380 U.S. 1	920
Union Carbide Corp. *v.* Russell Train, et al., Civ. Action No. 76-1973	489
Union Carbide Corp. *v.* Russell E. Train, et al, Civ. Action No. 76-5272	489
United Van Lines, Inc. *v.* United States, 448 F. 2d 1190	270
Urban Systems Development, ASBCA No. 18399, 74-2 BCA 10867	343
Utah Construction and Mining Co. *v.* United States, 168 Ct. Cl. 522	290
Utah Power & Light Co. *v.* United States, 243 U.S. 389	89, 136
Vest Bros. Mfg. Co. *v.* United States, 160 Ct. Cl. 578	136
von Kalinowski *v.* United States, 151 Ct. Cl. 172; cert. denied, 368 U.S. 829	136
Vulcanite Portland Cement Co. *v.* United States, 74 Ct. Cl. 692	978
Wear Ever Shower Curtain Corp., GSBCA No. 4360, Dec. 16, 1975, 76-1 BCA 11,636	979
West, A. E., Petroleum Co. *v.* Atchison, T. & S. F. Ry. Co., 212 F. 2d 812	531
Western Grain Co. *v.* St. Louis-San Francisco Ry., 56 F. 2d 160	531
Whitehall Packing Co., Inc. *v.* Safeway, 228 N.W. 2d 365	359
Wilhelm *v.* U.S. Dept. of the Air Force, 418 F. Supp. 162	594
Wilke, William F., Inc. *v.* Dept. of the Army, 357 F. Supp. 988; affirmed, 485 F. 2d 180	419
Williams *v.* Phillips, 360 F. Supp. 1363	138
Williams *v.* United States, 192 F. Supp. 97	92
Williams, United States *v.*, 302 U.S. 46	950
Williams *v.* Walker-Thomas Furniture Co., 350 F. 2d 445	468
WPC Enterprises, Inc. *v.* United States, 323 F. 2d 874; 163 Ct. Cl. 1	777

INDEX DIGEST

(OCTOBER 1, 1976–SEPTEMBER 30, 1977)

Page

ABSENCES (*See* **LEAVES OF ABSENCE**)
Leaves of absence. (*See* **LEAVES OF ABSENCE**)

ACCOUNTABLE OFFICERS
Certifying officers. (*See* **CERTIFYING OFFICERS**)

ADMINISTRATIVE DETERMINATIONS
Discretionary *v.* mandatory
Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57
Reasonableness of discretionary exercise of authority
Cancellation of RFP due to unavailability of funds is reasonable exercise of discretion because Anti-Deficiency Statute, 31 U.S.C. 665(a), prohibits the obligation of funds in excess of amount appropriated from one program to another 201

ADVERTISING
Advertising *v.* negotiation
Advertising when feasible and practicable
Problems with preaward surveys and performance difficulties that Air Force has encountered in obtaining adequate hospital cleaning service do not constitute reasons, in themselves, to authorize negotiation in lieu of advertised procurement method, which is preferred by statute. Modified by 56 Comp. Gen. 649 115
Formal advertising "wherever possible"
Procurement regulations have recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, procurement should otherwise be conducted under rules of formal advertising "wherever possible" 556
Indian affairs contracts
No clear abuse of agency discretion as to whether to invoke authority to negotiate a contract without competition with an Indian concern under "Buy Indian Act" (25 U.S.C. 47) is found where agency relied on Tribal resolution recommending procurement by formal advertising 178

ADVERTISING—Continued Page

Advertising *v.* negotiation—Continued

Maintenance and repair services

Agency's determination that it was unable to locate qualified sources to perform elevator, escalator, and dumbwaiter maintenance and repair services other than manufacturers of the equipment does not constitute rational basis for sole source procurement from manufacturers where agency did not make its requirements known to the public and where agency's determination does not appear to have a factual basis 434

Negotiation propriety

Waiver of formal advertising procedures

Since Administrator, General Services Administration, has waived regulation requiring use of formal advertising procedures whenever possible under small business set-aside procurements and because statute containing "exception one" negotiating authority contains no indication of any limit on negotiation procedures that can be used in "exception one" set-aside procurements, use of negotiation procedures under questioned procurements is lawful and not in violation of prior decision 556

Reprocurement

Although statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, when contracting officer conducts new competition for reprocurement, defaulted contractor may not automatically be excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility. B–175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified 976

Specifications availability

Assuming that impossibility of drafting specifications for management services related to furnishing immediate product or service is consideration which might otherwise justify negotiation even though specifications for furnishing basic product or service are known, fact remains that Air Force admits it could develop specification for management services—thereby negating any claim that it is impossible to draft specifications. Modified by 56 Comp. Gen. 649 115

Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified 649

Commerce Business Daily

Procurement not properly categorized

Bid opening date omitted

While protest concerning failure to solicit bid from previous supplier was filed after bid opening, protest is considered timely because procurement was not properly categorized in Commerce Business Daily and it would not be fair to impose burden of discovering that fact within time constraints of General Accounting Office Bid Protest Procedures 1011

Contention of protester concerning fact that synopsis of procurement in Commerce Business Daily (CBD) did not include bid opening date is academic because protester did not rely on CBD synopsis 1011

ADVERTISING—Continued Page
Commerce Business Daily—Continued
Publication requirement
Prior to ordering under basic ordering agreement
Publication of synopsis in Commercial Business Daily must precede ordering under Basic Ordering Agreement so as to allow potential bidders an opportunity to compete. Armed Services Procurement Regulation 1-1003.2 ---- 1005

AGENTS
Government
Authority
Government liability
Department of Justice appropriations are available to pay legal expenses, including private attorneys' fees, incurred by Government officers or employees in defending suit filed under section 7217, I.R.C. (1954), when the Department determines that officer or employee was acting within the scope of his employment; that United States has an interest in defending the officer or employee; and that representation by the Department is unavailable for some valid reason. 40 Comp. Gen. 95 and other similar decisions, overruled ---- 615
Government liability for acts beyond authority
Erroneous information
Although agency official indicated to an employee that his request to use POV as advantageous to the Government for temporary duty travel would be approved, such statement does not bind Government since official had no authority to approve POV use and Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous ---- 131
Government liability for negligent or erroneous acts
Doctrine of estoppel
Relocation allowances paid to employee transferred for training purposes are strictly limited by 5 U.S.C. 4109. Fact that cognizant agency officials erroneously authorized reimbursement of expenses beyond those permitted by statute will not form basis for estoppel against Government. Although estoppel has been found in some cases where there is contractual relationship between Government and citizen, same doctrine is not applicable here because relationship between Government and its employees is not contractual, but appointive, in strict accordance with statutes and regulations ---- 85
Military matters
Erroneous information regarding pay
The receipt of information, later established to be erroneous, by one dealing with a Government official which was relied upon by the recipient to his detriment does not afford a legal basis for a payment from appropriated funds since it has long been held that in the absence of specific statutory authority the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties ---- 943

AGREEMENTS
Basic ordering agreements
Negotiated contracts. (*See* CONTRACTS, Negotiation, Basic ordering agreements)

AGRICULTURE DEPARTMENT Page

Contracts

Negotiated

Master agreements

Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78

Farm Home Administration

Loans

Guaranteed loan programs

Small business investment companies

Small business investment companies (SBICs) are not eligible to participate as guaranteed lenders in either Small Business Administration's (SBA) or Farmers Home Administration's (FmHA) loan programs. As stated in 49 Comp. Gen. 32, legislative history of Small Business Investment Act demonstrates congressional intent that SBICs operate independently of other Government loan programs. Nothing in SBIC Act or Consolidated Farm and Rural Development Act, which established FmHA's authority to guarantee loans, or legislative history of either, supports SBA's position that SBICs should now be permitted to participate as guaranteed lenders in these loan programs 323

AIRCRAFT

Carriers

Fly America Act

Applicability

Employee's liability under 49 U.S.C. 1517 and the Fly America guidelines should be determined on the basis of loss of revenues by certificated U.S. air carriers as a result of the employee's improper use of, or indirect travel by, noncertificated air carriers. To the extent that State Department's formulas at 6 FAM 134.5 impose liability based on gain in revenues by "unauthorized" carriers where traveler's actions merely shift Government revenues between noncertified air carriers, those formulas unnecessarily penalize Government travelers 209

In the absence of agency instructions adopting a fare proration formula for determining traveler's liability for scheduling of travel in violation of the Fly America guidelines, this Office will apply a milege proration formula calculating the traveler's liability based on certificated U.S. air carriers' loss of revenues 209

Under State Department instructions, alternate rest and recuperation (R&R) point is to be regarded as the employee's primary R&R point for purposes of 49 U.S.C. 1517. Since certificated U.S. air carrier service is unavailable between the employee's duty station, Kinshasa, and his alternate R&R point, Amsterdam, employee's action in extending his ticket to include personal round-trip travel aboard a foreign air carrier to Los Angeles at a reduced through fare was not improper since his additional travel did not diminsh receipt of Government revenues by certificated U.S. air carriers 209

In view of State Department's instruction that alternate R&R point is to be regarded as employee's primary R&R point for purposes of 49 U.S.C. 1517 and application of the Fly America guidelines, employee's choice of alternate R&R location not serviced by certificated U.S. air carriers will be scrutinized to assure that it meets the purpose of rest and

AIRCRAFT—Continued Page
Carriers—Continued
Fly America Act—Continued
Applicability—Continued
recuperation and was not selected for the purpose of avoiding the requirement for use of certificated U.S. air carriers---- 209
Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable. Modified by 56 Comp. Gen. 629---- 219
The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier. Modified by 56 Comp. Gen. 629---- 219
Rates
Interest on retroactive increases
Payment of interest by the Government on retroactive increases in rates granted to overseas air carriers by the Civil Aeronautics Board is limited by the contract provisions and by the dates the increases are announced---- 55

ALASKA
Employees
Failure to complete employment agreement
Refund of transportation and travel expenses
Not required
Employee appointed as road locator in Alaska was unable to perform rigorous duties of position and was terminated prior to end of term of Service Agreement. Whether separation was for reasons beyond employee's control and acceptable to agency is for agency determination. Record here supports inference that separation was for benefit of Government and for reasons beyond employee's control. Voucher for return travel to Ithaca, New York, may be certified for payment upon such determination---- 606

ALLOWANCES
Family. (*See* FAMILY ALLOWANCES)
Military personnel
Basic allowance for quarters (BAQ). (*See* QUARTERS ALLOWANCE. Basic allowance for quarters (BAQ))
Family allowances. (*See* FAMILY ALLOWANCES)
Housing. (*See* STATION ALLOWANCES, Military personnel, Housing)
Members with dependents. (*See* TRANSPORTATION, Dependents. Military personnel, Dislocation allowance)
Station allowances overseas. (*See* STATION ALLOWANCES. Military personnel)

ALLOWANCES—Continued Page
Quarters. (*See* **QUARTERS ALLOWANCE**)
Station. (*See* **STATION ALLOWANCES**)

ANNUAL LEAVE (*See* **LEAVES OF ABSENCE, Annual**)

APPOINTMENTS
Absence of formal appointment
Reimbursement for services performed
It is not necessary for this Office to recover salary payments made to Acting Administrator during period he was not entitled to hold that position since incumbent acted with full knowledge of the Secretary and the President and may be considered a *de facto* employee, entitled to reasonable value of his services which equates to same amount as his salary 761
Presidential
Federal Insurance Administrator
Federal Insurance Administrator, a position established under 42 U.S.C. 3533a (1970), requires Presidential nomination and confirmation under Article II, Sec. 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere 137
When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345-3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator 761
Status
De facto
Validity of decisions made by the Acting Federal Insurance Administrator during period he was not authorized to hold position is in doubt and may have to be resolved ultimately by courts. Secretary is advised to ratify those decisions with which she agrees to avoid confusion about their binding effect in future 761

APPROPRIATIONS
Adjustments
Agency distribution
Sufficient evidence exists to support Treasury Department conclusion that United States currency in account of United States disbursing officer (USDO) was not destroyed prior to evacuation from Vietnam. Loss should be treated as a physical loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis 791
Loss of Vietnam piasters, held by United States disbursing officer (USDO) and State Department officials, abandoned during evacuation should be treated as a physical loss at official exchange rate at time of loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis 791

APPROPRIATIONS—Continued Page

Augmentation

Contract administration costs

Allegation not sustained by record

Allegation that agency's incurrence of additional contract administration costs because of contractor's deficiencies in one area would constitute an improper augmentation of appropriations cannot be sustained where record does not indicate that funds appropriated for procurement purposes will be supplemented by funds appropriated for other purposes---- 712

Availability

Agency's payment of moving expenses of another agency to obtain space

Health, Education and Welfare Department paying moving expenses and rent of another agency to consolidate HRA in one building

Apportionment of costs

Intraagency apportionment by HEW of Health Resources Administration moving costs among appropriations of other HEW constituent agencies which benefitted from move, on basis of amount of additional space made available to each agency, is proper if apportioned part of costs incurred was necessary or incident to meeting space needs of each constituent agency. 35 Comp. Gen. 701 and other similar cases overruled--- 928

Attorney fees

Attorneys' fees and related litigation expenses incurred by Northern Pueblo Tributary Water Rights Association, prior to decision by Court of Appeals that private attorneys may intervene in suit in which U.S. District Court denied intervention, may be paid from appropriations of Department of the Interior, because Department of Justice conceded before Court of Appeals that its representation would constitute conflict of interest and allowed private attorneys to cooperate in preparation and presentation of Northern Pueblo position despite failure of Court to permit intervention---- 123

Department of Justice appropriations are available to pay legal expenses, including private attorneys' fees, incurred by Government officers or employees in defending suit filed under section 7217, I.R.C. (1954), when the Department determines that officer or employee was acting within the scope of his employment; that United States has an interest in defending the officer or employee; and that representation by the Department is unavailable for some valid reason. 40 Comp. Gen. 95 and other similar decisions, overruled---- 615

Costs of searching for and producing files

Internal Revenue Service summons

In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons---- 36

Damages for unauthorized disclosure of tax return information

The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, Internal Revenue Code (I.R.C.) (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it

APPROPRIATIONS—Continued Page

Availability—Continued

Damages for unauthorized disclosure of tax return information Con. is administratively determined that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954). 40 Comp. Gen. 95 and other similar decisions, overruled 615

Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by the United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization. 40 Comp. Gen. 95 and other similar decisions, overruled 615

Erroneous military pay

Administrative errors

The receipt of information, later established to be erroneous, by one dealing with a Government official which was relied upon by the recipient to his detriment does not afford a legal basis for a payment from appropriated funds since it has long been held that in the absence of specific statutory authority the United States is not liable for the negligent or erroneous acts of its officers, agents, or employees, even though committed in the performance of their official duties 943

Expenses incident to specific purposes

Necessary expenses

Funds appropriated to agency for operating expenses may be used to exercise purchase option to the extent needed to meet a *bona fide* need arising within the fiscal year such funds become available 829

Grants-in-aid

Rule of statutory construction developed by courts which disfavors retroactive application of statute is relevant primarily where retroactive application of a statute would abrogate pre-existing rights or otherwise cause result which might seem unfair. However, these considerations, and thus cited rule of statutory construction, do not appear relevant to allowance of grant payments for costs incurred by grantee prior to availability of appropriation to be charged. Furthermore, it is doubtful that such use of grant funds even involves retroactive application of a statute in customary sense since determination of whether to allow payment, as well as payment itself, will be made after the appropriation becomes available 31

Invitations

Change of command ceremonies

Coast Guard

Government payment of expense of printing invitations to Coast Guard change of command ceremony is proper since ceremony is traditional and appropriate observance, and printing of invitations may be considered necessary and proper expense incident to ceremony 81

Judgments, decrees, etc. (*See* **COURTS, Judgments, decrees, etc., Payment**)

APPROPRIATIONS—Continued Page

Availability—Continued

Moving expenses for relocated agency

Liability of agency requesting relocation

To the extent one agency requires the relocation of another to meet its own space needs and the relocation is performed for the benefit of the requesting agency, its appropriations, not those of the relocated agency, are available to pay the cost of the relocated agency's move. The appropriations of the relocated agency would not be available to that same extent since the costs incurred are not necessary for it to carry out the purposes of its appropriations. 35 Comp. Gen. 701 and other similar cases overruled 928

Objects other than as specified

Related to specific activities

Food and Drug Administration (FDA) may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation 111

Special achievement award payment

Arbitrator's award

Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57

Wheelchairs

Motorized

Should GSA, pursuant to 42 U.S.C. 4156 (1970), and/or the Architectural and Transportation Compliance Board, pursuant to 29 U.S.C. 792 (Supp. IV, 1974), order the SSA to purchase and have available motorized wheelchairs for other handicapped employees and members of general public to rectify the violation in the Southeastern Program Service Center of the carpeting standards established pursuant to the Architectural Barriers Act of 1968, it may use its appropriations for that purpose. If other action is prescribed, wheelchair purchases are not authorized, regardless of savings in cost 398

Deficiencies

Antideficiency Act

Federal aid, grants, etc.

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available 31

APPROPRIATIONS—Continued Page

Fiscal year

Availability beyond

Contracts

Automatic Data Processing Systems

Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Payment of charges—a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"—would violate 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11, since charges represent part of price of future years' ADP requirements rather than reasonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory. B–164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 142

Although some separate charges payable for termination of ADP system prior to intended system's multiyear life contained in contracts supported by fiscal year funds with multiple yearly options are illegal, it is proper to pay separate charges in cases where charges, taken together with payments already made, reasonably represent value of fiscal year requirements actually performed. B–164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 142

Based on rationale employed in companion decision involving similar separate charges scheme, it is concluded that protesting offeror's proposed separate charges are violative of statutory restrictions on appropriations 167

Installment buying

Real property purchases

United States Fish and Wildlife Service may enter into purchase agreement with owner of real property in which even though settlement is held and legal title to the land is vested in the Government, it agrees to landowner's request to disburse the purchase price to the vendor over a period not to exceed 4 years, provided it obligates the full purchase price from appropriations available for such purpose from the fiscal year in which the options to purchase are exercised by the Service to meet a need of that fiscal year 351

Interior Department

Availability

Legal expenses

Indian tribes

Snyder Act, 25 U.S.C. 13, provides discretionary authority for Secretary of the Interior to use appropriated funds to pay for attorneys' fees and related expenses incurred by Indian tribes in administrative proceedings or judicial litigation, for purpose of improving and protecting resources under jurisdiction of Bureau of Indian Affairs. Attorneys' fees and expenses incurred in judicial litigation may only be paid where representation by Department of Justice is refused or otherwise unavailable, including situation where separate representation is mandated by Court 123

APPROPRIATIONS—Continued Page
Interior Department—Continued
Availability—Continued
Litigation costs incident to beneficial interest
Indian tribes
Attoneys' fees and related litigation expenses incurred by Northern Pueblo Tributary Water Rights Association, prior to decision by Court of Appeals that private attorneys may intervene in suit in which U.S. District Court denied intervention, may be paid from appropriations of Department of the Interior, because Department of Justice conceded before Court of Appeals that its representation would constitute conflict of interest and allowed private attorneys to cooperate in preparation and presentation of Northern Pueblo position despite failure of Court to permit intervention 123
Training non-Government employees
National Mine Health and Safety Academy
Mining Enforcement and Safety Administration (MESA) has authority under Federal Coal and Metal Acts to enter into agreements with colleges whereby college students enrolled in mining-related programs of study would receive training at MESA's National Mine Health and Safety Academy on a fully reimbursable basis. While statutes do not expressly provide for training of persons not presently affiliated with Government agencies or mining industry, proposed agreements for training of college students in mining-related programs are consistent with broad remedial purposes of statutes 817
Justice Department
Litigation expenses
Tax matters
Department of Justice appropriations are available to pay legal expenses, including private attorneys' fees, incurred by Government officers or employees in defending suit filed under section 7217, I.R.C. (1954), when the Department determines that officer or employee was acting within the scope of his employment; that United States has an interest in defending the officer or employee; and that representation by the Department is unavailable for some valid reason. 40 Comp. Gen. 95 and other similar decisions, overruled 615
Limitations
Compensation
Land commissioners
Where members of "continuous" land commission are substituted or added after June 30, 1975, to hear cases referred prior to that time, obligation for compensation to original commissioner (based on compensation rate prescribed in his order of appointment) ceases to exist, and new obligation as to substituted or added commissioner only is created based on compensation prescribed for new commissioner and anticipated length of service. Compensation would, therefore, be payable from appropriations current at time of substitution or addition, and would be subject to limitations contained in such appropriations, including GS–18 daily rate limitation contained in fiscal year 1976 and 1977 appropriation acts 414

APPROPRIATIONS—Continued Page
Limitations—Continued
Compensation—Continued
Land commissioners—Continued
Amended court order increasing previously fixed rate of compensation for land commissioners creates new obligation chargeable to appropriation current at time of amended order. Thus, increased compensation payable under such an amended order issued after June 30, 1975, is subject to, and limited by, any salary restrictions contained in appropriation charged 414
Obligation
Advance of appropriation availability
Concerning use of grant funds to pay for costs incurred by grantee prior to availability of appropriation to be charged, General Accounting Office (GAO) will no longer apply "general rule" that, in connection with grants, Federal Government may not participate in costs where the grantee's obligation arose before availability of appropriation to be charged unless the legislation or its history indicates a contrary intent, since such rule did not reflect actual basis on which decisions cited in support thereof were decided and, in any event, has no legal basis. 45 Comp. Gen. 515, 40 *id.* 615, 31 *id.* 308 and A–71315, Feb. 28, 1936, modified 31
Beyond fiscal year availability. (*See* **APPROPRIATIONS, Fiscal year, Availability beyond**)
Contracts
Availability of funds requirement
Cancellation of RFP due to unavailability of funds is reasonable exercise of discretion because Anti-Deficiency Statute, 31 U.S.C. 665(a), prohibits the obligation of funds in excess of amount appropriated from one program to another 201
Continuing
Army Corps of Engineers
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437
Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures 437
Future needs
Based on rationale employed in companion decision involving similar separate charges scheme, it is concluded that protesting offeror's proposed separate charges are violative of statutory restrictions on appropriations. 167

APPROPRIATIONS—Continued Page

Obligation—Continued

Contracts—Continued

Real estate purchases

United States Fish and Wildlife Service may enter into pruchase agreement with owner of real property in which even though settlement is held and legal title to the land is vested in the Government, it agrees to landowner's request to disburse the purchase price to the vendor over a period not to exceed 4 years, provided it obligates the full purchase price from appropriations available for such purpose from the fiscal year in which the options to purchase are exercised by the Service to meet a need of that fiscal year 351

Definite commitment

Appropriations for compensation of land commissioners are obligated only upon appointment of each commissioner *and* referral of particular condemnation action to commission of which he is a part, since no *bona fide* need for commissioner's services as to particular case arises until that time. Therefore, compensation for members of "continuous" land commission, established in 1969, is subject to GS–18 daily rate limitation under fiscal year 1976 or 1977 appropriations for payment of land commissioners with respect to cases referred to continuous commission after June 30, 1975. B–184782, February 26, 1976, amplified 414

Where members of "continuous" land commission are substituted or added after June 30, 1975, to hear cases referred prior to that time, obligation for compensation to original commissioner (based on compensation rate prescribed in his order of appointment) ceases to exist, and new obligation as to substituted or added commissioner only is created based on compensation prescribed for new commissioner and anticipated length of service. Compensation would, therefore, be payable from appropriations current at time of substitution or addition, and would be subject to limitations contained in such appropriations, including GS–18 daily rate limitation contained in fiscal year 1976 and 1977 appropriation acts 414

Subsequent appropriation availability

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available 31

Reprogramming

Funds

Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency, and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, were not the cause of claimant which was in line for award not receiving award, and cannot serve as basis for claim for proposal preparation costs, as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal 201

APPROPRIATIONS—Continued Page
Reprogramming—Continued
Funds—Continued
Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs 201
Restrictions
Boards, committees and commissions
Amended court order increasing previously fixed rate of compensation for land commissioners creates new obligation chargeable to appropriation current at time of amended order. Thus, increased compensation payable under such an amended order issued after June 30, 1975, is subject to, and limited by, any salary restrictions contained in appropriation charged 414

ARBITRATION
Award
Collective bargaining agreement
Violation
Agency implementation of award
Navy installation, in separate grievances, was ordered by two arbitrators to pay environmental differential to certain employees, which the installation began to pay. Navy Headquarters, however, concluded the awards were inconsistent with applicable regulations and directed installation to terminate payments. Navy received an unfair labor practice citation and seeks a ruling on legality of the terminated awards. General Accounting Office (GAO) holds that arbitrators' findings and conclusions satisfied the regulatory criteria and that awards may be implemented with backpay for period of termination 8
Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award by given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57
Consistent with law, regulations and GAO decisions
Navy installation terminated two arbitration awards for environmental differential for certain employees on basis payments were improper. Assistant Secretary for Labor-Management Relations cited the naval installation for an unfair labor practice and ordered awards be reinstated with backpay. To preclude ordering payments that may be illegal, GAO recommends that Assistant Secretary state in orders that payments shall be made "consistent with laws, regulations, and decisions of the Comptroller General." This would permit agency to obtain decision from this Office 8
Implementation by agency
Leave restored
Federal Aviation Administration (FAA) employee who transferred from Puerto Rico to Alaska was erroneously granted home leave. Agency charged employee's leave account with 104 hours annual leave and made deduction from salary for 18 hours of leave without pay.

ARBITRATION—Continued Page
Award—Continued
Implementation by agency—Continued
Leave restored—Continued
Arbitrator found this a violation of collective bargaining agreement and directed FAA to restore annual leave and reimburse salary. Award may be implemented since employee is entitled to waiver of repayment of 122 hours of home leave erroneously granted and used (5 U.S.C. 5584)---- 824
Travel expenses
Use of privately owned automobile not authorized
Employee's request to use privately owned vehicle (POV) as advantageous to Government for temporary duty travel was denied although official told him it would be approved. Arbitrator held that employee should be paid as though request had been approved since agency's failure to act on it within time frame in its regulations and official's statement amounted to approval. Award may not be implemented since no determination was made that POV is advantageous to Government on basis of cost, efficiency or work requirements as required by Federal Travel Regulations---- 131
Retroactive promotion with backpay
Violation of collective bargaining agreement
Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award---- 732
Special achievement award payment
Implementation by agency
Contrary to agency procedure
Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy---- 57

ARCHITECT AND ENGINEERING CONTRACTS (*See* CONTRACTS, Architect, engineering, etc., services)

ARCHITECTURAL BARRIERS ACT
Compliance with standards
Handicapped persons. (*See* HANDICAPPED PERSONS, Facilities, etc., Architectural Barriers Act, Compliance with standards established under Act)

ARMED SERVICES PROCUREMENT REGULATION
First article and initial production testing
Armed Services Procurement Regulation 1–1903(a)(iii) controls both first article testing and initial production testing---- 689

ARMY DEPARTMENT Page

Corps of Engineers

Construction projects

Flood control

Matching grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States 645

Rivers and Harbors projects

Continuing contracts

33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract whcih now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437

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

ATTORNEYS

Fees

Employee transfer expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Attorney fees**)

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

AWARDS

Arbitration. (*See* **ARBITRATION, Award**)

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

BANKRUPTCY

Contract assignment

Assignee *v.* trustee

Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer 400

Contractors

Payments due under Government contracts. (*See* **CONTRACTS, Payments, Bankrupt contractor**)

Government claims

Settlement

Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated

BANKRUPTCY—Continued Page
Government claims—Continued
Settlement—Continued
prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly 270

BIDDERS
Invitation right
Mailing list omission
In view of broad discretion permitted contracting officer in deciding whether to cancel invitation after opening, omission of bidder from bidder's mailing list does not require cancellation and resolicitation of procurement where there is no evidence of conscious or deliberate effort by procurement activity to preclude bidder from competing. Significant effort to obtain competition was made and award will be made at reasonable price 1011
Negotiated procurement
Publication of synopsis in Commerce Business Daily must precede ordering under Basic Ordering Agreement so as to allow potential bidders an opportunity to compete. Armed Services Procurement Regulation 1–1003.2 1005
Qualifications
Experience
Product experience clause *v.* manufacturer only specification
Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer the specification because of quality and inspection concerns. Notwithstanding such concerns, GAO has suggested that product experience clause be used instead of "manufacturer only" specification 912
Integrity, etc.
Small business concerns
While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed 411
Manufacturer or dealer
Walsh-Healey Act purpose
Questions relating to bidder's standing as a "manufacturer or regular dealer" under criteria of the Walsh-Healey Act are not germane to issues presented in protest, since protest involves contracts under $10,000 953
Prequalifications
Requirements
Restrictive of competition
Untimely protest involving challenge to on-going procurement policy which requires pre-qualification of bidders and excludes from competition an entire class of business firms, raises an issue significant to procurement practices and will be considered notwithstanding untimeliness 953

BIDDERS—Continued Page
Qualifications—Continued
Prequalifications—Continued
Requirements—Continued
Restrictive of competition—Continued
Although procedures for pre-qualification of bidders are restrictive of competition, they are based on agency's reasonable and longstanding interpretation of Joint Committee on Printing regulation and therefore are not subject to legal objection. However, the matter is referred to Committee for determination concerning efficacy of interpretation 953
Prior unsatisfactory service
Administrative determination
Time limitation
Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on events which occurred more than 3 years prior to determination when there is an adequate record of more recent experience because FPR 1–1.1203-1 provides that such unsatisfactory performance must be related to serious deficiencies in *current or recent* contracts 411
Tenacity and perseverance
Small business concerns
Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on (1) overcharge of $22.80, and (2) legitimate question of contract interpretation because FPR 1–1.1203-1 provides that such unsatisfactory performance must be related to *serious* deficiencies 411
Responsibility *v.* bid responsiveness
Bidder ability to perform
Propriety of incorporating by reference in resolicitation various representations and certifications submitted by bidders as part of bids previously rejected is questionable with respect to legal effect and since bidders would be precluded from modifying previous answers. However, resolicitation document is not totally defective since provisions in question basically involve bidder responsibility and thus representations may be furnished after bid opening 369
Descriptive literature requirement
Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid 608

BIDS
Acceptance
Unbalanced bids
Improper
Invitation for bids (IFB) soliciting bids on requirements-type contract on net basis or single percentage factor applied to agency priced items not stating estimated quantities or list of past orders is in violation of Federal Procurement Regulations para. 1–3.409(b)(1) and contrary to 52 Comp. Gen. 732, 736 107
Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where

BIDS—Continued Page
Acceptance—Continued
Unbalanced bids—Continued
Improper—Continued
examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs 271
Aggregate *v.* separable items, prices, etc.
Solicitation requirement
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487
All or none
Qualified. (*See* **BIDS, Qualified, All or none**)
Alternative
Acceptability
Even though low bid apparently was submitted on basis of alternative not contemplated by bidding schedule, bid may be accepted because it is responsive to specifications, both as submitted and as clarified. In circumstances protester was not prejudiced by low bidder's deviation from bid schedule instructions 328
Ambiguous
Bid modification
Where invitation permits multiple awards and does not prohibit "all or none" bids, insertion of "INCL" and asterisks next to various schedule line items in lieu of specific unit prices may be reasonably construed as evidencing bidder's intent not to charge for those items and in effect was tantamount to an "all or none" bid for those items for which prices were quoted 346
Nonresponsive bid
Mistake-in-bid procedures are not applicable to correct a nonresponsive or ambiguous bid in order to make it responsive 83
Notation "N/A" next to invitation for bids item for which price is required can reasonably be interpreted that bid price is not applicable or that bid price does not include item. Under circumstances bid must be rejected because bidder could not be contractually bound to deliver item 83
Amendments
Failure to acknowledge
Allegation that bid should be rejected as nonresponsive because of bidder's failure to acknowledge receipt of an amendment to invitation for bids is academic since portion of procurement which would be awarded to that bidder shall be readvertised 378
Solicitation *v.* amendment
Provisions
Where solicitation states that there is 117 Volt A.C. power supply and instruments must run off 24 Volt D.C. power supply, solicitation amendment indicating that agency will furnish the 24 Volt D.C. converter does not contradict earlier statement that there is 117 Volt A.C. power supply 378

BIDS—Continued Page

Base bid and alternates. (*See* **BIDS, Aggregate *v.* separable items, prices, etc.**)

Bidders.

Generally. (*See* **BIDDERS**)

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

Brand name or equal. (*See* **CONTRACTS, Specifications, Restrictive, Particular make**)

Buy American Act

Buy American Certificate

No exceptions stated by bidder

Allegation that low offeror did not meet source origin requirements of Agency for International Development Regulation No. 1, subpart B, section 201.11, which is virtually identical to "Buy American Art," 41 U.S.C. 10(a)–(e), is incorrect. While true that American Medical Instrument Corporation (AMICO) substituted domestic supplier for one submitted in offer, cost of components did not exceed 50 percent of cost of components of designated source country. Where offeror excludes no end products from Buy American certificate and does not indicate it is offering anything other than domestic end products, acceptance of offer will result in obligation on part of offeror to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award 531

Foreign product determination

Purchases for contractor's use

A computer program, consisting of an enhanced magnetic tape produced in the United States from a master tape, and associated documentation printed in the United States, is properly considered to be a domestic source end product for purpose of the Buy American Act, even though program was developed in a foreign country 102

Item to be delivered under subcontract containing Buy American clause constitutes an end product for purpose of Buy American Act even though item is to be incorporated into ultimate end product by prime contractor 596

Cancellation. (*See* **BIDS, Discarding all bids**)

Competitive system

Adequacy of competition

Sustained by record

Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions 487

"Buy Indian Act"

No clear abuse of agency discretion as to whether to invoke authority to negotiate a contract without competition with an Indian concern under "Buy Indian Act" (25 U.S.C. 47) is found where agency relied on Tribal resolution recommending procurement by formal advertising 178

Equal bidding basis for all bidders

Bidders' superior advantages

If not the result of preference or unfair action by Government, contractor may enjoy competitive advantage by virtue of incumbency 689

BIDS—Continued Page

Competitive system—Continued

Equal bidding basis for all bidders—Continued

Lacking

In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements 912

Federal aid, grants, etc.

Basic principles

Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1–10.103–4(a) provides exception when only one bid is received 43

Federal norm compelling "full and free" competition for Environmental Protection Agency (EPA) grantee contracts awarded under section 204(a)(6) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1284(a)(6) (Supp. V, 1975), together with implementing regulations, applies whether grantee uses "brand name" purchase description or formal specification 912

Negotiated contracts. (*See* **CONTRACTS, Negotiation, Competition**)

Procurement restrictions

Prequalifications of bidders, etc.

Although procedures for pre-qualification of bidders are restrictive of competition, they are based on agency's reasonable and longstanding interpretation of Joint Committee on Printing regulation and therefore are not subject to legal objection. However, the matter is referred to Committee for determination concerning efficacy of interpretation 953

Restrictions on competition

Prequalifications of bidders, etc.

Untimely protest involving challenge to on-going procurement policy which requires pre-qualification of bidders and excludes from competition an entire class of business firms, raises an issue significant to procurement practices and will be considered notwithstanding untimeliness 953

Specifications

Defective

Agency specified that instrument "capsule material" be of 316 stainless steel with intent that portion of instrument wetted by solution being measured be made of that material. Protester's design utilized 316 stainless steel capsule and wetted diaphragm of 430 stainless steel. Protester reasonably read specifications as consistent with its product although in fact product does not meet agency's needs. In view of specification ambiguity, unawarded portion of procurement should be readvertised .. 378

BIDS—Continued Page

Competitive system—Continued

Specifications—Continued

Defective—Continued

Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated 497

Two-step procurement

Discarding all bids

Although in two-step formal advertising divergent technical approaches may be acceptable to agency, costs associated with particular approach may not be acceptable, and Government need not take into account cost of more expensive approach or system in estimating reasonable price of system that would satisfy its needs. Further, where agency reports that higher bid price is due primarily to profit and overhead rather than to differences in technical proposals, Government estimate based on apparent cost of least expensive approach is not unduly prejudicial to bidder offering higher price 369

Unbalanced bids

Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria 668

Use of erroneous specifications

In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements 912

Conformability of articles to specifications, (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered)**

Contracts

Generally. (*See* **CONTRACTS)**

Correction

Approval. (*See* **BIDS, Modification)**

Deviations from advertised specifications. (*See* **CONTRACTS, Specifications, Deviations)**

Discarding all bids

Low bid nonresponsive

Two-step procurement

Resolicitation of second-step

Rejection of bid as unreasonably high, even though bid price is lower than initial Government estimate, is proper exercise of agency discretion

BIDS—Continued Page
Discarding all bids—Continued
Low bid nonresponsive—Continued
Two-step procurement—Continued
Resolicitation of second-step—Continued
where record shows that estimate was outdated and agency could reasonably determine that low bid price submitted by nonresponsive bidder accurately represented current fair market value of system that would satisfy Government's needs ---------- 369
Readvertisement justification
Changed conditions, etc.
Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs ---------- 271
Resolicitation
Auction atmosphere not created
Proper cancellation of IFB under ASPR 2-404.1 does not constitute auction as that term is used in ASPR 3-805.3(c) which refers to negotiated procurements ---------- 364
Cancellation of invitation justified
Improper cost evaluation formula use for item 1
Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended ---------- 671
Requirements understated
Armed Services Procurement Regulation (ASPR) 2-404.1, prohibiting, as a general rule, cancellation and resolicitation solely due to increased requirements, does not prevent cancellation when IFB does not adequately define unchanged requirements ---------- 364
Revised specifications
Cancellation of invitation for bids (IFB) after bid opening and resolicitation is not unreasonable where record indicates orginal IFB solicited bids for only half of quantity actually needed ---------- 364
Where the Government has unknowingly accepted nonconforming item, concedes acceptability of item by granting waivers accompanied by price decreases under existing contracts and has amended current solicitations and presumably will amend future solicitations to permit delivery of item, minimum needs are overstated. Although the record demonstrates uncertainty as to impact on bidding, proper method to determine savings is resolicitation of two preaward procurements reflecting needs of Government. Concerning the two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with view toward resolicitation should be considered. 924

BIDS—Continued Page
Discarding all bids—Continued
Resolicitation—Continued
Revised specifications—Continued
Incorporation of terms by reference
Propriety of incorporating by reference in resolicitation various representations and certifications submitted by bidders as part of bids previously rejected is questionable with respect to legal effect and since bidders would be precluded from modifying previous answers. However, resolicitation document is not totally defective since provisions in question basically Involve bidder responsibility and thus representations may be furnished after bid opening 369
Specifications
Defective
Ambiguous
Partial invitation cancelled
Agency specified that instrument "capsule material" be of 316 stainless steel with intent that portion of instrument wetted by solution being measured be made of that material. Protester's design utilized 316 stainless steel capsule and wetted diaphragm of 430 stainless steel. Protester reasonably read specifications as consistent with its product although in fact product does not meet agency's needs. In view of specification ambiguity, unawarded portion of procurement should be readvertised ... 378
Errors. (*See* **BIDS, Mistakes**)
Evaluation
Aggregate *v.* **separable items, prices, etc.**
Specification propriety. (*See* **CONTRACTS, Specifications, Aggregate** *v.* **separable items**)
All or none bids
Qualified. (*See* **BIDS, Qualified, All or none**)
Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Formula
Defective
Government's formula for evaluating bids which does not reflect anticipated requirements raises a significant issue notwithstanding agency's view that protest is untimely 668
Method of evaluation
Lowest bid not lowest cost
Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria 668
Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore,

BIDS—Continued Page
Evaluation—Continued
Method of evaluation—Continued
Lowest bid not lowest cost—Continued
cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended 671
Objective *v.* subjective factors
General Accounting Office (GAO) recommends that in future procurements, use of objective and subjective evaluation factors be clearly distinguished. Moreover, GAO questions whether nonresponsive samples should have been disassembled by agency to determine whether they met unlisted specification requirements since regulation provides for such evaluation only if the samples meet listed characteristics 841
Point system
Negotiation. (*See* **CONTRACTS, Negotiation, Evaluation factors. Point rating**)
Testing costs
General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable 689
Invitation for bids
Bids nonresponsive to invitation
Bid qualified
Where invitation permits multiple awards and does not prohibit "all or none" bids, insertion of "INCL" and asterisks next to various schedule line items in lieu of specific unit prices may be reasonably construed as evidencing bidder's intent not to charge for those items and in effect was tantamount to an "all or none" bid for those items for which prices were quoted 346
Cancellation
Resolicitation
Auction atmosphere not created
Proper cancellation of IFB under ASPR 2–404.1 does not constitute auction as that term is used in ASPR 3–805.3(c) which refers to negotiated procurements 364
Not required
In view of broad discretion permitted contracting officer in deciding whether to cancel invitation after opening, omission of bidder from bidder's mailing list does not require cancellation and resolicitation of procurement where there is no evidence of conscious or deliberate effort by procurement activity to preclude bidder from competing. Significant effort to obtain competition was made and award will be made at reasonable price 1011
Requirements decreased
Cancellation of invitation for bids (IFB) after bid opening and resolicitation is not unreasonable where record indicates original IFB solicited bids for only half of quantity actually needed 364
Two-step procurement
Rejection of bid as unreasonably high, even though bid price is lower than initial Government estimate, is proper exercise of agency discretion where record shows that estimate was outdated and agency could

BIDS—Continued Page
Invitation for bids—Continued
Cancellation—Continued
Resolicitation—Continued
Two-step procurement—Continued
reasonably determine that low bid price submitted by nonresponsive bidder accurately represented current fair market value of system that would satisfy Government's needs 369
Unbalanced bids
Protest against cancellation of solicitation due to inclusion of erroneous estimate of paintable area for closet interiors which inadvertently permitted bidders to submit unbalanced bids is denied, since where examination discloses that estimate is not reasonably accurate, proper course of action is to cancel solicitation and resolicit based on revised estimate which adequately reflects agency's needs 271
Clauses
Late bids, etc.
Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation 737
Requirements
Allegation of ambiguity
Notwithstanding protester's contention that invitation for bids did not clearly state agency's requirement for line item, causing protester to submit bid based on supplying duplicate set of item where agency required only single set, award to low bidder is not subject to objection where bid prices reveal that protester would not have been low bidder in any event 346
Responsiveness
Where invitation for bids called for item which required First Article testing only if item offered was not on qualified products list (QPL), bidder's notation in bid schedule that First Article testing was "not applicable," when read in conjunction with information contained in other portion of bid indicating that bidder's item was included on QPL, reasonably can be construed as bidder's offer to furnish QPL item 334
Labor stipulations. (*See* **CONTRACTS, Labor stipulations**)
Late
Acceptance
Prejudicial to other bidders
By accepting bid submitted 4 minutes after time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, the otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid 419

BIDS—Continued Page
Late—Continued
Agency responsibility
Bid received after specified deadline should be considered for award where agency failed to establish and implement procedures for timely receipt of bids 737
Mishandling determination
Bids received at one place for delivery to another place
Determination of whether proposal is late is measured by its time of arrival at office designated in the solicitation, and not by time of arrival at agency's central mailroom 50
Failure to establish and implement procedures for timely receipt of late bids
Where agency practice is not to accept special delivery mail on weekends and passive reliance is placed on routine deliveries to insure timely arrival of bids for Monday afternoon bid opening even though delays might be expected due to weekend mail buildup, agency has failed to meet standard required for effective establishment and implementation of procedures for timely receipt of bids 737
Time/date stamp on return receipt *v.* hand notation on bid envelope
Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation 737
Processing and delivery by Government
A delay of 2 hours and 5 minutes in the transmission of a proposal from the central agency mailroom to the designated office does not constitute Government mishandling since the mail distribution was accomplished in accordance with reasonable internal mail distribution procedures 50
Telegraphic modifications
Untranscribable
Due to Western Union machine malfunction, etc.
Telegraphic bid modification, unable to be transcribed intelligibly from Western Union office to telex receiver at procuring activity followed by inability to transmit when activity had "run out" of forms for receiving telegrams, all prior to bid opening, was properly not considered since Western Union was substantial cause for nonreceipt by failing (1) to resupply agency with forms timely ordered and (2) to deliver telegram by other means upon being apprised on evening before bid opening that receiver could not accept further telegrams. Prior decisions involving mishandling in process of, as opposed to after, receipt at Government installation are distinguished 4
Mistakes
Nonresponsive bids
Correction improper
Mistake-in-bid procedures are not applicable to correct a nonresponsive or ambiguous bid in order to make it responsive 83

BIDS—Continued Page
Mistakes—Continued
Recalculation of bid
Correction *v.* withdrawal
Agency properly permitted low bidder to withdraw rather than correct bid mistake because correction as requested would have increased low bid to within 1 percent of next acceptable bid, and other evidence submitted by bidder shows another "intended" bid price within less than ½ of one percent of next acceptable bid 1
Verification
Adequacy
Reaffirmation of extremely low bid following meeting called to discuss suspected mistake, at which prospective contractor had opportunity to review specifications and compare Government estimate with his own, satisfies Armed Services Procurement Regulation 2-406.3, and acceptance creates valid contract 239
Modification
After bid opening
Propriety
Low responsive bid may be reduced after bid opening 328
Negotiated procurement. (*See* **CONTRACTS, Negotiation**)
Nonresponsive to invitation
Conformability of equipment. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)
Failure to acknowledge amendment
Allegation that bid should be rejected as nonresponsive because of bidder's failure to acknowledge receipt of an amendment to invitation for bids is academic since portion of procurement which would be awarded to that bidder shall be readvertised 378
Omissions
Bid bond
Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1-10.103-4(a) provides exception when only one bid is received 43
Failure to bid on all items
Notation "N/A" next to invitation for bids item for which price is required can reasonably be interpreted that bid price is not applicable or that bid price does not include item. Under circumstances bid must be rejected because bidder could not be contractually bound to deliver item 83
Preparation
Costs
Noncompensable
Nonresponsive bid
Claim for "loss of profits" is not recoverable against Government. In addition claim for bid preparation costs is denied where bid was properly rejected as nonresponsive 608

BIDS—Continued Page
Preparation—Continued
Costs—Continued
Recovery
By accepting bid submitted 4 minutes afer time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, the otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid 419
Amount in dispute
Since amount of compensation for bid preparation costs due claimant is in dispute and claimant has not submitted adequate substantiating documentation to establish quantum of claim, there is no basis at this time to determine proper amount of compensation. Therefore, it is requested that necessary documentation be submitted to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to General Accounting Office for further consideration 419
Prices
Reduction by low bidder
After bid opening
Low responsive bid may be reduced after bid opening 328
Protests. (*See* **CONTRACTS, Protests**)
Qualified
All or none
Bid nonresponsive
Where invitation permits multiple awards and does not prohibit "all or none" bids, insertion of "INCL" and asterisks next to various schedule line items in lieu of specific unit prices may be reasonably construed as evidencing bidder's intent not to charge for those items and in effect was tantamount to an "all or none" bid for those items for which prices were quoted 346
Definite quantities
Notwithstanding protester's contention that invitation for bids did not clearly state agency's requirement for line item, causing protester to submit bid based on supplying duplicate set of item where agency required only single set, award to low bidder is not subject to objection where bid prices reveal that protester would not have been low bidder in any event 346
Descriptive literature
Unsolicited
A bidder's unsolicited descriptive data may not be disregarded where it appears that the bidder is offering the model described therein. Therefore, when such model does not comply with the Government's stated material requirements, the bid must be rejected as nonresponsive 334
Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Requests for proposals. (*See* **CONTRACTS, Negotiation, Requests for proposals**)

BIDS—Continued Page

Responsiveness

"Two bites at the apple" rule

Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487

Small business concerns

Contract awards. (*See* **CONTRACTS, Awards, Small business concerns**)

Sole source procurement. (*See* **CONTRACTS, Negotiation, Sole source basis**)

Specifications. (*See* **CONTRACTS, Specifications**)

Timely receipt

Evidence to establish

Time/date stamp, etc.

Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation 737

Failure to establish and implement procedures

Bid received after specified deadline should be considered for award where agency failed to establish and implement procedures for timely receipt of bids 737

Weekend mail buildup

Provisions for

Where agency practice is not to accept special delivery mail on weekends and passive reliance is placed on routine deliveries to insure timely arrival of bids for Monday afternoon bid opening even though delays might be expected due to weekend mail buildup, agency has failed to meet standard required for effective establishment and implementation of procedures for timely receipts of bids 737

Two-step procurement

Evaluation

Costs

Costs *v.* technical requirements

Although in two-step formal advertising divergent technical approaches may be acceptable to agency, costs associated with particular approach may not be acceptable, and Government need not take into account cost of more expensive approach or system in estimating reasonable price of system that would satisfy its needs. Further, where agency reports that higher bid price is due primarily to profit and overhead rather than to differences in technical proposals, Government estimate based on apparent cost of least expensive approach is not unduly prejudicial to bidder offering higher price 369

Low bid nonresponsive. (*See* **BIDS, Discarding all bids, Low bid nonresponsive, Two-step procurement**)

BIDS—Continued Page
Two-step procurement—Continued
Second step
Deviating from first step
Second-step IFB, under two-step formally advertised procurement, which contained greater quantity of construction than was included in scope of work under first step because final size of project was not known at time first step was issued due to continuing exploratory drilling, is not objectionable. IFB did not alter technical specifications contained in first step and successful offerors' proposals, but merely added additional quantity of wall to be constructed. Additional quantity would not have affected technical acceptability of rejected first-step proposals..... 971
Invitation canceled
Resolicitation
Propriety of incorporating by reference in resolicitation various representations and certifications submitted by bidders as part of bids previously rejected is questionable with respect to legal effect and since bidders would be precluded from modifying previous answers. However, resolicitation document is not totally defective since provisions in question basically involve bidder responsibility and thus representations may be furnished after bid opening..... 369
Two invitations
Not objectionable
Use of two invitations for bids (IFB) as second step of two-step formally advertised procurement where, due to size of project, neither acceptable offeror could obtain adequate bonds is not objectionable. Fact that second phase of second-step procurement was limited only to successful offerors under first step did not restrict any other firm's ability to compete as first step was open to competition from industry..... 971
Technical proposals
Deviations
Time for correction
Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs..... 454
Unbalanced
Bid evaluation formula
Defective
Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria..... 668

BIDS—Continued Page
Unbalanced—Continued
Evaluation
Invitation for bids (IFB) soliciting bids on requirements-type contract on net basis or single percentage factor applied to agency priced items not stating estimated quantities or list of past orders is in violation of Federal Procurement Regulations para. 1–3.409(b)(1) and contrary to 52 Comp. Gen. 732, 736 107

BOARDS, COMMITTEES AND COMMISSIONS
Compensation. (*See* COMPENSATION, Boards, committees and commissions)

BONDS
Bid
Failure to furnish
One acceptable bid
Waiver of bid bond requirement
Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1–10.103–4(a) provides exception when only one bid is received 43
Government employees
Coverage
Government to assume risks
Under Public Law 92–310, which prohibits bonding of Federal employees in favor of self-insurance by Government, United States is self-insurer of restitution, reparation and support payments received by probation officers as required by probation orders issued pursuant to 18 U.S.C. 3651. Such payments are received by probation officers in connection with their official duties and are subject to fiduciary responsibility while held in custody of courts 788
Government to assume risks
Probation officers
Payments received. (*See* BONDS, Government employees, Coverage, Government to assume risks)

BUREAU OF CENSUS (*See* CENSUS BUREAU)

BUREAU OF LABOR STATISTICS (*See* LABOR DEPARTMENT, Bureau of Labor Statistics)

BUY AMERICAN ACT
Applicability
Contractors' purchases from foreign sources
Computer tapes
Computer tape, initially processed abroad and further processed in United States, is not a manufactured end product for purposes of Buy American Act 18

BUY AMERICAN ACT—Continued Page
Applicability—Continued
Contractors' purchases from foreign sources—Continued
Computer tapes—Continued
A computer program, consisting of an enhanced magnetic tape produced in the United States from a master tape, and associated documentation printed in the United States, is properly considered to be a domestic source end product for purpose of the Buy American Act, even though program was developed in a foreign country 102
End product *v.* components
Item to be delivered under subcontract containing Buy American clause constitutes an end product for purpose of Buy American Act even though item is to be incorporated into ultimate end product by prime contractor 596
Waiver
Agency determination
Not reviewable by GAO
Agency refusal to waive Buy American Act evaluation for foreign items is not reviewable by GAO 596

CANAL ZONE GOVERNMENT
Employees
Compensation
Retroactive increases for police, firefighters and teachers
The Canal Zone Government may not implement pay increases for police, firefighters, and teachers retroactively under authority of section 144(c) of title 2, Canal Zone Code. Although section 144(c) authorizes raises to be made effective "*** not earlier than the effective date of the corresponding increases provided by Act of Congress," the corresponding increases for the same categories of employees of the District of Columbia, upon which comparability is based, are no longer established by "Act of Congress" 900

CERTIFYING OFFICERS
Liability
Improper certifications
Long distance telephone calls
31 U.S.C. 680a provides that long distance telephone calls must be for transaction of public business and that department and agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. Certifying officers are not liable for payment of long distance tolls if official designated under 31 U.S.C. 680a improperly certifies toll 28

CIVIL AERONAUTICS BOARD
Carriers
Rate increases
Payment of retroactive interest
Payment of interest by the Government on retroactive increases in rates granted to overseas air carriers by the Civil Aeronautics Board is limited by the contract provisions and by the dates the increases are announced 55

CIVIL SERVICE COMMISSION Page

Board of Appeals and Review

Remedies

Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976)..... 427

Jurisdiction

Approval of supergrade positions

Employee at GS–15 level was detailed to GS–17 position for more that 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS-17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a)..... 432

CLAIMS

Assignments

Contracts

Assignee's rights no greater than assignor's

Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign..... 499

Conflicting claims

Assignee *v.* IRS

While IRS is entitled to setoff against assignee-bank any of its claims against assignor-contractor which matured prior to assignment, agency may not set off claims which matured subsequent to assignment..... 499

Federal tax lien, unrecorded as of time of bankruptcy, is invalid against trustee in bankruptcy which would have priority to funds withheld from amount owed bankrupt contractor under contract..... 499

Notice of assignment

Payment status

Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer..... 499

Set-off

Contract payments. (*See* **SET-OFF, Contract payments, Assignments**)

CLAIMS—Continued Page
By Government
Collection. (*See* DEBT COLLECTIONS)
Evidence to support
Administrative records contrary to allegations
Acceptance of administrative statements
Contractor's allegation that modification of Forest Service timber sale contract allowing use of contractor's requested alternate logging methods instead of helicopter logging and increasing stumpage rates was signed by contractor because of coercion and duress is not supported, where first indication of protest in record was almost a month after modification's execution, contractor could have continued helicopter logging instead of signing agreement, and there is no indication that Forest Service wrongfully threatened contractor with action it had no legal right to take---- 459
Burden of proof
Claimant's responsibility
Conflicting statements insufficient evidence
Claim for proposal preparation cost on basis that cancellation of request for proposals (RFP) was motivated by prejudice against claimant is denied where claimant has not affirmatively proved that decision was not result of reasonable exercise of discretion to program limited funds to another project---- 201
Claimant's responsibility
Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration---- 448
Mobile home insurance
Set-off
Past due *v.* future premiums
As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified---- 279
Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly---- 279

CLAIMS—Continued Page

Priority

Wage claims, etc. *v.* taxes

Claims by workers underpaid under Contract Work Hours and Safety Standards Act and Service Contract Act would prevail over Internal Revenue Service (IRS) tax liens which matured subsequent to underpayments 499

Set-off. (*See* **SET-OFF**)

Transportation

Household goods forwarders

A carrier of household goods in international door-to-door container-MAC (Code T) service is entitled to payment for services it performed under a Government bill of lading contract when part of a shipment of goods is lost or destroyed and delivery of that part is not made because delivery was prevented by the act of the shipper's agent 820

CLASSIFICATION

Actions

Effective date

Effective date of conversions of employees' positions from Wage Board to General Schedule may not be retroactively changed even though some employees were converted prior to effective date of Wage Grade pay adjustment, thus losing benefit of adjustment, while other employees were converted after pay adjustment and had General Schedule pay set on basis of higher wage. Federal Personnel Manual, Subchapter 7-1.a, sets effective date of classification actions as date action is approved or later date specified by agency and prohibits retroactive effective date 624

CLOTHING AND PERSONAL FURNISHINGS

Special clothing and equipment

Motorized wheelchairs

Government property requirement

Social Security Administration (SSA) violated in the Southeastern Program Service Center the carpeting standards established under Architectural Barriers Act of 1968 and under Department of Health, Education, and Welfare (HEW) regulations. Prior to this violation, its employee had supplied his own nonmotorized wheelchair and was capable of performing his assigned duties. In order to make the best use of available personnel and in view of the fact that a powered vehicle became necessary only because of the violation of the Act's standards, we will not object to SSA's reimbursing its employee for the cost of acquiring the motorized wheelchair. The wheelchair will then become the Government's property for use solely in the subject building 398

COAST GUARD

Invitations

Change of command ceremonies

Government payment of expense of printing invitations to Coast Guard change of command ceremony is proper since ceremony is traditional and appropriate observance, and printing of invitations may be considered necessary and proper expense incident to ceremony 81

COAST GUARD—Continued Page
Reservists
Retired pay
Disability
Computation
Member of Coast Guard Reserve was placed on the Temporary Disability Retired List under 10 U.S.C. 1205, based on a finding of physical disability as a result of a service connected injury which occurred 10–12 years previously while serving on a 2-week period of active duty for training. For purpose of computing retired pay under Formula 2 of 10 U.S.C. 1401, the fact that member was not in basic pay status at time of disability determination or placement on that list is not a computation requisite, since Formula 2 merely calls for use of the pay rate for the "grade" to which member was entitled on that date. 47 Comp. Gen. 716 (1968), distinguished 807

COLLEGES, SCHOOLS, ETC.
Grants-in-aid
Educational programs. (*See* STATES, Federal aid, grants, etc., Educational institutions)
National Mine Health and Safety Academy
Student exchange program
Mining Enforcement and Safety Administration (MESA) has authority under Federal Coal and Metal Acts to enter into agreements with colleges whereby college students enrolled in mining-related programs of study would receive training at MESA's National Mine Health and Safety Academy on a fully reimbursable basis. While statutes do not expressly provide for training of persons not presently affiliated with Government agencies or mining industry, proposed agreements for training of college students in mining-related programs are consistent with broad remedial purposes of statutes 817

COMMERCE DEPARTMENT
Bureau of Census
Classification of entities
Political subdivisions
State entities are entitled to retain interest earned on Federal grants from October 16, 1968, the effective date of section 203 of the Intergovernmental Cooperation Act of 1968 that so provides, or from the date its status as a State entity was created, if later 353
Services for other agencies
Collections
Special account *v.* miscellaneous receipts
Administrative overhead applicable to supervision by Department of Commerce of service provided to other Federal agency is required to be included as part of "actual cost" under section 601 of Economy Act, 31 U.S.C. 686 (1970), and must therefore be paid by agency to which service is rendered. Above is applicable whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in General Fund of Treasury or credited to Department of Commerce General Administration appropriation 275

COMMISSIONS (*See* BOARDS, COMMITTEES, AND COMMISSIONS)

COMPENSATION Page

Additional

Environmental pay differential

Arbitration award

Navy installation, in separate grievances, was ordered by two arbitrators to pay environmental differential to certain employees, which the installation began to pay. Navy Headquarters, however, concluded the awards were inconsistent with applicable regulations and directed installation to terminate payments. Navy received an unfair labor practice citation and seeks a ruling on legality of the terminated awards. General Accounting Office (GAO) holds that arbitrators' findings and conclusions satisfied the regulatory criteria and that awards may be implemented with backpay for period of termination 8

Navy installation terminated two arbitration awards for environmental differential for certain employees on basis payments were improper. Assistant Secretary for Labor-Management Relations cited the naval installation for an unfair labor practice and ordered awards be reinstated with backpay. To preclude ordering payments that may be illegal, GAO recommends that Assistant Secretary state in orders that payments shall be made "consistent with laws, regulations, and decisions of the Comptroller General." This would permit agency to obtain decision from this Office 8

Constitutes basic pay

Employees whose positions are converted from Wage Grade to General Schedule may have environmental differential considered as included in definition of "rate of basic pay" for the purpose of establishing their compensation in General Schedule under 5 C.F.R. Part 539. Civil Service Regulations state that environmental differential is part of employee's basic rate of pay and that it is used in computation of premium pay, retirement benefit and life insurance 624

Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)

Basic

Benefits

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

Boards, committees and commissions

Land commissioners

Subject to GS–18 daily rate limitation

Appropriations for compensation of land commissioners are obligated only upon appointment of each commissioner *and* referral of particular condemnation action to commission of which he is a part, since no *bona fide* need for commissioner's services as to particular case arises until that time. Therefore, compensation for members of "continuous" land commission, established in 1969, is subject to GS–18 daily rate limitation under fiscal year 1976 or 1977 appropriations for payment of land commissioners with respect to cases referred to continuous commission after June 30, 1975. B–184782, February 26, 1976, amplified 414

COMPENSATION—Continued Page

Deputy Governors

Farm Credit Administration

Compensation of Deputy Governors, Farm Credit Administration, is authorized to be fixed at not to exceed the maximum scheduled rate of General Schedule. Such compensation, although not limited by compensation of Governor and not subject to classification provisions, may not exceed rate for level V of Executive Schedule, since effect of 5 U.S.C. 5308 is to limit maximum scheduled rate of General Schedule to level V rate. Higher amounts shown on General Schedule are merely projections of what rates would be without this limitation 375

Differentials

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Double

Holding two offices

Military officer appointed County Clerk while on terminal leave

Should a commissioned Officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b) (1970), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State government, the provisions of 5 U.S.C. 5534a (1970), which authorizes dual employment during terminal leave in certain other circumstances, would not exempt the member from those sanctions 855

Downgrading

Saved compensation

Employee development program

Not considered at employee's request

Employee was reduced in grade upon accepting new position with lower initial grade, but higher potential grade than her present position. Agency denied salary retention under 5 U.S.C. 5337, since reduction was at employee's request in response to agency announcement of vacancy. However, employee is entitled to salary retention, since Civil Service Commission determined that reduction in grade was result of employee development program, which is not considered to be at employee's request, and that denial of salary retention consitituted unjustified or unwarranted personnel action under Back Pay Act, 5 U.S.C. 5596 199

Dual. (*See* **COMPENSATION, Double**)

Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)

Holidays

Leave without pay status

Before and after holiday

Employee in a pay status for the day either immediately preceding or succeeding a holiday is entitled to regular pay for the holiday regardless of whether he is in an authorized leave-without-pay status or in an absent-without-leave status for the corresponding day immediately succeeding or preceding the holiday. 13 Comp. Gen. 207 (1934) overruled. 13 Comp. Gen. 206 (1934), 16 *id.* 807 (1937), 18 *id.* 206 (1938), and 45 *id.* 291 (1965) modified 393

COMPENSATION—Continued Page
Increases. (*See* COMPENSATION, Promotions)
Retroactive
Canal Zone Government employees
Police, firefighters and teachers. (*See* CANAL ZONE GOVERNMENT, Employees, Compensation, Retroactive increases for police, firefighters and teachers)
Night work
Customs employees
O'Rourke case distinguished
Customs employee claims overtime pay under Customs overtime laws, 19 U.S.C. 267 and 1451 (1970), for work performed in addition to regular tour of duty and between the hours of 5 p.m. and 8 a.m. Employee is entitled to such compensation regardless of whether he first performed 8 hours of duty on the day claimed, and any contrary interpretation of the laws or the decision in *O'Rourke* v. *United States*, 109 Ct. Cl. 33 (1947), will not be followed 310
Overpayments
Waiver. (*See* DEBT COLLECTIONS, Waiver)
Overtime
Inspectional service employees
Night work
Customs employees. (*See* COMPENSATION, Night work, Customs employees)
Not subject to negotiation
Prevailing rate employees serving under bargaining agreements exempted from effects of the Prevailing Rate Statute, 5 U.S.C. subchapter IV, chapter 53, may negotiate wages and employee benefits otherwise covered by provisions of that statute. However, they may not negotiate pay and employee benefits governed by other statutes and regulations, such as overtime pay and retirement benefits 360
Panama Canal employees
Retroactive increases
Canal Zone Government police, firefighters and teachers
The Canal Zone Government may not implement pay increases for police, firefighters, and teachers retroactively under authority of section 144(c) of title 2, Canal Zone Code. Although section 144(c) authorizes raises to be made effective "* * * not earlier than the effective date of the corresponding increases provided by Act of Congress," the corresponding increases for the same categories of employees of the District of Columbia, upon which comparability is based, are no longer established by "Act of Congress." 900
Tropical differential
Highest previous rate
Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

COMPENSATION—Continued Page
Premium pay
Sunday work regularly scheduled
"Eight-hour period of service"
Effect of change to daylight savings time
Federal Aviation Administration (FAA) employee's regularly scheduled tour of duty was from midnight Saturday to 8 a.m. Sunday. Daylight savings time began during tour of duty, and, therefore, employee was allowed, pursuant to provision of contract between FAA and union, to work from 8 a.m. until 9 a.m. so as to work full 8-hour tour of duty. FAA refused to pay Sunday premium pay for the hour from 8 a.m. to 9 a.m. Claim for Sunday premium pay may be paid for entire 8-hour tour of duty, including hour from 8 to 9 a.m. 5 U.S.C. 5546(a) (1970)--- 858
Prevailing rate employees. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees**)
Promotions
Retroactive
Administrative error
Action contrary to agency regulations
Department of Labor seeks a ruling on legality of employee retroactive temporary promotion that it effected when its intent to permanently promote and reassign a GS–3 employee to a GS–4 position effective on August 4, 1975, was frustrated through improper merit staffing procedures. Personnel actions may not be made retroactively effective absent an unjustified or unwarranted personnel action that deprived employee of vested right. Because employee had no vested right to a promotion, action was improper; however, erroneous payments may be waived under 5 U.S.C. 5584---------- 1003
Temporary
Detailed employees
Retroactive application
Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976)---------- 427
Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a)---------- 432
Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973.

COMPENSATION—Continued Page
Promotions—Continued
Temporary—Continued
Detailed employees—Continued
Retroactive application—Continued
Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award 732
Federal Trade Commission (FTC) questions whether it may grant a retroactive temporary promotion for an extended detail of a GS-14 competitive service employee to a GS-15 Schedule C position where an extension of the detail was not obtained. Since General Schedule position at grade GS-15 and below in both the competitive service and excepted service are covered by our *Turner-Caldwell* decision, 55 Comp. Gen. 539 (1975), FTC has authority to grant the employee a retroactive temporary promotion and backpay pursuant to the conditions set forth in that decision 982
Rates
Conversion of positions from wage board to classified. (*See* **COMPENSATION, Wage board employees, Conversion to classified positions**)
Executive schedule
Compensation of Deputy Governors, Farm Credit Administration, is authorized to be fixed at not to exceed the maximum scheduled rate of General Schedule. Such compensation, although not limited by compensation of Governor and not subject to classification provisions, may not exceed rate for level V of Executive Schedule, since effect of 5 U.S.C. 5308 is to limit maximum scheduled rate of General Schedule to level V rate. Higher amounts shown on General Schedule are merely projections of what rates would be without this limitation 375
Highest previous rate
Tropical differential
Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60
Removals, suspensions, etc.
Back pay
Entitlement
Unjustified or unwarranted personnel action
Employee was reduced in grade upon accepting new position with lower initial grade, but higher potential grade than her present position. Agency denied salary retention under 5 U.S.C. 5337, since reduction was at employee's request in response to agency announcement of vacancy. However, employee is entitled to salary retention, since Civil Service Commission determined that reduction in grade was result of

COMPENSATION—Continued Page
Removals, suspensions, etc.—Continued
Back pay—Continued
Entitlement—Continued
Unjustified or unwarranted personnel action—Continued
employee development program, which is not considered to be at employee's request, and that denial of salary retention constituted unjustified or unwarranted personnel action under Back Pay Act, 5 U.S.C. 5596 199
Salary retention. (*See* **COMPENSATION, Downgrading, Saved compensation**)
Severance pay
Computation
Second separation
Severance pay computed on basic pay of permanent position
Upon involuntary separation by reduction in force from permanent position, employee was appointed without break in service to full-time temporary position with another agency. Employee is entitled to have severance pay computed on basis of basic pay at time of separation from permanent position, but years of service and age should be determined as of termination of temporary position because full-time temporary appointment is employment with a definite time limitation within meaning of 5 U.S.C. 5595(a)(2)(ii) 750
Vessel employees
Crews
Limitation on pay fixed by administrative action
Agency questions whether pay of crews of vessels set under 5 U.S.C. 5348 (Supp. V, 1975) is subject to ceiling of grade GS–18 as provided under 5 U.S.C. 5363 (1970). Since we find that pay for crews of vessels is fixed by administrative action, we hold that such pay is subject to section 5363 and may not exceed the rate for grade GS–18 870
Wage board employees
Conversion to classified positions
Effective date
Retroactive prohibition
Effective date of conversions of employees' positions from Wage Board to General Schedule may not be retroactively changed even though some employees were converted prior to effective date of Wage Grade pay adjustment, thus losing benefit of adjustment, while other employees were converted after pay adjustment and had General Schedule pay set on basis of higher wage. Federal Personnel Manual, Subchapter 7–1.a, sets effective date of classification actions as date action is approved or later date specified by agency and prohibits retroactive effective date ... 624
Rate establishment
Environmental differential
Employees whose positions are converted from Wage Grade to General Schedule may have environmental differential considered as included in definition of "rate of basic pay" for the purpose of establishing their compensation in General Schedule under 5 C.F.R. Part 539. Civil Service Regulations state that environmental differential is part of employee's basic rate of pay and that it is used in computation of premium pay, retirement benefit and life insurance 624

COMPENSATION—Continued Page
Wage board employees—Continued
Prevailing rate employees
Entitlement to negotiate wages
Section 9(b) of Public Law 92–392, governing prevailing rate employees, exempts bargaining agreements, in effect on August 19, 1972, containing wage setting provisions. Certain United States Information Agency radio broadcast technicians are covered by such an agreement and therefore may continue to negotiate wage setting procedures until the parties agree to delete wage setting provisions from their agreement. Then such employees would be governed by the Prevailing Rate Statute. 360
Governed by Prevailing Rate Statute
Employees serving under bargaining agreements exempted
Prevailing rate employees serving under bargaining agreements exempted from effects of the Prevailing Rate Statute, 5 U.S.C. subchapter IV, chapter 53, may negotiate wages and employee benefits otherwise covered by provisions of that statute. However, they may not negotiate pay and employee benefits governed by other statutes and regulations, such as overtime pay and retirement benefits 360
Promotions
Temporary
Higher grade General Schedule positions
United States Information Agency questions whether bargaining agreement provision providing higher pay for employees temporarily assigned to higher grade positions would provide a basis for paying higher rates to prevailing rate employees while temporarily assigned to higher grade General Schedule positions. Such employees may not be paid for details. However, they may be temporarily promoted to higher grade General Schedule positions with higher pay. Prior denials of such pay may be corrected under Back Pay Act, 5 U.S.C. 5596, and such employees may receive retroactive temporary promotions and backpay 786
Withholding
Debt liquidation
Alimony and child support
Environmental Protection Agency negligently failed to withhold specfied amounts from employee's salary under a writ of garnishment. Governing state law permits entry of judgment against employer-garnishee under those circumstances. Since 42 U.S.C. 659 mandates that the United States and its agencies will be treated as if they were private persons with regard to garnishment for child support and alimony, employing agency may be found to be liable because, under the same circumstances, private employer would be liable 592

CONFLICT OF INTEREST STATUTES
Contracts
Enforcement of standards of conduct
Agency responsibility
Notwithstanding position that enforcement of standards of conduct is the responsibility of each agency, General Accounting Office has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement 580

CONFLICT OF INTEREST STATUTES—Continued Page
Contracts—Continued
Validity
Allegations of violations not supported by record
Protester argues that successful offeror should have been disqualified because of an alleged conflict of interest arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since succesful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper ---- 745
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Conflict of interest statutes**)
Violation determinations
Contract award
Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAO agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship ---- 381

CONSUMER PRICE INDEX (*See* **LABOR DEPARTMENT, Bureau of Labor Statistics, Consumer price index**)

CONTRACTING OFFICERS
Authority
Exceeded
Arbitrary and capricious action
By accepting bid submitted 4 minutes after time designated as bid opening time, bid opening officer's action exceeded authority and amount of discretion entrusted by statute and regulation without reasonable basis and can be considered arbitrary and capricious. Since late bid was low bid and contract was awarded to late bidder, the otherwise low, responsive, and responsible bidder is entitled to bid preparation costs. Conclusion is considered to be consistent with court's discussion in *Keco Industries, Inc.* v. *United States*, 492 F. 2d 1200 (Ct. Cl. 1974), insofar as case involved favoritism toward another rather than misreading or misevaluation of claimant's bid ---- 419
Regulation compliance
Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs ---- 201

CONTRACTORS
Allegations
Not substantiated by record
Timber sales contracts. (*See* **TIMBER SALES, Contracts, Contractors, Allegations not substantiated by record**)
Bankruptcy. (*See* **BANKRUPTCY, Contractors**)

CONTRACTORS—Continued Page

Conflicts of interest

Resume

Protester argues that successful offeror should have been disqualified because of an alleged conflict of interest arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since successful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper 745

Defaulted

Reprocurement

Standing

Right of defaulted contractor to be solicited upon reprocurement is limited by rule that repurchase contract may not be awarded to such contractor at price greater than terminated contract since award would be tantamount to modification of existing contract without consideration. B–175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified 976

Incumbent

Competitive advantage

If not the result of preference or unfair action by Government, contractor may enjoy competitive advantage by virtue of incumbency .. 689

Responsibility

Administrative determination

Nonresponsibility finding

Based on agency audit report

Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may properly be based on agency audit report even though (1) underlying data is not reviewed by contracting officer or protester, and (2) default of prior contracts based on those conclusions is presently under appeal 411

Serious deficiency requirement

Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on (1) overcharge of $22.80, and (2) legitimate question of contract interpretation because FPR 1–1.1203–1 provides that such unsatisfactory performance must be related to *serious* deficiencies 411

Contracting officer's affirmative determination accepted

Exceptions

Fraud

Since determination of contractor's responsibility is matter largely within discretion of procuring officials, affirmative determination of responsibility will not be reviewed in absence of allegation of fraud or that definitive responsibility criteria are not being applied 689

CONTRACTORS—Continued Page
Responsibility—Continued
Determination
Current information
Contracting officer's determination of nonresponsibility for lack of tenacity and perseverance may not be based on events which occurred more than 3 years prior to determination when there is an adequate record of more recent experience because FPR 1–1.1203–1 provides that such unsatisfactory performance must be related to serious deficiencies in *current or recent* contracts 411
Defaulted contractor
Although statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, when contracting officer conducts new competition for reprocurement, defaulted contractor may not automatically be excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility. B–175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified 976
Subcontractors
Privity. (*See* CONTRACTS, Privity, Subcontractors)
CONTRACTS
Advertising *v.* negotiation (*See* ADVERTISING, Advertising *v.* negotiation)
Appropriations
Fiscal year appropriation
Availability beyond. (*See* APPROPRIATIONS, Fiscal year, Availability beyond, Contracts)
Architect, engineering, etc., services
Award board *v.* technical board selection
Timing of report documenting reversal
Noncontemporaneous timing of report documenting reversal of priority of negotiation selections of technical board by awards board delegated authority of agency head to make final selection for negotiation of architect-engineer contract does not affect substance of justification where proper basis for negotiation priority existed. In any event, noncontemporaneous report essentially elaborated on reasons for priority already in contemporaneous report 721
Evaluation boards
Private practitioners
Federal Procurement Regulations requirement
Federal Procurement Regulations para. 1–4.1004–1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721

CONTRACTS—Continued Page

Architect, engineering, etc., services—Continued

Procurement practices

Forest Service

Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits 721

Assignments. (*See* CLAIMS, Assignments, Contracts)

Automatic Data Processing Systems. (*See* EQUIPMENT, Automatic Data Processing Systems)

Awards

Cancellation

Erroneous awards

Bid evaluation base

Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria 668

Initial proposal basis

Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals 580

Not prejudicial to other bidders

Notwithstanding protester's contention that invitation for bids did not clearly state agency's requirement for line item, causing protester to submit bid based on supplying duplicate set of item where agency required only single set, award to low bidder is not subject to objection where bid prices reveal that protester would not have been low bidder in any event 346

Numerous contracts to same contractor

No legal basis for objection to award

Fact that contractor under protested procurement has large number of other contracts with agency provides no legal basis for objection 381

Separable or aggregate

Single award

Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487

CONTRACTS—Continued Page

Awards—Continued

Small business concerns

Prior to SBA nonresponsibility determination

While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed 411

Set-asides

Administrative determination

Contracting officer's decision not to set aside procurement for small business because of lack of sufficient number of qualified small business firms for the procurement is not subject to legal objection 882

Failure to use

Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied. Modified by 56 Comp. Gen. 649 115

Negotiation authority

Procurement regulations have recognized that, even though a set-aside procurement was technically a negotiated procurement because competition was justifiably restricted to one class of bidders under "exception one" negotiation authority, procurement should otherwise be conducted under rules of formal advertising "wherever possible" 556

Since Administrator, General Services Administration, has waived regulation requiring use of formal advertising procedures whenever possible under small business set-aside procurements and because statute containing "exception one" negotiating authority contains no indication of any limit on negotiation procedures that can be used in "exception one" set-aside procurements, use of negotiation procedures under questioned procurements is lawful and not in violation of prior decision 556

Restrictive of competition

Series of General Accounting Office decisions sanctioning use of "exception one" negotiating authority (41 U.S.C. 252(c)(1) (1970)) for "small business set-aside" awards were premised on need to justify restriction of competition (which was otherwise found to be proper) to one category of bidders—small business concerns—since restriction of competition under current law is not compatible with formal advertising 556

Size

Eligibility determination date

Contract for guard services awarded to self-certified small business firm under small business set-aside was justified where award was made on basis of Regional Office Small Business Administration (SBA) determination that contractor was small and before Size Appeals Board determined that contractor was large. However, on basis of SBA report indicating that SBA District office erroneously failed to consider awardee's size at time of bid opening, SBA is instructed to take action to insure consistent application of size standards in future 1018

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Size—Continued
Obvious error
Contracting officer's duty to question
When, before award, information which reasonably would impeach small business self-certification of low bidder comes to attention of contracting officer, direct size protest with the Small Business Administration (SBA) should have been filed in order to assure that self-certification process is not abused. In absence of probative evidence, protester has not affirmatively established that small business self-certification was made in bad faith. Recommendation is made that agency consider feasibility of contract termination where SBA, less than 3 weeks after award, found contractor was other than small business because of affiliation with another firm discussed in preaward survey..... 878
Basic ordering agreements
Negotiated contracts. (*See* CONTRACTS, Negotiation, Basic ordering agreements)
Bid procedures. (*See* BIDS)
Bids
Generally. (*See* BIDS)
Brand name or equal. (*See* CONTRACTS, Specifications, Restrictive, Particular make)
Breach of contract
By Government
Claims for unliquidated damages
Submission to GAO for approval not required
It is no longer necessary for contracting agencies to submit to General Accounting Office for approval claims for unliquidated damages for breach of contract by Government where contracting agency and contractor mutually agree to settlement, because such settlements are favored by courts and are not viewed as disputes beyond authority of contracting agencies to settle. 47 Comp. Gen. 475 and 44 *id.* 353, modified..... 289
Buy American Act
Buy American Certificate. (*See* BIDS, Buy American Act, Buy American Certificate)
Computer data
Conversion and storage
Services *v.* manufacturing
A contract for conversion and storage of data to machine (computer) readable form is not manufacturing for the purpose of the Buy American Act..... 18
Converted to "software system"
A computer program, consisting of an enhanced magnetic tape produced in the United States from a master tape, and associated documentation printed in the United States, is properly considered to be a domestic source end product for purpose of the Buy American Act, even though program was developed in a foreign country..... 102

CONTRACTS—Continued Page
Buy American Act—Continued
Foreign products
End product *v.* components
Computer tape, initially processed abroad and further processed in United States, is not a manufactured end product for purposes of Buy American Act 18
Failure to indicate
Price adjustment
Allegation that items Nos. 52 and 53 were foreign source items rather than domestic as offered proved correct, but General Services Administration has accepted AMICO's explanation that items were commingled with those of another contract and has received restitution for difference between foreign items and those offered in solicitation 531
Cancellation
No longer feasible
Prior recommendation withdrawn
Detective agencies
Decision of September 23, 1976, 55 Comp. Gen. 1472, holding that contract for guard services at Navy installation violated 5 U.S.C. 3108, is affirmed, notwithstanding subsequent information which revealed that contract was originally awarded to sole proprietor who held private detective license and who formed corporation several months after award. In view of the time element involved, however, cancellation is no longer feasible. Corporation may be considered for future award if president divests himself of detective license, since corporate charter has been amended to eliminate authority to perform investigative services and corporation has applied for guard service license 225
Clauses
"Fixed-price options"
Ambiguous
Modification recommended
Inasmuch as payment of certain separate charges payable in event of termination of ADP system prior to intended multiyear life is illegal, indication in "fixed-price options clause" required to be included in such ADP procurements by Federal Property Management Regulation 101–32.408–5 that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts supported by fiscal year funds with multiple yearly options. In addition, clause is unclear as to how separate charges are to be evaluated, such that offerors are clearly unable to propose separate charges with any assurance that offers would not be rejected as unacceptable. Consequently, clause should be appropriately modified by GSA. B–164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 142
Inadequate
Request for proposals' "fixed-price options" clause failed to: inform offerors that certain charges may violate statutory restrictions; state how separate charges were to be specifically evaluated in determining whether charges made offer "unbalanced"; and warn as to how charges might improperly affect Government's flexibility in substituting equipment. Discussions with offeror did not cure failures nor give any indication that charges would be evaluated as ultimately done 167

CONTRACTS—Continued Page
Clauses—Continued
"Fixed-price options"—Continued
Inappropriate and misleading
Contracts funded with fiscal year appropriations
Statement in "fixed-price options" clause of Federal Property Management Regulations 101–32.408–5, to effect that "separate charges" (that is, penalty to be assessed against Government for non-exercise of option rights) may be quoted in certain data processing procurements, is inappropriate and misleading to potential offerors in contracts funded with fiscal year appropriations 167
"Funds available for payments"
Continuing contracts
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437
Interpretation
Claim involving question of law as to contractor's entitlement to general and administrative expenses and profit on amount of FET paid during contract performance is denied. Invitation for bids' statement that FET was inapplicable is not viewed as negating effectiveness of contract's taxes clause (Armed Services Procurement Regulation 7-103.10(a)), and where contract is specific as to price adjustment for changes in tax circumstances, adjustment is to be made as parties specifically provided for. Contract's changes clause appears inapplicable and no reason is seen why taxes clause provides basis for recovery of costs and profit claimed 340
Late bids, etc.
Conflict between time/date stamp on return receipt and hand notation on bid envelope of time of receipt is resolved by invitation for bids' late bid clause providing that the only acceptable evidence to establish timely receipt is time/date stamp of Government installation on bid wrapper or other documentary evidence of receipt maintained by installation 737
Modified product experience clause
In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements 912

CONTRACTS—Continued Page
Clauses—Continued
"Site visit"
In a solicitation for services, the inclusion of a clause providing for site inspection on Government installation was proper, notwithstanding protester's contention that contract was essentially one for supplies---- 882
Competitive system
Federal aid, grants, etc.
Compliance
Federal Water Pollution Control Act of 1972, 33 U.S.C. 1284 (Supp. V, 1975) together with implementing regulations, import Federal norm for full and free competition requiring that grantees avoid use of restrictive specifications. Upon review, GAO finds restrictive specification was not unreasonable. However, it is recommended that grantor agency assume a more activist role in future cases to insure maximization of competition rather than acquiesce in very cautious specifications used in instant cases---- 575
Compliance with requirements
Federal norm compelling "full and free" competition for Environmental Protection Agency (EPA) grantee contracts awarded under section 204(a)(6) of the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1284(a)(6) (Supp. V, 1975), together with implementing regulations, applies whether grantee uses "brand name" purchase description or formal specification---- 912
Master agreements
Use of list
Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete---- 78
Conflicts of interest prohibitions
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Conflicts of interest prohibitions**)
Construction
Against writer
Award should not be based on ambiguous price proposal through application of *contra proferentem* rule of contract construction that ambiguities be construed against their drafter; rather, discussions should be conducted to clarify price---- 768
Continuing. (*See* **CONTRACTS, Term, Continuing contracts**)
Damages
Unliquidated
Claim submission to GAO for approval
Not required
It is no longer necessary for contracting agencies to submit to General Accounting Office for approval claims for unliquated damages for breach of contract by Government where contracting agency and contractor mutually agree to settlement, because such settlements are favored by courts and are not viewed as disputes beyond authority of contracting agencies to settle. 47 Comp. Gen. 475 and 44 *id.* 353, modified---- 289

CONTRACTS—Continued Page

Data, rights, etc.

Disclosure

Trade secrets

Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shroud repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps..... 537

Security manuals

Allegation that contracting agency should not have required security manuals because it lacks authority to approve contractors' security manuals must fail in absence of basis for concluding that contracting agency may not evaluate and monitor compliance with established security requirements..... 1008

Status of information furnished

Government participation in development costs, etc.

Acceptance of protester's unsolicited proposal is not dispositive that TF-30 blade shroud repair process set out in proposal was proprietary data and that Government violated protester's rights by disclosing process in subsequently issued RFP, where acceptance was caused by administrative error and proposal's restrictive legend recognizes that nonproprietary common shop practices or process independently developed by Government or another firm are not protected against disclosure by Government..... 537

Unsolicited proposals

Although it is disputed whether protester's informal disclosure of alleged trade secret (repair process on TF-30 engine) to Air Force prior to submission of unsolicited proposal containing proper restrictive legend was in confidence, legitimate proprietary rights of protester on alleged trade secret contained in proposal have not been defeated by prior Air Force-protester discussions of secret under repair contract or Air Force's limited disclosure of secret to TF-30 engine manufacturer for evaluation and testing purposes, since secret was not generally disclosed by Air Force prior to unsolicited proposal's submission..... 537

Trade secrets

Protection

Although trade secret can exist in combination of characteristics or components, each of which by itself is in public domain, there should be no trade secret protection, where combination of three steps—each of which is apparently common shop practice—seems to be determined by normal shop practice and alleged "owner" of trade secret expended no great effort to develop process, notwithstanding that knowledge of combined process benefited Air Force and "owner's" competitors under RFP disclosing process because it informed them that this particular process worked..... 537

CONTRACTS—Continued Page
Data, rights, etc.—Continued
Use by Government
Basis
Where Air Force exercises prerogative in determining that TF–30 blade shroud weld repair process contained in protester's unsolicited proposal is incomplete and unacceptable without adding Government-funded steps of preheating prior to welding and stress relief after welding, process in unsolicited proposal is not entitled to trade secret protection, since there is mix of private and Government funds in developing process ---- 537
Default
Reprocurement
Defaulted contractor low bidder
Right of defaulted contractor to be solicited upon reprocurement is limited by rule that repurchase contract may not be awarded to such contractor at price greater than terminated contract since award would be tantamount to modification of existing contract without consideration. B–175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified ---- 976
Government procurement statutes
Applicability
Although statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, when contracting officer conducts new competition for reprocurement, defaulted contractor may not automatically be excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility. B–175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified ---- 976
Discounts
Based on ASPR provision
Not offered or accepted by contractor
Government cannot properly claim discounts based upon ASPR provision which contractor neither offered nor accepted ---- 307
Commencement of discount period
Disallowance of claim for prompt payment discount allegedly taken improperly is affirmed, since payment was made within discount period properly computed by excluding from computation day "from" which period began ---- 187
Computation of time period
Inconsistent provisions
Negotiated terms and ASPR provisions
When contract includes inconsistent provisions for computing discount period, specifically negotiated terms prevail over general Armed Services Procurement Regulation (ASPR) provision incorporated by reference ---- 307

CONTRACTS—Continued Page

Disputes

Procedure

Available remedies

Contractor's claim which normally would be resolved through appeal to Armed Services Board of Contract Appeals (ASBCA) under contract disputes clause is properly for consideration if contractor elects to submit claim to General Accounting Office in lieu of pursuing appeal to to ASBCA, and no material facts are disputed 340

Evaluation of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered**)

Federal Supply Schedule

Awards

Propriety

Contractor's listing of its equipment under special item categories inaccurately describing contractor's equipment does not render contractor's Federal Supply Schedule multiple award contract invalid. Intent of such listing is only to identify, as closely as practicable to industry practice, comparable items of the praticular commodity in order to provide initial guidance to the user agency as to what contractors are available to supply which commodities. Furthermore, none of the categories under which equipment could be listed accurately described contractor's equipment, thus forcing the contractor to choose, in effect, between two equally inaccurate categories 811

Bid evaluation factors

Propriety

Agency's evaluation of FSS contractor's equipment need not take into account deductions in contractor's schedule prices for lower priced accessories which are not offered by the contractor 811

Listing

Special item categories

Agency's order from Federal Supply Schedule (FSS) contractor is valid even though contractor had listed its equipment under special item categories inaccurately describing contractor's equipment 811

The fact that one contractor chose to list its equipment under a special item category in its Federal Supply Schedule price list which inaccurately described contractor's equipment and which caused evaluating agency to assume incorrectly that contractor's equipment would not meet its minimum needs does not affect another contractor's FSS contract, or orders placed thereunder, where the other contractor listed its essentially identical equipment under an incorrect category which effectively allowed its equipment to be evaluated 811

Prices

Reductions

Catalogue prices

Federal Supply Schedule contractor's prices were evaluated as lower than those contained in the FSS contractor's catalog because of the contractor's attempted price reductions. Even assuming that the applicable prices were those listed in the contractor's catalog, agency's orders based on the lower prices are not improper, because contractor's listed prices have not been shown to be higher than those of any other contractors whose items met the Government's needs 811

CONTRACTS—Continued Page
Grants-in-aid
Status
Grant related procurement complaint is for consideration by General Accounting Office (GAO) in accordance with announcement published at 40 Fed. Reg. 42406. Moreover, consideration is appropriate where, as here, grantor agency has requested advisory opinion ---- 575
Hospital management services
Advertising *v.* negotiation
Alleged impossibility of drafting specifications regarding "coordination of work tasks" does not justify negotiation since "coordination of work tasks" is inherent in proper furnishing of any product or service whether required under specification or not. Modified by 56 Comp. Gen. 649 ---- 115
Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified ---- 649
Incorporation of terms by reference
Oral statements
Award under request for proposals (RFP) incorporating by reference telephone conversations regarding proposed price—which had not been memorialized—does not violate 31 U.S.C. 200(a)(1). However, such incorporation is clearly inappropriate, since agreement reached in conversations should have been put in writing to avoid disputes ---- 768
Increased costs
Taxes
Federal excise taxes
No basis is seen to reform contract to reimburse contractor for general and administrative expenses and profit applicable to amount of Federal Excise Tax (FET) contractor was required to pay during performance of contract. Contract's taxes clause provided that if written ruling took effect after contract date resulting in contractor being required to pay FET, contract price would be increased by amount of FET—and this is what in fact occurred. Therefore, issue presented does not involve reformation, but whether contractor has valid claim under terms of contract as written ---- 340
Labor stipulations
"Buy Indian Act"
No clear abuse of agency discretion as to whether to invoke authority to negotiate a contract without competition with an Indian concern under "Buy Indian Act" (25 U.S.C. 47) is found where agency relied on Tribal resolution recommending procurement by formal advertising ---- 178
Service Contract Act of 1965
Minimum wage, etc., determinations
Labor Department's interpretation
Department of Labor's interpretation of Service Contract Act filing requirements and application of wage determinations to solicitation and contract, as interpretation of regulations by issuer, is accorded great deference ---- 160

CONTRACTS—Continued Page

Labor stipulations—Continued

Service Contract Act of 1965—Continued

Minimum wage, etc., determinations—Continued

Prospective wage rate increases

In view of (1) agency knowledge for over 3 weeks before award that wage determination was to be issued in close proximity to anticipated award date; (2) fact that agency's failure to include incumbent's collective bargaining agreement with Department of Labor (DOL) SF 98 significantly contributed to delay in issuance of new wage determination for inclusion in RFP; (3) fact that agency made preaward arrangement with successful offeror to accept expected wage determination, and modification was issued; and (4) DOL view that closing date should have been postponed when agency was notified that wage determination would be delayed: contract awarded was different from contract solicited. Therefore, requirements covered by current option should be resolicited..... 160

Wage underpayments

Claim priority

Contract provision

Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage underpayment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign..... 499

Walsh-Healey Act

Manufacturer or regular dealer determination. (*See* **BIDDERS, Qualifications, Manufacturer or dealer**)

Mistakes

Allegation after award

No basis for relief

Reaffirmation of extremely low bid following meeting called to discuss suspected mistake, at which prospective contractor had opportunity to review specifications and compare Government estimate with his own, satisfies Armed Services Procurement Regulation 2-406.3, and acceptance creates valid contract..... 239

Allegation before award. (*See* **BIDS, Mistakes**)

Contracting officer's error detection duty

Notice of error

Basis of previous offer

Where offeror orally submits firm fixed price for amended request for quotations work statement, protest based on contention that such price was based on mistake and that agency should have used earlier list of prices submitted for obsolete work statement is without merit..... 93

For errors prior to award. (*See* **BIDS, Mistakes**)

CONTRACTS—Continued Page
Mistakes—Continued
Procedures
Negotiated procurements
Although procedures applicable to mistakes are set forth in regulations pertaining only to formally advertised procurements, the principles therein can be applied to negotiated procurement to extent that they are not inconsistent with negotiation procedures 93
Unconscionable to take advantage
Claim not supported by evidence
Where vice president, now president, of contracting firm attended but did not actively participate in meeting to discuss suspected mistake, he cannot later be heard to say contract is unconscionable 239
Negotiation
Advertising *v.* negotiation. (*See* **ADVERTISING, Advertising *v.* negotiation**)
Auction technique prohibition
Disclosure of price, etc.
When proposals are improperly disclosed, procuring agency should make award without further discussions if possible. However, to overcome prejudicial effects of improper award, it is not possible to avoid auction-like situation in subject procurement through disclosure of protester's proposal to contractor. Disclosure will allow for nonprejudicial recompetition of improperly awarded contract insofar as possible 505
Authority
Series of General Accounting Office decisions sanctioning use of "exception one" negotiating authority (41 U.S.C. 252(c)(1) (1970)) for "small business set-aside" awards were premised on need to justify restriction of competition (which was otherwise found to be proper) to one category of bidders—small business concerns—since restriction of competition under current law is not compatible with formal advertising 556
Awards
Advantageous to Government
Price, etc.
Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request—alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest 675
Propriety of award
Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals 62

CONTRACTS—Continued Page
Negotiation—Continued
Awards—Continued
Allegation of bias
Evidence lacking
Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. 663 402
Basis
Tested *v.* untested design
Agency's conclusion that protester's proposed use of untested design involved risk as measured against competitor's use of tested design is reasonable 635
Contrary to negotiated procurement procedures
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited 531
Improper post-award discussions
Where award under RFP was based on improper post-award discussions, contract should be terminated and requirement resolicited, even where awardee's price was disclosed in debriefing to protester and auction situation may be created, because of primacy of statutory requirements for competition over regulatory prohibition of auction tehcniques. Furthermore, remedial action is in the Government's best interests to protect confidence in the integrity of competitive procurement system, notwithstanding adverse agency mission and cost impacts 768
Erroneous
Adjustment in price
Allegation that items Nos. 52 and 53 were foreign source items rather than domestic as offered proved correct, but General Services Administration has accepted AMICO's explanation that items were commingled with those of another contract and has received restitution for difference between foreign items and those offered in solicitation 531
Remedial action impracticable
No useful purpose in terms of remedy would be served by deciding protests against combination of requirements, experience clauses, and proposal evaluation under procurement which was improperly negotiated since protests, if found meritorious, assume either that award should be made under outstanding RFP, as perhaps modified, which would be contrary to holding that procurement was improperly negotiated, or that award should be made under advertised solicitation which may not be immediately possible. Modified by 56 Comp. Gen. 649 115

CONTRACTS—Continued Page
Negotiation—Continued
Awards—Continued
Initial proposal basis
Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals 580
Not prejudicial to other offerors
Although agency's failure to point out specific deficiency to offeror was improper, award will not be disturbed where it appears that offeror was not materially prejudiced in view of significant technical and cost differences between it and successful offerors 473
Record does not support allegation that agency treated certain aspects of competing proposals as deficiencies in one of them but not the other 473
Prejudice alleged
Not supported by record
Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. 663 402
Without merit
Contention that protester was prejudiced because evaulators examined competitor's disk during evaluation is without merit because there was no need for experienced technicians to examine PCB because PCB's have been very common for many years 62
Price determinative factor
Where agency reasonably determines that point spread in techinical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712
Procedural requirements
Noncompliance
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited 531

CONTRACTS—Continued Page
Negotiation—Continued
Awards—Continued
Proffered
Where Government had been put on direct notice that offeror's intended pricing is different from Government's interpretation of clearly ambiguous proposal, Government cannot compel offeror to accept Government's interpretation in award. Consequently, award by Government varying terms of offer constitutes inititation of discussions, since offeror can either accept or reject proffered "award" ---- 768
Propriety
Evaluation of proposals
Where offeror's lack of "biomedical" research experience is identified as proposal weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion ---- 473
To other than low offeror
In procurement of creative design concepts, which calls for creativity on part of individual offerors, agency's needs can be described only broadly; there is no requirement for use of detailed design specifications in such circumstances. Further, where agency seeks creativity and innovative approaches, agency is not required to award contract on the basis of lowest price since factors other than price are paramount ---- 882
Validity
Allegation that low offeror did not meet source origin requirements of Agency for International Development Regulation No. 1, subpart B, section 201.11, which is virtually identical to "Buy American Act," 41 U.S.C. 10(a)-(e), is incorrect. While true that American Medical Instrument Corporation (AMICO) substituted domestic supplier for one submitted in offer, cost of components did not exceed 50 percent of cost of components of designated source country. Where offeror excludes no end products from Buy American certificate and does not indicate it is offering anything other than domestic end products, acceptance of offer will result in obligation on part of offeror to furnish domestic end products, and compliance with obligation is matter of contract administration which has no effect on validity of contract award ---- 531
Award under initial proposals. (*See* **CONTRACTS, Negotiation, Competition, Award under initial proposals**)
Basic ordering agreements
Exclusion of surplus spare parts
Basic Ordering Agreements cannot be used to exclude surplus spare parts once procuring activity has been made aware of potential source of supply, especially where surplus parts are acceptable from item manufacturer ---- 1005
Brand name or equal procurement
Allegation that low offeror did not conform to purchase description used in solicitation by offering disposable rubber gloves is correct. Contracting officer acted improperly by accepting blanket assurance that low offeror's equal items were, in fact, equal to brands specified since such an offer to conform does not satisfy descriptive literature requirement of brand name or equal clause ---- 531

CONTRACTS—Continued Page
Negotiatiou—Continued
Buy American Act. (*See* CONTRACTS, Buy American Act)
Cancellation
Generally. (*See* CONTRACTS, Cancellation)
Changes, etc.
Oral *v.* written
Where agency did not issue amendment to request for proposals (RFP), but met with each offeror individually to advise of change in RFP evaluation criteria, but one offeror denies even being advised of change, it is clear that misunderstanding could have resulted from agency's failure to verify its oral advice by prompt issuance of RFP amendment in accordance with regulations---- 388
Reopening negotiations
Recommendation by GAO
Dispute focusing on protesters' assertion that they were prejudiced because awardee was permitted to correct mistake after submission of best and final offers need not be resolved because for other reasons agency should have clarified its requirements and reopened negotiations with all offerors. This would have provided contractor opportunity to cure its mistake---- 829
Specifications
Performance type
Original decision of May 19, 1977, is affirmed where facts not discussed in that decision do not alter conclusion that the protester's own similar deviations to the request for proposals (RFP) requirements which it now considers material were accepted by the agency without an RFP amendment, since protester was reasonably on notice that such deviations were not considered by the agency to be either material or a relaxation of requirements, requiring RFP amendment pursuant to Federal Procurement Regulations 1-3.805-1 (1976)---- 875
Competition
Award under initial proposals
Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals---- 580
Competitive range formula
When evaluation provision of request for proposals (RFP) gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evalution scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range---- 188
Technical acceptability
Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained---- 291

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Competitive range formula—Continued
Technical acceptability—Continued
Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied 934
Data withheld
Allegation not supported by record
Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals 635
Discussion with all offerors requirement
Actions not requiring
Based on review of areas of weaknesses and deficiences in protester's proposal, GAO cannot conclude that failure to probe areas resulted in noncompliance with statutory mandate for discussions since discussions in areas might have lead to improper leveling of merit of technical proposals, especially as concerns design weaknesses and deficiencies which are clearly within offerors' "competence, diligence, engineering and scientific judgment" 989
Deficiency in proposals
When discussions are held with offerors in competitive range, agency in most cases is required to inform offerors of all deficiencies and weaknesses in their respective proposals. Requirement extends to offeror whose proposal, as initially evaluated, is acceptable despite existence of some deficiencies, since offeror should be given opportunity to improve its proposal 473
Although agency's failure to point out specific deficiency to offeror was improper, award will not be disturbed where it appears that offeror was not materially prejudiced in view of significant technical and cost differences between it and successful offerors 473
Equal opportunity to compete
Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have effected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs 312

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Discussion with all offerors requirement—Continued
Failure to discuss
After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers—resulting in changes to offeror's proposed cost and fee—General Accounting Office recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date ---- 958
Proposals not within competitive range
Where proposal is determined not to be in competitive range, contracting officer is not required to conduct meeting with offeror prior to award to permit clarification of proposal; offeror is entitled only to post-award debriefing ---- 291
Right to discussion
If post-selection discussions have been conducted with successful offeror regarding price, discussions should have been conducted with other offeror in competitive range, even where discussions did not directly affect offeror's relative standing, because all offerors are entitled to equal treatment and opportunity to revise proposals. Debriefing does not constitute meaningful discussions, since protester was not afforded opportunity to revise proposal ---- 768
What constitutes discussion
Where Government had been put on direct notice that offeror's intended pricing is different from Government's interpretation of clearly ambiguous proposal, Government cannot compel offeror to accept Government's interpretation in award. Consequently, award by Governments varying terms of offer constitutes initiation of discussions, since offeror can either accept or reject proffered "award" ---- 768
Effect of eliminating one offeror
Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report ---- 172
Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in *Power Conversion, Inc.*, B–186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range ---- 172

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Equal bidding basis for all offerors
Where agency did not issue amendment to request for proposals (RFP), but met with each offeror individually to advise of change in RFP evaluation criteria, but one offeror denies even being advised of change, it is clear that misunderstanding could have resulted from agency's failure to verify its oral advice by prompt issuance of RFP amendment in accordance with regulations 388
Exclusion of surplus spare parts
Basic ordering agreements
Basic Ordering Agreements cannot be used to exclude surplus spare parts once procuring activity was been made aware of potential source of supply, especially where surplus parts are acceptable from item manufacturer 1005
Impracticable to obtain
Surplus spare parts
While Government may not have adequate data rights in parts to obtain competition from other manufactureres, assigned part number is sufficient to procure part from item manufacturer as well as surplus parts dealers 1005
Incumbent contractor
Competitive advantage
Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. 663 402
Prior decision, holding that erroneous estimate contained in request for proposals (RFP) misled offerors other than incumbent, is affirmed on reconsideration as arguments presented by incumbent do not alter prior determination that cost impact of erroneous estimate could not be predicted without reopening of negotiations 663
Protest based on competitive advantage enjoyed by incumbent contractors must fail where record indicates that basis for that advantage is prior development of operating procedures. There is nothing inherently objectionable in requiring offerors to explain their business approach to satisfying the solicitation's requirements merely because this will be less difficult for those who have performed similar, or even identical, work in the past 1008
Indefinite, etc., specifications
Finding that RFP did not contain accurate estimate of file size will not have adverse effect on use of estimates in future procurements as alleged in request for reconsideration, as orginal decision did not hold that estimates must be precisely accurate but only that they be based on best information available to Government 663

CONTRACTS—Continued Page

Negotiation—Continued

Competition—Continued

Master agreements

Enhancing competition

Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78

Preservation of systems integrity

Department of Interior insists that, in addition to substantial costs which will be involved in recompeting procurement as previously recommended by General Accounting Office (GAO), mission of protecting health and safety of miners will be delayed for up to a year if recompetition results in termination of proposed award. Even assuming accuracy of claimed costs and delays—which have not been explained or analyzed in detail—confidence in competitive procurement system mandates recompetition, where improperly awarded Automatic Data Processing (ADP) contract would extend 65 months and agency reported to GAO that successful proposal was "technically responsive" when it clearly was not 505

Propriety

Method of conducting negotiations

Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency, and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, were not the cause of claimant which was in line for award not receiving award, and cannot serve as basis for claim for proposal preparation costs, as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal 201

Sole source of supply. (*See* CONTRACTS, Negotiation, Sole-source basis)

Conflicts of interest prohibitions

Organizational

Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAO agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship 381

Status of offeror

Protester argues that successful offeror should have been disqualified because of an alleged conflict of interst arising from the proposed use of three consultants from food service industry to study the National School Lunch and School Breakfast Programs and to develop a model for school food procurement. Since successful offeror discussed matter in proposal, agency recognized and considered possible conflict of interest before award, and no provision of statute, regulation or the request for proposals prohibited award in the circumstances, there is no basis to conclude that the award was improper 745

CONTRACTS—Continued Page
Negotiation—Continued
Cost, etc., data
Ambiguous prices
Award should not be based on ambiguous price proposal through application of *contra proferentem* rule of contract construction that ambiguities be construed against their drafter; rather, discussions should be conducted to clarify price 768
Escalation
Contractor *v.* subcontractor methods
Prime contractor was not required to negotiate with potential subcontractor as to method it used for calculating price escalation. Although method used by prime was different from that used by proposed subcontractor, GAO cannot object so long as it was reasonable and consistent with request for proposals (RFP) 596
Evaluation factors changed
In negotiated procurement where agency utilized cost evaluation criteria by which dollar values were assigned to desirable and undesirable features of technically acceptable proposals, award must be made to low evaluated responsible offeror based on adjusted price unless agency first advises offerors that basis for evaluation is changed and gives offerors opportunity to amend proposals 829
Parametric cost estimating technique
Parametric and other cost estimating techniques may legitimately be used by agency to determine credibility of each offeror's production estimates and most probable cost to the Government 635
Price negotiation techniques
Award for micrographics services based on unit prices for 5 million, 6 million and 7 million images, respectively, is not "fixed" or "finitely determinable" for all periods of contract under "fixed prices" clause because, if 18 million images are exceeded in three evaluated periods, there exists no applicable unit price. Also, protester's proposal did not propose "fixed" or "finitely determinable" prices for all periods because, although fixed unit prices were proposed for initial contract period, subsequent options were based on same unit prices adjusted by Cost of Living Index for previous 12-month period. Clause contemplates "fixed" or "finitely determinable" prices as of time of award so proper price evaluation can be made 768
"Realism" of cost
Given essential equality of technical proposals, contracting officer's decision to award contract to offeror submitting slightly lower scored, significantly less-costly proposal did not give improper emphasis to cost, since decision merely applied common sense principle that if technical considerations are essentially equal, the only remaining consideration for selection of contractor is cost 725
Cost-reimbursement basis
Evaluation factors
Cost *v.* technical rating
Based on review of Department of Interior's evaluation record evidencing rationale for selection of cost-reimbursement contractor, General Accounting Office concludes that rationale is sound notwithstanding allegations that past experience and academic nature of protester ideally suited it to do study in question 725

CONTRACTS—Continued Page
Negotiation—Continued
Data, rights, etc. (*See* CONTRACTS, Data, rights, etc.)
Disclosure of price, etc.
Auction technique prohibition
When proposals are improperly disclosed, procuring agency should make award without further discussions if possible. However, to overcome prejudicial effects of improper award, it is not possible to avoid auction-like situation in subject procurement through disclosure of protester's proposal to contractor. Disclosure will allow for nonprejudicial recompetition of improperly awarded contract insofar as possible 505
Discussion requirement
Competition, (*See* CONTRACTS, Negotiation, Competition, Discussion with all offerors requirement)
Evaluation factors
Administrative determination
Agency failed to recognize ribbonless operation capability of protester's equipment during initial technical evaluation of proposals. After award agency reevaluated proposals, taking this feature into consideration, and concluded that it did not substantially affect its decision because of other advantages of competitor's equipment in that evaluation category. Since procurement officials enjoy a reasonable degree of discretion in evaluating proposals and their determinations are entitled to great weight, on basis of record we cannot conclude that agency acted arbitrarily 62
Protester contends that agency's conclusion that disk can be changed more simply than PCB is based on generalized information and not concrete facts. Since operator may attempt to insert PCB upside down but such error is not possible with disk, on whole, we believe that agency's conclusion is based on reasoned judgment of its source selection personnel in accordance with established evaluation factors 62
Contracting agency's technical evaluation that proposal for amplifiers can meet RFP requirement for interchangeability with corresponding Government equipment will not be disturbed, since it has not been shown to be arbitrary or contrary to statute or regulations 300
Agency's conclusion that protester's proposed use of untested design involved risk as measured against competitor's use of tested design is reasonable 635
Determinations of proposal merits are a matter of agency discretion which will not be disturbed unless demonstrated to be arbitrary or unreasonable, and the instant record fails to provide evidence of objectionable evaluation 905
All offerors informed requirement
Where offeror's lack of "biomedical" research experience is identified as proposal weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion 473

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

All offerors informed requirement—Continued

Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals..... 635

Where agency listed evaluation factors in descending order of importance with percentage of weights ascribed to each factor with notation that "maximum weight will not exceed" a certain percentage and, following receipt of proposals, evaluation panel varies percentages of certain factors but factors remain in the same order of importance, protest against such alteration is denied, as offerors must only be informed of factors and relative weights, not precise numerical weights assigned to each factor and alteration was not a radical departure from request for proposals' evaluation scheme..... 835

Areas of evaluation

Protester contends that pallet storage characteristics and field-reprogramming capability should not have been considered by agency Procurement Review Board because such features were not scored by technical evaluators. Since such features were within listed evaluation criteria and technical point scores are merely useful guides to agency source selection, it was entirely proper for Board to consider such features as explained to it by evaluators even though such features were not scored..... 62

Conformability of equipment, etc. (*See* **CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement**)

Cost

Changed

Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000. Modified by 56 Comp. Gen. 694..... 245

Cost analysis

Benchmark costs

Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate..... 388

Cost, etc., of changing contractors

Costs of phasing in a new contractor may be an evaluation factor where considered desirable to do so, but only if solicitation so provides.. 905

Cost realism

Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Cost realism—Continued
offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. 663 ---- 402
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria ---- 712
Criteria
Contention that pallet storage characteristics and field-reprogramming capability were improper evaluation criteria is without merit since agency reasonably considered them to be within purview of listed subfactor, "ease of operation and maintenance" ---- 62
Administrative determination
Agency's conclusion that protester's proposed use of untested design involved risk as measured against competitor's use of tested design is reasonable ---- 635
Application of criteria
Agency initially evaluated proposals and made award based on improper evaluation criteria. After protest, agency noticed its mistake, reconsidered its decision, and again selected same firm. During development of protest, agency was made aware of another error, reconsidered, and again determined that its source selection was justified. Contention that reconsiderations were invalid because contemporaneous documentation was not prepared is without merit because adequate documentation to support decision now exists and time of preparation does not affect substance of justification ---- 62
When evaluation provision of request for proposals (RFP) gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range ---- 188
Deviation
In negotiated procurement where agency utilized cost evaluation criteria by which dollar values were assigned to desirable and undesirable features of technically acceptable proposals, award must be made to low evaluated responsible offeror based on adjusted price unless agency first advises offerors that basis for evaluation is changed and gives offerors opportunity to amend proposals ---- 829
Establishment
Because of possible appearance of impropriety in procurement process, procuring agency should not review or scan technical or cost proposals prior to establishing final weights for evaluation factors ---- 835

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Criteria—Continued
Order of importance
Allegation that solicitation failed to indicate relative importance of evaluation criteria is without merit where criteria were listed in descending order of importance and solicitation so informed offerors. Absence from solicitation of precise numerical weights to be employed in evaluation is consistent with regulatory provision precluding such disclosure 882
Subcriteria
Concerning protester's contention that it was prejudiced because it assumed incorrectly that each subfactor was listed in descending order of importance, we have held that there is no obligation to advise offerors of relative importance of evaluation subfactors, or to list subfactors in descending order of importance, if they are to be considered of equal or approximately equal importance. Since subfactors were approximately equal in importance, we believe that RFP reasonably advised offerors of evaluation criteria to be applied 62
Evaluation of telecommunications and Federal accounting experience as subcriteria of "related corporate experience" is permissible without agency disclosing subcriteria to offerors, as such subcriteria are sufficiently definitive of corporate experience in view of the scope of the procurement 835
Discount terms
To extent that protest against Navy's cost reevaluation—which found that award was erroneously made to other than lowest cost offeror—implicitly calls into question sufficiency of request for proposals (RFP) evaluation factors, it is without merit. RFP adequately described evaluation factors and their relative importance; also, provisions are not viewed as defective or ambiguous when read together with agency instructions to offerors on pricing of discounts. Modified by 56 Comp. Gen. 694 245
Erroneous evaluation
Although protester's contention that agency erroneously computed scoring of technical evaluation factors by failing to weigh factors as intended is correct, proper computation of scoring results in approximately same percentage difference (5.1 versus 5.15 percent). Accordingly, we cannot perceive that protester was prejudiced by erroneous computation 62
Escalation
Time frame
Allegation that time frame for calculating price escalation should be different from that used in evaluating protester's proposal is denied since time frame used is that specified in RFP 596
Evaluators
Allegations of bias, unfairness, etc.
Contention that protester was prejudiced because evaluators examined competitor's disk during evaluation is without merit because there was no need for experienced technicians to examine PCB because PCB's have been very common for many years 62

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Evaluators—Continued
Allegations of bias, unfairness, etc.—Continued
Notwithstanding position that enforcement of standards of conduct is the responsibility of each agency, General Accounting Office has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement 580
Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied 934
Board membership
Protest that changes to membership of technical evaluation board occurred after evaluation process had started and replacement personnel were less qualified than personnel removed is denied, since investigation revealed that all membership changes occurred before start of evaluation and educational and professional backgrounds of replacement personnel were comparable to those removed 188
Federal Procurement Regulations para. 1-4.1004-1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721
Conflict of interest alleged
Award of contract for training Head Start trainees to firm possessing contract to assess effectiveness of agency's national training program results in firm evaluating its own work. GAO agrees with agency as to need for modifying assessment contract to eliminate conflicting relationship 381
Although it would have been appropriate for proposal evaluator to have disqualified himself completely from proposal evaluation upon notice that proposal had been received from former employer who had previously fired employee, fact remains that evaluator insists he did not discuss former employer's submitted proposal until fellow evaluators completed evaluation. Since protester has not submitted probative evidence contesting evaluator's statements and because relative standing of offerors is unchanged by excluding questioned evaluator's scores, new evaluation panel need not be convoked to rescore proposals to remedy irregularity 580
Technical evaluation panel
Board membership
Evaluation of revised proposals by some but not all of those who evaluated original proposals, without discussion among evaluators of their respective judgments, is not contrary to applicable regulations or otherwise improper 473

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Evaluators—Continued
Technical evaluation panel—Continued
Contracting officer *v.* panel determinations
Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits---- 721
Factors other than price
Technical acceptability
Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals---- 62
In procurement of creative design concepts, which calls for creativity on part of individual offerors, agency's needs can be described only broadly; there is no requirement for use of detailed design specifications in such circumstances. Further, where agency seeks creativity and innovative approaches, agency is not required to award contract on the basis of lowest price since factors other than price are paramount---- 882
Fixed-price contract may be awarded to higher-priced, but technically superior, offeror. Since agency's position that higher-priced offerors' proposals are technically superior is supported, awards to offerors cannot be questioned---- 989
Bias alleged
Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied---- 934
Information
Failure to furnish
Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent---- 381

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Method of evaluation
Formula
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria---------- 712
Where agency listed evaluation factors in descending order of importance with percentage of weights ascribed to each factor with notation that "maximum weight will not exceed" a certain percentage and, following receipt of proposals, evaluation panel varies percentages of certain factors but factors remain in the same order of importance, protest against such alteration is denied, as offerors must only be informed of factors and relative weights, not precise numerical weights assigned to each factor and alteration was not a radical departure from request for proposals' evaluation scheme---------- 835
Improper
Prejudicial to low offeror
Agency's evaluation of proposals and award to higher priced offeror was without reasonable basis, was arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs---------- 448
Not prejudicial
Although it is clear that the request for proposals (RFP) did not meet "relative importance of evaluation factors" disclosure requirement of our decisions and the Armed Services Procurement Regulation, since protester assumed correctly that point 1, Technical Approach, was most significant factor and since protester's and competitor's proposals were essentially equal and near maximum score on other points, we do not believe that protester was prejudiced by RFP's failure to disclose relative importance of evaluation factors. 50 Comp. Gen. 117, distinguished---- 62
Concerning protester's contention that it was prejudiced because it assumed incorrectly that each subfactor was listed in descending order of importance, we have held that there is no obligation to advise offerors of relative importance of evaluation subfactors, or to list subfactors in descending order of importance, if they are to be considered of equal or approximately equal importance. Since subfactors were approximately equal in importance, we believe that RFP reasonably advised offerors of evaluation criteria to be applied---------- 62
Procurement officials' actions in not informing offerors of possible funding problems while matter of reprogramming was being considered within agency, and continuing to proceed with the procurement, thereby causing further expenditure of funds by offerors, were not the cause of claimant which was in line for award not receiving award, and cannot serve as basis for claim for proposal preparation costs, as such action was not arbitrary so as to deprive claimant of a fair appraisal of its proposal-- 201

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Method of evaluation—Continued
Technical proposals
Protester contends that its teleprinter has fewer total parts, resulting in easy maintenance at low cost. Agency indicates that competitor's unit is better because its printhead has fewer moving parts, resulting in less maintenance at user level. Although protester disagrees with agency's technical judgment on this point, our examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in its evaluation of this point 62
Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals 635
Protest against Army's interpretation of "four-step" selection procedure and evaluation of proposals is timely under Bid Protest Procedures since protest was filed within 10 days from date protester learned of grounds giving rise to protest 989
Architect-engineer contracts
Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits 721
Points *v.* cost
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712
Determinations of proposal merits are a matter of agency discretion which will not be disturbed unless demonstrated to be arbitrary or unreasonable, and the instant record fails to provide evidence of objectionable evaluation 905
Options
No provision for evaluation in solicitation
Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited 448
Phasing in new contractors. (*See* CONTRACTS, Negotiation, Evaluation factors, Cost, etc. of changing contractors)

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Point rating
Disclosure of evaluation base
Although it is clear that the request for proposals (RFP) did not meet "relative importance of evaluation factors" disclosure requirement of our decisions and the Armed Services Procurement Regulation, since protester assumed correctly that point 1, Technical Approach, was most significant factor and since protester's and competitor's proposals were essentially equal and near maximum score on other points, we do not believe that protester was prejudiced by RFP's failure to disclose relative importance of evaluation factors. 50 Comp. Gen. 117, distinguished---- 62
Allegation that solicitation failed to indicate relative importance of evaluation criteria is without merit where criteria were listed in decending order of importance and solicitation so informed offerors. Absence from solicitation of precise numerical weights to be employed in evaluation is consistent with regulatory provision precluding such disclosure---- 882
Experience
Evaluation of traditional responsibility factors such as experience is not improper when an agency has a legitimate need to consider such factors in making relative assessment of offerors' proposals---- 882
Subcriteria
Evaluation of telecommunications and Federal accounting experience as subcriteria of "related corporate experience" is permissible without agency disclosing subcriteria to offerors, as such subcriteria are sufficiently definitive of corporate experience in view of the scope of the procurement---- 835
Predetermined distribution
Where predetermined distribution of points in evaluation of cost (lowest cost proposal received 8 points, next lowest 6 points and so on) is used by agency, protest that such distribution did not consider actual difference in costs is denied. While agency could have used a more rationally founded method of evaluating cost, the above-noted scoring scheme was not so prejudicial to protester as to require disturbing award, as solicitation made clear cost was secondary to technical considerations, and even giving protester maximum points under cost and no points to awardee does not alter ranking of proposals---- 835
Predetermined score
Because of possible appearance of impropriety in procurement process, procuring agency should not review or scan technical or cost proposals prior to establishing final weights for evaluation factors---- 835
Price consideration
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria---- 712

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Preference
Prejudice alleged
Protester contends that procuring agency had strong preference for disk-type pallet over printed circuit board (PCB) type pallet and that agency's failure to notify all competitors of such preference had prejudical effect on competition. Where competing offerors' proposals were acceptable and satisfied RFP requirement using two distinct state-of-the-art approaches, agency had no duty to amend RFP to specify particular approach 62
Prior experience
Evaluation of prior experience/past performance is not improper or discriminatory with respect to small business 882
Propriety of evaluation
Protester contends that agency's conclusion that disk can be changed more simply than PCB is based on generalized information and not concrete facts. Since operator may attempt to insert PCB upside down but such error is not possible with disk, on whole, we believe that agency's conclusion is based on reasoned judgment of its source selection personnel in accordance with established evaluation factors 62
Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained 291
Protester concludes, based on telephone conversations before and after award between successful offeror and itself, in which the possibility of protester working with successful offeror on project was discussed, that successful offeror was not completely staffed and should have been found unacceptable. Examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in evaluation of proposal since during negotiations successful offeror properly filled staff requirements from other firms 745
Superior product offered
Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent 381
Technical
Erroneous computation
Not prejudicial
Although protester's contention that agency erroneously computed scoring of technical evaluation factors by failing to weigh factors as intended is correct, proper computation of scoring results in approximately same percentage difference (5.1 versus 5.15 percent). Accordingly, we cannot perceive that protester was prejudiced by erroneous computation 62

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Technical acceptability. (*See* CONTRACTS, Negotiation, Evaluation factors, Factors other than price, Technical acceptability)
Testing procedures
Record does not support allegation that contractor gained unfair competitive advantage by conducting test to prove certain capability to contracting agency with view to modifying contract. Conduct of test was within discretion of agency in area of contract administration and fact that capability was required under pending solicitation of contract does not alter finding. Modified by 56 Comp. Gen. 663 402
Fixed-price
Cost, data, etc. (*See* CONTRACTS, Negotiation, Cost, etc., data)
Technically superior *v.* lower-priced offer
Based on review of voluminous record of technical evaluation, including assessment of technical risk associated with protester's fixed-price proposal, GAO concludes Army technical assessments are rationally founded 989
Fixed-price contract may be awarded to higher-priced, but technically superior, offeror. Since agency's position that higher-priced offerors' proposals are technically superior is supported, awards to offerors cannot be questioned 989
Impossibility of drafting specifications
Basis for exception to formal advertising
Since Air Force admits it has capability of drafting management services specifications, fact that it may not be able to specify all details of services for fear of lessening competition by limiting firms to specified management procedures does not justify determination that it is impossible to draft specifications for management services. Degree competition might be lessened is speculative; moreover, procurement regulation under which contracting officer negotiated procurement contemplates impossibility of drafting specifications, not difficulty or inconvenience. Modified by 56 Comp. Gen. 649 115
Late proposals and quotations
Sole-source solicitation
Amend or cancel RFP
Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition 300
Level of equity
Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified 649

CONTRACTS—Continued Page
Negotiation—Continued
Level of quality
Record suggests that need to obtain higher level of quality of service than that thought obtainable under formal advertising method was also reason prompting choice of negotiated procurement method for hospital cleaning services. Legislative history of Armed Services Procurement Act of 1947, source of authority for negotiated procurement in question, shows, however, that Congress specifically rejected proposal to permit negotiation to secure desired level of quality of services even when "health of personnel of the services are involved." Further analysis mandates conclusion that negotiated procurement method is not rationally founded under limits of existing law and regulation. Modified by 56 Comp. Gen. 649 115
Lowest offer
Price and other factors considered
Where RFP inconsistently states that award will be made to firm submitting "lowest evaluated acceptable offer," and that award will be made based on the most advantageous proposal "price and other factors considered," Order of Precedence Clause of RFP indicates that latter basis is proper basis for award 62
Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit 745
Offers or proposals
Best and final
Additional rounds
Because of analysis of deficiencies, recommendation is made that all offerors be afforded opportunity for another round of negotiations 167
Auction technique not indicated
Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique 712
Call for a new round of best and final offers, as a result of various material changes made to specification requirements after submission of best and final offers, is justified and does not constitute auction technique. Agency had no alternative but to institute a second round of negotiations. Moreover, the record indicates that price revisions made under second best and final offers were primarily the result of changed requirements and correction of proposal deficiencies 905
Recommended
Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made tnat negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. 663 402

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Best and final—Continued
Certification omitted
Where agency required certification in best and final offers that equipment configuration proposed was that which had passed computer benchmark and had been determined to be technically acceptable, successful offeror's responses are viewed as meeting intent of requirement through certification as such was not provided ... 312
Discussions
All offerors requirement
After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers—resulting in changes to offeror's proposed cost and fee—General Accounting Office recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date ... 958
Disclosure
To eliminate unfair competitive advantage insofar as possible, protester, as condition to competing under recompetition of improperly awarded ADP requirement limited to protester and contractor, must agree to disclosure to contractor of information from best and final proposal regarding details of proposed initial equipment configuration and unit prices. Information should be substantially comparable to information in initial order placed under contract which was disclosed by agency to protester ... 505
Late modification
Resolicitation recommended
Because "approximate" pricing communication should not have been considered for award and, since offeror's "corrected" cost tables, modifying communication, were submitted unacceptably late, recommendation is made that requirement be resolicited. Resolicitation is also recommended, since offeror was permitted to significantly correct unacceptable ADP configuration after closing time for best and final offers. Modified by 56 Comp. Gen. 505 ... 142
Mistakes
Correction
Dispute focusing on protesters' assertion that they were prejudiced because awardee was permitted to correct mistake after submission of best and final offers need not be resolved because for other reasons agency should have clarified its requirements and reopened negotiations with all offerors. This would have provided contractor opportunity to cure its mistake ... 829

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Best and final—Continued
"Most advantageous to Government"
Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request—alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantegeous to Government," and cannot be properly regarded as entirely separate ground of protest... 675
Time limit
Since protester observed opening of best and final offer prior to designated time, protest against early opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered. Modified by 56 Comp. Gen. 505..... 142
Written notification
Prior to discussions, agency's letter advised offerors of the opportunity to submit revised proposals after discussions. The same advice was repeated in oral discussions. Agency failed to fully comply with Armed Services Procurement Regulation 3-805.3(d) (1976 ed.), because there there was no subsequent written notification to offerors that discussions were closed and that best and final offers were being requested. However, award will not be disturbed, because protester was advised of and in fact had opportunity to revise proposal, common cutoff date existed, and circumstances of procurement strongly suggested that such opportunity was final chance to revise proposal before agency proceeded with award... 657
Defective proposals
On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range..... 694
Deficient proposals
Contradicting evidence not submitted
Since contracting officer insists that protester "was advised that their proposal was top heavy (too many Ph.D.'s), with too high number of man-hours," and because protester has not submitted probative evidence contradicting position, adequate discussions were held with company concerning alleged deficiences..... 725

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Deviations
Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs ---- 454
Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided ---- 694
Hardware requirements *v.* firmware proposals
Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have effected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs ---- 312
Substitution
Beyond contemplation of solicitation requirements
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited ---- 531

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Essentially equal technically
Price determinative factor
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712
Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique 712
Based on review of Department of Interior's evaluation record evidencing rationale for selection of cost-reimbursement contractor, General Accounting Office concludes that rationale is sound notwithstanding allegations that past experience and academic nature of protester ideally suited it to do study in question 725
Given essential equality of technical proposals, contracting officer's decision to award contract to offeror submitting slighty lower scored, significantly less-costly proposal did not give improper emphasis to cost, since decision merely applied common sense principle that if technical considerations are essentially equal, the only remaining consideration for selection of contractor is cost 725
Evaluation
Allegation of bias not sustained
Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained 291
Record does not support allegation that agency treated certain aspects of competing proposals as deficiencies in one of them but not the other 473
Errors
Not prejudicial
Agency failed to recognize ribbonless operation capability of protester's equipment during initial technical evaluation of proposals. After award agency reevaluated proposals, taking this feature into consideration, and concluded that it did not substantially affect its decision because of other advantages of competitor's equipment in that evaluation category. Since procurement officials enjoy a reasonable degree of discretion in evaluating proposals and their determinations are entitled to great weight, on basis of record we cannot conclude that agency acted arbitrarily 62
Initial proposal basis
Authority for award
Authority for "initial proposal" award depends on: (1) prospect that award will be made at "fair and reasonable" price; and (2) absence of uncertainty as to pricing or technical aspects of any proposals 580

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Late. (*See* CONTRACTS, Negotiation, Late proposals and quotations)
Offeror
Equal treatment requirement
Despite agency's view that RFP provision requiring successful completion of computer benchmark in 8 hours was established as matter of Government's convenience and was not necessarily inflexible, in case where agency found it appropriate to allow one offeror almost 15 total hours in two benchmark sessions more than 3 months apart, GAO believes that RFP should have been amended to indicate that 8-hour requirement was flexible, and second offeror should have been allowed to revise proposal and have been accorded similar flexible treatment in benchmark of revised proposals' equipment configuration 312
Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. 663 402
Post-award debriefing
Where proposal is determined not to be in competitive range, contracting officer is not required to conduct meeting with offeror prior to award to permit clarification of proposal; offeror is entitled only to post-award debriefing 291
Qualifications. (*See* CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors)
Superior rated proposal
Since successful offeror's superior-rated proposal was properly considered for initial proposal award in that tests for award were met, it was proper for procuring agency not to have discussed with protester deficiencies noted in protester's proposal—indeed, if discussions had been entered into, initial award would not have been authorized 580
Preparation
Costs
Claim for proposal preparation cost on basis that cancellation of request for proposals (RFP) was motivated by prejudice against claimant is denied where claimant has not affirmatively proved that decision was not result of reasonable exercise of discretion to program limited funds to another project 201
Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs 201
General Accounting Office (GAO) will consider question of protester's entitlement to proposal preparation costs, notwithstanding GAO recommendation that contract option not be exercised; prior decisions (55 Comp. Gen. 859 and B–186311, August 26, 1976) are overruled to extent they are inconsistent with this determination 448

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Preparation—Continued
Costs—Continued
Agency's evaluation of proposals and award to higher priced offeror was without reasonable basis, was arbitrary and capricious as to low offeror, and constituted failure to give fair and honest consideration to low offeror's proposal, thus entitling low offeror to proposal preparation costs 448
Where claimant has not provided supporting documentation to establish quantum of compensation due for proposal preparation costs, GAO has no basis at this time to determine proper amount of compensation. Claimant should submit necessary documentation to agency in effort to reach agreement on quantum. If agreement is not reached, matter should be returned to GAO for further consideration 448
Claim for proposal preparation costs is denied where lack of good faith, arbitrariness or capriciousness is not shown 596
Claim for proposal preparation costs is denied where protester does not show that it was in line for award 829
Prequalification of offerors
Master agreements
Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78
Prices
Fixed
Technical risk
Based on review of voluminous record of technical evaluation, including assessment of technical risk associated with protester's fixed-price proposal, GAO concludes Army technical assessments are rationally founded 989
Fixed-price contract may be awarded to higher-priced, but technicaliy superior, offeror. Since agency's position that higher-priced offeror's proposals are technically superior is supported, awards to offerors cannot be questioned 989
Not fixed
On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range 694

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Prices—Continued
Not fixed—Continued
Award for micrographics services based on unit prices for 5 million, 6 million and 7 million images, respectively, is not "fixed" or "finitely determinable" for all periods of contract under "fixed prices" clause because, if 18 million images are exceeded in three evaluated periods, there exists no applicable unit price. Also, protester's proposal did not propose "fixed" or "finitely determinable" prices for all periods because, although fixed unit prices were proposed for initial contract period, subsequent options were based on same unit prices adjusted by Cost of Living Index for previous 12-month period. Clause contemplates "fixed" or "finitely determinable" prices as of time of award so proper price evaluation can be made ---- 768
Reduction *v.* modification
Agency properly declined to consider contractor's reduction in contract price in reaching decision to terminate contract for convenience of Government and reaward to offeror which was actually lowest in overall cost, because in prevailing circumstances price reduction amounted to late modification of unsuccessful proposal. Modified by 56 Comp. Gen. 694 ---- 245
Unrealistic
Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. 663 ---- 402
Qualifications of offerors
Experience
Where offeror's lack of "biomedical" research experience is identified as proposal weakness, there has been no change from evaluation criteria expressed in terms of general scientific experience since there is direct correlation between stated weakness and more general evaluation criterion ---- 473
Award to offeror whose lower score can be principally attributed to lack of experience in one technical category is not award in anticipation of deficient performance where offeror takes no exception to specification requirements and deficiencies can be corrected through contract administration ---- 712
License requirement
Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license ---- 494

CONTRACT—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Qualifications of offerors—Continued
Prior contract performance
Although statutory requirement that contracts be let after competitive bidding is not applicable to reprocurements, when contracting officer conducts new competition for reprocurement, defaulted contractor may not automatically be excluded from competition since such exclusion would constitute an improper premature determination of nonresponsibility. B–175482, May 10, 1972, overruled; 54 Comp. Gen. 161 and prior inconsistent decisions, modified 976
Rejection
Improper
Finding that proposal offering "full payout lease" was nonresponsive was improper where amended solicitation invited proposals based on lease and on lease with option to purchase. In these circumstances, "full payout lease" was tantamount to offer of terminable lease with option to purchase 829
Revisions
Cost
Proposal unacceptable
Where, concurrent with submission of best and final communication, offeror stated "arithmetic" error was made in cost tables which would result in price increase of "*approximately* $120,000," communication was ineligible for award consideration, since it proposed neither fixed, nor finitely determinable, prices which the Government would be bound to pay if award were to be based on communication. Also, since offeror's final technical submission proposed significantly different equipment configuration from that which underwent benchmark testing, proposal is unacceptable. Modified by 56 Comp. Gen. 505 142
Cut-off date
Prior to discussions, agency's letter advised offerors of the opportunity to submit revised proposals after discussions. The same advice was repeated in oral discussions. Agency failed to fully comply with Armed Services Procurement Regulation 3–805.3(d) (1976 ed.), because there was no subsequent written notification to offerors that discussions were closed and that best and final offers were being requested. However, award will not be disturbed, because protester was advised of and in fact had opportunity to revise proposal, common cutoff date existed, and circumstances of procurement strongly suggested that such opportunity was final chance to revise proposal before agency proceeded with award ... 675
Equal opportunity to all offerors
Offeror, aware of problem with agency's request for revised proposals, protested, alleging that award was not "most advantageous to Government, price and other factors considered." Additional statement supporting protest—furnished later at General Accounting Office's (GAO) request—alleged for first time that best and final offers were never properly requested. Contention that "best and final" issue was untimely raised is rejected, because objection was in nature of additional support for contention that award was not "most advantageous to Government," and cannot be properly regarded as entirely separate ground of protest ... 675

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Revisions—Continued
Equal opportunity to all offerors—Continued
Where protester alleges it was told or persuaded in oral discussions not to submit revised proposal and agency's account of facts contradicts protester's, protester has failed to affirmatively prove its assertions, and, based upon record, GAO concludes that protester was informed of and in fact had opportunity to submit revised proposal---- 675
If post-selection discussions have been conducted with successful offeror regarding price, discussions should have been conducted with other offeror in competitive range, even where discussions did not directly affect offeror's relative standing, because all offerors are entitled to equal treatment and opportunity to revise proposals. Debriefing does not constitute meaningful discussions, since protester was not afforded opportunity to revise proposal---- 768
"Separate charges"
Alternate in nature
"Separate charges" cannot logically be added to base and option prices to determine successful offeror or to determine bid "unbalancing," since both prices and separate charges will not be paid—they are alternative in nature---- 167
Failure to exercise renewal options
Agency decision to preclude use of separate charges for failure to exercise renewal options in automatic data processing procurement is not abuse of agency discretion because competition existed on basis of terms solicited---- 860
Time sharing computer services
Proposal for computer time sharing services which reserved offeror's right to revise computer algorithm failed to conform to material RFP requirement that offerors submit fixed prices, because algorithm is directly related to proposed prices. Modified by 56 Comp. Gen. 694---- 245
Unacceptable proposals
Precluded from reinstatement
Since protester's proposal was unacceptable due to failure to offer fixed prices as required by RFP, primary remedy requested in its protest—reinstatement of its contract which Navy terminated for convenience—is precluded. Modified by 56 Comp. Gen. 694---- 245
Prices not fixed
On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range---- 694

CONTRACTS—Continued Page
Negotiation—Continued
Offers or proposals—Continued
Unsolicited proposals
Status
Acceptance of protester's unsolicited proposal is not dispositive that TF-30 blade shroud repair process set out in proposal was proprietary data and that Government violated protester's rights by disclosing process in subsequently issued RFP, where acceptance was caused by administrative error and proposal's restrictive legend recognizes that nonproprietary common shop practices or process independently developed by Government or another firm are not protected against disclosure by Government 537
Options
Generally. (*See* CONTRACTS, Options)
Prices
Comparison
Method of calculation
Prime contractor was not required to negotiate with potential subcontractor as to method it used for calculating price escalation. Although method used by prime was different from that used by proposed subcontractor, GAO cannot object so long as it was reasonable and consistent with request for proposals (RFP) 596
Error alleged
Not supported by record
Protester's allegation of fundamental error in calculation of price escalation is not sustained by record which shows that evaluation was reasonable and that even if evaluation were conducted as requested by protester, its proposal would not be low 596
Fixed. (*See* CONTRACTS, Negotiation, Fixed-price)
Proposals essentially equal technically
Where agency reasonably determines that point spread in technical evaluation does not indicate significant superiority of one proposal over another, cost, although designated as least important factor, may become determinative factor in award selection. Further, even though agency initially utilizes unpublished technical/cost trade-off formula, agency is not bound to award contract on basis of that formula so long as award is consistent with published evaluation criteria 712
Technical status of low offeror
Award to offeror whose lower score can be principally attributed to lack of experience in one technical category is not award in anticipation of deficient performance where offeror takes no exception to specification requirements and deficiencies can be corrected through contract administration 712
Pricing data. (*See* CONTRACTS, Negotiation, Cost, etc., data)
Protests
Requests for proposals. (*See* CONTRACTS, Negotiation, Requests for proposals, Protests under)

CONTRACTS—Continued Page
Negotiation—Continued
Reopening
Estimates
Best Information available requirement
Prior decision, holding that erroneous estimate contained in request for proposals (RFP) misled offerors other than incumbent, is affirmed on reconsideration as arguments presented by incumbent do not alter prior determination that cost impact of erroneous estimate could not be predicted without reopening of negotiations 663
Propriety
Auction bidding not indicated
Call for a new round of best and final offers, as a result of various material changes made to specification requirements after submission of best and final offers, is justified and does not constitute auction technique. Agency had no alternative but to institute a second round of negotiations. Moreover, the record indicates that price revisions made under second best and final offers were primarily the result of changed requirements and correction of proposal deficiencies 905
"Touch-up" negotiations with one offeror
After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers—resulting in changes to offeror's proposed cost and fee—General Accounting Office recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date 958
Requests for proposals
"All or none" proposals
Request for proposals (RFP) contemplating "all-or-none" award for 12 items was later amended orally to provide for immediate award of basic quantity of 4 items with option for remaining 8. Award based on lowest price for basic plus option quantities was not objectionable where agency had advised offerors that option "would be" exercised and award was consistent with written RFP. However, GAO recommends that in the future, oral amendments to solicitations be confirmed in writing 513
Amendment
Protest
Sole-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment 300
Required for changes in RFP
Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition 300

CONTRACTS– Continued Page
Negotiation—Continued
Requests for proposals—Continued
Cancellation
Alleged prejudice speculative
Claim for proposal preparation cost on basis that cancellation of request for proposals (RFP) was motivated by prejudice against claimant is denied where claimant has not affirmatively proved that decision was not result of reasonable exercise of discretion to program limited funds to another project 201
Unavailability of funds
Cancellation of RFP due to unavailability of funds is reasonable exercise of discretion because Anti-Deficiency Statute, 31 U.S.C. 665(a), prohibits the obligation of funds in excess of amount appropriated from one program to another 201
Clauses
Order of precedence
Where RFP inconsistently states that award will be made to firm submitting "lowest evaluated acceptable offer," and that award will be made based on the most advantageous proposal "price and other factors considered," Order of Precedence Clause of RFP indicates that latter basis is proper basis for award 62
Computer time sharing services
Ambiguous
Allegations not substantiated
To extent that protest against Navy's cost reevaluation—which found that award was erroneously made to other than lowest cost offeror—implicitly calls into question sufficiency of request for proposals (RFP) evaluation factors, it is without merit. RFP adequately described evaluation factors and their relative importance; also, provisions are not viewed as defective or ambiguous when read together with agency instructions to offerors on pricing of discounts. Modified by 56 Comp. Gen. 694 245
Requirements
Benchmark
Where RFP for computer time sharing services established benchmark requirements which related primarily to technical acceptability of proposals, and Navy regarded offeror's several performance discrepancies (time exceeded on 3 of 135 tasks, degradation factor exceeded on 1 of 3 benchmark runs) as minor, Navy's acceptance of proposal is not clearly shown to be without reasonable basis insofar as protestor's numerous objections concerning benchmark performance, memory allocation feature and 30-day contractor phase-in requirement are concerned. Modified by 56 Comp. Gen. 694 245
Fixed prices
Proposal for computer time sharing services which reserved offeror's right to revise computer algorithm failed to conform to material RFP requirement that offerors submit fixed prices, because algorithm is directly related to proposed prices. Modified by 56 Comp. Gen. 694 245
Since protester's proposal was unacceptable due to failure to offer fixed prices as required by RFP, primary remedy requested in its protest—reinstatement of its contract which Navy terminated for convenience—is precluded. Modified by 56 Comp. Gen. 694 245

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Computer time sharing services—Continued
Requirements—Continued
Fixed prices—Continued
On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposal's language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range ---- 694
Memory allocation
Where RFP for computer time sharing services required that main memory protection must ensure integrity of user's area during operations, Navy's acceptance of proposal lacked reasonable basis because, upon technical review, proposal does not demonstrate that approach proposed by offeror meets requirement. Modified by 56 Comp. Gen. 694 ---- 245
Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided ---- 694
Deficient
Call for a new round of best and final offers, as a result of various material changes made to specification requirements after submission of best and final offers, is justified and does not constitute auction technique. Agency had no alternative but to institute a second round of negotiations. Moreover, the record indicates that price revisions made under second best and final offers were primarily the result of changed requirements and correction of proposal deficiencies ---- 905
Evaluation criteria
When evaluation provision of request for proposals (RFP) gives no indication of relative importance of criteria, offerors may properly assume that all are of equal importance. Evaluation which eliminated protester from competitive range on basis of emphasis on one section vis-a-vis another was not in accordance with evaluation scheme in RFP and was therefore improper. This Office recommends rescoring proposal on basis of all criteria being equal to determine if the proposal should have been included in competitive range ---- 188

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Late receipt of proposals. (*See* CONTRACTS, Negotiation, Late proposals and quotations)
Master agreements
Use of list
Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78
Order of precedence clause. (*See* CONTRACTS, Negotiation, Requests for proposals, Clauses, Order of precedence)
Protests under
Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits 183
Allegation of arbitrary and capricious action not substantiated
Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit 745
Allegation of bias not substantiated
Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied 934
Allegation of misrepresentation in awardee's proposal
Not substantiated
Protester concludes, based on telephone conversations before and after award between successful offeror and itself, in which the possibility of protester working with successful offeror on project was discussed, that successful offeror was not completely staffed and should have been found unacceptable. Examination of record does not reveal grounds to conclude that agency acted arbitrarily or unreasonably in evaluation of proposal since during negotiations successful offeror properly filled staff requirements from other firms 745
Closing date
Date for receipt of initial proposals
Individual who files a protest in behalf of Association may continue protest in behalf of his firm when General Accounting Office is subsequently notified that Association withdraws from protest. For purpose of timeliness, the protest may be considered as having been filed by individual's firm initially 882

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Conflict between allegations and record
Determinations of proposal merits are a matter of agency discretion which will not be disturbed unless demonstrated to be arbitrary or unreasonable, and the instant record fails to provide evidence of objectionable evaluation 905
Conflict between allegations and report
Protest that changes to membership of technical evaluation board occurred after evaluation process had started and replacement personnel were less qualified than personnel removed is denied, since investigation revealed that all membership changes occurred before start of evaluation and educational and professional backgrounds of replacement personnel were comparable to those removed 188
Court action
Argument that, as a matter of policy, General Accounting Office should not consider merits of protest after protester has had hearing in United States District Court which resulted in adverse findings and conclusions of law in denial of motion for preliminary injunction is not adopted. Since ruling on either temporary restraining order or preliminary injunction is not final adjudication of merits and if case is dismissed without prejudice, we will consider merits of the protest if otherwise timely filed 934
Merits
Post-award protest that Department of Labor (DOL) Service Contract Act (SCA) wage determination attachment was omitted from request for proposals, involving a deficiency apparent before closing date for receipt of proposals, is untimely but presents issue of widespread interest concerning frequent SCA procurements and will be considered on merits as significant issue under 4 C.F.R. 20.2(c) (1976) 160
Timeliness
Contention first made in letter dated July 30, 1976 (received in our Office August 4, 1976) that other offeror's proposal does not satisfy requirements of RFP is untimely under subsection 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(2) (1976), since basis of protest was known on July 1, 1976, and was not filed in our Office within 10 working days 62
Protest which caused agency to terminate contract and make award to protester was timely filed within 10 working days after protester knew basis of protest. Issues in counter-protest by contractor whose contract was terminated are also timely, with exception of allegation that substantially higher price level should have been used in benchmark portion of cost evaluation. Contractor, as incumbent at time proposals were solicited, should have raised this issue prior to closing date for receipt of revised proposals. Modified by 56 Comp. Gen. 694 245
Issue first raised 4 months after protest was filed and almost 5 months after basis of protest became known is not timely and will not be considered on its merits 712

CONTRACTS—Continued Page
Mistakes—Continued
Requests for proposals—Continued
Protests under—Continued
Timeliness—Continued
General Accounting Office considered comments by protester even though filed more than 10 working days after time allowed under 4 C.F.R. 20.3(d) (1976) following receipt of agency report because protester was pursuing Freedom of Information Act request for additional documents; contract had been awarded and performance was proceeding 835
Constructive notice
Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report 172
Propriety of substitution of protesting firm
Individual who files a protest in behalf of Association may continue protest in behalf of his firm when General Accounting Office is subsequently notified that Association withdraws from protest. For purpose of timeliness, the protest may be considered as having been filed by individual's firm initially 882
Solicitation improprieties
Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals 62
Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R. 20.2(c) (1976) 675
Where RFP as amended contained detailed statement of evaluation factors and indicated their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to the meaning of evaluation factors. Untimely objection does not raise singificant issue under 4 C.F.R. 20.2(c) (1976) 675

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Protests under—Continued
Wording
Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of General Accounting Office's Bid Protest Procedures---- 300
Qualified products
Modification
No modification to qualified product portion of item offered by successful offeror under RFP was necessary to meet Government's requirement of interchangeability with previously supplied product, although unqualified portion of item was altered. In any case, qualified products list (QPL) preparing activity, acting within its discretion, has found requalification of product to be not necessary. Therefore, offeror offered qualified product in accordance with RFP QPL requirements and was eligible for award---- 183
Requirements
Security
Where Navy accepted proposal which did not meet material RFP computer security requirement, protest is sustained and General Accounting Office recommends that Navy renew competition by reopening negotiations, obtaining revised proposals, and either awarding contract to protestor (if it is successful offeror) or modifying contractor's contract pursuant to its best and final offer (if it remains successful offeror). Modified by 56 Comp. Gen. 694---- 245
Specification requirements
Agency's acceptance of successful offeror's firmware as meeting RFP computer hardware specification may not have effected substantial change in Government's requirements. However, where RFP did not mention firmware and indicated that Government's primary concern was obtaining acceptable computer at lowest price, GAO believes agency failed to maximize competition because it did not conduct meaningful discussions which would have advised protester that firmware approach might be acceptable and that protester's hardware approach was potentially excessive response to agency's needs---- 312
Benchmark equipment
Waiving certain computer benchmark requirements and allowing substitutions of equipment in successful offeror's benchmark performance is not found to be objectionable in circumstances where waivers and substitutions (1) were believed necessary to maintain competition in procurement, (2) involved incidental, lower-performance equipment, and (3) did not affect offeror's obligation to furnish higher-performance equipment it had proposed and which agency had found to be technically acceptable---- 312

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Specification requirements—Continued
Benchmark periods
Despite agency's view that RFP provision requiring successful completion of computer benchmark in 8 hours was established as matter of Government's convenience and was not necessarily inflexible, in case where agency found it appropriate to allow one offeror almost 15 total hours in two benchmark sessions more than 3 months apart, GAO believes that RFP should have been amended to indicate that 8-hour requirement was flexible, and second offeror should have been allowed to revise proposal and have been accorded similar flexible treatment in benchmark of revised proposal's equipment configuration 312
Level of effort
Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO) 381
Level of training services
Acceptance of lower rated technical proposal which allegedly reduced prior year's level of training services is not objectionable because protester failed to show that reduction was inconsistent with solicitation requirements. While award document erroneously deleted material page of solicitation because of typographical error, contract has been amended to correct this mistake 381
Off-site and on-site testing
Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis 675
Unrealistic
Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. 663 402
Statement of work
Unsolicited proposal
While comparison of statement of work in RFP and protester's previously submitted, unsolicited proposal, which initiated instant RFP, indicates that some portions of statement of work were taken verbatim from unsolicited proposal, no impropriety is shown as need for procurement was documented in review by Air Force predating unsolicited proposal 188

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals—Continued
Submission date
Late receipt
Sole-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment 300
Unbalanced proposal submission
"Separate charges" cannot logically be added to base and option prices to determine successful offeror or to determine bid "unbalancing," since both prices and separate charges will not be paid—they are alternative in nature 167
Variation from requirements
On reconsideration, decision is affirmed that proposal—(1) whose computer algorithm was directly related to proposed prices and (2) which reserved right to revise algorithm after award and to negotiate with agency concerning such changes—failed to comply with request for proposals (RFP) requirement that fixed prices be offered. Most reasonable interpretation of proposals' language is that subject of post-award negotiations would be changes in contract prices, and leaving open opportunity to change prices meant that prices were not fixed. Defect in proposal could not have been cured without further negotiations with all offerors in competitive range 694
Requests for quotations
Firm offer conformation
Mistake alleged
Where offeror orally submits firm fixed price for amended request for quotations work statement, protest based on contention that such price was based on mistake and that agency should have used earlier list of prices submitted for obsolete work statement is without merit 93
Responsiveness
Concept not applicable to negotiated procurements
"Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations 300
Small business concerns. (*See* CONTRACTS, Awards, Small business concerns)
Sole-source basis
Cancellation *v.* amendment of sole-source RFP
Where late proposal under sole-source solicitation issued to another firm offers and can be shown to meet Government's requirements within time constraints of procurement, agency may either cancel sole-source RFP and procure requirement on competitive basis, or amend sole-source RFP to provide for competition 300

CONTRACTS—Continued Page
Negotiation—Continued
Sole-source basis—Continued
Determination and findings
Factual basis
Agency's determination that it was unable to locate qualified sources to perform elevator, escalator, and dumbwaiter maintenance and repair services other than manufacturers of the equipment does not constitute rational basis for sole source procurement from manufacturers where agency did not make its requirements known to the public and where agency's determination does not appear to have a factual basis 434
Justification
Inadequate
While negotiations are justified where a procurement is for (1) technical services in connection with highly specialized equipment or where (2) the extent and nature of maintenance and repair of such equipment is not known such circumstances do not of themselves justify procuring the Government's minimum needs from a sole source of supply 434
Parts, etc.
Sole source procurement of repair and maintenance service from item's manufacturer is not justified merely because manufacturer can supply replacement parts on a priority basis. Agency has not shown that replacement parts cannot readily be obtained other than by award to the manufacturer 434
Competition availability
Basic Ordering Agreements cannot be used to exclude surplus spare parts once procuring activity has been made aware of potential source of supply, especially where surplus parts are acceptable from item manufacturer 1005
Specifications. (*See* CONTRACTS, Specifications)
Specifications conformability. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered)
Specifications unavailable
"Impossibility" requirement
Since Air Force admits it has capability of drafting management services specifications, fact that it may not be able to specify all details of services for fear of lessening competition by limiting firms to specified management procedures does not justify determination that it is impossible to draft specifications for management services. Degree competition might be lessened is speculative; moreover, procurement regulation under which contracting officer negotiated procurement contemplates impossibility of drafting specifications, not difficulty or inconvenience. Modified by 56 Comp. Gen. 649 115
Support services procurements
Research and development governing statutes not applicable
Despite erroneous coding of procurement as one for research and development (R&D), statute governing evaluation of proposals leading to award of R&D contract is not applicable where procurement is actually for support services 473

CONTRACTS—Continued Page
Negotiation—Continued
Technical acceptability of equipment, ect., offered. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies, Negotiated procurement)
Technical evaluation panel
Members
Absence
Evaluation of revised proposals by some but not all of those who evaluated original proposals, without discussion among evaluators of their respective judgments, is not contrary to applicable regulations or otherwise improper ---- 473
Membership source
Rational basis is found for awards board's reversal of firms for priority of negotiation for architect-engineer contract recommended by technical board where technical board findings show essential equality of the two firms (one firm was ranked over other by secret ballot after no consensus was reached) and awards board entrusted by regulation with responsibility for final selection gave supportable reasons for reversing order of negotiation priority, some of which protester admits ---- 721
Federal Procurement Regulations para. 1–4.1004–1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence ---- 721
Termination. (*See* CONTRACTS, Termination)
Two-step procurement
First step
Change in minimum needs
Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs ---- 454
Negotiation *v.* advertising. (*See* ADVERTISING, Advertising *v.* negotiation)
Options
Contract term extension
Price adjustment
Agency decision to preclude use of separate charges for failure to exercise renewal options in automatic data processing procurement is not abuse of agency discretion because competition existed on basis of terms solicited ---- 860
Duration
Computation
Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment

CONTRACTS—Continued
Options—Continued
Duration—Continued Page
Computation—Continued
or otherwise terminates ADP system prior to intended system's life end. Payment of charges—a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"—would violate 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11, since charges represent part of price of future years' ADP requirements rather than reasonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory. B–164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 142
Exercise at sole discretion of Government
Bid protest not for consideration
Where record shows that under option provisions contract is renewable at sole discretion of Government, General Accounting Office will not consider incumbent contractor's contention that agency should have exercised contract option provision instead of issuing new solicitation. Prior decisions will no longer be followed to extent they are inconsistent with this determination 397
Exercised
Automatic data processing equipment
Appropriation chargeable
Funds appropriated to agency for operating expenses may be used to exercise purchase option to the extent needed to meet a *bona fide* need arising within the fiscal year such funds become available 829
Real property purchases
Appropriation chargeable
United States Fish and Wildlife Service may enter into purchase agreement with owner of real property in which even though settlement is held and legal title to the land is vested in the Government, it agrees to landowner's request to disburse the purchase price to the vendor over a period not to exceed 4 years, provided it obligates the full purchase price from appropriations available for such purpose from the fiscal year in which the options to purchase are exercised by the Service to meet a need of that fiscal year 351
Failure to exercise *v.* costs
Contention without merit
Contention that failure to exercise option years of contract will result in Navy's incurring substantial termination for convenience costs is without merit, since authority cited (*Manloading & Management Associates, Inc.* v. *United States*, 461 F. 2d 1299 (Ct. Cl. 1972)) involved estoppel situation where Government gave unequivocal assurances that contract option would be exercised. Present case involved mere assurance that options would be exercised subject to eventualities normally associated with year-to-year funding, and is distinguishable on other grounds as well 694
Full payment lease *v.* terminable lease with option to purchase
Finding that proposal offering "full payout lease" was nonresponsive was improper where amended solicitation invited proposals based on lease and on lease with option to purchase. In these circumstances, "full payout lease" was tantamount to offer of terminable lease with option to purchase 829

CONTRACTS—Continued
Options—Continued
Hospital management services Page
Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and the Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified ---- 649
Multiple year
Termination of contract
Computation of charges
Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability, in violation of 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11. B-164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 ---- 142
Not to be exercised
Not in Government's best interest
Contractor and agency suggest that no recommendation for corrective action would be appropriate despite prior decision sustaining protest, because contract performance complies with requirements and protester suffered no prejudice. However, while some evidence in record indicates that contractor is providing "read protection" in computer timesharing services contract, written record does not establish that contract performance is fully in compliance with requirements, nor is it General Accounting Office's (GAO) function to make such determination. In any event, best interests of Government call for recommendation that contract option years not be exercised. 56 Comp. Gen. 245, modified ---- 694
Requirements to be resolicited
In view of (1) agency knowledge for over 3 weeks before award that wage determination was to be issued in close proximity to anticipated award date; (2) fact that agency's failure to include incumbent's collective bargaining agreement with Department of Labor (DOL) SF 98 significantly contributed to delay in issuance of new wage determination for inclusion in RFP; (3) fact that agency made preaward arrangement with successful offeror to accept expected wage determination, and modification was issued; and (4) DOL view that closing date should have been postponed when agency was notified that wage determination would be delayed: contract awarded was different from contract solicited. Therefore, requirements covered by current option should be resolicited ---- 160
Award in negotiated procurement to offeror whose offered price would become low price only upon agency's exercise of option is improper where solicitation did not provide for evaluation of option; consequently, it is recommended that option not be exercised and that any option requirements be resolicited ---- 448

CONTRACTS—Continued Page
Options—Continued
Renewal
Failure to exercise
Charges
Agency decision to preclude use of separate charges for failure to exercise renewal options in automatic data processing procurement is not abuse of agency discretion because competition existed on basis of terms solicited 860
Oral agreements
Not reduced to writing
Effect on award
Award under request for proposals (RFP) incorporating by reference telephone conversations regarding proposed price—which had not been memorialized—does not violate 31 U.S.C. 200(a)(1). However, such incorporation is clearly inappropriate, since agreement reached in conversations should have been put in writing to avoid disputes 768
Payments
Bankrupt contractor
Rights of unpaid workers *v.* trustee in bankruptcy
Courts, as well as this Office, recognize that unpaid laborers have equitable right to be paid from contract retainages and unpaid workers would have higher priority to funds withheld from amounts owing contractor than would trustee in bankruptcy 499
Set-off. (*See* SET-OFF, Contract payments, Bankrupt contractor)
Progress
Failure to provide
Absence of solicitation providing for progress payments is not objectionable where only 90-day performance period is involved 882
Set-off. (*See* SET-OFF, Contract payments)
Price adjustment
Taxes
Federal excise tax
Claim involving question of law as to contractor's entitlement to general and administrative expenses and profit on amount of FET paid during contract performance is denied. Invitation for bids' statement that FET was inapplicable is not viewed as negating effectiveness of contract's taxes clause (Armed Services Procurement Regulation 7-103.10(a)), and where contract is specific as to price adjustment for changes in tax circumstances, adjustment is to be made as parties specifically provided for. Contract's changes clause appears inapplicable and no reason is seen why taxes clause provides basis for recovery of costs and profit claimed 340
Prices
Costs, etc., data
Negotiated procurement. (*See* CONTRACTS, Negotiation, Cost, etc., data)
Privity
Subcontractors
Liability for contract overpayments
Privity of contract doctrine does not bar claim by Government for overpayments against subcontractor where subcontractor billed and ultimately received from Government substantially all of the contract payments 963

CONTRACTS—Continued Page

Procurements

Procedures

"Four-step" source selection

Since Department of Defense special test, "four-step" source selection procedures are comparable to source selection procedures of National Aeronautics and Space Administration (NASA), General Accounting Office (GAO) precedent derived from protests involving NASA's prior negotiated procurements is of aid in resolving issues under contested "four-step" procurement 989

Proprietary, etc., items. (*See* **CONTRACTS, Data, rights, etc.**)

Protests

Abeyance pending court action

Request for review received

General Accounting Office (GAO) will consider protest—even though it is also before court of competent jurisdiction—where court expressly requested decision in the matter 768

After award

Waiver of specification requirement

Where the Government has unknowingly accepted nonconforming item, concedes acceptability of item by granting waivers accompanied by price decreases under existing contracts and has amended current solicitations to permit delivery of item, minimum needs are overstated. Although the record demonstrates uncertainty as to impact on bidding, proper method to determine savings is resolicitation of two preaward procurements reflecting needs of Government. Concerning the two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with view toward resolicitation should be considered 924

After bid opening

Timeliness

While protest concerning failure to solicit bid from previous supplier was filed after bid opening, protest is considered timely because procurement was not properly categorized in Commerce Business Daily and it would not be fair to impose burden of discovering that fact within time constraints of General Accounting Office Bid Protests Procedures 1101

Allegation of error in price escalation calculation

Not supported by record

Protester's allegation of fundamental error in calculation of price escalation is not sustained by record which shows that evaluation was reasonable and that even if evaluation were conducted as requested by protester, its proposal would not be low 596

Allegation of improper rescission

Not supported by record

Claim based on alleged improper rescission is denied since acts of assigning contract number and requesting payment and performance bonds at least 7 weeks prior to commencement of contract period is not action a reasonable bidder would act on without obtaining confirmation in writing. Actions taken by Air Force were merely preparatory to contract and, without confirmation in writing, claimant acted at its own peril 271

CONTRACTS—Continued Page
Protests—Continued
Allegation of impropriety of technical proposal
Not supported by record
Low bidder's contention that protest is untimely under Bid Protest Procedures, 4 C.F.R. part 20 (1976), because specification requiring "14-gage or thicker" steel rollers should have been questioned as to allowability of substituting thinner steel prior to closing date for receipt of proposals is without merit since request for technical proposals contained no apparent impropriety 454
Allegation of unfairness
Not supported by record
Record does not support protester's contentions that awardee of automatic data processing (ADP) contract was permitted to perform benchmark test requirements in less demanding manner than request for proposals (RFP) required, wander in any material way from proposed system configuration, or utilize special computer software not meeting RFP requirements to pass tests. Modified by 56 Comp. Gen. 505 142
Record does not support contention that contracting agency withheld data from protester which was known to its competitor, or that technical proposals were evaluated using data other than that furnished all offerors, or that protester's competitor was given credit for design features which were not included in request for proposals 635
Allegations
Not supported by record
When, before award, information which reasonably would impeach small business self-certification of low bidder comes to attention of contracting officer, direct size protest with the Small Business Administration (SBA) should have been filed in order to assure that self-certification process is not abused. In absence of probative evidence, protester has not affirmatively established that small business self-certification was made in bad faith. Recommendation is made that agency consider feasibility of contract termination where SBA, less than 3 weeks after award, found contractor was other than small business because of affiliation with another firm discussed in preaward survey 878
Authority to consider
Waiver of specification requirement after award by contract modification
Post-award protests against waiver of specification requirement after award by contract modification will be considered where request for waiver has not been acted on by agency under one contract and no request for waiver has been made under another contract although presumably such request is foreseeable 924
Burden of proof
Protester
Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shroud repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each

CONTRACTS—Continued Page
Protests—Continued
Burden of proof—Continued
Protester—Continued
step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps 537
When record shows that bid samples were handled with due care by the procuring agency, protester who alleges, without further evidence, that mishandling or sabotage by Government caused samples to be rejected has not sustained burden of proof 841
Where protester contends that bias against it by agency personnel in evaluating its technical proposal was sole cause of its omission from competitive range, protester must establish existence of bias and impact upon its competitive position by showing that evaluation was not reasonable. Even assuming bias existed, since there is no indication that it affected protester's competitive standing, protest is denied 934
Timeliness
Protest based on procuring agency's administration of awardee's benchmark tests and allegation that awardee was improperly permitted to submit revised best and final offer after December 31, 1975, 2 p.m. closing time, which was filed in April 1976 and amended in June 1976 within 10 working days of when protester says it became aware of respective bases for protest, is timely under section 20.2(b)(2) of Bid Protest Procedures in absence of objective evidence to contary. Protester is not required to demonstrate by concrete evidence that protest is timely. Modified by 56 Comp. Gen. 505 142
Conflict in statements of contractor and contracting agency
Where protester alleges it was told or persuaded in oral discussions not to submit revised proposal and agency's account of facts contradicts protester's, protester has failed to affirmatively prove its assertions, and, based upon record, GAO concludes that protester was informed of and in fact had opportunity to submit revised proposal 675
Court action
Abeyance
Request for review received. (*See* **CONTRACTS, Protests, Abeyance pending court action, Request for review received**)
Dismissal
Without prejudice
Consideration on merits by GAO
Argument that, as a matter of policy, General Accounting Office should not consider merits of protest after protester has had hearing in United States District Court which resulted in adverse findings and conclusions of law in denial of motion for preliminary injunction is not adopted. Since ruling on either temporary restraining order or preliminary injunction is not final adjudication of merits and if case is dismissed without prejudice, we will consider merits of the protest if otherwise timely filed 934

CONTRACTS—Continued Page
Protests—Continued
Court solicited aid
Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions 487
General Accounting Office (GAO) will consider protest—even though it is also before court of competent jurisdiction—where court expressly requested decision in the matter 768
Favoritism alleged
Not established
Fact that contractor under protested procurement has large number of other contracts with agency provides no legal basis for objection 381
"Four-step" source selection procedures
Negotiated procurements
Since Department of Defense special test, "four-step" source selection procedures are comparable to source selection procedures of National Aeronautics and Space Administration (NASA), General Accounting Office (GAO) precedent derived from protests involving NASA's prior negotiated procurements is of aid in resolving issues under contested "four-step" procurement 989
Protest against Army's interpretation of "four-step" selection procedure and evaluation of proposals is timely under Bid Protest Procedures since protest was filed within 10 days from date protester learned of grounds giving rise to protest 989
Merits
Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in *Power Conversion, Inc.*, B-186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range 172
Oral advice of GAO staff members not binding
Informal oral advice given by GAO staff members to procuring agency representatives is not binding on GAO in event of bid protest 768
Patent infringement
Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits 183
Persons, etc., qualified to protest
Protester who was listed as subcontractor in rejected proposal submitted under agency solicitation is interested party for filing protest. Moreover, subsequent untimely protest by offeror does not require that offeror be excluded from protest action because firm is interested party concerning subcontractor's timely protest 381
Interested parties
Potential subcontractors excluded
Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed 730

CONTRACTS—Continued Page
Protests—Continued
Procedures
Bid Protest Procedures
When record shows that bid samples were handled with due care by the procuring agency, protester who alleges, without further evidence, that mishandling or sabotage by Government caused samples to be rejected has not sustained burden of proof 841
Constructive notice
Offeror contesting exclusion of proposal from competitive range must be held to have notice of basis for protest concerning rejection of proposal when offeror obtained procuring agency's excised evaluation report on proposal. Offeror was not entitled to wait for decision on release of "back-up" material to evaluation report before being held to have actual or constructive notice of basis for protest, since material was not final analysis of proposal and, at best, should have been considered to contain only individual judgments already evidenced in report 172
Improprieties and timeliness
Contention first made in letter dated July 30, 1976 (received in our Office August 4, 1976) that other offeror's proposal does not satisfy requirements of RFP is untimely under subsection 20.2(b)(2) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(2) (1976), since basis of protest was known on July 1, 1976, and was not filed in our Office within 10 working days 62
Protest that was filed with procuring agency and the General Accounting Office (GAO) more than 10 working days from date on which basis of protest was known is untimely filed under section 20.2 of Bid Protest Procedures (4 C.F.R. 20.2 (1976)). Argument that time limits specified in Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to protests filed before award has been previously considered and rejected 172
Low bidder's contention that protest is untimely under Bid Protest Procedures, 4 C.F.R. part 20 (1976), because specification requiring "14-gage or thicker" steel rollers should have been questioned as to allowability of substituting thinner steel prior to closing date for receipt of proposals is without merit since request for technical proposals contained no apparent impropriety 454
Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R 20.2(c) (1976) 675
Where RFP as amended contained detailed statement of evaluation factors and indicated their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to the meaning of evaluation factors. Untimely objection does not raise significant issue under 4 C.F.R 20.2(c) (1976) 675

CONTRACTS—Continued
Protests--Continued
Procedures—Continued
Bid Protest Procedures—Continued
Reconsideration
Conference with protester not provided for

Since General Accounting Office Bid Protest Procedures do not explicitly provide for conference when request for conference is made for the first time on reconsideration and because it is in the interest of those procedures to effect "prompt resolution" of reconsideration requests, the request for conference will only be granted where a matter cannot be promptly resolved without conference 875

New contentions

Original decision of May 19, 1977, is affirmed where facts not discussed in that decision do not alter conclusion that the protester's own similar deviations to the request for proposals (RFP) requirements which it now considers material were accepted by the agency without an RFP amendment, since protester was reasonably on notice that such deviations were not considered by the agency to be either material or a relaxation of requirements, requiring RFP amendment pursuant to Federal Procurement Regulations 1-3.805-1 (1976) 875

Standing to protest
"Interested" party

Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed 730

Time for filing

Since protester observed opening of best and final offer prior to designated time, protest against early opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered. Modified by 56 Comp. Gen. 505 142

Individual who files a protest in behalf of Association may continue protest in behalf of his firm when General Accounting Office is subsequently notified that Association withdraws from protest. For purpose of timeliness, the protest may be considered as having been filed by individual's firm initially 882

Date basis of protest made known to protester

Protest against Army's interpretation of "four-step" selection procedure and evaluation of proposals is timely under Bid Protest Procedures since protest was filed within 10 days from date protester learned of grounds giving rise to protest 989

Solicitation improprieties

While protest concerning failure to solicit bid from previous supplier was filed after bid opening, protest is considered timely because procurement was not properly categorized in Commerce Business Daily and it would not be fair to impose burden of discovering that fact within time constraints of General Accounting Office Bid Protests Procedures 1011

CONTRACTS—Continued Page
Protests—Continued
Proprietary data
Protests that successful offeror cannot meet requirement that procured items be interchangeable with protester's previously supplied units, without violating proprietary rights and infringing on patents of protester, will not be considered on merits---- 183
Reprocurement
Because "approximate" pricing communication should not have been considered for award and, since offeror's "corrected" cost tables, modifying communication, were submitted unacceptably late, recommendation is made that requirement be resolicited. Resolicitation is also recommended, since offeror was permitted to significantly correct unacceptable ADP configuration after closing time for best and final offers. Modified by 56 Comp. Gen. 505---- 142
Impracticable
No useful purpose in terms of remedy would be served by deciding protests against combination of requirements, experience clauses, and proposal evaluation under procurement which was improperly negotiated since protests, if found meritorious, assume either that award should be made under outstanding RFP, as perhaps modified, which would be contrary to holding that procurement was improperly negotiated, or that award should be made under advertised solicitation which may not be immediately possible. Modified by 56 Comp. Gen. 649---- 115
Request for information *v.* protest
Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of General Accounting Office's Bid Protest Procedures---- 300
Freedom of Information Act
General Accounting Office considered comments by protester even though filed more than 10 working days after time allowed under 4 C.F.R. 20.3(d) (1976) following receipt of agency report because protester was pursuing Freedom of Information Act request for additional documents; contract had been awarded and performance was proceeding- 835
Subcontractor protests
General Accounting Office (GAO) will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor---- 596
Interested party requirement
Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed---- 730
Timeliness
Protester who was listed as subcontractor in rejected proposal submitted under agency solicitation is interested party for filing protest. Moreover, subsequent untimely protest by offeror does not require that offeror be excluded from protest action because firm is interested party concerning subcontractor's timely protest---- 381

CONTRACTS—Continued Page
Protests—Continued
Timeliness
Since protester observed opening of best and final offer prior to designated time, protest against early opening filed more than 10 days later is untimely under section 20.2(b)(2) of Bid Protest Procedures. Where protester's understanding was that no best and final offers other than its own had been submitted prior to designated closing time, protest concerning alleged untimely receipt of awardee's best and final offer filed more than 10 days after notification of award is also untimely under section 20.2(b)(2) of Bid Protest Procedures, and will not be considered. Modified by 56 Comp. Gen. 505 142
Basis of protest
Date made known to protester
Since protester's contention that it only became aware of protest when it learned facts concerning contents of successful proposal is reasonable and not refuted, limitation on filing begins to run from that time and protest is timely 505
Concrete evidence by protester not required
Protest based on procuring agency's administration of awardee's benchmark tests and allegation that awardee was improperly permitted to submit revised best and final offer after December 31, 1975, 2 p.m. closing time, which was filed in April 1976 and amended in June 1976 within 10 working days of when protester says it became aware of respective bases for protest, is timely under section 20.2(b)(2) of Bid Protest Procedures in absence of objective evidence to contrary. Protester is not required to demonstrate by concrete evidence that protest is timely modified by 56 Comp. Gen. 505 142
Negotiated contracts
Solc-source procurement was changed to competitive procurement by amendment to request for proposals (RFP) which, although not specifically stating that procurement's nature was being changed, amended solicitation in manner clearly inconsistent with sole-source procurement. Protest against agency decision to proceed on competitive basis by firm issued sole-source RFP that admits amendment caused it to "suspect" agency would consider other proposals is untimely, since it was not filed by next closing date for receipt of proposals after issuance of amendment 300
Low bidder's contention that protest is untimely under Bid Protest Procedures, 4 C.F.R. part 20 (1976), because specification requiring "14-gage or thicker" steel rollers should have been questioned as to allowability of substituting thinner steel prior to closing date for receipt of proposals is without merit since request for technical proposals contained no apparent impropriety 454
Issue first raised 4 months after protest was filed and almost 5 months after basis of protest became known is not timely and will not be considered on its merits 712
Debriefing on proposal
Protest concerning defects in successful proposal is untimely filed since it was received more than 10 working days after protester received debriefing on proposal. Other bases of protest are timely filed 580

CONTRACTS—Continued Page
Protests—Continued
Timeliness—Continued
Negotiated contracts—Continued
"Non-solicitation defect"
Applicability
Protest that was filed with procuring agency and the General Accounting Office (GAO) more than 10 working days from date on which basis of protest was known is untimely filed under section 20.2 of Bid Protest Procedures (4 C.F.R. 20.2 (1976)). Argument that time limits specified in Bid Protest Procedures for filing protests relating to "non-solicitation defect" matters should not apply to protests filed before award has been previously considered and rejected 172
"Significant issue exception" lacking
Elimination of one offeror from competitive range in particular procurement is not regarded as "significant issue" to permit consideration of untimely protest. Principle enunciated in *Power Conversion, Inc.*, B–186719, September 20, 1976, applies to present untimely protest against exclusion of one of two competing offerors from competitive range 172
Protest after award challenging type of contract contemplated by RFP is untimely, because under GAO Bid Protest Procedures apparent solicitation improprieties must be protested prior to closing date for receipt of proposals. Protester's need to consult with counsel does not operate to extend protest filing time limits, and untimely objection does not raise significant issue under provisions of 4 C.F.R. 20.2(c) (1976) .. 675
Reconsideration
Since protester's contention that it only became aware of protest when it learned facts concerning contents of successful proposal is reasonable and not refuted, limitation on filing begins to run from that time and protest is timely 505
Significant issue exception
Protest after bid opening against inviting bids on requirements-type contract on net or single percentage factor basis to be applied to agency priced items not stating quantity estimates is considered significant issue, since propriety of method of soliciting bids which is continunig and increasing never has been addressed in prior decisions and is considered in circumstances to be of widespread application to procurement practices; however, since protest is untimely no corrective action is recommended for immediate procurement 107
Post-award protest that Department of Labor (DOL) Service Contract Act (SCA) wage determination attachment was omitted from request for proposals, involving a deficiency apparent before closing date for receipt of proposals, is untimely but presents issue of widespread interest concerning frequent SCA procurements and will be considered on merits as significant issue under 4 C.F.R 20.2(c) (1976) 160
Evaluation formula
Government's formula for evaluating bids which does not reflect anticipated requirements raises significant issue notwithstanding agency's view that protest is untimely 668

CONTRACTS--Continued Page
Protests--Continued
Timeliness--Continued
Significant issue exception--Continued
Restrictions on competition
Untimely protest involving challenge to on-going procurement policy which requires pre-qualification of bidders and excludes from competition an entire class of business firms, raises an issue significant to procurement practices and will be considered notwithstanding untimeliness 953
Solicitation improprieties
Protest after bid opening against ambiguity in item description apparent prior to bid opening is untimely and will not be reviewed as matter of widespread interst since it relates to isolated procurement 107
Apparent prior to closing date for receipt of proposals
Where RFP as amended contained detailed statement of evaluation factors and indicted their relative importance, objections made after award that statement was deficient involves apparent solicitation impropriety, and is untimely under GAO Bid Protest Procedures. Protester should have sought clarification from agency prior to closing date for receipt of revised proposals rather than relying on its own assumption as to the meaning of evaluation factors. Untimely objection does not raise significant issue under 4 C.F.R. 20.2(c) (1976) 675
Supplemental statement requested by GAO
Additional statement submitted in support of initial protest is timely because statement was not shown to have been mailed more than five days after receipt of General Accounting Office (GAO) request for additional statement, allowing for a reasonable time for protester to receive GAO request. Fact that more than 10 days elapsed between receipt of initial protest, which promised additional statement, and receipt of supplemental statement is not material 328
Two-step procurements
Low bidder's contention that protest is untimely under Bid Protest Procedures, 4 C.F.R. part 20 (1976), because specification requiring "14-gage or thicker" steel rollers should have been questioned as to allowability of substituting thinner steel prior to closing date for receipt of proposals is without merit since request for technical proposals contained no apparent impropriety 454
Withdrawal
Continued interest by protester in behalf of another firm
Individual who files a protest in behalf of Association may continue protest in behalf of his firm when General Accounting Office is subsequently notified that Association withdraws from protest. For purpose of timeliness, the protest may be considered as having been filed by individual's firm initially 882
Wording
Submission that is reasonably understood as protest may be considered as such, notwithstanding firm's failure to specifically request ruling by Comptroller General as required by section 20.1(c)(4) of General Accounting Office's Bid Protest Procedures 300
Qualified products. (*See* **CONTRACTS, Specifications, Qualified products**)
Requests for quotations
Negotiated procurement. (*See* **CONTRACTS, Negotiation, Requests for quotations**)

CONTRACTS—Continued Page
Requirements
Estimated amounts basis
Invitation for bids (IFB) soliciting bids on requirements-type contract on net basis or single percentage factor applied to agency priced items not stating estimated quantities or list of past orders is in violation of Federal Procurement Regulations para. 1–3.409(b)(1) and contrary to 52 Comp. Gen. 732, 736 107
Government obligation
Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency 689
Net basis or single percentage factor effect
Requirement for submitting net or single percentage bid on requirements-type contract prevents deliberate unbalancing of prices by bidder, which assures award to low bidder regardless of quantities ordered. Further, if predetermined prices in IFB are too low or too high, bidders can adjust prices by offered plus or minus percentage factor 107
Rescission
Alleged improper rescission
Not supported by record
Claim based on alleged improper rescission is denied since acts of assigning contract number and requesting payment and performance bonds at least 7 weeks prior to commencement of contract period is not action a reasonable bidder would act on without obtaining confirmation in writing. Actions taken by Air Force were merely preparatory to contract and, without confirmation in writing, claimant acted at its own peril 271
Research and development
Governing statutes not applicable to support services procurements
Despite erroneous coding of procurement as one for research and development (R&D), statute governing evaluation of proposals leading to award of R&D contract is not applicable where procurement is actually for support services 473
Small business concern awards. (*See* CONTRACTS, Awards, Small business concerns)
Sole-source procurements. (*See* CONTRACTS, Negotiation, Sole-source basis)
Specifications
Adequacy
Negotiated procurement
While it is alleged that requirement for standardization of encoding scheme for data base to that developed by contractor under questionable award will effectively preclude potential offerors other than incumbent from competing, such requirement is not unduly restrictive where, as here, need for standardization has been demonstrated as legitimate 663

CONTRACTS—Continued Page
Specifications—Continued
Administrative determination conclusiveness
Phrase interpretation
Since there is nothing in the legislative history of the Water Pollution Control Act that clearly details what is meant by phrases "brand names" or "trade names" of comparable quality, General Accounting Office (GAO) is reluctant to substitute its judgment—that phrases refer to product history, rather than manufacturer identity, of switchgear—for EPA's judgment that phrases also mean manufacturer identity.. 912
Aggregate *v.* separable items
Options to contractor
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition..... 487
Ambiguous
Definite specifications and brand name
Equipment
Switchgear
Notwithstanding grantee's intent to draft specifications for switchgear equipment so as to allow only manufacturers of circuit breakers to compete, drafted specifications did not reveal intent..... 912
Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer the specification because of quality and inspection concerns. Notwithstanding such concerns, GAO has suggested that product experience clause be used instead of "manufacturer only" specification..... 912
Partial invitation cancellation
Agency specified that instrument "capsule material" be of 316 stainless steel with intent that portion of instrument wetted by solution being measured be made of that material. Protester's design utilized 316 stainless steel capsule and wetted diaphragm of 430 stainless steel. Protester reasonably read specifications as consistent with its product although in fact product does not meet agency's needs. In view of specification ambiguity, unawarded portion of procurement should be readvertised..... 378
Basic ordering agreements
Propriety
Basic Ordering Agreements cannot be used to exclude surplus spare parts once procuring activity has been made aware of potential source of supply, especially where surplus parts are acceptable from item manufacturer..... 1005
Brand name or equal. (*See* CONTRACTS, Specifications, Restrictive, Particular make)

CONTRACTS—Continued Page
Specifications—Continued
Changes, revisions, etc.
Affecting price, quantity, or quality
Armed Services Procurement Regulation (ASPR) 2-404.1, prohibiting, as a general rule, cancellation and resolicitation solely due to increased requirements, does not prevent cancellation when IFB does not adequately define unchanged requirements---- 364
Conformability of equipment, etc., offered
Ability to meet requirements
"Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations---- 300
Contracting agency's technical evaluation that proposal for amplifiers can meet RFP requirement for interchangability with corresponding Government equipment will not be disturbed, since it has not been shown to be arbitrary or contrary to statute or regulations---- 300
Administrative determination
Negotiated procurement
Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent---- 381
Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO)---- 381
Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis---- 675
Protester contends that it should have been selected for award because of being more qualified than awardee and its initial price was lower than awardee's initial price. When examination of record provides no grounds to conclude that agency's determination was arbitrary or in violation of law and when award was made at price lower than protester's initial price, contention is without merit---- 745

CONTRACTS—Continued Page
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Approximated requirements
Original decision of May 19, 1977, is affirmed where facts not discussed in that decision do not alter conclusion that the protester's own similar deviations to the request for proposals (RFP) requirements which it now considers material were accepted by the agency without an RFP amendment, since protester was resonably on notice that such deviations were not considered by the agency to be either material or a relaxation of requirements, requiring RFP amendment pursuant to Federal Procurement Regulations 1-3.805-1 (1976) 875
Evaluation and technical acceptability
Acceptance of lower rated technical proposal which allegedly reduced prior year's level of training services is not objectionable because protester failed to show that reduction was inconsistent with solicitation requirements. While award document erroneously deleted material page of solicitation because of typographical error, contract has been amended to correct this mistake 381
Samples, etc., deviating from specifications
General Accounting Office (GAO) recommends that in future procurements, use of objective and subjective evaluation factors be clearly distinguished. Moreover, GAO questions whether nonresponsive samples should have been disassembled by agency to determine whether they met unlisted specification requirements since regulation provides for such evaluation only if the samples meet listed characteristics 841
Technical deficiencies
Negotiated procurement
Request for proposals provided that award will be made to that technically acceptable offeror whose technical and price proposal was most advantageous to Government, "price and other factors considered." Protester's contention, made after award, that RFP failed to advise offerors of relative importance of price to other factors is untimely under subsection 20.2(b)(1) of our Bid Protest Procedures, 4 C.F.R. 20.2(b)(1), since alleged impropriety was apparent prior to closing date for receipt of initial proposals 62
Where record reasonably supports agency's determination that proposal is technically unacceptable and therefore not within competitive range, protest allegation that proposal evaluation resulted from agency bias against protester cannot be sustained 291
"Responsiveness" is not concept applicable to negotiated procurements. Therefore, fact that initial proposal is not fully in accord with RFP requirements is not reason to reject proposal if deficiencies are subject to being made acceptable through negotiations 300
Where request for proposals (RFP) established computer hardware requirement and successful offeror proposed "firmware," after technical review of issue, General Accounting Office (GAO) does not believe protester has substantiated its view that firmware is always classified as software, nor has protester clearly shown that agency's acceptance of firmware as being sufficient to fulfill hardware requirement lacks reasonable basis 312

CONTRACTS—Continued Page
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Negotiated procurement—Continued
Although there may be some doubt, protester did not sustain burden of proving by clear and convincing evidence that Air Force wrongfully disclosed in request for proposals (RFP) allegedly proprietary TF-30 blade shround repair process contained in unsolicited proposal as to justify recommendation that RFP be canceled, where (1) Air Force contends that process was developed at Government expense; (2) each step, as well as combination of steps, in repair process apparently represents application of common shop practices; and (3) protester's proposed process was found incomplete without additional Government-funded steps---- 537
Where Air Force exercises prerogative in determining that TF-30 blade shroud weld repair process contained in protester's unsolicited proposal is incomplete and unacceptable without adding Government-funded steps of preheating prior to welding and stress relief after welding, process in unsolicited proposal is not entitled to trade secret protection, since there is mix of private and Government funds in developing process---- 537
Tests
Evaluation
General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable---- 689
Prior procurements
Test waived
Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate---- 689
Tests
Specification requirements
Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis---- 675

CONTRACTS—Continued Page
Specifications--Continued
Defective
Corrective action recommended
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated ... 497
Deficient provisions
Other bidders not prejudiced
Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions ... 487
Definiteness requirement
Notwithstanding protester's contention that invitation for bids did not clearly state agency's requirement for line item, causing protester to submit bid based on supplying duplicate set of item where agency required only single set, award to low bidder is not subject to objection where bid prices reveal that protester would not have been low bidder in any event ... 346
Specificity in defining terms
In procurement of creative design concepts, which calls for creativity on part of individual offerors, agency's needs can be described only broadly; there is no requirement for use of detailed design specifications in such circumstances. Further, where agency seeks creativity and innovative approaches, agency is not required to award contract on the basis of lowest price since factors other than price are paramount ... 882
Notwithstanding grantee's intent to draft specifications for switchgear equipment so as to allow only manufacturers of circuit breakers to compete, drafted specifications did not reveal intent ... 912
Variance justification
Finding that RFP did not contain accurate estimate of file size will not have adverse effect on use of estimates in future procurements as alleged in request for reconsideration, as original decision did not hold that estimates must be precisely accurate but only that they be based on best information available to Government ... 663
Descriptive data
Failure to submit
Model number and descriptive literature
Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid ... 608
Voluntary submission
Acceptability
A bidder's unsolicited descriptive data may not be disregarded where it appears that the bidder is offering the model described therein. Therefore, when such model does not comply with the Government's stated material requirements, the bid must be rejected as nonresponsive ... 334

CONTRACTS—Continued Page
Specifications—Continued
Deviations
Descriptive literature
Brand name or equal item
Allegation that low offeror did not conform to purchase description used in solicitation by offering disposable rubber gloves is correct. Contracting officer acted improperly by accepting blanket assurance that low offeror's equal items were, in fact, equal to brands specified since such an offer to conform does not satisfy descriptive literature requirement of brand name or equal clause 531
Informal *v.* substantive
Failure to bid on each item
Notation "N/A" next to invitation for bids item for which price is required can reasonably be interpreted that bid price is not applicable or that bid price does not include item. Under circumstances bid must be rejected because bidder could not be contractually bound to deliver item 83
Failure to furnish something required
Bid bond
Since grant contract included competitive bidding requirment, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1–10.103–4(a) provides exception when only one bid is received 43
Licensing-type requirement
Specific license
Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license 494
Intent *v.* drafted specifications
Resolicitation
Prejudice requirement
It is clear that, to the extent grantee could have properly specified "manufacturer only" requirement for switchgear, the fact that grantee inadequately expressed intent would have not required resolicitation absent showing of prejudice to other than protester which was not otherwise eligible to compete under requirement 912
Manuals
Security
Allegation that contracting agency should not have required security manuals because it lacks authority to approve contractors' security manuals must fail in absence of basis for concluding that contracting agency may not evaluate and monitor compliance with established security requirements 1008

CONTRACTS—Continued Page
Specifications—Continued
Manufacturer
Equipment
Switchgear
Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer the specification because of quality and inspection concerns. Notwithstanding such concerns, GAO has suggested that product experience clause be used instead of "manufacturer only" specification 912
Master agreements
Use of list
Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78
Minimum needs requirement
Administrative determination
Allegation that Federal Supply Schedule contractor's equipment does not meet specified minimum safety requirements is a matter of contract administration where contractor has taken no exception to such requirements 811
Preparation
Agency responsibility
Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency 689
Proprietary data use. (*See* CONTRACTS, Data, rights, etc.)
Qualified products
Bid *v.* invitation
Where invitation for bids called for item which required First Article testing only if item offered was not on qualified products list (QPL), bidder's notation in bid schedule that First Article testing was "not applicable," when read in conjunction with information contained in other portion of bid indicating that bidder's item was included on QPL, reasonably can be construed as bidder's offer to furnish QPL item 334
Changes
Approval
No modification to qualified product portion of item offered by successful offeror under RFP was necessary to meet Government's requirement of interchangeability with previously supplied product, although unqualified portion of item was altered. In any case, qualified products list (QPL) preparing activity, acting within its discretion, has found requalification of product to be not necessary. Therefore, offeror offered qualified product in accordance with RFP QPL requirements and was eligible for award 183

CONTRACTS--Continued Page
Specifications--Continued
Restrictive
Adequacy of specifications
While it is alleged that requirement for standardization of encoding scheme for data base to that developed by contractor under questionable award will effectively preclude potential offerors other than incumbent from competing, such requirement is not unduly restrictive where, as here, need for standardization has been demonstrated as legitimate 663
Particular make
Description availability
Bids were properly rejected where information reasonably available to procuring activity was not sufficient to establish that protesters' offered products were "equal" to the brand name items specified in the invitation for bids 608
"Or equal" product acceptability
Where bid contains only the name of the manufacturer of a purportedly "equal" product, procuring activity may not consider model number and descriptive literature submitted by the bidder after bid opening, because to do so would permit bidder to affect the responsiveness of its bid 608
"Or equal" product not solicited
Although request for proposals (RFP) specified part number of item, which only one firm had previously supplied, alternate, qualified, equal, and interchangeable products made by other firms meeting Government's RFP requirements can be considered, since these alternate products were not specifically excluded by RFP, albeit they were not specifically solicited; previous sole-source firm was made aware that requirement was going to be competed; and there is no indication of prejudice to potential offerors because of RFP's failure to state "equal" assemblies were acceptable 183
Salient characteristics
Absence of empirical evidence for need
In absence of empirical evidence that brand-name item has salient characteristic supposedly representing Air Force's minimum need, and in view of brand-name offeror's specific exception to that characteristic, General Accounting Office (GAO) advises Air Force that no further deliveries of brand-name item should be accepted until item's compliance with salient characteristic is established through actual demonstration 513
Unduly restrictive
Protester's contention that listed salient characteristic of brand-name item is unduly restrictive is sustained where even offeror of brand-name item took exception to requirement 513
Special design features
Specification provision which excluded particular design is without a reasonable basis where rationale for exclusion appears founded on erroneous concept of design 513
Review of specifications
Federal Water Pollution Control Act of 1972, 33 U.S.C. 1284 (Supp. V, 1975) together with implementing regulations, import Federal norm for full and free competition requiring that grantees avoid use of restrictive specifications. Upon review, GAO finds restrictive specification was not unreasonable. However, it is recommended that grantor agency

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Review of specifications—Continued
assume a more activist role in future cases to insure maximization of competition rather than acquiesce in very cautious specifications used in instant cases ... 575
Samples
Defective
Objective *v.* subjective characteristics
General Accounting Office (GAO) recommends that in future procurements, use of objective and subjective evaluation factors be clearly distinguished. Moreover, GAO questions whether nonresponsive samples should have been disassembled by agency to determine whether they met unlisted specification requirements since regulation provides for such evaluation only if the samples meet listed characteristics ... 841
Mishandling or sabotage by Government
Allegation not substantiated by evidence
When record shows that bid samples were handled with due care by the procuring agency, protester who alleges, without further evidence, that mishandling or sabotage by Government caused samples to be rejected has not sustained burden of proof ... 841
Tests to determine product acceptability
Bidder's preference to work from sample or "queen bee" provides no legal basis for overturning agency's determination that specifications and drawings are adequate for procurement without it, since determination of Government's requirements and drafting specifications to meet requirements are responsibility of procuring agency ... 689
Security manual requirement
Allegation that contracting agency should not have required security manuals because it lacks authority to approve contractors' security manuals must fail in absence of basis for concluding that contracting agency may not evaluate and monitor compliance with established security requirements ... 1008
Superior product offered
Negotiated procurement
Effect of agency's error in failing to advise offerors that it would accept a technically acceptable proposal which offered the lowest cost was to mislead protester into believing it could submit high quality proposal in false hope of convincing agency of its value. Nevertheless, record shows that protester was wedded to its high quality approach and was not prejudiced by agency's failure to negotiate concerning its technically superior proposal, which exceeded the successful offeror's estimated costs by 25 percent ... 381
Technical deficiencies. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Technical deficiencies)
Tests
Benchmark
Computers
Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevalua-

CONTRACTS—Continued Page
Specifications—Continued
Tests—Continued
Benchmark—Continued
Computers—Continued
tion which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000. Modified by 56 Comp. Gen. 694 245
Where agency states that computer benchmark output was examined and found to be acceptable, protester's contradictory assertion that successful offeror's benchmark results were partially unacceptable does not establish that agency's account of facts is inaccurate 312
Where agency required certification in best and final offers that equipment configuration proposed was that which had passed computer benchmark and had been determined to be technically acceptable, successful offeror's responses are viewed as meeting intent of requirement though certification as such was not provided 312
Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate 388
Conformability of equipment, etc., offered to specifications. (*See* CONTRACTS, Specifications, Conformability of equipment, etc., offered, Tests)
First article
Applicability
Where invitation for bids called for item which required First Article testing only if item offered was not on qualified products list (QPL), bidder's notation in bid schedule that First Article testing was "not applicable," when read in conjunction with information contained in other portion of bid indicating that bidder's item was included on QPL, reasonably can be construed as bidder's offer to furnish QPL item 334
Armed Services Procurement Regulation control
Armed Services Procurement Regulation 1–1903(a)(iii) controls both first article testing and initial production testing 689
Initial production testing
Waiver
Decision to grant waiver of initial production testing is matter of administrative discretion to which GAO will not object in absence of clear showing of arbitrary or capricious conduct on part of procuring officials 689
Necessary amount of testing
Administration determination
No modification to qualified product portion of item offered by successful offeror under RFP was necessary to meet Government's requirement of interchangeability with previously supplied product, although unqualified portion of item was altered. In any case, qualified products list (QPL) preparing activity, acting within its discretion, has found requalification of product to be not necessary. Therefore, offeror offered qualified product in accordance with RFP QPL requirements and was eligible for award 183

CONTRACTS—Continued Page

Specifications—Continued

Tests—Continued

Necessary amount of testing—Continued

Administrative determination—Continued

Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis 675

General Accounting Office (GAO) declines to establish rule that evaluation factors for testing over particular amount are *per se* unreasonable. Instead, GAO will examine evaluation factor to determine reasonableness to testing needs of Government. Testing costs of $66,000 are not shown to be unreasonable 689

Waiver

Invitation provision

Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate 689

Waiver of requirement

After award by contract modification

Post-award protests against waiver of specification requirement after award by contract modification will be considered where request for waiver has not been acted on by agency under one contract and no request for waiver has been made under another contract although presumably such request is foreseeable 924

Modified contracts and amended solicitations

Where the Government has unknowingly accepted nonconforming item, concedes acceptability of item by granting waivers accompanied by price decreases under existing contracts and has amended current solicitations and presumably will amend future solicitations to permit delivery of item, minimum needs are overstated. Although the record demonstrates uncertainty as to impact on bidding, proper method to determine savings is resolicitation of two preaward procurements reflecting needs of Government. Concerning the two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with view toward resolicitation should be considered 924

Status

Federal grants-in-aid

Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only

CONTRACTS—Continued Page
Status—Continued
Federal grants-in-aid—Continued
acceptable bid to include bid bond as required by solicitation may be waived since FPR 1–10.103–4(a) provides exception when only one bid is received 43
Complaint by would-be supplier to prime contractor that grantee's award of a contract was inconsistent with Federal competitive bidding principles applicable to grant is not sustained. Record shows that there was maximum and free competition among all bidders and that no bidder was prejudiced as a result of alleged deficient specification provisions 487
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition 487
Separable or aggregate
Awards. (*See* CONTRACTS, Awards, Separate or aggregate)
Subcontractors
Buy American Act. (*See* BUY AMERICAN ACT)
Protests
General Accounting Office (GAO) will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor 596
Interested party requirement
Protester's expectation of subcontract award does not, by itself, satisfy interested party requirement of 4 C.F.R. 20.1(a) (1976). Accordingly, protest by potential subcontractor is dismissed 730
Subcontracts
Buy American Act. (*See* BUY AMERICAN ACT)
Tax matters
Federal taxes
Excise
No basis is seen to reform contract to reimburse contractor for general and administrative expenses and profit applicable to amount of Federal Excise Tax (FET) contractor was required to pay during performance of contract. Contract's taxes clause provided that if written ruling took effect after contract date resulting in contractor being required to pay FET, contract price would be increased by amount of FET—and this is what in fact occurred. Therefore, issue presented does not involve reformation, but whether contractor has valid claim under terms of contract as written 340
Set-off (*See* SET-OFF, Contract payments, Tax debts)
Term
Continuing contracts
Army Corps of Engineers
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have

CONTRACTS—Continued Page
Term—Continued
Continuing contracts—Continued
Army Corps of Engineers—Continued
been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled---- 437
Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures-- 437
Termination
Convenience of Government
"Allowable cost"
If ADP contract is terminated for convenience of Government, payment of separate charges, which, by contract's provisions, are payable if Government returns equipment or otherwise terminates ADP system prior to intended 60-month system's life, would seem to be inconsistent with mandatory termination for convenience clause remedy, in that separate charges do not represent costs incurred in performance of work terminated and would clearly exceed basic contract's value. B-164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505---- 142
"Best interest of the Government" basis
Cost *v.* integrity of competitive bidding system
Where award under RFP was based on improper post-award discussions, contract should be terminated and requirement resolicited, even where awardee's price was disclosed in debriefing to protester and auction situation may be created, because of primacy of statutory requirements for competition over regulatory prohibition of auction techniques. Furthermore, remedial action is in the Government's best interests to protect confidence in the integrity of competitive procurement system, notwithstanding adverse agency mission and cost impacts---- 768
Erroneous awards
Protest which caused agency to terminate contract and make award to protester was timely filed within 10 working days after protester knew basis of protest. Issues in counter-protest by contractor whose contract was terminated are also timely, with exception of allegation that substantially higher price level should have been used in benchmark portion of cost evaluation. Contractor as incumbent at time proposals were solicited, should have raised this issue prior to closing date for receipt of revised proposals. Modified by 56 Comp. Gen. 694---- 245
Deleterious effect of termination
Department of Interior insists that, in addition to substantial costs which will be involved in recompeting procurement as previously recommended by General Accounting Office (GAO), mission of protecting health and safety of miners will be delayed for up to a year if recompetition results in termination of proposed award. Even assuming accuracy of claimed costs and delays—which have not been explained or analyzed in

CONTRACTS—Continued Page
Termination—Continued
Convenience of Government—Continued
Erroneous awards—Continued
Deleterious effect of termination—Continued
detail—confidence in competitive procurement system mandates recompetition, where improperly awarded Automatic Data Processing (ADP) contract would extend 65 months and agency reported to GAO that successful proposal was "technically responsive" when it clearly was not ---- 505
Not recommended
Urgency procurement
Where General Accounting Office (GAO) recommended that agency examine feasibility of terminating improperly awarded contract for convenience of Government, agency's response establishes grounds for position that award should not be disturbed due to urgency of supply situation. Therefore, notwithstanding doubts concerning methodology used by contracting officer in arriving at termination for convenience cost estimate, considering all circumstances of case GAO cannot conclude that recommending termination for convenience would be in best interests of Government. 55 Comp. Gen. 1412, modified ---- 296
Reporting to Congress
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond contemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be reoslicited -- 531
Negotiation procedures propriety
Recognizing difficulties encountered by Air Force in obtaining suitable hospital cleaning service and problem attending definition of common set of management procedures sufficient to presently permit reasonable degree of competition under advertised procurement, termination of contracts awarded under unauthorized negotiated solicitation is not recommended. Modified by 56 Comp. Gen. 649 ---- 115
Prior to intended life of Automatic Data Processing System
Computation of charges
Although some separate charges payable for termination of ADP system prior to intended system's multiyear life contained in contracts supported by fiscal year funds with multiple yearly options are illegal, it is proper to pay separate charges in cases where charges, taken together with payments already made, reasonably represent value of fiscal year requirements actually performed. B–164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 ---- 142
Inasmuch as payment of certain separate charges payable in event of termination of ADP system prior to intended multiyear life is illegal, indicat on in "fixed-price options clause" required to be included in such ADP procurements by Federal Property Management Regulation

CONTRACTS—Continued Page
Termination
Prior to intended life of Automatic Data Processing System—Con.
Computation of charges—Continued
101-32.408-5 that separate charges may be quoted is inappropriate and misleading to potential offerors on contracts supported by fiscal year funds with multiple yearly options. In addition, clause is unclear as to how separate charges are to be evaluated, such that offerors are clearly unable to propose separate charges with any assurance that offers would not be rejected as unacceptable. Consequently, clause should be appropriately modified by GSA. B-164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 142
Recommendation
Small business concerns
When, before award, information which reasonably would impeach small business self-certification of low bidder comes to attention of contracting officer, direct size protest with the Small Business Administration (SBA) should have been filed in order to assure that self-certification process is not abused. In absence of probative evidence, protester has not affirmatively established that small business self-certification was made in bad faith. Recommendation is made that agency consider feasibility of contract termination where SBA, less than 3 weeks after award, found contractor was other than small business because of affiliation with another firm discussed in preaward survey 878
Resolicitation
Revised specifications
Where the Government has unknowingly accepted nonconforming item, concedes acceptability of item by granting waivers accompanied by price decreases under existing contracts and has amended current solicitations and presumably will amend future solicitations to permit delivery of item, minimum needs are overstated. Although the record demonstrates uncertainty as to impact on bidding, proper method to determine savings is resolicitation of two preaward procurements reflecting needs of Government. Concerning the two awarded contracts, if any favorable action is contemplated on current or future requests for waivers, termination with view toward resolicitation should be considered 924
Solicitation inappropriate
Unduly restrictive of competition
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated 497
Timber sales. (*See* TIMBER SALES, Contracts)
Time and materials
Ceiling price requirement
Time and materials portion of contract which did not contain ceiling price was formulated in contravention of ASPR 3-406.1(c) (1975 ed.), which makes use of ceiling price mandatory condition in this method of contracting 160

CONTRACTS—Continued Page
Trade secrets. (*See* CONTRACTS, Data, rights, etc., Trade secrets)
Types
Services *v.* supplies
Propriety of "site visit" clause
In a solicitation for services, the inclusion of a clause providing for site inspection on Government installation was proper, notwithstanding protester's contention that contract was essentially one for supplies---- 882

CORPORATIONS
Officers
Debts
Corporation not liable
Where president of corporation leaves corporation and enters into several contracts with Government, as individual, claims against individual arising out of contracts may not be set off against funds withheld from amount owing corporation under contract which was signed by individual in his capacity as president of corporation---- 499

CORPS OF ENGINEERS (*See* ARMY DEPARTMENT, Corps of Engineers)

COURTS
Decisions
Testan case (U.S. *v.* Testan, 424 U.S. 392). (*See* COMPENSATION, Removals, suspensions, etc., Back pay, Testan case)
Judgments, decrees, etc.
Against officers and employees
Liability of Government
Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by the United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization. 40 Comp. Gen. 95 and other similar decisions, overruled---- 615
Amendment
Court order increasing compensation rate
Amended court order increasing previously fixed rate of compensation for land commissioners creates new obligation chargeable to appropriation current at time of amended order. Thus, increased compensation payable under such an amended order issued after June 30, 1975, is subject to, and limited by, any salary restrictions contained in appropriation charged---- 414
Payment
Appropriation chargeable
If judgment is entered against United States or one of its agencies as employer-garnishee under applicable state law, that judgment may be paid from the Judgment Appropriation created by 31 U.S.C. 724a, if Attorney General certifies that it is in the interest of the United States to pay the judgment---- 592

COURTS—Continued
Judgments, decrees, etc.--Continued
Payment--Continued
Appropriation chargeable--Continued Page
The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, Internal Revenue Code (I.R.C.) (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it is administratively determined that the unauthorized disclosure was made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954). 40 Comp. Gen. 95 and other similar decisions, overruled 615
Probation officers
Payments received under probation orders
Government to assume risks
Under Public Law 92-310, which prohibits bonding of Federal employees in favor of self-insurance by Government, United States is self-insurer of restitution, reparation and support payments received by probation officers as required by probation orders issued pursuant to 18 U.S.C. 3651. Such payments are received by probation officers in connection with their official duties and are subject to fiduciary responsibility while held in custody of courts 788
State
Jurisdiction
Garnishment proceedings
Environmental Protection Agency negligently failed to withhold specified amounts from employee's salary under a writ of garnishment. Governing state law permits entry of judgment against employer-garnishee under those circumstances. Since 42 U.S.C. 659 mandates that the United States and its agencies will be treated as if they were private persons with regard to garnishment for child support and alimony, employing agency may be found to be liable because, under the same circumstances, private employer would be liable 592
CREDIT CARDS
Use
Services, etc., to public
Except for certain transactions subject to statutory prohibitions against credit sales, Government Printing Office (GPO) may sell publications on credit, through its own facilities, where it determines that extending credit will facilitate sales without increasing administrative costs or price of publications. Under the same circumstances, and subject to the same statutory restrictions, GPO may also arrange with credit card company for sales by credit card. Moreover, sales to company cardholders could include transactions for which GPO is prohibited from making credit sales, since credit here is extended by card company rather than by GPO as vendor 90

CURRENCY Page
Foreign. (*See* FUNDS, Foreign)
United States
Destruction
Evacuation of Vietnam
31 U.S.C. 492a–492c (1970) and Treasury regulations permit purchase of foreign currency "for official purposes." Purchases by State Department officials of piasters from Vietnamese employees prior to evacuation from Vietnam were "for official purposes." Claims now submitted by Vietnamese who turned in piasters but did not receive dollars may be honored, if they can be substantiated ---------- 791

CUSTOMS
Employees
Overtime services
Reimbursement
Customs Service inspectional employees
Customs employee claims overtime pay under Customs overtime laws, 19 U.S.C. 267 and 1451 (1970), for work performed in addition to regular tour of duty and between the hours of 5 p.m. and 8 a.m. Employee is entitled to such compensation regardless of whether he first performed 8 hours of duty on the day claimed, and any contrary interpretation of the laws or the decision in *O'Rourke* v. *United States*, 109 Ct. Cl. 33 (1947), will not be followed ---------- 310

DAMAGES
Public property. (*See* PROPERTY, Public, Damage, loss, etc.)

DEBT COLLECTIONS
Referral to Justice
Contract matters
Set-off
Where amount of claim asserted by agency against subcontractor for recovery of overpayments is based on statistical sampling of 5.6 percent of orders under contract rather than on an audit of each contract order, claim is not so certain in amount as to warrant setoff by General Accounting Office. However, because liability exists, matter is referred to Department of Justice for appropriate action ---------- 963
Waiver
Civilian employees
Compensation overpayments
Administrative error
Action contrary to agency regulations
Department of Labor seeks a ruling on legality of employee retroactive temporary promotion that it effected when its intent to permanently promote and reassign a GS–3 employee to a GS–4 position effective on August 4, 1975, was frustrated through improper merit staffing procedures. Personnel actions may not be made retroactively effective absent an unjustified or unwarranted personnel action that deprived employee of vested right. Because employee had no vested right to a promotion, action was improper; however, erroneous payments may be waived under 5 U.S.C. 5584 ---------- 1003

DEBT COLLECTIONS—Continued
Waiver—Continued
Civilian employees—Continued
Leave payments
Annual leave charged for home leave erroneously granted Page
Federal Aviation Administration (FAA) employee who transferred from Puerto Rico to Alaska was erroneously granted home leave. Agency charged employee's leave account with 104 hours annual leave and made deduction from salary for 18 hours of leave without pay. Arbitrator found this a violation of collective bargaining agreement and directed FAA to restore annual leave and reimburse salary. Award may be implemented since employee is entitled to waiver of repayment of 122 hours of home leave erroneously granted and used (5 U.S.C. 5584) 824
Military personnel
Effect of member's fault
Reserve veterinary and optometry officers of the uniformed services, who were wrongly advised about their basic and special pay entitlements and who were then mistakenly overpaid, may receive favorable consideration under the statute authorizing waiver of claims arising out of such erroneous payments; however, overpayments received by an officer after he received notice of the error may not properly be waived, since upon notice the officer would become partially responsible for correcting the error, at least to the extent of setting aside subsequent overpayments for eventual return to the Government. 10 U.S.C. 2774 (Supp. II, 1972) 943
Pay, etc.
Readjustment pay
Where Army officers involuntarily separated from active duty subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 U.S.C. 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 U.S.C. 2774.. 587

DEPARTMENTS AND ESTABLISHMENTS
Services between
Reimbursement
Actual cost required
Overhead included
Administrative overhead applicable to supervision by Department of Commerce of service provided to other Federal agency is required to be included as part of "actual cost" under section 601 of Economy Act, 31 U.S.C. 686 (1970), and must therefore be paid by agency to which service is rendered. Above is applicable whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in General Fund of Treasury or credited to Department of Commerce General Administration appropriation 275
Sale/transfer of surplus/excess property
Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property

DEPARTMENTS AND ESTABLISHMENTS—Continued
Services between—Continued
Sale/transfer of surplus/excess property—Continued Page
Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c)..... 754

DETAILS
Extensions
Civil Service Commission approval
Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976)..... 427

Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a)..... 432

Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award. 732

Schedule C positions
Federal Trade Commission (FTC) questions whether it may grant a retroactive temporary promotion for an extended detail of a GS–14 competitive service employee to a GS–15 Schedule C position where an extension of the detail was not obtained. Since General Schedule position at grade GS–15 and below in both the competitive service and excepted service are covered by our *Turner-Caldwell* decision, 55 Comp. Gen. 539 (1975), FTC has authority to grant the employee a retroactive temporary promotion and backpay pursuant to the conditions set forth in that decision..... 982

DISBURSING OFFICERS
Relief
Appropriation adjustment
Sufficient evidence exists to support Treasury Department conclusion that United States currency in account of United States disbursing officer (USDO) was not destroyed prior to evacuation from Vietnam. Loss should be treated as a physical loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis..... 791

DISBURSING OFFICERS--Continued
Relief--Continued
Appropiation adjustment—Continued Page
Loss of Vietnam piasters, held by United States disbursing officer (USDO) and State Department officials, abandoned during evacuation should be treated as a physical loss at official exchange rate at time of loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis 791
Deposits of Vietnam piasters by United States disbursing officer with Treasury of Vietnam and National Bank of Vietnam should be treated as loss by exchange and charged to Gains and Deficiencies account in Treasury, pursuant to 31 U.S.C. 492b and Treasury Circular No. 830, since deposits were for purposes of exchange operations 791

DISCOUNTS
Contract payments. (*See* **CONTRACTS, Discounts**)

DISCRIMINATION (*See* **NONDISCRIMINATION**)

DISTRICT OF COLUMBIA
Leases, concessions, rental agreements, etc.
Hotel accommodations
Subject to statutory prohibitions
Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn 572

DOCUMENTS
Incorporation by reference
Contracts. (*See* **CONTRACTS, Incorporation of terms by reference**)

DONATIONS
Acceptance
Military members
Travel expenses
Military member who stayed with friends in lieu of staying in commercial lodging while on temporary duty assignment may not have cost of taking hosts to dinner included as actual lodging cost in computing his per diem allowance under paragraph M4205, Volume 1, Joint Travel Regulations, since payment for such expense was in the nature of a gift or gratuity and was not an actual cost of lodging 321

EDUCATION
Colleges, schools, etc. (*See* **COLLEGES, SCHOOLS, ETC.**)

EDUCATION—Continued Page

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc., Educational institutions**)

Student assistance programs

Military record correction effect on allowance

Whether or not erroneous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters 587

ENERGY

Energy Research and Development Administration

Newsletter

Breeder Briefs

Source of funding

Comments in "Breeder Briefs" newsletter (concerning Clinch River Breeder Reactor Project) urging readers to contact Congressmen in support of Project, do not violate Federal anti-lobbying statutes since statutes are conditioned on use of appropriated funds, and appropriated funds were not involved either in publication of newsletter or in payment of salary of Project official who made comments 889

ENVIRONMENTAL PROTECTION AND IMPROVEMENT

Environmental differential pay. (*See* **COMPENSATION, Additional, Environmental pay differential**)

EQUIPMENT

Automatic Data Processing Systems

Benchmarking

Acceptability

Administrative determination

Where agency states that computer benchmark output was examined and found to be acceptable, protester's contradictory assertion that successful offeror's benchmark results were partially unacceptable does not establish that agency's account of facts is inaccurate 312

Computers

Distinctions—firmware, hardware and software

Where request for proposals (RFP) established computer hardware requirement and successful offeror proposed "firmware," after technical review of issue, General Accounting Office (GAO) does not believe protester has substantiated its view that firmware is always classified as software, nor has protester clearly shown that agency's acceptance of firmware as being sufficient to fulfill hardware requirement lacks reasonable basis 312

Tapes

Buy American Act applicability

Computer tape, initially processed abroad and further processed in United States, is not a manufactured end product for purposes of Buy American Act 18

A computer program, consisting of an enhanced magnetic tape produced in the United States from a master tape, and associated documentation printed in the United States, is properly considered to be a domestic source end product for purpose of the Buy American Act, even though program was developed in a foreign country 102

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Computer service
Benchmarking Page

Where initial cost evaluation considered only cost of one computer benchmark at $50,000 point, and Navy later conducted cost reevaluation which considered proposed prices in terms of monthly expenditure rate of $50,000, no grounds are seen to object to cost reevaluation, because under RFP provisions as supplemented by instructions to offerors, benchmark portion of offerors' pricing was to be based on monthly usage rate of $50,000. Modified by 56 Comp. Gen. 694 245

Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided 694

Programming

Protester's contention that request for proposals (RFP) required all testing in connection with computer software modifications to be accomplished on-site is not persuasive, because while RFP required on-site testing, it did not establish any explicit requirement that all testing be on-site. While protester contends that successful offeror proposed only off-site testing, agency's view that the proposal, read as a whole, offered some off-site and some on-site testing appears reasonable. Protester has not shown that successful proposal failed to comply with material RFP requirement or that agency's technical judgment clearly lacked reasonable basis 675

Time/timesharing

Proposal for computer time sharing services which reserved offeror's right to revise computer algorithm failed to conform to material RFP requirement that offerors submit fixed prices, because algorithm is directly related to proposed prices. Modified by 56 Comp. Gen. 694 245

Leases
Full payment *v.* terminable with option to purchase

Finding that proposal offering "full payout lease" was nonresponsive was improper where amended solicitation invited proposals based on lease and on lease with option to purchase. In these circumstances, "full payout lease" was tantamount to offer of terminable lease with option to purchase 829

Long term

Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Payment of charges—a percentage of future years' rentals on discontinued equipment based on contractor's "list prices"—would violate 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11, since charges represent part of price of future years' ADP requirements rather than rea-

EQUIPMENT—Continued
Automatic Data Processing Systems—Continued
Leases—Continued
Long term—Continued Page
sonable value of actually performed, current fiscal year requirements. Liability for such substantial charges in lieu of exercising option renders Government's option "rights" essentially illusory. B-164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 ---- 142
Under provisions of ADP contract funded with fiscal year appropriations having multiple yearly options up to 65 months, separate charges are payable to contractor if Government returns contractor's equipment or otherwise terminates ADP system prior to intended system's life end. Charges are based, in part, on percentage of contractor's future years' commercial catalog prices for equipment. Inasmuch as catalog prices are subject to change within contractor's sole discretion, effect of provision would subject Government to indeterminate, uncertain or potentially unlimited liability, in violation of 31 U.S.C. 665(a), 31 U.S.C. 712a and 41 U.S.C. 11. B-164908, July 7, 1972, overruled. Modified by 56 Comp. Gen. 505 ---- 142
To eliminate unfair competitive advantage insofar as possible, protester, as condition to competing under recompetition of improperly awarded ADP requirement limited to protester and contractor, must agree to disclosure to contractor of information from best and final proposal regarding details of proposed initial equipment configuration and unit prices. Information should be substantially comparable to information in initial order placed under contract which was disclosed by agency to protester ---- 505
Contractor and agency suggest that no recommendation for corrective action would be appropriate despite prior decision sustaining protest, because contract performance complies with requirements and protester suffered no prejudice. However, while some evidence in record indicates that contractor is providing "read protection" in computer timesharing services contract, written record does not establish that contract performance is fully in compliance with requirements, nor is it General Accounting Office's (GAO) function to make such determination. In any event, best interests of Government call for recommendation that contract option years not be exercised. 56 Comp. Gen. 245, modified ---- 694
Purchase option
Dispute focusing on protesters' assertion that they were prejudiced because awardee was permitted to correct mistake after submission of best and final offers need not be resolved because for other reasons agency should have clarified its requirements and reopened negotiations with all offerors. This would have provided contractor opportunity to cure its mistake ---- 829
Agency decision to preclude use of separate charges for failure to exercise renewal options in automatic data processing procurement is not abuse of agency discretion because competition existed on basis of terms solicited ---- 860
Selection and purchase
Evaluation propriety
Agency's cost evaluation based solely on benchmark costs and without regard to other contract costs was inadequate ---- 388

EQUIPMENT—Continued
Automatic Data Processing Systems--Continued
Selection and purchase—Continued
Negotiation procedures Page

Where agency did not issue amendment to request for proposals (RFP), but met with each offeror individually to advise of change in RFP evaluation criteria, but one offeror denies even being advised of change, it is clear that misunderstanding could have resulted from agency's failure to verify its oral advice by prompt issuance of RFP amendment in accordance with regulations 388

Tests
Benchmark
Allegations of unfairness
Not supported by record

Record does not support protester's contentions that awardee of automatic data processing (ADP) contract was permitted to perform benchmark test requirements in less demanding manner than request for proposals (RFP) required, wander in any material way from proposed system configuration, or utilize special computer software not meeting RFP requirements to pass tests. Modified by 56 Comp. Gen. 505 142

Improprieties

Where, concurrent with submission of best and final communication, offeror stated "arithmetic" error was made in cost tables which would result in price increase of "*approximately* $120,000," communication was ineligible for award consideration, since it proposed neither fixed, nor finitely determinable, prices which the Government would be bound to pay if award were to be based on communication. Also, since offeror's final technical submission proposed significantly different equipment configuration from that which underwent benchmark testing, proposal is unacceptable. Modified by 56 Comp. Gen. 505 142

ESTOPPEL
Elements

Claim based on estoppel is denied since party to be estopped must know all facts at time that party induced claimant to act to its detriment and Government was unaware that solicitation contained erroneous estimates when it informed claimant of contract number and requested payment and performance bonds 271

Government liability for agents acts. (*See* **AGENTS, Government, Government liability for negligent or erroneous acts, Doctrine of estoppel)**
Prior actions

Modification of Forest Service timber sale contract was permitted under terms of contract. In any case, in absence of coercion, duress or unconscionability, contractor's signing of modification agreement and continuing contract performance in accordance with modification, without indication of protest and with apparent knowledge of modification's scope, constituted "election" or waiver of contractor's "right" to now assert that modification was beyond scope of contracting officer's authority and thus constituted breach of contract 459

ETHICS
Officers and employees. (*See* **OFFICERS AND EMPLOYEES, Ethics)**

FAMILY ALLOWANCES Page
Separation
Type I
Common residence
Family Separation Allowance, Type I, under 37 U.S.C. 427(a) (1970) is not authorized to an otherwise eligible member who is legally separated from his spouse since his separation from her results from personal considerations, not military assignment. 43 Comp. Gen. 332, overruled in part 805

FARM CREDIT ADMINISTRATION
Deputy Governors
Compensation
Compensation of Deputy Governors, Farm Credit Administration, is authorized to be fixed at not to exceed the maximum scheduled rate of General Schedule. Such compensation, although not limited by compensation of Governor and not subject to classification provisions, may not exceed rate for level V of Executive Schedule, since effect of 5 U.S.C. 5308 is to limit maximum scheduled rate of General Schedule to level V rate. Higher amounts shown on General Schedule are merely projections of what rates would be without this limitation 375

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

FEDERAL AVIATION ADMINISTRATION
Incentive award procedures
Collective bargaining agreement
Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency reuglations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57

FEDERAL GRANTS, ETC.
Grantee contracts
Review by General Accounting Office
Grant related procurement complaint is for consideration by General Accounting Office (GAO) in accordance with announcement published at 40 Fed. Reg. 42406. Moreover, consideration is appropriate where, as here, grantor agency has requested advisory opinion 575

FEDERAL PROCUREMENT REGULATIONS
Negotiated procurement
Architect-engineer evaluation boards
Private practitioners requirement
Federal Procurement Regulations para. 1–4.1004–1(a) requires that private practitioners be appointed to architect-engineer evaluation board only if provided for by agency procedure. Since agency's procedures do not require private practitioners on boards, there is no basis to object to their absence 721

FEDERAL SUPPLY SCHEDULE CONTRACTS (*See* CONTRACTS, Federal Supply Schedule)

FEDERAL WATER POLLUTION CONTROL ACT Page

Grants-in-aid

Contracts

Federal Water Pollution Control Act of 1972, 33 U.S.C. 1284 (Supp. V, 1975) together with implementing regulations, import Federal norm for full and free competition requiring that grantees avoid use of restrictive specifications. Upon review, GAO finds restrictive specification was not unreasonable. However, it is recommended that grantor agency assume a more activist role in future cases to insure maximization of competition rather than acquiesce in very cautious specifications used in instant cases 575

FEES

Searching for and producing records

Tax matters

Internal Revenue Service summons

In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons 36

FLITE (Federal Legal Information Through Electronics) (*See* LITE (Legal Information Through Electronics))

FLY AMERICA ACT

Applicability to air travel. (*See* TRAVEL EXPENSES, Air travel, Fly America Act, Applicability)

FOOD AND DRUG ADMINISTRATION

Adjudicative proceedings, etc.

Indigent persons

Food and Drug Administration may reimburse costs of persons or groups who participate in proceedings before it only where person or group lacks financial resources to participate adequately. Absent specific statutory authority, agency may not adopt more liberal standard of eligibility based on factors other than person's or group's actual financial resources which could be applied to participation in agency proceeding 111

Public intervenors

Financial assistance

Food and Drug Administration (FDA) may reimburse costs of otherwise eligible persons or groups who participate in its proceedings where agency determines that such participation "can reasonably be expected to contribute substantially to a fair determination of" issues before it. Participation need not be "essential" in the sense that issues cannot be decided without such participation 111

Agency proceedings, etc.

Participants

Financial assistance

Food and Drug Administration's authority to reimburse costs of otherwise eligible persons or groups who participate in proceedings before it extends to all types of agency proceedings 111

FOREIGN CURRENCIES (*See* **FUNDS, Foreign**) Page

FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES

Tropical differentials

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

FOREIGN GOVERNMENTS

License requirements for Government contractors. (*See* **LICENSES, Federal, State, etc., Government contractors**)

FOREST SERVICE

Timber sales. (*See* **TIMBER SALES**)

FORMS

Department of Defense

Form 1415

Reprogramming data

Failure to fill out form required by Department of Defense Directive 7250.10, which contains internal guidelines for reprogramming of funds, is not a violation of a regulation as envisioned by courts to sustain claim for proposal preparation costs 201

FREEDOM OF INFORMATION ACT

Disclosure requests

Contract protests

Propriety of disclosing contents of operating manuals prepared under earlier contracts is for resolution under Freedom of Information Act, 5 U.S.C. 552 *et seq.* (Supp. V, 1975) 1008

FUNDS

Advance

Federal aid, grants, etc.

Advance payment of 20 percent Federal agency share of student salaries to colleges administering College Work-Study Program (42 U.S.C. 2751 *et seq.* (1970)) appears to fall within prohibition against advances of public funds, 31 U.S.C. 529 (1970). Exceptions to 31 U.S.C. 529, including 41 U.S.C. 255 and 10 U.S.C. 2307 (1970), which provide for advance payments under contracts for property or services where Government's interest is adequately protected, are not available. General Accounting Office suggests that the Office of Education consider changing regulations to allow 80 percent grant share of salaries to be paid pending receipt of employer's share, where employer is Federal agency 567

Appropriated. (*See* **APPROPRIATIONS**)

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc.**)

FUNDS—Continued
Foreign
United States owned currencies
Purchase Page

31 U.S.C. 492a–492c (1970) and Treasury regulations permit purchase of foreign currency "for official purposes." Purchases by State Department officials of piasters from Vietnamese employees prior to evacuation from Vietnam were "for official purposes." Claims now submitted by Vietnamese who turned in piasters but did not receive dollars may be honored, if they can be substantiated 791

Miscellaneous receipts. (*See* **MISCELLANEOUS RECEIPTS**)
Reprogramming. (*See* **APPROPRIATIONS, Reprogramming, Funds**)
Revolving
Augmentation
Sale/transfer of surplus/excess property

Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754

GARNISHMENT
Administrative order
Legal process

If judgment is entered against United States or one of its agencies as employer-garnishee under applicable state law, that judgment may be paid from the Judgment Appropriation created by 31 U.S.C. 724a, if Attorney General certifies that it is in the interest of the United States to pay the judgment 592

Officers and employees
Compensation
Alimony and child support

Environmental Protection Agency negligently failed to withhold specified amounts from employee's salary under a writ of garnishment. Governing state law permits entry of judgment against employer-garnishee under those circumstances. Since 42 U.S.C. 659 mandates that the United States and its agencies will be treated as if they were private persons with regard to garnishment for child support and alimony, employing agency may be found to be liable because, under the same circumstances, private employer would be liable 592

GENERAL ACCOUNTING OFFICE
Contracts
Protests. (*See* **CONTRACTS, Protests**)
Decisions
Effect on entitlements prior to decision
Prospective effect

Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty,

GENERAL ACCOUNTING OFFICE—Continued
Decisions—Continued
Effect on entitlements prior to decision—Continued
Prospective effect—Continued Page
employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified 551
Prospective application
This decision relating to reimbursement of legal fees incurred for real estate transactions is prospective only; it may not be applied where the settlement of the transaction occurred prior to date of decision 561
Reconsideration
New contentions *v.* errors in law or fact
Requests for reconsideration have not shown errors of fact or law in prior decision sustaining protest, and decision's recommendation for corrective action—reopening negotiations—was correct at time it was made. Due solely to amount of time consumed by contractor's, agency's and protester's requests for reconsideration, and in view of approaching expiration of current contract term, GAO now changes recommendation: instead of reopening negotiations, Navy should not exercise two option years in current contract and should resolicit computer time-sharing services competitively. 56 Comp. Gen. 245, modified 694
Original decision of May 19, 1977, is affirmed where facts not discussed in that decision do not alter conclusion that the protester's own similar deviations to the request for proposals (RFP) requirements which it now considers material were accepted by the agency without an RFP amendment, since protester was reasonably on notice that such deviations were not considered by the agency to be either material or a relaxation of requirements, requiring RFP amendment pursuant to Federal Procurement Regulations 1-3.805-1 (1976) 875
Prior recommendation withdrawn
Decision of September 23, 1976, 55 Comp. Gen. 1472, holding that contract for guard services at Navy installation violated 5 U.S.C. 3108, is affirmed, notwithstanding subsequent information which revealed that contract was originally awarded to sole proprietor who held private detective license and who formed corporation several months after award. In view of the time element involved, however, cancellation is no longer feasible. Corporation may be considered for future award if president divests himself of detective license, since corporate charter has been amended to eliminate authority to perform investigative services and corporation has applied for guard service license 225
Request for conference
Denied
Since General Accounting Office Bid Protest Procedures do not explicitly provide for conference when request for conference is made for the first time on reconsideration and because it is in the interest of those procedures to effect "prompt resolution" of reconsideration requests, the request for conference will only be granted where a matter cannot be promptly resolved without conference 875

GENERAL ACCOUNTING OFFICE—Continued
Employees
Oral opinions
Page
Informal oral advice given by GAO staff members to procuring agency representatives is not binding on GAO in event of bid protest 768
Jurisdiction
Contracts
Breach of contract
It is no longer necessary for contracting agencies to submit to General Accounting Office for approval claims for unliquidated damages for breach of contract by Government where contracting agency and contractor mutually agree to settlement, because such settlements are favored by courts and are not viewed as disputes beyond authority of contracting agencies to settle. 47 Comp. Gen. 475 and 44 *id.* 353, modified 289
Contracting officer's affirmative responsibility determination
General Accounting Office review discontinued
Exceptions
Since determination of contractor's responsibility is matter largely within discretion of procuring officials, affirmative determination of responsibility will not be reviewed in absence of allegation of fraud or that definitive responsibility crtieria are not being applied 689
Disputes
Contractor's claim which normally would be resolved through appeal to Armed Services Board of Contract Appeals (ASBCA) under contract disputes clause is properly for consideration if contractor elects to submit claim to General Accounting Office in lieu of pursuing appeal to ASBCA, and no material facts are disputed 340
Grants-in-aid
Grant related procurement complaint is for consideration by General Accounting Office (GAO) in accordance with announcement published at 40 Fed. Reg. 42406. Moreover, consideration is appropriate where, as here, grantor agency has requested advisory opinion 575
Protests generally. (*See* CONTRACTS, Protests)
Small business matters
While ordinarily General Accounting Office will not review determinations of nonresponsibility based on lack of tenacity and perseverance where Small Business Administration (SBA) declines to contest that determination, contracting officer's determination will be reviewed here because SBA timely indicated intent to contest determination but suspended action when protest was filed. In future, SBA should not suspend such action when protest is filed 411
Small business matters
Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied. Modified by 56 Comp. Gen. 649 115
Subcontracts
General Accounting Office (GAO) will consider subcontractor protest where agency directed its prime contractor to conduct award evaluation for first-tier subcontractor 596

GENERAL ACCOUNTING OFFICE—Continued
Protests
Contracts. (*See* CONTRACTS, Protests)
Recommendations
Contracts
Agency review of feasibility of contract termination
Justification for not terminating Page
Where General Accounting Office (GAO) recommended that agency examine feasibility of terminating improperly awarded contract for convenience of Government, agency's response establishes grounds for position that award should not be disturbed due to urgency of supply situation. Therefore, notwithstanding doubts concerning methodology used by contracting officer in arriving at termination for convenience cost estimate, considering all circumstances of case GAO cannot conclude that recommending termination for convenience would be in best interests of Government. 55 Comp. Gen. 1412, modified---------- 296
Agency review of procurement policies and procedures
Recommendations are made that: (1) options in negotiated hospital cleaning contracts and in any similar contracts to be exercised subsequent to June 1977 not be exercised; and (2) Air Force immediately commence study of alternative solutions to problems and difficulties which prompted unauthorized negotiated procurement method. Recommendations are made under Legislative Reorganization Act of 1970. Modified by 56 Comp. Gen. 649---------- 115
Agency review of technical cost justification for award
Notations on successful offeror's cost proposal show that Department of Interior complied with minimal regulatory requirements mandating cost analysis as concerns examination of necessity and reasonableness of proposed costs---------- 725
Amendments
Oral
Confirmation in writing
Request for proposals (RFP) contemplating "all-or-none" award for 12 items was later amended orally to provide for immediate award of basic quantity of 4 items with option for remaining 8. Award based on lowest price for basic plus option quantities was not objectionable where agency had advised offerors that option "would be" exercised and award was consistent with written RFP. However, GAO recommends that in the future, oral amendments to solicitations be confirmed in writing---------- 513
Prior recommendation
Modified
Changed requirements
Prior recommendation in 56 Comp. Gen. 402 that negotiations be reopened because of impossibility of ascertaining price impact of misleading Government estimate is modified to permit agency to not exercise option under current contract and to resolicit offers under new solicitation because of changed Government requirements since issuance of original decision---------- 663

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Prior recommendation—Continued
Modified—Continued
Lapse of time Page
Requests for reconsideration have not shown errors of fact or law in prior decision sustaining protest, and decision's recommendation for corrective action—reopening negotiations—was correct at time it was made. Due solely to amount of time consumed by contractor's, agency's and protester's requests for reconsideration, and in view of approachings expiration of current contract term, GAO now changes recommendation: instead of reopening negotiations, Navy should not exercise two option years in current contract and should resolicit computer time-sharing services competitively. 56 Comp. Gen. 245, modified 694
Recompetition of procurement
Administrative difficulties no deterrent
Possible administrative difficulties attending recompetition of improper award in determining performance period, residual value of offered equipment, and treatment of services already performed by incumbent contractor do not constitute reasons to change prior recommendation for recompetition 505
Reevaluation of best and final offers
Because of analysis of deficiencies, recommendation is made that all offerors be afforded opportunity for another round of negotiations 167
Where request for proposals (RFP) requires offerors to assume file system of incumbent contractor which may not exceed 20,000 files and contracting agency has available data that shows file contains less than 1,500 files and has contained that amount for substantial period of time, such information should have been included in RFP to allow offerors to realistically price proposals. Recommendation is made that negotiations be reopened and another round of best and final offers be received and evaluated. Modified by 56 Comp. Gen. 663 402
After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers—resulting in changes to offeror's proposed cost and fee—General Accounting Office recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date 958
Reevaluation of minimum needs, etc.
Termination of awarded contract if necessary
While negotiations are justified where a procurement is for (1) technical services in connection with highly specialized equipment or where (2) the extent and nature of maintenance and repair of such equipment is not known such circumstances do not of themselves justify procuring the Government's minimum needs from a sole source of supply 434

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Reopen negotations Page
Where Navy accepted proposal which did not meet material RFP computer security requirement, protest is sustained and General Accounting Office recommends that Navy renew competition by reopening negotiations, obtaining revised proposals, and either awarding contract to protestor (if it is successful offeror) or modifying contractor's contract pursuant to its best and final offer (if it remains successful offeror). Modified by 56 Comp. Gen. 694 ---- 245
Resolicitation under revised evaluation criteria
Termination of awarded contract if necessary
In view of deficiencies in procurement, General Accounting Office recommends resolicitation of proposals and, if advantageous to Government, that new contract be awarded and that present contract be terminated ---- 388
Resolicitation under revised specifications
Termination of awarded contract, etc.
Notwithstanding fact that low offeror took no exceptions to specifications, contracting officer improperly allowed change of supplier of surgical blades from Medical Sterile Products to Bard-Parker since she was on notice of possible problem with this item since low offeror raised question during negotiations. Contracting officer disregarded descriptive literature requirement and should have known Medical Sterile Products does not manufacture carbon steel blades. Such substitution is beyond comtemplation of solicitation requirements and is contrary to negotiated procurement procedures. Therefore, recommendation is made that contract be terminated for the convenience of the Government and that outstanding medical kits either undelivered or unordered be resolicited -- 531
Bid prices must be evaluated against total and actual work to be awarded. Measure which incorporates more or less work denies Government benefits of full and free competition required by procurement statutes, and gives no assurance award will result in lowest cost to Government. General Accounting Office recommends agency resolicit requirements on basis of evaluation criteria reflecting best estimate of its requirements. Award should be terminated if bids received upon resolicitation are found to be more advantageous, using revised evaluation criteria ---- 668
Where award under RFP was based on improper post-award discussions, contract should be terminated and requirement resolicited, even where awardee's price was disclosed in debriefing to protester and auction situation may be created, because of primacy of statutory requirements for competition over regulatory prohibition of auction techniques. Furthermore, remedial action is in the Government's best interests to protect confidence in the integrity of competitive procurement system, notwithstanding adverse agency mission and cost impacts ---- 768
Termination of awarded contract if necessary
Where invitation for bids does not clearly state actual needs of agency, thereby providing competitive advantage to bidders with knowledge of what agency will actually require from contractor, General Accounting Office recommends resolicitation of proposal and, if advantageous to Government, that new contract be awarded and that present contract be terminated ---- 497

GENERAL ACCOUNTING OFFICE—Continued
Recommendations—Continued
Contracts—Continued
Specifications
Substitution of modified product experience clause for manufacturer only requirement Page

In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements 912

Termination

When, before award, information which reasonably would impeach small business self-certification of low bidder comes to attention of contracting officer, direct size protest with the Small Business Administration (SBA) should have been filed in order to assure that self-certification process is not abused. In absence of probative evidence, protester has not affirmatively established that small business self-certification was made in bad faith. Recommendation is made that agency consider feasibility of contract termination where SBA, less than 3 weeks after award, found contractor was other than small business because of affiliation with another firm discussed in preaward survey 878

Two-step procurement

Procuring activity's approval in first step of two-step procurement of low bidder's technical proposal offering 16-gage in lieu of "14-gage or thicker" steel rollers without advising other offerors was improper because (1) request for technical proposals clearly required "14-gage or thicker" steel rollers and (2) decision to relax that mandatory requirement for one offeror constituted basic change in the Government's minimum needs that should have been communicated to all offerors. Recommendation is made that step two invitation for bids be canceled and step one phase reopened based on Government's current minimum needs 454

GENERAL SERVICES ADMINISTRATION
Contracts
Obligation of current funds for future needs

Based on rationale employed in companion decision involving similar separate charges scheme, it is concluded that protesting offeror's proposed separate charges are violative of statutory restrictions on appropriations 167

Services for other agencies, etc.
Sale/transfer of surplus/excess property

Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754

GIFTS
Donations. (*See* **DONATIONS**)

GOVERNMENT PRINTING OFFICE
Contracts
Joint Committee on Printing regulation
Interpretation Page
Although procedures for pre-qualification of bidders are restrictive of competition, they are based on agency's reasonable and longstanding interpretation of Joint Committee on Printing regulation and therefore are not subject to legal objection. However, the matter is referred to Committee for determination concerning efficacy of interpretation---------- 953
Invoices
Prompt payment requirement
44 U.S.C. 310 (1970) requires prompt payment by Executive departments and independent establishments of bills rendered by the Public Printer for supplies ordered from the Government Printing Office, in advance of work if so requested, and exempts these bills from audit or certification prior to payment. General Services Administration, to comply with statute, must pay such bills without prepayment audit if audit would delay payment---------- 980
Publications
Credit sales
Except for certain transactions subject to statutory prohibitions against credit sales, Government Printing Office (GPO) may sell publications on credit, through its own facilities, where it determines that extending credit will facilitate sales without increasing administrative costs or price of publications. Under the same circumstances, and subject to the same statutory restrictions, GPO may also arrange with credit card company for sales by credit card. Moreover, sales to company cardholders could include transactions for which GPO is prohibited from making credit sales, since credit here is extended by card company rather than by GPO as vendor---------- 90

GRANTS
To States. (*See* **STATES, Federal aid, grants, etc.**)

HANDICAPPED PERSONS
Facilities, etc.
Architectural Barriers Act
Compliance with standards established under Act
Primary jurisdiction for assuring compliance with standards established under the Architectural Barriers Act of 1968, 42 U.S.C. 4151 (1970), is placed by statute with the General Services Administration (GSA), 42 U.S.C. 4156, and with the Architectural and Transportation Compliance Board, 29 U.S.C. 792 (Supp. IV, 1974). SSA should determine from those entities the proper means of rectifying noncompliance with standards on carpeting, which noncompliance has resulted in handicapped persons requiring the use of powered wheelchairs. Section 236 of the Legislative Reorganization Act, 31 U.S.C. 1176 (1970) is applicable to this recommendation for corrective action---------- 398

HANDICAPPED PERSONS—Continued
Facilities, etc.—Continued
Wheelchairs
Motorized Page

Social Security Administration (SSA) violated in the Southeastern Program Service Center the carpeting standards established under Architectural Barriers Act of 1968 and under Department of Health, Education, and Welfare (HEW) regulations. Prior to this violation, its employee had supplied his own nonmotorized wheelchair and was capable of performing his assigned duties. In order to make the best use of available personnel and in view of the fact that a powered vehicle became necessary only because of the violation of the Act's standards, we will not object to SSA's reimbursing its employee for the cost of acquiring the motorized wheelchair. The wheel chair will then become the Government's property for use solely in the subject building..... 398

Should GSA, pursuant to 42 U.S.C. 4156 (1970), and/or the Architectural and Transportation Compliance Board, pursuant to 29 U.S.C. 792 (Supp. IV, 1974), order the SSA to purchase and have available motorized wheelchairs for other handicapped employees and members of general public to rectify the violation in the Southeastern Program Service Center of the carpeting standards established pursuant to the Architectural Barriers Act of 1968, it may use its appropriations for that purpose. If other action is prescribed, wheelchair purchases are not authorized, regardless of savings in cost..... 398

HAWAII
Station allowances
Military personnel. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States, etc.**)

HEALTH, EDUCATION, AND WELFARE DEPARTMENT
Appropriations
Availability
Relocation expenses for HRA move

Intraagency apportionment by HEW of Health Resources Administration moving costs among appropriations of other HEW constituent agencies which benefitted from move, on basis of amount of additional space made available to each agency, is proper if apportioned part of costs incurred was necessary or incident to meeting space needs of each constituent agency. 35 Comp. Gen. 701 and other similar cases overruled.. 928

Public Health Service. (*See* **PUBLIC HEALTH SERVICE**)
Social Security Administration. (*See* **SOCIAL SECURITY ADMINISTRATION**)

HOLIDAYS
Annual leave charge. (*See* **LEAVES OF ABSENCE, Holidays**)
Compensation. (*See* **COMPENSATION, Holidays**)

HOSPITALS
Management services
Contracts
Advertising *v.* negotiation

Prior decision holding Air Force to be without authority to negotiate contracts for "desired" high level of hospital aseptic management services is modified in view of record reasonably establishing that Air Force's minimum needs can be satisfied only by best service available, and that Air Force cannot prepare adequate specification describing that service so as to permit competition under formal advertising procedures. 56 Comp. Gen. 115, modified..... 649

HOUSING
Loans
Default
Insurance coverage
Advance premiums Page

Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly ---------- 279

HOUSING AND URBAN DEVELOPMENT DEPARTMENT
Defaulted loans. (*See* **HOUSING, Loans, Default**)
Federal Insurance Administrator
Acting
Appointment
Limitation

When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345–3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator ---------- 761

Appointment
Authority

Federal Insurance Administrator, a position estabished under 42 U.S.C. 3533a (1970), requires Presidential nomination and confirmation under Article II, Sec. 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere ---------- 137

Compensation
Past payments
Prior to confirmation

Rejection by Conference Committee of Senate amendment to require confirmation of Federal Insurance Administrator does not constitute waiver of constitutional right and duty to advise and consent. Secretarial authority to appoint, including officers, under 42 U.S.C. 3535(c) (1970) does not include Insurance Administrator. However, no exception will be taken to past compensation of incumbent or for reasonable period after date of this decision to allow time for presentation of his name for Senate confirmation ---------- 137

Deputy
Status and authority

Although the Acting Insurance Administrator was appointed Deputy Administrator on May 23, 1977, which job requires the Deputy to act in place of the Administrator during his absence or inability to act, this duty may not be performed until a new Administrator has been confirmed since maximum statutory period of 30 days to fill such vacancy under the Vacancies Act has already been exhausted ---------- 761

HOUSING AND URBAN DEVELOPMENT DEPARTMENT—Continued
Federal Insurance Administrator—Continued
Validity of decisions
Unauthorized period of service Page

Validity of decisions made by the Acting Federal Insurance Administrator during period he was not authorized to hold position is in doubt and may have to be resolved ultimately by courts. Secretary is advised to ratify those decisions with which she agrees to avoid confusion about their binding effect in future 761

Loans and grants
Mobile home loan insurance
"In advance" premiums

Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly 279

Use of HUD community block grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States 645

HUSBAND AND WIFE
Dependents
Family allowances
Separation
Type I

Family Separation Allowance, Type I, under 37 U.S.C. 427(a) (1970) is not authorized to an otherwise eligible member who is legally separated from his spouse since his separation from her results from personal considerations, not military assignment. 43 Comp. Gen. 332, overruled in part 805

Dual rights where both in military or Federal service
Dislocation allowance

Where a permanent change of station requires the disestablishment of a household in one place and a reestablishment of the household in another, a dislocation allowance is authorized, except for members

HUSBAND AND WIFE—Continued
Dual rights where both in military or Federal service—Continued
Dislocation allowance—Continued Page
without dependents who are assigned to Government quarters. In no event can more than one dislocation allowance be paid where only one movement of a household is required. However, where both members of the uniformed services married to each other qualify for a dislocation allowance upon a permanent change of station but only one movement of the household occurs, they may elect to be paid the greater amount of the two entitlements 46
Separation agreements
Status
Relocation expenses incident to transfer
Transferred employee sold interest in residence to his estranged wife. Employee may be reimbursed legal expenses for preparation of deed and preparation of affidavit of title since the sale of interest in a residence constitutes a residence transaction within the meaning of Federal Travel Regulations (FPMR 101–7) para. 2–6.2c. Reimbursement for costs sf attorney's attendance at closing is not allowed as such expense is of an advisory nature 862

INDIAN AFFAIRS
Bureau of Indian Affairs
Attorney fees, etc.
Administrative proceedings or judicial litigation
Snyder Act, 25 U.S.C. 13, provides discretionary authority for Secretary of the Interior to use appropriated funds to pay for attorneys' fees and related expenses incurred by Indian tribes in administrative proceedings or judicial litigation, for purpose of improving and protecting resources under jurisdiction of Bureau of Indian Affairs. Attorneys' fees and expenses incurred in judicial litigation may only be paid where representation by Department of Justice is refused or otherwise unavailable, including situation where separate representation is mandated by Court 123
Determination—Secretary of Interior
Basis of financial status of tribe
Secretary of Interior is not obligated to pay for attorneys' fees and related expenses incurred by Indian tribes, but may, within his broad discretion to make expenditures he deems necessary for protection of Indian resources, make such payments on basis of factors he concludes should be considered, including relative impecuniousness of tribe. Determinations, however, should be made on uniform basis. B–114868, May 30, 1975, modified 123
Contracting with Government
Preference to Indian concerns
Agency's internal policy memorandum implementing "Buy Indian Act," which allegedly required sole-source negotiation with protester (Indian concern), does not establish legal rights and responsibilities such as to make actions taken in violation of memorandum illegal 178

INDIAN AFFAIRS--Continued
Contracts
Bureau of Indian affairs
Advertising *v.* negotiation Page
No clear abuse of agency discretion as to whether to invoke authority to negotiate a contract without competition with an Indian concern under "Buy Indian Act" (25 U.S.C. 47) is found where agency relied on Tribal resolution recommending procurement by formal advertising... 178
Tribal rights
Indian and non-Indian lands acquired for Oahe Dam
Grazing rights
As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83-776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B-142250, May 2, 1961, overruled..... 655

INSURANCE
Premiums
Mobile home loan insurance
As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified..... 279
Although payment of insurance premiums in advance is required in order to maintain ongoing effective insurance coverage for mobile home loan insurance under 12 U.S.C. 1703, payment of insurance premiums constitutes continuing obligation of lender that cannot be terminated prior to end of term of underlying loan. HUD has authority to set off delinquent unpaid insurance premiums constituting existing debt presently due and payable to United States by lender against claims otherwise payable to lender, pending bankruptcy adjudication as to propriety of final setoff but may not withhold estimated future premiums. 55 Comp. Gen. 658 is modified accordingly..... 279

INTEREST
Federal grants, etc., to States and their subdivisions
Retention of interest earned
State entities
Effective date
State entities are entitled to retain interest earned on Federal grants from October 16, 1968, the effective date of section 203 of the Intergovernmental Cooperation Act of 1968 that so provides, or from the date its status as a State entity was created, if later..... 353

INTEREST—Continued
Payments on retroactive rate increases
Air carriers
Overseas Page
Payment of interest by the Government on retroactive increases in rates granted to overseas air carriers by the Civil Aeronautics Board is limited by the contract provisions and by the dates the increases are announced ---- 55

INTERIOR DEPARTMENT
Appropriations. (*See* **APPROPRIATIONS, Interior Department**)
Bureau of Indian Affairs. (*See* **INDIAN AFFAIRS, Bureau of Indian Affairs**)
Contracts
Costs
Analysis
Evaluation factors
Notations on successful offeror's cost proposal show that Department of Interior complied with minimal regulatory requirements mandating cost analysis as concerns examination of necessity and reasonableness of proposed costs ---- 725
Fish and Wildlife Service
Real property acquisition
Procedures
United States Fish and Wildlife Service may enter into purchase agreement with owner of real property in which even though settlement is held and legal title to the land is vested in the Government, it agrees to landowner's request to disburse the purchase price to the vendor over a period not to exceed 4 years, provided it obligates the full purchase price from appropriations available for such purpose from the fiscal year in which the options to purchase are exercised by the Service to meet a need of that fiscal year ---- 351
Mining Enforcement and Safety Administration
National Mine Health and Safety Academy
Student exchange program
Mining Enforcement and Safety Administration (MESA) has authority under Federal Coal and Metal Acts to enter into agreements with colleges whereby college students enrolled in mining-related programs of study would receive training at MESA's National Mine Health and Safety Academy on a fully reimbursable basis. While statutes do not expressly provide for training of persons not presently affiliated with Government agencies or mining industry, proposed agreements for training of college students in mining-related programs are consistent with broad remedial purposes of statutes ---- 817

INTERNAL REVENUE SERVICE
Employees
Liability for Government losses
Tax suit damages and costs
The liability of a Government officer or employee for damages (actual and punitive) and costs under section 7217, Internal Revenue Code (I.R.C.) (1954), for unauthorized disclosure of tax returns or tax return information, may be assumed by the United States under section 7423(2), I.R.C. (1954), and paid from general operating appropriations, when it is administratively determined that the unauthorized disclosure was

INTERNAL REVENUE SERVICE—Continued
Employees—Continued
Liability for Government losses—Continued
Tax suit damages and costs—Continued Page
made while the officer or employee was acting in the due performance of his duties in matters relating to tax administration as defined in section 6103(b)(4), I.R.C. (1954). 40 Comp. Gen. 95 and other similar decisions, overruled 615
Although section 7423(2), I.R.C. (1954), does not protect Government officers or employees whose official duties are not related to matters of tax administration as defined in section 6103(b)(4), I.R.C. (1954), their liability for damages and costs under section 7217, I.R.C. (1954), may be assumed under general rule that expenses incurred by an officer or employee in defending a suit arising out of the performance of his official duties should be borne by the United States. The availability of appropriations may depend, however, upon the existence of specific statutory language authorizing the payment of judgments, since general operating appropriations normally may not be used to pay judgments in the absence of specific authorization. 40 Comp. Gen. 95 and other similar decisions, overruled 615
The liability of a Government officer or employee for punitive damages under section 7217, I.R.C. (1954), may be assumed by the United States under section 7423(2), I.R.C. (1954), provided it is administratively determined that the officer or employee was acting in the due performance of his official duties at the time the unauthorized disclosure was made. 40 Comp. Gen. 95 and other similar decisions, overruled 615
Tax matters
Disability retired pay
Excluded from gross income for tax purposes
Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement 740
Summons
Fees
Searching for and producing records
In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons 36

INVOICES (*See* VOUCHERS AND INVOICES) Page

JUDGMENTS, DECREES, ETC.
Courts. (*See* COURTS, Judgments, decrees, etc.)

LABOR DEPARTMENT
Bureau of Labor Statistics
Consumer price index
Food prices
Subsistence
Relocation expenses
Transferred employee seeking reconsideration of General Accounting Office decision limiting reimbursement of temporary quarters subsistence expenses to Department of Labor Statistics for family of four persons submits further evidence concerning family composition. Since older child is age 17, maximum allowable subsistence amount may be adjusted upward in accordance with Bureau of Labor Statistics equivalence scales. 55 Comp. Gen. 1107 (1976) amplified---------- 604

LANDS
Land and Water Conservation Act
Appropriations
Grants
Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available---------- 31

LEASES
Automatic Data Processing Systems
Equipment. (*See* EQUIPMENT, Automatic Data Processing Systems, Leases)

LEAVES OF ABSENCE
Administrative leave
Acclimatization rest. (*See* LEAVES OF ABSENCE, Administrative leave, Rest periods, After overseas travel)
Administrative determination
Where Federal Aviation Administration has authorized travel by common carrier to training course based on its determination that travel by privately owned vehicle is not advantageous to the Government, it is not an appropriate exercise of administrative discretion to excuse employees from duty without charge to leave for the excess traveltime occasioned by the employees' election as a matter of personal preference to travel by privately owned vehicle---------- 865
Rest periods
After overseas travel
Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination---------- 629

LEAVES OF ABSENCE—Continued

Annual

Charging

Travel time excessive Page

Because employing agency has discretion to charge transferred employee for excess time consumed by employee's failure to travel on any day, agency may require employee to submit accurate time and attendance reports for each day traveled 104

Where an employee delays his travel from Friday in order to travel during regular duty hours on Monday in disregard of the "2-day per diem rule," his per diem is limited to that which would have been payable if he had begun his return travel following the completion of work on Friday and continued to destination without delay 847

Holidays

Charging precluded

Within regularly scheduled tour of duty

Employees receiving premium pay

Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified 551

Premium pay

Regularly scheduled tour of duty

In 54 Comp. Gen. 662 (1975) it was held that employees receiving premium pay under 5 U.S.C. 5545(c)(1) should have leave restored to them which was charged to them for absences on holidays. That decision is overruled since absences within tours of duty should be charged to leave and, contrary to statement of VA Hospital Director, duty on holidays was included in determining premium pay rates of employees. However, no action is necessary where leave was restored and included in lump-sum payments or such leave was used by employees pursuant to 54 Comp. Gen. 662 since such actions were proper when done under decision 551

Restored

Substitution of restored leave for annual leave. (*See* **LEAVES OF ABSENCE, Annual, Substitution for restored leave**)

Substitution for restored leave

Employee with restored annual leave requested that absence be charged to restored leave account. Absence was instead charged to annual leave and employee forfeited restored leave at end of 2 years. Agency erred in failing to charge restored leave account and should correct its records by substituting restored leave for annual leave 1014

Temporary duty

Travel expense reimbursement. (*See* **TRAVEL EXPENSES, Leaves of absence, Temporary duty, After departure on leave**)

LEAVES OF ABSENCE—Continued
Forfeiture
Scheduling requirement Page
Annual leave forfeited at end of 1974 leave year allegedly due to exigencies of the public business but not scheduled in advance may not be restored under 5 U.S.C. 6304(d)(1), even if employees did not have actual notice of scheduling requirement and it was known in advance that leave would not be granted if scheduled. Scheduling is a statutory requirement which may not be waived and failure to give actual notice of this requirement is not administrative error since employees are charged with constructive notice of it 470
Holidays
Leave without pay before and after holiday
Employee in a pay status for the day either immediately preceding or succeeding a holiday is entitled to regular pay for the holiday regardless if whether he is in an authorized leave-without-pay status or in an absent-without-leave status for the corresponding day immediately succeeding or preceding the holiday. 13 Comp. Gen. 207 (1934) overruled. 13 Comp. Gen. 206 (1934), 16 *id.* 807 (1937), 18 *id.* 206 (1938), and 45 *id.* 291 (1965) modified 393
Home leave. (*See* **OFFICERS AND EMPLOYEES, Overseas, Home leave**)
Interruption
Temporary duty
Travel expenses. (*See* **TRAVEL EXPENSES, Leaves of absence, Temporary duty, After departure on leave**)
Military personnel
Payments for unused leave on discharge, etc.
Adjustment on basis of record correction
Reservists who receive payments for unused accrued leave under 37 U.S.C. 501 (1970) upon separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be recredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. 501(f) (1970) 587
Terminal leave
State government employment
Should a commissioned Officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b) (1970), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State government, the provisions of 5 U.S.C. 5534a (1970), which authorizes dual employment during terminal leave in certain other circumstances, would not exempt the member from those sanctions 855
Recording requirements
Hours of departure and return to duty
Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded 104

LEAVES OF ABSENCE—Continued
Time and attendance reports
Submission with travel vouchers Page
Because employing agency has discretion to charge transferred employee for excess time consumed by employee's failure to travel on any day, agency may require employee to submit accurate time and attendance reports for each day traveled 104
Traveltime
Excess
Annual leave charge
Where Federal Aviation Administration has authorized travel by common carrier to training course based on its determination that travel by privately owned vehicle is not advantageous to the Government, it is not an appropriate exercise of administrative discretion to excuse employees from duty without charge to leave for the excess traveltime occasioned by the employees' election as a matter of personal preference to travel by privately owned vehicle 865
Rest periods
Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination 629

LEGISLATION
Statutory construction. (*See* **STATUTORY CONSTRUCTION**)

LICENSES
Federal, State, etc.
Government contractors
Where agency issues request for proposals which contains broad, general requirement that contractor obtain appropriate licenses and later during course of negotiations modifies its requirement so as to require a specific license, agency did not act improperly in rejecting offer of firm which refuses to apply for required specific license 494
Offeror qualifications
Negotiated contracts. (*See* **CONTRACTS, Negotiation, Offers or proposals, Qualifications of offerors**)

LITE (Legal Information Through Electronics)
Air Force project
Contracts
Buy American Act
A contract for conversion and storage of data to machine (computer) readable form is not manufacturing for the purpose of the Buy American Act 18

LOANS
Government insured
Authority
Small business investment companies (SBICs) are not eligible to participate as guaranteed lenders in either Small Business Administration's (SBA) or Farmers Home Administration's (FmHA) loan programs. As stated in 49 Comp. Gen. 32, legislative history of Small Business Investment Act demonstrates congressional intent that SBICs operate

LOANS—Continued
Government insured—Continued
Authority—Continued Page
independently of other Government loan programs. Nothing in SBIC Act or Consolidated Farm and Rural Development Act, which established FmHA's authority to guarantee loans, or legislative history of either, supports SBA's position that SBICs should now be permitted to participate as guaranteed lenders in these loan programs---------- 323

LOBBYING
Federal anti-lobbying statutes
Limited to Federal legislation
Comments in "Breeder Briefs" newsletter (concerning Clinch River Breeder Reactor Project) urging readers to contact Congressmen in support of Project, do not violate Federal anti-lobbying statutes since statutes are conditioned on use of appropriated funds, and appropriated funds were not involved either in publication of newsletter or in payment of salary of Project official who made comments---------- 889

MARITIME MATTERS
Vessels
Crews. (*See* **VESSELS, Crews**)
Sales
Minimum acceptable bid price
Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price---------- 230
Requirement that minimum acceptable price be determined on "current" basis and that evaluation of bids not be based on speculative factors does not preclude consideration of changing and projected market conditions in establishing minimum acceptable price---------- 230

MEETINGS
Rental of conference rooms
Prohibition
Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn---------- 572

MILEAGE Page

Helicopter

Helitack mission formula

Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended 671

Proration formula

Air travel in violation of Fly American guidelines

In the absence of agency instructions adopting a fare proration formula for determining traveler's liability for scheduling of travel in violation of the Fly America guidelines, this Office will apply a mileage proration formula calculating the traveler's liability based on certificated U.S. air carriers' loss of revenues 209

Travel by privately owned automobile

Administrative approval

Advantage to Government

Employee's request to use privately owned vehicle (POV) as advantageous to Government for temporary duty travel was denied although official told him it would be approved. Arbitrator held that employee should be paid as though request had been approved since agency's failure to act on it within time frame in its regulations and official's statement amounted to approval. Award may not be implemented since no determination was made that POV is advantageous to Government on basis of cost, efficiency or work requirements as required by Federal Travel Regulations 131

Although agency official indicated to an employee that his request to use POV as advantageous to the Government for temporary duty travel would be approved, such statement does not bind Government since official had no authority to approve POV use and Government is not estopped from repudiating advice given by one of its officials if that advice is erroneous 131

Daily mileage allowance

Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded 104

Compliance with FTR para. 1–11.5a (May 1973), which specifies voucher requirements, is not waived by FTR para. 2–2.3d(2), which fixes maximum allowable per diem on basis of minimum driving distance of 300 miles per day, since latter provision is for application when it appears from properly executed and documented voucher that traveler failed to maintain prescribed minimum mileage 104

MILITARY PERSONNEL Page

Allowances

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

Station. (*See* **STATION ALLOWANCES**)

Annuity election for dependents

Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

Contracting with Government

Retired members. (*See* **MILITARY PERSONNEL, Retired, Contracting with Government**)

Correction of military records. (*See* **MILITARY PERSONNEL, Record correction**)

Cost-of-living allowances. (*See* **STATION ALLOWANCES, Military personnel, Excess living costs outside United States**)

Dual employment

Holding two offices. (*See* **COMPENSATION, Double, Holding two offices**)

Dual payments

Hazardous duty

A member of the uniformed services is entitled to dual payments of hazardous duty incentive pay, provided he is required to perform specific multiple hazardous duties in order to carry out his assigned mission and otherwise meets the criteria established by departmental regulations. 37 U.S.C. 301(e) (1970) and Executive Order No. 11157, June 22, 1964, as amended. However, such duties need not be performed simultaneously or in rapid succession as was stated in 44 Comp. Gen. 426 and 43 *id.* 667 which, to that extent, will no longer be followed 983

Air Force pararescue team members may qualify for hazardous duty incentive pay as aerial crewmembers, provided they are an integral part of an aircrew contributing to the safe and efficient operation of an aircraft, and their flight duties are not merely incidental to their duties involving parachute jumping. 37 U.S.C. 301(a) (1970) 983

While the Department of Defense Military Pay and Allowances Entitlements Manual currently prohibits dual payment of hazardous duty incentive pay to pararescue team members who perform aircrew duties and no other hazardous duty in addition to flying and parachute jumping, those regulations may be amended to authorize dual incentive payments to them; however, whether the regulations should be so amended is ultimately a matter for evaluation and determination by appropriate Defense Department authorities 983

Education. (*See* **EDUCATION**)

Family separation allowances. (*See* **FAMILY ALLOWANCES, Separation**)

Holding two positions

Civil office prohibition

Should a commissioned Officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b) (1970), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State government, the provisions of 5 U.S.C. 5534a (1970), which authorizes dual employment during terminal leave in certain other circumstances, would not exempt the member from those sanctions 855

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

MILITARY PERSONNEL—Continued
Pay
Retired. (*See* **PAY, Retired**)
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Quarters allowance. (*See* **QUARTERS ALLOWANCE**)
Record correction
Discharge change as entitlement to pay, etc.
Educational assistance allowance adjustment Page

Whether or not erroneous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters 587

Overpayment liability
Interim Reserve pay and allowances

Army members separated from extended active duty, who thereafter earn military pay and allowances as members of Reserve components, but whose records are corrected to reflect continued active duty with no break in service, are liable to repay such interim Reserve pay and allowances 587

Payment for unused leave on discharge

Reservists who receive payments for unused accrued leave under 37 U.S.C. 501 (1970) upon separation from active duty, but whose records are corrected to expunge the fact of such separation, are liable to repay amounts received for unused leave; however, they are entitled to be recredited for days of unused leave up to the 60-day maximum prescribed by 37 U.S.C. 501(f) (1970) 587

Where Army officers involuntarily separated from active duty subsequently obtain records correction to show continuation on active duty, readjustment payments made upon separation under 10 U.S.C. 687 (together with payments received for accrued leave on separation and for interim Reserve duty) are thereby rendered erroneous, and such payments may therefore be considered for waiver under 10 U.S.C. 2774 587

Readjustment payments

Army Reserve officers involuntarily separated from active duty, with readjustment payments computed under 10 U.S.C. 687 (1970), whose military records are subsequently corrected to show continuation on active duty, are liable to repay such readjustment payments to the United States 587

Payment basis
Interim civilian earnings

Army members separated from but later retroactively restored to active duty by administrative record correction action (10 U.S.C. 1552 (1970)) thereby become entitled to retroactive payment of military pay and allowances; and while interim civilian earnings may properly be set off against amounts due members, such civilian earnings are deductible only from net balance due members after setoff of their debts to the Government and are not recoupable in excess of that net balance 587

MILITARY PERSONNEL—Continued
Retired
Contracting with Government
Negotiations preparatory to contract Page
Participation in preproposal conference of retired Air Force General to ascertain if his retired status affected his acceptability as project manager is not a violation of 18 U.S.C. 281, and implementing regulations, in absence of further contacts for selling purposes, since contact between retired officers and former branch of military is permissible in nonsales environment and mere association of retired officer's name with particular company is not sufficient to establish violation ---------- 188
What constitutes selling
Where a contractor, doing business with Department of Defense agency, sponsors and pays for a social function at which retired Regular officers of the uniformed services employed by the contractor make contact with departmental personnel who are in a position to influence procurements by the Department, such contacts will be viewed as establishing a *prima facie* case that such officers are "selling" within the meaning of 37 U.S.C. 801(c) and they will be subject to forfeiture of retired pay ---------- 898
Retired pay. (*See* **PAY, Retired**)
Retirement
Effective date
Active duty after retirement
***De facto* status**
Member, retired for disability who has notice of such retirement on or before the designated retirement date, is considered retired on the designated date even though delivery of retirement orders is delayed beyond the retirement date. This is so even if he performs additional days of active duty subsequent to retirement date and received payment therefor. Such delay does not in any way add to member's retirement rights in absence of specific active duty orders covering the additional period of service ---------- 98
Station allowances. (*See* **STATION ALLOWANCES, Military personnel**)
Status
Officer appointed County Clerk
Should a commissioned Officer of the Regular Air Force on terminal leave pending retirement accept a civil office under a State government or perform the duties of the office during such leave, the sanctions of 10 U.S.C. 973(b) (1970), which provides for termination of his military appointment, would apply to him. Since the civil office is under a State government, the provisions of 5 U.S.C. 5534a (1970), which authorizes dual employment during terminal leave in certain other circumstances, would not exempt the member from those sanctions ---------- 855
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)
Survivor Benefit Plan. (*See* **PAY, Retired, Survivor Benefit Plan**)

MILITARY PERSONNEL—Continued
Telephone services
Private residences Page
Claim that reimbursement of telephone reconnection charges should be paid under same authority as other utility charges incurred incident to a required relocation of Air Force member, not constituting a permanent change of station, may be paid, since it is doubtful that Congress intended to preclude payment in such cases when enacting 31 U.S.C. 679 (1970), which precludes the payment of any expense in connection with telephone service installed in a private residence. Decisions inconsistent with the foregoing will not be followed in the future. 55 Comp. Gen. 932, 54 *id.* 661 and B–141573, January 5, 1960, overruled 767
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Military personnel**)

MINING ENFORCEMENT AND SAFETY ADMINISTRATION (MESA) (*See* **INTERIOR DEPARTMENT, Mining Enforcement and Safety Administration**)

MISCELLANEOUS RECEIPTS
Special account *v.* miscellanous receipts
Collections
Commerce Department services
Administrative overhead applicable to supervision by Department of Commerce of service provided to other Federal agency is required to be included as part of "actual cost" under section 601 of Economy Act, 31 U.S.C. 686 (1970), and must therefore be paid by agency to which service is rendered. Above is applicable whether amounts collected for Departmental overhead are deposited to miscellaneous receipts in General Fund of Treasury or credited to Department of Commerce General Administration appropriation 275

MOBILE HOMES
Loans. (*See* **HOUSING, Loans**)
Transportation
Damage, loss, etc.
Carrier's liability
The law places burden on carrier to establish not only the general tendency of a mobile home to be damaged in transit, but that damage was due solely to that tendency 357

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
Employees
Compensation
Limitation
Agency questions whether pay of crews of vessels set under 5 U.S.C. 5348 (Supp. V, 1975) is subject to ceiling of grade GS–18 as provided under 5 U.S.C. 5363 (1970). Since we find that pay for crews of vessels is fixed by administrative action, we hold that such pay is subject to section 5363 and may not exceed the rate for grade GS–18 870

NIGHT WORK
Compensation. (*See* **COMPENSATION, Night work**)

NONDISCRIMINATION
Discrimination alleged
Basis of physical handicap Page
Agreement between Federal Aviation Administration and union (PATCO) provided that discrimination would not be used in the agency's awards program. Arbitrator found that employee had been discriminated against by supervisor in violation of agreement and directed that cash performance award be given to employee. Payment of cash award ordered by arbitrator would be improper since granting of awards is discretionary with agency, agency regulations require at least two levels of approval, and labor agreement did not change granting of awards to nondiscretionary agency policy 57

OFFICERS AND EMPLOYEES
Administrative leave. (*See* **LEAVES OF ABSENCE, Administrative leave**)
Appointments. (*See* **APPOINTMENTS**)
Back pay. (*See* **COMPENSATION, Removals, suspensions, etc., Back pay**)
Back Pay Act
Applicability
Promotions
Temporary
Wage board employees
United States Information Agency questions whether bargaining agreement provision providing higher pay for employees temporarily assigned to higher grade positions would provide a basis for paying higher rates to prevailing rate employees while temporarily assigned to higher grade General Schedule positions. Such employees may not be paid for details. However, they may be temporarily promoted to higher grade General Schedule positions with higher pay. Prior denials of such pay may be corrected under Back Pay Act, 5 U.S.C. 5596, and such employees may receive retroactive temporary promotions and backpay 786
Compensation. (*See* **COMPENSATION**)
Debt collections. (*See* **DEBT COLLECTIONS**)
De facto
Compensation
Reasonable value of services performed
It is not necessary for this Office to recover salary payments made to Acting Administrator during period he was not entitled to hold that position since incumbent acted with full knowledge of the Secretary and the President and may be considered a *de facto* employee, entitled to reasonable value of his services which equates to same amount as his salary 761
Details. (*See* **DETAILS**)
Disputes
Arbitration
Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976) 427
Downgrading
Saved compensation. (*See* **COMPENSATION, Downgrading, Saved compensation**)

OFFICERS AND EMPLOYEES—Continued
Ethics
Procurement employees
Evaluators Page
Notwithstanding position that enforcement of standards of conduct is the responsibility of each agency, General Accounting Office has, on occasion, offered views as to considerations bearing on alleged violations of standards as they relate to propriety of particular procurement---- 580
Executive Schedule rate employees
Governor and Deputy Governors
Farm Credit Administration
Compensation of Deputy Governors, Farm Credit Administration, is authorized to be fixed at not to exceed the maximum scheduled rate of General Schedule. Such compensation, although not limited by compensation of Governor and not subject to classification provisions, may not exceed rate for level V of Executive Schedule, since effect of 5 U.S.C. 5308 is to limit maximum scheduled rate of General Schedule to level V rate. Higher amounts shown on General Schedule are merely projections of what rates would be without this limitation---- 375
Foreign differentials and overseas allowances. (*See* **FOREIGN DIFFERENTIALS AND OVERSEAS ALLOWANCES**)
Handicapped
Attendants
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem, Attendants, Handicapped employees**)
Travel expenses. (*See* **TRAVEL EXPENSES, Private parties, Attendants, Handicapped employees**)
Household effects
Storage. (*See* **STORAGE, Household effects**)
Liability
Judgments against. (*See* **COURTS, Judgments, decrees, etc., Against officers and employees**)
Moving expenses
Relocation of employees, (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Night work
Compensation. (*See* **COMPENSATION, Night work**)
Oral advice of GAO staff members not binding
Contract protests. (*See* **CONTRACTS, Protests, Oral advice of GAO staff members not binding**)
Overseas
Home leave
Erroneously granted and used
Restoration of annual leave charged
Federal Aviation Administration (FAA) employee who transferred from Puerto Rico to Alaska was erroneously granted home leave. Agency charged employee's leave account with 104 hours annual leave and made deduction from salary for 18 hours of leave without pay. Arbitrator found this a violation of collective bargaining agreement and directed FAA to restore annual leave and reimburse salary. Award may be implemented since employee is entitled to waiver of repayment of 122 hours of home leave erroneously granted and used (5 U.S.C. 5584)---- 824
Overtime. (*See* **COMPENSATION, Overtime**)
Per diem. (*See* **SUBSISTENCE, Per diem**)

OFFICERS AND EMPLOYEES—Continued
Premium pay
Leaves of absence
Holidays Page

In 54 Comp. Gen. 662 (1975) it was held that employees receiving premium pay under 5 U.S.C. 5545(c)(1) should have leave restored to them which was charged to them for absences on holidays. That decision is overruled since absences within tours of duty should be charged to leave and, contrary to statement of VA Hospital Director, duty on holidays was included in determining premium pay rates of employees. However, no action is necessary where leave was restored and included in lump-sum payments or such leave was used by employees pursuant to 54 Comp. Gen. 662 since such actions were proper when done under decision 551

Although the rates of premium compensation established at 5 C.F.R. 550.144 are determined on the assumption that employees will in fact work on holidays falling within their regularly scheduled tours of duty, employees receiving premium compensation under 5 U.S.C. 5545(c)(1) at rates prescribed at 5 C.F.R. 550.144 may nonetheless be excused from duty on such holidays without charge to leave where it has been administratively determined that their services are unnecessary. This decision is prospective in application. 54 Comp. Gen. 662 (1975) overruled; 35 Comp. Gen. 710 (1956) modified 551

Prevailing rate employees
Compensation. (*See* **COMPENSATION, Wage board employees, Prevailing rate employees**)
Promotions
Compensation. (*See* **COMPENSATION, Promotions**)
Temporary
Detailed employees

Turner-Caldwell, 55 Comp. Gen. 539 (1975), allowed retroactive temporary promotions with backpay for employees improperly detailed to higher grade positions for extended periods. The Civil Service Commission requested a review of this decision. On reconsideration, we find the interpretation proper and affirm *Turner-Caldwell* and *Marie Grant*, 55 Comp. Gen. 785 (1976) 427

Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a) 432

Federal Labor Relations Council requests decision on legality of arbitration award of backpay for difference in pay between grades WG–1 and WG–2 for custodial employees detailed for extended periods to WG–2 positions between October 10, 1972, and November 11, 1973. Award may be implemented if modified to conform with requirements of our *Turner-Caldwell* decisions, 55 Comp. Gen. 539 (1975) and 56 Comp. Gen. 427 (1977), which were issued subsequent to the date of the award 732

OFFICERS AND EMPLOYEES—Continued
Promotions—Continued
Temporary—Continued
Detailed employees—Continued Page

Federal Trade Commission (FTC) questions whether it may grant a retroactive temporary promotion for an extended detail of a GS-14 competitive service employee to a GS-15 Schedule C position where an extension of the detail was not obtained. Since General Schedule position at grade GS-15 and below in both the competitive service and excepted service are covered by our *Turner-Caldwell* decision, 55 Comp. Gen. 539 (1975), FTC has authority to grant the employee a retroactive temporary promotion and backpay pursuant to the conditions set forth in that decision 982

Quarters allowance
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters**)
Relocation expenses
Transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)
Removals, suspensions, etc.
Compensation. (*See* **COMPENSATION, Removals, suspensions, etc.**)
Retirement. (*See* **RETIREMENT, Civilian**)
Salary retention. (*See* **COMPENSATION, Downgrading, Saved compensation**)
Service agreements
Failure to fulfill contract
Separated for deficiencies in work performance

Employee appointed as road locator in Alaska was unable to perform rigorous duties of position and was terminated prior to end of term of Service Agreement. Whether separation was for reasons beyond employee's control and acceptable to agency is for agency determination. Record here supports inference that separation was for benefit of Government and for reasons beyond employee's control. Voucher for return travel to Ithaca, New York, may be certified for payment upon such determination 606

Travel expenses. (*See* **TRAVEL EXPENSES, Failure to fulfill contract**)
Overseas employees
Failure to fulfill contract
Travel expenses. (*See* **TRAVEL EXPENSES, Overseas employees, Failure to fulfill contract**)
Severance pay
Compensation. (*See* **COMPENSATION, Severance pay**)
Eligibility
Temporary appointment subsequent to reduction-in-force

Upon involuntary separation by reduction in force from permanent position, employee was appointed without break in service to full-time temporary position with another agency. Employee is entitled to have severance pay computed on basis of basic pay at time of separation from permanent position, but years of service and age should be determined as of termination of temporary position because full-time temporary appointment is employment with a definite time limitation within meaning of 5 U.S.C. 5595(a)(2)(ii) 750

OFFICERS AND EMPLOYEES—Continued
Subsistence
Per diem. (*See* **SUBSISTENCE, Per diem**)
Relocation expenses for transferred employees. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Temporary quarters, Subsistence expenses**)
Supergrades
Promotions
Temporary
Detailed employees Page

Employee at GS–15 level was detailed to GS–17 position for more than 120 days without agency request for Civil Service Commission (CSC) approval as required by regulations. Employee was subsequently permanently promoted to the GS–17 position with CSC approval. Employee is not entitled to retroactive temporary promotion for period of detail since the law requires CSC approval of appointee's qualifications for promotion to GS–17 level. Subsequent approval of employee's qualifications for permanent position by CSC does not constitute endorsement of his qualifications for promotion during his detail. Moreover, CSC regulations require prior approval before appointments may be made to supergrade positions covered by 5 U.S.C. 3324(a)..... 432

Training
Expenses
Meals and rooms at headquarters

Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn..... 572

Travel and transportation

Relocation allowances paid to employee transferred for training purposes are strictly limited by 5 U.S.C. 4109. Fact that cognizant agency officials erroneously authorized reimbursement of expenses beyond those permitted by statute will not form basis for estoppel against Government. Although estoppel has been found in some cases where there is contractual relationship between Government and citizen, same doctrine is not applicable here because relationship between Government and its employees is not contractual, but appointive, in strict accordance with statutes and regulations..... 85

Transfers
Relocation expenses
Administrative determinations
Budget constraints

An employee was denied relocation expenses incident to transfer from Philadelphia to Mechanicsburg, Pennsylvania, on the basis that budget constraints precluded reimbursement. The record fails to show that the agency made a determination as to whether transfer was in Government's interest. Federal Travel Regulations, para. 2–1.3 (May

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Administrative determinations—Continued
Budget constraints—Continued Page

1973), require that determination be made as to whether transfer is in Government's interest or primarily for convenience or benefit of employee or at his request. Our decisions provide guidelines to assist agencies in reaching such determinations. Her, employee is not entitled to reimbursement for relocation expenses since he applied for and otherwise took initiative in obtaining transfer 709

Attorney fees
House purchase and/or sale

Necessary and reasonable legal fees and costs, except for the fees and costs of litigation, incurred by reason of the purchase or sale of a residence incident to a permanent change of station constitute "similar expenses" within the meaning of Federal Travel Regulations para. 2–6.2c (May 1973). Such costs may be reimbursed, provided they are within the customary range of charges for such services in the locality of the residence transaction. B–161891, August 21, 1967; 48 Comp. Gen. 469 (1969); and similar cases no longer to be followed regarding attorney fees 561

Preparing conveyances, other instruments, and contracts
Purchase and/or sale of house not consummated

Because legal fees and costs associated with unsuccessful efforts to sell are analogous to statutorily unreimbursable losses due to market conditions, rule denying payment of such fees and costs is not changed. Accordingly, claim of transferred employee for attorney's fee for preparation of affidavit of title relative to unsuccessful sales effort may not be paid 561

Single fee
Customary charges in locality of residence transaction

Since the cost of legal services normally rendered in the locality of the transaction may be reimbursed, a single overall fee charged may be paid without itemization if it is within the customary range of charges in that locality. B–163203, March 24, 1969; B–165280, December 31, 1969; and similar cases modified 561

House purchase
Closing charges
Documentation required for reimbursement

Employee who purchased residence incident to transfer of duty station claims closing costs paid by seller but included in purchase price. Since closing costs are clearly discernible and separable from price allocable to realty and both buyer and seller regarded costs as having been paid by buyer, claim may be paid for full amount of closing costs upon proper documentation itemizing the costs, the amount of each item claimed, and claimant's liability therefor. 52 Comp. Gen. 11, modified 298

Husband and wife divorced, separated, etc.

Transferred employee sold interest in residence to his estranged wife. Employee may be reimbursed legal expenses for preparation of deed and preparation of affidavit of title since the sale of interest in a residence constitutes a residence transaction within the meaning of Federal Travel Regulations (FPMR 101–7) para. 2–6.2c. Reimbursement for costs of attorney's attendance at closing is not allowed as such expense is of an advisory nature 862

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Leases
Forfeited prepaid rent Page

Transferred employee paid lessor of rented apartment entire balance of rent due for unexpired term of 7 months immediately upon transfer. Five months later, employee removed household goods from apartment and relet premises. Reimbursement of rent paid for 5 months between transfer and date of sublease may not be reimbursed because Federal Travel Regulations (FTR) para. 2-6.2h (May 1973) requires employee to make reasonable efforts to compromise outstanding obligation, and employee failed to make such effort 20

Miscellaneous expenses
Dental contract loss

Amount forfeited under contract for orthodontic services at old duty station is reimbursable as miscellaneous expense where employee's transfer necessitated forfeiture. Cost of completion contract at new duty station may not be used as measure of forfeiture 53

Pollution control devices
Installed in automobiles

Cost of installation of pollution control device in automobile of employee transferred to California may be reimbursed as miscellaneous expense. California requires installation and certification of such devices on automobiles previously registered out of state prior to registration in California, and installation may therefore be properly regarded as a necessary cost of automobile registration 53

Temporary quarters
Beginning of occupancy
Thirty day period

Transferred employee occupied temporary quarters for more than 30 days. Employee contends that the calendar day quarter on which he became eligible for reimbursement of temporary quarters expenses should be used throughout his eligibility period to determine when reimbursement should cease. Since the authorizing statute allows reimbursement only for calendar days spent in temporary quarters and the implementing regulations utilize the quarter day concept to ascertain commencement of eligibility only, date of initial eligibility constitutes one calendar day. Thereafter, reimbursement may be made only in units of whole calendar days 15

Subsistence expenses
Reasonableness of meal costs

Transferred employee seeking reconsideration of General Accounting Office decision limiting reimbursement of temporary quarters subsistence expenses to Department of Labor Statistics for family of four persons submits further evidence concerning family composition. Since older child is age 17, maximum allowable subsistence amount may be adjusted upward in accordance with Bureau of Labor Statistics equivalence scales. 55 Comp. Gen. 1107 (1976) amplified 604

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Relocation expenses—Continued
Temporary quarters—Continued
Vacating residence requirement Page

Transferred employee arranged in advance to rent former residence after date of closing on sale because temporary quarters, although available, were expensive and not convenient. Claim for temporary quarters subsistence expenses for period of continued occupancy of former residence may not be certified for payment since the residence at the old duty station was not vacated within the meaning of Federal Travel Regulations para. 2–5.2c 481

Training assignments

Relocation allowances paid to employee transferred for training purposes are strictly limited by 5 U.S.C. 4109. Fact that cognizant agency officials erroneously authorized reimbursement of expenses beyond those permitted by statute will not form basis for estoppel against Government. Although estoppel has been found in some cases where there is contractual relationship between Government and citizen, same doctrine is not applicable here because relationship between Government and its employees is not contractual, but appointive, in strict accordance with statutes and regulations 85

Voluntary transfer

An employee was denied relocation expenses incident to transfer from Philadelphia to Mechanicsburg, Pennsylvania, on the basis that budget constraints precluded reimbursement. The record fails to show that the agency made a determination as to whether transfer was in Government's interest. Federal Travel Regulations, para. 2–1.3 (May 1973), require that determination be made as to whether transfer is in Government's interest or primarily for convenience or benefit of employee or at his request. Our decisions provide guidelines to assist agencies in reaching such determinations. Here, employee is not entitled to reimbursement for relocation expenses since he applied for and otherwise took initiative in obtaining transfer 709

Service agreements

Other than transfers. (*See* **OFFICERS AND EMPLOYEES, Service agreements)**

Travel by foreign air carriers. (*See* **TRAVEL EXPENSES, Air travel, Foreign air carriers, Prohibition, Availability of American carriers)**

Travel expenses. (*See* **TRAVEL EXPENSES)**

Traveltime

Hours of departure

"Reasonable" and/or "practical hour"

The "2-day per diem rule" of 53 Comp. Gen. 882 (1974) and 55 Comp. Gen. 590 (1975)—that up to but not including 2 days' per diem may be paid to enable an employee to travel during regular duty hours—is intended to preclude delays in initiation or continuation of travel over weekends or over the 2 consecutive days that an employee is otherwise scheduled not to be on duty 847

OFFICERS AND EMPLOYEES—Continued
Traveltime—Continued
Hours of travel
Regular *v.* nonduty hours Page
The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier. Modified by 56 Comp. Gen. 629 ---------- 219
Application of Fly America Act
Where the only certificated air carrier service available between points in the United States and points outside the United States requires boarding or leaving the carrier between midnight and 6 a.m., or travel spanning those hours, the employee is required by 49 U.S.C. 1517 to use such service insofar as otherwise available under the Comptroller General's Guidelines of March 12, 1976, and decisions of this Office. 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified --- 629
Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination ---------- 629
Sleeping time
Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certifícted service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable. Modified by 56 Comp. Gen. 629 ---------- 219
Regularly scheduled workweek
Where an employee delays his travel from Friday in order to travel during regular duty hours on Monday in disregard of the "2-day per diem rule," his per diem is limited to that which would have been payable if he had begun his return travel following the completion of work on Friday and continued to destination without delay ---------- 847
Wage board
Compensation. (*See* **COMPENSATION, Wage board employees**)
Waiver of overpayments. (*See* **DEBT COLLECTIONS, Waiver, Civilian employees**)

OVERTIME
Compensation. (*See* **COMPENSATION, Overtime**)

PANAMA CANAL Page

Employees

Differential

Tropical

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

PAY

Additional

There is currently no statutory authority for the payment of special professional pay to Reserve veterinary and optometry officers of the uniformed services who entered on active duty after June 30, 1975; hence, such officers are not entitled to special pay notwithstanding any administrative regulations or recruiters' promises to the contrary. 37 U.S.C. 302a and 303 (Supp. III, 1973) 943

Hazardous duty generally

More than one duty

A member of the uniformed services is entitled to dual payments of hazardous duty incentive pay, provided he is required to perform specific multiple hazardous duties in order to carry out his assigned mission and otherwise meets the criteria established by departmental regulations. 37 U.S.C. 301(e) (1970) and Executive Order No. 11157, June 22, 1964, as amended. However, such duties need not be performed simultaneously or in rapid succession as was stated in 44 Comp. Gen. 426 and 43 *id.* 667 which, to that extent, will no longer be followed 983

Parachute duty

Pararescue

Air Force pararescue team members may quality for hazardous duty incentive pay as aerial crewmembers, provided they are an integral part of an aircrew contributing to the safe and efficient operation of an aircraft, and their flight duties are not merely incidental to their duties involving parachute jumping. 37 U.S.C. 301(a) (1970) 983

Aviation duty

Double incentive pay

While the Department of Defense Military Pay and Allowances Entitlements Manual currently prohibits dual payment of hazardous duty incentive pay to pararescue team members who perform aircrew duties and no other hazardous duty in addition to flying and parachute jumping, those regulations may be amended to authorize dual incentive payments to them; however, whether the regulations should be so amended is ultimately a matter for evaluation and determination by appropriate Defense Department authorities 983

Civilian employees. (*See* **COMPENSATION**)

PAY—Continued
Entitlement
Based on applicable law
Page
A service member's entitlement to military pay is dependent upon a statutory right, and neither equitable considerations nor the common law governing private employment contracts have a place in the determination of entitlement to military pay---- 943
Longevity. (*See* PAY, Service credits)
Retainer
Navy or Marine Corps members
Entitlement
On or after January 1, 1971
Under 10 U.S.C. 1401a(f) (Supp. V, 1975) the retainer pay of a former Navy or Marine Corps member who initially became entitled to that pay on or after January 1, 1971, may not be less than the retainer pay to which he would be entitled if transferred to the Fleet Reserve or Fleet Marine Corps Reserve at an earlier date, adjusted to reflect applicable increases in such pay under that section even though transferred to Fleet Reserve or Fleet Marine Corps Reserve at a lower pay grade because of unsatisfactory performance of duty or as result of disciplinary action---- 740
Retired
Disability
Computation
Method
Member, voluntarily retireable, but who is retired for disability with retired pay computed under 10 U.S.C. 1401, has three retired pay computation methods available, two methods of which, in absence of Secretarial action under 10 U.S.C. 1221, designating earlier retirement date, are subject to Uniform Retirement Date Act, 5 U.S.C. 8301, which requires use of basic pay rates in effect on date member was retired. Third method authorizes computation as though member's retirement was voluntary (not subject to 5 U.S.C. 8301), thereby permitting use of increased basic pay rates, if in effect on date member's name is placed on retired rolls---- 98
Application of Act of October 7, 1975 (Pub. L. 94-106)
Where a Navy or Marine Corps enlisted member is eligible for retired pay by reason of disability, his pay may be computed on the retainer pay formula pursuant to 10 U.S.C. 6330 (1970), adjusted to reflect any applicable changes authorized by 10 U.S.C. 1401a (1970), if he was qualified for transfer to the Fleet Reserve or Fleet Marine Corps Reserve on a date earlier than his disability retirement the terms, "retired pay" and "retainer pay" being interchangeable for purposes of the computation authorized by 10 U.S.C. 1401a(f) (Supp. V, 1975)---- 740
Effective date
Delay
Member, retired for disability who has notice of such retirement on or before the designated retirement date, is considered retired on the designated date even though delivery of retirement orders is delayed beyond the retirement date. This is so even if he performs additional days of active duty subsequent to retirement date and received payment therefor. Such delay does not in any way add to member's retirement rights in absence of specific active duty orders covering the additional period of service---- 98

PAY—Continued
Retired—Continued
Disability—Continued
Rate computed on nondisability formula
Excluded from gross income for tax purposes Page

Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement 740

Temporary retired list
Computation of retired pay under Formula 2, 10 U.S.C. 1401

Member of Coast Guard Reserve was placed on the Temporary Disability Retired List under 10 U.S.C. 1205, based on a finding of physical disability as a result of a service connected injury which occurred 10–12 years previously while serving on a 2-week period of active duty for training. For purpose of computing retired pay under Formula 2 of 10 U.S.C. 1401, the fact that member was not in basic pay status at time of disability determination or placement on that list is not a computation requisite, since Formula 2 merely calls for use of the pay rate for the "grade" to which member was entitled on that date. 47 Comp. Gen. 716 (1968), distinguished 807

Survivor Benefit Plan
Dependency and indemnity compensation
Refund entitlement
Computation

Where widow's Survivor Benefit Plan (SBP) annuity is reduced pursuant to 10 U.S.C. 1450(c), by the award of Dependency and Indemnity Compensation (DIC), the computation of cost of the reduced annuity in order to determine amount of any refund due the widow pursuant to 10 U.S.C. 1450(e) is to be done on a monthly basis and shall include all cost-of-living increases in retired pay and all increases in DIC rates from the date of member's retirement until the date of his death 482

Remarriage of member
Annuity deductions
Resumption after post-election marriage

Since section 1(5)(a)(ii) of Public Law 94–496 authorizes that reduction in retired pay for Survivor Benefit Plan (SBP) spouse coverage purposes is no longer required for any month in which there is no eligible spouse beneficiary, resumption of such reduction in retired pay for spouse coverage in the case of post-election remarriages would not occur until the spouse on remarriage qualifies as an eligible spouse beneficiary by the happening of the earlier of the two requirements stipulated in 10 U.S.C. 1447(3)(A) and (B) and (4)(A) and (B) 1022

PAY—Continued
Retired—Continued
Survivor Benefit Plan—Continued
Retired prior to effective date of SBP
Divorce and remarriage
Children's annuity eligibility Page

Where a pre-SBP effective date retiree, who had a spouse and dependent children on or before March 21, 1974, elects to participate in the Plan under subsection 3(b) of Public Law 92-425, for his spouse but does not choose coverage for his dependent children, upon the close of the 18-month period authorized for such election, the member is thereafter precluded from electing dependent children coverage in the absence of additional legislation to reopen the Plan to him---------- 1022

Spouse
Eligible beneficiary

The meaning of the phrase "eligible spouse beneficiary" as used in 10 U.S.C 1452(a), as amended by section 1(5)(A)(ii) of Public Law 94-496, is to be defined in terms of the definition of "widow" or "widower" contained in 10 U.S.C. 1447, for the purpose of entitlement to 10 U.S.C. 1450(a) benefits; that is, that in order to receive a survivor annuity as an eligible widow or widower beneficiary on the death of the member in retirement, they must be an eligible spouse beneficiary immediately before that death---------- 1022

Termination or reduction
Refunds

Where a surviving spouse receives the full amount of selected SBP annuity for any period because an award of DIC could not be made retroactive to the date of death, since recalculation of SBP annuity pursuant to 10 U.S.C. 1450(c) and (e) is permitted only when annuity is reduced by DIC award effective "upon the death" of the retiree, no refund is due---------- 482

Withholding
Contracting with Government

Where a contractor, doing business with Department of Defense agency, sponsors and pays for a social function at which retired Regular officers of the uniformed services employed by the contractor make contact with departmental personnel who are in a position to influence procurements by the Department, such contacts will be viewed as establishing a *prima facie* case that such officers are "selling" within the meaning of 37 U.S.C. 801(c) and they will be subject to forfeiture of retired pay---------- 898

Service credits
Health Professions Scholarship Program

By statute, Reserve service performed by members participating in the Armed Forces Health Professions Scholarship Program may not be counted in computing years of service creditable for basic pay, except as may otherwise be provided for certain physicians and dentists; hence, veterinary officers who participated in the program may not receive longevity credit for time spent in professional school in the computation of their active duty basic pay despite any promises to the contrary that may have been made to them. 10 U.S.C. 2126 (Supp. II, 1972)-------- 943

Special. (See **PAY, Additional**)

Waiver of overpayments. (See **DEBT COLLECTIONS, Waiver, Military personnel, Pay, etc.**)

PAYMENTS Page

Advance

Authority

Food and Drug Administration may not make advance payments for costs of otherwise eligible persons or groups for participation in proceedings before it, absent specific statutory authority which overcomes prohibition against advance payments in 31 U.S.C. 529 111

Between Federal agencies

44 U.S.C. 310 (1970) requires prompt payment by Executive departments and independent establishments of bills rendered by the Public Printer for supplies ordered from the Government Printing Office, in advance of work if so requested, and exempts these bills from audit or certification prior to payment. General Services Administration, to comply with statute, must pay such bills without prepayment audit if audit would delay payment 980

Housing allowances

Military personnel

Joint Travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the advance payment authorization in section 303(a) of the Career Compensation Act of 1949, as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments 180

Wages due students under College Work-Study Program

Advance payment of 20 percent Federal agency share of student salaries to colleges administering College Work-Study Program (42 U.S.C. 2751 *et seq.* (1970)) appears to fall within prohibition against advances of public funds, 31 U.S.C. 529 (1970). Exceptions to 31 U.S.C. 529, including 41 U.S.C. 255 and 10 U.S.C. 2307 (1970), which provide for advance payments under contracts for property or services where Government's interest is adequately protected, are not available. General Accounting Office suggests that the Office of Education consider changing regulations to allow 80 percent grant share of salaries to be paid pending receipt of employer's share, where employer is Federal agency 567

POLLUTION PREVENTION

Cost of installing pollution control devices in automobiles

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Miscellaneous expenses, Pollution control devices, Installed in automobiles**)

PRESIDENT

Presidential appointees

Federal Insurance Administrator

Federal Insurance Administrator, a position established under 42 U.S.C. 3533a (1970), requires Presidential nomination and confirmation under Article II, Sec. 2, Cl. 2 of Constitution. Constitution presumes all officers of United States must be appointed with advice and consent of Senate except when Congress affirmatively delegates full appointment authority elsewhere 137

PRESIDENT—Continued Page

Presidential appointees—Continued

Federal Insurance Administrator—Continued

When nomination of the incumbent Acting Insurance Administrator for Administrator's position was withdrawn by the President on February 21, 1977, and no further nominations were made for Senate confirmation, the position may be filled by an Acting Administrator only for 30 days thereafter, pursuant to the Vacancies Act, 5 U.S.C. 3345–3349. After March 23, 1977, there was no legal authority for incumbent or anyone else to serve as Acting Insurance Administrator--- 761

PRINTING AND BINDING

Invitations

Change of command ceremonies

Government payment of expense of printing invitations to Coast Guard change of command ceremony is proper since ceremony is traditional and appropriate observance, and printing of invitations may be considered necessary and proper expense incident to ceremony-------- 81

PROPERTY

Private

Damage, loss, etc.

Government liability

Freight charges

A carrier of household goods in international door-to-door container-MAC (Code T) service is entitled to payment for services it performed under a Government bill of lading contract when part of a shipment of goods is lost or destroyed and delivery of that part is not made because delivery was prevented by the act of the shipper's agent---------- 820

Public

Damage, loss, etc.

Bill of lading conditions

Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must must be instituted---------- 264

Carrier's liability

Burden of proof

The law places burden on carrier to establish not only the general tendency of a mobile home to be damaged in transit, but that damage was due solely to that tendency---------- 357

Carrier has failed to rebut its prima facie case of liability for damage and to meet its burden of proof that sole cause of damage was due to an inherent defect. However, amount of damages is in error and is to be adjusted accordingly---------- 357

Prima facie case. (*See* **PROPERTY, Public, Damage, loss, etc., Carrier's liability, Burden of proof**)

"Inherent vice"

Definition of "inherent vice" indicates that loss is caused in commodity without outside influence, and courts have so held---------- 357

Mobile homes

Carrier's responsibility for avoidance of damage

If carrier knows or should have known that goods delivered to it for transportation are in danger of loss or damage, law requires carrier to use ordinary care, skill and foresight to avoid consequences---------- 357

PROPERTY—Continued
Public—Continued
Damage, loss, etc.—Continued
Rejection of shipment
Partial damage Page

Prima facie case of liability of common carrier by water for goods shipped through Panama Canal is established when shipper shows that cargo was received in good order and condition at origin and arrived in damaged condition at destination. To escape liability, carrier must show that loss or damage was caused by an Act of God, the public enemy, inherent vice of the goods or fault of shipper, and that it was free of negligence 264

Statutes of limitation. (*See* **STATUTES OF LIMITATION, Claims, Transportation**)

Surplus
Transfer to Government agencies
Proceeds disposition

Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754

PROTESTS
Contracts. (*See* **CONTRACTS, Protests**)

PUBLIC BUILDINGS
Moving costs, etc., of one agency for convenience of another
Appropriation availability

To the extent one agency requires the relocation of another to meet its own space needs and the relocation is performed for the benefit of the requesting agency, its appropriations, not those of the relocated agency, are available to pay the cost of the relocated agency's move. The appropriations of the relocated agency would not be available to that same extent since the costs incurred are not necessary for it to carry out the purposes of its appropriations. 35 Comp. Gen. 701 and other similar cases overruled 928

PUBLIC HEALTH SERVICE
Health Resources Administration
Relocation in one building
Moving expenses
Appropriation availability

Intraagency apportionment by HEW of Health Resources Administration moving costs among appropriations of other HEW constituent agencies which benefitted from move, on basis of amount of additional space made available to each agency, is proper if apportioned part of costs incurred was necessary or incident to meeting space needs of each constituent agency. 35 Comp. Gen. 701 and other similar cases overruled 928

PUBLIC LANDS
Leases
Former Indian lands Page

As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83–776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B–142250, May 2, 1961, overruled ---------- 655

PURCHASES
Payment
Credit cards

Except for certain transactions subject to statutory prohibitions against credit sales, Government Printing Office (GPO) may sell publications on credit, through its own facilities, where it determines that extending credit will facilitate sales without increasing administrative costs or price of publications. Under the same circumstances, and subject to the same statutory restrictions, GPO may also arrange with credit card company for sales by credit card. Moreoer, sales to company cardholders could include transactions for which GPO is prohibited from making credit sales, since credit here is extended by card company rather than by GPO as vendor ---------- 90

Purchase orders
Federal Supply Schedule
Contractor's listing
Special item categories

Agency's order from Federal Supply Schedule (FSS) contractor is valid even though contractor had listed its equipment under special item categories inaccurately describing contractor's equipment ---------- 811

QUARTERS ALLOWANCE
Basic allowance for quarters (BAQ)
Assigned to Government quarters
Single *v.* family
Married members

A member of a uniformed service married to another member, who has no dependents other than his or her spouse, is entitled to partial basic allowance for quarters (BAQ) under 37 U.S.C. 1009(d), when assigned to single-type Government quarters. However, such a member assigned to family quarters is not entitled to partial BAQ ---------- 894

Single members

A single member without dependents is not entitled to partial BAQ under 37 U.S.C. 1009(d) when assigned to family quarters since partial BAQ is intended to be paid to members not entitled to full BAQ who are assigned to low-value Government single quarters, not higher value family quarters ---------- 894

QUARTERS ALLOWANCE—Continued
Basic allowance for quarters (BAQ)—Continued
Shipboard quarters uninhabitable
Officers on sea duty Page

An officer on sea duty being reimubrsed under 10 U.S.C. 7572(b) for the expense incurred for quarters because his shipboard quarters are uninhabitable is entitled to partial BAQ under 37 U.S.C. 1009(d)------ 894

Temporary lodging facilities
Effect of occupancy

Under 37 U.S.C. 403 (1970) and applicable regulations, a member of a uniformed service may occupy Government "public quarters" for not in excess of 30 days at his permanent duty station incident to a permanent change of station without loss of basic allowance for quarters (BAQ). Payment of a service charge for linen and housekeeping services does not make such quarters "rental" quarters wlthin the meaning of 37 U.S.C. 403(e) so as to allow occupancy for longer than 30 days without loss of BAQ---------- 850

Operated by nonappropriated funds

A member of a uniformed service may occupy temporary lodging facilities in excess of 30 days without loss of basic allowance for quarters if a substantial "rent" for such quarters is charged to cover direct operating costs, loan repayment, repairs, etc., and which quarters are acquired and operated with nonappropriated funds---------- 850

REAL PROPERTY
Acquisition
Reimbursement
Installment payments
Appropriation chargeable

United States Fish and Wildlife Service may enter into purchase agreement with owner of real property in which even though settlement is held and legal title to the land is vested in the Government, it agrees to landowner's request to disburse the purchase price to the vendor over a period not to exceed 4 years, provided it obligates the full purchase price from appropriations available for such purpose from the fiscal year in which the options to purchase are exercised by the Service to meet a need of that fiscal year---------- 351

RECORDS
Public Information Law
Application
Procurement records

General Accounting Office considered comments by protester even though filed more than 10 working days after time allowed under 4 C.F.R. 20.3(d) (1976) following receipt of agency report because protester was pursuing Freedom of Information Act request for additional documents; contract had been awarded and performance was proceeding---------- 835

REGULATIONS Page

Amendment

Dual hazardous duty incentive pay

Pararescue team members

While the Department of Defense Military Pay and Allowances Entitlements Manual currently prohibits dual payment of hazardous duty incentive pay to pararescue team members who perform aircrew duties and no other hazardous duty in addition to flying and parachute jumping, those regulations may be amended to authorize dual incentive payments to them; however, whether the regulations should be so amended is ultimately a matter for evaluation and determination by appropriate Defense Department authorities ---------- 983

Effect on prior rights

A Marine Corps member with dependents was transferred from duty in continental United States to restricted duty (dependents prohibited) overseas. His orders stated the intention of the Commandant to reassign him to Hawaii after completion of his restricted duty assignment. Member's dependents moved to Hawaii concurrent with the member's restricted duty assignment and the member now claims station allowances for dependents under 37 U.S.C. 405 (1970). Since such move may be viewed as having a connection with the member's duty assignment, the Joint Travel Regulations may be amended to authorize station allowances in such cases. However, this member's claim may not be paid because current regulations clearly prohibit it. ---------- 525

Applicability to laws

Requirement

Where a statute is unambiguous and its directions specific, its plain meaning may not be altered or extended by administrative regulations, nor may administrative regulations be formulated in an attempt to add to the statute something which is not there ---------- 943

Armed Services Procurement Regulation

Mistake procedures

Applicable to advertised and negotiated procurements

Although procedures applicable to mistakes are set forth in regulations pertaining only to formally advertised procurements, the principles therein can be applied to negotiated procurement to extent that they are not inconsistent with negotiation procedures ---------- 93

Compliance

Contracting officers. (*See* **CONTRACTING OFFICERS, Regulation compliance**)

Federal Property Management Regulations

"Fixed-price options" clause

Data processing procurements

Statement in "fixed-price options" clause of Federal Property Management Regulations 101–32.408–5, to effect that "separate charges" (that is, penalty to be assessed against Government for non-exercise of option rights) may be quoted in certain data processing procurements, is inappropriate and misleading to potential offerors in contracts funded with fiscal year appropriations ---------- 167

REGULATIONS—Continued
Retroactive
Administrative error correction Page
Where a regulation was based upon clearly erroneous information and did not represent a judgment arrived at upon a consideration of the actual circumstances involved, an exception to the general rule prohibiting retroactive adjustment or application of a regulation may be allowed. Therefore, where station allowances are erroneously reduced due to a devaluation of the Spanish peseta for a station where housing costs are based on United States dollars, not pesetas, the allowances may be retroactively corrected 1015
Travel
Joint
Amendments
Effective date
Mileage and/or per diem rates
Civilian employees of the Mare Island Naval Shipyard who performed temporary duty in Guam between September 16, 1975, and January 13, 1976, are only entitled to per diem at the $49 rate prescribed by Joint Travel Regulations, Change No. 57, dated September 16, 1975, and made effective that date, notwithstanding that notification of the reduction in per diem rate from $56 was not received at the Shipyard until January 13, 1976 425
Military personnel
Housing allowance advance payments
Amendment rejected
Joint Travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the advance payment authorization in section 303(a) of the Career Compensation Act of 1949, as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments 180

RETIREMENT
Civilian
Benefits
Not subject to negotiation
Prevailing rate employees serving under bargaining agreements exempted from effects of the Prevailing Rate Statute, 5 U.S.C. subchapter IV, chapter 53, may negotiate wages and employee benefits otherwise covered by provisions of that statute. However, they may not negotiate pay and employee benefits governed by other statutes and regulations, such as overtime pay and retirement benefits 360
Military personnel
Retired pay. (*See* **PAY, Retired**)

RIVERS AND HARBORS
Rivers and Harbors Act
Funding provisions for continuing contracts
33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of

RIVERS AND HARBORS—Continued
Rivers and Harbors Act—Continued
Funding provisions for continuing contracts—Continued Page
continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437
Recognition that under 33 U.S.C. 621 Corps of Engineers may obligate full amount of continuing contract price for authorized public works projects in advance of appropriations requires change in current budgetary procedures, under which budget authority is presented only as appropriations are made for yearly contract payments, since new theory of continuing contract obligations alters their budget authority status for purposes of Public Law 93-344. Corps should consult with cognizant congressional committees in developing revised budgetary procedures 437

SALES
Bids
Minimum acceptable price
Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price 230
Requirement that minimum acceptable price be determined on "current" basis and that evaluation of bids not be based on speculative factors does not preclude consideration of changing and projected market conditions in establishing minimum acceptable price 230

SET-OFF
Authority
Common law right
Government agency may exercise its common law right of setoff if prima facie case of carrier liability is established. Setoff may be exercised by the Government before liability is judicially established. A review of a setoff by the United States is within jurisdiction of the Court of Claims, 28 U.S.C. 1503 (1970) 264
The Government's common law right of setoff is not extinguished by 49 U.S.C. 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges 264
Contract payments
Assignments
Labor stipulation violations
Workers underpaid under Contract Work Hours and Safety Standards Act, 40 U.S.C. 327, *et seq.*, and Service Contract Act, 41 U.S.C. 351, *et seq.*, would have priority over assignee to funds withheld from amount owing contractor since contract contained provision allowing Government to withhold funds pursuant to two acts to satisfy wage under-

SET-OFF—Continued
Contract payments—Continued
Assignments—Continued
Labor stipulation violations—Continued Page
payment claims. Assignee can acquire no greater rights to funds than assignor has and since certain employees were underpaid and amount sufficient to cover underpayments was withheld, assignor has no right to funds to assign 499
Tax debts
While IRS is entitled to setoff against assignee-bank any of its claims against assignor-contractor which matured prior to assignment, agency may not set off claims which matured subsequent to assignment 499
Bankrupt contractor
Assignee *v.* trustee
Where assignee has filed assignment with contracting agency in accordance with Assignment of Claims Act, 31 U.S.C. 203, 41 U.S.C. 15 (1970), it will have perfected assignment to extent that funds assigned under assignment cannot be attached by trustee in bankruptcy, unless trustee in bankruptcy can prove that there was preferential transfer 499
Unpaid workers *v.* trustee in bankruptcy
Courts, as well as this Office, recognize that unpaid laborers have equitable right to be paid from contract retainages and unpaid workers would have higher priority to funds withheld from amounts owing contractor than would trustee in bankruptcy 499
Corporation not liable for debts of officers
Where president of corporation leaves corporation and enters into several contracts with Government, as individual, claims against individual arising out of contracts may not be set off against funds withheld from amount owing corporation under contract which was signed by individual in his capacity as president of corporation 499
Subcontractors
Where amount of claim asserted by agency against subcontractor for recovery of overpayments is based on statistical sampling of 5.6 percent of orders under contract rather than on an audit of each contract order, claim is not so certain in amount as to warrant setoff by General Accounting Office. However, because liability exists, matter is referred to Department of Justice for appropriate action 963
Tax debts
Federal tax lien, unrecorded as of time of bankruptcy, is invalid against trustee in bankruptcy which would have priority to funds withheld from amount owned bankrupt contractor under contract 499
Past due *v.* future premiums
Mobile home insurance premiums
As stated in 55 Comp. Gen. 658, claims under mobile home loan insurance pursuant to 12 U.S.C. 1703 by lending institution presently delinquent in insurance premium payments may be allowed if default in loan occurred while premium payments were current. However, in accordance with applicable regulations, lender is required to continue to pay insurance premiums up to date claim is filed with Department of Housing and Urban Development (HUD) rather than date of default, and setoff of this amount against allowable claims is appropriate. 55 Comp. Gen., *supra*, clarified 279

SET-OFF—Continued
Transportation
Property damage, etc.
Set-off common law right Page
The Government's common law right of setoff is not extinguished by 49 U.S.C. 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges---- 264

SMALL BUSINESS ADMINISTRATION
Authority
Small business concerns
Allocation of 8(a) subcontracts
Since nothing in Small Business Act or procurement regulations mandates that there be set-aside for small business as to any particular procurement and because it has been held that agency's decision not to make "8(a)" award for given procurement is not subject to review, protests demanding either small business set-aside or "8(a)" award are denied. Modified by 56 Comp. Gen. 649---- 115
Certifications
Effective date
Contract for guard services awarded to self-certified small business firm under small business set-aside was justified where award was made on basis of Regional Office Small Business Administration (SBA) determination that contractor was small and before Size Appeals Board determined that contractor was large. However, on basis of SBA report indicating that SBA District office erroneously failed to consider awardee's size at time of bid opening, SBA is instructed to take action to insure consistent application of size standards in future---- 1018
Contracts
Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)
Investment companies
Participation in guaranteed loan programs
Small business investment companies (SBICs) are not eligible to participate as guaranteed lenders in either Small Business Administration's (SBA) or Farmers Home Administration's (FmHA) loan programs. As stated in 49 Comp. Gen. 32, legislative history of Small Business Investment Act demonstrates congressional intent that SBICs operate independently of other Government loan programs. Nothing in SBIC Act or Consolidated Farm and Rural Development Act, which established FmHA's authority to guarantee loans, or legislative history of either, supports SBA's position that SBICs should now be permitted to participate as guaranteed lenders in these loan programs---- 323
Small Business Investment Act
Venture capital
Investments (including certain long-term loans) by small business investment company (SBIC) in small business concerns which otherwise meet the requirements of 15 U.S.C. 683(b) and implementing regulations do not lose their character as "venture capital" even though the SBIC-lender reserves right to approve or disapprove future borrowings of small business concern from other potential lending institutions. 23

SOCIAL SECURITY ADMINISTRATION Page

Noncompliance with carpeting standards under Architectural Barriers Act

Rectification

Primary jurisdiction for assuring compliance with standards established under the Architectural Barriers Act of 1968, 42 U.S.C. 4151 (1970), is placed by statute with the General Services Administration (GSA), 42 U.S.C. 4156, and with the Architectural and Transportation Compliance Board, 29 U.S.C. 792 (Supp. IV, 1974). SSA should determine from those entities the proper means of rectifying noncompliance with standards on carpeting, which noncompliance has resulted in handicapped persons requiring the use of powered wheelchairs. Section 236 of the Legislative Reorganization Act, 31 U.S.C. 1176 (1970) is applicable to this recommendation for corrective action 398

STATE DEPARTMENT

Disbursing officers

Losses

Loss of Vietnam piasters, held by United States disbursing officer (USDO) and State Department officials, abandoned during evacuation should be treated as a physical loss at official exchange rate at time of loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis 791

STATES

Federal aid, grants, etc.

Availability

In advance of appropriation availability

Concerning use of grant funds to pay for costs incurred by grantee prior to availability of appropriation to be charged, General Accounting Office (GAO) will no longer apply "general rule" that, in connection with grants, Federal Government may not participate in costs where the grantee's obligation arose before availability of appropriation to be charged unless the legislation or its history indicates a contrary intent, since such rule did not reflect actual basis on which decisions cited in support thereof were decided and, in any event, has no legal basis. 45 Comp. Gen. 515, 40 *id.* 615, 31 *id.* 308 and A–71315, Feb. 28, 1936, modified 31

Educational institutions

Student assistance programs

Plan assuring college education (PACE)

North Carolina

Advance payment of 20 percent Federal agency share of student salaries to colleges administering College Work-Study Program (42 U.S.C. 2751 *et seq.* (1970)) appears to fall within prohibition against advances of public funds, 31 U.S.C. 529 (1970). Exceptions to 31 U.S.C. 529, including 41 U.S.C. 255 and 10 U.S.C. 2307 (1970), which provide for advance payments under contracts for property or services where Government's interest is adequately protected, are not available. General Accounting Office suggests that the Office of Education consider changing regulations to allow 80 percent grant share of salaries to be paid pending receipt of employer's share, where employer is Federal agency 567

STATES—Continued
Federal aid, grants, etc.—Continued
Federal statutory restrictions
Competitive bidding procedure
Page

Since grant contract included competitive bidding requirement, basic principles of Federal procurement law must be followed by grantee in absence of contrary provisions in grant contract. Even though all Federal Procurement Regulations (FPR) provisions need not necessarily be followed to comply with basic principles, an action which follows FPR is consistent with such principles. Therefore, failure of only acceptable bid to include bid bond as required by solicitation may be waived since FPR 1-10.103-4(a) provides exception when only one bid is received..... 43

Matching fund activities
Grant used for additional matching

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States..... 645

Payments
Prior to availability of appropriations

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*-4 to 460*l*-11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available..... 31

STATION ALLOWANCES
Military personnel
Excess living costs outside United States, etc.
Dependents
Move concurrent with member's restricted duty

A Marine Corps member with dependents was transferred from duty in continental United States to restricted duty (dependents prohibited) overseas. His orders stated the intention of the Commandant to reassign him to Hawaii after completion of his restricted duty assignment. Member's dependents moved to Hawaii concurrent with the member's restricted duty assignment and the member now claims station allowances for dependents under 37 U.S.C. 405 (1970). Since such move may be viewed as having a connection with the member's duty assignment, the Joint Travel Regulations may be amended to authorize station allowances in such cases. However, this member's claim may not be paid because current regulations clearly prohibit it..... 525

STATION ALLOWANCES—Continued
Military personnel—Continued
Housing
Advance payments
Page

Joint Travel Regulations may not be amended to allow advance payment for station housing and similar allowances paid under 37 U.S.C. 405, as the advance payment authorization in section 303(a) of the Career Compensation Act of 1949, as amended, 37 U.S.C. 404(b)(1), is limited to payments for the member's travel, which does not include station housing allowance. Therefore, in the absence of specific statutory authority for advance payment of such allowances, 31 U.S.C. 529 precludes such advance payments 180

Retroactive adjustments
Spain

Where a regulation was based upon clearly erroneous information and did not represent a judgment arrived at upon a consideration of the actual circumstances involved, an exception to the general rule prohibiting retroactive adjustment or application of a regulation may be allowed. Therefore, where station allowances are erroneously reduced due to a devaluation of the Spanish peseta for a station where housing costs are based on United States dollars, not pesetas, the allowances may be retroactively corrected 1015

STATUTES OF LIMITATION
Claims
Transportation
Ocean barge, etc., carriers
Commercial *v.* Government bills of lading

Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted 264

STATUTORY CONSTRUCTION
Court interpretation
Effect

Rule of statutory construction developed by courts which disfavors retroactive application of statute is relevant primarily where retroactive application of a statute would abrogate pre-existing rights or otherwise cause result which might seem unfair. However, these considerations, and thus cited rule of statutory construction, do not appear relevant to allowance of grant payments for costs incurred by grantee prior to availability of appropriation to be charged. Furthermore, it is doubtful that such use of grant funds even involves retroactive application of a statute in customary sense since determination of whether to allow payment, as well as payment itself, will be made after the appropriation becomes available 31

Language of statute unambiguous
Plain meaning *v.* administrative regulations

Where a statute is unambiguous and its directions specific, its plain meaning may not be altered or extended by administrative regulations, nor may administrative regulations be formulated in an attempt to add to the statute something which is not there 943

STATUTORY PROHIBITIONS
Rental of conference rooms, etc.
District of Columbia Page
Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn ---------- 572

STORAGE
Household effects
Temporary storage
In former residence
Transferred employee who left household goods in former residence for 5 months prior to reletting apartment may not be reimbursed for temporary storage since placement or retention of employee's goods at his residence may not serve as the basis for reimbursement ---------- 20

SUBCONTRACTORS
Generally. (*See* **CONTRACTS, Subcontractors**)

SUBSISTENCE
Per diem
Actual expenses
Itemization of actual food expenses
National Labor Relations Board employee who is authorized reimbursement for actual subsistence expenses while on 90-day detail may not be reimbursed for meal expenses claimed on a flat-rate basis and must provide itemization of actual daily food expenses ---------- 40
Attendants
Handicapped employees
Physically handicapped individual, confined to wheelchair, serving without compensation on Commerce Technical Advisory Board may be reimbursed for travel expenses of wife who accompanied him as attendant on official travel. Based on Federal Government's policy of nondiscrimination because of physical handicap set forth in 5 U.S.C. 7153 (1970) and 29 U.S.C. 791 (1975), where agency determines that handicapped employee, who is incapable of traveling alone, should perform official travel, travel expenses of escort are necessary expenses of travel -- 661
Calendar day
Midnight to midnight
Transferred employee occupied temporary quarters for more than 30 days. Employee contends that the calendar day quarter on which he became eligible for reimbursement of temporary quarters expenses should be used throughout his eligibility period to determine when reimbursement should cease. Since the authorizing statute allows reimbursement only for calendar days spent in temporary quarters and the implementing regulations utilize the quarter day concept to ascertain commencement of eligibility only, date of initial eligibility constitutes one calendar day. Thereafter, reimbursement may be made only in units of whole calendar days ---------- 15

SUBSISTENCE—Continued
Per diem—Continued
Delays
To avoid travel after duty hours Page

Where an employee delays his travel from Friday in order to travel during regular duty hours on Monday in disregard of the "2-day per diem rule," his per diem is limited to that which would have been payable if he had begun his return travel following the completion of work on Friday and continued to destination without delay 847

Fractional days
Computation

Inasmuch as the Federal Travel Regulations (FPMR 101–7) (May 1973) provide for computation of per diem on the basis of quarters of days in a travel status, a cost factor of an additional 1¾ days' per diem is to be used in connection with a determination of permissible delay in initiation or continuation of travel to permit an employee to travel during regular duty hours 847

Hours of departure, etc.
Arrival and departure time evidence

Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded 104

During duty hours

The "2-day per diem rule" of 53 Comp. Gen. 882 (1974) and 55 Comp. Gen. 590 (1975)—that up to but not including 2 days' per diem may be paid to enable an employee to travel during regular duty hours—is intended to preclude delays in initiation or continuation of travel over weekends or over the 2 consecutive days that an employee is otherwise scheduled not to be on duty 847

Military personnel
Rates
Staying with friends, relatives, etc.

Military member who stayed with friends in lieu of staying in commercial lodging while on temporary duty assignment may not have cost of taking hosts to dinner included as actual lodging cost in computing his per diem allowance under paragraph M4205, Volume 1, Joint Travel Regulations, since payment for such expense was in the nature of a gift or gratuity and was not an actual cost of lodging 321

Overseas employees
Delays
Use of certificated air carriers

Up to 2 days additional per diem is payable to comply with the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service for foreign air transportation. If total delay, including delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of noncertificated service, certificated service may be considered unavailable 216

SUBSISTENCE—Continued
Per diem—Continued
Overseas employees—Continued
Delays—Continued
Use of certificated air carriers—Continued Page

Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination ---- 629

Rates
Lodging costs
Apartment rental
Cleaning services

Although employee who rents apartment while on temporary duty may be reimbursed expenses for cleaning services as a cost of lodgings, claim for $600 for maid service for 3 months is excessive based on cleaning needs of a one-bedroom apartment occupied by one individual. Reimbursement should be limited on the basis of the cost of commercial cleaning service provided on a once-a-week basis ---- 40

Telephones and televisions

Employee who rents apartment while on temporary duty may be reimbursed telephone user charges, taxes thereon, and television rental charges as costs of lodgings. However, the cost of telephone installation may not be included as an expense of lodgings ---- 40

Reduction
Effective date

Civilian employees of the Mare Island Naval Shipyard who performed temporary duty in Guam between September 16, 1975, and January 13, 1976, are only entitled to per diem at the $49 rate prescribed by Joint Travel Regulations, Change No. 57, dated September 16, 1975, and made effective that date, notwithstanding that notification of the reduction in per diem rate from $56 was not received at the Shipyard until January 13, 1976 ---- 425

Government to reserve hotel accommodations

Decision of September 10, 1974, B–159633, which denied payment to the Wellington Hotel for lodging accommodations furnished to Federal agency in connection with training conference on the basis of general prohibition in 40 U.S.C. 34 against procurement of space in the District of Columbia, is reaffirmed insofar as it holds that agency's procurement of hotel accommodations was subject to statutory prohibition. However, decision is also modified to allow partial payment to Hotel based on difference between reduced per diem paid to guest employees and agency's regular per diem allowance at the time. The overruling action of 54 Comp. Gen. 1055 regarding 49 Comp. Gen. 305 is hereby withdrawn ---- 572

Temporary duty
At place of family residence

Employee who stayed at family residence while performing temporary duty may not be reimbursed lodging expenses based on average mortgage, utility, and maintenance expenses because such expenses are costs of acquisition of private property and are not incurred by reason of official travel or in addition to travel expenses. 35 Comp. Gen. 554, and other prior decisions, should no longer be followed ---- 223

SUBSISTENCE—Continued
Per diem—Continued
Transferred employees
Reimbursement basis
Mileage distance Page

Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded..... 104

Compliance with FTR para. 1–11.5a (May 1973), which specifies voucher requirements, is not waived by FTR para. 2–2.3d(2), which fixes maximum allowable per diem on basis of minimum driving distance of 300 miles per day, since latter provision is for application when it appears from properly executed and documented voucher that traveler failed to maintain prescribed minimum mileage..... 104

SUNDAYS
Premium pay. (*See* **COMPENSATION, Premium pay, Sunday work regularly scheduled**)

TAXES
Contract matters. (*See* **CONTRACTS, Tax matters**)
Federal
Excise
Contract price adjustment

No basis is seen to reform contract to reimburse contractor for general and administrative expenses and profit applicable to amount of Federal Excise Tax (FET) contractor was required to pay during performance of contract. Contract's taxes clause provided that if written ruling took effect after contract date resulting in contractor being required to pay FET, contract price would be increased by amount of FET—and this is what in fact occurred. Therefore, issue presented does not involve reformation, but whether contractor has valid claim under terms of contract as written..... 340

Liens
Payments due contractors

Claims by workers underpaid under Contract Work Hours and Safety Standards Act and Service Contract Act would prevail over Internal Revenue Service (IRS) tax liens which matured subsequent to underpayments..... 499

Personal income tax
Disability retired pay
Excluded from gross income for tax purposes

Proper pay rate to be used in computing the amount of retired pay which, as compensation for injury or sickness, is not includable in gross income for tax purposes under 26 U.S.C. 104(a)(4) (1970) when a member is retired for disability but is entitled to compute retired pay on a nondisability formula pursuant to 10 U.S.C. 1401a(f) (Supp. V, 1975) is a matter for consideration by the Internal Revenue Service. However, it is the Comptroller General's view that although a disability retired member may compute his retired pay on some other formula pursuant to 10 U.S.C. 1401a(f), he still receives his retired pay by virtue of his disability retirement..... 740

TELEPHONES
Long distance calls
Government business necessity Page
31 U.S.C. 680a provides that long distance telephone calls must be for transaction of official business and that agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. If, after examining facts surrounding long distance tolls on travel vouchers to traveler's family, properly designated official determines said calls were in interest of Government, General Accounting Office (GAO) will not question such determination 28
31 U.S.C. 680a provides that long distance telephone calls must be for transaction of public business and that department and agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. Certifying officers are not liable for payment of long distance tolls if official designated under 31 U.S.C. 680a improperly certifies toll 28
Private residences
Telephone installation charges
Relocation of military member's mobile home
Claim that reimbursement of telephone reconnection charges should be paid under same authority as other utility charges incurred incident to a required relocation of Air Force member, not constituting a permanent change of station, may be paid, since it is doubtful that Congress intended to preclude payment in such cases when enacting 31 U.S.C. 679 (1970), which precludes the payment of any expense in connection with telephone service installed in a private residence. Decisions inconsistent with the foregoing will not be followed in the future. 55 Comp. Gen. 932, 54 *id.* 661 and B-141573, January 5, 1960, overruled 767

TELEVISIONS
Rental
Employee who rents apartment while on temporary duty may be reimbursed telephone user charges, taxes thereon, and television rental charges as costs of lodgings. However, the cost of telephone installation may not be included as an expense of lodgings 40

TIMBER SALES
Contracts
Contractors
Allegations
Not substantiated by record
Contractor's allegation that modification of Forest Service timber sale contract allowing use of contractor's requested alternate logging methods instead of helicopter logging and increasing stumpage rates was signed by contractor because of coercion and duress is not supported, where first indication of protest in record was almost a month after modification's execution, contractor could have continued helicopter logging instead of signing agreement, and there is no indication that Forest Service wrongfully threatened contractor with action it had no legal right to take 459

TIMBER SALES—Continued
Contracts—Continued
Contractors—Continued
Rights
"Election" or waiver Page

Modification of Forest Service timber sale contract was permitted under terms of contract. In any case, in absence of coercion, duress or unconscionability, contractor's signing of modification agreement and continuing contract performance in accordance with modification, without indication of protest and with apparent knowledge of modification's scope, constituted "election" or waiver of contractor's "right" to now assert that modification was beyond scope of contracting officer's authority and thus constituted breach of contract 459

Modification
Consideration
Adequacy

Contractor has alleged that modification agreement to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates lacked consideration since Forest Service could have allowed change without increasing rates. However, contractor received consideration of being relieved of more risky and costly logging method and being allowed to use equipment he apparently was more familiar with and had more control over 459

Consistent with Forest Service manual

Forest Service action of modifying contract to change logging methods and raise stumpage rates is not inconsistent with Forest Service Manual. In any case, manual is merely expression of Forest Service policy, of which failure to adhere does not render action invalid 459

Contract provision
Alternate logging methods

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging 459

Not unconscionable under Uniform Commercial Code

Contract modification to Forest Service timber sale contract permitting change from helicopter logging to contractor requested alternate logging methods and increasing stumpage rates is not unconscionable under Uniform Commercial Code Section 2–302, as contended by contractor, where contractor is experienced logger, record indicates that Forest Service apprised contractor of scope and nature of modification over a month prior to its execution and modification was lawful and not one-sided 459

TIMBER SALES—Continued
Contracts—Continued
Modification—Continued
Rates
Structure
Agreement Page

Modification of rate structure of timber sale contract is in violation of 36 C.F.R. 221.16(a) (1976), which prohibits retroactive rate modifications, because modification pertains to contract unexecuted portions as well as executed portions. However, contractor, who signed modification agreement and performed contract in accordance therewith, cannot now assert violation to excuse himself from agreement 459

TIME
Standard advanced to daylight savings
Compensation effect
Sunday premium pay

Federal Aviation Administration (FAA) employee's regularly scheduled tour of duty was from midnight Saturday to 8 a.m. Sunday. Daylight savings time began during tour of duty, and, therefore, employee was allowed, pursuant to provision of contract between FAA and union, to work from 8 a.m. until 9 a.m. so as to work full 8-hour tour of duty. FAA refused to pay Sunday premium pay for the hour from 8 a.m. to 9 a.m. Claim for Sunday premium pay may be paid for entire 8-hour tour of duty, including hour from 8 to 9 a.m. 5 U.S.C. 5546(a) (1970) .. 858

TRANSPORTATION
Air carriers
Certificated *v.* noncertificated air carrier service
Additional per diem for delay in travel

Where, to comply with 49 U.S.C. 1517, an employee travels by certificated U.S. air carrier requiring boarding or leaving carrier between or travel spanning the hours of midnight and 6 a.m., he may be granted a brief period of administrative leave and additional per diem for "acclimatization rest" at destination 629

Hours of travel

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable. Modified by 56 Comp. Gen. 629 219

The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier. Modified by 56 Comp. Gen. 629 219

TRANSPORTATION—Continued
Air carriers—Continued
Certificated *v.* noncertificated air carrier service—Continued
Hours of travel—Continued Page

Where the only certificated air carrier service between points, both of which are outside United States, requires boarding or leaving the carrier between or travel spanning the hours of midnight and 6 a.m., and where a noncertificated carrier is available which does not require travel at those hours, the certificated service may be considered unavailable. The traveler may instead travel by noncertificated carrier to the nearest practicable interchange point on a usually traveled route to connect with a certificated carrier in accordance with 55 Comp. Gen. 1230 (1976). 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified 629

Foreign
"Certificated air carriers"

Employee's liability under 49 U.S.C. 1517 and the Fly America guidelines should be determined on the basis of loss of revenues by certificated U.S. air carriers as a result of the employee's improper use of, or indirect travel by, noncertificated air carriers. To the extent that State Department's formulas at 6 FAM 134.5 impose liability based on gain in revenues by "unauthorized" carriers where traveler's actions merely shift Government revenues between noncertified air carriers, those formulas unnecessarily penalize Government travelers 209

Up to 2 days additional per diem is payable to comply with the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service for foreign air transportation. If total delay, including delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of noncertificated service, certificated service may be considered unavailable 216

Bills of lading
Government
Report of loss, damage or shrinkage
Condition 7

Condition 7 in Government bill of lading constitutes a waiver of the limitation period in a commercial bill of lading regarding time within which notice of loss or damage or suit or claim regarding the same must be instituted 264

Claims
Generally. (*See* **CLAIMS, Transportation**)
Damage, loss, etc., of public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)
Dependents
Military personnel
Dislocation allowance
Husband and wife both members of uniformed services

Where a permanent change of station requires the disestablishment of a household in one place and a reestablishment of the household in another, a dislocation allowance is authorized, except for members without dependents who are assigned to Government quarters. In no event can more than one dislocation allowance be paid where only one

TRANSPORTATION—Continued
Dependents—Continued
Military personnel—Continued
Dislocation allowance—Continued
Husband and wife both members of uniformed services—Con. Page
movement of a household is required. However, where both members of the uniformed services married to eqch other qualify for a dislocation allowance upon a permanent change of station but only one movement of the household occurs, they may elect to be paid the greater amount of the two entitlements ---- 46
Household effects
Damage, loss, etc.
Freight charges
A carrier of household goods in international door-to-door container-MAC (Code T) service is entitled to payment for services it performed under a Government bill of lading contract when part of a shipment of goods is lost or destroyed and delivery of that part is not made because delivery was prevented by the act of the shipper's agent ---- 820
Storage. (*See* **STORAGE, Household effects**)
Mobile homes. (*See* **MOBILE HOMES, Transportation**)
Ocean carriers
Liability
Damage, loss, etc., of cargo
Evidence
Prima facie case of liability of common carrier by water for goods shipped through Panama Canal is established when shipper shows that cargo was received in good order and condition at origin and arrived in damaged condition at destination. To escape liability, carrier must show that loss or damage was caused by an Act of God, the public enemy, inherent vice of the goods or fault of shipper, and that it was free of negligence ---- 264
Overcharges
Set-off
The Government's common law right of setoff is not extinguished by 49 U.S.C. 66. The right of the Government to deduct from the payment of freight charges is not limited to overcharges ---- 264
Property damage, loss, etc.
Public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)
Rates
Expedited service
Shipment of household effects
Liability
Employee is not liable for expedited service charges on shipment of household goods moved under actual expense method where bill of lading contract between Government and carrier did not conform to rules in governing tariff ---- 757
Tariffs
Ambiguous
Ambiguity unfounded
No ambiguity is found in tariff when one tariff item clearly makes rates in tariff inapplicable on shipments having certain physical characteristics, and directs tariff user to another tariff for applicable rates on those shipments ---- 529

TRANSPORTATION—Continued
Rates—Continued
Tariffs—Continued
Construction
Against carrier Page
A tariff should be construed strictly against the carrier who drafted it, but a tariff must be given a fair reading and any unreasonable ambiguities cannot be imparted 529
Waiver
Rules in a regulated common carrier tariff on file with regulatory commission are part of the tariff and cannot be waived 757

TRANSPORTATION DEPARTMENT
Urban Mass Transportation Administration
Transit authorities
Status
State agencies or instrumentalities
Entitlement to interest earned on Federal grants
Federal grantor agencies should follow State law in determining whether transit authorities are State instrumentalities, and therefore permitted to retain interest earned on Federal grants, or political subdivisions of State, which may not retain such interest, pursuant to section 203 of Intergovernmental Cooperation Act of 1968. Bureau of Census classification or other reasonable criteria may be used to determine status of transit entities in absence of State guidance. Neither Act nor its legislative history requires Bureau of Census classifications to be followed 353

TRAVEL EXPENSES
Actual expenses
Evidence sufficiency
National Labor Relations Board employee who is authorized reimbursement for actual subsistence expenses while on 90-day detail may not be reimbursed for meal expenses claimed on a flat-rate basis and must provide itemization of actual daily food expenses 40
Air travel
Fly America Act
Applicability
In the absence of agency instructions adopting a fare proration formula for determining traveler's liability for scheduling of travel in violation of the Fly America guidelines, this Office will apply a mileage proration formula calculating the traveler's liability based on certificated U.S. air carriers' loss of revenues 209
Up to 2 days additional per diem is payable to comply with the requirement of 49 U.S.C. 1517 for use of available certificated air carrier service for foreign air transportation. If total delay, including delay in initiation of travel, in en route travel, and additional time at destination before the employee can proceed with his assigned duties, involves more than 48 hours per diem costs in excess of per diem that would be incurred in connection with use of noncertificated service, certificated service may be considered unavailable 216

TRAVEL EXPENSES—Continued
Air travel—Continued
Fly America Act—Continued
Applicability—Continued Page

Under 49 U.S.C. 1517 and the Fly America Guidelines a traveler is not required to travel during hours normally allocated to sleep to facilitate his use of certificated air carrier service for foreign air transportation. The requirement for reasonable periods of sleep is more than a matter of mere convenience to the traveler. Thus, where the only certificated service available requires travel during periods normally used for sleep and where a noncertificated air carrier is available which does not require travel during those hours, the certificated service may be considered unavailable. Modified by 56 Comp. Gen. 629 219

The policy of 49 U.S.C. 1517 requiring use of certificated air carrier service is to be considered in determining the practicability of scheduling travel during the employee's regularly scheduled workweek in accordance with 5 U.S.C. 6101(b)(2). Where a choice of certificated service is available, travel should be scheduled aboard the carrier permitting travel during regular duty hours. However, where certificated service is available only during nonduty hours, the employee would be required to use that service as opposed to traveling by a noncertificated air carrier. Modified by 56 Comp. Gen. 629 219

Where the only certificated air carrier service available between points in the United States and points outside the United States requires boarding or leaving the carrier between midnight and 6 a.m., or travel spanning those hours, the employee is required by 49 U.S.C. 1517 to use such service insofar as otherwise available under the Comptroller General's Guidelines of March 12, 1976, and decisions of this Office. 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified 629

Employees' liability
Travel by noncertificated air carriers

Employee's liability under 49 U.S.C. 1517 and the Fly America guidelines should be determined on the basis of loss of revenues by certificated U.S. air carriers as a result of the employee's improper use of, or indirect travel by, noncertificated air carriers. To the extent that State Department's formulas at 6 FAM 134.5 impose liability based on gain in revenues by "unauthorized" carriers where traveler's actions merely shift Government revenues between noncertified air carriers, those formulas unnecessarily penalize Government travelers 209

Rest and recuperation
Alternate point

In view of State Department's instruction that alternate R&R point is to be regarded as employee's primary R&R point for purposes of 49 U.S.C. 1517 and application of the Fly America guidelines, employee's choice of alternate R&R location not serviced by certificated U.S. air carriers will be scrutinized to assure that it meets the purpose of rest and recuperation and was not selected for the purpose of avoiding the requirement for use of certificated U.S. air carriers 209

TRAVEL EXPENSES—Continued
Air travel—Continued
Fly America Act—Continued
Rest and recuperation—Continued
Primary point Page

Under State Department instructions, alternate rest and recuperation (R&R) point is to be regarded as the employee's primary R&R point for purposes of 49 U.S.C. 1517. Since certificated U.S. air carrier service is unavailable between the employee's duty station, Kinshasa, and his alternate R&R point, Amsterdam, employee's action in extending his ticket to include personal round-trip travel aboard a foreign air carrier to Los Angeles at a reduced through fare was not improper since his additional travel did not diminish receipt of Government revenues by certificated U.S. air carriers 209

Foreign air carriers
Prohibition
Availability of American carriers

Where the only certificated air carrier service between points, both of which are outside United States, requires boarding or leaving the carrier between or travel spanning the hours of midnight and 6 a.m., and where a noncertificated carrier is available which does not require travel at those hours, the certificated service may be considered unavailable. The traveler may instead travel by noncertificated carrier to the nearest practicable interchange point on a usually traveled route to connect with a certificated carrier in accordance with 55 Comp. Gen. 1230 (1976). 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel*, modified 629

Apartment rental
Temporary duty. (*See* **TRAVEL EXPENSES, Temporary duty, Rental of apartment**)

Constructive travel costs
Limited to cost of common carrier

Where Federal Aviation Administration has authorized travel by common carrier to training course based on its determination that travel by privately owned vehicle is not advantageous to the Government, it is not an appropriate exercise of administrative discretion to excuse employees from duty without charge to leave for the excess traveltime occasioned by the employees' election as a matter of personal preference to travel by privately owned vehicle 865

Failure to fulfill contract
Alaskan employees

Employee appointed as road locator in Alaska was unable to perform rigorous duties of position and was terminated prior to end of term of Service Agreement. Whether separation was for reasons beyond employee's control and acceptable to agency is for agency determination. Record here supports inference that separation was for benefit of Government and for reasons beyond employee's control. Voucher for return travel to Ithaca, New York, may be certified for payment upon such determination 606

TRAVEL EXPENSES—Continued
Leaves of absence
Temporary duty
After departure on leave
Payment basis Page

Agency believes that it would be unreasonable for employee to assume expenses of returning to his permanent duty station via a temporary duty station after his annual leave was interrupted by directions that he testify before a Federal district court. Such expenses may not be allowed since purpose of employee's vacation was in large part accomplished and vacation was interrupted only a day before it would have otherwise ended---- 96

Miscellaneous expenses
Telephones
Long distance calls
Voucher certifications

Travel Voucher, Standard Form 1012, revised August 1970, provides for certification of long distance telephone calls by officials authorized under 31 U.S.C. 680a on voucher itself. Separate certification of long distance calls is no longer required. 44 Comp. Gen. 595 and B–115511, July 3, 1953, modified---- 28

Permanent change of station
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Private parties
Attendants
Handicapped employees

Physically handicapped individual, confined to wheelchair, serving without compensation on Commerce Technical Advisory Board may be reimbursed for travel expenses of wife who accompanied him as attendant on official travel. Based on Federal Government's policy of nondiscrimination because of physical handicap set forth in 5 U.S.C. 7153 (1970) and 29 U.S.C. 791 (1975), where agency determines that handicapped employee, who is incapable of traveling alone, should perform official travel, travel expenses of escort are necessary expenses of travel---- 661

Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

Temporary duty
Assignment interrupted
Return expenses, etc.
Illness or death in family

Employee who returned to duty station to attend funeral of mother alleges that mission was substantially completed before return and second trip was for different purpose. Claim for travel expenses may be paid if agency determines that mission was substantially completed or second trip was for different objective---- 34

TRAVEL EXPENSES—Continued
Temporary duty—Continued
Rental of apartment
Cleaning services Page

Although employee who rents apartment while on temporary duty may be reimbursed expenses for cleaning services as a cost of lodgings, claim for $600 for maid service for 3 months is excessive based on cleaning needs of a one-bedroom apartment occupied by one individual. Reimbursement should be limited on the basis of the cost of commercial cleaning service provided on a once-a-week basis..... 40

Telephones
User charges, etc.

Employee who rents apartment while on temporary duty may be reimbursed telephone user charges, taxes thereon, and television rental charges as costs of lodgings. However, the cost of telephone installation may not be included as an expense of lodgings..... 40

Transfers
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses**)

UNITED STATES INFORMATION AGENCY
Employees
Prevailing rate employees
Entitlement to negotiate wages

Section 9(b) of Public Law 92-392, governing prevailing rate employees, exempts bargaining agreements, in effect on August 19, 1972, containing wage setting provisions. Certain United States Information Agency radio broadcast technicians are covered by such an agreement and therefore may continue to negotiate wage setting procedures until the parties agree to delete wage setting provisions from their agreement. Then such employees would be governed by the Prevailing Rate Statute.. 360

VEHICLES
Privately owned
Cost of installing pollution control devices in automobiles
Relocation expenses. (*See* **OFFICERS AND EMPLOYEES, Transfers, Relocation expenses, Miscellaneous expenses, Pollution control devices, Installed in automobiles**)

VESSELS
Crews
Compensation
Limitation on pay fixed by administrative action

Agency questions whether pay of crews of vessels set under 5 U.S.C. 5348 (Supp. V, 1975) is subject to ceiling of grade GS-18 as provided under 5 U.S.C. 5363 (1970). Since we find that pay for crews of vessels is fixed by administrative action, we hold that such pay is subject to section 5363 and may not exceed the rate for grade GS-18..... 870

VESSELS—Continued
Sales
Price determination Page
Portion of prior decision 54 Comp. Gen. 830, holding that Maritime Administration's establishment of a minimum acceptable bid price for surplus vessels and that its rejection of bids below that price was not subject to objection in view of broad discretion vested in Secretary of Commerce, is affirmed since record does not establish that agency acted arbitrarily or in bad faith. Prior holding that absence from solicitation of minimum acceptable bid price does not comport with competitive bidding requirements is modified in view of subsequent case law and absence of specific statutory requirement for disclosure of minimum price 230
Requirement that minimum acceptable price be determined on "current" basis and that evaluation of bids not be based on speculative factors does not preclude consideration of changing and projected market conditions in establishing minimum acceptable price 230

VETERANS
Education
Overpayments
Educational assistance allowances to veterans
Whether or not erroneous or excessive Veterans Administration disability compensation and educational assistance payments which constitute debts to the United States must be collected is a matter for submission to the Veterans Administration, which has exclusive jurisdiction in such matters 587

VETERANS ADMINISTRATION
Surplus/excess property
Sale/transfer
Disposition of proceeds
Veterans Administration's authority under 38 U.S.C. 5011, by which its revolving supply fund receives proceeds from sale of scrap, excess or surplus property, does not enable VA to conduct its own sales of excess or surplus property. Such transactions must be handled by General Services Administration in accordance with the Federal Property Act and implementing regulations which make need for personal property by any Federal agency paramount to any other disposal. However, VA revolving fund should be reimbursed for transfers or sales of its property if reimbursement is requested under 40 U.S.C. 485(c) 754

VIETNAM
Evacuation
Claims for currency
Substantiation
31 U.S.C. 492a–492c (1970) and Treasury regulations permit purchase of foreign currency "for official purposes." Purchases by State Department officials of piasters from Vietnamese employees prior to evacuation from Vietnam were "for official purposes." Claims now submitted by Vietnamese who turned in piasters but did not receive dollars may be honored, if they can be substantiated 791

VIETNAM—Continued
Evacuation—Continued
Loss of currency Page

Sufficient evidence exists to support Treasury Department conclusion that United States currency in account of United States disbursing officer (USDO) was not destroyed prior to evacuation from Vietnam. Loss should be treated as a physical loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis 791

Loss of Vietnam piasters, held by United States disbursing officer (USDO) and State Department officials, abandoned during evacuation should be treated as a physical loss at official exchange rate at time of loss. Adjustment for loss will be from current appropriation for disbursing function. 31 U.S.C. 82a–1 (1970). Loss may be distributed among agencies using USDO services on a reimbursable basis 791

Deposits of Vietnam piasters by United States disbursing officer with Treasury of Vietnam and National Bank of Vietnam should be treated as loss by exchange and charged to Gains and Deficiencies account in Treasury, pursuant to 31 U.S.C. 492b and Treasury Circular No. 830, since deposits were for purposes of exchange operations 791

VOUCHERS AND INVOICES
Certifications
Long distance telephone calls

31 U.S.C. 680a provides that long distance telephone calls must be for transaction of official business and that agency heads or officials designated by them must determine and certify that such calls are in interest of Government before payment is made from appropriated funds. If, after examining facts surrounding long distance tolls on travel vouchers to traveler's family, properly designated official determines said calls were in interest of Government, General Accounting Office (GAO) will not question such determination 28

Government Printing Office
Prompt payment requirement

44 U.S.C. 310 (1970) requires prompt payment by Executive departments and independent establishments of bills rendered by the Public Printer for supplies ordered from the Government Printing Office, in advance of work if so requested, and exempts these bills from audit or certification prior to payment. General Services Administration, to comply with statute, must pay such bills without prepayment audit if audit would delay payment 980

Travel
Certifications
Long distance telephone calls

Travel Voucher, Standard Form 1012, revised August 1970, provides for certification of long distance telephone calls by officials authorized under 31 U.S.C. 680a on voucher itself. Separate certification of long distance calls is no longer required. 44 Comp. Gen. 595 and B–115511, July 3, 1953, modified 28

VOUCHERS AND INVOICES—Continued
Travel—Continued
Leave during travel status
Recording requirements Page

Transferred employee claimed per diem on travel voucher which stated only date of departure from old station, date of arrival at new station, and allowable travel time based on miles between stations divided by 300 miles per day. Payment of per diem must be suspended since voucher does not meet requirements of Federal Travel Regulations (FTR) para. 1–11.5a, which specifies that taking of leave and exact hour of departure from and return to duty status be recorded---- 104

Compliance with FTR para. 1–11.5a (May 1973), which specifies voucher requirements, is not waived by FTR para. 2–2.3d(2), which fixes maximum allowable per diem on basis of minimum driving distance of 300 miles per day, since latter provision is for application when it appears from properly executed and documented voucher that traveler failed to maintain prescribed minimum mileage---------- 104

WAIVERS
Debt collections. (*See* **DEBT COLLECTIONS, Waiver**)

WATER
Land and Water Conservation Act
Appropriations
Grants

Grants from appropriations under the Land and Water Conservation Fund Act (Act), 16 U.S.C. 460*l*–4 to 460*l*–11 may be applied to costs incurred by States after Sept. 3, 1964 (date of enactment), but prior to availability of the appropriation charged, if it is determined that such payments would aid in achieving the purposes of the Act, since nothing in the Act prohibits such payments and there is no possibility that Federal dollars will be used merely to replace State dollars expended for non-Federal purposes. Furthermore, there is no Anti-Deficiency Act objection since the grant itself would not be made until the appropriation charged becomes available---------- 31

WITNESSES
Third party
Administrative proceedings
Fees
Searching for and producing records

In view of enactment of section 1205 of Tax Reform Act of 1976 expressly authorizing such payments effective Jan. 1, 1977, and a variety of court cases and Comptroller General decisions, we will not object if, when Internal Revenue Service (IRS) determines that it will avoid costly litigation and delays in obtaining necessary documents pursuant to duly issued summons, IRS enters into agreement with third party record holder to pay the reasonable costs of searching for, producing and/or transporting documents which are the subject of that summons---------- 3

WORDS AND PHRASES

Auction technique Page

Request for second round of best and final offers after agency concluded price would be determinative factor for award because of lack of "decided technical advantage" between offerors did not constitute an auction technique 712

Call for a new round of best and final offers, as a result of various material changes made to specification requirements after submission of best and final offers, is justified and does not constitute auction technique. Agency had no alternative but to institute a second round of negotiations. Moreover, the record indicates that price revisions made under second best and final offers were primarily the result of changed requirements and correction of proposal deficiencies 905

Basic compensation

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule 60

Basic ordering agreements

Basic Ordering Agreements cannot be used to exclude surplus spare parts once procuring activity has been made aware of potential source of supply, especially where surplus parts are acceptable from item manufacturer 1005

Block grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States 645

Brand names

Since there is nothing in the legislative history of the Water Pollution Control Act that clearly details what is meant by phrases "brand names" or "trade names" of comparable quality, General Accounting Office (GAO) is reluctant to substitute its judgment—that phrases refer to product history, rather than manufacturer identity, of switchgear—for EPA's judgment that phrases also mean manufacturer identity 912

Breeder Briefs

Clinch River Breeder Reactor Project

Comments in "Breeder Briefs" newsletter (concerning Clinch River Breeder Reactor Project) urging readers to contact Congressmen in support of Project, do not violate Federal anti-lobbying statutes since statutes are conditioned on use of appropriated funds, and appropriated funds were not involved either in publication of newsletter or in payment of salary of Project official who made comments 889

WORDS AND PHRASES—Continued

Contra proferentem rule Page

Award should not be based on ambiguous price proposal through application of *contra proferentem* rule of contract construction that ambiguities be construed against their drafter; rather, discussions should be conducted to clarify price 768

Digest

Language in a headnote is only a paraphrase or digest, and cannot be relied upon in preference to the text of a decision 275, 277

Eligible spouse beneficiary

The meaning of the phrase "eligible spouse beneficiary" as used in 10 U.S.C. 1452(a), as amended by section 1(5)(A)(ii) of Public Law 94–496, is to be defined ln terms of the definition of "widow" or "widower" contained ln 10 U.S.C. 1447, for the purpose of entitlement to 10 U.S.C. 1450(a) benefits; that is, that in order to receive a survivor annuity as an eligible widow or widower beneficiary on the death of the member in retirement, they must be an eligible spouse beneficiary immediately before that death 1022

"Entitlement" block grant funds

Lands purchased with "entitlement" block grant funds under title I of Housing and Community Development Act of 1974 may be accepted by the Corps of Engineers for its local flood control projects. The provisions of 42 U.S.C. 5305(a)(9) (Supp. V, 1975), specifically authorize the use of grant funds thereunder to pay the non-Federal share required in another Federal grant project undertaken as a part of a community development program. The local flood control project program, governed in part by 33 U.S.C. 701c (1970), is analogous to a Federal grant-in-aid program with the local "matching" share being the provision of the land without cost to the United States 645

Expedited service

Employee is not liable for expedited service charges on shipment of household goods moved under actual expense method where bill of lading contract between Government and carrier did not conform to rules in governing tariff 757

"Finitely determinable" or "fixed" prices

"Fixed" or "finitely determinable" prices

Award for micrographics services based on unit prices for 5 million, 6 million and 7 million images, respectively, is not "fixed" or "finitely determinable" for all periods of contract under "fixed prices" clause because, if 18 million images are exceeded in three evaluated periods, there exists no applicable unit price. Also, protester's proposal did not propose "fixed" or "finitely determinable" prices for all periods because, although fixed unit prices were proposed for initial contract period, subsequent options were based on same unit prices adjusted by Cost of Living Index for previous 12-month period. Clause contemplates "fixed" or "finitely determinable" prices as of time of award so proper price evaluation can be made 768

"Four-step" source selection procedures

Since Department of Defense special test, "four-step" source selection procedures are comparable to source selection procedures of National Aeronautics and Space Administration (NASA), General Accounting Office (GAO) precedent derived from protests involving NASA's prior negotiated procurements is of aid in resolving issues under contested "four-step" procurement 989

WORDS AND PHRASES—Continued

Full payout lease Page

Finding that proposal offering "full payout lease" was nonresponsive was improper where amended solicitation invited proposals based on lease and on lease with option to purchase. In these circumstances, "full payout lease" was tantamount to offer of terminable lease with option to purchase 829

"Funds available for payments" clause of continuing contracts

33 U.S.C. 621, which provides that public works projects adopted by Congress may be prosecuted by direct appropriations, continuing contracts, or both, permits Corps of Engineers to obligate full price of continuing contracts in advance of appropriations where projects have been specifically authorized by Congress. Therefore, Corps may modify standard "Funds Available for Payments" clause of continuing contract which now limits Government's obligation to amounts actually appropriated from time to time. 2 Comp. Gen. 477, overruled 437

Headnote

Language in a headnote is only a paraphrase or digest, and cannot be relied upon in preference to the text of a decision 275, 277

Helicopter logging

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging 459

Helitack mission formula

Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended 671

"High lead slack line" and tractor logging

Modification of timber sale contract permitting logging method changes requested by contractor from helicopter logging to "high lead slack line" and tractor logging and increasing stumpage and acreage rates is allowed under contract which provided for modifications, with appropriate compensating adjustments, to provide for contractual provisions then in general use by Forest Service, such as provisions for these alternate logging methods, in view of sale's advertisement on basis of expensive helicopter logging 459

"Inherent vice"

Definition of "inherent vice" indicates that loss is caused in commodity without outside influence, and courts have so held 357

Initial production testing

Provision in invitation for bids allowing waiver of initial production testing if bidder previously produced essentially identical item contains no requirement for prior testing. Agency determination to waive testing on basis of prior production is therefore appropriate 689

WORDS AND PHRASES—Continued

Interchange point on usually traveled route Page

Where the only certificated air carrier service between points, both of which are outside United States, requires boarding or leaving the carrier between or travel spanning the hours of midnight and 6 a.m., and where a noncertificated carrier is available which does not require travel at those hours, the certificated service may be considered unavailable. The traveler may instead travel by noncertificated carrier to the nearest practicable interchange point on a usually traveled route to connect with a certificated carrier in accordance with 55 Comp. Gen. 1230 (1976). 56 Comp. Gen. 219 (1977), *Fly America Act—hours of travel,* modified--- 629

Leases

Full payout *v.* terminable with option to purchase

Finding that proposal offering "full payout lease" was nonresponsive was improper where amended solicitation invited proposals based on lease and on lease with option to purchase. In these circumstances, "full payout lease" was tantamount to offer of terminable lease with option to purchase--- 829

Level of effort

Insofar as protester's objection to contractor's level of effort is directed to Government's specification, protest raised after submission of proposal is untimely. Moreover, specifications regarding quantity and levels of training to be furnished is a decision for the contracting agency rather than for General Accounting Office (GAO)--- 381

"Line"

As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83-776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B-142250, May 2, 1961, overruled--- 655

Manufacturer identity

Since there is nothing in the legislative history of the Water Pollution Control Act that clearly details what is meant by phrases "brand names" "trade names" of comparable quality, General Accounting Office (GAO) is reluctant to substitute its judgment—that phrases refer to product history, rather than manufacturer identity, of switchgear—for EPA's judgment that phrases also mean manufacturer identity--- 912

Manufacturer only

Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer the specification because of quality and inspection concerns. Notwithstanding such concerns, GAO has suggested that product experience clause be used instead of "manufacturer only" specification--- 912

In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is

WORDS AND PHRASES—Continued

Manufacturer only—Continued Page

unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements 912

Master agreements

Department of Agriculture's proposed use of master agreements for prequalifying firms to compete for agency consulting requirements is tentatively approved, since it is not unduly restrictive of competition but may actually enhance competition in situations where small firms otherwise might not be able to compete 78

Missile-mile

Invitation's award evaluation formula, using cost per mission-mile, is improper because it is functionally identical to cost per single helitack mission formula found improper in prior decision and because award on either basis could cost Government more over contract term than award based on hourly flight rate bid and guaranteed flight hours. Therefore, cancellation of item 1 and resolicitation using cost evaluation criteria assured to obtain lowest possible total cost to Government is recommended 671

Modified product experience clause

In the present case, motivation for "manufacturer only" requirement was prompted by grantee's stated inability to "write a specification that permits qualified assemblers to [compete] while precluding an assembler who is inexperienced and unqualified from doing so." It is unfair, however, to prevent competent concerns from competing because of inability; consequently, GAO suggests the use of suitably modified product experience clause to evaluate nonmanufacturer's equipment in future procurements 912

Parametric and other cost estimating techniques

Parametric and other cost estimating techniques may legitimately be used by agency to determine credibility of each offeror's production estimates and most probable cost to the Government 635

Privity of contract doctrine

Privity of contract doctrine does not bar claim by Government for overpayments against subcontractor where subcontractor billed and ultimately received from Government substantially all of the contract payments 963

Product experience clause

Long-standing history of disputes between complainant and Federal agencies regarding propriety of "manufacturer only" specification for switchgear equipment shows some agency engineers generally prefer the specification because of quality and inspection concerns. Notwithstanding such concerns, GAO has suggested that product experience clause be used instead of "manufacturer only" specification 912

Proffered award

Where Government had been put on direct notice that offeror's intended pricing is different from Government's interpretation of clearly ambiguous proposal, Government cannot compel offeror to accept Government's interpretation in award. Consequently, award by Government varying terms of offer constitutes initiation of discussions, since offeror can either accept or reject proffered "award" 768

WORDS ANE PHRASES—Continued Page

"Rate of basic pay"

Employee placed in position within United States following reduction in force in Canal Zone requests ruling on whether tropical differential authorized by section 7(a)(2) of Act of July 25, 1958, 72 Stat. 407, may be included in "rate of basic pay" for purpose of applying "highest previous rate" rule. Question is based on provision of above-cited law requiring inclusion of tropical differentials as basic compensation for, *inter alia*, "any other benefits which are related to basic compensation." In 39 Comp. Gen. 409 we held that tropical differential may not be included in applying "highest previous rate" rule ---------- 60

"Read protection"

Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided ---------- 694

"Site visit" clause

In a solicitation for services, the inclusion of a clause providing for site inspection on Government installation was proper, notwithstanding protester's contention that contract was essentially one for supplies. 882

"Storage protection"

Contentions in requests for reconsideration—to effect that proposal offering "storage protection" satisfied RFP computer security requirement involving "read protection"; that proposal was sufficiently detailed to demonstrate satisfaction of requirements; that RFP did not require extensive detail; that furnishing more detail would have subverted security; that competing proposal provided no more detail; and that current contract performance complies with requirements—do not show prior decision that Navy acted unreasonably in accepting proposal was erroneous. Navy could not reasonably determine from proposal whether full read protection was offered and how it would be provided ---------- 694

"Taking area"

"Taking line"

As part of settlement with Cheyenne River Sioux Tribe for Oahe Dam project, section X of Public Law 83-776 gave Tribe grazing rights "on the land between the level of the reservoir and the taking line described in Part II hereof," Part II being a listing of tracts acquired by the United States from Indians. Since statute used term "taking area" in seven other sections to describe Indian lands taken, use of different term, "taking line" in section X is presumed to intend different meaning. "Line" means exterior boundaries of project within reservation, and Tribe has grazing rights on all project lands within such boundaries, whether lands were acquired from Indians or non-Indians. B-142250, May 2, 1961, overruled ---------- 655

Terminable lease with option to purchase

Finding that proposal offering "full payout lease" was nonresponsive was improper where amended solicitation invited proposals based on

WORDS AND PHRASES—Continued
Terminable lease with option to purchase—Continued Page
lease and on lease with option to purchase. In these circumstances, "full payout lease" was tantamount to offer of terminable lease with option to purchase ---- 829
"Touch-up" negotiations
After best and final offers are received, it is not proper for Government to reopen negotiations with only one offeror where other offerors are still within competitive range. Thus, where contracting agency conducted "touch-up" negotiations with only one of two offerors in competitive range after receipt of best and final offers—resulting in changes to offeror's proposed cost and fee—General Accounting Office recommends that agency reopen negotiations, give offerors reasonable opportunity to submit new best and final offers, and properly terminate negotiations upon receipt of those offers by common cutoff date ---- 958
Trade names
Since there is nothing in the legislative history of the Water Pollution Control Act that clearly details what is meant by phrases "brand names" or "trade names" of comparable quality, General Accoun ting Office (GAO) is reluctant to substitute its judgment—that phrases refer to product history, rather than manufacturer identity, of switchgear—for EPA's judgment that phrases also mean manufacturer identity ---- 912
"Two bites at the apple"
Solicitation provision which allows bidders to submit bid based on specified design and alternate bid deviating from those design features, the latter subject to post-bid opening qualification procedures, does not fatally taint procurement. Although provision gives bidders "two bites at the apple" with respect to alternate bid, bidders are bound by their basic bids and bidder who was low on both basic and alternate systems did not have option of deciding, after bid opening, whether to remain in competition ---- 487
Two-day per diem rule
The "2-day per diem rule" of 53 Comp. Gen. 882 (1974) and 55 Comp. Gen. 590 (1975)—that up to but not including 2 days' per diem may be paid to enable an employee to travel during regular duty hours—is intended to preclude delays in initiation or continuation of travel over weekends or over the 2 consecutive days that an employee is otherwise scheduled not to be on duty ---- 847
Where an employee delays his travel from Friday in order to travel during regular duty hours on Monday in disregard of the "2-day per diem rule," his per diem is limited to that which would have been payable if he had begun his return travel following the completion of work on Friday and continued to destination without delay ---- 847
Unbalanced bids
Unbalancing of prices
Requirement for submitting net or single percentage bid on requirements-type contract prevents deliberate unbalancing of prices by bidder, which assures award to low bidder regardless of quantities ordered. Further, if predetermined prices in IFB are too low or too high, bidders can adjust prices by offered plus or minus percentage factor ---- 107

WORDS AND PHRASES—Continued

Page

Venture capital

Investments (including certain long-term loans) by small business investment company (SBIC) in small business concerns which otherwise meet the requirements of 15 U.S.C. 683(b) and implementing regulations do not lose their character as "venture capital" even though the SBIC-lender reserves right to approve or disapprove future borrowings of small business concern from other potential lending institutions..... 23

Widow

Widower

The meaning of the phrase "eligible spouse beneficiary" as used in 10 U.S.C. 1452(a), as amended by section 1(5)(A)(ii) of Public Law 94–496, is to be defined in terms of the definition of "widow" or "widower" contained in 10 U.S.C. 1447, for the purpose of entitlement to 10 U.S.C. 1450(a) benefits; that is, that in order to receive a survivor annuity as an eligible widow or widower beneficiary on the death of the member in retirement, they must be an eligible spouse beneficiary immediately before that death..... 1022

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