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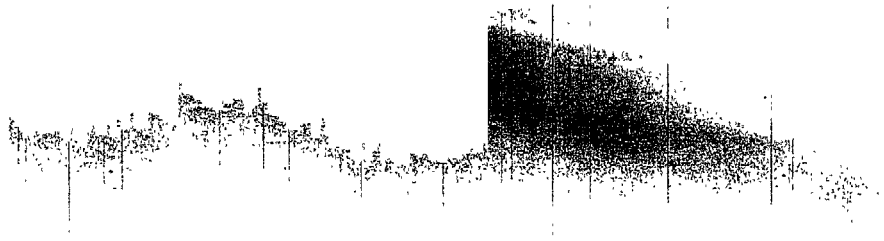

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TABLE OF DECISION NUMBERS

	Page
B-215842, June	666
B-218165.2, B-218165.3, June 10	643
B-218816, June 2	605
B-219813, June 24	657
B-220552, June 9	626
B-220680.3, June 3	619
B-220822, June 26	677
B-220941, June 11	647
B-221265, June 2	608
B-221496, June 26	679
B-221545, June 3	621
B-221585, June 9	635
B-221608, June 2	611
B-221634, June 24	660
B-221846, June 9	640
B-221851.2, June 26	683
B-222001, June 2	613
B-222122, June 30	685
B-222249, June 29	654
B-222328, June 2	615
B-222345.2, June 3	625
B-222481, June 24	663
B-222816, June 17	651

Cite Decisions as 65 Comp. Gen. —

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

[B-218816]

Federal Grant and Cooperative Agreement Act of 1977—Compliance—Cooperative Agreements—Procurement *v.* Cooperative Agreement—Criteria for Determining

A proposed study has been developed and submitted by the National Academy c Sciences to the Council on Environmental Quality for funding at the request of th Environmental Protection Agency. The purpose of the study is to provide informa tion on risks and benefits of certain pesticides to help Federal regulatory agencie such as EPA, in analyzing prospective regulations. The proper funding mechanisr should be a procurement contract, rather than a cooperative agreement, as require by 31 U.S.C. 6303 (1982), since the primary purpose of the study is to acquire infor mation for the direct benefit or use of the Federal Government.

Federal Grant and Cooperative Agreement Act of 1977—Compliance—Cooperative Agreements

The Council on Environmental Quality has no authority to use its Managemer Fund to provide grants or analogous assistance and therefore cannot enter into cooperative agreement, which is a form of assistance under 31 U.S.C. 6305.

Matter of: Council on Environmental Quality and Office of Environmental Quality—Cooperative Agreement With National Academy of Sciences, June 2, 1986:

The Executive Officer of the Council on Environmental Qualit and the Office of Environmental Quality [1] has requested a decisio on whether the Council has authority to enter into a cooperativ agreement with the National Academy of Sciences. According t the submission, the Council received a proposal from the Nationa Academy of Sciences for funding, in order for the Academy to cor duct a study on "Analytic Methods for Estimating Pesticide Ben fit." The proposed study would be financed via interagency agre ments from the Council's Management Fund. Although such study clearly comes within the Council's program authority, th Executive Officer was uncertain whether the Council has authorit to use a cooperative agreement as the mechanism to fund the pr posed study. *See* 42 U.S.C. § 4372(d)(4). The Executive Officer als asked whether the Management Fund can accept grant mone from another Federal agency and provide assistance with thos funds under a cooperative agreement.

As explained below, we find that the proper funding vehicle fc the proposed study is a "contract" rather than a "cooperativ

[1] The Council on Environmental Quality, 42 U.S.C. §§ 4341-47, was established b the National Environmental Policy Act of 1969, 42 U.S.C. §§ 4321 *et seq.*, to overs the Act's implementation. The Office of Environmental Quality was established b the Environmental Quality Improvement Act of 1970, 42 U.S.C. §§ 4371-74. This A made the Chairman of the Council on Environmental Quality the Director of th Office of Environmental Quality and enunciated as one of the Office's duties th provision of staff and support for the Council. 42 U.S.C. § 4372(d)(1). Since its cr at[illegible] Council and the Office of Environmental Quality have operated as s[illegible]ty under both statutes. Hereinafter, we will refer to these two agencies [illegible]."

agreement." There is no problem with the Council entering into a contractual relationship with the National Academy of Sciences for the project as described, as long as applicable Federal procurement regulations are met. However, we find that the Council has no authority to enter into a cooperative agreement with the National Academy of Sciences to carry out the proposed study.

Discussion

The Academy states that the purpose of the proposed project is—

> * * * to assist regulatory agencies and researchers in developing sound analyses of the economic impacts of prospective regulat[ions] impacting pesticide use patterns. National Academy of Sciences, National Research Council Board on Agriculture, "A Proposal for a Study on Analytic Methods for Estimating Pesticide Benefits" (Proposal No. 85-224).

The proposed study was developed and submitted to the Council at the request of the Environmental Protection Agency (EPA). EPA bases its pesticide regulatory decisions on a balancing of risks and benefits of particular pesticides and is concerned over existing limitations in methodologies and data for the estimation of comparative benefits of pesticide uses. The key focus of the study will be to develop methods for calculating comparative benefits of chemical and non-chemical pesticides.

As mentioned earlier, we have no question about the Council's authority to sponsor this type of study. The scope of its program authority is quite broad. *See* 42 U.S.C. § 4372. The only question is whether the Council is free to fund the project via a cooperative agreement or whether it must enter into a contractual relationship with the Academy instead. The Federal Grant and Cooperative Agreement Act, 31 U.S.C. §§ 6301-08 (1982), established the criteria which agencies must follow in deciding which legal instrument to use when entering into a funding relationship with a state, locality, or other recipient for an authorized purpose. Under these criteria, a contract is the proper funding vehicle when the services being acquired are for "the direct benefit or use of the United States." 31 U.S.C. § 6303.

Grants and cooperative agreements,[2] on the other hand, reflect a relationship between the United States Government and a State, a local government, or other recipient when—

> (1) the principal purpose of the relationship is to transfer a thing of value to the state, local government, or other recipient to carry out a public purpose of support or stimulation authorized by a law of the United States instead of acquiring (by purchase, lease or barter) property or services for the direct benefit or use of the United States Government. 31 U.S.C. §§ 6304 and 6305.

[2] The quoted description in paragraph (1) is the same for both grants and cooperative agreements. The principal difference is that a grant does not usually involve substantial participation by the Federal agency (31 U.S.C. § 6304). "Substantial involvement" is expected when cooperative agreements are used. 31 U.S.C. § 6305(2). It is customary to refer to both instruments as evidencing "assistance relationships."

The results of the proposed study are clearly intended primarily for the direct benefit of the EPA as well as other regulatory agencies concerned in the development of regulatory policy on pesticide use. Therefore, under the directives of the Federal Grant and Cooperative Agreement Act, discussed above the proper funding vehicle for the proposed study is a contract and not a cooperative agreement, as proposed. Providing applicable Federal procurement regulations are met, we see no problem with the Council entering into a contractual relationship with the Academy to perform the proposed study and financing it through the Management Fund.

The Executive Officer's second question was whether the Council's Management Fund can accept grant money from another agency and "provide assistance with those funds under a cooperative agreement." We assume, for purposes of this question, that the hypothetical study sought to be funded, unlike the National Academy proposal, is one intended primarily to support a public purpose rather than providing goods or services which the Federal Government wishes to procure for its own purposes.

In general, every agency has inherent power to enter into contracts to provide for its needs. However, we cannot assume that agencies have the power to donate Government funds to assist non-Government entities to accomplish their own purposes, however meritorious, without clear evidence that the Congress intended to authorize such an assistance relationship. B-210655, April 14, 1983. Therefore, in order to provide assistance through a cooperative agreement, there must be some affirmative legislative authorization. *Id.*

We have examined the Council's statutory authority but are unable to find any specific authority for it to enter into a cooperative agreement. The Management Fund of the Council was established by an amendment to the Environmental Quality Improvement Act. Pub. L. No. 98-951, 98 Stat. 3093, Oct. 30, 1984, to be codified at 42 U.S.C. § 4375. By law, the Fund can only participate in: (1) study contracts that are jointly sponsored by the Office and one or more other Federal agencies; and (2) Federal interagency environmental projects (including task forces) in which the Office participates."

With respect to the first authority, we find nothing in the Fund's legislative history that would support a broader interpretation for the words "study contract" than the plain meaning of the words would suggest. Therefore, we think that paragraph (1) merely authorizes the Council to enter into jointly sponsored contracts through the Management Fund.

The second authority, "Federal interagency environmental projects", does not involve the use of a "cooperative agreement" (as the term is defined in the Federal Grant and Cooperative Agreement Act), since the intended relationship is between Federal agencies, one of more of which may itself conduct the study in question.

Fund transfers between Federal agencies are not accomplished by awarding grants or entering into cooperative agreements. By statute, when an agency wishes to acquire goods or services from another agency, the transaction would be funded under the Economy Act (31 U.S.C. § 1535) or some other statute on a reimbursable basis. Since the Fund cannot be used to make assistance awards, such as cooperative agreements, even if it receives an order from another agency that has grant assistance authority, it remains limited to act within the scope of its own authority.

[B-221265]

Leaves of Absence—Sick—Substitution for Annual Leave

An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceding leave year. The request is denied. After annual leave is granted in lieu of sick leave as a matter of choice, thereby avoiding forfeiture of that leave at the end of the leave year under 5 U.S.C. 6304, the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the purpose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later.

Matter of: Virginia A. Gibson—Retroactive Substitution of Sick Leave for Annual Leave, June 2, 1986:

This decision is in response to a request from the Director, Headquarters Personnel Operations Division, Department of Energy. It concerns the entitlement of Ms. Virginia A. Gibson to substitute sick leave for annual leave which was used in the calendar year prior to the year in which she retired. For the reasons set forth below, we hold that the retroactive leave substitution requested may not be granted.

BACKGROUND

Ms. Gibson was an employee of the Energy Information Administration, Department of Energy. On October 24, 1984, she requested and received approval for the use of 72 hours of annual leave to be taken during the period December 21, 1984, through January 4, 1985, the last Friday of the leave year ending January 5, 1985. On November 19, 1984, she suffered injuries as a result of a non-job related automobile accident and was placed in a sick leave status. She did not return to duty until Monday, January 7, 1985.

After the accident, when it became apparent that her injuries were sufficiently incapacitating so as to preclude her use of the annual leave for the purpose for which it was intended, she requested and was granted permission to substitute the use of that approved annual leave in lieu of the sick leave she could have otherwise taken. The submission points out that Ms. Gibson took this action in order to avoid possible forfeiture of the 72 hours of annual leave.

In June or July 1985, she submitted a further request regarding leave substitution. She requested that she be permitted to retroactively substitute 72 hours of sick leave for the 72 hours of annual leave already approved to be used in lieu of sick leave in the first instance and that the 72 hours of annual leave be restored and carried forward into the 1985 leave year. Her apparent purpose was to enhance her lump-sum leave payment, since we understand that Ms. Gibson retired from Federal service on September 27, 1985.

Prior to submisison here, the agency, based on their interpretation of our decision *Interstate Commerce Commission*, 57 Comp. Gen. 535 (1978), has already proposed allowing retroactive substitution of 24 hours of sick leave for annual leave, which represented the leave taken on January 2, 3, and 4, 1985, because it was in the calendar year of her retirement. The question asked is whether similar retroactive substitution and restoration may be made for the annual leave used in the calendar year prior to that in which the employee retired.

DECISION

Preliminarily, we do not agree with the agency's interpretation of our decision *Interstate Commerce Commission, supra*. The facts in that case showed that in November 1977, the employee took 2 weeks of approved annual leave. He died on November 29, 1977, following return to duty. Shortly thereafter, a member of his family informed the agency that the period during which he had requested and was charged annual leave should have been charged as sick leave, since the reason he was absent was due to an illness and he needed hospital care, which he wanted to keep secret. Based on those circumstances, the family requested that the leave period be charged to sick leave and the annual leave charged be recredited for the purpose of the lump-sum leave payment to the employee's survivor.

We ruled in that case that we had no objection to the retroactive charging of the absence to sick leave and recrediting the annual leave used, if the agency determined that such action was appropriate. In so ruling, we stated in part:

> * * * in those cases where the employee retires or dies during the same year in which the leave is taken, and a timely request is made, it is appropriate to permit agencies to allow retroactive leave substitution * * *. 57 Comp. Gen. at 536.

The year involved in that discussion was not a "calendar" year. Nor did the case involve potential forfeiture of leave for non-use. Since the focus of the discussion was the provisions governing annual and sick leave under 5 U.S.C. §§ 6301 to 6312, the year to which we referred was a "leave" year. This distinction is im-

portant for several reasons. First, while the last work day of a leave year may coincide with the last day of a calendar year, it rarely does so because the cycle of biweekly pay period is not equal to the exact number of weeks and days in a calendar year. More often than not the last biweekly pay period beginning in December of a particular year extends into January of the succeeding calendar year, thus establishing those days in January which are within that biweekly pay period as days within that leave year for annual leave accrual and use. Second, unlike the accrual and accumulation of sick leave (5 U.S.C. § 6307), the accumulation of sick leave is subject, generally, to a maximum carryover of 240 hours from one leave year to the next with the excess annual leave subject to statutory forfeiture under 5 U.S.C. § 6304, if not used during the leave year.

All of the annual leave for which recredit is sought in the present case was subject to forfeiture under 5 U.S.C. § 6304 if not used by the end of the leave year. In view of the fact that *Interstate Commerce Commission, supra,* did not involve the prospect of possible forfeiture of any annual leave, the ruling therein would not control disposition of this case.

The law governing restoration of forfeited annual leave is contained in 5 U.S.C. § 6304 (1982). Subsection 6304(d)(1)(C) provides, in part:

> (d)(1) Annual leave which is lost by operation of this section because of—
>
> * * * * * * *
>
> (C) sickness of the employee when the annual leave was scheduled in advance; shall be restored to the employee.

Clearly, if Ms. Gibson had not used the annual leave in question in place of sick leave, it would have been forfeited and restored under the above-quoted section.

In 31 Comp. Gen. 524 (1952), we recognized, in principle, that while absences due to illnesses are normally charged to sick leave, such absences may be charged to accrued annual leave if timely requested and administratively approved, thereby preserving that sick leave for future use. Thus, the above provisions and that decision, when considered in combination, establish that an employee may elect which type of leave to use to cover absences due to illness. If the illness occurs during an approved period of annual leave which cannot be used for the purpose intended and because it is not used it is forfeited at the conclusion of the leave year, that forfeited annual leave may be restored to the employee for use in the following year. If, on the other hand, the employee chooses to use that otherwise forfeitable annual leave in lieu of sick leave and such use is approved, then at the close of the leave year, to the extent that such excess annual leave is used, the employee would have no excess annual leave to be forfeited.

In our decision 54 Comp. Gen. 1086 (1975), we considered a factual situation parallel to that involved in Ms. Gibson's case. There the employee chose to have his absence for illness charged to annual leave, thereby reducing his annual leave balance to a level where he had no excess annual leave at the conclusion of the leave year. We concluded that since he had already exercised his option and there was no annual leave forfeited by operation of law, there was no basis upon which a retroactive substitution of sick leave for annual leave during that preceding leave year could be premised.

In the present case, Ms. Gibson made a similar request before the close of the leave year, which request was approved. As a result, since she did not have any annual leave otherwise subject to forfeiture at the end of the leave year immediately preceding the leave year in which she retired, 54 Comp. Gen. 1086, above, controls her situation.

Accordingly, the agency may not retroactively substitute any sick leave for annual leave in her case, and may not recredit any annual leave for lump-sum payment purposes in the succeeding leave year.

[B-221608]

Transportation—Overcharges—Deduction Reclaims—Rate Propriety

Where the delivering/billing carrier had the appropriate authority to serve the origin and destination points, offered the government direct service between the points at single-line rates, and the Government Bills of Lading were issued to that carrier, the General Services Administration's determination that the higher joint-line rates charged and collected by the carrier were inapplicable is sustained, even though other carriers provided the pick-up service. The billing carrier's mere denial of an agency relationship and the absence of a written agency agreement do not rebut the presumption that the government followed its usual practice, called the carrier shown on the bills of lading, and looked to that carrier for performance of through single-line service.

Matter of: ABF Freight System, Inc., June 2, 1986:

ABF Freight System, Inc. (ABF), asks the Comptroller General to review deduction actions taken by the General Services Administration (GSA) against the carrier to recover overcharges collected for the transportation of various government shipments.[1] The GSA's overcharge claims were based on lower single-line rates which it deemed applicable to the shipments rather than the higher joint-line rates charged by ABF. We agree with GSA that the single-line rates are applicable.

S7008451	EP0844195	BP0767415	BP0766251	BP0767275
S4314960	S7008455	BP0767765	BP0765924	BP0766460
R0575005	S7008844	BP0768042	BP0765317	BP0767526

[1] The requests for review covered by this decision were contained in several letters dated December 17 and 18, 1985, and January 7, 1986, involving the following 41 Government Bills of Lading:

S8400137	BP0766255	BP0766242	BP0767359	BP0767409
S8400167	BP0766961	FP0018269	BP0767235	BP0766509
S2640465	BP0766968	BP0838767	BP0767324	BP0767732
S5894900	BP0767237	S5510715	BP0766893	BP0768479
S5626626	BP0766839	EP0844182	BP0767073	S6815874
BP0765961				

Facts

There is no dispute over the material facts. ABF held operating authority to provide direct service between all the points involved and offered the government direct service to these points at single-line rates. Each Government Bill of Lading was issued to ABF. ABF (or its agents) delivered the shipments at destination and was the billing carrier. ABF, however, billed for and collected freight charges based on higher joint-line rates (rather than single-line rates) on the basis that the shipments were not picked up by its employees.

The GSA recovered overcharges from ABF based on the single-line rates on the basis that the bills showed ABF as both the origin and destination carrier. Thus, GSA concluded that the pick-up services, if not actually performed by ABF, were performed by mere agents of ABF rather than interline carriers. The GSA cites *ABF Freight System, Inc. (East Texas Motor Freight),* B-218695, October 30, 1985, 65 Comp. Gen. 45, as support for its position.

ABF denies that the pick-up carriers were its agents and argues that since the bills were not signed by its employees, the shipments were picked up by interline carriers; therefore, the joint-line rates were applicable.

Discussion

The record in the October 30, 1985 *ABF Freight System* decision, *supra,* which sustained GSA's action, contained bills showing that they were not only issued to the billing carrier (ABF), but also that the shipments were received by the pick-up carriers on behalf of the billing carrier. The record in a related decision, *ABF Freight System, Inc. (East Texas Motor Freight),* B-218696/B-218697, October 30, 1985, which also sustained GSA's action, contained a letter from the billing carrier to the shipping officer designating the other carriers as its pick-up agents. See also *ABF Freight System, Inc.,* B-221609, February 28, 1986, sustaining GSA's action on other similar shipments. In these cases the agency relationship between the pick-up carriers and the delivering/billing carrier was shown by either a letter of agency designation or bills showing that the initial carriers received the shipments in an agency capacity. A similar clear showing of an agency relationship is not present in the current case. The issue here is whether GSA's determination of overcharges can be sustained in the absence of such affirmative evidence establishing an agency relationship between ABF and the pick-up carrier.

Our consideration of the issue leads to the conclusion that in the absence of contrary evidence, GSA establishes the *prima facie* validity of its audit determination by presenting three facts: (1) that ABF had the appropriate operating authority to serve the points involved, (2) ABF offered the government direct service from the origin to the destination points, and (3) the bills of lading show that they were issued to ABF as the transportation company to which the shipments were tendered, which was also the delivering/billing carrier. We also understand that it is the general government practice to offer the shipment to the carrier shown on the bill of lading.[2] Thus, there is a reasonable presumption that the government tendered the shipments to ABF, and did so with the understanding that it would provide through service at the lower single-line rates.

In these circumstances, as to the rates to be charged the government, it is irrelevant whether the relationship between ABF and the pick-up carrier was that of agency or interline carrier, for the operational details and the financial arrangements between ABF and the pick-up carriers have no legal effect on the agreement between the government and ABF. The pick-up carriers are not in privity with that agreement. The rationale for this rule rests on the inference from the facts that the government looked to ABF for the performance of through service, and on the recognition of the usual practice that government shipping officers call the carrier listed on the bill of lading for service, or call the pick-up carrier at the instruction of the carrier listed on the bill of lading. See *Navajo Freight Lines, Inc.,* B-189382, January 6, 1978.

While we would consider competent contrary evidence showing that the usual practice was not followed by the government, the mere denial by ABF of an agency relationship and the absence of a written agency agreement are not sufficient to rebut GSA's determination here.

Accordingly, in the absence of any relevant contrary evidence from the carrier here, GSA's audit actions are sustained.

[B-222001]

Transportation—Household Effects—House Trailer Shipments, etc.—Reimbursement

A transferred employee who transported her mobile home from her old to her new duty station is entitled to reimbursement for the transportation of a mobile home, in lieu of expenses for shipment of household goods, since she used the mobile home

[2] To verify our understanding of the usual practice we contacted the Joint Personal Property Shipping Office, Cameron Station, Alexandria, Virginia, where over 60 percent of the bills involved in this case were issued. The government official there unequivocally stated that it was the practice to instruct the warehouseman (the shipper) to contact ABF for service, and they looked to ABF for through service.

as her residence at her new duty station. However, she is not entitled to any additional miscellaneous expenses above an amount equivalent to 2 weeks of her basic salary.

Matter of: Bonnie J. Zachary—Transportation of Mobile Home, June 2, 1986:

An authorized certifying officer with the National Finance Center, United States Department of Agriculture, has asked whether a transferred employee, who has already received a miscellaneous expenses allowance equivalent to 2 weeks of her basic salary, may be reimbursed additional amounts for miscellaneous expenses. We hold that, although the employee, Bonnie J. Zachary, is not entitled to reimbursement of additional miscellaneous expenses, she is entitled to reimbursement for the expenses she incurred in transporting her mobile home from her old to her new duty station.

Ms. Zachary was transferred by the Forest Service from Halfway, Oregon, to Baker, Oregon. By a travel authorization dated August 12, 1985, she was authorized transportation of her immediate family, transportation and temporary storage of her household goods, temporary quarters subsistence expenses and a miscellaneous expenses allowance. Ms. Zachary traveled to her new duty station on August 29, 1985. Rather than selling her mobile home in Halfway, she decided to move it to Baker for use as her permanent residence there.

In connection with her move, Ms. Zachary incurred miscellaneous expenses in the amount of $1,181.71, primarily related to the relocation of her mobile home. She was reimbursed $588.80, an amount equal to 2 weeks of her basic salary, but she received no reimbursement for costs associated with the transportation of her mobile home. The National Finance Center suspended payment for the mobile home expenses on the ground that such expenses must be specifically authorized.

Ms. Zachary submitted a reclaim voucher for $592.91, representing the difference between the total expenses she incurred and the amount she was reimbursed. She claims she is entitled to the additional reimbursement because her decision to move her mobile home resulted in far less cost to the Government than if she had sold the mobile home and bought a residence at her new duty station.

An employee transferred in the interest of the Government is entitled to a miscellaneous expense allowance under 5 U.S.C. § 5724a(b). For an employee with an immediate family, such as Ms. Zachary, both the statute and the implementing regulations limit reimbursement to an amount not to exceed 2 weeks' basic pay. See 5 U.S.C. § 5724a(b), and paragraph 2-3.3a(2) of the Federal Travel Regulations (Supp. 4, Aug. 23, 1982), *incorp. by ref.* 41 C.F.R. § 101-7.003 (1985) (FTR). We cannot waive the limits prescribed by these

authorities, even though Ms. Zachary chose a method of relocating which was less costly to the Government than the method she was authorized to use. Therefore, Ms. Zachary is not entitled to any additional miscellaneous expense reimbursement.

However, where an employee transports a mobile home used as a residence, and the employee would otherwise be entitled to transportation of household goods, 5 U.S.C. § 5724(b) provides that the employee is entitled to reimbursement for the cost of transporting the mobile home. See FTR paragraph 2-7.1a (Supp. 1, Sept. 28 1981). Thus, we have held that where an employee was originally authorized payment of expenses for the shipment of household goods, he was entitled to expenses for the movement of a mobile home, in lieu of expenses for shipment of the household goods, if he certified that the mobile home was to be used as a residence at his new duty station. B-172536, August 17, 1972. See also 51 Comp Gen. 27 (1971). Under the statute and the Federal Travel Regulations, no specific authorization is required.

Since there appears to be no question that Ms. Zachary is using her mobile home as her residence, she should be reimbursed for the transportation of the mobile home in accordance with the regulations cited above.

[B-222328]

Contracts—Negotiation—Offers or Proposals Evaluation—Competitive Range Exclusion—Reasonableness

Agency's decision to exclude an offeror from the competitive range is proper where the offeror's technical proposal received an average score of 27 points out of a possible 100 and where the agency reasonably considered the offeror's technical proposal to be so deficient as to require major revisions before it could be made acceptable

Matter of: LNR Associates, June 2, 1986:

LNR Associates protests its exclusion from the competitive range under request for proposals (RFP) No. RS-NMS-86-001, issued by the Nuclear Regulatory Commission (NRC), Washington, D.C., to provide technical assistance to the NRC in its evaluation of environmental assessment studies prepared by the Department of Energy (DOE).

We deny the protest.

The Nuclear Waste Policy Act, 42 U.S.C. § 10101, *et seq.* (1982) requires that DOE select a site for the location of a repository for nuclear waste (high-level waste (HLW) repository). Consequently DOE prepared environmental assessments for nine candidate sites. The act also requires that the NRC adopt for its own purposes, to the extent practicable, Environmental Impact Statements (EIS) prepared by DOE for any candidate site. Accordingly, the subject RFP was issued by NRC to procure technical assistance in reviewing and evaluating DOE's technical assessments.

The RFP provided that award would be made to the offeror (1) whose proposal is technically acceptable and (2) whose technical/cost relationship is most advantageous to the government. The RFP also stated that while cost was a factor in the evaluation of proposals, technical merit would be more significant in the selection of the successful offeror. The RFP cautioned offerors that expertise in numerous technical areas was required and included the following technical evaluation criteria (ranked in descending order of importance):

A. *Related Past Experiences* (total 50)	30
1. Amount and type of the proposed review team's education and experiences in planning and conducting Environmental Impact Statement (EIS) preparation and NEPA reviews. Technical areas included are water quality, land use planning, terrestrial ecology, aquatic ecology, air quality, meteorology, noise, aesthetic resources, archeological, cultural and historical resources, radiological impact, non-radiological transportation and socioeconomic impacts.	
2. Amount and type of EIS experiences in completing EIS's on a timely basis for nuclear plants, waste disposal facilities or other similar facilities. 20 points	
B. *Management* (total 35)	20
* * * * * * *	
3. Offeror's proposed quality assurance program to support the technical soundness of work	5
* * * * * * *	
C. *Technical Approach* (total 15)	10
* * * * * * *	
Total	100

Three proposals were received in response to the RFP and were evaluated by a Source Evaluation Panel. LNR received an average score of 27 points of a potential 100 points, while the scores of the other two offerors were both above 75 points. LNR therefore was not included in the competitive range and its proposal was rejected as technically unacceptable.

Accordingly, the NRC notified LNR that its proposal had been eliminated from further consideration for the following reasons:

(1) the level of education of proposed personnel and related past experience were insufficient;

(2) the proposed management structure, quality assurance program and cost control program were unacceptable; and

(3) the proposal indicated a lack of understanding of the technical approach necessary to complete a timely EIS review and failed to demonstrate capability to provide multidiscipline assistance as required by the statement of work.

LNR disagrees with the NRC's evaluation in these areas and argues that the rejection of its proposal was not justified. While our Office has been furnished the evaluation reports and other relevant exhibits concerning this protest, the agency, which still has not selected a successful offeror, considers these documents to be privileged and has not provided them to the protester. Although we therefore are unable to reveal technical and cost details concerning the evaluation, our decision is based on a review of all relevant reports and exhibits submitted to our Office by NRC.

Our Office will not disturb an agency's decision to exclude a firm from the competitive range on grounds that it had no reasonable chance of being selected for award when, considering the relative superiority of other proposals, this determination was reasonable. *Ameriko Maintenance Co., Inc.*, B-216406, Mar. 1, 1985, 85-1 CPD ¶ 255. A protester has the burden of proving that the agency's evaluation was unreasonable. *Robert Wehrli*, B-216789, Jan. 16, 1985, 85-1 CPD ¶ 43. Moreover, an agency's decision to exclude an offeror from the competitive range is proper where the offeror's technical proposal is so deficient that it would require major revisions before it could be made acceptable. *Ameriko Maintenance Co., Inc.*, B-216406, *supra*.

LNR was found unacceptable in several areas under the experience factor (factor A.1. and 2.). LNR argues that it did propose personnel with the required qualifications since (1) its major participant in the project has a Masters of Science degree in meteorology and 30 years of experience as a staff member at NRC; and (2) its proposed program manager also has a Masters of Science degree in meteorology, advanced education equivalent to a Ph.D. in nuclear engineering, as well as 30 years of experience as a nuclear engineer, including 10 years as a licensing program manager, which involved the supervision of multidisciplinary groups in the review of nuclear plant licensing. These two individuals, argues LNR, have previously participated in EIS preparation, while others would be available if needed. Additionally, LNR claims that a hydrologist and a civil engineer are also available.

NRC states that the experience demonstrated in LNR's proposal related only to three of the 13 areas of experience listed as necessary in the RFP. We have independently reviewed LNR's proposal and find that NRC reasonably determined that LNR did not demonstrate experience in 10 of the 13 required areas. LNR apparently argues that it does have experience in these areas, but submitted its proposal with the assumption that the evaluators would already know the operations of two other offices within NRC, Nuclear Reactor Regulation and Nuclear Regulatory Research, in which some of its proposed personnel have had experience. In other words, LNR assumed that by simply listing the title of these proposed personnel, the SEP would assume that these persons had a full range of relevant experience. LNR also states that it deliberately emphasized its experience in meteorology because the solicitation contained, as an attachment, an illustrative "Meteorological Monitoring Plan." Consequently, LNR's discussion about its experience was set forth in about two pages of text, while the other offerors' discussions were extensive (approximately 100 pages).

It was incumbent on LNR, not the contracting agency, to affirmatively demonstrate the acceptability of its proposal by showing its relevant experience. See *Electronic Communications, Inc.*, 55 Comp. Gen. 636 (1976), 76-1 CPD ¶ 15; *Consolidated Service, Inc. of Charleston*, B-183622, Feb. 18, 1976, 76-1 CPD ¶ 107. The solicitation clearly required that experience in numerous areas be demonstrated and not only in meteorology. Since the record shows that LNR failed to do so, NRC's very low evaluation of this aspect of LNR's proposal and its finding that LNR's proposal was so deficient in this major area (50 points) that it would require major revisions before it could be made acceptable were reasonable. In this regard, we also note that with respect to previous EIS experience (factor A.2), LNR failed to indicate that it had any experience whatsoever in completing an EIS on a timely basis or any experience in an HLW program.

Concerning management structure and quality assurance (factors B.1., 2., and 3.), the solicitation required that the contractor ensure that independent review and verification be made of all numerical computations and mathematical equations, derivations and models. The NRC found that LNR's proposal contained no discussion of how computations and equations would be handled or how revisions would be made. LNR argues that it could have corrected this deficiency during discussions and that, therefore, the deficiency should not have been a basis for excluding its proposal from the competitive range. In response, NRC states that since LNR's proposal admittedly failed to contain the required discussion of computations and equations, LNR's assertion that it could have subsequently cured the deficiency does not refute NRC's reasonable finding that this deficiency in fact existed in LNR's proposal. We note that the solicitation cautioned all offerors that award may be made without discussions and that, therefore, proposals should be submitted initially on the most favorable terms from a cost and technical standpoint. We also note that it is incumbent on an offeror to demonstrate the acceptability of its proposal. See e.g. *Electronics Communications, Inc.*, 55 Comp. Gen. 636, *supra*. Here, we find that LNR again simply failed to do so.

The NRC also found that LNR failed to separate the quality assurance function from the project management function in its management structure. LNR argues that a certain individual, separate from the project manager, would be available for review of the reports for quality. However, our review of LNR's proposal shows that only a 15-percent effort level (part-time) for this individual was proposed by LNR for quality review. NRC found this unacceptable and we have no basis to disagree. We therefore find NRC's evaluation to be reasonable with respect to this aspect of its proposal.

Regarding the last major basis for NRC's rejection of LNR's proposal, lack of understanding of the proper technical approach, we do not think that we need to separately discuss this additional basis for rejection because it is clear that NRC intended to award a contract to a very experienced offeror and that its solicitation was accordingly so structured to give weight to the experience factor (50 points out of 100). NRC found that LNR's proposal was so weak and so deficient in demonstrating related past experience that it would require major revisions before it could be made acceptable. The NRC also found that the two other proposals demonstrated an acceptable level of related past experience. Moreover, the record shows that even if LNR would have received a perfect score in demonstrating a proper technical approach, it could have received only nine additional points under this criterion. Thus, there is no basis to conclude that any misevaluation under this criterion could have prejudiced LNR by depriving the firm of the opportunity to be included in the competitive range and by eventually depriving the firm of an award to which it was otherwise entitled. See *Employment Perspective*, B-218338, June 24, 1985, 85-1 CPD ¶ 715; *Lingtec, Inc.*, B-208777, Aug. 30, 1983, 83-2 CPD ¶ 279. Stated differently, we think that LNR's demonstrated experience was so weak in relevant past experience, the most important evaluation area, that NRC could reasonably exclude the firm from the competitive range because major revisions would have been required to make the proposal acceptable.

Accordingly, the protest is denied.

[B-220680.3]

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

A party that submits late Step 1 proposal is not an interested party to protest the evaluation of proposals or any changes in the terms and conditions of the solicitation that occur during or after proposal evaluation when those issues only affect the parties to the competition.

Matter of: Flight Resources Inc., June 3, 1986:

Flight Resources Inc. protests solicitation No. DTFA15-85-R-10011, issued by the Federal Aviation Administration (FAA), Department of Transportation, to obtain proposals for the operation of a general aviation service facility at Washington National Airport. The procurement was conducted under two-step sealed bidding procedures.[1] Flight Resources contends that the procurement

[1] The procedure used in the two-step sealed bidding are set forth in the Federal Acquisition Regulation (FAR), subpart 14.5 (FAC 84-5, April 1, 1985). Step 1 is similar to a negotiated procurement and consists of a request for technical proposals without price to determine the acceptability of the supplies or services offered. In Step 2, sealed bids are invited from those who submitted acceptable technical proposals in Step 1. After evaluation of the Step 2 bids, award is made to the responsible bidder with the lowest responsive bid. *Hewlett-Packard Co., et al.*, B-216125.2, May 24, 1985, 85-1 CPD ¶ 597.

was defective because the Step 1 negotiations resulted in such substantial changes to the agency's requirement that the procurement should have been resolicited with all potential offerors, including Flight Resources, invited to compete.

We dismiss the protest.

This protest is Flight Resources' third attempt, after failing to submit a timely Step 1 technical proposal, to compete for award under this solicitation. The proposal due date was September 5, 1985; the firm's proposal was not submitted until September 20, and it was thereafter returned because it was late. Flight Resources' initial protest to the agency, alleging that the agency should have extended the closing date for receipt of proposals, was dismissed as untimely. Its subsequent protest to this Office was also dismissed as untimely because the protest to the agency did not comply with the time limits of our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(3) (1985). *Flight Resources, Inc.*, B-220680, Oct. 25, 1985, 85-2 CPD ¶ 467. A request for reconsideration resulted in affirmance of the dismissal. *Flight Resources, Inc.*, B-220680.2, Nov. 12, 1985. Although this current protest initially included several grounds of protest, Flight Resources has withdrawn certain issues, leaving for resolution a challenge to Flight Resources' status as an interested party, and the protester's allegation that the Step 1 negotiations had so changed the requirements that a new solicitation should have been issued.

Under our Bid Protest Regulations, 4 C.F.R. § 21.1(e), only an "interested party" may protest to our Office. Whether a party is sufficiently interested depends on the party's status in relation to the procurement and the issues involved and how these circumstances show the existence of a direct or a substantial economic interest on the part of the protester. *NEFF Instrument Corp.*, B-216236, Dec. 11, 1984, 84-2 CPD ¶ 649. A party that would not be in line for award if its protest is sustained is generally not an interested party. *Zinger Constr. Co., Inc.*, B-220203, Oct. 31, 1985, 85-2 CPD ¶ 493. In some cases, if the remedy sought is not award under the protested solicitation, but cancellation and resolicitation of the requirement and the protester is a potential competitor on the new solicitation, the protester has the necessary direct interest to be an interested party. *Tracor Jitco, Inc.*, B-220139, Dec. 24, 1985, 85-2 CPD ¶ 710. However, a protester does not become "interested" merely by seeking cancellation and resolicitation. Thus, a party that submits a late proposal does not have standing to protest the evaluation of proposals or any changes in the terms and conditions of the solicitation that occurs after or during the course of proposal evaluation, since these issues only affect the parties that remain in the competition and only they have a direct economic interest in the outcome.

In this case, Flight Resources first asserts that the Step 1 solicitation required that each proposal provide a statement detailing the amount of investment in fixed improvements and operating facilities at the aviation service facility the offeror would make if awarded the contract. Flight Resources contends that after the Step 1 discussions, the FAA, for evaluation purposes, improperly limited to $2,200,000 the amount of investment for fixed improvements that an offeror could have added to the guaranteed minimum offered to the government for the contract. Flight Resources insists that the Step 1 solicitation made no reference to changes or putting caps on the investment and that this change was substantial and prejudicial "to the economic interest[s] and willingness to bid by the other potential offeror * * *" We fail to see how a change occurring after Step 1 technical discussions could conceivably keep any firm from entering the initial competition, nor do we believe that any firms other than those that submitted timely proposals have a legitimate stake in this issue. Since only those offerors that submitted timely Step 1 proposals have a legitimate interest in the evaluation, Flight Resources is not an interested party to protest this issue because it has no direct economic interest in the outcome. 4 C.F.R. 21.0(a) (1985).

Flight Resources also complains about a change to an obligation of the contractor to amortize its required investment in a new fuel farm over the 5-year period of the contract. This was changed after the Step 1 discussions to permit the contractor to amortize its investment over 10 years. Flight Resources contends that this is a substantial change and that the initial 5-year period kept many qualified firms from entering into the competition. We do not find Flight Resources to be a party of sufficient interest to challenge this issue either. As noted earlier, Flight Resources in fact attempted to submit its proposal under Step 1 of the solicitation. Although the proposal was not considered because it was late, there was no suggestion that the 5-year amortization schedule limited the protester's ability to compete for the award of the contract. By failing either to submit a timely proposal or a timely protest of what it now alleges was an unduly restrictive requirement, Flight Resources cannot be considered "an active or prospective bidder or offeror whose direct economic interest would be affected by the award of a contract * * *." 4 C.F.R. § 21.0(a).

The protest is dismissed.

[B-221545]

Releases—Proper Release or Acquittance—Survivor Benefit Plan Annuitant—Mentally Incapacitated Adult

Survivor Benefit Plan annuity payments should not be made to a mentally incapacitated annuitant's agent appointed under a power of attorney, notwithstanding that the validity of the power of attorney may have been preserved by operation of a state statute. The Survivor Benefit Plan is an income maintenance program for the dependents of deceased service members, entailing continuing periodic payments of indefinite duration in substantial aggregate amounts. Accounting officers have a

duty to obtain acquittance when payments are made under Federal law, and it is a matter of serious doubt that a good acquittance could be assured through payment of Survivor Benefit Plan annuities due mentally incapacitated annuitants to anyone other than court-appointed representatives, since only such representatives are subject to continuing independent supervision.

Matter of: Survivor Benefit Plan—Mentally Incapacitated Annuitants, June 3, 1986:

The question presented in this matter is whether an agent appointed under a power of attorney by a Survivor Benefit Plan annuitant may receive the annuity on the basis of the appointment after the annuitant becomes mentally incapacitated, if an applicable state statute provides that the authority conferred by the power of attorney shall be exercisable notwithstanding the annuitant's incompetency.[1] We conclude that annuity payments should not be made to an agent acting under a power of attorney in those circumstances.

Background

This matter concerns the widow of a retired member of the United States Marine Corps who elected to participate in the Survivor Benefit Plan. The retired marine thus elected to receive military retired pay at a reduced rate in order to provide a survivor's annuity for his wife if she survived him. Following his death, the Marine Corps Finance Center commenced making the annuity payments to his widow.

On August 17, 1982, the widow signed a document styled as a "durable power of attorney" in which she appointed her daughter as her "true and lawful attorney to * * * manage * * * my affairs." It specifically authorized the daughter to "receive, endorse, and collect checks * * * drawn on the Treasurer or other fiscal officer or depository of the United States." The document also provided that the daughter's authority to act "shall not be affected by disbility, incompetency, or incapacity of the principal."

In September 1985 the daughter sent a copy of this power of attorney to the Marine Corps Finance Center. The daughter advised hat her mother was in a nursing home and had become mentally ncapacitated, and requested that the monthly annuity payments ɔe remitted to her in the full amount.

The Marine Corps Finance Center then suspended payment of he annuity on the basis of decisions of our Office in which we expressed the view that payments due mentally incapacitated annutants under the Survivor Benefit Plan and the Retired Serviceman's Family Protection Plan should be reserved for remittance to

[1] This action is in response to a request for an advance decision submitted by the Disbursing Officer, Centralized Pay Division, Marine Corps Finance Center. The request was cleared through the Department of Defense Military Pay and Allowance Committee with submission number DO-MC-1461, and forwarded here by the Fiscal Director of the Marine Corps, Headquarters United States Marine Corps.

a guardian, custodian, or other fiduciary appointed by state court order.

The daughter disagreed with the position taken by the Marine Corps Finance Center because her mother had provided her with a "durable" power of attorney. The prevailing statutory law of the State of Alabama, her mother's place of domicile, defines a durable power of attorney as follows:

> (a) A durable power of attorney is a power of attorney by which a principal designates another his attorney in fact or agent in writing and the writing contains * * * words showing the intent of the principal that the authority conferred shall be exercisable notwithstanding the principal's subsequent disability, incompetency or incapacity. Ala. Code § 26-1-2(a).

The Alabama statute further states that "all acts done by an attorney during any period of disability, incompetency or incapacity of the principal * * * bind the principal and his successors in interest as if the principal were competent." Ala. Code § 26-1-2(b). The daughter has apparently suggested that on the basis of these provisions of the Alabama Code, the Marine Corps Finance Center should be required to remit her mother's annuity payments to her.

In requesting an advance decision on the question of whether continued annuity payments should be made to the payee's personally appointed agent in this case, the concerned Marine Corps officials observe that while all 50 of the states have enacted statutes in one form or another which allow powers of attorney to remain in effect under certain conditions even if the principal becomes mentally incapacitated, agents are without authority to compel third parties to transact business on the basis of a power of attorney. The Marine Corps officials also add these observations concerning the safeguards afforded in making disbursements to a court-appointed fiduciary rather than to an agent acting under a power of attorney:

> There remain serious differences between a State fiduciary proceeding based upon the incompetency or incapacity of an individual and durable power of attorney which empowers the agent to act for the incapacitated or incompetent principal. * * * (T)he Alabama Curators statute is submitted as an example * * *. In the fiduciary proceeding, the fiduciary's power emanates from the court in accordance with State law. See Ala. Code § 26-7A-2. The scope of the fiduciary's power is governed by State statute. In the durable power of attorney, the source of the agent's power is the voluntary delegation or assignment by the principal. The scope of the agent's power is governed by the instrument, the power of attorney itself. A State fiduciary is judicially supervised. See Ala. Code § 26-7A-9. The agent under a durable power of attorney is not. A state fiduciary is required to account for receipts and expenditures to the court. See Ala. Code § 26-7A-11. An agent under a durable power of attorney is not required to account. State law normally requires that a State fiduciary be bonded. See Ala. Code § 26-7A-8. The agent under a durable power of attorney is not required to be bonded. State fiduciary statutes prescribe that moneys must be expended for the benefit of the incompetent or incapacitated person. See Ala. Code § 26-7A-9. Statutes authorizing durable powers of attorney contain no such requirement. * * *

The Marine Corps officials consequently indicate that because of the relative lack of safeguards involved, they have reservations concerning the propriety of disbursing annuity payments to annu-

itants' agents acting under powers of attorney after the annuitants have become mentally incapacitated.

Analysis and Conclusion

In 1972 Congress established the Survivor Benefit Plan, 10 U.S.C. §§ 1447–1455, as an income maintenance program for the dependents of deceased service members. It was designed to provide better benefits at less cost than were available under the then current military survivor annuity program contained in the Retired Serviceman's Family Protection Plan, 10 U.S.C. §§ 1431–1446.[2]

Neither the Survivor Benefit Plan nor the Retired Serviceman's Family Protection Plan contains any provision prescribing procedures for making annuity payments to persons incapable of handling their own financial affairs. In the decisions referred to by the Marine Corps officials, we expressed the view that in the absence of any express provision of Federal statute or regulation on the subject, such payments should generally be made only to a representative payee duly appointed by a state court, since court-appointed representatives ordinarily act under judicial supervision and have a requirement to provide financial accounting statements periodically to the court.[3] Hence, we disapproved the making of such payments to agents or trustees acting without court appointment or supervision.

These decisions were predicated on the fundamental principle that the accounting officers of the uniformed services have a duty to obtain a good acquittance when payments are made by their direction under Federal law.[4] In that connection, we note that the rules governing the use of the durable power of attorney in Alabama, as applicable here, recognize that such a power of attorney is subservient to the rights and duties of a court-appointed "guardian, curator or other fiduciary." See Ala. Code § 26–1–2(c)(1). Thus, the durable power of attorney provides an agent with limited powers over the assets of the principal which may be superseded by a formal court appointment. In view of the substantial amounts of money involved in payments under the military survivor annuity programs, and the fact that the payments may continue for years, it would seem appropriate for the accounting officers of the uniformed services to insist on a court approved guardianship before payment is made on behalf of an incompetent annuitant, to assure that a good acquittance is obtained.[5]

[2] See, generally, S. Rep. No. 1089, 92d Cong., 2d Sess., *reprinted in* 1972 U.S. Code Cong. & Ad. News 3288; H.R. Rep. No. 481, 92d Cong., 1st Sess. (1971).
[3] See, generally, 62 Comp. Gen. 302, 306–308 (1983); 51 Comp. Gen. 437, 438 (1972).
[4] See, e.g., 62 Comp. Gen., *supra*, at page 307.
[5] In a proper case, we might have no objection to the disbursement of a nonperiodic payment to the personally appointed agent or trustee of an incompetent payee, provided that the laws of the payee's state of domicile authorized that procedure as a means of obtaining a good acquittance, the expense of obtaining a court-appointed guardianship would be disproportionate to the amount due from the United States, and the matter was otherwise free from doubt. Compare 47 Comp. Gen. 209, 211 (1967)

Accordingly, we conclude that the Survivor Benefit Plan annuity at issue here should not be paid on the basis of the power of attorney in question.

[B-222345.2]

Contracts—Protests—General Accounting Office Procedures—Timeliness of Comments on Agency's Report

General Accounting Office (GAO) will not reopen a protest file that was closed because the protester failed to file comments or express continued interest in the protest within 7 working days after receipt of the agency report as required by the Bid Protest Regulations. Protester's response to the contracting agency's decision on its prior agency protest may not be considered as comments on the agency's protest report to GAO because the response, submitted 24 days prior to the agency report due date, does not address the agency's detailed response to the GAO protest.

Matter of: Chemray Coatings Corp.—Reconsideration, June 3, 1986:

Chemray Coatings Corp. (Chemray) requests that we reopen its protest concerning the rejection of its bid as nonresponsive for failure to acknowledge a material amendment under solicitation No. 10PR–ZBS–5673 issued by the General Services Administration (GSA) for primer coatings. We dismissed the protest on May 12, 1986 because Chemray had not filed comments or a statement of continued interest in the protest within 7 working days after receipt of the agency report as required by our Bid Protest Regulatons, 4 C.F.R. § 21.3(e) (1985). The regulations provide that a protester's failure to file comments, a statement requesting that the protest be decided on the existing record, or a request for extension of the period for submitting comments will result in the dismissal of the protest.

We affirm our prior dismissal.

Chemray requests that our Office consider its response to GSA's decision on Chemray's prior agency protest as its comments on the agency report. The comments were submitted to this Office on April 1, which was 24 days before the due date for the agency's report.

Initially, we point out that our protest acknowledgment notice, sent to Chemray on the day its GAO protest was filed, specifically advised Chemray of the regulatory requirement to express continued interest in the protest within 7 working days of receiving the agency report.

Absent such an expression of interest from the protester, there was no basis for this Office to determine that Chemray retained interest in the protest. Chemray's submission 24 days before the agency report merely disagreed with GSA's conclusion that the amendment was material. GSA's response to Chemray's initial pro-

test had not explained in detail why the amendment was material. In contrast, the GSA report contained detailed legal and factual support for GSA's conclusion that Chemray's bid was properly rejected as nonresponsive. In addition, the report alleged a procedural deficiency for which the protest could be dismissed. Thus, Chemray's response to GSA's decision clearly does not take issue with GSA's position set forth in the report, and cannot be considered comments on the agency report.

Because of this, and our notice to Chemray as to the consequences of its failure to respond in some manner to the GSA report—for example, by advising us to consider its comments on the GSA decision as its comments on the GSA protest report—the prior dismissal is affirmed.

[B-220522]

Vacancies—Vacancies Act—Applicability

Provisions of the Vacancies Act, 5 U.S.C. 3345-49 (1982), govern the filling of vacancies in those offices which require Senate confirmation in the Department of Health and Human Services, except where there is specific statutory authority to fill such vacancies. The Vacancies Act applies to the position of Under Secretary, and various Assistant Secretary positions, and the positions of Deputy Inspector General, Commissioner on Aging, Administrator of the Health Care Financing Administration, and Commissioner of Social Security. The Vacancies Act limits acting appointments to fill such positions to 30-days duration.

Appointments—Presidential—"Vacancies Act" Restrictions

Actions by individuals occupying offices pursuant to the Vacancies Act which are taken subsequent to expiration of 30-day time limitation set forth in 5 U.S.C. 3348 are of uncertain validity. Accordingly, at the end of the 30-day period, such individuals should refrain from taking any further action in an acting capacity.

To the Honorable William Proxmire, United States Senate,
June 9, 1986:

This is in partial response to your letter dated September 25, 1985, in which you asked, among other things, to what extent the Vacancies Act applies to various officers of the Department of Health and Human Services serving in an acting capacity without Senate confirmation. As shown below, we conclude that the Vacancies Act is applicable to all of the positions in question and that those officers who serve more than 30 days in an acting status in such positions are in violation of the Act.

BACKGROUND

The following persons continue to serve in an acting status in positions that require confirmation by the Senate:

Interim Appointee	Position	Effective Date of Acting Status
Don M. Newman	Acting Under Secretary	12/16/85
Lawrence J. DeNardis	Acting Assistant Secretary for Legislation.	1/29/85
Robert B. Helms	Acting Assistant Secretary for Planning and Evaluation.	4/23/84
Carol Fraser Fisk	Acting Commissioner on Aging.	12/18/84
Henry R. Desmarais,[1] M.D.	Acting Administrator, Health Care Financing Administration.	2/02/86
Donald I. Macdonald, M.D.	Acting Assistant Secretary for Health.	12/02/85
Martha A. McSteen	Acting Commissioner of Social Security.	9/14/83

The following information has been provided our Office by the Department of Health and Human Services concerning the officers presently serving in acting capacities. All of the persons named above were appointed by the Secretary to serve in their present "acting" capacities.

Mr. Newman, the Acting Under Secretary, was nominated by the President to serve as Under Secretary on February 12, 1986. Additionally, Assistant Secretary for Human Development Services Dorcas R. Hardy has been nominated by the President to serve as Commissioner of Social Security and William R. Roper has been nominated to serve as Administrator, Health Care Financing Administration. We understand that the Senate Finance Committee has conducted hearings on these nominations.

No other nominations have been made for the above positions. With the exception of Dr. Donald I. Macdonald, who was confirmed as the Administrator of the Alcohol, Drug Abuse, and Mental Health Administration, none of the above named individuals has ever been confirmed by the Senate in any capacity. In addition, the Department has informed our Office that the position of Deputy Inspector General has remained vacant since January 22, 1981.

The positions of Under Secretary and two Assistant Secretaries were established by section 2 of the Reorganization Plan No. 1 of

[1] C. McClain Haddow served as Acting Administrator of the Health Care Financing Administration from August 12, 1985, to February 2, 1986, before the designation of Dr. Desmarais.

1953, effective April 11, 1953, 67 Stat. 631, 42 U.S.C. § 3501 note (1982). This section provides:

> There shall be in the Department an Under Secretary of Health, Education, and Welfare and two Assistant, Secretaries of Health, Education, and Welfare, each of whom shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions as the Secretary may prescribe, and shall receive compensation at the rate now or hereafter provided by law for under secretaries and assistant secretaries, respectively, of executive departments. The Under Secretary (or, during the absence or disability of the Under Secretary or in the event of a vacancy in the office of Under Secretary, an Assistant Secretary determined according to such order as the Secretary shall prescribe) shall act as Secretary during the absence or disability of the Secretary or in the event of a vacancy in the office of Secretary.

The position of Commissioner of Social Security was established pursuant to section 4 of Reorganization Plan No. 1 of 1953, *supra,* which provides as follows:

> There shall be in the Department a Commissioner of Social Security who shall be appointed by the President by and with the advice and consent of the Senate, shall perform such functions concerning social security and public welfare as the Secretary may prescribe, and shall receive compensation at the rate now or hereafter fixed by law for grade GS-18 of the general schedule * * *.

The other positions referred to above were established later. They all require appointment by the President and confirmation by the Senate, and the Congress has made no special provision for filling a vacancy in any of them.[2]

Appointment of Officers of the United States

The Appointments Clause of the Constitution, Article II, section 2, clause 2, provides as follows with regard to the appointments of offices:

> [The President] shall nominate, and by and with the Advice and Consent of the Senate, shall appoint Ambassadors, other public Ministers and Consuls, Judges of the Supreme Court, and all other Officers of the United States, whose Appointments are not herein otherwise provided for, and which shall be established by Law: but the Congress may by Law vest the Appointment of such inferior Officers, as they think proper, in the President alone, in the Courts of Law, or in the Heads of Departments.

Thus, the Constitution provides that officers of the United States must be appointed with the advice and consent of the Senate, except when the Congress clearly vests the full appointment power for a particular position or class of positions by law "in the President alone, in the Courts of Law, or in the Heads of Departments." See *Scully* v. *United States,* 193 F. 185, 187 (C.C.D. Nev. 1910).

[2] Under section 4(a) of Pub. L. 89-115, 79 Stat. 449 (1965), 42 U.S.C. § 3501a (1982), Congress provided for three additional Assistant Secretaries. The position of Commissioner on Aging was established by section 201 of title II, Pub. L. 89-73 (1965), 42 U.S.C. § 3011 (1982). The position of Administrator of the Health Care Financing Administration was made subject to Senate confirmation by section 2332(a) of Pub. L. 98-369 (1984), 98 Stat. 1089, to be codified at 42 U.S.C. § 1317. The position of Deputy Inspector General was established by section 202, title II, of Pub. L. 94-505 (1976), 42 U.S.C. § 3522(b) (1982).

The Vacancies Act

The so-called Vacancies Act, 5 U.S.C. §§ 3345-3349 (1982), provides methods for the temporary filling of vacancies created by the death, resignation, sickness or absence of the head of an Executive department or military department or the head of a bureau thereof whose appointment is not vested in the head of the department or in the President alone. Section 3345 provides that when the head of an Executive department or military department dies, resigns, or is sick or absent, unless otherwise directed by the President under section 3347, his first assistant shall perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3346 provides that when an officer of a bureau of an Executive department or military department whose appointment is not vested in the head of the department dies, resigns, or is sick or absent, unless otherwise directed by the President under section 3347, his first assistant shall perform the duties of the office until a successor is appointed or the absence or sickness stops.

Section 3347 provides that, instead of a detail under section 3345 or 3346, the President may direct the head or another officer of an Executive department or military department, whose appointment is vested in the President, by and with the advice and consent of the Senate, to perform the duties of the office until a successor is appointed or the absence or sickness stops. Section 3349 makes the methods described in the preceding sections the sole means for filling the vacancies described therein, except in the case of a vacancy occurring during a recess of the Senate.

Section 3348 of title 5, United States Code, provides that a vacancy caused by death or resignation may be filled temporarily under sections 3345, 3346, and 3347 for not more then 30 days.

The current provisions of the Vacancies Act are derived from the Act of July 23, 1868, ch. 227, 15 Stat. 168. The time limit now set forth in section 3348 was originally 10 days and was increased to 30 days by the Act of February 6, 1891, ch. 113, 26 Stat. 733.

Department of Health and Human Services Position

The Department of Health and Human Services does not view the Vacancies Act as being applicable to any of the appointments enumerated and discussed above. The Department's position is that each of the temporary appointments discussed above was made by the Secretary pursuant to section 6 of Reorganization Plan No. 1 of 1953, *supra,* which provides as follows:

> The Secretary may from time to time make such provisions as the Secretary deems appropriate authorizing the performance of any of the functions of the Secretary by any other officer, or by any agency or employee, of the Department.

Although recognizing that the vacancies discussed above are subject to the Appointments Clause of the Constitution, it is the De-

partment's position that the authority granted by section 6 of Reorganization Plan No. 1 of 1953, set forth above, allows for the Secretary's actions in one of two ways as explained below:

> First, the Secretary has promulgated a series of organizational plans and position descriptions that normally provide that if a vacancy occurs, the officer's first assistant (or other designated deputy) will act for the principal until the vacancy is filled. Here * * * six of the eight *ad interim* appointees are currently so-called first assistants (e.g., Deputy Commissioner, Social Security Administration) and assumed their *ad interim* status by virtue of the Department's organizational plan, authority vested in such deputies by virtue of those deputies position descriptions, or designation from among multiple deputies. Second, in certain instances where it was not feasible for the first assistant to assume the duties of the officer, the Secretary has made a special delegation of authority to a particular individual to carry out the functions of the vacant office. * * * [T]his method was used in two instances: Acting Assistant Secretary for Health and Acting Commissioner on Aging. In both cases, the *ad interim* appointee had occupied a significant position within the programmatic unit prior to the *ad interim* appointment.[3]

Additionally, it is HHS's position that the 30-day limitation on tenure of temporary appointees found in 5 U.S.C. § 3348 is not applicable to any of the vacancies discussed above for the following reasons:

> * * * First, the proscriptive provisions of the [Vacancies] Act do not restrict the authority of the Secretary to make *ad interim* designations where, as here, the Secretary is vested with independent statutory authority [section 6, Reorganization Plan No. 1 of 1953] to fill vacancies on an *ad interim* basis. Second, the Vacancies Act restrictions do not apply where, as here, each of the vacancies in question occurred during a Senate recess. Finally, since the 30-day restriction on interim appointments was not intended to apply to first assistants, even if the Act were applicable it should not be read as precluding the continued orderly functioning of the Department.

OPINION

The congressional intent in passing the 1868 act is indicated by debate recorded in the Congressional Globe of February 14, 1868:

> Mr. Trumbull. *The intention of the bill was to limit the time within which the President might supply a vacancy temporarily in the case of the death or resignation of the head of any of the Departments or of any officer appointed by him by and with the advice and consent of the Senate in any of the Departments.* As the law now stands, he is authorized to supply those vacancies for six months without submitting the name of a person for that purpose to the Senate; and it was thought by the committee to an unreasonable length of time, and hence they have limited it by this bill to thirty days," [Changed by floor amendment to 10 days.] 39 Congressional Globe 1163, February 14, 1868 [Italic supplied.]

It has long been held by the Attorney General that after a vacant position has been temporarily filled under the Vacancies Act the power conferred by the Act is exhausted and the President does not have the authority to appoint either the same or another officer to temporarily fill the Office for an additional period. 16 Op. Atty. Gen. 596 (1880); 18 Op. Atty. Gen. 50 (1884); *Id.* at 58; 20 Op. Atty. Gen. 8 (1891).

[3] The Department's position, as described here and elsewhere in this letter, was provided in a memorandum dated November 27, 1985, Mr. Robert E. Robertson, the Department's General Counsel.

As the intent of the Vacancies Act is to preclude unreasonable delays in submitting nominations for offices subject to Senate confirmation, we have adopted the view that the 30-day limitation contained in 5 U.S.C. § 3348 runs only during the period that there is no name before the Senate for confirmation by the body. See 56 Comp. Gen. 761 (1977). Also see *Williams* v. *Phillips,* 482 F. 2d 669 (D.C. Cir. 1973). But see *United States* v. *Lucido,* 373 F. Supp. 1142 (E.D. Michigan, 1974), wherein the court in effect stated that, notwithstanding that a name has been submitted to the Senate for confirmation, an appointment under the Vacancies Act would terminate at the end of the 30-day period set forth in 5 U.S.C. § 3348. Accord, 32 Op. Atty. Gen. 139 (1920).

The 30-day limitation placed on temporary appointments by 5 U.S.C. § 3348 applies by its express terms only to appointments or designations made under the Vacancies Act. Accordingly, the limitation contained in section 3348 is not applicable where vacancies are filled pursuant to authority other than the Vacancies Act.

By its express terms the Vacancies Act is applicable to the Executive departments and military departments. Section 101 of title 5, United States Code (1982), sets forth the Executive departments. The Executive departments include the Department of Health and Human Services, of which the Administration on Aging, the Health Care Financing Administration, and the Social Security Administration are a part.

The positions filled by the seven acting officials under consideration here all require appointment by the President by and with the advice and consent of the Senate, and are, in our opinion, subject to the Vacancies Act. With the exception of Mr. Newman, none of the seven officials has been nominated for the position in which they are serving. Thus, the 30-day limitation set forth in 5 U.S.C. § 3348 is applicable to all such appointments except Mr. Newman's.

In addition, we note that, from the list furnished us by the Department of the persons acting in the various positions, several were apparently neither "the first assistant" to the office in which they are acting nor are they officers whose regular appointments were made by the President "by and with the advice and consent of the Senate," as is required by the Vacancies Act. 5 U.S.C. §§ 3346, 3347. Therefore, it does not appear that they were eligible for appointment to the acting positions under the Vacancies Act.

The Department, however, argues that section 6 of the Reorganization Plan provides the necessary authority for these temporary appointments, thereby making the Vacancies Act inapplicable. Under section 6, Reorganization Plan No. 1 of 1953, the Secretary of Health and Human Services may authorize any other officer or employee of the Department of Health and Human Services to perform any function of the Secretary.

The provisions of section 6 of the Reorganization Plan are virtually the same as those contained in 28 U.S.C. § 510 under which the

Attorney General may authorize any other officer or employee of the Department of Justice to perform any function of the Attorney General. In our decision B-150136, February 19, 1976, we held that 28 U.S.C. § 510 does not supersede the provisions of the Vacancies Act. As discussed below, we believe that the same conclusion should pertain with regard to section 6 of the Reorganization Plan No. 1 of 1953.

It is clear that the primary intent of Reorganization Plan No. 1 of 1953 was to establish the Department of Health, Education, and Welfare (now Health and Human Services); to provide clear and direct lines of authority and responsibility for the management of the Department; and to make the Secretary clearly responsible for the effectiveness and economy of administration of the Department. The wording in Reorganization Plan No. 1 is similar to the wording of other reorganization plans approved in that time period. In fact, nearly all executive agencies were reorganized under similarly worded reorganization plans to effectuate the recommendations of the Hoover Commission by establishing clear and direct lines of authority within each agency. See B-150136, February 22, 1973. Therefore, the position of the Department of Health and Human Services based on section 6 of Reorganization Plan No. 1 would, in effect, virtually nullify the statutory provisions contained in sections 3345-49 of title 5, United States Code. It is clear that such result was not intended.

The Department argues that the proscriptive provisions of the Vacancies Act, including the 30-day limitation imposed by 5 U.S.C. § 3348, do not apply where the vacancies in question arose while the Senate was in recess. As indicated above, section 3349 makes the methods described in the preceding sections the sole means for filling the vacancies described therein, "except to fill a vacancy occurring during a recess of the Senate." What the quoted language in section 3349 recognizes is that the Vacancies Act *is not* the exclusive authority given to the President to make temporary appointments necessary "to fill a vacancy occurring during a recess of the Senate," thereby acknowledging the President's recess appointment authority found in Article II, section 2, clause 3 of the Constitution as follows: "The President shall have Power to fill up all Vacancies that may happen during the Recess of the Senate, by granting Commissions which shall expire at the End of their next Session." Clearly, when the President elects to exercise his constitutional authority to make appointments during a recess of the Senate, the 30-day limitation found in the Vacancies Act does not apply. Instead, such an appointee would be eligible to serve until the end of the Senate's next session.

This is clearly not the case with the Department's interim appointments, however, as none was made by the President. We do not agree with the Department's broad reading of section 3349 as enabling the Secretary of Health and Human Services to fill all vacancies occurring during a recess of the Senate without time limitation. We believe that section 3349 provides a limited exception for only temporary appointments made by the President.

The Department also argues that the legislative history of the Vacancies Act can be read to support the notion that the time limitation in the Vacancies Act "originally was not intended to apply to vacancies filled in the natural course by the first assistants." The Department suggests that the compilers of the "Revised Statutes," acting pursuant to authority found in 19 Stat. 268 (1877), "erroneously broadened the limitation to encompass all temporary office holders, even the first assistants." However, as the Department acknowledged in its report to our Office, the Revised Statutes, being an Act of Congress, had the full force and effect of law. The Department also recognizes that the Congress has enacted subsequent amendments to the Vacancies Act and has enacted numerous recodifications of the United States Code without changing the Vacancies Act from its current form. Therefore, we conclude that the present wording of the Act represents the intent of the Congress on this matter and, in any event, is legally effective.

Finally, we note that some of the enumerated positions have been without a nominee for two years and longer. This appears to be precisely the sort of "unreasonable" delay the Vacancies Act was enacted to prevent. In the absence of any other statutory authority to fill the positions on a temporary basis outside the Vacancies Act, we conclude that the 30-day limit is applicable.

Effect of Vacancies on Actions Taken by Temporary Appointees

The legal status of actions taken by temporary appointees under the Vacancies Act who continue to serve in an acting capacity beyond the 30-day time limitation is uncertain.

Those actions may possibly be viewed as acts performed by a *de facto* officer. A *de facto* officer or employee is one who performs the duties of an office or position with apparent right and under color of appointment and claim to title of such office or position. *William A. Keel, Jr.*, B-188424, March 22, 1977, and decisions cited. In general we have held that acts performed while a person is serving in a *de facto* status are valid and effectual insofar as concerns the public and the rights of third persons. 42 Comp. Gen. 495 (1963); see also 63 Am. Jur.2d Public Officers and Employees § 518.

With regard to defective or invalid appointments, the general rule is stated in 63 Am. Jur.2d Public Officers and Employees § 504 (1972) as follows:

> * * * the general rule is that when an official person or body has apparent authority to appoint to public office, and apparently exercises such authority, and the person so appointed enters on such office, and performs its duties he will be an officer de facto, notwithstanding that there was want of power to appoint in the body or person who professed to do so, or although the power was exercised in an irregular manner.

It is not clear, however, whether the Courts would apply the *de facto* doctrine where a statute specifically precluded the continued occupancy of the position. In 32 Op. Atty. Gen. 139 (1920), the Attorney General advised the Undersecretary of State, who inquired as to what action he and the officers of the Department of State should take upon the end of his 30-day period of service as Acting Secretary of State pursuant to the Vacancies Act:

> It is probably safer to say that you should not take action in any case out of which legal rights might arise which would be subject to review by the courts.

In 56 Comp. Gen. 761 (1977), we considered the effect of actions taken by the Acting Insurance Administrator, Department of Housing and Urban Development, who had continued to serve beyond the 30-day time limitation set forth at 5 U.S.C. § 3348. We stated that when it is too late to offer the advice set forth by the Attorney General in 32 Op. Atty. Gen. 139, the secretary of the department should consider ratification of those actions and decisions already taken which she agreed with to avoid any further confusion as to their binding effect.

Ongoing Enforcement Problem Under the Vacancies Act

Since your original request of June 21, 1972, to our Office concerning the applicability of 5 U.S.C. § 3348 to the temporary appointment of Mr. L. Patrick Gray III as Acting Director of the Federal Bureau of Investigation, we have been called upon by members of the Congress to issue many decisions concerning other officials in the various Executive Branch departments and agencies. Although our decision holding that Mr. Gray's continued services as Acting Director was prohibited by law [4] resulted in the President's contemporaneous action in nominating Mr. Gray to be the permanent Director, our more recent decisions finding various Executive Branch officers serving in violation of the Vacancies Act have had less than the desired salutory effect. In fact, there now seems to be a discernible pattern for Executive Branch agencies to take exception to our decisions on Vacancies Act questions and, supported by the Department of Justice, to ignore the holdings of these decisions. Our interpretation of the Act has consistently recognized that its application can only be superseded in the case of statutes that provide specifically for an alternate means of filing a particular office. The Executive agencies take the view that the Act can be overcome by the general authority of a cabinet secretary to assign functions and delegate authority within a department.

You have also asked what enforcement authority exists in the Vacancies Act itself and what is the most appropriate remedy for appointments in violation of the Act. The Vacancies Act does not contain any specific enforcement authority or remedy for violations. In other situations we have recognized that we have the authority to disallow salary payments from appropriated funds for purposes that are contrary to law. See 53 Comp. Gen. 600 (1974). However, the "acting" official in Vacancies Act cases is usually one who is otherwise entitled to the salary of his or her permanent position. Hence, we have not to date exercised this authority in such cases.

We trust that the above information serves the purpose of your inquiry concerning the applicability of the Vacancies Act to the enumerated positions within the Department of Health and Human Services. The other issues raised in your September 25 letter will be answered in a separate report.

[4] B-150136, February 22, 1973.

[B-221585]

Appropriations—Augmentation—Details—Improper

Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. 1301(a), and unlawfully augment the appropriation of the receiving agency. 64 Comp. Gen. 370 (1985) *affirmed.*

Detail—Between Agencies—Non-Reimbursable Details

Proposed detail of 15 of 20 administrative law judges (ALJs) from the National Labor Relations Board (Board) to the Department of Labor on a nonreimbursable basis for the remainder of fiscal year 1986 does not conform to either of the exceptions in 64 Comp. Gen. 370 (1985) in which we generally found nonreimbursable details to be improper. The exception where the detail has a negligible fiscal impact is a *de minimus* exception for administrative convenience where the detail is for a brief period and the number of persons and costs involved are minimal. The detail of 15 to 20 ALJs and the related amount of salary expenses far exceeds the *de minimus* standard we intended to establish. Furthermore, the detail is not particularly related to the purpose for which the Board's appropriations are provided. Thus the proposed nonreimbursable detail does not fall within the other exception set forth in 64 Comp. Gen. 370.

Matter of: Nonreimbursable Transfer of Administrative Law Judges, June 9, 1986:

The Department of Labor asks whether it may utilize on a nonreimbursable basis the equivalent of 10 judge years from the administrative law judge corps of the National Labor Relations Board (Board) during the remainder of fiscal year 1986. At this point in fiscal year 1986, the Department's request for the equivalent of 10 judge years means 15 to 20 judges. For the reasons given below, we find that the proposed transfer of administrative law judges (ALJs) is improper.

The Department informs us that it needs additional ALJs to assist in adjudicating a backlog of some 20,000 black lung cases,[1]

[1] The number of black lung cases appealed to the Department's ALJ corps increased from 484 at the end of fiscal year 1979 to 20,450 at the end of fiscal year

see 30 U.S.C. §§ 901 *et seq.* However, it cannot reimburse the Board for its judges since it already is using all available black lung program funds. Funds for the black lung program cases are appropriated in the yearly Department of Labor appropriations acts under the line item "Black Lung Disability Trust Fund." *E.g.,* Pub. L. No. 99-178, 99 Stat. 1102. Funds for the Board's ALJS come from the yearly lump-sum salaries and expense appropriation to the Board. *Id.*

The legislative history of both the 1985 Supplemental Appropriations Act, Pub. L. No. 99-88, 99 Stat. 293, 370, and the fiscal year 1986 Department of Labor Appropriations Act, *supra,* reflects congressional concern about the backlog and provides suggestions about how to resolve it. The Senate report accompanying the 1985 Supplemental directed the Department, to the extent practical, to increase its efforts to temporarily borrow ALJs from other agencies with less pressing workloads. S. Rep. No. 82, 99th Cong., 1st Sess. 158 (1985). For fiscal year 1986, aside from recommending an additional $4.4 million for 15 [2] new ALJs, and a substantial number of attorneys and support positions, the Senate again directed the Department to actively pursue borrowing ALJs from other agencies. S. Rep. No. 151, 99th Cong., 1st Sess. 18-19 (1985). Both congressional debate and hearings accompanying the 1986 appropriations act contain similar comments. 131 Cong. Rec. S. 8586 (daily ed. June 20, 1985) (statement of Senator Byrd); 131 Cong. Rec. H. 8033-34 (daily ed. Oct. 2, 1985) (statement of Representative Rahall); Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for Fiscal Year 1986: Hearings before a Subcomm. of the House Appropriations Comm., 99th Cong., 1st Sess. at 54-55, 1257, 1318-19 (pt. 1, 1985) (statements of Department officials).

Although the Senate Report accompanying the 1985 Supplemental suggested that the borrowing be done on a nonreimbursable basis, S. Rep. No. 82, *supra,* at 158, the Senate Report accompanying the 1986 Department of Labor appropriations act was silent about how the borrowing was to be funded. S. Rep. No. 151, *supra,* at 18-19. In hearings on the fiscal year 1986 appropriations act, however, several Department officials suggested that the borrowing could only be done on a reimbursable basis. House hearings, *supra,* at 1318-19; Departments of Labor, Health and Human Services, Education and Related Agencies Appropriations for Fiscal Year 1986: Hearings on H.R. 3424 before a Subcomm. of the Senate

1984. According to the Department, this increase resulted primarily from the Black Lung Benefits Reform Act of 1977, Pub. L. No. 95-239, 92 Stat. 95, 96-97, 103-04, which liberalized criteria for determining coal miners' and dependents' eligibility for Black Lung benefits and required review of previously denied and pending claims using the new criteria. *See* General Accounting Office, *Adjudication of Black Lung Claims,* app. I at 7 (B-216900, HRD-85-19, Oct. 26, 1984).

[2] A similar increase was supported by the House. S. Rep. 151, 99th Cong., 1st Sess. 19 (1985).

Comm. on Appropriations, 99th Cong., 1st Sess. 357 (pt. 2, 198 (Comments of Chief ALJ Litt of the Labor Department).

The Department points out that section 3344 of title 5 of tl United States Code, which permits agencies occasionally or temp rarily insufficiently staffed with ALJs to use [3] ALJs of other age cies, is silent on the question of reimbursement. Thus a question raised about whether a nonreimbursable borrowing would confli with our decision in 64 Comp. Gen. 370 (1985) in which we he that, absent specific statutory authority, nonreimbursable inte agency and intra-agency details were unlawful. This holding, whic reversed previous GAO decisions, found that such details violate the law that appropriations be only spent on the objects for whic they are appropriated, 31 U.S.C. § 1301(a), since the appropriatic funding the details neither provided for the details nor were so co nected with the work that was being done that the details al furthered a specific purpose for which the appropriation was mad Correspondingly, we found that such details augmented the appr priations of the receiving agency. Our holding covered situatio both in which the detail was not authorized by statute, and which the detail was so authorized, 5 U.S.C. § 3341, but the statu said nothing about how the detail was to be funded.[4] 64 Com Gen. at 376-82.

In our decision, however, we did formulate two exceptions to tl prohibition: one where the detail involves a matter (1) related the loaning agency's appropriations and which would aid it in a complishing a purpose for which its appropriations are provide and (2) where the detail would have a negligible impact on tl loaning agency's appropriations and would conform to the tin limits in Federal Personnel Manual Chapter 300, subchapter 8.[5] Comp. Gen. at 380-81.

In response to our decision the Office of Personnel Manageme (OPM) incorporated these exceptions into Federal Personn Manual Letter number 300-31, dated Aug. 27, 1985. The Depa ment of Labor urges that the described transfer would conform the second exception. As only a limited number of Board AL would be detailed, and all additional expenses resulting from tl detail, such as transportation and travel allowances, would be pa for by the Department, it thinks that the detail would have a neg gible fiscal impact on Board appropriations. Furthermore, since tl time involved would be for less than a year and would be coor nated through OPM's ALJ staffing group, the detail would confor to OPM's time limitations. Informally, the Department also h suggested that the transfer involves a labor matter related to t

[3] We regard the term "use" in the statute as synonymous with detail or transf

[4] Reimbursable details generally are authorized by section 601 of the Econo Act, 31 U.S.C. § 1535.

[5] This section allows intra-agency details of up to 1 year under certain conditic without OPM approval and extensions beyond that limit with prior OPM approv

Board's functions and will aid the Board in accomplishing a purpose for which the Board's appropriations are provided. The Board does not agree with this last assertion, according to a letter dated January 30, 1986, which we received from its Assistant Director for Administrative Law Judges Staffing Group. Neither the Board nor OPM object to the idea of the proposed detail so long as it is legally proper.

Initially, we would point out that neither of the exceptions set forth in 64 Comp. Gen. at 380–81 and adopted by OPM in FPM Letter 300–31 applies here. The Department misconstrues the exception where a detail would have a negligible fiscal impact. This is a *de minimus* exception for administrative convenience when a detail is for a brief period and the number of persons and costs involved are minimal, notwithstanding that 31 U.S.C. §1301(a) technically would be violated. The detail proposed here, involving 15 to 20 ALJs and the related substantial amount of salary expenses, far exceeds the *de minimus* standard we intended to establish. Although we think it prudent not to be overly restrictive and state what precise dollar amount or number of people participating in a detail would be considered *de minimus*, the Board indicates that the salary costs, exclusive of benefits, would come to $674,250 for the balance of fiscal year 1986. In view of the modest size of the NLRB's fiscal year 1986 appropriation for salaries and expenses, it would be difficult to conclude that this amount, if not reimbursed, would have a "negligible fiscal impact."

We are also unable to find that the transfer of Board ALJs to the Department to handle Black Lung Program cases is so related to the purpose for which the Board's appropriations are provided, that the detail falls within the first exception. There is no particular connection between the Board's appropriations and the resolution of Black Lung Program cases. By statute, the Black Lung Program is a Department of Labor responsibility. *See* 30 U.S.C. §§901 *et seq.* Moreover, as mentioned earlier, the Board itself finds the first exception "clearly not applicable."

Consistent with this discussion, it is evident that the propriety of the detail depends upon the authority provided by section 3344 of title 5. This section was enacted as part of section 11 of the Administrative Procedure Act of 1946, Pub. L. 79–404, 60 Stat. 237, 244, the section which described how ALJs (then called hearing examiners) were to be paid and used. Neither the legislative history of section 3344 of title 5 nor the regulations implementing the section, 5 C.F.R. §§930.201 *et seq.*, provide any clarification about whether the loaning or borrowing agency is to pay for the detailed ALJs.

Neither OPM, the agency responsible for administering the ALJ program, nor the agencies involved have interpreted section 3344 one way or the other. Nevertheless, OPM has told us that its policy is to allow agencies to work out the issue of reimbursement between themselves. As a practical matter, OPM indicates that the

vast majority of the 150 to 200 ALJs who are temporarily transferred per year to hear one or a number of cases in agencies other than the agency by whom they are employed are paid by the agency to whom they are transferred. Moreover, even though the transferring agency does occasionally pick up the costs, this has been done when the transfer involves minimal costs and never, to our knowledge, in a situation like the present one which involves a large number of ALJs.

We see no reason why the basis for our holding in 64 Comp. Gen. 370 (1985) that section 3341 of title 5 does not authorize nonreimbursable details should not apply here. As indicated, section 3344, like section 3341, is a statute that authorizes details but says nothing about reimbursement.

Section 1301(a) of title 31 is one of a number of statutes expressing Congress' constitutional control over the appropriations process. U.S. Const. art 1, §9, cl. 7. As pointed out in 64 Comp. Gen. at 382, when the Congress has found it desirable to do so it has enacted legislation that specifically allows for nonreimbursable details. Thus, for example, section 3343 of title 5 specifically authorizes such details to international organizations.

It is true that the Senate reports referenced above clearly intended the Department to borrow ALJs to help dispose of the black lung case backlog. Moreover, at least in its report accompanying the 1985 Supplemental Appropriations Act, S. Rep. No. 82, *supra,* the Senate indicated that the borrowing, to the extent practicable, be done on a nonreimbursable basis. However, it is well settled that suggestions or expressions of congressional intent in committee reports, floor debates and hearings are not legally binding unless they are incorporated either expressly or by reference in an appropriations act itself or in some other statute. 64 Comp. Gen. 359, 361 (1985); 55 Comp. Gen. 307, 319 (1975). Moreover, in this instance, even the Senate's position is not clear. The report accompanying the 1986 Labor Department appropriation said nothing about how the directed details were to be paid for. This was consistent with departmental suggestions in the hearings that nonreimbursable transfers would be unlawful. We also point out that in 1978, congressional concern with nonreimbursable details was expressed during the process of enacting amendments clarifying the authority for employing personnel in the White House Office and the President's authority to employ personnel to meet unanticipated needs, Pub. L. No. 95–570, 92 Stat. 2445, 2449–50. S. Rep. No. 868, 95th Cong., 2d Sess. 1, 4, 11 (1978); H.R. Rep. No. 979, 95th Cong., 2d Sess. 10–11 (1978).

For the reasons given above, we affirm the principles stated in 64 Comp. Gen. 370, and find that the proposed transfer in this case is improper if made on a nonreimbursable basis.

[B-221846]

Bids—Invitation for Bids—Defective—Evaluation Criteria

An invitation for bids and the award of fixed-rate, labor-hour, indefinite-quantity requirements contract for temporary clerical services is defective where the method of evaluating bids only involved the numerical averaging of hourly rates for each line item and not the extension or "weighting" of the line item prices by the government's best estimate of the quantities of hours required to determine the bid that would result in the lowest ultimate cost to the government.

Bids—Invitation for Bids—Defective

A solicitation which calls for bidders to submit option prices must state whether the evaluation will include or exclude option prices to allow for the submission of bids on an equal basis.

Matter of: Temps & Co., June 9, 1986:

Temps & Co. (Temps) protests the award of a contract to Woodside Temporaries, Inc. (Woodside), under invitation for bids (IFB) No. C66025, issued by the Federal Home Loan Bank Board (FHLBB). The procurement is for the acquisition of temporary clerical services. Temps asserts that the agency's method for evaluating bids as provided in the IFB was materially defective and, therefore, failed to assure that an award to Woodside would result in the lowest ultimate cost to the government. We sustain the protest.

Background

The IFB contemplated the award of a fixed-rate, labor-hour, indefinite-quantity requirements contract for the following labor categories: Secretary; Executive Secretary; Word Processor; Accounting Clerk; File Clerk; Receptionist; and Para-Legal (line items 001 through 007, respectively). The IFB described the type of services and qualifications required in each category and incorporated a current Department of Labor minimum wage rate determination. The IFB also set forth the estimated number of personnel that would be required in each labor category: Secretary (20); Executive Secretary (5); Word Processor (12); Accounting Clerk (2); File Clerk (3); Receptionist (2); and Para-Legal (3). Bidders were to bid hourly rates for each category of personnel.

The IFB advised bidders that the contemplated contract would be awarded for a 9-month base period (January 6, 1986, through September 30, 1986), with the right of the government to extend the contract for up to three additional 1-year periods. Although the IFB's schedule sought option prices, bidders were not advised as to whether the options would be evaluated in determining the successful bid.

Bids were opened on December 30, 1985. Seventeen bids were received, and upon the permitted withdrawal of the three lowest bids on the basis of mistake, the contracting officer determined that Woodside was the remaining low, responsive bidder. According to the FHLBB's administrative report, bids were evaluated by

numerically averaging the hourly rates bid for the base period only. Woodside submitted the following hourly rates for the base period:

001	Secretary	$12.15
002	Executive Secretary	12.83
003	Word Processor	13.50
004	Accounting Clerk	6.41
005	File Clerk	6.08
006	Receptionist	6.75
007	Para-legal	9.45

The numerical average of these rates was $9.59 (hourly rate total of $67.17 divided by 7), the lowest average among the remaining bids. (Temps' average hourly rate was $11.14.) Accordingly, upon a determination of Woodside's responsibility as a prospective contractor, the firm was awarded the contract on January 15, 1986. However, after examining the bid documents, Temps then protested the award to this Office on January 30.

Protest Position

Temps raises numerous allegations with respect to the conduct of the procurement, but the firm's essential ground of protest is that the agency's method of evaluating bids as set forth in the IFB was so defective that the FHLBB had no assurance that an award to Woodside would result in the lowest ultimate cost to the government. Specifically, Temps argues that the numerical averaging approach was improper because a bid that proposed high hourly rates for the high-volume labor categories (i.e., Secretary and Word Processor) and low hourly rates for the low-volume categories would be more favorably evaluated under that approach than a bid offering more balanced hourly rates for all labor categories. In the firm's view, the proper approach would have been to evaluate bids on the basis of "weighted" prices—that is, hourly rates extended by the estimated number of personnel required in each labor category.

Moreover, Temps notes that the IFB failed to advise bidders whether the options would be evaluated in determining the successful bid, and, consequently, that bidders may not have competed on a fair and equal basis for this reason. The firm urges that it would have displaced Woodside as the remaining low bidder if the agency had evaluated both its base period and option prices under the "weighted" approach.

Analysis

At the outset, we agree with the the FHLBB that Temps' protest is untimely. Our Bid Protest Regulations, 4 C.F.R. § 21.2(a)(1) (1985), specifically provide that protests based upon alleged impro-

prieties in an IFB which are apparent prior to bid opening must be filed prior to bid opening in order to be considered. See *DSG, Ltd.*, B-218948, July 29, 1985, 85-2 CPD ¶ 105. In our view, the issues now raised by Temps should have been apparent to the firm prior to the December 30, 1985, bid opening, and, therefore, its protest, filed one month later, was clearly untimely. Nevertheless, because we believe that the solicitation was materially defective by not providing for the proper evaluation of bids, we will consider the protest under the "significant issues" exception to our basic requirement for the timely submission of protests. 4 C.F.R. § 21.2(c). Exercise of this limited exception is appropriate in these circumstances where this is the first instance when the FHLBB is the affected "federal agency" in a bid protest matter, and where the agency's potential exercise of its right to extend the contract for a significant period could result in substantially increased costs to the federal government. Therefore, our consideration of the protest will provide useful guidance to the agency, and it will enable corrective action to be taken with minimal disruption to the government.

An IFB must clearly state the basis on which bids will be evaluated for award, and we have recognized that a properly constructed solicitation for an indefinite-quantity requirements contract must state that the evaluation will include estimated quantities as a factor. The rationale is that any award in an advertised procurement must be made to the responsive, responsible bidder whose submitted price is the lowest based on a measure of the total work to be awarded. *A to Z Typewriter Co. et al.*, B-215830.2 *et al.*, Feb. 14, 1985, 85-1 CPD § 198; *aff'd on reconsideration*, B-218281.2, Apr. 8, 1985, 85-1 CPD ¶ 404. Where the method for evaluating bids provides no assurance that an award will in fact result in the most favorable cost to the government, the IFB is materially defective. See *North-East Imaging, Inc.*, B-216734, Aug. 28, 1985, 85-2 CPD ¶ 237.

Thus, we have held that an IFB which indicated that selection for award would be made on the basis of the sum of the offered unit prices was defective *per se*, since there was a failure to apply the estimated amount of services against the item prices in determining the low bid. *Allied Container Manufacturing Corp.*, B-201140, Mar. 5, 1981, 81-1 CPD ¶ 175. Here, the agency not only failed to provide a meaningful estimate of the quantity of services required, but also attempted to determine the lowest bid through a numerical averaging of the hourly rates bid. More importantly, we also question why the agency expressed its estimates in terms of the number of personnel that would be needed. Rather, since the IFB clearly contemplated a fixed-rate, labor-hour contract, a properly constructed solicitation would have expressed the agency's estimated requirements in terms of the total number of labor hours or personnel days for each personnel category, rather than providing only the numbers of personnel estimated to be required. See

Ross Aviation, Inc., B-219658, Dec. 11, 1985, 85-2 CPD ¶ 648. In this regard, there was nothing in the IFB to indicate to bidders that these temporary employees would work on a full-time basis, since the FHLBB has in fact stated that the services were to meet an urgent requirement "during this particularly hectic period in the savings and loan industry * * *." A proper solicitation would have provided for the evaluation of bids by extending the bidders' hourly rates for each line item by the estimated hours to determine the low bidder.[1] Thus, because Woodside's submitted hourly rates had no direct relationship with the total amount of work to be performed, see *KISS Engineering Corp.*, B-221356, May 2, 1986, 86-1 CPD ¶425, the agency simply had no assurance that an award to the firm would result in the most favorable cost to the government.

Moreover, we believe the IFB was also defective by failing to advise bidders as to whether the submitted option period prices would be evaluated in determining the successful bid. The Federal Acquisition Regulation (FAR), § 17.203(b) (FAC 84-5, Apr. 1, 1985), provides that a solicitation which calls for bidders to submit option prices must state whether the evaluation will include or exclude option prices. See *Browning-Ferris Industries of the South Atlantic, Inc. et al.*, B-217073 *et al.*, Apr. 9, 1985, 85-1 CPD ¶ 406. Thus, by not knowing whether bids would be evaluated with regard to either aggregate prices or the base period price alone, the bidders here may not have submitted bids on an equal basis.

On the record before us, we conclude that the IFB was materially defective. Accordingly, by separate letter of today, we are recommending to the Chairman of the FHLBB that no options be exercised under Woodside's present contract and that any remaining requirements be resolicited under a properly constructed IFB.

The protest is sustained.

[B-218165.2 & .3]

General Accounting Office—Recommendations—Contracts—Prior Recommendation—Clarified

Decision sustaining protest against agency's use of negotiated cost-type contract for acquisition of mess services is modified to recommend assessment of overall risks of procurement and determination of propriety of use of cost-type contract. If agency reasonably determines that uncertainty is so great or has such a direct impact on pricing or costs that it directly affects an offeror or bidder's ability to project its costs of performance so as to preclude use of a fixed-price contract, agency may exercise options under current cost-type contract in accordance with Federal Acquisition Regulation.

[1] The estimate used must be based on the best information available to the agency. *D.D.S Pac*, B-216286, Apr. 12, 1985, 85-1 CPD ¶ 418.

Matter of: United Food Services—Reconsideration, June 10, 1986:

The Department of the Army and Rice Services, Inc. (Rice) request reconsideration of our decision *United Food Services, Inc.*, B-217211, Sept. 24, 1985, 64 Comp. Gen. 880, 85-2 CPD ¶ 326. In that decision we found that the Army's decision to use a cost-type, negotiated contract in lieu of a fixed-price, formally advertised contract in procuring mess services at Fort Jackson, South Carolina, was not justified. In sustaining United Food Services' protest, we noted that although the Competition in Contracting Act (CICA), Title VII of Pub. L. 98-369, eliminated the statutory preference for formally advertised (now "sealed bid") procurements, CICA and the Federal Acquisition Regulation (FAR) provide criteria for determining whether a procurement should be conducted by the use of sealed bids or competitive proposals. We recommended that the Army not exercise contract renewal options with the awardee, Rice, and instead conduct a new procurement under the applicable provisions of the FAR. We modify our prior decision.

The Army states that its determination to use a cost-type negotiated contract at Fort Jackson was based on the lack of reliable data on which to predict the effort required and the population of trainees to be fed with sufficient accuracy to permit offerors to bid on a fixed-price basis. The Army contends that budgeted recruitment and training goals did not provide a sufficiently accurate estimate or workload and that actual experience under the contract thus far has shown monthly attendance fluctuations above and below the scheduled number of trainees by over 20 percent with only a few days notice. The Army states that most food service contractors have stated that they could provide fixed-price services if meal counts deviated no more than ±20 percent and has provided an analysis of meal count data from five military installations which shows variations in monthly average meal count ranging from −38 percent to +31 percent from the annual average.

The Army also states that all but one of the decisions relied upon in our original decision concerned contracts for dining facility attendant services (mess attendant services), whereas the work involved under this contract is for full food services, which encompass a wider variety of services, such as determining how much food to requisition, accounting for food use and cash receipts, preparing and serving food, and cleaning dining facilities. Mess attendant services are reportedly less than 20 percent of the total effort under this contract.

Rice, the awardee, states that our review of a contracting agency's determination to negotiate is limited to ascertaining whether the determination is reasonably based, and cites *Government Sales Consultants, Inc.*, B-211375, Nov. 9, 1983, 83-2 CPD ¶ 546, and *W. B. Jolley*, B-209933, June 6, 1983, 83-1 CPD ¶ 609. Rice asserts that

the innovative approach that it has been required to adopt at Fort Jackson, coupled with unforeseen problems, such as government transportation shortages which caused delays in food deliveries, inoperable and defective government-furnished equipment, and uncertain meal schedules because of weather and the vagaries of basic training, demonstrate that the Army's determination to use a cost-type contract at Fort Jackson was reasonable. Rice further argues that implementation of our recommendation that the Army not exercise any contract renewal options is both disruptive and unnecessary under CICA.

In a more recent decision involving essentially the same parties, *United Food Services, Inc.*, B-220367, Feb. 20, 1986, 86-1 CPD ¶ 177, concerning a procurement conducted under CICA, we found that the Army's decision to use a cost-plus-award-fee contract to acquire full food services at Fort Dix, New Jersey, was justified. (For clarity, we will refer to this latter case as the "Fort Dix" decision and to the present reconsideration as the "Fort Jackson" procurement.) Although CICA eliminated the statutory preference for formally advertised (now "sealed bid") procurements, the preference for fixed-price contracts was preserved, and it was the Army's different treatment of this issue in these two procurements which led us to reach different results.

In our decision on the Fort Jackson procurement, we pointed out that we have generally rejected the argument that variations in meal requirements and attendance justify the use of negotiated cost-type contracts. We find support for this view in Army Regulation 30-1 (AR 30-1), September 30, 1985. This regulation, presumably drawing on Army experience current at the time of the Fort Jackson procurement, states that the normal bid unit for government-owned, contractor-operated dining facility operations is per facility per day of operations (paragraph 13-3a) and points out specifically that some factors, such as the number of personnel subsisted, have no direct relationship to price or cost (paragraph 13-3b(3)). The example contained in this regulation is especially pertinent to the justification offered by the Army at Fort Jackson:

> For example, if the Government has estimated an average of 125 diners per meal, the contractor is operating at minimum staffing. It has been established that this minimum staffing would accommodate a range of 1 to 175 diners per meal, therefore, a new estimate of 165 diners per meal would not trigger an increase in price. (AR 30-1, paragraph 13-3b(3)).

We think these two sentences aptly illustrate the basis for our consistently held view, often expressed in the "dining facility attendant" cases to which the Army now refers, that not every uncertainty precludes the use of a fixed-price contract. In our judgment, the issue is not whether there is uncertainty, but whether that uncertainty is so great or has such a direct impact on pricing or costs that it directly inhibits an offeror's or bidder's ability to project its costs of performance.

In the Fort Dix procurement, the Army relied not only on variations in head count in justifying the use of a cost-type contract, but also on uncertainties associated with the initiation of a new recycling effort, contractor access to disposal sites, and other factors which would have a direct effect on an offeror's ability to project its costs of performance. A vendor could not, for instance, predict whether it needed a small number of trucks (and staff) for multiple daily trips to a nearby disposal site or a large number of trucks to make single trips daily to a distant site. We believed that the addition of those uncertainties, particularly when viewed cumulatively, had the effect of so impeding offerors' abilities to estimate their costs of performance with reasonable certainty that the Army properly could view the use of a cost-type contract as appropriate for the situation.

In contrast, in the Fort Jackson procurement, the Army merely relied on its inability to accurately predict the trainee population as justification for use of a cost-type contract, with no demonstration that the accompanying uncertainty precluded reasonable estimation by vendors of the cost of performance. The Army's present request for reconsideration is little more than an expanded restatement of the Army's original position—that meal count variations alone are adequate to justify a cost-type contract. We rejected this position in our original decision and find it no more compelling now.

We are mindful, however, that this contract is, as the Army argues, more complex than the traditional mess attendant contract and involves more difficult cost and pricing issues, many of which have been identified by Rice. These issues, however, appear not to have been evaluated by the Army in its determination to use a cost-type contract, unlike the situation in the Fort Dix procurement. The present record, therefore, affords us no basis upon which to assess whether use of a cost-type contract at Fort Jackson might not be justified in a manner consistent with our decision on the Fort Dix procurement.

In view of the foregoing, we find it appropriate to modify our prior decision to recommend that the Army assess the overall risks and uncertainties associated with the Fort Jackson procurement to determine the propriety of use of a cost-type contract. If, as a result of this study, the Army reasonably determines that a cost-type contract is appropriate, then in lieu of a new competition the Army may exercise the options under the present contract in accordance with FAR Subpart 17.2.

Our prior decision is modified.

[B-220941]

Travel Expenses—Transfers—Reimbursement—Approval

Employee who traveled by a longer route and did not travel 300 miles per day in connection with a permanent change of station explains that the route and delay resulted from his wife's illness. The agency may reimburse the employee on the basis of the mileage and time claimed if they determine that the employee has explained to their satisfaction the reasons for the alternate route and delay.

Officers and Employees—Transfers—Temporary Quarters—Subsistence Expenses—Reasonableness

An agency is responsible for determining the reasonableness and meal and miscellaneous expenses claimed during a temporary quarters subsistence expense period. The medical condition of a transferred employee's wife should be taken into account to the extent restaurant meals were required and criteria used to determine reasonableness of expenses based on restaurant meals rather than meals taken in the temporary lodging was appropriate.

Officers and Employees—Transfers—Temporary Quarters—Time Limitation—Extension

Indications that a transferred employee's wife was ill prior to their occupancy of temporary quarters does not preclude the possibility that the subsequent extension of authority to stay in temporary quarters was precipitated by circumstances occurring during the initial period as the regulations require. An extension documented some time after the fact based upon an assertion of timely verbal approval will support payment for the additional temporary quarters subsistence allowance period.

Matter of: John L. Duffy, June 11, 1986:

This decision is in response to a request from the Department of Health and Human Services [1] for our decision concerning payment of several claims contained in a reclaim voucher submitted by John L. Duffy, an employee of the Public Health Service. Payment of the amounts claimed is not precluded by our decisions but the agency must determine, based on the facts and circumstances involved, whether and to what extent reimbursement should be authorized.

FACTS

On August 6, 1984, Mr. Duffy was issued a travel order incident to a permanent change of station from San Francisco, California, to Seattle, Washington. The travel order authorized mileage, per diem, and 60 days' temporary quarters subsistence allowance for himself and his family.

Mr. Duffy and his family traveled by privately-owned automobile August 13, through August 17, 1984. In Seattle, they occupied temporary quarters from August 18 through October 29—a total of 73 days.

In April 1985, Mr. Duffy submitted his change-of-station travel voucher and in May 1985, the responsible financial management office disallowed various parts of the claims submitted. Mr. Duffy

[1] The request, dated October 15, 1985, was sent by Robert A. Carlisle, an authorized certifying officer in HHS' Region X, Seattle, Washington.

subsequently submitted a reclaim voucher requesting payment of the amounts previously denied. This voucher was forwarded to us for consideration.

En Route Travel Expenses

Mr. Duffy's claim for expenses incident to his trip from San Francisco to Seattle is computed on the basis of 4 days per diem allowance and mileage for a 900-mile trip. He states that his wife's illness required them to take a longer-than-normal route, and also caused them to travel less than an average of 300 miles per day.

The financial management official disallowed a part of his claim for mileage, stating that the regularly traveled distance between San Francisco and Seattle is 800 miles. Part of the claimed per diem allowance was disallowed on the basis that a government traveler performing change-of-station travel is required to travel an average of 300 miles per day.

Under Chapter 2, Part 2 of the Federal Travel Regulations (FTR), a transferred employee is entitled to transportation between his old and new duty stations in accordance with the provisions of FTR Chapter 1. For authorized travel by privately-owned vehicle FTR, para. 1-4.1, provides that the basis for a mileage payment shall be the distance shown in standard highway mileage guides. Any substantial deviation from distances shown in the standard highway mileage guides shall be explained. In addition, FTR Chapter 1, Part 2, para. 1-2.5, provides that all travel shall be by a usually traveled route unless it is satisfactorily established that travel by a different route is a matter of official necessity.

Concerning the number of days of per diem which may be authorized for a given trip, FTR, para. 2-2.3(d)(2) provides the per diem allowances will be paid on the basis of the actual time used to complete the trip, but that the minimum driving distance per day of not less than 300 miles shall be prescribed as reasonable. Exceptions to that requirement may be authorized by an agency based on circumstances beyond the employee's control and acceptable to the agency. As an example, an acceptable reason is travel by a physically handicapped employee. See also *Steve Stone,* 64 Comp. Gen. 310 (1985).

The employee explained that the use of the longer coastal route was to avoid the heat over the shorter inland route which would have been harmful to his wife for medical reasons. In a note on a copy of the Travel Voucher Adjustment Notice he indicates further that his wife was ill with a miscarriage possible.

Although we have not previously authorized deviations from the direct route because of the medical condition of a member of the family in permanent change-of-station cases, we have not precluded consideration of this factor in determinations made under paragraphs 1-4.1 and 2.2-3d(2), FTR. Therefore, if the agency finds that the employee has satisfactorily explained the excessive mileage and given an acceptable explanation of his failure to travel an average of 300 miles a day, we would not question payment on that basis.

In this case it appears that the agency has not approved the excess mileage or time on the basis of the employee's explanation to date. If this matter is reconsidered and a determination made that the excess distance and time were justified, payment on that basis would not be precluded by our decisions.

Temporary Quarters Expenses

Mr. Duffy's claim for expenses incident to his first 60 days in temporary quarters included $3,598.40 for meals; $199 spent in coin-operated laundry facilities; and $1,720 for lodging expenses. He explained that it was necessary for his family to take nearly all of their meals in restaurants because of his wife's illness.

The agency limited the amount reimbursable for nonlodging (i.e. meals and laundry) expenses to 49 percent of the maximum subsistence allowance established in Chapter 2, Part 5 of the Federal Travel Regulations. The reduced allowance was based on the principle that expenses for lodging should constitute the major portion of the total expenses incurred. The finance officer indicates that the impact Mrs. Duffy's physical condition may have had on the expenses incurred was not considered.

We have repeatedly held that an employee is entitled to reimbursement for only reasonable expenses incurred incident to a temporary duty assignment since travelers are required by paragraph 1-1.3a of the FTR to act prudently in incurring expenses. In applying this requirement to claims for reimbursement for meals and miscellaneous expenses while entitled to a temporary quarters subsistence allowance we have consistently held that it is the responsibility of the employing agency to make the initial determination as to the reasonableness of the claimed expenses.[2]

In considering whether an agency has acted in a reasonable manner in reducing the reimbursement for meals below the amount claimed in connection with payment of temporary quarters subsistence allowance, we have determined that the use of generally available statistical data on the cost of meals is appropriate. These cases, however, have involved claims for the cost of groceries for meals prepared at the temporary quarters. In this case the employee has said that, due to his wife's illness, they ate virtually all their meals in restaurants. Thus, the situation is similar to that involved in the payment of actual subsistence expenses for individuals on temporary duty because in those circumstances employees would be required to take meals in restaurants, generally costing

[2] *Jesse A. Burks,* 55 Comp. Gen. 1107, 1110 (1976); *Charles J. Klee,* B-189489, June 7, 1978; *Gregory J. Abbott,* B-193322, December 11, 1979; *Thomas D. Voglesonger,* B-196030, December 11, 1979; *Eugene R. Pori,* B-198523, October 6, 1980.

more than groceries for meals consumed at temporary quarters. Accordingly, it seems appropriate that criteria used by the agency for determining reasonableness was derived from our decisions relating to reasonable meal costs for employees on temporary duty in high cost geographical areas. In those cases we have approved agency use of the criterion, derived from the Federal Travel Regulations, that lodgings should represent the major part of the subsistence allowance.[3] The claimant was limited to 49 percent of the allowable maximum reimbursement for temporary quarters subsistence allowances for his family.

We have also held that the determination of the reasonableness of meal expenses should be made on a case-by-case basis taking into account the particular circumstances involved. Under that rule the illness of the spouse could be properly considered in determining reasonableness. However, it appears that this condition was adequately addressed by the agency since they applied a rule used in situations where meals are taken in restaurants and not data regarding the normal cost of groceries for meals taken in temporary quarters. Since the limitation on reimbursement to the employee was predicated upon a reasonable limitation as applied to the particular facts involved we will not substitute our judgment for that of the agency with respect to maximum allowable for meals and miscellaneous expenses during the occupancy of temporary quarters.

Additional Time in Temporary Quarters

Mr. Duffy's voucher also contains a claim for 13 days temporary quarters allowance beyond the 60 days initially authorized. In support of this claim, he has presented to the financial management office an amendment to his travel order, signed by the same official who authorized his original travel order. The amendment, dated July 11, 1985, states that the 13 additional days of temporary quarters "* * * were verbally approved by approving official prior to expiration of temporary quarters, however, due to administrative oversight the travel order was not amended at that time."

The financial management office questions the validity of this amendment on the basis of FTR, para. 2-5.2(a)(2) (Supp. 10, November 14, 1983), which states:

> * * * Extensions of the temporary quarters may be authorized only in situations where there is a demonstrated need for additional time in temporary quarters *due to circumstances which have occurred during the initial 60-day period of temporary quarters occupancy* * * *. [*Italic* supplied.]

The agency refers to Mr. Duffy's memo of July 31, 1984, which apparently indicated his wife's medical condition existed prior to the time they occupied temporary quarters in Seattle. Officials in the financial management office question whether the extension was valid since FTR, para. 2-5.2 requires an extension to result from circumstances occurring during the initial 60-day period.

The fact that Mrs. Duffy's medical condition existed when the transfer orders were initially issued does not require the conclusion that subsequent events did not require the extension. There could have been a change in the spouse's condition or other outside factors which caused the original 60-day allowance to be inadequate which occurred during the initial 60-day period. We are reluctant to assume that an otherwise valid amendment authorized by the appropriate official did not comply with the regulations.

We have noted the delay in issuing the travel order amendment authorizing the extension of the temporary quarters subsistence allowance period. Such a delay would, in most circumstances, cause questions to be raised as to whether the extension was validly given. However, in the circumstances of this case there appears to be no question that the authorizing official was aware of the facts involved at the time the temporary quarters were being occupied and approved the additional 13 days. In that connection we have consistently held that approval of extensions in temporary quarters subsistence allowance period, within the maximum prescribed by law, may be approved on a retroactive basis if the facts show that an extension was in fact approved and in keeping with agency practice.[4]

Summary

For the reasons stated the Department of Health and Human Services may authorize additional reimbursement to Mr. Duffy for mileage and per diem en route to his new duty station if it is determined that the extra travel time was required by his wife's condition. The record does not support a conclusion that additional temporary quarters subsistence allowance should be paid for the time he occupied temporary quarters, but it does support an extension of the temporary quarters subsistence allowance for a period of 13 days.

[3] *Norma J. Kephart*, B-186078, October 12, 1976; *Micheline Motter and Linn Huskey*, B-197621, B-197622, February 26, 1981; *R. Edward Palmer*, 62 Comp. Gen. 88 (1982); *Charles P. Boucher*, B-213021, May 2, 1984.

[4] *Gerald R. Adams*, B-186549, March 7, 1977; see also, *Gerald M. Anderson*, B-189556, December 15, 1977; *Joseph D. Argyle*, B-186317, January 24, 1977.

[B-222816]

Contracts—Architect, Engineering, etc. Services—Appropriation Availability

Protest contending that the award of an architectural and engineering (A-E) contract for work to be performed in Alaska to a non-Alaskan firm violates section 8078 of the Department of Defense (DOD) Appropriations Act of 1986, which requires, under certain circumstances, that firms which perform work in Alaska hire Alaskan residents, is denied. The act does not preclude the award of A-E contracts for

work to be performed in Alaska to non-Alaskan firms, but, in effect, requires non-Alaskan firms to hire Alaskan residents for work performed in Alaska under DOD contracts.

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

Protester's new and independent ground of protest is dismissed where the later-raised issue does not independently satisfy rules of General Accounting Office (GAO's) Bid Protest Regulations.

Contracts—Protests—Contract Administration—Not for Resolution by GAO

Whether a contract requirement is met during performance of the contract is a matter of contract administration which General Accounting Office (GAO) will not consider.

Matter of: Little Susitna Company, June 17, 1986:

Little Susitna Company (Susitna), located in Anchorage, Alaska, protests the Department of the Navy's selection of Wesley Bull & Associates, Inc. (Wesley), to perform architectural and engineering (A-E) services in connection with the repair and restoration of a communication cable plant at Adak, Alaska. The protester contends that the award to Wesley, a non-Alaskan firm, is improper because it violates section 8078 of the Department of Defense (DOD) Appropriations Act of 1986 (Act), Pub. L. No. 99-190, 99 Stat. 1214-1215 (1985), which allegedly prohibits an award of a DOD contract for work in Alaska to a non-Alaskan firm.

The protest is denied in part and dismissed in part.

On November 22, 1985, and January 3, 1986, the Navy published in the Commerce Business Daily (CBD) a request for expression of interest from A-E firms to perform the above-mentioned services. The procurement was conducted under special procedures prescribed in the Brooks Act for the acquisition of A-E services. *See* 40 U.S.C. §§ 541-544 (1982). In accordance with the CBD announcement and Brooks Act procedures, interested A-E firms were to submit a statement of qualifications, on standard form (SF) 255, so that the Navy could determine the firms' capabilities relative to the seven selection criteria stated in the CBD announcement. Wesley was considered the most qualified firm to perform the work and was selected for contract award in accordance with Brooks Act procedures.

Susitna argues that the selection of Wesley violated section 8078 of the Act because Wesley is not an Alaskan firm. Section 8078 of the Act provides:

> Notwithstanding any other provision of law, each contract awarded by the Department of Defense in fiscal year 1986 for construction or services to be performed in whole or in part in a State which is not contiguous with another State [Alaska or Hawaii] and has an unemployment rate in excess of the national average rate of unemployment as determined by the Secretary of Labor shall include a provision requiring the contractor to employ, for the purpose of performing that portion of the contract in such State that is not contiguous with another State, individuals who are residents of such State and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills: *Provided*, That the Secretary of Defense may waive the requirements of this section in the interest of national security.

We disagree with Susitna's contention that section 8078 of the Act prohibits the award of this contract to a non-Alaskan firm. In our view, section 8078 of the Act merely requires that each contract awarded by DOD in fiscal year 1986 for construction or services to be performed in Alaska shall include a provision requiring the contractor to employ, for the purpose of performing that portion of the contract in Alaska, individuals who are residents of Alaska. Thus, where, as here, the Act applies, the DOD contracting activity awarding the contract must include a provision for hiring Alaskan residents for work to be performed in Alaska.

In this connection, the Navy, in its report on the protest, has indicated that it intends to comply with the requirements of section 8078 of the Act by inserting the following clauses into Wesley's contract prior to award:

> RESTRICTIONS ON EMPLOYMENT OF PERSONNEL (JAN 1986)
>
> (a) The contractor shall employ, for the purpose of performing that portion of the contract work in the State of Alaska, individuals who are residents of the state, and who, in the case of any craft or trade, possess or would be able to acquire promptly the necessary skills to perform the contract.
>
> (b) The Contractor agrees to insert the substance of this clause, including this paragraph (b), in each subcontract.

Thus, the Navy is complying with the Act's requirement to include an Alaskan resident hiring provision in the protested contract and, therefore, the contract award does not violate section 8078 of the Act.

In its comments on the agency report, filed more than 5 weeks after Susitna's initial protest was filed, Susitna raises for the first time, the contention, based on conjecture, that the individuals listed in Wesley's SF 255 qualifications statement all reside in the State of Washington. Susitna argues, therefore, that if this contention is true, Wesley would have to change its design team in order to comply with the requirement for hiring Alaskan residents to perform the work in Alaska, thereby making Wesley's SF 255 an inaccurate reflection of its qualifications. In this case, Susitna asserts the selection of Wesley based on the SF 255 improper.

Susitna's newly raised protest contention is untimely. Our Bid Protest Regulations require that a protest be filed within 10 working days after the basis of the protest is known or should have been known. *See* 4 C.F.R. § 21.2(a)(2) (1986). Where a protester initially files a timely protest and later supplements it with new and independent grounds for protest, the later-raised allegations must independently satisfy these timeliness requirements. *Siska Construction Company, Inc.*, B-218428, June 11, 1985, 85-1 C.P.D. ¶ 669. Our Reg-

ulations do not contemplate the unwarranted piecemeal development of protest issues. See *Baker Company, Inc.*, B-216220, Mar. 1, 1985, 85-1 C.P.D. ¶ 254. Since Sustina's newly raised contention is based solely on Susitna's suspicions and could have been raised when Susitna filed its protest, it is untimely and will not be considered. *Baker Company, Inc.*, B-216220, *supra*.

Finally, to the extent Susitna is claiming that Wesley will not meet the contractual requirement to hire Alaskan residents for work to be performed in Alaska, we dismiss this aspect of the protest. Once a contract has been awarded, the question of whether a contractor actually meets its contractual obligations is a matter of contract administration which is the responsibility of the procuring agency and is not encompassed by our bid protest function. 4 C.F.R. § 21.3(f)(1) (1986); *Right Away Foods Corp.—Reconsideration*, B-219676.4, Mar. 24, 1986, 86-1 C.P.D. ¶ 287.

We deny the protest in part and dismiss the remainder.

[B-222249]

Advertising—*Commerce Business Daily*—Automatic Data Processing Equipment—Orders Under ADP Schedule—Unreasonable—Less Costly Alternative

Protest against Navy's issuance of a purchase order to nonmandatory General Services Administration (GSA) schedule contractor for maintenance of certain automated data processing equipment is sustained where *Commerce Business Daily* (CBD) synopsis did not contain an accurate description of Navy's minimum needs as required by GSA regulations and it appears potential offerors could meet those needs at substantially lower cost to the government.

Matter of: Federal Services Group, June 19, 1986:

Federal Services Group protests to the Department of the Navy's issuance of a purchase order to International Business Machines Corporation (IBM) for maintenance of certain automated data processing equipment under IBM's schedule contract No. GS00K86A6S5557 with the General Services Administration (GSA). Federal Services Group contends that the issuance of this purchase order against IBM's nonmandatory GSA schedule contract was improper because Federal Services Group offered to provide the same services to the Navy at a substantially lower proposed price. We find that Federal Services Group's protest has merit and we sustain the protest.

On November 12, 1985, the Naval Supply Center, San Diego, announced in the *Commerce Business Daily* (CBD) its intention to purchase maintenance services for certain automated data processing equipment from IBM for a 1-year period. Firms, other than IBM, desiring to compete were advised to submit proposals within 15 calendar days identifying their interest in and capability to satisfy the requirement and their proposed price to perform the work.

Two companies—Federal Services Group and Sorbus—submitted proposals. The Navy determined that it could not properly evaluate the proposals because neither proposal contained sufficient data, and, therefore, Navy representatives contacted both firms to obtain additional information. Among the questions asked of both firms was what their response time would be to requests for service. Federal Services Group and Sorbus both indicated that they would respond to requests for service within 4 hours. The Navy decided that both firms' proposals were inadequate, because the mission of the user activity would be adversely affected if services were not rendered within 2 hours. In addition to the impact on the user activity's mission, the Navy reports that lost time caused by inoperative IBM equipment would result in a $900 to $1,000 per hour loss based upon salaries of individuals who would be idle while waiting for necessary repairs to be performed. In particular, concerning Federal Services Group's proposal, the Navy determined that it was "inadequate and not cost effective" to support the operations of the user activity. The Navy reports that the equipment is used to produce tactical soft-ware tapes used in E-2 Hawkeye early warning radar aircraft and it is critical that response time be kept to a minimum in order not to degrade squadron combat readiness. Accordingly, the Navy determined that Federal Services Group's proposal at a price of $39,172.80 was technically unacceptable and, on February 26, 1986, placed an order against IBM's GSA contract in the amount of $54,726.

The use of GSA nonmandatory schedules to acquire automated data processing resources, including maintenance and support services, is governed by the Federal Information Resources Management Regulation (FIRMR), 41 C.F.R. ch. 201 (1985) (throughout the remainder of this decision all citations to the FIRMR are to the section number within chapter 201). The FIRMR permits an agency to place an order against GSA nonmandatory automated data processing schedule contracts like IBM's when certain conditions are met. One condition is that the agency synopsize in the CBD its intent to place an order against a nonmandatory schedule contract at least 15 calendar days before placing the order. FIRMR, § 32.206(f). The agency must then evaluate all written responses to the notice from responsible non-schedule vendors to determine whether ordering from the schedule contract or preparing a solicitation document will result in the lowest overall cost alternative. This procedure is not a formal competition; rather, it is a device to test the market to determine whether there are non-schedule vendors interested in competing for the requirement at prices that would make competition practicable. If evaluation of responses indicates that a competitive acquisition would be more advantageous to the government, a formal solicitation normally would be issued, and all vendors, including schedule vendors, invited to compete.

See *CMI Corp.*, B-210154, Sept. 23, 1983, 83-2 C.P.D. ¶ 364 at 2: FIRMR, §§ 32.206(f), (g).

We believe that the Navy did not properly test the market to determine whether to issue a solicitation or order from IBM's schedule contract for the required maintenance services. The CBD synopsis is required to include sufficient information to permit the agency to analyze responses from potential suppliers which do not have GSA schedule contracts and to compare those responses to the GSA nonmandatory schedule contract. FIRMR, §§ 32.206(f), (g). The FIRMR in section 32.206(f)(2) sets forth the minimum information which must be contained in the CBD announcement. In particular, the CBD notice must contain an accurate description of the equipment or services to be ordered, including: "(D) The support requirement (e.g., hours of maintenance coverage or response times) for the ordered items * * *." FIRMR § 32.206(f)(2)(v).

The Navy did not include an accurate description of its maintenance services requirements in the CBD synopsis; rather, the CBD announcement contained only a very general description of the type of work to be performed. Most significantly, the CBD synopsis did not include any indication of the hours of required coverage or the required response times for these maintenance services. Ultimately, it was the 2-hour response time which became the determining factor in the Navy's decision to issue a purchase order to IBM rather than soliciting for offers on a competitive basis. At a minimum, the Navy should have indicated that the user activity's needs were such that a 2-hour response time was mandatory. While Navy representatives did ask both Sorbus and Federal Services Group how long they would take to respond to requests for services, the record shows that the Navy specifically did not tell Federal Services Group that its 4-hour response time was not adequate or that 2 hours was the maximum acceptable response time. Federal Services Group states that "normally" it can respond to requests for services in the same manner as is required of IBM under its schedule contract within a 2-hour period and it would have so indicated had it been informed of the Navy's needs in this regard; the Navy has provided no evidence to show that Federal Services Group would not be able to meet the user activity's actual, unstated, response-time needs.

Moreover, in this regard, we note that IBM's schedule contract states that IBM maintenance personnel will "normally" arrive at the government installation within 2 hours after repairs have been requested; the IBM contract also specifically indicates that in some instances a malfunction may not be diagnosed and repairs may not begin within 2 hours after a request therefor and states the procedures which will be followed by IBM in such instances. It thus appears from the Navy's acceptance of a response time of more than 2 hours from IBM in certain circumstances that the unstated, 2-hour response requirement may not be a mandatory requirement at all, but rather, a desired service expected of the contractor in most instances.

In these circumstances, we find that Navy's failure to describe accurately its minimum needs—in particular, the required response time—in either the CBD synopsis or during conversations with the protester was inconsistent with the FIRMR synopsis requirement at section 32.206(f) and left potential contractors with having to guess which provisions of IBM's contract were crucial to the Navy. Furthermore, in view of the fact that IBM's price is approximately $15,553 more than Federal Services Group's proposed price, the Navy's award to IBM may be inconsistent with the FIRMR mandate that agencies procure automated data processing resources using the method which will achieve the lowest cost alternative. FIRMR, §§ 32.206(a)(2) and 32.206(g). Compare *Spectrum Leasing Corp.*, B-205367, Mar. 4, 1982, 82-1 C.P.D. 199, wherein we upheld the Marine Corps' decision to reject the protester's response to the CBD synopsis as unacceptable and to purchase from the nonmandatory schedule contractor, in part, because the CBD synopsis adequately communicated the mandatory nature of the delivery requirement which the protester's proposal failed to meet.

For the above reasons, we sustain Federal Services Group's protest. We recommend that the Navy properly synopsize its actual maintenance services needs for the remaining contract period (until September 30, 1986) as well as for any foreseeable follow-on contract period in accord with the FIRMR synopsis requirements and this decision in order to determine whether there are responsible firms which will compete with IBM if a solicitation is ultimately issued. The Navy will then be able to determine the lowest cost alternative for procuring its maintenance services as required by the FIRMR. By letter of today, we are notifying the Secretary of the Navy of our recommendation.

The protest is sustained.

[B-219813]

Officers and Employees—Transfers—Service Agreements—Failure to Fulfill—Retirement

Employee who was transferred from Idaho Falls, Idaho, to Albany, Oregon, failed to complete 12-month service requirement when he voluntarily retired. The employee had requested retirement for health reasons so that he could return to Albany, Oregon. However, this case is distinguished from those cases where the employee transfers solely for retirement purposes since, here, agency requested employee to remain on duty for approximately 3 months and employee performed necessary and substantial duty at Albany, his new official duty station, prior to his retirement. Compare *James D. Belknap*, B-188597, June 17, 1977. Thus, his transfer is considered to be in the interest of the Government, and his voluntary retirement prior to completion of the 12-month service period may be considered as a valid reason for separation, and his travel and transportation expenses may be paid, subject to a determination by the head of the agency that his separation was for reasons beyond his control, and acceptable to the agency.

Matter of: Jack L. Henry—Relocation Expenses—Retirement After Return to Former Duty Station, June 24, 1986:

The issue in this decision is whether a transferred employee who did not complete the required term of Government service at Albany, Oregon, his new duty station, is entitled to travel and transportation expenses incident to his transfer. The employee had requested retirement for health reasons so that he could return to Albany, Oregon. Since the agency requested the employee to remain with the agency for approximately 3 months and he performed necessary and substantial duty at Albany prior to his retirement, his transfer is considered to be in the interest of the Government. Thus, he may be reimbursed upon a determination by his agency that his separation was beyond his control and acceptable to the agency.

This decision is in response to a request by Mr. Dennis A. Sykes, Chief, Division of Finance, Bureau of Mines, United States Department of the Interior, for an advance decision as to the propriety of certifying for payment a travel voucher submitted by Dr. Jack L. Henry, a former employee of the agency. Dr. Henry's claim is for travel and transportation expenses in the amount of $632.65 incurred in connection with his transfer from Idaho Falls, Idaho, to Albany, Oregon, in June 1985.

The pertinent facts are as follows. In September 1984, Dr. Henry was transferred from Albany to Idaho Falls to serve as a Technical Project Officer in connection with the Bureau's Interagency Agreement with the United States Department of Energy. The original intent of the Bureau was to place Dr. Henry on long-term temporary duty travel at a reduced per diem since the program was expected to continue until May 1985, but the specific duration was not known. However, Dr. Henry agreed to move to Idaho Falls provided the Bureau would pay his travel expenses, and the rental cost of a small trailer to transport his personal belongings. This arrangement was acceptable to the agency since the cost of the stated travel and transportation expenses was considerably less than the per diem estimated cost.

Dr. Henry suffered a severe heart attack in Idaho Falls and underwent multiple bypass heart surgery. This condition made it extremely difficult for him to continue living and working at the higher altitude of Idaho Falls. Consequently, Dr. Henry requested that he be allowed to retire from Government service, and return to Albany, Oregon. The Bureau officials asked Dr. Henry to remain with the agency for about 3 months in a full-time, permanent capacity in Albany before he retired, and to remain on the rolls as a reemployed annuitant for some months after that date to assist in training a new Technical Project Officer. Thus travel orders were issued authorizing his return to Albany in June 1985. Dr. Henry returned to Albany on June 29, 1985, and retired on November 1, 1985. Thus, he completed only 4 months of the 12-month service requirement.

The finance officer has expressed concern as to the propriety of the claim since (1) Dr. Henry had already indicated an intent to retire at the time his transfer to Albany was authorized; (2) there is no evidence that Dr. Henry signed an employment agreement prior to his return to Albany; and (3) the information provided indicates that the re-transfer to Albany was at the request and primarily for the benefit of the employee. In spite of these concerns, the finance officer agrees that the total cost of Dr. Henry's two moves was less than the cost of per diem at Idaho Falls for the time he actually spent there. In addition, he points out that there was a benefit to the Government for Dr. Henry to continue work on the program in Albany rather than losing his services entirely.

The payment of travel, transportation, and relocation expenses of Federal civilian employees who are transferred in a change of official station is authorized by the provisions of 5 U.S.C. §§ 5724 *et seq.*, as implemented by the Federal Travel Regulations, FPMR 101-7 (September 1981) *incorp by ref.*, 41 C.F.R. § 101-7.003 (1985) (FTR). Travel, transportation, and relocation allowances may be paid only after the employee agrees in writing to remain in the Government service for 12 months after his transfer, unless separated for reasons beyond his control that are acceptable to the agency concerned. 5 U.S.C. § 5724(i). See also FTR para. 2-1.5a(1)(a). Inasmuch as the 12-month service requirement must be satisfied before relocation expenses are reimbursable, we have held that an employee is bound by the service obligation even if he does not execute a written agreement. *Orville H. Myers,* 57 Comp. Gen. 447 (1978).

This Office has also held that voluntary retirement may be considered as a reason for separation which is beyond the control of an employee, and, therefore, that such retirement prior to completion of the required 12-month service period is not a bar to reimbursement of relocation expenses. 46 Comp. Gen. 724 (1967). However, it is within the discretion of the head of the agency concerned to determine whether, under the particular circumstances, an employee's separation through voluntary retirement is an acceptable reason for releasing him from his service obligation. An agency's determination in this regard is not subject to question by this Office unless there is no reasonable basis for the determination. *Federal Bureau of Investigation,* 61 Comp. Gen. 361 (1982); *Ralph W. Jeska,* B-193456, December 28, 1978.

We have also determined that an employee who is transferred solely for the purpose of voluntary retirement immediately after reporting to his new duty station may not be reimbursed any amount of the relocation expenses incurred where the purpose of the transfer was primarily for the convenience or benefit of the employee, notwithstanding that the ultimate return of the employ-

ee to his former duty station was contemplated at the time of the original transfer by the employing agency and the employee. 5 U.S.C. § 5724(h) (1982); 29 Comp. Gen. 255 (1949). Thus, the rule in 46 Comp. Gen. 724—voluntary retirement prior to completion of the 12-month service period may be considered as a valid and acceptable reason for separation—applies only where the employee is transferred in good faith to a location at which he performs necessary and substantial duty prior to his voluntary retirement. *James D. Belknap,* B-188597, June 17, 1977. Such is the case here.

Dr. Henry was subject to the required 12-month service agreement, though not formally executed; however, his transfer back to Albany was not solely for the purpose of his voluntary retirement. His services were needed by the Bureau of Mines at Albany to assist in the training of a new Technical Project Officer, and to continue his work on the interagency agreement. Thus, at the request of the agency, Dr. Henry was transferred in good faith to Albany and he did, in fact, perform necessary and substantial duty at Albany for 4 months prior to his voluntary retirement. Therefore, we regard Dr. Henry's transfer as being in the interest of the Government. Further, we have been informed that Dr. Henry has been employed by the Bureau of Mines as a reemployed annuitant.

Since Dr. Henry's transfer was in the interest of the Government, the rule in 46 Comp. Gen. 424, *supra,* applies, and his voluntary retirement prior to completion of the 12-month service period may be considered as a valid reason for separation.

Accordingly, Dr. Henry's travel and transportation expenses may be paid subject to a determination by the head of the agency that his separation was for reasons beyond his control, and acceptable to the agency.

[B-221634]

Subsistence—Per Diem—Thirty-Minute Rule—Arrival and Departure Time Evidence

Under the "30-minute rule" an employee who completes temporary duty travel within 30 minutes after the beginning of a per diem quarter must provide a statement on his travel voucher explaining the official necessity for his arrival time in order to receive per diem for that quarter. That statement should demonstrate that he departed from his temporary duty station promptly following the completion of his assignment and that he proceeded expeditiously thereafter. Where statement furnished by employee fails to address promptness of departure, agency properly denied claims for an additional quarter day of per diem submitted by an employee who returned to his residence at 6:10 p.m.

Matter of: John D. Tree, Jr., June 24, 1986:

In this case involving an employee who completed temporary duty travel at 6:10 p.m. we find that the United States Army Corps of Engineers properly applied the "30-minute rule" in denying his claim for per diem for the fourth quarter of that day.

Background

Mr. John D. Tree, Jr., was authorized travel expenses, including per diem and transportation by Government vehicle to attend a hydroelectric power supervisors conference at Vicksburg, Mississippi, between October 25 and October 28, 1982. He drove from West Point, Georgia, his permanent duty station, to Vicksburg, Mississippi, on October 25th and commenced the return trip at 10:45 a.m. October 28, 1982, arriving at his residence in West Point at 6:1(p.m. the same day.

Mr. Tree claims per diem for the fourth quarter of the day of October 28, 1982. The fourth quarter of the leave day is the 6-hou period between 6 p.m. and 12 midnight. The disbursing office denied Mr. Tree's claim under the "30-minute rule" which pro vides:

> * * * when the time of departure is within 30 minutes prior to the end of a quarter day, or the time of return is within 30 minutes after the beginning of a quarter day, per diem for either such quarter will not be allowed unless a statemen is included with the voucher explaining the official necessity for the time of depar ture or return.

This limitation on the beginning and ending of per diem entitlement is set forth in Joint Travel Regulations, vol. 2 (2 JTR) para C4557 (Change 131, September 1, 1976).

Mr. Tree stated on his travel voucher that his return at 6:10 p.m was justified because of the time required to travel from the tempo rary duty site to his residence. The disbursing officer advised Mr Tree that his justification for arrival at 6:10 p.m. was insufficien and failed to meet the requirement set forth in 2 JTR para. C455' for a statement on the travel voucher "explaining the official ne cessity for the time * * * of return." Responding to the memoran dum, Mr. Tree explained that the return trip covered a distance o 371 miles, involving 6 hours and 25 minutes of travel time an spanned two normal meal periods. He claims that the travel wa performed prudently as required by 2 JTR para. C4464 (Chang 156, October 1, 1978). Notwithstanding this explanation, the Arm Corps of engineers recommends disallowance of the claim for tw reasons. It cites Mr. Tree's failure to specify why the travel coul not have been completed prior to 6 p.m. and the travel approvin official's failure to approve Mr. Tree's return after the beginning c the fourth quarter as a matter of official necessity.

Our Claims Group, by settlement certification Z-2847113, date November 6, 1985, disallowed Mr. Tree's claim because the Arm Corps of Engineers had not determined that his return within 3 minutes after the beginning of the fourth per diem quarter was jus tified for reasons of official necessity. It pointed out that it is th agency's responsibility to make this determination and that th General Accounting Office will not question its determinatio unless it is clearly shown to be arbitrary and capricious. Se *Gustav W. Muehlenhaupt,* 55 Comp. Gen. 1186, 1188 (1976). Th

Claims Group concluded that the agency's determination to disallow the fourth quarter per diem was not arbitrary or capricious.

Discussion

The purpose of the "30-minute rule" and the adequacy of the justification required by the regulation are discussed in *Gustav W. Muehlenhaupt*, 55 Comp. Gen. at 1188. The rule is "intended to ensure that an employee schedules departure in a prudent manner and completes return travel expeditiously." This decision explains that an employee's justification for return within 30 minutes after the beginning of a per diem quarter should establish that he departed on the return trip at the earliest possible time and traveled expeditiously, arriving home as soon as practicable. The justification offered by the claimant in the *Muehlenhaupt* case satisfied both requirements. It traced the employee's activities showing that he performed official duty until noon and departed from his temporary duty station promptly after lunch. In addition, it provided information which established that after departure, he proceeded expeditiously. He made connections with the first scheduled airline serving his permanent duty station. He arrived at his destination airport at 5 p.m. and, after collecting his luggage, drove the 40-mile distance to his residence, arriving there by 6:15 p.m.

Mr. Tree's voucher contains only the following statement:

> The arrival time is justified due to the time required to travel from the TDY site to my residence. Statement to comply with SAMDR 55-1-5.

This statement merely expresses a conclusion. It does not provide information which would justify a determination that there was an official necessity for his return at 6:10 p.m. Mr. Tree has now supplemented that statement with information that the distance between his temporary duty site and his residence was 371 miles and that he drove that distance in 6 hours and 25 minutes. This information, indicating that he proceed at a rate slightly in excess of 55 miles per hour, provides a sufficient basis for the travel approving official to have determined that Mr. Tree proceeded expeditiously following his departure. It does not, however, provide a basis for a determination that he departed from his temporary duty station promptly following the completion of his temporary duty assignment. To establish per diem entitlement for arrival within 30 minutes after the beginning of a per diem quarter, prompt departure as well as expeditious travel must be shown to establish an official necessity for the time of return.

Because Mr. Tree did not provide a sufficient justification for travel time we sustain the disallowances by the United States Army Corps of Engineers and by our Claims Group.

[B-222481]

Contracts—Negotiation—Offers or Proposals—Technical Acceptability—Offeror's Responsibility to Demonstrate

Although the burden in a negotiated procurement is on the offeror to submit with its proposal sufficient information for the agency to make an intelligent evaluation, contracting agency's determination that offeror's general offer of compliance and specific responses to the specifications of "[n]oted and accepted" are sufficient is not unreasonable where the solicitation merely required a statement accepting all terms and conditions of the solicitation and provided for simple statements of acknowledgment in response to the specifications.

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

General Accounting Office will not review an affirmative determination of responsibility unless the possibility of fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Technical specifications which merely describe the items offerors are to agree to supply in the event they receive the award are not definitive responsibility criteria which instead establish standards related to an offeror's ability to perform the contract.

Contracts—Protests—Contract Administration—Not for Resolution by GAO

Whether awardee will meet its contractual obligations to the government is a matter of contract administration, which is the responsibility of the procuring agency and is not encompassed by the General Accounting Office's bid protest function.

General Accounting Office—Jurisdiction—Patent Infringement

Claims of possible patent infringement do not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function.

Matter of: Ridge, Inc., June 24, 1986:

Ridge, Inc. (Ridge), protests the award of a contract to TFI Corporation (TFI) under request for proposals No. F09650-85-R-0461, issued by the Department of the Air Force for the supply of a micro-focus real time x-ray imaging system. Ridge challenges the Air Force's determination that TFI's proposal is technically acceptable and the agency's affirmative determination of TFI's responsibility. We deny the protest in part and dismiss it in part.

The solicitation required offerors to include in their proposals a "statement accepting all terms and conditions of the solicitation." In addition, it provided that:

> Technical proposals shall follows the Specifications format with appropriate response to each paragraph, indicating how the requirement contained therein will be satisfied. A simple statement of acknowledgement is sufficient where implementing procedures or organizations are not involved.

The solicitation indicated that award would be made on the basis of the low technically acceptable offer.

In response to the solicitation, the Air Force received proposals from TFI and Ridge. The agency found the best and final offers (BAFO's) subsequently submitted by these firms to be technically acceptable. A preaward survey on TFI, which included the demonstration of a micro-focus x-ray imaging system, resulted in a favorable recommendation as to that firm's responsibility. Accordingly, the agency made award on the basis of TFI's low offer of $315,731, which was $159,924 less than Ridge's offer of $475,655. Ridge, having expressed prior to award its belief that the Scanray Microfocus X-ray System Type MF-160/200 which it believed TFI was offering did not conform to the specifications, thereupon protested the award, first to the agency and then to our Office.

Ridge claims that TFI "cannot" or "will not" meet the specifications set forth in the solicitation, specifications which it considers to constitute definitive responsibility criteria. Ridge has provided our Office with a copy of the descriptive literature for the Scanray Microfocus X-ray System Type MF-160/200 and has noted various specifications which an unmodified Scanray Type MF-160/200 System allegedly would not meet. In addition, Ridge claims that it holds a patent on an automatic tube focusing mechanism required by the specifications and argues that since it has not licensed the use of this feature by other firms, TFI will be unable to meet this requirement without infringing on Ridge's patent.

We view Ridge's references to the differences between the Scanray Microfocus X-ray System Type MF-160/200 and the specifications as a challenge to the agency's affirmative determination of the technical acceptability of TFI's proposal. In negotiated procurements, any proposal that fails to conform to the material terms and conditions of the solicitation should be considered unacceptable and not form the basis for award. *AT&T Information Systems, Inc.*, B-216386, Mar. 20, 1985, 85-1 C.P.D. ¶ 326. Generally, however, we will not disturb an agency's determination of the technical acceptability of a proposal absent a clear showing that the determination was unreasonable or in violation of procurement statutes and regulations. Moreover, the protester bears the burden of affirmatively proving its case, and mere disagreement with a technical evaluation does not satisfy this requirement. *Management Systems Designers, Inc.*, B-219601.2, Jan. 23, 1986, 86-1 C.P.D. ¶ 75; see *APEC Technology Limited*, B-220644, Jan. 23, 1986, 65 Comp. Gen. 230, 86-1 C.P.D. ¶ 81.

The Air Force has provided our Office with a copy of the proposal—both the initial and best and final offers—submitted by TFI. In response to a question from our Office as to whether TFI submitted descriptive or commercial literature in support of its proposal, the Air Force has advised us that the material provided our Office includes all of the documentation concerning TFI's proposal and has indicated that "the inclusion [in proposals] of product descriptive literature was not necessary" because the x-ray imaging system to be supplied was "not an off-the-shelf item." The Air Force reports that "[a]t no time did TFI ever indicate they were furnishing a commercial piece of equipment."

Our examination of TFI's proposal reveals neither descriptive literature on the Scanray Type Microfocus X-ray System MF-160/200 nor any reference to that system. Instead, the proposal primarily consists of a response—often merely the statement of "[n]oted and accepted"—to each paragraph of the specifications. TFI generally indicated that the "[m]inimum needs of the Government as listed in specifications will be complied with," with "[n]o exceptions * * * taken to the specification." In addition, it responded with statements of "[n]oted and accepted" to 11 of the 12 paragraphs in the technical specifications, including the paragraph requiring automatic tube focusing, that Ridge believes cannot be met by an unmodified Scanray Type MF-160/200 System. As for the 12th paragraph, TFI promised in its best and final offer (BAFO) to supply the oil-cooled high tension generator required by the specifications.

The Air Force maintains that TFI has proposed meeting the requirements of the specifications. Ridge's claims to the contrary, based upon descriptive literature not included in TFI's proposal and describing a system not referenced in that proposal, provide our Office no basis upon which to question the agency's determination in this regard.

We recognize that Ridge also questions whether the statements of "[n]oted and accepted" are sufficient responses to the specifications. We note in this regard that in a negotiated procurement the burden is on the offeror to submit sufficient information with its proposal such that the agency can make an intelligent evaluation of its proposal. See *The Communications Network*, B-215902, Dec. 3, 1984, 84-2 C.P.D. ¶ 609. Further, a blanket offer of compliance is not sufficient to comply with a solicitation requirement for the submission of detailed technical information which an agency deems necessary for evaluation purposes. *AEG Aktiengesellschaft*, B-221079, Mar. 18, 1986, 65 Comp. Gen. 418, 86-1 C.P.D. ¶ 267.

The solicitation here, however, did not require the submission of descriptive literature or detailed technical information. On the contrary, it required a "statement accepting all terms and conditions of the solicitation." Although the solicitation also required technical proposals to include "appropriate responses to each paragraph" of the specifications, it provided that a "simple statement of acknowledgment is sufficient where implementing procedures or organizations are not involved." Moreover, when TFI failed to address in its initial proposal several paragraphs of the solicitation, the agency, in its request for BAFO's, merely indicated that "[a]cceptance or denial of these paragraphs has been omitted." Accordingly, we see no basis upon which to question the agency's determination that TFI's statements of "[n]oted and accepted" were adequate responses to the specifications in these circumstances.

As for Ridge's challenge to TFI's ability to meet the specifications, we note that our Office will not review an affirmative determination of responsibility unless the possibility of fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have not been applied. ABC *Appliance Repair Service,* B-221850, Feb. 28, 1986, 86-1 C.P.D. ¶ 215. Ridge has not shown fraud or bad faith on the part of the procuring officials. While it alleges that the technical specifications constitute definitive responsibility criteria which have not been applied, we have previously held that purchase descriptions and specifications which merely describe the items offerors are to agree to supply in the event they receive the award, as do the technical specifications here, are not definitive responsibility criteria. Definitive responsibility criteria instead establish standards related to an offeror's ability to perform the contract, such as specific experience in a particular area. See *Victaulic Co. of America,* B-217129, May 6, 1985, 85-1 C.P.D. ¶ 500; *Vulcan Engineering Co.,* B-214595, Oct. 12, 1984, 84-2 C.P.D. ¶ 403.

Further, whether TFI actually will meet its contractural obligations to the Air Force is a matter of contract administration, which is the responsibility of the procuring agency and is not encompassed by our bid protest function. *Presto Lock, Inc.,* B-218766, Aug. 16, 1985, 85-2 C.P.D. ¶ 183; *BUR-TEL Security Protection Systems,* B-218829, May 16, 1985, 85-1 C.P.D. ¶ 561; *see* 4 C.F.R. § 21.3(f)(1) (1986).

Finally, we note that claims of possible patent infringement do not provide a basis for us to object to an award since, like questions of contract administration, questions of patent infringement are not encompassed by our bid protest function. *Presto Lock, Inc.,* B-218766, *supra,* 85-2 C.P.D. ¶ 183 at 3; *Sewer Rodding Equipment Co.,* B-214952, June 5, 1984, 84-1 C.P.D. ¶ 599.

The protest is denied in part and dismissed in part.

[B-215842]

Miscellaneous Receipts—Agency Appropriations *v.* Miscellaneous Receipts

Job Corps Center receipts derived from sales of meals, clothing, tool kits, and arts and crafts, and from fines and property damage restitution, may be retained by the Job Corps program and need not be deposited into the Treasury as miscellaneous receipts as normally required by section 3302 of title 31. Section 1551(m) of title 29 allows retention of income generated under the Job Corps program, and the appropriation covering the Job Corps program, for "Training and Employment Services," as provided in the annual Department of Labor appropriations acts, specifically allows reimbursements to be added to it.

Funds—Deposit Accounts

Monies received from fines for corpsmember misconduct and sales of arts and crafts objects made by corpsmembers may be deposited in the Corpsmember Welfare Association funds, as required by program regulations. Such funds lose their Federal character and may be spent for association activities.

Funds—Deposit Accounts

Since Job Corps Welfare Association funds are not public funds subject to the statutory restrictions applicable thereto, they need not be maintained in the Treasury or in depositaries designated by the Secretary of the Treasury, and may be kept in local banks.

Miscellaneous Receipts—Agency Account *v.* Miscellaneous Receipts

Monies received from agreements between the Weber Basin Job Corps Center, operated by the Department of the Interior, and Utah Davis County School District and Utah State Department of Corrections, may be returned to the Job Corps program rather than deposited into the Treasury as miscellaneous receipts. The monies may be considered both as income generated under the Job Corps program, 29 U.S.C. 1551(m), and as reimbursements which the yearly appropriations acts covering the Job Corps specifically allow to be added to appropriations. As section 1580 of title 29 allows acceptance of state services and facilities for programs under the Job Training Partnership Act, Pub. L. No. 97-300, 96 Stat. 1322, 1370, including the Job Corps program, payments under the agreements may also be made through in-kind services or property.

Funds—Imprest—Losses—Employee Liability

Consistent with interagency agreements between the Interior and Labor Departments and Labor and the Department of Defense, Interior Department imprest fund cashiers receiving monies from Army disbursing officers for payments to Job Corps enrollees are responsible, accountable and liable in the same manner as other imprest fund cashiers consistent with Section 22 of title 7 of the General Accounting Office's Policy and Procedures Manual, Volume I, 4-3000 of the Treasury Fiscal Requirements Manual and the Labor Department's Job Corps Handbook No. 630.

Matter of: Job Corps Center Receipts, June 25, 1986:

The Department of the Interior has asked a number of questions about its financial management of funds provided to it for operation of Job Corps Civilian Conservation Centers (Centers). The Department's authority to operate these Centers derives from an interagency agreement between the Interior and Labor Departments, originally entered under section 407 of the Comprehensive Employment and Training Act of 1973 (CETA) [1], Pub. L. No. 93-203, 87 Stat. 839, 863. Pursuant to the agreement, Labor transfers funds from its annual Job Corps appropriation to Interior for Interior's operating expenses for the Centers.

Specifically Interior asks:

(1) whether it should credit Job Corps Center receipts derived from meals, clothing, tool kits and arts and crafts sales, corpsmember fines, and property damage restitution to (a) Job Corps appropriations, (b) miscellaneous receipts of the Treasury, or (c) the Corpsmember Welfare Associations;

(2) whether Corpsmember Welfare Association financial transactions may be processed through local banks instead of being maintained in trust funds in the Treasury;

[1] Most of CETA's provisions pertaining to the Job Corps were repealed and reenacted as part of the Job Training Partnership Act. Pub. L. No. 97-300, 96 Stat. 1322, 1370.

(3)(a) whether collections received from agreements between the Weber Basin Job Corps Center and the Utah Davis County School District, and Utah State Department of Corrections, should be deposited to the Job Corps appropriation, the miscellaneous receipts account in the Treasury, or handled in some other way, and (b) if deposit of these collections in the Job Corps appropriation would unlawfully augment that appropriation, whether the receipt of in-kind services or property also would constitute such an augmentation; and

(4)(a) whether the Interior Department's operation of the Department of Defense imprest funds is proper, (b) the financial treatment the imprest funds should be accorded in Interior's fiscal records, and (c) the responsibility of the Interior Department and its cashiers for the funds.

For the reasons indicated below, we conclude:

(1) Interior should credit the questioned receipts to the Job Corps appropriation, with the exception of the fines and the arts and crafts sales which, pursuant to program regulations, may be deposited to the credit of the Corpsmember Welfare Associations;

(2) Corpsmember Welfare Association transactions may be processed through local banks;

(3) monies received from the Utah agreements may be credited to the Job Corps account, and in-kind services may also be accepted; and

(4) Interior employees who act as imprest fund cashiers using funds provided by the Department of the Army should be held to the same standards of accountability as any other civilian imprest fund cashier.

I. Proper Deposit of Job Corps Center Receipts

A. Background

The purpose of the Job Corps program is to assist youth "who need and can benefit from an unusually intensive program, operated in a group setting, to become more responsible, employable, and productive citizens * * *." 29 U.S.C. § 1691. The program calls for establishing residential and nonresidential Centers in which Corps enrollees participate in intensive programs of education, vocational training, work experience, counseling, planned recreational activities, rehabilitation and development. *Id.* §§ 1691, 1698.

Section 407 of CETA, reenacted as section 427 of the Job Training Partnership Act, 29 U.S.C. § 1697, authorizes the Secretary of Labor to make agreements with Federal, state or local agencies for establishing and operating Job Corps Centers, including Civilian Conservation Centers, located primarily in rural areas. Under the authority in section 407, the Secretary of Labor entered into an agreement with the Department of the Interior, effective July 1, 1974, authorizing Interior to administer and operate Centers in accordance with the Job Corps program legislation on lands under Interior Department jurisdiction.

Funds for Interior's operation of the Centers are transferred from the Labor Department appropriation for "Training and Employment Services," the appropriation that funds the Job Corps program. (*E.g.*, Pub. L. No. 98-139, 97 Stat. 871.) Since fiscal year 1975, the annual appropriation supporting the Job Corp program has included language allowing "reimbursements" to be added to the amounts appropriated. Moreover, a provision applicable to all programs covered by the Job Training Partnership Act provides that "income generated under any program may be retained by the recipient to continue to carry out the program * * *." 29 U.S.C. § 1551(m).

Under normal circumstances, in addition to the transferred appropriations, center operators also receive monies from sales of meals to employees and outside visitors, tool kits, clothing, and arts and crafts objects (made by corpsmembers, with materials furnished by Interior), from fines assessed against corpsmembers for disciplinary infractions, and from restitution for damage to center property caused by corpsmembers. Interior is authorized by regulations of the Department of Labor published at 20 C.F.R. § 684, to make all these charges.

The regulations also authorize establishment of Corpsmember Welfare Associations and Welfare Association funds. *Id.* § 684.79. The associations and funds are to be run by elected corpsmember association councils. The regulations specifically prohibit expenditure of appropriated funds on Welfare Association activities. Moreover, Interior has informed us that the corpsmembers themselves provide the start-up funds for the associations and that no Federal funds are used even on a reimbursable basis. Instead, the associations receive revenues from such sources as "snackbars, vending machines, disciplinary fines, sale of arts and crafts objects made by corpsmembers, and pay telephones." *Id.* Subsection 684.73(f) of the program regulations authorizes the sale of arts and crafts made by corpsmembers in accordance with an arts and crafts program approved by the Corpsmember Welfare Associations, provided that the profits benefit the associations. Disciplinary fines are also required by the program regulations to be deposited in the Welfare Association funds.

B. Legal Discussion

1. Receipts from sales of meals, tool kits, clothing, and arts and crafts objects.

Generally, absent statutory authority to the contrary, all funds received for use of the United States, regardless of source, must be deposited into the general fund of the Treasury as miscellaneous receipts (31 U.S.C. § 3302), on the theory that if receipts are cred-

ited to a specific appropriation instead, they would unlawfully augment the appropriation. 62 Comp. Gen. 678, 679 (1983). In the present case, however, we think the provisions in the Job Training Partnership Act and annual appropriation acts providing funds for the Job Corps program provide the necessary statutory authority to allow the receipts described above to be retained for Job Corps program purposes, with the exception of the receipts from arts and crafts sales which are treated as non-appropriated funds, as explained below.

Section 1551(m) of title 29, which applies to all the programs set forth in the Job Training Partnership Act, allows income generated under the Job Corps program to be retained by the recipient to "continue to carry out the program." In this case, the recipient is the Department of the Interior. Although the legislative history of the Act does not discuss the provision to any extent, we think the plain language would include as "income generated," receipts from sales of meals, tool kits, and clothing. Thus, these receipts can be retained by the Department of the Interior for further use in the program.

In addition, the words "including reimbursements" in the annual appropriations covering the Job Corps program, the appropriation to the Labor Department for "Training and Employment Services," provide further support for our conclusion. Although the term "reimbursement" is not defined in the annual appropriations acts or in their respective legislative histories, both the Department of the Treasury and this Office have defined the term as sums collected by the Government in payment for commodities sold or services furnished. *See* 7 GAO Policy and Procedures Manual for the Guidance of Federal Agencies, § 12.2 We think our definition would cover receipts from sales of meals, tool kits, and clothing, as those items would qualify as commodities sold.

As mentioned before, these sums would normally have to be deposited into the Treasury's miscellaneous receipts account, but in this case the annual appropriations acts specifically make these reimbursements available for obligation, just as if they were part of the basic appropriation.

While it appeared to us at first reading that receipts from the sales of arts and crafts objects made by Corpsmembers with materials furnished by the Centers should also be treated as reimbursements for commodities sold, the program regulations (20 C.F.R. § 684.73(f)) require deposit of these receipts in the Corpsmembers Welfare funds. The Department of Labor, whose views we sought on the various questions raised by Interior, offers the following explanation of its regulatory requirement:

> These arts and crafts are considered corpsmember's [sic] property. Thus, receipts from sales should not be deposited to a Federal account.

We are not inclined to quarrel with the Department's program judgment on that question.

2. Receipts from fines.

Receipts from fines imposed on corpsmembers for disciplinary infractions are not sums collected by the Government "for commodities sold or services furnished." Therefore, they do not qualify as "reimbursements" which, as discussed earlier, the annual appropriation acts specifically make available to program recipients for program obligations. In B-130515, Aug. 18, 1970, we held that monies received by the Labor Department from fines for corpsmembers' misconduct were not monies collected for the use of the United States at all. Instead, we regarded the fines as a reduction in the amount of the personal allowance that would otherwise have been paid to a corpsmember but for his unsatisfactory behavior. *See* sections 109(a) and 110(b) of the Economic Opportunity Act of 1964, as amended, 81 Stat. 676-77. As substantially the same legislation is currently in force (29 U.S.C. §§ 1699, 1700),[2] that decision would also apply to the present Job Corps program.

Although the funds "freed up" by the reduction in the allowances payable to the corpsmembers who were fined do not qualify as "reimbursements," they do constitute "program income" since they were derived from a program activity. As discussed above, 29 U.S.C. § 1551(m) permits program recipients to retain all income generated by the program for further use in the program. As was the case with the funds from the sales of arts and crafts objects, receipts from fines are also required by the program regulations to be deposited in the Corpsmember Welfare funds. The Department of Labor, in response to our inquiry about the propriety of this disposition of the fines, stated:

> Since this fine is paid by the corpsmember from personal funds, and does not involve payment for goods or services, it would seem proper for the money to be deposited to the Corpsmember Welfare Fund.

The Department of the Treasury also agreed that the above described disposition of disciplinary fines was a "proper exercise of the Secretary's [of Labor] statutory rulemaking authority."

We agree with both departments that the funds generated by imposition of disciplinary fines, while "program income" because they resulted from a program requirement, were not collected for use of the United States. (Contrast the receipts derived from property damage reimbursements, as discussed below, which are specifically collected to make restitution for Government expenditures for repairs.) We think that the disposition of these monies lies in the discretion of the officials responsible for the management of the program. We have no objection to their determination.

3. Receipts from property damage reimbursements.

Like other receipts, we have held that monies received from loss or damage to Government property generally cannot be credited to

[2] Section 1700 of title 29 authorizes Job Corps Center directors to take appropriate disciplinary measures against Job Corps enrollees, and section 1699 permits reduction of allowances as a disciplinary measure.

the appropriation available to repair or replace the property but must be deposited and covered into the Treasury as miscellaneous receipts. 64 Comp. Gen. 431 (1985); 26 Comp., Gen. 618, 621 (1947). Nevertheless, consistent with our views on the other receipts described above, monies received by Interior for property damage restitution would be considered to be reimbursements, retention of which the annual appropriation acts permit.

II. Financial Transactions of Corpsmember Welfare Associations

All public monies must be deposited into the Treasury of the United States or with a public depositary designated by the Secretary of the Treasury. 31 U.S.C. §§ 3302, 3303; B-199722, Sept. 15, 1981. The private origin of a fund does not necessarily mean that the monies therein are not public monies. We have consistently regarded a statute that authorizes collection and credit of fees to a particular fund, and which makes the fund available for specified expenditures, as constituting a continuing appropriation subject to the statutory controls and restrictions applicable to appropriated funds. 63 Comp. Gen. 285, 287 (1984); 35 Comp. Gen. 615, 618 (1956).

Nevertheless, we do not think the Corpsmember Welfare Association funds are public funds. These funds are not created or governed by statute, and the regulations authorizing their establishment specifically state that appropriated funds are not to be used to support welfare association activities. On the contrary, most of the funds used in running the welfare associations, including start-up funds, come from private sources. (To the extent that certain receipts, such as monies from sales of arts and crafts objects or receipts from disciplinary fines are required by regulation to be deposited in the Welfare Association funds for their exclusive use, we think that they lose their Federal character and become non-appropriated funds.) Moreover, for the most part, the persons managing and having access to the funds are corpsmembers and not Federal employees.[3] Accordingly, we do not think the restrictions on public funds would apply to welfare association funds, and, thus, the funds would not have to be maintained in the Treasury or in particular depositaries designated by the Secretary of the Treasury,[4] but could not be kept in local banks.

We also think our conclusion is consistent with the statutory purpose of providing enrollees with "education and work experience." 29 U.S.C. § 1697(a). The Corpsmember Welfare Association Handbook states that participation of corpsmembers in operating and managing the associations will serve as training devices for corpsmembers in operating small businesses. United States Department of the Interior, Corpsmember Welfare Association Handbook § 1.2 (1983). Administering the financial transactions of the funds promotes this purpose.

Although it is true that the funds will not be subject to the Federal control that they would have were they maintained in the Treasury or, perhaps, in a designated depositary, the regulations describing the welfare associations do require (1) that a center staff member be responsible for maintaining the corpsmember association accounting system; (2) establishing a method to insure the security of welfare association funds; and (3) that the accounting system be subject to audit by the Department of the Interior. 20 C.F.R. § 684.79(b)(3).

III. Weber Basin Job Corps Agreements

Pursuant to an agreement between Interior's Weber Basin Job Corps Center, and the Utah State Office of Education and the Davis County School District, for several years the Weber Basin Center has been accepting a number of Utah students who receive the same programs and services as regular Job Corps enrollees. A similar agreement has been concluded between the Weber Basin Center and the Utah State Department of Corrections. Under both agreements, the Weber Basin Center is reimbursed for the training it provides. The Department of Labor informs us that the number of regular enrollees that the Interior-run Job Corps Centers can accept is limited by the amount of funds transferred from Labor. Therefore, even if eligible, the individuals covered by the agreements would probably not have been selected for regular enrollment.

With respect to these agreements, Interior asks whether an illegal augmentation would result if monies received from Utah are deposited into the Job Corps appropriation, and, if so, whether such an augmentation would also occur if Utah paid instead with in-kind services or property. The services and property contemplated include instruction and use of word processing and related computer equipment. Prior to answering these questions, we first must determine whether Interior was authorized to conclude the Weber Basin agreements.

Although the Job Training Partnership Act does not specifically authorize reimbursable agreements with political subdivisions of states, such as the ones in question, these agreements are consistent with the purpose of the Job Corps program, and authority to enter them may be inferred from other provisions covering the program.[5] Thus, section 421 of the Act, 29 U.S.C. § 1691, states the Job

[3] For most purposes, Job Corps enrollees are not considered Federal employees. 29 U.S.C. § 1706.

[4] As most of the Centers appear to be located in rural areas it might also be impractical to maintain the funds at designated depositaries.

[5] The Labor Department agrees that the agreements are valid and has presented various arguments in support. The Treasury Department, in its views on the issues raised by Interior, has questioned their validity, essentially on the basis that they are not specifically authorized by statute.

Corps program is to assist young people to "become more responsible, employable, and productive citizens * * * in a way that contributes * * * to the development of national, State, and community resources * * *."; section 427, *id.* § 1697, authorizes the Secretary of Labor to make agreements with state or local agencies for establishing and operating residential or nonresidential Job Corps Centers, and authorizes Job Corps Centers to offer reimbursable educational and vocational training opportunities on a nonresidential basis to participants in other programs under the Job Training Partnership Act; [6] section 431, *id.* § 1701, authorizes the Secretary to encourage and cooperate in activities to establish a mutually beneficial relationship between Job Corps Centers and nearby communities; and section 435, *id.* § 1705, authorizes the Secretary to facilitate the effective participation of states in the Job Corps program, and to enter into agreements with states to assist in operating or administering state-operated programs that carry out the purposes of the Job Corps program. As the Labor Department, through the statutorily-authorized interagency agreement with Interior, essentially has delegated to Interior its authority to run Job Corps programs on lands under Interior jurisdiction, Interior has the same authority that Labor would have to conclude agreements with states and subdivisions of states.

As pointed out by the Labor Department, in at least one instance, this Office has approved a similar training agreement. Thus, in 42 Comp. Gen. 673, 674 (1963), we found proper acceptance of a limited number of private persons on a fee basis at courses of training given at the United States Patent Office Academy, notwithstanding the absence of a specific statutory basis authorizing training of non-Government personnel. We said that attendance of private persons was merely incidental to the necessary and authorized training of Government employees, although we cautioned that private trainees could be accepted only after adequate provision had been made for all Government trainees. *Id.* at 674. Similarly, although we find the Weber Basin agreements legally proper, we do not think they should serve to decrease the number of regular Job Corps enrollees who normally would participate in the program.

Consistent with our discussion in question 1, we think the monies received by the Weber Basin Center from Utah for training the Utah enrollees may be considered both "income generated under the Job Corps program," and "reimbursements," as provided in the appropriation covering the program. The monies received by Interior are in return for the services it provides. Accordingly, they could be returned to the program and need not be deposited into the Treasury as miscellaneous receipts.

[6] Neither Interior nor Labor has suggested that the state-supported enrollees are participants in other programs under the Act.

With regard to payment through in-kind goods or services instead of reimbursements, the general provisions of the Job Training Partnership Act provide that the Secretary of Labor may accept and use the services and facilities of any state agencies or political subdivisions of a state. 29 U.S.C. § 1580.[7] This authority, together with the authorities described above, which permit reimbursable agreements with state agencies, allows the Labor Department to receive payments of in-kind services or property. Pursuant to the interagency agreement with Labor, the Interior Department has the same authority. Accordingly, Interior could lawfully receive payment in property or services from Utah for its training of the Utah enrollees.

IV. Job Corps Center Imprest Fund Cashiers

In 1971 the Departments of Labor and Defense entered into a reimbursable interagency agreement pursuant to the Economy Act, 31 U.S.C. § 1535, under which the United States Army agreed to provide financial service support, through the United States Army Finance and Accounting Center, to the Department of Labor for the Job Corps program. The financial service to be provided covers the payment, certifying and disbursing functions for the Job Corps program, including maintenance and reimbursement of imprest funds. The payment responsibilities primarily cover payments to Job Corps enrollees for pay and allowances. The agreement states that payments are to be made in accordance with the procedures set forth in Job Corps Handbook No. 630.

Under the agreement, the Labor Department is authorized to maintain and develop a system of accounting and internal control; to furnish all authorizations and delegations to the Army as are necessary for making payments; to make the necessary funds available to the Army for the Army's financial service; and to arrange for periodic audits of the financial accounts and operations of the financing center.

Interior informs us that there are two imprest fund cashiers at each of the 12 Corps Centers it runs, all of whom are Interior Department employees. One of the cashiers receives disbursements from the Army under the interagency agreement between Labor and the Defense Departments, and the other from the Treasury Department. The 12 cashiers who receive Army funds make disbursements for pay and allowances of Job Corps enrollees. The 12 who receive funds from the Treasury, among other things, make disbursements for small purchase procurements needed at the Cen-

[7] The Act also authorizes the Secretary to accept, purchase or lease in the name of the department, and employ or dispose of any money or property—real, personal, or mixed, tangible or intangible—received by gift, devise, bequest, or otherwise, and to accept voluntary and uncompensated services, notwithstanding the provisions of section 1342 of title 31. 29 U.S.C. § 1579. Section 1342 generally prohibits United States employees from accepting voluntary services.

ters. Although its question is not altogether clear, Interior appears to be concerned about the responsibilities and potential liability of the 12 Interior Department imprest fund cashiers who receive disbursements from the Army as well as the proper way to account for the imprest funds.

We have no legal objection to the interagency agreement between Labor and the Defense Department which authorizes the Army to make disbursements for the Job Corps program. In the past we have found similar agreements proper. 44 Comp. Gen. 818, 820–21 (1965); 22 Comp. Gen. 48, 51 (1942). The combined effect of the Labor-Defense and the Labor-Interior agreements discussed above is to make Interior a recipient of Labor Department monies, for pay and allowances of corpsmembers, which are disbursed by the Army. We see no reason why the Interior Department imprest fund cashiers receiving these monies should not be responsible, liable, and accountable in the same manner as other imprest fund cashiers.

The general provisions governing the responsibilities and duties of imprest fund cashiers[8] are set forth in section 22 of title 7 of the General Accounting Office's Policy and Procedures Manual, and Volume 1, § 4-3000 of the Treasury Fiscal Requirements Manual. More particular guidance for the Job Corps program is described in the Labor Department's Job Corps Handbook No. 630, at 4–6 (1981).[9]

Consistent with this guidance, the Army disbursing officer ultimately is accountable for the imprest funds disbursed. Specifically, that officer is responsible for insuring execution of the prescribed procedures and requirements for Job Corps Center accounting for imprest funds, accountable for advances and transactions of the funds, and responsible for auditing the funds.

Concurrently, the Job Corps center directors are required to annually audit imprest funds, and should audit the fund with every change of imprest fund cashier. Our procedures also require that the Interior Department make unannounced verifications and audits of balances in the funds. Any improprieties should be reported to the head of the activity, in this instance presumably the Job Corps center director involved, and to the Army disbursing officer who advanced the funds. This is consistent with the Labor-Interior

[8] Army regulation 37-103 does mention imprest fund cashiers generally but the discussion is not very detailed. The Army has informed us that it has no particular regulation or guidance for its disbursements to Job Corps imprest fund cashiers.

[9] As the Army appoints its own disbursing officers in contrast to most other Federal agencies whose monies are disbursed by Treasury disbursing officers or disbursing officers under Treasury delegation, 31 U.S.C. § 3321, the relationship between the Army disbursing officers and the Interior imprest fund cashiers may not be exactly the same as that between Treasury Department disbursing officers, or disbursing officers operating under Treasury delegations, and agency imprest fund cashiers. Nevertheless, while the cited section of the Treasury Fiscal Requirements Manual may not legally be binding on the Army, it does provide guidance consistent with and similar to this Office's standards and those in the Job Corps Handbook.

interagency agreement which makes Interior responsible for financial management of its Job Corps operations and for providing an accounting of the funds spent.

The Interior Department imprest fund cashiers are required to protect the funds they receive by using appropriate safeguards, to document all cash payments from the imprest funds, and to obtain reimbursement of their funds from the Army disbursing officer under authorized signature. Imprest fund cashiers are responsible to the disbursing officer for their funds, and at all times should be able to account for the full amount of the funds advanced to them. Although our procedures do not require that imprest fund cashiers maintain formal records of their transactions, the Job Corps Handbook suggests that cashiers document all cash payments from their imprest funds on appropriate subvouchers signed by payees.

Of course the Interior imprest fund cashiers, like other Government imprest fund cashiers, are accountable officers of the United States. As such they are held to a standard of strict liability for the funds they have in physical custody, and are automatically liable at the moment a physical loss occurs or an erroneous payment is made. 54 Comp. Gen. 112, 114 (1974). Nevertheless, if a loss or deficiency occurs without fault or negligence of an imprest fund cashier, the cashier may be relieved of liability under 31 U.S.C. § 3527.

[B-220822]

Appropriations—Availability—Medical Fees—Physical Examinations

An individual not employed by the Government, but invited to participate in an exercise with the Naval Ocean Research and Development Activity, Department of the Navy, claimed the cost of a required physical examination on her claim for travel expenses. The cost of a physical examination necessary to participate in an exercise may not be paid as travel expense; however, as in the case of an employee, when a physical examination is undergone for the benefit of the Government, the cost of the examination may be reimbursed to the invitee.

Matter of: Nancy Wittpenn, June 26, 1986:

This action is in response to a request from the Department of the Navy for an advance decision regarding reimbursement for the cost of a physical examination to an individual not an employee of the Government.[1] We find that the individual may be reimbursed for such costs when the physical examination is found to be for the benefit of the Government.

The Navy asks whether Ms. Nancy Wittpenn, an individual associated with the University of Miami, may be reimbursed for a physical examination she underwent in connection with her participation in an exercise with the Naval Ocean Research and Development Activity, Department of the Navy. Since Ms. Wittpenn is

[1] The request was made by L. G. Cogsdil, Disbursing Officer, Naval Oceanographic Office Department of the Navy, Bay St. Louis, NSTL, Mississippi.

not an employee of the Government, she was issued invitational travel orders and was reimbursed for all travel expenses to and from Montevideo, Uruguay, where the exercise, Leg II of the South Atlantic Geocorridor Cruise, began and ended.

In accordance with agency regulations, Ms. Wittpenn was required to have a physical examination in order to participate in the exercise. (See Department of the Navy regulations, COMSCINST 6000.1B, April 23, 1979.) Ms. Wittpenn included the cost of her physical examination on the travel voucher she submitted for reimbursement of her travel expenses. Since the applicable travel regulations do not authorize the expense of a physical examination, the Navy withheld payment and requested an advance decision regarding whether or not the expense may be paid.

Travel and Transportation Expenses

Authority for paying travel expenses of individuals performing service to the Government without pay is contained in 5 U.S.C. § 5703. Implementing regulations pertaining to individuals such as Ms. Wittpenn, who are serving the Government without pay, are contained in the Federal Travel Regulations and Joint Travel Regulations. Although under certain circumstances, individuals may be reimbursed for such travel related costs as innoculations (e.g., Volume 2, Joint Travel Regulations, paragraph C4709, Ch. 231, January 1, 1985), there is no authority for allowing reimbursement for the examination involved here. Thus, the examination may not be reimbursed as a travel expense.

Physical Examination Expenses

We have consistently allowed agencies to pay the costs of physical examinations which are required in the interest of the Government and are necessary in the performance of authorized programs. This rule covers necessary fitness for duty examinations, 41 Comp. Gen. 531 (1962), examination required after exposure to toxic chemicals; 22 Comp. Gen. 32 (1942), medication required after exposure to contagious disease, 23 Comp. Gen. 888 (1944), and a physical examination for an individual who was injured in an automobile accident with a Government vehicle and was making a claim under the Tort Claims Act, 29, Comp. Gen. 111 (1949). We have held that an applicant for employment is not entitled to payment for a pre-employment physical examination. 22 Comp. Gen. 243 (1942); 31 Comp. Gen. 465 (1952). Such examinations generally are considered to be for the primary benefit of the prospective employee. As they apply to Federal employees these rules are reflected in Part 339 of Office of Personnel Management Regulations, 5 C.F.R. §§ 339.101-304.

The rule prohibiting payment for a pre-employment physical examination, however, is applied only to routine physicals needed to

determine the individual's eligibility and fitness for employment. A Government agency may pay the costs of pre-employment or other medical procedures, including physical examinations, which are primarily for the Government's interest under the rule in 22 Comp. Gen. 243, *supra*. B-108693, April 8, 1952; see also 23 Comp. Gen. 746 (1944). Thus, we have approved the use of appropriated funds to pay for physical examinations which are of a precautionary or preventative nature and primarily for the benefit of the Government rather than the employee. See 30 Comp. Gen. 387 (1951); 22 Comp. Gen. 32 (1942).

In the present case, Ms. Wittpenn was invited to participate in the cruise at Government expense. A requirement of such participation is that the individual undergo a physical examination. The physical examination was required by the Government for the protection of the Government due to the nature of the assignment. Specifically, the applicable regulation describes such physical examinations as necessary—

> * * * in order to minimize the probability of having to divert the ship from its mission and to ensure, insofar as possible, that involve[d] personnel will remain able to perform their duties in a satisfactory manner throughout the mission.

Therefore, the examination clearly is for the primary benefit of the Government. It is not analogous to a routine pre-employment physical examination.

Under the circumstances presented, the cost of the physical examination Ms. Wittpenn was required to have in order to participate in the cruise may be paid for from funds available for that program.

[B-221496]

Travel Expenses—First Duty Station—Manpower Shortage—Relocation Expenses

A new appointee to a manpower shortage position was issued travel orders erroneously authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses and miscellaneous expenses as though he were a transferred employee. After travel was completed, his orders were corrected to show entitlement only to travel, travel per diem and movement of household goods, as authorized for manpower shortage position. The claimant asserts entitlement to full reimbursement, arguing that the advice received when hired and the travel orders issued are consistent with private sector practices. The claim is denied. Under 5 U.S.C. 5723 (1982), the travel and transportation rights of a manpower shortage appointee are strictly prescribed. Regardless of whether the error was committed orally or in writing, the government is not bound by any agent's or employee's acts which are contrary to governing statute or regulations.

Claims—Reporting to Congress—Meritorious Claims Act—Appropriate for Submission

General Accounting Office (GAO) will no longer follow its general policy of not referring erroneous advice cases to Congress under the Meritorious Claims Act, 31 U.S.C. 3702(d). Instead, each such case will be considered for submission based on its individual merits. Accordingly, GAO submits to Congress claim of new appointee to a manpower shortage position who was erroneously issued travel orders authorizing

reimbursement for temporary quarters subsistence expenses, real estate expenses, and miscellaneous expenses where the appointee reasonably relied on this erroneous authorization and incurred substantial costs.

Matter of: John H. Teele—Manpower Shortage Travel and Transportation—Meritorious Claims Act, June 26, 1986:

This decision is in response to a letter from Mr. John H. Teele. He requests that his relocation expense claim, which was disallowed administratively, be allowed by this Office or submitted to Congress as a meritorious claim under the provisions of 31 U.S.C. § 3702(d). We conclude that while his relocation expense claim may not be allowed, it is appropriate to submit it to Congress as a meritorious claim.

BACKGROUND

Mr. Teele, who was employed in the private sector and resided in Chelmsford, Massachusetts, applied for Federal employment with the United States Missile Command, Department of the Army. By letter dated April 26, 1985, he was informed that he was selected for the position of Electronics Engineer, grade GS–14; that his first duty station would be Redstone Arsenal, Alabama; and that his tenative reporting for duty date (May 20, 1985) was dependent on preparation of travel orders which were to follow. We understand that the position to which he was appointed was designated a manpower shortage category position.

The travel orders issued on April 29, 1985, authorized him and his immediate family (spouse and four dependent children) to travel from Chelmsford, Massachusetts, to Huntsville, Alabama, by privately owned vehicle. In addition to mileage reimbursement, travel per diem, and shipment of household goods with up to 90 days temporary storage, Mr. Teele incorrectly was authorized temporary quarters subsistence expenses, not to exceed 60 days, real estate expenses, and miscellaneous expenses. He was also given a travel advance of $3,600.

Following his reporting for duty at Redstone Arsenal, Alabama, and submission of his travel voucher claim, it was administratively determined that his travel orders had been improperly issued since he was not an employee being transferred from one official duty station to another for permanent duty. By amendment dated October 8, 1985, his orders were corrected to show that the purpose for his travel was to effect a first duty station move in a manpower shortage position and that reimbursement for temporary quarters subsistence expenses, real estate expenses, and miscellaneous expenses was not authorized.

The total amount of his claim is approximately $14,500.[1] Because Mr. Teele was a manpower shortage position employee, it was administratively determined that his maximum entitlement, in addition to the transportation of his household goods, was $357.33. In this connection, because his travel orders had been erroneously issued, the agency determined that, since he was only entitled to $357.33, he had to repay $3,242.67, representing the balance of his $3,600 travel advance.

As the basis for his request that his claim be submitted as a meritorious claim, Mr. Teele asserts that in the private sector when a business firm hires an individual for a position which requires the individual to move to another location, it is normal for that firm to reimburse all of the individual's relocation expenses. He contends that having received similar advice from the Missile Command's Civilian Personnel Office, he had no reason to question the validity of that advice, especially when that advice was confirmed in the travel orders.

DECISION

The employment relationship between the Federal government and its employees is statutory, not a simple contractual relationship, nor one which is established by informal custom and practices. Since Federal employees are appointed and may serve only in accordance with applicable statutes and regulations, the ordinary principles of contract law do not apply. See *Elder and Owen*, 56 Comp. Gen. 85, at 88 (1976); *Kania* v. *United States*, 227 Ct. Cl. 240, at 251, 640 F.2d 264, at 268, *cert. denied*, 454 U.S. 895 (1981); and *Shaw* v. *United States*, 226 Ct. Cl. 240, at 251, 640 F.2d 1254, at 1260 (1981).

It is a rule of long standing that all public officers and employees of the Federal government must bear the expense of travel and transportation to their first permanent duty stations in the absence of a provision of law or regulation providing otherwise. One such provision of law is contained in 5 U.S.C. § 5723 (1982). That provision authorizes the travel and transportation expenses of a manpower shortage position appointee and immediate family and includes the movement of their household goods and other personal effects from their place of residence at the time of selection to the first duty station. However, it does not include temporary quarters subsistence expenses, real estate expenses, or miscellaneous expenses. Those expenses are authorized only for Federal employees who are being transferred from one official station or agency to another for permanent duty (5 U.S.C. § 5724(a)(1)).

[1] A line item audit of his overall claim was never performed administratively since it was determined that he was not entitled to reimbursement for any expenses other than his actual mileage and travel per diem.

With regard to the erroneous advice given and the improperly issued travel orders, it is a well settled rule of law that the government cannot be bound beyond the actual authority conferred upon its agents and employees by statute or by regulations. This is so even though the agent or employee may not have been completely aware of the limitation on his authority. See *M. Reza Fassihi*, 54 Comp. Gen. 747 (1975), and court cases cited therein. Also, the government is not estopped from repudiating unauthorized acts performed by one of its agents or employees and any payments made on the basis of such erroneous authorizations are recoverable. See *Joseph Pradarits*, 56 Comp. Gen. 131 (1976), and *T. N. Beard*, B-187173, October 4, 1976.

In the present case, Mr. Teele was a new appointee in a manpower shortage position. His maximum statutory entitlement was reimbursement for his and his immediate family's travel, travel per diem, and movement of their household goods and personal effects. Since Mr. Teele's household goods and effects were shipped by Government Bill of Lading and he was reimbursed for his travel and his family's travel to Huntsville, he has received all the reimbursement to which he is entitled under 5 U.S.C. § 5723, and the agency's action to require him to repay the excessive travel advance received by him ($3,242.67), is legally correct.

Having determined that the disallowance of Mr. Teele's claim was legally correct, we turn to his request that the matter be submitted to Congress as a meritorious claim under 31 U.S.C. § 3702(d). For the reasons stated below, we agree with Mr. Teele that a submission is appropriate in this case.

Subsection 3702(d) of title 31, the so-called Meritorious Claims Act, provides:

> The Comptroller General shall report to Congress on a claim against the Government that is timely presented under this section that may not be adjusted by using an existing appropriation, and that the Comptroller General believes Congress should consider for legal or equitable reasons. The report shall include recommendations of the Comptroller General.

It has been our general policy not to report to Congress under the Meritorious Claims Act, claims which are based on erroneous official advice furnished to Government employees, even where the employee acted reasonably in reliance on the erroneous advice and incurred substantial costs.[2] We reasoned that since such cases are not unusual they fail to present the extraordinary circumstances for which submissions under the Meritorious Claims Act should be reserved. Also, we expressed the view that to submit individual erroneous advice cases to Congress would afford preferential treatment to the few claimants whose cases come before us over many other similarly situated whose cases we never see.

[2] See, *e.g.*, B-209292, February 1, 1983; B-202628, December 30, 1981; B-195242, August 29, 1979; B-191039, June 16, 1978.

We now conclude that a change in this policy is warranted. While erroneous advice cases are not unusual, each such case deserves to be considered on its own merits. The fact that we are unable to seek relief in all cases should not prevent the submission of those worthy cases that do come before us. Therefore, we now will submit to Congress erroneous advice cases which, in our judgment, meet the standards for relief under the Meritorious Claims Act.

We are satisfied that Mr. Teele's claim meets the Act's standards based on substantial equitable considerations. As noted previously, the erroneous authorization was set forth in his travel orders and thus had every appearance of official sanction. It seems clear that he incurred substantial costs in reliance on this authorization and that his reliance was reasonable. Accordingly, we are forwarding a report to Congress requesting that Mr. Teele be reimbursed normal relocation expenses as though he had been an employee transferred in the interest of the government. Collection action on the excessive travel advance should be suspended pending congressional consideration of our request.

[B-221851.2]

Contracts—Protests—Subcontractor Protests—Awards "for" Government

The General Accounting Office affirms its dismissal of a protest on the grounds that the prime contractor is not acting for the government in awarding subcontracts where the protester has not shown that the prime contractor is principally providing large-scale management services at a government-owned facility.

Matter of: Ocean Enterprises, Ltd.—Reconsideration, June 26, 1986:

Ocean Enterprises, Ltd. (OEL), requests reconsideration of our decision, *Ocean Enterprises, Ltd.*, B-221851, May 22, 1986, 65 Comp. Gen. 585, 86-1 C.P.D. 479. In that decision, we dismissed OEL's protest of the award of a subcontract to Buccaneer Marine, Ltd. (Buccaneer), under request for quotations (RFQ) No. 34-468-00 issued by Science Applications International Corporation (SAIC), a prime contractor performing services for the United States Department of the Navy at the Santa Cruz, Acoustical Range Facility (SCARF), Santa Cruz Island, California. We affirm our prior decision.

We dismissed the protest because we concluded that SAIC was not awarding the subcontract "for" the government within the meaning of the exception allowing for review of subcontract awards by our Office, *see* Bid Protest Regulations, 4 C.F.R. § 21.3(f)(10) (1986), because the prime contractor is not operating a government-owned facility and is not otherwise serving as a mere conduit between the government and the subcontractor.

In requesting reconsideration, OEL first argues that our decision to dismiss its protest is inconsistent with a previous GAO decision, *Holiday Homes of Georgia, Inc.*, B-210656, Aug. 4, 1983, 83-2 C.P.D. ¶ 169, which should control this case. In *Holiday Homes*, we found that a Navy acoustical testing facility, the Atlantic Undersea Test and Evaluation Center (AUTEC), Andros Islands, Bahamas, was a government-owned facility being managed or operated by a prime contractor and, consequently, that the subcontract was "for" the government and would be reviewed by our Office. OEL maintains that AUTEC performs functions identical to SCARF and argues that since we reviewed the procurement involving AUTEC in *Holiday Homes*, we should also review this procurement.

Initially, we note that in *Holiday Homes* we concluded that AUTEC was a government-owned facility being managed or operated by a prime contractor. Even assuming that the functions performed at AUTEC and SCARF are identical, there is no indication in the record of this case or *Holiday Homes* that these facilities are being managed in a similar manner. There is also no indication that the facilities are similar in nature, that is, that AUTEC, like SCARF, is based on land leased by the prime contractor from a private owner and does not have a permanent facility or plant. Therefore, we have no basis for a finding that this situation is similar to that in *Holiday Homes* and, consequently, should be controlled by the decision.

OEL next argues that, in our prior decision, we erroneously based our conclusion that SCARF is not a government-owned facility on the Navy's failure to follow its internal procedures for the establishment and maintenance of government-owned, contractor-operated (GOCO) facilities and the fact that the Navy does not own the land on which SCARF is based. The protester cites *J.C. Yamas Company*, B-211105, Dec. 7, 1983, 83-2 C.P.D. ¶ 653, as standing for the proposition that ownership of land by the government is immaterial as to whether our Office will review a subcontract award.

We agree with OEL that the fact that the Navy has not made any determination under its procedures for the establishment and maintenance of GOCO's alone does not establish that SCARF is not a GOCO; however, the fact that no determination had been made does indicate that the Navy, contrary to OEL's assertions, did not regard SCARF as a GOCO. As to the ownership of the land, we indicated in our prior decision that in order for a facility to be a GOCO, the government must own the facility. Generally, a facility refers to the land and any constructed buildings and fixtures located on that land. Here, the Navy does not own the land on which SCARF is based and there is no permanent building or plant on the site and, while, as OEL points out, the government obviously owns the government-furnished equipment (GFE) at SCARF, the equipment itself does not constitute the facility. Further, our finding of jurisdiction in *J.C. Yamas Company*, B-211105, *supra*, is inapplicable here because in that case the land on which the government facility was based was owned in part by a private company and in part by the government, whereas here the government does not own any of the land at the site. Moreover, jurisdiction in that case was based on grounds other than a finding that the subcontract award was made by a firm operating or managing a government-owned facility.

Finally, OEL argues that a review of SAIC's contract with the Navy indicates that, contrary to our prior decision, SAIC provides large-scale management services. OEL asserts that this is evidenced by the fact that the contract indicates that SAIC reports to Navy personnel located in Bremerton, Washington, and there is nothing in the record showing that there is any Navy personnel based at SCARF or that the Navy manages the project operations at the site. It also asserts that the contract provision that only 10 percent of the man-hours necessary to perform this contract are for managerial/operation functions does not establish that SAIC does not provide management services since SCARF is a research/technical facility and there can be only so many managers to perform such a contract. OEL further argues that SAIC purchases or leases all of the equipment at SCARF at the government's written direction and cost and such equipment becomes GFE and, thus, SAIC has ongoing purchasing responsibility resulting from its management services.

We disagree with OEL's interpretation of the Navy's contract with SAIC. Even assuming that Navy personnel are not present at SCARF, management of project operations at SCARF easily could be performed by Navy personnel from offsite locations and, as stated in our decision, our review of the contract indicates that the Navy in fact manages the project operations while SAIC provides maintenance and operational assistance to the Navy. Specifically, the conducting of experiments and tests at SCARF requires large-scale management services, but the fact that management services constitute less than 10 percent of the services under the contract indicates that the contract is not principally for such services. Furthermore, SAIC's purchasing responsibilities are incidental to performance of its support and maintenance tasks specified under the contract and are not connected with operation of the facility.

We affirm our prior decision.

[B-222122]

Contracts—Requests for Quotations—Quotations Rejection—Propriety

Where a request for quotations under small purchase procedures does not contain a clause advising that quotations must be submitted by a certain date to be considered, the contracting agency should have considered the protester's low quotation received prior to award since no substantial activity had transpired towards award and the other offeror would not have been prejudiced.

Matter of: Instruments & Controls Service Company, June 30, 1986:

Instruments & Controls Service Company (ICSC) protests that the United States Mint, Philadelphia, Pennsylvania, failed to fairly consider ICSC's quotation under request for quotations (RFQ) No. NG-86-16, issued as a small business, small purchase set-aside to obtain equipment maintenance services. The Mint awarded a contract to the only other firm that submitted a quotation. The protester complains that the Mint improperly rejected its quotation as late, because the RFP contained no closing date for submitting quotations and ICSC submitted its quotation before the award. The Mint maintains that ICSC was informed of the closing date and that rejecting the quotation therefore was proper.

We sustain the protest.

The RFQ was issued on October 25, 1985, to six potential sources that included the protester and Accurate Instrument Company, Inc. (currently Process Electronics Corp.), the incumbent contractor. Accurate Instrument submitted a quotation of $8,930 on November 14, 1985, and ICSC submitted its quotation of $8,688 on November 24. The Mint signed the purchase order for Accurate Instrument on January 15, 1986.

The facts otherwise are in dispute. The protester contends that the RFQ did not request the submission of quotations by a certain date, and has provided a copy of the RFQ with a blank space for such a date. The protester further alleges that it twice asked the procurement agent (identified in the RFQ as the person to call for information) when quotations were due, and was advised that the Mint would like to have them within a couple of weeks. During a November 22 phone conversation, the procurement agency allegedly asked ICSC to hand-deliver the quotation instead of mailing it. The protester did so 2 days later.

The Mint maintains that the RFQ requested that quotes be submitted by November 15, 1985, and has enclosed copies of the RFQ with that date inserted in the appropriate space. The Mint does not allege that it otherwise advised ICSC that a quotation had to be submitted by November 15 to be considered, and the RFQ contained no such advice. According to the Mint, when the protester called on November 22, the procurement agent advised that the closing date for receipt of quotations had passed and that the award decision had been made.

Initially, there is a question whether the protest is timely. The Mint contends ICSC's protest should be dismissed since it was not filed within 10 working days after November 22, when the Mint allegedly advised ICSC of the award decision. Our Bid Protest Regulations require that protests of allegedly improper agency actions be filed within 10 working days after the basis for protest is known or should have been known, whichever is earlier. 4 C.F.R. § 21.2(a)(2) (1986). It is our practice to resolve doubts about timeliness in favor of the protester. *Consol. Bell, Inc.*, B-220421, Feb. 6, 1986, 86-1 CPD ¶ 136. Since the protester denies that the Mint advised it of the award decision on November 22, we resolve the doubt in the protester's favor and consider the protest timely.

Regarding the merits, the Competition in Contracting Act of 1984 (CICA) authorizes simplified procedures for small purchases—not exceeding $25,000—of property and services to promote efficiency and economy in contracting and to avoid unnecessary burdens for agencies and contractors. 41 U.S.C. § 253(g) (Supp. II 1984). To facilitate these stated objectives, CICA only requires that purchasing agencies obtain competition to the maximum extent practicable. *Id.; S.C. Servs., Inc.*, B-221012, Mar. 18, 1986, 86-1 CPD ¶ 266.

We have held that language requesting quotations by a certain date cannot be construed as establishing a firm closing date for the receipt of quotations absent a late quotation provision expressly providing that quotations must be received by that date to be considered. See *CMI Corp.*, B-211426, Oct. 12, 1983, 83-2 CPD ¶ 453. An agency therefore should consider any quotations received prior to award if no substantial activity has transpired in evaluating quotations and other offerors would not be prejudiced. *Id.* The failure to do so would be inconsistent with the statutory requirement for competition to the maximum extent practicable.

In view of this standard, whether the RFP contained a closing date is irrelevant since the RFQ contained no late quotations clause. Here, the record does not indicate that when ICSC submitted its quotation, more than 6 weeks prior to the execution of the purchase order, the Mint had undertaken any actions that would have made considering ICSC's quotation impracticable or burdensome. There also is no indication that ICSC obtained any material advantage by being permitted to submit its quotation on November 24. The rejection of ICSC's quotation therefore was improper.

The protest is sustained.

We recommend that the Mint terminate the current contract for the convenience of the government and award a contract for the remainder of the contract term to ICSC based on its low quotation if that company is otherwise qualified for award. 4 C.F.R. § 21.6(a). Since the contract is more than half completed, ICSC may be unwilling to perform the remaining work at its quoted price. In such an event, the protester should be reimbursed the costs of preparing and submitting its quotation and protest. 4 C.F.R. § 21.6(e).

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INDEX

APRIL, MAY, AND JUNE 1986

LIST OF CLAIMANTS, ETC.

	Page
Agriculture, Dept. of	473, 508
Agro Construction and Supply Co., Inc	471
Army, Dept. of	469, 541, 554, 644
AuCoin, The Honorable Les	589
Bisbee, John C	473
Brown, The Honorable George E	589
Bureau of Land Management	570
BWC Technologies, Inc	500
Challenger Piping, Inc	505
Chemray Coatings Corp	625
Coughlin, The Honorable Lawrence	589
Cox, Barbara J.	517
Defense, Dept. of	497, 521
Defense, Department of, General Counsel	543
Defense Logistics Agency	599
Dicks, The Honorable Norman D	589
Duffy, John L	647
Dynalectron Corporation	558
Edgewater Machine & Fabricators, Inc	489
Energy, Dept. of	529
Environmental Protection Agency	485
Environmental Quality and Office of Environmental Quality, Council on	605
Environmental Tectonics Corp	504
Epp, Edgar K	461
Fairbanks Associates	573
Falcon Systems, Inc	585
Federal Aviation Administration	464
Federal Services Group	654
Flight Resources Inc	619
Fort Wainwright Developers, Inc	573
Franklin Lumber, Inc	552
General Services Administration	564
General Services Administration, General Counsel	601
Gibson, Virginia A	608
Health and Human Services, Dept. of	626
Henry, Jack L	658
House of Representatives	589
Indian Affairs, Bureau of	534
Instruments & Controls Service Company	686
Interior, Dept. of	461, 557, 570, 667
Internal Revenue Service	554
KISS Engineering Corporation	549
Labor, Dept. of	635
Little Susitna Company	652
MacDonald, John R	485
MacWilliams, J.D.	508
Marine Corps Finance Center	622
Mounts Engineering	477
Ocean Enterprises, Ltd	585, 683
Pacific Sky Supply, Inc	457
Proxmire, The Honorable William	626
Rice Services, Inc	644
Ridge, Inc	663
Sadco Enterprises	573
S.A.F.E. Export Corporation	531
Security State Bank of Aitkin	554
Semtex Industrial Corp	503
Simmons, Janice M	529
Smith, W.H. Hardware Co	569
Spurlock, The Honorable Delbert L. Jr	469
Superior Court of the District of Columbia	594
Tandem Computers, Inc	491
Teele, John H	680
Temps & Co	640
Topley Realty Co., Inc	511
Transportation, Dept. of	464, 525
Tree, John D. Jr	660
Trueblood, Carl	557
Uniformed Services University of Health Sciences	543
Veterans Administration	517
Wener, Charles	541
Wittpenn, Nancy	677
Zachary, Bonnie J	614

TABLES 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
1868, July 23, 15 Stat. 168	629
1877, March 1, 19 Stat. 268	633
1891, Feb. 6, 26 Stat. 733	629
1946, June 11, 60 Stat. 237	638
1964, Aug. 14, 78 Stat. 439	522
1964, Aug. 30, 78 Stat. 701	572
1965, Aug. 6, 79 Stat. 449	628
1973, Dec. 24, 87 Stat.	597
1973, Dec. 28, 87 Stat. 839	667
1976, Sept. 14, 90 Stat. 1255	555
1976, Oct. 15, 90 Stat. 2429	628
1978, Mar. 1, 92 Stat. 95	636
1978, Sept. 30, 92 Stat. 788–789	545
1978, Sept. 30, 92 Stat. 1211–1215	546
1978, Oct. 13, 92 Stat. 1179	486
1978, Nov. 2, 92 Stat. 2445	639
1979, Oct. 12, 93 Stat. 657	546
1980, Oct. 1, 94 Stat. 1352	545
1983, Sept. 24 97 Stat. 614	593
1983, Oct. 25, 96 Stat. 1749	537
1984, July 18, 98 Stat. 1174	496
1984, Oct. 12, 98 Stat. 1837	541
1984, Oct. 19, 98 Stat. 2492	593
1984, Oct. 30, 98 Stat. 3093	607
1985, Aug. 15, 99 Stat. 293	636
1985, Dec. 3, 99 Stat. 961	574
1985, Dec. 12, 99 Stat. 1102	636
1985, Dec. 19, 99 Stat. 1185	526, 589

UNITED STATES CODE

See also, U.S. Statutes at Large

	Page
2 U.S.C. 683	525
5 U.S.C. 101	631
5 U.S.C. 2062	462
5 U.S.C. 2102	596
5 U.S.C. 2102(a)(3)	596
5 U.S.C. 3131–3136	546
5 U.S.C. 3341	637
5 U.S.C. 3344	638
5 U.S.C. 3345–3349	629
5 U.S.C. 3346	629
5 U.S.C. 3348	629
5 U.S.C. 4110	509
5 U.S.C. 5301–5308	546
5 U.S.C. 5318	545
5 U.S.C. 5334(a)	519
5 U.S.C. 5382(b)	546
5 U.S.C. 5401–5405	486
5 U.S.C. 5402	487
5 U.S.C. 5402(c)(2)	486
5 U.S.C. 5525	542
5 U.S.C. 5584	529
5 U.S.C. 5703	678
5 U.S.C. 5722	469
5 U.S.C. 5723	681
5 U.S.C. 5724	659
5 U.S.C. 5724(a)(1)	681
5 U.S.C. 5724a	475
5 U.S.C. 5724a(a)(4)(A)	475
5 U.S.C. [illegible](b)	614
5 U.S.C [illegible]	615
5 U.S.C [illegible]	469
5 U.S.C. 5724(h)	660
5 U.S.C. 5724(i)	659
5 U.S.C. 5727	469
5 U.S.C. 6301–6312	609
5 U.S.C. 6303	462
5 U.S.C. 6309(a)	463
5 U.S.C. 6304	610
5 U.S.C. 6304(d)(1)(C)	610
5 U.S.C. 6307	610
5 U.S.C. 7103(10)	487
5 U.S.C. 7103(11)	487
5 U.S.C. 8331(13)	463
5 U.S.C. 8332(c)(1)(A)	463
10 U.S.C. 101(22)	463
10 U.S.C. 101(24)	463
10 U.S.C. 687(b)(4)	463
10 U.S.C. 1035	542
10 U.S.C. 1212	462
10 U.S.C. 1431–1446	624
10 U.S.C. 1447–1455	624
10 U.S.C. 2304(a)	461
10 U.S.C. 2305(b)(4)	551
10 U.S.C. 2113(f)	543
10 U.S.C. 2828(g)	574
10 U.S.C. 2828(g)(1)	574
10 U.S.C. 2828(g)(6)(A)	574
15 U.S.C. 637(b)(7)(C)	504
25 U.S.C. 372	534
25 U.S.C. 385a	467
25 U.S.C. 410	538
26 U.S.C. 9502	466

	Page
26 U.S.C. 9602(b)(3)	466
26 U.S.C. 9502(c)	466
26 U.S.C. 9502(d)	466
28 U.S.C. 510	631
29 U.S.C. 1551(m)	669
29 U.S.C. 1579	675
29 U.S.C. 1580	675
29 U.S.C. 1691	668
29 U.S.C. 1697	668
29 U.S.C. 1697(a)	672
29 U.S.C. 1699	671
29 U.S.C. 1706	672
30 U.S.C. 191	571
30 U.S.C. 901	636
30 U.S.C. 1301(a)	637
31 U.S.C. 725S–1	467
31 U.S.C. 1301(a)	637
31 U.S.C. 1301(c)	591
31 U.S.C. 1342	675
31 U.S.C. 1535	608, 637
31 U.S.C. 1552(b)	603
31 U.S.C. 3227(d)	555
31 U.S.C. 3302	571, 602, 669
31 U.S.C. 3321	676
31 U.S.C. 3324(a)	490
31 U.S.C. 3527	677
31 U.S.C. 3527(c)	534
31 U.S.C. 3527(d)(1)(B)	541
31 U.S.C. 3529	534
31 U.S.C. 3551–3556	504, 585
31 U.S.C. 3553(b)(2)	459, 553
31 U.S.C. 3553(b)(2)(A)	553
31 U.S.C. 3553(d)(1)	574
31 U.S.C. 3554(c)(1)	473
31 U.S.C. 3702(d)	682
31 U.S.C. 3711–19	537
31 U.S.C. 3711(a)(3)	538
31 U.S.C. 3721	603
31 U.S.C. 3726	564
31 U.S.C. 3727	554, 599
31 U.S.C. 3727(c)(3)	555
31 U.S.C. 6301–08	606
31 U.S.C. 6303	606
31 U.S.C. 6304	606
31 U.S.C. 6305	606
31 U.S.C. 6305(2)	606
37 U.S.C. 201–209	544
37 U.S.C. 302–303a	544
37 U.S.C. 404(a)	497
37 U.S.C. 404(f)(2)(A)	497
37 U.S.C. 406	521
37 U.S.C. 406(h)	522
39 U.S.C. 410	584
39 U.S.C. 410(a)	584
39 U.S.C. 410(b)	585
40 U.S.C. 541–544	478, 652
40 U.S.C. 543	478
40 U.S.C. 544	479
41 U.S.C. 253(a)(1)(A)	472
41 U.S.C. 253(g)	687
41 U.S.C. 253(g)(1)	516
41 U.S.C. 253(g)(4)	516
41 U.S.C. 416	515
42 U.S.C. 1317	628
42 U.S.C. 2000e–5	595
42 U.S.C. 2000e–5(b)	595
42 U.S.C. 2000e–16	595
42 U.S.C. 2000e–16(a)	596
42 U.S.C. 2000e–2000e–17	595
42 U.S.C. 2000e(b)	596
42 U.S.C. 3011	628
42 U.S.C. 3501 note	628
42 U.S.C. 3501a	628
42 U.S.C. 3522(b)	628
42 U.S.C. 4321	605
42 U.S.C. 4341–47	605
42 U.S.C. 4371–74	605
42 U.S.C. 4372	606
42 U.S.C. 4372(d)(1)	605
42 U.S.C. 4372(d)(4)	605
42 U.S.C. 4375	607
42 U.S.C. 10101	615
45 U.S.C. 822	525
45 U.S.C. 825–27	525
45 U.S.C. 827	525
45 U.S.C. 827(a)	526
45 U.S.C. 829(a)	526
49 U.S.C. 1301(8)	466
49 U.S.C. App. 1348(b)	466
49 U.S.C. App. 1353	466
49 U.S.C. App. 2205(a)	466
49 U.S.C. App. 2205(b)	466
49 U.S.C. App. 2205(c)	466
49 U.S.C. 10721	566
50 U.S.C. 1651(a)(4)	555

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL

	Page
9 Comp. Gen. 248	590
10 Comp. Gen. 120	589
18 Comp. Gen. 815	530
20 Comp. Gen. 322	589
22 Comp. Gen. 32	678
22 Comp. Gen. 48	676
22 Comp. Gen. 243	678
23 Comp. Gen. 746	679
23 Comp. Gen. 888	678
26 Comp. Gen. 354	590
26 Comp. Gen. 368	520
26 Comp. Gen. 530	520
26 Comp. Gen. 618	672
29 Comp. Gen. 111	678
29 Comp. Gen. 255	660
30 Comp. Gen. 288	530
30 Comp. Gen. 387	679
31 Comp. Gen. 15	519
31 Comp. Gen. 213	463
31 Comp. Gen. 389	469
31 Comp. Gen. 465	678
31 Comp. Gen. 524	610
33 Comp. Gen. 176	603
34 Comp. Gen. 145	602
34 Comp. Gen. 152	537
34 Comp. Gen. 164	498
34 Comp. Gen. 504	498
35 Comp. Gen. 615	672
36 Comp. Gen. 106	499
36 Comp. Gen. 434	589
36 Comp. Gen. 628	463
37 Comp. Gen. 287	565
37 Comp. Gen. 318	556
38 Comp. Gen. 134	509
38 Comp. Gen. 268	463
38 Comp. Gen. 338	541
40 Comp. Gen. 309	568
41 Comp. Gen. 235	465
41 Comp. Gen. 237–238	466
41 Comp. Gen. 238	465

	Page
41 Comp. Gen. 531	678
42 Comp. Gen. 495	633
42 Comp. Gen. 673	674
44 Comp. Gen. 574	523
44 Comp. Gen. 818	676
45 Comp. Gen. 169	600
45 Comp. Gen. 442	523
46 Comp. Gen. 424	660
46 Comp. Gen. 724	659
47 Comp. Gen. 141	463
47 Comp. Gen. 209	625
49 Comp. Gen. 44	556
49 Comp. Gen. 695	521
51 Comp. Gen. 27	615
52 Comp. Gen. 700	530
53 Comp. Gen. 71	509
53 Comp. Gen. 457	509
53 Comp. Gen. 600	635
53 Comp. Gen. 603	568
54 Comp. Gen. 93	557
54 Comp. Gen. 112	677
54 Comp. Gen. 308	568
54 Comp. Gen. 747	682
54 Comp. Gen. 1086	611
55 Comp. Gen. 42	487
55 Comp. Gen. 117	572
55 Comp. Gen. 201	578
55 Comp. Gen. 219	582
55 Comp. Gen. 289	527
55 Comp. Gen. 307	624
55 Comp. Gen. 636	618
55 Comp. Gen. 768	584
55 Comp. Gen. 839	584
55 Comp. Gen. 972	578
55 Comp. Gen. 982	582
55 Comp. Gen. 1051	472, 514
55 Comp. Gen. 1107	649
55 Comp. Gen. 1151	581
55 Comp. Gen. 1183	523
55 Comp. Gen. 1185–86	523
55 Comp. Gen. 1186	661
55 Comp. Gen. 1188	661
56 Comp. Gen. 85	681
56 Comp. Gen. 131	682
56 Comp. Gen. 561	475
56 Comp. Gen. 761	634
57 Comp. Gen. 447	659
57 Comp. Gen. 535	609
57 Comp. Gen. 536	609
57 Comp. Gen. 584	568
58 Comp. Gen. 375	567
58 Comp. Gen. 501	499
59 Comp. Gen. 380	540
59 Comp. Gen. 515	465
60 Comp. Gen. 510	555
60 Comp. Gen. 710	465
61 Comp. Gen. 112	475
61 Comp. Gen. 361	659
61 Comp. Gen. 5377	603
62 Comp. Gen. 54	589
62 Comp. Gen. 70	603
62 Comp. Gen. 88	650
62 Comp. Gen. 302	624
62 Comp. Gen. 307	624
62 Comp. Gen. 678	603, 670
62 Comp. Gen. 683	555
63 Comp. Gen. 68	475
63 Comp. Gen. 210	462
63 Comp. Gen. 281	469
63 Comp. Gen. 285	672
63 Comp. Gen. 474	557
64 Comp. Gen. 310	648
64 Comp. Gen. 359	639
64 Comp. Gen. 370	637
64 Comp. Gen. 376–82	637
64 Comp. Gen. 380–81	637
64 Comp. Gen. 382	639
64 Comp. Gen. 406	510
64 Comp. Gen. 408	510
64 Comp. Gen. 431	672
64 Comp. Gen. 441	489
64 Comp. Gen. 557	475
64 Comp. Gen. 772	477
64 Comp. Gen. 858	583
64 Comp. Gen. 880	644
64 Comp. Gen. 883	485
64 Comp. Gen. 888	481
65 Comp. Gen. 1	490
65 Comp. Gen. 25	496
65 Comp. Gen. 45	612
65 Comp. Gen. 92	558
65 Comp. Gen. 230	664
65 Comp. Gen. 268	570
65 Comp. Gen. 418	665
65 Comp. Gen. 585	683
65 Comp. Gen. 756	585

DECISIONS OF THE COMPTROLLERS OF THE TREASURY

	Page
8 Comp. Dec. 624	499
20 Comp. Dec. 707	499

DECISIONS OVERRULED, MODIFIED OR DISTINGUISHED

	Page
B–202863, Jan. 8, 1982	517
41 Comp. Gen. 235	464
44 Comp. Gen. 574	521
45 Comp. Gen. 442	521
40 Comp. Gen. 695	520
64 Comp. Gen 880	644

OPINIONS OF THE ATTORNEYS GENERAL

	Page
16 Op. Atty. Gen. 596	630
18 Op. Atty. Gen. 50	630
20 Op. Atty. Gen. 8	630
32 Op. Atty. Gen. 139	631

DECISIONS OF THE COURTS

	Page
Alcea Band of Tillamooks, U.S. *v.*, 341 U.S. 48 (1951)	539
American Indians Residing on Maricopa-AK Chin Reservation, U.S. *v.*, 667 F.2d 980 (Ct. Cl. 1981)	540
Bentley, U.S. *v.*, 107 F.2d 382 (2d Cir. 1939)	537
Bethel *v.* Jefferson, 589 F.2d 631 (D.C. Cir. 1978)	596
City of Mesa *v.*, Home Builders Assn. of Central Arizona, Inc., 111 Ariz., 523 P.2d 57 (1974)	557
Coleman, U.S. *v.*, 158 Ct. Cl. 498 (1962)	599
DiSilvestro, U.S. *v.*, 405 F.2d 150 (2d Cir. 1968) *cert. denied*, 396 U.S. 964 (1969)	536
Economy Plumbing and Heating Co., U.S. *v.*, 470 F.2d 585 (Ct. Cl. 1972)	542
Gila River Pima-Maricopa Indian Community, U.S. *v.*, 586 F.2d 209 (Ct. Cl. 1978) *rev'g* 33 Ind. Cl. Comm. 1 (1976)	540
Gratiot, U.S. *v.*, 40 U.S.C. (15 Pet.) 336 (1841)	537
Grey *v.*, Dukedom Bank, 216 F.2d 108 (6th Cir. 1954)	539
Kania, U.S. *v.*, 227 Ct. Cl. 240, at 251, 640 F.2d, at 268, *cert denied*, 454 U.S. 895	681
Kennerly, U.S. *v.*, 721 F.2d 1252 (9th Cir. 1983)	539
Key *v.*, Doyle, 434 U.S. 59 (1977)	598
Lucido, U.S. *v.*, 373 F. Supp. 1142	631
Matthews *v.*, Eldridge, 424 U.S. 319 (1976)	539
Mescalero Apache Tribe, U.S. *v.*, 518 F.2d 1309 (Ct. Cl. 1975), *cert. denied* 425 U.S. 911 (1976)	539
Mescalero Apache Tribe, U.S. *v.*, 518 F.2d 1309 (Ct. Cl. 1975) *rev'g* 31 Ind Cl. Comm. 417 (1973)	540
Meunich, U.S. *v.*, 410 F. Supp. 944 (N.D. Ind. 1976)	539
Munsey Trust Co., U.S. *v.*, 332 U.S. 234 (1947)	537
Navajo Tribe, U.S. *v.*, 624 F.2d 981 (Ct. Cl. 1980)	538
N.Y. Rayon Importing Co., U.S. *v.*, 329 U.S. 654	542
Palmore, U.S. *v.*, 411 U.S. 389 (1973)	598
Produce Factors Corporation, U.S. *v.*, 467 F.2d 1343 (Ct. Cl. 1972)	600
Scully, U.S. *v.*, 193 F. 185	628
Seminole Nation, U.S. *v.*, 316 U.S. 286 (1942)	537
Shaw, U.S. *v.*, 226 Ct. Cl. 240, at 251, 640 F.2d 1254, at 1260	681
Squillacote, U.S. *v.*, 562 F. Supp. 338 (E.D. Wis. 1983), *aff'd in part and rev'd in part*, 739 F.2d 1208 (7th Cir. 1984) *Reh'g denied*, 747 F.2d 432 (7th Cir. 1984), *cert. denied*, 105 S. Ct. 2021 (1985)	543
Swain *v.* Pressley, 430 U.S. 372 (1977)	598
Torre *v.* Barry, 661 F.2d 1371 (D.C. Cir. 1981)	596
Watt *v.*, Alaska, 451 U.S. 259 (1981)	571
Williams *v.*, Phillips, 482 F.2d 669	631

INDEX DIGEST

APRIL, MAY, AND JUNE 1986

Page

ACCOUNTABLE OFFICERS

Physical Losses, etc. of Funds, Vouchers, etc.

Cashiers, etc.

Consistent with interagency agreements between the Interior and Labor Departments and Labor and the Department of Defense, Interior Department imprest fund cashiers receiving monies from Army disbursing officers for payments to Job Corps enrollees are responsible, accountable and liable in the same manner as other imprest fund cashiers consistent with Section 22 of title 7 of the General Accounting Office's Policy and Procedures Manual, Volume I, 4-3000 of the Treasury Fiscal Requirements Manual and the Labor Department's Job Corps Handbook No. 630 666

ADVERTISING

Commerce Business Daily

Automatic Data Processing Equipment

Orders Under ADP Schedule

Unreasonable

Less Costly Alternative

Protest against Navy's issuance of a purchase order to nonmandatory General Services Administration (GSA) schedule contractor for maintenance of certain automated data processing equipment is sustained where *Commerce Business Daily* (CBD) synopsis did not contain an accurate description of Navy's minimum needs as required by GSA regulations and it appears potential offerors could meet those needs at substantially lower cost to the government 654

APPOINTMENTS

Manpower Shortage Category

Travel Expenses (*See* TRAVEL EXPENSES, First Duty Station, Manpower Shortage)

Presidential

"Vacancies Act" Restrictions

Actions by individuals occupying offices pursuant to the Vacancies Act which are taken subsequent to expiration of 30-day time limitation set forth in 5 U.S.C. 3348 are of uncertain validity. Accordingly, at the end of the 30-day period, such individuals should refrain from taking any further action in an acting capacity 626

Page

APPROPRIATIONS
Augmentation
Details
Improper
Proposed transfer of 15 to 20 National Labor Relations Board administrative law judges to Department of Labor on nonreimbursable basis under the authority in section 3344 of title 5, which provides for transfers, but does not indicate whether the transferring or receiving agency is to pay for the judges, is improper. Where a detail is authorized by statute, but the statute does not specifically authorize the detail to be carried out on a nonreimbursable basis, the detail cannot be done on that basis. Nonreimbursable details contravene the law that appropriations be spent only on the objects for which appropriated, 31 U.S.C. 1301(a), and unlawfully augment the appropriation of the receiving agency. 64 Comp. Gen. 370 (1985) affirmed 635
Authorization
Programs, etc. Without Authorization
Fiscal year 1986 funds appropriated to the Treasury Secretary to purchase Fund Anticipation Notes used to finance the Department of Transportation's Redeemable Preference Share Program, are available to buy Notes and thus continue the rail improvement projects financed under the Program in 1986, despite the expiration of the Program's organic authority on September 30, 1985. A specific appropriation for an expired program provides a sufficient legal basis to continue that program, absent a contrary expression of congressional intent. 55 Comp. Gen. 289 (1975) 524
Availability
Medical Fees
Physical Examinations
An individual not employed by the Government, but invited to participate in an exercise with the Naval Ocean Research and Development Activity, Department of the Navy, claimed the cost of a required physical examination on her claim for travel expenses. The cost of a physical examination necessary to participate in an exercise may not be paid as travel expense; however, as in the case of an employee, when a physical examination is undergone for the benefit of the Government, the cost of the examination may be reimbursed to the invitee 677
Miscellaneous Receipts (*See* **MISCELLANEOUS RECEIPTS**)
Obligation
Definite Commitment
Unobligated balances in the Rail Fund lapsed under the provisions of the 1984 DOT appropriation act, but obligated balances remain available to liquidate outstanding obligations 524
Refund of Expenditures
Disposition
Rebates from Travel Management Centers redistributed to paying Federal agency may be retained by agency for credit to its own appropriation and does not need to be deposited into the Treasury as miscellaneous receipts. This does not constitute an illegal augmentation of appropriations in that these rebates are adjustments of previ-

Page

APPROPRIATIONS—Continued
Refund of Expenditures—Continued
Disposition—Continued
ous amounts disbursed and therefore qualify as "refunds" under regulations permitting such refunds to be retained by the agency 601

ARCHITECT AND ENGINEERING CONTRACTS (*See* **CONTRACTS, Architect, Engineering, etc. Services**)
AUTOMATIC DATA PROCESSING SYSTEMS (*See* **EQUIPMENT, Automatic Data Processing Systems**)

BIDDERS
Debarment
Affiliates of Debarred Firm
Eligibility
The Federal Acquisition Regulation, 48 CFR 9.406-1(b), provides that a debarring official may extend the decision to debar a contractor to all of its affiliates only if each affiliate is specifically named on the notification of proposed debarment. The failure of the debarring official to comply with this requirement is a mere procedural defect, not affecting the validity of the proposed debarment of the affiliate, where the affiliate is otherwise on notice of proposed action and is afforded the opportunity to respond 530
Contract Award Eligibility
Proposed Debarment
Suspension of Contractor by One Agency Effect
A firm proposed for debarment from government contracting generally is precluded from receiving government contracts pending a final debarment decision 530
Extension
Where actions of a debarred firm following an initial debarment so warrant, the debarment may be extended in order to protect the government's interests 530

BIDS
Cancellation (*See* **BIDS, Invitation for Bids, Cancellation**)
Invitation for Bids
Cancellation
After Bid Opening
Defective Solicitation
Due to special experience requirement in invitation for bids (IFB), which agency determined was not necessary to meet its needs, only one of five actual bidders was eligible for award and other potential bidders were excluded from competing. Canceling the IFB after bid opening in order to resolicit without the experience requirement therefore was proper since both actual and potential bidders would be prejudiced by award under the original IFB 470
Defective
A solicitation which calls for bidders to submit option prices must state whether the evaluation will include or exclude option prices to allow for the submission of bids on an equal basis 640
Evaluation Criteria
An invitation for bids and the award of fixed-rate, labor-hour, indefinite-quantity requirements contract for temporary clerical serv-

BIDS—Continued Page
Invitation for Bids—Continued
Defective—Continued
Evaluation Criteria—Continued
ices is defective where the method of evaluating bids only involved the numerical averaging of hourly rates for each line item and not the extension or "weighting" of the line item prices by the government's best estimate of the quantities of hours required to determine the bid that would result in the lowest ultimate cost to the government 640
Protests (*See* CONTRACTS, Protests)
Rejection
Nonresponsive (*See* BIDS, Responsiveness)
Responsiveness
Failure to Furnish Something Required
Manufacturer, Authorized Dealer, etc. Representations
Failure of the low bidder to list specific manufacturers and suppliers of equipment the bidder was required to supply does not require rejection of the bid where the listing requirement was not intended to prevent bid shopping, but rather was intended to insure the use of acceptable suppliers and manufacturers, and the low bidder agreed to use suppliers which had been given prior approval by the procuring agency and were on a list included in the invitation 505
Test to Determine
Unqualified Offer to Meet All Solicitation Terms
The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation. The required commitment to the terms of the invitation need not be made in the manner specified by the solicitation; all that is necessary is that the bidder, in some fashion, commit itself to the solicitation's material requirements 505

CLAIMS
Assignment
Contracts (*See* CONTRACTS, Payments, Assignments)
Payments (*See* CONTRACTS, Payments, Assignment)
Reporting to Congress
Meritorious Claims Act
Appropriate for Submission
General Accounting Office (GAO) will no longer follow its general policy of not referring erroneous advice cases to Congress under the Meritorious Claims Act, 31 U.S.C. 3702(d). Instead, each such case will be considered for submission based on its individual merits. Accordingly, GAO submits to Congress claim of new appointee to a manpower-shortage position who was erroneously issued travel orders authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses, and miscellaneous expenses where the appointee reasonably relied on this erroneous authorization and incurred substantial costs 679

COOPERATIVE AGREEMENTS
Propriety of Use
Statutory Authority (*See* FEDERAL GRANT AND COOPERATIVE AGREEMENT OF 1977)

COMPENSATION Page
De facto Status of Employees (*See* OFFICERS AND EMPLOYEES, *De facto*)
Increases
Limitations
Applicability
Civilian faculty members of the Uniformed Services University of the Health Sciences question whether their pay is subject to statutory pay caps imposed on federal salaries for fiscal years 1979–1981. Although the salaries of the faculty members are set by the Secretary of Defense under 10 U.S.C. 2113(f) to be comparable with other medical schools in the vicinity of the District of Columbia, we hold these salaries are subject to the statutory pay caps imposed by Congress for fiscal years 1979 and 1981. Pay increases for these positions were also limited by administrative determination for fiscal year 1980 to be comparable with other Federal executive pay increases. A recent court decision involving backpay for Senior Executive Service employees in not applicable to these faculty members 542
Periodic Step Increases
Upon Reconversion to General Schedule
After Erroneous Conversion to Merit Pay
Propriety of Agency Action
When an agency assigns employees to the merit pay system and then reassigns them back to the General Schedule system, those employees are not entitled to retroactive pay and within-grade waiting time credit equal to what they would have accrued if they had remained in the General Schedule system, unless administrative error occurred. An agency that properly converted an employee to merit pay status and then reconverted him to the General Schedule upon its prospective adoption of a new standard of employee coverage under the merit pay system, and properly assigned the employee to comparable pay levels, acted in conformity with the relevant statutes and regulations, and did not commit administrative error. Therefore, the employee is not entitled to additional pay and within-grade waiting time credit based on his claim that he was improperly assigned to the merit pay system 485
Rates
Highest Previous Rate
Administrative Discretion
Employee accepted grade GS–3, step 1 position with Veterans Administration (VA) but seeks retroactive salary adjustment and backpay because the VA did not allow her additional steps in grade GS–3 based on her highest previous rate (grade GS–6, step 8). The employee's claim is denied since (1) payment of the highest previous rate is discretionary with the agencies, (2) applicable VA regulations do not require payment of the highest previous rate in these circumstances, and (3) the VA's determination was not shown to be arbitrary, capricious, or an abuse of discretion. This decision distinguishes B–202863, Jan. 8, 1982 517

Page

CONTRACTORS

Debarment (See BIDDERS, Debarment)

Responsibility

Determination

Definitive Responsibility Criteria

Where a bidder is found to be responsible even though it does not meet definitive responsibility criteria requirements set out in the solicitation, and the agency deletes from subsequent solicitations the requirements for a specific minimum number of years of experience in the same areas of expertise, the definitive responsibility criteria in the first solicitation overstated the agency's minimum needs and unduly restricted competition..... 510

Review by GAO

Affirmative Finding Accepted

General Accounting Office will not review an affirmative determination of responsibility unless the possiblity of fraud or bad faith on the part of procuring officials is shown or the solicitation contains definitive responsibility criteria which allegedly have not been applied. Technical specifications which merely describe the items offerors are to agree to supply in the event they receive the award are not definitive responsibility criteria which instead establish standards related to an offeror's ability to perform the contract..... 663

CONTRACTS

Architect, Engineering, etc. Services

Appropriation Availability

Protest contending that the award of an architectural and engineering (A-E) contract for work to be performed in Alaska to a non-Alaskan firm violates section 8078 of the Department of Defense (DOD) Appropriations Act of 1986, which requires, under certain circumstances, that firms which perform work in Alaska hire Alaskan residents, is denied. The act does not preclude the award of A-E contracts for work to be performed in Alaska to non-Alaskan firms, but, in effect, requires non-Alaskan firms to hire Alaskan residents for work performed in Alaska under DOD contracts..... 651

Contractor Selection Base

"Brooks Bill" Application (*See* CONTRACTS, Architect, Engineering, etc. Services, Procurement Practices)

Procurement Practices

Evaluation of Competitors

Application of Stated Criteria

In procurements conducted under the Brooks Act, 40 U.S.C. 541-544 (1982), the contracting agency is required to consider the location of an architect-engineer firm and its knowledge of the locality of the project—unless application of the criterion would not leave an appropriate number of qualified firms. Higher evaluation score for location closer to project is reasonable..... 476

Protest that the architect-engineer (A-E) firm selected as the most highly qualified A-E firm did not comply with state licensing laws is denied where the statement of work only required the use of a registered surveyor, the awardee proposed to use a registered surveyor,

Pag

CONTRACTS—Continued

Architect, Engineering, etc. Services—Continued

Procurement Practices—Continued

Evaluation of Competitors—Continued

Application of Stated Criteria—Continued

and a state investigation indicated that the awardee hired licensed surveyors..... 47

Discussions

The discussions with three architect-engineer (A-E) firms—as to anticipated concepts and the relative utility of alternative methods of approach—required under the Brooks Act, 40 U.S.C. 541-544 (1982), should contribute to making possible a meaningful ranking of the A-E firms. Accordingly, they should occur prior to the selection of the most highly qualified firm. Moreover, they may include questions reasonably related to an evaluation of a firm's qualifications..... 47

Evaluator's inquiry as to cost of protester's equipment, made during discussions which preceded the final ranking of architect-engineer firms, has not been shown to have been an inappropriate concern and in any event did not prejudice the protester where (1) agency reports that question was motivated only by personal interest and that the answer was not considered in evaluation, (2) nothing in record indicates otherwise, and (3) there is no showing that the cost of the equipment—as opposed to the cost of personnel—was such that it would be a substantial factor in determining the likely fee..... 47

Evaluation Board

Contracting agency did not act unreasonably when it failed to inform the board evaluating the qualifications of architect-engineer firms of the allegation that one firm had failed to fully comply with a requirement in a prior contract for use of a registered surveyor where the question of licensing is unresolved and pending before the state licensing authority..... 47

Cost-type

Negotiation (*See* CONTRACTS, Negotiation, Cost-type)

Negotiated Procurements (*See* CONTRACTS, Negotiation)

Negotiation

Awards

To Other Than Low Offeror

Protest challenging selection of a higher-priced offeror is denied where the selection is consistent with the evaluation scheme in the solicitation, under which offerors are ranked according to cost per quality point..... 57

Late Proposals and Quotations

Rejection Propriety

Competitive System

A quotation that is submitted 7 months after the date it was due, and after the agency's repeated solicitation of the offeror during that period, is not a late offer, since it essentially was not submitted in response to the solicitation. The quotation therefore cannot be accepted without first surveying the market and permitting other potential suppliers to submit quotations..... 5

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals
Evaluation
Brand Name or Equal
Salient Characteristics-Satisfaction of Requirements
Awardee's noncompliance with salient characteristics set out in a request for proposals may not be waived notwithstanding that awardee's product meets the government's needs, since the characteristics were material to protester's and other potential offerors' decision to compete 490
Competitive Range Exclusion
Reasonableness
Agency's decision to exclude an offeror from the competitive range is proper where the offeror's technical proposal received an average score of 27 points out of a possible 100 and where the agency reasonably considered the offeror's technical proposal to be so deficient as to require major revisions before it could be made acceptable 615
Life-Cycle Costing
Where a cost ceiling is included in a solicitation for the purpose of comparing life cycle costs for government construction of military family housing with the same costs for contractor construction, and the government's cost is expressed in terms of present value, the cost for contractor construction also must be converted to present value. A proposal that, before discounting, exceeds the cost ceiling should not, therefore, be rejected 573
Where a solicitation does not specify the inflation rates to be used to evaluate cost proposals for a 19.5 year lease, but merely states that during the term of the lease, maintenance costs will be allowed to escalate according to "Economic Indicators" prepared by the Council of Economic Advisors, the agency is not required to use an average of past indicators for evaluation purposes, but rather is free to use any reasonable index of future inflation 573
Preparation
Costs
Recovery
Offerors may reasonably rely on request for proposals as indicating the government's needs. Where, based on such reliance, a protester submits a proposal that is in line for award but is not accepted because the government determines that its needs can be met by significantly less expensive equipment of different type, the protester may recover its proposal preparation costs unless it chooses to compete under the revised RFP 490
Technical Acceptability
Offeror's Responsibility to Demonstrate
Although the burden in a negotiated procurement is on the offeror to submit with its proposal sufficient information for the agency to make an intelligent evaluation, contracting agency's determination that offeror's general offer of compliance and specific responses to the specifications of "[n]oted and accepted" are sufficient is not unreasonable where the solicitation merely required a statement accepting all terms and conditions of the solicitation and provided for

CONTRACTS—Continued Page
Negotiation—Continued
Offers or Proposals—Continued
Technical Acceptability—Continued
Offeror's Responsibility to Demonstrate—Continued
simple statements of acknowledgment in response to the specifications 663
Requests for Proposals
Defective
Ambiguous Terms
Where a solicitation requires offerors to propose a single daily rate for preparing appraisal reports, but is ambiguous as to the meaning of a "Total Daily Rate" and does not estimate the length of time necessary for the work or otherwise relate the daily rate to the price of work orders to be negotiated for each appraisal report, it is deficient since bidders are unable to compete on an equal basis and the rate is not related to the probable cost to the government of competing proposals 549
Requests for Proposals
Deficient
Where a solicitation requires offerors to propose a single daily rate for preparing appraisal reports, but is ambiguous as to the meaning of a "Total Daily Rate" and does not estimate the length of time necessary for the work or otherwise relate the daily rate to the price of work orders to be negotiated for each appraisal report, it is deficient since bidders are unable to compete on an equal basis and the rate is not related to the probable cost to the government of competing proposals 549
Requests for Quotations (*See* CONTRACTS, Requests for Quotations)
Payments
Assignment
The Defense Logistics Agency (DLA), which erroneously paid certain contract proceeds to the contractor-assignor rather than to the assignee. The assignee complied with all requirements of the Assignment of Claims Act, 31 U.S.C. 3727. DLA could not discharge its payment obligation under the contract by paying the contractor. A letter from the assignee to the contractor, after the erroneous payment, releasing the assignee's interest in the contract does not revoke the assignment or otherwise extinguish the assignee's right to payment in these circumstances 598
Conflicting Claims
Assignee *v.* I.R.S.
Assignee banks had priority over the Internal Revenue Service for payment of contract proceeds even though tax debt matured before assignee satisfied requirements of Assignment of Claims Act, 31 U.S.C. 3727, since contract included a no setoff clause, the assignment was made to finance the contract, and the assignor still owes the assignee bank more than the amount of the contract proceeds 554

CONTRACTS—Continued Page

Protests

Allegations

Not Prejudicial

Protester was not prejudiced by the failure of the solicitation to state whether an annual cost ceiling represented anticipated actual expenditures where the protester did not rely on the cost ceiling in formulating its price proposal 573

Unsubstantiated

Protest by incumbent contractor that workload estimates in solicitation are defective because they differ from the current workload is denied where protester fails to show that the estimates are not based on the best information available concerning the agency's anticipated future requirements, otherwise misrepresent the agency's need, or result from fraud or bad faith 558

Authority to Consider

Activities Not Involving Federal Procurement

General Accounting Office has no authority to consider a protest of the award of a contract by the Government of Egypt to be financed under the Foreign Military Sales program because the solicitation was issued and the award made by other than a federal agency 504

Contract Administration

Not for Resolution by GAO

Whether a contract requirement is met during performance of the contract is a matter of contract administration which General Accounting Office (GAO) will not consider 651

Whether awardee will meet its contractual obligations to the government is a matter of contract administration, which is the responsibility of the procuring agency and is not encompassed by the General Accounting Office's bid protest function 663

General Accounting Office Procedures

Filing Protest With Agency

General Accounting Office (GAO) will not waive regulatory requirement that protester provide contracting officer with a copy of its protest within 1 day of filing where the agency otherwise did not have specific knowledge concerning the protest's details so that it would be able to file a responsive report within the statutorily-required timeframe 552

***Reconsideration* Requests**

Error of Fact or Law Established

The General Accounting Office (GAO) sustains a protest on reconsideration where the agency failed to provide GAO with a copy of a memorandum, prepared while the protest was pending, that reversed its determination that the protester's proposal to provide an aircraft part could not be evaluated without a final assembly drawing used by the previous supplier. Since the memorandum establishes that the agency's initial rejection of the protester's proposal was unreasonable, GAO recommends resolicitation if delivery schedules permit 457

Timeliness of Comments on Agency's Report

General Accounting Office (GAO) will not reopen a protest file that was closed because the protester failed to file comments to express continued interest in the protest within 7 working days after receipt of the agency report as required by the Bid Protest Regulations. Protester's response to the contracting agency's decision on its prior agency protest may not be considered as comments on the agency's protest report to GAO because the response, submitted 24 days prior to the agency report due date, does not address the agency's detailed response to the GAO protest 625

CONTRACTS—Continued Page

Protests—Continued

General Accounting Office Procedures—Continued

Timeliness of Comments on Agency's Report—Continued

Timelines of Protest

Additional Information Supporting Timely Submission

General Accounting Office (GAO's) Bid Protest Regulations, 4 C.F.R. 21.1(c)(4) (1985), require that an initial protest set forth a detailed statement of the legal and factual protest grounds and do not contemplate a piecemeal presentation of arguments or information even where they relate to the original grounds for protest. Where, however, the initial protest called into question the accuracy of all the workload estimates in a solicitation and the agency possessed sufficient information to take comprehensive corrective action or otherwise to fully respond to the protest, then a subsequently submitted specific enumeration of defective estimates is timely 558

Date Basis of Protest Made Known to Protester

Protest filed more than 10 working day after basis was known is untimely. 4 C.F.R. 21.2(a)(2) (1985) 476

Debriefing Conferences

Issues Providing Protest Basis

Protester may delay filing protest until after debriefing is held where protest is based on information regarding the awardee's proposal and that information was first revealed at the debriefing 490

***Furnishing* of Information on Protest**

Specificity Requirement

General allegation that multiple dissimilar tasks should not have been consolidated under single work category for purposes of calculating payment deduction is untimely to the extent the protester failed to identify in its initial protest the specific work categories to which its general allegation applied, since such a determination depends on subjective criteria not defined by the protester and the contracting agency therefore could not reasonably determine which work categories, in the protester's view, were covered by the general allegation 558

New Issues

Unrelated to Original Protest Basis

Protester's new and independent ground of protest is dismissed where the later-raised issue does not independently satisfy rules of General Accounting Office (GAO's) Bid Protest Regulations 651

Significant Issue Exception

For Application

A protest involving a questionable application of definitive responsibility criteria by the contracting agency raises an issue significant to the procurement system, 4 C.F.R. 21.2(c)(2) (1985), and will be considered on the merits even though it is untimely filed 510

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office Procedures—Continued
Timelines of Protest—Continued
Solicitation Improprieties
Apparent Prior to Bid Opening/Closing Date for Proposals
Protests that firm lacks sufficient time to prepare its bid concerns an apparent impropriety in the solicitation and must be filed prior to bid opening in order to be timely 510
Interested Party Requirement
Protester Not in Line for Award
A party that submits late Step 1 proposal is not an interested party to protest the evaluation of proposals or any changes in the terms and conditions of the solicitation that occur during or after proposal evaluation when those issues only affect the parties to the competition. 619
Suspended, Debarred, etc. Contractors
Protest is dismissed where debarment proceeding against the protester has been initiated because, pending a debarment decision, the firm is not eligible for government contract awards 503
Moot, Academic, etc. Questions
Award Made to Protester
Allegation that agency improperly relaxed specifications and sought to preclude protester from competition is rendered academic by award to protester 510
Corrective Action Proposed, Taken, etc. by Agency
Whether an agency improperly excluded an initial proposal from the competitive range because of its inclusion of an interest rate contingency is academic when the agency in fact evaluates an unsolicited best and final offer from which the contingency has been deleted 573
Protester Not in Line for Award
Protest that second low bid is nonresponsive is academic and not for consideration where the protester has not presented a basis upon which to question a prospective award to the low bidder 505
Preparation
Costs
Noncompensable
While a protest against the award of a contract to a materially unbalanced offeror was sustained, the protester's subsequent claim for proposal preparation costs and the costs of filing and pursuing the protest is denied where the record shows that the protester did not have a substantial chance of receiving the award and was therefore not unreasonably excluded from the competition because the protester's price proposal was also materially unbalanced, although to a lesser degree 488
Subcontractor Protests
Awards "for" Government
Subcontractor selection is not made for the government within the meaning of the exception allowing General Accounting Office review because the prime contractor is not operating a government-owned facility and is not otherwise serving as a mere conduit between the government and the subcontractor 585

CONTRACTS—Continued Page
Protests—Continued
Subcontractor Protests—Continued
Awards "for" Government—Continued
The General Accounting Office affirms its dismissal of a protest on the grounds that the prime contractor is not acting for the government in awarding subcontracts where the protester has not shown that the prime contractor is principally providing large-scale management services at a government-owned facility 683
Requests for Proposals
Negotiated Procurement (*See* CONTRACTS, Negotiation, Requests for Proposals)
Requests for Quotations
Purchases on Basis of Quotations
Evaluation Propriety
Where a drawing accompanying a timely small purchase quotation from the protester is in need of clarification; the agency does not make award for 7 months after receiving the drawing; and the agency actively solicits the awardee's quote during the delay, the protester should have been given an opportunity during the delay to clarify its drawing 500
Quotation
Rejection
Propriety
Where a request for quotations under small purchase procedures does not contain a clause advising that quotations must be submitted by a certain date to be considered, the contracting agency should have considered the protester's low quotation received prior to award since no substantial activity had transpired towards award and the other offeror would not have been prejudiced 685
Small Business Concerns
Awards
Responsibility Determination
Nonresponsibility Finding
Referral to SBA for COC Mandatory Without Exception
Under the Small Business and Federal Procurement Competition Enhancement Act of 1984, contracting agencies must refer to the Small Business Administration nonresponsibility decisions against small business concerns even though small purchase procedures are used 503
Subcontracts
Protests (*See* CONTRACTS, Protests, Subcontractor Protests)

COURTS
District of Columbia
Superior Court
The Superior Court of the District of Columbia, although established by Congress under Article I of the Constitution, is more analogous to a state court than to a Federal court for purposes of Title VII of the Civil Rights [illegible]964. Accordingly, and since its employees are not in the [illegible]rvice, it is subject to the jurisdiction of the Equal Em[illegible]tunity Commission under section 706 of

COURTS—Continued Page
District of Columbia—Continued
Superior Court—Continued
the Civil Rights Act, which generally covers state and local governments, rather than section 717 which applies to Federal entities..... 594

DEFENSE DEPARTMENT
Appropriations (*See* APPROPRIATIONS, Defense Department)

DEPARTMENTS AND ESTABLISHMENTS
Damage Claims
Reimbursement Prohibition
The Federal Aviation Administration may not be reimbursed by the Navy for replacement cost of an Instrument Landing System owned by the Government at the El Paso, Texas International Airport which was destroyed by the crash of a Navy aircraft, since property of Government agencies is not the property of the separate entities but rather of the Government as a single entity and there can be no reimbursement by the Government to itself for damage to or loss of its own property. This decision distinguishes 41 Comp. Gen. 235..... 464

DETAILS
Between Agencies
Non-Reimbursable Details
Proposed detail of 15 to 20 administrative law judges (ALJs) from the National Labor Relations Board (Board) to the Department of Labor on a nonreimbursable basis for the remainder of fiscal year 1986 does not conform to either of the exceptions in 64 Comp. Gen. 370 (1985) in which we generally found nonreimbursable details to be improper. The exception where the detail has a negligible fiscal impact is a *de minimus* exception for administrative convenience where the detail is for a brief period and the number of persons and costs involved are minimal. The detail of 15 to 20 ALJs and the related amount of salary expenses far exceeds the de minimus standard we intended to establish. Furthermore, the detail is not particularly related to the purpose for which the Board's appropriations are provided. Thus the proposed nonreimbursable detail does not fall within the other exception set fourth in 64 Comp. Gen. 370..... 635

DISBURSING OFFICERS
Relief
Appropriation Adjustment
Monies returned to Indian, which earlier were improperly recovered, would be repaid from the current lump-sum appropriation to the Bureau of Indian Affairs for "Operation of Indian Programs." Since such repayment would not be improper or incorrect, there is no need for the disbursing officer to request relief under section 3527(c) of title 31 of the United States Code or for this Office to grant relief..... 533

DISTRICT OF COLUMBIA
Courts
Superior Court (*See* COURTS, District of Columbia, Superior)

Page
FEDERAL GRANT AND COOPERATIVE AGREEMENT ACT OF 1977
Compliance
Cooperative Agreements
The Council on Environmental Quality has no authority to use its Management Fund to provide grants or analogous assistance and therefore cannot enter into a cooperative agreement, which is a form of assistance under 31 U.S.C. 6305..... 605
Procurement *v.* Cooperative Agreement
Criteria for Determining
A proposed study has been developed and submitted by the National Academy of Sciences to the Council on Environmental Quality for funding at the request of the Environmental Protection Agency. The purpose of the study is to provide information on risks and benefits of certain pesticides to help Federal regulatory agencies, such as EPA, in analyzing prospective regulations. The proper funding mechanism should be a procurement contract, rather than a cooperative agreement, as required by 31 U.S.C. 6303 (1982), since the primary purpose of the study is to acquire information for the direct benefit or use of the Federal Government..... 605

FUNDS
Deposit Accounts
Monies received from fines for corpsmember misconduct and sales of arts and crafts objects made by corpsmembers may be deposited in the Corpsmember Welfare Association funds, as required by program regulations. Such funds lose their Federal character and may be spent for association activities..... 666
Since Job Corps Welfare Association funds are not public funds subject to the statutory restrictions applicable thereto, they need not be maintained in the Treasury or in depositaries designated by the Secretary of the Treasury, and may be kept in local banks..... 666

GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Postal Service, United States
The United States Postal Service is not subject to the General Accounting Office's bid protest jurisdiction under the Competition in Contracting Act of 1984 as a result of the statutory provision (39 U.S.C. 410) exempting the Postal Service from any federal procurement law not specifically made applicable to it..... 584
Patent Infringement
Claims of possible patent infringement do not provide a basis for the General Accounting Office (GAO) to object to an award since questions of patent infringement are not encompassed by GAO's bid protest function..... 663
Recommendations
Contracts
Prior Recommendation
Clarified
Decision sustaining protest against agency's use of negotiated cost-type contract for acquisition of mess services is modified to recommend assessment of overall risks of procurement and determination of propriety of use of cost-type contract. If agency reasonably determines that uncertainty is so great or has such a direct impact on

GENERAL ACCOUNTING OFFICE—Continued Page
Recommendations—Continued
Contracts—Continued
Prior Recommendation—Continued
Clarified—Continued
pricing or costs that it directly affects an offeror or bidder's ability to project its costs of performance so as to preclude use of a fixed-price contract, agency may exercise options under current cost-type contract in accordance with Federal Acquisition Regulation 643
Termination
Erroneous Awards
Award to Protester if Otherwise Eligible
Agency which terminated contract after discovering that solicitation understated its requirements and that awardee's product would not meet its needs should reinstate the solicitation and make award to the protester since protester's offer will meet the agency's actual needs and was the lowest technically acceptable offer under the original solicitation 569

INTEREST
Indian Affairs
Trust Funds
Consistent with general rule that Government cannot be charged interest without a specific waiver of sovereign immunity either in a statute, treaty, or contract, and decisions of this Office and the United States Claims Court strictly applying the rule, Government cannot be charged interest on monies it pays to Indian notwithstanding Government breached its trust responsibilities to Indian 533
Payment Delay
Contracts
The Defense Logistics Agency may not pay interest on a delayed contract payment to the assignee of a Government contract. Interest is not recoverable against the United States unless it is expressly authorized in the relevant statute or contract 598
Employee Benefits
When the allotment check of an Army employee was not received by his bank, the employee requested that the check be reissued. He did not receive the reissued check until several months later. The Army may not pay interest on the amount of the allotment since interest may only be paid under express statutory or contractual authorization and no such authorization exists under these circumstances 541

LEAVES OF ABSENCE
Annual
Accrual
Crediting Basis
Military Service
Temporary Disability Retired List Status Effect
A former member of the United States Navy who was separated from the service with disability severance pay (10 U.S.C. 1212), has been a civilian employee of the government since 1960. At the time of civilian appointment, he was credited with 6 years, 6 months and 10 days of military years of service for annual leave accrual purposes

LEAVES OF ABSENCE—Continued Page
Annual—Continued
Accrual—Continued
Crediting Basis—Continued
Military Service—Continued
Temporary Disability Retired List Status Effect—Continued
(5 U.S.C. 6303), which included 3 years, 7 months and 10 days of time spent on the Temporary Disability Retired List (TDRL). The TDRL time is not properly creditable for this purpose. Under 5 U.S.C. 6303(a), and 5 U.S.C. 8332(c)(1)(A), while military service is creditable, the term "military service" is defined in 5 U.S.C. 8331(13) to mean "honorable active service." Since placement of a military member's name on the TDRL list removes his name from the active duty list, he is in a retirement status during that time. Therefore, the employee's civilian service computation data must be reestablished and his annual leave balance adjusted 461
Sick
Substitution for Annual Leave
An employee timely requested and had approved the use of 72 hours of annual leave at the end of a leave year in order to avoid forfeiture. Shortly thereafter, the employee was involved in a non-job related accident and went on sick leave. Due to a lengthy recuperation period, the employee requested that a portion of the absence be charged to the annual leave subject to forfeiture, rather than sick leave. Such request was granted. In June or July of the succeeding leave year, the employee requested retroactive substitution of sick leave for the excess annual leave used at the end of the preceeding leave year. The request is denied. After annual leave is granted in lieu of sick leave as a matter of choice, thereby avoiding forfeiture of that leave at the end of the leave year under 5 U.S.C. 6304, the employee may not thereafter have sick leave retroactively substituted for such annual leave and have that annual leave recredited solely for the purpose of enhancing the lump-sum leave payment upon separation for retirement nearly a year later 608

MEALS
Headquarters
An employee may not be reimbursed for a meal at his headquarters solely by virtue of having met the three-part test established in Gerald Goldberg, et al., B-198471, May 1, 1980. Rather, the employee must first show that the meal was part of a formal meeting or conference that included not only functions such as speeches or business carried out during a seating at the meal, but also included substantial functions that took place separate from the meal. See Randall R. Pope and James L. Ryan, 64 Comp. Gen. 406 (1985) 508

MEETINGS
Attendance, etc. Fees
Meals Included
An employee of the Forest Service who conducted at his duty station a General Management Review meeting with timber associations and other private users of the Mt. Baker-Snoqualmie National Forest may not be reimbursed for the cost of a meal served at the

MEETINGS—Continued Page
Attendance, etc. Fees—Continued
Meals Included—Continued
meeting. The general rule is that in the absence of specific statutory authority the Government may not pay for meals of civilian employees at their headquarters. Reimbursement has been allowed where the meal was incident to a formal meeting or conference that included substantial functions separate from the meal. This case did not meet this threshold requirement 508

MILITARY PERSONNEL
Allowances
Travel (*See* TRAVEL ALLOWANCES, Military Personnel)

MISCELLANEOUS RECEIPTS
Agency Appropriations v. Miscellaneous Receipts
Job Corps Center receipts derived from sales of meals, clothing, took kits, and arts and crafts, and from fines and property damage restitution, may be retained by the Job Corps program and need not be deposited into the Treasury as miscellaneous receipts as normally required by section 3302 of title 31. Section 1551(m) of title 29 allows retention of income generated under the Job Corps program, and the appropriation covering the Job Corps program, for "Training and Employment Services," as provided in the annual Department of Labor appropriations acts, specifically allows reimbursements to be added to it 666

Monies received from agreements between the Weber Basin Job Corps Center, operated by the Department of the Interior, and Utah Davis County School District and Utah State Department of Corrections, may be returned to the Job Corps program rather than deposited into the Treasury as miscellaneous receipts. The monies may be considered both as income generated under the Job Corps program, 29 U.S.C. 1551(m), and as reimbursements which the yearly appropriations acts covering the Job Corps specifically allow to be added to appropriations. As section 1580 of title 29 allows acceptance of state services and facilities for programs under the Job Training Partnership Act, Pub. L. 97-300, 96 Stat. 1322, 1370, including the Job Corps program, payments under the agreements may also be made through in-kind services or property 666

Agency Appropriations *v.* Miscellaneous Receipts (*See also* MISCELLANEOUS RECEIPTS, Special Account *v.* Miscellaneous Receipts
Special Account *v.* Miscellaneous Receipts
When the high bidder for a mineral lease offered by the Bureau of Land Management does not execute a lease, the one-fifth bonus submitted with the bid is forfeited. Section 35 of the Mineral Lands Leasing Act of 1920, as amended (30 U.S.C. 191), provides that all money received from sales, bonuses, royalties, and rentals are to be distributed under that section. Therefore, the forfeited bonuses are to be distributed in the same manner as other lease proceeds to which section 35 is applicable 570

OFFICERS AND EMPLOYEES
Compensation (*See* COMPENSATION)

OFFICERS AND EMPLOYEES—Continued Page
DE FACTO
Compensation
Retention of Compensation Received
An employee was temporarily and then permanently promoted from a GS–4 position to a GS–5 position. It was later discovered that the promotion was erroneous because she did not meet the general experience requirement of the position to which she was promoted. The error was corrected and a Bill of Collection issued. Because she performed the duties of the GS–5 position based on the apparent authority of the promoting personnel, she is to be regarded as a *de facto* employee and is therefore entitled to retain the compensation of GS–5 528
Health Services (*See* MEDICAL TREATMENT, Officers and Employees)
Leaves of Absence (*See* LEAVES OF ABSENCE)
Overseas
Automobile Transportation (*See* TRANSPORTATION, Automobiles)
Relocation Expenses
Transferred Employees
Real Estate Expenses (*See* OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)
Retirement (*See* RETIREMENT, Civilian)
Subsistence
Per Diem (*See* SUBSISTENCE, Per Diem)
Transfers
Attorney Fees
House Purchase and/or Sale
The Federal Travel Regulations provide that transferred federal employees may be allowed reimbursement of legal expenses associated with the sale of their old residence, including the expenses of advisory and representational services not involving litigation before the courts. A transferred employee may therefore be reimbursed for legal fees reasonably and necessarily paid to obtain representational services to negotiate his release from a mortgage contract in exchange for his conveyance of his ownership of his old residence in a situation that did not involve foreclosure proceedings or other type of litigation 473
Real Estate Expenses
Construction Costs
Transferred employee may not be reimbursed a transaction privilege tax imposed by Arizona on constructors of new houses even though the tax was passed on to the employee when he purchased a newly constructed residence at his new duty station. Although the tax qualifies as a "transfer tax" within the meaning of Federal Travel Regulations, paragraph 2-6.2d, it was a charge imposed incident to the construction of a new residence, and therefore may not be reimbursed in view of the specific prohibition contained in paragraph 2-6.2d 557
Reimbursement
The statutes and regulations authorizing transferred federal employees to be reimbursed for the expenses of the "sale" of their resi-

Page

OFFICERS AND EMPLOYEES—Continued
Transfers—Continued
Real Estate Expenses—Continued
Reimbursement—Continued
dence at their old duty station place no definitive limitations on the meaning of the term "sale." Hence, a transferred employee who conveyed the title of his old residence to a state agency in exchange for $10 and a release from his mortgage contract may be reimbursed for his allowable expenses in the sales transaction, even though it was not an ordinary open-market real estate sale 473
Relocation Expenses
Real Estate Expenses (*See* OFFICERS AND EMPLOYEES, Transfers, Real Estate Expenses)
Service Agreements
Failure to Fulfill
Retirement
Employee who was transferred from Idaho Falls, Idaho, to Albany, Oregon, failed to complete 12-month service requirement when he voluntarily retired. The employee had requested retirement for health reasons so that he could return to Albany, Oregon. However, this case is distinguished from those cases where the employee transfers solely for retirement purposes since, here, agency requested employee to remain on duty for approximately 3 months and employee performed necessary and substantial duty at Albany, his new official duty station, prior to his retirement. Compare James D. Belknap, B-188597, June 17, 1977. Thus, his transfer is considered to be in the interest of the Government, and his voluntary retirement prior to completion of the 12-month service period may be considered as a valid reason for separation, and his travel and transportation expenses may be paid, subject to a determination by the head of the agency that his separation was for reasons beyond his control, and acceptable to the agency 657
Temporary Quarters
Subsistence Expenses
Reasonableness
An agency is responsible for determining the reasonableness of meal and miscellaneous expenses claimed during a temporary quarters subsistence expense period. The medical condition of a transferred employee's wife should be taken into account to the extent restaurant meals were required and criteria used to determine reasonableness of expenses based on restaurant meals rather than meals taken in the temporary lodging was appropriate 647
Time Limitation
Extension
Indications that a transferred employee's wife was ill prior to their occupancy of temporary quarters does not preclude the possibility that the subsequent extension of authority to stay in temporary quarters was precipitated by circumstances occurring during the initial period as the regulations require. An extension documented some time after the fact based upon an assertion of timely verbal approval will support payment for the additional temporary quarters subsistence allowance period 647
Travel Expenses (*See* TRAVEL EXPENSES, Transfers)

Page

PAY
Civilian Employees (*See* COMPENSATION)
Retired
Annuity Elections for Dependents
Survivor Benefit Plan (*See* PAY, Retired, Survivor Benefit Plan)

PAYMENTS
Erroneous
Recovery
Government's Right to Recover
Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accrued interest on overpayment, were withdrawn by the Indian in good faith but were subsequently recovered by the Interior Department from monies deposited in the Indian's Individual Indian money account from an unrelated proceeding, may be returned to Indian overpaid 533
Amounts received by an Indian as overpayment from an erroneous Indian probate proceeding distribution and which, together with accrued interest on the overpayment, the Interior Department subsequently recovered from monies in the Indian's Individual Indian money account attributable to the same proceeding, may not be returned to Indian overpaid 533

PROPERTY
Public
Damage, Loss, etc.
Repair, Replacement, etc. Costs
Although the Federal Aviation Administration (FAA) charged the cost of replacement of Instrument Landing System (ILS) to its "Facilities and Equipment (Airport and Airway Trust Fund)" appropriation account which consists of appropriations made to the FAA from the Airport and Airway Trust Fund for the purpose of funding the acquisition, establishment and improvement of air navigation facilities, this does not bring activity within exception to interdepartmental waiver rule recognized by this Office for damage caused to property held in trust by the Government on behalf of particular identifiable beneficiaries in order to protect beneficiaries equitable interest in property. FAA is using Federal funds to repair damage to Government-owned property and is not acting as trustee on behalf of particular group of identifiable beneficiaries in repairing ILS. This decision distinguishes 41 Comp. Gen. 235 464

RELEASES
Proper Release or Acquittance
Survior Benefit Plan Annuitant
Mentally Incapacitated Adult
Survivor Benefit Plan annuity payments should not be made to a mentally incapacitated annuitant's agent appointed under a power of attorney, notwithstanding that the validity of the power of attorney may have been preserved by operation of a state statute. The Survivor Benefit Plan is an income maintenance program for the depend-

RELEASES—Continued Page
Proper Release or Acquittance—Continued
Survior Benefit Plan Annuitant—Continued
Mentally Incapacitated Adult—Continued
ents of deceased service members, entailing continuing periodic payments of indefinite duration in substantial aggregate amounts. Accounting officers have a duty to obtain aquittance when payments are made under Federal law, and it is a matter of serious doubt that a good acquittance could be assured through payment of Survivor Benefit Plan annuities due mentally incapacitated annuitants to anyone other than court-appointed representatives, since only such representatives are subject to continuing independent supervision 621

STATUTORY CONSTRUCTION
Permanency
Section 8097 of the Department of Defense Appropriations Act, 1986, Pub. L. No. 99-190, 99 Stat. 1185, 1219 (1986), does not constitute permanent legislation. A provision contained in an appropriation act may not be construed as permanent legislation unless the language or nature of the provision makes it clear that such was the intent of the Congress. Here, the provision in question includes no words of futurity and the provision is not unrelated to the purposes of the Act. Further, the provision is not rendered ineffectual by a finding that it is not permanent 588

SUBSISTENCE
Per Diem
Thirty-Minute Rule
Arrival and Departure Time Evidence
Under the "30-minute rule" an employee who completes temporary duty travel within 30 minutes after the beginning of a per diem quarter must provide a statement on his travel voucher explaining the official necessity for his arrival time in order to receive per diem for that quarter. That statement should demonstrate that he departed from his temporary duty station promptly following the completion of his assignment and that he proceeded expeditiously thereafter. Where statement furnished by employee fails to address promptness of departure, agency properly denied claim for an additional quarter day of per diem submitted by an employee who returned to his residence at 6:10 p.m. 660

TRANSPORTATION
Automobiles
Overseas Employees
Authority
Civilian employees of the Government who are separated from service at an overseas post may be allowed to have privately-owned vehicles which were transported to those posts at Government expense transported to an alternate destination not in the United States or the country in which the employee's actual residence is located. Such transportation is subject to the limitation that the cost may not exceed the constructive cost of having the vehicle shipped to the employee's place of actual residence when transferred to his last duty station overseas and may not be authorized if separation oc-

TRANSPORTATION—Continued Page
Automobiles—Continued
Overseas Employees—Continued
Authority—Continued
curred before April 10, 1984, the date of decision *Thelma I. Grimes*, 63 Comp. Gen. 281 468
Household Effects
Military Personnel
Reshipment of Effects Without a Station Change
Under current regulations service members who have their household goods and automobiles shipped to an overseas duty station in anticipation of the family move are not entitled to return transportation if the family, for personal reasons, changes its plans and does not join the member. The appliable statute, 37 U.S.C. 406(h), is broad enough to provide authority for regulations authorizing return transportation of the household goods and privately owned vehicle independent of travel by the member or the dependents in these circumstances when the service finds that the transportation is in the best interest of the member or the dependents and the United States. To the extent they are inconsistent herewith, 49 Comp. Gen. 695 (1970) and 44 Comp. Gen. 574 (1965) are overruled 520
House Trailers, Mobile Homes, etc. (*See* TRANSPORTATION, Household Effects, House Trailer Shipments, etc.)
House Trailer Shipments, etc.
Reimbursement
A transferred employee who transported her mobile home from her old to her new duty station is entitled to reimbursement for the transportation of a mobile home, in lieu of expenses for shipment of household goods, since she used the mobile home as her residence at her new duty station. However, she is not entitled to any additional miscellaneous expenses above and amount equivalent to 2 weeks of her basic salary 613
Overcharges
Deduction Reclaims
Rate Propriety
Where the delivering/billing carrier had the appropriate authority to serve the origin and destination points, offered the government direct service between the points at single-line rates, and the Government Bills of Lading were issued to that carrier, the General Services Administration's determination that the higher joint-line rates charged and collected by the carrier were inapplicable is sustained, even though other carriers provided the pick-up service. The billing carrier's mere denial of an agency relationship and the absence of a written agency agreement do not rebut the presumption that the government followed its usual practice, called the carrier shown on the bills of lading, and looked to that carrier for performance of through single-line service 611
Rates
Section 22 Quotations
Tender Revision
A provision of a tender negotiated under the Military Traffic Management Command's Guaranteed Traffic program permits otherwise applicable rates to be used. This permits lower rates in the motor

TRANSPORTATION—Continued Page
Rates—Continued
Section 22 Quotations—Continued
Tender Revision—Continued
carrier's existing non-negotiated rate tender which are lower than the negotiated rates to be applied in the absence of evidence that special services were requested and performed on special shipments..... 563

Rates applicable on the date that transportation services are performed are binding on the parties. In the absence of a benefit to the Government, the applicable tender may not be retroactively modified to nullify its application to a particular point of origin which would result in higher charges being due the carrier..... 563

TRAVEL ALLOWANCES
Military Personnel
Enlistment Extension, Discharge, Reenlistment, etc.

Travel allowances payable in advance to enlisted service members at the time of their final discharge for their subsequent personal travel home may not properly be subjected to offset on account of their debts to the Government, since it has long been recognized as a matter of public policy that it is impermissible to discharge enlisted service members at their last post of duty without the means of returning home. This policy has no application to former enlisted members who have completed their separation travel, however, and travel allowances remaining due to them after they have returned home may be withheld and applied against their debts..... 497

TRAVEL EXPENSES
First Duty Station
Manpower Shortage
Relocation Expenses

A new appointee to a manpower shortage position was issued travel orders erroneously authorizing reimbursement for temporary quarters subsistence expenses, real estate expenses and miscellaneous expenses as though he were a transferred employee. After travel was completed, his order were corrected to show entitlement only to travel, travel per diem and movement of house hold goods, as authorized for manpower shortage position. The claimant asserts entitlement to full reimbursement, arguing that the advice received when hired and the travel orders issued are consistent with private sector practices. The claim is denied. Under 5 U.S.C. 5723 (1982), the travel and transportation rights of a manpower shortage appointee are strictly prescribed. Regardless of whether the error was committed, orally or in writing, the government is not bound by any agent's or employee's acts which are contrary to governing statute or regulations..... 679

Transfers
Reimbursement
Approval

Employee who traveled by a longer route and did not travel 300 miles per day in connection with a permanent change of station explains that the route and delay resulted from his wife's illness. The agency may reimburse the employee on the basis of the mileage and

TRAVEL EXPENSES—Continued Page
Transfers—Continued
Reimbursement—Continued
Approval—Continued
time claimed if they determine that the employee has explained to their satisfaction the reasons for the alternate route and delay..... 647

VACANCIES
Vacancies Act
Applicability

Provisions of the Vacancies Act, 5 U.S.C. 3345–49 (1982), govern the filling of vacancies in those offices which require Senate confirmation in the Department of Health and Human Services, except where there is specific statutory authority to fill such vacancies. The Vacancies Act applies to the position of Under Secretary, and various Assistant Secretary positions, and the positions of Deputy Inspector General, Commissioner on Aging, Administrator of the Health Care Financing Administration, and Commissioner of Social Security. The Vacancies Act limits acting appointments to fill such positions to 30-days duration..... 626