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TABLE OF DECISION NUMBERS

	Page
B–40342.3, Mar. 19	260
B–189387, Mar. 6	241
B–211812, Mar. 26	270
B–212512, Mar. 16	257
B–212570, Mar. 20	265
B–212684, Mar. 13	251
B–213089, Mar. 6	242
B–213474, Mar. 13	253
B–213593, Mar. 20	268
B–213836, Mar. 13	254
B–213891, Mar. 5	239
B–213955, B–213955.2, Mar. 9	248
B–213993, Mar. 6	245

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

INDEX

JANUARY, FEBRUARY, AND MARCH 1984

LIST OF CLAIMANTS, ETC.

	Page
A.B. Dick Co	185
Amray, Inc	202
Andersen Construction Co	248
Army, Dept. of	180, 268
Bosch, James A	268
Cejka, Daniel F	210
CeleNav Industries, Inc	205
Coast Guard, United States	251
Collins, D	251
Cook, Bobby L	222
Crimson Enterprises, Inc	208
Defense, Dept. of	230
Dewitt Freight Forwarding	254
Doyon Construction Co., Inc	215
Energy, Dept. of	190
Fed Con Corporation	167
General Services Administration	270
Hanning, Jack M	170
Hoage, Murrel C	187
Holmes Ambulance Service Corp	186
Ikard Manufacturing Co	239
Immigration and Naturalization Service	222
Instrumentation, Communication, Engineering, Inc	204
Instrumentation Laboratory, Inc	179
Interior, Dept. of	187, 195, 225, 233, 245
Internal Revenue Service	241
International Alliance of Sports Officials	162
Ken's Trash Removal Service	237
Krom, Gerald F	268
Labor, Dept. of	170
Levine, Daisy	225
Marine Corps, United States	210
McLaurin, John D	233
Metzenbaum, The Honorable Howard M	145
Milewski, Leonard J	180
Pedestrian Bus Stop Shelters, Ltd	265
Prince Construction Co	200
Rapp Constructors, Inc	248
Rutledge, Fred	253
Saloshin, Isma	157
Senate, United States	145
S.F.A. Corporation	154
Shampine, William J	195
Shattuck, Kennon D	251
Skyspares Parts, Inc	207
Southeastern Freight Lines	243
Tom Walsh & Associates	175
Tomko, Inc	218
United Building Service	168
Veterans Administration	157, 257
Wilde Tool Co., Inc	235
Woody, Emmett R	182
Work System Design, Inc	209
Young, Michael C	251

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
1982, Dec. 21, 96 Stat. 1830	236
1982, Dec. 21, 96 Stat. 1836	153
1979, Sept. 29, 93 Stat. 573	237
1982, Sept. 30, 96 Stat. 1179	258
1983, July 12, 97 Stat. 238	259

UNITED STATES CODE

See also U.S. Statutes at Large

	Page
5 U.S. Code Ch. 81	181
5 U.S. Code 504	261
5 U.S. Code 504(d)(1)	262
5 U.S. Code 552	241
5 U.S. Code 552(a)(4)(E)	261
5 U.S. Code 3101	212
5 U.S. Code 3501	211
5 U.S. Code 3501(a)(2)	212
5 U.S. Code 4503	273
5 U.S. Code 5584	214, 229
5 U.S. Code 5596	157, 171
5 U.S. Code 5596(b)(1)(A)(ii)	174
5 U.S. Code 5702	227
5 U.S. Code 5704	274
5 U.S. Code 5724(a)	198
5 U.S. Code 5724(g)	197
5 U.S. Code 5724a	198
5 U.S. Code 5724a(a)(2)	188
5 U.S. Code 5724a(a)(3)	223
5 U.S. Code 5901	246
5 U.S. Code 5921(3)	197
5 U.S. Code 5924(2)(B)	197
5 U.S. Code 6303	211
5 U.S. Code 6303(a)	211
5 U.S. Code 6303(a)(1)	214
5 U.S. Code 6303(a)(2)	214
5 U.S. Code 6303(a)(3)	214
5 U.S. Code 6303(a)(A)	211
5 U.S. Code 6303(a)(A)(i)	213
5 U.S. Code 6303(a)(A)(ii)	213
5 U.S. Code 6303(a)(B)	211
5 U.S. Code 6303(a)(C)	211
5 U.S. Code 7701(g)	174
5 U.S. Code 7701(g)(1)	174
5 U.S. Code 7703	174
5 U.S. Code 7903	245
10 U.S. Code 687(b)(4)	213
10 U.S. Code 1168	253
10 U.S. Code 1168(a)	251
10 U.S. Code 1202	212
10 U.S. Code 1205	212
10 U.S. Code 1210(b)	212
10 U.S. Code 1210(c)	212
10 U.S. Code 1210(d)	212
10 U.S. Code 1210(e)	212
10 U.S. Code 1210(h)	212
10 U.S. Code 2208(a)(2)	150
15 U.S. Code 637(b)(7)	208
15 U.S. Code 637(b)(7)(A)	219
16 U.S. Code 470w-4	260
20 U.S. Code 1401	272
22 U.S. Code Ch. 32	196
22 U.S. Code 2385(d)	196
22 U.S. Code 3901	196
22 U.S. Code 4081	198
22 U.S. Code 4081(14)	198
28 U.S. Code 2412	261
28 U.S. Code 2412(b)	260
28 U.S. Code 2412(c)(2)	262
28 U.S. Code 2412(d)	262
28 U.S. Code 2412(d)(1)(A)	262
28 U.S. Code 2412(d)(4)(A)	262
28 U.S. Code 2414	261
28 U.S. Code 2517	261
29 U.S. Code 201	269
29 U.S. Code 668	246
29 U.S. Code 701	272
29 U.S. Code 791	271
29 U.S. Code 791 note	272
29 U.S. Code 791(a)	272
29 U.S. Code 791(b)	273
29 U.S. Code 792(c)	273
31 U.S. Code Rev. 720	195, 218
31 U.S. Code Rev. 1304	260
31 U.S. Code Rev. 1322	190
31 U.S. Code Rev. 1322(b)(2)	192
31 U.S. Code Rev. 1341(a)	145
31 U.S. Code Rev. 1344	258
31 U.S. Code Rev. 1344(a)	258
31 U.S. Code Rev. 1344(a)(2)	258
31 U.S. Code Rev. 1348(b)	242
31 U.S. Code Rev. 3521(b)	242
38 U.S. Code 4101(b)	258
40 U.S. Code 471	271

	Page
40 U.S. Code 481	236
40 U.S. Code 490(h)(1)	271
41 U.S. Code 35-45	205
41 U.S. Code 351	208
41 U.S. Code 601-613	168
42 U.S. Code 2000e-5(k)	261
49 U.S. Code 1612	272
49 U.S. Code 11707	244
49 U.S. Code 11707(b)	245

PUBLISHED DECISIONS OF THE COMPTROLLERS GENERAL

	Page
16 Comp. Gen. 803	152
17 Comp. Gen. 859	193
18 Comp. Gen. 980	257
22 Comp. Gen. 342	228
23 Comp. Gen. 162	228
25 Comp. Gen. 844	259
27 Comp. Gen. 52	273
28 Comp. Gen. 365	150
31 Comp. Gen. 213	213
31 Comp. Gen. 289	227
31 Comp. Gen. 340	257
32 Comp. Gen. 229	247
35 Comp. Gen. 85	147
39 Comp. Gen. 895	220
40 Comp. Gen. 479	172
41 Comp. Gen. 371	227
41 Comp. Gen. 774	160
42 Comp. Gen. 708	150
42 Comp. Gen. 723	202
43 Comp. Gen. 131	272
44 Comp. Gen. 61	266
45 Comp. Gen. 169	162, 171
45 Comp. Gen. 651	177
47 Comp. Gen. 141	212
47 Comp. Gen. 322	224
48 Comp. Gen. 22	208
48 Comp. Gen. 403	236
48 Comp. Gen. 638	244
49 Comp. Gen. 429	252
49 Comp. Gen. 431	168
49 Comp. Gen. 476	271
49 Comp. Gen. 619	220
50 Comp. Gen. 649	177
50 Comp. Gen. 677	212
51 Comp. Gen. 448	221
51 Comp. Gen. 494	267
51 Comp. Gen. 498	202
51 Comp. Gen. 598	150
52 Comp. Gen. 425	241
53 Comp. Gen. 344	221
53 Comp. Gen. 457	227
54 Comp. Gen. 66	240
54 Comp. Gen. 271	250
54 Comp. Gen. 480	166
54 Comp. Gen. 580	267
54 Comp. Gen. 760	171
54 Comp. Gen. 824	147
55 Comp. Gen. 133	204
55 Comp. Gen. 243	192
55 Comp. Gen. 590	268
55 Comp. Gen. 800	273
55 Comp. Gen. 1160	177
56 Comp. Gen. 398	273
56 Comp. Gen. 606	189
56 Comp. Gen. 661	273
56 Comp. Gen. 847	269
57 Comp. Gen. 170	244
57 Comp. Gen. 321	241
57 Comp. Gen. 347	156
57 Comp. Gen. 379	246
57 Comp. Gen. 415	244
58 Comp. Gen. 5	171
58 Comp. Gen. 744	227
59 Comp. Gen. 90	240
59 Comp. Gen. 95	230, 234
59 Comp. Gen. 296	183
59 Comp. Gen. 369	147
60 Comp. Gen. 15	190
60 Comp. Gen. 219	155
61 Comp. Gen. 79	156
61 Comp. Gen. 224	192
61 Comp. Gen. 578	171
62 Comp. Gen. 143	146
62 Comp. Gen. 361	147
62 Comp. Gen. 379	190
62 Comp. Gen. 438	259
62 Comp. Gen. 692	263
63 Comp. Gen. 234 (B-210717, Feb. 24, 1984)	233
63 Comp. Gen. 233 (B-212236, Feb. 24, 1984)	232

DECISIONS OF THE COURTS

	Page
Aetna Casualty & Surety Co. *v.* United States, 526 F.2d 1127, cert. denied, 425 U.S. 973	168
Alyeska Pipeline Service Co. *v.* Wilderness Society, 421 U.S. 240	261
Bray *v.* United States, 515 F.2d 1383; 207 Ct. Cl. 60	252
Cason *v.* United States, 471 F.2d 1225; 200 Ct. Cl. 424	252
Citronelle-Mobile Gathering, Inc. *v.* Edwards, 669 F.2d 717; cert. denied, 103 S. Ct. 172	191
Crist *v.* United States, 124 Ct. Cl. 825	252
Dept. Of Energy Stripper Well Exemption Litigation, In Re, No. MDL 378, Sept. 13, 1983	192
Fitzgerald and Van Winkle *v.* McLucas, 537 F.2d 246, cert. denied, 429 U.S. 1093	171
Fitzgerald *v.* Staats, 578 F.2d 435	171
Hodnick *v.* Federal Mediation and Conciliation Service, 4 MSPB 431	174
Kleinfelter *v.* United States, 318 F.2d 929; 162 Ct. Cl. 88	160
Madden, R. T. Co., ASBCA No. 11999, Aug. 7, 1981, 81-2 BCA 15,311	168

INDEX DIGEST

JANUARY, FEBRUARY, AND MARCH 1984

Page

ADVERTISING
Commerce Business Daily
Information
Date of bid opening, etc.
Constructive notice from publication
Synopsis in the Commerce Business Daily constitutes constructive notice of a solicitation and its contents, so that an incumbent contractor's failure to receive a copy and consequent lack of actual notice of the closing date for receipt of initial proposals does not provide a legal basis for considering its late proposal 178

APPROPRIATIONS
Availability
Clothing and personal furnishings. (*See* CLOTHING AND PERSONAL FURNISHINGS)
Parking space
Rule that appropriated funds may not be used to pay for daily parking costs of Federal employees in commercial facilities generally applies to severely disabled employees. An exception is warranted when the condition requires the severely disabled employee to pay substantially higher commercial parking costs than those generally paid by non-disabled employees working at the same building who are to utilize less expensive facilities at a greater distance.................... 270
Where an exception to the general rule is warranted, appropriated funds can be used to pay the difference between the parking costs the severely disabled employee must pay and those generally paid by non-disabled Federal employees working at the same facility 270
Judgments
Permanent indefinite appropriation availability. (*See* COURTS, Judgments, decrees, etc., Payment, Permanent indefinite appropriation availability)
Obligation
Leases
Long-term
Vessel charters. (*See* VESSELS, Charters, Long-term, Obligational availability)
Navy Industrial Fund
Vessel charters. (*See* VESSELS, Charters, Long-term, Obligational availability)
Permanent indefinite
Judgments, (*See* COURTS, Judgments, decrees, etc., Payment, Permanent indefinite appropriation availability)

APPROPRIATIONS—Continued Page

Restrictions
Defense Department appropriations
Applicability to GSA procurement for DOD. (*See* GENERAL SERVICES ADMINISTRATION, Services to other agencies, etc., Procurement, Defense Department, Applicability of DOD procedures, restrictions, etc.)

BIDDERS
Qualifications
Responsibility of contractors. (*See* CONTRACTORS, Responsibility, Determination)
Small business concerns. (*See* CONTRACTS, Small business concerns, Awards)
Responsibility. (*See* CONTRACTORS, Responsibility)

BIDS
Bonds. (*See* BONDS, Bid)
Cancellation. (*See* BIDS, Invitation for bids, Cancellation, After bid opening)
Competitive system
Profit *v.* nonprofit orginizations
Where solicitation is issued on unrestricted basis, nonprofit associations may compete with commercial concerns for Government contract 162
Invitation for bids
Amendments
Acknowledgment
Failure to acknowledge
Waived as minor informality
An amendment is not material, and a bidder's failure to acknowledge receipt of the amendment thus may be waived, where the amendment imposes no different or additional legal obligations on the bidders from those imposed by the original invitation 182
Failure to acknowledge
Bid nonresponsive
Bid must be rejected as nonresponsive where bidder fails to acknowledge material solicitation amendment 214
Bid responsive
Where an amendment merely relaxes a solicitation's specifications, a bid which does not contain an acknowledgment of its receipt, and thus in effect represents an offer to meet the more stringent original requirements, in responsive 182
Materiality determination
Amendment which adds information for bidders' knowledge, but merely reiterates requirements of original invitation for bids (IFB), is not material 214
Amendment which requires contractor to perform in a different manner than under the initial IFB is material 214
Amendment is material where the performance requirements added by the amendment will affect the quality of completed structure 214

	Page
Missouri Pacific R.R. *v.* Elmore & Stahl, 377 U.S. 134	244
National Trust for Historic Preservation, et al., *v.* Corps of Engineers, 570 F. Supp. 465	260
Seaboard Air Line Railway *v.* United States, 261 U.S. 299	162
Seebach *v.* United States, 182 Ct. Cl. 342	160
Smyth *v.* United States, 302 U.S. 329	162
Van Winkle *v.* McLucas, 537 F.2d 246, cert. den. 429 U.S. 1093	162
WATCH *v.* Harris, 535 F. Supp. 9	261

BIDS—Continued Page

Late receipt

Where an invitation for bids was amended to reinstate a previous description of the required dimensions of the solicited product, thus allowing protester again to contemplate bidding; the amendment was easily understood; the place for receipt of bids was approximately 15–20 miles from protester's office; five other bidders acknowledged the amendment; and the protester itself submitted a bid, then a protest that issuing the amendment 10 days before bid opening allowed the protester insufficient time to consider the amendment is denied......... 175

Cancellation
After bid opening
Low bid in excess of Government estimate
Agency's rejection of sole responsive bid on the basis of unreasonable price, resulting in cancellation of the solicitation, is proper when the bid price is significantly higher than either the Government's estimate or prices submitted by other, albeit, ineligible bidders.. 162

Resolicitation
Pending protest
Propriety
Agency is not prohibited from issuing new solicitation for same requirements after cancellation of solicitation even if there is a protest of the cancellation pending before General Accounting Office.............. 162

Mistakes
Allegation after award. (*See* CONTRACTS, Mistakes)
Verification
Accepance of bid unwarranted
Where low bidder verified its bid but nevertheless admitted the bid was mistaken, and failed to furnish evidence to show that the bid would have been low absent the mistake, the contracting officer's decision not to accept the bid because of his concern about whether the bid actually intended would have been low was reasonable.................. 200

Responsiveness
Failure to acknowledge amendment. (*See* BIDS, Invitation for bids, Amendments, Failure to acknowledge)

BONDS
Bid
Discrepancy between bid and bid bond
Bid nonresponsive
When a bid is submitted in the name of a corporation, but a bid bond is in the name of a joint venture consisting of the corporation and its president in his individual capacity, the bid bond is materially deficient, and the bid must be rejected as nonresponsive................... 248
Joint ventures
Bond principal and bidder discrepancy
Under surety law, no one incurs a liability to pay the debts or to perform the duty of another unless he expressly agrees to be bound, and a surety under a bond in the name of several principals is not

BONDS—Continued Page
Bid—Continued
Joint ventures—Continued
Bond principal and bidder discrepancy—Continued
liable for the default of one of them. Therefore, General Accounting Office consistently has held that a bid bond naming a principal different from the nominal bidder is deficient, and the defect generally may not be waived as a minor informality 248

CLAIMS
Transportation
Evidence
Household effects
Where the claimant questions the allegation of the agency that the weights set forth in the Joint Military/Industry Table of Weights are net weights but presents no evidence, the claimant has failed to sustain the burden to furnish evidence to establish its claim 254
Household effects
Measure of damages. (*See* **TRANSPORTATION, Household effects, Damage, loss, etc., Measure of damages**)
Loss and damage claims
Under the Interstate Commerce Act, a shipper can file a claim for damage to transported goods against either the originating or the delivering carrier, irrespective of which one had the goods when they were damaged; the carrier paying the claim then has the right to pursue recovery from the responsible carrier 242

CLOTHING AND PERSONAL FURNISHINGS
Special clothing and equipment
Protective clothing
Parkas
The Office of Surface Mining (OSM), Department of Interior, may furnish down-filled parkas to employees temporarily assigned to Alaska or the high country of the Western States during the winter months under authority of section 19 of the Occupational Safety and Health Act of 1970 since it has been administratively determined that the parkas are required as personal protective equipment for work to be performed under extreme weather conditions 245
Purchase by the Office of Surface Mining (OSM), Department of Interior, of down-filled parkas for employees temporarily assigned to Alaska or the high country of the Western States during the winter months is also authorized under 5 U.S.C. 7903. The purchase meets the three-pronged test set forth in General Accounting Office decisions 245

COMMERCE BUSINESS DAILY
Advertising procurements, etc. (*See* **ADVERTISING, *Commerce Business Daily***)

COMPENSATION
Removals, suspensions, etc.
Backpay
Interest. (*See* **INTEREST, Backpay**)

COMPENSATION—Continued Page

Removals, suspensions, etc.—Continued

Backpay—Continued

Involuntary leave

Pending appeal to Merit Systems Protection Bond

Agency appealed a CSC initial rejection of their disability retirement application, and won. The employee, in turn, appealed retirement action to the MSPB. Pending outcome, employee was continued in a non-pay status. Claim for backpay (5 U.S.C. 5596), asserted because MSPB overturned retirement approval, is denied. Once disability retirement application is approved, it is appropriate for agency to retire employee then, and no basis exists for employee to assert continuing employment rights thereafter. Fact that MSPB overturned CSC retirement approval did not make agency action continuing employee in non-pay status pending appeal outcome improper or unjustified ... 156

Sick

Employee was placed in an involuntary leave status pending Civil Service Commission (CSC) approval of agency-initiated disability retirement application based on orthopedic examinations, including one performed by employee's own physician, all of which found her physically incapacitated to perform assigned nursing duties. Even though the application for disability retirement was ultimately denied by the Merit Systems Protection Board (MSPB), her claim for backpay is denied. The issue before the MSPB was whether the earlier determined physical incapacity was sufficient to support disability retirement. While it was determined that retirement criteria were not met, the validity of the earlier medical findings was not questioned. Therefore, placement of employee on involuntary leave was not unwarranted or unjustified ... 156

Deductions from backpay

Outside earnings

Travel expenses from outside earnings

Employee of Department of Labor who successfully appealed his removal before Merit Systems Protection Board (MSPB) contests the resulting backpay award. He contends he is entitled to interest on the backpay, deduction of employment expenses from wages earned during period of removal, and that the agency's computation results in double taxation. Neither the Back Pay Act, 5 U.S.C. 5596 (Supp. III, 1979), nor any other authority provides for payment of interest or deduction of employee's personal expenses. We find no evidence in the record of double taxation or other objectionable computation by agency ... 170

CONTRACTORS

Responsibility

Determination

Review by GAO

Affirmative finding accepted

Protest against the ability of the awardee to meet the contract's delivery schedule raises a challenge to the contracting officer's affirmative determination of the awardee's responsibility, which General Accounting Office will not review since the solicitation con-

CONTRACTORS—Continued Page
Responsibility—Continued
Determination—Continued
Review by GAO—Continued
Affirmative finding accepted—Continued
tained no definitive responsibility criteria and there has been no showing of possible fraud or bad faith on the part of the procuring officials. 239
Small business concerns. (*See* CONTRACTS, Small business concerns, Awards, Responsibility determination)

CONTRACTS
Amounts
Indefinite
What constitutes
Defense Acquisition Regulation governing indefinite quantity contracts does not apply to invitation for bids which contemplates firm, fixed-price contract. 154
Awards
Cancellation
Erroneous awards
Bid evaluation error
Where, before contract performance has begun, the agency discovers that because of its error in addition of the quotations received the contract had not been awarded to the low offeror, cancellation and re-award to the low offeror is proper since, in the absence of substantial reasons showing that it is not in the best interest of the Government to do so, the preservation of the integrity of the competitive procurement system requires such corrective action 168
Cancellation
Awards. (*See* CONTRACTS, Awards, Cancellation)
Consideration
Rule
Contract will not fail for lack of mutuality of obligation where both parties to the contract have made a promise to perform. 154
Federal Supply Schedule
Prices
Reductions
Agency consideration of reduced price
When, prior to the issuance of a delivery order, an ADP schedule contractor informs the procuring agency of a reduction in its schedule contract prices, the agency must consider the reduced prices in determining the low quote even though GSA is unable to confirm the price reduction 185
Confirmation of price
An automatic data processing (ADP) schedule contractor may offer a price reduction at any time, without prior or subsequent approval by the General Services Administration (GSA); the procuring agency may, but need not, confirm the price reduction with GSA 185

CONTRACTS—Continued Page

Late proposals and quotations. (*See* **CONTRACTS, Negotiation, Late proposals and quotations**)

Mistakes

Allegation after award

Board of Contract Appeals jurisdiction

Post-award mistake in bid claim is a matter "relating to" a contract, and it therefore must be resolved according to the procedures set forth in the Contract Disputes Act of 1978 166

Mutuality of obligation. (*See* **CONTRACTS, Consideration**)

Negotiation

Late proposals and quotations dig.

Solicitation's late offer clause

Acceptability of offer

Unless a late proposal for a Federal Supply Schedule contract falls within one of the exceptions set forth in Federal Procurement Regulations' standard late proposal clause, General Services Administration (GSA) generally may not consider it. Protester's failure to receive a copy of solicitation does not change the rule when there is adequate competition and no showing that GSA intended to exclude the firm from such competition 178

Offers or proposals

Offeror

Identity

Contention that award of a bus stop shelter franchise agreement resulted from an improper transfer of the proposal is denied where, although the proposal referred to the offeror corporation by a number of different variations of its legal name, it is clear from the proposal and other available information that the awardee was actually the intended offeror 265

Prices

Price goal

Establishment by agency

Propriety

It is not improper for an agency to reveal a price goal during discussions for purposes of negotiating a fair and reasonable price so long as the agency is not conducting direct price bidding (an auction) among competing offers 239

Requests for proposals

Acceptance time limitation

Expiration

Failure to request extension

Where offeror indicates a proposal acceptance period of 1 day rather than the 60 days contemplated by the request for proposals, the contracting officer has no duty to seek an extension, so that upon expiration of the offer, the offeror is ineligible for award 253

Offer and acceptance

Acceptance

Effect

In procurement by formal advertising, when the Government accepts a bid and notifies the bidder, a binding contract is created, even though a formal contract is to be executed and a performance bond is to be furnished at a later date 166

CONTRACTS—Continued Page

Protests

Burden of proof

On protester

Protest that agency buyer told protester that its price had to meet a particular price to be considered for award is denied since agency, while conceding that its price goal was revealed to both competitors during negotiations, denies that either was told it had to meet that price, so that protester has not met its burden of proof.......................... 239

Conferences

Request denied

Protest not for consideration on the merits

In a protest that General Accounting Office summarily denies because it is clear from the initial submission that it lacks legal merit, request for a conference will be declined because it would serve no useful purpose.. 178

General Accounting Office procedures

Timeliness of protest

Adverse agency action effect

Protest alleging that agency improperly failed to select proposal for award under Defense Small Business Advanced Technology Program is untimely since protest was filed with General Accounting Office more than 10 working days after firm's notice of initial adverse agency action on protest filed with contracting agency or, alternatively, more than 10 working days after basis for protest was known.. 205

Constructive notice of procedures

Although the protester alleges that it did not know of the requirement concerning the time for filing of a GAO protest, an untimely protest may not be considered because bidders are on constructive notice of the requirement.. 186

Bid Protest Procedures are published in the Federal Register, and protesters therefore are charged with constructive knowledge of their contents. Thus, lack of actual knowledge of timeliness requirements does not excuse untimely filing of protest.. 237

Date basis of protest made known to protester

Protest to General Accounting Office (GAO), filed more than 10 days after the protester had been informed that award had been made to another contractor and basis therefor, is untimely and not for consideration.. 186

Solicitation improprieties

Apparent prior to bid opening/closing date for proposals

Post-bid-opening protest against agency's estimate of its needs is untimely and will not be considered on the merits.................................. 154

TWX message notifying the contracting agency that the sender was protesting a solicitation and had requested a formal ruling by the General Accounting Office (GAO), but did not specify the grounds for the protest or request the agency to take remedial action, was not a protest to the agency; its receipt by the agency on the closing date

CONTRACTS—Continued Page
Protests—Continued
General Accounting Office procedures—Continued
Timeliness of protest—Continued
Solicitation improprieties—Continued
Apparent prior to bid opening/closing date for proposals—Continued
for receipt of offers cannot convert a protest concerning alleged solicitation improprieties filed with GAO after that date into a timely protest........................ 202
A protest filed after receipt of proposals which alleges ambiguities which were apparent in the solicitation is untimely 209
Quantities. (*See* CONTRACTS, Amounts)
Requests for proposals
Negotiated procurement. (*See* CONTRACTS, Negotiation, Requests for proposals)
Responsibility of contractors
Determination. (*See* CONTRACTORS, Responsibility, Determination)
Small business concerns
Awards
Responsibility determination
Nonresponsibility finding
New information—effect
Although GAO does not review allegation that agency's nonresponsibility finding was improper after denial of COC by SBA, GAO will consider agency's refusal to consider new information probative of the bidder's responsibility where this information is presented to the contracting officer within a reasonable time before contract award..... 218
Where contracting officer has explicity agreed to consider new information relating to bidder's responsibility after COC denial, but refuses to do so because information arrived 5 minutes after an extended deadline, which was 1½ months before the contract commencement date, this refusal was unreasonable and the protester was entitled to have the new information considered by the procuring agency. However, the protester was not prejudiced; GAO review of the "new information" discloses that it fails to satisfy the financial requirements which the agency and the SBA had indicated were required........................ 218
Review by GAO
General Accounting Office will not consider protest where a small business protester's initial objection that its bid improperly was found nonresponsive has been rendered academic by the contracting agency's redetermination of responsiveness, but the protester was subsequently determined to be nonresponsible by the contracting officer because the protester did not qualify as a regular dealer or manufacturer under the Walsh-Healey Act and the Small Business Administration (SBA) has concurred with this finding. By law, this question is reserved for the contracting officer's determination subject to final review by the SBA and the Secretary of Labor........................ 204
General Accounting Office will not review a contracting officer's finding that a small business concern is nonresponsible since the Small Business Administration has conclusive authority to determine

CONTRACTS—Continued Page

Small business concerns—Continued

Awards—Continued

Responsibility determination—Continued

Nonresponsibility finding—Continued

Review by GAO—Continued

the responsibility of small business concerns under its certificate of competency procedures ... 207

Small Business Adminstraction's authority

Certificate of Competency

Conclusiveness

Where small business concern is found to be nonresponsible by procuring activity, subsequent denial of certificate of competency (COC) by Small Business Administration (SBA) constitutes affirmation of nonresponsibility determination which General Accounting Office (GAO) does not review ... 218

COURTS

Judgments, decrees, etc.

Payment

Permanent indefinite appropriation availability

Effect of Equal Access to Justice Act

Permanent indefinite appropriation for judgments established by 31 U.S.C. 1304 is available to pay attorney fees, except for "bad faith" cases, awarded under the authority of 28 U.S.C. 2412(b), as long as award is final and payment is not otherwise provided for. However, judgment appropriation is not available to pay awards under 28 U.S.C. 2412(d), nor "bad faith" awards under 2412(b), both of which must be paid from agency appropriations ... 260

DEBT COLLECTIONS

Waiver

Civilian employees

Leave payments

Excessive leave credited

The leave account of a civilian employee who has been erroneously credited with annual leave at a rate to which he is not entitled must be adjusted to correct the error immediately upon determination that an error was committed. If, on adjustment, the employee has sufficient leave credits to cover the adjustment, no overpayment of pay to which waiver under 5 U.S.C. 5584 would apply has occurred. If, on adjustment, he has insufficient leave credits to cover the adjustment, the resulting negative leave balance represents pay received to which he is not entitled, and, thus, is subject to possible waiver ... 210

DEPARTMENT OF ENERGY. (*See* **ENERGY, Department of Energy**)

DISCHARGES AND DISMISSALS

Military personnel

Certificates of discharge

Issuance delay

Although 10 U.S.C. 1168(a) provides that of member of an Armed Force may not be discharged until his final pay and certificate of discharge are ready for delivery to him, the statute does not operate to

DISCHARGES AND DISMISSALS—Continued Page
Military personnel—Continued
Certificates of discharge—Continued
Issuance delay—Continued
invalidate an otherwise proper discharge when both the member and the service intend that and act as if a discharge or separation has occurred even though actual delivery of the discharge document is delayed 251

EQUIPMENT
Automatic Data Processing Systems
Acquisition, etc.
Federal Supply Schedule
Price reductions. (*See* **CONTRACTS, Federal Supply Schedule, Prices, Reduction**)

FEDERAL SUPPLY SCHEDULE CONTRACTS. (*See* **CONTRACTS, Federal Supply Schedule**)

FREEDOM OF INFORMATION ACT
General Accounting Office authority
General Accounting Office has no authority to determine what information another agency must disclose in response to a Freedom of Information Act request 239

FUNDS
Recovered overcharges
Distribution
Department of Energy
Department of Energy should compile a list of consent orders which provided for deposit of settlements of alleged violations of petroleum price and allocation regulations in Treasury as miscellaneous receipts without prior efforts at restitution to overcharged customers. The list should identify potentially overcharged customers, and be published in the *Federal Register* as a Notice inviting claims for payment with supporting evidence from such customers. Reasonable claims should be referred for administrative proceedings under 10 C.F.R. 205.280 *et seq.* Pending consent orders should be amended to include administrative proceedings for claimants. Funds remaining undistributed after administrative proceedings are to be deposited in miscellaneous receipts account of Treasury 189
Direct payment to Treasury
Propriety
Department of Energy exceeded its statutory authority to collect and dispose of funds obtained in consent order settlements of alleged violations of petroleum price and allocation regulations by depositing funds in Treasury as miscellaneous receipts without prior efforts at restitution to overcharged purchasers. Funds were erroneously deposited and are subject to retrieval by Energy under 31 U.S.C. 1322 for distribution following administrative proceedings under 10 C.F.R. 205.280 *et seq* 189

GENERAL ACCOUNTING OFFICE
Contracts
Protests. (*See* **CONTRACTS, Protests**)

GENERAL ACCOUNTING OFFICE—Continued Page

Jurisdiction

Freedom of Information Act. (*See* **FREEDOM OF INFORMATION ACT, General Accounting Office authority)**

Labor stipulations

Wage determinations

General Accounting Office does not review wage rate determinations issued by the Department of Labor pursuant to the Service Contract Act of 1965 ... 208

GENERAL SERVICES ADMINISTRATION

Services for other agencies, etc.

Procurement

Defense Department

Applicability of DOD procedures, restrictions, etc.

Restrictions on total labor surplus area set-asides

No legal authority exists to extend a Department of Defense (DOD) appropriations restriction on total labor surplus area set-asides to a General Services Administration (GSA) purchase of pliers, even though DOD is the major user of the pliers, where GSA is purchasing the pliers with its own appropriations ... 235

Protest allegation that a DOD appropriations restriction was applied to a GSA procurement while another DOD appropriations restriction was not applied and, thus, the latter restriction should have been, is without merit where the terms of the solicitation indicate that neither restriction was applied to the procurement ... 235

INTEREST

Backpay

Statutory authority required

Employee has received backpay for a portion of period she was in a non-pay status, while agency-initiated disability retirement application was in appellate process. Employee is not entitled to interest on the backpay award since it is not specifically authorized by Back Pay Act, 5 U.S.C. 5596 ... 156

LEAVES OF ABSENCE

Annual

Accrual

Crediting basis

Military service

Temporary Disability Retired List status effect

A servicemember received a Veterans Readjustment Appointment (5 C.F.R. Part 307) as a civilian employee during the time his name was on the Temporary Disability Retired List (TDRL) (10 U.S.C. 1202 and 1205) and was credited with his military service for annual leave accrual purposes (5 U.S.C. 6303). Under those provisions retired servicemembers may only receive such credit for leave purposes in limited circumstances. Since "temporary retirement" is "retirement," and since the member's disability does not meet the criteria stated in 5 U.S.C. 6303(a)(A)(i) or (ii), nor does his service time qualify under 5 U.S.C. 6303(a)(B) or (C), so long as he remains in a TDRL status, none of his service time may be credited for annual leave accrual purposes 210

LEAVES OF ABSENCE—Continued Page
Annual—Continued
Accrual—Continued
Crediting basis—Continued
Military service—Continued
Temporary Disability Retired List status effect—Continued
A servicemember who received a Veterans Readjustment Appointment to a civilian position during the time his name was on the TDRL was not entitled to credit his military service time for annual leave accrual under 5 U.S.C. 6303. On question as to whether impediment to crediting such service is removed upon subsequent removal of his name from that list, upon removal, a member is either retired for pemanent disability, separated from the service with severance pay, or returned to active duty for full duty, or for retirement for length of service. Only the condition of separation with severance pay would permit such crediting, unless as a retired member one or more of the conditions in 5 U.S.C. 6303(a)(A), (B), or (C) are met 210
A servicemember who is a civilian employee while his name is on the TDRL and not entitled to credit his military service for annual leave accrual under 5 U.S.C. 6303 during that time is only entitled to such credit effective as of the date of removal of his name from the list, if he is placed in a non-retirement status. This is so because the basis for crediting annual leave at one of the rates specified in 5 U.S.C. 6303(a)(1)–(3) is predicated on the completion of creditable years of service at the close of a biweekly pay period, with the applicable annual leave rate for "each full biweekly pay period" credited at the beginning of the next pay period 210
Restored
Administrative error determination
Employee of the Department of the Army who was absent from work from June 21, 1982, through January 23, 1983, due to work injury, forfeited 47 hours of annual leave in the 1982 leave year. Employees only received annual notices warning them in general to schedule annual leave in advance, and the employee was not specifically notified that in his case he would forfeit the leave if it were not scheduled. Hence, we presume that he would have scheduled leave to avoid forfeiture if he had been properly notified, and the 47 hours of leave may be restored 180
Restored leave
Annual. (*See* LEAVES OF ABSENCE, Annual, Restored)

MILITARY PERSONNEL
Discharges. (*See* DISCHARGES AND DISMISSALS, Military personnel)

OFFICERS AND EMPLOYEES
Back Pay Act
Attorney fees
Employee of Department of Labor who prevailed on appeal before MSPB was awarded attorney fees by the Board under 5 U.S.C. 7701(g)(1) (Supp. III, 1979). However, Board refused to consider portion of attorney fees relating to the negotiation of the amount of the backpay award, and that single issue is before this Office under 5 U.S.C. 5596 which also provides authority for the award of attorney

OFFICERS AND EMPLOYEES—Continued Page
Back Pay Act—Continued
Attorney fees—Continued
fees. We hold that employee is not entitled to attorney fees in connection with appealing agency's computation of backpay since he was not the "prevailing party" on this issue within the meaning of 5 U.S.C. 7701(g) and 5 C.F.R. 550.806(c)(1) (1983) ... 170
Conflict of interest statutes
Awards of Government contracts
Propriety
Where record does not include any evidence that bidders were owned or controlled by Government employees, award to any of those firms would not be prohibited by regulatory provisions generally precluding entering into contracts with firms owned by Government employees ... 162
Leaves of absence. (*See* LEAVES OF ABSENCE)
Per diem. (*See* SUBSISTENCE, Per diem)
Transfers
Overseas employees
Transferred to U.S.
Home service transfer allowance
Eligibility requirements
The home service transfer allowance, under 5 U.S.C. 5924(2)(B) prescribed in the Standardized Regulations (Government Civilians, Foreign Areas), provides reimbursement for subsistence and miscellaneous expenses for employees (including Foreign Service members) only when they are transferred to the United States "between assignments to posts in foreign areas." Under authority of the Foreign Service Act of 1980 the restriction "between assignments" in foreign areas was removed from the regulations. That change is valid as to Foreign Service members and others whose relocation allowances are authorized under the Foreign Service Act, but the restriction still applies to other employees not covered by the Act ... 195
Relocation expenses
Transportation for house hunting. (*See* OFFICERS AND EMPLOYEES, Transfers, Transportation for house hunting)
Temporary quarters
Absences
An injured employee on sick leave was transferred from Hong Kong to Dallas, Texas. On arrival in Dallas he reported by telephone to his supervisor and was officially entered on duty on Jan. 17, 1983, without physically appearing at the office. Following surgery and recuperation, he returned to Dallas and reported for duty on Mar. 7, 1983. He claims temporary quarters expenses for Jan. 11 through 14 and Mar. 6 through 26, 1983. The claim is allowed. While that interruption of temporary quarters occupancy did not involve "official necessity" as that term is used in FTR para. 2-5.2a, it does constitute a proper basis to permit extension of the 30 consecutive days since the period of surgery and recuperation was covered by approved sick leave. See B-165902, Jan. 23, 1969 ... 222
Entitlement
An employee of the U.S. Geological Survey assigned to Saudi Arabia under the Foreign Assistance Act whose travel was governed

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Temporary quarters—Continued

Entitlement—Continued

by the Foreign Service Travel Regulations may not be reimbursed for temporary quarters expenses under the Federal Travel Regulations upon his return to the United States. However, the employee is eligible for a "home service transfer allowance" under section 250 of the Standardized Regulations (Government Civilians, Foreign Areas), as amended, under authority contained in the Foreign Service Act of 1980 195

Transportation for house hunting

Transfer acceptance requirement

Employee declined transfer after house-hunting trip, contending that he could not find suitable and affordable housing at new duty station. If reason for declination was in fact beyond employee's control and acceptable to agency, General Accounting Office (GAO) will not object to agency's payment of expenses of house-hunting trip. However, whether or not reason meets this test is primarily for determination by agency, and GAO will not disturb agency's decision unless it is clearly erroneous, arbitrary, or capricious 187

PROPERTY

Public

Damage, loss, etc.

Carrier's liability

Burden of proof

A shipper establishes a *prima facie* case of carrier liability for damaged goods when the shipper establishes that the goods were tendered in good condition and were received from the carrier in damaged condition. The fact that the consignee's delivery receipt does not note the damage does not in itself overcome the presumption of carrier liability, since the terms of a delivery receipt may be varied or explained as the actual facts become known 242

Inspection by carrier

The fact that a carrier claimed responsible for damage to transported engines was unable to inspect the damage fully because the carrier delayed inspection until after the engines, which were priority items, were repaired and mounted, so that the carrier could only inspect the damaged parts, does not affect the shipper's *prima facie* case of carrier liability 242

Prima facie case. (*See* PROPERTY, Public, Damage, loss, etc., Carrier's liability, Burden of proof)

QUARTERS

Temporary

Incident to employee transfer. (*See* OFFICERS AND EMPLOYEES, Transfers, Temporary quarters)

Page

REGULATIONS
Construction
Agency determination
Acceptance
General Accounting Office will not question an agency's interpretation of an agency regulation where the protester has not shown that the interpretation is unreasonable 154

SUBSISTENCE
Per diem
Delays
Administratively directed
The "2-day per diem" rule limiting per diem which is outlined in 56 Comp. Gen. 847 and 55 Comp. Gen. 590 is not applicable where an employee's travel is extended by 2 or more days, not due to his personal desire to avoid working on nonworkdays, but rather due to Government orders based upon an administrative determination that it would be cost effective to extend the employee's traveltime in lieu of requiring weekend overtime work. 55 Comp. Gen. 590, distinguished 268
Headquarters
Temporary employees' entitlement to travel, per diem, and salary
Where orders assign newly appointed seasonal employees to a duty station where they are fed and lodged and all their duties are to be performed at that station, they cannot be viewed as itinerant employees for travel per diem purposes 225
What constitutes
Where newly appointed employees report to an administrative headquarters merely for personnel processing and perform all duties at an assigned duty station in the field, the reporting station cannot be considered their duty station for travel per diem purposes even though the agency designates it as such on the employees' orders. There is no authority to pay per diem to the employees from the time they departed the reporting station 225

TELEPHONES
Long distance calls
Government business necessity
Certification requirement
Statistical sampling use
The certification by agency heads of long-distance telephone calls required by 31 U.S.C. 1348(b) may be satisfied through implementation of an appropriate statistical sampling system. 57 Comp. Gen. 321, clarified 241

TRANSPORTATION
Household effects
Damage, loss, etc.
Measure of damages
Interpretation by the Military Traffic Management Command of released valuation provision to mean use of gross weight in calculation of released valuation, which has been regularly applied for sev-

TRANSPORTATION—Continued Page
Household effects—Continued
Damage, loss, etc.—Continued
Measure of damages—Continued
eral years, governs meaning of that provision in tender covering movement of unaccompanied baggage ... 254
Proprty damage, loss, etc.
Public property. (*See* **PROPERTY, Public, Damage, loss, etc.**)

TRAVEL EXPENSES
Air travel
Bonuses, gifts, etc.
The general rule is that Federal employee is obligated to account for any gift, gratuity or benefit received from private sources incident to the performance of official duty. This rule applies to situations where an employee enters a promotional program sponsored by an airline, and, while traveling on official business, receives a discount as a result of entering that promotional program ... 229
A bonus ticket received by an employee as a result of trips paid by both appropriated funds while on official travel and personal funds is the property of the Government and must be turned into the appropriate official of the Government. If employee wishes to participate in the bonus program and retain the benefits from the program, he should make certain that all trips included in the bonus program are paid from personal funds ... 229
An employee who enters a promotional program sponsored by airlines which includes free upgrade of service to first class, membership in clubs, and check-cashing privileges, does not have to turn in such benefits to the Government. The Government is unable to use such benefits, and there is no reason for employee not to use such benefits ... 229
A discount for future travel received by employee while on official travel, which is either non-transferable or carries an expiration date, still is property of the Government and should not be given back to the employee for personal use even if it appears that the Government may have no use for the discount ... 229
An employee received and used a bonus ticket and a free hotel room for personal travel as a result of trips paid by both personal funds and Government funds. Such promotional gifts which were received because of travel paid by Government funds belong to the Government. The employee must pay the full value of the tickets and benefits received to the Government. Since this employee used these gifts prior to the issuance of guidance on the use of such materials, he may reduce his liability for repayment based on the percentage of travel paid by personal funds. Any future use of promotional gifts will result in liability for the full value of the bonus or gift. See 63 Comp. Gen. 229 (B-210717, dated today) ... 233

Page

VEHICLES
Government
Home to work transportation
Government employees
Prohibition
Exemptions
The prohibition on home-to-work transportation in section 1344(a)(2) of title 31 of the United States Code and in section 406 of the Department of Housing and Urban Development Appropriations Acts for fiscal years 1983 and 1984 does not apply to the Veterans Administration's proposal to have its employee keep a Government passenger bus home at night to facilitate transporting Jefferson Medical College students between Philadelphia and the VA Medical Center in Coatesville, Pa., in furtherance of a training program authorized by law. The arrangement involves use of a Government vehicle for an official purpose. Any benefit the driver receives from keeping the passenger bus home and driving it to work is incidental to that purpose 257
Privately owned
Parking space
Appropriations availability. (*See* APPROPRIATIONS, Availability, Parking space)

VESSELS
Charters
Long-term
Obligational availability
Navy Industrial Fund
Anti-Deficiency Act compliance
Navy contracts for long-term lease of 13 TAKX prepositioning ships provide for the Navy to indemnify contractors in case of certain contingencies, principally the loss of specified tax benefits. Because the Government's liability under such clauses is determinable in advance or, where not so determinable, may be avoided by separate action by the Navy, General Accounting Office does not consider such provisions to impose an "indefinite or potentially unlimited contingent liability" in violation of the Antideficiency Act. In addition, with the exception of a provision concerning additional tax liability for increased rental payments resulting from Government ordered improvements, such indemnification clauses are authorized as reasonably incidental to the TAKX program 145

VETERANS ADMINISTRATION
Employees
Home to work transportation using Government vehicles. (*See* VEHICLES, Government, Home to work transportation, Government employees)

WORDS AND PHRASES
"Home service transfer allowance"
The home service transfer allowance, under 5 U.S.C. 5924(2)(B) prescribed in the Standardized Regulations (Government Civilians, Foreign Areas), provides reimbursement for subsistence and miscellane-

WORDS AND PHRASES—Continued Page

"Home service transfer allowance"—Continued

ous expenses for employees (including Foreign Service members) only when they are transferred to the United States "between assignments to posts in foreign areas." Under authority of the Foreign Service Act of 1980 the restriction "between assignments" in foreign areas was removed from the regulations. That change is valid as to Foreign Service members and others whose relocation allowances are authorized under the Foreign Service Act, but the restriction still applies to other employees not covered by the Act 195

Home to work transportation

The prohibition on home-to-work transportation in section 1344(a)(2) of title 31 of the United States Code and in section 406 of the Department of Housing and Urban Development Appropriations Acts for fiscal years 1983 and 1984 does not apply to the Veterans Administration's proposal to have its employee keep a Government passenger bus home at night to facilitate transporting Jefferson Medical College students between Philadelphia and the VA Medical Center in Coatesville, Pa., in furtherance of a training program authorized by law. The arrangement involves use of a Government vehicle for an official purpose. Any benefit the driver receives from keeping the passenger bus home and driving it to work is incidental to that purpose 257

"Itinerant employees"

Where orders assign newly appointed seasonal employees to a duty station where they are fed and lodged and all their duties are to be performed at that station, they cannot be viewed as itinerant employees for travel per diem purposes 225

"Temporary retirement"

A servicemember received a Veterans Readjustment Appointment (5 C.F.R. Part 307) as a civilian employee during the time his name was on the Temporary Disability Retired List (TDRL) (10 U.S.C. 1202 and 1205) and was credited with his military service for annual leave accrual purposes (5 U.S.C. 6303). Under those provisions retired servicemembers may only receive such credit for leave purposes in limited circumstances. Since "temporary retirement" is "retirement," and since the member's disability does not meet the criteria stated in 5 U.S.C. 6303(a)(A)(i) or (ii), nor does his service time qualify under 5 U.S.C. 6303(a)(B) or (C), so long as he remains in a TDRL status, none of his service time may be credited for annual leave accrual purposes 210

[B-213891]

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

Protest against the ability of the awardee to meet the contract's delivery schedule raises a challenge to the contracting officer's affirmative determination of the awardee's responsibility, which General Accounting Office will not review since the solicitation contained no definitive responsibility criteria and there has been no showing of possible fraud or bad faith on the part of the procuring officials.

Contracts—Protests—Burden of Proof—On Protester

Protest that agency buyer told protester that its price had to meet a particular price to be considered for award is denied since agency, while conceding that its price goal was revealed to both competitors during negotiations, denies that either was told it had to meet that price, so that protester has not met its burden of proof.

Contracts—Negotiation—Prices—Price Goal—Establishment by Agency—Propriety

It is not improper for an agency to reveal a price goal during discussions for purposes of negotiating a fair and reasonable price so long as the agency is not conducting direct price bidding (an auction) among competing offers.

Freedom of Information Act—General Accounting Office Authority

General Accounting Office has no authority to determine what information another agency must disclose in response to a Freedom of Information Act request.

Matter of: Ikard Manufacturing Company, March 5, 1984:

Ikard Manufacturing Company protests an award to R&D Electronics, Inc. by the Department of the Army under request for proposals (RFP) No. DAAH01-83-R-A764. Ikard contends that R&D cannot deliver the 19 fail safe kits for the Hercules Missile System within the required 270 days and that, during the negotiations, the agency improperly told Ikard that if Ikard did not lower its offered unit price to $1,740, the offer would not be considered for award. Ikard also complains about the Army's response to the firm's request for information under the Freedom of Information Act.

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

Ikard and R&D initially proposed unit prices of $2,800 and $2,865, respectively, and neither offeror changed its price in its best and final offer. Based on the procurement history for the items, the contracting officer determined that both prices were unreasonable. He therefore reopened negotiations and obtained a second round of best and final offers. Ikard's price remained unchanged at $2,800, while R&D lowered its price to $2,585. The contracting officer, based on a preaward survey, then determined that R&D was responsible, that is, was capable of meeting the contractual obligations, and therefore awarded the contract to that firm.

Ikard contends that R&D cannot deliver the fail safe kits within 270 days, as required. The protester takes issue with an memorandum in the record prepared by the contract specialist the same day the preaward survey was signed in which the specialist states that the delivery history for the item is 150 to 282 days, and that R&D previously delivered the item in 270 days. Ikard contends that R&D had five contracts between 1971 and late 1975 where the shortest required delivery actually was 180 days, and that R&D's delivery on four of the contracts was substantially late, and always more than 270 days.

Ikard's challenge to R&D's ability to meet the required delivery schedule raises an issue pertaining to the agency's affirmative determination of R&D's responsibility. Because responsibility determinations generally involve business judgment within the sound discretion of the contracting officials, we do not review a decision that a firm is responsible in the absence of a showing of possible fraud or bad faith on the part of the procuring officials, or where the solicitation contains definitive criteria of responsibility which allegedly have not been applied. *Central Metal Products,* 54 Comp. Gen. 66 (1974), 74-2 CPD 64; *Morse Typewriter Co., Inc.,* B-212636.2, September 27, 1983, 83-2 CPD 383.

Even if the negotiation memorandum is inaccruate as to R&D's past performance, that does not, in our view, indicate fraud or bad faith on the Army's part. See *American Athletic Equipment Division, AMF Incorporated—Reconsideration,* 59 Comp. Gen. 90 (1979), 79-2 CPD 344. Procurement officials are presumed to act in good faith, and in order to show otherwise, a protester must submit virtually undeniable proof that the officials had a malicious and specific intent to harm the protester. *Creative Electric Incorporated,* B-206684, July 15, 1983, 83-2 CPD 95. The fact is that the Army's contracting officials, based on a preaward survey and their business judgment, have determined that R&D is capable of delivering the fail safe kits on time. Ikard's disagreement with the procuring officials' determination does not meet the firm's heavy burden of proof. *J.F. Barton Contracting Co.,* B-210663, February 22, 1983, 83-1 CPD 177.

Therefore, as there has been no showing of possible fraud or bad faith, and there are no definitive responsibility criteria in the solicitation, Ikard's protest as it relates to R&D's responsibility is dismissed.

Ikard also complains that it was told it had to lower its offered unit price to $1,740 to be considered for award. As evidence, Ikard has submitted a copy of its own record of a telephone message from the Army's buyer stating that Ikard should "get your pen ready to negotiate—they are looking at $1,740.00." In response, the agency does not deny that Ikard and R&D were told that the Government's price negotiation goal was $1,740 per unit, but it does deny that either of them was told that it had to propose a price of $1,740 to be considered for award at all.

Defense Acquisition Regulation (DAR) § 3-805.3(c) (1976 ed.) does preclude an agency from indicating to an offeror a price that must be met to obtain further consideration. The protester, however, has the burden of proof, and in our view the language in the telephone message that the Army is "looking at $1,740.00" simply does not support Ikard's position. Moreover, we note that Ikard and R&D submitted final offers substantially more than $1,740. At best, we have a factual dispute between the Army and Ikard as to the substance of the cost discussion, and where the only evidence on an issue is conflicting statements by the protester and the procuring agency, the protester has not met its burden of proof. *Jensen-Kelly Corporation*, B-208685; B-208960, January 10, 1983, 83-1 CPD 21.

In any event, the purpose of DAR § 3-805.3(c) is to prevent direct price bidding between competing offerors, not the negotiation of a price with the Government where an offeror's standing in the competition is not divulged. *See* 52 Comp. Gen. 425, 429 (1973). Indeed, the regulation expressly permits an agency to inform an offeror that its price is too high. Thus, it is not improper for an agency to disclose, during discussions with an offeror, the agency's price goal as a negotiation tool for reaching a fair and reasonable contract price. *Id.*; see *Griggs and Associates, Inc.*, B-205266, May 12, 1982, 82-1 CPD 458.

Therefore, this part of Ikard's protest is denied.

Finally, Ikard complains that the agency did not comply with the Freedom of Information Act, 5 U.S.C. § 552 (1982), in reacting to Ikard's request for information about the procurement. We have no authority, however, to determine when or what information must be disclosed by an agency in response to such a request. *Ikard Manufacturing Company*, B-211041, March 23, 1983, 83-1 CPD 302. Ikard's recourse is to pursue the disclosure remedies provided under the procedures set out in the Freedom of Information Act itself. *Bell & Howell Corporation*, B-196165, July 20, 1981, 81-2 CPD 49.

The protest is denied in part and dismissed in part.

[B-189387]

Telephones—Long Distance Calls—Government Business Necessity—Certification Requirement—Statistical Sampling Use

The certification by agency heads of long-distance telephone calls required by 31 U.S.C. 1348(b) may be satisfied through implementation of an appropriate statistical sampling system. 57 Comp. Gen. 321, clarified.

Matter of: IRS—Statistical sampling of long-distance telephone calls, March 6, 1984:

The Assistant Commissioner for Planning, Finance and Research of the Internal Revenue Service has requested amplification of our decision at 57 Comp. Gen. 321 (1978) to clarify whether the certification requirement for long-distance telephone calls contained in

31 U.S.C. § 1348(b) (formerly 31 U.S.C. § 680a) can be satisfied through the use of statistical sampling. In 57 Comp. Gen. 321 we held that the certification of "short-haul" [1] long-distance calls could be made on the basis of a regular random sampling of such calls, sufficiently large to be statistically reliable for the enforcement of the statute. We agree with the IRS that even though our 1978 decision considered the use of statistical sampling in conjunction with "short-haul" calls only, its rationale can properly be extended to encompass all long-distance calls.

Subsection (b) of 31 U.S.C. § 1348 provides that:

> Appropriations of an agency are available to pay charges for a long-distance call if required for official business and the voucher to pay for the call is sworn to by the head of the agency. Appropriations of an executive agency are available only if the head of the agency also certifies that the call is necessary in the interest of the Government.

As we said in our 1978 decision, there is statutory precedent for the use of sampling techniques in the examination of documents relating to Government expenditures. 31 U.S.C. § 3521(b) (formerly 31 U.S.C. § 82b-1) authorizes the head of an agency to prescribe a statistical sampling procedure to audit vouchers of an agency (up to the maximum amount prescribed by the Comptroller General) when the agency head decides such procedure will result in economies. The maximum currently prescribed by subsection 19.4 of GAO's Policy and Procedures Manual is $750.

We agree that there is no reason to distinguish between "short-haul" toll calls and all other toll calls in permitting certification to be based on an appropriate statistical sampling. The IRS recognizes, in its submission, that the sample would need to be sufficiently large and that sampling would need to be conducted with sufficient frequency to provide an accurate determination that the calls were made in the interest of the Government. The IRS indicates that it will adhere to the guidelines outlined in Title 3, Chapter 5 of the GAO Policy and Procedures Manual in establishing its sampling procedures. We are of the opinion that a statistical sampling system developed in conformity with these guidelines would satisfy the requirements of 31 U.S.C. § 1348(b). Accordingly, we have no objection to implementation of a properly designed system as proposed by the IRS.

[B-213089]

Property—Public—Damage, Loss, etc.—Carrier's Liability—Burden of Proof

A shipper establishes a *prima facie* case of carrier liability for damaged goods when the shipper establishes that the goods were tendered in good condition and were re-

[1] "Short-haul" telephone calls were described by the IRS in its submission in that case as all toll calls for which there was a charge of less than 50 cents for the first 3 minutes.

ceived from the carrier in damaged condition. The fact that the consignee's delivery receipt does not note the damage does not in itself overcome the presumption of carrier liability, since the terms of a delivery receipt may be varied or explained as the actual facts become known.

Property—Public—Damage, Loss, etc.—Carrier's Liability—Inspection by Carrier

The fact that a carrier claimed responsible for damage to transported engines was unable to inspect the damage fully because the carrier delayed inspection until after the engines, which were priority items, were repaired and mounted, so that the carrier could only inspect the damaged parts, does not affect the shipper's *prima facie* case of carrier liability.

Claims—Transportation—Loss and Damage Claims

Under the Interstate Commerce Act, a shipper can file a claim for damage to transported goods against either the originating or the delivering carrier, irrespective of which one had the goods when they were damaged; the carrier paying the claim then has the right to pursue recovery from the responsible carrier.

Matter of: Southeastern Freight Lines, March 6, 1984:

Southeastern Freight Lines appeals our Claims Group's denial of the firm's claim for funds withheld from Southeastern because of damage to two jet engines delivered by the claimant to Myrtle Beach Air Force Base, South Carolina, after shipment from the Naval Air Station in Alameda, California. Southeastern contends that the damage occurred after delivery, and complains that it did not have the opportunity to inspect the damage.

We affirm the Claims Group decision.

The Government bill of lading was issued to Lee Way Motor Freight, Inc. in Alameda, which subsequently transferred the engines to Southeastern for delivery. The only damage noted on the delivery receipt was a broken tie rod (for which Southeastern concedes liability). The Air Force, however, states that inspection at delivery also disclosed that,

> * * * the tongue of the engine dolly that was loaded in the rear of the van was wired up against the spinner cap on the nose of the engine (evidently to save space). The tongue tore the covering and worked a groove into the tip of the spinner cap. This engine came loose from improper blocking and bracing and shifted forward in the trailer against the engine loaded in the front of the van. When the rear engine dolly shifted forward, it hit the rotor blade, causing damage.

The Air Force states that on the day after delivery, Southeastern's local representative, a Ms. Thompson, was advised of the damage, and was requested to inspect the engines, which the agency repeated in writing 5 days later. Southeastern did not attempt inspection until 7 days after delivery, by which time the engines had been moved two blocks to a hangar. The record is not clear, but it appears that the engines, for which repairs were needed on a priority basis, also had been repaired as necessary and mounted, and consequently could not be inspected fully by Southeastern; Southeastern therefore was able to view only the damaged parts.

445-522 O - 84 - 2

Southeastern contends that it should not be held liable since the engine damage, which Southeastern argues should have been visible at delivery, was not noted on the delivery receipt, and since the firm was not able to confirm the claimed damage by full post-delivery inspection.

Where a shipper shows that goods were tendered to the carrier at origin in good order and condition, and were received from the carrier at destination in a damaged condition, a *prima facie* case of carrier liability has been established. The carrier, to relieve itself of liability, must show that it was free from negligence and that the damage to the cargo was due to one of the excepted causes set forth in section 20(11) of the Interstate Commerce Act, 49 U.S.C. § 11707 (Supp. IV 1980), formerly 49 U.S.C. § 20(11). *Missouri Pacific R.R.* v. *Elmore & Stahl*, 377 U.S. 134 (1964); *Trans Country Van Lines, Inc.*, 57 Comp. Gen. 170 (1977). Moreover, the *prima facie* case of liability does not extend only to those damages indicated on a delivery receipt. A clear delivery receipt is only a piece of evidence, not conclusive evidence, of the condition of goods at destination, since the terms of the receipt may be varied or explained as the actual facts become known. See *National Trailer Convoy, Inc.*, B-199156, March 5, 1981, 81-1 CPD 168.

The record includes a statement by the shipping section supervisor at the Alameda Naval Air Station that "[t]he material tendered to the carrier was 'A' condition, Ready for Issue;" a statement from the Traffic Management Officer at Myrtle Beach Air Force Base describing the damage to the engine; photographs of the damage; and a statement of the amount of damages. This record obviously is sufficient to establish a *prima facie* case of the carrier's liability.

We recognize that Southeastern's ability to rebut the presumption of its liability is limited because when it arrived to inspect the damage the engines had been moved and, apparently, repaired and mounted. In this respect, there is a dispute in the record as to when Southeastern first was advised of the damage and invited to inspect. As stated above, the Air Force asserts it telephoned Southeastern's Ms. Thompson the day after delivery; the written notice to Southeastern purports to confirm that telephone conversation. The record, however, also includes an affidavit from Southeastern's claims agent that the first notice of damage was received 6 days after delivery. (Significantly, there is no statement in the record from Southeastern's Ms. Thompson to the effect that the Air Force did not advise her of the damage the day after delivery.)

We have stated that where there is a dispute as to a fact between a claimant and administrative officers of the Government, we will accept the officers' statement absent clear and convincing evidence to the contrary. See *McNamara-Lunz Vans and Warehouses, Inc.*, 57 Comp. Gen. 415, 419 (1978); 48 Comp. Gen. 638, 644 (1969). Consequently, we must conclude that Southeastern could have performed a more timely inspection than it did, perhaps before the engines were repaired and mounted. In any event, Southeastern in fact was able to inspect the damaged parts, and has offered no evidence to rebut the fact or amount of the damage, or the presumption of the firm's liability. Southeastern thus has not carried its burden to prove it was not responsible.

Finally, to the extent the engine may have been damaged while in the initial carrier's possession, section 20(11) of the Interstate Commerce Act permits a claim for damage to be filed against either the originating or delivering carrier, and either is liable for the full loss irrespective of who may have possession of the goods when damaged. However, section 20(12), 49 U.S.C. § 11707(b) (Supp. IV 1980), formerly 49 U.S.C. § 20(12), gives the carrier paying the claim the right to pursue recovery from the responsible carrier.

The Claims Group decision is affirmed.

[B-213993]

Clothing and Personal Furnishings—Special Clothing and Equipment—Protective Clothing—Parkas

The Office of Surface Mining (OSM), Department of Interior, may furnish down-filled parkas of employees temporarily assigned to Alaska or the high country of the Western States during the winter months under authority of section 19 of the Occupational Safety and Health Act of 1970 since it has been administratively determined that the parkas are required as personal protective equipment for work to be performed under extreme weather conditions.

Clothing and Personal Furnishings—Special Clothing and Equipment—Protective Clothing—Parkas

Purchase by the Office of Surface Mining (OSM), Department of Interior, of down-filled parkas for employees temporarily assigned to Alaska or the high country of the Western States during the winter months is also authorized under 5 U.S.C. 7903. The purchase meets the three-pronged test set forth in General Accounting Office decisions.

Matter of: Purchase of Down-Filled Parkas, March 6, 1984:

The Assistant Director, Budget and Administration, Office of Surface Mining (OSM), Department of Interior, requests an advance decision on the legality of purchasing down-filled parkas for use by OSM employees in Alaska and the high country of the Western States during the winter. We find that OSM is authorized to purchase these parkas under section 19 of the Occupational Safety and Health Act of 1970 if it is administratively determined that the parkas are required as personal protective equipment. Similarly, purchase of the parkas would be authorized by 5 U.S.C. § 7903 (1982), if they qualify as "special" clothing necessary for performance of an employee's assigned task.

According to the information provided, the down-filled parkas would be used by employees, including inspectors and support personnel, called upon to conduct surface mine inspections as well as to respond to emergency mine slides and subsidences during winter months. These employees are assigned to work in Alaska or the high country of the Western States on a rotating or temporary basis. Their normal duty stations are located in relatively warmer areas, such as Denver, Colorado; Albuquerque, New Mexico; or Casper, Wyoming. Therefore, the Assistant Director states, the employees would not normally be expected to provide for themselves outer clothing meeting the specifications required to work under "conditions of extreme cold." Finally, the Assistant Director states that the parkas would be labeled as OSM property, centrally controlled, and issued and reissued to employees only for job requirements.

Our general rule is "that every employee of the Government is required to present himself for duty properly attired according to the requirements of his position." B-123223, June 22, 1955. In other words, most items of wearing apparel are considered to be the employee's personal responsibility, and not the Government's. However, there are exceptions. There are three statutory provisions which permit the purchase of items of apparel from appropriated funds in certain circumstances.

First, 5 U.S.C. § 5901 authorizes annual appropriations to each agency to provide a uniform allowance of up to $125 to each employee required to wear a uniform by statute or regulation. We have been informally advised that the mine inspectors are issued uniforms and that the uniform includes a light-weight parka. However, heavy parkas are needed only for employees who are assigned duty in Alaska or the high country of the Western States and it is therefore not a standard item in the uniform of mine inspectors. Accordingly, the uniform allowance would not be applicable in this situation.

Second, section 19 of the Occupational Safety and Health Act of 1979 (OSHA), 29 U.S.C. § 668 (1982), requires each Federal agency to establish an occupational safety and health program consistent with the Secretary of Labor's standards. We have held that protective clothing and equipment, such as swamp boots to work in a jungle environment or ski boots for Forest Service snow rangers, may be furnished by the Government if the head of an executive agency or department, or an official designated by him, determines the item to be necessary under OSHA and its implementing regulations. B-187507, December 23, 1976; 57 Comp. Gen. 379 (1978). The Secretary of Labor's published general standards for the provision of personal protective equipment states that protective equipment and protective clothing shall be provided, used, and maintained whenever necessary because "hazards of processes or environment" could cause injury or physical impairment. 29 C.F.R. § 1910.132(a) (1982).

The Office of Surface Mining has issued Directive No. ADS—4, Transmittal Number 124, June 24, 1982, to establish standardized requirements for the use and wearing of personal protective equipment in compliance with both OSHA and Mine Safety and Health

Administration Standards. Although heavy duty parkas are not specifically mentioned, section (4) states:

> *Additional Personal Protective Equipment.* Each State Director and Service Center Administrator shall evaluate particular situations not covered by the above criteria and, where deemed advisable or required by applicable regulations, prescribe additional protective equipment for mandatory wear and/or use.* * *

We have been advised that several State directors, particularly from the western regions, have determined that heavy parkas are required as mandatory wear for personnel working in the "high country" or in Alaska during the winter. Although the submission did not include an updated Directive to this effect, the 1982 Directive appears to authorize individual State Directors or Service Center Administrators to prescribe such clothing or equipment at their own discretion. Since the parkas were administratively determined to be necessary personal protective equipment under the OSM directive, we conclude that appropriated funds may be used for their purchase, if their acquisition was approved in accordance with authorized procedures.

Finally, section 7903 of title 5, enacted as part of the Administrative Expenses Act of 1946, provides:

> Appropriations available for the procurement of supplies and material or equipment are available for the purchase and maintenance of special clothing and equipment for the protection of personnel in the performance of their assigned tasks. * * *

In order for an item to be authorized by 5 U.S.C. § 7903, three tests must be met: (1) the item must be "special" and not part of the ordinary and usual furnishings an employee may reasonably be expected to provide for himself; (2) the item must be for the benefit of the Government, that is, essential to the safe and successful accomplishment of the work, and not solely for the protection of the employee, and (3) the employee must be engaged in hazardous duty. See B–193104, January 9, 1979; 32 Comp. Gen. 229 (1952).

We believe the proposed procurement meets these standards. It appears that the extreme cold makes "special" clothing necessary. Employees who are assigned for temporary duty would not be expected to own clothing suitable for such extreme environments but without it, they could not physically perform their duties without endangering their health. Therefore, it can be said that the item is not solely for the benefit of the Government and the expenditure is authorized under 5 U.S.C. § 7903 as well as under OSHA, as discussed before.

We conclude that under these circumstances, appropriated funds may be expended to procure down-filled parkas for use by Office of Surface Mining personnel working in Alaska and the high country of the Western States during the winter. It is understood that the down-filled parkas would be the property of the Government and would be issued to OSM employees for use during working hours only.

[B-213955, B-213955.2]

Bonds—Bid—Joint Ventures—Bond Principal and Bidder Discrepancy

Under surety law, no one incurs a liability to pay the debts or to perform the duty of another unless he expressly agrees to be bound, and a surety under a bond in the name of several principals is not liable for the default of one of them. Therefore, General Accounting Office consistently has held that a bid bond naming a principal different from the nominal bidder is deficient, and the defect generally may not be waived as a minor informality.

Bonds—Bid—Discrepancy Between Bid and Bid Bond—Bid Nonresponsive

When a bid is submitted in the name of a corporation, but a bid bond is in the name of a joint venture consisting of the corporation and its president in his individual capacity, the bid bond is materially deficient, and the bid must be rejected as nonresponsive.

Matter of: Andersen Construction Co.; Rapp Constructors, Inc., March 9, 1984:

This decision responds to preaward protests by the low and second-low bidders for a contract for construction of a conveyance channel north of the town of Alamosa, Colorado. Known as the San Luis Valley Project, the 10-mile long channel will convey water from a shallow, unconfined aquifer to the Rio Grande River.

Andersen Construction Co., the low bidder, and Rapp Constructors, Inc., the second-low bidder under solicitation 3-SB-5D-00490/DC7571, issued by the Bureau of Reclamation, Department of the Interior, each protests the award to any firm other than themselves.

Although Rapp has alleged that Andersen's bid is deficient in five different ways, the dispositive issue here is the legal sufficiency of Andersen's bid bond. We find that the bond may not bind Andersen's surety, and we therefore sustain Rapp's protest. Andersen asserts only that it is entitled to award; we deny its protest.

There is no dispute as to the facts. Eight bids were opened on December 6, 1983; of these, Andersen's was low at $3,047,675.85. Because two items for step-ladder quantities were priced higher than the solicitation permitted, Andersen's bid was corrected in accord with the special provisions of the solicitation to $3,016,675.85. Rapp's bid was second-low at $3,348,491. In a memo dated December 7, 1983, the bid opening board advised the Bureau of Reclamation's Southwest Regional Director that Andersen had satisfactorily completed previous work for the San Luis Valley Project and was highly qualified to perform the work required; it recommended that Andersen be awarded the contract "provided the bid is legally sufficient."

An examination of the bid itself (Standard Form 21) reveals that the bidder is identified as follows: Andersen Construction Company, P.O. Box 1107, Alamosa, CO. 81101. On the back of the form, the exact same name and address is repeated twice, once in the box for name of bidder and again in the box for the bidder's business address. The form is signed by Dale S. Andersen, President. On Standard Form 19B, the Andersen Construction Company name and address is again repeated; the box indicating that the firm is a corporation is checked, and Colorado is shown as the place of incorporation.

The bid bond (Standard Form 24) submitted with the bid, however, is made out as follows: Dale Andersen, Individually, and Dale Andersen Construction Co., a Joint Venture. The bond is signed by Dale S. Andersen, President, as principal; it also is signed by Dale S. Andersen (no title) as an individual surety. The corporate surety is identified as the Fidelity and Deposit Company of Maryland, the surety has a Denver, Colorado, address, and its Attorney-in-Fact has signed for it. In the box indicating type of organization, joint venture is checked.

In a protest filed simultaneously with the contracting officer and with our Office, Rapp argues that Andersen's bid should be rejected because, among other things, the bond is for a joint venture made up of two entities as principal (rather than for a Colorado corporation, as stated on SF 19B), neither of which is the same as the bidder. Rapp also has submitted a document signed by the Colorado Secretary of State to the effect that there is no corporation, domestic or foreign, operating in Colorado under the name of Dale Andersen Construction Co. Even assuming for the sake of argument that the discrepancy between the Andersen Construction Company and the Dale Andersen Construction Co. can be overlooked, Rapp argues that under the decisions of our Office, Andersen's bid is nonresponsive.

Andersen's protest indicates that it intended to bid as a Colorado corporation. It appears that Andersen's surety first issued the bond in the corporation's name, but immediately before bid opening provided a substitute bond and instructed Andersen to use it, which it did. Andersen argues that the name and signatures on the second bond were to establish that Dale Andersen was guaranteeing it individually as well as in his capacity as president of the corporation, of which he owns 100 percent of the capital stock. Any discrepancy between the bid and the bid bond, Andersen concludes, is a minor informality that can be corrected without prejudice to other bidders. In support of its position, Andersen has provided a letter dated December 28, 1983, from the surety's Denver agents to the contracting officer, confirming that upon award of the contract to Dale Andersen and Dale Andersen Construction Company, they will be providing the required performance and payment bonds.

The contracting officer's report to our Office states that it is "apparent that the Andersen Company and the bonding company had every intent to be bonded and bound by the bid." After reviewing the decisions cited by Rapp, however, the contracting officer concludes that the bid bond is not acceptable, stating that he has no alternative but to make award to Rapp unless otherwise directed by our Office.

The law of suretyship is very clear: no one incurs a liability to pay the debts or to perform the duty of another unless he expressly agrees to be bound. Moreover, a surety under a bond in the name of several principals is not liable for the default of one of them. See *A. D. Roe Company, Inc.*, 54 Comp. Gen. 271 (1974), 74-2 CPD 194, and cases cited therein. For this reason, we consistently have held that a bid bond naming a principal different from the nominal bidder is deficient, and the defect generally may not be waived as a minor informality. *Id.*

We reaffirmed this principle most recently in *Atlas Contractors, Inc./Norman T. Hardee, a Joint Venture,* B-208331, January 19, 1983, 83-1 CPD 69. In that case, as here, the bid was in the name of a corporation and was signed by its president in that capacity; the bond, however, identified both the corporation and the president, the latter not by title but as an individual, and indicated that they were organized as a joint venture. Although the protester argued that it had intended to bid as a joint venture, we held that the bid was at best ambiguous and therefore could properly be rejected.

In an earlier case involving a bid submitted in a corporate name, accompanied by a bond issued to a joint venture consisting of the corporation and its president as an individual, the protester also had advised the contracting officer that its surety (again Fidelity and Deposit Company of Maryland) would not provide the required coverage unless both the corporation's and the president's personal assets were included on the bond. There too the corporation bore the name of the president, who was its sole owner. In addition, the surety subsequently submitteed assurances that it would be no problem to change the bid bond to conform with any required wording. We could not conclude that the surety would be bound, and we held that the bid properly had been rejected as nonresponsive. See *Villarreal Construction Co., Inc.*, B-184409, November 28, 1975, 75-2 CPD 351.

In this case, if following award the president of Anderson Construction Company refused to execute the contract and to provide the required performance and payment bonds, we believe the surety might successfully argue that it was not bound by a bond issued to Dale Andersen, Individually, and Dale Andersen Construction Co., a Joint Venture. Further, Andersen's post-opening attempts to cure the deficiency may not be considered, since the responsiveness of a bid must be determined as of the time of opening. *A. D. Roe Company, Inc., supra.*

We therefore find that the award must go to Rapp if it is otherwise determined to be a responsive and responsible bidder.

Rapp's protest is sustained; Anderson's is denied.

[B-212684]

Discharges and Dismissals—Military Personnel—Certificates of Discharge—Issuance Delay

Although 10 U.S.C. 1168(a) provides that a member of an Armed Force may not be discharged until his final pay and certificate of discharge are ready for delivery to him, the statute does not operate to invalidate an otherwise proper discharge when both the member and the service intend that and act as if a discharge or separation has occurred even though actual delivery of the discharge document is delayed.

Matter of: Kenon D. Shattuck, and others, March 13, 1984:

The question to be resolved in this case is what is the effect on a Coast Guard member's separation from active duty when his final pay and certificate of discharge are not delivered to him at the time of the separation. Does the individual continue on active duty and is he entitled to pay, allowances and other benefits until he receives the documentation? Under the circumstances presented, there is no effect on the date of separation as a result of the Coast Guard's failure to deliver documentation and final pay.[1]

The three factual situations presented are as follows. Kenon D. Shattuck was separated from the service for the convenience of the Government on August 28, 1982. His final pay and discharge documentation were mailed to him on September 13 and received on September 16, 1982. Michael C. Young was separated at the expiration of his enlistment on January 2, 1981. He did not receive his Certificate of Release or Discharge from Active Duty, DD Form 214, until February 2, 1981. Finally, D. Collins was discharged from the Coast Guard on May 23, 1980. At the time of his discharge he alleged error in the certificates of discharge and was subsequently issued another certificate on June 4, 1981. In each of these cases there was no doubt on the part of the individual involved or the Coast Guard that the individual had been separated and was no longer under military control after the initial date specified for separation. Each of them left military control and proceeded to their homes.

ANALYSIS

A member of an Armed Force may not be discharged or released from active duty until his discharge certificate or certificate of release from active duty, respectively, and his final pay or a substantial part of that pay, are ready for delivery to him or to his next of kin or legal representive. 10 U.S.C. 1168(a).

This provision originated in the Servicemen's Readjustment Act of 1944, June 22, 1944, ch. 266, 58 Stat. 284, 285, and was part of a

[1] This and related questions as applied to certain factual situations were presented by Mr. E. J. Rowe, an Authorized Certifying Officer of the Coast Guard. The submission has been assigned control number CG-ACO-1424 by the Department of Defense Military Pay and Allowance Committee per agreement with the Coast Guard. As a result of the answer to the general question the related questions need not be answered. The vouchers presented are returned but may not be certified for payment.

445-522 O - 84 - 3

more comprehensive section dealing with disability claims or potential claims arising out of a member's service. The purpose was to have records available and to process for discharge even members who were uncooperative in the process. It was not mentioned that the provision was intended to invalidate an otherwise proper discharge. H.R. No. 1418, 78th Cong. 2d Sess. (1944).

In certain circumstances a discharge or separation has been held to be defective and, as a result, an individual is considered as continuing on active duty and entitled to pay and allowances until a valid discharge is issued. *Bray* v. *United States,* 515 F.2d 1383 (Ct. Cl. 1975); *Cason* v. *United States,* 471 F.2d 1225 (Ct. Cl. 1973). Additionally, where a discharge or retirement order is not delivered to an individual in circumstances where he is not aware of his status, it has been held that the member is entitled to active duty pay and allowances until delivery of the order changing his status. *Crist* v. *United States,* 124 Ct. Cl. 825 (1952), and 49 Comp. Gen. 429 (1970). However, we are not aware of any authority holding that deviation from the requirement of 10 U.S.C. § 1168(a) would invalidate an otherwise proper discharge.

In the cases presented there was no misunderstanding on the part of those involved. The discharged members and the Coast Guard knew that a separation had occurred. The Coast Guard had no jurisdiction over the former members and the members themselves believed they had been discharged. To say at this point that the untimely delivery of the original Certificate of Release or Discharge from Active Duty voided the discharge would not be in keeping with prior holdings which do not make the effective date of discharge depend upon delivery of documents when the parties are both aware and both intend to effect a discharge or separation on a given date.

Regarding the provisions of Coast Guard regulations which require the furnishing of a Certificate of Release or Discharge from Active Duty, DD Form 214, at the time an individual is separated, the applicable Department of Defense regulation (which also applies to the Coast Guard under 32 C.F.R. 45.2(a)) provides that the issuance of this form is to have no legal effect on termination of the member's service. 32 C.F.R. 45.3(b). Therefore, we do not find that failure to comply with additional requirements in Coast Guard regulations with respect to the furnishing of this certificate can have the effect of changing the otherwise established date of separation in order to permit payment of pay and allowances for added periods.

We do not view any possible failure to comply with 10 U.S.C. § 1168(a), in that final pay and a Certificate of Release or Discharge from Active Duty may not have been ready for delivery, as invalidating an otherwise proper discharge. The claims for continuation of pay after the date of discharge as originally fixed must be denied.

Our decision in this case should not be construed as authority to disregard 10 U.S.C. § 1168. The purpose of the statute is to have readily available to both the individual and the service information which is necessary to accomplish a separation or discharge. It should be complied with at all times.

[B-213474]

Contracts—Negotiation—Requests for Proposals—Acceptance Time Limitation—Expiration—Failure to Request Extension

Where offeror indicates a proposal acceptance period of 1 day rather than the 60 days contemplated by the request for proposals, the contracting officer has no duty to seek an extension, so that upon expiration of the offer, the offeror is ineligible for award.

Matter of: Fred Rutledge, March 13, 1984:

Fred Rutledge protests the award of a contract to Kelley Workshop, Inc., for the operation of a Government-owned cafeteria, under request for proposals (RFP) No. 4-S-ARS-84 issued by the Department of Agriculture. Rutledge essentially contends that the agency failed to evaluate his proposal properly. We deny the protest because Rutledge was otherwise ineligible for award.

The RFP was issued June 13, 1983, and two proposals were received on August 22, the closing date for receipt of initial proposals. The RFP advised, by standard provision, that the Government might accept an offer "within the time specified therein," whether or not negotiations are conducted, unless the offer is withdrawn by written notice received by the Government prior to award. Additionally, the following standard proposal acceptance clause was included on the first page of the RFP:

[T]he undersigned agrees, if the offer is accepted within —— calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers * * * to furnish any or all items * * * in the schedule.

Rutledge placed the word "one" in the blank space, thus limiting its acceptance period to 1 day. The other offeror under the RFP offered a 60-day acceptance period.

Rutledge did not extend the 1-day proposal acceptance period before its expiration, and no award was made during that time period. The contracting officer, while harboring reservations about the propriety of considering Rutledge's proposal in view of the 1-day acceptance period, nevertheless submitted both proposals for technical evaluation. Approximately 7 weeks later, on October 4, the contracting officer, after reviewing the evaluation results, awarded the contract to Kelley. No communication relating to Rutledge's proposal took place between the contracting officer and Rutledge from the closing date for receipt of initial proposals to the date of contract award.

We need not consider the propriety of the evaluation of Rutledge's proposal, since once Rutledge's offer expired by its own terms after 1 day, it was no longer eligible for award. The terms of an offeror's proposal acceptance period define the period of the offer's existence. Here, Rutledge voluntarily restricted the acceptance of its proposal by the Government to 1 day, and made no effort to extend its offer during the allotted time. Thus, after 1 day, and without further assent from Rutledge, there simply was no legal offer for the Government to consider or evaluate.

Moreover, we do not believe the contracting officer was obligated to request Rutledge to extend the offer. In our view, where an offeror unequivocally specifies a shorter proposal acceptance period than requested (here, 1 day instead of 60), and there is no indication that the offeror has changed his intentions concerning the duration of the offer, there is no duty on the part of the contracting officer to seek an extension of the limited proposal acceptance period from the offeror. See *Environmental Tectonics Corporation*, B-183616, October 31, 1975, 75-2 CPD 266 (concerning a formally advertised procurement).

Thus, since Rutledge's proposal expired, we will not review his complaint about the evaluation of the proposal. The protest is denied.

[B-213836]

Transportation—Household Effects—Damage, Loss, etc.—Measure of Damages

Interpretation by the Military Traffic Management Command of released valuation provision to mean use of gross weight in calculation of released valuation, which has been regularly applied for several years, governs meaning of that provision in tender covering movement of unaccompanied baggage.

Claims—Transportation—Evidence—Household Effects

Where the claimant questions the allegation of the agency that the weights set forth in the Joint Military/Industry Table of Weights are net weights but presents no evidence, the claimant has failed to sustain the burden to furnish evidence to establish its claim.

Matter of: Dewitt Freight Forwarding, March 13, 1984:

Dewitt Freight Forwarding (Dewitt) requests review pursuant to 4 C.F.R. § 32 (1983) of the denial by our Accounting and Financial Management Division, Claims Group, of a claim for refund of part of the amounts collected by set-off for damage in transit to several items of household effects of SSgt. Ronald J. Morey, transported as unaccompanied baggage from Torrejon de Ardoz, Spain, to Langley Air Force Base, Virginia, under Government bill of lading No. S-2023686, dated November 23, 1981.

We sustain the denial of the claim.

The baggage was picked up by the carrier in Spain on November 27, 1981, and delivered at destination on January 12, 1982, after temporary storage-in-transit. On delivery at destination, damage was noted to six packaged items and to two unpackaged bicycles.

For this damage, the Air Force originally claimed $235.80. The Air Force reports that this amount was based on the agreed released valuation of 60 cents per pound per article at the gross weight of the shipment. Dewitt offered $128 on the basis of the actual costs of repair to one of the bicycles plus the released valuation on the packaged items computed on the weights in the Joint Military/Industry Table of Weights (weight table). The Air Force adjusted the claim to $234.60 and, upon the failure of Dewitt to pay damages in the full amount claimed, the claim was referred for recovery by setoff. The claim was again adjusted to $295.44 and recovered by setoff. Dewitt claimed refund of the difference, $60.84, between the amount recovered by setoff and the interim claim of $234.60.

The amount of $295.44 was computed on the following bases: the actual amount of damages to one bicycle and to four items in two shipping containers; the released valuation for a second bicycle which was computed on the basis of the agreed weight table, and the released valuation of two commodities in shipping containers which was computed on the basis of the constructive gross weight. The dispute involves the use of gross weight to compute the released liability for the two commodities in shipping containers. The shipping manifest did not set forth the weights of the cartons or of the items. The cubic measurement of the shipping container is specified. Consequently, the gross weight was computed on the basis of 11 pounds per cubic foot of the shipping container. However, the shipping manifest also set forth specifically each item contained in each shipping container.

Dewitt contends that since the items are individually identified, the Air Force has improperly computed released valuation on the gross weight of the shipping container. Dewitt asserts that when the items in the cartons are individually identified on the inventory, the weights set forth for each item in the weight table are mandatory.

The Air Force contends that the Table of Agreed Weights sets forth net weights which are not applicable on a Code J shipment and certain other shipments not here relevant. A Code J shipment, as in the present instance, is an international shipment of baggage in which the common carrier takes responsibility for the through shipment by land, air and land, and provides packing and pickup at origin, surface transportation to a Military Air Command (MAC) aerial port, surface transportation from the MAC destination aerial port to final delivery point, and partial unpacking. *See* DOD 4500.34R,C22,2001am(2)(i).

For a number of years the Code J shipments have been covered by the unaccompanied baggage military basic rate tenders. The shipment which is the subject of this claim was covered by Military Basic Tender No. 2-B, I.C.C. No. 7 (MBT 2-B), effective on and after January 1, 1981. MBT-2-B is published by the Household

Goods Forwarders Association of America, Inc., an association representing household goods carriers, and participated in by Dewitt.

The liability of the carrier for loss or damage in transit is set forth in Item No. 10 of MBT 2-B, which states, "All rates in this tender apply on shipments when released to a value not exceeding 60 cents per pound per article." The item, however, does not specify whether gross or net weight is to be used for the computation of the released valuation. Therefore, when in 1977 the construction of this provision came into question concerning use of the gross or net weight of an item for the computation of the released valuation, the Military Traffic Management Command (MTMC) determined that since all other references to weight in the tender were to gross weight, gross weight also applied to the determination of the released valuation. The Air Force asserts, and Dewitt does not deny, that this construction has been in use without serious question by the agent of the household goods carriers, the Household Goods Forwarders Association of America, Inc., or any of the participating carriers until the present time.

The practical construction, conduct or practice of the parties to a contract will generally govern the construction of provisions of the contract when later questioned. *See* 17A C.J.S., Contracts § 325(1), 17 AM. Jur.2d., Contracts § 274. Since the released valuation provision has been applied on gross weight for approximately 6 years without objection by Dewitt, either individually or through the tender publishing agent, it will govern the application of the provision on the present claim.

In support, however, of its contention, Dewitt refers to a circular letter of June 6, 1983, from MTMC to the household goods carriers associations defining the terms "packing carton," "shipping container," and "item or article," and stating, in effect, that if a carrier lists a shipping container, which is the external container into which are placed individual items of baggage or smaller cartons containing items of baggage, as a single item without identifying the items in the container, liability for loss or damage will be computed on the gross weight of the shipping container. This letter also states that it is a result of the annual negotiations held on February 18, 1983. Dewitt also furnished a copy of a letter from the Household Goods Forwarders Association of America, dated June 28, 1983, and quoted from that letter the following:

> At a final meeting held with the military claims representatives on June 20, 1983, it was agreed that the revised Table of Weights would have application on unaccompanied baggage shipments, if such shipments are inventoried the same as household goods shipments.

Therefore, as a result of negotiations in 1983, the military agreed with the household goods carriers that when items are individually identified on the inventory, as here, the agreed table of weights would apply on items of unaccompanied baggage.

The present shipment, however, was accepted by the carrier on November 27, 1981, and was delivered at destination on January 12, 1982. This contract of carriage, therefore, came into existence and was fully performed prior to the revised agreement. The June 28, 1983 letter of the Household Goods Forwarding Association, on which Dewitt relies, expressly states: "The current Table of Weights has an exception so that it does not apply to unaccompanied baggage or DPM shipments." Dewitt has neither alleged nor shown that the 1983 agreement has any application to a 1981 contract.

In additional support of its contention, Dewitt states that use of the gross weight "* * * would make the carrier pay a claim on the weight of the container, as well as the contents," and the shipping containers are generally the property of the carrier. However, it is not the weight of damaged goods that is being determined, but the measure of the released valuation. We cannot say that the use of the gross weight of the loaded shipping container for that determination is any less reasonable than for the determination of charges under the tender, and MBT2B expressly provides that all charges based on weight are based on gross weight.

Dewitt also questions the assertion by Air Force that the weights set forth in the weight table are net weights. However, no evidence to the contrary has been presented. A claimant bears the burden of furnishing evidence clearly and satisfactorily establishing its claim and all incidental matters to establish the clear legal liability of the United States and the claimant's right to payment. *See* 31 Comp. Gen 340 (1952), 18 Comp. Gen. 980 (1939). Dewitt has failed to sustain the burden of evidence.

Therefore, we sustain denial of the claim.

[B-212512]

Vehicles—Government—Home to Work Transportation—Government Employees—Prohibition—Exemptions

The prohibition on home-to-work transportation in section 1344(a)(2) of title 31 of the United States Code and in section 406 of the Department of Housing and Urban Development Appropriations Acts for fiscal years 1983 and 1984 does not apply to the Veterans Administration's proposal to have its employee keep a Government passenger bus home at night to facilitate transporting Jefferson Medical College students between Philadelphia and the VA Medical Center in Coatesville, Pa., in furtherance of a training program authorized by law. The arrangement involves use of a Government vehicle for an official purpose. Any benefit the driver receives from keeping the passenger bus home and driving it to work is incidental to that purpose.

Matter of: Veterans Administration—Transportation of Medical Students, March 16, 1984:

The Veterans Administration (VA) asks whether one of its employees may keep a passenger bus home at night to facilitate transportation of Jefferson Medical College students from Philadelphia to the VA Medical Center in Coatesville, Pa., located approximately 35 miles from the College. For the reasons given below, we find that the described arrangement is proper and would not conflict with the rule prohibiting home-to-work transportation of Government employees as set forth either in 31 U.S.C. § 1344(a) or in the annual Department of Housing and Urban Development-Independent Agencies Appropriation Act.

The VA informs us that at one time there was a significant problem transporting students between the Medical College and VA Medical Center. This problem was solved by acquiring a large passenger bus which currently is parked at the Medical Center. Each day a VA employee-driver makes two round trips to Philadelphia to transport students first to the VA facility and then back to the College. The VA suggests that it would be more economical to allow an employee-driver who lives in Philadelphia to make one round trip each day. Thus, the employee would pick up the students at the Medical College on the way to work and drive them to the VA facility. He would then return the students to the College and keep the bus home at night. As we understand it, the employee doing the driving would not necessarily be employed as a driver but might be a doctor, nurse or other employee. Although the employee-driver would not be paid additional compensation for transporting the medical students, the driving responsibility would be written into the employee's job description.

The medical students receive training at the VA facility under a program authorized by 38 U.S.C. § 4101(b). That statute requires the VA Administrator, to the extent feasible, to "develop and carry out a program of education and training of * * * health personnel * * * acting in cooperation with such schools of medicine * * * medical centers * * * and such other public or nonprofit agencies, institutions, or organizations as the Administrator deems appropriate." The medical students participating in the program and receiving the transportation are not VA employees.

In support of the proposed arrangement, the VA maintains that its employee-driver would be performing "field work" for the VA's benefit, and thus, the driver would be exempted, under 31 U.S.C. § 1344(a)(2), from the prohibition on home-to-work transportation. The VA argues that since large distances separate the driver's residence, the Medical Center, and the Medical School, it would be reasonable to consider the driving duties to be in the nature of employee field work.

The VA also contends that section 406 of the Department of Housing and Urban Development-Independent Agencies Appropriation Act, 1983, Pub. L. No. 97-272, 96 Stat. 1160, 1179, which prohibited any funds appropriated therein from being spent on home-to-work transportation of employees of agencies covered by the Act, was not intended to eliminate the exceptions to the home-to-work rule contained in 31 U.S.C. § 1344. The same prohibition has been repeated in section 406 of the Department of Housing and

Urban Development–Independent Agencies Appropriation Act, 1984, Pub. L. No. 98–45, 97 Stat. 219, 238.

Discussion

Section 1344(a) allows appropriations to be spent on the operation of Government motor vehicles for official purposes only. [1] Official purposes do not include "transporting officers or employees of the Government between their domiciles and places of employment." An exception to the prohibition on home-to-work travel is allowed for employees performing field work requiring transportation between their domiciles and places of employment when the transportation is approved by the head of the agency.

The prohibition on home-to-work transportation presumes that a Government employee bear the cost of daily travel between the employee's residence and place of employment. Its primary purpose is to prevent use of Government vehicles for the personal convenience of the employee. 25 Comp. Gen. 844, 847 (1946); B–181212, August 15, 1974. Although we have construed the prohibition broadly (*see* 62 Comp. Gen. 438 (1983)) we do not think it applies where a Government vehicle is provided to an employee for the official purpose of carrying out a Government program, and where the benefit afforded to the employee by keeping the motor vehicle home at night is merely incidental to that purpose.

For this reason, we find that neither the prohibition on home-to-work transportation in section 1344(a) of title 31 nor the prohibition in section 406 of the Department of Housing and Urban Development Appropriations Acts for fiscal years 1983 and 1984 applies to the proposed arrangement. The VA employee-driver is being provided with a VA passenger bus for the official purpose of transporting medical students between the Jefferson Medical College in Philadelphia and the VA hospital in Coatesville in furtherance of a training program authorized by law, *i.e.,* 38 U.S.C. § 4101(b). The medical students are not Government employees and the transportation provided to them has been made part of the VA employee's work responsibilities. Any benefits the driver receives from keeping the passenger bus home at night and driving it to work is incidental to that responsibility. Accordingly, we conclude that the arrangement proposed by the VA involves use of a Government vehicle primarily for an official purpose, and, therefore, is permissible.

Notwithstanding our conclusion, as the VA has raised the matter, we will respond to its argument that its employee-driver would be performing field work. The term "field work" is not defined in section 1344 or in its precodification version, nor has this Office had many occasions to rule on its meaning. Our present

[1] The current arrangement whereby the passenger bus operates between the VA facility and Medical College is authorized by 38 U.S.C. § 4101(b) as being incident to the purpose of cooperating with medical schools in training health personnel.

view is that the term pertains to employees whose work includes a large proportion of time "on the road," away from an office or other headquarters. Under the proposed arrangement, neither the VA employee driving the bus nor the medical students would be working away from the regular place of business. On the contrary, the arrangement is that the employee drive the medical students to the regular place of business every day. The only activity that could be considered "work" for the driver, as opposed to ordinary commutation, is the short time that driving to and from the Medical College might add to the usual home-to-work trip. We do not think this constitutes a large proportion of time on the road working away from the regular place of business. Accordingly, we could not sustain an administrative determination that the proposed arrangement is proper because the VA employee-driver would be performing field work.

[B-40342.3]

Courts—Judgments, Decrees, etc.—Payment—Permanent Indefinite Appropriation Availability—Effect of Equal Access to Justice Act

Permanent indefinite appropriation for judgments established by 31 U.S.C. 1304 is available to pay attorney fees, except for "bad faith" cases, awarded under the authority of 28 U.S.C. 2412(b), as long as award is final and payment is not otherwise provided for. However, judgment appropriation is not available to pay awards under 28 U.S.C. 2412(d), nor "bad faith" awards under 2412(b), both of which must be paid from agency appropriations.

Matter of: Attorney fees—judicial awards under Equal Access to Justice Act, March 19, 1984:

This decision responds to a question that has arisen in a number of recent cases—whether the permanent indefinite appropriation for judgments (31 U.S.C. § 1304) is available to pay attorney fees awarded under the authority of 28 U.S.C. § 2412(b). As discussed below, except for awards based on a finding that the United States acted in bad faith, we believe it is.

A sample of the cases raising this issue is *National Trust for Historic Preservation, et al.* v. *Corps of Engineers,* 570 F. Supp. 465 (S.D. Ohio 1983). The plaintiffs in that case alleged that the Corps of Engineers violated Federal historic preservation statutes by issuing a permit to construct and maintain a barge loading facility on the Ohio River. The Court found that the Corps had violated the National Historic Preservation Act, and then awarded costs and attorney fees to the plaintiffs in the amount of $46,726.43. Under 16 U.S.C. § 470w-4 (1982), courts may award attorney fees in actions to enforce provisions of the National Historic Preservation Act:

> In any civil action brought in any United States district court by any interested person to enforce the provisions of this subchapter, if such person substantially prevails in such action, the court may award attorneys' fees, expert witness fees, and other costs of participating in such action, as the court deems reasonable.

Background

Prior to 1981, the liability of the United States for attorney fees was governed by the so-called American Rule, enunciated by the Supreme Court in *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975). Under the American Rule, the prevailing party in litigation is not entitled to recover attorney fees unless provided for by statute. In the case of the United States, the American Rule was further reenforced by statute. 28 U.S.C. § 2412 (1976).

Over the years, Congress had dealt with fee-shifting on a piecemeal basis, and had enacted over 30 statutes expressly making the United States liable for attorney fees in specific contexts. Prominent examples are Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e–5(k), and the Freedom of Information Act, 5 U.S.C. § 552(a)(4)(E). For convenience, we will refer to this category as "Group I." Under a Group I statute, the payment of judicial fee awards is governed by the statutes governing the payment of judgments against the United States generally, 28 U.S.C. §§ 2414 and 2517, and 31 U.S.C. § 1304. In brief, the awards, when final, are paid, upon certification by the General Accounting Office, from the permanent appropriation established by 31 U.S.C. § 1304 unless payment has been "otherwise provided for."

In addition to the Group I statutes, Congress has enacted several dozen other fee-shifting statutes which do not mention the United States or Federal agencies, and which, therefore, under the doctrine of sovereign immunity, have been viewed for the most part as not authorizing fee awards against the United States. We will refer to these as "Group II." One such example is 16 U.S.C § 470w–4, quoted above.[1]

The Equal Access to Justice Act

On October 21, 1980, Congress enacted the Equal Access to Justice Act (EAJA), Pub. L. No. 96–481, title II, 94 Stat. 2321, 2325, effective October 1, 1981. EAJA authorizes fee awards against the United States in a variety of administrative and judicial contexts in which they were not previously authorized. First, EAJA added a new 5 U.S.C. § 504, authorizing fee awards in certain administrative proceedings, specifically, adversary adjudications under the Administrative Procedure Act. Second, EAJA addressed judicial fee awards by extensively revising 28 U.S.C. § 2412.

[1] We are aware that *WATCH* v. *Harris*, 535 F. Supp. 9 (D. Conn. 1981), relying heavily on legislative history, held that 16 U.S.C. § 470w–4 does authorize fee awards against Federal agencies. The Court went on to point out that, to the extent there may be any doubt, it was removed by the Equal Access to Justice Act, discussed in the text. We do not quarrel with that decision, and cite 16 U.S.C. § 470w–4 merely as an example of a fee-shifting statute which does not expressly mention the United States or Federal agencies. In any event, to the extent that 16 U.S.C. § 470w–4 may be viewed as independently authorizing fee awards against the United States without the need to rely on the Equal Access to Justice Act, it is clearly an exception to the "Group II" statutes.

As revised by EAJA, 28 U.S.C. § 2412 deals with judicial fee awards against the United States in two separate subsections, subsection (b) and subsection (d). Each subsection has its own payment provision.

Subsection (b) provides as follows:

> Unless expressly prohibited by statute, a court may award reasonable fees and expenses of attorneys * * * to the prevailing party in any civil action brought by or against the United States or any agency * * * in any court having jurisdiction of such action. The United States shall be liable for such fees and expenses to the same extent that any other party would be liable under the common law or under the terms of any statute which specifically provides for such an award.

The primary effect of subsection (b) is to authorize fee awards against the United States under the several dozen fee-shifting statutes which do not expressly mention the United States, i.e., the "Group II" statutes.[2] The payment provision applicable to "subsection (b) awards" is subsection (c)(2):

> Any judgment against the United States or any agency * * * for fees and expenses of attorneys pursuant to subsection (b) shall be paid as provided in sections 2414 and 2517 of this title, except that if the basis for the award is a finding that the United States acted in bad faith, then the award shall be paid by any agency found to have acted in bad faith and shall be in addition to any relief provided in the judgment.

Standing alone, subsection (c)(2) clearly contemplates payment from the judgment appropriation except in "bad faith" cases.

The second broad category of judicial fee awards authorized by EAJA is subsection (d)(1)(A) of the revised 28 U.S.C. § 2412:

> Except as otherwise specifically provided by statute, a court shall award to a prevailing party other than the United States fees and expenses * * * incurred by that party in any civil action (other than cases sounding in tort) brought by or against the United States * * * unless the court finds that the position of the United States was substantially justified or that special circumstances make an award unjust.

Subsection (d) goes on to prescribe eligibility requirements and application procedures, the details of which are not relevant here. The effect of subsection (d) is to authorize fee awards against the United States, as long as the "not substantially justified" test and the eligibility requirements are met, in cases where there was no pre-existing fee-shifting statute, that is, in cases where a fee award against a private litigant would not be authorized. The payment provision for "subsection (d) awards" is subsection (d)(4)(A):

> Fees and other expenses awarded under this subsection may be paid by any agency over which the party prevails from any funds made available to the agency, by appropriation or otherwise, for such purpose. If not paid by any agency, the fees and other expenses shall be paid in the same manner as the payment of final judgments is made in accordance with sections 2414 and 2517 of this title.

The subsection (d) payment provision is virtually identical to the payment provision for administrative awards. *See* 5 U.S.C. § 504(d)(1), 94 Stat. 2327. There is no need to attempt to determine

[2] Subsection (b) also waives sovereign immunity under certain common-law exceptions to the American Rule—the "bad faith" exception and the "common fund" or "common benefit" exception. *See* S. Rep. No. 96-253, p. 3 (1979); H.R. Rep. No. 96-1418, p. 8 (1980). The "common fund" exception may present special problems and is not dealt with in this decision.

when the judgment appropriation might be available under subsection (d)(4)(A), because EAJA § 207 provides that:

> The payment of judgments, fees and other expenses in the same manner as the payment of final judgments as provided in this Act is effective only to the extent and in such amounts as are provided in advance in appropriations Acts.

Before proceeding with our discussion, another aspect of the EAJA must be noted. Subsection (d) and 5 U.S.C. § 504 are considered experimental and have a "sunset" date of October 1, 1984; they will be automatically repealed as of that date unless Congress enacts legislation to make them permanent. EAJA §§ 203(c) and 204(c), 94 Stat. 2327 and 2329. The sunset date does not apply to subsection (b), however, which will therefore remain as permanent legislation even if Congress takes no further action to retain the other provisions.

Awards Under 5 U.S.C. § 504 and 28 U.S.C. § 2412, Subsection (d)

In a recent decision, 62 Comp. Gen. 692 (1983), we traced the legislative history of EAJA § 207 in detail, and considered its application to fee awards under 5 U.S.C. § 504 and subsection (d) of 28 U.S.C. § 2412. We pointed out that section 207 was inserted in response to a point of order which had been sustained based on the expansion of the availability of the permanent judgment appropriation. We concluded that section 207 prohibits use of the judgment appropriation to pay awards under either 5 U.S.C. § 504 or subsection (d) of 28 U.S.C. § 2412. We noted further that agency operating appropriations are available to pay these awards without the need for specific appropriations, unless prohibited by some other statute. We see no need to repeat that extensive discussion in this decision, and incorporate it here by reference.

Awards Under 28 U.S.C. § 2412, Subsection (b)

The real issue in this decision is whether our holding in 62 Comp. Gen. 692, *supra,* applies as well to subsection (b) awards. Restated, the issue is whether section 207 prohibits use of the judgment appropriation to pay awards under subsection (b).

On the one hand, it is certainly possible to argue that section 207 applies to subsections (b) and (d) equally. It is not a part of either subsection, but is a separate provision applicable presumptively to the entire statute. As discussed in our decision 62 Comp. Gen. 692, the purpose of section 207 was to counteract a point of order based on the expansion of the availability of the judgment appropriation. Subsections (b) and (d) both purport to expand the availability of the judgment appropriation and thus, under this approach, would both be subject to section 207.

However, several factors suggest that section 207 was not intended to apply to subsection (b) awards.[3] First, former Representative

[3] We have been provided with an opinion dated December 15, 1983, by the Office of Legal Counsel, Department of Justice, concluding that section 207 applies to sub-

Danielson's point of order, the sustaining of which gave rise to section 207, objected to:

> [A]n amendment to the bill, a title II, which provides for the award of attorneys' fees and other expenses to the prevailing party other than the United States, in certain actions or administrative proceedings in which the judgment or adjudication has been adverse to the United States, unless the court or adjudicative officer of the agency finds that the position of the United States was substantially justified or that special circumstances make the award unjust.

126 Cong. Rec. 28638 (October 1, 1980). Since subsection (b) is not limited to parties "other than the United States," nor is it limited by the "substantially justified" test, Mr. Danielson seems clearly to have been alluding to subsection (d) and the proposed new 5 U.S.C. § 504, rather than subsection (b).

Second, the language of section 207 ("payment of judgments * * * in the same manner as the payment of final judgments as provided in this Act") is patterned after the payment provisions of subsection (d) and 5 U.S.C. § 504, rather than subsection (b). *See* 28 U.S.C. § 2412(d)(4)(A), quoted earlier in this decision, and the virtually identical 5 U.S.C. § 504(d)(1). Thus, it can be argued that the real concern of the Congress was over the experimental portions of the EAJA rather than subsection (b).

Finally, it is important to note that, although agency funds are available to pay subsection (d) awards, they are not available to pay subsection (b) awards. The payment provision for subsection (b) and subsection (c)(2), quoted above, directs payment from the judgment appropriation except for bad faith cases. Except for the bad faith cases, there is nothing in the language or legislative history of the EAJA to suggest that agency funds are available for subsection (b) awards. Thus, if the judgment appropriation is not available, there would be no source of funds available for immediate payment of subsection (b) awards, and agencies would be required to seek specific congressional appropriations. While this factor is not controlling in and of itself, viewing it in conjunction with the points noted above, it does not strike us as unreasonable to construe section 207 as barring use of the judgment appropriation in situations where agency funds are legally available for payment, but as not precluding its use where agency funds are not available.

In sum, although we do not view the matter as entirely free from doubt, we conclude that the prohibition of section 207 need not be applied to subsection (b) awards, although it continues to apply to awards under subsection (d) and 5 U.S.C. § 504. Accordingly, we will treat fee awards in the future under the following guidelines:

(1) Awards under "Group I" statutes—fee-shifting statutes which applied to the United States before enactment of the EAJA—will continue to be paid from the permanent judgment appropriation

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section (d), but not to subsection (b), and that agency funds may not be used to pay subsection (b) awards except in "bad faith" cases. This decision is in essential agreement with that opinion.

unless otherwise provided for. The EAJA has no effect on payment under these statutes.

(2) Awards under "Group II" statutes—fee-shifting statutes which did not apply to the United States prior to EAJA but which now apply to the United States by virtue of subsection (b)—will also be paid from the judgment appropriation unless otherwise provided for. Payment requests in this category should cite as authority both subsection (b) and the specific underlying fee-shifting statute involved in that case.

(3) Awards under subsection (d) and 5 U.S.C. § 504, as well as "bad faith" awards under subsection (b), will not be certified for payment from the judgment appropriation but must be paid from agency funds.

As a final note, in view of the October 1, 1984 sunset date for certain portions of the EAJA, it is likely that the Congress will be considering legislation in this area during the present session. We are therefore sending copies of this decision to the Senate and House Judiciary Committees for consideration in their deliberations as to precisely what form that legislation should take.

[B-212570]

Contracts—Negotiation—Offers or Proposals—Offeror—Identity

Contention that award of a bus stop shelter franchise agreement resulted from an *improper transfer of the proposal is denied where, although the proposal referred to* the offeror corporation by a number of different variations of its legal name, it is clear from the proposal and other available information that the awardee was actually the intended offeror.

Matter of: Pedestrian Bus Stop Shelters, Ltd., March 20, 1984:

Pedestrian Bus Stop Shelters, Ltd. protests the award by the District of Columbia of Formal Agreement No. DT 8220 to CSC of Washington, D.C., Inc. The negotiated agreement is a 10-year exclusive franchise which provides for the franchisee to design, erect, and maintain up to 500 bus stop shelters in the District and to pay the district a fixed percentage of the gross receipts derived from selling commerical advertising space on the shelters. The protester contends that the awardee did not participate in the procurement and, therefore, was not eligible for award; it contends that the initial proposal and the best and final offer actually were submitted by a different entity: Convenience and Safety Corporation of Washington, D.C., Inc.

We deny the protest.

In response to its request for proposals, the District received an initial proposal accompained by a letter on stationery of the "Convenience and Safety Corporation" of a New York City address. At the top of the letter was the logo "C&S." The letter began, "The officers and directors of Convenience Safety Corporation of Washington, D.C., Inc. (CSC) are pleased to respond to the Bus Shelter Request For Proposal (RFP) * * * ." It continued by describing the offeror's qualifications, usually referring to the offeror simply as "CSC." The one exception was a statement that identified William B. Fitzgerald as a 50 percent owner of "CSC of Washington, D.C. Inc." The letter was signed by Alexander J. Mautner, who was identified as "President, CSC Washington, D.C. Inc." at a Washington, D.C. address. The cover sheet of the initial proposal indicated that it was submitted by "Convenience and Safety Corporation of Washington, D.C., Inc." A similar letter and cover sheet accompanied the offeror's best and final offer.

Following the evaluation of the best and final offers, the District's Acting Director of Transportation wrote to Mr. Mautner and informed him that his firm, Convenience and Safety Corporation of Washington, D.C., Inc., had been selected for award of the franchise. The letter also stated that before a contract could be executed, the District would have to determine that the offeror was responsible. The protester apparently obtained a copy of the letter and wrote to this Office contending, initially, that Convenience and Safety Corporation of Washington, D.C., Inc., did not exist, either as a District of Columbia corporation or as a foreign corporation authorized to do business in the District, and therefore, any award to that entity would be a nullity.[1] The contracting officer determined, however, that delay in awarding the franchise agreement would deprive the District of substantial revenues and, notwithstanding Pedestrian's protest, awarded the franchise to CSC of Washington, D.C., Inc. The protester then complained to this Office that award had been made to an entity that had not submitted a proposal.

In support of its protest, Pedestrian cites a number of cases illustrating the general rule that, in advertised procurements, an agency may not award a contract to any entity other than one that submitted a bid. *See, e.g.,* 44 Comp. Gen. 61 (1961); *Ebsco Interiors,* B-205526, August 16, 1982, 82-2 CPD 130; *Martin Company,* B-178540, May 8, 1974, 74-1 CPD 234. As the District correctly notes, however, these cases are not directly applicable to negotiated procurements. The reason for this, of course, is that in an advertised procurement, the requirement that the identity of the bidder be unambiguous at the time of bid opening is based on the need to preclude the bidder from later avoiding the obligation of its bid. See, e.g., *Mark II, Inc.,* B-203694, February 8, 1982, 82-1 CPD 104. In the absence of proof of a mistake, a bid may not be modified, explained, or withdrawn after bid opening.

[1] In addition, the protester's counsel informed us that no other entity could now use the name "Convenience and Safety Corporation of Washington, D.C., Inc." because, subsequent to the filing of this protest, counsel formed a corporation in the District of Columbia under that name.

In a negotiated procurement, on the other hand, an offeror generally may withdraw its offer any time prior to award. *United Electric Motor Company, Inc.,* B-191996, September 18, 1978, 78-2 CPD 206. The concern that award of a negotiated contract be made only to an offeror who submitted an initial proposal usually surfaces only in cases involving late proposals, see, e.g., *S.H.E. Corporation,* B-205417.2, September 30, 1982, 82-2 CPD 298, or in cases involving an attempted transfer or assignment of a proposal, since a proposal may not be transferred or assigned except by operation of law, sale of an entire business, etc. *Numax Electronics, Inc.,* 54 Comp. Gen. 580 (1975), 75-1 CPD 21.

In essence, the protester here is contending that award of the bus shelter franchise to CSC of Washington, D.C., Inc., based on a proposal the protester claims was submitted by Conveniences and Safety Corporation of Washington, D.C., Inc., resulted from an improper transfer of the rights in the initial proposal from one entity to another. Thus, the issue for us to resolve is whether the awardee was an original participant in the procurement. Broadly speaking, this factual inquiry is similar to the issue in our cases involving advertised procurements, that is, to determine who it was that actually submitted the bid. For this reason, although these cases are not controlling, we find them helpful to the resolution of the issue presented here.

We have examined copies of both the initial proposal and the best and final offer submitted by the awardee, and it appears that the offeror was referred to almost interchangeably in both documents and the accompanying cover letters as "Convenience and Safety Corporation of Washington, D.C., Inc.," and as "CSC of Washington, D.C., Inc." The address given for both of these entities, however, was always the same. The offeror was also, but less frequently, described as "CSC Washington, D.C., Inc." and "Convenience and Safety of Washington." The initials "CSC" were used as a shorthand reference both to the offeror and to one of its two 50 percent owners: Convenience and Safety Corporation. Significantly, both the initial proposal and the best and final offer were signed by an individual described as "President, CSC Washington, D.C., Inc." and, of all the various descriptions, it appears that the only entity actually existing as a District of Columbia corporation at the time of these submissions was CSC of Washington, D.C., Inc.

In our view, these variations were merely discrepancies involving a matter of form. With the exception of the shorthand reference "CSC," each variation was used simply as a different way of referring to the same legal entity. See *Mark II, supra; Jack B. Imperiale Fence Co., Inc.,* B-203261, October 26, 1981, 81-2 CPD 339. We view the use of these variations as similar to the use of a trade name, a practice that we believe the corporation statutes of the District of Columbia allow. *See* 51 Comp. Gen. 494 (1972). In short, from our review of the record, we think it was clear that both the initial and revised proposals were submitted by the intended offeror, CSC of Washington, D.C., Inc., and we see no indication of an attempt to transfer rights in the proposals from one entity to another.

In its comments on the District's report to this Office, the protester suggests that we should insist on examining the originals of the awardee's proposals rather than deciding this protest based on the copies that the District provided to us. We have no reason to suspect, however, that the copies provided us were inaccurate; thus, we regard the protester's suggestion as unnecessary.

We deny the protest.

[B-213593]

Subsistence—Per Diem—Delays—Administratively Directed

The "2-day per diem" rule limiting per diem which is outlined in 56 Comp. Gen. 847 and 55 Comp. Gen. 590 is not applicable where an employee's travel is extended by 2 or more days, not due to his personal desire to avoid working on nonworkdays, but rather due to Government orders based upon an administrative determination that it would be cost effective to extend the employee's traveltime in lieu of requiring weekend overtime work. 55 Comp. Gen. 590, distinguished.

Matter of: Gerald F. Krom and James A. Bosch—"Two-Day Per Diem Rule"—Reimbursement of Travel Costs, March 20, 1984:

This responds to a request for an advance decision by a certifying officer of the Omaha District, Army Corps of Engineers (Corps), as to the propriety of payment of travel claims submitted by Mr. Gerald F. Krom and Mr. James A. Bosch. For the following reasons, we conclude that the claims may be paid as submitted by the employees.

Claim of Gerald F. Krom

Mr. Krom, a drill rig operator with the Corps, was ordered to travel from Denver, Colorado, his temporary duty (TDY) station, to his permanent duty station, Omaha, Nebraska, to transport a drill rig from Omaha to Denver because of a major mechanical breakdown of the rig being used in Denver. Mr. Krom prepared a Government-owned, truck-mounted rig for transport to Denver on the afternoon of November 18, 1982. He departed from Omaha with the rig at 9:15 a.m. on Friday, November 19, and drove to Julesburg, Colorado, arriving at 5:15 p.m. the same day. Mr. Krom remained in Julesburg Saturday and Sunday and departed for Denver on Monday at 7 a.m. He arrived with the rig at 11:15 a.m. Monday. Mr. Krom then remained in Denver performing work in a TDY status.

Relying on our decision at 55 Comp. Gen. 590 (1975), the Corps' Finance and Accounting Office denied Mr. Krom's claim for per diem for the weekend spent in Julesburg, Colorado. In 55 Comp. Gen. 590 (1975), we denied payment of per diem for a 3-day (holiday) weekend to an employee who traveled during work hours on a Friday to report for temporary duty the following Tuesday. Noting the administrative finding that the employee's early departure "was a matter of personal convenience," we discussed the "2-day per diem rule" stating that, "* * * the payment of additional per diem costs for 2 days or more *for the purpose of facilitating an employee's travel during regular duty hours is not considered reasonable.*" We also discussed the so-called "2-day per diem" rule in *George K. Derby*, B-203915, June 8, 1982, where we stated that it, "* * * governs payment of per diem *when an employee delays travel* in order to travel during regularly scheduled working hours * * *." [Italic supplied.]

The facts here are distinguishable from those in 55 Comp. Gen. 590 (1975). Mr. Krom, a nonexempt employee under the overtime provisions of the Fair Labor Standards Act (FLSA), 29 U.S. Code 201 (1976), was ordered by his supervisors to travel as he did and stay in Julesburg for the weekend based upon a management decision that it would be more cost effective to pay Mr. Krom per diem for the weekend than to pay him FLSA required overtime for working on the weekend. In addition, due to the potential cost of having the drilling crew idle, it was administratively determined that Mr. Krom had to start moving the rig Friday, instead of waiting until the following week. Under circumstances such as these, where an employee's traveltime is extended for the calculated pecuniary advantage of the Government rather than for the employee's personal convenience, the "2-day per diem" rule of 56 Comp. Gen. 847 (1977) and 55 Comp. Gen. 590 (1975) limiting per diem does not apply. Accordingly, Mr. Krom may be paid per diem for the Saturday and Sunday during which he was instructed to remain in Julesburg, Colorado.

Claim of James A. Bosch

Mr. Bosch was a drill rig operator and driver with the Corps and was a nonexempt employee under the overtime provisions of the FLSA. He was ordered to drive a heavy duty Government-owned vehicle from Fort Peck, Montana, his TDY station, to his permanent duty station in Omaha, Nebraska. The travel began on Wednesday, September 29, 1982, and Mr. Bosch arrived at Sioux City, Iowa, on Friday, October 1, at 4:30 p.m. Under standing orders requiring prior approval for overtime work, Mr. Bosch was not given approval to continue travel from Sioux City, Iowa, to Omaha, Nebraska, on October 2, 1982, in an overtime status. Instead, Mr. Bosch remained in Sioux City over the weekend and completed his travel between the hours of 7:30 a.m. and 11 a.m. on Monday, October 4.

While it is unclear whether it would have been possible for Mr. Bosch to begin transporting the vehicle on Tuesday instead of

Wednesday thereby preventing the weekend holdover in Sioux City, we nonetheless conclude that since the holdover in Sioux City was based upon orders to avoid overtime work and an administrative determination that the Government would save money if Mr. Bosch stayed over in Sioux City the "2-day per diem rule" of 56 Comp. Gen 847 (1977) and 55 Comp. Gen. 590 (1975) is not applicable. Mr. Bosch may be paid per diem for the weekend of October 2 and October 3, 1982, spent in Sioux City.

The vouchers are returned and payment may be made in accordance with the above.

[B-211812]

Appropriations—Availability—Parking Space

Rule that appropriated funds may not be used to pay for daily parking costs of Federal employees in commercial facilities generally applies to severely disabled employees. An exception is warranted when the condition requires the severely disabled employee to pay substantially higher commercial parking costs than those generally paid by non-disabled employees working at the same building who are able to utilize less expensive facilities at a greater distance.

Appropriations—Availability—Parking Space

Where an exception to the general rule is warranted, appropriated funds can be used to pay the difference between the parking costs the severely disabled employee must pay and those generally paid by nondisabled Federal employees working at the same facility.

Matter of: Use of Appropriated Funds to Pay Commercial Parking Costs of Severely Disabled Employees, March 26, 1984:

The General Services Administration (GSA) asks whether agencies may expend appropriated funds on commercial parking for severely disabled [1] Federal employees when there are no Government-owned or -controlled parking facilities available. For the reasons given below, we find the rule requiring Federal employees to pay for their own parking in commercial facilities is generally applicable to the severely disabled; nevertheless, appropriated funds may be used for such parking when an individual's severely disabled condition requires the individual to pay for commercial parking at a cost more than a *de minimus* amount above that generally paid by other employees working at the same facility.

BACKGROUND

The policies and procedures concerning employee parking on Government-owned or -leased property under the control of GSA

[1] The Federal Property Management Regulations—Temporary Regulation D-69 defines a "Handicapped employee" as one who has "a severe, permanent impairment which for all practical purposes precludes use of public transportation, or an employee who is unable to operate a car as a result of permanent impairment who is driven to work by another." 48 Fed. Reg. 16272, § 8(d)(1). For our purposes, the definition applies to those who are severely disabled.

set forth priorities for agency assignment of spaces to employees for private parking. Severely disabled employees have the highest priority. Temp. Reg. D-69, 48 Fed. Reg. 16272, § 11(c). Currently no charge for parking on such property is required.

There are no similar procedures, however, pertaining to space assignments for severely disabled employees working in a commercial space leased by the Government which does not include Government-owned or -controlled parking facilities. In those situations, when an agency requires commercial parking, it requests GSA to lease the necessary accommodations. The Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. §§ 471, 490(h)(1), among other things, allows the GSA Administrator to enter into lease agreements for periods not in excess of 20 years "on such terms as he deems to be in the interests of the United States and necessary for the accommodation of Federal agencies in buildings and improvements * * * and to assign and reassign space therein to Federal agencies." Once GSA leases the parking space, the requesting agency then uses its appropriated funds to reimburse GSA for the costs.

In the past, before GSA granted a request for parking, the agency involved was required to certify to GSA that the parking was needed to employ and retain personnel to perform agency work and thereby avoid a significant impairment of agency operational efficiency. This was the standard set forth in GSA order PBS 7030.2B, para. 10c (April 18, 1968), and adopted in 49 Comp. Gen. 476, 478-80 (1970). In 1977 that order was amended. One of the changes was to eliminate the "substantial impairment" language. Although GSA still uses the substantial impairment standard, it no longer requires agencies to make the certification required under the old order. It assumes that the agencies themselves use the same standard before requesting space, however.

GSA has informed us that in many leased buildings the provision of parking facilities would not be vital to the hiring and retention of the workforce as a whole, but that the absence of such facilities might impede the hiring and retention of severely disabled employees who must use their own automobiles, particularly those employees occupying lower-level positions in large metropolitan areas. In support of its position, GSA suggests that expenditure of appropriated funds for commercial parking (1) would be a reasonable accommodation to severely disabled employees under section 501 of the Rehabilitation Act of 1973, as amended, 29 U.S.C. § 791, to enable them to occupy positions for which they are qualified where the cost of the commercial parking is prohibitive; (2) would aid in the hiring and retention of severely disabled individuals; and (3) would be tantamount to an authorized reimbursement for parking incident to official business. GSA states that the parking could be provided either by reimbursement to the employee or through procurement of space by the Government for the employee. GSA also states that payments for such parking at GSA would not be burdensome as the number of employees involved in small. We will consider GSA's first two arguments generally in the discussion below. We will respond specifically to its third point at the end of our discussion.

DISCUSSION

The basic policy of the Government with respect to employee parking is that ordinarily it is the employee's responsibility to furnish transportation to and from the place of employment or duty, and if an employee chooses to use a private automobile for such purpose, the Government is under no obligation to provide a parking space. 43 Comp. Gen. 131, 132 (1963). As discussed in the Background section, in the past exceptions have been warranted when the parking was required to avoid a significant impairment of agency operating efficiency. 49 Comp. Gen. 476, 479–80 (1970). In the case presented, GSA has suggested that use of appropriated funds to pay for the parking is not necessary to avoid a significant impairment of agency operating efficiency for its work force as a whole. As there is no statute authorizing use of appropriated funds for the parking described, and the GSA standard approved by us in 49 Comp. Gen. 476, 478–80, has not been met, we must determine whether there is a sufficiently strong governmental interest in assisting the severely disabled to permit an exception to the general rule requiring Federal employees to pay for their own parking in commercial facilities.

The President and the Congress have committed the Federal Government both to employ and to prohibit discrimination against the handicapped. *See,* for example, Executive Order No. 11480 of September 9, 1969, 34 Fed. Reg. 14273, 29 U.S.C. § 791 note (1976), establishing the President's Committee on Employment of the Handicapped. A number of pieces of legislation have been enacted to effect this commitment, including, among others, the Rehabilitation Act of 1973, as amended, 29 U.S.C. §§ 701 and following; the Education of the Handicapped Act, as amended, 20 U.S.C. §§ 1401 and following; and the Urban Mass Transportation Act of 1964, as amended, 49 U.S.C. § 1612.

The Rehabilitation Act of 1973 established a national policy of bringing disabled citizens into the mainstream of American life. H.R. Rep. No. 1279, 96th Cong., 2d Sess. 4 (1980). Among other things, the Act set up a Federal Interagency Committee on Handicapped Employees. In cooperation with the Civil Service Commission (now a function handled by the Equal Employment Opportunity Commission), one of the Committee's purposes is to review, on a periodic basis, the adequacy of hiring, placement, and advancement practices for handicapped employees in the Executive Branch of the Federal Government and to insure that the special needs of handicapped employees are being met. 29 U.S.C. § 791(a). The Act also requires that Executive Branch agencies prepare affirmative action program plans for the hiring, placement, and advancement of handicapped individuals, including in the plans a description of the extent to which the special needs of the handicapped are being met and the methods used therefor. *Id.* § 791(b).

In 1980, the Congress reaffirmed its commitment to assist handicapped Federal employees by enacting legislation which, among other things, establishes an Architectural and Transportation Barriers Compliance Board. Pub. L. No. 96–523, December 12, 1980. The Board is responsible, as one of its duties, for insuring accessibility by the handicapped to federally occupied or funded buildings and facilities. It was authorized "to consider ways in which travel expenses in connection with transportation to and from work for handicapped individuals can be met or subsidized when such individuals are unable to use mass transit systems or need special equipment in private transportation * * *." *Id* § 792(c). This authority could well include agency payment of parking costs.[2]

The commitment to assist the handicapped has been reflected in GAO decisions as well. In some early decisions, we had concluded that illness or physical disability provided no basis for increasing the cost of transportation or travel expenses to be paid by the Government. *See, e.g.,* 27 Comp. Gen. 52 (1947). Recently, however, we have made exceptions for the benefit of the handicapped. 56 Comp. Gen. 661, 662 (1977) (travel and per diem expenses of an attendant are necessary travel expenses incident to a handicapped employee's travel); 56 Comp. Gen. 398 (1977) (Social Security Administration could use its appropriations to reimburse handicapped employee for cost of a motorized wheelchair where the Administration violated standards under the Architectural Barriers Act and a nonpowered wheelchair could not be used); 55 Comp. Gen. 800 (1976) (travel expenses of attendant accompanying handicapped employee to awards ceremony for honorary recognition of handicapped employee are necessary expenses under 5 U.S.C. § 4503).

Notwithstanding the strong Government commitment to facilitate employment of the handicapped, we do not think a general exception to the rule requiring Federal employees to pay for commercial parking is warranted for severely disabled employees when the benefit conferred is primarily economic, and, for the most part, is not directly related to ameliorating access-to-work impediments arising from a severely disabled condition. For example, in large urban areas where no Government-owned or -controlled parking facilities are available and where parking costs are high, it is possible that substantial numbers of non-handicapped employees work-

[2] The Board, however, has told us informally that it has not yet made such a proposal.

ing at the same facility and receiving the same salaries as the severely disabled would have to pay the same parking costs.

On the other hand, there may well be circumstances in which an agency could find that an individual's severely disabled condition requires that individual to park in a particular commercial lot, presumably close to the place of work, at a cost substantially above that paid by non-handicapped Federal employees working at the same facility. In this regard, the non-handicapped employees either could use other means of transportation to and from work that are cheaper, or pay less for parking because they are able to park in lots farther from the place of work, neither of which alternatives would be available to the severely disabled employee. When this occurs, we think the higher costs paid by the severely disabled employee would be directly related to that employee's condition, and could frustrate the hiring and retention of such persons. In those situations, even in the absence of specific legislation, we think the Government's general commitment to the handicapped would be sufficiently strong to allow an exception to our general rule requiring employees to pay for their parking.

Accordingly, where an individual's severely disabled condition is the principal reason that he or she must pay parking costs more than a *de minimus* amount above the costs paid by non-handicapped employees for parking, we think appropriated funds can be used to pay the difference. An agency's determination that severely disabled employees must pay substantially greater amounts for parking than is usually paid by other employees can be made on the basis of a general survey of available parking facilities near its building. It would not be necessary for an agency to ascertain how much each of its employees actually spends for parking.

It remains to address GSA's suggestion that expenditure of appropriated funds on commercial parking at the regular work place of a severely disabled employee can be equated to a reimbursement for official business authorized by 5 U.S.C. § 5704. The purpose of a reimbursement under section 5704 is to compensate employees for parking as part of the mileage and related allowances for travel incurred on official business. Thus, when an agency makes payments under that section, it is not paying for the parking space, but is reimbursing its employees for travel expenses. B-162020, July 6, 1973. The parking costs under consideration have nothing to do with travel on official business: they are incident to an employee's commute to and from the regular place of business. For a variety of reasons, including the Government's potential liability for damage or injury incurred by an employee acting within the scope of employment, we think it is unwise to suggest that while commuting to and from the regular place of work, a severely disabled employee is on official business.