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Contents

Preface

This volume cumulates the digests of the decisions of the Comptroller General of the United States which were rendered during the period October 1, 1986, to September 30, 1991, and published in the annual volume Nos. 66 through 70. The decisions establish legal precedents, and this book has been compiled to enable researchers to locate these precedents.

The need for cumulative digests and indexes to the decisions of the accounting officers was first recognized in 1852, when the decisions of the Office of the Second Comptroller of the Treasury, which had accumulated from its establishment in 1817, were put in a convenient digested form so that government officers, as well as persons doing business with the government, might be apprised of the legal opinions involving public contracting procedures, the construction of federal statutes, and the receipt and expenditure of federal funds.

The format of this volume is similar to that followed in the previous 5-year index digest of decisions. The digests of the decisions point up both the facts and the legal conclusions of each decision. All digests on the same subject have been collected and classified under class topics arranged alphabetically. These topics are listed on the Contents page. Following each digest is a reference to the volume and page in which the decision appears. For example, 66:707 refers to volume 66 and the figures after the colon identify the page on which the decision begins.

Tables to these published decisions, the laws, court opinions and other references cited in the Decisions of the Comptroller General begin on page 463.

Table of Decision Numbers

List of Claimants, etc.

Appropriations/Financial Management

Accountable Officers
■ Account deficiency
■■ Check cashing
■■■ Adjustments
■■■■ Administrative discretion

Agencies have the discretion under 31 U.S.C. § 3342 to refuse to adjust a disbursing officer's account for check cashing and other accommodation exchange losses. GAO will view that discretion as properly exercised when the agency cannot determine that official acted in good faith or with due care. Cases indicating that adjusting accounts under section 3342 is dependent upon such a finding, 27 Comp. Gen. 211 (1947), 61 Comp. Gen. 649 (1982), B-82565, June 1, 1949; B-82108, Jan. 17, 1949, are modified.

70:616

■ Account deficiency
■■ Check cashing
■■■ Adjustments
■■■■ GAO review

When an agency decides not to adjust a disbursing official's account for a loss from cashing an uncollectible check under 31 U.S.C. § 3342, the case must be sent to GAO for review as an erroneous payment under 31 U.S.C. § 3527.

70:616

■ Account deficiency
■■ Check cashing
■■■ Losses
■■■■ Adjustmemts

Deficiencies in an accountable officer's account from cashing uncollectible checks do not have to be treated as either physical losses or erroneous payments to adjust the accounts for the deficiencies. Under 31 U.S.C. § 3342, which authorizes check cashing, agencies have independent authority to adjust the officers' account for such losses. Prior cases, 27 Comp. Gen. 211 (1947), 61 Comp. Gen. 649 (1982), B-82565, June 1, 1949; B-82108, Jan. 17, 1949, indicating that such losses must be submitted to GAO as erroneous payments under 31 U.S.C. § 3527 are modified.

70:616

■ Cashiers
■■ Liability
■■■ Physical losses

Relief from liability for an unexplained loss may not be granted pursuant to 31 U.S.C. § 3527(a) (1988) to the Alternate Class B Cashier of the Embassy in The Hague where the request was based solely upon the fact that, under applicable State Department procedures, she was not qualified to hold that post. However, the Class B Cashier for whom she was the Alternate is jointly and several-

ly liable with her for the loss because he was responsible for determining the Alternate's qualifications before he entrusted imprest funds to her.

70:389

■ **Cashiers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Fraud**

Under the provisions of 31 U.S.C. § 3527(c), we deny relief to a Veterans Administration cashier who accepted for deposit a fraudulently negotiated draft and who later permitted withdrawal from a patron's account amounts credited for these deposits. The cashier negligently failed to follow printed instructions to call the bank for an authorization number before cashing. Had the cashier followed the instructions, clearly printed on the draft, the cashier would not have accepted the drafts for deposit and permitted subsequent withdrawals of the supposed deposits.

68:371

■ **Cashiers**
■■ **Relief**
■■■ **Physical losses**

Relief from liability for an unexplained loss may not be granted pursuant to 31 U.S.C. § 3527(a) (1988) to the Alternate Class B Cashier of the Embassy in The Hague where the request was based solely upon the fact that, under applicable State Department procedures, she was not qualified to hold that post. However, the Class B Cashier for whom she was the Alternate is jointly and severally liable with her for the loss because he was responsible for determining the Alternate's qualifications before he entrusted imprest funds to her.

70:389

■ **Cashiers**
■■ **Relief**
■■■ **Physical losses**
■■■■ **Theft**

Relief for the physical loss of funds due to theft is denied imprest fund cashier under 31 U.S.C. § 3527(a) (1988). The cashier failed to follow regulations requiring that the safe combination and key be stored in a secure manner, and thus was negligent. The evidence does not support a determination that the cashier's negligence did not contribute to the theft.

70:12

■ **Certifying officers**
■■ **Liability**
■■■ **Payments**

Certifying officer is not liable for payment he originally certified because payment was not illegal, improper or fraudulent. At the time of certification, payment was based on a thorough joint investigation and final administrative decision.

67:386

■ Certifying officers
■■ Liability
■■■ Waiver
■■■■ Statutory regulations

Questions concerning (1) the financial liability of an authorized certifying official arising out of the performance of his official duties, (2) the relief of a certifying official's financial liability as authorized by law and (3) the compromise of any debt found due and owing to the United States arising out of the failure of an authorized certifying official to properly perform his duties, are not subject to resolution under the Department of State's grievance procedures since they fall outside its jurisdiction as specified by law.

67:457

■ Certifying officers
■■ Relief
■■■ Illegal/improper payments
■■■■ Overpayments

The False Claims Act and the Program Fraud Civil Remedies Act specify the government's rights to collect damages and penalties from employees who submit fraudulent travel expense claims. Agency actions to recoup fraudulent overpayments of subsistence expense claims from fraudulent payees should be taken in light of those Acts and other applicable statutes and regulations. Prior decisions advising agencies to recoup from fraudulent payees both the fraudulent overpayments and non-fraudulent subsistence expenses claimed for any day tainted by the fraudulent claim are overruled. 41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are overruled in part.

70:464

■ Determination criteria

The Department of Health and Human Services is advised that where agency policies (1) prohibit an employee from personally retrieving from the agency cashier payments authorized for travel advances or expense reimbursements, and (2) mandate the use of agency messengers to retrieve those amounts, the messenger becomes the agent of the government and the employee will not be liable for amounts received by the messenger unless and until those funds are actually delivered to the employee.

67:402

■ Determination criteria

National Forest Volunteer Collection Agents who sell permits and collect user fees in National Forests are subject to the provisions of 31 U.S.C. § 3527(a) pertaining to relief from liability of accountable officials and agents for certain types of physical losses or deficiencies of public funds. 62 Comp. Gen. 339 (1983) is superseded.

68:470

■ **Disbursing officers**
■■ **Records management**
■■■ **Computer software**

The provisions of 31 U.S.C. § 3528(a)(1) governing the responsibilities of a certifying official and 31 U.S.C. § 3325(a) governing the responsibilities of a disbursing official would not preclude Treasury disbursing officials from using an automated software system to correct addresses and ZIP Codes contained in certified payment vouchers to qualify checks processed for mailing for reduced Postal Service rates.

69:85

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Computer software**

In the rare event that a disbursing official incurs liability for an improper payment that results from the use of a reliable automated address and ZIP Code correction software system, we may relieve a disbursing official from liability under the provisions of 31 U.S.C. § 3527. If relief is to be granted, the improper payment cannot result from bad faith or a lack of due care. Disbursing officials can demonstrate due care by showing that the automated system made payments that were accurate and legal, functioned properly, and was reviewed at least annually to ensure its effectiveness.

69:85

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Computer software**

Because the liability of disbursing officials for improper payments is governed by federal statutory provisions contained in 31 U.S.C. § 3325(a) and 31 U.S.C. § 3527 a proposed memorandum of understanding between the Treasury and client agencies to shield Treasury disbursing officials from liability for improper payments would be ineffectual.

69:85

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Overpayments**

Administrative acquiescence by certain Department of State (Department) officials is not a basis for relieving authorized certifying official of personal liability for intentionally certifying improper payments resulting in loss to the United States. The Department officials notified of his actions were not in the certifying officer's direct chain of command and may not have had authority to reverse his action or had knowledge that it was improper.

67:458

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Overpayments**

Payroll Branch Chief who certified voucher (SF-1166) Voucher and Schedule of Payments) based upon memorandum voucher certified by her supervisor (an authorized certifying official) is justified in relying upon the information certified by her supervisor and is not responsible for the correctness of the facts set forth in supervisor's certification.

67:458

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Overpayments**

Bureau of Indian Affairs certifying official is relieved of liability pursuant to 31 U.S.C. § 3528(b)(1)(B) for certifying payments that were not proper under the appropriation. However, BIA should take appropriate action to resolve the amount owed the government as a result of the improper payments.

70:723

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Substitute checks**

Army disbursing official, asked to issue new checks to payee where original checks are held by former business associate of payee, may issue new checks but will be responsible for loss if payee regains first checks and cashes old and new checks. This Office may grant him relief once a loss occurs. If payee voluntarily provides indemnity for such a loss, disbursing official may accept.

66:192

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Substitute checks**

When an accountable officer is issuing 4,671 replacement checks because the original checks were lost in a bulk shipment, it is premature to request relief, in advance, for any loss due to payment of both original and substitute checks. First, we cannot grant relief until a loss occurs. Second, any loss might be recovered by collection action or through a claim under the Government Losses in Shipment Act. A loss must occur and the factual record must be complete before we will address relieving liability.

70:9

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Substitute checks**

Relief from liability for improper payment resulting from payee negotiating original and successor checks is granted Department of Navy disbursing officer under 31 U.S.C. § 3527(c) (1988). Disbursing officer's failure to obtain the required "Statement of the Claimant" from payee before issuing a successor check was not the proximate cause of the loss and provides us with no basis on which to deny relief.

70:298

■ **Disbursing officers**
■■ **Relief**
■■■ **Illegal/improper payments**
■■■■ **Substitute checks**

Relief from liability for improper payment resulting from payee negotiating original and successor checks is granted Department of Navy disbursing officer under 31 U.S.C. § 3527(c) (1988). Disbursing officer exercised reasonable care in issuing successor check to payee since Navy's regulations authorized her to do so under the circumstances and the record indicates that she neither knew nor had reason to know that payee had negotiated original check.

70:298

■ **Disbursing officers**
■■ **Substitute checks**
■■■ **Issuance**
■■■■ **Authority**

Army disbursing official, asked to issue new checks to payee where original checks are held by former business associate of payee, may issue new checks but will be responsible for loss if payee regains first checks and cashes old and new checks. This Office may grant him relief once a loss occurs. If payee voluntarily provides indemnity for such a loss, disbursing official may accept.

66:192

■ **Disbursing officers**
■■ **Substitute checks**
■■■ **Issuance**
■■■■ **Authority**

Authority of Secretary of Treasury to authorize issuance of substitute checks applies to lost, stolen, destroyed or mutilated checks, not to circumstances where location of checks is known and they have not been stolen.

66:193

■ **Disbursing officers**
■■ **Substitute checks**
■■■ **Issuance**
■■■■ **Authority**

The Navy has authority to waive its requirement to obtain written statements of nonreceipt from check payees before issuing successor checks. The delay in waiting for such statements will likely cause financial hardship to allotment payees. Therefore, under the circumstances in this case, a Navy Disbursing Officer's issuance of successor checks without first obtaining signed statement from original check's payees is not evidence of a lack of due care.

70:9

■ **Illegal/improper payments**
■■ **Determination**

When an accountable officer cashes a check outside the scope of his statutory authority under 31 U.S.C. § 3342, the payment of the check is an erroneous payment. If the check is uncollectible, under 31 U.S.C. § 3527(c), only GAO may grant relief for the deficiency in the accountable officer's account.

70:420

■ **Liability**
■■ **Check cashing**
■■■ **Account deficiency**
■■■■ **Statutes of limitation**

GAO responds to a number of questions about the effect of the 3-year statute of limitations on agencies' abilities to collect amounts from accountable officers who are responsible for losses or erroneous payments out of their accounts.

70:616

■ **Liability**
■■ **Debt collection**

Where an improper certification of payments of pay was intentionally made by an authorized certifying officer, resulting in overpayments of pay to 25 Foreign Service National employees in the amount of $17,899.89, and only $6,699 was recovered after Department of State (Department) improperly reduced the indebtedness following employee's filing of grievance under Foreign Service statutory grievance procedures, the Department must attempt to recover uncollected balance of debt.

67:457

■ **Liability**
■■ **Debt collection**
■■■ **Amount determination**

Accountable officers should have their liability for improperly paying fraudulent travel subsistence expense claims determined on the basis of the actual fraudulent overpayments made. Accountable officers are strictly liable for losses of government funds under their control. Under the False

Claims Act and the Program Fraud Civil Remedies Act, the government's loss for paying fraudulent subsistence claims is the amount overpaid due to the fraud. Accountable officers' liabilities also should be limited to those overpayments. Prior cases which included in the officer's liability non-fraudulent expenses claimed for the same day as fraudulent expenses are modified. 41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are modified in part. 65 Comp. Gen. 858 (1986); B-217114.3, Feb. 10, 1987; B-217114, Mar. 26, 1987; B-217114, Feb. 29, 1988; B-217114, Aug. 12, 1988; B-217114.5, June 8, 1990; B-217114.6, July 24, 1990, are modified.

70:463

■ **Liability**
■■ **Debt collection**
■■■ **Amount determination**

The False Claims Act and the Program Fraud Civil Remedies Act specify the government's rights to collect damages and penalties from employees who submit fraudulent travel expense claims. Agency actions to recoup fraudulent overpayments of subsistence expense claims from fraudulent payees should be taken in light of those Acts and other applicable statutes and regulations. Prior decisions advising agencies to recoup from fraudulent payees both the fraudulent overpayments and non-fraudulent subsistence expenses claimed for any day tainted by the fraudulent claim are overruled. 41 Comp. Gen. 285 (1961) and 57 Comp. Gen. 664 (1978) are overruled in part.

70:464

■ **Liability**
■■ **GAO authority**

A Bureau of Indian Affairs accountable officer is personally liable for making erroneous payments from an individual Trust Account. Making a corrective payment from Operation of Indian Programs fund does not remove the liability for the original erroneous payment, but it does not create additional liability for the accountable officer making the corrective payment. The first accountable officer's liability for the erroneous payment can only be extinguished by recovering the amount paid out or by a grant of relief from the appropriate authority.

67:342

■ **Liability**
■■ **GAO authority**

The Department of Health and Human Services is advised that where agency policies (1) prohibit an employee from personally retrieving from the agency cashier payments authorized for travel advances or expense reimbursements, and (2) mandate the use of agency messengers to retrieve those amounts, the messenger becomes the agent of the government and the employee will not be liable for amounts received by the messenger unless and until those funds are actually delivered to the employee.

67:402

■ **Liability**
■■ **Statutes of limitation**
■■■ **Effective dates**
■■■■ **Illegal/improper payments**

The Air Force did not toll the statute of limitations on an accountable officer's liability for an erroneous payment under 31 U.S.C. § 3526 by attempting to hold an accountable officer liable for a physical loss. Only GAO may toll the statute of limitations by suspending an item within an account under 31 U.S.C. § 3526(g).

70:420

■ **Relief**
■■ **Account deficiency**

CIA accountable officer denied relief where shortage appeared in his account during a long period when he was isolated from his supervisors and required to devote long hours in a sensitive overseas post doing logistics, administrative and finance work. A heavy work load is not a basis for relief.

67:6

■ **Relief**
■■ **Account deficiency**

When an accountable officer cashes a check outside the scope of his statutory authority under 31 U.S.C. § 3342, the payment of the check is an erroneous payment. If the check is uncollectible, under 31 U.S.C. § 3527(c), only GAO may grant relief for the deficiency in the accountable officer's account.

70:420

■ **Relief**
■■ **Illegal/improper payments**
■■■ **Agency request**
■■■■ **Submission time periods**

An accountable officer's account, including a deficiency from an erroneous payment made when a check was improperly cashed, is settled by operation of law upon the passing of the 3-year statute of limitations in 31 U.S.C. § 3526. The agency did not submit the questioned item to GAO until more than three years after both (1) the officer signed over responsibility for the account and (2) the loss was discovered.

70:420

■ **Relief**
■■ **Physical losses**
■■■ **Theft**

An accountable officer's hotel room was burglarized while he was sleeping, after he had locked its door, and the cash and other items were out of sight. The hotel did not have a safe deposit box available, either in the hotel room or at the front desk, and locked containers were not otherwise available. We concur with the agency's administrative determinations that he was acting in the dis-

charge of his official duties, and that he was not negligent. Thus, we grant relief from liability for the physical loss of funds under 31 U.S.C. § 3527 (1988).

69:586

■ **Relief**
■■ **Physical losses**
■■■ **User fees**

National Forest Volunteer Collection Agents who sell permits and collect user fees in National Forests are subject to the provisions of 31 U.S.C. § 3527(a) pertaining to relief from liability of accountable officials and agents for certain types of physical losses or deficiencies of public funds. 62 Comp. Gen. 339 (1983) is superseded.

68:470

Appropriation Availability
■ **Amount availability**
■■ **Antideficiency prohibition**
■■■ **Violation**

The Office of the Assistant Secretary for Administration and Management violated 31 U.S.C. §§ 1301 and 1532 when it used appropriated funds of nine agencies within the Department of Labor (Department) to purchase computer equipment for a communications system in amounts in excess of actual costs of equipment provided eight of the agencies. Although the Economy Act and 31 U.S.C. § 1534 authorize transfers between agencies to fund certain shared activities or needs, the Department's cost allocation methodology exceeded the authority granted by these statutes because it required several agencies to subsidize costs allocable to Departmental Management and the Pension Benefit Guaranty Corporation appropriations.

70:592

■ **Amount availability**
■■ **Antideficiency prohibition**
■■■ **Violation**

Twenty-year agreement between the United States Information Agency (USIA) and a West German copyright agency was only valid for the first year of the agreement since USIA had no authority to enter into a multi-year agreement under a 1-year appropriation. The agreement violated the Antideficiency Act, 31 U.S.C. § 1341, since it created obligations in advance of appropriations.

66:556

■ **Amount availability**
■■ **Augmentation**
■■■ **Commercial carriers**
■■■■ **Computer equipment/services**

The ICC did not improperly augment its appropriations by allowing private carriers to install computer equipment at the ICC's headquarters. The computers are used to give both the public and ICC staff access to tariffs which are electronically filed by the carriers. The ICC has broad statutory

authority to prescribe the form and manner in which carriers must file tariffs and make them available to the public. Requiring carriers to provide computer equipment to access electronic tariff information is within the ICC's authority. However, the ICC should adopt the controls necessary to reasonably assure that the equipment is used only to access the tariff information.

70:597

■ **Amount availability**
■■ **Augmentation**
■■■ **Gifts/donations**
■■■■ **Advertising**

The United States Information Agency (USIA) is authorized to accept donations of radio programs from private syndicators for broadcast over Voice of America facilities in view of its broad statutory discretion to accept conditional gifts. And in the absence of any statutory prohibition on broadcasting commercials, we cannot say it is unlawful that a gift of programs is conditioned on the broadcast of commercial advertising. However, GAO notes longstanding federal policy concerns against this practice and suggests that before adopting a policy that would permit acceptance of advertising without explicit authority, USIA consider consulting with appropriate committees of Congress.

67:90

■ **Amount availability**
■■ **Augmentation**
■■■ **Maintenance/operation accounts**
■■■■ **Cost allocation**

The U.S. Army Civilian Appellate Review Agency (USACARA) does not improperly augment its appropriations by directly charging to another Army activity's funding authority travel and per diem costs incurred to investigate civilian employee grievances. The direct citation of another activity's funding authority is authorized because in most situations the "Operation and Maintenance, Army" appropriation account provides all the funds. However, where more than one Army appropriation account is involved, 31 U.S.C. § 1534 authorizes the allocation of common service type costs among the appropriation accounts.

70:601

■ **Amount availability**
■■ **Augmentation**
■■■ **Maintenance/operation accounts**
■■■■ **Cost allocation**

USACARA's open ended authority to cite another activity's funds for travel and per diem costs incurred when investigating civilian employee grievances is not improper since amounts involved are relatively small and activities can assure that funds are available by reserving sufficient amounts to cover estimated travel and per diem costs.

70:601

■ **Amount availability**
■■ **Augmentation**
■■■ **Miscellaneous revenues**
■■■■ **Child care services**

Reimbursement of costs associated with the provision of space allotted under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is authorized by paragraph 139(b)(2) to be made to the miscellaneous receipts or any other appropriate account of the Treasury. Section 139 does not expressly authorize funds received as reimbursement to be credited to agency appropriations. Payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must, therefore, be deposited in the Treasury as miscellaneous receipts or result in an improper augmentation of Air Force appropriations.

67:444

■ **Amount availability**
■■ **Augmentation**
■■■ **User fees**

The ICC has satisfied the requirement in 40 U.S.C. § 303b that it charge carriers for the space used by the carrier's computer equipment placed within the ICC's headquarters. ICC already charges the carriers user fees under 31 U.S.C. § 9701. The record shows that the user fees compensate the ICC for the space used by the computers. GAO will not use section 303b to examine the nature of a fee established within the proper use of ICC's discretion under section 9701.

70:597

■ **Amount availability**
■■ **Augmentation**
■■■ **User fees**

The Forest Service may pay county landfill user fees as a reasonable service charge, analogous to other utility services provided the government, since the charge is based on levels of service provided and appears nondiscriminatory.

70:687

■ **Amount availability**
■■ **Fiscal-year appropriation**
■■■ **Dislocation allowances**

Service members who commenced permanent change-of-station moves between October 1 and December 19, 1985, were entitled to a dislocation allowance at a rate equal to 2 months' basic allowance for quarters. Funds appropriated for the Department of Defense by fiscal year 1986 continuing resolution for that period remained available for payment of the dislocation allowance to those service members at that rate, even though the regular appropriation act of December 19, 1985, reduced the rate at which the allowance could be paid.

67:475

■ **Claim settlement**
■■ **Deobligated balances**
■■■ **Availability**

The Nuclear Regulatory Commission can use available deobligated fiscal year 1987 funds to pay an award of attorneys' fees and expenses under the Equal Access to Justice Act that could not be paid from fiscal year 1988 funds by virtue of a restriction contained in its fiscal year 1988 appropriations act since deobligated no-year appropriations are available for obligation on the same basis as if they were unobligated balances of no-year appropriations.

67:554

■ **Claim settlement**
■■ **Fiscal-year appropriation**
■■■ **Availability**

For purposes of determining the availability of fiscal year 1987 funds to pay Equal Access to Justice Act awards for attorneys' fees and expenses that, by virtue of the restriction in section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. 1329-129, could not be paid from fiscal year 1988 funds, the Nuclear Regulatory Commission (NRC) should subtract its total obligations incurred since the effective date of its fiscal year 1987 appropriations act from the amount of the fiscal year 1987 appropriation. If the amount of funds obligated is less than the amount of the 1987 appropriation, the NRC should consider the difference as the amount of the fiscal 1987 appropriation still available for obligation to pay the award. Conversely, the NRC should consider itself as operating on fiscal year 1988 funds if the obligated amount is greater than the fiscal year 1987 appropriation.

67:553

■ **Purpose availability**
■■ **Appropriation restrictions**
■■■ **Leasehold improvement**

The Federal Aviation Administration may award a contract for permanent improvements to a leasehold because Congress has specifically appropriated money for the alterations. The appropriation is thus available despite the policy prohibition against government improvements to privately owned property.

69:673

■ **Purpose availability**
■■ **Attorney fees**

Department of Interior employee was charged with prohibited personnel practices by Merit Systems Protection Board Agency, upon determining that employee's conduct was within the scope of her employment, may use appropriated funds to pay reasonable costs of employee's legal representation in the administrative proceedings.

67:37

■ **Purpose availability**

■■ **Attorney fees**

The Forest Service may not use appropriated funds to reimburse a federal employee for attorney's fees and other expenses incurred as a defendant in a criminal proceeding that was prosecuted by the Department of Justice. The reimbursement of attorney's fees is not predicated on the outcome of judicial proceedings and is not available where the fees incurred do not advance the interests of the United States.

70:628

■ **Purpose availability**

■■ **Attorney fees**

Appropriated funds of the Smithsonian Institution are not available to provide litigative services to federal employees unless the Attorney General determines that representation of the employee would be in the interest of the United States but cannot be provided by the Justice Department. Based on the record submitted to this Office, we conclude that the Smithsonian should not have used appropriations to finance the legal defense of a Department of the Interior employee detailed to the Smithsonian who became the subject of multiple federal civil and criminal investigations, and should not spend any additional appropriated funds for this purpose unless the Justice Department, based on evidence not made available to us, certifies that representing this employee is in the government's interest.

70:647

■ **Purpose availability**

■■ **Business cards**

The Forest Service, United States Department of Agriculture, may not pay for "identification" cards used by its public affairs officers. The "identification" cards are no different from business or calling cards. The purchase of these cards has always been viewed as a personal expense which may not be paid for with appropriated funds, in the absence of specific statutory authority.

68:467

■ **Purpose availability**

■■ **Contracts**

The Federal Aviation Administration may award a contract for permanent improvements to a leasehold because Congress has specifically appropriated money for the alterations. The appropriation is thus available despite the policy prohibition against government improvements to privately owned property.

69:673

■ **Purpose availability**

■■ **Credit cards**

■■■ **Fees**

Under 16 U.S.C. § 460*l*-6a(f) (1982), the Department of Agriculture (USDA) may allow credit card companies to deduct their commissions from the proceeds of commercial credit card transactions charged to the public for "reservation services." However, without additional statutory authority,

commissions on credit card transactions for other kinds of USDA services or fees must be paid from current operating appropriations.

67:48

■ **Purpose availability**
■■ **Debt conversion**
■■■ **Foreign currencies**

Unless otherwise authorized, the United States Information Agency (USIA) may not use appropriated funds to engage in "debt for equity" swaps to fund educational and cultural exchange activities. The authority contained in the Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2451, to finance educational and cultural exchange activities by "grant, contract, or otherwise" does not include the authority to purchase discounted foreign debt from commercial lenders.

70:413

■ **Purpose availability**
■■ **Fitness centers**
■■■ **Membership fees**

Under 5 U.S.C. § 7901 (1988), federal agencies may establish preventive health service programs to promote and maintain the physical and mental fitness of their employees. Moreover, regulations issued by the Office of Personnel Management to implement section 7901 specifically authorize agencies to establish and operate "physical fitness programs and facilities designed to promote and maintain employee health." Federal Personnel Manual (FPM), ch. 792 (Inst. 261, Dec. 31, 1980), as amended by FPM letter 792-15 (April 14, 1986). As such, we conclude 5 U.S.C. § 7901 and its implementing regulations authorize the Department of Defense, Defense Medical Systems Support Center to use appropriated funds to provide its employees access to a private fitness center's exercise facilities.

70:190

■ **Purpose availability**
■■ **Health services**

Under 5 U.S.C. § 7901, federal agencies have authority to establish smoking cessation programs for their employees and to use appropriated funds to pay the costs incurred by employees participating in these programs. However, before such programs can be implemented, the Office of Personnel Management would have to amend the Federal Personnel Manual to add smoking cessation as a prevention activity that agencies can include as part of the health services program they provide their employees. 64 Comp. Gen. 789 (1985) is modified accordingly.

68:222

■ **Purpose availability**
■■ **Lump-sum appropriation**
■■■ **Administrative discretion**
■■■■ **Charities**

An agency may use its administrative discretion to spend a reasonable portion of appropriated funds to provide its employees with the opportunity to contribute to the Combined Federal Cam-

paign (CFC). Such an expenditure furthers governmental interests because the CFC is a legitimate, government-sanctioned charity fund-raising campaign.

67:254

■ **Purpose availability**
■■ **Mandatory use**
■■■ **Grants**

The Bureau of Justice Assistance is required to make certain specified grant awards under earmark provisions contained in its fiscal year 1988 appropriation act. Should the Bureau not award these grants, it would constitute an impoundment and trigger the reporting requirements of the Impoundment Control Act.

67:401

■ **Purpose availability**
■■ **Mandatory use**
■■■ **Grants**

The Veterans Rehabilitation and Education Amendments of 1980, which established the Disabled Veterans Outreach Program (DVOP), required each state accepting DVOP funds to use those funds to hire the number of DVOP specialists as calculated in accordance with a statutory formula. 38 U.S.C. § 2003A. Department regulation, however, which instructed the states that their Employment Service grant funds would also have to finance DVOP, did not earmark any part of the grant funds for this program. Consequently, this Office sees no basis to question states' expenditures of grant funds on otherwise appropriate grant activities even though the DVOP did not operate at the level anticipated.

69:600

■ **Purpose availability**
■■ **Necessary expenses rule**

Expenditure for refreshments at a ceremony, conducted under the authority of the Government Employees' Incentive Awards Act, in recognition of an Internal Revenue Service employee's appointment as Director's representative, is permissible as a "necessary expense" under 5 U.S.C. § 4503. This expenditure may be charged to the Internal Revenue Service's operating appropriation, regardless of that appropriation's lack of provision for entertainment or representation expenses.

66:536

■ **Purpose availability**
■■ **Necessary expenses rule**

Agency expenditure for seasonal decorations as necessary expenses may be properly payable where purchase is consistent with work-related objectives, agency or other applicable regulations, and the agency mission, and is not primarily for the personal convenience or satisfaction of a government employee. Agency must also determine that seasonal decorations are appropriate in light of constitutional considerations. GAO advises agencies to establish guidelines to prevent abuse in this area. 52 Comp. Gen. 504 (1973) is overruled and 60 Comp. Gen. 580 (1981) is modified to conform with this decision.

67:87

■ **Purpose availability**
■■ **Necessary expenses rule**

Under proper circumstances, outplacement assistance to employees is a legitimate matter of agency personnel administration. Therefore, appropriations for the Defense Nuclear Agency (DNA) may be available in reasonable amounts to enroll an employee in a course entitled "Strategy of Career Transition," if the DNA determines such enrollment to be a necessary expense of the agency.

68:127

■ **Purpose availability**
■■ **Necessary expenses rule**

Under 31 U.S.C. § 1348, an agency may pay long distance telephone charges only when required "for official business" and certified as "necessary in the interest of the Government." The Soil Conservation Service may not reimburse the telephone company for charges incurred by an unidentified computer hacker; the agency may pay for charges incurred during an investigation to identify the hacker, however, as incident to the operations of the agency.

70:643

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Advertising**

Due to the commercial nature of the commemorative coin program, GAO would not object to Treasury's use of coinage profit funds to host promotional functions and to give occasional coins at public events. *See* B-206273, Sept. 2, 1983. GAO also would not object to the giving of coins as goodwill gestures to customers whose orders have been mishandled. Based on our prior decisions, however, GAO would object to the printing of business cards for sales representatives. *See* Comptroller General decisions cited.

68:583

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

The U.S. Sentencing Commission does not have authority under its authorization or current appropriation acts to establish a meritorious awards program since such a program could not be considered a "necessary expense" in light of the fact that Congress in other acts has specifically legislated for meritorious award expenses, indicating that such expenditures should not be incurred except by its express authority.

66:650

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

A voucher presented by the Defense Depot, Richmond, Virginia, for the purchase of telephones for use as career service or honorary awards may be certified for payment since such purchase is a proper expenditure of the agency's appropriated funds under provisions of the Government Employ-

ees' Incentive Awards Act, 5 U.S.C. §§ 4501–4506 (1982), as implemented by Department of Defense and Office of Personnel Management (OPM) instructions. However, approval of an incentive awards program for reduced usage of sick leave is the responsibility of OPM, and OPM has recommended against such approval.

67:349

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

The Railroad Retirement Board may elect to use either its general appropriations or the separate appropriation supporting its Office of Inspector General (OIG) to pay performance awards to members of the OIG's Senior Executive Service. When one can reasonably construe two appropriations as available for an expenditure, we will accept an administrative determination as to which appropriation to charge; once the Board has made its selection, it must continue to use that appropriation.

68:337

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

Section 503 of title 14, United States Code, does not provide authority similar to 5 U.S.C. § 4503 to pay monetary incentive awards for superior accomplishments to military members of the Coast Guard who were members of a group comprised of military members and civilian employees that was given a group award.

68:343

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

The spouse of an employee was issued invitational travel orders to attend a Departmental Awards Ceremony honoring the employee. Her travel expense claim may be paid. Under 5 U.S.C. § 4503 (1982), each agency head has the discretion to determine the award to be given and the ceremony commensurate with that award and to incur necessary expenses to that end. If the agency determines that the presence of the employee's spouse would further the purposes of the awards program, travel expenses for the spouse may be considered a "necessary expense" under 5 U.S.C. § 4503. 54 Comp. Gen. 1054 (1975) is overruled.

69:38

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

Employees attending regional awards ceremony sponsored by the local Federal Executive Board may be reimbursed the cost of the luncheon and related expenses under the Incentive Awards Act.

70:16

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Awards/honoraria**

The Government Employees Incentive Awards Act, 5 U.S.C. §§ 4501–4514, provides no authority for the Internal Revenue Service (IRS) to purchase T-shirts for employees contributing certain amounts to the Combined Federal Campaign.

70:248

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Identification tags**

An agency may use appropriated funds to purchase employee identification tags which, unlike calling or business cards, are not personal in nature and are reasonably necessary to the operations of the agency.

69:129

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Prizes**

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

70:720

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Training**
■■■■ **Career counseling**

Under proper circumstances, outplacement assistance to employees is a legitimate matter of agency personnel administration. Therefore, appropriations for the Defense Nuclear Agency (DNA) may be available in reasonable amounts to enroll an employee in a course entitled "Strategy of Career Transition," if the DNA determines such enrollment to be a necessary expense of the agency.

68:127

■ **Purpose availability**
■■ **Necessary expenses rule**
■■■ **Trust funds**
■■■■ **Reimbursement**

Pursuant to the authority contained in 31 U.S.C. § 1552(a)(2), Department of Veterans Affairs (VA) may credit the Personal Funds of Patients Trust Account, Boston Medical Center, for a deficiency resulting from a 1979 erroneous payment from the unobligated balance of its 1979 expired appropriations because VA is liable for the loss and because under the circumstances we consider the covering of the loss a necessary expense of administering the trust account.

68:600

■ **Purpose availability**
■■ **Office space**
■■■ **Use**
■■■■ **Child care services**

The Secretary of the Air Force may, under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1323 (1985), *codified at* 40 U.S.C. § 490b (Supp. III 1985), provide support for child care centers for the children of civilian employees by authorizing the allotment of space under his control in government buildings, as well as the services delineated in paragraph 139(b)(3), and may do so without charge. The support provided may include the cost of making the space suitable for child care facilities, including the cost of renovation, modification or expansion of existing government-owned or leased space.

67:443

■ **Purpose availability**
■■ **Office space**
■■■ **Use**
■■■■ **Child care services**

The authority of the Secretary of the Air Force to allocate space for child care centers under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is limited to the allotment of existing space in government-owned or leased buildings. Section 139 does not grant independent authority to enter new leases for child care facilities, and we are aware of no legislation that specifically authorizes the Air Force to do so for civilian child care centers.

67:444

■ **Purpose availability**
■■ **Office space**
■■■ **Use**
■■■■ **Child care services**

The authority of the Secretary of the Air Force to allot space and to make it suitable for child care facilities under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is applicable to existing

space in federal buildings. This authority extends to the expansion of existing space in military child care centers in government buildings to accommodate the children of civilian employees.

67:444

■ **Purpose availability**
■■ **Office space**
■■■ **Use**
■■■■ **Child care services**

The General Services Administration (GSA) may lease space or construct buildings specifically for child care facilities if there is insufficient space available for such purposes in its existing inventory. The Trible amendment, 40 U.S.C. § 490b, authorizes officials controlling space in federal buildings to provide space for child care facilities if, among other requirements, "such space is available." Because a restrictive reading of the "space available" language (in light of the limited existing inventory of appropriate space in federal buildings) would effectively preclude GSA from providing space for child care; and because the legislative history of the Federal Credit Union Act, upon which the Trible amendment is modeled, indicates that the "space available" language was not intended to limit agency ability to provide facilities for credit unions, we interpret the statute as permitting GSA to acquire space to make it available for child care facilities. To the extent it is inconsistent with this decision, 67 Comp. Gen. 443 (1988) is overruled.

70:210

■ **Purpose availability**
■■ **Permanent/indefinite appropriation**
■■■ **Travel expenses**

Balancing of congressional travel clearing account on the books of the Department of the Treasury Financial Management Service where clearing account was not reimbursed with funds appropriated to the Congress for that purpose by charging permanent appropriation enacted after travel expenses were incurred is authorized by 2 U.S.C. § 102a, which provides that unpaid obligations which are more than 2 fiscal years old and which are chargeable to withdrawn unexpended balances of congressional accounts are to be liquidated with current appropriations for the same purpose.

67:119

■ **Purpose availability**
■■ **Public buildings**
■■■ **Use**
■■■■ **Credit unions**

The Internal Revenue Service may provide an automatic teller machine at its own expense to the Federal Credit Union located at its Atlanta Service Center. Section 124 of the Federal Credit Union Act (12 U.S.C. § 1770) generally authorizes government agencies to provide space and "services" to credit unions without charge. Section 515 of Public Law 97-320, which added definition of "services" to 12 U.S.C. § 1770, was clearly enacted in response to prior Comptroller General decisions holding "special services" unauthorized. As amended, statute is now sufficiently broad to encompass special services, including an automatic teller machine, if administratively determined to be necessary.

66:356

■ **Purpose availability**
■■ **Representational funds**
■■■ **Foreign service personnel**
■■■■ **Personal expenses/furnishings**

The State Department may use representation funds to reimburse costs incurred by Embassy officers in renting formal evening dress required of staff accompanying Ambassador in presenting his credentials to the Queen.

68:638

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Educational programs**

Unless otherwise authorized, the United States Information Agency (USIA) may not use appropriated funds to engage in "debt for equity" swaps to fund educational and cultural exchange activities. The authority contained in the Mutual Educational and Cultural Exchange Act, 22 U.S.C. § 2451, to finance educational and cultural exchange activities by "grant, contract, or otherwise" does not include the authority to purchase discounted foreign debt from commercial lenders.

70:413

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Entertainment/recreation**

Federal agencies may expend appropriated funds for registration fees required for attendance at state-sponsored conferences even though registration includes identifiable cost of a social event so long as the social event cost is a mandatory non-separable element of the registration fee.

66:350

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Entertainment/recreation**

Expenditure for refreshments at a ceremony, conducted under the authority of the Government Employees' Incentive Awards Act, in recognition of an Internal Revenue Service employee's appointment as Director's representative, is permissible as a "necessary expense" under 5 U.S.C. § 4503. This expenditure may be charged to the Internal Revenue Service's operating appropriation, regardless of that appropriation's lack of provision for entertainment or representation expenses.

66:536

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Entertainment/recreation**

A federal agency may not use operating appropriations to purchase or pay contractors for gifts, meals, or receptions for foreign and domestic participants in U.S. government-sponsored cooperative activities under international agreement. Official reception and representation funds are available

for official entertainment but may not be used for entertainment in connection with an unauthorized activity.

68:226

■ Purpose availability
■■ Specific purpose restrictions
■■■ Entertainment/recreation

U.S. Department of the Interior appropriations for the operation of the National Park System may be used to reimburse the Golden Spike National Historic Site imprest fund for the cost of musical entertainment provided at the Site's 1988 Annual Railroader's Festival. Under 16 U.S.C. § 1a-2(g), the Secretary of the Interior may contract for interpretive demonstrations at Park Service sites. The Golden Spike National Historic Site commemorates the 1869 completion of the first U.S. transcontinental railroad and the musical entertainment was representative of nineteenth century railroad and western U.S. music. We have no basis for questioning the agency's judgment that there was a meaningful nexus between the music and the purpose of the Golden Spike site. Further, the music was part of a program determined by the agency to advance the commemoration of Golden Spike, and was not elaborate or extravagant.

68:544

■ Purpose availability
■■ Specific purpose restrictions
■■■ Entertainment/recreation

Music and other artistic events may constitute interpretative demonstrations at National Park Service (NPS) sites for which appropriated funds may be used. While our decisions provide some criteria for determining the propriety of entertainment expenses, we do not believe that a single rule can delineate the circumstances under which music and other artistic events constitute interpretative demonstrations. Rather, whether a particular event sufficiently interprets an NPS site must be determined on a case-by-case basis. Therefore, to assist NPS units in determining when entertainment may constitute an interpretative demonstration for an NPS site, we recommend that the NPS adopt guidelines consistent with our decisions.

68:544

■ Purpose availability
■■ Specific purpose restrictions
■■■ Entertainment/recreation

U.S. Army School of the Americas may use official representation funds to pay for a change of command/incoming commander reception since the reception was an official function rather than a purely private social one and the use of official representation funds is consistent with Army regulations.

69:242

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Federal executive boards**
■■■■ **Financing**

A governmentwide restriction against using appropriate funds from more than one agency to finance boards or commissions applies to Federal Executive Boards (FEBs), which do not have specific authority that would overcome the restrictions. However, one agency may lawfully pay the Board's expenses in a particular region if that agency has a substantial stake in the outcome of the interagency venture and the success of the interagency undertaking furthers the agency's own mission, programs, or functions. The Office of Personnel Management, which has oversight responsibility for the establishment and guidance of FEBs, would not usually be the appropriate agency to assume the financing burden since its role may not involve any direct participation in FEB activities, once a particular Board is established.

67:27

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Federal executive boards**
■■■■ **Financing**

A governmentwide restriction against using appropriate funds from more than one agency to finance boards or commissions, such as Federal Executive Boards, prohibits both cash and in-kind financial support such as contributions of supplies or staff support, but agency participation at Board meetings does not constitute financial support of the Board as a separate entity.

67:28

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Interagency program funding**
■■■■ **Charities**

An interagency financing scheme to administer the Combined Federal Campaign (CFC) in the Ogden, Utah area in fiscal year 1985 was prohibited by a general prohibition on such financing enacted by the Congress for that fiscal year and each subsequent year. Because this scheme required payment to support a separate organization established to provide CFC services to all participating agencies, the amounts of which did not necessarily correspond to the value of the goods or services actually received by each agency, it also fails to qualify as an exception to the statutory prohibition in 31 U.S.C. § 1532, known as the "Economy Act" which permits one federal agency to provide goods or services for another federal agency on a reimbursable basis.

67:255

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Lotteries**

National Oceanic and Atmospheric Administration's (NOAA) proposal to pay cash prizes to selected individuals providing information about certain fish is intended to further NOAA's acquisition of that information and its statutorily required research. The proposal thus satisfies a requirement for an authorized purpose for the use of appropriated funds under 31 U.S.C. § 1301(a) (1988) and our related cases. However, NOAA's proposal contains certain elements of a lottery which may be prohibited by certain federal statutes, state laws, and regulations. NOAA therefore is advised to consult with the Department of Justice and other appropriate agencies to ensure that its proposal is not a prohibited lottery before spending appropriated funds as proposed.

70:720

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Meals**

Customs Service may not pay for cost of catered meal provided federal employees attending Customs Service sponsored meeting of United States-Bahamas Working Group, an interagency task force. Absent specific statutory authority, federal employees may not be paid per diem or actual subsistence at headquarters regardless of any unusual working conditions. *See* cases cited. *Gerald Goldberg, et al.*, B-198471, May 1, 1980, is not applicable to situations involving routine business meetings at headquarters.

68:604

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Meals**

U.S. Army may not pay for meals provided to employees at internal Army meeting within employees' official duty station. Although 5 U.S.C. § 4110 authorizes the payment for cost of meals where cost of meals is included in registration or attendance fee, 38 Comp. Gen. 134 (1958), or, in limited circumstance, where the cost of meals is separately charged, *Gerald Goldberg, et al.*, B-198471, May 1, 1980, this provision has little or no bearing upon purely internal business meetings or conferences sponsored by government agencies. 46 Comp. Gen. 135 (1966).

68:606

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Meals**

Employees attending regional awards ceremony sponsored by the local Federal Executive Board may be reimbursed the cost of the luncheon and related expenses under the Incentive Awards Act.

70:16

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Membership fees**

The prohibition in 5 U.S.C. § 5946 against the use of appropriated funds to pay the membership dues of a federal employee in a society or association does not prohibit a federal agency from using appropriated funds to purchase access for its employees to a private fitness center's exercise facilities.

70:191

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Personal expenses/furnishings**

Purchase of steel toe safety shoes by a District Office of the Internal Revenue Service (IRS) for a supply clerk whose work includes movement of heavy objects with various equipment is authorized under Section 19 of the Occupational Safety and Health Act (OSHA) of 1970, if such footwear is administratively determined to be necessary for safety reasons to protect the clerk from the possibility of foot injury. As a federal agency the IRS is subject to OSHA regulations and must satisfy standards set by the Secretary of Labor for personal protective equipment.

67:104

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Personal expenses/furnishings**

Voice of America radio broadcaster who rented a tuxedo for the purpose of attending an official function where formal dress was mandatory, may not be reimbursed from public funds if it is shown that attendance at such functions was part of his regular duties and that formal attire was a personal furnishing which the employee may reasonably be required to provide at his own expense. If, on the other hand, formal dress is required only rarely for radio broadcasters at comparable positions in his agency, the rental expense may be reimbursed. Because there was conflicting factual information in the report submitted with the employee's request for reconsideration of the denial of his claim for reimbursement, GAO sets out the applicable principles and instructs the agency to pay or deny the claim, depending on how the conflicting information is resolved.

67:592

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Personal expenses/furnishings**

The State Department may use representation funds to reimburse costs incurred by Embassy officers in renting formal evening dress required of staff accompanying Ambassador in presenting his credentials to the Queen.

68:638

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Personal expenses/furnishings**

The IRS may not use appropriated funds to purchase T-shirts for employees contributing certain amounts to the Combined Federal Campaign. The T-shirts are personal gifts and, as they are not essential to the accomplishment of an authorized purpose, the expenditure does not constitute a necessary and proper use of appropriated funds.

70:248

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Personal expenses/furnishings**
■■■■ **Utility services**

Agencies may not reimburse federal employees participating in a mandatory work-at-home program the incremental costs of utilities associated with the residential workplace, because such costs cannot be said to primarily benefit the government. *See* 68 Comp. Gen. 502 (1989). We find no compelling reason to distinguish between mandatory and voluntary programs.

70:631

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Personal expenses/furnishings**
■■■■ **Utility services**

In the absence of statutory authority, appropriated funds may not be used for items that are the personal expenses of an employee. Exceptions to this rule have been permitted where the item primarily benefits the government. IRS employees participating in a work-at-home program may not be reimbursed for the incremental costs of utilities associated with the residential workplace, because such costs cannot be said to primarily benefit the government.

68:502

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Publicity/propaganda**

The Department of State's Office of Public Diplomacy for Latin America and the Caribbean utilized deceptive covert propaganda to influence the media and the public to support the Administration's Latin American policies. The use of deceptive propaganda constituted a violation of a restriction in State's annual appropriation act on the use of funds for publicity or propaganda not authorized by the Congress.

66:707

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Publicity/propaganda**

The Department of State's Office of Public Diplomacy for Latin America and the Caribbean (S/LPD) established a close mutually supportive relationship with a public interest group, Citizens for America (CFA) which is a nationwide fund raising and grass roots lobbying organization for Nicaraguan contra causes. S/LPD provided CFA with a great deal of information. However, we were unable to establish that any funds were expended on such information so as to violate the applicable anti-lobbying statute, 18 U.S.C. § 1913.

66:707

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Publicity/propaganda**

An agency may use its administrative discretion to spend a reasonable portion of appropriated funds to provide its employees with the opportunity to contribute to the Combined Federal Campaign (CFC). Such an expenditure furthers governmental interests because the CFC is a legitimate, government-sanctioned charity fund-raising campaign.

67:254

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Telephones**

The National Park Service may use appropriated funds to install private telephone service in residence of employee who was required to temporarily vacate his government-furnished residence for about 2-1/2 months during renovation. It is doubtful that Congress intended to preclude payment in such cases when enacting 31 U.S.C. § 1348(a)(1) (1982), which generally prohibits the payment of any expense in connection with telephone service installed in a private residence. *Airman First Class Vernell J. Townzel,* B-213660, May 3, 1984, overruled.

68:307

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Utility services**
■■■■ **Use taxes**

9-1-1 Emergency Number Fee imposed by Hillsborough County, Florida, is actually a tax, levied to support the municipal service of access to fire and police, etc. The fee has all the same characteristics as Maryland and Texas 9-1-1 fees previously disallowed in 64 Comp. Gen. 655 and B-215735, Sept. 26, 1986. The fact that the telephone company is buying 9-1-1 equipment and selling it to the county government is not sufficient to distinguish this case on the grounds that 9-1-1 access is a service provided by the telephone company to its customers.

66:385

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Utility services**
■■■■ **Use taxes**

United States Department of the Interior can pay a surcharge levied indiscriminately against the United States, commercial businesses, and private residences, pursuant to a Utah Public Service Commission lifeline telephone service program that provides discounted residential telephone rates for Utah residents eligible for various public assistance programs. Discrimination by a public utility in setting its rates is not unlawful when based upon a classification corresponding to economic differences among its consumers.

67:220

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Utility services**
■■■■ **Use taxes**

Surcharge assessed by telephone service providers to implement Utah Public Service Commission's lifeline telephone service program by which lower income individuals receive less expensive service is not a tax, but part of an authorized rate for telephone services. The surcharge represents a partial redistribution of costs incurred by telephone service providers whereby the poorer users pay less for their services. 64 Comp. Gen. 655 (1985) distinguished.

67:221

■ **Purpose availability**
■■ **Specific purpose restrictions**
■■■ **Utility services**
■■■■ **Use taxes**

The Forest Service may pay county landfill user fees as a reasonable service charge, analogous to other utility services provided the government, since the charge is based on levels of service provided and appears nondiscriminatory.

70:687

■ **Purpose availability**
■■ **Training expenses**
■■■ **Career counseling**

The Government Employees Training Act (Act) applies to civilian employees and, by its own terms, does not apply to active duty members of the uniformed services. 5 U.S.C. § 4102(a)(1)(C). Therefore, the Act does not bear on the authority of the Defense Nuclear Agency to spend appropriated funds to enroll a Colonel on active duty in the Air Force in a course entitled "Strategy of Career Transition." B-223447, Oct. 10, 1986; B-195461, Oct. 15, 1979; and B-167156, July 10, 1969, clarified.

68:127

■ **Specific purpose restrictions**
■■ **Account balances**
■■■ **Cancelled checks**
■■■■ **Procedures**

Treasury checks issued to pay benefits provided under the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, and expenses incurred by the Railroad Retirement Board in administering RUIA are subject to the check cancellation and disposition procedures in 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, by virtue of the comprehensive language "all Treasury checks" in section 3334(b).

70:705

■ **Specific purpose restrictions**
■■ **Account balances**
■■■ **Cancelled checks**
■■■■ **Statutory interpretation**

The operative language of 31 U.S.C. § 3334(b), as added by section 1003 of the Competitive Equality Banking Act of 1987, and statutory provisions governing the use of funds in accounts established by the Railroad Unemployment Insurance Act (RUIA), 45 U.S.C. §§ 351-369, are not irreconcilable. The provisions of RUIA do not address the cancellation and disposition of uncashed Treasury checks issued against the RUIA accounts and hence, under applicable canons of statutory construction, the procedures specified in section 3334(b), the general law on the subject, apply.

70:706

■ **Specific purpose restrictions**
■■ **Utility services**
■■■ **Use taxes**

9-1-1 Emergency Number Fee cannot be paid as a service charge because the reasonable value of the service to the United States has not been calculated. Additionally, the computation of the fee as a flat rate per telephone line per month is itself an indication that the charge is not a user charge, but rather a tax.

66:385

■ **Time availability**
■■ **Bona fide needs doctrine**
■■■ **Applicability**
■■■■ **Multi-year appropriation**

The Defense Technical Information Center does not violate the *bona fide* needs rule by charging purchases to a 2-year appropriation during the second year of its availability. Requisitions by the Defense Technical Information Center represented *bona fide* needs arising within the 2-year period for which the appropriation was intended and obligations may be made to the extent funds remain available.

68:170

■ **Time availability**
■■ **Fiscal-year appropriation**
■■■ **Claim settlement**
■■■■ **Interest**

Effective December 22, 1987, interest on backpay claims applies to periods before and after that date and is chargeable to the same appropriations and in the same manner as is the backpay upon which the interest is paid.

69:41

■ **Time availability**
■■ **Fiscal-year appropriation**
■■■ **Claim settlement**
■■■■ **Retroactive compensation**

Agency should charge backpay claims awarded pursuant to an administrative determination to the fiscal year or years to which the award related.

69:40

■ **Time availability**
■■ **Fiscal-year appropriation**
■■■ **Contract modification**

Fiscal year 1982 Shipbuilding and Conversion (Navy) appropriation, available for obligation through fiscal year 1986, may not be used beyond original period of availability to fund replacement contract for two vessels deleted from original contract by a modification initiated by the Navy in order to prevent possible rejection of the contract under section 365 of the Bankruptcy Code by a contractor who had filed in bankruptcy for reorganization. Originally obligated funds remain available for replacement contract to complete unfinished work only when failure of performance is beyond the agency's control. Modification here was an essentially voluntary act on the part of the Navy. Cost of replacement contract is therefore chargeable to appropriations current at the time the replacement contract was made.

66:625

■ **Time availability**
■■ **Fiscal-year appropriation**
■■■ **Relocation service contracts**

Amounts the Veterans Administration (VA) pays to a third party relocation firm under a contract with the firm for purchasing transferred employees' old residences should be paid from appropriations available when the purchase order under the contract is awarded. The VA typically incurs these discretionary expenses a year or two after a transfer is authorized, and thus they reflect new contractual commitments not based on preexisting obligations.

66:554

■ **Time availability**
■ ■ **Fiscal-year appropriation**
■ ■ ■ **Replacement contracts**

Funds originally obligated in one fiscal year, for a contract that is terminated for convenience in response to a court order (or a determination by the General Accounting Office or other competent authority) that the contract award was improper, remain available in a subsequent fiscal year to fund a replacement contract, provided the original contract was awarded in good faith, the agency has a continuing *bona fide* need for the goods or services involved, and the replacement contract is awarded without undue delay and on the same basis as the original contract. 60 Comp. Gen. 591 (1981) is modified accordingly.

68:158

■ **Time availability**
■ ■ **Fiscal-year appropriation**
■ ■ ■ **Replacement contracts**

When a contracting officer terminates a contract for the convenience of the government as a result of his or her determination that the award was clearly erroneous, the funds originally obligated for that contract remain available for a replacement contract awarded in a subsequent fiscal year, provided the conditions specified in 68 Comp. Gen. 158 are satisfied and the contracting officer's determination of improper award is supported by findings of fact and law. 68 Comp. Gen. 158, clarified.

70:230

■ **Time availability**
■ ■ **Fiscal-year appropriation**
■ ■ ■ **Substitute checks**

An agency may, in issuing replacement checks for pre-effective date checks canceled under the provisions of Public Law 100-86, charge the original appropriation that supported the obligation to the extent funds remain available.

70:416

■ **Time availability**
■ ■ **Fiscal-year appropriation**
■ ■ ■ **Travel expenses**

The reimbursable relocation expenses of transferred service members should be charged as an obligation against the appropriation current when their permanent change-of-station orders are issued, and their rights to reimbursement vest when the change-of-station move is then performed under those orders. Payment of the reimbursable expenses should be made from the appropriation so obligated, rather than some other appropriation that may later be current when the travel is completed and the claim for reimbursement is processed.

67:474

■ **Time availability**
■■ **Fiscal-year appropriation**
■■■ **Unobligated balances**

Under a sequestration order issued by the President under Pub. L. No. 99-177, the Balanced Budget and Emergency Deficit Control Act of 1985, the Railroad Retirement Board reduced monthly payments made under the Dual Benefit Payments Account (Federal Windfall Subsidy). Excess amounts not required to be sequestered remained in the account but were not disbursed prior to the end of fiscal year 1986. Because the excess amounts were not included in any of the monthly payments made in fiscal year 1986, they did not constitute a part of the beneficiaries' entitlements, and therefore are not available for disbursement after the end of fiscal year 1986. See 62 Comp. Gen. 521 (1983).

66:364

■ **Time availability**
■■ **Fiscal-year appropriation**
■■■ **Unobligated balances**

The unobligated balance of an expired appropriation to implement extended educational assistance benefits mandated by 38 U.S.C. § 1662(a)(3) (1988) and 29 U.S.C. § 1721 note (1988) may be used by the Department of Veterans Affairs (VA) to satisfy a court order (or a proposed settlement agreement) which requires VA to entertain new applications and reconsider the eligibility of veterans improperly denied benefits under those acts. The unobligated balance of VA's appropriations may be used to provide the mandated benefits pursuant to 31 U.S.C. §§ 1502(b) and 1553(a), as amended by section 1405 of the National Defense Authorization Act for Fiscal Year 1991, Pub. L. No. 101-510, 104 Stat. 1485, 1675-80 (Nov. 5, 1990).

70:225

■ **Time availability**
■■ **Permanent/indefinite appropriation**
■■■ **Determination criteria**

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

70:351

■ **Time availability**
■■ **Time restrictions**
■■■ **Advance payments**

The Veterans Administration's advance purchase of coupons, which are redeemable for cash if unused, for use in procuring medical articles would not violate the prohibition against advances of public money, because it would fall within the exception in 31 U.S.C. § 3324(d) for "charges for a publication printed or recorded in any way for the auditory or visual use of the agency."

67:491

■ **Time availability**
■■ **Time restrictions**
■■■ **Advance payments**

Payments for McDonald's gift certificates and movie tickets, which will be redeemed at a later date for their full value, are not in violation of the advance payment prohibition in 31 U.S.C. § 3324, provided that adequate administrative safeguards for the control of the certificates and tickets are maintained, the purchase of the certificates and tickets is in the government's interest, and the certificates and tickets are readily redeemable for cash.

70:701

■ **Time availability**
■■ **Time restrictions**
■■■ **Fiscal-year appropriation**

Twenty-year agreement between the United States Information Agency (USIA) and a West German copyright agency was only valid for the first year of the agreement since USIA had no authority to enter into a multi-year agreement under a 1-year appropriation. The agreement violated the Antideficiency Act, 31 U.S.C. § 1341, since it created obligations in advance of appropriations.

66:556

■ **Time availability**
■■ **Time restrictions**
■■■ **Fiscal-year appropriation**

Proposed multiyear contract for the supply, storage, and rotation of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA) is not permissible. The Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B) (1982), prohibits multiyear procurement, *i.e.,* a procurement which obligates the United States for future fiscal years, without either multiyear or no-year funding or specific statutory authority. The storage and rotation portion of the proposed contract satisfies neither of those conditions. Nothing in 10 U.S.C. § 2306(a) (1982), cited by DLA, constitutes authority for multiyear procurement. A "subject to availability clause" does not permit a multiyear procurement using annual funds.

67:190

■ **Time availability**
■■ **Time restrictions**
■■■ **Fiscal-year appropriation**

Availability of funds is subject to the new account closing procedures enacted in the National Defense Authorization Act, Fiscal Year 1991. Pub. L. No. 101-510.

70:416

■ **Time availability**
■■ **Time restrictions**
■■■ **Fiscal-year appropriation**
■■■■ **Multi-year appropriation**

The Defense Technical Information Center may use 2-year funds appropriated for fiscal year 1987 for obligations properly incurred in fiscal year 1988. As the appropriation was specifically made available for obligation until September 30, 1988, it could be obligated during the entire 2 years of its availability.

68:170

■ **Time availability**
■■ **Time restrictions**
■■■ **Fiscal-year appropriation**
■■■■ **Training**

The Department of Agriculture, Food and Nutrition Service, may properly charge fiscal year 1989 appropriations for the cost of a training course scheduled to begin the first day of fiscal year 1990 since the course was intended to meet a *bona fide* need of fiscal year 1989, scheduling of the course was beyond the agency's control, and the time between procurement and performance was not excessive.

70:296

■ **Time availability**
■■ **Time restrictions**
■■■ **Fiscal-year appropriation**
■■■■ **Training**

Travel and transportation expenses of temporary duty travel spanning more than one fiscal year should be charged against the appropriations current in the fiscal years in which the expenses are incurred rather than in the fiscal year in which the travel is ordered.

70:469

Budget Process
■ **Child care services**
■■ **Miscellaneous revenues**
■■■ **Treasury deposit**

Reimbursement of costs associated with the provision of space allotted under section 139 of Pub. L. No. 99-190, 99 Stat. 1185, 1324 (1985), is authorized by paragraph 139(b)(2) to be made to the miscellaneous receipts or any other appropriate account of the Treasury. Section 139 does not expressly authorize funds received as reimbursement to be credited to agency appropriations. Payments received by the Air Force for its capital improvement expenditures in providing space for civilian child care centers must, therefore, be deposited in the Treasury as miscellaneous receipts or result in an improper augmentation of Air Force appropriations.

67:444

■ **Conflicting statutes**
■■ **Statutory interpretation**

When two statutes are enacted on the same day, even if there is evidence that one passed several hours after the other, we will not apply the general rule that the later passed statute represents the most recent expression of congressional will and therefore nullifies or supersedes the earlier statute, to the extent that they are inconsistent. Such close proximity in time is forceful evidence that Congress intended the two statutes to stand together.

67:332

■ **Continuing resolutions**
■■ **Statutory interpretation**
■■■ **Congressional intent**

The Defense Security Assistance Agency is authorized to obligate funds in the Special Defense Acquisition Fund (SDAF), 22 U.S.C. §§ 2795-2795b, during the duration of continuing resolutions which do not contain a specific authorization provision for SDAF. The terms of the continuing resolution appropriating foreign assistance funds for fiscal year 1986, Pub. L. No 99-103, § 101(b)(1), make SDAF funds available for obligation, notwithstanding an apparent restriction in the fiscal year 1985 Foreign Assistance and Relations Appropriation Act.

66:484

■ **Continuing resolutions**
■■ **Statutory interpretation**
■■■ **Congressional intent**

When two statutes are enacted on the same day, even if there is evidence that one passed several hours after the other, we will not apply the general rule that the later passed statute represents the most recent expression of congressional will and therefore nullifies or supersedes the earlier statute, to the extent that they are inconsistent. Such close proximity in time is forceful evidence that Congress intended the two statutes to stand together.

67:332

■ **Continuing resolutions**
■■ **Statutory interpretation**
■■■ **Congressional intent**

The funding provision for the Special Defense Acquisition Fund contained in the fiscal year 1985 Foreign Assistance and Relations Appropriations Act, Pub. L. No. 98-473, 98 Stat. 1837, 1884 (1984), was within the scope of the first fiscal year 1986 continuing resolution, Pub. L. No. 99-103, § 101(b)(1).

66:485

■ **Funding**
■■ **Construction contracts**

In overseeing construction of the Federal Triangle Development Project, The Pennsylvania Avenue Development Corporation may have its construction consultants' fees amortized as a cost of construction rather than as an expense of the Corporation because the funds transferred to the Corpo-

ration under the Federal Triangle Development Act were intended to cover start-up costs. The Corporation formally notified the required congressional committees of its plan to amortize these costs as a cost of construction and the committees did not object to this arrangement.

69:289

■ **Funding**
■■ **Contracts**
■■■ **Gifts/donations**

Letters to Representatives Fascell, Garcia and Morella conclude that the Christopher Columbus Quincentenary Jubilee Commission may invest donated funds in non-Treasury, interest-bearing accounts and is not required to comply with the Federal Property and Administrative Services Act or the Federal Acquisition Regulation for contracts financed with donated funds.

68:237

■ **Funding**
■■ **Gifts/donations**
■■■ **Educational programs**

USIA may accept donations of foreign debt for the purpose of funding international educational and cultural activities. Under 22 U.S.C. § 2697, USIA may accept conditional gifts. Congress specifically provided that USIA may hold, invest, reinvest, and use the principal and income from any such conditional gift in accordance with the conditions of the gift to carry out authorized functions.

70:413

■ **Funds**
■■ **Deposit**
■■■ **Miscellaneous revenues**

Internal Revenue Service's short-term undercover operations may be treated as single transactions, and the amount of money that must be deposited into the Treasury as miscellaneous receipts, pursuant to 31 U.S.C. § 3302(b), may be determined at the end of the operation.

67:353

■ **Funds**
■■ **Deposit**
■■■ **Miscellaneous revenues**

The Internal Revenue Service needs specific legislation to carry out long-term business-type undercover operations that regularly offset income against expenditures. Absent this legislation, the failure to deposit receipts into the general fund of the Treasury would conflict with 31 U.S.C. § 3302(b). B–201751, February 17, 1981, clarified.

67:353

■ Funds
■■ Deposit
■■■ Miscellaneous revenues

The Federal Emergency Management Agency (FEMA) may deposit in the National Insurance Development Fund (Fund) that portion of a damage award or settlement obtained pursuant to the False Claims Act that would reimburse the Fund for losses suffered as a result of a policyholder's false claims. In addition to the principal amount of the false claims paid, the Fund may be reimbursed for interest on that amount plus any administrative expenses incurred in connection with the payment and recovery of these claims. However, FEMA must deposit any portion of an award or settlement that exceeds these amounts in the Treasury as miscellaneous receipts.

69:260

■ Funds transfer
■■ Amount availability
■■■ Appropriation restrictions

The Bureau of Indian Affairs (BIA) practice of disbursing to a proper payee before collecting amounts due from an erroneous payee, may result in an overdraft of an Individual Trust Account. Under these circumstances, BIA may avoid an overdraft by using funds from its Operation of Indian Programs appropriations to correct the erroneous payment from the Individual Trust Account.

67:342

■ Funds transfer
■■ Authority

The Office of the Assistant Secretary for Administration and Management violated 31 U.S.C. §§ 1301 and 1532 when it used appropriated funds of nine agencies within the Department of Labor (Department) to purchase computer equipment for a communications system in amounts in excess of actual costs of equipment provided eight of the agencies. Although the Economy Act and 31 U.S.C. § 1534 authorize transfers between agencies to fund certain shared activities or needs, the Department's cost allocation methodology exceeded the authority granted by these statutes because it required several agencies to subsidize costs allocable to Departmental Management and the Pension Benefit Guaranty Corporation appropriations.

70:592

■ Funds transfer
■■ Authority

The U.S. Army Civilian Appellate Review Agency (USACARA) does not improperly augment its appropriations by directly charging to another Army activity's funding authority travel and per diem costs incurred to investigate civilian employee grievances. The direct citation of another activity's funding authority is authorized because in most situations the "Operation and Maintenance, Army" appropriation account provides all the funds. However, where more than one Army appropriation account is involved, 31 U.S.C. § 1534 authorizes the allocation of common service type costs among the appropriation accounts.

70:601

■ **Funds transfer**
■■ **Authority**

USACARA's open ended authority to cite another activity's funds for travel and per diem costs incurred when investigating civilian employee grievances is not improper since amounts involved are relatively small and activities can assure that funds are available by reserving sufficient amounts to cover estimated travel and per diem costs.

70:601

■ **Funds transfer**
■■ **General/administrative costs**
■■■ **Cost allocation**

Section 7(c)(2) of the Railroad Retirement Act of 1974, 45 U.S.C. § 231f(c)(2) (1982), provides for transferring funds between the Social Security trust funds and the Railroad Retirement Account. When computing costs for this purpose, either full costing or incremental costing may be used since administrative cost determinations are left to the discretion of Railroad Retirement Board and Secretary of Health and Human Services.

69:483

■ **Funds transfer**
■■ **Loans**
■■■ **Authority**

Decision by Railroad Retirement Board (Board) to treat transfer of funds from the Railroad Retirement Account (RRA) to the Social Security Equivalent Benefit Account (SSEBA) on October 1, 1984, as a loan from the RRA that the SSEBA was subsequently required to repay with interest is correct. Under 45 U.S.C. § 231n-1, which established the SSEBA as a separate account effective October 1, 1984, to pay social security equivalent benefits due railroad retirees on or after the date, SSEBA is in effect, authorized "to borrow" funds from the RRA if needed to make monthly benefit payments.

66:319

■ **Miscellaneous revenues**
■■ **Applicability**
■■■ **In-kind replacement**

Even though an agency may have a specific appropriation to cover the costs of replacing agency vehicles, the acceptance of in-kind replacement of vehicles damaged beyond repair by a negligent third party in lieu of cash payment does not require the agency to make an offsetting transfer of funds from its current appropriations to the miscellaneous receipts fund of the Treasury in order to comply with the requirements of 31 U.S.C. § 3302(b), since the statute only applies to moneys received for the use of the United States. 22 Comp. Gen. 1133, 1137 (1943) clarified.

67:510

■ **Permanent/indefinite appropriation**

Statutory authority to fund the Commodity Credit Corporation for 1988 and subsequent fiscal years, by means of a current indefinite appropriations is merely an authorization to make appropriations

in that manner. It is not itself an appropriation act and cannot be construed to nullify or supersede line-item appropriations for fiscal year 1988.

67:332

Claims Against Government

■ Burden of proof

■■ Factual issues

Claims or demands against the government which seek payment for supplies or services sold to it must be accompanied by adequate evidence of delivery to or acceptance by an appropriate government official of the goods or services at issue.

67:72

■ Burden of proof

■■ Factual issues

■■■ Credit cards

When settling oil company credit card claims against the United States, conducting audits, or prosecuting false or fraudulent credit card claims, the government needs to be able to satisfy itself, based on the "documents" which evidence those transactions, that an authorized individual used a valid card to properly service or supply an official vehicle engaged on official business.

67:72

■ Burden of proof

■■ Factual issues

■■■ Credit cards

Oil companies participating in the United States Government National Credit Card Program (SF-149) may be permitted to adopt new technologies which result in the elimination of signed paper "delivery tickets" (e.g., credit card charge receipts), if appropriate auditing and accounting controls are maintained and the government's ability to settle claims, conduct audits, and litigate false and fraudulent claims, are otherwise adequately protected.

67:72

■ Burden of proof

■■ Factual issues

■■■ Credit cards

The United States Government National Credit Card Program (SF-149) should be modified to require users of the SF-149 credit card to tender their government "ID" along with the SF-149, so that the station operator can verify the user's name and official status.

67:72

■ **Claim settlement**
■■ **Court decisions**
■■■ **Effects**

Forest Service payment to the state of Oregon and cancellation of billing to the Douglas Fire Protection Association for fire suppression services are unaffected by a subsequent decision of a federal district court in an action brought by a private landowner, which made a different factual finding on the issue of liability. Subsequent court decision imposed no duty on government accounting officer to reopen settlements and reexamine them.

67:385

■ **Claim settlement**
■■ **Missing/interned persons**
■■■ **Applicability**

A claim made under the Missing Persons Act, 5 U.S.C. §§ 5561–5570 (Supp. IV 1986), may be paid since the employing agency made a determination of death, which is supported by the findings of a court of competent jurisdiction, and such finding is conclusive on all other agencies.

67:576

■ **Claim settlement**
■■ **Permanent/indefinite appropriation**
■■■ **Purpose availability**

Based on broad statutory definition, Federal Retirement Thrift Investment Board should be regarded as federal agency for purposes of Federal Tort Claims Act (FTCA). Administrative FTCA settlements of $2,500 or less are payable from Thrift Savings Fund. Administrative settlements greater than $2,500, plus judgments and settlements of lawsuits under the FTCA, are payable from permanent judgment appropriation (31 U.S.C. § 1304) to the extent they represent personal injury or physical property damage. However, liability resulting from program losses, even though tortious in nature, should be governed by statutory provisions on liability and bonding of fiduciaries.

67:142

■ **Deposit accounts**
■■ **Funds**
■■■ **Distribution**
■■■■ **Timber sales**

Deposits or credits established pursuant to contracts for the removal of timber from national forest land should not be included in annual distributions to states under 16 U.S.C. § 500, unless they are earned or offset by the corresponding removal of timber. This decision is based on both generally accepted and specifically applicable accounting principles and on analysis of 16 U.S.C. § 500.

67:388

■ **Grant-funded personnel**
■■ **Privity**

Claim against Administration on Aging (AOA) by former employee of grantee is denied where there is no contract between agency and former grantee employee upon which to base agency liability,

nor is the grantee an agent of the agency for purposes of holding the federal government liable for the actions of the grantee.

66:604

■ **Interest**

The Department of the Interior is without authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error because earnings on contributions are a form of interest not expressly provided for by Interior appropriations and such payments are not otherwise authorized under the Back Pay Act, 5 U.S.C. § 5596.

68:220

■ **Interest**

Because interest is generally not recoverable against the United States in the absence of express authorization by contract or statute, claimant who recovers from the government under the equitable theory of *quantum meruit* is not entitled to interest.

70:664

■ **Past due accounts**
■■ **Liquidated damages**
■■■ **Interest**
■■■■ **Utility services**

The Western Area Power Administration (Western), a Department of Energy electric power marketing agency, may properly assess late payment liquidated damages in the form of interest fees against federal agencies which fail to pay their electric power bills on time. Western has specific authority to fix rates and establish charges in connection with its sales of electric power to all users and therefore is not limited by the Economy Act of 1932 to actual cost charges when furnishing services to other federal agencies.

67:426

■ **Statutes of limitation**

A claim asserted against the United States Navy by the government of the Netherlands may not be paid, because the claim was not actually received at GAO within 6 years after the date on which the claim accrued (i.e., the date when fuel was delivered, not the date on which the Netherlands issued its bill for payment of the fuel), as required by 31 U.S.C. § 3702(b)(1) (1982).

67:52

■ **Statutes of limitation**

GAO may not waive the provisions of 31 U.S.C. § 3702(b)(1) (1982), and lacks the jurisdiction necessary to consider whether a claim barred by operation of that act might be valid under the laws of another country because section 3702(b)(1) is not a mere "statute of limitations," but rather is a "condition precedent" to the right to have the claim considered by GAO.

67:53

■ Statutes of limitation

An employee's claim for backpay, which accrued more than 6 years from the date the claim was filed in GAO, is barred by the 6-year limitation set forth in 31 U.S.C. § 3702(b) (1982). Although the employee argues that the delay in filing the claim with GAO was due to the agency's failure to advise him of his right to appeal its decision to GAO, we have consistently held that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b).

67:467

■ Torts

■■ Government liability

Based on broad statutory definition, Federal Retirement Thrift Investment Board should be regarded as federal agency for purposes of Federal Tort Claims Act (FTCA). Administrative FTCA settlements of $2,500 or less are payable from Thrift Savings Fund. Administrative settlements greater than $2,500, plus judgments and settlements of lawsuits under the FTCA, are payable from permanent judgment appropriation (31 U.S.C. § 1304) to the extent they represent personal injury or physical property damage. However, liability resulting from program losses, even though tortious in nature, should be governed by statutory provisions on liability and bonding fiduciaries.

67:142

■ Unauthorized contracts

■■ Quantum meruit/valebant doctrine

Claims asserted against the United States Navy by the governments of the United Kingdom and Italy (which arose in the course of a routine and continuing series of transactions that hinge directly upon the long-standing, day-to-day relationships of the governments involved) may be paid, despite the absence of supporting official records, because their validity and non-payment have been satisfactorily substantiated.

67:52

■ Unauthorized contracts

■■ Quantum meruit/valebant doctrine

A claim against the Army, arising from its continued use of rental automated data processing equipment and services for nearly a year after the applicable contract had expired, may be paid on a *quantum meruit/quantum valebant* basis. However, since the equipment and services at issue could have been procured under a nonmandatory General Services Administration (GSA) Federal Supply Schedule, the amount of the claim is reduced to that which would have been paid had the items been properly procured under the relevant schedule.

69:13

■ Unauthorized contracts

■■ Quantum meruit/valebant doctrine

Notwithstanding agency failure to comply with procurement regulations in issuing a delivery order for vehicle repairs on a noncompetitive basis, the contractor who performed the repairs may be paid in accordance with the terms of the order.

70:664

■ **Unauthorized contracts**
■■ **Quantum meruit/valebant doctrine**

A claim for repair work ordered by an agency official whose contract warrant had expired may be paid on a *quantum meruit* basis since the government received and accepted the benefit of the work, the claimant acted in good faith, and the amount claimed represents reasonable value of the benefits received.

70:664

■ **Unauthorized contracts**
■■ **Quantum meruit/valebant doctrine**
■■■ **Amount determination**

The Department of Labor may include a fee (or profit) in calculating the amount of a *quantum meruit* payment to Acumenics Research and Technology. To the extent profits are determined to be reasonable and constitute compensation for what the government received under the circumstances, inclusion of profits as an element of value in a *quantum meruit* recovery is not prohibited.

67:507

■ **Witness fees**
■■ **Experts/consultants**

An employee of the Department of Energy (DOE) requested payment for expert witness fees incurred due to a cancellation by the agency of the original hearing date. The payment of the witness fees by DOE may not be allowed in the absence of specific statutory authority.

67:574

Claims By Government
■ **Bonds**
■■ **Forfeiture**
■■■ **Funds**
■■■■ **Use**

Under section 579c of title 16 of the United States Code, proceeds received from bond forfeitures can reimburse general Forest Service Appropriations to the extent of the costs of repairs related to the bond forfeitures. The language of section 579c stating "cover the cost to the United States" for the needed repairs supports this conclusion. Moneys received that exceed these costs should be deposited into the miscellaneous receipts of the Treasury.

67:276

■ **Credit cards**
■■ **Acceptability**

Except where prohibited by statute, agencies may accept commercial credit card transactions in payment for amounts owned to the United States, subject to certain safeguards. However, where the Miscellaneous Receipts Act (31 U.S.C. § 3302(b) (1982) applies, credit card company commissions

must be paid from the agency's current operating appropriations, rather than be deducted from the proceeds of the credit card transaction itself.

67:48

■ **Debt collection**
■■ **Agency officials**
■■■ **Authority**
■■■■ **Waiver**

The Department of Agriculture, Soil Conservation Service, may not terminate collection of a debt arising from underpayment of the Department's proportionate share of a settlement payment made to a grant recipient by its contractor's surety company. Under the Federal Claims Collection Standards, collection action may be terminated if there is no legal basis for recovery by the United States. Because the Department of Agriculture has a significant basis for recovery, it must proceed with collection action.

68:609

■ **False claims**
■■ **Claim settlement**
■■■ **Funds**
■■■■ **Deposit**

The Federal Emergency Management Agency (FEMA) may deposit in the National Insurance Development Fund (Fund) that portion of a damage award or settlement obtained pursuant to the False Claims Act that would reimburse the Fund for losses suffered as a result of a policyholder's false claims. In addition to the principal amount of the false claims paid, the Fund may be reimbursed for interest on that amount plus any administrative expenses incurred in connection with the payment and recovery of these claims. However, FEMA must deposit any portion of an award or settlement that exceeds these amounts in the Treasury as miscellaneous receipts.

69:260

■ **False claims**
■■ **Claim settlement**
■■■ **Interest**

The Federal Emergency Management Agency (FEMA) may deposit in the National Insurance Development Fund (Fund) that portion of a damage award or settlement obtained pursuant to the False Claims Act that would reimburse the Fund for losses suffered as a result of a policyholder's false claims. In addition to the principal amount of the false claims paid, the Fund may be reimbursed for interest on that amount plus any administrative expenses incurred in connection with the payment and recovery of these claims. However, FEMA must deposit any portion of an award or settlement that exceeds these amounts in the Treasury as miscellaneous receipts.

69:260

■ **Interest**

The Forest Service is not required to discontinue the assessment of interest, late payment penalties, or administrative costs pursuant to the Federal Claims Collection Act, as amended, 31 U.S.C. § 3717, during the pendency of an appeal under the Contract Disputes Act.

70:517

■ **Litigation expenses**
■■ **General/administrative costs**

The Forest Service may not include the costs of defending the agency's position in any appeals brought by a contractor or surety pursuant to the Contract Disputes Act as part of the administrative costs assessed under 31 U.S.C. § 3717 against contractors and sureties.

70:517

■ **Past due accounts**
■■ **Debt collection**
■■■ **Penalties**
■■■■ **Interest**

Debts arising under Veterans Administration (VA) programs are not subject to late payment penalties, or any of the other charges prescribed by section 11 of the Debt Collection Act of 1982, 31 U.S.C. § 3717 (1982), since section 3717(g)(1) of that Act defers to previously enacted statutes that cover the same ground. Therefore, unless otherwise provided in the contract under which they arise, delinquent VA program debts may only be assessed the charges provided for under 38 U.S.C. § 3115 (1982).

66:512

Federal Assistance
■ **Bonds**
■■ **Refinancing**
■■■ **Advance payments**
■■■■ **Minority businesses**

Unless it receives adequate legal consideration, the Small Business Administration (SBA) has no authority to agree to a refinancing proposal whereby Minority Enterprise Small Business Investment Companies (MESBICs) would prepay high-interest rate debentures held by SBA for the purpose of refinancing them with new debentures that SBA would agree to purchase at the current lower interest rates. An alternative proposal under which MESBICs would pay a so-called prepayment penalty in the form of a non-interest bearing note payable over a 10-year period as consideration for SBA's reduction of the interest rate on the existing debentures, is not acceptable either because the purported consideration is inadequate.

67:271

■ **Grant recipients**
■■ **Advances**
■■■ **Interest**

In the Urgent Supplemental Appropriations Act, Pub. L. No. 99-349, 100 Stat. 710, 725 (1986), which directed that Syracuse University receive a research grant, Congress did not evidence a clear intent that the University have the benefit of interest earned on grant funds. The general rule therefore applies that interest earned by a grantee on funds advanced by the United States belongs to the United States rather than the grantee and must be paid to the United States. *See* 42 Comp. Gen. 289, 293 (1962).

69:660

■ **Grants**
■■ **Cooperative agreements**
■■■ **Use**
■■■■ **Criteria**

Maritime Administration (MARAD) awarded cooperative agreement for the operation of its Computer Aided Operations Research Facility (CAORF). The CAORF will be operated for MARAD to principally serve its needs and other government agencies. Accordingly, under the Federal Grant and Cooperative Agreement Act, the proper instrument for this type of relationship is a contract and not a cooperative agreement. See cited cases.

67:13

■ **Grants**
■■ **Interest**
■■■ **Computation**

In absence of evidence documenting actual interest earned, Navy properly computed interest by using the 6-month Treasury rate provided in 4 C.F.R. § 102.13(c) (1989). *See* 31 U.S.C. § 3717 (1982).

69:661

■ **Grants**
■■ **State/local governments**
■■■ **Funding levels**

The Veterans Rehabilitation and Education Amendments of 1980, which established the Disabled Veterans Outreach Program (DVOP), required each state accepting DVOP funds to use those funds to hire the number of DVOP specialists as calculated in accordance with a statutory formula. 38 U.S.C. § 2003A. Department regulation, however, which instructed the states that their Employment Service grant funds would also have to finance DVOP, did not earmark any part of the grant funds for this program. Consequently, this Office sees no basis to question states' expenditures of grant funds on otherwise appropriate grant activities even though the DVOP did not operate at the level anticipated.

69:600

Judgment Payments

■ **Attorney fees**

An employee who filed an agency grievance alleging that his reassignment was in retaliation for his whistleblowing, received a favorable settlement but no backpay or other monetary award. Since the grievance did not involve a reduction or denial of pay or allowances, it was not subject to the Back Pay Act, as amended, 5 U.S.C. § 5596 (1982). He may not be reimbursed his attorney fees since there is no statutory or other authority for the payment of attorney fees in connection with an administrative grievance proceeding where there is no backpay or other monetary award.

68:366

■ **Attorney fees**

An employee who settled an agency grievance may not be reimbursed his attorney fees under the Equal Access to Justice Act. The Act only applies to "adversary adjudications" and the agency grievance is not within the statutory definition of an adversary adjudication.

68:366

■ **Attorney fees**
■ ■ **Fiscal-year appropriation**
■ ■ ■ **Availability**

Section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, does not preclude the Nuclear Regulatory Commission (NRC) from using fiscal year 1988 funds to pay a court award of attorneys' fees and expenses under the Equal Access to Justice Act resulting from a party's successful challenge to an NRC rule. The party involved was not an intervenor and section 502 only applies to intervenors.

67:553

■ **Attorney fees**
■ ■ **Fiscal-year appropriation**
■ ■ ■ **Availability**

Section 502 of the fiscal year 1988 Energy and Water Development Appropriations Act, Pub. L. No. 100-202, 101 Stat. at 1329-129, does not preclude the Nuclear Regulatory Commission from using prior year appropriations to pay an award for attorneys' fees and expenses under the Equal Access to Justice Act made in fiscal year 1988 to the extent that such appropriations are available. the restriction in section 502, as amended for fiscal year 1988, would only apply to fiscal year 1988 appropriations and not prior year appropriations.

67:553

■ **Permanent/indefinite appropriation**
■ ■ **Availability**

Back pay claims awarded by judicial determination resulting in a final judgment should be paid from the judgment fund established by 31 U.S.C. § 1304.

69:41

■ **Permanent/indefinite appropriation**
■■ **Availability**

A court order finding defendant agency guilty of discrimination and directing the specific administrative action of developing new, nondiscriminatory employment systems is not a money judgment for which 31 U.S.C. § 1304, the Judgment Fund, is available as a source of funding. The fees and expenses of an expert paid for by defendant agency to help develop the new systems were neither "costs" of the litigation nor part of the plaintiffs' attorney fees. Accordingly, the expert's fees and expenses are properly paid for out of agency appropriations, not the Judgment Fund.

69:160

■ **Permanent/indefinite appropriation**
■■ **Availability**

The Judgment Fund, 31 U.S.C. § 1304 (1988), is not legally available to cover the costs of compliance by the Department of Veterans Affairs with either judgments or proposed compromise settlements that are "injunctive" in nature (i.e., they direct the government to perform or not perform some act).

70:225

■ **Permanent/indefinite appropriation**
■■ **Purpose availability**
■■■ **Real property**
■■■■ **Condemnation**

Use of permanent judgment appropriation, provided by 31 U.S.C. § 1304(a), is inappropriate to pay judgment in favor of Congaree Limited Partnership in *United States v. 14,770.65 Acres of Land,* 616 F. Supp. 1235 (1985) that resulted from condemnation of land for Congaree Swamp National Monument because land acquisition appropriations of the acquiring agency have always, as a matter of law, been available to pay land acquisition judgments, and judgment appropriation is available only when payment is "not otherwise provided for."

66:157

■ **Permanent/indefinite appropriation**
■■ **Purpose availability**
■■■ **Real property**
■■■■ **Condemnation**

Requiring condemnation to be funded through acquiring agency's budget enables Congress to make informed decision with respect to both agency spending levels and pace of land acquisition and recognizes a condemnation is not result of agency wrongdoing but is a normal program activity.

66:157

■ **Permanent/indefinite appropriation**
■■ **Purpose availability**
■■■ **Real property**
■■■■ **Condemnation**

Redwood National Park litigation (B-212681(1), Sept. 27, 1983) is not applicable because Redwood legislation expressly provides for use of judgment fund for amounts in excess of amount deposited with court. Klamath Indian Case (B-198352, April 18, 1980) is also distinguishable because Klamath legislation directed land be acquired by condemnation, and Congress provided line-item appropriation specifically and solely for Klamath condemnation. Legislative history showed Congress recognized appropriation as insufficient.

66:158

■ **Permanent/indefinite appropriation**
■■ **Purpose availability**
■■■ **Real property**
■■■■ **Condemnation**

Congaree acquisition is funded from Land and Water Conservation Fund with annual lump-sum appropriations made, allocated among various projects in committee reports, and these allocations do not create legally binding restrictions. Therefore, "exhaustion of appropriation" cited by Park Service here refers to allocation which can be reprogrammed although process may be inconvenient.

66:158

■ **Permanent/indefinite appropriation**
■■ **Purpose availability**
■■■ **Real property**
■■■■ **Condemnation**

Filing of declaration of taking by government, which vests immediate title in United States and irrevocably commits government to pay resulting judgment, does not render appropriation process unnecessary and would not create another limited exception to traditional treatment of land acquisition judgments. It is a decision taken by acquiring agency and does not permit access to judgment appropriations.

66:158

Obligation
■ **Fiscal-year appropriation**
■■ **Expiration**
■■■ **Continuing resolutions**

The Defense Security Assistance Agency is authorized to obligate funds in the Special Defense Acquisition Fund (SDAF), 22 U.S.C. §§ 2795-2795b, during the duration of continuing resolutions which do not contain a specific authorization provision for SDAF. The terms of the continuing resolution appropriating foreign assistance funds for fiscal year 1986, Pub. L. No 99-103, § 101(b)(1), make

SDAF funds available for obligation, notwithstanding an apparent restriction in the fiscal year 1985 Foreign Assistance and Relations Appropriation Act.

66:484

■ **Payments**
■■ **Estimates**
■■■ **Communications systems/services**

Under 40 U.S.C. § 757 (1982), General Services Administration billings to the Navy only are required to approximate the cost of Federal Telecommunications System (FTS) service provided. The information provided this Office does not support a conclusion that GSA's billings were unreasonable approximations.

69:112

■ **Payments**
■■ **Estimates**
■■■ **Communications systems/services**

The General Services Administration (GSA) is authorized by 40 U.S.C. § 757 (1988) to recover approximate costs of Federal Telecommunications System (FTS) services and facilities provided to Tennessee Valley Authority (TVA) as a result of TVA withdrawal from FTS. GSA is also authorized to recover termination costs that arose by virtue of GSA's authorized administrative practice regarding the Federal Telecommunications (FT) Fund, 40 U.S.C. § 757 (1982), but which were incurred subsequent to merger of FT Fund into the Information Technology (IT) Fund, 40 U.S.C. § 757 (1988).

70:233

■ **Payments**
■■ **Estimates**
■■■ **Communications systems/services**

The General Services Administration (GSA) is authorized by 40 U.S.C. § 757 (1988) to recover approximate costs of Federal Telecommunications System (FTS) services and facilities provided to Army and Air Force Exchange Service (AAFES) incurred as a result of AAFES withdrawal from FTS. Although AAFES undertook measures that might have resulted in reduced billings had it continued to participate in FTS, it withdrew from FTS before possible cost saving measures could be reflected in FTS billings. GSA is also authorized to recover termination costs that arose by virtue of GSA's authorized administrative practice regarding the Federal Telecommunications (FT) Fund, 40 U.S.C. § 757 (1982), but which were incurred subsequent to merger of FT Fund into the Information Technology (IT) Fund, 40 U.S.C. § 757 (1988).

70:238

■ Payments
■■ Termination costs
■■■ Communications systems/services

The General Services Administration (GSA) is authorized to assess Navy with direct costs associated with Navy's withdrawal from FTS. Nothing in 40 U.S.C. § 757 (1982) requires GSA to recover such costs only through rates imposed on remaining FTS users.

69:112

■ Payments
■■ Termination costs
■■■ Communications systems/services

The General Services Administration (GSA) is authorized by 40 U.S.C. § 757 (1988) to recover approximate costs of Federal Telecommunications System (FTS) services and facilities provided to Tennessee Valley Authority (TVA) as a result of TVA withdrawal from FTS. GSA is also authorized to recover termination costs that arose by virtue of GSA's authorized administrative practice regarding the Federal Telecommunications (FT) Fund, 40 U.S.C. § 757 (1982), but which were incurred subsequent to merger of FT Fund into the Information Technology (IT) Fund, 40 U.S.C. § 757 (1988).

70:233

■ Payments
■■ Termination costs
■■■ Communications systems/services

The General Services Administration (GSA) is authorized by 40 U.S.C. § 757 (1988) to recover approximate costs of Federal Telecommunications System (FTS) services and facilities provided to Army and Air Force Exchange Service (AAFES) incurred as a result of AAFES withdrawal from FTS. Although AAFES undertook measures that might have resulted in reduced billings had it continued to participate in FTS, it withdrew from FTS before possible cost saving measures could be reflected in FTS billings. GSA is also authorized to recover termination costs that arose by virtue of GSA's authorized administrative practice regarding the Federal Telecommunications (FT) Fund, 40 U.S.C. § 757 (1982), but which were incurred subsequent to merger of FT Fund into the Information Technology (IT) Fund, 40 U.S.C. § 757 (1988).

70:238

■ Recording
■■ Advances
■■■ Imprest funds

The Department of Veterans Affairs was not required to record Imprest Fund advances made in 1985 as obligations against its appropriations. Advances to cashiers made to finance unspecified future cash payments do not meet the statutory requirements for recording obligations. The obligations occur only as cashiers use the funds and obtain reimbursements from available appropriations.

70:481

■ Recording
■■ Advances
■■■ Imprest funds

Imprest Fund advances to cashiers represent potential obligations which agencies may be compelled to record against their appropriations. To prevent over-obligation of the appropriations, agencies should administratively record commitments or reservations of funds against their current appropriations which will have to be obligated to reimburse the Imprest Fund expenditures.

70:481

■ Retirement accounts
■■ Unobligated balances

Under a sequestration order issued by the President under Pub. L. No. 99-177, the Balanced Budget and Emergency Deficit Control Act of 1985, the Railroad Retirement Board reduced monthly payments made under the Dual Benefit Payments Account (Federal Windfall Subsidy). Excess amounts not required to be sequestered remained in the account but were not disbursed prior to the end of fiscal year 1986. Because the excess amounts were not included in any of the monthly payments made in fiscal year 1986, they did not constitute a part of the beneficiaries' entitlements, and therefore are not available for disbursement after the end of fiscal year 1986. See 62 Comp. Gen. 521 (1983).

66:364

Civilian Personnel

Compensation
■ Additional compensation
■■ Determination
■■■ Apartment rental

A transferred federal employee rented a furnished condominium apartment at his new post of duty from another employee for use as temporary quarters while his new permanent residence was under construction. The lessor's rental of his property is unrelated to his official duties and does not result in additional pay or allowances under 5 U.S.C. § 5536. 7 Comp. Gen. 348 (1927) overruled.

68:329

■ Additional compensation
■■ Medical officers
■■■ Physicians

A medical officer of the Public Health Service is not eligible to enter into a service agreement for retention special pay when he is satisfying a pre-existing service obligation incurred as the result of financial assistance he received in medical school under the National Health Service Corps Scholarship Program.

68:292

■ Arbitration decisions
■■ GAO review

Where an arbitrator failed to take jurisdiction of an issue that was a matter of interest and not grievance arbitration, we will consider the claims under 4 C.F.R. Part 31 (1988). A grievance was not filed in this case, and the employees' rights to environmental differential pay for the period of time prior to implementation of the new collective bargaining agreement are based on statutes and regulations which exist independently from the collective bargaining agreement.

67:489

■ Awards/honoraria
■■ Authority
■■■ Agency officials

The Director of the Office of Technology Assessment (OTA) does not have the authority to establish an incentive awards program for the Office. Absent specific authority or inclusion of OTA within the scope of the Incentive Awards Act, 5 U.S.C. Chapter 45 (1982), OTA may not pay incentive awards to its employees. The authority to "fix the compensation" of its employees does not include the authority to make incentive awards. 37 Comp. Gen. 343 (1957), distinguished.

67:418

■ Civil Service regulations/laws
■■ Service contracts
■■■ Personal services
■■■■ Prohibition

A contract which results in a direct employer-employee relationship between a federal agency and the contractor's personnel is prohibited under current civil service directives. Hence, a federal

agency may not properly contract with a commercial firm for the assignment of contractor personnel to the agency's offices to act, for all practical purposes, as duly appointed federal employees in performing personal services for the agency.

66:420

■ **Civil Service regulations/laws**
■■ **Service contracts**
■■■ **Personal services**
■■■■ **Prohibition**

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

70:682

■ **Civil Service regulations/laws**
■■ **Service contracts**
■■■ **Personal services**
■■■■ **Prohibition**

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

70:682

■ **Claim settlement**
■■ **Labor disputes**
■■■ **GAO authority**

A labor organization, on behalf of a Federal Aviation Administration (FAA) employee, requests that the Comptroller General vacate our Claims Group's denial of the employee's claim for additional temporary quarters subsistence expenses on the ground that a formal grievance had been filed at the time of the GAO settlement. Since the claim was properly submitted to GAO by the agency at the employee's request and settled, according to law, without the Claims Group being advised of the grievance, the settlement is valid and will not be vacated.

68:625

■ **Classification**
■■ **Appeals**
■■■ **GAO review**

A grade GS-7 employee was given a general reduction-in-force (RIF) notice informing him that the installation where he was then currently employed was targeted for closure. Subsequently he was reassigned to a position at the same grade and step. Since this reassignment neither was pursuant

to a specific RIF notice nor resulted in a demotion, it does not appear to have resulted in any adverse consequences which would be subject to remedial action. Further, employee was subsequently laterally reassigned to a different position at the same grade and step. However, employee notes that new position was reclassified from GS-9 to GS-7 concurrent with his reassignment to it and questions this action. The Office of Personnel Management is required to review and correct agency classification and its corrective action is binding. *See* 5 U.S.C. §§ 5110, 5112. Hence, we are without jurisdiction to issue any ruling or decision concerning the classification of positions.

69:733

■ **Classification**
■■ **Appeals**
■■■ **Statutes of limitation**

An employee with the Soil Conservation Service who was classified as an intermittent employee from 1966 to 1974 asserts that she should instead have been classified as part-time during that period. However, her claims based on her alleged misclassification between 1966 and 1974 for retroactive holiday pay, additional pay for within-grade increases, and credit for annual and sick leave were not received here until 1986, and consequently they are barred by the 6-year time limit on the filing of claims prescribed by the Barring Act, 31 U.S.C. § 3702(b). Decisions where we have held that a claim for sick leave is not a monetary claim cognizable by the Comptroller General, and subject to the Barring Act, are overruled. (58 Comp. Gen. 741; B-189288, Nov. 23, 1977; B-171947.36, Nov. 16, 1972; B-171947.24, June 16, 1972).

67:188

■ **Compensation restrictions**
■■ **Deferred compensation**
■■■ **Propriety**

In our opinion the Tennessee Valley Authority (TVA) may not circumvent the statutory ceiling on the salaries of TVA employees through deferred compensation supplemental retirement plans or lump-sum payments for relocation incentives. We disagree with TVA's distinction between "salary" and "compensation" for the purposes of the statutory ceiling. *See* B-222334, June 2, 1986; B-205284, Nov. 16, 1981. To the extent that TVA performance bonuses are modeled after the bonus program for the federal Senior Executive Service, we would not view such payments as improperly circumventing the TVA salary limitation.

68:363

■ **Compensation restrictions**
■■ **Off-site work**
■■■ **Utility services**
■■■■ **Reimbursement**

In the absence of statutory authority, appropriated funds may not be used for items that are the personal expenses of an employee. Exceptions to this rule have been permitted where the item primarily benefits the government. IRS employees participating in a work-at-home program may not be reimbursed for the incremental costs of utilities associated with the residential workplace, because such costs cannot be said to primarily benefit the government.

68:502

■ **Compensation restrictions**
■■ **Off-site work**
■■■ **Utility services**
■■■■ **Reimbursement**

Agencies may not reimburse federal employees participating in a mandatory work-at-home program the incremental costs of utilities associated with the residential workplace, because such costs cannot be said to primarily benefit the government. *See* 68 Comp. Gen. 502 (1989). We find no compelling reason to distinguish between mandatory and voluntary programs.

70:631

■ **Compensation restrictions**
■■ **Rates**
■■■ **Amount determination**

Compensation of Staff Director, U.S. Sentencing Commission, is authorized to be fixed at a rate not to exceed the highest rate prescribed for grade 18 of the General Schedule pay rates. Such compensation may not exceed the rate for level V of the Executive Schedule, since the effect of 5 U.S.C. § 5308 is to limit the maximum scheduled rate of the General Schedule to the level V rate for anyone whose rate of pay is derived from the General Schedule. Higher amounts shown on the General Schedule are merely projections of what the rates would be without this limitation.

66:650

■ **Compensation restrictions**
■■ **Rates**
■■■ **Amount determination**

Under 17 U.S.C. § 802(a) (1988), the Copyright Royalty Tribunal Commissioners are entitled to be compensated at the highest rate now or hereafter prescribed for grade GS-18. Since 5 U.S.C. § 5308 (1988) limits the highest rate prescribed (payable) for grade GS-18 to the rate of basic pay for level V of the Executive Schedule, the Commissioners may not be paid at a rate in excess of that rate, notwithstanding the fact that chapter 53 of title 5, United States Code, which includes 5 U.S.C. § 5308 (1988), may not otherwise be applicable to Copyright Royalty Tribunal positions. *See U.S. Sentencing Commission,* 66 Comp. Gen. 650 (1987), and *Farm Credit Administration,* 56 Comp. Gen. 375 (1977).

70:404

■ **Compensation retention**
■■ **Eligibility**

A former Postal Service employee claims grade and pay retention as a result of his transfer to the Air Force. The grade and pay retention provisions in 5 U.S.C. §§ 5362 and 5363 do not apply to an employee transferring from the Postal Service to a covered agency. Hence, the claim is denied.

69:689

■ Fringe benefits
■■ Health services

Under 5 U.S.C. § 7901, federal agencies have authority to establish smoking cessation programs for their employees and to use appropriated funds to pay the costs incurred by employees participating in these programs. However, before such programs can be implemented, the Office of Personnel Management would have to amend the Federal Personnel Manual to add smoking cessation as a prevention activity that agencies can include as part of the health services program they provide their employees. 64 Comp. Gen. 789 (1985) is modified accordingly.

68:222

■ Hazardous duty differentials
■■ Eligibility
■■■ Administrative determination

Employees claim hazardous duty differential for a period prior to arbitration award. The entitlement to hazardous duty differential is a decision vested primarily in the employing agency, and this Office will not substitute its judgment for that of agency officials unless that judgment was clearly wrong or was arbitrary and capricious. The claims are denied.

67:489

■ Hazardous duty differentials
■■ Eligibility
■■■ Administrative determination

Employees' claims for hazard pay differential for handling a potentially hazardous substance may be paid retroactively for hazardous duty performed at Federal Aviation Administration (FAA) facility back to June 15, 1983, which is 6 years prior to the time these claims were constructively filed under 4 C.F.R. § 31.5. Retroactive payment may not be made for hazardous duty performed prior to that date. While the courts have recognized an equitable exception to the statute of limitations in cases where a plaintiff's cause of action was inherently unknowable, the exception is intended to apply where the plaintiff has suffered latent injury at the hands of the defendant. This exception is not applicable to these claims however since there is no evidence that FAA acted wrongly or concealed facts from its employees.

70:292

■ Labor standards
■■ Exemptions
■■■ Administrative determination
■■■■ GAO review

Pursuant to 4 C.F.R. Part 22, an agency and a union jointly request a determination from the Comptroller General on the exempt/nonexempt status for overtime compensation under the Fair Labor Standards Act (FLSA) of a grade GS-12 Audio Visual Production Officer. Since the Office of Personnel Management has the authority to administer the FLSA under 29 U.S.C. § 204(f) (1982) for federal employees, including the authority to make final determinations as to whether employees are covered by its various provisions, the General Accounting Office will not consider overtime claims

under FLSA where the employee's position has been classified by OPM as exempt. Appeals of classification status should be directed to OPM.

69:17

■ **Overpayments**
■■ **Error detection**
■■■ **Debt collection**
■■■■ **Waiver**

An employee received overpayments of pay because the agency erroneously deducted only 7 percent for retirement instead of 7.5 percent for retirement as applicable for law enforcement officers. The error occurred when the employee was promoted, and, as a result of a promotion, the employee was taken off administratively uncontrolled overtime and his gross pay per pay period decreased. The employee expected his retirement withholding to decrease, and he states that he did not notice the $10.53 difference in his retirement deduction. Given that this is such a minor discrepancy in his withholding and that the deduction, which decreased simultaneously with his decrease in gross pay, appeared reasonable on its face, we are aware of no reason to expect or require the employee to audit the amount shown. The overpayments are waived since the employee is not at fault and could not reasonably have been expected to question the accuracy of this pay.

66:509

■ **Overpayments**
■■ **Error detection**
■■■ **Debt collection**
■■■■ **Waiver**

Waiver of employee's overpayments received after his agency erroneously stopped deducting life insurance premiums is denied because the employee was partially at fault. The employee had the responsibility of reviewing his earnings statements to ascertain whether his life insurance premiums were being properly deducted.

67:610

■ **Overpayments**
■■ **Error detection**
■■■ **Debt collection**
■■■■ **Waiver**

In a prior decision we held that the erroneous overpayment representing the difference between FICA and Civil Service Retirement deductions from an employee's salary may be subject to waiver under 5 U.S.C. § 5584 (1982) and remanded the question to the agency for waiver determination on the merits. The agency took no action since it did not receive the employee's letter requesting waiver. The prior decision in this case may be considered as initiating the waiver process, thus tolling the 3-year limitation period in 5 U.S.C. § 5584, and waiver consideration may proceed under 4 C.F.R. § 92.1 (1988).

68:86

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

An employee was erroneously retained on the payroll by his agency for 2 days beyond his retirement resulting in an overpayment for final pay and leave. Waiver of the overpayment is denied, notwithstanding the employee's lack of fault, since the agency promptly notified the employee of the error and requested repayment. In these circumstances it is not against equity and good conscience, as provided by the waiver statute, to require repayment.

68:326

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

An employee asserted that because of changes in tax laws, his tax liability was increased due to his agency's error in overpaying him in 1986 for which he made refund in 1987, and that should be a basis for waiving the overpayment. The application of the tax laws to individual cases is a matter for the revenue authorities and is not a basis for waiving an erroneous payment of pay pursuant to 5 U.S.C. § 5584.

68:326

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

Due to administrative error, an employee received a within-grade increase 1 year before it was expected. In the absence of any mitigating factors, we conclude that the employee knew or should have known the correct waiting period, and we deny his request for waiver.

68:573

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

Waiver of collection of salary overpayments resulting from premature within-grade increase is granted in the case of a foreign national who had been hired overseas with no prior federal experience and had only 2 years of federal service at the time the erroneous action occurred. As a general rule, federal employees are expected to know the appropriate waiting periods for within-grade increases and to make inquiry about increases which do not conform to those waiting periods. However, in the present case, the employee's limited exposure to the federal personnel system warrants an exception to this general rule.

68:629

■ Overpayments
■■ Error detection
■■■ Debt collection
■■■■ Waiver

A reemployed annuitant's request for waiver must be denied when he was aware that the amount of the annuity was not being deducted from his salary and that he was being overpaid. Although the employee immediately notified the agency, we have consistently held that when an employee is aware of an error he cannot reasonably expect to retain the overpayment. Financial hardship cannot form the basis for waiver.

70:699

■ Overtime
■■ Claims
■■■ Statutes of limitation

Fair Labor Standards Act claims and overtime claims under 5 U.S.C. § 5542 which are filed with the General Accounting Office (GAO) are both subject to the 6-year statute of limitations under 31 U.S.C. § 3702(b)(1). Since claims were filed in GAO on December 7, 1981, March 11, 1982, and March 16, 1982, portions of claims arising before December 7, 1975, March 11, 1976, and March 16, 1976, respectively, may not be considered for payment, as 31 U.S.C. § 3702(b)(1) bars claims presented to GAO more than 6 years after date claims accrued.

67:248

■ Overtime
■■ Claims
■■■ Statutes of limitation

Federal firefighters' request for additional retroactive FLSA compensation on the basis of a 1984 letter submitted to our Office is denied since the letter was not accompanied by a signed representation authorization or claim over the signature of the claimants so as to toll the 6-year Barring Act, 31 U.S.C. § 3702(b) (1982).

68:681

■ Overtime
■■ Claims
■■■ Statutes of limitation

The fact that an employee's grievance concerning overtime pay was untimely filed under the terms of a collective bargaining agreement does not preclude consideration of his claim for such pay by the General Accounting Office provided it is filed within the 6 years prescribed in 31 U.S.C. § 3702.

69:17

■ Overtime
■■ Claims
■■■ Statutes of limitation

On reconsideration, our prior decision denying additional overtime compensation to individual members of the International Association of Firefighters, Local F-100, is affirmed. An initial request for

a decision was not accompanied by a signed representation authorization or claim over the signature of the individual claimants so as to toll the 6-year Barring Act, 31 U.S.C. § 3702(b) (1982). The 6-year period of limitation in 31 U.S.C. § 3702(b) is a condition precedent to the right to have a claim considered by our Office, and our Office has no authority to waive or modify its application. 68 Comp. Gen. 681 (1989), affirmed.

69:455

■ **Overtime**
■■ **Computation**
■■■ **Conflicting statutes**

Federal employees are covered by two statutes requiring compensation for overtime work, the Fair Labor Standards Act, or FLSA, and the Federal Employees Pay Act, commonly called "title 5" overtime. Under this dual coverage, where there is an inconsistency between the statutes, employees are entitled to the greater benefit.

67:247

■ **Overtime**
■■ **Eligibility**
■■■ **Advance approval**

An employee who performed and was paid for overtime work during a 4-month period claims overtime for another 4 months after his supervisor indicated he should no longer request payment for overtime. The employee may not be paid overtime under 5 U.S.C. § 5542 (1982) during the second 4-month period. Such overtime was not ordered or approved and there was no inducement on the part of the supervisor for the employee to continue to perform overtime work.

68:385

■ **Overtime**
■■ **Eligibility**
■■■ **Court decisions**

Employees sought retroactive overtime compensation under the Fair Labor Standards Act (FLSA). By decision *Civilian Aircraft Pilots,* 61 Comp. Gen. 191 (1982), the General Accounting Office (GAO) declined to consider the merits of these claims since the Office of Personnel Management (OPM) found the employees exempt from FLSA coverage and GAO will not review OPM determinations of exempt/nonexempt status under FLSA. The employees now seek reconsideration of that decision because the United States Claims Court overturned the OPM finding and determined that they were nonexempt under FLSA and entitled to overtime compensation under that statute. *Walter D. Sabey, et al, v. United States* 6 Cl. Ct. 36 (1984). In view of that decision, the GAO will now consider these claims on their merits. Our decision in *Civilian Aircraft Pilots,* above, is modified only as to these employees.

66:501

■ **Overtime**
■■ **Eligibility**
■■■ **Court decisions**

Our Office will follow the decision in *Lanehart v. Horner,* 818 F.2d 1574 (Fed. Cir. 1987), which held that the leave with pay statutes prevent any reduction in firefighters' regular and customary pay, including overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.,* when eligible employees are on authorized leave. Therefore, we will allow claims for overtime compensation for all periods of paid leave, subject to the 6-year limitation period in 31 U.S.C. § 3702(b). Our contrary decisions (60 Comp. Gen. 493 (1981), 55 Comp. Gen. 1035 (1976), B-216640, Mar. 13, 1985, B-216640, Sept. 18, 1985) are overruled.

68:681

■ **Overtime**
■■ **Eligibility**
■■■ **Early reporting**

Civilian police officers who were required to report 15 minutes early to perform preliminary duties before beginning their regular shift each workday, and who had a 30-minute meal break during each shift, are entitled to overtime credit for both the preshift work and the 30-minute meal break under section 7(k) of the Fair Labor Standards Act (FLSA). Under this FLSA provision applicable to law enforcement personnel, mealtimes, duty-free or otherwise, are counted in determining entitlement to overtime compensation.

67:247

■ **Overtime**
■■ **Eligibility**
■■■ **Early reporting**

Civilian police officers required to report for duty at least 15 minutes prior to the start of each shift may be allowed overtime credit for their preshift services under the Federal Employees Pay Act, title 5 of the United States Code, 5 U.S.C. § 5542. They may not be allowed credit for their meal breaks under the standards prescribed for "title 5" overtime, however, where it appeared that they were relieved from their posts during these breaktimes and were required only to remain in contact by radio for recall on an occasional basis in emergency situations.

67:247

■ **Overtime**
■■ **Eligibility**
■■■ **Lunch breaks**

Civilian police officers who were required to report 15 minutes early to perform preliminary duties before beginning their regular shift each workday, and who had a 30-minute meal break during each shift, are entitled to overtime credit for both the preshift work and the 30-minute meal break under section 7(k) of the Fair Labor Standards Act (FLSA). Under this FLSA provision applicable to law enforcement personnel, mealtimes, duty-free or otherwise, are counted in determining entitlement to overtime compensation.

67:247

■ Overtime
■■ Eligibility
■■■ Lunch breaks

Civilian police officers required to report for duty at least 15 minutes prior to the start of each shift may be allowed overtime credit for their preshift services under the Federal Employees Pay Act, title 5 of the United States Code, 5 U.S.C. § 5542. They may not be allowed credit for their meal breaks under the standards prescribed for "title 5" overtime, however, where it appeared that they were relieved from their posts during these breaktimes and were required only to remain in contact by radio for recall on an occasional basis in emergency situations.

67:247

■ Overtime
■■ Eligibility
■■■ Travel time

Supervisory employee of the Federal Aviation Administration is not entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1982) for time spent traveling outside of his regularly scheduled administrative workweek since (1) the travel was within the employee's official duty station and (2) the travel must be away from the official duty station to be compensable. Moreover, the employee's tasks to pick up and deliver mail and supplies while traveling to and from his duty site was not compensable traveltime since, as a supervisor, it was not his primary function. The employee's claim for reimbursement for mileage for local travel is also denied since payment is discretionary with the agency, and the record indicates it was never authorized or approved.

66:658

■ Overtime
■■ Eligibility
■■■ Travel time

National Labor Relations Board (NLRB) employees are not entitled to overtime or compensatory time for time spent in travel outside normal work hours to or from union representation elections since the NLRB is given broad discretionary authority to hold and schedule such elections. It cannot be said that such events are unscheduled and administratively uncontrollable so as to permit overtime under the provisions of 5 U.S.C. § 5542(b)(2)(B)(iv) (Supp. IV 1986).

68:29

■ Overtime
■■ Eligibility
■■■ Travel time

The National Labor Relations Board (NLRB) could make a determination as to immediate official necessity and compensate employees for travel during nonduty hours when they must investigate certain unfair labor practice cases. Where an NLRB employee performs return travel from an event which could not be scheduled or controlled administratively, the employee would be entitled to overtime compensation or compensatory time under 5 U.S.C. § 5542(b)(2)(B)(iv) (Supp. IV 1986) for travel during nonduty hours.

68:30

■ Overtime
■■ Eligibility
■■■ Travel time

When an employee of the National Park Service is released from temporary duty assignment to return to his home park as soon as possible and be available for fire fighting duty or for backup duty resulting from forest fire emergency, the condition of immediate official necessity occasioned by an administratively uncontrollable event is properly met under 5 U.S.C. §5542(b)(2)(B)(iv). His claim for overtime pay for traveltime on an off-duty day is allowed.

68:229

■ Overtime
■■ Eligibility
■■■ Travel time

A nonexempt employee under the Fair Labor Standards Act (FLSA), who drives a government vehicle between a temporary duty site and lodgings during hours outside of the normal 40-hour workweek, is not entitled to overtime pay under the FLSA, even though the driver transports another employee, since use of the government vehicle cannot be considered a requirement of the employee's job.

68:535

■ Overtime
■■ Eligibility
■■■ Travel time

Entitlement to overtime compensation by federal employees while in a travel status under 5 U.S.C. § 5542(b)(2)(B)(iv) requires that travel result from an event which could not be scheduled or controlled administratively. Travel performed by an employee to attend an event scheduled and conducted by the employee's agency clearly does not meet this requirement, and the employee may not be paid overtime compensation for that travel.

69:17

■ Overtime
■■ Eligibility
■■■ Travel time

Two Navy employees are not entitled to overtime or compensatory time for time spent in travel outside normal work hours to ships in response to messages requesting technical assistance to correct equipment breakdowns. The employees have not presented sufficient evidence or documentation which would indicate that travel was of an immediate official necessity and to an event that was unscheduled and administratively uncontrollable so as to permit payment under 5 U.S.C. § 5542 (1988). The burden of proof is upon the claimants to establish the liability of the United States and the claimant's right to payment.

69:385

■ **Overtime**
■ ■ **Eligibility**
■ ■ ■ **Travel time**

Employees who traveled away from their official duty stations on Sunday and returned on Friday evening in order to take training courses at a private institution may be allowed overtime pay or compensatory time for their travel. The government had no control over the content or scheduling of the courses, and, thus, the travel resulted from an event which could not be scheduled or controlled administratively. *See* 5 U.S.C. § 5542(b)(2)(B)(iv) (1988) and Federal Personnel Manual Supplement 990-2, Book 550, S1-3b. *Gerald C. Holst,* B-222700, Oct. 17, 1986, *overruled.*

69:545

■ **Overtime**
■ ■ **Eligibility**
■ ■ ■ **Travel time**

The claims of four employees for compensatory time for travel are allowed where the employees traveled to or returned from meetings or hearings which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542(b)(2)(B)(iv) (1988).

70:77

■ **Overtime**
■ ■ **Eligibility**
■ ■ ■ **Travel time**

Thirteen employees, nonexempt from the Fair Labor Standards Act (FLSA), were found by the Office of Personnel Management (OPM) in its compliance order to be entitled to FLSA overtime for time spent as hours of work outside their normal duty hours for travel as passengers from their temporary lodgings to their temporary duty worksites outside established official duty stations. The agency disagrees with such determination. The claims for FLSA overtime are allowed since we do not find OPM's determination to be clearly erroneous or contrary to law or regulation.

70:380

■ **Overtime**
■ ■ **Retroactive compensation**
■ ■ ■ **Amount determination**
■ ■ ■ ■ **Statutes of limitation**

Fair Labor Standards Act (FLSA) claims which are filed with the General Accounting Office (GAO) are subject to the 6-year statue of limitations under 31 U.S.C. § 3702(b)(1), in contrast to the 2-year time limitation on "actions at law" under the FLSA. Where by court action an employee has established his right to retroactive overtime compensation under the FLSA for the 2-year period prior to the date the complaint was filed and has previously filed a claim here, additional amounts found due may be paid for an earlier period, but not before 6 years prior to the date such claim was filed with the GAO.

66:502

■ **Payroll deductions**
■■ **Taxes**
■■■ **Error detection**
■■■■ **Statutes of limitation**

An agency erroneously deducted FICA taxes instead of Civil Service Retirement from an employee's salary. In the prior Comptroller General decision regarding this matter it was held that the erroneous FICA deductions should be recovered and paid into the Civil Service Retirement Fund. The agency never received the employee's letter authorizing the refund of the FICA amount from the Internal Revenue Service (IRS). Inasmuch as the IRS is bound by a 3-year statute of limitations when acting on claims submitted by federal agencies for refunds of erroneously paid FICA taxes, and more than 3 years have passed, the agency is now unable to recover the FICA taxes erroneously deducted from the employee's salary.

68:86

■ **Personnel death**
■■ **Balances**
■■■ **Payees**

The claims by his mother and alleged son for unpaid compensation due a deceased civilian employee are too doubtful to be allowed without resolution by a court of competent jurisdiction. The alleged son's claim is higher on the statutory list of distribution; however, his status as son is based on a document executed by the deceased in El Salvador recognizing him as the deceased's son, and other information of record makes his status as biological son questionable.

68:284

■ **Propriety**
■■ **Bonuses**
■■■ **Compensation restrictions**

In our opinion the Tennessee Valley Authority (TVA) may not circumvent the statutory ceiling on the salaries of TVA employees through deferred compensation supplemental retirement plans or lump-sum payments for relocation incentives. We disagree with TVA's distinction between "salary" and "compensation" for the purposes of the statutory ceiling. *See* B-222334, June 2, 1986; B-205284, Nov. 16, 1981. To the extent that TVA performance bonuses are modeled after the bonus program for the federal Senior Executive Service, we would not view such payments as improperly circumventing the TVA salary limitation.

68:363

■ **Rates**
■■ **Determination**
■■■ **Highest previous rate rule**

Employee accepted a grade GS-4, step 1, position with the Department of the Air Force having previously been employed by the Department of the Navy. She later resigned that position to accept a grade GS-7, step 1, position at the same Air Force activity, without a break in service. She seeks a retroactive salary adjustment and backpay for both positions based on her highest previous rate of pay (grade GS-6, step 8). The Air Force activity has applied the highest previous rate rule to her

grade GS–4 position and determined she was retroactively entitled to the pay of step 10 of that grade. With regard to the use of the highest previous rate rule for the grade GS–7 position, we hold that her claim must be denied. The Air Force regulations in effect at the time of the claim, as supplemented by local activity regulations, provide that the rate of pay payable on a position change during a period of continuous service will be at least equal to present rate of pay. Since the rate for grade GS–7, step 1, exceeded the rate for grade GS–4, step 10, her rate of pay in the grade GS–7 position was properly set.

66:684

■ Rates
■■ Determination
■■■ Highest previous rate rule

An employee who previously held a position as an intermittent employee is not eligible for highest previous rate consideration upon reemployment under 5 C.F.R. § 531.203(c) (1987), since the highest previous rate rule is based upon a regularly scheduled tour of duty and intermittent employment by definition does not involve a regularly scheduled tour of duty. Moreover, in this case the employee was properly classified as an intermittent employee inasmuch as the employee independently scheduled her work and the days and hours worked fluctuated each pay period.

67:570

■ Reduction-in-force
■■ Compensation retention

Agency abolished employee's position of Quality Assurance Specialist, GS–12, effective November 17, 1981, and offered employee a wage grade position in lieu of separation by reduction in force (RIF). Employee was erroneously notified that acceptance of Laborer position would include indefinite retention of GS–12 pay. Employee elected the lower grade position, rather than discontinued service retirement pursuant to RIF. In January 1984, employee was notified that GS–12 pay was not indefinite, but would be reduced retroactively to November 19, 1983. Employee is not entitled to pay of GS–12 position beyond statutory period of 2 years. Notice by agency official to contrary does not provide a basis to allow him additional compensation. Government cannot be bound beyond the actual authority conferred upon its agents by statute or regulations.

68:97

■ Reduction-in-force
■■ Compensation retention

A grade GS–9 employee was given a specific reduction-in-force (RIF) notice providing for his separation effective September 18, 1981. On September 17, 1981, the agency offered him a grade GS–5 position, which he accepted, but advised him that salary could not be set higher than grade GS–5, step–10, because it was outside his competitive area set under RIF procedures. The agency committed an unjustified and unwarranted personnel action when it erroneously denied him grade and pay retention on the basis that the employee did not receive a demotion pursuant to a RIF but was reassigned to a lower-graded position. The employee met the requirements for retained grade and pay since the employee had received a specific RIF notice and the grade GS–5 position was offered at the initiative of management.

69:733

■ **Reduction-in-force**
■■ **Grade retention**

A grade GS–9 employee was given a specific reduction-in-force (RIF) notice providing for his separation effective September 18, 1981. On September 17, 1981, the agency offered him a grade GS–5 position, which he accepted, but advised him that salary could not be set higher than grade GS–5, step–10, because it was outside his competitive area set under RIF procedures. The agency committed an unjustified and unwarranted personnel action when it erroneously denied him grade and pay retention on the basis that the employee did not receive a demotion pursuant to a RIF but was reassigned to a lower-graded position. The employee met the requirements for retained grade and pay since the employee had received a specific RIF notice and the grade GS–5 position was offered at the initiative of management.

69:733

■ **Reduction-in-force**
■■ **Procedural defects**

Two employees who resigned following a general announcement of a proposed reduction in force (RIF) contend that the agency did not follow proper procedures in conducting the RIF. This Office cannot consider the employees' contention because challenges to agency RIF actions must either be processed through a negotiated grievance procedure, if applicable, or presented to the Merit Systems Protection Board.

66:609

■ **Reduction-in-force**
■■ **Procedural defects**

Employee who accepted lower grade position after receiving a reduction-in-force (RIF) notice contends that the agency did not follow the proper procedures in conducting the RIF. This Office cannot consider the employee's contention because challenges to agency RIF actions must either be processed through a negotiated grievance procedure, if applicable, or presented to the Merit Systems Protection Board.

68:97

■ **Reduction-in-force**
■■ **Procedural defects**

A grade GS–7 employee was given a general reduction-in-force (RIF) notice informing him that the installation where he was then currently employed was targeted for closure. Subsequently he was reassigned to a position at the same grade and step. Since this reassignment neither was pursuant to a specific RIF notice nor resulted in a demotion, it does not appear to have resulted in any adverse consequences which would be subject to remedial action. Further, employee was subsequently laterally reassigned to a different position at the same grade and step. However, employee notes that new position was reclassified from GS–9 to GS–7 concurrent with his reassignment to it and questions this action. The Office of Personnel Management is required to review and correct agency classification and its corrective action is binding. *See* 5 U.S.C. §§ 5110, 5112. Hence, we are without jurisdiction to issue any ruling or decision concerning the classification of positions.

69:733

■ **Retirement compensation**
■■ **Separation dates**
■■■ **Retroactive adjustments**

A retired civil service employee requests that his separation date be changed retroactively so that he may accept a discontinued service retirement pursuant to reduction-in-force notice. Employee alleges that his electing to forgo discontinued service retirement in November 1981 resulted from erroneous advice that saved pay would be indefinite. Agency may retroactively change employee's date of separation and submit request for retroactive discontinued service retirement to the Office of Personnel Management where agency incorrectly advised employee whose position was abolished that he would receive GS-12 pay indefinitely. The failure of agency to give employee correct information as to consequences of refusing separation and discontinued service retirement constituted administrative error which deprived him of right granted by statute and regulation to elect discontinued service retirement.

68:98

■ **Retroactive compensation**
■■ **Adverse personnel actions**
■■■ **Attorney fees**
■■■■ **Eligibility**

Although there is no authority to pay attorney fees in connection with an administrative settlement of a complaint of age discrimination, a federal agency may pay the full claim for attorney fees related to settlement of an employee's age and sex discrimination complaints where the agency concedes that the employee would have prevailed in the same manner on just the sex discrimination complaint.

69:469

■ **Retroactive compensation**
■■ **Bonuses**
■■■ **Interest**

Federal agency and labor union have adopted provisions in collective bargaining agreement that specify criteria for granting cash incentive awards, impose deadlines for the agency's payment of such incentive awards, and require the agency to pay interest on late payments of awards. Under these circumstances incentive awards constitute "pay, allowances, or differentials" for purposes of the Back Pay Act, 5 U.S.C. § 5596, and the Act (including its interest provision) applies in the case of failure of an agency to comply with award payment deadlines it has agreed to in collective bargaining.

70:711

■ **Retroactive compensation**
■■ **Compensatory time**
■■■ **Adverse personnel actions**
■■■■ **Retired personnel**

Employee who was denied a promotion because of age discrimination is entitled to be credited with the amount of compensatory time earned by the incumbent of the position she was denied for all

periods during which she would have been ready, willing, and able to perform the duties of the position. Since the employee now is retired, she may receive overtime pay for these compensatory hours as part of her backpay award.

68:657

■ **Retroactive compensation**
■■ **Deductions**
■■■ **Outside employment**

The employee worked on his mother's farm during the period of an unjustified or unwarranted personnel action and received no wages, salary, or monetary payments for his services. The agency may not deduct from the backpay award the monetary value of the food and lodging he received in kind since the food and lodging were furnished for the convenience of the employer and are excludable from gross income for federal income tax purposes. 26 U.S.C. § 119 (1988). Therefore, the meals and lodging do not constitute "amounts earned . . . through other employment" within the meaning of 5 U.S.C. § 5596(b)(1)(A)(i) (1988).

69:541

■ **Retroactive compensation**
■■ **Deductions**
■■■ **Outside employment**

An employee who was retroactively restored to duty and awarded backpay disputes the employing agency's determination to deduct the full amount the employee earned through outside employment during the period of the corrected action from the gross amount of the backpay award. In accordance with 5 U.S.C. § 5596(b)(1)(A)(i) (1988) and implementing regulations, the full amount earned by the employee through other employment during the period of improper separation must be deducted from the gross amount of the backpay award. The repayment obligation for lump-sum leave payment is subject to waiver consideration under 5 U.S.C. § 5584. Refunded retirement contributions may be considered for waiver by the Office of Personnel Management under 5 U.S.C. § 8346(b).

70:124

■ **Retroactive compensation**
■■ **Eligibility**
■■■ **Adverse personnel actions**
■■■■ **Classification**

Where employees performed duties of a position classified at a higher grade than the position they occupied, no right to increased pay exists. A federal employee is entitled only to the salary of his/her appointed position even though higher level duties were performed. Moreover, collective bargaining agreement provision that provided higher pay where an employee is detailed to a higher-graded position for more than 30 days is not applicable, since there was no detail but merely an accretion or misassignment of some higher-graded duties. Therefore, the employees are not entitled to backpay for performing the higher-graded duties.

69:140

■ **Retroactive compensation**
■■ **Eligibility**
■■■ **Arbitration decisions**
■■■■ **GAO review**

GAO will not assert jurisdiction of a request filed by an authorized certifying officer pursuant to 4 C.F.R. Part 22 which questions the legality of a payment ordered by a step III negotiated grievance decision where the union has objected to submission of the matter to GAO and has already initiated procedures under 5 U.S.C. Chapter 71 to resolve the issue.

66:346

■ **Retroactive compensation**
■■ **Interest**

The Department of the Interior is without authority to make payments to employee Thrift Savings Plan accounts for lost earnings on insufficient agency contributions resulting from administrative error because earnings on contributions are a form of interest not expressly provided for by Interior appropriations and such payments are not otherwise authorized under the Back Pay Act, 5 U.S.C. § 5596.

68:220

■ **Retroactive compensation**
■■ **Interest**

Effective December 22, 1987, interest on back pay claims applies to periods before and after that date and is chargeable to the same appropriations and in the same manner as is the back pay upon which the interest is paid.

69:41

■ **Retroactive compensation**
■■ **Interest**

No interest is due on an arbitrator's award of backpay which became final before December 22, 1987, the effective date of the amendment to the Back Pay Act which provided for interest on final decisions granting backpay, even though the award was clarified after that date. Although several compliance issues were not resolved until later, such issues which arise during the implementation phase of an award do not affect the finality of an award in which liability and remedy had been decided.

70:560

■ **Retroactive compensation**
■■ **Promotion**
■■■ **Discretionary authority**
■■■■ **Violation**

A headquarters memorandum directing the promotion of all employees occupying Air Reserve Technician foreman positions constituted a nondiscretionary agency policy. Although the agency failed to include the employee's instrument mechanic foreman position on a list of positions to which the policy applied, the employee is entitled to a promotion with backpay retroactive to the date when

other foremen were promoted. Omission of the existing and occupied foreman position from the list was an administrative error which resulted in the failure to carry out a nondiscretionary agency policy requiring the promotion.

66:114

■ **Retroactive compensation**
■■ **Retired personnel**
■■■ **Reinstatement**

Employee whose retirement application was disallowed by Office of Personnel Management after separation from General Services Administration claims backpay, alleging that disallowance and separation were due to agency error. In view of the responsibility of an agency to maintain retirement records and to counsel employees with regard to their retirement rights, where an employee's retirement was induced by administrative error and the employee is subsequently restored to the rolls of the agency, the employee is entitled to backpay for the period he was off the employment rolls.

66:185

■ **Retroactive compensation**
■■ **Settlement terms**
■■■ **Overseas allowances**

An Army employee who had filed a religious discrimination complaint returned from Europe to the United States and resigned. To resolve the complaint, the Army negotiated a settlement agreement providing for reinstatement to an overseas position without a break in service, and backpay retroactive from the date of resignation to the date of reinstatement. The backpay award may include an overseas living quarters allowance between the date the employee left Europe and the date of his reinstatement.

66:422

■ **Retroactive compensation**
■■ **Statutes of limitation**

An employee's claim for backpay, which accrued more than 6 years from the date the claim was filed in GAO, is barred by the 6-year limitation set forth in 31 U.S.C. § 3702(b) (1982). Although the employee argues that the delay in filing the claim with GAO was due to the agency's failure to advise him of his right to appeal its decision to GAO, we have consistently held that we are without authority to waive or modify the application of 31 U.S.C. § 3702(b).

67:467

■ **Severance pay**
■■ **Amount determination**
■■■ **Computation**

Upon voluntary separation from a permanent GS-13, step 4, position, employee was appointed without break in service to a GM-14 full-time temporary position with another agency. Record shows his separation after temporary appointment was involuntary, and he is therefore entitled to severance pay. Once eligibility to receive severance pay has been found, the amount due must be computed in accordance with the formula prescribed at 5 U.S.C. § 5595(c) and 5 C.F.R. § 550.704. This formula

provides that while the employee's entitlement is determined upon the termination of the temporary position, the amount of the severance pay fund is computed based on employee's basic rate at the time of the separation from the permanent position, in the case GS-13, step 4.

66:164

■ **Severance pay**
■■ **Amount determination**
■■■ **Computation**

Upon voluntary separation from a permanent GS-13 position, employee was appointed without a break in service to a temporary GS-14 position with another agency. We affirm our prior decision holding that severance pay must be computed based upon the pay rate in effect at the time of employee's separation from last permanent appointment as required by 5 C.F.R. § 550.704(b)(4)(ii). This unambiguous regulatory provision is a valid exercise of administrative discretion by the Office of Personnel Management, the agency designated to issue regulations governing severance pay.

67:344

■ **Severance pay**
■■ **Eligibility**

Upon voluntary separation from a permanent GS-13, step 4, position, employee was appointed without break in service to a GM-14 full-time temporary position with another agency. Record shows his separation after temporary appointment was involuntary, and he is therefore entitled to severance pay. Once eligibility to receive severance pay has been found, the amount due must be computed in accordance with the formula prescribed at 5 U.S.C. § 5595(c) and 5 C.F.R. § 550.704. This formula provides that while the employee's entitlement is determined upon the termination of the temporary position, the amount of the severance pay fund is computed based on employee's basic rate at the time of the separation from the permanent position, in the case GS-13, step 4.

66:164

■ **Severance pay**
■■ **Eligibility**
■■■ **Involuntary separation**
■■■■ **Determination**

Employee was directed by his agency head to resign as soon as possible because the employing agency no longer wanted him in excepted position. He submitted his *"pro forma"* resignation the next day. We find he was actually involuntarily dismissed, his separation being a resignation in form only. Since he was involuntarily separated, not by removal for cause on charges of misconduct, delinquency, or inefficiency, he is entitled to severance pay.

66:600

■ **Severance pay**
■■ **Eligibility**
■■■ **Involuntary separation**
■■■■■ **Determination**

An employee sought and received a transfer from a permanent career service position in ACTION to a time-limited appointment for 5 years in the Peace Corps, which could not be extended except

for extraordinary reasons. For purposes of the severance pay statute, 5 U.S.C. § 5595 (1982), we find that she was an "employee" and that she was involuntarily separated, *i.e.*, her separation from her position in the Peace Corps was against her will and without her consent. Therefore, the employee is entitled to severance pay.

67:300

■ **Severance pay**
■■ **Eligibility**
■■■ **Reduction-in-force**
■■■■ **Notification**

Two employees resigned following a general announcement of a proposed reduction in force (RIF) but before the agency issued specific notice of personnel actions to be effected pursuant to the RIF. The employees are not eligible for severance pay under 5 U.S.C. § 5595, because implementing regulations allow severance pay only if an employee resigns subsequent to specific notice of a RIF action (5 C.F.R. § 550.706(a)(1)) or general notice that all positions within the employee's competitive area will be abolished (5 C.F.R. § 550.706(a)(2)). The RIF notice that the employees received before resigning did not qualify as a general notice under 5 C.F.R. § 550.706(a)(2) because it did not announce the abolishment of all positions within the employees' competitive area.

66:609

■ **Weekends/holidays**
■■ **Leave-without-pay**
■■■ **Effects**

An employee was in an administratively approved leave without pay status (LWOP) on December 24. Due to delay in arriving at her duty station on December 26, she was charged an additional 1 hour as LWOP, but she worked the remainder of her scheduled tour of duty that day. We conclude that she is entitled to pay for the December 25 holiday. So long as an employee is in a pay status on the workday either before or following a holiday, the presumption is that the employee would have worked on the holiday and straight-time pay for the holiday may be paid. While the LWOP status on the workday before the holiday was planned, the employee's delay on the day following the holiday which caused the 1 hour LWOP charge was not anticipated. Under these circumstances, we presume that she would have worked on the day designated as the holiday.

66:331

Leaves Of Absence
■ **Administrative leave**
■■ **Eligibility**
■■■ **Reduction-in-force**

The Assistant Secretary of the Navy (Financial Management) proposes to provide by regulation that employees subject to reduction-in-force (RIF) procedures be placed on administrative leave during the 30-day RIF notice period. The Secretary is advised that there is no authority to grant adminis-

trative leave under these circumstances. Further, the Office of Personnel Management regulations state that an employees should remain in a duty status during the advance notice period.

66:639

■ Administrative leave
■■ Use
■■■ Administrative discretion

This Office would not object to Department of Housing and Urban Development exercising administrative discretion in authorizing short periods of administrative leave for employee to participate in research project at Public Health Service, National Institutes of Health (NIH). Although it is generally not within the discretion of an agency to grant administrative leave for a lengthy period of time, each agency has the responsibility for determining situations in which administrative leave will be granted for brief absences.

67:126

■ Annual leave
■■ Charging

A transferred employee who was offered government housing for 1 year as an accommodation in a high-cost resort area may not be paid the expenses incurred in later moving his household goods locally to a private residence. Such moving expenses may be paid by the agency only where the employee is required to occupy government quarters. Furthermore, the employee may not have restored the 16 hours of annual leave used during the move.

68:324

■ Annual leave
■■ Charging

Firearms Instructor may not be reimbursed for costs of trying out for Olympic Shooting Team, since the tryouts did not constitute a training program or meeting for which reimbursements are allowed, nor did it constitute official business. The period of absence while at tryouts must be charged against annual leave.

68:721

■ Annual leave
■■ Charging
■■■ Amount determination

Following a late evening return from a temporary duty assignment in Virginia, several employees of the Portsmouth, New Hampshire, Naval Shipyard took annual leave the next day. While these employees were on annual leave, most employees were dismissed at noon because of a hurricane and given 4 hours administrative leave. The employees on annual leave were charged annual leave for the entire day, but claim entitlement to 4 hours administrative leave on the basis that they had intended to schedule only 4 hours of annual leave and would have reported for duty but for the early dismissal. Since none of the employees on leave informed the agency that they would be reporting for duty at any time that day, the agency reasonably applied the leave regulations by placing the employees in an annual leave status for the entire shift.

66:607

■ **Annual leave**
■■ **Charging**
■■■ **Procedures**
■■■■ **Occupational illness/injuries**

U.S. Park Policeman injured in the performance of duty and assigned to light duty for 4 hours a day continues in a pay status for the accrues leave based on a full 8-hour workday under 5 U.S.C. § 6324. When that officer requests a week of annual leave, he should be charged 40 hours rather than 20 hours of annual leave. Section 6324 does not preclude the charging of annual or sick leave for absences unrelated to the injury which occurred in the performance of duty.

66:353

■ **Annual leave**
■■ **Charging**
■■■ **Retroactive adjustments**
■■■■ **Leave-without-pay**

An employee who received advance credit of annual leave as a temporary employee used all that leave and was placed in a leave-without-pay (LWOP) status to cover the remainder of his absence. When he was later appointed to a permanent position during the same leave year and received advance crediting of additional annual leave, he requested it be retroactively substituted for part of the LWOP period previously charged. The request is denied. The prior period of LWOP was properly charged because the employee did not have sufficient leave to cover his absence. Since the entitlement to additional advance annual leave arose only because of his new employment status, it may not be retroactively substituted for any period prior to the first date it became available for his use.

67:594

■ **Annual leave**
■■ **Eligibility**
■■■ **Temporary quarters**
■■■■ **Actual subsistence expenses**

A transferred employee, who occupied temporary quarters at his new duty station, took 6 days personal leave to return to his old duty station for the closing on the sale of his old residence. His claim for the cost of the 6 days as part of his temporary quarters lodging expense is allowed since his taking of leave did not cause an unwarranted extension of the temporary quarters period.

68:268

■ **Annual leave**
■■ **Forfeiture**
■■■ **Restoration**

Some employees of the Norfolk Naval Shipyard, on approved leave for the remainder of the 1987 leave year ending January 2, 1988, forfeited up to 4 hours of annual leave as a result of the President declaring the last half (4 hours) of the scheduled workday on December 24, 1987, as a half-day closing. As a result, the employees' annual leave accounts exceeded the maximum carryover of 240

hours. There is no authority to restore the forfeited annual leave in excess of statutory limit of 240 hours for carryover into the next leave year.

68:630

■ Annual leave
■■ Lump-sum payments
■■■ Computation

State Department Foreign Service officers who are receiving a special differential at the time of their separation may have such amount included in their lump-sum leave payment. The officers are receiving the pay under statutory authority, and the lump-sum leave payment is computed on the basis of the employee's rights at the time of separation. Furthermore, since the employee's rights vest at the time of separation, there is no authority to place a limitation occurring between the time of separation and the expiration of the period to be considered in determining the amount of the lump-sum leave payment.

67:351

■ Annual leave
■■ Lump-sum payments
■■■ Computation

In August 1987, immediately before beginning a 90-day temporary appointment with the Army, the claimant was notified that she had prevailed in an equal employment opportunity complaint against the Veterans Administration (VA). As a result, she was reinstated as a VA employee with backpay and restoration of leave from February 1984 until she started working for the Army. In view of her reinstatement by VA, she is treated as an employee who is transferred from one agency to another. Consequently, she first became entitled to a lump-sum leave payment at the end of her 90-day temporary appointment, and the Army must pay her for her full annual leave balance, including restored leave.

68:548

■ Benefit election
■■ Senior executive service

An agency failed to advise a career Senior Executive Service (SES) member prior to receiving a presidential appointment to an Executive Level IV position that he could elect to continue receiving annual and sick leave or other SES benefits during his presidential appointment, as provided in 5 U.S.C. § 3392(c) (1982). As a result of the agency's failure to properly counsel the employee, the employee placed his annual and sick leave balance in abeyance and did not elect to retain leave benefits for a period of 4 years. We conclude that the agency's failure to properly advise the employee constituted an unwarranted personnel action and that the annual and sick leave the employee would have earned during this period may be retroactively restored.

66:674

■ Court leave
■■ Eligibility

Court leave authorized by 5 U.S.C. § 6322 to employees serving as witnesses is limited to the time required by an employee to appear personally as a witness or a juror. Consequently, this statutory

provision does not permit court leave to an employee required to accompany her 10-year-old son who was a witness at a federal grand jury proceeding.

66:355

■ **Leave substitution**
■■ **Eligibility**

After separation from his employment with the government, a former employee seeks to have a portion of his period of leave without pay (LWOP) converted to sick leave because he was not previously informed that sick leave might be available to him while he held outside employment. We hold that sick leave may not be substituted retroactively after separation in the absence of a *bona fide* error or violation of a regulation governing the employee's separation.

67:565

■ **Leave transfer**
■■ **Leave substitution**
■■■ **Propriety**
■■■■ **Personnel death**

Under the Temporary Leave Transfer Program for fiscal year 1988, the retroactive substitution of donated annual leave for leave without pay after the death of a leave recipient was improper. Any unused donated leave remaining to the credit of a leave recipient after his death should have been restored to the leave donors. In addition, the payment of compensation resulting from the retroactive substitution was erroneous but may be subject to waiver.

68:694

■ **Leave transfer**
■■ **Leave substitution**
■■■ **Propriety**
■■■■ **Personnel death**

Under the Voluntary Leave Transfer Program, donated leave may not be transferred to the recipient or used after the medical emergency terminates and any unused transferred leave must be restored to the leave donors. Therefore, the retroactive substitution of a recipient's unused donated leave for the recipient's leave without pay after the death of the recipient was improper, and the payment of compensation resulting from the retroactive substitution was erroneous. The erroneous payment, however, may be subject to waiver.

70:432

■ **Lump-sum payments**
■■ **Reinstatement**
■■■ **Retroactive compensation**
■■■■ **Set-off**

Employee received lump-sum leave payment upon separation because of reduction in force (RIF), which was later found to be improper by court. When employee was reinstated gross amount of backpay was set off against gross amount of lump-sum leave payment, and additional amounts were deducted from employee's salary up to total of original lump-sum leave payment. Employee sought

waiver of repayment of entire lump-sum leave payment. Waiver under 5 U.S.C. § 5584 is granted only to the extent of the net indebtedness; therefore, our Claims Group's partial waiver applied the proper legal standard. The waiver is, however, modified in amount to reflect corrected computation of backpay.

66:570

■ **Lump-sum payments**
■■ **Reinstatement**
■■■ **Retroactive compensation**
■■■■ **Set-off**

Following grant of waiver, agency deducted income taxes and medicare when refunding repayments to employee. Record showed that amounts refunded originally had been collected from employee's after-tax salary. While this Office does not rule on tax questions, which should be resolved between the individual and the Internal Revenue Service, this issue also involves the administration of the Comptroller General's waiver authority. Where, as it was here, amount being refunded had been collected from employee's after-tax salary, it was improper to deduct taxes when the moneys were refunded following waiver. Agency should furnish revised W-2 form and any other necessary documentation so that employee can file amended tax returns or claims for refund of taxes that were improperly collected from waiver refund.

66:570

■ **Military leave**
■■ **Accrual**
■■■ **Eligibility**

In light of the 1980 amendment to the military leave statute, 5 U.S.C. § 6323(a), federal employees who are members of the Reserve or National Guard are now entitled to carry over up to 15 days of unused military leave into the next fiscal year. When the carried over leave is combined with the 15 days accrued in the new fiscal year, it produces a maximum military leave benefit of 30 days which may be used in one fiscal year. Employees may be continued in military leave status on leave they had to their credit in the fiscal year they entered active duty although the military duty to which the leave is applied extends into the next fiscal year. Decisions to the contrary [10 Comp. Gen. 102 (1930), 10 Comp. Gen. 116 (1930), 11 Comp. Gen. 469 (1932), 12 Comp. Gen. 241 (1932), 17 Comp. Gen. 174 (1937), 29 Comp. Gen. 269 (1949), 35 Comp. Gen. 708 (1956), 40 Comp. Gen. 186 (1960), 41 Comp. Gen. 320 (1961), 51 Comp. Gen. 23 (1971)] are no longer applicable.

70:263

■ **Military leave**
■■ **Accrual**
■■■ **Eligibility**

Federal employees who are members of the Reserve or National Guard serving on active military duty which extends into a second fiscal year now may accrue and use the 15 days of military leave which accrues at the beginning of the second year without return to civilian status. This is authorized under the 1980 amendment to section 6323(a), which provides additional flexibility in accrual and use of military leave. Comptroller General decisions to the contrary [10 Comp. Gen. 102 (1930), 10 Comp. Gen. 116 (1930), 11 Comp. Gen. 469 (1932), 12 Comp. Gen. 241 (1932), 17 Comp. Gen. 174

(1937), 29 Comp. Gen. 269 (1949), 35 Comp. Gen. 708 (1956), 40 Comp. Gen. 186 (1960), 41 Comp. Gen. 320 (1961), 51 Comp. Gen. 23 (1971)] are superseded.

70:264

■ **Military leave**
■■ **Overpayments**
■■■ **Error detection**
■■■■ **Debt waiver**

An employee who had accumulated 16 days of military leave was erroneously granted 28 days of military leave over a 2-month period. His indebtedness for use of 12 days of excess military leave is subject to waiver under 5 U.S.C. § 5584 (1982), but we conclude that waiver is not appropriate under the circumstances.

68:104

■ **Overtime**
■■ **Eligibility**

Our Office will follow the decision in *Lanehart v. Horner,* 818 F.2d 1574 (Fed. Cir. 1987), which held that the leave with pay statutes prevent any reduction in firefighters' regular and customary pay, including overtime pay under the Fair Labor Standards Act, 29 U.S.C. §§ 201 *et seq.,* when eligible employees are on authorized leave. Therefore, we will allow claims for overtime compensation for all periods of paid leave, subject to the 6-year limitation period in 31 U.S.C. § 3702(b). Our contrary decisions (60 Comp. Gen. 493 (1981), 55 Comp. Gen. 1035 (1976), B-216640, Mar. 13, 1985, B-216640, Sept. 18, 1985) are overruled.

68:681

■ **Suspension**
■■ **Disciplinary actions**
■■■ **Propriety**
■■■■ **Senior executive service**

Agency questions whether career Senior Executive Service (SES) employees may be suspended for periods of 14 days or less for disciplinary reasons. We agree with the position of the Office of Personnel Management, the agency vested with the authority to issue regulations implementing the statutes governing SES employees, that there is no authority to suspend career SES employees for periods of 14 days or less. Any prior suspensions must be regarded as unwarranted personnel actions which require the payment of backpay.

66:338

Relocation

■ Actual expenses

■■ Eligibility

■■■ Administrative determination

■■■■ Errors

Agency erroneously authorized certain relocation expenses and the error was discovered after the employee had incurred the expenses but before the voucher was paid. The newly amended waiver statutes do not authorize waiver in cases where no payment has been made. Nothing in the statute, either before or after its amendment, modifies or abrogates the rule that the government is not liable for the erroneous advice of its agents. The statute and its legislative history demonstrate that Congress intended waiver authority to apply only to cases in which an erroneous payment has already been made.

66:642

■ Actual expenses

■■ Eligibility

■■■ Distance determination

An employee claims entitlement to relocation expenses in connection with a short-distance transfer and argues that the preferred commuting route increases the commuting distance by 15 miles. Under the Federal Travel Regulations, para. 2-1.5b(1), the agency must determine whether relocation of an employee's residence is incident to a short-distance transfer before reimbursement is allowed. Ordinarily, the commuting distance must increase by at least 10 miles. The 10-mile criterion is not an inflexible benchmark which, when exceeded, entitles the employee to a determination that the move was made incident to a transfer. Since the agency involved considered various factors, including the distances of the commutes and the various routings used in determining that a change of residence would not be incident to the transfer, we cannot find that that determination was clearly erroneous, arbitrary, or an abuse of discretion.

67:336

■ Actual expenses

■■ Eligibility

■■■ Retired personnel

■■■■ Reinstatement

Neither the Back Pay Act, 5 U.S.C. 5596, nor implementing regulations which prescribe allowable payments when an employee undergoes an unwarranted personnel action authorize consequential relocation and moving expenses when an employee is erroneously separated. Although such expenses may result from an improper personnel action, they do not represent benefits an employee would have received had the personnel action not occurred. However, relocation and moving expenses in connection with a restored employee's transfer may be allowed where the employee would have received such benefits but for the personnel action.

66:185

■ Executive exchange programs

A federal employee who participates in the Executive Exchange Program is entitled either to relocation expenses or to travel expenses since the program is in the interest of the government and the participant remains an employee of his agency during the exchange period. However, the agency retains the discretionary authority to determine whether the employee's placement at the private sector location shall be as a permanent change of station or as a temporary duty assignment. 54 Comp. Gen. 87 (1974), modified.

70:378

■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Manpower shortages

An appointee to a manpower shortage category position was issued orders erroneously authorizing reimbursement of relocation expenses as though he were a transferred employee, and he was given an advance of funds to cover some of those expenses. After he completed travel to his duty station the error was discovered. The employee has no legal right to reimbursement of the expenses of the house-hunting trip and temporary quarters subsistence expenses he incurred, even though the orders purportedly authorized reimbursement of these expenses, since the expenses were in excess of those prescribed by statute and the government is not bound by orders or advice contrary to the applicable statutes. The government's resulting claim against the employee for repayment of the travel advance can be considered for waiver under 5 U.S.C. § 5584 to the extent that (1) the advance was used for the erroneously authorized temporary quarters subsistence expenses and (2) the employee remains indebted to the government for repayment of the amounts advanced after the advance has been applied against the legitimate expenses. Since in this case the employee's legitimate expenses exceed the amount of the travel advance, however, there is no net indebtedness which would be appropriate for waiver consideration.

67:493

■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Manpower shortages

A new manpower shortage category appointee, while on temporary duty in Washington, D.C., for orientation/training en route to his undetermined first permanent duty station, was requested during that training to execute a 1-year service agreement designating Washington, D.C., as his permanent duty station, but the agency states no decision on his duty station had in fact been made. One week later he was issued a permanent change-of-station authorization and his wife shipped their household goods and travelled at government expense to Washington, D.C. Therefore, since the record does not establish notice to the employee of his duty station assignment until he received his permanent change-of-station authorization, his temporary duty allowances continued until that latter date.

70:717

■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Personal convenience

Defense Logistics Agency's refusal to grant a transferred employee relocation expenses was not clearly erroneous, arbitrary, or capricious where the employee initiated the transfer to a lateral position with no greater promotion potential. Under these circumstances, the agency properly determined that the transfer was primarily for the convenience of the employee, thereby precluding entitlement to relocation expenses.

67:392

■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Service breaks

An employee, as the consequence of an on-the-job injury, was separated from federal employment and carried on the rolls of the Office of Workers' Compensation Programs. Upon reemployment 5 U.S.C. § 8151 mandates that he be treated as though he had never left federal employment for the purpose of benefits based on length of service. Where he is reemployed at a different geographical location from his duty station at the date of separation he, therefore, is entitled to relocation expenses under 5 U.S.C. §§ 5724 and 5724a to the same extent as if he had been transferred to the new duty station without a break in service.

67:295

■ Expenses
■■ Reimbursement
■■■ Eligibility
■■■■ Service breaks

Where an individual is reemployed at his former duty station following a period of separation during which he was carried on the rolls of the Office of Workers' Compensation Programs, he is not entitled to reimbursement for expenses he incurs in relocating his residence back to that same duty station incident to the reemployment action. The individual's handicap resulting from an on-the-job injury does not justify an exception to the rule that one reappointed to federal employment following a break in service must bear the costs of traveling to his first duty station. These costs are common to all individuals appointed or reappointed to positions at locations distant from their places of residence; therefore, reimbursement for such costs cannot be viewed as ameliorating access-to-work impediments that arise as the result of a handicapping condition. However, because of equitable considerations, a report is being submitted to the Congress recommending that it authorize relocation expenses as a meritorious claim under 31 U.S.C. § 3702(d).

67:295

■ **House-hunting travel**
■■ **Travel expenses**
■■■ **Reimbursement**
■■■■ **Amount determination**

A transferred employee, who occupied temporary quarters, was joined by his wife for 8 days of househunting during the temporary quarters occupancy period. The employee is entitled to continue receiving temporary quarters subsistence expense for himself during that period, and, under FTR, para. 2-4.1a, to receive reimbursement for his wife's travel expenses and per diem, limited to the meals and incidental expense rate, during the 8 days of househunting. *George L. Daves,* 65 Comp. Gen. 342 (1986).

68:459

■ **Household goods**
■■ **Advance payments**
■■■ **Liability**
■■■■ **Waiver**

Based on erroneous agency information an employee, expecting to pay $150, placed insurance on his household effects being transported at government expense from Puerto Rico to New York. The insurance actually cost $900, and the employee requests waiver of the $750 the agency paid the carrier for the employee's insurance in excess of the $150. Since the employee's debt resulted from the erroneous advice of his agency, it is considered to have arisen out of an erroneous payment and is subject to consideration under the waiver statute. We concur with the agency's recommendation to waive the $750.

67:589

■ **Household goods**
■■ **Commuted rates**
■■■ **Weight certification**
■■■■ **Evidence sufficiency**

An employee's claim for reimbursement on the commuted rate basis for the transportation of household goods in his pickup truck, which he used to travel to his new official duty station, was disallowed because it was supported only by an estimate of weight rather than actual scale weight. On appeal from the disallowance, the claimant submitted copies of weight certificates obtained more than 4 years after the transportation occurred by reloading and weighing the truck. The claim may not be allowed since scales were available during transportation and the weight certificates obtained years after the transportation occurred are not sufficient evidence.

68:497

■ **Household goods**
■■ **Shipment**
■■■ **Advances**

The Panama Canal Commission may fund advance shipments of household goods for its eligible employees, who have completed their service agreements, under authority of 5 U.S.C. § 5729(a)(1) (1988).

69:560

■ **Household goods**
■■ **Shipment**
■■■ **Reimbursement**
■■■■ **Eligibility**

Reimbursement may be allowed for the expenses of a household goods shipment initiated by the widow of the deceased employee pursuant to the authorized sale of their house at the old duty station in furtherance of an authorized transfer, notwithstanding that the employee died before the shipment was initiated.

68:44

■ **Household goods**
■■ **Shipment**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee who was offered government housing for 1 year as an accommodation in a high-cost resort area may not be paid the expenses incurred in later moving his household goods locally to a private residence. Such moving expenses may be paid by the agency only where the employee is required to occupy government quarters. Furthermore, the employee may not have restored the 16 hours of annual leave used during the move.

68:324

■ **Household goods**
■■ **Shipment**
■■■ **Reimbursement**
■■■■ **Senior executive service**

An individual, who was appointed to a Senior Executive Service position from the private sector, seeks reimbursement for the cost of shipping household goods to his residence near his new duty station prior to and in contemplation of his appointment. Reimbursement of such costs is authorized under 5 U.S.C. § 5723 (1988), but is limited to transportation costs from the appointee's residence at selection to his first duty station. Since the appointee's residence at selection was in the same locality as his first duty station, and the one from which he regularly commuted to that duty station, the cost of transporting household goods from elsewhere to that residence is an excess cost to be borne by the appointee. Paragraph 2-1.5f(5) of the Federal Travel Regulations.

70:252

■ Household goods
■■ Shipment
■■■ Reimbursement
■■■■ Senior executive service

An individual, who was appointed to a Senior Executive Service position (SES) from the private sector, made a short-distance change of residence 8 months after his appointment and seeks reimbursement for the cost of moving his household goods to his new residence. Because his commuting distance and time to his duty station were only reduced by 4 miles and 5 minutes, the agency doubts that the move qualified as being incident to his appointment. Agencies have broad discretion under paragraph 2-1.5b(2) of the Federal Travel Regulations to determine whether short-distance relocations of new SES appointees are incident to their appointment. Since the agency did not make the required determination that the appointee's short-distance move was incident to his appointment, we conclude that he may not be reimbursed those transportation costs.

70:252

■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

Since no prohibition is found in the authorizing statute or its legislative history, the Federal Travel Regulations may be revised to authorize the transportation of an employee's privately owned vehicle (POV) from overseas at government expense, even though no POV was transported overseas initially, provided the employee was assigned or transferred to a post of duty overseas for other than temporary duty, a determination was made that use of a POV at the overseas station was in the government's interest, and the employee actually used the POV at the overseas station.

68:258

■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

The Federal Travel Regulations may not be revised to authorize transportation of POVs of employees recruited in Hawaii and Puerto Rico to their first permanent duty station in the continental United States. The statute authorizing transportation of POVs to, from, and between posts of duty outside the continental United States provides such authority only where the POV is to be used at a duty station outside the continental United States.

68:258

■ Household goods
■■ Shipment
■■■ Restrictions
■■■■ Privately-owned vehicles

An employee is not entitled to reimbursement for shipment of his automobile to his new duty station in Hawaii where shipment at government expense was not authorized at time of transfer and

the employee shipped his automobile at personal expense. The employee has not shown that the agency abused its discretion in determining that it would not authorize overseas transportation of employees' automobiles to their duty station as being "in the best interest of the government," pursuant to 5 U.S.C. § 5727(b)(2) and the implementing provisions of the Federal Travel Regulations and Joint Travel Regulations. *Frayne W. Lehmann,* B-227534.4, Nov. 5, 1990, and B-227534.3, Feb. 21, 1990, affirmed.

70:327

■ Household goods
■■ Shipment
■■■ Time restrictions
■■■■ Extension

An employee stationed in New Orleans was transferred to Baltimore. He was granted a 1-year extension of time to purchase a residence in the Baltimore area, but the agency denied an extension of time to initiate the travel of his immediate family and ship his household goods. That action was erroneous and has now been corrected. Under paragraph 2-1.5a(2) of the Federal Travel Regulations, an employee who has been granted an extension of time to complete approved real estate transactions is automatically entitled to an equal extension period to initiate family travel and ship household goods.

67:395

■ Household goods
■■ Temporary storage
■■■ Expenses
■■■■ Weight certification

Rental expense for self-storage facility for temporary storage of household goods and personnel effects may not be reimbursed in the absence of proof of weight of the items stored.

67:286

■ Household goods
■■ Vessels
■■■ Restrictions
■■■■ Liability

An employee who ships a boat and its trailer as part of a household goods shipment incident to a transfer of duty station must bear the expense since boats are expressly excluded by regulations from the definition of "household goods" that may be shipped at government expense, even though a government transportation officer mistakenly authorized shipment of the boat and the trailer at government expense.

66:166

■ **Household goods**
■■ **Weight restrictions**
■■■ **Liability**
■■■■ **Computation**

The constructive weight that the mover used as the basis for his charges in this case (which was based on the full cubic capacity of his vehicle), and which was also used as the basis of overweight charges assessed against the employee, must be recalculated because that constructive weight does not appear to represent sufficiently the actual weight shipped. The proper formula for computing the employee's expenses for shipping items that are not household goods as well as for shipping more than the authorized weight of household goods is explained in *James Knapp,* B-216723, August 21, 1985.

66:166

■ **Household goods**
■■ **Weight restrictions**
■■■ **Liability**
■■■■ **Computation**

An officer of the Public Health Service selected a motor common carrier to transport his household goods. The officer alleges that the carrier represented that the shipment's weight would not exceed the officer's authorized weight allowance of 13,500 pounds and that a Guaranteed Price Pledge based on the weight was quoted. The shipment's actual net weight, however, as determined from certified weight tickets, was 21,060 pounds. After adjustments for crating and professional books, the certifying officer determined that the officer was liable for 4,454 pounds of excess weight. Where facts show that the Guaranteed Price Pledge was based on tender rates applied to a prudent estimate of the shipment's actual net weight, the determination of excess weight charges is proper. The officer's reliance on the carrier's erroneous low weight estimate does not provide a basis for relief from liability for excess weight charges since the government's legal obligation is to pay the charges for transporting only the officer's authorized weight allowance.

67:171

■ **Household goods**
■■ **Weight restrictions**
■■■ **Liability**
■■■■ **Waiver**

A long-distance practice of the government in arranging transportation of employees' and service members' household goods incident to transfers of duty stations is for the government to contract with commercial carriers using government bills of lading (GBLs). Upon completion of the shipment the government pays the carrier and collects any excess charges from the member or employee for exceeding his or her authorized weight allowance or for extra services. Employees' or members' resulting debts do not arise out of "erroneous" payments, and therefore are not subject to consideration for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

67:484

■ **Miscellaneous expenses**
■■ **Reimbursement**
■■■ **Eligibility**

Transferred employee is entitled to $350 miscellaneous expenses allowance where record shows residence was established at new duty station and employee moved household effects from one state to another.

67:286

■ **Miscellaneous expenses**
■■ **Reimbursement**
■■■ **Eligibility**

Corps of Engineers' employees stationed in Germany, who are to be transferred to positions in the United States, may not be reimbursed lease termination expenses as miscellaneous expenses since the FTR provides that the miscellaneous expense allowance may not be used to reimburse employees for costs or expenses which are disallowed elsewhere in the regulations.

69:507

■ **Miscellaneous expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Licenses**

A transferred employee claimed the cost of new driver's licenses for himself and his wife as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. The agency permitted the inclusion of only one license. The cost of both are to be included as allowable expenses. *George M. Lightner,* B-184908, May 26, 1976.

70:486

■ **Miscellaneous expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Litigation expenses**

A transferred employee attempted to cancel a residence purchase contract entered into prior to notice of transfer and retrieve his earnest money deposit. As a result of court action initiated by the seller, the court concluded that the earnest money deposit had been forfeited to the seller for breach of contract, and awarded the seller judgment for an additional amount as liquidated damages to cover expenses and lost rental income. The forfeited deposit as well as the liquidated damages and court costs may be included as miscellaneous expenses under section 302-3.1(c) of the Federal Travel Regulation because the transfer to the new duty station was the proximate cause of those expenses. *Cf. Steven W. Hoffman,* B-184280, May 8, 1979.

70:486

■ **Miscellaneous expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Post-office box**

A transferred employee rented a post office box at his new duty station for a short period until he established a residence at that location and claimed the cost as a miscellaneous expense under section 302-3.1(b) of the Federal Travel Regulation. Since the purpose for the allowance is to help defray the extra expenses incurred during the transitional period when a residence is discontinued at the old station and a residence is established at the new station, the short-term post office box rental qualifies as an allowable miscellaneous expense. B-163107, May 18, 1973, and *George M. Lightner,* B-184908, May 26, 1976, are overruled in part.

70:486

■ **Miscellaneous expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Telephone calls**

A transferred employee's claim for telephone calls as allowable miscellaneous expenses under section 302-3.1(b) of the Federal Travel Regulation (FTR) was disallowed by the agency in its entirety. Such expenses may be allowed or disallowed depending on the purpose for the calls. Where telephone calls concern a matter which would itself be allowable elsewhere in the FTR, *e.g.,* real estate transactions, telephone calls regarding it are includable as a miscellaneous expense. *Timothy R. Glass,* 67 Comp. Gen. 174, 177 (1988).

70:487

■ **Mobile homes**
■■ **Reimbursement**
■■■ **Overpayments**
■■■■ **Liability**

Uniformed services members and civilian employees are entitled to movement of their mobile homes in lieu of household goods at government expense upon a change in duty station. Their maximum entitlement is an amount equal to the cost of moving their maximum entitlement of household goods. In some cases the government arranges the move and pays the carrier the full cost, and in other cases the members or employees receive an advance and arrange the move themselves. In either case if the members or employees incur a debt to the government because of exceeding their maximum entitlement, the debts may not be considered for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584, because they resulted from the regular operation of the program and did not arise out of "erroneous" payments. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

67:485

■ **Mobile homes**
■■ **Shipment**
■■■ **Actual expenses**
■■■■ **Reimbursement**

The Federal Travel Regulations currently authorize transferred federal employees only the costs directly related to the actual shipment of a mobile home as reimbursable "transportation" expenses. Their costs necessarily incurred in relocating the mobile home before and after shipment are instead classified as "miscellaneous" expenses and are reimbursable only through the payment of a separate miscellaneous expense allowance. Hence, transferred employee's out-of-pocket costs for blocking, leveling, and connecting utilities for his mobile home at his new duty station are reimbursable only as miscellaneous expenses, notwithstanding that the maximum payable was inadequate to cover his costs.

66:480

■ **Mobile homes**
■■ **Shipment**
■■■ **Actual expenses**
■■■■ **Reimbursement**

The statute authorizing transferred employees reimbursement of "transportation" expenses in relocating a mobile home was designed by Congress to provide civilian employees with the "same entitlement" previously granted to military personnel. Regulations implementing the military statute apply the statutory term "cost of transportation" as generally covering all costs necessarily incurred by a service member in relocating a mobile home, including costs incurred before and after its actual shipment. The Comptroller General has no objection to this interpretation and recommends that the Federal Travel Regulations be amended to provide the same rule for civilian employees, in furtherance of the congressional policy. *Katherine I. Tang,* 65 Comp. Gen. 749 (1986), overruled in part.

66:480

■ **Mobile homes**
■■ **Shipment**
■■■ **Actual expenses**
■■■■ **Reimbursement**

A transferred employee moved her mobile home to her new duty station and claims entitlement to expenses incurred to prepare the mobile home for transport and to set it up at the new duty station. Chapter 2, part 7 of the Federal Travel Regulations (FTR), authorizes reimbursement of costs directly related to actual shipment of a mobile home. Expenses necessarily incurred to relocate it before and after shipment are classified as miscellaneous expenses and reimbursable only through payment of a miscellaneous expense allowance under chapter 2, part 3 of the FTR. *John Schilling,* 66 Comp. Gen. 480 (1987). Since she has been paid the maximum amount allowable under FTR, para. 2-3.3b, her claim is denied.

70:429

■ **New appointment**
■■ **Travel expenses**
■■■ **First duty stations**

An agency ordered a new appointee to successive training assignments en route to a permanent duty assignment in Washington, D.C. Ordinarily, a new appointee must bear the expenses of travel to the first duty station; however, where the employee performs actual and substantial work duties at three locations while being trained on the job for a period of nearly 15 months, GAO would not question the agency's determination to view the transfers as changes of official duty station for reimbursement of authorized relocation expenses.

68:133

■ **Overseas personnel**
■■ **Home service transfer allowances**
■■■ **Eligibility**

An employee was assigned to a United States-Saudi Arabian Commission under the Foreign Assistance Act and his travel was governed by the Foreign Service Travel Regulations. Upon his return to the United States, he is eligible for a home service transfer allowance even though he was not between assignments to posts in foreign areas. *See William J. Shampine,* 63 Comp. Gen. 195 (1983).

68:692

■ **Overseas personnel**
■■ **Household goods**
■■■ **Shipment**
■■■■ **Privately-owned vehicles**

An employee shipped a privately owned vehicle (POV) to Hawaii at government expense. Due to an accident and damage to the POV, he purchased a foreign manufactured vehicle as a replacement from a commercial automobile dealer in Hawaii. On subsequent transfer to another agency, he seeks reimbursement for shipment of that POV to the continental United States. While the FTRs are silent on the point, the gaining agency has discretionary authority to allow shipment at government expense of that foreign-made POV to the continental United States upon his return. Following the rule in *Thomas D. Mulder,* 65 Comp. Gen. 900 (1986), and under authority of paragraph 2-1.6 of the FTR, the cost of that shipment, if determined to be appropriate, is to be borne by the gaining agency.

70:734

■ **Overseas personnel**
■■ **Leases**
■■■ **Termination costs**
■■■■ **Reimbursement**

Corps of Engineers asks whether employees stationed in Germany, who are to be transferred to positions in the United States due to a reduction in staffing levels, may be reimbursed for expenses incurred in settling unexpired leases in Germany. The employees may not be reimbursed such ex-

penses since 5 U.S.C. § 5724a(a)(4)(A) (1988) does not allow reimbursement of lease termination expenses at a duty station outside the United States or certain other areas specified in the statute.

69:506

■ **Overseas personnel**
■■ **Return travel**
■■■ **Eligibility**

Employee transferred from Canada to Hawaii and served approximately 17 months with the agency in Hawaii, prior to his transfer to another government agency in Hawaii, where he remained for 2-1/2 years. He is entitled to his return travel and transportation expenses to the continental United States since he fulfilled his service agreement. Expenses should be paid by the agency to which the employee transferred, computed on a constructive cost basis.

68:587

■ **Overseas personnel**
■■ **Return travel**
■■■ **Eligibility**

An employee, who had vested return travel rights under 5 U.S.C. § 5722 from Hawaii, received an inter-agency transfer to the continental United States. He is entitled to full relocation expense reimbursement under 5 U.S.C. § 5724 and § 5724a from the gaining agency. A losing agency pays vested return right expenses only when the return travel is performed before an inter-agency transfer occurs. *Thomas D. Mulder,* 65 Comp. Gen. 900 (1986).

70:733

■ **Per diem**
■■ **Reimbursement**
■■■ **Amount determination**

Entitlement to relocation travel per diem under paragraph 2-2.3d(2) of the Federal Travel Regulations is not dependent on the actual distance the employee traveled each day. Per diem is allowed on the basis of the actual time used to complete the entire trip, not to exceed the number of days established by dividing the total authorized mileage by not less than 300 miles a day.

69:72

■ **Relocation service contracts**
■■ **Eligibility**

An agency policy limiting temporary quarters to 30 days for all transferred employees who elect relocation services is contrary to the Federal Travel Regulations and should not be enforced. An employee's claim for an additional period of temporary quarters, denied on the basis of the agency policy, is remanded to the agency for reconsideration in light of the employee's particular circumstances.

69:95

■ **Relocation service contracts**
■■ **Property management**
■■■ **Authority**

The National Security Agency (NSA) questions whether a property rental management service may be included in the agency's relocation service contracts for its employees who are transferred within the continental United States. Although the statutory authority for relocation service contracts contained in 5 U.S.C. § 5724c (Supp. III 1985) does not necessarily preclude this type of service, it has not been provided for by regulations implementing the statute. In the absence of such implementing regulations, there is no authority for NSA to include property rental management service in its relocation service contracts.

66:568

■ **Relocation service contracts**
■■ **Reimbursement**
■■■ **Direct costs**

The Bonneville Power Administration (BPA) is advised that BPA employees do not have to reimburse the agency for direct costs incurred incident to a relocation services contract when a residence sale is not completed. The authority to enter into relocation service contracts under 5 U.S.C. § 5724c (Supp. IV 1986) affords agencies a broader opportunity to provide services related to real estate transactions for transferred employees, subject to the terms of the agency's contract, and is not as restrictive as the language in 5 U.S.C. § 5724a(2)(4) (1982), which specifically refers to the sale and purchase of a residence.

68:321

■ **Relocation service contracts**
■■ **Reimbursement**
■■■ **Direct costs**

Employee accepted use of relocation services contractor, but rejected contractor's offer to purchase his former home. Employee does not have to reimburse the agency for direct costs agency paid to contractor when the employee rejects the contractor's purchase offer. *Gerald F. Stangel, Larry D. King,* 68 Comp. Gen. 321 (1989).

69:135

■ **Relocation travel**
■■ **Dependents**
■■■ **Eligibility**

A transferred employee was issued travel orders authorizing reimbursement of travel and temporary quarters subsistence expenses for herself, her spouse, and her daughter who was 22 years old. The employee was given a travel advance based on the estimated expenses for herself and the two family members. After she incurred expenses in reliance on the orders and submitted a voucher, the agency realized that the daughter was over 21 years old and precluded by regulation from being considered as a family member of the employee for purposes of relocation expenses. Her claim for travel expenses for her daughter may not be allowed. However, since she incurred expenses for the daughter in reliance on the erroneous orders, her debt for the portion of her travel advance still

outstanding is subject to consideration for waiver. Case is remanded to the agency for computation of the debt subject to waiver.

68:462

■ **Relocation travel**
■■ **Eligibility**
■■■ **Administrative determination**
■■■■ **Errors**

A Veterans Administration employee who, due to an agency administrative error, received improper authorization for a house-hunting trip for his wife and himself from San Juan, Puerto Rico, to Houston, Texas, is granted a waiver of the claim against him for the cost of the round-trip airfare paid by the government. Payment for house-hunting trips to, from, or outside of the continental United States is not authorized under 5 U.S.C. § 5724a(a)(2). However, a waiver of the claim is granted under the Comptroller General's newly extended waiver authority at 5 U.S.C. § 5584 since there is no evidence of fraud, misrepresentation, fault, or lack of good faith on the part of the employee and collection in this case would be against equity and good conscience and not in the best interests of the United States.

66:666

■ **Relocation travel**
■■ **Eligibility**
■■■ **Time restrictions**
■■■■ **Extension**

An employee stationed in New Orleans was transferred to Baltimore. He was granted a 1-year extension of time to purchase a residence in the Baltimore area, but the agency denied an extension of time to initiate the travel of his immediate family and ship his household goods. That action was erroneous and has now been corrected. Under paragraph 2-1.5a(2) of the Federal Travel Regulations, an employee who has been granted an extension of time to complete approved real estate transactions is automatically entitled to an equal extension period to initiate family travel and ship household goods.

67:395

■ **Residence transaction expenses**
■■ **Appraisal fees**
■■■ **Reimbursement**

A transferred employee incurred as expense to have his old residence appraised before trying to sell it himself. He later used the services of a relocation company under contract to his agency, and he claimed reimbursement for the cost of the earlier appraisal. Paragraph 2-12.5b of the Federal Travel Regulations prohibits reimbursement to an employee for any personally incurred real estate expenses that are similar or analogous to any expenses the agency is required to pay to a relocation company. Since the relocation company had the property appraised as part of their contract to purchase the residence from the employee, which service was paid for by the agency, the employee may not be reimbursed his appraisal costs.

67:453

■ **Residence transaction expenses**
■■ **Appraisal fees**
■■■ **Reimbursement**

A transferred employee claims reimbursement for a fee paid to the lender reflecting an appraiser's charge for inspecting the employee's newly constructed residence prior to the closing date. Pursuant to FTR, para. 2-6.2d(1)(j), only those construction expenses which are comparable to allowable expenses associated with the purchase of an existing residence may be reimbursed. The customary cost of an appraisal is such an expense and is, therefore, reimbursable as provided by FTR, para. 2-6.2b.

68:373

■ **Residence transaction expenses**
■■ **Appraisal fees**
■■■ **Reimbursement**

Agency paid relocation services contractor its direct costs for appraisals and title work. After employee rejected contractor's purchase offer, he also incurred expense for appraisal and title services. He may not be reimbursed for those expenses since they duplicate expenses agency paid to relocation services contractor. The Federal Travel Regulations in para. 2-12.5 (Supp. 11, Aug. 27, 1984) prohibit a dual benefit once an election is made to use a contractor.

69:136

■ **Residence transaction expenses**
■■ **Cooperative apartments**
■■■ **Title transfer**
■■■■ **Fees**

A transferred employee may not be reimbursed the amount paid for a cooperative apartment transfer fee since it is not specifically authorized in the Federal Travel Regulations, nor is it analogous to other items for which reimbursement is authorized.

68:552

■ **Residence transaction expenses**
■■ **Finance charges**

A transferred employee may not be reimbursed the amount of a seller financing concession adjustment that went into the determination of the market valuation of his house which was the basis of the offer made to him by a relocation services contractor and accepted by him in the sale of his house.

70:198

■ **Residence transaction expenses**
■■ **Inspection fees**
■■■ **Reimbursement**

A transferred employee claimed reimbursement for the costs of a home inspection and a pool inspection, both of which were recommended by his real estate agent. His claim for reimbursement for those fees, on the basis that once they were inserted in the contract they qualified as "required

services," is denied. The term "required" as used in the applicable statute and regulations relates only to those services which are imposed on the employee by state or local law or by the lender as a precondition to the sale or purchase of a residence.

67:449

■ **Residence transaction expenses**
■■ **Leases**
■■■ **Termination costs**
■■■■ **Reimbursement**

Pursuant to a permanent change-of-station transfer, employee paid lessor of rented apartment one month's rent as required by terms of unexpired lease when employee terminates lease because of job transfer but is unable to give 30-day notice to lessor. Rent paid may not be reimbursed. An underlying premise upon which the lease termination expense benefit is grounded is that the leased quarters were actually vacated. This premise was unfulfilled here because employee continued to occupy the apartment for part of the month and her husband continued to occupy the apartment during the entire month. In any event, FTR para. 2-6.2h, providing for reimbursement of lease termination expenses, requires employee to make reasonable efforts to sublet apartment. Where facts reveal that employee's spouse rented apartment immediately after employee terminated lease, employee failed to make reasonable efforts to sublet.

67:285

■ **Residence transaction expenses**
■■ **Leases**
■■■ **Termination costs**
■■■■ **Reimbursement**

Transferred employee is not entitled to reimbursement of a rental deposit forfeited at new permanent duty station where employee terminated employment at new duty station prior to occupancy of rented quarters.

67:286

■ **Residence transaction expenses**
■■ **Leases**
■■■ **Termination costs**
■■■■ **Reimbursement**

An employee, who knew he would be transferred in 6 months, entered into a 6-month lease containing a short-term penalty provision, rather than entering into a customary 12-month lease. Although the employee acted prudently to protect the government from a greater potential liability for breaking a 12-month lease, the employee may not be reimbursed the short-term lease penalties as though they were settlements of unexpired leases. However, they may be reimbursed as miscellaneous expenses subject to the limitations applicable thereto. There is no similar authority to reimburse an employee for a credit clearance report relating to a lease.

68:133

■ **Residence transaction expenses**
■■ **Litigation expenses**
■■■ **Attorney fees**
■■■■ **Reimbursement**

An employee's legal expenses incurred in connection with the preparation and settlement of a claim against his agency for relocation expenses may not be reimbursed since no express statutory authority allows such payment.

68:456

■ **Residence transaction expenses**
■■ **Litigation expenses**
■■■ **Attorney fees**
■■■■ **Reimbursement**

A transferred employee, who jointly owned a residence with his former wife, was required to secure a modification of the court order associated with the divorce decree so that the employee could sell his interest in the residence to his former wife. While the modification itself was not contested, it was a continuation of a litigated matter. Under paragraph 2-6.2c of the Federal Travel Regulations the costs of litigation are not reimbursable. Hence, the legal fee incurred to secure the court order modification may not be reimbursed.

70:330

■ **Residence transaction expenses**
■■ **Loan document preparation fees**
■■■ **Reimbursement**

Employee who paid a loan application fee of $250 may be reimbursed for that fee as well as a loan origination fee, since he has demonstrated that $250 is the customary fee charged for taking of loan applications in the locality of his new residence. Since a loan application fee is charged to all applicants, it is not a finance charge and it may be reimbursed under FTR, para. 2-6.2d(1)(f) as a fee "similar" to an FHA or VA loan application fee.

66:627

■ **Residence transaction expenses**
■■ **Loan origination fees**
■■■ **Reimbursement**
■■■■ **Amount determination**

Transferred employee who purchased a residence at his new duty station may not be reimbursed for the full amount of a loan origination fee of 3 percent. Although he has demonstrated by a Federal Home Loan Bank's survey of local lenders that a fee of 3 percent was customary in the locality for the conventional financing involved, the "fees" reflected in the survey include not only loan origination fees but also points and discounts which are not reimbursable expenses. *Steven C. Krems,* 65 Comp. Gen. 447, overruled in part.

66:627

■ **Residence transaction expenses**
■■ **Loan origination fees**
■■■ **Reimbursement**
■■■■ **Amount determination**

Ordinarily reimbursable real estate selling expenses would include those for refinancing the employee's residence at the old duty station to expedite the sale by permitting the buyer to assume the new mortgage. But the total real estate selling expenses, including a loan origination fee for refinancing, may not exceed 10 percent of the sales price ($9,250), the statutory maximum. Thus, the employee may not, in order to avoid the statutory maximum amount, be reimbursed the loan origination fee incurred in refinancing the old residence as a cost of purchasing a home at the new duty station. However, the fee may be allowed as an expense of the sale to the extent total sales expenses do not exceed $9,250.

66:472

■ **Residence transaction expenses**
■■ **Loan origination fees**
■■■ **Reimbursement**
■■■■ **Amount determination**

If an employee retains a mortgage broker who performs necessary administrative services that assist the ultimate lender in processing a loan, the employee may be reimbursed for the loan origination fees charged by both the broker and lender. The employee's total reimbursement, however, is limited to the customary fee charged by financial institutions in the area of the residence. Furthermore, the services of the broker must not be duplicated by the lender and must not increase the loan origination fee over what the lender would have charged in the absence of a broker having been involved.

69:340

■ **Residence transaction expenses**
■■ **Loan origination fees**
■■■ **Reimbursement**
■■■■ **Amount determination**

The fact that an employee's loan obtained to purchase a residence at his new station includes an amount for prepaid finance charges would not affect the amount he may be reimbursed for a loan origination fee which is charged as a percentage of the total loan.

69:340

■ **Residence transaction expenses**
■■ **Miscellaneous expenses**
■■■ **Reimbursement**

A transferred employee claims reimbursement for shipping charges incurred by him to speed delivery of his loan documents to the lender incident to the purchase of a residence. The claim is denied. Such shipping charges are not specifically listed as items to be reimbursed under FTR, para. 2-6.2d(1)(a-e) (Supp. 4, Oct. 1, 1982). Nor are shipping (delivery) charges "similar in nature" to the specifically listed reimbursable items as authorized in FTR, para. 2-6.2d(1)(f). None of the listed au-

thorized expenses relates to shipping or delivery fees; therefore, the shipping charges may not be allowed under any of those clauses, nor under FTR, para. 2-6.2f which authorizes reimbursement for incidental charges since the expense was not for a "required service."

68:373

■ **Residence transaction expenses**
■■ **Miscellaneous expenses**
■■■ **Reimbursement**

An employee became legally obligated to buy a home at his old duty station and subsequently learned he was being considered for a new position in another state. The legal fees incurred in renegotiating the sales contract to include a clause allowing the employee to terminate the contract without loss of the deposit if the employee transferred may not be reimbursed as a real estate expense under 5 U.S.C. § 5724a(a)(4) since he did not acquire an interest in the property. However, the legal fees may be reimbursed as a miscellaneous expense under 5 U.S.C. § 5724a(b), subject to the agency's determination that an administrative intent to offer him the new position had been expressed before the expenses were incurred.

68:456

■ **Residence transaction expenses**
■■ **Miscellaneous expenses**
■■■ **Reimbursement**

In connection with the sale or purchase of a residence, a transferred employee is not entitled to reimbursement for a lawn service expense since that is a nonreimbursable routine maintenance cost. Also, where pest and home inspections were not required by law or as conditions of obtaining financing, they are not reimbursable. Costs of express mail are not reimbursable real estate expenses but may be reimbursed under the miscellaneous expense allowance.

70:362

■ **Residence transaction expenses**
■■ **Mortgage insurance**
■■■ **Reimbursement**

A transferred employee claims reimbursement for two title insurance policy endorsements. FTR, para. 2-6.2d(1)(h) specifically authorizes reimbursement of mortgage title insurance premiums paid for by employees and required by lenders. The endorsements are reimbursable.

68:374

■ **Residence transaction expenses**
■■ **Property titles**
■■■ **Insurance premiums**
■■■■ **Reimbursement**

A transferred Veterans Administration employee purchased a residence at his new official station. In obtaining the title insurance necessary to secure financing, he received a reduced rate on his purchase of mortgagee's title insurance because it was purchased in conjunction with an owner's title insurance policy. The cost of the title insurance was equally divided between seller and buyer.

The employee is entitled to reimbursement of an amount equal to one-half of the charge for the mortgagee's title insurance if purchased separately.

66:206

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

In the absence of any statutory or regulatory restriction, the amounts paid by an agency to a relocation services contractor on behalf of an employee under the provisions of 5 U.S.C. § 5724c are not considered in determining the maximum allowable reimbursement to the employee for his own expenses in selling his residence on the open market under § 5724a(a)(4).

69:136

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

An employee who is transferred back to his former duty station is entitled to only those real estate expenses which he incurred prior to notice of the retransfer and those which cannot be avoided. *Warren L. Shipp,* 59 Comp. Gen. 502 (1980), amplified.

69:287

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

Employee was transferred from Columbus to Dayton and then back to Columbus within 1 year. She sold her Columbus residence within 1 year from effective date of first transfer and prior to official notice of retransfer. Subsequent transfer does not extinguish the right to reimbursement created by the initial transfer. Employee is entitled to reimbursement of residence sale expenses incident to initial transfer to Dayton. Further, employee is entitled to residence purchase expenses incident to the retransfer to Columbus.

69:414

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

An employee who transferred from Missouri to Germany for personal convenience and was subsequently transferred to Illinois in the interest of the government, is not entitled to reimbursement for real estate expenses in connection with the sale of his home in Missouri and the purchase of a house in Illinois. Only employees who were transferred to a foreign area in the interest of the government and who have completed a tour of duty in a foreign area as provided for in a service agreement are entitled to be reimbursed their real estate expenses.

69:559

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

Employee entered into a contract to sell his old residence after he was selected and accepted a job offer from another agency at a new duty station. He later accepted another job offer from his old agency and declined the first offer. He is entitled to reimbursement of sales expenses incident to his transfer by his agency. Since the residence sales contract was occasioned in contemplation of a transfer in the interest of the government his acceptance of another transfer does not defeat his right to be reimbursed.

70:205

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B-168074, Oct. 29, 1969, and B-180986, Sept. 18, 1974.

70:330

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

A transferred employee, who jointly owned a residence with his former wife, sold his entire interest in the property to his former wife. The rule requiring proration of expenses between the employee and his former wife is not applicable because the residence was not sold by both parties to a third party. Hence, the employee is entitled to full reimbursement of the allowable expenses he incurred in that transaction.

70:330

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**

An employee executed an agreement to sell his old residence after he received and accepted an intra-agency job offer involving transfer to a new duty station. He later accepted a job offer from another agency, also involving transfer to a new duty station, declined the first job offer and settled on the residence sale after receiving his travel authorization from the second agency. Declination of first job offer after accepting second job offer does not defeat his right to residence sale expense reimbursement so long as the conditions of entitlement under paragraph 2-6.1 of the Federal Travel Regulations (FTR) are met. *Paul W. Adamske,* B-239590, Jan. 29, 1991, 70 Comp. Gen. 205.

70:734

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Lot sales**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B–168074, Oct. 29, 1969, and B–180986, Sept. 18, 1974.

70:329

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **New residence construction**

A transferred employee constructed a residence at his new permanent station rather than purchase an existing residence. The real estate expenses authorized under paragraph 2–6.2 of the Federal Travel Regulations to be reimbursed are those which are comparable to expenses incurred in connection with the purchase of an existing residence. Since the expenses incurred as a result of permanent financing of the residence are most representative of the expenses incurred to purchase an existing residence, the employee's entitlement is to be primarily based on the expenses attendant to that settlement. *Ray F. Hunt,* B–226271, Nov. 5, 1987.

69:573

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **New residence construction**

A transferred employee constructed a residence at his new permanent station. Although the expenses authorized by paragraph 2–6.2 of the Federal Travel Regulations (FTR) to be reimbursed are those usually incurred incident to the securing of permanent financing upon completion of the residence, other expenses incurred prior to permanent financing also may be reimbursed so long as they are not a duplication of an expense item already allowed incident to that permanent financing, an expense uniquely applicable to the construction process, or a nonreimbursable item listed under FTR, para. 2–6.2d(2).

69:574

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred government employee attempted to purchase a house in connection with her permanent change-of-station move. Because the employee had recently been discharged in bankruptcy,

however, title to the property was placed solely in the name of a friend in order to satisfy the requirements of a mortgage lender. The employee may not be reimbursed real estate expenses since title to the property purchased was not in her name solely, in her name and the name of an immediate family member jointly, or solely in the name of an immediate family member, as required by the applicable statute and regulations. The fact that the employee later married the friend in whose name title was vested, and the fact that the employee made financial contributions towards the purchase, are irrelevant for purposes of determining whether the employee has met the title requirements.

66:44

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

Agency questions whether a transferred employee wishing to use a relocation contractor's house sale services at no personal expense meets the applicable title requirements in paragraph 2-6.1c of the Federal Travel Regulations. These requirements are that an employee must have held title to his residence either alone or jointly with a member of his immediate family before receiving notice of his transfer. Here, the employee has met neither requirement because: (1) his separated wife's oral agreement to sell her interest in their residence to him was unenforceable under state law and thus did not vest him with sole title; and (2) his separated wife was not part of his household and, therefore, did not qualify as a member of his immediate family.

66:95

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred employee purchased a residence at his new duty station with his nondependent brother, and the employee claims real estate expense reimbursement based on his 95 percent interest in the property. Since title to the property was in both their names as tenants-in-common and specifically designated their respective financial interests, the employee may be reimbursed 95 percent of the total allowable expenses. *Cf. Bernard Mowinski,* B-228614, Dec. 30, 1987.

68:519

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred employee, who jointly owned a residence with his former wife, sold his one-half interest to her based on an agreed to selling price which was below the market price. His claim for expenses which would have been incurred had the residence been sold on the open market is denied. Reimbursement for real estate transaction expenses under the Federal Travel Regulations is limited

to those allowable expenses which the transferred employee actually incurs and is legally obligated to pay. B-168074, Oct. 29, 1969, and B-180986, Sept. 18, 1974.

70:330

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred employee, who jointly owned a residence with his former wife, sold his entire interest in the property to his former wife. The rule requiring proration of expenses between the employee and his former wife is not applicable because the residence was not sold by both parties to a third party. Hence, the employee is entitled to full reimbursement of the allowable expenses he incurred in that transaction.

70:330

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Property titles**

A transferred employee sold his residence at the old duty station which he owned in his capacity as trustee of an *inter vivos* trust which he created in which he was sole beneficiary during his lifetime and in which he retained full powers of revocation. Since employee was both sole trustee and sole beneficiary, he retained all legal title and beneficial interest in the property and therefore, retained sufficient title for purposes of real estate expense reimbursement under the Federal Travel Regulations. Thus, he is entitled to receive reimbursement of real estate expenses associated with the sale of the residence.

70:362

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Residency**

An employee who bought a house and resided there on weekends while remodeling it may be reimbursed for real estate expenses related to its sale even though he was not using it as a residence from which he commuted to and from work on a daily basis at the time he was notified of his transfer. The record shows the employee would have made the house his permanent home but for his transfer in the interest of the government.

67:174

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Residency**

An employee stationed in New Orleans was transferred to Baltimore. The only residence he owned was located in Atlanta where his family lived. His request to be reimbursed the expense of selling his Atlanta residence is denied. Under paragraphs 2-1.4i and 2-6.1 of the Federal Travel Regulations, in order for a residence to qualify for sales expense reimbursement, the employee must live there and regularly commute to and from his worksite from that residence. The record shows that he rented quarters in New Orleans from which he commuted to work daily and only occupied the Atlanta residence on weekends and holidays.

67:395

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Time restrictions**

Employee completed real estate transaction 2 years and 8 months after the effective date of his transfer but did not request a 1-year extension of the 2-year time limit for completion of real estate transactions until after the initial 2-year period had expired. Paragraph 2-6.1e(2)(b) of the Federal Travel Regulations (Supp. 4, August 23, 1982) requires employees to request an extension not later than 30 days after expiration of the initial 2-year period but permits agencies to extend the period for accepting requests for extensions. Accordingly, although payment cannot be made under the circumstances as they now exist, the agency should review the record to see if approval of an extension is warranted. If such approval then is given, the employee's real estate expenses may be reimbursed.

66:428

■ **Residence transaction expenses**
■■ **Reimbursement**
■■■ **Eligibility**
■■■■ **Time restrictions**

An employee stationed in New Orleans was transferred to Baltimore and was authorized the maximum 3-year period, including a 1-year extension, to purchase a residence in the Baltimore area, initiate the travel of his immediate family, and ship his household goods. Because of unusual circumstances, the employee seeks an unlimited extension period within which to complete all aspects of his permanent change-of-station move. His request is denied since the maximum time limit imposed by paragraph 2-6.1e of the Federal Travel Regulations has already been granted and there is no basis upon which an additional extension period may be allowed. Those regulations have the force and effect of law and may not be waived or modified by an agency.

67:396

■ **Residence transaction expenses**
■■ **Relocation service contracts**
■■■ **Offers**
■■■■ **Rejection**

Agency paid relocation services contractor its direct costs for appraisals and title work. After employee rejected contractor's purchase offer, he also incurred expense for appraisal and title services. He may not be reimbursed for those expenses since they duplicate expenses agency paid to relocation services contractor. The Federal Travel Regulations in para. 2-12.5 (Supp. 11, Aug. 27, 1984) prohibit a dual benefit once an election is made to use a contractor.

69:136

■ **Residence transaction expenses**
■■ **Relocation service contracts**
■■■ **Use**

A transferred employee incurred an expense to have his old residence appraised before trying to sell it himself. He later used the services of a relocation company under contract to his agency, and he claimed reimbursement for the cost of the earlier appraisal. Paragraph 2-12.5b of the Federal Travel Regulations prohibits reimbursement to an employee for any personally incurred real estate expenses that are similar or analogous to any expenses the agency is required to pay to a relocation company. Since the relocation company had the property appraised as part of their contract to purchase the residence from the employee, which service was paid for by the agency, the employee may not be reimbursed his appraisal costs.

67:453

■ **Residence transaction expenses**
■■ **Relocation service contracts**
■■■ **Use**
■■■■ **Taxes**

The FTR provides that the expenses paid by a relocation company providing relocation services on behalf of a transferred employee may be subject to a relocation income tax allowance to the extent such payments constitute income to the employee. Specific questions pertaining to the income tax consequences of such payments or to the applicability of the allowance should be addressed to the Internal Revenue Service.

69:136

■ **Residence transaction expenses**
■■ **Settlement**
■■■ **Agents**
■■■■ **Fees**

Two transferred employees were denied reimbursement for settlement agent fees charged by the same lender who earlier charged them fees for originating their mortgage loans. The claims may be allowed. Each described activity is separate and distinct. Where a fee is charged a purchase by an individual to act as settlement agent at a real estate closing, it may be allowed under FTR para. 2-

6.2c and f, if it is customary in the locality for the purchaser to pay and does not exceed the usual amount charged in the area.

67:503

■ **Residence transaction expenses**
■■ **Taxes**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee constructed a residence at his new permanent station. Fee paid to public officials for tax certificates showing that the property was not encumbered by unpaid taxes may be allowed. Section 1605(d)(1) of title 15, United States Code, exempts such fees from computation of finance charge incident to the extension of credit under the Truth in Lending Act. *Wayne E. Holt,* B-189295, Aug. 16, 1977, and *John S. Derr,* B-215709, Oct. 24, 1984, are overruled in part.

69:574

■ **Taxes**
■■ **Allowances**
■■■ **Eligibility**

An employee entitled to relocation expenses because he was transferred and required to occupy government housing at a site 26 miles from his previous duty station was not entitled to deduct any of the moving expenses from his income tax because the move was less than 35 miles. Employee may be paid a relocation income tax allowance based upon the entire amount of the reimbursed expenses since none of his expenses were deductible in the particular circumstances of this case.

66:478

■ **Taxes**
■■ **Allowances**
■■■ **Eligibility**

The Department of Agriculture requests an opinion as to whether claims for Relocation Income Tax (RIT) allowances may be paid to certain employees who were transferred from the United States to the Virgin Islands and Puerto Rico since the statutory authority in 5 U.S.C. § 5724b (Supp. III 1985) does not specifically state that RIT allowances apply to possessions of the United States. The claims may be paid since it is consistent with the intent of Congress that RIT allowances be extended to federal employees transferred in the interest of the government to United States possessions and the Commonwealth of Puerto Rico in the same manner as those employees transferred within the United States. However, it will be necessary for the Administrator of General Services, in consultation with the Secretary of the Treasury, to establish the applicable marginal tax rate.

67:135

■ **Taxes**
■■ **Allowances**
■■■ **Eligibility**

Due to the reimbursement of his relocation expenses, a transferred employee's adjusted gross income exceeded the maximum allowable for taking a deduction for a contribution to an Individual Retirement Account (IRA) on a jointly filed tax return. He indicates that the loss of the IRA deduc-

tion increased his tax liability by $300, and he seeks an additional amount of relocation income tax (RIT) allowance to compensate him for this loss. Although a RIT allowance is intended to reimburse an employee for substantially all of the increased taxes he incurs due to the expenses of relocation that he is reimbursed, the applicable regulations provide that the allowance is not to be adjusted to accommodate an employee's unique circumstances. Payment of an additional RIT allowance in these circumstances is not authorized.

69:258

■ **Taxes**
■■ **Allowances**
■■■ **Eligibility**

A transferred employee sold her residence at her old duty station and requests reimbursement for state income taxes required to be paid on the profit realized from that sale as a Relocation Income Tax (RIT) allowance under 5 U.S.C. § 5724b (1988). The claim is denied. Under the statute and chapter 2, part 11 of the Federal Travel Regulations (FTR), only those relocation expenses and allowances which are reimbursable elsewhere in the FTR, chapter 2, may be included in the computation of a RIT allowance. Since state income taxes paid on the residence sales profit are not reimbursable under the FTR in the first instance, such taxes are not includable in computation of a RIT allowance. *See Guerry G. Notte,* B-223374, Feb. 17, 1987, and decisions cited.

69:348

■ **Taxes**
■■ **Allowances**
■■■ **Eligibility**

A transferred employee who was required to have Federal Insurance Contributions Act (FICA) taxes withheld from her relocation expense reimbursement, may not be reimbursed those taxes under the provisions of 5 U.S.C. § 5724b (1988) and chapter 2, part 11 of the Federal Travel Regulations (FTR). Only the moving and relocation expenses listed in paragraph 2-11.3(a) through (i) of the FTR may be included in the computation of a Relocation Income Tax allowance.

69:349

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Dependents**
■■■■ **Eligibility**

A transferred employee was issued travel orders authorizing reimbursement of travel and temporary quarters subsistence expenses for herself, her spouse, and her daughter who was 22 years old. The employee was given a travel advance based on the estimated expenses for herself and the two family members. After she incurred expenses in reliance on the orders and submitted a voucher, the agency realized that the daughter was over 21 years old and precluded by regulation from being considered as a family member of the employee for purposes of relocation expenses. Her claim for travel expenses for her daughter may not be allowed. However, since she incurred expenses for the daughter in reliance on the erroneous orders, her debt for the portion of her travel advance still

outstanding is subject to consideration for waiver. Case is remanded to the agency for computation of the debt subject to waiver.

68:462

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Eligibility**
■■■■ **Annual leave**

A transferred employee, who occupied temporary quarters at his new duty station, took 6 days personal leave to return to his old duty station for the closing on the sale of his old residence. His claim for the cost of the 6 days as part of his temporary quarters lodging expense is allowed since his taking of leave did not cause an unwarranted extension of the temporary quarters period.

68:268

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Eligibility**
■■■■ **Extension**

A transferred employee purchased a yet-to-be constructed residence which was not scheduled for completion until a date beyond the 60-day period of temporary quarters for subsistence expenses (TQSE). The agency denied his request for an additional 15 days TQSE. Paragraph 2-5.2 of the Federal Travel Regulations permits an agency to grant an extension of time for TQSE purposes, but only if events arise during the initial TQSE period to cause permanent quarters occupancy delays and if the events are beyond the employee's control. Since there were no such delaying events in this case, the claim is denied.

67:567

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Eligibility**
■■■■ **Extension**

To justify an extension of temporary quarters subsistence expenses, there must be a need for an extension due to the circumstances beyond the employee's control and occurring within the first 60 days of temporary quarters. The decision to grant an extension is at the discretion of the agency and the agency acted correctly in denying an extension when it found that the employee's request for an extension did not demonstrate compelling reasons beyond his control.

68:419

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Eligibility**
■■■■ **Extension**

An agency properly exercised its discretion by denying a request for a 1-year extension of the 2-year period in which an employee must complete his real estate transaction for purposes of reloca-

tion expense reimbursement. The determination to grant an extension is for the agency, and our Office would not object to such determination unless it is found to be arbitrary or capricious.

68:420

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Eligibility**
■■■■ **Extension**

An agency policy limiting temporary quarters to 30 days for all transferred employees who elect relocation services is contrary to the Federal Travel Regulations and should not be enforced. An employee's claim for an additional period of temporary quarters, denied on the basis of the agency policy, is remanded to the agency for reconsideration in light of the employee's particular circumstances.

69:95

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Amount determination**

Transferred employee was authorized 120 days Temporary Quarters Subsistence Expenses (TQSE) and a househunting trip. He did not take househunting trip, but his wife did. The agency paid for her househunting trip, but deducted the 7 days paid for her trip from the employee's 120 days of TQSE. Employee's reclaim for the 7 days of TQSE for himself and his children was properly denied, since these are discretionary items and the agency interpretation of the regulations and travel orders is not unreasonable.

67:258

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Amount determination**

A transferred employee occupied temporary quarters for 60 days and claimed meal costs at an average daily rate of $35.05. The agency reduced the claim to $10.39 per day based upon an analysis of the meal expenses claimed by other employees in that work area. The claim is returned to the agency for consideration of the reasonableness of the amounts claimed for meals based on valid statistical references from the Bureau of Labor Statistics or the Runzheimer Index.

68:550

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Amount determination**

An employee's claim for additional temporary quarters subsistence expenses was denied by our Claims Group which sustained the agency's determination as to reasonable amounts for meals. The

employee appeals that settlement on the basis of the collective bargaining agreement between the agency and a union which he argues makes inapplicable an agency guideline of 46 percent of per diem as being a reasonable rate for meals. Even if the guideline is not applicable, however, the agency was required by law and regulations to limit reimbursement to an amount it determined as "reasonable." The agency determined a reasonable amount to be 55 percent in this case, and that determination will not be disturbed since there is no showing it is clearly erroneous, arbitrary, or capricious.

68:626

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

Voucher supporting Mine Safety and Health Administration employee's claim for temporary quarters subsistence expenses does not specify meals taken at restaurants or meals prepared in-quarters from groceries purchased in bulk. Although actual receipts are not required for meals or groceries consumed while occupying temporary quarters, such expenses are only allowable if reasonable in amount and properly itemized. Minimum itemization necessary to support voucher here requires a showing of whether meals were taken in quarters or in restaurants to support agency computation of reasonable costs of those meals.

66:515

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

Determination of reasonableness of expenditures of employee for subsistence while occupying temporary quarters may be made by the employing agency by reference to statistics and other information gathered by government agencies, such as U.S. Department of Labor, Bureau of Labor Statistics, regarding living costs in relevant area, and the "Runzheimer Meal—Lodging Cost Index" for meal expenses at restaurants. Employee who fails to provide information on his voucher to enable agency to effectively utilize government data to determine reasonableness of employee's claim for temporary quarters subsistence expenses has failed to establish the government's liability for the expenses he claims, and that voucher must be resubmitted or denied altogether.

66:515

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

An employee was transferred to his temporary duty site and continued to reside in the same housing he had occupied while on temporary duty. He may not be allowed temporary quarters subsistence expenses because, under paragraph 2-5.2c of the Federal Travel Regulations, those expenses

are payable only if an employee has vacated the residence he was occupying at the time of his transfer. However, his indebtedness may be considered for waiver.

66:532

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee purchased a residence under construction. Pending its completion, he and his family lived in other quarters and were reimbursed temporary quarters subsistence expenses. Upon construction completion, the employee and his family moved into the new house on a rental basis pending settlement, and he claims a continuing right to temporary quarters based on fact that the temporary quarters authorization period which covered in part the new house rental period, was issued before he began that occupancy. The claim is denied. Under paragraph 2-5.2 of the Federal Travel Regulations, the allowance is authorized only while the employee is in temporary quarters. Once an employee occupies a residence with the intention to make it his permanent residence, entitlement to temporary quarters terminates.

66:701

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

Transferred employee may disestablish residence at the old duty station even though the spouse did not disestablish residence there. Thus, the employee is entitled to temporary quarters subsistence expenses. However, the employee may not be reimbursed for the first 10-day period of lodging for which receipts are not available since regulations require receipts for lodging before reimbursement is allowed. Federal Travel Regulations (FTR) para. 2-5.4b.

67:285

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

When transferred federal employees can demonstrate a reasonable need, temporary quarters subsistence expenses (TQSE) may be paid for periods prior to the moving day at the old permanent residence and after the delivery day of household goods at the new permanent residence. Hence, an employee of the National Security Agency who was transferred from Ottawa, Canada, to Fort Meade, Maryland, may be allowed TQSE for his use of a hotel in Ottawa prior to the time his household goods were picked up at his old residence there, if he can demonstrate that the residence was unavoidably rendered uninhabitable prior to that time because of the packing of his furniture. The employee was also properly allowed TQSE for an additional night's temporary lodgings following the delivery of his household goods in Maryland because the delivery was made late in the day and

without advance notice, and in those circumstances the employee could neither move into his new residence immediately nor avoid being charged for staying an additional night at his hotel.

67:310

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee requests reimbursement for a fee he paid to a relocation company so that his family could remain in their former residence 23 days after the residence was purchased. The claim is denied since the employee's home was not vacated as required by the applicable provisions of the Federal Travel Regulations.

67:544

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee was authorized and reimbursed for temporary quarters subsistence expenses for 60 days, but the agency questions whether the quarters were temporary based upon the duration of the lease (6 months), the movement of household goods into the residence, the type of quarters (single family dwelling), the lack of clear and definite intent to seek permanent quarters, and the length of time the employee occupied the dwelling (1-1/2 years). We hold that the record supports a determination that, at the time he moved into the dwelling, the employee only intended to occupy it on a temporary basis. He attempted to negotiate a shorter-term lease, he made substantial efforts to locate a permanent residence, he moved his household goods into the residence but did not unpack most of them, and, later, he was uncertain as to whether to purchase a residence since he might be transferred again to another city. Under these circumstances, we conclude that the payment of temporary quarters was proper.

67:585

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred federal employee rented a furnished condominium apartment at his new post of duty from another employee for use as temporary quarters while his new permanent residence was under construction. Reimbursement is permissible for noncommercial lodgings if the charges are reasonable and result from expenses incurred by the other party. Hence, in this case the transferred employee may be allowed full reimbursement of the rent he paid based on information showing that the rent was less than the cost of commercial lodgings and was reasonably related to the actual expenses incurred by the other employee in the arrangement.

68:329

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee, who performed en route travel for more than 24 hours, and arrived at 9 p.m., claims lodging costs for the evening of arrival. The claim is denied. Under paragraph 1-7.5b(2)(c) of the Federal Travel Regulations (FTR), his allowable en route per diem for the last day is limited to the meals and incidental expense (M&IE) rate for the previous day. Since he arrived during the last quarter of the day, the full daily M&IE rate is payable. Under FTR, para. 2-5.2g(1)(a), his temporary quarters eligibility begins with the next calendar day quarter. Since that was the first quarter of the following day, that full day is the first day of temporary quarters eligibility for which 60 days' temporary quarters subsistence expenses were reimbursable thereafter.

68:459

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee claimed temporary quarters subsistence expenses for herself for 4 days when inclement weather prevented her from returning to her residence at old duty station which she had not vacated in order to allow daughter to complete school session. Her claim is disallowed since she had not vacated her old residence as required by the Federal Travel Regulations before temporary quarters expenses may be reimbursed.

69:414

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Reimbursement**
■■■■ **Eligibility**

A transferred employee's claim for temporary quarters subsistence expense (TQSE) at his new duty station was terminated by his agency because his family moved into permanent quarters elsewhere. The employee may be reimbursed TQSE as a single individual for the period authorized since his dependents' occupancy of quarters away from his duty station was not related to his transfer.

69:493

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Spouses**
■■■■ **Eligibility**

Where transferred employee's spouse failed to join employee at new duty station, the employee's claim for temporary quarters subsistence expense for spouse is denied since there is no evidence that the spouse vacated or intended to vacate the residence at the old station.

67:286

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Spouses**
■■■■ **Eligibility**

A transferred employee, who occupied temporary quarters, was joined by his wife for 8 days of househunting during the temporary quarters occupancy period. The employee is entitled to continue receiving temporary quarters subsistence expense for himself during that period, and, under FTR, para. 2-4.1a, to receive reimbursement for his wife's travel expenses and per diem, limited to the meals and incidental expense rate, during the 8 days of househunting. *George L. Daves,* 65 Comp. Gen. 342 (1986).

68:459

■ **Temporary quarters**
■■ **Actual subsistence expenses**
■■■ **Spouses**
■■■■ **Eligibility**

An agency may pay a civilian employee's claim for temporary quarters subsistence expenses for her spouse incident to her transfer, even though the authorization is issued retroactively by amendment to the employee's order, and even though the spouse is a member of the uniformed services who is also being transferred, provided reimbursement would not result in the couple receiving a duplication of payments for the same purpose.

69:224

■ **Temporary quarters**
■■ **Determination**
■■■ **Criteria**

A transferred employee and his immediate family moved into a house which he owned at the new duty station. He had rented it out for 3 years prior to transfer, and has currently listed it for sale. The employee claims entitlement to 60 days' subsistence expenses for temporary occupancy of the residence, asserting that it is unsuitable for children and that he intends to move to permanent quarters closer to his worksite as soon as it is sold. His claim may not be allowed. The asserted unsuitability for children and the plan to move as soon as it is sold are too vague and indefinite to establish that the house qualifies as temporary quarters.

68:554

■ **Temporary quarters**
■■ **Determination**
■■■ **Criteria**

Employee whose old and new residences were in Columbus occupied temporary quarters for 30 days in connection with successive transfers. She acquired a new permanent residence but was unable to occupy new residence immediately because of a holdover provision allowing the sellers to remain in possession. Paragraph C13006 of the Joint Travel Regulations, volume 2 (FTR para. 2-5.2h), which generally prohibits payment of TQSE for short distance transfers, is not a bar to payment since this provision was not intended to apply to situations where the old residence sale is under one transfer

order and the new residence purchase is under another order as the timing of the sale and purchase are no longer within the employee's control.

69:414

■ **Temporary quarters**
■■ **Interruption**
■■■ **Actual expenses**
■■■■ **Temporary duty**

A transferred employee, while occupying temporary quarters at his new permanent duty station, was required to perform several days temporary duty away from that duty station. He retained his temporary quarters during that absence and seeks reimbursement as part of his temporary quarters subsistence expenses in addition to per diem received for his temporary duty. His claim for temporary quarters lodging expenses may be allowed if the agency determines that the employee acted reasonably in retaining those quarters. 47 Comp. Gen. 84 (1967); and B–175499, Apr. 21, 1972, are overruled.

69:73

■ **Temporary quarters**
■■ **Interruption**
■■■ **Actual expenses**
■■■■ **Temporary duty**

Paul G. Thibault, 69 Comp. Gen. 72 (1989), held that a transferred employee who, while occupying temporary quarters at his new duty station, was required to perform several days temporary duty away from that station, may be reimbursed the costs of retaining his temporary quarters during his absence in addition to per diem he received for his temporary duty if the agency determines that he acted reasonably in retaining those quarters. *Thibault* applies prospectively only since it represented a substantial departure from prior decisions. Therefore, an employee's claim which was settled prior to *Thibault* may not be overturned on appeal based on the new rules announced in *Thibault.*

70:321

■ **Travel expenses**
■■ **Privately-owned vehicles**
■■■ **Mileage**

A transferred employee claims reimbursement for 3,541 miles for relocation travel based on his odometer reading for the route he traveled. The claim is limited to 2,853 miles which represents the most reasonably direct point-to-point routing between his old and new duty stations based on a standard highway mileage guide.

69:72

■ **Travel expenses**
■■ **Privately-owned vehicles**
■■■ **Mileage**

An employee, permanently transferred to the place where he was on a temporary duty assignment, returned to his old duty station by privately owned vehicle to retrieve stored household goods. The

employee is entitled to en route per diem and mileage expenses for the round-trip since relocation travel by privately owned vehicle is deemed advantageous to the government under the Federal Travel Regulations, para. 2-2.3a.

69:424

■ **Travel expenses**
■■ **Privately-owned vehicles**
■■■ **Mileage**

On reconsideration, our prior decision, *James R. Stockbridge,* 69 Comp. Gen. 424 (1990), which held that an employee who was permanently transferred to the place where he was on temporary duty, is entitled to round-trip en route per diem and mileage expenses for return to his old duty station by privately owned automobile to retrieve stored household goods, is affirmed. Interest is not payable on the claim in the absence of an express statutory or contractual authorization.

70:571

■ **Travel expenses**
■■ **Privately-owned vehicles**
■■■ **Multiple vehicles**
■■■■ **Mileage**

An employee, transferred from Fairbanks, Alaska, to Washington, D.C., was initially authorized to drive one privately owned vehicle (POV), to be accompanied by his wife and dependent child, with a second dependent child to travel by air at a later date. His travel authorization was amended to permit delayed relocation travel by his wife using a second POV, to be accompanied by the second dependent child. Employee was allowed mileage only for first POV. Under paragraph 2-2.3e(1) of the Federal Travel Regulations, use of more than one POV in lieu of other modes of personal transportation may be authorized under certain specified conditions. Since the conditions were met and agency approval was granted, mileage for the second POV is allowed.

68:417

■ **Travel expenses**
■■ **Privately-owned vehicles**
■■■ **Multiple vehicles**
■■■■ **Mileage**

An employee, transferred from Fairbanks, Alaska, to Washington, D.C., by amendment to his travel authorization, was authorized to use two privately owned vehicles (POV), to transport himself and his immediate family, based on his wife's need to delay her relocation travel. The employee drove one POV and was paid travel per diem at the full rate. His wife, who drove the second POV at a later date, was allowed per diem only at the accompanied rate (75 percent of full per diem). Under paragraph 2-2.2b(1)(b) of the Federal Travel Regulations, per diem at the full rate applies to her since she drove a second POV as an authorized mode of transportation on different days than the employee.

68:417

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Circuitous routes**
■■■■ **Weather conditions**

A transferred employee traveled to his new duty station by an indirect route to avoid a severe heat wave in accordance with an American Automobile Association recommendation. He was denied the extra mileage and per diem associated with that route because his agency determined that the heat wave was not an "act of God." The claim is remanded to the agency to consider whether the cause necessitating the indirect route was for other reasons acceptable to the agency. *See* decisions cited.

68:37

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Eligibility**

An employee, permanently transferred to the place where he was on a temporary duty assignment, returned to his old duty station by privately owned vehicle to retrieve stored household goods. The employee is entitled to en route per diem and mileage expenses for the round-trip since relocation travel by privately owned vehicle is deemed advantageous to the government under the Federal Travel Regulations, para. 2–2.3a.

69:424

Travel
■ **Actual subsistence expenses**
■■ **Fraud**
■■■ **Allegation substantiation**
■■■■ **Evidence sufficiency**

An employee represented on a travel voucher that he lodged for 64 days at Saarbrucken during temporary duty in Germany, when, in fact, he lodged in Homburg, where the applicable per diem rate was lower than in Saarbrucken. In the absence of a satisfactory explanation for the discrepancy, there was sufficient evidence to support the agency's finding of fraud, and the employee may not be allowed subsistence expenses for those days.

68:517

■ **Actual subsistence expenses**
■■ **Reimbursement**
■■■ **Amount determination**

A Veterans Administration employee transferred from Michigan to New York was authorized 60 days of temporary quarters subsistence expenses. He was allowed full payment in the amount of $3,256.81 on his claim for reimbursement of his meal costs based on his itemized listing of the actual cost of each meal and an agency determination that these costs were reasonable. Additional reimbursement is denied on a supplemental claim in the amount of $950 for groceries the employee later asserted had been transported from Michigan to New York and used in temporary quarters. The Federal Travel Regulations limit reimbursement to reasonable expenses, and the record provides no

basis to disturb the agency's determination that his reasonable subsistence expenses had already been fully reimbursed. Furthermore, the record shows that the $950 claimed was an estimate. Such estimate is insufficient to establish actual grocery costs, as the regulations require.

67:451

■ **Advances**
■■ **Debt collection**
■■■ **Waiver**
■■■■ **Manpower shortages**

An appointee to a manpower shortage category position was issued orders erroneously authorizing reimbursement of relocation expenses as though he were a transferred employee, and he was given an advance of funds to cover some of those expenses. After he completed travel to his duty station the error was discovered. The employee has no legal right to reimbursement of the expenses of the house-hunting trip and temporary quarters subsistence expenses he incurred, even though the orders purportedly authorized reimbursement of these expenses, since the expenses were in excess of those prescribed by statute and the government is not bound by orders or advice contrary to the applicable statutes. The government's resulting claim against the employee for repayment of the travel advance can be considered for waiver under 5 U.S.C. § 5584 to the extent that (1) the advance was used for the erroneously authorized temporary quarters subsistence expenses and (2) the employee remains indebted to the government for repayment of the amounts advanced after the advance has been applied against the legitimate expenses. Since in this case the employee's legitimate expenses exceed the amount of the travel advance, however, there is no net indebtedness which would be appropriate for waiver consideration.

67:493

■ **Advances**
■■ **Overpayments**
■■■ **Debt collection**
■■■■ **Waiver**

Authority to waive uniformed services members', National Guard members' and civilian employees' debts arising out of erroneous payments of travel and transportation allowances was added to 10 U.S.C. § 2774, 32 U.S.C. § 716, and 5 U.S.C. § 5584, by Public Law 99-224, 99 Stat. 1741. As provided in section 4 of Public Law 99-224, the authority applies only to debts arising out of payments made on or after the effective date of the law, December 28, 1985.

67:484

■ **Bonuses**
■■ **Acceptance**
■■■ **Propriety**

Five AID employees traveling on official business participated in airline frequent flyer programs and earned free tickets which they used for personal travel. AID found the employees liable for the value of the tickets used and the employees appeal. Decisions of the Comptroller General have consistently applied the rule that airline promotional mileage credits earned on official travel may only be used for official travel and may not be used by employees for personal travel. Thus, the employ-

ees are liable for the full value of the tickets. Erroneous advice of agency officials cannot defeat application of the rule.

67:79

■ **Bonuses**
■■ **Acceptance**
■■■ **Propriety**

The rule requiring an employee to account for airline promotional material earned on official travel applies to benefits such as accommodation upgrades to business class or first class when they are obtained in exchange for mileage credits. Therefore, an employee may not exchange mileage credits for accommodation upgrades absent authorization or approval by the appropriate agency official. 63 Comp. Gen. 229 (1984) clarified. The restrictions on the use of first-class travel contained in FTR para. 1-3.3d now apply to upgrades obtained in exchange for mileage credits, but could be revised in order to maximize the integration of airline incentive programs into agency travel plans. Collection of the value of the unauthorized or unapproved upgrades used prior to this decision is not required.

67:80

■ **Bonuses**
■■ **Acceptance**
■■■ **Propriety**

An employee, while traveling on official business, was denied lodging the first night at the selected hotel due to their overbooking. The hotel issued a bonus lodging certificate to the employee for one night of free lodging. Such a certificate is the property of the government and not the employee since the general rule is that a federal employee is obligated to account for any gift, gratuity, or benefit received from private sources incident to the performance of official duty. Also, allowing the employee to retain the certificate would result in double reimbursement to the employee since the government paid for lodging at a substitute hotel that evening.

67:328

■ **Bonuses**
■■ **Acceptance**
■■■ **Propriety**

The Department of Health and Human Services, Region VI, maintains airline frequent flyer accounts for its employees who travel on official government business. Since GSA regulations do not provide for a system in which the agency may return these materials to employees and employees have no property rights in the materials, the accounts may not be returned to employees upon separation or retirement even if the agency determines it has no use for the benefits.

69:643

■ **Commuting expenses**
■■ **Prohibition**
■■■ **Applicability**

Use of a government vehicle for transportation between an employee's home and an airport or other common carrier terminal in conjunction with official travel is not precluded by the statute

governing home-to-work transportation or by any provision of the Federal Travel Regulations. Contrary views expressed in B-210555.23, May 18, 1987, will no longer be followed.

70:196

■ Executive exchange programs

A federal employee who participates in the Executive Exchange Program is entitled either to relocation expenses or to travel expenses since the program is in the interest of the government and the participant remains an employee of his agency during the exchange period. However, the agency retains the discretionary authority to determine whether the employee's placement at the private sector location shall be as a permanent change of station or as a temporary duty assignment. 54 Comp. Gen. 87 (1974), modified.

70:378

■ Government vehicles
■■ Accidents
■■■ Government liability

If a vehicle being operated by a federal employee in the performance of official business is involved in a collision due to the employee's negligence and a member of the family who is accompanying the employee as a passenger is injured, then a passenger may seek damages. Since the right of recovery under the Federal Tort Claims Act, 28 U.S.C. §§ 2671-2680 (1982), is predicated on the law of the place of occurrence, the government's liability might be increased by permitting the family member to accompany the employee.

68:186

■ Government vehicles
■■ Use

Under the provisions of 31 U.S.C. §§ 1344 and 1349 (1982 & Supp. IV 1986), a government-owned or leased vehicle may only be used for the performance of official business. It does not violate those statutes, however, for an agency to allow a dependent of an employee to accompany the employee as a passenger in such vehicle. 57 Comp. Gen. 226 (1978).

68:186

■ Government vehicles
■■ Use

Customs Inspectors are not entitled to mileage reimbursement where Customs Service determines that use of government-owned vehicles (GOV) is advantageous to the government, a GOV is available, and Inspectors do not request or receive agency approval to use their privately owned vehicles (POV) to travel from headquarters to nearby airports in order to perform inspections. *See* 41 C.F.R. § 301-4.4(c) (1990).

70:727

■ **Handicapped personnel**
■■ **Baggage**
■■■ **Handling costs**

Under the Rehabilitation Act of 1973 an employee confined to a wheelchair may be reimbursed baggage handling fees he incurred at airports on temporary duty travel, but only to the extent that these fees were incurred as the result of his disability and were higher than those that would be incurred by a nondisabled person.

68:242

■ **Lodging**
■■ **Reimbursement**
■■■ **Government quarters**
■■■■ **Availability**

Defense Department civilian employee on temporary duty who left government quarters which she considered inadequate and moved into commercial lodgings may not be reimbursed her commercial lodging costs where installation officials determined that the government quarters were adequate and therefore declined to issue a statement of non-availability pursuant to 2 JTR para. C1055. GAO will not substitute its judgment for that of officials who are responsible for determining adequacy of government quarters absent clear evidence that their determination was arbitrary or unreasonable.

69:205

■ **Non-workday travel**
■■ **Travel time**
■■■ **Overtime**

Finding that travel for employees attending training course away from their official duty station and outside their regularly scheduled administrative workweeks does not qualify as an event which could not be scheduled or controlled administratively within the meaning of 5 U.S.C. § 5542(b)(2)(B) (1982), claims for overtime compensation for employees under the statute are denied. Agency here controlled use of training facility and controlled scheduling of participation. Although agencies are exhorted to schedule traveltime to the maximum extent possible within the regular workweek of the employee (5 U.S.C. § 6101(b)(2)), Congress has authorized overtime pay for traveltime only under the specifically limited circumstances set forth in 5 U.S.C. § 5542 and employees in this case are not entitled to overtime compensation merely on the basis that their travel took place outside their regular workweek.

66:620

■ **Non-workday travel**
■■ **Travel time**
■■■ **Overtime**

Customs Inspectors may be entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1988) if Customs Service requires them to spend time in travel outside normal duty hours to return GOVs to headquarters following completion of inspections. Entitlement to overtime would depend upon the particular circumstances and cannot be determined in the abstract.

70:728

■ **Overseas allowances**
■■ **Rental allowances**
■■■ **Eligibility**

Upon occupying rental quarters overseas, the employee claims he is entitled to the rental portion of the living quarters allowance authorized by 5 U.S.C. § 5923(2) (1982), despite the fact that he had previously owned and occupied a home at the same post for more than 10 years. We hold that the 10-year limitation on reimbursement of a rent substitute when the employee owns quarters did not bar his entitlement to rent reimbursement upon occupying rental quarters.

68:341

■ **Overseas travel**
■■ **Tour renewal travel**
■■■ **Dependents**

Under 41 C.F.R. § 302-1.4(e) (1990), an employee's daughter is a member of his household where he and his former spouse have joint legal and physical custody of their daughter and she resides with him more than 50 percent of the time. Therefore, the employee may be reimbursed for his daughter's travel costs incurred in connection with his overseas tour renewal agreement travel.

70:522

■ **Overseas travel**
■■ **Travel modes**
■■■ **Domestic sources**
■■■■ **Air carriers**

Under travel arrangements made by his agency, a U.S. Information Agency employee traveled from Costa Rica to Greece on foreign air carriers, although under an alternate routing he could have traveled part of the way on a U.S. carrier. The employee should not be assessed a penalty for violating the Fly America Act, 49 U.S.C. App. § 1517, because he is an employee of an agency covered by an exception to the act, 49 U.S.C. App. § 1518, for travel between points outside the United States. Although it is within the agency's discretion to limit use of the exception, applicable agency regulations do not make the exception inapplicable to this travel.

69:264

■ **Overseas travel**
■■ **Travel modes**
■■■ **Domestic sources**
■■■■ **Air carriers**

A U.S. Information Agency employee being transferred from California to Greece was required to stop in Washington, D.C., for 7 days of consultation. He was then routed by his agency on a U.S. air carrier from Washington, D.C., to Frankfurt, Germany, and by foreign carrier on to Greece, because U.S. carrier service for the entire distance was not available on the day he traveled, although it was available 5 days a week. The Comptroller General's Fly America Guidelines do not specifically require a delay in beginning travel in these circumstances. The Foreign Affairs Manual provides generally that scheduling the use of U.S. carriers is expected for transfer travel or when the traveler has flexibility. However, this general policy statement does not support a penalty against the em-

ployee in this case since the agency scheduled his travel and apparently concluded that the travel could not be delayed.

69:265

■ **Overseas travel**
■■ **Travel modes**
■■■ **Terrorist threats**

Where the Drug Enforcement Administration follows its proposed procedure in granting authority to employees, threatened by terrorists acts, to travel on foreign flag air carriers to avoid the threats, the Comptroller General will not question the agency's determinations that the use of a foreign carrier is necessary to protect the employees' safety. In these circumstances use of the foreign carrier is considered a necessity as provided under the guidelines implementing the Fly America Act.

68:633

■ **Permanent duty stations**
■■ **Actual subsistence expenses**
■■■ **Prohibition**

An employee attending an advisory council meeting in the vicinity of her official duty station rented a hotel room rather than return to her residence, due to heavy snow and blizzard conditions, in order to ensure her presence at the meeting the next day. Her claim for lodging expenses must be denied since employees may not be reimbursed for per diem or subsistence at their headquarters regardless of unusual conditions.

68:46

■ **Permanent duty stations**
■■ **Actual subsistence expenses**
■■■ **Prohibition**

Internal Revenue Service employees seek reimbursement of cost of attending a speech given by the Commissioner of the Internal Revenue Service at their permanent duty station, which included a meal. Cost of attendance may be paid under 5 U.S.C. § 4110 since attendance fee included the meal which was provided at no additional or separable cost and which was incidental part of the event in question.

68:348

■ **Permanent duty stations**
■■ **Actual subsistence expenses**
■■■ **Prohibition**

Customs Service may not pay for cost of catered meal provided federal employees attending Customs Service sponsored meeting of United States-Bahamas Working Group, an interagency task force. Absent specific statutory authority, federal employees may not be paid per diem or actual subsistence at headquarters regardless of any unusual working conditions. *See* cases cited. *Gerald Goldberg, et al.,* B-198471, May 1, 1980, is not applicable to situations involving routine business meetings at headquarters.

68:604

■ **Permanent duty stations**
■■ **Actual subsistence expenses**
■■■ **Prohibition**

U.S. Army may not pay for meals provided to employees at internal Army meeting within employees' official duty station. Although 5 U.S.C. § 4110 authorizes the payment for cost of meals where cost of meals is included in registration or attendance fee, 38 Comp. Gen. 134 (1958), or, in limited circumstance, where the cost of meals is separately charged, *Gerald Goldberg, et al.,* B-198471, May 1, 1980, this provision has little or no bearing upon purely internal business meetings or conferences sponsored by government agencies. 46 Comp. Gen. 135 (1966).

68:606

■ **Rental vehicles**
■■ **Fines**
■■■ **Liability**

Absent a clear and unambiguous law to the contrary, United States and its activities are free from state regulation including payment of fines. Therefore, parking tickets are personal liability of employee responsible for their being issued. See court cases cited.

70:153

■ **Rental vehicles**
■■ **Fines**
■■■ **Liability**

A Selective Service System (SSS) employee paid a $50 parking ticket written on a vehicle leased by SSS to prevent the ticket from doubling. SSS determined that the paying employee was not the party responsible for receipt of the ticket and did not identify another employee as responsible for receipt of ticket. Whether SSS may reimburse paying employee depends upon whether employee paid a valid obligation of the United States arising by virtue of the language in motor vehicle lease agreement whereby SSS as lessee agreed to not permit leased "vehicle to be used in violation of" District of Columbia law and regulations and that SSS would "indemnify and hold lessor harmless from any and all . . . penalties resulting from violation of such laws."

70:153

■ **Rental vehicles**
■■ **Fines**
■■■ **Liability**

Although the operator of vehicle is liable for payment of parking ticket, District of Columbia law makes owner of vehicle ultimately liable for payment of parking ticket. District law also provides that lessor of vehicle may eliminate liability for parking tickets incurred by lessee. Therefore, whether employee who paid $50 ticket on assumption that agency was liable for such as damages to lessor under a hold-harmless clause in lease agreement paid an obligation of the government for which employee may be reimbursed, depends upon whether lessor would have had to pay the ticket. Request is returned to agency with instruction to make determination regarding lessor's liability since submission lacks requisite finding.

70:154

■ **Rental vehicles**
■■ **Property damages**
■■■ **Claims**
■■■■ **Payments**

An Army employee who was authorized to rent a commercial vehicle while on temporary duty and who damaged the vehicle while returning it from the meeting place to his place of lodging at 2 a.m. was on official business and is entitled to be reimbursed for the payment of damages.

68:318

■ **Temporary duty**
■■ **Annual leave**
■■■ **Return travel**
■■■■ **Constructive expenses**

An employee was authorized round-trip air travel by premium class, but he did not return by premium class since he had scheduled annual leave in advance. The employee is not entitled to credit for the premium-class travel for the return trip for purposes of establishing constructive cost since his scheduled annual leave removed the justification for premium-class travel on the return trip.

70:437

■ **Temporary duty**
■■ **Determination**

Two Interior Department employees, who were assigned to temporary duty on the Statue of Liberty/Ellis Island project, may be paid per diem even though their assignments may last 2 to 3 years. These assignments can be considered temporary duty given the nature of the duties and the fact that the project is time-limited even though it has encountered unanticipated delays beyond the control of the agency. *See Edward W. DePiazza,* B–234262, dated today. (68 Comp. Gen. 465)

68:454

■ **Temporary duty**
■■ **Determination**

A Navy employee on a long-term temporary duty assignment at a contractor's site may remain on temporary duty until completion of the contract. The employee's duties, flight-testing during the term of a contract, are the type of duties normally handled on a temporary duty basis; the assignment is for a finite period; and the cost to the government of the temporary duty assignment is less than a permanent change of station.

68:465

■ **Temporary duty**
■■ **Determination**

A federal employee who participates in the Executive Exchange Program is entitled either to relocation expenses or to travel expenses since the program is in the interest of the government and the participant remains an employee of his agency during the exchange period. However, the agency retains the discretionary authority to determine whether the employee's placement at the private

sector location shall be as a permanent change of station or as a temporary duty assignment. 54 Comp. Gen. 87 (1974), modified.

70:378

■ **Temporary duty**
■■ **Per diem**
■■■ **Additional expenses**

An employee is not entitled to additional per diem for an extended tour of temporary duty in Ottawa, Canada, where an agency complied with the Federal Travel Regulations and reduced his per diem in writing, in advance. Employee has not shown that agency's action in reducing per diem rate for long-term temporary duty detail was arbitrary, capricious, or contrary to law. Moreover, employee is not entitled to any per diem for the period after his duty station was changed to Ottawa.

69:638

■ **Temporary duty**
■■ **Per diem**
■■■ **Additional expenses**
■■■■ **Rest periods**

An employee in an official travel status made an unauthorized daytime stopover as a rest stop instead of continuing travel to his destination, which by his own admission he could have reached well before nightfall. His claim for additional per diem incident to the rest stop may not be allowed. Our decisions do not approve rest stops unless travel during normal periods of rest are involved. 54 Comp. Gen. 1059 (1975).

67:292

■ **Temporary duty**
■■ **Per diem**
■■■ **Additional expenses**
■■■■ **Rest periods**

An employee, who traveled by an indirect route and combined an extended period of annual leave with temporary duty travel from Anchorage, Alaska, to Oklahoma City, Oklahoma, and return, was not authorized a rest stop under 41 C.F.R. § 301-7.6(c)(6)(i) since the scheduled travel, if performed by a usually traveled route, would have been less than 14 hours. However, the employee was permitted a reasonable rest period with per diem at the temporary duty location before reporting for duty under 41 C.F.R. § 301-7.6(c)(6)(v). Per diem may be paid on a constructive basis beginning the last quarter of the day the employee could have left to arrive at the temporary duty station the evening before temporary duty was to begin and ending on the quarter day the employee would have arrived home had return travel been performed timely and expeditiously.

70:656

■ Temporary duty
■■ Per diem
■■■ Additional expenses
■■■■ Rest periods

An employee performed temporary duty travel from Bethel, Alaska, to Oklahoma City, Oklahoma, by usually traveled route several days prior to the date travel was scheduled, and returned home timely and expeditiously immediately following completion of the temporary duty assignment. Since scheduled outbound travel was in excess of 14 hours, a rest stop with per diem could have been authorized under 41 C.F.R. § 301-7.6(c)(6)(i) at an intermediate point. Even though a rest stop was not authorized under 41 C.F.R. § 301-7.6(c)(6)(v), the employee was permitted a reasonable rest period with per diem at the temporary duty location before reporting for duty there. On a constructive basis, per diem may be paid beginning the last quarter of the day the employee could have reasonably left to arrive at the temporary duty station the day before temporary duty was to begin and ending on the quarter day the employee arrived home following the temporary duty assignment.

70:656

■ Temporary duty
■■ Per diem
■■■ Additional expenses
■■■■ Rest periods

Under the provisions of the Federal Travel Regulation governing authorized rest stops for travel where one or more duty points are outside the continental United States, 41 C.F.R. § 301-7.6(c)(6)(i)-(v) (1989), a reasonable rest period, not to exceed 24 hours, may be permitted as a matter of agency discretion at destination before reporting for duty when a rest stop is not authorized en route even if annual leave is taken en route.

70:656

■ Temporary duty
■■ Per diem
■■■ Eligibility

Two Interior Department employees, who were assigned to temporary duty on the Statue of Liberty● Ellis Island project, may be paid per diem even though their assignments may last 2 to 3 years. These assignments can be considered temporary duty given the nature of the duties and the fact that the project is time-limited even though it has encountered unanticipated delays beyond the control of the agency. *See Edward W. DePiazza,* B-234262, dated today. (68 Comp. Gen. 465)

68:454

■ Temporary duty
■■ Per diem
■■■ Eligibility

A Navy employee on a long-term temporary duty assignment at a contractor's site may remain on temporary duty until completion of the contract. The employee's duties, flight-testing during the term of a contract, are the type of duties normally handled on a temporary duty basis; the assign-

ment is for a finite period; and the cost to the government of the temporary duty assignment is less than a permanent change of station.

68:465

■ **Temporary duty**
■■ **Per diem rates**
■■■ **Amount determination**

Employee authorized to travel by commercial air carrier on two separate temporary duty assignments chose, as a matter of personal preference, to travel by privately owned vehicle and to take annual leave for the brief period between the two assignments. Although the employee did not return to his permanent duty station between the two assignments, he is entitled to reimbursement for mileage and per diem for his actual travel limited, however, to the constructive costs for two round trips by commercial air carrier between his permanent duty station and the respective temporary duty locations. The constructive cost is computed on the basis of the travel by commercial air carrier authorized and not on the basis of commercial air travel between points on the employee's actual travel itinerary.

66:449

■ **Temporary duty**
■■ **Per diem rates**
■■■ **Amount determination**

Employee who traveled by privately owned vehicle as a matter of personal preference is entitled to mileage and per diem for the distance actually traveled, limited to the constructive cost of the travel authorized. Where travel orders provided for travel by commercial air carrier, constructive cost computation should include usual taxicab or airport limousine fares to and from the origination and destination airports.

66:450

■ **Temporary duty**
■■ **Per diem rates**
■■■ **Amount determination**

On the basis of amended travel orders stating that the use of government and/or contractor mess facilities would adversely affect their mission or be impractical, a certifying officer of the United States Army paid civilian employees of the Army Corps of Engineers on temporary duty in Saudi Arabia per diem for meals for periods they occupied government-furnished quarters where government-furnished meals were available. The certifying officer should take action to recoup per diem amounts paid in excess of the reduced rates authorized by regulation for temporary duty in Saudi Arabia where evidence clearly shows the employees requested the amendments to their orders for their personnel convenience and none of the employees submitted a statement of nonavailability of meals from the commanding officer at the temporary duty point.

66:631

■ **Temporary duty**
■■ **Per diem rates**
■■■ **Reduction**
■■■■ **Shared lodging**

The Food and Drug Administration reduced the per diem rate authorized for a group of employees performing official travel to attend a training course, based on an agency policy of arranging for shared hotel accommodations to be made available to groups of employees when they are attending training courses, as a means of reducing their lodging expenses. There is nothing inherently objectionable about this policy under the applicable laws and regulations, and the reduction of authorized per diem is consistent with the requirement of the Federal Travel Regulations that per diem rates be reduced when lodgings are available at a reduced cost. Hence, an employee who elected to have single accommodations as a matter of personal preference may not be allowed per diem at a higher rate on the basis of a theory that the shared lodgings policy is invalid.

67:540

■ **Temporary duty**
■■ **Personnel death**

When an employee dies while on temporary duty in the United States, an agency head, in conjunction with authorizing payment for the preparation and transportation of the employee's remains back to his duty station, may authorize payment of the expenses of the return of the employee's privately owned vehicle if the employee was authorized to use the vehicle on his temporary duty assignment as being advantageous to the government. 52 Comp. Gen. 493 (1973); B–189826, April 7, 1978, overruled.

66:677

■ **Temporary duty**
■■ **Return travel**
■■■ **Administrative discretion**

A construction employee who is required to perform long periods of temporary duty away from his official station and does not maintain a permanent residence at his official station may be reimbursed for the expenses of periodic, authorized return travel for nonworkdays to his permanent residence, not to exceed the constructive cost of travel to his official station.

69:401

■ **Temporary duty**
■■ **Return travel**
■■■ **Amount determination**

Agency is correct in its contention that employee was erroneously reimbursed for mileage for weekend return travel to any place other than his new headquarters. Such overpayments may be considered for waiver if they occurred after December 28, 1985, the effective date of the amendment to 5 U.S.C. § 5584 allowing waiver of travel expense overpayments.

69:136

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Additional expenses**
■■■■ **Excursion rates**

An employee, who had purchased a Super Saver ticket in order to combine personal travel with temporary duty travel, was required by the government to return early to his duty station. As a result, the employee was unable to meet the prescheduling conditions of the Super Saver ticket and he could not use it for his return trip. Since the government may reimburse only those travel expenses that would have been incurred for direct official travel, there is no authority to compensate the employee for his loss on the Super Saver ticket.

68:640

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Privately-owned vehicles**
■■■■ **Mileage**

Employee authorized to travel by commercial air carrier on two separate temporary duty assignments chose, as a matter of personal preference, to travel by privately owned vehicle and to take annual leave for the brief period between the two assignments. Although the employee did not return to his permanent duty station between the two assignments, he is entitled to reimbursement for mileage and per diem for his actual travel limited, however, to the constructive costs for two round trips by commercial air carrier between his permanent duty station and the respective temporary duty locations. The constructive cost is computed on the basis of the travel by commercial air carrier authorized and not on the basis of commercial air travel between points on the employee's actual travel itinerary.

66:449

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Privately-owned vehicles**
■■■■ **Mileage**

Employee who traveled by privately owned vehicle as a matter of personal preference is entitled to mileage and per diem for the distance actually traveled, limited to the constructive cost of the travel authorized. Where travel orders provided for travel by commercial air carrier, constructive cost computation should include usual taxicab or airport limousine fares to and from the origination and destination airports.

66:450

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Privately-owned vehicles**
■■■■ **Mileage**

Customs Inspectors are not entitled to mileage reimbursement where Customs Service determines that use of government-owned vehicles (GOVs) is advantageous to the government, a GOV is avail-

able, and Inspectors do not request or receive agency approval to use their privately owned vehicles (POVs) to travel from headquarters to nearby airports in order to perform inspections. *See* 41 C.F.R. § 301–4.4(c) (1990).

70:727

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Privately-owned vehicles**
■■■■ **Mileage**

Where a GOV is available for use but the Customs Service expressly authorizes an Inspector to use his POV for official travel, the Inspector is entitled to mileage at the rate of 9.5 cents per mile. *See* 41 C.F.R. § 301–4.4(c). The agency may deduct from this mileage allowance the distance the Inspector would normally travel between his residence and headquarters.

70:727

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Reimbursement**
■■■■ **Amount determination**

An employee was authorized round-trip air travel by premium class, but he did not return by premium class since he had scheduled annual leave in advance. The employee is not entitled to credit for the premium-class travel for the return trip for purposes of establishing constructive cost since his scheduled annual leave removed the justification for premium-class travel on the return trip.

70:437

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Reimbursement**
■■■■ **Fees**

An employee, who failed to negotiate a travel advance check prior to her departure on temporary duty, may not be reimbursed for the fee incurred when a relative sent funds via wire service.

68:689

■ **Travel expenses**
■■ **Air carriers**
■■■ **Code-share**
■■■■ **Use**

Travel under a ticket issued by a U.S. certificated air carrier which leases space on the aircraft of a foreign air carrier under a "code-share" arrangement in international air transportation is considered to be "transportation provided by air carriers holding certificates" as required under 49 U.S.C. App. § 1517 (1988), the Fly America Act. Thus, passengers may properly use tickets paid for by the

government under a "code-share" arrangement if the tickets were purchased from the U.S. air carrier.

70:713

■ **Travel expenses**
■■ **Cancellation**
■■■ **Penalties**
■■■■ **Reimbursement**

Employee may be reimbursed for a $200 penalty fee assessed by an airline when she canceled her super-saver ticket, in spite of the fact that the ticket was originally purchased for personal reasons. An initial determination was made by the agency that utilization of a super-saver fare would result in economies to the government, and the charge was caused by the agency and not the employee when it canceled the employee's temporary duty training assignment and rescheduled it for a later date.

67:347

■ **Travel expenses**
■■ **Documentation procedures**
■■■ **Burden of proof**

Agency's disallowance of employee's claim for $20 per night paid to employee's parents for lodging with them in New York City while assigned there on official business is sustained. Employee submitted no documentation of the specific expenses incurred by his parents. Under these circumstances, the agency's determination that the amount claimed was excessive is not clearly erroneous, arbitrary, or capricious.

66:347

■ **Travel expenses**
■■ **Documentation procedures**
■■■ **Burden of proof**

Employee's claim for reimbursement for lodging expenses is denied where the agency has met its burden of proof that claims for subsistence expenses were tainted by fraud. The agency investigation clearly revealed fraudulent statements on a travel voucher, and the failure to prosecute criminally for fraud does not preclude administrative action on a voucher where fraudulent action is strongly indicated.

68:108

■ **Travel expenses**
■■ **Fraud**
■■■ **Effects**

Four employees admitted providing false information on travel vouchers for the cost of meals and incidental expenses incurred while on temporary duty. Where any subsistence item shown on a voucher for a particular day is fraudulent, the finding taints the entire per diem or actual expenses

for that day. Thus, lodging claims for the same days of duty may not be paid. 60 Comp. Gen. 357 (1981), amplified.

68:399

■ **Travel expenses**
■■ **Fraud**
■■■ **Effects**

An employee represented on a travel voucher that he lodged for 64 days at Saarbrucken during temporary duty in Germany, when, in fact, he lodged in Homburg, where the applicable per diem rate was lower than in Saarbrucken. In the absence of a satisfactory explanation for the discrepancy, there was sufficient evidence to support the agency's finding of fraud, and the employee may not be allowed subsistence expenses for those days.

68:517

■ **Travel expenses**
■■ **Mileage**
■■■ **Eligibility**
■■■■ **Local travel**

Supervisory employee of the Federal Aviation Administration is not entitled to overtime under 5 U.S.C. § 5542(b)(2)(B) (1982) for time spent traveling outside of his regularly scheduled administrative workweek since (1) the travel was within the employee's official duty station and (2) the travel must be away from the official duty station to be compensable. Moreover, the employee's tasks to pick up and deliver mail and supplies while traveling to and from his duty site was not compensable traveltime since, as a supervisor, it was not his primary function. The employee's claim for reimbursement for mileage for local travel is also denied since payment is discretionary with the agency, and the record indicates it was never authorized or approved.

66:658

■ **Travel expenses**
■■ **Official business**
■■■ **Determination**
■■■■ **Burden of proof**

A school principal employed by Department of Defense Dependents Schools, Germany Region, claims travel allowances for expenses he incurred incident to travel he performed when he received notice of the agency's proposal to remove him. The notice provided for his right to make an oral response pursuant to agency regulation. The employee's duty station was Erlangen, Germany, and the agency designated Wiesbaden, Germany, as the location for the oral presentation. The oral response, as part of the proposed adverse action process constitutes official business for which travel expenses are reimbursable.

68:669

■ **Travel expenses**
■■ **Official business**
■■■ **Determination**
■■■■ **Burden of proof**

Firearms Instructor may not be reimbursed for costs of trying out for Olympic Shooting Team, since the tryouts did not constitute a training program or meeting for which reimbursements are allowed, nor did it constitute official business. The period of absence while at tryouts must be charged against annual leave.

68:721

■ **Travel expenses**
■■ **Official business**
■■■ **Privately-owned horses/mules**

Absent specific statutory authority, an agency may not pay its employees on a fee basis for the use of privately owned transportation, including horses and mules, while conducting official business. However, the agency may reimburse employees on an actual expense basis.

70:645

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Amount determination**
■■■■ **Administrative discretion**

Federal agencies are not required by law to establish identical maximum expense reimbursement rates for different employees performing the same or similar travel assignments, but reimbursement rates should be reasonably fixed under uniform policies applicable to all employees. Under this standard the Food and Drug Administration properly adopted a uniform policy of reducing per diem rates for employees on group training assignments when they are able to reduce their lodging expenses by sharing hotel accommodations, and of granting exemptions when room sharing is unavailable for a particular employee or would be unreasonable because of a medical problem or other factor.

67:540

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Amount determination**
■■■■ **Administrative discretion**

Two employees were authorized temporary duty travel to receive awards at a Departmental Honor Awards Ceremony and to be accompanied by their spouses. Although the preplanned ceremonies were scheduled to end the morning of June 14, 1990, the official authorizing the travel had discretion to allow return travel on June 15. Accordingly, the employees may be allowed lodging and full per diem for June 14 and meals and incidental expenses for June 15.

70:440

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Amount determination**
■■■■ **Administrative discretion**

Under the Office of Personnel Management's guidelines in FPM Letter 451-7, July 25, 1990, agency heads have broad discretionary authority to establish allowable per diem amounts, points of travel origin and return, and the number of individuals authorized to travel in connection with award ceremonies under 5 U.S.C. § 4503 (1988).

70:440

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Awards/honoraria**

Under the Office of Personnel Management's guidelines in FPM Letter 451-7, July 25, 1990, agency heads have broad discretionary authority to establish allowable per diem amounts, points of travel origin and return, and the number of individuals authorized to travel in connection with award ceremonies under 5 U.S.C. § 4503 (1988).

70:440

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Official business**
■■■■ **Determination**

Attendance at a funeral is not normally considered official business for which an agency may pay an employee's travel expenses. However, where the head of the agency or his delegatee determines that there are circumstances relating to significant activities of the agency that justify the designation of an employee as an official agency representative to attend a funeral, the employee may be reimbursed travel expenses from agency funds. B-236110, Jan. 26, 1990; B-199526, Feb. 23, 1981; B-166141, Feb. 27, 1969; and B-129612, July 1, 1957, are modified.

70:200

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Official business**
■■■■ **Determination**

Candidates for National Institutes of Health's (NIH) Intramural Research Training Award (IRTA) Program may be paid for travel expenses incurred in attending preselection interviews since NIH determines whether the candidates are qualified and the interviews are necessary to determine their qualifications and adaptability for the positions. Although the successful candidates are considered to be "Fellows" under the Program and are not appointed as federal employees, NIH treats the candidates in the same manner as applicants for positions in the excepted service. *See Office of Personnel Management,* 60 Comp. Gen. 235 (1981), and cases cited therein.

70:261

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Spouses**

Two employees were authorized temporary duty travel to receive awards at a Departmental Honor Awards Ceremony and to be accompanied by their spouses. Although the preplanned ceremonies were scheduled to end the morning of June 14, 1990, the official authorizing the travel had discretion to allow return travel on June 15. Accordingly, the employees may be allowed lodging and full per diem for June 14 and meals and incidental expenses for June 15.

70:440

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Witnesses**

The statutory provision in 5 U.S.C. § 5751, authorizing reimbursement of travel expenses of government employees called as witnesses and the implementing regulations in 28 C.F.R. Part 21 are applicable to discrimination hearings before an Administrative Judge of the Equal Employment Opportunity Commission (EEOC). An employee who appears as a witness at such a hearing is in an official duty status and entitled to reimbursement for travel expenses.

69:310

■ **Travel expenses**
■■ **Reimbursement**
■■■ **Witnesses**

A current employee of the Department of Veterans Affairs (VA) was summoned to testify at an EEOC hearing concerning the witness's official duties at his former agency, the Coast Guard. The VA must initially authorize and pay the employee's travel expenses so as not to disrupt the equal employment opportunity process. Then, the VA is entitled to reimbursement from the respondent agency (Coast Guard), which is ultimately responsible for the cost of the employee's travel to attend the hearing.

69:310

■ **Travel expenses**
■■ **Vouchers**
■■■ **Fraud**

Employee's claim for reimbursement for lodging expenses is denied where the agency has met its burden of proof that claims for subsistence expenses were tainted by fraud. The agency investigation clearly revealed fraudulent statements on a travel voucher, and the failure to prosecute criminally for fraud does not preclude administrative action on a voucher where fraudulent action is strongly indicated.

68:108

■ Travel regulations

■■ Applicability

Attendance at a funeral is not normally considered official business for which an agency may pay an employee's travel expenses. However, where the head of the agency or his delegatee determines that there are circumstances relating to significant activities of the agency that justify the designation of an employee as an official agency representative to attend a funeral, the employee may be reimbursed travel expenses from agency funds. B-236110, Jan. 26, 1990; B-199526, Feb. 23, 1981; B-166141, Feb. 27, 1969; and B-129612, July 1, 1957, are modified.

70:200

Military Personnel

Leaves Of Absence
■ Annual leave
■■ Negative leave balances
■■■ Error detection
■■■■ Debt collection

Discharged Navy member's request for waiver of a claim against him for excess leave he took while he was in service is denied since under the circumstances he either knew or should have known at the time that he was taking leave he had not earned, and therefore he was at fault in taking the excess leave. Such "fault" precludes favorable consideration of his request to be relieved of his repayment obligations under the provisions of the waiver statute, 10 U.S.C. § 2774. Interested charges incorrectly assessed on the debt must, however, be deleted under Department of Defense Instruction 7045.18, which provides that interest shall not accrue on the amount due while a request for waiver is pending.

66:124

■ Involuntary leave
■■ Eligibility
■■■ Allowances

A member of the military services on involuntary leave pending appellate review of a court-martial sentence to a dishonorable or bad conduct discharge or dismissal from the Service, to the extent entitled to pay and allowances, is entitled to the allowances appropriate for his duty station.

70:435

Pay
■ Awards/honoraria
■■ Eligibility

Section 503 of title 14, United States Code does not provide authority similar to 5 U.S.C. § 4503 to pay monetary incentive awards for superior accomplishments to military members of the Coast Guard who were members of a group comprised of military members and civilian employees that was given a group award.

68:343

■ Basic quarters allowances
■■ Rates
■■■ Determination
■■■■ Dependents

A member with dependents is entitled to a basic allowance for quarters at the "with-dependent" rate (BAQ-W) when adequate government quarters are not provided for him and his dependents. A divorced member may qualify for BAQ-W for a child living with the member's former spouse in private quarters if he pays child support in an amount at least equal to the difference between BAQ at the "with-" and "without-dependents" rates.

70:703

■ **Basic quarters allowances**
■■ **Rates**
■■■ **Determination**
■■■■ **Dependents**

The cost of maintaining a separate residence for the times when the member has custody of the child may not be used instead of or in addition to support payments to qualify for BAQ-W.

70:703

■ **Benefit election**
■■ **Records**
■■■ **Revision**
■■■■ **GAO authority**

Decisions regarding who may petition a Board for Correction of Military Records are not within the jurisdiction of the General Accounting Office. However, it is noted that pursuant to 10 U.S.C. § 1552, only the "heir or legal representative" of a deceased member has authority to do so. In addition, while 10 U.S.C. § 1552 confers authority to correct a military record in favor of a member, courts have held that it does not confer the authority to correct the record against a member.

66:688

■ **Benefit election**
■■ **Survivor benefits**

The determination of whether a written agreement, entered into prior to the effective date of the applicable law authorizing an election to provide Survivor Benefit Plan annuity coverage for a former spouse, may properly serve as the basis of a "deemed" election under 10 U.S.C. § 1450(f)(3)(A) depends on the terms of the particular agreement. Such determinations must be made on a case-by-case basis. In cases where the written agreement is determined to be effective for purposes of "deeming" an election, if the court order predates the statute, cost should be assessed retroactive to the effective date of the statute, otherwise the effective date is the first day of the first month which begins after the court order.

66:687

■ **Benefit election**
■■ **Survivor benefits**

If a retiree voluntarily elects to provide a former spouse Survivor Benefit Plan annuity coverage within 1 year of his divorce, the effective date of the election is the actual date it is made. Alternately, if the retiree fails or refuses to make such voluntary election, the effective date of the "deemed" election is the first day of the month after the court order. Although the former spouse may request the deemed election prior to the expiration of the 1-year period, the deemed election may not be made until the year has expired, in the absence of an affirmative refusal or other event warranting a determination that the retiree "failed or refused" to make the election.

66:687

■ **Benefit election**
■■ **Survivor benefits**

If a member dies before the effective date of statutory amendment that would have permitted the member to elect former spouse as Survivor Benefit Plan beneficiary, there can be no deemed election under 10 U.S.C. § 1450(f)(3)(A).

66:687

■ **Benefit election**
■■ **Survivor benefits**

Amendments made to the Survivor Benefit Plan in 1982 and 1983 gave retired service members the option of voluntarily electing survivor annuity coverage for a "former spouse." A further amendment enacted in 1984 provides that if a retiree agrees in writing to elect annuity coverage for a former spouse and then "fails or refuses" to do so, the retiree nevertheless "shall be deemed to have made such an election." If a retiree is and always has been ineligible to provide annuity coverage for a former spouse under the provisions of the Survivor Benefit Plan, however, the retiree cannot properly be considered to have ever failed or refused to elect such coverage nor can the retiree be "deemed" to have made the election under the terms of the 1984 amendment.

66:687

■ **Benefit election**
■■ **Survivor benefits**

A court order other than the original decree of divorce, dissolution, or annulment may be used as a basis for a deemed election under 10 U.S.C. § 1450(f)(3). A valid legal document from a court of competent jurisdiction which modifies the provisions of previous court orders relating to the subject matter must clearly indicate that the member has voluntarily agreed to provide coverage under the Survivor Benefit Plan for the former spouse.

66:688

■ **Benefit election**
■■ **Survivor benefits**

The "deemed" election in 10 U.S.C. § 1450(f)(3) requires the election be deemed effective on the first day of the first month which begins after the date of the court order. Thus, in the case of a deemed election, the election of an annuity is based on the court order rather than the date of the deemed election and the type of coverage available the date of the court order would be applicable.

66:688

■ **Claims**
■■ **Savings deposit**
■■■ **Statutes of limitation**
■■■■ **Applicability**

Because the 6-year statute of limitations (31 U.S.C. § 3702(b)) does not apply to claims for deposits under the soldiers' savings deposit program, a claim received in the General Accounting Office 32 years after it accrued is not barred by the statute. The claim for such deposits made by the service member's widow may not be paid, however, because the only service records still in existence relat-

ing to it support the inference that the member was paid such deposits at the time of his retirement in 1951, and the claimant has not presented evidence to overcome that inference.

66:40

■ **Claims**
■■ **Statutes of limitation**

Settlement by the Claims Group that 31 U.S.C. § 3702(b) barred claim by son for arrears of military retired pay that were owed but never paid to his father, a retired Navy member living in China, and survivor's benefits, if any, owed his spouse is reversed. The claim is for moneys withheld in accordance with 31 U.S.C. § 3329 which authorizes the Secretary of the Treasury to hold moneys in trust if the Secretary determines that the payee lives in a country where it is unlikely that he or she will receive checks from the United States or be able to negotiate them for full value. Claims to recover moneys held in trust by the government are not barred under 31 U.S.C. § 3702(b).

70:612

■ **Death gratuities**
■■ **Eligibility**
■■■ **Children**

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren.

67:569

■ **Death gratuities**
■■ **Eligibility**
■■■ **Former spouses**

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren.

67:569

■ **Death gratuities**
■■ **Eligibility**
■■■ **Spouses**

In the absence of evidence that husband of deceased service member acted with felonious intent in connection with the member's death, he is entitled to death gratuity payable under 10 U.S.C. § 1477.

68:340

■ **Death gratuities**
■■ **Eligibility**
■■■ **Stepchildren**

A woman's claim for a death gratuity as the widow of a deceased service member is denied since she never obtained a divorce from her first husband and legally was not a surviving spouse. Also, her alternative claim for the death gratuity to be paid to her children as the stepchildren of the deceased is denied since her invalid marriage to the deceased precludes her children from having become the deceased's stepchildren.

67:569

■ **Overpayments**
■■ **Error detection**
■■■ **Debt collection**
■■■■ **Waiver**

Discharged Navy member's request for waiver of a claim against him for excess leave he took while he was in service is denied since under the circumstances he either knew or should have known at the time that he was taking leave he had not earned, and therefore he was at fault in taking the excess leave. Such "fault" precludes favorable consideration of his request to be relieved of his repayment obligations under the provisions of the waiver statute, 10 U.S.C. § 2774. Interest charges incorrectly assessed on the debt must, however, be deleted under Department of Defense Instruction 7045.18, which provides that interest shall not accrue on the amount due while a request for waiver is pending.

66:124

■ **Overpayments**
■■ **Error detection**
■■■ **Debt collection**
■■■■ **Waiver**

A Navy Captain who exchanged British pounds sterling, representing the proceeds from the sale of his London home, for dollars at a Navy disbursing office is indebted to the United States for the $29,000 overpayment he received as a result of the disbursing officer's use of an erroneous currency exchange rate that violated the applicable provisions in the Navy Comptroller Manual.

70:102

■ **Overpayments**
■■ **Interest**
■■■ **Waiver**

Discharged Navy member's request for waiver of a claim against him for excess leave he took while he was in service is denied since under the circumstances he either knew or should have known at the time that he was taking leave he had not earned, and therefore he was at fault in taking the excess leave. Such "fault" precludes favorable consideration of his request to be relieved of his repayment obligations under the provisions of the waiver statute, 10 U.S.C. § 2774. Interest charges incorrectly assessed on the debt must, however, be deleted under Department of Defense Instruction

7045.18, which provides that interest shall not accrue on the amount due while a request for waiver is pending.

66:124

■ **Reenlistment bonuses**

■■ **Computation**

Under an Air Force early separation program a group of first-term enlisted members were released up to 5 months before their enlistments expired. Since these members were entirely free to separate from the service, their previously obligated service may be regarded as having been terminated. Therefore, when such a member reenlists immediately rather than separates from the service, the full period of the member's reenlistment may be counted as additional obligated service under 37 U.S.C. § 308(a)(1) for the purpose of computing the member's selective reenlistment bonus.

70:67

■ **Reservists**

■■ **Retirement pay**

■■■ **Amount determination**

■■■■ **Computation**

A reservist's civil service retirement income is not "earned income from nonmilitary employment" under the dual compensation restrictions of 37 U.S.C. § 204 which requires a reduction in the pay and allowances a member receives while incapacitated if he receives income from nonmilitary employment since civil service retirement income is unrelated to the member's current employment status. Accordingly, it may not be offset against his pay and allowances.

70:350

■ **Retired personnel**

■■ **Post-employment restrictions**

A retired Regular Navy officer who was employed by a Department of Defense contractor did not violate 37 U.S.C. § 801(b) and implementing regulations, which prohibit a retired Regular officer from negotiating changes in specifications of a contract with the Department of Defense, when that officer worked with non-contracting Defense personnel as a technical expert for the purpose of coordinating the correction of the malfunctioning of an item that had previously been procured and delivered. This is so even though the technical solution proposed by the officer ultimately led to a modification of the contract.

68:240

■ **Retired personnel**

■■ **Post-employment restrictions**

Statutes barring retired military officer from representing other parties before military department within 2 years of retirement and permanently barring officer from representing parties before government concerning matters in which officer was personally and substantially involved are, either by explicit statutory language or agency regulation, not applicable to retired enlisted military personnel.

68:332

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Under 10 U.S.C. § 1401a(f), a member of an armed force who retires after January 1, 1971, may have his retired pay calculated on the basis of the pay rates in effect and applicable to him at any point in time after he became eligible to retire. A member receives the benefit of this law even if he is reduced in grade, following his eligibility to retire, for disciplinary reasons including a reduction in grade pursuant to a court-martial sentence. *See* 56 Comp. Gen. 740 (1977).

66:425

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Military retired pay is adjusted to reflect changes in the Consumer Price Index rather than changes in active duty pay rates, and as a result a "retired pay inversion" problem arose: service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, commonly referred to as the "Tower amendment," was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.

67:267

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

A provision included in the appropriation acts applicable to the Department of Defense in effect between January 1, 1982, and December 18, 1985, prohibited any service member "who, on or after January 1, 1982, becomes entitled to retired pay" from rounding 6 months or more of service to a full year for purposes of computing retired pay. The Department determined that this prohibition applied to retired pay computations under the Tower amendment, 10 U.S.C. § 1401a(f), in the case of service members who retired after January 1, 1982, but who had their retired pay computed on the basis of their eligibility to retire on an earlier date when that prohibition was not in effect. The Comptroller General sustains the Department's determination, in view of the wording of the provision, but notes that reductions in retired pay under the provision should have ceased after it expired in December 1985.

67:267

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Military retired pay is adjusted to reflect cost-of-living increases rather than changes in active duty pay rates, and as a result service members who remained on active duty after becoming eligible for retirement were receiving less retired pay when they eventually retired than they would have received if they had retired earlier. Subsection 1401a(f), title 10, U.S. Code, was adopted to alleviate that problem, and it authorizes an alternate method of calculating retired pay based not on a service member's actual retirement but rather on his earlier eligibility for retirement.

68:649

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Members of the armed services, whether officer or enlisted, who have not met the requirements prescribed by statute and regulation of time-in-grade for retirement in a certain grade may not have their retired pay computed on the basis of the higher grade through operation of 10 U.S.C. § 1401a(f) unless a waiver of that requirement has been granted pursuant to proper authority.

68:649

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Time-in-grade restrictions must be satisfied by a service member in the establishment of the hypothetical retirement date to be used for purposes of the alternate computation of military retired pay authorized under 10 U.S.C. § 1401a(f).

68:649

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Ordinarily, an original interpretation of a statute must be applied back to the time of enactment of the law. However, prospective application may be given to a decision which is inconsistent with a reasonable administrative determination which would result in collection action against retired members for erroneous payments of retired pay. The computation of retired pay for those members affected should be adjusted for future payments.

68:650

■ **Retirement pay**
■■ **Amount determination**
■■■ **Computation**
■■■■ **Effective dates**

Marine Corps board of inquiry recommended to the Secretary that a major be retired at the rank of captain and that the member had not served satisfactorily as a major. Even though the major first became eligible for voluntary retirement before the board's recommendation was approved by the Secretary, his retired pay should be calculated on the grade of captain, since it is evident that the Secretary would not have made the statutorily required determination of satisfactory service as a major on the eligibility date.

70:398

■ **Retirement pay**
■■ **Amount determination**
■■■ **Post-retirement active duty**

The retired pay of a service member who was immediately recalled to active duty without a break in service for less than 2 years is computed according to 10 U.S.C. § 1402 to reflect the additional service, and is based on the pay rate as prescribed in that statute.

69:141

■ **Retirement pay**
■■ **Claims**
■■■ **Trust funds**
■■■■ **Statutes of limitation**

Settlement by the Claims Group that 31 U.S.C. § 3702(b) barred claim by son for arrears of military retired pay that were owed but never paid to his father, a retired Navy member living in China, and survivor's benefits, if any, owed his spouse is reversed. The claim is for moneys withheld in accordance with 31 U.S.C. § 3329 which authorizes the Secretary of the Treasury to hold moneys in trust if the Secretary determines that the payee lives in a country where it is unlikely that he or she will receive checks from the United States or be able to negotiate them for full value. Claims to recover moneys held in trust by the government are not barred under 31 U.S.C. § 3702(b).

70:612

■ **Retirement pay**
■■ **Computation**
■■■ **Dual compensation restrictions**
■■■■ **Bonuses**

A bonus received by a retired member employed in a civilian position with the government should not be considered in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) when an individual's combined retired pay and pay for the civilian position exceeds level V of the Executive Schedule as a result of the bonus, since the statute refers to the basic pay of the position.

69:338

■ **Retirement pay**
■■ **Computation**
■■■ **Dual compensation restrictions**
■■■■ **Bonuses**

A payment characterized as a bonus made to a retired member of a uniformed service employed by the government which is awarded by raising his rate of pay temporarily must be included in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) where cognizant authorities have concluded that there is no statutory authority for the payment of bonuses and the payment is treated as basic pay for other purposes. 69 Comp. Gen. 338 (1990) is overruled.

70:641

■ **Retirement pay**
■■ **Overpayments**
■■■ **Debt collection**
■■■■ **Set-off**

Collection of a debt under 37 U.S.C. § 1007(c), which provides that two-thirds of monthly pay may be deducted from members of the uniformed service to repay a debt, rather than 5 U.S.C. § 5514 which limits collection to 15 percent, is appropriate where legislation amending 37 U.S.C. § 1007(c) was enacted subsequent to legislation amending 5 U.S.C. § 5514.

69:226

■ **Retirement pay**
■■ **Overpayments**
■■■ **Debt collection**
■■■■ **Waiver**

A retired member of the Coast Guard was informed that he was being paid erroneously and he repaid the amounts due to the Coast Guard; however, the erroneous payments continued following the notification and repayment. The member is not without fault since he should have expected the monthly payments to change and he should have made inquiries of the proper officials when the payments were not reduced. In such circumstances waiver of his debt may not be granted under 10 U.S.C. § 2774.

69:226

■ **Retirement pay**
■■ **Overpayments**
■■■ **Personnel death**

Over a 2-year period the widow of a deceased Army sergeant erroneously received recurring monthly payments of military retired pay, amounting to $24,403.60, which should have ceased at the time of her husband's death. After Army officials learned of his death, they stopped the retired pay and calculated the Survivor Benefit Plan annuity payable to the widow. The widow was entitled to a survivor's annuity in an amount equal to 55 percent of her husband's military retired pay. Although the annuity entitlement is retroactive to the date of the retired soldier's death, the widow may not be allowed additional payment for the period for which she received erroneous retired pay. Instead, the amount of her retroactive survivor's annuity entitlement should be applied toward the satisfac-

tion of the debt owed by her as the result of her improper receipt of her husband's military retired pay, and the remainder of the debt should be either collected or waived in accordance with applicable law and regulation.

66:260

■ **Retirement pay**
■■ **Property distribution**
■■■ **Former spouses**

Notwithstanding a 1986 modification to a divorce decree giving her a direct interest in her former husband's retired pay, the former spouse of a retired U.S. Army member is not entitled to receive direct payments from the retired pay of the service member since the original divorce decree issued in 1977 awarded the retired pay solely to the member. According to the Uniformed Services Former Spouses' Protection Act and implementing regulations, a subsequent amendment of a court order issued on or after June 26, 1981, to provide for a division of retired pay as property is unenforceable.

68:116

■ **Retirement pay**
■■ **Reduction**
■■■ **Computation**

Marine Corps board of inquiry recommended to the Secretary that a major be retired at the rank of captain and that the member had not served satisfactorily as a major. Even though the major first became eligible for voluntary retirement before the board's recommendation was approved by the Secretary, his retired pay should be calculated on the grade of captain, since it is evident that the Secretary would not have made the statutorily required determination of satisfactory service as a major on the eligibility date.

70:398

■ **Retirement pay**
■■ **Reemployed annuitants**
■■■ **Dual compensation restrictions**
■■■■ **Bonuses**

A bonus received by a retired member employed in a civilian position with the government should not be considered in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) when an individual's combined retired pay and pay for the civilian position exceeds level V of the Executive Schedule as a result of the bonus, since the statute refers to the basic pay of the position.

69:338

■ **Retirement pay**
■■ **Reemployed annuitants**
■■■ **Dual compensation restrictions**
■■■■ **Bonuses**

A payment characterized as a bonus made to a retired member of a uniformed service employed by the government which is awarded by raising his rate of pay temporarily must be included in computing the reduction in retired pay required by 5 U.S.C. § 5532(c) where cognizant authorities have

concluded that there is no statutory authority for the payment of bonuses and the payment is treated as basic pay for other purposes. 69 Comp. Gen. 338 (1990) is overruled.

70:641

■ **Retirement pay**
■■ **Suspension**
■■■ **Foreign employment**

In 65 Comp. Gen. 382 (1986), we held that a retired U.S. Marine Corps officer, ostensibly employed by a U.S. corporation which furnished services to the Royal Saudi Naval Forces (RSNF), was actually an employee of the Saudi Arabian government and, as such, was required to obtain consent under 37 U.S.C. § 908 before payments of his military retired pay could be resumed. Arguments submitted in support of a request for reconsideration of this decision do not change our conclusion that the RSNF had the right to control, supervise and direct the work of the retired officer, the key elements in our determination that he was employed by the foreign government. Accordingly, our previous decision is affirmed.

69:220

■ **Separation allowances**
■■ **Eligibility**

A Marine Corps Reserve officer on active duty for 5 years or more who, upon involuntary separation, would be entitled to receive separation pay, is not entitled to such pay where he was transferred to the Naval Reserve under 10 U.S.C. § 716 without a break in service. In regard to entitlement to pay and allowances, his military status is not considered to have been interrupted, but rather he is considered at all times to have remained on active duty. 37 Comp. Gen. 357, distinguished.

68:1

■ **Set-off**
■■ **Military leave**

Where a statute specifically refers by section number to another statute, they are interpreted as of the time of adoption, without subsequent amendments, in the absence of a contrary legislative intent. Therefore, under the current code, the salary offset provision in 5 U.S.C. § 5519 (1988) applies to amounts received by reservists and national guardsmen while on military leave to enforce the law under 5 U.S.C. § 6323(b) (1988), but salary offset does not apply to leave under 5 U.S.C. § 6323(c) (1988) for District of Columbia National Guardsmen ordered or authorized to serve in parades or encampments even though section 5519 literally refers to section 6323(c).

70:1

■ **Survivor benefits**
■■ **Annuities**
■■■ **Amount determination**

Over a 2-year period the widow of a deceased Army sergeant erroneously received recurring monthly payments of military retired pay, amounting to $24,403.60, which should have ceased at the time of her husband's death. After Army officials learned of his death, they stopped the retired pay and calculated the Survivor Benefit Plan annuity payable to the widow. The widow was entitled to a

survivor's annuity in an amount equal to 55 percent of her husband's military retired pay. Although the annuity entitlement is retroactive to the date of the retired soldier's death, the widow may not be allowed additional payment for the period for which she received erroneous retired pay. Instead, the amount of her retroactive survivor's annuity entitlement should be applied toward the satisfaction of the debt owed by her as the result of her improper receipt of her husband's military retired pay, and the remainder of the debt should be either collected or waived in accordance with applicable law and regulation.

66:260

■ **Survivor benefits**
■■ **Annuities**
■■■ **Amount determination**

In *Croteau v. United States,* 823 F.2d 539 (1987), the Court of Appeals for the Federal Circuit held that the widow of two service members was entitled to a full, unreduced Survivor Benefit Plan annuity from the Army based on her second marriage, even though she was also drawing Dependency and Indemnity Compensation from the Veterans Administration on the basis of her first marriage. We will follow the court's judgment and overrule our prior contrary decision in *Technical Sergeant John T. Baker, USAF (Retired) (Deceased),* B-190617, Feb. 16, 1978. Individuals similarly situated to the plaintiff in the *Croteau* litigation are entitled to have their annuities adjusted upward retroactively, subject to the 6-year statute of limitations set out under 31 U.S.C. § 3702(b).

67:408

■ **Survivor benefits**
■■ **Annuities**
■■■ **Amount determination**

A provision of the laws governing the Survivor Benefit Plan, 10 U.S.C. § 1450(b), in certain circumstances requires a widow or widower who is eligible for more than one annuity, on the basis of more than one marriage, to elect which annuity to receive. While the provision uses the term "elect," its evident purpose is to give the individuals covered the highest annuity for which they are eligible. Hence, what is involved is not so much a matter of making an election as it is of simply determining which annuity provides the greatest benefit. There is consequently no basis for objection to the retroactive changing of such so-called elections, if that change will produce the greatest benefit for an annuitant in the retroactive recomputation of annuities necessitated by a new interpretation of the law under a court judgment.

67:408

■ **Survivor benefits**
■■ **Annuities**
■■■ **Eligibility**
■■■■ **Former spouses**

Army officer, having validly divorced his first wife in 1946, married again in 1960. When he then married a third wife in 1972 without dissolving his second marriage, his third wife was not legally married to him and therefore did not qualify as the beneficiary of his Survivor Benefit Plan (SBP) annuity. Since the second wife was legally married to the retired officer at the time of his death,

she is his widow and is the proper beneficiary of the SBP annuity in spite of the third ceremonial marriage.

67:561

■ **Survivor benefits**
■■ **Annuities**
■■■ **Eligibility**
■■■■ **Illegitimate children**

Claims for Survivor Benefit Plan annuities submitted by the mothers of illegitimate children of two deceased retired service members are denied because neither child lived with her father in a regular parent-child relationship, as required by 10 U.S.C. § 1447(5).

70:25

■ **Survivor benefits**
■■ **Annuity payments**
■■■ **Eligibility**

If a member has voluntarily agreed to make an election of Survivor Benefit Plan coverage on behalf of his former spouse but fails to do so, and the former spouse requests the deemed election in compliance with 10 U.S.C. § 1450(f)(3)(A), the deemed election on behalf of the former spouse must be recognized. Collection must be made of any funds paid to the current spouse, subject to waiver provisions under 10 U.S.C. § 1453.

66:688

■ **Survivor benefits**
■■ **Annuity payments**
■■■ **Eligibility**

A retired Air Force sergeant elected to provide Survivor Benefit Plan annuity coverage for his daughter. The daughter was subsequently adopted by her stepfather following her mother's divorce and remarriage. The adoption proceeding was set aside by a later state court order. Questions about the soundness of the later court order setting aside the adoption do not overcome the presumption in favor of its validity. Therefore, the daughter remained eligible for an annuity under the Plan as the member's dependent child beneficiary.

67:138

■ **Survivor benefits**
■■ **Annuity payments**
■■■ **Insane/incompetent persons**
■■■■ **Determination**

Survivor Benefit Plan annuitants should not be considered incompetent, and in need of a court-appointed guardian to manage their annuity payments, solely because they have a physical handicap or disability. Thus, there is not basis for objecting to benefit payments being sent directly to an annuitant solely because of her impaired vision, since that alone would not render her incompetent to manage her personal financial affairs. 65 Comp. Gen. 621 (1986) clarified.

66:340

■ **Survivor benefits**
■■ **Annuity payments**
■■■ **Insane/incompetent persons**
■■■■ **Determination**

While Alzheimer's disease can cause or lead to mental incompetence, persons diagnosed as having this disease may nevertheless remain competent to manage their personal financial affairs responsibly. There is no basis for objecting to Survivor Benefit Plan payments being made directly to an annuitant who has the disease, unless it is established that the annuitant is actually incompetent, either in competency proceedings in a state court, or otherwise in a statement of professional opinion of a physician or psychologist that the annuitant is incompetent to manage responsibly the amounts due. 62 Comp. Gen. 302, 307-308 (1983) clarified.

66:340

■ **Survivor benefits**
■■ **Annuity payments**
■■■ **Offset**
■■■■ **Social security**

When a widow's Survivor Benefit Plan annuity is reduced because she receives social security benefits based on her husband's lifetime earnings, the reduction cannot exceed the amount she actually receives from Social Security.

69:203

■ **Survivor benefits**
■■ **Annuity payments**
■■■ **Powers of attorney**

Survivor Benefit Plan annuitants are not precluded from accepting assistance from other persons in completing and filing annuity application forms. There is consequently no basis for objection to the son of a retired Army colonel's widow filing an annuity application form on her behalf as her agent under a power of attorney, with the request that benefit payments be made directly to her, provided that she is not mentally incompetent. 65 Comp. Gen. 621 (1986), clarified.

66:341

■ **Variable housing allowances**
■■ **Amount determination**

A member who is entitled to Basic Allowance for Quarters (BAQ) at the with-dependent rate, based on his payment of child support, and who is also entitled to a Variable Housing Allowance (VHA), may not receive VHA at the higher with-dependent rate solely by reason of a separation agreement that also awards "primary custody" of dependent children to the former spouse, but with "temporary" and "physical" "secondary custody" to the member at other times. However, the member is entitled to VHA at the with-dependent rate where he can demonstrate that he had actual physical custody of the children for periods in excess of 3 months. The computation of such VHA should take into consideration only the member's direct housing costs and not the costs incurred by the former spouse.

69:407

■ **Variable housing allowances**
■■ **Amount determination**

A divorced member who is entitled to a variable housing allowance (VHA) may receive the higher rate for a member with dependents (VHA-W) for continuous periods in excess of 3 months when his child is living with him. The costs of maintaining a home for the child's visits does not entitle him to VHA-W when the child is living with the member's former spouse or visiting the member for shorter periods.

70:703

■ **Variable housing allowances**
■■ **Eligibility**

Service members are generally authorized payment of a variable housing allowance (VHA) when assigned to duty in a "high-housing-cost area." The applicable statute restricts the eligibility of reservists for VHA to those called to active duty for a period of not less than 20 weeks. This restriction was imposed because reservists are eligible for per diem allowances to provide reimbursement of their lodging expenses when they are called away from their homes to perform duty for a period of up to 20 weeks at another locality, and an anomaly would result if their lodging costs were paid through per diem but they simultaneously received VHA for that locality. Hence, a regulation implementing the VHA statute properly restricts payment to reservists assigned to duty for 20 weeks or more "at one location," even though the statute does not use that phrase in express terms, since this regulation furthers the purpose of the statute and operates to prevent simultaneous payments of per diem and VHA for one locality.

66:453

Relocation
■ **Cost-of-living allowances**
■■ **Eligibility**

A member of the military services ordered to a designated place outside the continental United States, Alaska, and Hawaii to await final action by a Physical Evaluation Board is entitled to the overseas housing allowance (OHA) and cost of living allowance (COLA) appropriate for the designated place.

70:435

■ **Cost-of-living allowances**
■■ **Eligibility**

A member of the military services ordered to a designated place in the continental United States, Alaska, or Hawaii to await final action by a Physical Evaluation Board is entitled to the variable housing allowance and cost of living allowance appropriate for the designated place.

70:435

■ **Dislocation allowances**
■■ **Eligibility**

An Air Force chaplain with no dependents assigned to family-type housing rather than to bachelor quarters upon a permanent change-of-station transfer is not entitled to a dislocation allowance, not-

withstanding his belief that his assignment to family housing caused him to incur miscellaneous relocation expenses that should be reimbursed through payment of the allowance. The governing provisions of statute authorize payment of a dislocation allowance to transferred service members without dependents only if they are not assigned to government living quarters of any type at their new duty station.

66:225

■ Dislocation allowances
■■ Eligibility

The Joint Travel Regulations may not be revised to authorize the payment of a dislocation allowance to service couples, without dependents, assigned to government family quarters upon a permanent change-of-station transfer. Under the applicable statutes two active duty service members who are married cannot claim one another as dependents for allowance purposes. Therefore, both must be considered members without dependents and neither is entitled to a dislocation allowance when assigned to government quarters upon a permanent change-of-station transfer.

66:225

■ Household goods
■■ Advance payments
■■■ Liability
■■■■ Waiver

Under the armed services voluntary do-it-yourself (DITY) program, transferred members move their own household goods and receive an incentive payment based on 80 percent of what it would have cost the government to move them by commercial carrier. The member may receive an advance payment based on his estimated weight of the goods with final settlement being made based on actual weight of the goods. In some cases because of inaccuracies in the weight estimate, the member must repay part of the advance received. The resulting debt is not subject to waiver consideration under 10 U.S.C. § 2774 because it did not arise out of an "erroneous payment," but was the result of the regular operation of the program. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

67:485

■ Household goods
■■ Losses
■■■ Replacement
■■■■ Shipment costs

Where a service member's household goods are lost at sea during government-procured transportation to Iceland incident to a permanent change of station, the transportation of replacement items, within the member's authorized weight allowance applicable when the travel orders became effective, may be made at government expense, even though the items were acquired after the effective date of orders. Our holding in 50 Comp. Gen. 556 (1971) will no longer be followed. The Joint Federal Travel Regulations may be amended to authorize the transportation of replacement items under such circumstances. 50 Comp. Gen. 556, overruled.

68:143

■ **Household goods**
■■ **Vessels**
■■■ **Shipment**

The definition of the term "household goods" contained in the Joint Federal Trave Regulations, promulgated under the authority in 37 U.S.C. § 406(b), may be revised to include small boats and canoes so such articles may be moved at government expense as part of uniformed service members' household goods shipments. Upon such revision 53 Comp. Gen. 159 (1973) would be superseded.

67:230

■ **Household goods**
■■ **Weight restrictions**
■■■ **Liability**
■■■■ **Waiver**

A long-distance practice of the government in arranging transportation of employees' and service members' household goods incident to transfers of duty stations is for the government to contract with commercial carriers using government bills of lading (GBLs). Upon completion of the shipment the government pays the carrier and collects any excess charges from the member or employee for exceeding his or her authorized weight allowance or for extra services. Employees' or members' resulting debts do not arise out of "erroneous" payments, and therefore are not subject to consideration for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

67:484

■ **Household goods**
■■ **Weight restrictions**
■■■ **Liability**
■■■■ **Waiver**

Married enlisted members sharing the same residence in Belgium were each entitled to a household goods transportation allowance of 7,000 pounds for their return to the United States to be discharged from the Army. Although the husband initially intended a combined allowance of 14,000 pounds, the wife, who was in the hospital with serious injuries, did not have the opportunity to authorize use of her allowance for pickup of the household goods. The Army, therefore, allocated all 8,592 pounds of the pickup to the husband's 7,000-pound allowance, resulting in his purported indebtedness for excess weight. But after their discharge, they shared a residence in the United States when the household goods were delivered, and neither of them sought to have the Army reship the household goods because of misdelivery. Consequently, by acceptance of the delivery they demonstrated that they intended the shipment to be made under a combined allowance of 14,000 pounds, and there is no indebtedness to the government for excess weight.

68:521

■ **Mobile homes**
■■ **Reimbursement**
■■■ **Overpayments**
■■■■ **Liability**

Uniformed services members and civilian employees are entitled to movement of their mobile homes in lieu of household goods at government expense upon a change in duty station. Their maximum entitlement is an amount equal to the cost of moving their maximum entitlement of household goods. In some cases the government arranges the move and pays the carrier the full cost, and in other cases the members or employees receive an advance and arrange the move themselves. In either case if the members or employees incur a debt to the government because of exceeding their maximum entitlement, the debts may not be considered for waiver under 10 U.S.C. § 2774, 32 U.S.C. § 716, or 5 U.S.C. § 5584, because they resulted from the regular operation of the program and did not arise out of "erroneous" payments. Exceptional cases where there was some government error, such as erroneous orders, will be considered on a case-by-case basis.

67:485

■ **Overseas allowances**
■■ **Variable housing allowances**
■■■ **Eligibility**

A member of the military services ordered to a designated place outside the continental United States, Alaska, and Hawaii to await final action by a Physical Evaluation Board is entitled to the overseas housing allowance (OHA) and cost of living allowance (COLA) appropriate for the designated place.

70:435

■ **Reimbursement**
■■ **Payments**
■■■ **Foreign currencies**
■■■■ **Exchange rates**

A Navy Captain who exchanged British pounds sterling, representing the proceeds from the sale of his London home, for dollars at a Navy disbursing office is indebted to the United States for the $29,000 overpayment he received as a result of the disbursing officer's use of an erroneous currency exchange rate that violated the applicable provisions in the Navy Comptroller Manual.

70:102

■ **Relocation travel**
■■ **Dependents**
■■■ **Post differentials**
■■■■ **Eligibility**

The Joint Federal Travel Regulations may be changed to allow the payment of station allowances for service members' dependents who are moved to a designated place outside of the continental United States in Alaska, Hawaii, Puerto Rico, or in any territory or possession of the United States when the service members are transferred from their duty stations inside the continental United States to a restricted area in the same circumstances that would allow payment of the dependents'

transportation to the place upon the authorization or approval of the Service Secretary concerned. 49 Comp. Gen. 548 (1970) and *Lieutenant Colonel Charles D. Robinson,* 56 Comp. Gen. 525 (1977), are modified.

68:167

■ **Relocation travel**
■■ **Dependents**
■■■ **Travel regulations**
■■■■ **Amendments**

There has been recognized only a narrow exception to the general rule that only persons who are a uniformed service member's dependents on the effective date of his change-of-station order are entitled to transportation to the new station at government expense. This exception applies to children who are unborn on the effective date of the order where the mother's travel is delayed by service regulations prohibiting her travel due to her advanced pregnancy. Upon further consideration and in accordance with a broader exception authorized civilian employees, no objection is raised to a proposed amendment to the uniformed services regulations to include as a dependent, for transportation allowance purposes, infants born after the effect date of orders because their mother's travel was delayed for any official reason. 50 Comp. Gen. 220 is modified accordingly.

66:497

■ **Relocation travel**
■■ **Post differentials**
■■■ **Dependents**

The Joint Federal Travel Regulations may be changed to allow the payment of station allowances for service members' dependents who are moved to a designated place outside of the continental United States in Alaska, Hawaii, Puerto Rico, or in any territory or possession of the United States when the service members are transferred from their duty stations inside the continental United States to a restricted area in the same circumstances that would allow payment of the dependents' transportation to the place upon the authorization or approval of the Service Secretary concerned. 49 Comp. Gen. 548 (1970) and *Lieutenant Colonel Charles D. Robinson,* 56 Comp. Gen. 525 (1977), are modified.

68:167

■ **Relocation travel**
■■ **Reimbursement**
■■■ **Circuitous routes**

Notwithstanding orders directing a member to report to a specific port of embarkation incident to a transfer overseas, the member's entitlement to travel allowances is based on travel from the appropriate port of embarkation serving his temporary duty station when the orders do not direct travel to some other point.

69:164

■ **Relocation travel**
■■ **Reimbursement**
■■■ **Circuitous routes**

Service member was assigned on an emergency, permissive basis to a unit near his family en route to a permanent change of station from Germany to Seneca, New York, and subsequently was directed to report to Seneca. Member should be reimbursed for his travel in accordance with the orders issued to him, which authorized reimbursement for travel from Germany to St. Louis, which facilitated the permissive assignment, and per diem and mileage limited to that applicable for travel to Seneca from Philadelphia, the port to which he otherwise would have flown from Germany.

69:537

■ **Relocation travel**
■■ **Travel time**
■■■ **Delays**
■■■■ **Personal convenience**

Service members traveling under permanent change-of-station orders are eligible under the Joint Travel Regulations for additional travel time and monetary allowances for delays en route taken at ports to await delivery of their automobiles, only if they demonstrate that the delays were caused by circumstances beyond their control. Hence, a Navy officer may not be allowed an additional 10 days travel time for a delay taken to accept delivery of his automobile at Norfolk, Virginia, while he was en route from Bermuda to Texas, where it appeared he could have avoided the delay by arranging for the timely shipment of the automobile prior to his departure from Bermuda.

66:152

■ **Temporary quarters**
■■ **Actual expenses**
■■■ **Spouses**
■■■■ **Eligibility**

An agency may pay a civilian employee's claim for temporary quarters subsistence expenses for her spouse incident to her transfer, even though the authorization is issued retroactively by amendment to the employee's order, and even though the spouse is a member of the uniformed services who is also being transferred, provided reimbursement would not result in the couple receiving a duplication of payments for the same purpose.

69:224

■ **Variable housing allowances**
■■ **Eligibility**
■■■ **Amount determination**

Under a 1985 amendment to the variable housing allowance (VHA) law, VHA is reduced under certain circumstances where it, together with basic allowance for quarters, exceeds a member's housing costs. The amount of reduction, if any, depends on the member's monthly housing costs, with higher monthly housing costs resulting in no reduction or a lesser reduction. The regulation defining monthly housing costs may not include the cost of a second mortgage taken for reasons other than

repairing, renovating or enlarging a residence since VHA is an allowance to help a member pay for housing in a high cost area.

67:145

■ **Variable housing allowances**
■■ **Eligibility**
■■■ **Amount determination**

The definition of monthly housing costs for the purpose of computing the VHA may include the cost of a loan not secured by realty provided that the loan is taken for the purpose of repairing, renovating or enlarging the member's residence. There is no statutory impediment to amending applicable regulations to reflect this, but is a matter left to administrative discretion in implementing the VHA statute.

67:146

■ **Variable housing allowances**
■■ **Eligibility**
■■■ **Amount determination**

A service member married a woman who owned a house with a first and second mortgage on it, and it became their family residence. She had been previously married, and she had taken the second mortgage to pay her former husband an amount due him in their community property settlement whereby she retained the house after their divorce. The regulation defining monthly housing costs for purposes of computing a uniformed service member's variable housing allowance (VHA) excludes the cost of a second mortgage taken for other than repairing, renovating, or enlarging a residence since VHA is an allowance to help a member pay for housing in a high-cost area, not to satisfy a community property settlement. Neither may the second mortgage in these circumstances be considered a mortgage taken for the initial purchase of a residence.

67:578

■ **Variable housing allowances**
■■ **Eligibility**
■■■ **Amount determination**

The definition of monthly housing costs for purposes of computing a variable housing allowance (VHA) may not include a cost for the interest or other return on investment a service member loses for the money he puts down upon purchasing his residence (a so-called "opportunity cost"). In promulgating the VHA regulations, the services chose not to include opportunity costs, and it was within their latitude under the law to do so.

67:578

■ **Variable housing allowances**
■■ **Eligibility**
■■■ **Amount determination**

Service member who paid cash for his home may not prorate the purchase amount monthly in order to include it in his "monthly housing cost" for purposes of obtaining a full Variable Housing Allowance (VHA). The purpose of a VHA is to defray housing costs in those parts of the United States where housing costs are especially high, and since the allowance is intended to be attuned to mem-

bers' actual housing costs, a member who has no actual out-of-pocket housing expense does not qualify for the full allowance.

68:106

■ **Variable housing allowances**
■■ **Eligibility**
■■■ **Amount determination**

A member of the military services ordered to a designated place in the continental United States, Alaska, or Hawaii to await final action by a Physical Evaluation Board is entitled to the variable housing allowance and cost of living allowance appropriate for the designated place.

70:435

Travel
■ **Advances**
■■ **Overpayments**
■■■ **Debt collection**
■■■■ **Waiver**

Authority to waive uniformed services members', National Guard members' and civilian employees' debts arising out of erroneous payments of travel and transportation allowances was added to 10 U.S.C. § 2774, 32 U.S.C. § 716, and 5 U.S.C. § 5584, by Public Law 99-224, 99 Stat. 1741. As provided in section 4 of Public Law 99-224, the authority applies only to debts arising out of payments made on or after the effective date of the law, December 28, 1985.

67:484

■ **Advances**
■■ **Overpayments**
■■■ **Debt collection**
■■■■ **Waiver**

Under the waiver statutes, the Comptroller General may waive claims against federal employees and service members, amounting to more than $500, arising from overpayments of pay or allowances if collection would be against equity and good conscience. The Comptroller General and agency heads have concurrent jurisdiction to waive claims amounting to $500 or less. Effective December 28, 1985, the waiver statutes were amended to include claims arising from erroneous payments of travel and transportation expenses. As a result of this amendment, travel advance payments are subject to waiver to the extent that expenses are incurred by an employee or service member in reliance on erroneous authorizations. Hence, under 10 U.S.C. § 2774, as amended, waiver of indebtedness may be considered in the case of a member of the Air Force who was over-advanced $326.60 for this transfer to a new duty station, where it is shown that he received the overpayment as the result of an erroneous travel authorization and errors made in the computation of his entitlement. Since the record before us does not indicate whether the standards for waiver have been met in this particular case, the case is remanded to the Air Force for determination of whether to grant waiver.

67:496

■ **Bonuses**
■■ **Acceptance**
■■■ **Propriety**
■■■■ **Dependents**

Dependent students of a military member may retain nontransferable travel certificates received from an airline as a result of a 24-hour flight delay. General rule that discount coupons and other benefits received in the course of official travel are the property of the government does not apply in the case of benefits received by dependents of government employees or military members whose travel is paid for by the government but who are not eligible for per diem payments.

70:50

■ **Per diem**
■■ **Eligibility**

An Army Reserve officer was called to active duty from his home in Texas under orders to attend a course of instruction at Fort Gordon, Georgia, for a period of "139 days plus allowable travel time." Under the applicable regulations this constituted active duty under instruction for less than a full period of 20 weeks, or 140 days, and he was thus eligible for per diem, notwithstanding a suggestion advanced that his assignment might be considered to have been 20 weeks or more in duration based on the concept that it consisted of an 800-hour program of instruction conducted 8 hours per day, 5 days per week for 20 weeks.

66:264

■ **Per diem**
■■ **Eligibility**

After completing 58 days of a 139-day school assignment at Fort Gordon, Georgia, an Army Reserve officer received an amendment to his original orders extending the period of his stay at Fort Gordon from 139 days to 165 days and recharacterizing the assignment as permanent. Under the applicable regulations this amendment did not give rise to a permanent duty assignment, however, since the amendment did not create a new, prospective assignment period of 140 days or more as of the date the officer received the amendment. Hence, the officer continued to be eligible for per diem during the remainder of his assignment. The recharacterization of the assignment as "permanent" was contrary to regulation and therefore invalid.

66:265

■ **Rental vehicles**
■■ **Property damages**
■■■ **Claims**
■■■■ **Payments**

Direct payment may be made to car rental company on behalf of military member who rented the car where the car was damaged by another member operating it recklessly, and for personal business, but the government also should collect any amounts it pays the company from the member who caused the damage.

68:309

■ Temporary duty
■■ Determination
■■■ Durations
■■■■ Time restrictions

As a general rule a service member's assignment in excess of 5 or 6 months at one place may not properly be characterized as "temporary," since a temporary duty assignment confers eligibility for reimbursement of daily lodging and subsistence expenses through payment of a per diem allowance, and this is appropriate only for assignments of reasonably short duration. Conversely, an assignment of short duration may not properly be characterized as "permanent," since under permanent change-of-station orders service members are eligible to have their dependents and household effects relocated at government expense, and this is appropriate only for lengthy assignments.

66:264

■ Temporary duty
■■ Determination
■■■ Durations
■■■■ Time restrictions

Regulations specifically provide that the assignment of a service member to a school to attend a course of instruction of "20 weeks" or more constitutes a "permanent" assignment for travel and transportation allowance purposes. A settled principle has been established that the term "20 weeks" means 140 days, exclusive of allowable travel time and extensions caused by public holidays. While this is necessarily a rule of sharp delineation for determining whether an assignment to a school is "permanent," it is nevertheless a standard that is uniform, equitable, and administratively useful.

66:264

■ Temporary duty
■■ Orders
■■■ Amendments
■■■■ Permanent duty stations

After completing 58 days of a 139-day school assignment at Fort Gordon, Georgia, an Army Reserve officer received an amendment to his original orders extending the period of his stay at Fort Gordon from 139 days to 165 days and recharacterizing the assignment as permanent. Under the applicable regulations this amendment did not give rise to a permanent duty assignment, however, since the amendment did not create a new, prospective assignment period of 140 days or more as of the date the officer received the amendment. Hence, the officer continued to be eligible for per diem during the remainder of his assignment. The recharacterization of the assignment as "permanent" was contrary to regulation and therefore invalid.

66:265

■ **Temporary duty**
■■ **Travel expenses**
■■■ **Reimbursement**
■■■■ **Amount determination**

A military member on temporary duty in Germany used his personal credit card to charge the cost of renting automobiles for official business on three occasions. He received invoices stating the cost in Deutsche Marks and U.S. dollars and was reimbursed the dollar amounts stated. His credit card company billed him more than the dollar amounts on the invoices because it used a different exchange rate than did the automobile rental company. Since the member incurred the rental costs in Deutsche Marks, he should be reimbursed consistent with the general practice for reimbursing a traveler on official duty overseas for charge transactions. Under the general practice, reimbursement is based on the accepted exchange rate, usually the New York foreign exchange selling rate (New York exchange rate) as of the dates of the charge transactions.

68:644

■ **Travel expenses**
■■ **Debt collection**

A member's claim for reimbursement of a collection made against him for the cost of traveling on a government aircraft pursuant to personal business is denied when the member alleges that he was eligible for space available travel but does not offer documentary evidence demonstrating that he would have been permitted to board the flight taken as a space available passenger.

69:164

■ **Travel expenses**
■■ **Foreign currencies**
■■■ **Exchange rates**
■■■■ **Credit cards**

A military member on temporary duty in Germany used his personal credit card to charge the cost of renting automobiles for official business on three occasions. He received invoices stating the cost in Deutsche Marks and U.S. dollars and was reimbursed the dollar amounts stated. His credit card company billed him more than the dollar amounts on the invoices because it used a different exchange rate than did the automobile rental company. Since the member incurred the rental costs in Deutsche Marks, he should be reimbursed consistent with the general practice for reimbursing a traveler on official duty overseas for charge transactions. Under the general practice, reimbursement is based on the accepted exchange rate, usually the New York foreign exchange selling rate (New York exchange rate) as of the dates of the charge transactions.

68:644

Miscellaneous Topics

Agriculture
■ Agricultural loans
■■ Default
■■■ Interest
■■■■ Waiver

The Farmers Home Administration (FmHA) appears to have broad statutory authority that would allow it to terminate the accrual of interest on the guaranteed portion of defaulted loans. However, under the regulations FmHA has promulgated to implement its statutory authority, FmHA may only terminate the accrual of interest on loans in limited circumstances if the borrower is eligible for such a debt reduction in accordance with the applicable regulatory requirements.

67:471

Commerce
■ Imports
■■ Restrictions

Office of U.S. Trade Representative interpretation and administration of competitive need ceilings of Generalized System of Preferences trade program, section 504(c)(1) of the Trade Act of 1974, 19 U.S.C. § 2464(c)(1), are legally supportable. The term "preceding calendar year" refers to the year in which exports arrived in the United States, as well as to the year before the President determines whether the exported articles exceeded the statutory formula in that section.

66:393

■ Imports
■■ Restrictions

Office of U.S. Trade Representative need not change its application of competitive need formula in future years, since interpretation and administration of Generalized System of Preferences trade program are legally supportable.

66:393

Environment/Energy/Natural Resources
■ Environmental protection
■■ Air quality
■■■ Standards
■■■■ Review procedures

EPA may send draft rules to OMB for review under Executive Order 12291 at the same time it begins final internal review of proposed rules. Clean Air Act provisions that require creating a formal record and docketing drafts circulated for interagency review do not prohibit concurrent EPA/OMB review. Neither the applicable statute nor its legislative history dictates that only final products be circulated, or that all input to the rules, including verbal input from OMB, be identifiable from the public record, although any EPA actions to modify draft rules based on verbal input must also be fully supported by the public record. Courts that have considered similar issues have

held that it is not necessary to create a public record of verbal input from OMB and have not disapproved of concurrent review.

67:19

■ **Environmental protection**
■■ **Recycled materials**
■■■ **Use**
■■■■ **Cost increase**

Award to lowest bidder offering to comply with mandatory solicitation requirement for 50 percent waste paper content, even though there was lower bid not meeting requirement, is consistent with Resource Conservation and Recovery Act of 1976 and Environmental Protection Agency implementing Guideline; although narrative accompanying Guideline indicates EPA's view that higher price for paper meeting minimum waste paper content requirement is unreasonable, neither statute nor Guideline prohibits paying such a premium.

69:410

■ **Regulatory agencies**
■■ **Authority**
■■■ **Civil penalties**
■■■■ **Mitigation**

The Nuclear Regulatory Commission (NRC) lacks authority to permit licensees who violate NRC requirements to fund nuclear safety research projects in lieu of paying monetary civil penalties. *See* 42 U.S.C. § 2282(a).

70:17

Federal Administrative/Legislative Matters
■ **Administrative regulations**
■■ **Gifts/donations**
■■■ **Investments**

Letters to Representatives Fascell, Garcia and Morella conclude that the Christopher Columbus Quincentenary Jubilee Commission may invest donated funds in non-Treasury, interest-bearing accounts and is not required to comply with the Federal Property and Administrative Services Act or the Federal Acquisition Regulation for contracts financed with donated funds.

68:237

■ **Government corporations**
■■ **Construction contracts**
■■■ **Funding**

In overseeing construction of the Federal Triangle Development Project, The Pennsylvania Avenue Development Corporation may have its construction consultants' fees amortized as a cost of construction rather than as an expense of the Corporation because the funds transferred to the Corporation under the Federal Triangle Development Act were intended to cover start-up costs. The Cor-

poration formally notified the required congressional committees of its plan to amortize these costs as a cost of construction and the committees did not object to this arrangement.

69:289

Finance Industry
■ Financial institutions
■■ Accounting services
■■■ Contract awards
■■■■ Propriety

So long as a federal disbursing officer exercises managerial responsibility for reviewing and overseeing disbursement operations and discharges other judgmental tasks set forth in 31 U.S.C. § 3325, 31 U.S.C. § 3321 does not preclude an agency from contracting with a private bank to perform the ministerial, operational aspects of disbursement, such as printing checks, delivering checks to payees, and debiting amounts from accounts.

69:314

■ Financial institutions
■■ Government corporations
■■■ Authority
■■■■ Government securities

Comptroller General letter concludes that the Federal Home Loan Bank Board, in operating the Federal Savings and Loan Insurance Corporation (FSLIC), has the statutory authority to issue promissory notes and assistance guarantees as part of restructuring failed savings and loan institutions. Statutory authority is derived from legislation governing FSLIC, sections 402 and 406 of the National Housing Acts, as amended, 12 U.S.C. §§ 1725, 1729.

68:14

■ Financial institutions
■■ Government corporations
■■■ Funding

Statutory authority to fund the Commodity Credit Corporation for 1988 and subsequent fiscal years, by means of a current indefinite appropriation is merely an authorization to make appropriations in that manner. It is not itself an appropriation act and cannot be construed to nullify or supersede line-item appropriations for fiscal year 1988.

67:332

■ Financial institutions
■■ Government corporations
■■■ Government-insured loans
■■■■ Government liability

Comptroller General letter concludes that FSLIC obligations are obligations of the United States backed by its full faith and credit since no general liability of the United States has been statutorily disclaimed. Conclusion is based on analysis that FSLIC is an instrumentality of the United States,

has been designated by Congress to carry out a program of insurance and regulation, and issues notes and guarantees under statutory authority. Analysis used is based on series of Attorney General opinions.

68:14

National Security/International Affairs
■ Foreign aid programs
■■ Funding restrictions
■■■ Military assistance

The use of Economic Support Fund (ESF) moneys by Egypt to pay Foreign Military Sales (FMS) debt was improper. Section 531(e) of the Foreign Assistance Act of 1961, as amended, 22 U.S.C. § 2346(e) (Supp. III 1985), prohibits the use of ESF funds for "military or paramilitary purposes." Here, there is no dispute that the FMS loan funds were used to purchase military services and equipment and that the ESF disbursement was used to pay the FMS loan. Because the military equipment was both provided and financed by the United States government, there is too close a nexus between the military equipment and services and the ESF moneys.

66:634

■ Foreign aid programs
■■ Loans
■■■ Refinancing
■■■■ Authority

An executive branch proposal to restructure certain loans made under the Foreign Military Sales (FMS) credit sales program, section 23 of the Arms Export Control Act, 22 U.S.C. § 2763 (1982), should be legislatively authorized. One of the two restructuring options proposed would permit countries to prepay the balance of their loans without penalty, resulting in a financial loss to the United States. The other option permits reduction of the interest rates and capitalization of the difference between old and new rates, to be recovered with interest at the end of the loan period in the form of a large balloon payment. This option, too, while facially proper, involves a significant financial risk of loss to the United States. The avoidance of serious damage to the foreign policy interests of the United States, which is likely to occur without rescheduling of the loans, does not constitute a sufficient "compensating benefit," within the meaning of relevant GAO decisions, to permit waiver of the government's contractual rights unless the Congress specifically authorizes the restructuring for that reason.

66:577

■ Service academies
■■ Retroactive degrees
■■■ Authority
■■■■ Statutory interpretation

The authority of the United States Merchant Marine Academy to confer retroactive bachelor of science degrees on graduates of the Academy who had graduated before the Academy was accredited and who otherwise have met the Academy's requirement for that degree was not repealed by implication upon enactment of the Maritime Education and Training Act of 1980. Repeals by implication

are generally disfavored unless the earlier and later statutes are irreconcilable. In this case, there is no conflict between the statutory provision enacted in 1956 granting the Academy the authority to award retroactive degrees and the Maritime Education and Training Act of 1980. Repeals by implication are generally disfavored unless the earlier and later statutes are irreconcilable. In this case, there is no conflict between the statutory provision enacted in 1956 granting the Academy the authority to award retroactive degrees and the Maritime Education and Training Act of 1980.

68:19

Transportation

■ Air carriers

■■ Excursion rates

■■■ Availability

Under the airlines' deregulated pricing system the city-pair contract fare, if applicable, or the fare selected by a traveler when a reservation is made or the ticket is issued generally is the applicable fare. GSA's position that the government is entitled to the lowest available fare for the service provided although another fare was requested has no reasonable basis in law. However, if GSA can establish that a lower fare applied and was requested but not furnished, it may apply the lower fare. The burden is then on the carriers to provide evidence to show why such fare was not available, since such evidence is peculiarly within their knowledge and competence.

69:691

■ Railroads

■■ Statutory restrictions

Prohibition contained in section 402 of the Department of Transportation and Related Agencies Appropriation Act for fiscal year 1982, Pub. L. No. 97-102, 95 Stat. 1442, 1465 (1981) (codified at 49 U.S.C. § 10903 note (1988)), constitutes permanent legislation. Therefore, until amended or repealed, section 402 prohibits the Interstate Commerce Commission from approving railroad branchline abandonments by Burlington Northern Railroad in North Dakota in excess of a total of 350 miles.

70:351

Procurement

Bid Protests

■ Agency-level protests

■■ Information adequacy

The fact that, under an agency's protest regulations, an agency-level protest may be untimely or the protester may lack interested party status, does not provide a basis for questioning the agency's subsequent determination to undertake corrective action based on information presented in connection with the protest.

69:399

■ Agency-level protests

■■ Protest timeliness

■■■ GAO review

Where a protest has been filed initially with contracting agency, subsequent protest to General Accounting Office is timely where filed within 10 days of initial adverse agency action, provided that the initial protest was filed in a timely manner. Where government contractor is conducting the procurement "by or for the government," protest to contractor constitutes agency-level protest.

70:579

■ Allegation

■■ Abandonment

Contention that agency should have held discussions with protester before requesting best and final offers so that protester could revise its proposal to correct any deficiencies is considered abandoned where agency reported that discussions were not necessary because protester's initial proposal was technically acceptable, and protester did not rebut or otherwise comment upon agency's assertion.

69:172

■ Allegation investigation

■■ GAO review

General Accounting Office will not invoke its independent audit authority and conduct an investigation into protest allegations where the record shows that they already have been thoroughly investigated by the contracting agency.

66:77

■ Allegation substantiation

■■ Lacking

■■■ GAO review

Protest that contracting agency improperly induced protester to compete for and accept award of a contract which included several option years when in fact agency intended to acquire the services under a different, more comprehensive contract to be awarded a short time later, is without merit since the agency only decided to acquire the services under the comprehensive contract once it became clear, after award had been made to the protester, that the services could be acquired at a lower price under that contract than under the protester's contract.

67:548

■ Allegation substantiation
■■ Lacking
■■■ GAO review

Protest that selected firm is less qualified than protester is denied where record does not demonstrate that the agency's evaluation was unreasonable.

68:684

■ Allegation substantiation
■■ Lacking
■■■ GAO review

Protest challenging agency price and frequency estimates for landscape maintenance services is denied where agency properly prepared estimates on the basis of historic information, and adjusted estimates in light of information provided by the protester and further agency review of the requirements; protester's allegation that uncorrected defects in the estimate remain is unsupported.

70:185

■ Allegation substantiation
■■ Lacking
■■■ GAO review

Protest, contending that proposed agency procurement of waste disposal services is improper because of the existence of protester's exclusive franchise as sole refuse collector within city limits, is denied where city code expressly excludes federal facilities from the scope of the franchise.

70:193

■ Allegation substantiation
■■ Lacking
■■■ GAO review

Where protester alleges procuring agency has violated its proprietary rights in a technical drawing which it developed through reverse engineering but does not provide sufficient factual record to determine whether the drawing is protectable, and does not provide adequate information regarding the value of materials that were provided by the government at no charge for the reverse engineering effort, protester has not shown that the drawing is entitled to protection as a trade secret and the government's release of the drawing therefore is not legally objectionable.

70:202

■ Allegation substantiation
■■ Lacking
■■■ GAO review

Protest that contracting agency improperly removed best and final offers (BAFO) from room designated for receipt of BAFOs prior to the BAFO receipt deadline and may have tampered with BAFO prices is denied, where the record shows that proposals were properly safeguarded and the protester

fails to provide evidence in support of its allegation in response to affidavits of agency personnel denying there was tampering.

70:255

■ **Allegation substantiation**
■■ **Lacking**
■■■ **GAO review**

The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

70:510

■ **Award pending appeals**
■■ **Multiple/aggregate awards**
■■■ **Propriety**

Where the solicitation contemplates multiple contracts for services required at many different locations throughout the country, and a protest has been filed against proposed awards at some but not all of those locations, the stay provision of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(1) (Supp. IV 1986), requires the contracting agency to refrain from making awards only on those proposed contracts that are the subject of the protest.

68:314

■ **Award pending appeals**
■■ **Multiple/aggregate awards**
■■■ **Propriety**

Contention that recommendation in decision sustaining protest which challenged several but not all contract awards under solicitation providing for multiple awards was too narrow and should extend to all awards under the solicitation, whether or not the subject of a protest, is without merit where party challenging recommendation chose not to protest other awards and, as a result, those awards were not the subject of the decision sustaining the protest.

68:315

■ **Bad faith**
■■ **Allegation substantiation**
■■■ **Lacking**

Protest alleging that contracting agency officials acted unfairly and in bad faith in setting aside procurement for exclusive small business participation is denied, where there is no evidence that contracting officials intended to harm the protester and the decision to set aside was properly made in accordance with Federal Acquisition Regulation § 19.502-2 which governs small business set-aside determinations.

68:429

■ **Bias allegation**
■■ **Allegation substantiation**
■■■ **Burden of proof**

Allegation of bad faith on the part of government officials in deciding to retain the sample data collection services within the Small Business Administration 8(a) program is denied where protester fails to offer irrefutable proof that the government officials had a specific, malicious intent to cause it harm.

68:130

■ **Bias allegation**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Protester fails to show that procurement was improperly influenced in favor of awardee due to alleged conflict of interest on part of contracting agency officials where protester does not show what role officials played in the procurement; alleged conflict of interest is limited to membership in awardee, a professional organization; and there is no evidence that evaluation was influenced in any way by favoritism toward awardee.

66:170

■ **Constitutional rights**
■■ **GAO review**

Agency decision to delay publication of initial regulatory flexibility analysis required by Regulatory Flexibility Act until after effective date of interim rule is not subject to review by General Accounting Office where agency determined under emergency provision of the Act that publication of the rule without prior public comment was necessary to meet statutory goal and, under the Act, that determination is not subject to judicial review.

67:357

■ **Contract performance**
■■ **Work suspension**

Competition in Contracting Act provision requiring suspension of performance if an agency receives notice of a protest within 10 calendar days of award does not apply to the exercise of an option; the law makes no mention of such a requirement, and there is nothing in the legislative history of the Act indicating that Congress intended the provision to apply.

66:464

■ **Definition**

Protest jurisdiction of the General Accounting Office extends to protests filed by interested parties challenging procurements conducted by federal agencies and does not turn on whether appropriated funds are involved.

66:231

■ **Definition**

General Accounting Office has jurisdiction to consider protests alleging that Travis Air Force Base is required to utilize the city of Fairfield, California's exclusive franchisee for refuse collection. Although resolution of the protests requires interpretation of the Resource Conservation and Recovery Act, the protests primarily concern procurements for property or services by a federal agency and require that GAO decide whether the protested solicitations comply with statute or regulation.

66:237

■ **Definition**

Letter to agency stating intent to protest rejection of proposal which does not state any basis for protest is not sufficient to constitute a protest to agency; in any event, agency-level protest must be filed within 10 working days of date protester knew the basis for its protest.

68:43

■ **Evidence evaluation**
■■ **Factual issues**
■■■ **Discrepancies**
■■■■ **Burden of proof**

Where agency fails to request in writing, or to confirm in writing an oral request for samples that are necessary for the evaluation of proposals, and during a subsequent protest an irreconcilable conflict of fact regarding the request arises, the General Accounting Office is unwilling to presume that the agency's version of events is correct.

66:377

■ **Federal procurement regulations/laws**
■■ **Applicability**
■■■ **GAO authority**

The Government Printing Office (GPO), a legislative branch agency, is not subject to the Federal Acquisition Regulation but is governed by its own Printing Procurement Regulation as to the acceptance of late bids. GAO does not find unreasonable GPO's determination that a late bid set by express mail may be accepted where the Postal Service states that the majority of such express mail is delivered prior to bid opening time as GPO found this to show the bid was mailed in sufficient time to arrive in the normal course of the mails.

67:363

■ **Forum election**
■■ **Finality**

Protester that has filed with the General Services Administration Board of Contract Appeals (GSBCA) may not elect to file the same protest with the General Accounting Office solely to preserve the timeliness of the latter protest in the event that the GSBCA determined that it lacks jurisdiction. The Competition in Contracting Act envisions mutually exclusive forums.

66:113

■ Forum election
■■ Finality

Protest, which was initially filed with and then withdrawn from the General Services Administration Board of Contract Appeals (GSBCA), may be considered by the General Accounting Office (GAO), despite the fact that the GSBCA did not issue an order dismissing the protest until 2 days after the protest was filed at the GAO, where the protester sought withdrawal of its GSBCA protest in order to pursue its protest at the GAO, the withdrawal was not opposed by the agency, and the protest was otherwise timely filed at the GAO.

70:172

■ GAO authority

Protest against award of subcontract by prime contractor of National Science Foundation will not be considered by General Accounting Office since the contract for construction was not to be performed on government-owned property and that the prime contractor was not otherwise a mere conduit between the government and the subcontractor.

67:412

■ GAO authority

Even though Bonneville Power Administration is engaged in contracting activities pursuant to its own procurement authority, it is nonetheless subject to General Accounting Office's (GAO) bid protest jurisdiction pursuant to the Competition in Contracting Act of 1984 (CICA), since Bonneville comes within the statutory definition of a federal agency subject to GAO's CICA jurisdiction.

68:447

■ GAO authority

On reconsideration, General Accounting Office reverses prior dismissal of protest concerning request for rate tenders from freight carriers issued under the Department of the Army's Military Traffic Management Command's guaranteed traffic program pursuant to the Transportation Act of 1940, and asserts jurisdiction under the Competition in Contracting Act of 1984 over protests concerning such transportation services procured pursuant to the Transportation Act. 65 Comp. Gen. 328 (1986), B-229890, Mar. 3, 1988 and B-233393, Nov. 9, 1988, overruled.

68:451

■ GAO authority

General Accounting Office (GAO) will consider protest against General Services Administration (GSA) solicitation to provide public pay telephones in government controlled property under GAO's bid protest authority where awards under solicitation will provide a service to government employees and will satisfy GSA mission needs, and thus the solicitation is a procurement of services by a federal agency.

69:61

■ GAO authority

Protest concerning request for carriers' rate tenders falls outside of General Accounting Office's bid protest jurisdiction, where transportation services will be obtained through the issuance of a govern-

ment bill of lading pursuant to a tender for a one-time routing under relatively informal agency procedures.

69:524

■ **GAO authority**

Rule that General Accounting Office (GAO) generally will not review protests of agency refusal to exercise a contract option is inapplicable where agency uses the exercise of contract options in parallel development contracts to select one contractor to continue the effort, because, under such circumstances, the agency's actions do not constitute contract administration but are, in fact, a form of limited competition properly subject to review by GAO.

69:562

■ **GAO authority**

The Federal Reserve Board is a federal agency whose procurements are subject to the General Accounting Office's bid protest jurisdiction.

69:644

■ **GAO authority**
■■ **Protective orders**
■■■ **Information disclosure**

In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decision-making and the degree and level of supervision to which the applicant is subject.

70:667

■ **GAO decisions**
■■ **Recommendation affirmation**

Recommendation to reopen negotiations under revised specifications is affirmed notwithstanding potential for additional cost to the government where any such cost would be due in large measure to the agency having placed a substantial order under the contract after the protest conference, at which the awardee's compliance with the specifications was in issue, and only 1 month prior to the due date for the General Accounting Office's decision.

69:445

■ **GAO decisions**
■■ **Recommendations**
■■■ **Convenience termination**
■■■■ **Withdrawal**

Recommendation that an agency terminate an existing contract and resolicit the requirement because the agency proposed to issue modifications that exceed the contract's scope is modified. The agency has not implemented the proposed modifications, and the record shows it would be in the government's best interest to accept the agency's proposal that it first explore other possible modifications to the contract which did not go beyond the scope of that contract, and, if that effort is

unsuccessful, that is review the results of any resolicitation before terminating. In any case, the protester is entitled to recover the costs of filing and pursuing its protest. 67 Comp. Gen. 404, B-229972, May 16, 1988, modified.

67:614

■ GAO decisions
■■ Recommendations
■■■ Modification

Recommendation in initial decision that protester's proposal be reevaluated as if protester offered no separate price for mistaken subline item is modified to state that price negotiations be reopened between protester and initial awardee.

67:372

■ GAO decisions
■■ Recommendations
■■■ Modification

Where prior decision correctly held that agency improperly found individual sureties unacceptable for pledging their personal residences in support of bid guarantee, and agency presents new information in requesting reconsideration that shows sureties properly were determined unacceptable for different reasons, decision is modified to eliminate recommendation that award be made to protester.

69:345

■ GAO procedures
■■ Agency notification
■■■ Deadlines
■■■■ Constructive notification

General Accounting Office will not dismiss protests by potential subcontractors of a prime contractor because the protesters did not provide copies of their protests to the agency contracting officer for the prime contract. The protesters provided copies of their protests to the prime contractor and government officials believed to be involved in the subcontract selection.

66:538

■ GAO procedures
■■ Agency notification
■■■ Deadlines
■■■■ Constructive notification

Requirement under 4 C.F.R. § 21.1(d) (1991) of General Accounting Office's (GAO) Bid Protest Regulations that the contracting officer receive copy of protest within 1 working day after filing with GAO was met by subcontractor which provided copies of the protest to the contractor conducting the procurement "by or for the government" as well as to government officials believed to be involved in the subcontractor selection.

70:579

■ GAO procedures
■■ Agency notification
■■■ Evidence sufficiency

Protest is dismissed where protester failed to furnish copy of protest filed with the General Accounting Office to contracting officer or other designated individual or location, as required by applicable Bid Protest Regulations. While protester claims to have mailed copy to designated agency office, protester is unable to present evidence that it was received and, thus, that the notice requirement was satisfied.

66:42

■ GAO procedures
■■ Agency notification
■■■ Purposes

Purpose of requirement in Bid Protest Regulations that protesters serve procuring agencies with copy of their protests within 24 hours of filing with the General Accounting Office (GAO) is to inform the agency promptly of the basis for protest and to enable it to prepare a report within the required 25 working days. When an agency has actual notice of the basis for protest and delivers its report in a timely fashion, GAO will not dismiss the protest because the protester served a firm acting for the government, rather than the agency itself.

66:22

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

The General Accounting Office finds without merit a request for reconsideration of a decision that an agency had a reasonable basis for excluding the protester's proposal from the competitive range where the protester has presented no information bearing on the agency's determination that was not previously considered.

66:388

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

In deciding whether a protester might have been prejudiced by an agency's failure to hold meaningful discussions, the General Accounting Office does not require the firm to establish with certainty what would have resulted absent the procurement deficiency. Before the procurement or contract will be disturbed, however, and especially where cost is an important selection factor, there must be some evidence that the protester would have been competitive with the awardee but for the agency's improper actions.

67:264

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Requests for reconsideration of merits of prior decision are denied because requests do not show that initial decision contained errors of fact or of law or that information not previously considered exists that would warrant its reversal or modification.

67:372

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Decision that agency's proposed modifications to a contract were beyond the scope of the contract is affirmed where the contracting agency's and the protester's requests for reconsideration fail to show that the decision was legally or factually incorrect.

67:614

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Request for reconsideration is denied where protest presents no statement of facts or legal grounds warranting reversal, but merely restates arguments considered, and rejected, by the General Accounting Office in denying the original protest.

68:435

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Request for reconsideration is denied where the requester fails to show that the dismissal of its protest was based on any error of fact or law or information not previously considered.

68:437

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

On reconsideration, General Accounting Office reverses prior dismissal of protest concerning request for rate tenders from freight carriers issued under the Department of the Army's Military Traffic Management Command's guaranteed traffic program pursuant to the Transportation Act of 1940, and asserts jurisdiction under the Competition in Contracting Act of 1984 over protests concerning such transportation services procured pursuant to the Transportation Act. 65 Comp. Gen. 328 (1986), B-229890, Mar. 3, 1988 and B-233393, Nov. 9, 1988, overruled.

68:451

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Prior decision is affirmed despite the agency's contention that protester was not prejudiced where the record remains unclear as to what selection decision would have been made if the awardee had submitted a factually accurate final offer concerning the availability and number of its proposed key personnel.

68:559

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Prior decision in which we sustained a protest and recommended termination of the contract is affirmed where the record showed that awardee improperly obtained source selection sensitive information concerning its competitor's product and where request for reconsideration does not establish any factual or legal errors in the prior decision.

68:677

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Consideration of quality as an aspect of an evaluation of proposals is not required by the 1987 National Defense Authorization Act and its implementing regulation; statutory and regulatory language and legislative history indicate that use of quality as a technical evaluation criterion is permissive, not mandatory.

69:59

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Decision sustaining protest against agency's determination that individual sureties on bid guarantee were unacceptable for pledging their personal residences—when in fact there was no prohibition against pledging of personal residences in support of guarantee—is affirmed on reconsideration even though, after issuance of original decision, agency undertook investigation that revealed other bases for rejecting sureties; original decision was correct based on issues, record and arguments developed by the agency and protester.

69:345

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Protest costs awarded in connection with sustained protest are disallowed on reconsideration where information surfaces after issuance of decision indicating that the protest was filed even though protester knew or should have known that sureties' personal residences—which, protester had argued

and General Accounting Office ultimately found, had improperly been disregarded by agency in rejecting sureties based on inadequate assets—were not solely owned by sureties and thus could not properly be pledged on bid guarantee, as the agency originally had concluded.

69:345

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Decision finding that awardee's proposal was noncompliant with solicitation requirements, and recommending that negotiations be reopened under revised specifications, is affirmed where reconsideration request is based on mere disagreement with prior decision or arguments that could have been, but were not, raised during consideration of protest, and record does not otherwise show error of fact or law warranting reversal or modification of decision.

69:445

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

General Accounting Office denies request for reconsideration of previous decision which upheld award to low evaluated offeror, in absence of evidence that low evaluated offer would result in other than the lowest ultimate cost to the government.

69:488

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

In awarding a subcontract for the Department of Energy, a private management and operating contractor is not required to submit a nonresponsibility determination to the Small Business Administration for certificate of competency consideration.

69:509

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Bid Protest Regulations require party requesting reconsideration of prior decision to show that decision may contain either errors of fact or law or to present information not previously considered that warrants reversal or modification of our decision; repetition of arguments made during consideration of the original protest and mere disagreement with decision do not meet this standard.

70:208

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

Second request for reconsideration of dismissal of protest as academic due to agency's corrective action is denied where protester fails to show that prior decision contained errors of fact or law, and information which protester alleged had not been previously considered was factually incorrect.

70:394

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA) and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

70:510

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration

The General Accounting Office will not reconsider the conclusion in a prior decision sustaining a protest on the basis that the offers of the interested party and protester were technically equal such that award should be made to the protester as the offeror with the lower evaluated cost, where the agency and interested party now argue that the two firms' proposals are not equal yet fail to identify a single technical difference.

70:510

■ GAO procedures
■■ GAO decisions
■■■ Reconsideration
■■■■ Additional information

Request for reconsideration of decision dismissing protester's supplemental protest as untimely is denied where, by waiting until after its initial protest was dismissed without receiving an agency report and more than 5 weeks after notice of the award to file a Freedom of Information Act request, protester did not diligently pursue information which may have revealed additional ground of protest.

70:339

■ GAO procedures
■■ Information submission
■■■ Timeliness

Where protester is in possession of facts that would establish his interested party status under Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), but does not include those facts in its protest submission, protester bears the risk of dismissal for lack of interest and, upon reconsideration of the dismissal, General Accounting Office will not consider the information that could have been presented initially.

68:352

■ GAO procedures
■■ Information submission
■■■ Timeliness

Where record does not indicate that stockholder in unsuccessful offeror firm is authorized to act on behalf of the firm, the stockholder is not an interested party to protest award to another firm under Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), which define interested party as actual or prospective offeror; a corporation is a legal entity separate and distinct from its stockholders, and it is the corporation, not the stockholders, that is the prospective or actual offeror on the procurement.

68:352

■ GAO procedures
■■ Information submission
■■■ Timeliness

Where protest as initially filed asserted only generally that the awardee's voltage standard, offered as an alternate product, should not have been accepted for award because it is of a lesser quality than the specified product manufactured by the protester, and a detailed argument that specific characteristics of the alternate product differ materially from those of the specified product was raised for the first time in the protester's comments on the agency report, the detailed argument is untimely and will not be considered; the detailed argument was based on information that the protester had in its possession when it filed its protest, and thus had to be raised at that time.

70:159

■ GAO procedures
■■ Interested parties

Allegation that the awardee's proposal was technically nonconforming will not be considered because the protester, whose offer was properly rejected for taking express exception to certain standard provisions of the solicitation, is not eligible for an award and, hence, is not an "interested party" under the General Accounting Office's bid protest procedures.

66:444

■ GAO procedures
■■ Interested parties

Bidder submitting nonresponsive bid is considered an interested party under Bid Protest Regulations to raise the argument that the awardee, a bidder offering a higher price, submitted a bid which is nonresponsive for similar reasons.

66:505

■ GAO procedures
■■ Interested parties

Under solicitation calling for award of cost-reimbursement contract, protester whose initial proposed costs were not low nevertheless is an interested party to challenge contracting agency's method of evaluating offerors' cost proposals since, if the protest is sustained, protester could be in line for award.

67:226

■ GAO procedures
■■ Interested parties

Large business is an interested party to protest that the award price under a small business set-aside is unreasonable, since, if successful, the requirement could be resolicited on a non-set-aside basis, and large businesses would be eligible for award.

67:261

■ GAO procedures
■■ Interested parties

Where party requesting reconsideration was placed on notice by the contracting agency of original protest proceedings at General Accounting Office (GAO) and had actual knowledge of issues raised, failure of the agency to provide that party with a copy of the original letter of protest is a minor procedural irregularity. Consequently, the party's argument that it was not afforded an opportunity to participate in the original protest is without merit and the party is not an interested party entitled to seek reconsideration.

67:366

■ GAO procedures
■■ Interested parties

Bidder which, as of the date of bid opening, has been found to be other than small by the Small Business Administration is not an interested party within meaning of Bid Protest Regulations for purposes of protesting alleged improprieties in solicitation set aside for small business concerns, since it is not eligible to receive award.

67:368

■ GAO procedures
■■ Interested parties

Protester that refuses to extend its offer acceptance period is not an interested party to protest award to another offeror by drawing of lots among equal low offerors.

68:122

■ GAO procedures
■■ Interested parties

Since the government is generally precluded from contracting with its employees, even those not employed by the contracting agency, protester who is a government employee is not an interested party to file a protest.

68:212

■ GAO procedures
■■ Interested parties

Where protester seeks cancellation and resolicitation of a procurement based on failure to receive a material amendment to the invitation for bids (IFB), protester is an interested party to challenge award under the IFB despite the fact that it submitted a late bid since, if the protest is sustained, protester will have an opportunity to compete under the new IFB.

68:213

■ GAO procedures
■■ Interested parties

Where protester is in possession of facts that would establish his interested party status under Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), but does not include those facts in its protest submission, protester bears the risk of dismissal for lack of interest and, upon reconsideration of the dismissal, General Accounting Office will not consider the information that could have been presented initially.

68:352

■ GAO procedures
■■ Interested parties

Where record does not indicate that stockholder in unsuccessful offeror firm is authorized to act on behalf of the firm, the stockholder is not an interested party to protest award to another firm under Bid Protest Regulations, 4 C.F.R. § 21.1(a) (1988), which define interested party as actual or prospective offeror; a corporation is a legal entity separate and distinct from its stockholders, and it is the corporation, not the stockholders, that is the prospective or actual offeror on the procurement.

68:352

■ GAO procedures
■■ Interested parties

United States-Canada Free-Trade Agreement does not provide jurisdictional basis for the General Accounting Office (GAO) to consider protest by Canadian firm that is not an interested party under the Competition in Contracting Act of 1984 and GAO's Bid Protest Regulations.

68:438

■ GAO procedures
■■ Interested parties

Protester, the third low acceptable offeror, did not fail to qualify as an interested party eligible to bring protest—such that General Accounting Office would not have sustained protest against award agency concedes was improper—where protest alleged award improperly was based on relaxed requirements; appropriate remedy for successful protest on this ground could be recompetition, which would afford protester opportunity to offer different price on changed requirements.

69:354

■ GAO procedures
■■ Interested parties

General Accounting Office (GAO) affirms prior dismissal based on the determination that the protester was not an interested party entitled to protest under GAO Bid Protest Regulations, where the protester knowingly took itself out of the competition by disbanding its proposal team prior to filing its protest and disclaiming any interest in the award.

69:725

■ GAO procedures
■■ Interested parties

Bidder who protested terms of invitation for bids (IFB) prior to bid opening is an interested party to challenge IFB's payment bond requirement, notwithstanding that protester's bid was nonresponsive because it failed to include a required bid bond, since if the protest were sustained, the remedy would be a resolicitation under which the protester could compete.

70:165

■ GAO procedures
■■ Interested parties
■■■ Contracts
■■■■ Assignment

Third low bidder is not an interested party for purpose of challenging the eligibility of the low bidder for award even though the protester states that the second low bidder intends to assign any contract it might receive to the protester, because the protester does not have the necessary direct interest in the results of the procurement since the assignment depends on an event that may not happen. Moreover, transfer of the rights and obligations arising out of a bid or proposal is permissible only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of a merger, corporate reorganization, the sale of the entire business, or

the sale of the entire portion of a business embraced by the bid or proposal, which is not the case here.

66:344

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Third low bidder is not an interested party for purpose of challenging the eligibility of the low bidder for award even though the protester states that the second low bidder intends to assign any contract it might receive to the protester, because the protester does not have the necessary direct interest in the results of the procurement since the assignment depends on an event that may not happen. Moreover, transfer of the rights and obligations arising out of a bid or proposal is permissible only where the transfer is to a legal entity which is the complete successor in interest to the bidder or offeror by virtue of a merger, corporate reorganization, the sale of the entire business, or the sale of the entire portion of a business embraced by the bid or proposal, which is not the case here.

66:344

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Where protester's offer was technically unacceptable, it is not an interested party to raise issues concerning the award because it does not have the requisite direct economic interest to be considered an interested party under the Bid Protest Regulations.

67:93

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Protester, the fourth ranked offeror, is not an interested party to protest the award to the highest ranked offeror where the second and third ranked offerors are in line for award if the protest is sustained.

67:236

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

A protester which did not submit a bid under a challenged invitation for bids (IFB) is an interested party to protest IFB requirements as unduly restrictive where the protester indicates that restrictions prevented it from bidding.

67:531

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Where award is made under a set-aside pursuant to section 8(a) of the Small Business Act, a protester which is a non-8(a) firm and is questioning the propriety of the award to a particular 8(a) eligible firm is not an interested party under the General Accounting Office Bid Protest Regulations. The protester lacks the requisite direct economic interest since it would not be eligible to compete for the contract even if the protest were sustained.

68:130

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Generally, firm that is owned or controlled by federal employees is not eligible for award of contract and is not an interested party to protest since it would not be in line for award even if its protest were sustained. Firm is an interested party, however, where federal employees that own and control firm were eligible to retire and indicated in their proposal their willingness to retire from government employment before award, since date of award is the critical time at which, in order to be eligible for award, an offeror may not be owned or controlled by government employees.

68:563

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Protester is an interested party under Bid Protest Regulations to protest that agency improperly evaluated its proposal and that request for proposals (RFP) was improperly canceled on the basis that no acceptable proposals were received, even though the protester's proposal was among the lowest ranked and highest priced.

69:154

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Offeror whose direct economic interest would be affected by award of a contract under protested procurement is an interested party for purposes of protesting that preproduction evaluation clause deviates from Changes clause required by Federal Acquisition Regulation and should be deleted from solicitation.

69:172

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Protest that agency improperly rejected protester's quotation as nonresponsive to request for quotations is dismissed where protester is not an interested party since another firm that was rejected on

the same basis had a lower evaluated price and protester therefore would not be in line for award even if its protest were sustained.

69:320

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

In a negotiated procurement in which award was made to the offer representing the best value to the government, a protester is an interested party under the General Accounting Office Bid Protest Regulations to protest the evaluation of proposals, even where the protester's offer is second highest priced of five offers, since, if its protest were sustained, it could be in line for award.

69:648

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

A company is not an interested party to protest its alleged improper exclusion from the competitive range and to pursue claim for proposal and protest costs when (1) prior to filing its protest the firm voluntarily releases its proposed team members from their commitments to work for the firm should it receive the award, and (2) expressly rejects reinstatement in the competition and award of a contract as a remedy in the event its protest is sustained.

69:659

■ GAO procedures
■■ Interested parties
■■■ Direct interest standards

Protester is not an interested party eligible to challenge agency's failure to include evaluation preference clauses favoring small disadvantaged businesses (SDB) in a partial small business set-aside where it would not be in line for award even if the SDB evaluation preferences were applied and its protest were sustained.

70:85

■ GAO procedures
■■ Interested parties
■■■ Subcontractors

General Accounting Office will consider a protest by potential subcontractor of a firm acting as a general agent for the Maritime Administration, since the firm is acting "by or for" the government in issuing a solicitation for ship repair and maintenance.

66:22

■ GAO procedures
■■ Pending litigation
■■■ GAO review

Request for reconsideration is denied where the issue raised in the protest could be affected by suit in the district court filed by the protester and where the court has not expressed interest in a General Accounting Office decision.

67:380

■ GAO procedures
■■ Preparation costs

When protest of an improper sole source is sustained, protester is entitled to recover costs of filing and pursuing the protest, even where recommended relief is a new procurement under which the protester will have the opportunity to compete.

66:58

■ GAO procedures
■■ Preparation costs

Protester is entitled to recover proposal preparation costs and costs of filing and pursuing the protest where contracting agency improperly induced protester to incur the cost of competing by failing to disclose a significant evaluation factor.

66:121

■ GAO procedures
■■ Preparation costs

Recovery of the protester's quotation preparation costs and its costs of filing and pursuing the protest, including attorney's fees, is allowed where the contracting agency's actions effectively excluded the protester from the procurement, and there was a substantial likelihood that the protester would have received the award.

66:134

■ GAO procedures
■■ Preparation costs

Recovery of neither proposal preparation costs nor the costs of filing and pursuing a protest is appropriate where the remedy afforded the protester is the opportunity to submit a revised technical proposal and to be reevaluated on the basis of unambiguous specifications.

66:139

■ GAO procedures
■■ Preparation costs

When protester successfully challenges an unduly restrictive specification, it is entitled to recover the costs of filing and pursuing the protest.

66:208

■ GAO procedures
■■ Preparation costs

When solicitation deficiencies prevented offers from being evaluated on an equal basis, but termination and resolicitation of the basic contract is not possible, the procuring activity should not exercise options, but resolicit using a revised solicitation. However, since the protester participated in the competition and did not complain of an allegedly deficient evaluation until after award, it is not entitled to recover either proposal preparation costs or the costs of filing and pursing the protest.

66:243

■ GAO procedures
■■ Preparation costs

Protester is entitled to the costs of preparing its bid and pursuing its protest where protest is sustained and no other remedy is appropriate due to substantial completion of contract performance.

66:269

■ GAO procedures
■■ Preparation costs

Protester is entitled to recover the cost of filing and pursuing its protest, including reasonable attorney's fees, as well as its proposal preparation costs, where the protester was improperly denied fair and equal opportunity to compete but corrective action is not appropriate under the circumstances.

66:302

■ GAO procedures
■■ Preparation costs

Where corrective action is not possible because contract performance has been completed, successful protester is entitled to recover its bid preparation costs and the costs of filing and pursuing the protest, even though its protest was untimely filed, since the protester would have received an award under a proper bid evaluation and the improper award and contract performance did not result from delays by the protester in raising the protest issue.

66:367

■ GAO procedures
■■ Preparation costs

Claim for costs of pursuing bid protest is denied where protest is dismissed.

66:475

■ GAO procedures
■■ Preparation costs

Where protest involving challenges on distinct grounds to two specifications in request for proposal calling for award by line item of separate indefinite quantity contracts is denied in part and sustained in part, protester is entitled to recover protest costs only for the issue on which it prevailed, as well as its defense of contracting agency's general timeliness challenge to the protest, since the issues raised in the protest in effect constituted two separate protests. Protester is not entitled to recover its protest costs for the issue on which the protest was denied, nor for another issue con-

cerning a third distinct line item which protester withdrew as a basis for protest after the contracting agency decided not to carry out the action the protester had challenged.

66:597

■ GAO procedures
■■ Preparation costs

Administrative Office of the United States Courts' award of a contract to a nonresponsive bidder violated 41 U.S.C. § 5. Since the award did not comply with that statute, a protester is entitled to the costs of filing and pursuing its protest, inasmuch as most of the improperly awarded contract has been performed.

66:645

■ GAO procedures
■■ Preparation costs

General Accounting Office affirms a prior decision awarding protester costs of filing and pursuing its protest, which successfully challenged the use of competitive negotiations versus sealed bids, since such award is consistent with the broad purpose of CICA to increase and enhance competition on federal procurements.

67:16

■ GAO procedures
■■ Preparation costs

Where a bid protest is sustained based on agency's improper rejection of the protester's bid, and the contract in issue already has been performed, the protester is entitled to reimbursement of its bid preparation costs and costs of pursuing the protest, including attorney's fees.

67:131

■ GAO procedures
■■ Preparation costs

Where legislation passed subsequent to a General Accounting Office decision sustaining a protest has the effect of rendering moot the recommendation for corrective action—reinstating the protester as the low responsible bidder for Office of Management and Budget Circular (A-76) cost comparison purposes—the protester is entitled to award of costs of pursuing the protest, including reasonable attorneys' fees, but not bid preparation costs.

67:371

■ GAO procedures
■■ Preparation costs

Where the result of the General Accounting Office sustaining a protest of an unduly restrictive requirement is that competition for the contract will be increased and enhanced, protesters are entitled to recover costs of filing and pursuing the protest and of responding to the contracting agency's unsuccessful request for reconsideration.

67:442

■ GAO procedures
■■ Preparation costs

Protesters may not be awarded the costs of filing and pursuing protests, including attorneys' fees, where protests are dismissed as academic and thus no decision on the merits has been issued.

67:607

■ GAO procedures
■■ Preparation costs

Recommendation that an agency terminate an existing contract and resolicit the requirement because the agency proposed to issue modifications that exceed the contract's scope is modified. The agency has not implemented the proposed modifications, and the record shows it would be in the government's best interest to accept the agency's proposal that it first explore other possible modifications to the contract which did not go beyond the scope of that contract, and, if that effort is unsuccessful, that it review the results of any resolicitation before terminating. In any case, the protester is entitled to recover the costs of filing and pursuing its protest. 67 Comp. Gen. 404, B-229972, May 16, 1988, modified.

67:614

■ GAO procedures
■■ Preparation costs

Request for recovery of proposal preparation costs by unsuccessful offeror based on decision sustaining protest brought by another offeror under same solicitation is denied where firm requesting costs did not file protest, since recovery of costs under General Accounting Office Bid Protest Regulations is limited to actual protesters whose protests are sustained.

68:142

■ GAO procedures
■■ Preparation costs

Where protester's refusal to submit sufficient documentation supporting the amount of its claim for proposal preparation costs and the cost of filing and pursuing a protest effectively prevents the contracting agency from determining reasonableness of amount it ultimately will have to pay, General Accounting Office will not review the claim *de novo.*

68:383

■ GAO procedures
■■ Preparation costs

Claimant is entitled to recover incurred company costs of filing and pursuing General Accounting Office protest, but not agency-level protest where costs claimed were sufficiently documented and agency did not articulate a reasoned analysis for the rejection of specific hours or show the costs to be otherwise unreasonable.

68:400

■ GAO procedures
■■ Preparation costs

Request for payment of costs of pursuing claim is denied since such costs are not reimbursable.

68:507

■ GAO procedures
■■ Preparation costs

Award of protest costs is affirmed where, upon learning during the course of the protest that awardee misrepresented the availability and number of its key personnel, the agency elected to treat the matters as immaterial instead of taking prompt corrective action.

68:560

■ GAO procedures
■■ Preparation costs

Claim for proposal preparation and protest costs is denied where cancellation of solicitation was proper.

68:589

■ GAO procedures
■■ Preparation costs

Claim for protest costs on basis that agency took corrective action remedying alleged solicitation defects in response to protest is denied, since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

68:642

■ GAO procedures
■■ Preparation costs

Protester is not entitled to be reimbursed costs of preparing proposal and pursuing protest that were awarded by General Accounting Office (GAO) decision, which sustained the protest but did not recommend that the award be disturbed, where the protester subsequently sought to have award overturned in United States District Court and the court denied the protest.

68:655

■ GAO procedures
■■ Preparation costs

Claim for proposal preparation and protest costs where agency took corrective action remedying alleged procurement defect in response to protest is denied since award of protest costs is contingent upon issuance of decision on merits finding that agency violated a statute or regulation in the conduct of a procurement.

69:83

■ GAO procedures
■■ Preparation costs

Successful protester is entitled to recover company costs incurred in pursuing protest to the extent that such costs are sufficiently documented and are reasonable.

69:122

■ GAO procedures
■■ Preparation costs

Protester awarded costs in connection with successful protest is entitled to reimbursement for proposal preparation and protest costs incurred or initially paid by prospective subcontractor, where the costs were incurred by the subcontractor acting in concert with and on behalf of offeror and offeror has agreed to reimburse to subcontractor the amount ultimately recovered from the government.

69:199

■ GAO procedures
■■ Preparation costs

Where claim for costs of proposal preparation and of filing and pursuing protests is not adequately documented, claimant is not entitled to recovery.

69:199

■ GAO procedures
■■ Preparation costs

Protest costs awarded in connection with sustained protest are disallowed on reconsideration where information surfaces after issuance of decision indicating that the protest was filed even though protester knew or should have known that sureties' personal residences—which, protester had argued and General Accounting Office ultimately found, had improperly been disregarded by agency in rejecting sureties based on inadequate assets—were not solely owned by sureties and thus could not properly be pledged on bid guarantee, as the agency originally had concluded.

69:345

■ GAO procedures
■■ Preparation costs

Where General Accounting Office sustains protest against award on basis that agency concedes it made award to nonconforming offeror, but contract has been performed so that recompetition of the requirement no longer is a practicable remedy, protester is entitled to reimbursement of protest and proposal preparation costs.

69:354

■ GAO procedures
■■ Preparation costs

Claim for bid protest costs incurred for working on a companion protest and in pursuit of a cost claim, and for contacting a congressional representative, are disallowed since they are unrelated to the pursuit of the protest.

69:433

■ GAO procedures
■■ Preparation costs

Claim for a general and administrative expense factor to be applied to protester's direct expenses is disallowed in the absence of a sufficient explanation of the basis for that factor.

69:433

■ GAO procedures
■■ Preparation costs

Request by agency for dismissal of claim for costs of filing and pursuing a protest because claimant did not wait until agency ruled on amount of claim before filing at General Accounting Office is denied since information submitted is sufficient to determine whether claim is allowable and nothing would be accomplished by having the agency review the matter further since it is clear that the agency does not believe that the claim should be allowed.

69:679

■ GAO procedures
■■ Preparation costs

Claimant may not recover costs of filing and pursuing General Accounting Office protest which are not sufficiently documented or are unreasonable.

70:358

■ GAO procedures
■■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action within 2 weeks of when the protest was filed.

70:558

■ GAO procedures
■■ Preparation costs

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action after the protest was filed, responding to 37 specific questions raised by the protester in two amendments totaling 39 pages.

70:709

■ GAO procedures
■■ Preparation costs
■■■ Amount determination

Where improperly awarded contract is terminated and protester has opportunity to compete for remaining contract work, recovery of proposal preparation costs is limited to that amount that relates to the portion of the contract work for which protester was deprived of the opportunity to compete.

68:507

■ GAO procedures
■■ Preparation costs
■■■ Amount determination

Claimant is entitled to recover incurred company costs of filing and pursuing General Accounting Office protests, but not agency-level protest, where costs claimed are sufficiently documented.

69:679

■ GAO procedures
■■ Preparation costs
■■■ Amount determination

Request for payment of costs associated with following-up agency actions pursuant to sustained decision and pursuing claim for recovery of costs of filing and pursuing protest are denied since such costs are not recoverable in the absence of express statutory or contractual authority.

69:680

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees

Request for payment of costs associated with pursuing claim for recovery of attorneys' fees and costs of filing and pursuing protest are denied since such costs are not recoverable in the absence of express statutory or contractual authority.

68:400

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees

Attorneys' fees claimed by prevailing protester are determined reasonable, and thus are allowable, where the hourly rates are within bounds of rates charged by similarly situated attorneys, and the hours claimed are properly documented and do not appear to be excessive.

69:679

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees
■■■■ Amount determination

Provision in Equal Access to Justice Act limiting attorneys' fees to $75/hour does not apply to recovery of attorneys' fees under Competition in Contracting Act, which requires only that the fees recovered be reasonable. To be reasonable, attorneys' fees must reflect the attorneys' customary hourly rates and must be in line with prevailing rates for similar services.

66:598

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees
■■■■ Amount determination

Attorneys' fees claimed by prevailing protester are determined reasonable, and thus are allowable, where the hourly rates are within bounds of rates charged by similarly situated attorneys, and the hours claimed are properly documented and do not appear to be excessive.

68:400

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees
■■■■ Amount determination

Attorneys' fees claimed by prevailing protester are allowable where hours are adequately documented and the rates and hours claimed are shown to be reasonable.

69:122

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees
■■■■ Amount determination

Attorneys' fees need not be allocated between sustained and denied protest issues where all of the issues raised by the protester were related to the same core protest allegation which was sustained, and there were no distinct and severable grounds of protest on which the protester did not prevail.

69:122

■ GAO procedures
■■ Preparation costs
■■■ Attorney fees
■■■■ Amount determination

Agency's general objections to the allegedly "excessive" number of hours claimed by the protester as spent by its attorneys and employees in pursuit of its protest provide an insufficient basis for

concluding that the attendant costs are not reasonable where the hours are properly documented and certified.

69:433

■ GAO procedures
■■ Preparation costs
■■■ Burden of proof

Amounts claimed for costs of filing and pursuing protest and for proposal preparation may be recovered to the extent that they are adequately documented and not shown to be unreasonable. To the extent that the claim is not adequately documented, claimant is not entitled to recovery.

68:506

■ GAO procedures
■■ Preparation costs
■■■ Burden of proof

Where a claimant, seeking the recovery of its proposal preparation and protest costs, fails to adequately document its claim to show that the hourly rates, upon which its claim is based, reflects the employee's actual rate of compensation plus reasonable overhead and fringe benefits, the claim for costs is denied.

69:622

■ GAO procedures
■■ Preparation costs
■■■ Burden of proof

Where a protester, seeking the recovery of his protest costs, fails to adequately document his claim to show that the hourly rates, upon which his claim is based, reflect the employee's actual rate of compensation plus reasonable overhead and fringe benefits, the claim for costs is denied.

70:661

■ GAO procedures
■■ Preparation costs
■■■ Interest

Payment of interest on claim for reimbursement of costs of pursuing a sustained protest is not authorized.

69:680

■ GAO procedures
■■ Preparation costs
■■■ Profits

Claim for profits on protester's labor costs is disallowed since there is no statutory basis to award profits as part of the costs for pursuing a bid protest.

69:433

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Protest that awardee's product fails to meet mandatory solicitation requirements is untimely where protester first raised specific alleged deficiencies at a debriefing but did not file its protest until 5 weeks later. Bid Protest Regulations require protests not based on solicitation improprieties to be filed within 10 working days after protester knew or should have known the basis for its protest.

66:310

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Where the protester does not learn of the weight the agency gave to certain technical/performance evaluation factors until the debriefing conference, a protest that the agency gave too much weight to those technical/performance factors and too little weight to price is timely when filed within 10 working days after the debriefing conference.

67:58

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Protest that the Army's testing of protective masks and analysis of those test results bear no relation to real battle situations and therefore should not have been used to predict casualties is dismissed as untimely where the protester was aware of the test methods, witnessed that tests, and apparently was satisfied with the testing during the 2-1/2 year period during which tests were conducted. It was only after the protester's mask was shown to be rated lower than the awardee's mask that the protester voiced complaints about testing and analysis—about 8 months after the completion of testing.

67:58

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Allegation first raised in comments on the agency report is untimely where not filed within 10 working days of when the basis for the allegation was known or should have been known; separate grounds of protest asserted after a protest has been filed must independently satisfy the timeliness requirements of Bid Protest Regulations.

67:123

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Where protester knew of alleged protest basis, that preaward survey of its plant was limited to certain items offered and a revised best and final offer was subsequently requested, thus allegedly lead-

ing to an auction, protest is untimely since protester waited more than 10 working days to learn that similar allegedly improper action was taken with respect to its competitor, before filing a protest.

67:414

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Protest against disclosure of proprietary data is untimely where filed more than 10 working days after the protester knew of the disclosure.

67:597

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Where the agency's and the protester's versions of the facts conflict concerning when the protester was orally notified that part of its offer was considered unacceptable, the General Accounting Office will resolve doubt over whether the protest was timely filed within 10 days of that notification in the protester's favor.

68:172

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Protest concerning rejection of quotation filed more than 10 working days after protester was orally advised that the product it proposed was unacceptable is untimely.

68:432

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Protest that statement of work in architect-engineer contract was inadequate is untimely when not filed within 10 working days of the date protester received a draft copy of the contract in preparation for price negotiations.

69:35

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule

Protest challenging the manner in which procurement was handled is dismissed as untimely where filed more than 10 working days after the bases of protest were known or should have been known.

69:526

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Agency challenge to timeliness of protest is denied where protester diligently pursues information that forms the basis of its protest, and files a timely protest upon receipt of such information.

69:562

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protest challenging solicitation listing of competitor as an approved source, on the ground that approval was based on improper disclosure of protester's proprietary technical data, is untimely where protester had constructive notice of competitor's approval through announcement of prior award to competitor for same part in *Commerce Business Daily* more than 2 years before issuance of solicitation.

69:615

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protester's new and independent grounds of protest are dismissed where the later raised issues do not independently satisfy the timeliness rules of the General Accounting Office Bid Protest Regulations.

70:165

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protest, which was initially filed with and then withdrawn from the General Services Administration Board of Contract Appeals (GSBCA), may be considered by the General Accounting Office (GAO), despite the fact that the GSBCA did not issue an order dismissing the protest until 2 days after the protest was filed at the GAO, where the protester sought withdrawal of its GSBCA protest in order to pursue its protest at the GAO, the withdrawal was not opposed by the agency, and the protest was otherwise timely filed at the GAO.

70:172

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protest that agency deprived protester of an opportunity to compete because it failed to furnish it a copy of the solicitation is dismissed as untimely where procurement was properly synopsized in the

Commerce Business Daily, and the protester did not file protest within 10 working days of the closing date specified in the synopsis.

70:187

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protest that apparent low bidder on a construction contract should be disqualified since it is an affiliate of the designer is timely filed under the Bid Protest Regulations, where the protest is filed within 10 days of when the protester first reasonably became aware of low bidder's affiliation.

70:374

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Where protester knew basis of protest, but protester reasonably understood from competition advocate that agency would not act contrary to the protester's interests while the competition advocate investigated the matter, protester reasonably delayed filing protest until it received notice to the contrary.

70:448

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Lower priced offeror timely filed protest of agency's cost evaluation and technical/cost tradeoff within 10 days of its receipt of information under a Freedom of Information Act request pertaining to the awardee's prices; however, protest is untimely to the extent that it touches on the protester's objections to the agency's technical evaluation and technical ranking of its proposal because it was not filed within 10 days of an agency debriefing disclosing the specific deficiencies in the protester's technical proposal.

70:524

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **10-day rule**

Protest of agency nonresponsibility determination filed more than 10 working days after the Small Business Administration (SBA) Regional Office finds protester ineligible for consideration under certificate of competency program because the protester is not a small business will be considered timely under the General Accounting Office (GAO) Bid Protest Regulations when filed with GAO within 10 working days of the denial of protester's timely (within 5 working days) appeal by the SBA Office of Hearings and Appeals.

70:535

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Adverse agency actions

Where a bill is enacted into law after bid opening that, in protester's view, precludes award under the solicitation, 10-day period for filing protest begins when protester learns of award, since protester could assume up to the time of award that agency would act in accordance with the statute.

66:400

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Adverse agency actions

Protest challenging rejection of protester's offer is timely despite contracting agency's contention that it sent letter to protester advising of rejection more than 10 days before the protest was filed where protester denies ever receiving the letter and protest was filed within 10 days after protester was orally notified that award was made to another offeror.

67:534

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Adverse agency actions

Letter to agency stating intent to protest rejection of proposal which does not state any basis for protest is not sufficient to constitute a protest to agency; in any event, agency-level protest must be filed within 10 working days of date protester knew the basis for its protest.

68:43

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Adverse agency actions

Where protest initially was filed with contracting agency, subsequent protest to General Accounting Office (GAO) which was not filed within 10 working days of actual knowledge of the initial adverse agency action is dismissed as untimely. Earlier receipt by GAO of information copy of letter which was addressed to the contracting agency and did not include a clear indication of a desire for a decision by GAO did not constitute timely protest to GAO.

69:278

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Adverse agency actions

Where a protest has been filed initially with contracting agency, subsequent protest to General Accounting Office is timely where filed within 10 days of initial adverse agency action, provided that the initial protest was filed in a timely manner. Where government contractor is conducting the procurement "by or for the government," protest to contractor constitutes agency-level protest.

70:579

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Certified mail

A bid is late when received 6 days after the time set for opening in a contracting office in Guam, even though it was sent by certified mail at least 5 calendar days before the specified bid opening date, since the certified mail exception to the late bid rule is not applicable where bids are submitted outside the 50 states of the United States, the District of Columbia and Canada.

70:97

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Effective dates

Protest challenging contracting agency's justification for sole-source award based on urgent circumstances is timely when filed within 10 days after protester receives the justification, despite the fact that the protester had learned earlier of agency's selection of awardee, since the protester did not know the grounds of its protest until the justification was received.

66:58

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Effective dates

Protest is considered timely where it was filed in the General Accounting Office (GAO) within 10 working days after agency's initial adverse action on agency-level protest (issuance of amendment demonstrating that agency was not going to delete solicitation clause as requested by protester). Even though agency denied agency-level protest by letter more than 10 working days before protester filed protest with GAO, where protester denies receipt of agency's letter and record contains no evidence to show receipt by protester, we resolve doubt concerning timeliness in favor of protester.

69:172

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Effective dates

Where the agency's and the protester's versions conflict concerning when the protester was notified that its proposal would not be considered for award, the General Accounting Office will resolve doubt over whether the protest was filed within 10 days of that notification in the protester's favor.

69:596

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Effective dates

Protest alleging noncompliance of brand name product with specification requirements in a negotiated brand name or equal procurement need not be filed by the closing date for receipt of proposals; it may be timely filed within 10 working days of the date on which the protester learned of the procuring agency's determination that the brand name product was compliant with the specifications. Since an agency may properly specify specifications that go beyond those of the designated brand name and may reject the offer of a brand name product that does not comply, the protester need not file a "defensive" protest but properly may await an agency determination that is adverse to the protester's interest.

70:242

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Forum election

The fact that protest is first filed with General Services Administration Board of Contract Appeals and dismissed without prejudice for lack of jurisdiction does not preclude subsequent filing at General Accounting Office within 10 days of when protester originally learned its basis for protest.

68:295

■ GAO procedures
■■ Protest timeliness
■■■ 10-day rule
■■■■ Reconsideration motions

Claim for proposal preparation costs is disallowed where claimant was not awarded proposal preparation costs in the protest decision and did not timely request reconsideration of the costs awarded.

69:122

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest of performance and payment bond requirements in a solicitation is untimely where first raised after date set for receipt of proposals since the alleged deficiency in the solicitation was evident at that time.

66:12

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Contention that specification in invitation for bids (IFB) overstated contracting agency's minimum needs is timely where filed within 10 days after contracting officer advised the protester that a technical feature which the protester maintains was required by the specification would not be needed.

66:127

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest that request for quotations for a preapproved ballscrew unduly restricts competition must be filed before the closing date for receipt of quotations.

66:133

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest concerning alleged improprieties apparent on the face of a solicitation is untimely when the protest is not filed until after the date set for receipt of initial proposals.

66:280

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

A protest that the contracting agency unduly restricted competition by allowing only 61 days for submission of proposals and by providing functional specifications instead of detailed design specifications concerns an alleged impropriety which was apparent prior to the closing date for receipt of initial proposals, and therefore is untimely where not filed until after the closing date.

66:308

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

In procurements requesting competitive proposals, alleged improprieties which are subsequently incorporated into the solicitation must be protested no later than the next closing date for receipt of proposals following the incorporation.

66:444

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest basis concerning an alleged solicitation impropriety, raised approximately 5 months after bid opening, is untimely and not for consideration on the merits.

66:504

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest of the type of a procurement used, filed after bid opening, is untimely.

66:531

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest alleging solicitation improprieties is untimely when filed after time set for receipt of proposals. Protester's contention that it attempted to protest by sending TWX to the General Accounting Office (GAO) prior to the closing time but that the GAO TWX terminal was not working properly is denied where GAO's records show that GAO's TWX terminal was neither shut off nor malfunctioning at the times pertinent to the protests.

67:1

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest alleging solicitation improprieties is untimely when received in the General Accounting Office (GAO) after the time set for submission of initial proposals, even though a copy of the protest addressed to the GAO was timely received by the contracting agency.

67:1

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Contention, not raised until after bid opening, that agency abused its discretion by failing to delete labor surplus area (LSA) clause and cancel solicitations set aside for LSA concerns after realizing that one required place of performance no longer was designated as an LSA, constitutes an untimely challenge to the agency's initial determination to set aside the procurements, and will not be considered.

67:178

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest of solicitation's misdescription of surplus scrap metal is untimely where protester was aware that property was misdescribed and that agency would request waiver of liability for the misdescription prior to bid opening but did not file a protest with the agency until after bid opening.

68:67

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest alleging apparent defects in a request for proposals is untimely where it was not filed prior to the closing date for receipt of initial proposals.

68:112

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest that technical specifications were unduly restrictive of competition is untimely where this alleged impropriety is apparent from the request for quotations but is not filed prior to the closing time for receipt of quotations.

68:432

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest against alleged apparent defects in evaluation criteria for architect-engineer selection is untimely where filed after the date specified for receipt of qualification statements from the competing firms.

68:684

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

To the extent that protester contends that Small Business Administration (SBA) regulation in effect superseded provision in invitation for bids (IFB) requiring that bidder perform at least 50 percent of the cost of manufacturing the supplies called for by the IFB, protester was required to raise the issue before bid opening, since inconsistency between SBA regulation and IFB provision was apparent from the IFB.

69:20

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Allegation that procurement should have been set aside for small business is dismissed as untimely where not filed prior to date set for submission of architect-engineer qualifications statements.

69:69

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest allegation that agency failed to synopsize sole-source procurement properly, not filed until after award of the contract, is untimely and therefore not for consideration under the Bid Protest Regulations of the General Accounting Office.

69:97

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protester's objection to the use of negotiated rather than sealed bid procedures is untimely when filed after award rather than prior to the closing date for receipt of proposals.

69:365

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Arguments that agency should have considered building lease offer that included utilities, that solicitation should have contained preference for a central business district location, and should have provided for Brooks Act evaluation procedures are untimely since these matters are alleged solicitation improprieties and protest was not filed until after award.

69:516

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest challenging issuance of solicitation—on basis that an implied contract already existed for the same services—is dismissed as untimely where filed after the closing date for receipt of proposals.

69:526

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Where protester challenges the agency's award of a contract to an approved source rather than the solicitation's omission of the protester as an approved source, the protest does not involve an allegation of a solicitation impropriety and, therefore, need not be filed before the closing date for receipt of proposals.

69:596

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest challenging the application of the new individual surety regulations to the procurement is dismissed as untimely where protester did not protest this application within 10 working days of learning agency intention to apply the new regulations.

70:94

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Protest that agency failed to provide adequate proposal preparation and evaluation period is untimely under the General Accounting Office's Bid Protest Regulations where protested after award.

70:215

■ GAO procedures
■■ Protest timeliness
■■■ Apparent solicitation improprieties

Agency-level protest, and subsequent protest to the General Accounting Office, of an alleged solicitation impropriety are untimely where the agency-level protest was transmitted by facsimile machine to the procuring agency on the closing date at the exact time set for the receipt of proposals but was not received until after the time set for receipt of proposals.

70:371

■ GAO procedures
■■ Protest timeliness
■■■ Conflicting evidence
■■■■ Burden of proof

Protest was not untimely filed—such that General Accounting Office would not have sustained protest against award agency concedes was improper—where agency asserts, without documentation, that it advised protester of denial of agency-level protest more than 10 working days before protest was filed, but protester denies receiving such advice and circumstances tend to support protester's position; doubt as to timeliness is resolved in favor of the protester.

69:354

■ GAO procedures
■■ Protest timeliness
■■■ Deadlines
■■■■ Constructive notification

Protest that agency failed to timely notify protester of intent to award to another firm is denied where, even though agency erred in not providing timely notice, protester was not prejudiced.

69:182

■ GAO procedures
■■ Protest timeliness
■■■ Delays
■■■■ Agency-level protests

Where protester waits 8 months to receive the procuring agency's final decision on its agency-level protest, before filing a protest at the General Accounting Office and in the interim performance is completed under the contract, the protest is untimely because the protester failed to diligently pursue the protest.

68:439

■ GAO procedures
■■ Protest timeliness
■■■ Effective dates
■■■■ Facsimile

Agency-level protest, and subsequent protest to the General Accounting Office, of an alleged solicitation impropriety are untimely where the agency-level protest was transmitted by facsimile machine to the procuring agency on the closing date at the exact time set for the receipt of proposals but was not received until after the time set for receipt of proposals.

70:371

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **Significant issue exemptions**
■■■■ **Applicability**

Under its Bid Protest Regulations, 4 C.F.R. § 21.2(c) (1986), the General Accounting Office (GAO) will consider an untimely protest if it raises a significant issue. When, upon further review of a protest originally dismissed as untimely, the matter raised appears to involve action by the contracting agency that is inconsistent with statute and regulation, the GAO will invoke the exception.

66:367

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **Significant issue exemptions**
■■■■ **Applicability**

Untimely protest that does not raise issues of widespread interest to the procurement community will not be considered under the exception to the General Accounting Office timeliness requirements for significant issues.

67:1

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **Significant issue exemptions**
■■■■ **Applicability**

Request for reconsideration of untimely protest based on significant issue exception is granted and case decided on the merits where it is alleged by small business that it was denied opportunity to compete because agency failed to advise it of procurement under agency's previously established procedure.

67:66

■ **GAO procedures**
■■ **Protest timeliness**
■■■ **Significant issue exemptions**
■■■■ **Applicability**

Protest presents a significant issue justifying consideration on the merits even if it is untimely filed where, based on the fully developed record, it is clear that the issues raised involve improper agency action inconsistent with statute and regulation.

68:473

■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

Untimely protests, concerning procurement of all processed foods by the Department of Defense (DOD), presents a significant issue justifying consideration on the merits where protests concern the proper interpretation of a continuing statutory restriction on DOD's procurement of food which has not been previously considered by the General Accounting Office.

69:274

■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

The failure of an invitation for bids, which requested option prices, to state whether the evaluation of bids would include or exclude option prices is an apparent solicitation impropriety which should have been protested prior to bid opening; however, the General Accounting Office will consider the untimely protest under the significant issue exception to the timeliness rules where consideration of the protest is in the interest of the procurement system.

69:610

■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

Untimely protest of a solicitation's evaluation scheme will not be considered under the significant issue exception to the General Accounting Office (GAO) timeliness requirements where the issue raised in the protest has been considered on the merits by GAO in prior decisions and resolution of the issue would not be of widespread interest to the procurement community but only to the protester in this procurement. GAO will no longer invoke the significant issue exception solely because the record shows a violation of statute or regulation. 68 Comp. Gen. 473 (1989), 66 Comp. Gen. 367 (1987), and 66 Comp. Gen. 31 (1986) will no longer be followed.

70:38

■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

The General Accounting Office (GAO) considers untimely protest to raise a significant issue under the Bid Protest Regulations, where the issue of the protest, pertaining to the obligations of contracting officers under the newly promulgated regulations on individual sureties, has not been previously considered by GAO and may affect future procurements.

70:273

■ GAO procedures
■■ Protest timeliness
■■■ Significant issue exemptions
■■■■ Applicability

Untimely protest that solicitation terms provide the contractor with unfair and early use of Federal Energy Guidelines in violation of public information dissemination laws and policy is not an issue of widespread interest to the procurement community justifying invocation of the significant issue exception to the General Accounting Office timeliness requirements.

70:372

■ GAO procedures
■■ Protest timeliness
■■■ Time/date notations
■■■■ Establishment

A protest is filed for purposes of General Accounting Office (GAO) timeliness rules when it is received in GAO. The GAO time/date stamp establishes the time of receipt absent other evidence to show actual earlier receipt.

67:260

■ GAO procedures
■■ Protest timeliness
■■■ Unapparent solicitation improprieties

Offeror's failure to request clarification or to protest regarding ambiguous specifications before the closing date for receipt of initial proposals does not preclude relief where the ambiguity was not apparent on the face of the solicitation.

66:139

■ GAO procedures
■■ Purposes
■■■ Competition enhancement

General Accounting Office (GAO) will not consider allegation that agency acted improperly in relaxing solicitation experience requirement in order to broaden competition since GAO's role in reviewing bid protests is to ensure that the statutory requirements for full and open competition are met, not to protect a protester's interest in a more restrictive requirement.

70:105

■ Intellectual property
■■ Disclosure
■■■ Remedies

The appropriate remedy for a firm that contends that the government has infringed its proprietary rights is an action against the government for damages or administrative settlement of its claim.

67:597

■ Lobbying

Allegation that an offeror's failure to disclose expenditures for lobbying activities allegedly concerning the contract award requires rejection of its proposal is without basis where the alleged lobbying activities concern the awardee's grievance with respect to the government's termination of the prior contract, not the reprocurement award, and do not fall within the scope of the disclosure requirement.

69:604

■ Moot allegation
■■ GAO review

Where General Accounting Office determines that one reason for a procuring agency's rejection of a bid is proper, it will not consider allegations regarding the reasons for the rejection.

66:492

■ Moot allegation
■■ GAO review

Contention that contracting agency improperly increased protester's bid by the cost of installing its products is academic where bid would not be low even without the addition of any installation costs.

66:128

■ Moot allegation
■■ GAO review

Protest that contracting agency improperly induced protester to compete for and accept award of a contract which included several option years when in fact agency intended to acquire the services under a different, more comprehensive contract to be awarded a short time later, is without merit since the agency only decided to acquire the services under the comprehensive contract once it became clear, after award had been made to the protester, that the services could be acquired at a lower price under that contract than under the protester's contract.

67:548

■ Moot allegation
■■ GAO review

Protest alleging *de facto* debarment because agency repeatedly failed to refer protester's nonresponsibility to the Small Business Administration (SBA) for a certificate of competency is dismissed as academic where, subsequent to the filing of the protest, agency takes corrective measures including referral of nonresponsibility determinations to SBA which cure earlier procedural errors.

68:488

■ Moot allegation
■■ GAO review

Protester has no basis to object to the agency decision to hold discussions and request best and final offers where firm is not low if discussions were not held, and discussions effectively provide a new opportunity for firm to compete for award.

69:143

■ **Moot allegation**
■■ **GAO review**

Protest that awardee's plans did not meet Uniform Federal Accessibility Standard concerning wheelchair turning space in its bathrooms for the handicapped is denied where agency architect concluded that awardee met the requirement and our review of the requirement does not provide us with any basis to question that determination.

69:229

■ **Moot allegation**
■■ **GAO review**

Protest that contracting agency improperly deleted clause from request for proposals (RFP), which required domestically manufactured forgings, is rendered academic where the agency reinstates the clause.

70:147

■ **Moot allegation**
■■ **GAO review**

Awardee's protests against the contracting agency's requesting new proposals are rendered academic where the awardee's contracts are ultimately not disturbed.

70:147

■ **Non-appropriated funds**
■■ **GAO review**

Where the provisions of the Armed Services Procurement Act do not apply to a procurement by a defense agency because payment would not be made from appropriated funds, the General Accounting Office will review the actions of the agency to determine whether it acted reasonably.

66:232

■ **Non-appropriated funds**
■■ **GAO review**

General Accounting Office (GAO) has no authority under Competition in Contracting Act of 1984 to review a protest which concerns an agency decision not to conduct a procurement to obtain unofficial, nongovernment travel services. Agency decision to encourage nonappropriated fund activities to expand their unofficial travel services functions is an executive agency decision not to use the procurement system and, therefore, is not reviewable by GAO.

66:475

■ **Non-prejudicial allegation**
■■ **GAO review**

Where the manufacturer of a brand name product does not argue that it would have lowered its price or offered an equivalent product if it had known that the agency would consider offers for such products, the manufacturer has not shown that it was prejudiced by the omission of "or equal" language from a solicitation.

66:17

■ Subcontracts
■■ GAO review

Protest of a subcontract awarded by a government prime contractor is dismissed where the subcontract is not "by or for" the government.

68:376

■ Subcontracts
■■ GAO review

The General Accounting Office will not consider a bid protest of a subcontractor selection by an Environmental Protection Agency (EPA) emergency response clean-up contractor, even assuming EPA effectively directed the subcontractor selection, since the EPA involvement was not so pervasive that the contractor would be considered a mere conduit for an EPA acquisition.

68:635

■ Subcontracts
■■ GAO review

General Accounting Office (GAO) will consider protest of subcontract award where the government's involvement in the procurement is so pervasive that the contractor was a mere conduit for the government in selecting the subcontractor. Where government officials identify the need for the services, draft the solicitation evaluation criteria, select government officials to serve on the evaluation committee, and approve the evaluation committee's subcontractor selection, the procurement is "by or for the government" and subject to GAO's bid protest jurisdiction.

70:579

Competitive Negotiation
■ Alternate offers
■■ Acceptance
■■■ Propriety

Protest that agency acted improperly in determining that proposed alternate product satisfied solicitation requirement for interchangeability with referenced brand name voltage standard is denied where, although alternate model was not subject to same shock and vibration standards as the referenced model, the relaxation of this requirement did not result in competitive prejudice to the protester, and thus was unobjectionable.

70:158

■ Alternate offers
■■ Acceptance
■■■ Propriety

Where protest as initially filed asserted only generally that the awardee's voltage standard, offered as an alternate product, should not have been accepted for award because it is of a lesser quality than the specified product manufactured by the protester, and a detailed argument that specific characteristics of the alternate product differ materially from those of the specified product was raised for the first time in the protester's comments on the agency report, the detailed argument is

untimely and will not be considered; the detailed argument was based on information that the protester had in its possession when it filed its protest, and thus had to be raised at that time.

70:159

■ **Best/final offers**
■■ **Alternatives**
■■■ **Ambiguity**

Agency should have amended solicitation specifications to allow for the offer of alternative equipment that the agency had determined would meet its minimum needs. Protest that the specifications were unduly restrictive is denied, however, where the protester clearly understood from the agency's best and final offer request that its alternative equipment would be acceptable if the agency's size limitations could be met, and the protester responded with a corrected best and final offer that the agency reasonably believed was for the alternative equipment, but rejected because it was not low. Although the protester asserts that its offered price was actually for the equipment originally specified, its assumption that the agency would understand this, and request another round of best and final offers to give it an opportunity to submit a price for the alternative equipment, was unreasonable.

66:101

■ **Best/final offers**
■■ **Contractors**
■■■ **Notification**

Protester's allegation that it failed to receive an oral request for a second best and final offer (BAFO) is denied where the preponderance of the evidence in the record indicates that protester was notified of request for BAFO.

67:217

■ **Best/final offers**
■■ **Evaluation**
■■■ **Pre-award surveys**
■■■■ **Auction prohibition**

The fact that a preaward survey can in a particular case give rise to the inference that an offeror's price is not low in relation to that of another offeror, does not mean that such necessary action on the part of the government constitutes an auction *per se.*

67:414

■ **Best/final offers**
■■ **Modification**
■■■ **Acceptance criteria**

Competition was not conducted on a common basis, and the resulting award was improper, where the contracting agency requested revised best and final offers (BAFOs) limited to revisions in price and delivery schedule, but made award on the basis of a revised BAFO that included significant changes in technical, management and logistics support approach.

68:413

■ **Best/final offers**
■■ **Modification**
■■■ **Acceptance criteria**

Contracting agency has the authority to decide when the negotiation and offer stage of a procurement is finished and an offeror has no legal right to insist that negotiations be reopened and attempt to modify its technically unacceptable proposal after best and final offers are submitted.

69:51

■ **Best/final offers**
■■ **Price adjustments**
■■■ **Misleading information**
■■■■ **Allegation substantiation**

Protest that firm was misled by alleged agency oral advice is denied where even if protester's version of facts were true, the record contains no evidence that protester was placed at a competitive disadvantage by the alleged oral advice.

69:182

■ **Best/final offers**
■■ **Price disclosure**
■■■ **Allegation substantiation**

Agency may reject proposal of offeror who takes exception in its best and final offer to Certificate of Independent Price Determination and explains the circumstances of an exchange of pricing information with another offeror, where the agency determines the exchange had the effect of restricting competition.

69:236

■ **Best/final offers**
■■ **Price disclosure**
■■■ **Contractors**
■■■■ **Competitive restrictions**

Agency may reject proposal of offeror who takes exception in its best and final offer to Certificate of Independent Price Determination and explains the circumstances of an exchange of pricing information with another offeror, where the agency determines the exchange had the effect of restricting competition.

69:236

■ **Best/final offers**
■■ **Pricing errors**
■■■ **Correction**
■■■■ **Propriety**

Where, before award, but after receipt of best and final offers, an offeror claims a mistake in its proposal, agency may—but is not required to—reopen negotiations with offerors to allow the offeror

claiming the mistake to revise its proposal, if the agency determines it is clearly in the government's best interest to do so.

69:634

■ **Best/final offers**
■■ **Procedural defects**

Failure by the agency to confirm a request for best and final offers in writing violates the Federal Acquisition Regulation §§ 15.611(a) and 15.611(b)(3) (FAC 84-16). However, this violation does not in itself provide a compelling reason to disturb an award where all offerors in the competitive range are nevertheless afforded an opportunity to compete on a common basis.

67:217

■ **Best/final offers**
■■ **Procedural defects**

The fact that the agency did not state a common cutoff date for best and final offers does not require corrective action where there is no evidence of disclosure of information during the course of the competitive process.

67:415

■ **Best/final offers**
■■ **Rejection**
■■■ **Propriety**

Where protester is given notice of agency's interpretation of government requirement during discussions, agency properly rejected protester's offer as unacceptable for failing to meet requirement in its best and final offer.

69:193

■ **Best/final offers**
■■ **Rejection**
■■■ **Qualified offers**

Protester's proposal was properly rejected as unacceptable where the firm took exception in its revised best and final offer to certain standard provisions of the solicitation deemed to be material. An offeror should not anticipate a further opportunity to revise its proposal after it makes its "best and final" submission.

66:444

■ **Best/final offers**
■■ **Technical acceptability**
■■■ **Negative determination**
■■■■ **Propriety**

A best and final offer was properly found to be technically unacceptable where the protester continued to propose elements of high risk despite agency concern and where its alternative approaches in

those areas were not sufficiently detailed to establish their acceptability, since an offeror should not expect any further discussions once it has submitted its best and final offer.

66:2

■ **Best/final offers**
■■ **Technical acceptability**
■■■ **Negative determination**
■■■■ **Propriety**

Where procuring agency advises the protester of the deficiency in its initial offer concerning fire safety, which was a mandatory requirement, and protester fails to address the deficiency in its best and final offer, the final offer was technically unacceptable and properly should not have been considered for award.

67:93

■ **Best/final offers**
■■ **Technical acceptability**
■■■ **Negative determination**
■■■■ **Propriety**

Protester's proposal was properly rejected as technically unacceptable where protester's best and final offer did not comply with material, mandatory requirements under the request for proposals. An offeror should not expect to be granted an additional opportunity to clarify or revise its proposal after submission of best and final offers.

68:708

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Allegation substantiation**
■■■■ **Lacking**

Protest that awardee is ineligible for a contract because of a conflict of interest arising from its relationship with a company which could possibly be subject to audit services required under present contract is denied where agency reasonably determines that no actual conflict exists and where agency's proper administration of task orders issued under contract would provide adequate safeguards to prevent the contractor from possibly conducting a biased audit.

69:464

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Post-employment restrictions**
■■■■ **Allegation substantiation**

Offeror's employment of a former government employee is not improper where there is no evidence in the record that actions of the employee, either before or after he left the agency, resulted in prejudice for or bias on behalf of the offeror. Although the employment of such an individual may benefit the offeror as a result of the employee's familiarity with the required work, where there is no evidence that the employee was privy to agency information concerning the procurement that

was not available to other offerors, any competitive advantage is not the result of preference or unfair government action.

66:67

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Post-employment restrictions**
■■■■ **Allegation substantiation**

Protest that awardee's employment of a retired Army officer as its program manager should disqualify the firm is denied where the officer retired 22 months before the solicitation was issued and the record does not show that any action by the retired officer resulted in prejudice for or on behalf of the awardee. Mere sales "puffery" by the awardee about the influence of the retired officer in soliciting potential subcontractors is insufficient evidence of an impropriety to warrant barring the awardee from the procurement.

66:309

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Post-employment restrictions**
■■■■ **Allegation substantiation**

Offeror's employment of a retired Army officer who allegedly wrote the specifications for the procurement does not violate the post-employment restrictions on government employees in 18 U.S.C. § 207 (1982), when no specific party, i.e., an offeror for the procurement, was involved in the particular matter under the former employee's responsibility.

66:309

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Post-employment restrictions**
■■■■ **Allegation substantiation**

The General Accounting Office will not question award to offeror on the basis of an alleged conflict of interest where record does not demonstrate (1) that the contracting agency was unreasonable in finding the offeror's employment of a former government employee consistent with post-employment restrictions, or (2) that any action of the former government employee resulted in prejudice for or on behalf of the offeror.

66:388

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Post-employment restrictions**
■■■■ **Allegation substantiation**

Protest that proposed awardee's employment of a former agency employee as its program manager constitutes a conflict of interest which should disqualify the firm from the award is denied where the record does not show that any action by the former agency employee resulted in prejudice for,

or on behalf of, the proposed awardee or establish violation of post-employment restrictions on government employees.

68:6

■ **Competitive advantage**
■■ **Conflicts of interest**
■■■ **Post-employment restrictions**
■■■■ **Allegation substantiation**

Statutes barring retired military officer from representing other parties before military department within 2 years of retirement and permanently barring officer from representing parties before government concerning matters in which officer was personally and substantially involved are, either by explicit statutory language or agency regulation, not applicable to retired enlisted military personnel.

68:332

■ **Competitive advantage**
■■ **Foreign businesses**
■■■ **Foreign governments**
■■■■ **Subsidies**

There is no requirement that a contracting agency equalize whatever competitive advantage a foreign firm may have because it may be subsidized by a foreign government or because it is not subject to the same socio-economic requirements as domestic firms.

66:297

■ **Competitive advantage**
■■ **Foreign laws**

Protest is dismissed where protester complains of its competitive disadvantage in procurement of Embassy guard services resulting from application of Panamanian law since disadvantage is not the result of preference or unfair action by United States government.

70:170

■ **Competitive advantage**
■■ **Incumbent contractors**

Incumbent contractor need not be excluded from competition because of an alleged organizational conflict of interest where (1) the contractor neither prepared the statement of work nor provided "material leading directly, predictably, and without delay" to the statement of work, and (2) did not provide systems engineering services for items to be supplied under the contract as prohibited by applicable regulations.

66:404

■ **Competitive advantage**
■■ **Incumbent contractors**

Agency's failure to equalize competition to compensate for some potential offerors' legal acquisition of incumbent contractor's contract information is not objectionable where the information's avail-

ability was not the result of improper or unfair action and pertinent information possessed by the agency was not necessary for offerors to compete intelligently and on a relatively equal basis.

70:424

■ **Competitive advantage**
■■ **Non-prejudicial allegation**

An agency is not required to cast its procurement in a manner that neutralizes the competitive advantages some firms may have over the protester by virtue of their own particular circumstances.

68:57

■ **Competitive advantage**
■■ **Non-prejudicial allegation**

Protest that operator of lodging facility has a competitive advantage is denied where protester does not show what advantage the operator is alleged to have or that the alleged advantage was caused by any unfair action by the government.

69:147

■ **Competitive advantage**
■■ **Non-prejudicial allegation**

Protest that agency acted improperly in determining that proposed alternate product satisfied solicitation requirement for interchangeability with referenced brand name voltage standard is denied where, although alternate model was not subject to same shock and vibration standards as the referenced model, the relaxation of this requirement did not result in competitive prejudice to the protester, and thus was unobjectionable.

70:158

■ **Competitive advantage**
■■ **Non-prejudicial allegation**

Agency's failure to equalize competition to compensate for some potential offerors' legal acquisition of incumbent contractor's contract information is not objectionable where the information's availability was not the result of improper or unfair action and pertinent information possessed by the agency was not necessary for offerors to compete intelligently and on a relatively equal basis.

70:424

■ **Competitive advantage**
■■ **Privileged information**
■■■ **Disclosure**

Protest is sustained where record shows that awardee improperly obtained source selection sensitive information concerning its competitor's product.

68:422

■ **Competitive restrictions**
■■ **Preferred products/services**
■■■ **Domestic sources**

Protest that agency improperly restricted procurement for launch vehicle services to domestic sources is denied where the agency reasonably interpreted statute to give it the authority to include such a restriction.

68:646

■ **Contingent fees**

Incumbent contractor's offer to sell access to its employees and its contract information to potential offerors who agree to buy inventory and equipment at pre-agreed prices if they win the contract is not a prohibited contingent fee arrangement within the meaning of 10 U.S.C. § 2306(b) (1988) because the services were not "to solicit or obtain the contract" since they did not involve any dealings with government officials.

70:424

■ **Contract award notification**
■■ **Procedural defects**

Protest that contracting agency improperly failed to provide notice of contract award prior to award is denied where the agency properly waived the prior notice requirement of Federal Acquisition Regulation § 15.1001(b)(2) by determining, in writing, that the urgency of the requirement necessitated the award without delay.

70:256

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Cost savings**

A contracting officer properly may decide in favor of a technically lower rated proposal in order to take advantage of its lower price, even though price was the least important evaluation criterion, where he reasonably determines that the cost premium involved in making an award to the higher rated, higher priced offeror is not justified in light of the acceptable level of technical competence available at the lower cost.

66:246

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Cost savings**

An agency officer may properly decide in favor of technically lower rated proposal in order to take advantage of its lower cost, notwithstanding evaluation scheme in which cost was the least important evaluation criterion but must supply a reasonable justification for such a decision.

67:223

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Cost savings**

Allegation that agency made improper price/technical tradeoff is denied where, contrary to protester's assumption that its proposal was higher technically rated than awardee's, award was made to lower priced offeror whose proposal received a higher technical score.

68:75

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Cost savings**

Contracting agency may accept a technically lower rated proposal to take advantage of its lower costs, even though cost is the least important evaluation criterion, so long as agency reasonably decides that the cost premium involved in an award to a higher-rated, higher-cost offeror is not warranted in light of the acceptable level of technical competence available at the lower cost.

68:714

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Cost savings**

The source selection official could properly select for award the low priced, lower rated offeror in a negotiated procurement where the solicitation provided that, although cost was less important than technical evaluation factors, award would be on a best value basis to that offeror submitting an acceptable proposal with appropriate consideration given to cost and other factors.

69:648

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Cost savings**

The source selection official reasonably determined, contrary to the recommendations of lower-level evaluators, that the technical advantages of the highest rated proposal did not reflect significant technical superiority outweighing the awardee's price advantage, given the awardee's acceptable level of technical competence available at the lower cost.

69:649

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Protester's allegation that its proposal and the awardee's were technically equal and that protester should have received award based on its lower proposed costs is without merit where agency evaluators considered awardee's proposed personnel superior in one area and where protester was awarded full credit for its lower proposed costs but awardee remained the higher ranked offeror.

66:198

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Award on the basis of highest total point score is not required by a solicitation that contains a formula for scoring technical and price proposals but does not state that award will be made to the offeror receiving the highest total point score, and instead provides that the offer which represents the best combination of technical merit and price will be selected for award.

66:246

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

When a solicitation provides that user preference will be considered slightly less important than price in the evaluation of offers for bayonet systems, award to a higher-rated, higher-priced offeror than the protester is not unreasonable in view of a critical safety deficiency in the lower-priced system that called into question the reliability of that system for use in the field. An agency is not required to procure a bayonet system that does not meet minimum safety requirements.

66:308

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Contracting agency acted reasonably in selecting for award an offeror proposing a superior document handling approach over an offeror proposing a less expensive system where the solicitation provided technical factors would be worth 70 percent in the evaluation.

68:249

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Award to higher priced, higher technically rated offeror is not objectionable where the solicitation award criteria made technical considerations more important than price, and the agency reasonably concluded that the awardee's superior proposal provided the best overall value.

69:6

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Procuring agency made a proper cost/technical analysis in determining to make award to a higher technically rated, higher cost offeror over protester's significantly lower rated, lower cost proposal where the record shows that the agency reasonably found that the protester's low cost approach may not allow for the quality of work and personnel contemplated by the solicitation as indicated by the protester's entry level labor rates and excessive hours proposed to accomplish the sample task.

69:207

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Award to higher priced, higher technically rated offeror is not objectionable where technical considerations outweighed cost in solicitation's award criteria, and the agency reasonably concluded that the awardee's superior proposal provided the best overall value.

69:212

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Contract awarded for *"on-site research animal colony support"* to offeror submitting higher proposed cost proposal was reasonable where contracting agency found higher cost proposal to contain excellent merit compared with protester's lower cost, lower scored technical proposal and contracting agency further found that technical merit in higher cost proposal was worth the financial premium involved.

69:269

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Where solicitation provided that the lowest priced offeror would not necessarily receive award, and that the award would be based on the combination of technical merit and price which is most advantageous to the government, agency properly awarded to higher priced offeror since agency reasonably determined that the technical advantage associated with higher-rated proposal warranted the price premium.

70:62

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Award to a higher priced offeror is unobjectionable under a request for proposals that stated that technical considerations were more important than cost and the agency reasonably concluded that the protester's price advantage over the awardee was outweighed by its significantly higher evaluated risk.

70:173

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Award to higher priced offeror is unobjectionable where solicitation made technical considerations more important than cost and agency reasonably determined that the clear technical superiority and lesser risk associated with awardee's proven microcomputer workstation system was worth the additional cost.

70:313

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Agency properly exercised its discretion in determining awardee's technical superiority to be worth its higher cost under an evaluation scheme that accorded equal weight to costs and to technical factors.

70:525

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Protest is sustained where solicitation provided that technical factors were more important than cost and record indicates that agency made award to the low cost, technically acceptable offeror without properly assessing relative technical merit.

70:632

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Cost/technical tradeoffs**
■■■■ **Technical superiority**

Award to higher cost offeror was proper under solicitation that gave greater weight to technical merit compared to cost, where source selection authority determined that superiority of awardee's technical proposal was worth the extra cost, and the awardee received the highest greatest value score, as adjusted.

70:668

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Technical equality**
■■■■ **Cost equality**

Where selection official, after evaluation of proposals on a basis consistent with the solicitation's stated scheme, reasonably regards technical proposals as essentially equal and perceives no cost advantage in either proposal, base and award fees may become the determinative selection factor for award of a cost-plus-award-fee contract where this is consistent with stated evaluation factors.

68:25

■ **Contract awards**
■■ **Administrative discretion**
■■■ **Technical equality**
■■■■ **Cost savings**

Notwithstanding greater importance of other factors in overall evaluation scheme, agency may make award to lower-cost offeror where record establishes that contracting officer had determined proposals to be technically equal and that he had previously advised offerors at the preproposal conference (subsequently confirmed in writing to all offerors) that the agency would use cost as a tie-breaker in the event proposals were rated technically equal.

68:25

■ Contract awards
■■ Administrative discretion
■■■ Technical equality
■■■■ Cost savings

Where proposals are found technically equal, cost or price properly may become the determinative factor in making an award.

69:527

■ Contract awards
■■ Administrative discretion
■■■ Technical equality
■■■■ Cost savings

Agency reasonably found that protester's proposal, which received a consolidated technical and cost score of 91.5 points on a 100-point scale, was not essentially equal to the awardee's proposal, which received a consolidated point score of 92, where the contracting officer found the point difference justified the award in view of the protester's significantly higher (12 percent) evaluated price and the relatively close technical ratings of the protester and awardee.

70:214

■ Contract awards
■■ Administrative discretion
■■■ Technical equality
■■■■ Cost savings

Protest is sustained and award recommended to the protester, if otherwise appropriate, where the record shows that the protester's and awardee's proposals were technically equal, and the protester's evaluated costs should be considered lower than the awardee's.

70:279

■ Contract awards
■■ Award pending appeals
■■■ Multiple/aggregate awards
■■■■ Propriety

Where the solicitation contemplates multiple contracts for services required at many different locations throughout the country, and a protest has been filed against proposed awards at some but not all of those locations, the stay provision of the Competition in Contracting Act of 1984, 31 U.S.C. § 3553(c)(1) (Supp. IV 1986), requires the contracting agency to refrain from making awards only on those proposed contracts that are the subject of the protest.

68:314

■ **Contract awards**
■■ **Award procedures**
■■■ **Procedural defects**

Protest that agency failed to timely notify protester of intent to award to another firm is denied where, even though agency erred in not providing timely notice, protester was not prejudiced.

69:182

■ **Contract awards**
■■ **Best/final offers**
■■■ **Acceptance time periods**

Award may not be made upon the basis of an offeror's unrevoked 13-month-old best and final offer (BAFO), even though the BAFO had no stated acceptance period, inasmuch as a reasonable time for accepting the offer had passed, the offeror did not respond to a new request for BAFOs, and the offer to accept award under the old BAFO was made after award under the latest BAFO to the offeror who submitted the lowest price on both BAFOs.

70:323

■ **Contract awards**
■■ **Errors**
■■■ **Corrective actions**
■■■■ **Moot allegation**

Dismissal of protest challenging award to other than the low offeror without discussions is affirmed where, shortly after filing of protest, agency corrected deficiency by opening discussions with all offerors in the competitive range and requesting best and final offers; although protester's requested relief was award of contract to itself, since such relief was not appropriate, dismissal of protest as academic based on agency's appropriate corrective action was proper.

69:83

■ **Contract awards**
■■ **Government delays**
■■■ **Justification**

When 16 months elapse between submission of an offer for an alternate product and award, agency's failure to consider whether it could evaluate the alternate product by such means as first article testing is not reasonable or consistent with the Competition in Contracting Act requirement for advance planning.

66:90

■ **Contract awards**
■■ **Government delays**
■■■ **Justification**

Where firm's proposal under Small Business Innovation Research program initially is found acceptable for award, but firm subsequently undergoes a restructuring, the agency has a reasonable basis for reevaluating the firm's technical capability and financial responsibility to perform the project originally proposed; fact that reevaluation delays award process to end of fiscal year, and funds are

reallocated so that award cannot be made to the firm, does not evidence improper action on agency's part.

67:154

■ **Contract awards**
■■ **Government delays**
■■■ **Procedural defects**

While an agency is required to award a contract with reasonable promptness, 8-month period from closing date to award for a negotiated procurement is not *per se* unreasonable where agency conducts three reevaluations in response to offerors' complaints and protests. In any case, delay in award of contract generally is a procedural deficiency which does not provide a basis of protest because it has no effect on the validity of the procurement.

67:550

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Discussion**
■■■■ **Propriety**

Protest is sustained where the procuring agency awarded a contract on the basis of initial proposals, but there was a reasonable chance that by conducting discussions the agency would find a proposal offering a lower overall cost to the government to be more advantageous under the evaluation factors listed in the solicitation.

66:327

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Discussion**
■■■■ **Propriety**

Contracting agency improperly made award on the basis of initial proposals, without discussions, where the record does not clearly show that the contract awarded will result in the lowest overall cost to the government.

68:334

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**

Protest against agency award to other than the lowest cost offeror on the basis of initial proposals is denied where the protester's allegedly lower cost all or none alternate proposal did not constitute a valid offer but was only an informational quantity recommendation, requested under the solicitation for agency use in determining economical future purchase quantities.

66:106

■ Contract awards
■■ Initial-offer awards
■■■ Propriety

The General Accounting Office sustains a protest where the procuring agency awarded a contract on the basis of initial proposals, but there was a reasonable chance that by conducting discussions the agency would find a proposal offering a lower overall cost to the government to be more advantageous under the evaluation factors listed in the solicitation.

66:280

■ Contract awards
■■ Initial-offer awards
■■■ Propriety

Prior decision holding that the Competition in Contracting Act of 1984 prohibits contracting agencies conducting a negotiated procurement from making an award on the basis of initial proposals without discussions to other than the "lowest overall cost" offeror where there would be at least one lower-priced proposal within the competitive range is affirmed. The statutory language clearly precludes the making of discretionary cost/technical tradeoffs before discussions are held by requiring the selection of the most favorable initial proposal which is lowest in terms of cost and cost-related factors specified in the solicitation.

66:457

■ Contract awards
■■ Initial-offer awards
■■■ Propriety

Competition in Contracting Act of 1984 prohibits contracting agencies conducting a negotiated procurement from making an award on the basis of initial proposals without discussions to other than the "lowest overall cost" offeror where there would be at least one lower priced proposal within the competitive range.

67:223

■ Contract awards
■■ Initial-offer awards
■■■ Propriety

Where initial technical proposal makes a blanket offer to provide products that conform to the requirements of the request for proposals, but also takes specific exceptions to the solicitation specifications, the contracting agency's rejection of such proposal without discussions and award of the contract based on the lowest priced, technically acceptable offer is not unreasonable or in violation of federal procurement principles if the solicitation explicitly provided that award might be made on the basis of initial proposals.

68:280

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**

Award to low acceptable offeror on basis of initial proposals was proper even though protester, after a pricing audit conducted by Defense Contract Audit Agency as part of the evaluation, offered to lower the price in its initial proposal below the price in awardee's initial proposal; procurement did not progress beyond the initial proposal stage so as to require request for best and final offers (BAFOs), there was no indication that the awardee would reduce its price in a BAFO, and the potential reduction in protester's price would not offset awardee's significant technical superiority.

69:158

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**

Where agency cannot reasonably conclude that awards represented the lowest overall costs to the government, agency cannot make award on the basis of initial proposals.

69:249

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**

Protest against award of a small business set-aside contract on the basis of initial proposals is sustained where awardee's proposal was unacceptable as submitted because the proposal failed to include required resumes and took exception to the mandatory requirement of the RFP to expend, on a small business set-aside solicitation for services, at least 50 percent of the cost of personnel for the successful contractor's own employees.

69:500

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**

Contracting agency conducting an urgent procurement under the authority of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(c)(2) (1988), may make award on the basis of initial proposals whether or not such award represents the lowest overall cost to the government.

70:74

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**
■■■■ **Price reasonableness**

Protest is sustained where the procuring agency awarded a contract on the basis of initial proposals, but there was a reasonable chance that by conducting discussions the agency would find a proposal

offering a lower overall cost to the government to be more advantageous under the evaluation factors listed in the solicitation.

66:327

■ **Contract awards**
■■ **Initial-offer awards**
■■■ **Propriety**
■■■■ **Price reasonableness**

Where government estimate of staffhours in not revealed to offerors and proposals submitted offer staffhour levels that differ substantially from government estimate, acceptance of an initial proposal based on the government's estimate and not a detailed cost analysis of each proposal is improper since the agency has not assured itself that it is actually making award at the lowest overall cost available to the government as required by law.

67:226

■ **Contract awards**
■■ **Multiple/aggregate awards**
■■■ **Propriety**

Agency decision to procure airfield paint and rubber removal and restriping services under one contract is not objectionable where agency reasonably anticipates that combining these services under one contract will reduce scheduling difficulties that significantly delayed performance and increased costs in prior procurements where the services were procured under separate contracts.

69:511

■ **Contract awards**
■■ **Multiple/aggregate awards**
■■■ **Propriety**

Protest that solicitation was deceptive regarding the possibility of multiple contract awards is denied where the solicitation specifically provided for the possibility of multiple awards.

70:213

■ **Contract awards**
■■ **Personnel**
■■■ **Substitution**
■■■■ **Propriety**

Protester's interpretation of a clause in a solicitation for dental services as allowing substitution of dentists initially proposed by the protester with dentists proposed by other offerors is reasonable where the solicitation does not specifically prohibit such practice.

68:172

■ **Contract awards**
■■ **Pre-qualification**
■■■ **Determination time periods**

A potential offeror may not be denied the opportunity to submit an offer (or quotation) and have it considered for a contract solely because the offeror has not met a prequalification requirement if the offeror can demonstrate that the offeror or its product can meet the standards established for qualification before the date specified for award.

66:133

■ **Contract awards**
■■ **Prior contracts**
■■■ **Errors**
■■■■ **Effects**

Where technical proposals submitted by the protester and incumbent contractor were considered to be substantially equivalent, contracting agency improperly made award to incumbent contractor having the higher evaluated price based on consideration of price-related factors not set out in solicitation where resulting price advantage to incumbent derived from prior improper contract award.

68:34

■ **Contract awards**
■■ **Propriety**

A contracting agency need not await the results of an Inspector General's investigation into the alleged mischarging of the government before making award where the contracting officer, after a preliminary investigation, reasonably determines that there is insufficient evidence to conclude that the firm selected for award lacks a satisfactory record of integrity and business ethics.

66:405

■ **Contract awards**
■■ **Propriety**

Offer complies with Commercial Operations clause requesting a list of sites where equipment of the same model, type and class as the proposed system has operated successfully, where the information submitted is verified by the agency, and the equipment is found to be successfully operating at those sites.

69:299

■ **Contract awards**
■■ **Propriety**

General Accounting Office denies request for reconsideration of previous decision which upheld award to low evaluated offeror, in absence of evidence that low evaluated offer would result in other than the lowest ultimate cost to the government.

69:488

■ **Contract awards**
■■ **Propriety**
■■■ **Corporate entities**

Generally, firm that is owned or controlled by federal employees is not eligible for award of contract and is not an interested party to protest since it would not be in line for award even if its protest were sustained. Firm is an interested party, however, where federal employees that own and control firm were eligible to retire and indicated in their proposal their willingness to retire from government employment before award, since date of award is the critical time at which, in order to be eligible for award, an offeror may not be owned or controlled by government employees.

68:563

■ **Contract awards**
■■ **Propriety**
■■■ **Corporate entities**
■■■■ **State/local personnel**

Protest that award to parent company is improper where the parent company submitted the initial proposal and its subsidiary submitted the revised technical proposal and best and final offer (BAFO) is denied where the agency reasonably regarded the two companies as a single entity and the individuals who signed the revised technical proposal and BAFO had the authority to represent and bind the parent company.

68:346

■ **Contract awards**
■■ **Propriety**
■■■ **Evaluation errors**
■■■■ **Materiality**

Award to offeror whose proposal in negotiated procurement failed to conform to material specification requirement concerning computer workstation was improper where waiver of requirement resulted in competitive prejudice.

69:214

■ **Contract awards**
■■ **Propriety**
■■■ **Evaluation errors**
■■■■ **Materiality**

Protest alleging that agency improperly made award to firm whose product does not conform to specifications is sustained where record shows that agency in fact relaxed material requirements of specification for awardee and such action was prejudicial to the other competitive range offerors.

69:627

■ **Contract awards**
■■ **Propriety**
■■■ **Offers**
■■■■ **Minor deviations**

Contract awards to offeror, whose offer indicated it did not intend to comply with the Department of Defense Federal Acquisition Regulation Supplement § 208.7801 *et seq.* requirements for domestic forging, are not void *ab initio,* where agency and awardee were confused as to the applicability of the requirements and appeared to be acting in good faith.

70:147

■ **Contract awards**
■■ **Propriety**
■■■ **Pending protests**

Protest that contracting agency improperly continued negotiations with offerors under a request for quotations after the protester's initial protest was filed is denied, since General Accounting Office (GAO) Bid Protest Regulations do not require cessation of negotiations during the pendency of a protest; rather, the agency is only required to withhold contract award where notice of a protest is received from GAO prior to award, and to suspend contract performance where the agency receives GAO notice of a protest within 10 days of the contract award date.

69:531

■ **Contract awards**
■■ **Propriety**
■■■ **Subcontracts**

Protest against award of subcontract is sustained where proposals were not evaluated based solely on evaluation factors stated in the solicitation.

70:580

■ **Contract awards**
■■ **Shipment schedules**
■■■ **Modification**
■■■■ **Propriety**

Contracting agency may not award a contract with the intention of significantly modifying it after award. Where record shows agency relaxed delivery terms contemporaneous with contract award, and protester could have offered significantly better terms if it had known that delivery schedule would be modified, so that competition would have been materially different from that originally obtained, award was improper and another round of best and final offers is recommended.

68:206

■ **Contracting officer duties**
■■ **Competitive system integrity**

It is a fundamental rule of federal procurement that an agency must treat all offerors equally and must provide a common basis for the preparation and submission of competitive proposals.

66:272

■ **Contracting officer duties**
■■ **Information disclosure**

In determining whether to grant access to documents under protective order, the General Accounting Office considers whether the applicant primarily advises on litigation matters or whether he also advises on pricing and production decisions, including the review of proposals, as well as the degree of physical and organizational separation from employees of the firm who participate in competitive decision-making and the degree and level of supervision to which the applicant is subject.

70:667

■ **Contracting officer duties**
■■ **Information evaluation**
■■■ **Fairness**

While contracting officer, acting in good faith, may ordinarily rely on information provided by transportation rate specialists in calculating transportation costs on f.o.b. origin offers, he may not automatically do so if it leads to an improper or unreasonable evaluation of the offered prices.

69:364

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Meaningful discussions have occurred where an offeror is reasonably informed of the perceived deficiencies in its proposal and has been given the opportunity to correct those deficiencies in a best and final offer.

66:2

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

The General Accounting Office sustains a protest where the procuring agency awarded a contract on the basis of initial proposals, but there was a reasonable chance that by conducting discussions the agency would find a proposal offering a lower overall cost to the government to be more advantageous under the evaluation factors listed in the solicitation.

66:280

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

An agency acts improperly by not conducting technical discussions and by requesting best and final price proposals where omissions and weaknesses noted in the initial technical proposals were suitable for correction through discussion, since, as a general rule, contracting agencies must hold discussions with all responsible offerors for a negotiated procurement whose proposals are within the competitive range.

66:283

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Agency conducted meaningful discussions with protester where it sent a list of questions to the protester pointing out the principal weaknesses in its proposal and afforded it the opportunity to submit a best and final offer.

66:585

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Discussions cannot be meaningful if an offeror is not apprised that its price exceeds what the agency believes to be reasonable.

67:39

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Contracting agency's failure to inform protester of deficiencies in its technical proposal, which was included in the competitive range, deprived the protester of the opportunity to participate in meaningful discussions. Protester, however, was not prejudiced since its cost proposal was so much higher than the awardee's cost proposal that, even if protester had raised its technical proposal to the level of the awardee's, the protester would not have been awarded the contract.

67:45

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Where agency did not consider protester's proposed costs unreasonable and those costs did not exceed the government's estimate, it was not necessary for the agency to notify protester during discussions that its proposed costs were too high.

67:236

■ Discussion
■■ Adequacy
■■■ Criteria

In deciding whether a protester might have been prejudiced by an agency's failure to hold meaningful discussions, the General Accounting Office does not require the firm to establish with certainty what would have resulted absent the procurement deficiency. Before the procurement or contract will be disturbed, however, and especially where cost is an important selection factor, there must be some evidence that the protester would have been competitive with the awardee but for the agency's improper actions.

67:264

■ Discussion
■■ Adequacy
■■■ Criteria

Where an agency led an offeror into the areas of its proposals that required amplification and afforded it the opportunity to submit a revised proposal, meaningful discussions were conducted.

67:315

■ Discussion
■■ Adequacy
■■■ Criteria

Where procuring agency presented the protester with several specific questions concerning deficiencies in its proposal during discussions and later rejected the proposal because the protester did not adequately answer these questions in its best and final offer, procuring agency conducted meaningful discussions. Agency properly led the protester into the areas of its proposal needing amplification, and is not required to conduct all-encompassing negotiations or provide preferred approach.

68:62

■ Discussion
■■ Adequacy
■■■ Criteria

In view of the protester's recognition as the incumbent that it was proposing a significant reduction in staffing (relative to historical levels), contracting agency reasonably communicated its concern with the proposed reduction and satisfied the requirement for meaningful discussions when it questioned whether the proposed approach was adequate to handle anticipated work load and offered the protester a reasonable opportunity to explain why its staffing was adequate and/or to revise its approach.

68:81

■ Discussion
■■ Adequacy
■■■ Criteria

Protest that agency failed to conduct meaningful discussions with offeror is without merit where agency sent protester detailed questions that informed the protester of the areas of its proposal with

which the agency was concerned, and the protester was given an opportunity to revise its proposal in response to these questions.

68:138

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

An agency satisfies requirement for meaningful discussions where it twice advises the protester of which responses to sample tasks, requested by request for proposals to evaluate the offerors' understanding of the government's requirements, were unacceptable and affords the protester the opportunity to revise its proposal. Since the offeror's understanding was being tested by its responses to the sample tasks, the agency need not specify all deficiencies in each sample task response because this may defeat the purpose of that evaluation criterion.

68:699

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Agency conducted meaningful discussions where it directed protester to areas in which its proposal was deficient or noncompliant with mandatory solicitation requirements. Procuring agency is not required to provide an offeror with exact proposal language which will establish compliance.

68:708

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Procuring agency failed to conduct meaningful discussions with the protester where the agency's technical concerns, which resulted in the elimination of the protester from the competitive range, were discovered during an onsite demonstration of the protester's software conducted after receipt of best and final offers and the agency failed to point out these concerns to allow the protester the opportunity to explain or retest the questioned aspects of the software.

69:252

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Protest that agency failed to properly notify it of possible errors where agency specifically cited only one item and failed to cite a second item is denied where both items were identical, except for shipping costs, and an error in one would have identified an error in the other.

69:634

■ Discussion
■■ Adequacy
■■■ Criteria

Exclusion of proposal from the competitive range is not reasonable where the deficiencies cited are minor in relation to the scope of work and the revisions necessary to correct them; the deficiencies, in some cases, have been corrected during discussions but the corrections apparently have been overlooked; and discussions, in certain cases, were not sufficiently specific to advise offeror of the needed corrections.

69:717

■ Discussion
■■ Adequacy
■■■ Criteria

Department of Energy prime contractor was not obligated to provide the protester with all specific information or data needed to establish the acceptability of its proposal of an alternate proprietary product; prime contractor satisfied its obligation to conduct meaningful discussions by repeated discussions requesting information to establish the acceptability of the alternate proprietary product.

70:81

■ Discussion
■■ Adequacy
■■■ Criteria

Where an agency advised offerors in the competitive range of all technical and cost concerns and gave the offerors an opportunity to revise their proposals based on these concerns, agency has satisfied the requirement that meaningful discussions be conducted. Even if an offeror's price is higher than the other offeror's price, the agency is not required to advise the high offeror of this fact if there is no indication that the agency found the high offeror's price to be unreasonable.

70:88

■ Discussion
■■ Adequacy
■■■ Criteria

Protest that meaningful discussions were not conducted is untimely filed under the General Accounting Office Bid Protest Regulations, where the protester only identifies in its post-conference comments the specific areas where it contends discussions were not conducted even though it was made aware of the facts on which it bases this contention at a debriefing conducted prior to the filing of the initial protest.

70:173

■ Discussion
■■ Adequacy
■■■ Criteria

An agency may not reject protesters' low fixed-price proposals for proposing unrealistically low professional compensation packages, where the agency did not discuss the matter with those firms, the

technical evaluation criteria specifically encompassed the adequacy of professional compensation packages, and the agency advised the protesters that their offers were technically acceptable.

70:505

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Protest that agency does not have a reasonable basis to cancel request for proposals set aside for small businesses is sustained where basis for cancellation is that protester, the only offeror remaining in the competitive range, submitted unreasonably high proposed costs, but agency improperly failed to conduct meaningful discussions with protester relating to its proposed costs.

70:545

■ **Discussion**
■■ **Adequacy**
■■■ **Criteria**

Where protester offered more highly qualified personnel in its best and final offer (BAFO) but lowered its estimated salaries for district representative positions, agency was not obligated to discuss concerns over cost realism that first arose after protester submitted its BAFO.

70:668

■ **Discussion**
■■ **Bad faith**
■■■ **Allegation substantiation**

Discussions were prejudicially unequal where, during discussions, agency advised awardee of availability of upgraded, higher performance computer which awardee subsequently offered to provide, and which was deemed a significant technical advantage in the selection of the awardee, but failed to advise other offerors, including the protester, of its desire for higher performance computer and solicitation gave no reasonable indication that agency wanted this higher level of performance.

70:268

■ **Discussion**
■■ **Determination criteria**

Contracting agency engaged in discussions with offeror where contracting officer invited and accepted significant additions to offeror's initial technical proposal which were necessary to determine if the offeror would fully meet the agency's requirements.

66:519

■ **Discussion**
■■ **Determination criteria**

Contracting agency engages in discussions, not clarifications, where it asks offeror to provide information relating to essential functions of its proposed equipment and offeror's responses have a determinative effect on the agency's evaluation of the proposal.

67:534

■ **Discussion**
■■ **Determination criteria**

Since letters to agency from awardee concerned only matters of responsibility and not the acceptability of the awardee's proposal, letters did not constitute discussions.

69:515

■ **Discussion**
■■ **Error correction**
■■■ **Post-award error allegation**

Where awardee's proposal is found to be deficient after award, agency is not required to terminate and make award to higher priced offeror without first allowing awardee to correct deficiencies through discussions.

67:525

■ **Discussion**
■■ **Misleading information**
■■■ **Allegation substantiation**

Discussions were prejudicially unequal where, during discussions, agency advised awardee of availability of upgraded, higher performance computer which awardee subsequently offered to provide, and which was deemed a significant technical advantage in the selection of the awardee, but failed to advise other offerors, including the protester, of its desire for higher performance computer and solicitation gave no reasonable indication that agency wanted this higher level of performance.

70:268

■ **Discussion**
■■ **Offers**
■■■ **Clarification**
■■■■ **Propriety**

In a competitively negotiated procurement, it is not improper for agency to obtain clarification of initial offer which appears to be nonconforming to solicitation requirements where information requested does not materially change offer.

66:19

■ **Discussion**
■■ **Offers**
■■■ **Clarification**
■■■■ **Propriety**

Contracting agency acted improperly by holding discussions and allowing submission of revised proposal by only one of two offerors in competitive range, since agency is required to hold discussions with all offerors in the competitive range if discussions are held with any offeror.

66:519

■ Discussion
■■ Offers
■■■ Clarification
■■■■ Propriety

Contracting agency engages in discussions, not clarifications, where it asks offeror to provide information relating to essential functions of its proposed equipment and offeror's responses have a determinative effect on the agency's evaluation of the proposal.

67:534

■ Discussion
■■ Offers
■■■ Clarification
■■■■ Propriety

Protester has no basis to object to the agency decision to hold discussions and request best and final offers where firm is not low if discussions were not held, and discussions effectively provide a new opportunity for firm to compete for award.

69:143

■ Discussion
■■ Offers
■■■ Clarification
■■■■ Propriety

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

70:459

■ Discussion
■■ Propriety
■■■ Post-award error allegation
■■■■ Contract rescission

Where awardee's proposal is found, subsequent to award, to be materially defective, agency decision to rescind award made on basis of initial proposal and to hold discussions with all offerors in competitive range, including initial awardee, is proper.

67:525

■ Discussion
■■ Propriety
■■■ Post-award error allegation
■■■■ Contract rescission

Once agency has determined that initial proposal on which award was based is materially deficient, rescinding the award and initiating competitive range discussions, even though prices have been

disclosed, is the appropriate remedy; the statutory requirements for competition take primacy over regulatory prohibitions of auction techniques.

67:526

■ **Discussion reopening**
■■ **Auction prohibition**

Where reopening of negotiations is properly required, notwithstanding the disclosure of an offeror's proposal, this does not constitute either technical leveling or an improper auction.

67:39

■ **Discussion reopening**
■■ **Auction prohibition**

Where there was a reasonable possibility that the failure of a solicitation adequately to advise offerors of the actual basis for award resulted in competitive prejudice, then the determination of the contracting agency to reopen negotiations was proper, notwithstanding the prior disclosure of offerors' proposed costs, the alleged disclosure of proprietary information from the awardee's proposal, and the cost to the government of terminating the awardee's contract if another offeror ultimately received the award.

67:512

■ **Discussion reopening**
■■ **Auction prohibition**

Once agency has determined that initial proposal on which award was based is materially deficient, rescinding the award and initiating competitive range discussions, even though prices have been disclosed, is the appropriate remedy; the statutory requirements for competition take primacy over regulatory prohibitions of auction techniques.

67:526

■ **Discussion reopening**
■■ **Auction prohibition**

Protest that agency, in taking corrective action to remedy previously improper procurement, is engaged in improper auction technique is denied. Fact that agency did not ultimately make various changes in its requirements, as agency represented it would do, does not affect the need for appropriate corrective action in cases where explicit statutory violations have occurred, and this need takes primacy over possible risk of auction.

70:115

■ **Discussion reopening**
■■ **Competitive system integrity**
■■■ **GAO decisions**
■■■■ **Recommendations**

Agency did not abuse its discretion by requesting best and final offers after reopening negotiations pursuant to recommendation by the General Accounting Office.

67:123

■ **Discussion reopening**
■■ **Competitive system integrity**
■■■ **GAO decisions**
■■■■ **Recommendations**

The General Accounting Office finds no reason to alter its prior recommendation that competitive range discussions be opened where, despite awardee's claim that such action would be prejudicial, contract performance is not substantially completed and the need to preserve the integrity of the competitive procurement system by taking appropriate corrective action to remedy the defective procurement outweighs any concerns that implementation of the recommendation will lead to technical leveling or transfusion and a prohibited auction situation.

66:457

■ **Discussion reopening**
■■ **Propriety**

Reopened discussions with only one offerer following receipt of best and final offers were not improper where, as the result of the agency's evaluation of best and final offers, only that offeror justifiably remained within the competitive range.

66:3

■ **Discussion reopening**
■■ **Propriety**

Where there was a reasonable possibility that the failure of a solicitation adequately to advise offerors of the actual basis for award resulted in competitive prejudice, then the determination of the contracting agency to reopen negotiations was proper, notwithstanding the prior disclosure of offerors' proposed costs, the alleged disclosure of proprietary information from the awardee's proposal, and the cost to the government of terminating the awardee's contract if another offeror ultimately received the award.

67:512

■ **Discussion reopening**
■■ **Propriety**

Where offeror responds to notice of proposal deficiency by taking explicit exception to mandatory requirement with alternate approach in its best and final offer, the agency need not again raise the deficiency and request a second round of best and final offers to allow offeror another opportunity to respond.

68:265

■ **Discussion reopening**
■■ **Propriety**

Protest of reopening of discussions with original offerors that remained in the competitive range is denied where agency terminated award to the protester under small business set-aside due to Small Business Administration's final determination that protester was other than small since conducting a new procurement in such circumstances is not required.

69:44

■ **Discussion reopening**
■■ **Propriety**

Where awardee waits until after award to advise the government that certain of its proposed line items do not meet the technical specifications required by the solicitation, if agency reopens discussions to permit offeror to modify its proposal, it must conduct discussions with all offerors in the competitive range.

69:196

■ **Discussion reopening**
■■ **Propriety**

Where, during discussions, agency requested the protester to review its proposed pricing on a specific item and protester verified its original price, agency determination not to reopen negotiations to allow protester to correct a subsequently discovered error is reasonable since protester was previously provided an opportunity to review its proposal and further negotiations would result in unacceptable delay of performance.

69:634

■ **Discussion reopening**
■■ **Propriety**
■■■ **Best/final offers**
■■■■ **Competitive ranges**

Contracting agency's decision to allow only the prospective awardee to revise its best and final offer was improper since, when discussions are reopened after best and final offers are received, the contracting agency must hold discussions with all the offerors in the competitive range and allow them to submit new best and final offers.

66:433

■ **Discussion reopening**
■■ **Propriety**
■■■ **Best/final offers**
■■■■ **Competitive ranges**

Agency did not abuse its discretion by requesting best and final offers after reopening negotiations pursuant to recommendation by the General Accounting Office.

67:123

■ **Discussion reopening**
■■ **Propriety**
■■■ **Best/final offers**
■■■■ **Non-prejudicial allegation**

Protest that agency improperly reopened negotiations and requested best and final offers after announcing that protester was apparent successful offeror is denied where prices were not disclosed, and other offerors did not gain advantage from knowing identity of apparent successful offeror.

70:137

■ **Discussion reopening**
■■ **Propriety**
■■■ **Best/final offers**
■■■■ **Price adjustments**

Determination of whether the reopening of negotiations based on a late proposal modification is in the government's best interest is within the contracting officer's discretion; decision to reopen where the late modification showed the availability of prices significantly lower than those received in best and final offers does not constitute an abuse of discretion.

69:108

■ **Government agents**
■■ **Contract awards**

General Accounting Office will consider a protest by potential subcontractor of a firm acting as a general agent for the Maritime Administration, since the firm is acting "by or for" the government in issuing a solicitation for ship repair and maintenance.

66:22

■ **Incumbent contractors**
■■ **Information disclosure**
■■■ **Contingent fees**
■■■■ **Prohibition**

Incumbent contractor's offer to sell access to its employees and its contract information to potential offerors who agree to buy inventory and equipment at pre-agreed prices if they win the contract is not a prohibited contingent fee arrangement within the meaning of 10 U.S.C. § 2306(b) (1988) because the services were not "to solicit or obtain the contract" since they did not involve any dealings with government officials.

70:424

■ **Multiple offers**
■■ **Acceptance**
■■■ **Propriety**

Multiple offers from commonly owned and/or controlled companies may be accepted unless the acceptance of such offers is prejudicial to the interests of the government or other offerors.

69:364

■ **Offers**
■■ **Acceptance time periods**
■■■ **Expiration**

Where low offer expires and offeror, having sold its business interests through which it could provide the solicitation requirements, purports to withdraw its offer, the contracting agency's acceptance of the offeror's "withdrawal" of its offer is not improper or unreasonable where prior to the expiration of the offer or the agency's acceptance of the "withdrawal" of the offer, the buyer of the

business did not assert any possessory interests in the offer and the agency, otherwise, has no basis to conclude that the buyer is a successor in interest.

68:481

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

Protest is denied where, despite numerous allegations of agency misconduct, the record establishes that the agency acted properly in no longer considering for award a proposal which had not been made technically acceptable through the course of discussions and which was more than $40 million higher in price than that of sole remaining competitive range offeror.

66:2

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

The fact that a proposal was initially included within the competitive range does not preclude the agency from later excluding it from further consideration if it no longer has a reasonable chance of being selected for award.

66:3

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

Where a proposal to conduct historical archaeological studies reflects a level of effort significantly less than and markedly different in emphasis from that which the agency believes is necessary to perform the contract, the agency does not act unreasonably in eliminating the proposal from the competitive range, because it has no reasonable chance for award without major revisions.

66:68

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

Under request for proposals which provides for award to lowest priced technically acceptable offeror, contracting agency properly excluded protester's technically acceptable offer from competitive range where protester's proposed price was so substantially higher than other technically acceptable offer that protester did not have a reasonable chance of receiving award.

66:169

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

Protest is sustained where the agency's exclusion of the protester's proposal leaves only one proposal in the competitive range, since discussions with the rejected offeror could reasonably be expected to result in revisions making the proposal acceptable without submission of an entirely new proposal.

66:216

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

An initial proposal was properly excluded from the competive range, leaving a competitive range of only one offeror, where the proposal reasonably was found to be so deficient in its technical adequacy that major revisions would have been required to make it acceptable.

67:30

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

It is an offeror's responsibility to furnish all of the information required by the request for proposals, and an agency therefore properly may exclude from the competitive range an offer with significant informational deficiencies.

68:10

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

Absent a clear showing that an agency's evaluation was unreasonable, or inconsistent with the stated evaluation criteria, exclusion of protester's proposal from the competitive range is warranted where agency evaluation finds the proposal unacceptable with major deficiencies that are considered to be the result of a poor and risky design and concludes that the proposal does not have a reasonable chance of being selected for award.

68:48

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Agency decision to eliminate protester from competitive range was reasonable even though it resulted in a competitive range of one. The totality of the major and minor deficiencies found by the evaluators in the protester's proposal provide adequate support for the decision.

68:112

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Exclusion from competitive range of technically unacceptable proposal not susceptible to being made acceptable without complete revision, and which thus has no reasonable chance of being selected for award, is proper.

68:118

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Protester was properly excluded from the competitive range where the agency reasonably concluded that the offeror had no reasonable chance of award because of deficiencies in proposed resumes and because of its otherwise low technical score and high price.

69:284

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Protester was properly excluded from the competitive range where agency reasonably concluded that firm had no reasonable chance for award because of significant technical deficiencies identified in its proposal which was rated by agency's technical evaluators as "unacceptable" in seven of the solicitation's nine technical and management evaluation areas.

69:351

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Administrative discretion

Where solicitation provided for evaluation on comparative basis, elimination of protester's proposal from the competitive range and acceptance of another proposal for award, even though proposals

may share a similar deficiency, is proper, so long as proposal selected for award properly was highest rated under solicitation's evaluation scheme.

69:553

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Administrative discretion**

Competitive range of one is unobjectionable where agency reasonably determined that due to initial substantial scoring and price differential the excluded firms lacked a reasonable chance for award.

70:58

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Discussion**

Where proposal is included in the competitive range only because it is susceptible to being made acceptable and discussions later make clear that proposal should not have been included in the competitive range initially, proposal may be eliminated from the competitive range without an opportunity to submit a revised proposal.

67:535

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Discussion**

Elimination of a technically acceptable, lower cost proposal from the competitive range without discussions, leaving a competitive range of one, was unreasonable where the record shows that weaknesses in the lower cost proposal were considered minor and could be easily addressed during discussions to make it stronger, and that the awardee's evaluated technical superiority was not such that no other offeror had a reasonable chance for award.

70:443

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Discussion**

In a negotiated, indefinite quantity procurement for construction, maintenance, and repair services, the procuring agency reasonably evaluated the protester's proposal as technically unacceptable and properly eliminated it from the revised competitive range after discussions, where the protester's model project submissions, which were evaluated under a specific evaluation criterion, failed to

demonstrate the protester's understanding of the solicitation requirements or the protester's ability to use the required unit price book to price contract services.

70:574

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Discussion

Offeror was afforded reasonable opportunity to correct deficiencies in its proposal, and proposal was subsequently properly eliminated from the competitive range, where during discussions the agency asked how off-line equipment in proposed satellite communications system could be replaced without causing interruption to communications, as required by the solicitation, and the offeror responded that not all equipment could be so replaced; offeror's refusal to comply with mandatory solicitation requirement rendered its proposal technically unacceptable.

70:624

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Evaluation errors

Where there is no determination that the low offeror's proposal, which was rejected from the competitive range, was technically unacceptable, and the agency did not consider price proposals in establishing the competitive range, the agency violated the Federal Acquisition Regulation (FAR), 48 C.F.R. § 15.609(a) (1986).

66:545

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Evaluation errors

Under request for proposals calling for award to low technically acceptable offerors, agency determination that protester's proposal was outside of the competitive range was improper where agency determination was based on proposal's relative technical ranking, without consideration of price, and consequently agency violated Federal Acquisition Regulation § 15.609(a) (FAC 84-16) in establishing the competitive range.

69:403

■ Offers
■■ Competitive ranges
■■■ Exclusion
■■■■ Evaluation errors

Exclusion of proposal from the competitive range is not reasonable where the deficiencies cited are minor in relation to the scope of work and the revisions necessary to correct them; the deficiencies, in some cases, have been corrected during discussions but the corrections apparently have been

overlooked; and discussions, in certain cases, were not sufficiently specific to advise offeror of the needed corrections.

69:717

■ **Offers**
■■ **Competitive ranges**
■■■ **Exclusion**
■■■■ **Evaluation errors**

Elimination of a technically acceptable, lower cost proposal from the competitive range without discussions, leaving a competitive range of one, was unreasonable where the record shows that weaknesses in the lower cost proposal were considered minor and could be easily addressed during discussions to make it stronger, and that the awardee's evaluated technical superiority was not such that no other offeror had a reasonable chance for award.

70:443

■ **Offers**
■■ **Cost realism**
■■■ **Evaluation**
■■■■ **Administrative discretion**

Agency's cost realism analysis reasonably adjusted upward protester's proposed costs for a cost-reimbursement contract to develop an instructional system where the protester based reduction of man-hours on the use of a computer program that has not been previously used for that purpose and has not yet been fully developed.

66:585

■ **Offers**
■■ **Cost realism**
■■■ **Evaluation**
■■■■ **Administrative discretion**

Agency need not perform a cost realism analysis where solicitation is competitive and results in the award of a fixed-price contract.

67:236

■ **Offers**
■■ **Cost realism**
■■■ **Evaluation**
■■■■ **Administrative discretion**

Agency cost realism analysis had a reasonable basis where the agency reviewed awardee's responses to agency cost discussions, verified labor categories, labor mix, labor hours proposed and burden rates, verified other miscellaneous direct costs, and verified awardee's overhead and general and administrative rates with the Defense Contract Audit Agency.

68:566

■ Offers
■■ Cost realism
■■■ Evaluation
■■■■ Administrative discretion

Protest that agency improperly awarded time and materials/labor hour contract to firm offering allegedly "below cost" labor hour rate is denied where record shows that agency considered reasonableness and realism of proposed rate and offers an adequate explanation for the admittedly low rate.

69:25

■ Offers
■■ Cost realism
■■■ Evaluation
■■■■ Administrative discretion

Agency may rely on the recommendations of the Defense Contract Audit Agency concerning direct labor and indirect cost rates in analyzing cost proposals.

69:459

■ Offers
■■ Cost realism
■■■ Evaluation
■■■■ Administrative discretion

Agency's cost realism analysis is reasonable where agency made probable cost adjustments based upon the government's requirements as embodied in an independent government cost estimate as well as the agency's assessment of the costs associated with each firm's particular technical approach.

70:541

■ Offers
■■ Cost realism
■■■ Evaluation
■■■■ Administrative discretion

Agency's cost realism analysis of awardee's proposal was reasonable where agency relied on information provided under Defense Contract Audit Agency's audit and verified awardee's proposed labor rates, fringe benefits, overhead rates, and subcontractor costs.

70:633

■ Offers
■■ Cost realism
■■■ Evaluation errors
■■■■ Allegation substantiation

Protest that agency did not conduct a proper cost realism analysis of awardee's proposal is denied where, even though agency accepted awardee's zero percent general and administrative rate, under

the contract awarded the firm waived its right to recover these costs throughout the life of the contract and agreed that these costs will not be allocated to any other government contract.

68:567

■ **Offers**
■■ **Cost realism**
■■■ **Evaluation errors**
■■■■ **Allegation substantiation**

The General Accounting Office will not reconsider prior decision sustaining a protest where the agency and interested party request reconsideration on the basis that the contracting officer's cost realism adjustments were based upon audit advice of the Defense Contract Audit Agency (DCAA) and that the contracting officer had no reason to know, at the time of the award, that DCAA's advice was erroneous, where these new arguments and information are inconsistent with the arguments and information provided during the initial consideration of the protest, and could have and should have been raised at that time. In any event, a contracting officer's cost realism determination may not reasonably be based upon erroneous DCAA audit advice, even where the procuring agency is unaware at the time of the determination that the audit information is incorrect.

70:510

■ **Offers**
■■ **Cost realism**
■■■ **GAO review**

Contracting agency's cost realism analysis involves the exercise of informed judgment, and the General Accounting Office will not question such an analysis unless it clearly lacks a reasonable basis. Reasonable basis is provided by determination that awardee's technical approach is feasible, by Defense Contract Audit Administration analysis of awardee's rates, and by reconciliation of awardee's estimated costs with independent government cost estimate.

68:714

■ **Offers**
■■ **Designs**
■■■ **Evaluation**
■■■■ **Technical acceptability**

Where an agency states its specifications in terms of detailed design requirements set forth in clear and unambiguous terms in a request for proposals, and states that it will evaluate major areas of the specifications, a submission of "conceptual designs" prepared in response to the solicitation's proposal instructions that did not include the detailed designs required by the specifications is not sufficient.

67:314

■ Offers
■■ Designs
■■■ Evaluation
■■■■ Technical acceptability

Preproduction evaluation clause requiring contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is to be read in conjunction with Changes clause which was incorporated into the solicitation as required by the Federal Acquisition Regulation (FAR), and therefore does not represent a deviation from the FAR Changes clause or a new procurement regulation requiring publication for public comment.

69:172

■ Offers
■■ Designs
■■■ Evaluation
■■■■ Technical acceptability

Use in production contract of preproduction evaluation (PPE) clause in order to shift burden to contractor to evaluate production drawings/specifications and to suggest and accept engineering changes for certain purposes before beginning production with no increase in price or delay in delivery is proper where the contractor will be compensated for its PPE efforts as part of the overall contract price.

69:173

■ Offers
■■ Designs
■■■ Evaluation
■■■■ Technical acceptability

Protest that awardee did not meet solicitation requirement that a major section of house roof face within 20 degrees of south is denied where agency reasonably found that awardee's proposal substantially complied with the requirement and the protester was not prejudiced by the agency's acceptance of the proposal.

69:229

■ Offers
■■ Designs
■■■ Evaluation
■■■■ Technical acceptability

Protest that awardee's plans did not meet Uniform Federal Accessibility Standard concerning wheelchair turning space in its bathrooms for the handicapped is denied where agency architect concluded that awardee met the requirement and our review of the requirement does not provide us with any basis to question that determination.

69:229

■ Offers
■■ Evaluation

Protest that agency failed to properly follow the source selection plan (SSP) in evaluating offers is denied since SSPs are merely internal agency instructions which do not vest outside parties with rights, and agencies are only required to adhere to the evaluation scheme outlined in the solicitation.

69:182

■ Offers
■■ Evaluation
■■■ Cost estimates

Evaluated cost may become the award determinative factor where proposals are found technically equal, notwithstanding that the solicitation evaluation criteria assigned cost less importance than technical considerations.

67:32

■ Offers
■■ Evaluation
■■■ Cost estimates

Agency's mechanical application of government estimate of staffhours to each offeror's proposed wage rates to determine evaluated costs for each offeror does not satisfy the requirement for an independent analysis of each offeror's proposed costs.

67:226

■ Offers
■■ Evaluation
■■■ Cost estimates

Contention that where solicitation contemplates award of a fixed-price, time and materials contract and requires the submission of cost and pricing data, agency must perform a cost analysis, is denied where adequate price competition was obtained, permitting agency to waive further submission of such cost data and perform a price analysis in lieu of a cost analysis.

69:368

■ Offers
■■ Evaluation
■■■ Descriptive literature

Even though a request for proposals (RFP) did not specifically require the submission of descriptive literature with proposals, where protester submitted with its technical proposal its product brochure which indicated the item it offered did not comply with the RFP specifications without modifications, it was not improper for the contracting agency to reject the proposal as technically unacceptable based on that descriptive literature.

68:279

■ **Offers**
■■ **Evaluation**
■■■ **Descriptive literature**

Agency reliance during evaluation on preexisting descriptive literature (not submitted with offer), describing upgrade to software that permits offered model to meet solicitation requirement, is unobjectionable where literature was not inconsistent with literature submitted with offer and it showed conformance with requirement.

69:553

■ **Offers**
■■ **Evaluation**
■■■ **Downgrading**
■■■■ **Propriety**

Downgrading of protester's proposal under one of 19 evaluation subcriteria during the best and final offer evaluation was not prejudicial to the protester because it did not materially affect source selection decision.

69:182

■ **Offers**
■■ **Evaluation**
■■■ **Downgrading**
■■■■ **Propriety**

Contracting agency properly downgraded proposal on the basis that the proposal did not describe health and/or fitness activities other than those listed in the solicitation, where the solicitation advised quoters that proposal should address the activities listed in the solicitation as well as other activities which offerors considered essential to an effective fitness program.

69:527

■ **Offers**
■■ **Evaluation**
■■■ **Methods**

Use of color adjective rating scheme in lieu of using point scores is not improper since even point scores are used only as guides for award selection.

68:25

■ **Offers**
■■ **Evaluation**
■■■ **Options**
■■■■ **Prices**

Where solicitation provided that offers would be evaluated for award "by adding the total price for all options to the total price for the basic requirement," contracting agency reasonably included in

the evaluation the prices for option quantities of artillery fuzes that were not included in the basic requirement.

69:379

■ **Offers**
■■ **Evaluation**
■■■ **Orientation costs**

Where solicitation for custodial services provided that offers from other than incumbent contractor would be evaluated for award by adding orientation costs for a period beginning July 1, or date of award, whichever is later, through July 31, contracting agency reasonably included in the evaluation of protester's proposed price the cost of 8 days of orientation where contract was awarded on July 23, and protester was not the incumbent contractor.

70:111

■ **Offers**
■■ **Evaluation**
■■■ **Personnel**

Where none of the personnel required to perform the statement of work were "professional employees" as defined in the Federal Acquisition Regulation (FAR), contracting officer was not required to evaluate proposed professional employee compensation as specified in the standard FAR clause regarding evaluation of such compensation.

69:368

■ **Offers**
■■ **Evaluation**
■■■ **Personnel**

Agency does not have a duty to verify the availability of prospective employees proposed by an offeror for whom offeror has submitted letters of commitment.

69:459

■ **Offers**
■■ **Evaluation**
■■■ **Personnel**
■■■■ **Adequacy**

Contracting agency acted reasonably in selecting for award of cost-reimbursement contract an offeror proposing a level of staffing that more closely conforms to actual historical manning levels rather than offeror proposing a significant reduction in staffing.

68:81

■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Adequacy

Prior decision is affirmed despite the agency's contention that protester was not prejudiced where the record remains unclear as to what selection decision would have been made if the awardee had submitted a factually accurate final offer concerning the availability and number of its proposed key personnel.

68:559

■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Adequacy

Protest that agency overlooked alleged staffing inadequacies in the awardee's proposal and thus insufficiently downgraded the proposal is denied where the agency's evaluation was reasonable and consistent with the solicitation, which did not specify any minimum acceptable staff size.

69:526

■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Cost evaluation

Contracting agency's mechanical application of an undisclosed man-hour estimate to determine the acceptability of offers for a fixed-price contract is unreasonable where the agency rejected offers without discussing the discrepancy between the offerors' estimates and the government's estimate, and did not, in accordance with the requirements of the solicitation, assess the realism of the offerors' lower prices or otherwise evaluate the offerors' technical approaches.

69:248

■ Offers
■■ Evaluation
■■■ Personnel
■■■■ Cost evaluation

Where agency determined, based on a survey of similar staff positions under other contracts and the salaries contained in other technically acceptable proposals, that in order to supply district representatives under recruiting contract, protester would have to pay higher salaries than estimated in its proposal or to hire personnel with less qualifications than indicated in the protester's proposal, it was proper for agency to adjust estimated cost, since solicitation did provide for cost realism adjustments and since technical evaluation was based on assumption that protester would hire personnel with the qualifications proposed.

70:667

■ **Offers**
■■ **Evaluation**
■■■ **Personnel**
■■■■ **Cost evaluation**

Agency adjustment of protester's estimated cost to reflect cost experience of incumbent in identifying salary required to recruit qualified district representatives was reasonable, where the limited data available indicated that the incumbent's salaries were generally in the middle range of those paid for similar staff positions.

70:668

■ **Offers**
■■ **Evaluation**
■■■ **Personnel experience**

Protest that contracting agency improperly evaluated awardee's proposed staff and quality of program for a halfway house is without merit when, in best and final offer, the awardee revises staffing schedules to comply with solicitation requirements. The agency need not downgrade the awardee because the protester proposed additional staff members that, in agency's judgment, are not necessary.

66:332

■ **Offers**
■■ **Evaluation**
■■■ **Personnel experience**

Agency reasonably found protester's proposal was unacceptable because it failed to offer personnel with direct relevant experience as required by the RFP. The protester's assertion that the failure to have the specified experience is not deficient since the personnel it offered have broad experience in related fields and may utilize this experience for their assignments under the RFP is merely an attempt by protester to rewrite the solicitation and restate the agency's needs.

69:154

■ **Offers**
■■ **Evaluation**
■■■ **Personnel experience**

Agency reasonably rejected the protester's proposal as technically unacceptable where the protester's proposed personnel did not meet the agency's specific education and experience requirements and the protester did not indicate that it could or would offer different personnel meeting these requirements.

69:154

■ Offers
■■ Evaluation
■■■ Personnel experience

Protest that awardee's proposed labor mix does not meet solicitation personnel education and experience requirements, and therefore agency's evaluation of awardee's proposal was unreasonable, is denied where record shows that proposed labor mix met the solicitation staff requirements.

69:463

■ Offers
■■ Evaluation
■■■ Point ratings

Where a solicitation provides for award on the basis of highest total point score, point scores properly may be carried out two decimal places in order to break a tie score between the two highest rated proposals. Therefore, award to the lower technically rated, lower cost proposal that received a total score .02 points higher than the protester's, is proper, even though price was the least important evaluation criterion.

66:246

■ Offers
■■ Evaluation
■■■ Point ratings

Agency's evaluation approach, which for many evaluation subfactors results in scores of 0, 5, or 10 points depending largely upon extent to which offers exceeded minimum requirements, is not objectionable where scores reflect agency's judgment of relative value of competing proposals and not the use of unstated evaluation factors.

69:579

■ Offers
■■ Evaluation
■■■ Point ratings

Under solicitation for design and construction of a commissary, evaluation and assignment of points for innovative design features is proper, notwithstanding solicitation's general description of desired commissary as one operated and designed under standards similar to those found in commercial food stores, where solicitation provided that offerors would receive quality points for innovative or creative proposals and there is no language in the evaluation criteria requiring that design features meet only commercial food store standards.

70:62

■ Offers
■■ Evaluation
■■■ Point ratings

Protest that agency failed to follow stated evaluation methodology by using penalty points and bonus points in its actual scoring is denied since the solicitation advised offerors of the broad method of scoring to be employed and gave reasonably definite information concerning the relative

importance of evaluation factors. The precise numerical weights in an evaluation need not be disclosed.

70:88

■ **Offers**
■■ **Evaluation**
■■■ **Pre-award surveys**

Protest that contracting agency inequitably subjected the protester to an arduous pre-award survey, while ordering only a short-form survey for the awardee, is denied where the record shows that the contracting agency ordered short-form surveys for both the offerors, and the protester, who was second low priced on a request for proposals awarded to the low acceptable offeror, was not prejudiced as a result of the survey since the protester was not in line for award in any case.

70:256

■ **Offers**
■■ **Evaluation**
■■■ **Prices**
■■■■ **Additional work/quantities**

Agency price evaluation that only considered the total cost of a sample task, rather than the total contract cost, on a solicitation for an indefinite quantity of services under a delivery order contract was proper, where the sample task provided a common basis for cost evaluation under a solicitation that did not specify labor classifications or labor hours because of the uncertainty of the tasks that may be ordered during the contract and the agency's desire to use offerors' existing organizational structure and approaches, and where the task is typical of work under the contract.

70:525

■ **Offers**
■■ **Evaluation**
■■■ **Rates**
■■■■ **Mileage**

Where solicitation provides that offerors' rates will be adjusted based on mileage determined by the Installation Transportation Officer (ITO) to reflect cost of roadmarch of a large convoy transporting tanks, trucks, and other heavy military equipment between Army base and offeror's railroad terminal, the ITO reasonably determined the protester's mileage on the basis of a four-lane interstate highway route which the ITO selected based on safety considerations. The agency was not required to calculate the mileage based on a shorter state highway route which the ITO considered less safe.

70:70

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

When responsibility-type factor such as experience are included as technical evaluation criteria in a request for proposals, they do not constitute definitive responsibility criteria. The General Accounting Office will review the agency's evaluation of them in the same manner as it does any other

technical evaluation factor, i.e., to determine whether the evaluation was reasonable and complied with applicable statutes and regulations.

66:289

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

Protester fails to show that contracting agency lacked reasonable basis for weakness found in evaluation of protester's technical proposal under request for proposals (RFP) for aircraft maintenance services where agency's calculation of protester's aircraft hanger space reasonably showed that protester lacked minimum hangar space called for by RFP; had relatively high labor turnover rate; had experienced delays in delivery under prior contracts; and lacked sprinkler and storage tank separation and diking facilities required by RFP.

66:590

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

Contracting agency reasonably and properly accepted offers of valves other than the brand name models specified in the solicitation, even though the offeror has never produced the items, where the Products Offered clause permitted offers of alternates that are physically, mechanically, electronically, and functionally interchangeable with the brand-name models and the offers contained both drawings complying with the requirement for interchangeability and first article test procedures ensuring satisfactory production.

66:613

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

Even where the protester demonstrated superior understanding in technical approach and is appropriately credited for it under the pertinent part of the solicitation evaluation scheme, the agency may reasonably find the protester's proposal technically equal to another proposal, which offered a lesser rated, but "good," technical approach, where the evaluators determine the particular technical approach is not sufficiently significant to be award determinative and the protester does not otherwise contest the technical evaluation.

67:33

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

Agency properly rejected offer to furnish surplus property where the protester failed to provide sufficient information to establish that the surplus items met all the requirements of the solicitation and the agency considers the items critical to the safety of persons and property.

67:99

■ Offers
■■ Evaluation
■■■ Technical acceptability

Protester's proposal was properly rejected as technically unacceptable where protester fails to show that its proposal or other descriptive material submitted as a result of discussions demonstrated that the equipment it offered would include an essential feature required by the solicitation; protester's subsequent submission of detailed explanation with its protest does not satisfy protester's obligation to show through its proposal that its equipment meets the solicitation requirements.

67:535

■ Offers
■■ Evaluation
■■■ Technical acceptability

Although an agency may use traditional responsibility factors, like prior performance, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's offer as unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the offer but instead effectively constituted a finding of nonresponsibility.

67:612

■ Offers
■■ Evaluation
■■■ Technical acceptability

Procuring agency's decision to reject the protester's proposal as technically unacceptable was reasonable where the proposal did not meet several of the solicitation requirements. General Accounting Office will not substitute its evaluation of the proposal for the agency's, but rather will examine the agency's evaluation to ensure that it was reasonable and consistent with the evaluation criteria and procurement laws and regulations.

68:63

■ Offers
■■ Evaluation
■■■ Technical acceptability

Mandatory requirement that computed tomography scanner possess an operator console capable of displaying images is not met by proposed scanner which can only meet requirement when operated in conjunction with equipment already possessed by the government, and proposal was therefore properly deemed technically unacceptable.

68:265

■ Offers
■■ Evaluation
■■■ Technical acceptability

Protester's contention that the contracting agency improperly evaluated its technical proposal is denied where record shows that agency's evaluation of protester's proposal was reasonable and in accordance with the evaluation criteria.

68:567

■ Offers
■■ Evaluation
■■■ Technical acceptability

Where a protester received an unacceptable rating on the most important evaluation criterion of four criteria listed in the request for proposals in relative order of importance, and acceptable ratings on the other three criteria, the overall unacceptable rating awarded the protester did not give inordinate weight to that most important criterion.

68:699

■ Offers
■■ Evaluation
■■■ Technical acceptability

Protester's status as large corporation which has the capability to satisfy mandatory solicitation requirements does not establish that it will satisfy those requirements where its proposal indicates otherwise. Compliance with solicitation specifications must be determined on the basis of an offeror's proposal, not on the basis of the offeror's alleged intentions, corporate capability, or reputation.

68:708

■ Offers
■■ Evaluation
■■■ Technical acceptability

Agency reasonably rejected the protester's proposal as technically unacceptable where the protester's proposed personnel did not meet the agency's specific education and experience requirements and the protester did not indicate that it could or would offer different personnel meeting these requirements.

69:154

■ Offers
■■ Evaluation
■■■ Technical acceptability

Where evaluation under technical evaluation criteria for proposed facilities and production approach was based on detailed information in proposal and in-plant survey, protester's disagreement with agency determination that awardee's approach was acceptable does not establish that the determination was unreasonable.

69:379

■ Offers
■■ Evaluation
■■■ Technical acceptability

Contracting agency reasonably rejected proposal as technically unacceptable without discussions where the proposal contained several deficiencies and weaknesses which would have required major revisions to the proposal.

69:664

■ Offers
■■ Evaluation
■■■ Technical acceptability

Department of Energy prime contractor reasonably determined that the protester's low priced, alternate proposal to produce coils for dipole magnets to be incorporated in an electron accelerator was technically unacceptable where the contractor found the alternate product may be less reliable and more risky and the protester did not provide sufficient documentation, even after discussions and a site visit, to demonstrate the acceptability of its alternate product.

70:81

■ Offers
■■ Evaluation
■■■ Technical acceptability

Where solicitation specification requires that offered product be one of a manufacturer's current models, proposal to provide a product which will require major modifications to meet domestic content provisions of solicitation should have been rejected as technically unacceptable.

70:99

■ Offers
■■ Evaluation
■■■ Technical acceptability

Protest that awardee's offers were technically unacceptable under solicitations for components of final drive gears for combat support vehicles, which required domestically manufactured metal forgings, is sustained, where the awardee's proposals indicated that the forging would be done in a foreign country.

70:146

■ Offers
■■ Evaluation
■■■ Technical acceptability

In a negotiated, indefinite quantity procurement for construction, maintenance, and repair services, the procuring agency reasonably evaluated the protester's proposal as technically unacceptable and properly eliminated it from the revised competitive range after discussions, where the protester's model project submissions, which were evaluated under a specific evaluation criterion, failed to

demonstrate the protester's understanding of the solicitation requirements or the protester's ability to use the required unit price book to price contract services.

70:574

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

Offeror was afforded reasonable opportunity to correct deficiencies in its proposal, and proposal was subsequently properly eliminated from the competitive range, where during discussions the agency asked how off-line equipment in proposed satellite communications system could be replaced without causing interruption to communications, as required by the solicitation, and the offeror responded that not all equipment could be so replaced; offeror's refusal to comply with mandatory solicitation requirement rendered its proposal technically unacceptable.

70:624

■ **Offers**
■■ **Evaluation**
■■■ **Technical acceptability**

Although an agency may use traditional responsibility factors, like management and staff capabilities and company experience, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's proposal as technically unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the proposal but instead effectively constituted a finding of nonresponsibility.

70:679

■ **Offers**
■■ **Evaluation**
■■■ **Wage rates**

Protest challenging agency's evaluation of awardee's proposal which allegedly proposed the use of tradesmen who would be paid hourly rates less than those required by the solicitation is denied where record shows that awardee's proposal did not take exception to solicitation requirement that it pay specified wage rates and thus the awardee is obligated under the contract to pay the required rates.

70:355

■ **Offers**
■■ **Evaluation errors**
■■■ **Allegation substantiation**

A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that the awardee submitted a technically superior proposal and offered the lowest probable cost to the government.

66:405

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Agency reasonably found an offeror did not demonstrate understanding of agency requirements in responding to sample tasks that could be ordered, as set forth in request for proposals, where the offeror was twice apprised of which task responses were unacceptable and the offeror's protest of the evaluation constitutes a mere disagreement with the agency evaluation.

68:698

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Disparities in evaluation ratings among technical evaluators do not establish an award decision was not rationally based in view of the potential for disparate subjective judgments of different evaluators on the relative strengths and weaknesses of technical proposals.

68:699

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Contracting agency reasonably evaluated awardee's offer based on its proposed use of a component manufactured by protester, where protester refused to formally agree before award that it would make the component available, but the record, including a fact-finding conference, establishes that the protester made statements to the agency before award from which the agency reasonably concluded that the protester would make the component available in the event of an award to another firm.

69:89

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

A protest against agency's allegedly improper evaluation of proposals is without merit where review of the evaluation provides no basis to question the reasonableness of the determination that based on the solicitation evaluation formula, the awardee's proposal offered the combination of technical and price most advantageous to the government.

70:88

■ Offers
■■ Evaluation errors
■■■ Allegation substantiation

Protest that agency relaxed certain solicitation requirements for the awardee is denied where record shows that the agency allowed both the protester and the awardee to make certain minor

software and hardware changes to their products and nothing in the solicitation precluded such changes.

70:88

■ **Offers**
■■ **Evaluation errors**
■■■ **Allegation substantiation**

Protest that contracting agency will waste $50,000 in unnecessary travel costs is denied where travel costs were not an evaluation factor for award.

70:214

■ **Offers**
■■ **Evaluation errors**
■■■ **Allegation substantiation**

Protest is sustained where cost/technical tradeoff is based on flawed technical evaluation.

70:268

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Agency's evaluation of awardee's technical proposal is unreasonable where the awardee's proposed staff does not meet specific, material experience requirements set forth in a request for proposals and experience is the most important technical evaluation factor.

66:289

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Where solicitation for construction and lease of off-post military family housing requires that offerors submit evidence of site ownership or access to site ownership through held options, contracting agency improperly relaxed its requirements by accepting from an offeror a "letter of intent" to acquire property in the future as evidence of legal access to real property.

66:302

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Where technical proposals submitted by the protester and incumbent contractor were considered to be substantially equivalent, contracting agency improperly made award to incumbent contractor

having the higher evaluated price based on consideration of price-related factors not set out in solicitation where resulting price advantage to incumbent derived from prior improper contract award.

68:34

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Where technical evaluation scheme in request for proposals sets forth prior experience and performance under prior contracts as an evaluation factor and awardee referenced in its proposal its performance under a major, ongoing contract with the contracting agency, reevaluation of proposals—undertaken after prior protest against award was sustained—was unreasonable where the agency ignored the problems encountered by the awardee in performing the contract since issuance of the prior decision sustaining the protest.

68:577

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Protest is sustained where agency evaluation gave greater weight to technical factors than was reasonably consistent with the solicitation evaluation criteria by using a scoring formula which accorded only 10 percent to price, and 90 percent to technical, which resulted in award to a firm whose price was 67 percent higher than the protester's but whose technical score was only 9 percent higher than the protester's.

69:66

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Protest that agency abandoned evaluation criteria in solicitation and that contracting officer lacked a reasonable basis for selection decision is sustained where performance testing of protester's prototype equipment contributed significantly to selection decision under evaluation scheme, and such testing was conducted using test equipment that did not comply with the specification requirement; where the faulty operation of the test equipment was clearly related to operation of the prototype equipment; and where valid tests were never completed.

69:562

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Agency did not waive specification requirements regarding seat adjustments in making an award for a centrifuge trainer.

69:648

■ **Offers**
■■ **Evaluation errors**
■■■ **Evaluation criteria**
■■■■ **Application**

Where solicitation provided for evaluation of "any other costs to the government attributable to the offeror's proposal," agency was required to take into account in its evaluation of price the relative cost to the government of providing fuel for contractor-furnished aircraft.

69:741

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

Although contracting agency improperly considered an incumbent contractor's possession of a source code for a computer-aided drawing system to be an important factor in evaluating corporate resources, because the agency envisioned no revisions to the system and instructed offerors not to propose revisions, the error did not materially affect the agency's selection and the protester was not prejudiced by the impropriety; a protest on this basis is therefore without merit.

66:405

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

An agency which relaxes a material solicitation requirement at one offeror's request is required to issue a written amendment to all offers. However, even where the protester is not apprised of the material change, its protest is denied, where cost is the award determinative factor and the potential cost impact on the protester's proposal is $90,000 and the awardee's cost is $262,000 less than the protester's cost.

67:33

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

Contracting agency's failure to inform protester of deficiencies in its technical proposal, which was included in the competitive range, deprived the protester of the opportunity to participate in meaningful discussions. Protester, however, was not prejudiced since its cost proposal was so much higher

than the awardee's cost proposal that, even if protester had raised its technical proposal to the level of the awardee's, the protester would not have been awarded the contract.

67:45

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

A showing of prejudice is an essential element of a viable protest. Where rescoring of proposals is undertaken because original evaluation used weights inconsistent with those in the solicitation, and rescoring using proper weighting shows that selected firm is still clearly the highest rated, protester is not prejudiced.

68:684

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

Even though evaluation of transportation costs on f.o.b. origin supply solicitation appears unreasonable, protest against the evaluation is denied, where the protester would not be in line for award, even assuming the application of its own transportation calculations.

69:364

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

Protest that contracting agency inequitably subjected the protester to an arduous pre-award survey, while ordering only a short-form survey for the awardee, is denied where the record shows that the contracting agency ordered short-form surveys for both the offerors, and the protester, who was second low priced on a request for proposals awarded to the low acceptable offeror, was not prejudiced as a result of the survey since the protester was not in line for award in any case.

70:256

■ **Offers**
■■ **Evaluation errors**
■■■ **Non-prejudicial allegation**

Where the agency reasonably concluded that labor costs would escalate during the option periods of a cost reimbursement contract, the procuring agency reasonably sought to normalize the offers of the awardee and the protester where the protester did not offer labor escalation, and the awardee did. It was not reasonable, however, for the agency to remove the labor escalation costs from the awardee's proposal to normalize the two firms' proposals, but rather these costs should have been added to the protester's lower labor cost proposal.

70:279

■ **Offers**
■■ **Evaluation errors**
■■■ **Personnel experience**
■■■■ **Point ratings**

Agency's evaluation of awardee's technical proposal is unreasonable where the awardee's proposed staff does not meet specific, material experience requirements set forth in a request for proposals and experience is the most important technical evaluation factor.

66:289

■ **Offers**
■■ **Evaluation errors**
■■■ **Personnel experience**
■■■■ **Point ratings**

Agency's use of a rating plan that resulted in the assignment of zero points for a labor category in the evaluation of protester's best and final offer, on the ground that 3 of 11 resumes submitted for the category were unacceptable, was an improper material departure from the evaluation plan set forth in the solicitation; the plan stated there, and used by the agency in evaluating initial proposals provided for a composite score based on the scores of all resumes submitted, regardless of whether any particular resume was found unacceptable.

69:472

■ **Offers**
■■ **Evaluation errors**
■■■ **Prices**

Protest is sustained where agency failed to discover and call to offeror's attention an obvious proposal pricing error which should have been reasonably detected and which materially prejudiced the offeror.

67:156

■ **Offers**
■■ **Evaluation errors**
■■■ **Prices**

Agency's three requests for price verification of low offer, after submission of initial offers and before submission of best and final offers, were not improper, coercive, or misleading when circumstances reasonably lead the agency to question whether the offeror may have made a mistake in its offer in view of the previous prices paid for the item and the low offeror's inexperience in producing the item.

69:669

■ **Offers**

■■ **Personnel experience**

■■■ **Contractor misrepresentation**

Protest is sustained in part where awardee failed to disclose material changes in the availability of its proposed key personnel which occurred between the submission of initial and best and final offers.

68:300

■ **Offers**

■■ **Post-award error allegation**

Where a mistake in an offer other than the awardee's offer is first alleged after award, the unsuccessful offeror must bear the consequences of its mistake where the contracting officer had neither actual nor constructive notice of an error before award to another offeror.

68:358

■ **Offers**

■■ **Preparation costs**

Protester is entitled to recover proposal preparation costs and costs of filing and pursuing the protest where contracting agency improperly induced protester to incur the cost of competing by failing to disclose a significant evaluation factor.

66:121

■ **Offers**

■■ **Preparation costs**

Recovery of the protester's quotation preparation costs and its costs of filing and pursuing the protest, including attorney's fees, is allowed where the contracting agency's actions effectively excluded the protester from the procurement, and there was a substantial likelihood that the protester would have received the award.

66:134

■ **Offers**

■■ **Preparation costs**

When solicitation deficiencies prevented offers from being evaluated on an equal basis, but termination and resolicitation of the basic contract is not possible, the procuring activity should not exercise options, but resolicit using a revised solicitation. However, since the protester participated in the competition and did not complain of an allegedly deficient evaluation until after award, it is not entitled to recover either proposal preparation costs or the costs of filing and pursing the protest.

66:243

■ Offers

■■ Preparation costs

Where agency concedes low bidder was responsible and therefore should have been awarded a contract prior to loss of fiscal year funds, bidder is entitled to bid preparation and protest costs if it does not ultimately receive the award.

66:249

■ Offers

■■ Preparation costs

Protester is entitled to recover the cost of filing and pursuing its protest, including reasonable attorney's fees, as well as its proposal preparation costs, where the protester was improperly denied fair and equal opportunity to compete but corrective action is not appropriate under the circumstances.

66:302

■ Offers

■■ Preparation costs

General Accounting Office affirms a prior decision awarding protester costs of filing and pursuing its protest, which successfully challenged the use of competitive negotiations versus sealed bids, since such award is consistent with the broad purpose of CICA to increase and enhance competition on federal procurements.

67:16

■ Offers

■■ Preparation costs

Where protester's refusal to submit sufficient documentation supporting the amount of its claim for proposal preparation costs and the cost of filing and pursuing a protest effectively prevents the contracting agency from determining reasonableness of amount it ultimately will have to pay, General Accounting Office will not review the claim *de novo.*

68:383

■ Offers

■■ Preparation costs

Claimant is entitled to recover proposal preparation costs which are adequately documented and shown to be allocable to the subject procurement.

68:400

■ Offers

■■ Preparation costs

Award of protest costs is affirmed where, upon learning during the course of the protest that awardee misrepresented the availability and number of its key personnel, the agency elected to treat the matters as immaterial instead of taking prompt corrective action.

68:560

■ Offers

■■ Preparation costs

Claim for proposal preparation and protest costs is denied where cancellation of solicitation was proper.

68:589

■ Offers

■■ Preparation costs

Protester is not entitled to be reimbursed costs of preparing proposal and pursuing protest that were awarded by General Accounting Office (GAO) decision, which sustained the protest but did not recommend that the award be disturbed, where the protester subsequently sought to have award overturned in United States District Court and the court denied the protest.

68:655

■ Offers

■■ Preparation costs

Claim for proposal preparation costs is disallowed where claimant was not awarded proposal preparation costs in the protest decision and did not timely request reconsideration of the costs awarded.

69:122

■ Offers

■■ Preparation costs

Protester awarded costs in connection with successful protest is entitled to reimbursement for proposal preparation and protest costs incurred or initially paid by prospective subcontractor, where the costs were incurred by the subcontractor acting in concert with and on behalf of offeror and offeror has agreed to reimburse to subcontractor the amount ultimately recovered from the government.

69:199

■ Offers

■■ Preparation costs

Where agency erroneously relies on past procurement history and issues solicitation on unrestricted basis which results in a protest and subsequent agency determination, shortly before closing date for receipt of proposals, to set procurement aside for small disadvantaged businesses (SDB), claim for proposal preparation costs is denied since there is no evidence of bad faith on the agency's part; mere negligence or lack of due diligence by the agency, standing alone, does not provide a basis for the recovery of proposal preparation costs.

70:343

■ **Offers**
■■ **Preparation costs**

Protester is not entitled to award of the costs of filing and pursuing its protest where agency promptly took corrective action after the protest was filed, responding to 37 specific questions raised by the protester in two amendments totaling 39 pages.

70:709

■ **Offers**
■■ **Price disclosure**
■■■ **Allegation substantiation**
■■■■ **Evidence sufficiency**

Protest that prices may have been disclosed to the protester's competition is denied where the allegation is primarily based on the awardee's reduction of the prices in its best and final offer to levels slightly below protester's initial prices.

69:670

■ **Offers**
■■ **Price reasonableness**
■■■ **Determination**
■■■■ **Administrative discretion**

Protester fails to show that contracting agency should have found unrealistic awardee's price proposal for aircraft maintenance services to the extent that awardee's prices declined over the life of the contract, where awardee's pricing structure was reasonably based on reduction in work hours required as awardee's employees gained experience under the contract.

66:590

■ **Offers**
■■ **Price reasonableness**
■■■ **Determination**
■■■■ **Administrative discretion**

Protest against dissolution of a small business setaside and solicitation on an unrestricted basis is proper where the contracting officer had rational basis for determination that the prices submitted by eligible small businesses were unreasonably high.

69:625

■ **Offers**
■■ **Price reasonableness**
■■■ **Determination**
■■■■ **Administrative discretion**

In considering price reasonableness under a small business set-aside, contracting officer has discretion in deciding which factors to consider and a price submitted by an otherwise ineligible large business properly may be considered.

69:625

■ Offers
■■ Prices
■■■ Rent
■■■■ Government property

In calculating imputed rental evaluation factor to be added to offeror's price to account for rent-free use of government-furnished property, agency reasonably relied upon period of use entered by offeror in evaluation clause, rather than authorized period of use on delivery schedule, where solicitation provided for evaluation based on period entered by offeror and where offeror would be required to pay rent if its use exceeded entered period.

69:379

■ Offers
■■ Revision
■■■ Propriety

An agency is not required to permit an offeror to revise an unacceptable proposal when the revisions required would be of such magnitude as to be tantamount to the submission of a new proposal.

67:213

■ Offers
■■ Risks
■■■ Evaluation
■■■■ Technical acceptability

The element of risk is clearly related to the evaluation of capability and approach, and it is permissible to evaluate risk in a technical evaluation of a proposal for a firm fixed-price contract.

68:49

■ Offers
■■ Risks
■■■ Evaluation
■■■■ Technical acceptability

Award to a higher priced offeror is unobjectionable under a request for proposals that stated that technical considerations were more important than cost and the agency reasonably concluded that the protester's price advantage over the awardee was outweighed by its significantly higher evaluated risk.

70:173

■ Offers
■■ Risks
■■■ Pricing

Protest allegation that solicitation provision, which requires contractor to lodge its employees in a privately operated facility, places undue cost risk on offerors is denied where the solicitation pro-

vides that the contractor's costs of lodging will be reimbursed by the government and any other costs to the contractor are easily calculable.

69:147

■ **Offers**
■■ **Risks**
■■■ **Pricing**

Fact that original equipment manufacturer (OEM), the only source of necessary spare parts, is in position to influence competition by imposing restrictions upon spare parts availability does not render procurement defective where (1) the restrictions appear reasonable and have not been applied to prevent any particular firm from purchasing the parts and (2) the only alternative procurement method would be a sole-source award to the OEM, but record does not support conclusion that OEM is only acceptable source. Ability to obtain parts is matter of firm's ability to develop business relationship with OEM, a matter outside the General Accounting Office's purview.

69:418

■ **Offers**
■■ **Sample evaluation**
■■■ **Testing**
■■■■ **Administrative discretion**

Rejection of proposal as technically unacceptable is unreasonable where agency requests samples only from the proposed awardee and evaluates protester's equipment on the basis of previously purchased item that the protester has specifically indicated has been modified in critical areas. Where samples are necessary for evaluation purposes, the procuring activity should request them from each offeror in the competitive range.

66:377

■ **Offers**
■■ **Subcontracts**
■■■ **Use**
■■■■ **Propriety**

Protest that awardee lacks manufacturing capability and intends to rely substantially on subcontractors is denied where the solicitation places no limit on subcontractors and does not otherwise restrict the government's authority to accept a proposal based on substantial subcontracting.

66:309

■ **Offers**
■■ **Subcontracts**
■■■ **Use**
■■■■ **Propriety**

Award to a firm that proposed to subcontract 39 percent of the work under the service contract to a large business was consistent with solicitation provisions limiting subcontracting on this small business set-aside.

70:214

■ **Offers**
■■ **Submission time periods**
■■■ **Time restrictions**
■■■■ **Propriety**

A protest that the contracting agency unduly restricted competition by allowing only 61 days for submission of proposals is without merit when (1) the period exceeds the statutorily mandated minimum time of 30 days; (2) 6 offerors submitted samples which passed the initial inspection for conformance to essential physical requirements, and (3) the agency conducted the procurement to obtain a non-developmental item.

66:308

■ **Offers**
■■ **Submission time periods**
■■■ **Time restrictions**
■■■■ **Propriety**

Where the protester effectively was permitted 2 hours to submit an offer due to the agency's unjustified failure to provide reasonable time to solicit offers, the protester was improperly deprived of an opportunity to compete.

69:427

■ **Offers**
■■ **Submissions methods**
■■■ **Minor deviations**

Where a request for proposals requires offerors to submit copies of their proposal to two separate locations in Africa by the stipulated closing date, and an offeror timely delivers copies of its proposal to only one of those locations, the proposal should not be rejected as late since its acceptance, if otherwise appropriate, would result in a binding contract and would not unfairly prejudice other offerors.

66:460

■ **Offers**
■■ **Technical acceptability**
■■■ **Computer software**
■■■■ **Modification**

Proposal to create a new anti-AIDS drug information system (DIS) by using software enhancements to modify existing anticancer drug DIS and integrate the two systems complies with solicitation which contemplated modifications to existing DIS necessary to accommodate new anti-AIDS drug program.

68:137

■ **Offers**
■■ **Technical acceptability**
■■■ **Deficiency**
■■■■ **Blanket offers of compliance**

Where initial technical proposal makes a blanket offer to provide products that conform to the requirements of the request for proposals, but also takes specific exceptions to the solicitation specifications, the contracting agency's rejection of such proposal without discussions and award of the contract based on the lowest priced, technically acceptable offer is not unreasonable or in violation of federal procurement principles if the solicitation explicitly provided that award might be made on the basis of initial proposals.

68:280

■ **Offers**
■■ **Technical acceptability**
■■■ **Negative determination**
■■■■ **Propriety**

Agency evaluation of technical proposals lacks a reasonable basis where, without explanation or discussions, an agency rejects as technically unacceptable a proposal for equipment described as equal to that on which the agency's acquisition plan and specifications are based.

66:377

■ **Offers**
■■ **Technical acceptability**
■■■ **Negative determination**
■■■■ **Propriety**

Where in its proposal and accompanying catalog, a protester fails affirmatively to demonstrate compliance with critical specification requirements, and the catalog in fact suggests non-compliance, agency's rejection of the proposal without discussions or a request for samples is reasonable.

66:377

■ **Offers**
■■ **Withdrawal**

Where low offer expires and offeror, having sold its business interests through which it could provide the solicitation requirements, purports to withdraw its offer, the contracting agency's acceptance of the offeror's "withdrawal" of its offer is not improper or unreasonable where prior to the expiration of the offer or the agency's acceptance of the "withdrawal" of the offer, the buyer of the business did not assert any possessory interests in the offer and the agency, otherwise, has no basis to conclude that the buyer is a successor in interest.

68:481

■ Partial contract awards

■■ Propriety

Protest against parallel contracting (*i.e.,* division of award between two low offerors) is sustained where contracting agency fails to demonstrate reasonable basis for its choice of this method of award.

66:680

■ Price reasonableness

The General Accounting Office will not question an agency determination concerning the reasonableness of an offeror's price for bayonet systems, which involves the exercise of business judgment by the contracting officer, unless it is unreasonable or there is a showing of bad faith or fraud. Protester's statement that it could offer an equivalent system for 20 percent less does not establish the unreasonableness of the determination where the awardee's system received a substantially higher technical rating than the protester's system; all of the systems receiving a higher technical rating were substantially higher-priced than the protester's system; and the agency's detailed price/cost analysis indicates that the contract price was reasonable.

66:308

■ Price reasonableness

Protester fails to show that contracting agency should have found unrealistic awardee's price proposal for aircraft maintenance services to the extent that awardee's prices declined over the life of the contract, where awardee's pricing structure was reasonably based on reduction in work hours required as awardee's employees gained experience under the contract.

66:590

■ Requests for proposals

■■ Advertising

Procurement for transient aircraft services was properly synopsized under maintenance and repair category of *Commerce Business Daily,* even though requirement also covers certain work that could be synopsized under housekeeping services, where solicitation clearly includes significant proportion of maintenance and repair work and, although other activities previously have synopsized similar procurements under housekeeping, prior procurement by this activity was synopsized as maintenance and repair work.

70:187

■ Requests for proposals

■■ Amendments

■■■ Criteria

Information disseminated during the course of a procurement that is in writing, signed by the contracting officer, and sent to all offerors, meets all of the "essential elements" of a solicitation amendment and will therefore bind both the offerors and the agency.

68:102

■ **Requests for proposals**
■■ **Amendments**
■■■ **Notification**
■■■■ **Contractors**

Although an agency in a negotiated procurement was not necessarily required to reject a proposal which offered an approach deemed to be superior to that originally conceived by the agency, but which was technically nonconforming to the literal requirements of the solicitation, the agency, upon its determination that alternative means existed to satisfy its acquisition needs, should have issued a written solicitation amendment to that effect or taken other steps to advise all competitive range offerors that its requirements were significantly changed from those stated in the solicitation.

66:272

■ **Requests for proposals**
■■ **Amendments**
■■■ **Notification**
■■■■ **Contractors**

Protest that contracting agency improperly failed to provide the protester with a copy of an amendment that removed a protested certification requirement from the solicitation is denied since the protester was no longer in the competitive range when the amendment was issued.

69:532

■ **Requests for proposals**
■■ **Amendments**
■■■ **Notification**
■■■■ **Contractors**

Protester's nonreceipt of an amendment requesting a new round of best and final offers provides no legal basis to challenge the validity of the award where the record does not indicate that agency deliberately attempted to exclude offeror from the competition or otherwise violated applicable regulations governing the distribution of amendments.

70:323

■ **Requests for proposals**
■■ **Amendments**
■■■ **Propriety**

Protest challenging agency's decision after receipt of initial proposals to issue amendment to request for proposals (RFP) increasing the number of items to be procured, instead of issuing separate solicitation for the additional number required, is denied since a significant change in the government's requirements is a proper basis for amending an RFP after receipt of proposals.

69:152

■ **Requests for proposals**
■■ **Amendments**
■■■ **Submission time periods**
■■■■ **Adequacy**

Protest that offeror had insufficient time to prepare revised proposal because of its late receipt of amendments is denied where the protester had the last-issued amendment 5 working days prior to the closing date; 5 days appears to be a reasonable time period to address the particular changes made by the amendments; adequate competition was achieved through the receipt of eight proposals; and there is no showing that the agency deliberately attempted to exclude protester.

70:424

■ **Requests for proposals**
■■ **Amendments**
■■■ **Submission time periods**
■■■■ **Effects**

Language in a letter from the agency and in an amendment to a solicitation giving notice to all offerors of common cutoff date for receipt of offers has the intent and effect of a request for best and final offers where all offerors submitted revisions to their proposals and no offerors were prejudiced.

67:315

■ **Requests for proposals**
■■ **Cancellation**
■■■ **Justification**
■■■■ **Competition enhancement**

An agency may cancel a negotiated procurement based on the potential for increased competition or cost savings.

68:589

■ **Requests for proposals**
■■ **Cancellation**
■■■ **Justification**
■■■■ **GAO review**

Protest that agency does not have a reasonable basis to cancel request for proposals set aside for small businesses is sustained where basis for cancellation is that protester, the only offeror remaining in the competitive range, submitted unreasonably high proposed costs, but agency improperly failed to conduct meaningful discussions with protester relating to its proposed costs.

70:545

■ Requests for proposals
■■ Cancellation
■■■ Resolicitation
■■■■ Information disclosure

Recompetition of procurement is not required despite evidence that agency official, following evaluation of initial proposals, may have disclosed confidential source selection information to one firm participating in procurement, where there is no evidence of misconduct affecting the evaluation, and record indicates that competitive range determination and other source selection decisions were based entirely on appropriate considerations.

68:117

■ Requests for proposals
■■ Cancellation
■■■ Resolicitation
■■■■ Propriety

Protest that agency lacks reasonable basis to cancel a request for proposals (RFP) and resolicit requirements of a brand name or equal procurement is denied where record shows that protester is not prejudiced by agency action.

66:383

■ Requests for proposals
■■ Cancellation
■■■ Resolicitation
■■■■ Propriety

Agency's failure to provide incumbent contractor required 30 days advance notice of solicitation for successor contract, to allow incumbent time to negotiate updated collective bargaining agreement to be incorporated in new solicitation, did not by itself warrant resolicitation to incorporate updated agreement where the agreement first was submitted to the contracting officer almost 2 months after bid opening.

69:549

■ Requests for proposals
■■ Cancellation
■■■ Resolicitation
■■■■ Propriety

An agency had a reasonable basis to cancel and resolicit a request for proposals (RFP), under which award was to be made to the low priced acceptable offeror, after the receipt of proposals and disclosure of prices, where the major required item was solicited in the RFP on a "brand name" rather than on a "brand name or equal" basis and an acceptable equal item was proposed, because the RFP overstated the agency's requirements, which caused a reasonable possibility of prejudice to the competitive system since actual and potential offerors did not have the opportunity to compete on the government's actual requirements.

70:345

■ **Requests for proposals**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Procuring agency which misclassifies advertisement in the *Commerce Business Daily* (CBD) has failed to effectively notify firms most likely to respond to a pending procurement and, therefore, violated the Competition in Contracting Act of 1984 (CICA) requirements to obtain full and open competition.

67:77

■ **Requests for proposals**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Protest that agency deprived incumbent contractor of opportunity to bid because agency did not provide it with a copy of the solicitation is denied where record shows that although agency improperly failed to solicit the incumbent, otherwise reasonable efforts were made to publicize and distribute the solicitation and three proposals were received.

67:240

■ **Requests for proposals**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Protest by incumbent contractor challenging its exclusion from a limited competition for an interim contract for waste collection and disposal services is sustained where contracting agency failed to obtain maximum practicable competition by not inviting protester to respond to solicitation on the basis that the solicitation required submission of supporting cost data with proposals and protester had been unwilling to provide such data when offered an extension to its then-current contract to cover these services. The agency's exclusion of the contractor on this basis is unreasonable since such data would not have been required if adequate price competition were achieved.

70:4

■ **Requests for proposals**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Protest that agency deprived protester of an opportunity to compete because it failed to furnish it a copy of the solicitation is dismissed as untimely where procurement was properly synopsized in the *Commerce Business Daily,* and the protester did not file protest within 10 working days of the closing date specified in the synopsis.

70:187

■ **Requests for proposals**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Protest that offeror had insufficient time to prepare revised proposal because of its late receipt of amendments is denied where the protester had the last-issued amendment 5 working days prior to the closing date; 5 days appears to be a reasonable time period to address the particular changes made by the amendments; adequate competition was achieved through the receipt of eight proposals; and there is no showing that the agency deliberately attempted to exclude protester.

70:424

■ **Requests for proposals**
■■ **Competitive restrictions**
■■■ **Justification**
■■■■ **Statutory interpretation**

Protest that agency improperly restricted procurement for launch vehicle services to domestic sources is denied where the agency reasonably interpreted statute to give it the authority to include such a restriction.

68:646

■ **Requests for proposals**
■■ **Cost evaluation**
■■■ **Evaluation criteria**
■■■■ **Applicability**

General Accounting Office will review an agency's evaluation of the probable cost of a proposed lease to ensure that it has a reasonable basis and is consistent with stated evaluation criteria. While protester questions just about every aspect of agency's cost evaluation, including the cost of moving, utilities and parking, there is nothing in the record which shows that the evaluation did not have a reasonable basis or was inconsistent with the solicitation's evaluation criteria.

69:515

■ **Requests for proposals**
■■ **Cost proposals**
■■■ **Submission methods**

A solicitation provision requiring a cost proposal to be submitted on a computer disk is not unduly restrictive of competition where experience has shown that the requirement reduces the time and errors in evaluating cost proposals containing numerous bid items, and complying with the requirement involves a minimal amount of expense and effort.

68:443

made on the basis, but instead provides that award will be made to the offeror whose proposal is most advantageous to the government, price and other factors considered.

66:333

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Cost/technical tradeoffs**
■■■■ **Weighting**

Where the request for proposals (RFP) indicates that technical/performance, cost, and production capability will be considered in the evaluation of proposals, without any indication of each factor's relative weight, each factor is assumed to be accorded substantially equal weight in the evaluation; protest of the evaluation is sustained where the agency considered the technical/performance factor to be significantly more important than the other factors set forth in the RFP.

67:59

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Cost/technical tradeoffs**
■■■■ **Weighting**

A protest that the contracting agency did not properly evaluate technical proposals according to the solicitation's stated evaluation scheme is denied, where the record shows that the evaluators conducted a detailed evaluation of proposals in each of the technical evaluation factors listed in the request for proposals (RFP) and each factor was weighted to give it the appropriate degree of importance accorded it in the RFP.

67:600

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Cost/technical tradeoffs**
■■■■ **Weighting**

Consideration of quality as an aspect of an evaluation of proposals is not required by the 1987 National Defense Authorization Act and its implementing regulation; statutory and regulatory language and legislative history indicate that use of quality as a technical evaluation criterion is permissive, not mandatory.

69:59

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Level-of-effort contracts**

Protest is sustained where, in violation of solicitation provision, agency failed to upwardly adjust awardee's estimated labor rates in cost realism analysis even though contracting officials expressed concern that the labor rates included deflated hourly rates, *i.e.,* rates based on an individual working more than 2,080 hours per year.

67:516

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Multiple/aggregate awards**
■■■■ **Best-buy analysis**

Agency decision to procure airfield paint and rubber removal and restriping services under one contract is not objectionable where agency reasonably anticipates that combining these services under one contract will reduce scheduling difficulties that significantly delayed performance and increased costs in prior procurements where the services were procured under separate contracts.

69:511

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Prior contracts**
■■■■ **Contract performance**

Contracting agency in evaluating proposals may consider evidence obtained from sources outside the proposals so long as the use of extrinsic evidence is consistent with established procurement practice. Thus, where the solicitation constrains "references" as an evaluation criterion, the contracting agency may consider the unsatisfactory past performance of an offeror under a recent contract with the agency and, in effect, furnish its own reference in evaluating the offeror's proposal.

66:699

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Subcriteria**
■■■■ **Disclosure**

Where an offeror's experience in a particular agency program is the single most important evaluation subfactor and is worth more than five of the six general evaluation factors, contracting agency should have disclosed the subfactor in the request for proposals (RFP), even though the subfactor was reasonably related to the general experience evaluation factor listed in the RFP.

66:121

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Subcriteria**
■■■■ **Disclosure**

Protest challenging technical evaluation of proposal on ground that evaluation panel improperly relied on undisclosed evaluation factor is dismissed as academic where, after protest was filed, contracting agency reevaluated proposal based solely on the evaluation factors set out in the solicitation. Challenge to reevaluation is denied since there is no indication that it was based on undisclosed evaluation factor protester alleged was used by initial evaluation panel. Use of same evaluation panel to conduct both evaluations is not sufficient to call into question the validity of the re-

evaluation where there is no evidence of bias, bad faith or other improper conduct on the part of the evaluators.

67:84

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Subcriteria**
■■■■ **Disclosure**

An agency is not required to specify evaluation subfactors in a request for proposals (RFP) where those subfactors are reasonably related to or encompassed by the stated evaluation criteria, and offerors were on notice of the importance of the subfactors from the RFP itself.

67:315

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Subcriteria**
■■■■ **Disclosure**

Contention that protester could have proposed items with improved overall performance had it been advised of new, higher optical density standard is without merit where (1) protester should have been on notice of new optical density standard from incorporation by reference in solicitation, and (2) solicitation provided for evaluation based on items previously submitted that were furnished under prior, lower standard, and did not contemplate modifications to the technology of those items; thus, even had protester been aware of higher standard, evaluation still would have been based on items furnished under the prior, lower standard.

68:177

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Sufficiency**

The disclosure of precise numerical weights in an evaluation scheme is not required where the solicitation clearly advises offerors of the broad scheme to be employed and gives reasonably definite information concerning the relative importance of the evaluation factors in relation to each other.

67:314

■ **Requests for proposals**
■■ **Evaluation criteria**
■■■ **Sufficiency**

Where evaluation factors are clearly set forth and their relative importance is specified, solicitation is consistent with applicable regulations requiring adequate specificity in evaluation scheme.

68:444

■ Requests for proposals
■■ Government estimates
■■■ Wage rates

Protest challenging as too low the wage rates (of employee classes not covered by wage rate determination) used in government's cost estimate and, thus, the propriety of the cost realism analysis based on that estimate, is without merit where record indicates that, although protester utilized higher skilled employees in its proposal than agency utilized in developing estimate, agency's use of lower skilled employees in estimate was not inconsistent with solicitation requirements.

67:581

■ Requests for proposals
■■ Terms
■■■ Ambiguity allegation
■■■■ Interpretation

Where there is a dispute between the protester and the agency as to the meaning of provisions of a solicitation, GAO will resolve the matter by reading the solicitation as a whole and in a manner that gives effect to all provisions of the solicitation.

68:563

■ Requests for proposals
■■ Terms
■■■ Compliance

Protester's status as large corporation which has the capability to satisfy mandatory solicitation requirements does not establish that it will satisfy those requirements where its proposal indicates otherwise. Compliance with solicitation specifications must be determined on the basis of an offeror's proposal, not on the basis of the offeror's alleged intentions, corporate capability, or reputation.

68:708

■ Requests for proposals
■■ Terms
■■■ Compliance

Award to offeror whose proposal in negotiated procurement failed to conform to material specification requirement concerning computer workstation was improper where waiver of requirement resulted in competitive prejudice.

69:214

■ Requests for proposals
■■ Terms
■■■ Compliance

Protest that awardee did not meet solicitation requirement that all houses should be built facing south is denied where protester has not shown that solicitation requirement that houses be oriented

within 20 degrees of south, such that a major section of the roof faces within 20 degrees of south, could reasonably be read as requiring that the front of each house must face south.

69:229

■ **Requests for proposals**
■■ **Terms**
■■■ **Compliance**

Protest that awardee did not meet solicitation requirement that a major section of house roof face within 20 degrees of south is denied where agency reasonably found that awardee's proposal substantially complied with the requirement and the protester was not prejudiced by the agency's acceptance of the proposal.

69:229

■ **Requests for proposals**
■■ **Terms**
■■■ **Compliance**

Protest against award of a small business set-aside contract on the basis of initial proposals is sustained where awardee's proposal was unacceptable as submitted because the proposal failed to include required resumes and took exception to the mandatory requirement of the RFP to expend, on a small business set-aside solicitation for services, at least 50 percent of the cost of personnel for the successful contractor's own employees.

69:500

■ **Requests for proposals**
■■ **Terms**
■■■ **Compliance**

Protest alleging that agency improperly made award to firm whose product does not conform to specifications is sustained where record shows that agency in fact relaxed material requirements of specification for awardee and such action was prejudicial to the other competitive range offerors.

69:627

■ **Requests for proposals**
■■ **Terms**
■■■ **Compliance**

Agency improperly awarded contract on basis of proposal which indicated that the offeror would not comply with a jewel-bearing clause contained in the solicitation, which was a material contract requirement.

70:490

■ **Requests for proposals**
■■ **Terms**
■■■ **Intellectual property**
■■■■ **Incumbent contractors**

Request for proposals which states requirements in basic terms and does not reveal previously undisclosed details of incumbent's career planning program does not infringe incumbent's proprietary rights.

66:563

■ **Requests for proposals**
■■ **Terms**
■■■ **Interpretation**

Protester's interpretation of a clause in a solicitation for dental services as allowing substitution of dentists initially proposed by the protester with dentists proposed by other offerors is reasonable where the solicitation does not specifically prohibit such practice.

68:172

■ **Requests for proposals**
■■ **Terms**
■■■ **Liquidated damages**
■■■■ **Propriety**

Provision in a solicitation for operation of a distribution center which authorizes deduction for entire task because of unsatisfactory performance of any one element of the task is unobjectionable, where the task is not divisible by separate elements for purposes of determining an acceptable quality level because partial satisfactory performance will be of little or no value to the agency.

68:533

■ **Requests for proposals**
■■ **Terms**
■■■ **Service contracts**
■■■■ **Applicability**

Contracting officer properly determined—consistent with the view of the Department of Labor, the agency charged with implementing the Walsh-Healey Act—that the Walsh-Healey Act does not apply to contract for rental of personal property since such a contract does not involve "furnishing" equipment within the meaning of the act. 19 Comp. Gen. 486 (1939), affirmed.

69:238

■ **Requests for proposals**
■■ **Terms**
■■■ **Service contracts**
■■■■ **Applicability**

Protest is sustained where the procuring agency unreasonably disregarded the Department of Labor's determination that the Service Contract Act was applicable to the agency's procurement and in proceeding to receive proposals in the face of Labor's determination.

70:35

■ **Requests for proposals**
■■ **Terms**
■■■ **Subcontracts**
■■■■ **Small businesses**

Agency properly included provision in request for proposals (RFP) requiring that the company awarded a supply contract under a small business set-aside perform at least 50 percent of the cost of manufacturing the supplies called for by RFP since provision implements the requirements of the Small Business Act.

69:267

■ **Requests for proposals**
■■ **Terms**
■■■ **Time/materials contracts**
■■■■ **Costs**

Under request for proposals for time and materials contract which specifically advises offerors not to propose any direct costs other than material and travel, and provides for payment for services based on fixed-labor rates, government is obligated to reimburse the successful offeror for expenses incurred in relocating its employees only to the extent that such costs are included in its labor rates.

68:311

■ **Requests for proposals**
■■ **Terms**
■■■ **Time/materials contracts**
■■■■ **Costs**

Request for proposals (RFP), which estimates that 97 percent of work will be performed at the government site and 3 percent off-site, does not, contrary to protester's argument, permit an offeror to manipulate its level of effort so as to create an unrealistically low offer since the RFP requests only 1 hourly rate per labor category, which means that the successful offeror will be reimbursed at the same rate regardless of whether the work is performed at the government site or off-site.

68:311

■ **Requests for quotations**
■■ **Cancellation**
■■■ **Justification**
■■■■ **Minimum needs standards**

Protest challenging proposed cancellation of request for quotations (RFQ) for systems furniture issued under requote procedures set out in the Federal Supply Schedule (FSS) on the grounds that RFQ is ambiguous with regard to inclusion of a panel-sharing discount and that RFQ does not call for component pricing necessary to calculate panel-sharing discount is sustained where (1) the only reasonable interpretation of the RFQ is that, consistent with the terms of the FSS, panel-sharing is not to be factored into vendors' price calculations; and (2) component pricing is an expected part of contract administration under the FSS requote procedures, and, in any event, vendor who is in line for award under the RFQ submitted the detailed component pricing which the agency seeks.

70:287

■ **Source selection boards**
■■ **Offers**
■■■ **Evaluation**
■■■■ **Propriety**

Source selection officials are not bound by the technical evaluators' scores and may reevaluate proposals subject to the test of rationality and consistency with the solicitation's stated evaluation criteria.

68:137

■ **Suspended/debarred contractors**
■■ **Contract awards**
■■■ **Eligibility**

Offeror suspended from government contracting at time initial proposals are due is not foreclosed from consideration for award if suspension is lifted before award is made. Once the suspension is lifted, contracting agency has discretion to decide whether to consider offeror's proposal and may do so without making written finding called for by Department of Defense Federal Acquisition Regulation Supplement that compelling reason exists for considering proposal, since requirement for written finding applies only while suspension is in effect, not after it is lifted.

66:589

■ **Suspended/debarred contractors**
■■ **Offers**
■■■ **Rejection**
■■■■ **Propriety**

General Accounting Office denies protest challenging propriety of proposed award to offeror whose proposal relied on a subcontractor suspended from federal government contracting after evaluation of best and final offers, but who was reinstated before award; agency was not precluded by regula-

tion from further consideration of the offeror's proposal once the intended subcontractor was suspended, and award is proper where suspension is not in effect at time of award.

68:616

■ **Technical evaluation boards**
■■ **Bias allegation**
■■■ **Allegation substantiation**

The General Accounting Office will not attribute bias in the evaluation of proposals on the basis of inference or supposition such as protester's questioning of the ethnic composition of evaluation officials.

68:684

■ **Technical evaluation boards**
■■ **Bias allegation**
■■■ **Allegation substantiation**
■■■■ **Evidence sufficiency**

Protester fails to show that procurement was improperly influenced in favor of awardee due to alleged conflict of interest on part of contracting agency officials where protester does not show what role officials played in the procurement; alleged conflict of interest is limited to membership in awardee, a professional organization; and there is no evidence that evaluation was influenced in any way by favoritism toward awardee.

66:170

■ **Technical evaluation boards**
■■ **Conflicts of interest**
■■■ **Corrective actions**

Contracting agency's action in convening a second technical evaluation panel was reasonable where the agency considered the chairperson of the first panel to have a potential appearance of conflict of interest because of the individual's prior working relationship with the chief executive officer of the protester.

69:6

■ **Technical transfusion/leveling**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Allegation that agency engaged in technical leveling and transfusion by issuing an amendment which required the protester's approach in one technical area and improperly discussed protester's proposed solution with an offeror in another area is denied where record shows that all offerors included in their proposal the same technical approach proposed by the protester and where there is no evidence that discussions were held in order to raise other proposals to protester's level.

66:35

■ **Technical transfusion/leveling**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

No technical transfusion occurred during discussions where the agency did not discuss the technical management approach of respective offerors.

67:32

■ **Technical transfusion/leveling**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Agency did not engage in improper technical transfusion by permitting competitor of protester to conduct a site visit to a government-owned facility at which protester was incumbent.

70:115

■ **Unbalanced offers**
■■ **Materiality**
■■■ **Determination**
■■■■ **Criteria**

Even though an offer may be mathematically unbalanced, it is not materially unbalanced where there is no doubt it will result in the lowest cost to the government.

67:39

■ **Unbalanced offers**
■■ **Materiality**
■■■ **Determination**
■■■■ **Criteria**

Awardee's offer for base and option quantities is not materially unbalanced where the protester fails to show that the option quantities evaluated were not reasonably expected to be exercised and that award to the firm will not result in the lowest ultimate cost to the government.

68:287

■ **Unbalanced offers**
■■ **Materiality**
■■■ **Determination**
■■■■ **Criteria**

Awardee's offer of base and option quantities is not subject to rejection as materially unbalanced where there is no showing that the offer is unbalanced or that the award will not result in lowest ultimate cost to government.

69:380

■ **Unbalanced offers**
■■ **Rejection**
■■■ **Propriety**

The apparent low offer under a request for proposals for washer and dryer rental for a 1-year base period and two 1-year options is mathematically unbalanced where there is a price differential of 685 percent between the base year and the second option year and the requirement is essentially the same for all 3 years. Such an offer is properly rejected as materially unbalanced where the agency has a reasonable doubt that acceptance of the offer, which would not become low until the final option year, would ultimately result in the lowest overall cost to the government.

68:277

■ **Use**
■■ **Criteria**

Allegation that agency should not have conducted a competitive procurement for its interim requirements but rather should have extended protester's current contract pending the resolution of its protest will not be reviewed since agency's actions are consistent with statutory requirements to obtain full and open competition.

66:120

■ **Use**
■■ **Criteria**

Agency decision to use negotiation procedures, in lieu of sealed bidding procedures to acquire mess attendant services, is justified where the contracting officer determines that discussions are necessary to ensure that offerors fully understand the services and the staffing required to adequately perform the contract.

66:179

■ **Use**
■■ **Criteria**

Protest against agency's use of negotiation procedures rather than sealed bidding is denied where agency reasonably decided to make parallel awards to the two low offerors and, as a result, award would not be based on lowest price, as is required where sealed bids are used.

66:680

■ **Use**
■■ **Criteria**

General Accounting Office affirms prior decision in which it reviewed, and sustained, a challenge to a contracting agency's decision to solicit competitive proposals instead of sealed bids. The Competition in Contracting Act of 1984 (CICA) did not leave to the complete discretion of the contracting officer which competitive procedure to use, but provides in determining which procedure is appropriate under the circumstances that sealed bids "shall" be solicited where four criteria are met, all of which were present here.

67:16

■ Use
■■ Criteria

Use of negotiated rather than sealed bid procedures in procuring maintenance services is unobjectionable where consolidation of numerous, diverse services into one contract created a complex procurement that agency determined necessitated discussions to determine offerors' management and administrative capabilities, as well as their technical understanding of the work.

68:444

Contract Disputes

■ Appeals
■■ Interest

The Forest Service is not required to discontinue the assessment of interest, late payment penalties, or administrative costs pursuant to the Federal Claims Collection Act, as amended, 31 U.S.C. § 3717, during the pendency of an appeal under the Contract Disputes Act.

70:517

■ Shipment schedules
■■ Prior contracts
■■■ Adverse effects
■■■■ GAO review

GAO will not consider objections regarding solicitation requirements which protester was obligated to meet by virtue of a prior contract for virtually identical products since protester is required to resolve all claims arising under that contract pursuant to the disputes clause of the contract. GAO consideration of objections would permit protester to circumvent claim resolving process of protester's prior contract since a favorable decision by GAO could be used as a basis to challenge the prior contract.

66:85

■ Sureties
■■ Liability
■■■ Amount determination

Corporate sureties are liable, up to the penal sum of their bond, for the interest, late payment penalties, and administrative costs assessed against the contractor on whose behalf the surety provides its bond, plus any such assessments made against the surety for its own failure to pay in a timely fashion, even if the latter assessments exceed the penal sum of the bond.

70:517

Contract Formation Principles
■ Contract awards
■■ Offers
■■■ Acceptance

Allegation that a valid contract exists between the protester and the contracting agency is without merit where the agency made award contingent upon the inclusion of the protester's safety proposal into the resulting contract, and the protester refused to agree to this new contingency.

67:563

Contract Management
■ Contract administration
■■ Contract terms
■■■ Compliance
■■■■ GAO review

Requirement that halfway house comply with all applicable zoning ordinances, laws and codes is a condition of performance that an awardee must meet. Whether it does so is a matter of contract administration, not for resolution in a bid protest.

66:333

■ Contract administration
■■ Contract terms
■■■ Compliance
■■■■ GAO review

Protest that proposed awardee will not be able to satisfy solicitation clauses concerning preaward survey, preproduction milestones, and production capacity is dismissed since the clauses are not definitive responsibility criteria, *i.e.*, specific, objective standards measuring the offeror's ability to perform, but, rather concern factors encompassed by the contracting officer's subjective responsibility determination or contract administration, both of which are matters not for review by the General Accounting Office.

67:151

■ Contract administration
■■ Contract terms
■■■ Compliance
■■■■ GAO review

Whether awardee actually complies with its contractual obligations is a matter of contract administration that is not reviewable under General Accounting Office's bid protest function.

69:369

■ **Contract administration**
■■ **Contract terms**
■■■ **Compliance**
■■■■ **GAO review**

Agency improperly awarded contract on basis of proposal which indicated that the offeror would not comply with a jewel-bearing clause contained in the solicitation, which was a material contract requirement.

70:490

■ **Contract administration**
■■ **Contract terms**
■■■ **Modification**
■■■■ **GAO authority**

The General Accounting Office has no jurisdiction under 50 U.S.C. § 1431 to reform executive agency transportation contracts to facilitate national defense.

67:480

■ **Contract administration**
■■ **Convenience termination**
■■■ **Administrative determination**
■■■■ **GAO review**

Where the offerors were unaware of the actual basis for award, award under such solicitation was properly terminated.

67:39

■ **Contract administration**
■■ **Convenience termination**
■■■ **Administrative determination**
■■■■ **GAO review**

Where contracting agency determined that low bidder had erroneously been rejected as nonresponsible based on inaccurate information, and that award thus should not have been made to second low bidder, agency's subsequent correction of situation by terminating contract for convenience of the government and awarding contract to low bidder is unobjectionable; low bidder had no reason to believe, and was not required to assume, that contracting agency would not rely on correct responsibility information, and thus cannot be faulted for agency's initial erroneous nonresponsibility determination based on inaccurate information.

68:235

■ **Contract administration**
■■ **Convenience termination**
■■■ **Administrative determination**
■■■■ **GAO review**

Although contracting agency improperly allowed upward correction of bid to include additional profit, bond costs and insurance costs when the costs were not adequately substantiated, there is no evidence of fraud, bad faith or mutual mistake, the resulting contract was not plainly or palpably illegal, and the contractor may be paid at the contract price where the agency determines that it is not in the government's best interest to terminate the contract.

69:30

■ **Contract administration**
■■ **Convenience termination**
■■■ **Administrative determination**
■■■■ **GAO review**

Contracting agency's decision to terminate the contract which it had awarded and to make no award to any other offeror, including the protester, is reasonable where as the result of post-award protests it concludes that no technically acceptable proposal was received.

69:51

■ **Contract administration**
■■ **Convenience termination**
■■■ **Competitive system integrity**

Protest is sustained where record shows that awardee improperly obtained source selection sensitive information concerning its competitor's product.

68:422

■ **Contract administration**
■■ **Convenience termination**
■■■ **Competitive system integrity**

Prior decision in which we sustained a protest and recommended termination of the contract is affirmed where the record showed that awardee improperly obtained source selection sensitive information concerning its competitor's product and where request for reconsideration does not establish any factual or legal errors in the prior decision.

68:677

■ **Contract administration**
■■ **Convenience termination**
■■■ **Competitive system integrity**

Contracting agency's determination not to terminate contract award based solely on an FBI record of an interview with a former employee of the agency indicating that the awardee bribed the former employee to help it obtain the award will not be disturbed where (1) the awardee denies the alleged wrongdoing, leaving the charges disputed; (2) a criminal investigation of the alleged wrongdoing is

ongoing; and (3) the agency states that if evidence of misconduct by the awardee to support terminating the contract is uncovered, corrective action will be taken at that time.

69:166

■ **Contract administration**
■■ **Convenience termination**
■■■ **Competitive system integrity**

Where timely size protest is filed after small business-small purchase set-aside award and awardee does not contest Small Business Administration finding that it is other than a small business, intent of Small Business Act and integrity of competitive system is served by terminating the contract and, if otherwise appropriate, making award to only small business quoter.

69:392

■ **Contract administration**
■■ **Convenience termination**
■■■ **Invitations for bids**
■■■■ **Reinstatement**

Where a contract is properly awarded to the low bidder under a invitation for bids (IFB), but subsequently is terminated for convenience because the agency and the awardee are unable to agree on contract requirements, there is no merit to the contention that the agency is required to reinstate the IFB and make award to the second low bidder.

67:469

■ **Contract administration**
■■ **Convenience termination**
■■■ **Resolicitation**
■■■■ **GAO review**

Termination of contract for the convenience of the government and resolicitation of a requirement was not improper where shortly after award agency discovered that the quantity estimates for one line item in the contract were significantly understated and that award had been made based upon a mathematically and materially unbalanced offer.

67:429

■ **Contract administration**
■■ **Default termination**
■■■ **Propriety**
■■■■ **GAO review**

General Accounting Office will not consider the propriety of the procuring agency's decision to terminate a contract for default, since this is a matter for the procuring agency's board of contract appeals under the contract disputes clause.

68:183

■ **Contract administration**
■■ **Default termination**
■■■ **Resolicitation**
■■■■ **Procedures**

Agency properly conducted a reprocurement limited to the defaulted awardee and the second low offeror under the prior solicitation, rather than making a sole-source award to the second low offeror, where the agency had an urgent requirement but there was sufficient time to solicit offers from these two known potential sources.

69:604

■ **Contract administration**
■■ **Domestic products**
■■■ **Compliance**
■■■■ **GAO review**

Where solicitation specification requires that offered product be one of a manufacturer's current models, proposal to provide a product which will require major modifications to meet domestic content provisions of solicitation should have been rejected as technically unacceptable.

70:99

■ **Contract administration**
■■ **GAO review**

Protest alleging that the agency improperly failed to review prices for laundry and dry cleaning services during the course of an existing contract concerns contract administration, and it is therefore outside the General Accounting Office's bid protest jurisdiction.

66:148

■ **Contract administration**
■■ **GAO review**

Protest that awardee is not conforming with solicitation requirement for teaching aerobics for specified period per week is dismissed because it concerns an issue of contract administration which is not for resolution under the General Accounting Office's Bid Protest Regulations.

69:526

■ **Contract administration**
■■ **Options**
■■■ **Use**
■■■■ **GAO review**

General Accounting Office will not review agency decision not to exercise an option in incumbent/protester's contract for travel services as exercise of option is a matter of contract administration.

66:474

■ **Contract administration**
■■ **Options**
■■■ **Use**
■■■■ **GAO review**

When agency's exercise of an option is based on an informal price analysis that considered the prices offered under the original solicitation, market stability and other factors, protest that price analysis is insufficient is without legal merit.

68:303

■ **Contract administration**
■■ **Options**
■■■ **Use**
■■■■ **GAO review**

Agency is not required to consult previous unsuccessful offeror during price analysis, nor is the agency required to issue a new solicitation to test the market before exercising an option merely because a previous offeror states that it would offer a lower price, when prices have already been tested in a fully competitive procurement in which the protester participated.

68:303

■ **Contract administration**
■■ **Options**
■■■ **Use**
■■■■ **Notification**

Protest of solicitation's renewal clause, which does not require agency to give contractor preliminary notice of its intent to exercise contract option by a specified time before contract expiration, is denied where applicable regulations do not require such a specific time period and the provision is otherwise reasonable.

70:494

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Criteria**
■■■■ **Determination**

Decision that agency's proposed modifications to a contract were beyond the scope of the contract is affirmed where the contracting agency's and the protester's requests for reconsideration fail to show that the decision was legally or factually incorrect.

67:614

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Criteria**
■■■■ **Determination**

Protest that a contract modification was beyond the scope of the contract is denied where the modification did not result in the procurement of services materially different from the services competed under the original contract.

68:376

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Criteria**
■■■■ **Determination**

Modification of existing contract to add court reporting services for an interim period pending completion of competitive procurement for new contract constitutes an improper sole-source award where new services are not within the scope of the contract as originally awarded, limited competition was not justified, and procuring agency was aware that the incumbent contractor was interested in competing.

69:292

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Criteria**
■■■■ **Determination**

Requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts. Where the long distance service does not differ in any technical respect from that being provided under the FTS2000 contracts, the contracts specifically provide for additional users, and the contracts cover telephone services related to official government business, including telephone calls by inmates.

70:20

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Criteria**
■■■■ **Determination**

Where agency requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts, agency is required to place orders for the service under the FTS2000 contract in the absence of an exception granted by the General Services Administration and such orders will not constitute improper sole-source procurements.

70:20

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Criteria**
■■■■ **Determination**

Protest against issuance of delivery order under existing contract is denied where record establishes that the order for engineering services to replace circuit card assemblies and redesign the F-16 Control Air Data Computer was within the scope of an existing contract to provide engineering services for the microelectronics technology support program.

70:554

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Effects**

Proposed issuance of delivery orders for quantity of uninterruptible power systems in excess of stated maximum quantity under the contract would be outside the scope of that contract, would result in a contract materially different from that for which the competition was held, and absent a valid sole-source determination, would be subject to Competition in Contracting Act requirements for competition.

70:449

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **Effects**
■■■■ **Resolicitation**

Where a contract for an aircraft generator test stand as modified would be materially different from the contract for which a competition was held, the modifications go beyond the scope of the contract so that the contract should be terminated and the requirement resolicited.

67:404

■ **Contract modification**
■■ **Cardinal change doctrine**
■■■ **GAO review**

Where contract provided for purchase of nonredundant uninterruptible power systems and for expansion of those systems to redundant configuration, agency's purchase of redundant systems made from nonredundant systems and ancillary items available under the contract is within scope of contract.

70:448

■ **Contract modification**
■■ **Fixed-price contracts**
■■■ **Retroactive adjustments**
■■■■ **Consideration**

Fixed-price construction contracts executed before January 1, 1986, may not be modified without consideration to delete the requirement for payment of premium rates for overtime worked in excess of 8 hours a day in order to conform to Pub. L. No. 99-145, which eliminated the requirement from contracts executed after January 1, 1986. Neither the statute nor its legislative history reflects congressional intent to have the statute applied retroactively.

66:51

■ **Contract modification**
■■ **Fixed-price contracts**
■■■ **Retroactive adjustments**
■■■■ **Consideration**

The desire to conform old contracts to a new statute which amended overtime pay laws does not constitute sufficient consideration to delete provisions for the payment of premium pay for overtime worked in excess of 8 hours a day from the contracts which were awarded before the effective date of the statute. Modification of contract to delete daily overtime provisions requires that adequate consideration should be negotiated between agency and individual contractors.

66:51

■ **Contract performance**
■■ **Off-site work**

Proposal to perform emergency broadcasts from an off-site location does not constitute a unique or innovative solution to contract performance where the issue was raised in a pre-proposal conference and the agency currently uses off-site locations to perform many of its broadcasts.

70:633

■ **Contracts**
■■ **Assignment**

Although Anti-Assignment Act, 41 U.S.C. § 15 (1982), generally prohibits the assignment of government contracts, this statute is intended solely for the protection of the government and the government may recognize an assignment as the circumstances in a particular case may warrant notwithstanding the Act.

68:53

■ **Contracts**
■■ **Assignment**

Contracting agency acted reasonably in approving assignment of a government contract where agency thereby assured continued performance of contract for urgently needed supplies under essentially the same material contract terms.

68:54

■ **Contracts**
■■ **Assignment**

Assignment of a government contract is not inconsistent with the provisions of the Competition in Contracting Act of 1984, 10 U.S.C. § 2304(a) (Supp. IV 1986), generally requiring agencies to obtain full and open competition in conducting procurements.

68:54

■ **Shipment costs**
■■ **Rates**
■■■ **Overcharge**
■■■■ **Set-off**

A carrier contends that higher tariff rates are applicable to a shipment picked up at Kelly Air Force Base in lieu of a Freight All Kinds mileage-rate tender applied from San Antonio, Texas, to various points, since Kelly is a separate entity from the city of San Antonio. The General Services Administration (GSA) collected overcharges by deduction on the basis that the tender rates apply to Kelly Air Force Base, which, although a separate entity, is adjacent to and surrounded by San Antonio. GSA's action is sustained since evidence indicates an understanding by the parties that tender rates would apply where the Government Bill of Lading referred to the tender, to the estimated tender charges, to the mileage between origin and destination, and the carrier's agent received the shipment with notice of the annotations without objection, and originally billed the government on the basis of the tender rates.

66:574

Contract Types
■ **Basic ordering agreements**
■■ **Purchase orders**
■■■ **Optional use**

There is no basis to require contracting agency to terminate an existing contract in order to place an order for the items being procured under a basic ordering agreement which did not take effect until after the existing contract was awarded.

66:128

■ **Fixed-price contracts**
■■ **Incentive contracts**
■■■ **Use**
■■■■ **Administrative determination**

Protest that solicitation should provide for a cost reimbursement contract is denied where there is no evidence that the agency's choice of firm, fixed-priced contract type is unreasonable.

69:703

■ **Fixed-price contracts**
■■ **Offers**
■■■ **Evaluation**
■■■■ **Travel expenses**

Protest that travel and related expenses should be excluded from the quoted hourly rate and essentially not evaluated in the total cost is denied where the solicitation calls for a firm, fixed-price contract and it would be improper not to evaluate such costs.

69:703

■ **Supply contracts**
■■ **Options**
■■■ **Construction contracts**

Protest that solicitation should be for supply contract rather than construction contract is denied where agency, to meet congressional limitation on construction in Philippines, obtains proposals to supply generators with option for construction of power plant and includes clauses applicable to both supply and construction contracts and protester fails to show how it was prejudiced thereby.

69:49

■ **Time/materials contracts**
■■ **Cost reimbursement**

Under request for proposals for time and materials contract which specifically advises offerors not to propose any direct costs other than material and travel, and provides for payment for services based on fixed-labor rates, government is obligated to reimburse the successful offeror for expenses incurred in relocating its employees only to the extent that such costs are included in its labor rates.

68:311

■ **Time/materials contracts**
■■ **Cost reimbursement**

Request for proposals (RFP), which estimates that 97 percent of work will be performed at the government site and 3 percent off-site, does not, contrary to protester's argument, permit an offeror to manipulate its level of effort so as to create an unrealistically low offer since the RFP requests only 1 hourly rate per labor category, which means that the successful offeror will be reimbursed at the same rate regardless of whether the work is performed at the government site or off-site.

68:311

Contracting Power/Authority
■ **Federal procurement regulations/laws**
■■ **Applicability**

Even though Bonneville Power Administration is engaged in contracting activities pursuant to its own procurement authority, it is nonetheless subject to General Accounting Office's (GAO) bid pro-

test jurisdiction pursuant to the Competition in Contracting Act of 1984 (CICA), since Bonneville comes within the statutory definition of a federal agency subject to GAO's CICA jurisdiction.

68:447

Contractor Qualification
■ Approved sources
■■ Alternate sources
■■■ Approval
■■■■ Government delays

Where contracting agency fails to comply with statutory and regulatory provisions calling for prompt qualification procedures, so that offeror of an alternate product does not have a reasonable opportunity to compete and the agency does not obtain full and open competition, the General Accounting Office sustains the protest. In this context, a delay of 3-1/2 months between the protester's request for source approval and the agency's referral to user agencies for evaluation is not prompt.

66:370

■ Approved sources
■■ Alternate sources
■■■ Approval
■■■■ Government delays

Unwarranted delays in agency's alternate source approval process that prevented prompt qualification of protester's product is not basis for sustaining protest where agency canceled the solicitation with the intention of postponing the acquisition until approval of the protester's product was completed, and then proceeded to complete approval of protester's product; protester will have opportunity to compete for requirement and thus was not competitively prejudiced by the delays.

68:381

■ Approved sources
■■ Alternatives
■■■ Pre-qualification
■■■■ Testing

Procuring agency properly rejected the protester's alternate item in a procurement involving a "Products Offered" clause where the protester refused to bear the costs of properly required qualification testing.

69:130

■ Approved sources
■■ Equivalent products
■■■ Acceptance
■■■■ Administrative discretion

Where an agency lacks sufficient data to write criteria to describe the attributes of a video cassette in an approved source procurement, it has broad latitude to approve a substitute cassette upon whatever data it deems adequate for that purpose if the agency concludes that the data submitted

with the bid provides adequate assurance that the substitute item will perform properly. Such an approval will not be questioned unless the decision was made in a manner that is tantamount to fraud or willful misconduct.

66:286

■ **Approved sources**
■■ **Government delays**

Protest against exclusion due to urgency is sustained where agency approved protester as source but unduly delayed determination regarding need for first article testing.

68:612

■ **Approved sources**
■■ **Government delays**

Protest that agency took an unreasonable amount of time to qualify protester's transmitters is denied where the record shows that the agency continually evaluated the protester's submissions but the transmitters never passed all required qualification tests.

69:495

■ **Approved sources**
■■ **Qualification**
■■■ **Delays**

Protest that agency delay during its source approval process improperly precluded protester from competing is denied where, even if the protester had received source approval, it would not have been eligible for waiver of first article testing; since the agency's urgent need for the contract item, a flight-critical part, could only be met by an approved source that was not subject to the delays involved in first article testing, the protester would not have been eligible for award of a contract to meet the agency's urgent requirement in any event.

69:684

■ **Approved sources**
■■ **Qualification**
■■■ **Standards**

Where the contracting agency's stock of certain aircraft spare parts was projected to be depleted during the procurement lead time and the agency lacked the technical data to develop competitive specifications or precise qualification requirements that the protester could have met in the short time available, the agency properly awarded a sole-source contract to the only available qualified source; the agency was not required to delay the procurement in order to develop and advise the protester of precise qualification requirements.

67:110

■ **Approved sources**
■■ **Qualification**
■■■ **Standards**

Protester's assertion that it will manufacture an aircraft engine part according to the original equipment manufacturer's (OEM) technical drawings does not establish that the contracting agen-

cy's requirement for engine qualification testing before approval of a source is unreasonable where the part is critical to the safe and effective operation of the engine. Since the agency is unable to secure from the OEM technical expertise to establish qualification guidelines, and the OEM's testing facilities, protest of award to OEM without consideration of protester's offer is denied.

67:244

■ Approved sources
■■ Qualification
■■■ Standards

Allegation that agency's urgent requirement for a flight-critical part was brought about by lack of acquisition planning by the agency is rejected, where the record shows that the agency was aware of and had taken measures to meet shortages of the item, but deferred actual procurement of the item primarily in order to qualify additional sources.

69:685

■ Competition rights
■■ Administrative agencies

The United States Department of Agriculture Graduate School may compete in competitive procurements because of its unique status as a nonappropriated fund instrumentality.

68:63

■ Contractor personnel
■■ Misrepresentation

Where solicitation did not require personnel to be committed to performance under the resulting contract, awardee did not misrepresent the availability of persons it "intended for assignment" by submitting the resumes of three of the protester's employees as part of its proposal since the record discloses that, prior to the submission of the resumes, two of the individuals took direct actions expressing a willingness to consider employment with the awardee, and the third individual relayed a similar willingness through his supervisor.

69:326

■ De facto debarment
■■ Non-responsible contractors

Protest alleging *de facto* debarment because agency repeatedly failed to refer protester's nonresponsibility to the Small Business Administration (SBA) for a certificate of competency is dismissed as academic where, subsequent to the filing of the protest, agency takes corrective measures including referral of nonresponsibility determinations to SBA which cure earlier procedural errors.

68:488

■ **De facto debarment**
■■ **Non-responsible contractors**

Protester's allegation that agency, to avoid awards to firm, acted arbitrarily in proposing firm for debarment is denied where agency offers sufficient evidence to show that its actions were reasonable.

68:488

■ **Licenses**
■■ **Determination time periods**

Where the solicitation requires the acquisition of necessary licenses prior to award, this is ordinarily a performance requirement encompassed in a contracting officer's subjective affirmative responsibility determination, which is not subject to review by the General Accounting Office, except in limited circumstances.

69:645

■ **Licenses**
■■ **State/local laws**
■■■ **GAO review**

Allegation that firm does not comply with state and local licensing requirements for providing guard services is a matter between the bidder and state and local officials which does not affect the legality of the award.

66:1

■ **Licenses**
■■ **State/local laws**
■■■ **GAO review**

In the absence of a specific licensing requirement in the solicitation, a contracting officer properly may make award without regard to whether the awardee is in compliance with state and local licensing requirement.

67:591

■ **Organizational conflicts of interest**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Allegation that conflict of interest exists because awardee proposed to utilize three members of 10-member advisory panel that made recommendations to the contracting agency as to how to best proceed under the current solicitation is denied where all deliberations of the panel were made available and where there is no evidence that panel members had access to any information which provided the awardee with an unfair advantage in the procurement.

66:35

■ **Organizational conflicts of interest**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Offeror is not prohibited from competing for a procurement for services to enhance industrial preparedness because it previously prepared a list of recommended actions to achieve the same objectives under a grant from the procuring agency. The offeror was not employed to prepare or assist in preparing the statement of work; only a few of the recommended actions resemble tasks in the statement of work; and the offeror could not reasonably have gained any competitive advantage from the agency's consideration of the recommended actions in developing the solicitation.

66:217

■ **Organizational conflicts of interest**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Incumbent contractor need not be excluded from competition because of an alleged organizational conflict of interest where (1) the contractor neither prepared the statement of work nor provided "material leading directly, predictably, and without delay" to the statement of work, and (2) did not provide systems engineering services for items to be supplied under the contract as prohibited by applicable regulations.

66:404

■ **Organizational conflicts of interest**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

The government is not required to exclude from a competition a firm that might possess advantages and capabilities due to the prior experience of its parent company, if there is no evidence of preferential treatment by the government or access to information unavailable to other offerors, and the parent company did not prepare material leading predictably, directly and without delay to the work statement.

67:314

■ **Organizational conflicts of interest**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

Agency is not required to exclude a firm from a procurement because of an organizational conflict of interest where, although the firm previously provided related services to the agency under a forerunner contract, it did not prepare the work statement, or material leading directly, predictably, and without delay to the work statement, under the current solicitation.

68:537

■ **Organizational conflicts of interest**
■■ **Allegation substantiation**
■■■ **Evidence sufficiency**

In light of agency's broad discretion to decide to contract or not contract through the section 8(a) program, there is no legal basis to object to agency's suspension of negotiations with an 8(a) firm pending resolution of protest by another 8(a) firm involving allegations of conflict of interest on the part of the agency's technical project officer in selecting the 8(a) firm for negotiations or to the issuance of a task order for these services within the scope of an existing contract with a third 8(a) contractor.

69:189

■ **Organizational conflicts of interest**
■■ **Corporate ownership**

Agency reasonably determined that firm was substantially owned or controlled by a government employee, and therefore ineligible for a contract award, where government employee was a co-founder of the corporation and signed the firm's bid as president, and the corporation's address is the employee's residential address.

66:190

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Affirmative determination**
■■■■ **GAO review**

General Accounting Office will not take exception to a contracting officer's affirmative responsibility determination where there has been no showing that definitive responsibility criteria may not have been met, and there is no showing of fraud or bad faith on the part of contracting officials, or of conduct which is so arbitrary and capricious as to be tantamount to bad faith.

66:77

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Affirmative determination**
■■■■ **GAO review**

The General Accounting Office will not review a challenge to an affirmative determination of an awardee's responsibility on the ground that the awardee's former program manager lacks integrity where there is no showing of possible fraud or bad faith on the part of contracting officials.

66:310

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Affirmative determination**
■■■■ **GAO review**

Protest that proposed awardee will not be able to satisfy solicitation clauses concerning preaward survey, preproduction milestones, and production capacity is dismissed since the clauses are not definitive responsibility criteria, *i.e.,* specific, objective standards measuring the offeror's ability to perform, but, rather concern factors encompassed by the contracting officer's subjective responsibility determination or contract administration, both of which are matters not for review by the General Accounting Office.

67:151

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Affirmative determination**
■■■■ **GAO review**

An unincorporated bidder can demonstrate compliance with special responsibility standards through its employees to the same extent as an incorporated bidder.

68:163

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Affirmative determination**
■■■■ **GAO review**

Affirmative responsibility determination is not subject to objection where, although awardee had experienced financial difficulties, contracting officer considered the company's financial situation and found in light of the fact that the company has become part of another corporation reportedly in a strong financial position, and has submitted satisfactory bank references, that company had the financial resources to perform the contract.

69:186

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Affirmative determination**
■■■■ **GAO review**

General Accounting Office will not review a protest of an affirmative determination of responsibility absent a showing that it may have been made fraudulently or in bad faith, or that definitive responsibility criteria set out in the solicitation were not met.

69:368

■ Responsibility
■■ Contracting officer findings
■■■ Affirmative determination
■■■■ GAO review

Allegations that awardee of building lease contract cannot construct building in time for delivery date and that awardee has performed poorly on other contracts concern the awardee's ability to fulfill its contract obligations and thus relate to its responsibility. Agency's award of contract included an affirmative determination of responsibility which General Accounting Office will not challenge absent fraud or bad faith on the part of contracting officials or the failure to apply definitive responsibility criteria.

69:515

■ Responsibility
■■ Contracting officer findings
■■■ Affirmative determination
■■■■ GAO review

Where a requirement that subcontractors be listed is to determine the offerors' affirmative responsibility rather than for the purposes of evaluation, the General Accounting Office will not review that determination except in limited circumstances.

69:644

■ Responsibility
■■ Contracting officer findings
■■■ Affirmative determination
■■■■ GAO review

Agency reasonably determined that offerors which had received prior production contracts for items being procured, completed in-house testing and appeared to be making satisfactory progress under the contracts, satisfied solicitation provision restricting procurement to "producers with a proven ability to produce the item(s) under a previous procurement."

70:551

■ Responsibility
■■ Contracting officer findings
■■■ Bad faith
■■■■ Allegation substantiation

Protest that contracting officer's affirmative responsibility determination was made in bad faith is denied where the record does not support the protester's assertion that such determination was made in complete disregard of the contractor's alleged prior history of poor performance. The record shows that the agency thoroughly investigated the protester's allegations concerning the contractor's responsibility and found them to be without merit, and the protester's disagreement with the outcome of this investigation does not suffice to show bad faith.

66:77

■ Responsibility
■■ Contracting officer findings
■■■ Bad faith
■■■■ Allegation substantiation

To show bad faith, protester must submit virtually irrefutable proof that procurement officials had a specific and malicious intent to harm the protester.

68:90

■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Criteria

The provisions of a settlement agreement between the agency and the protester with regard to its contract performance for products it manufactured do not substantially affect the issue of protester's responsibility to supply imported goods which require no manufacturing.

67:375

■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Criteria

An agency is not required to conduct a preaward survey if the information on hand or readily available is sufficient to allow the contracting officer to make a determination of responsibility.

68:89

■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Criteria

Awardee did not meet definitive responsibility criterion in invitation for bids requiring bidders' possession of a $100,000 working capital fund, where the contracting officer had no objective evidence that the awardee had working capital meeting the requirement.

69:618

■ Responsibility
■■ Contracting officer findings
■■■ Negative determination
■■■■ Criteria

Where processing bank declined to accept high bidder's credit card for the amount of his bid deposit, protest that contracting officer improperly rejected bid as nonresponsive is sustained since (1) deficiency in credit balance pertains solely to bidder's responsibility and can therefore be cured any time prior to award; (2) despite credit deficiency, government's interests were never at risk since as part of its bid, the bidder had submitted a pre-approved bid bond which insured the government

against all default by the bidder, even where the bidder's instrument of payment was in a non-guaranteed form such as a credit card; and (3) prior to award, the bidder promptly cured credit deficiency with cash.

70:28

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **GAO review**

Protest challenging nonresponsibility determination is sustained where contracting officer relied solely on a negative preaward survey report showing delinquent deliveries in arriving at the determination, but the record casts substantial doubt on the validity of the survey data.

66:109

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **GAO review**

Protest that agency made an improper *de facto* determination of nonresponsibility is denied where record shows that firm's disqualification resulted from technical finding that firm was less qualified and experienced than other firms based on the stated evaluation criteria. Fact that certain evaluation criteria encompassed traditional elements of responsibility does not serve to convert technical finding to finding of nonresponsibility.

69:69

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **GAO review**

Protester properly was found nonresponsible where it failed to provide sufficient information to permit finding that individual sureties on its bid bond were acceptable and the record shows the contracting officer's nonresponsibility determination was reasonable.

69:387

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **GAO review**

Agency reasonably determined protester was nonresponsible where the protester's recent contract performance on similar work was inadequate, and protester does not specifically dispute agency position.

70:535

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Pre-award surveys**

Protest challenging nonresponsibility determination is sustained where contracting officer relied solely on a negative preaward survey report showing delinquent deliveries in arriving at the determination, but the record casts substantial doubt on the validity of the survey data.

66:109

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Pre-award surveys**

Preaward survey team acted reasonably in limiting protester to a short oral presentation concerning its corporate capabilities since the protester had already submitted extensive written materials on the subject. Survey team's refusal to visit protester's maintenance facilities was reasonable since solicitation required little in-plant performance.

68:475

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Pre-award surveys**

Agency reasonably found low bidder nonresponsible on solicitation for an automotive maintenance/repair contract, where the bidder has no current automotive maintenance contract, a pre-award survey team received unsatisfactory reports on the bidder's only prior contract for this work, the bidder's other contract work is not readily transferable, and the agency was reasonably concerned about the bidder's personnel staffing.

69:303

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Prior contract performance**

Prior default determinations are proper matters for consideration in determining a contractor's responsibility despite pending appeals to a board of contract appeals.

68:89

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Prior contract performance**

Protest that a contracting officer's determination of nonresponsibility based on unsatisfactory performance on current contracts was made fraudulently or in bad faith is denied where the protester does not challenge negative agency report concerning its performance which provides an independent basis to find the firm nonresponsible.

68:690

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Prior contract performance**

Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

69:359

■ **Responsibility**
■■ **Contracting officer findings**
■■■ **Negative determination**
■■■■ **Propriety**

Agency's negative determination of responsibility lacks a reasonable basis where the agency's sole basis for its determination is that protester's estimated manning level is lower than what agency believes is necessary and where agency does not find that the protester is unable or unwilling to stand by its commitment to perform the contract as required.

68:3

■ **Responsibility**
■■ **Corporate entities**

Where step one technical proposal and step two bid are submitted by an entity that certifies itself as a corporation, are signed by the president of the corporation, indicate that corporation will be prime contractor, while two other corporations engaged in a joint venture will be subcontractors, and do not indicate that bidder is part of a joint venture, the General Accounting Office concludes, from the record as a whole, that bid was submitted by corporation and not by joint venture.

68:92

■ **Responsibility**
■■ **Financial capacity**
■■■ **Contractors**

Where solicitation did not advise offerors that financial condition would be considered in the evaluation of proposals, small business concern's financial condition related solely to its responsibility; accordingly, agency's rejection of its proposal on the basis of inadequate financial capacity but under the guise of a comparative, "best value" evaluation effectively constituted a finding of nonresponsibility which the agency was required to refer to the Small Business Administration.

69:741

■ **Responsibility**
■■ **Financial capacity**
■■■ **Contractors**

Where processing bank declined to accept high bidder's credit card for the amount of his bid deposit, protest that contracting officer improperly rejected bid as nonresponsive is sustained since (1) deficiency in credit balance pertains solely to bidder's responsibility and can therefore be cured any time prior to award; (2) despite credit deficiency, government's interests were never at risk since as part of its bid, the bidder had submitted a pre-approved bid bond which insured the government against all default by the bidder, even where the bidder's instrument of payment was in a non-guaranteed form such as a credit card; and (3) prior to award, the bidder promptly cured credit deficiency with cash.

70:28

■ **Responsibility**
■■ **Financial capacity**
■■■ **Line of credit**

Protest challenging responsiveness of awardee's bid for failure to comply with bid deposit requirement is denied where the awardee's bid documents contained no irregularities or facial defects and bid deposit statement unequivocally bound bidder to furnish 20 percent of its bid price as a bid deposit as required by the solicitation. Fact that bidder pledged credit card account with insufficient line of credit is a matter of responsibility since it pertains solely to the adequacy of assets supporting the bid deposit; accordingly, this error did not render bid nonresponsive and agency properly allowed bidder to correct it prior to award.

70:335

■ **Responsibility**
■■ **Information**
■■■ **Submission time periods**

Information relating to offeror's ability to perform contract is a matter of responsibility and, even though solicitation required submission of information with proposals, requirements that relate to responsibility may be satisfied any time prior to award.

69:515

■ **Responsibility**
■■ **Pending investigations**
■■■ **Contract awards**
■■■■ **Propriety**

A contracting agency need not await the results of an Inspector General's investigation into the alleged mischarging of the government before making award where the contracting officer, after a preliminary investigation, reasonably determines that there is insufficient evidence to conclude that the firm selected for award lacks a satisfactory record of integrity and business ethics.

66:405

■ **Responsibility criteria**
■■ **Administrative discretion**

Fact that no other agency has found protester nonresponsible is not evidence of bad faith on the part of the present agency as agencies may reach opposite results based on similar facts because responsibility determinations are inherently judgmental.

68:89

■ **Responsibility criteria**
■■ **Distinctions**
■■■ **Performance specifications**

Protest that awardee's proposal did not meet solicitation requirement that contractor personnel possess top secret security clearance is denied since clearance is a contract performance requirement and the agency reasonably was satisfied that the awardee would meet the requirement.

68:296

■ **Responsibility criteria**
■■ **Education**

An unincorporated bidder can demonstrate compliance with special responsibility standards through its employees to the same extent as an incorporated bidder.

68:163

■ **Responsibility criteria**
■■ **Organizational experience**

Agency may properly consider manufacturing experience of parent corporation in finding that awardee subsidiary corporation met definitive responsibility criterion (5-year manufacturing experience requirement), where bid stated that product would be manufactured at parent corporation's facilities.

69:359

■ **Responsibility criteria**
■■ **Performance capabilities**

Solicitation provision which calls upon bidders at the request of the contracting officer, to demonstrate their experience by supplying evidence of the commerciality of the equipment being offered or similar equipment, is a definitive responsibility criterion which looks to the manufacturer's capa-

bility rather than to the product history of the particular model solicited. Consequently, an experienced manufacturer who bids its newest model may be deemed responsible even though the offered model does not meet the requirements of the solicitation provision (i.e., was not marketed for the stated period of time prior to bid opening).

67:163

■ Responsibility criteria

■■ Performance capabilities

Definitive responsibility criterion requiring prior successful "reclassification" of a high concentration PCB transformer to non-PCB status for a minimum of 1 year without performing additional work can be met by submission of evidence of successful reclassification for a shorter time period after which the transformer was tested to determine residual PCB content. A test report, which established that the maximum PCB concentration level permitted could not have been exceeded for a period substantially longer than 1 year, properly may be considered equivalent to the 1 year performance requirement since it establishes that the requirement would have been exceeded.

68:74

■ Responsibility/responsiveness distinctions

When responsibility-type factor such as experience are included as technical evaluation criteria in a request for proposals, they do not constitute definitive responsibility criteria. The General Accounting Office will review the agency's evaluation of them in the same manner as it does any other technical evaluation factor, i.e., to determine whether the evaluation was reasonable and complied with applicable statutes and regulations.

66:289

■ Responsibility/responsiveness distinctions

Solicitation provision which calls upon bidders at the request of the contracting officer, to demonstrate their experience by supplying evidence of the commerciality of the equipment being offered or similar equipment, is a definitive responsibility criterion which looks to the manufacturer's capability rather than to the product history of the particular model solicited. Consequently, an experienced manufacturer who bids its newest model may be deemed responsible even though the offered model does not meet the requirements of the solicitation provision (i.e., was not marketed for the stated period of time prior to bid opening).

67:163

■ Responsibility/responsiveness distinctions

Statement in bid that bidder did not currently have an affirmative action plan on file because of a recent corporate reorganization did not render the bid nonresponsive, as a bidder's compliance with such requirements is a matter of the bidder's responsibility that can be satisfied any time prior to award.

67:179

■ Responsibility/responsiveness distinctions

Generally, completion of Place of Performance clause relates to responsibility of bidder and not responsiveness of bid; therefore, completion of clause does not cure failure to certify that all end items

will be manufactured or produced by a small business. Case holding otherwise (B-216293, Dec. 21, 1984) no longer will be followed.

67:522

■ **Responsibility/responsiveness distinctions**

When a responsibility-type factor such as corporate experience is included as a technical evaluation criterion under a request for proposals, it does not constitute a definitive responsibility criterion.

68:75

■ **Responsibility/responsiveness distinctions**
■■ **Supply contracts**
■■■ **Work sites**

Solicitation provision requiring bidders to specify the name and location of the facility where the supplies offered are to be produced relates to responsibility, since this information is not necessary to determine what a bidder that has not otherwise taken exception to the specifications will provide. An agency should not reject a bid as nonresponsive for failure to include such information, which may be furnished any time before award.

66:74

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

The contracting agency improperly rejected the protester's bid as nonresponsive where individual sureties' net worths were insufficient to cover the penal amount of required bonds, because surety net worth involves a matter of responsibility. Since a bidder's responsibility may be demonstrated any time prior to contract award, and no award has been made during the pendency of the protest, the contracting agency should consider the financial capability of the sureties based on current information before determining whether to reject the bid.

66:214

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

A bid cannot be rejected as nonresponsive on the basis that a surety's affidavit which accompanied the bid bond allegedly contained false information regarding the surety's net worth. Responsiveness is determined from the bidding documents at bid opening, and if the bond as submitted is proper on its face, the bid is responsive. The matter instead is one of responsibility, and the acceptability of the surety may be established any time before award.

66:549

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

Bid is responsive despite individual surety's failure to file pledge of assets with bid bond since a pledge of assets is information which bears on responsibility and, as such, may be furnished any time prior to award.

68:396

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

Alleged defects in affidavit of individual surety submitted with bid bond do not affect responsiveness of bid since affidavit serves only to assist the contracting officer in determining the surety's responsibility.

68:397

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

Individual sureties improperly were found to lack inadequate net worths, and as a result low bidder improperly was rejected as nonresponsible, where agency failed to include sureties' personal residences as assets in net worth calculation; there is no general prohibition against sureties pledging their personal residences under a bid guarantee, and agency did not establish any basis for disregarding personal residences in this case.

68:529

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

Protest against agency's acceptance of awardee's four individual sureties is denied where agency investigated the sureties and found that at least two of them were acceptable.

69:187

■ **Responsibility/responsiveness distinctions**
■■ **Sureties**
■■■ **Financial capacity**

Agency may not automatically reject a bidder for unacceptable individual sureties, where the bid bond is sufficient, even though the Standard Form 28, "Affidavit of Individual Surety," and supporting documents of the individual sureties submitted with the bid contain minor defects that might easily be remedied. Since these matters concern bidder responsibility, absent any evidence that the sureties lacked integrity or credibility or an unreasonable delay in the procurement, the agency

should give the bidder the opportunity to have his sureties provide satisfactory explanations or pledge sufficient and acceptable assets.

70:274

Government Property Sales
■ Bids
■■ Error correction
■■■ High bid displacement
■■■■ Propriety

Where a bidder on a sale designates a unit price per gross ton on an item requiring a unit price per pound and the only reasonable explanation for this discrepancy is that the bidder intended to bid on another specific item in the solicitation, the bid may be corrected, even though correction will displace the high bidder, since the nature of the mistake and the intended bid are ascertainable from the face of the bid.

69:534

■ GAO review

Under the Competition in Contracting Act of 1984, a protest filed with the General Accounting Office (GAO) must pertain to a procurement of property or services by a federal agency. Protests concerning sales will be reviewed by GAO only where the federal agency involved has agreed to such review.

66:67

Noncompetitive Negotiation
■ Alternate offers
■■ Rejection
■■■ Propriety

Protester has the responsibility of demonstrating that its product is an acceptable alternative to the designated sole-source item, and where agency has reviewed protester's submittal and reasonably concluded that acceptability of the firm's product cannot be determined without testing, agency has fulfilled its obligation to consider protester's proposal and need not conduct discussions with the offeror.

69:98

■ Alternate offers
■■ Rejection
■■■ Propriety

Where protester failed to offer an acceptable product in response to a sole-source procurement, neither the contracting agency's delay, if any, in advising protester of the contract award, nor its decision not to conduct a debriefing, which are procedural matters, affect the propriety of its rejection of the protester's proposal.

69:98

■ **Amendments**
■■ **Issuance**
■■■ **Lacking**

Protest of agency's correction of an apparent solicitation ambiguity, after receipt of proposals submitted in response to a sole-source procurement, without issuing an amendment is denied since the protester, which submitted a nonconforming proposal, was not prejudiced by the agency's action.

69:98

■ **Contract awards**
■■ **Sole sources**
■■■ **Justification**
■■■■ **Procedural defects**

Contracting agency failed to comply with the procedural requirements for a sole-source award under the Competition in Contracting Act of 1984 where written justification for the sole-source award lacks an adequate demonstration of the rationale for agency's conclusion that only the proposed awardee can provide the required products.

66:145

■ **Contract awards**
■■ **Sole sources**
■■■ **Justification**
■■■■ **Procedural defects**

A sole-source award based on determination that only one responsible source would satisfy agency needs is improper where the record indicates the agency failed to synopsize the contract action in the *Commerce Business Daily* as required under the Competition in Contracting Act of 1984, 41 U.S.C. § 253(c)(1) and (f)(1)(C) (Supp. III 1985), and thus interested parties such as protesting firms were not given opportunity to submit offers.

66:195

■ **Contract awards**
■■ **Sole sources**
■■■ **Justification**
■■■■ **Procedural defects**

Protest is sustained where agency's justification for proposed sole-source award under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not based on evidence that establishes the reasonableness of its determination that only one known source can meet the government's needs.

70:497

■ **Contract awards**
■■ **Sole sources**
■■■ **Propriety**

Although agency's need to replace existing telecommunications equipment was of sufficient urgency to justify limiting the number of sources considered, it was improper for the agency to make a sole-

source award without considering any other offers, since the agency failed to show that the time constraints imposed by the urgency of the agency's needs prevented the agency from using abbreviated competitive procedures to consider proposals from other sources.

66:58

■ **Contract awards**
■■ **Sole sources**
■■■ **Propriety**

Sole-source award is improper where, due to contracting agency's failure to adequately consider whether protester's products also will meet its minimum needs, agency fails to show a reasonable basis for its conclusion that only the proposed awardee can provide the required products.

66:145

■ **Contract awards**
■■ **Sole sources**
■■■ **Propriety**

Although the Competition Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through use of competitive procedures, the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) is not objectionable where the agency reasonably determined that only one source could supply the desired item within the governing time constraints of the procurement, and the protester's offered product had yet to be found fully compatible with the agency's particular acquisition needs.

66:254

■ **Contract awards**
■■ **Sole sources**
■■■ **Propriety**

Where the contracting agency properly determined that only one qualified source could meet its needs within the requirement timeframe, the fact that the qualified source submitted a late quotation had no adverse effect on the protester, and acceptance of the quotation thus was unobjectionable, since the protester could not have received the award in any event.

67:110

■ **Contract awards**
■■ **Sole sources**
■■■ **Propriety**

Agency's justification for a sole-source procurement is inadequate where the record does not demonstrate that agency had any reasonable basis for concluding that sole-source awardee was the only responsible source capable of meeting the agency's needs.

67:149

■ Contract awards
■■ Sole sources
■■■ Propriety

Purchase under non-mandatory automatic data processing schedule contract from firm which agency reasonably determines to be only source available to supply the desired product is not objectionable where procurement was conducted in accordance with applicable regulations and protester has not shown that there is no reasonable basis for the sole-source award.

68:188

■ Contract awards
■■ Sole sources
■■■ Propriety

Where record shows that only one source currently is capable of furnishing required equipment and that other firms are developing capability to meet agency requirements, agency should only procure its immediate needs using noncompetitive procedures.

68:531

■ Contract awards
■■ Sole sources
■■■ Propriety

Protest against exclusion due to urgency is sustained where agency approved protester as source but unduly delayed determination regarding need for first article testing.

68:612

■ Contract awards
■■ Sole sources
■■■ Propriety

Agency decision to award sole-source contract to the only known qualified source is proper where agency does not have the necessary data to conduct a competitive procurement or sufficient time to test an unproven product.

69:97

■ Contract awards
■■ Sole sources
■■■ Propriety

Protest challenging sole-source award of two interim contracts for automated data processing services based on unusual and compelling urgency is denied where, as a result of protests filed against long-term contract, contracting agency makes a series of short-term awards to incumbent whom agency reasonably believes to be only firm capable of timely fulfilling agency's requirements.

70:142

■ **Industrial mobilization bases**
■■ **Contract awards**
■■■ **Propriety**

Protest of contracting agency's proposed award of a contract for apparel to particular source to serve industrial mobilization purposes is denied where awardee's position would thereby be strengthened and protester was reasonably considered by contracting agency to be ineligible for award given its delinquent production status on current contracts.

69:119

■ **Offers**
■■ **Sole sources**
■■■ **Clarification**
■■■■ **Propriety**

Protest is sustained where agency provided clarifications of solicitation requirements to offeror under sole-source solicitation, but did not provide same clarifications to protester when requirement was resolicited on competitive basis.

70:459

■ **Sole sources**
■■ **Alternate sources**
■■■ **Qualification**

Where *Commerce Business Daily* (CBD) notice announcing agency's plans to make sole-source award contains footnote 22—giving other potential sources 45 days to submit expressions of interest showing their ability to meet agency's stated requirements—a potential source must first timely respond to the CBD notice and receive a negative agency response before it can protest the agency's sole-source decision at the General Accounting Office (GAO). GAO will dismiss protest as premature where protest does not indicate that the protester submitted an expression of interest to the agency before filing the protest at GAO.

70:534

■ **Sole sources**
■■ **Justification**
■■■ **Military assistance**
■■■■ **Foreign governments**

The Army may properly specify a sole source for items being purchased to implement a foreign military sale where the foreign government has provided written directions to do so by executing Department of Defense Form 1513, "Letter of Offer and Acceptance," or through an amendment or modification to the form.

66:360

■ **Sole sources**
■■ **Justification**
■■■ **Military assistance**
■■■■ **Foreign governments**

A sole-source procurement to implement a foreign military sale is not improper because the procuring agency recommended or advised the foreign government that a particular item would meet its needs where there is no evidence that the agency recommended a particular source in bad faith or for the purpose of avoiding competition and where ultimately the foreign government provided written directions for the item, since agency may suggest to foreign government what item(s) will meet requirements.

66:360

■ **Sole sources**
■■ **Military assistance**
■■■ **Foreign assistance**
■■■■ **Contract award notification**

Agency is not required to publish notice before award of two proposed sole-source procurements on behalf of foreign military sale customers in the *Commerce Business Daily,* since the law provides an exemption from the requirement where written directions of the foreign customers have the effect of requiring sole-source procurements.

66:360

■ **Use**
■■ **Approval**
■■■ **Justification**

Protest that noncompetitive procurement is improper because it resulted from lack of advance planning is denied where record shows that agency's decision to procure on a sole-source basis was reasonable.

70:53

■ **Use**
■■ **Justification**
■■■ **National defense interests**

Agency unnecessarily used national security exemption to justify other than full and open competition when it could have justified the limitation on other grounds under the Competition in Contracting Act of 1984.

66:229

■ **Use**
■■ **Justification**
■■■ **Urgent needs**

Agency procuring telecommunications services adequately demonstrated the urgency required by statute (41 U.S.C. § 253(c)(2)) to use the noncompetitive procedures where, due to age of existing tele-

communications equipment, the user agency was experiencing periodic losses of telecommunications services which could have a serious adverse impact on the agency's operations.

66:58

■ Use
■■ Justification
■■■ Urgent needs

United States Marshals Service's decision to limit a procurement for metal detectors for use in federal buildings and courthouses to the two sources which it reasonably finds can provide the most sophisticated equipment currently available is proper where it can be demonstrated that the acquisition is urgently needed to ensure the security of the federal judiciary.

66:228

■ Use
■■ Justification
■■■ Urgent needs

Where the contracting agency has an urgent requirement for clocks used in navigation of aircraft and the applicable procurement regulation calls for acquisition of domestically-manufactured clocks if available, the agency properly may restrict reprocurement after default to the one firm the agency has determined can produce the domestic item without first article testing and attendant delays.

68:179

■ Use
■■ Justification
■■■ Urgent needs

Where agency properly determines due to urgent circumstances that it must use noncompetitive procedures provided for under the Competition in Contracting Act, agency properly may limit the number of sources to those firms it reasonably believes can promptly and properly perform the work. Agency reasonably determined protester was not a potential source for a 12-month, emergency contract where protester, who was terminated for default on the previous contract for the solicited services, had encountered problems in an aspect of performance critical to the emergency contract.

68:183

■ Use
■■ Justification
■■■ Urgent needs

While an urgency determination was not required in order for the agency to exercise an option, the existence of a critical equipment need for outfitting ships in battlefield threat areas, in conjunction with the fact that the awardee is the only firm currently producing the item and the only firm which would not need to submit a first article prior to production provides a reasonable basis for an urgent sole-source award.

68:304

■ Use
■■ Justification
■■■ Urgent needs

Agency—a wholly-owned government corporation engaged in sales to other government agencies—properly limited competition for required raw materials to six of nine potential sources where agency properly conducted procurement under Federal Acquisition Regulation § 6.302 (unusual and compelling urgency provision) because (1) the raw material order had to be quickly placed to obtain both a source of supply able to meet production and delivery deadlines and a price low enough to avoid a loss on agency's contract with another government agency; (2) an incorrect telephone number on the agency's source list thwarted the agency's attempt to seek a quotation from the protester; and (3) there is no evidence of a deliberate attempt by the agency to exclude the protester from the competition.

68:663

■ Use
■■ Justification
■■■ Urgent needs

Agency—a wholly-owned government corporation funded by proceeds from sales to other government agencies—properly ordered its entire production-run requirement for raw material under a limited competition procurement where agency obtained competitive prices from six offerors, and immediate purchase of the entire requirement was necessary to secure source of supply and current prices, in order to ensure that agency would meet its delivery deadlines and avoid a loss on a contract to sell the resulting production to another agency.

68:663

■ Use
■■ Justification
■■■ Urgent needs

Protest is sustained where the agency, using noncompetitive procedures to award contract extension on a sole-source basis, fails to establish that the time constraints imposed by urgency prevented the agency from soliciting offers from other potential sources including the protester.

69:426

■ Use
■■ Justification
■■■ Urgent needs

Although the Competition in Contracting Act of 1984 mandates that agencies obtain "full and open competition" in their procurements through the use of competitive procedures, the proposed sole-source award of a contract under the authority of 10 U.S.C. § 2304(c)(1) (1988) is not objectionable where the agency reasonably determined that only one source could supply the desired item within the urgent time constraints of the procurement.

69:591

■ Use
■■ Justification
■■■ Urgent needs

Contracting agency's decision to award contract to the only approved source that submitted a proposal is proper where, in view of unexpected deterioration of supply stock, the approved source is the only firm that can meet the agency's urgent need for the item.

69:597

■ Use
■■ Justification
■■■ Urgent needs

Sole-source award for chaff under 10 U.S.C.§ 2304(c)(2) (1988) was unobjectionable where based on urgent wartime requirement and agency's reasonable determination that only one source was available that had proven acceptable chaff, since testing necessary for other potential sources, including protester, would cause unacceptable delay in procurement.

70:588

■ Use
■■ Justification
■■■ Utility services

Agency determination to acquire non-interruptible natural gas from local utility and limit competition for gas to interruptible supplies is reasonable where it is based on a market survey showing limited potential competition, and a balancing of risk of acquiring non-interruptible gas from utility and non-utility suppliers against agency's concern for potential dislocation of personnel, damage and disruption which might accompany interruption of gas supply.

66:116

Noncompetitive negotiation
■ Sole sources
■■ Justification
■■■ Intellectual property

Contention that Competition in Contracting Act mandates sole-source procurement, based on alleged proprietary rights, is without merit where agency can describe requirements without revealing proprietary information.

66:563

Payment/Discharge

■ Cooperative agreements

■■ Subcontractors

Since UMTA does not have privity of contract with the subcontractor, there is no basis upon which to pay a claim made by a subcontractor when the claim has not been made with the consent and in the name of the recipient of the cooperative agreement that entered into the subcontract.

68:494

■ Costs

■■ Substitution

A contracting officer is required to pay all allowable costs under a grant or contract up to the maximum amounts authorized and allocated for the contract. If additional amounts become available as a result of some audited cost disallowances, the contracting officer must apply them to any excess costs that are otherwise allowable but which could not previously be paid because they exceeded the cost ceiling.

68:247

■ Payment deductions

■■ Propriety

An amendment made by the Civil Aeronautics Sunset Act of 1984 to 31 U.S.C. § 3726(b)(1) does not limit GSA's longstanding authority to deduct overcharges for airline fares from current bills due the airlines. Other authority in 31 U.S.C. § 3726(b)(2), encompassing rates based on all means of contractual arrangements or exemptions from regulation, supports such deductions.

69:691

■ Payment deductions

■■ Propriety

Section 322 of the Transportation Act of 1940, now codified in 31 U.S.C. § 3726, provides authority for the government to pay its transportation bills prior to audit and recover overcharges administratively determined in the post-payment audit by deduction from other bills. In *United States v. New York, New Haven and Hartford Railroad Co.,* 355 U.S. 253 (1957), the Supreme Court held that this places the burden on the carriers to provide evidence to support their charges and the burden is not on the government to prove it has been overcharged. Deregulation of domestic air transportation has not changed this relationship.

69:691

■ Payment priority

■■ Assignees/IRS

An assignee bank receives priority of payment over an IRS tax levy against the contractor under an Army Corps of Engineers contract. A valid assignment under a government contract gives the assignee priority over government claims against the assignor arising after perfection of the assignment.

67:505

■ **Payment priority**
■■ **Bankrupt contractors**
■■■ **Tax liability**

Order of priority for the payment of remaining contract proceeds held by EPA, the contracting federal agency, is first to the IRS for the tax debts owed by the contractor and the remaining funds to the trustee in bankruptcy.

68:215

■ **Payment priority**
■■ **Payment procedures**
■■■ **Set-off**

Although IRS served notice of levy on GPO pursuant to 26 U.S.C. § 6331, we view such notice as an IRS request for GPO to set off amounts GPO owed its contractor. *U.S. for Use of P.J. Keating Co. v. Warren Corp.,* 805 F.2d 449, 452 (1st Cir. 1986). Thus, GPO properly transferred to IRS amounts owed the contractor, Swanson Typesetting Service, on invoices received both before and after receipt of the notice of levy.

70:41

■ **Payment priority**
■■ **Payment sureties**

Consistent with doctrine of subrogation which allows a payment bond surety who pays the debts of his principal to assert all the rights of the creditors who were paid to enforce the surety's right to be reimbursed, payment bond surety has priority over an assignee bank to $2,902.29 paid by the surety to subcontractor materialmen.

67:309

■ **Payment priority**
■■ **Sureties/government**

Order of priority for remaining contract funds held by the contracting agencies and Small Business Administration (SBA) is to the Army for any liquidated damages under its contract, the Surety on its performance bonds, the SBA and Internal Revenue Service (IRS) for debts owed by the contractor, and the Surety on its payment bonds.

68:269

■ **Payment priority**
■■ **Sureties/government**

In making advance payments to subcontractors, SBA's status is that of a government agency and not a contractor's assignee. Therefore, because the United States' right of set-off extends to debts owed as a result of loans by SBA to 8(a) subcontractors, SBA's claim to remaining contract proceeds is superior to that of a payment bond surety.

68:269

■ **Payment procedures**
■■ **Bankrupt contractors**
■■■ **Set-off rights**
■■■■ **Statutory restrictions**

The government's right of set-off is affected by the filing of a bankruptcy petition. Under the bankruptcy law, although a party's right to set-off is preserved, 11 U.S.C. § 553, the automatic stay provision does not allow the exercise of that right unless the creditor obtains relief from the bankruptcy court. 11 U.S.C. § 362(a)(7). Therefore, before the government can exercise its right of set-off against the remaining contract proceeds of a bankrupt contractor, it must apply to the bankruptcy courts to have the automatic stay lifted.

68:216

■ **Payment procedures**
■■ **Contracts**
■■■ **Assignment**

Since the assignee of amounts retained by contracting agency did not render any financial assistance to specifically facilitate the performance of the government contract, the assignment is invalid against the government. Accordingly, the assignee is not entitled to any of the remaining contract proceeds held by a contracting federal agency.

68:215

■ **Payment procedures**
■■ **Joint payees**
■■■ **Illegal/improper payments**
■■■■ **Corrective actions**

Where the Army Corps of Engineers breached a joint payment agreement by issuing a check only to one party, the proper measure of damages is the amount the aggrieved party would have received had the check been issued jointly.

66:617

■ **Payment time periods**
■■ **Computation**
■■■ **Deadlines**
■■■■ **Fast payment procedures**

In response to a request from the Office of Management and Budget (OMB), GAO recommends that, if OMB includes a time computation rule in its pending revision to Circular A-125 which implements the Prompt Payment Act of 1982, as amended, it should follow modern, prevailing time computation practices, as exemplified by Rule 6(a) of the Federal Rules of Civil Procedure, and specify that prompt payment deadlines which expire on Saturdays, Sundays, or legal holidays should be extended until the end of the next day that is not a Saturday, Sunday, or legal holiday.

68:355

■ **Payment time periods**
■■ **Government delays**
■■■ **Interest**

Payments on invoices by the National Park Service, Department of the Interior, submitted by an unregulated private electric utility company which is not governed by tariff approved by a state commission may be covered by the shorter payment term established by company policy rather than the longer payment term set forth in provision of the Prompt Payment Act, 31 U.S.C. § 3903(1)(B), where elements of implied contract, *i.e.,* acceptance of electrical service with notice of company's policy are present.

67:24

■ **Payment withholding**
■■ **Prompt payment discounts**
■■■ **Propriety**

The Government Printing Office (GPO) was entitled to take prompt payment discounts on contract payments owed to Swanson Typesetting Service but paid to the Internal Revenue Service (IRS) pursuant to notice of levy even though actual transfer of funds to IRS did not occur until after contractual payment period for prompt payment discounts. GPO may not be deprived of its right to take prompt payment discounts where payment to contractor is withheld on account of an IRS levy notice.

70:41

■ **Shipment**
■■ **Carrier liability**
■■■ **Amount determination**

In the absence of a written agreement reducing the carrier's liability, it was indebted for a high-value clock's full actual loss. Even though the clock has no market value, that loss is measured by its cost, the practicability and expense of replacing it, and other factors that affect its value to the owner. Since the Air Force's determination of full actual loss was based on these elements, it was not excessive.

68:724

■ **Shipment**
■■ **Carrier liability**
■■■ **Burden of proof**

Claim for damage to household goods not noted at time of delivery can be substantiated by subsequent timely notification to the carrier of additional damage. While the memorandum of understanding between the household goods moving industry and the military services prescribes a standardized method for reporting and processing claims, the failure of the installation claims office to send the carrier a specified form listing additional damage does not relieve the carrier of liability when the demand on the carrier and supporting documentation, which is substance fully notified the carrier of the damage, is furnished the carrier within the agreed upon 75 days of delivery.

67:211

■ **Shipment**
■■ **Carrier liability**
■■■ **Burden of proof**

An affidavit by the shipper's employee, who has personal knowledge of the facts, stating that a missing carton was loaded on the carrier's vehicle, establishes receipt by the carrier. Since the carrier offers no other explanation for the loss of the carton, a *prima facie* case of carrier liability for loss is established.

68:723

■ **Shipment**
■■ **Losses**
■■■ **Common carriers**
■■■■ **Notification**

A notice of loss called a discrepancy report, sent by the Department of the Air Force to the carrier 10 weeks after receipt of a carton by the carrier, identifying the lost property, its value, and stating the intention to hold the carrier liable, substantially complies with normal claims-filing requirements. Other circumstances indicating the carrier's awareness of the loss demonstrate that the carrier was not prejudiced by a 2-year delay in filing a formal claim.

68:723

■ **Shipment**
■■ **Tenders**
■■■ **Terms**
■■■■ **Interpretation**

A carrier's tender offered to transport Freight-All-Kinds, except articles of "unusual value." This exception is limited to items of intrinsic value, such as precious metals; it does not cover items such as scientific equipment which are expensive but lack intrinsic value. Therefore, an atomic clock valued at over $600 per pound cannot be viewed as an article of "unusual value" within the meaning of the tender exception since it possesses no intrinsic value.

68:724

■ **Shipment costs**
■■ **Additional costs**
■■■ **Evidence sufficiency**

When notations on the government bill of lading showed that standard equipment was ordered by the shipper but special equipment was furnished by the carrier may offer evidence to show that government shipping agents ordered the special equipment. However, to refute the bill of lading notations the evidence must clearly show that the notations were mistaken. Since it did not, the General Services Administration's (GSA) actions in recovering overcharges from the carrier for the special equipment are sustained.

67:479

■ **Shipment costs**
■■ **Additional costs**
■■■ **Evidence sufficiency**

General equitable considerations concerning the interpretation of government contracts do not affect a carrier's obligation under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1982), to collect only the applicable charges shown in the carrier's tender or tariff filed with the Interstate Commerce Commission. Where the carrier files two tenders, both of which are in effect and contain applicable rates for the same shipments, the government is entitled to use the lower rates. Therefore, there is no basis to reverse GSA's collection of overcharges, which was based on alternate provisions in both tenders giving the government the benefit of the lower rates.

67:479

■ **Shipment costs**
■■ **Overcharge**
■■■ **Payment deductions**
■■■■ **Propriety**

On a shipment destined to Lexington Park, Maryland, the General Services Administration (GSA) collected, as overcharges, the difference between assessed tariff rates and reduced rates published in the carrier's tender. GSA's action was improper since the carrier's tender reflects the intent to restrict the reduced rates to points served direct, as listed in a particular section of a tariff, and Lexington Park was not shown as a direct-service point for the carrier. The carrier's merger with and adoption of operating authority of another carrier, which included direct-service authority to serve Lexington Park, do not establish the carrier's intent to extend application of its tender rates to Lexington Park where its tender continued to expressly refer to the list of points which excluded Lexington Park.

66:442

■ **Shipment costs**
■■ **Overcharge**
■■■ **Payment deductions**
■■■■ **Propriety**

A motor carrier with a general commodities division that operates regular van equipment and a "SCAT" division that operates special equipment, including flatbeds, refrigerated, and temperature controlled units, issued tenders which offered special rates to the government. The tender rates were based on use of the special equipment. Government contractors call the general commodities division for transportation service that would protect from freezing 38 truckload shipments of pickles. The carrier transported 13 of the shipments in closed vans containing portable heaters, and 25 shipments in "refrigerator" equipment, and collected charges were based on rates that were higher than the tender rates. GSA applied the lower tender rates and deducted overcharges. Held: Applicability of the tenders did not depend on whether shippers called a specific division but on the type of equipment used. The tenders were not applicable to the 13 shipments moved in closed vans; however, they were applicable to the other 25 shipments since special equipment reasonably can be viewed to include the "refrigerator" equipment used.

66:662

■ **Shipment costs**
■■ **Overcharge**
■■■ **Payment deductions**
■■■■ **Propriety**

A motor carrier contends it was improper for the General Services Administration (GSA) to recover overcharges on the basis of rates published in a tender which the carrier denies that it ever issued. However, the Military Traffic Management Command (MTMC) received the tender and returned it to the carrier for revision, and MTMC received it back again with required revisions. Also, reference to the tender on Government Bills of Lading gave the carrier notice of the government's intentions to apply the tender; however, the carrier failed to inquire about it until after GSA issued the notices of overcharge. Under these circumstances, the carrier's general denial of responsibility for the tender does not meet its burden to prove the legal liability of the United States, and where there is doubt concerning the government's liability, GSA's audit action is sustained.

66:670

■ **Shipment costs**
■■ **Overcharge**
■■■ **Payment deductions**
■■■■ **Propriety**

When notations on the government bill of lading showed that standard equipment was ordered by the shipper but special equipment was furnished by the carrier may offer evidence to show that government shipping agents ordered the special equipment. However, to refute the bill of lading notations the evidence must clearly show that the notations were mistaken. Since it did not, the General Services Administration's (GSA) actions in recovering overcharges from the carrier for the special equipment are sustained.

67:479

■ **Shipment costs**
■■ **Overcharge**
■■■ **Payment deductions**
■■■■ **Propriety**

General equitable considerations concerning the interpretation of government contracts do not affect a carrier's obligation under the Interstate Commerce Act, 49 U.S.C. § 10101 *et seq.* (1982), to collect only the applicable charges shown in the carrier's tender or tariff filed with the Interstate Commerce Commission. Where the carrier files two tenders, both of which are in effect and contain applicable rates for the same shipments, the government is entitled to use the lower rates. Therefore, there is no basis to reverse GSA's collection of overcharges, which was based on alternative provisions in both tenders giving the government the benefit of the lower rates.

67:479

■ **Unauthorized contracts**
■■ **Quantum meruit/valebant doctrine**

Contractor provided chemical supplies ordered by Naval officer who had no authority to do so. Navy declined ratification because it could not concur that sales price was a "fair and reasonable" price

as required by regulations. Contractor may be paid on *quantum valebant* basis because supplies constituted a permissible procurement, government received and accepted benefit, and the contractor acted in good faith. However, recovery is limited to amount Navy determined supplies would have cost had proper competitive procurement procedures been followed.

66:351

■ **Unauthorized contracts**

■■ **Quantum meruit/valebant doctrine**

Claims asserted against the United States Navy by the governments of the United Kingdom and Italy (which arose in the course of a routine and continuing series of transactions that hinge directly upon the long-standing, day-to-day relationships of the governments involved) may be paid, despite the absence of supporting official records, because their validity and non-payment have been satisfactorily substantiated.

67:52

■ **Unauthorized contracts**

■■ **Quantum meruit/valebant doctrine**

The General Accounting Office allows payment for transportation charges on a *quantum meruit* basis only where there is no valid transportation contract or applicable tariff or tender which dictates the proper amount due. In a case where neither condition pertains payment on a *quantum meruit* basis would be inappropriate; the lowest applicable charges must be collected.

67:479

■ **Unauthorized contracts**

■■ **Quantum meruit/valebant doctrine**

A claim against the Army, arising from its continued use of rental automated data processing equipment and services for nearly a year after the applicable contract had expired, may be paid on a *quantum meruit/quantum valebant* basis. However, since the equipment and services at issue could have been procured under a nonmandatory General Services Administration (GSA) Federal Supply Schedule, the amount of the claim is reduced to that which would have been paid had the items been properly procured under the relevant schedule.

69:13

■ **Unauthorized contracts**

■■ **Quantum meruit/valebant doctrine**

Notwithstanding agency failure to comply with procurement regulations in issuing a delivery order for vehicle repairs on a noncompetitive basis, the contractor who performed the repairs may be paid in accordance with the terms of the order.

70:664

■ **Unauthorized contracts**

■■ **Quantum meruit/valebant doctrine**

A claim for repair work ordered by an agency official whose contract warrant had expired may be paid on a *quantum meruit* basis since the government received and accepted the benefit of the work,

the claimant acted in good faith, and the amount claimed represents reasonable value of the benefits received.

70:664

■ **Utility services**
■■ **Payment procedures**
■■■ **Administrative policies**
■■■■ **Revision**

The General Accounting Office has no objection in principle to a General Services Administration (GSA) proposal to combine elements of fast pay procedures and statistical sampling to pay and audit utility invoices, even though payments involved may be larger than normally associated with statistical sampling procedures. However, a valid sampling plan should be carefully designed and documented to provide for effective monitoring, meaningful sampling of all invoices not subject to 100 percent audit, audit emphasis commensurate with the risk of the government, and a basis for the certification of payments. In our opinion, GSA, with appropriate modification to current proposal, could develop a valid statistical sampling plan to meet these requirements.

67:194

■ **Utility services**
■■ **Payment procedures**
■■■ **Administrative policies**
■■■■ **Revision**

The General Accounting Office has no objection to a General Services Administration (GSA) modified proposal to combine elements of fast pay procedures and statistical sampling techniques to pay and audit utility invoices. GSA's modified proposal is a valid sampling plan because it is designed and documented to provide for effective monitoring, a sampling of those invoices not subject to complete audit coverage, audit emphasis commensurate with the risk to the government, and a basis for the certification of payments.

68:618

Sealed Bidding
■ **All-or-none bids**
■■ **Evaluation**
■■■ **Propriety**

In the absence of evidence affirmatively establishing that "all or none" qualification was added to a bid after opening, the General Accounting Office will not question consideration of the bid as qualified, even though an appearance of impropriety was created when the agency failed to discover the qualification until 2 months after bid opening.

66:87

■ All-or-none bids
■■ Evaluation
■■■ Propriety

Even though the protester's bid for one of five line items is not low, when its bid for all five items combined is less than any other bidder's, the fact that it is on an all-or-none basis does not prevent the agency from considering it.

66:367

■ All-or-none bids
■■ Evaluation
■■■ Propriety

An all or none bid qualification should be construed as restricting award to all or none of the line items of a solicitation unless the context and circumstances indicate otherwise.

67:132

■ All-or-none bids
■■ Evaluation
■■■ Propriety

Where the language of a message sent to an agency plainly evinces an intent that an "all or none" qualification contained in bid was intended to apply to the total quantities of an individual line item, rather than to all of the line items in the aggregate, the bidder may not subsequently revise the qualification to suit its own purpose of receiving the award of all line items for which it bid.

67:132

■ All-or-none bids
■■ Responsiveness

Agency's failure to discover "all or none" bid qualification at bid opening but before award does not affect responsiveness of bid or consideration of qualification in evaluation of bids, where invitation for bids permitted bidding on an "all or none" basis and the qualification was typed on the bid at the end of the pricing schedule.

66:86

■ All-or-none bids
■■ Responsiveness

Standard clause in invitation for bids providing that bids for supplies or services other than those specified will not be considered does not constitute a prohibition on "all or none" bids so as to render nonresponsive a bid containing an "all or none" qualification.

69:105

■ **All-or-none bids**
■■ **Responsiveness**

Low bid is properly determined to be responsive as an "all or none" bid where bidder provides one lump-sum price for work required rather than individual prices for six line items (base item plus five additives) in the solicitation's schedule.

69:144

■ **Ambiguous bids**
■■ **Determination criteria**

In a firm, fixed-price requirements contract, bid was not ambiguous, and agency's rejection of it as nonresponsive was improper where bidder inserted in its bid a notation providing for a discount to the government, and where, even without the discount, bidder is lowest, responsible bidder.

67:121

■ **Ambiguous bids**
■■ **Determination criteria**

The procuring agency in a sealed bid procurement reasonably rejected as nonresponsive a bid that first stated that the protester offered a particular model that met all specifications and then included language that could reasonably be interpreted as meaning the particular model would not meet certain material solicitation requirements. A bid that takes exception to material solicitation requirements or is ambiguous with respect to whether the bid represents an offer to comply with all material requirements, must be rejected as nonresponsive.

70:219

■ **Amendments**
■■ **Acknowledgment**
■■■ **Government mishandling**

Procuring agency properly considered misplaced acknowledgment of solicitation amendment where record establishes that the acknowledgment was deposited at the government installation 2 days prior to bid opening and was misplaced by the agency, but was in the agency's possession until it was found, and it was discovered prior to award.

70:131

■ **Bid guarantees**
■■ **Amounts**
■■■ **Indefinite quantities**

Completed Certificate of Procurement Integrity is properly required under solicitation contemplating award of an indefinite quantity contract with a minimum quantity of $50,000, where the estimated value of the orders to be placed exceeded $100,000, as reflected by solicitation's evaluation provision which was based on specified maximum quantities which the solicitation estimated would fall within a range of $1,000,000 to $5,000,000.

70:676

■ **Bid guarantees**
■■ **Post-acceptance periods**
■■■ **Submission**

Where invitation specifically states that payment and performance bonds may be furnished after contract award, awardee's failure to furnish such bonds prior to award does not nullify contract.

68:622

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Agents**
■■■■ **Identification**

Protest that bid bond was defective due to corporate surety's failure to name federal process agents is denied because such failure is a procedural omission that does not bear directly on the authority of the surety to issue the bond or affect the underlying obligation of the surety.

69:296

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Checks**
■■■■ **Adequacy**

Bid guarantee in the form of a cashier's check to the order of "Farmers Home Bureau, U.S. Government" on a construction services solicitation issued by the Farmers Home Administration is an acceptable firm commitment to the government since there is no doubt that the check can be negotiated by the agency in the event of a default by the bidder.

70:530

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Contractors**
■■■■ **Identification**

Where corporation submits bid in assumed trade name registered prior to bid opening, official documentation of such registration submitted after bid opening, which existed and was publicly available prior to bid opening, adequately identified corporation as party that would be legally bound by bid; therefore, bid is responsive and award to corporation would be proper.

67:117

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Contractors**
■■■■ **Identification**

There is no discrepancy between the legal entity named on a bid and a bid guarantee where the nominal bidder is an operating unit of the corporation designated as principal on the bid guarantee.

67:178

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Contractors**
■■■■ **Identification**

Contracting agency's rejection of bid as nonresponsive because of uncertainty as to the identity of the actual bidder is proper where bid was submitted by an entity that certified itself as both a joint venture and a corporation, characterized its corporate status as "other corporate entity," and used the employer's identification number of one member of the purported joint venture, a corporation.

68:492

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Contractors**
■■■■ **Identification**

Where the legal entity shown on the bid form and the legal entity shown on the bid bond are not the same, and it is not possible to conclude from the bid itself that the two entities intended to bid as a joint venture, the contracting officer properly rejected the bid as nonresponsive.

69:712

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Invitations for bids**
■■■■ **Identification**

Protest that agency unreasonably rejected protester's bid as nonresponsive is sustained where sole defect was a typographical error in solicitation number on bid bond, bond contained correct bid opening date and there was no other ongoing procurement with which bond could otherwise be confused.

67:455

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

Agency improperly determined that a bank letter of credit submitted as a 20 percent bid guarantee was deficient for failure to authorize the agency to draw sight drafts on the bank or specify the

dollar amount of the credit since neither omission would appear to affect the validity of the letter of credit, and the penal sum of a bid guarantee may be expressed as a percentage of the bid.

66:324

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

Where letter of credit, submitted as a bid guarantee, incorporates terms which indicate that the letter is revocable or which, at the very least, creates an uncertainty as to whether the letter would be enforceable against the issuing bank, the letter is unacceptable as a "firm commitment" within the meaning of the government's standard bid guarantee clause, Federal Acquisition Regulation, 48 C.F.R. § 52.228-1 (1985).

66:492

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

Bid guarantee (in the form of an irrevocable letter of credit), unless otherwise required by the procuring agency's own regulations, need only be available for the full duration of the solicitation's acceptance period; there is no general requirement that a bid guarantee extend for a full year.

67:178

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

The naming of a federal employee on a bid guarantee who is required to certify as to the bidder's default before payment would be made under irrevocable letter of credit is unobjectionable since it would not affect the procuring agency's ability to enforce the bid guarantee in the event the bidder failed to carry out its obligations under the solicitation.

67:178

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

Where letter of credit submitted as a bid guarantee is conditioned upon assignment of the contract to a commercial banker in the event of default, thereby limiting the government's rights under the standard Default clause, agency properly rejected the bid as nonresponsive.

67:546

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

Where copy of irrevocable letter of credit submitted as a bid guarantee indicates that the agency can only demand payment from the surety upon presenting the original letter of credit, the letter is of questionable enforceability, and the bid therefore is properly rejected as nonresponsive.

68:152

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Letters of credit**
■■■■ **Adequacy**

Where a solicitation requires a bid guarantee but protester submits a letter of credit which in fact is merely a revocable line of credit, and a promissory note which merely provides for the furnishing of a performance bond in the future upon acceptance of the bid, the bid properly is rejected as nonresponsive.

68:192

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Liability restrictions**

Where a commercial bid bond form limits the surety's obligation to the difference between the amount of the awardee's bid and the amount of a reprocurement contract, the terms of the commercial bond represent a significant departure from the rights and obligations of the parties as set forth in the solicitation, which renders the bid bond deficient and the bid nonresponsive.

69:715

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Liability restrictions**

Bid bond in the amount of 20 percent of the bid price submitted by the low bidder on an invitation for bids (IFB) for an indefinite quantity construction contract, which did not solicit bid prices, but instead requested bidders to bid multipliers that would be applied to pre-priced items in performing the contract, is insufficient to meet the IFB requirement for a $20,000 bid bond, since the IFB only provided for a $50,000 minimum value and stated no estimate of the government's anticipated needs; thus, the bid bond amount would be $10,000. However, the low bid may be accepted under applicable regulation because the difference between the low bid price and the next higher price is less than the insufficient $10,000 bid bond amount under any reasonable calculation.

70:180

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Signatures**
■■■■ **Authority**

The validity of a bid is not affected by the bidder's failure to affix a corporate seal to the bid or the bid bond.

68:397

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Signatures**
■■■■ **Omission**

Failure of a bidder to sign a bid bond in the capacity of principal constitutes a minor informality that can be waived where the unsigned bond is submitted with a signed bid.

68:397

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Signatures**
■■■■ **Powers of attorney**

Agency properly determined a bid bond was defective and the bid therefore nonresponsive under a sealed bid procurement where the bond indicated that it was executed by the bonding agent 3 days before power of attorney authorized the bonding agent to sign the bond on behalf of the surety.

69:737

■ **Bid guarantees**
■■ **Responsiveness**
■■■ **Signatures**
■■■■ **Sureties**

Bidder's failure to sign an otherwise proper bid bond may be waived if the bond is submitted with a signed bid.

67:284

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Where a question arises after bid opening as to the adequacy of a bid bond because a surety's net worth may actually be less than stated, agency may still accept the bid because the surety's submission of cashier's check after bid opening met requirement under Federal Acquisition Regulation, 48 C.F.R. § 28.101-4(b) (1986), that net worth of individual sureties need only be equal to the difference between the bidder's price and the price of the next low acceptable bid.

66:549

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Solicitation provision which, in accordance with a deviation from the Federal Acquisition Regulation (FAR), precludes the use of individuals as security for bid, payment and performance bonds unless they deposit adequate tangible assets with the government is not objectionable where the deviation properly was authorized under the FAR, and is a temporary element of a pilot contracting program aimed at improving the efficiency of the agency's procurement efforts.

67:234

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Bidder, who is also the principal on the bid bond, cannot be his own surety since a surety necessarily must be distinct from the principal.

68:192

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

General Accounting Office will not disturb agency's determination that individual sureties are acceptable where record does not show that determination was made in bad faith; there was no information available to contracting officer prior to award that should have prompted her to undertake independent investigation of sureties, beyond consideration of documentation furnished with bid.

68:408

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Protest against agency's acceptance of awardee's four individual sureties is denied where agency investigated the sureties and found that at least two of them were acceptable.

69:187

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Decision sustaining protest against agency's determination that individual sureties on bid guarantee were unacceptable for pledging their personal residences—when in fact there was no prohibition against pledging of personal residences in support of guarantee—is affirmed on reconsideration even though, after issuance of original decision, agency undertook investigation that revealed other bases for rejecting sureties; original decision was correct based on issues, record and arguments developed by the agency and protester.

69:345

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Even though an individual surety may have been accepted by a contracting agency, another agency is not required to accept the surety where it reasonably finds the surety to be unacceptable based on information submitted to it.

69:388

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Protester properly was found nonresponsible where sureties pledged assets which are unacceptable under the current regulatory requirements.

70:94

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**

Agency may not automatically reject a bidder for unacceptable individual sureties, where the bid bond is sufficient, even though the Standard Form 28, "Affidavit of Individual Surety," and supporting documents of the individual sureties submitted with the bid contain minor defects that might easily be remedied. Since these matters concern bidder responsibility, absent any evidence that the sureties lacked integrity or credibility or an unreasonable delay in the procurement, the agency should give the bidder the opportunity to have his sureties provide satisfactory explanations or pledge sufficient and acceptable assets.

70:274

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**
■■■■ **Information submission**

Individual sureties on a bid bond were properly found unacceptable where, in their Affidavits of Individual Surety (standard form 28), they misstated and omitted essential information needed to verify their net worths, thereby casting doubt on their integrity and ability to fulfill the surety obligation.

68:666

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**
■■■■ **Information submission**

Agency reasonably found individual surety on bid bond unacceptable, and thus properly rejected bidder as nonresponsible, where, in response to agency request for supporting information showing

ownership and value of assets claimed, the surety submitted escrow agreement as a pledge of assets, but the agreement was made subject to Louisiana, rather than federal law; agency was not required to compromise the financial guarantee represented by the bid bond by making government subject, in case of default, to laws under which its rights may be less than under federal law, which otherwise applies to federal contracts.

69:191

■ **Bid guarantees**
■■ **Sureties**
■■■ **Acceptability**
■■■■ **Information submission**

Where agency investigation revealed misstatements and discrepancies in individual sureties' net worth information furnished in Affidavits of Individual Surety in support of bid guarantee, agency reasonably determined that there was inadequate evidence of value and ownership of claimed assets as well as doubt as to the integrity of the sureties and the credibility of their representations; contracting officer therefore properly rejected bidder as nonresponsible.

70:133

■ **Bid guarantees**
■■ **Validity**

The validity of a bid is not affected by the bidder's failure to affix a corporate seal to the bid bond.

67:284

■ **Bid guarantees**
■■ **Waiver**

Requirement for bid, performance and payment bonds can be waived for firms submitting bids through the Canadian Commercial Corporation (CCC) since the Canadian government, pursuant to a letter of agreement with the United States, guarantees all commitments, obligations, and covenants of the CCC in connection with any contract or order issued to the CCC by any contracting activity of the U.S. government.

69:23

■ **Bids**
■■ **Acceptance time periods**
■■■ **Expiration**

Where contracting officer deliberately allowed bid acceptance period to expire without making award in order to effect cancellation of solicitation which she had determined was warranted, General Accounting Office will review propriety of the decision to cancel.

69:395

■ Bids
■■ Acceptance time periods
■■■ Expiration
■■■■ Reinstatement

Expiration of bid acceptance period is tolled where bidder files protest challenging rejection of its bid and award to another bidder within the original bid acceptance period.

69:106

■ Bids
■■ Additional information
■■■ Incorporation by reference

Where solicitation incorporates by reference a prior solicitation but provides for revised delivery schedule, a bidder obligates itself to perform all work as changed in the revised solicitation when it signs the revised solicitation; the bidder does not render its offer nonresponsive to the revised schedule by including the prior solicitation in its bid without crossing out or editing the prior schedule to conform it to the revised schedule.

68:196

■ Bids
■■ Bid guarantees
■■■ Justification

Bonding requirements for laundry services contract are justifiably imposed to protect the government's interest where the government will provide the contractor with a considerable amount of equipment for the performance of the contract and the continuous provision of laundry services is essential to the operation of two medical centers including operating rooms.

68:204

■ Bids
■■ Error correction
■■■ Low bid displacement
■■■■ Propriety

Correction of a bid which results in the displacement of a lower bid is permissible where it is clear from the face of the bid that the bidder mistakenly totaled its price for the first three items in the blank for the fourth item and where bidder's intention not to charge for the fourth item is ascertainable from the solicitation itself.

68:523

■ Bids
■■ Error correction
■■■ Low bid displacement
■■■■ Propriety

Agency improperly permitted correction of bid containing discrepancy between arithmetic total of line item prices and grand total price indicated in bid where either price reasonably could have

been intended, and only one of which was low. Agency may not rely upon bidder's worksheets to determine which price was intended since the request for correction is considered as resulting in displacing a lower bid.

69:178

■ **Bids**
■■ **Error correction**
■■■ **Pricing errors**
■■■■ **Line items**

Agency properly determined not to correct bid containing discrepancy between arithmetic total of prices and total price indicated in bid where either price reasonably could have been intended. Solicitation provision providing that apparent errors in addition of lump-sum and extended prices shall be corrected is not applicable where the bid does not clearly indicate an apparent addition error. 64 Comp. Gen. 830 and B-200165, B-200165.2, Dec. 31, 1980, distinguished.

67:421

■ **Bids**
■■ **Errors**
■■■ **Error substantiation**

Contracting officer's rejection of protester's low bid in Office of Management and Budget Circular No. A-76 procurement on the basis that bid contained a mistake was premature where: (1) protester immediately and consistently verified that its bid price was not mistaken, (2) there is no evidence in the record that bid contained a mistake, and (3) protester's low bid was not so low as to make it unconscionable for government to award contract to protester. Agency should request protester to provide sufficient explanation and/or documentation to assure contracting officer that bid as confirmed is without error and that protester sufficiently understands the scope and nature of the work to be found responsible.

66:468

■ **Bids**
■■ **Errors**
■■■ **Error substantiation**

A protester has shown clear and convincing evidence that its low bid was mistaken because of a malfunction in its bid preparation computer software where there was a considerable disparity between the low bid and the other bids and the software manufacturer has confirmed that there was a "bug" in the software that could cause this problem.

67:278

■ **Bids**
■■ **Errors**
■■■ **Error substantiation**

Although contracting agency improperly allowed upward correction of bid to include additional profit, bond costs and insurance costs when the costs were not adequately substantiated, there is no evidence of fraud, bad faith or mutual mistake, the resulting contract was not plainly or palpably

illegal, and the contractor may be paid at the contract price where the agency determines that it is not in the government's best interest to terminate the contract.

69:30

■ **Bids**
■■ **Evaluation**
■■■ **Prices**
■■■■ **Options**

Evaluation of bids under invitation for bids, which failed to state whether the evaluation of bids would include or exclude the evaluation of option prices, is improper.

69:610

■ **Bids**
■■ **Evaluation errors**
■■■ **Price reasonableness**

Where the contracting officer makes a finding of price reasonableness based solely on a government estimate, and the estimate is shown to have been calculated improperly, the price reasonableness determination is invalid and should be redetermined based on a properly calculated estimate.

67:261

■ **Bids**
■■ **Judgmental errors**
■■■ **Error correction**
■■■■ **Propriety**

Procuring agency properly denied protester's request to increase the price of its low bid because of alleged mistake of failing to apply a state use tax where the protester intentionally did not include the tax in computing its bid.

68:110

■ **Bids**
■■ **Late submission**
■■■ **Acceptance criteria**
■■■■ **Government mishandling**

Protest is sustained where agency failed to transmit to the bid opening site prior to bid opening a bid received at the agency's mailing address (a post office caller number) more than 4 hours before bid opening.

66:269

■ **Bids**
■■ **Late submission**
■■■ **Acceptance criteria**
■■■■ **Government mishandling**

Late bid should have been considered when the paramount reason for lateness was the agency's failure to establish reasonable procedures to assure the timely transmission of the bid to the bid opening location which arrived at the installation's post office the day before bid opening.

66:417

■ **Bids**
■■ **Late submission**
■■■ **Acceptance criteria**
■■■■ **Government mishandling**

The Government Printing Office (GPO), a legislative branch agency, is not subject to the Federal Acquisition Regulation but is governed by its own Printing Procurement Regulation as to the acceptance of late bids. GAO does not find unreasonable GPO's determination that a late bid set by express mail may be accepted where the Postal Service states that the majority of such express mail is delivered prior to bid opening time as GPO found this to show the bid was mailed in sufficient time to arrive in the normal course of the mails.

67:363

■ **Bids**
■■ **Modification**
■■■ **Allegation substantiation**
■■■■ **Burden of proof**

Protester's assertion that contracting official improperly refused to accept attempted telephone modification of its bid through Western Union is not sufficiently supported by record where protester presents confirming notice from Western Union that call was attempted, but there is no contemporaneous documentation that call was made or that contracting official refused to accept modification, and contracting official denies in affidavit that she received call from Western Union or that she ever instructed any employee to refuse telephone modification.

68:150

■ **Bids**
■■ **Modification**
■■■ **Interpretation**
■■■■ **Intent**

Since property sales contemplate award being made on an item-by-item basis, where bidder sets forth in his bid deposit statement that his total contract price is "$1,602" and that the amount of his bid deposit is "20% of Bid," subsequent facsimile modifications which contain the solicitation number, the word "modification," the date, the signature of the bidder, and a clear itemized list of new bids and corresponding bid prices reasonably can be construed to mean that the initial contract price of $1,602 has been modified; under these circumstances, the $1,602 figure does not limit the

amount of bidder's deposit and contractor is entitled to award on all items for which he was high bidder.

70:28

■ **Bids**
■■ **Modification**
■■■ **Late submission**
■■■■ **Mail/telegraph delays**

Bidders must allow a reasonable time for telefaxed bid modifications to be delivered from the point of receipt to the designated location for receipt of bids; when they do not do so, late arrival at the designated location cannot be attributed to government mishandling. One minute is not a reasonable or sufficient amount of time to deliver a telefaxed bid modification from the mailroom to the office designated for bid opening.

68:125

■ **Bids**
■■ **Modification**
■■■ **Late submission**
■■■■ **Rejection**

Although late receipt of bid modification was due to agency's providing bidder with incorrect telex number, modification may not be considered where bidder, after learning of bidding results before modification was received by agency, instructs Western Union to deliver the modification; this gave bidder impermissible opportunity to decide whether to submit its modification and accept award.

66:375

■ **Bids**
■■ **Modification**
■■■ **Late submission**
■■■■ **Rejection**

Telegraphic bid modification, recorded by the agency as having been received for the first time the day after bid opening, is properly rejected as late notwithstanding information from Western Union purporting to show that it was transmitted prior to bid opening; the only acceptable evidence to establish timely receipt is the government's time/date stamp or other evidence of receipt maintained at the government installation.

68:149

■ **Bids**
■■ **Preparation costs**

Recovery of neither proposal preparation costs nor the costs of filing and pursuing a protest is appropriate where the remedy afforded the protester is the opportunity to submit a revised technical proposal and to be reevaluated on the basis of unambiguous specifications.

66:139

■ Bids
■■ Preparation costs

When protester successfully challenges an unduly restrictive specification, it is entitled to recover the costs of filing and pursuing the protest.

66:208

■ Bids
■■ Preparation costs

Where agency concedes low bidder was responsible and therefore should have been awarded a contract prior to loss of fiscal year funds, bidder is entitled to bid preparation and protest costs if it does not ultimately receive the award.

66:249

■ Bids
■■ Preparation costs

Protester is entitled to the costs of preparing its bid and pursuing its protest where protest is sustained and no other remedy is appropriate due to substantial completion of contract performance.

66:269

■ Bids
■■ Preparation costs

Where corrective action is not possible because contract performance has been completed, successful protester is entitled to recover its bid preparation costs and the costs of filing and pursuing the protest, even though its protest was untimely filed, since the protester would have received an award under a proper bid evaluation and the improper award and contract performance did not result from delays by the protester in raising the protest issue.

66:367

■ Bids
■■ Preparation costs

Proper basis exists for canceling invitation for bids after bid opening and a decision sustaining a protest of the agency's rejection of a bid on other grounds where a contracting agency reviewing official determines the items are not needed and denies necessary approval of the procurement. Prior decision finding the protester entitled to bid preparation costs and costs of pursuing the protest therefore is modified to delete entitlement to bid preparation costs since the protester could not have received the award.

66:499

■ Bids
■■ Preparation costs

Administrative Office of the United States Courts' award of a contract to a nonresponsive bidder violated 41 U.S.C § 5. Since the award did not comply with that statute, a protester is entitled to the

costs of filing and pursuing its protest, inasmuch as most of the improperly awarded contract has been performed.

66:645

■ Bids
■■ Preparation costs

Where a bid protest is sustained based on agency's improper rejection of the protester's bid, and the contract in issue already has been performed, the protester is entitled to reimbursement of its bid preparation costs and costs of pursuing the protest, including attorney's fees.

67:131

■ Bids
■■ Preparation costs

Claim for bid preparation costs is disallowed where the protester was not awarded bid preparation costs in a General Accounting Office decision sustaining the protest and did not timely request reconsideration of the decision when he learned he would not receive award as conditionally recommended by the decision.

70:661

■ Bids
■■ Responsiveness
■■■ Acceptance time periods
■■■■ Deviation

The offer of a bid acceptance period significantly longer than the 60-day period requested in the IFB is acceptable since it exceeds the agency's minimum needs.

68:194

■ Bids
■■ Responsiveness
■■■ Acceptance time periods
■■■■ Deviation

Bid was properly rejected as nonresponsive where in "Period for Acceptance of Bids" clause and cover letter attached to bid it was stated that bid was for acceptance within 30 days, whereas "Minimum Bid Acceptance Period" clause also included in solicitation required a 60-day bid acceptance period; IFB was not rendered ambiguous by inappropriate inclusion of "Period for Acceptance of Bids" clause since, reading solicitation as a whole, space provided in the clause for an acceptance period different than 60 days clearly meant a period longer than 60 days.

69:27

■ Bids
■■ Responsiveness
■■■ Ambiguous prices

Bid sent by the protester's own telex equipment and containing a bid price in the form of garbled letters properly is rejected, notwithstanding that the numbers on the same keys as the garbled let-

ters allegedly represent the intended price, where there is no showing that confirming bid was mailed and was outside of the bidder's control prior to bid opening, and there is no other evidence of intended bid that was outside bidder's control prior to bid opening.

67:22

■ **Bids**
■■ **Responsiveness**
■■■ **Ambiguous prices**

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

67:529

■ **Bids**
■■ **Responsiveness**
■■■ **Ambiguous prices**

Where invitation for bids (IFB) contemplates award of a firm, fixed-price contract for disposal of hazardous and nonhazardous waste and bid includes extra charge not contemplated by the IFB, which renders the total price of the bid uncertain and conditions the bidder's obligation to perform, the bid is nonresponsive and cannot form the basis for award.

69:539

■ **Bids**
■■ **Responsiveness**
■■■ **Brand name/equal specifications**
■■■■ **Equivalent products**

A bid offering an "equal" product under a brand name or equal solicitation must contain sufficient descriptive literature to permit a determination that the product possesses the salient characteristics specified in the solicitation, a requirement that is not met by a bid that merely parrots back the salient characteristics specified.

66:181

■ **Bids**
■■ **Responsiveness**
■■■ **Brand name/equal specifications**
■■■■ **Equivalent products**

"Equal" bid in response to brand name or equal solicitation was properly rejected as nonresponsive where inadequate descriptive material was submitted to establish that offered item met the salient characteristics listed in the solicitation.

66:504

■ Bids
■■ Responsiveness
■■■ Certification
■■■■ Omission

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of a bid where such small business certification is not required for the type of contract to be awarded.

68:361

■ Bids
■■ Responsiveness
■■■ Certification
■■■■ Omission

Protest that low and second-low bids are nonresponsive for bidders' failure to complete certification regarding statutory limitation on use of appropriated funds for lobbying activities is denied where certification imposed no additional material obligation upon bidders beyond those imposed by the statute itself.

69:588

■ Bids
■■ Responsiveness
■■■ Certification
■■■■ Omission

Bid was properly rejected as nonresponsive for failure to submit required Certificate of Procurement Integrity because completion of the certificate imposes material legal obligations on the bidder to which it is not otherwise bound.

70:676

■ Bids
■■ Responsiveness
■■■ Clerical errors

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

67:529

■ Bids
■■ Responsiveness
■■■ Conflicting terms
■■■■ Ambiguity

Where a discrepancy exists between the legal entity shown on the bid and the legal entity shown on the bid bond, and it is not possible to conclude from the bid itself that the intended bidder was the

same legal entity as the named principal on the bid bond, the contracting officer properly rejected the bid as nonresponsive since the bid was at best, ambiguous.

68:164

■ **Bids**
■■ **Responsiveness**
■■■ **Conflicting terms**
■■■■ **Ambiguity**

Bid which is ambiguous—because bidder included conflicting delivery terms in cover letter and bid form—was properly rejected as nonresponsive since under one interpretation the bid takes exception to a material term of the solicitation.

69:54

■ **Bids**
■■ **Responsiveness**
■■■ **Conflicting terms**
■■■■ **Ambiguity**

Where bidder creates an ambiguity in its bid by offering different f.o.b. term than required by invitation for bids (IFB), ambiguity may not be waived or corrected as a minor informality, since offering a different f.o.b. term than required by the IFB is a material deviation.

69:54

■ **Bids**
■■ **Responsiveness**
■■■ **Conflicting terms**
■■■■ **Ambiguity**

Where bid is submitted under name "Sigma Electronics" and bond is submitted under name "Sigma General Corporation" contracting officer properly rejected bid as nonresponsive because of uncertainty as to identity of the actual bidder and was not required to investigate further whether the named entities referred to same legal entity, since bidder bears primary responsibility for unambiguously identifying itself as the party to be bound by the bid and there was insufficient evidence in the bid documents to alert contracting officer that named entities might be the same legal entity.

69:133

■ **Bids**
■■ **Responsiveness**
■■■ **Contractor liability**
■■■■ **Liability restrictions**

A bid is rendered unacceptable when a bidder attempts to limit its liability to the government. A bid stating that the contractor will take every precaution to contain residue from abrasive blasting during preparation of ship for painting, but will consider the firm acting for the government in issu-

ing a solicitation requiring such blasting to be responsible for any environmental violations, therefore is not acceptable.

66:23

■ **Bids**
■■ **Responsiveness**
■■■ **Contractor liability**
■■■■ **Liability restrictions**

Inclusion in bid of statement reserving bidder's right to provide performance and payment bonds from any surety reasonably could be construed as limiting the government's right to enforce the bidder's bid guarantee in event of default and, therefore rendered the bid nonresponsive.

67:179

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Absence**

Rejection of a bid for microcomputers as nonresponsive on basis that protester failed to submit descriptive literature to establish that the offered products conform to the specifications is improper where the solicitation does not require descriptive literature and there is no evidence in the protester's bid to indicate that protester took exception to the requirements.

70:365

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Adequacy**

Where an invitation for bids requires the submission of descriptive literature to establish conformance of the product offered with the material specifications of the solicitation, a bid must be rejected as nonresponsive if the literature submitted evidences nonconformity with the specifications.

66:530

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Adequacy**

Rejection of bid as nonresponsive on the basis that protester's descriptive literature shows different models of an offered product—one which conforms to solicitation requirement for .31 dot pitch and one that does not—is improper where a reasonable interpretation of the bid's entire contents does not support conclusion that bidder was offering a nonconforming model.

70:365

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Adequacy**

Rejection of bid as nonresponsive on the basis that protester submitted descriptive literature, which showed four different configurations of a keyboard to establish conformance to the solicitation's "enhanced keyboard" requirement, is improper where all four configurations depict enhanced keyboards and thus conform to the requirement.

70:366

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Ambiguous bids**

Bid that includes informational descriptive literature (not needed for bid evaluation) which describes two models of the required item, one of which does not meet a specification, may be accepted if the only reasonable view of the bid is that it is an offer of the conforming model.

66:704

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Ambiguous bids**

The pre-printed legend "prices and data subject to change" included in informational descriptive literature does not render the bid nonresponsive if the bid otherwise establishes precisely what the bidder is offering and at what price.

66:704

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Ambiguous bids**

The procuring agency cannot properly disregard unsolicited descriptive literature, where a bid specifically states that the bidder is offering equipment meeting or exceeding specifications contained in the descriptive literature; where the specifications contained in the unsolicited descriptive literature are noncompliant with a material solicitation requirement, the bid must be rejected as nonresponsive.

70:219

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Ambiguous bids**

Rejection of bid as nonresponsive on the basis that protester submitted descriptive literature, which showed four different configurations of a keyboard to establish conformance to the solicitation's "enhanced keyboard" requirement, is improper where all four configurations depict enhanced keyboards and thus conform to the requirement.

70:366

■ **Bids**
■■ **Responsiveness**
■■■ **Descriptive literature**
■■■■ **Ambiguous bids**

Fact that bidder's descriptive literature merely refers to "full 1-year warranty" and does not also repeat solicitation requirement that warranty service be performed on-site does not render bid nonresponsive where there is no clear indication in bid that the bidder does not intend to conform with warranty requirement.

70:366

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

To be responsive, a bid must represent an unequivocal offer to provide the product or service as specified in the invitation for bids, so that acceptance of the bid will bind the contractor to meet the government's needs in all significant respects.

67:121

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

A bid that included suggestions as to possible alternative methods of accomplishing the results desired by the agency did not take exception to any solicitation requirements, and thus improperly was rejected as nonresponsive.

67:131

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

Where submitted copies of a bid are not exact copies of the original, the bid is responsive provided the bidder is given no opportunity to select between two prices.

68:194

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

Rejection of bid that was inordinately low based on bidder's mistaken interpretation of specifications was proper despite bidder's assertion that no error was made, where bid was substantially below the government estimate and agency properly determined that the bidder's proposed method of performance did not conform to the solicitation specifications.

68:244

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

Bidder's failure to inspect material from core borings in procurement for excavation work, even where the solicitation so requires, provides no basis to reject an otherwise responsive bid that takes no exception to solicitation requirements.

69:57

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

Where the identity of the bidder is clear from the bid as submitted and there is no indication that the bidder will not perform in accordance with the requirements of the solicitation, the bid is responsive.

69:359

■ **Bids**
■■ **Responsiveness**
■■■ **Determination criteria**

Bid offering to furnish compliant item was properly found responsive notwithstanding post-bid opening notice from bidder that manufacturer named in bid does not manufacture compliant item; whether a bid is responsive and therefore eligible for award must be determined from contents of the bid itself at bid opening, without reference to information submitted after bid opening.

70:208

■ **Bids**
■■ **Responsiveness**
■■■ **Determination time periods**

A bid that is nonresponsive may not be corrected after bid opening to be made responsive, since the bidder would have an unfair advantage over other bidders by being able to choose to make its bid responsive or nonresponsive.

69:54

■ **Bids**
■■ **Responsiveness**
■■■ **Price data**
■■■■ **Minor deviations**

Where an uninitialed bid correction leaves no doubt as to the intended bid price, the requirement for initialing changes is a matter of form and the omission may be excused as a minor informality.

68:194

■ **Bids**
■■ **Responsiveness**
■■■ **Price omission**
■■■■ **Line items**

The protester's deletion of one subline item in its low bid on a sealed-bid procurement should be waived as a minor informality where the deleted bid requirement was not material or an essential or integral part of the overall contract work and where the waiver of the requirement would not affect the relative competitive standing of the bidders.

69:441

■ **Bids**
■■ **Responsiveness**
■■■ **Shipment**
■■■■ **Risk allocation**

Bid proposing delivery on an f.o.b. origin basis with freight allowed, contrary to solicitation requirement for delivery on an f.o.b. destination basis, is nonresponsive since it reduces the contractor's responsibility by shifting the risk of loss of or damage to goods during transit from the contractor to the government.

69:54

■ **Bids**
■■ **Responsiveness**
■■■ **Signatures**
■■■■ **Omission**

Bidder's failure to sign a telecopied bid modification may not be waived as a minor informality where the only evidence in the modification of the bidder's intent to be bound is the corporate letterhead and no other document signed by the bidder accompanied the modification.

68:79

■ **Bids**
■■ **Responsiveness**
■■■ **Small business set-asides**
■■■■ **Compliance**

Bid submitted in response to a total small business set-aside which failed to certify that all end items will be manufactured or produced by small business concerns properly was rejected as nonresponsive.

67:522

■ **Bids**
■■ **Responsiveness**
■■■ **Small business set-asides**
■■■■ **Compliance**

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of the bid where such small business certification is not required for the type of contract to be awarded.

68:290

■ **Bids**
■■ **Responsiveness**
■■■ **Terms**
■■■■ **Deviation**

Bid incorporating statements set forth in bidder's internal guidelines that did not parallel the language of the IFB but did not conflict with any of the IFB's requirements of otherwise reduce the bidder's affirmative obligation to perform in strict conformance with the solicitation is responsive.

67:179

■ **Bids**
■■ **Responsiveness**
■■■ **Terms**
■■■■ **Deviation**

Bid which offered to supply a machine tool with a hydraulic drive instead of the mechanical drive required by the solicitation specifications was nonresponsive.

69:323

■ **Bids**
■■ **Responsiveness**
■■■ **Terms**
■■■■ **Deviation**

Protester's bid for printing paper was properly rejected as nonresponsive where solicitation as a whole required bidders to agree to furnish paper with 50 percent waste paper content, and protester's bid offered zero percent content.

69:410

■ **Bids**
■■ **Responsiveness**
■■■ **Terms**
■■■■ **Deviation**

The procuring agency in a sealed bid procurement reasonably rejected as nonresponsive a bid that first stated that the protester offered a particular model that met all specifications and then included language that could reasonably be interpreted as meaning the particular model would not meet certain material solicitation requirements. A bid that takes exception to material solicitation requirements or is ambiguous with respect to whether the bid represents an offer to comply with all material requirements, must be rejected as nonresponsive.

70:219

■ **Bids**
■■ **Submission methods**
■■■ **Telegrams**

Bid sent by the protester's own telex equipment and containing a bid price in the form of garbled letters properly is rejected, notwithstanding that the numbers on the same keys as the garbled letters allegedly represent the intended price, where there is no showing that confirming bid was mailed and was outside of the bidder's control prior to bid opening, and there is no other evidence of intended bid that was outside bidder's control prior to bid opening.

67:22

■ **Bonds**
■■ **Justification**
■■■ **GAO review**

General Accounting Office will not question a requirement for performance and payment bonds on a non-construction contract unless the decision to include the requirement is shown to be unreasonable or made in bad faith.

66:63

■ **Bonds**
■■ **Justification**
■■■ **GAO review**

Air Force regulation that prohibits the use of performance and payment bonds in nonconstruction contracts unless there is documented history of prior default by contractors in the particular type of work to be performed, does not preclude a requirement for such bonds where (1) the contracting officer's determination to require them is based, in part, on the fact that a contract for similar services at another installation was terminated for default and (2) some of the work to be performed involves construction.

66:155

■ **Bonds**
■■ **Justification**
■■■ **GAO review**

Bonding requirements in an invitation for bids for equipment used for the replenishment of supplies and the refueling of ships at sea are not unduly restrictive of competition where the agency experienced a significant percentage of defaults in prior procurements resulting in severe consequences to the Navy mission.

69:22

■ **Bonds**
■■ **Sureties**
■■■ **Contingent liability**
■■■■ **Amount determination**

In determining the outstanding obligation of an individual surety under payment and performance bonds, the contracting officer properly may consider the full penal amount of the bond until completion of the contract and the expiration of any mandatory warranty period under the contract.

66:214

■ **Competitive advantage**
■■ **Incumbent contractors**

Unless the government has contributed to the competitive advantage of an incumbent contractor, an agency is not required to take action to equalize the competition. Nevertheless, when an agency has provided information as to the incumbent's current work load in the context of a bid protest, the General Accounting Office suggests that the agency make this information available to all bidders in a solicitation amendment.

66:148

■ **Conflicts of interest**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

A prospective bidder who, at the using agency's request, furnished a specification which the purchasing activity incorporated into its solicitation not knowing that it was descriptive of the protest-

er's product, may not be declared ineligible for any subsequent award under that solicitation on the grounds that the bidder has an organizational conflict of interest where the government had not contracted with that firm to prepare the specification and because the government has an obligation to screen for unduly restrictive specifications furnished by prospective vendors.

69:322

■ **Contract awards**
■■ **Multiple/aggregate awards**

Although IFB required consideration of multiple awards for components of an integrated thermal target system, contracting agency's decision that aggregate award was necessary to meet its minimum needs was proper where multiple awards would require equipment modification to make components compatible.

66:127

■ **Contract awards**
■■ **Multiple/aggregate awards**

When an invitation for bids permits multiple awards and states that award will be based on the lowest overall cost to the government, a single award at a price more than the total of two awards plus the administrative costs for two contracts is improper. The Competition in Contracting Act of 1984 requires agencies to evaluate sealed bids based solely on the factors stated in a solicitation and to make award considering only price and price-related factors included in the solicitation.

66:367

■ **Contract awards**
■■ **Propriety**

Protest against proposed award of a contract to a bidder that acknowledges an amendment containing a Procurement Integrity Certificate clause but fails to complete and sign the Certificate itself is denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for the Certificate, which implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988, has been suspended from December 1, 1989, to November 30, 1990, by section 507 of the Ethics Reform Act of 1989.

69:127

■ **Contract awards**
■■ **Propriety**
■■■ **Evaluation criteria**
■■■■ **Defects**

Protest is sustained where the evaluation method used by the agency resulted in award of a contract to a bidder who was not low for any possible combination of work that could be required.

66:31

■ **Contract awards**
■■ **Propriety**
■■■ **Evaluation criteria**
■■■■ **Defects**

Solicitation is defective where it lists eight evaluation factors, including price, in descending order of importance when in fact non-price factors were intended to be used only to determine whether the offerors were technically acceptable, not as the basis for a relative evaluation of the offerors' technical merit, and contracting agency in fact intended to award to the lowest priced technically acceptable offeror. Nevertheless, agency properly may make award under the defective solicitation since there is no indication that any offeror was prejudiced by the defect and the awardee's product meets the agency's needs.

68:387

■ **Contract awards**
■■ **Propriety**
■■■ **Invitations for bids**
■■■■ **Defects**

An agency may award misdescribed surplus property to the high bidder where the property is less valuable than what was advertised and the high bidder is willing to waive its rights under the solicitation's Guaranteed Description clause.

68:67

■ **Contract awards**
■■ **Propriety**
■■■ **Invitations for bids**
■■■■ **Defects**

Contracting officer's failure to check a box on the "solicitation, offer, and award" form, indicating whether contract is a negotiated agreement or is an award under sealed bidding procedures, does not affect the validity of contract award, because the form otherwise clearly indicates the existence of an enforceable contract.

68:622

■ **Contract awards**
■■ **Propriety**
■■■ **Invitations for bids**
■■■■ **Defects**

Award of an indefinite quantity contract for construction services under an invitation for bids (IFB) was improper where the IFB bid schedule was susceptible of two reasonable interpretations and the protester's bid could have been low under that firm's reasonable interpretation of the bid schedule.

70:607

■ **Contract awards**
■■ **Propriety**
■■■ **Low bid displacement**
■■■■ **Post-bid opening periods**

Air Force award of a construction contract containing additive items to other than the apparent low bidder determined at the time of bid opening on the basis of funds then available, because funding subsequently was reduced, was inconsistent with applicable regulations; the solicitation instead should have been canceled and the requirement resolicited, as the regulations clearly do not provide for a post-bid opening redetermination of the low bidder.

67:499

■ **Contract awards**
■■ **Propriety**
■■■ **Performance specifications**
■■■■ **Waiver**

Protest that bidder's proposed roofing system did not satisfy a solicitation requirement that the roof have a Class A fire rating is denied where record indicates that the roofing system in fact satisfied the requirement.

69:210

■ **Contract awards**
■■ **Propriety**
■■■ **Recycled materials**
■■■■ **Cost increase**

Award to lowest bidder offering to comply with mandatory solicitation requirement for 50 percent waste paper content, even though there was lower bid not meeting requirement, is consistent with Resource Conservation and Recovery Act of 1976 and Environmental Protection Agency implementing Guideline; although narrative accompanying Guideline indicates EPA's view that higher price for paper meeting minimum waste paper content requirement is unreasonable, neither statute nor Guideline prohibits paying such a premium.

69:410

■ **Contracting officers**
■■ **Bad faith**
■■■ **Allegation substantiation**

Protest that contracting officer was improperly influenced in decision to waive awardee's insufficient bond and failure to acknowledge immaterial amendment is denied where the contracting officer acted in accordance with applicable procurement regulations and denies the alleged impropriety and there is no evidence corroborating the protest allegation.

68:592

■ **Contractors**
■■ **Eligibility**
■■■ **Professional societies**

No statute or regulation prohibits organizations, whose members are required to return a percentage of their earnings to the organization to cover its general and administrative costs, from bidding on federal procurements.

66:26

■ **Hand-carried bids**
■■ **Late submission**
■■■ **Acceptance criteria**

Hand-carried bid which was brought to the designated place for hand-carried bids and placed in the Navy's control at the exact time, 2 p.m., called for in the solicitation and prior to any declaration that the time for receipt of bids had passed is not late as the Federal Acquisition Regulation does not require that a bid be submitted prior to the time called for in the solicitation but rather not later than the exact time set for opening bids.

68:440

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Responsiveness must be determined from the face of the bid. Therefore, bidder's failure to acknowledge a material amendment to a solicitation which also extended the bid opening date may not be waived where the bid contains only the previous bid opening date. The mere submission of the bid on the amended bid opening date is not sufficient to show the bidder intended to be bound by the terms of the amendment. Previous cases inconsistent herewith, B-194496, Jan. 17, 1980; B-208877, May 17, 1983; and B-212465, Oct. 19, 1983; will no longer be followed.

67:107

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Contracting agency properly accepted low bid that failed to acknowledge a solicitation amendment making changes that either had only a minimal impact on cost, or merely clarified requirements already contained in the solicitation.

68:198

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Contracting officer properly accepted bid that failed to acknowledge a solicitation amendment that required contractor to transport less than 200 pounds of government-furnished equipment 5 miles to the work site, since the work had no significant cost or other impact on performance, and thus was not material.

68:349

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Bidder's failure to acknowledge an amendment which increased by $650 the estimated cost of performance rendered the bid nonresponsive because the cost impact amounted to more than two times the difference between the low bid and the second low bid and more than 30 percent of the difference between the low bid and the protester's responsive bid. Such an amendment had a material impact on cost, and therefore the agency erred in allowing the apparent low bidder to acknowledge the amendment after bid opening.

68:719

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

A bidder's failure to acknowledge with its bid a material amendment to an invitation for bids renders the bid nonresponsive.

69:31

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

A bidder's intention and commitment to perform in accordance with the terms of a material amendment is determined from the acknowledgment of such amendment or constructively from the bid itself, not from the bidder's past performance under a prior contract. Where a bid does not include an essential requirement which appears only in the amendment, there is no constructive acknowledgment of the amendment.

69:32

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Protest against proposed award of a contract to a bidder that acknowledges an amendment containing a Procurement Integrity Certificate clause but fails to complete and sign the Certificate itself is denied where bids were opened prior to December 1, 1989, but award has not been made, since the requirement for the Certificate, which implements section 27(d)(1) of the Office of Federal Procurement Policy Act Amendments of 1988, has been suspended from December 1, 1989, to November 30, 1990, by section 507 of the Ethics Reform Act of 1989.

69:127

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Agency improperly rejected a bid that failed to acknowledge a solicitation amendment which was not material because it merely relaxed the agency's requirements by extending the time for performance from 30 to 60 days.

69:727

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Protest challenging rejection of bid as nonresponsive for failure to acknowledge an amendment to the solicitation is sustained where the amendment merely clarifies an existing requirement in the solicitation and thus is not material.

70:365

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Responsiveness**

Contention that acknowledgment of amendment adding requirement to complete certificate of procurement integrity was sufficient to commit bidder and that completion of certification should be permitted up to time of award is denied where completion of certificate imposes substantial legal burdens on contractor and is properly viewed as matter of responsiveness.

70:383

■ **Invitations for bids**
■■ **Amendments**
■■■ **Acknowledgment**
■■■■ **Waiver**

Bidder's failure to acknowledge invitation for bids (IFB) amendment changing the line items under which costs for different parts were to be included but not changing the requirement to supply parts for radio repair services and requiring bidders to use manufacturer-approved replacement parts and testing equipment for the maintenance and repair of a particular type of radio equipment may be waived since these provisions merely clarified already existing requirements in the solicitation's performance work statement and bidding schedule and thus had no material effect on the procurement.

67:208

■ **Invitations for bids**
■■ **Amendments**
■■■ **Cost estimates**
■■■■ **Indefinite quantities**

Agency properly amended invitation for bids (IFB) to solicit bids for an indefinite quantity-type contract for landscape maintenance and request a single percentage factor to be applied to agency prepriced work items and agency estimated frequencies to determine the amount paid under the contract; this is a legitimate method to prevent deliberate unbalancing of prices by bidders and assure award to the low bidder under the IFB regardless of quantities ordered.

70:184

■ **Invitations for bids**
■■ **Amendments**
■■■ **Materiality**

An amendment which incorporates into an invitation for bids for lease of a parking lot an additional requirement of minimum operating hours is material since it imposes a legal obligation on the contractor that was not contained in the original solicitation and therefore changes the legal relationship between the parties.

69:31

■ **Invitations for bids**
■■ **Amendments**
■■■ **Materiality**

Bidder's argument that amendment adding a requirement to complete a certificate of procurement integrity is not a material change to the solicitation is denied where the certification requirement binds the contractor to detect and report violations of the procurement integrity provisions and thus imposes a substantial legal burden on the bidder.

70:383

■ **Invitations for bids**
■■ **Amendments**
■■■ **Notification**

A bidder bears the risks of not receiving invitation for bids amendments unless it is shown that the contracting agency made a deliberate effort to exclude the bidder from competing, or the agency inadvertently failed to furnish the amendment where the bidder availed itself of every reasonable opportunity to obtain the amendment.

67:204

■ **Invitations for bids**
■■ **Amendments**
■■■ **Notification**

Agency violated provisions of Federal Acquisition Regulation governing the distribution of amendments and caused the improper exclusion of the protester from the competition where (1) unreasonable actions by agency personnel resulted in the agency mailing an amendment setting a new bid opening date to the protester's former address, which in turn caused the protester to receive the amendment 1 hour prior to bid opening; (2) the protester did not fail to avail itself of a reasonable opportunity to obtain the amendment; and (3) only one responsive bid was submitted and four prospective bidders were eliminated from the competition because of the agency's actions.

70:563

■ **Invitations for bids**
■■ **Amendments**
■■■ **Notification**

Where agency failed to send the protester two material solicitation amendments in violation of applicable regulatory requirement governing the dissemination of solicitation materials, and the record shows significant deficiencies in the contracting agency's procedures in sending out solicitation amendments which contributed to the protester's exclusion from the competition and resulted in the receipt of only two responsive bids, the protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competition.

70:567

■ **Invitations for bids**
■■ **Cancellation**
■■■ **Bids**
■■■■ **Price disclosure**

Where two of 42 bids submitted are prematurely opened and publicly exposed, the improper exposure does not warrant restricting consideration for award to the two opened bids since other bidders would thereby be prejudiced. Under the circumstances, agency reasonably determined to cancel the invitation for bids.

69:504

■ Invitations for bids
■■ Cancellation
■■■ Justification

Decision to postpone bid opening and amend solicitation to set aside procurement for small businesses after initially issuing solicitation on an unrestricted basis is proper where agency shows set-aside determination based on information discovered after the solicitation was issued was reasonable.

66:222

■ Invitations for bids
■■ Cancellation
■■■ Justification

Proper basis exists for canceling invitation for bids after bid opening and a decision sustaining a protest of the agency's rejection of a bid on other grounds where a contracting agency reviewing official determines the items are not needed and denies necessary approval of the procurement. Prior decision finding the protester entitled to bid preparation costs and costs of pursuing the protest therefore is modified to delete entitlement to bid preparation costs since the protester could not have received the award.

66:499

■ Invitations for bids
■■ Cancellation
■■■ Justification

Where contracting officer deliberately allowed bid acceptance period to expire without making award in order to effect cancellation of solicitation which she had determined was warranted, General Accounting Office will review propriety of the decision to cancel.

69:395

■ Invitations for bids
■■ Cancellation
■■■ Justification

Contracting agency lacked compelling reason to cancel invitation for bids (IFB) for rental of construction equipment where apparent inconsistency between IFB provisions—which described certain requirements in terms of hourly and daily rates, but called for pricing on the basis of daily and weekly unit rates—did not prejudice any bidder, all bidders understood that daily and weekly unit pricing was required, they provided such pricing which was evaluated on a common basis, and an award under the IFB would meet the agency's actual needs.

69:395

■ **Invitations for bids**
■■ **Cancellation**
■■■ **Justification**
■■■■ **Competition enhancement**

Where only one responsive bid was received, contracting officer's desire to obtain enhanced competition by relaxing delivery schedule and geographic restriction constitutes a compelling reason to cancel the invitation and resolicit.

68:705

■ **Invitations for bids**
■■ **Cancellation**
■■■ **Resolicitation**
■■■■ **Propriety**

After only bid submitted under invitation for bids is determined to be unreasonable as to price and contracting officer reasonably determines that additional competition is needed, contracting officer cannot complete acquisition by conversion to negotiation and selectively soliciting another firm to compete. Rather, solicitation must be canceled and all potential offerors solicited.

67:339

■ **Invitations for bids**
■■ **Cancellation**
■■■ **Resolicitation**
■■■■ **Propriety**

Where full and open competition and a reasonable price are obtained and the record does not show a deliberate attempt by the contracting agency to exclude the offeror from the competition, an offeror's nonreceipt of a solicitation amendment establishing a new bid opening date does not require cancellation and resolicitation of the procurement.

68:213

■ **Invitations for bids**
■■ **Cancellation**
■■■ **Resolicitation**
■■■■ **Propriety**

Where two of 42 bids submitted are prematurely opened and publicly exposed, the improper exposure does not warrant restricting consideration for award to the two opened bids since other bidders would thereby be prejudiced. Under the circumstances, agency reasonably determined to cancel the invitation for bids.

69:504

■ **Invitations for bids**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Protest of multiple award Federal Supply Schedule contractor, whose prior contract contained renewal clause, that it failed to receive notice of solicitation is denied where agency synopsized procurement in *Commerce Business Daily* and mailed solicitation to protester. Renewal clause confers no additional protection to protester.

67:66

■ **Invitations for bids**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Where contracting agency did not provide protester/incumbent contractor with the solicitation, in spite of several requests by the incumbent contractor that agency procurement officials do so, incumbent contractor was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competitive procedures.

67:96

■ **Invitations for bids**
■■ **Competition rights**
■■■ **Contractors**
■■■■ **Exclusion**

Under Competition in Contracting Act of 1984, agency is required to make a diligent good faith effort to comply with the statutory and regulatory requirements regarding notice and distribution of solicitation materials. Because the agency's effort to comply with those requirements was flawed in that the agency failed to solicit an incumbent and therefore it received only one bid on many of the line items solicited, the General Accounting Office recommends that the agency resolicit those line items under which single bids were received.

67:201

■ **Invitations for bids**
■■ **Defects**
■■■ **Descriptive literature**

Descriptive literature clause in an invitation for bids which merely states in general terms what categories of descriptive literature might be required is defective due to lack of specificity and because the contract file does not contain a technical justification as to why product acceptability cannot be determined without the submission of descriptive literature, as required by Federal Acquisition Regulation (FAR), 48 C.F.R. § 14.202-5(c) (1985). Therefore, it is improper for the procuring agency to reject a bid as nonresponsive for failure to include descriptive literature.

66:92

■ **Invitations for bids**
■■ **Defects**
■■■ **Evaluation criteria**

Protest is sustained where solicitation for refuse collection and disposal allows either on-post disposal or off-post disposal, but provides for evaluation of cost of additional work for on-post bids, even though work is unrelated to collection and disposal requirement and will have to be performed even if a contract is awarded for offpost disposal; under this evaluation scheme bidders were not competing on equal basis and award did not result in lowest ultimate cost to the government.

68:473

■ **Invitations for bids**
■■ **Defects**
■■■ **Signature lines**
■■■■ **Omission**

Protest is sustained where solicitation's Certificate of Procurement Integrity failed to provide a signature line, which reasonably misled bidders to believe a separate signature on the certificate was not required.

70:502

■ **Invitations for bids**
■■ **Evaluation criteria**
■■■ **Unit prices**

IFB for thermal targets and wiring harnesses which provided that award would be based on the "price of basic targets" did not require the contracting agency to exclude bids for the harnesses in calculating the lowest bid where the bidding schedule included line items for equal quantities of the targets and harnesses and the reference to "basic targets" in the award clause reasonably encompassed the harnesses, which are necessary to operate the target systems.

66:127

■ **Invitations for bids**
■■ **Interpretation**
■■■ **Terms**

IFB for thermal targets and wiring harnesses which provided that award would be based on the "price of basic targets" did not require the contracting agency to exclude bids for the harnesses in calculating the lowest bid where the bidding schedule included line items for equal quantities of the targets and harnesses and the reference to "basic targets" in the award clause reasonably encompassed the harnesses, which are necessary to operate the target systems.

66:127

■ **Invitations for bids**
■■ **Interpretation**
■■■ **Terms**

Award of an indefinite quantity contract for construction services under an invitation for bids (IFB) was improper where the IFB bid schedule was susceptible of two reasonable interpretations and the protester's bid could have been low under that firm's reasonable interpretation of the bid schedule.

70:607

■ **Invitations for bids**
■■ **Interpretation**
■■■ **Terms**
■■■■ **Bonds**

Intent of provision in invitation for guard services that sureties furnishing bonds for initial year are "bound . . . to include the option periods, if exercised" (option prices were evaluated) is unclear, since sureties are not parties to the contract and thus cannot actually be bound by it. Statement is not legally objectionable in the context of the procurement, however, since initial and option year bond requirements of the solicitation are separate and distinct, so that invitation does not contemplate contractor paying a first-year premium for option year for bonds, and government thus improperly reimbursing the firm in the initial-year price to protect only a contingent interest.

66:64

■ **Invitations for bids**
■■ **Oral amendments**
■■■ **Contract performance**
■■■■ **Effective dates**

Under the Federal Acquisition Regulation, any change in delivery schedules, including a previously unannounced starting date, must be in writing and provided to all firms to which an invitation for bids has been issued. When a protester categorically denies that it was orally informed of a required starting date by a firm acting for the government, statement in its bid that it anticipated starting 2 weeks later would not alone be grounds for rejection of the bid.

66:22

■ **Invitations for bids**
■■ **Post-bid opening cancellation**
■■■ **Justification**
■■■■ **Competition enhancement**

Determination after bid opening that Walsh-Healey Act does not apply to contract for rental of personal property, despite inclusion of Walsh-Healey requirements in the invitation for bids (IFB), does not require cancellation of IFB, since there is no indication that competition was restricted due to inclusion of Walsh-Healey requirements and no bidders were prejudiced by agency's subsequent determination to waive Walsh-Healey requirements.

69:238

■ Invitations for bids
■■ Terms
■■■ Defects

Disparity in bid prices received does not by itself establish the existence of a solicitation defect.

70:407

■ Invitations for bids
■■ Terms
■■■ Indemnification
■■■■ Naval vessels

Provision in solicitation for ship repair services prohibiting contractor from requiring indemnification as a condition of access by third parties to its facilities and ship under repair is not inconsistent with standard Access to Vessel clause allowing contractor to make "reasonable arrangements" for third party access, since there is no indication in the Access to Vessel clause that indemnification agreements fall within the scope of "reasonable arrangements."

66:524

■ Invitations for bids
■■ Terms
■■■ Liquidated damages
■■■■ Propriety

Agency's failure to adhere to executive branch guidance in formulating deduction provision does not render the provision improper; guidance was not binding and provision was unobjectionable because it did not establish impermissible penalty for defective performance.

68:435

■ Invitations for bids
■■ Terms
■■■ Options

Protest of solicitation's renewal clause, which does not require agency to give contractor preliminary notice of its intent to exercise contract option by a specified time before contract expiration, is denied where applicable regulations do not require such a specific time period and the provision is otherwise reasonable.

70:494

■ Invitations for bids
■■ Terms
■■■ Performance bonds

Bonding requirements for laundry services contract are justifiably imposed to protect the government's interest where the government will provide the contractor with a considerable amount of equipment for the performance of the contract and the continuous provision of laundry services is essential to the operation of two medical centers including operating rooms.

68:204

■ **Invitations for bids**
■■ **Terms**
■■■ **Pricing**
■■■■ **Additional work/quantities**

Provision in solicitation for ship repair services requiring bidders to propose a fixed labor rate for additional work contracting agency may order is not so uncertain as to prevent the preparation of bids in a reasonable manner, even though burden falls on bidders to assess the risk of being asked to perform different types of additional work at different times during contract performance, since contracting agency has included in the IFB all the information it reasonably can regarding its need for additional work, including the total number of additional work hours; definition of labor experience level required; estimates allocating the additional work by general work category; and limits on when the additional work may be ordered.

66:523

■ **Invitations for bids**
■■ **Terms**
■■■ **Pricing**
■■■■ **Additional work/quantities**

Provision in solicitation for ship repair services requiring bidders to propose a fixed labor rate for additional work contracting agency may order is not inconsistent with standard Changes clause provision for equitable adjustments for delay and disruption due to changed work, since solicitation specifically advises bidder to include delay and disruption as a cost element of the fixed labor rate.

66:523

■ **Invitations for bids**
■■ **Terms**
■■■ **Pricing**
■■■■ **Additional work/quantities**

Where solicitation requires bidders to propose a fixed labor rate for additional work contracting agency may order, agency is not required to obtain cost and pricing data or conduct a cost analysis in connection with the labor rate included in each actual order for additional work where the fixed rate is the result of adequate price competition and work orders do not involve "price adjustments" to which requirements for cost analysis apply.

66:523

■ **Invitations for bids**
■■ **Terms**
■■■ **Pricing**
■■■■ **Additional work/quantities**

Provision in solicitation for ship repair services requiring bidders to propose a fixed labor rate for additional work contracting agency may order and which defines which functions are to be included by bidders in formulating proposed fixed rate does not purport to define how different costs are to be classified for purposes of the bidders' cost accounting systems and therefore does not conflict with

Cost Accounting Standards requirements that covered firms use a consistent system for estimating, accumulating, and reporting costs.

66:524

■ **Invitations for bids**
■■ **Terms**
■■■ **Progress payments**

A request for progress payments is precatory in nature and does not render a bid nonresponsive in the absence of circumstances which indicate that the request is more than a mere wish or desire.

69:557

■ **Invitations for bids**
■■ **Terms**
■■■ **Risks**

Protest that solicitation for military family housing maintenance subjects bidders to unreasonable financial risk because it requires the submission of a lump-sum price for much of the work, rather than breaking out each element of work separately for payment on a unit price basis, is denied where the solicitation limited the amount of work which the contractor could be required to perform under the lump-sum portion of the contract, and contained sufficient information for bidders to compete intelligently and on a relatively equal basis.

70:406

■ **Invitations for bids**
■■ **Terms**
■■■ **Risks**

Protest alleging that firm, fixed-price solicitation for maintenance services subjects contractor to unreasonable risk of work load fluctuations is denied where the record shows that bidders can reasonably estimate the project cost given their expertise and the historical work load data provided in solicitation.

70:493

■ **Invitations for bids**
■■ **Terms**
■■■ **Risks**

Protest alleging that agency's omission from solicitation of Variation in Quantity clause, which limits circumstances under which government will accept variation in quantity, subjects contractor to unreasonable risk of work load fluctuations is denied; since clause is not intended to protect the contractor in the event of work load fluctuations, omission of clause does not impose additional risk on contractor.

70:494

■ **Invitations for bids**
■■ **Wage rates**
■■■ **Amendments**
■■■■ **Acknowledgement**

Failure to acknowledge invitation for bids (IFB) amendment increasing wage rates cannot be cured after bid opening by bidder whose employees are not covered by collective bargaining agreement binding firm to pay wages not less than those prescribed by Secretary of Labor. Decision in *United States Department of the Interior—Request for Advance Decision, et al.,* 64 Comp. Gen. 189 (1985), 85-1 CPD ¶ 34, which holds otherwise, is overruled.

66:47

■ **Low bids**
■■ **Error correction**
■■■ **Price adjustments**
■■■■ **Propriety**

An agency reasonably found that a low bidder did not show by clear and convincing evidence its intended bid price, so as to permit correction of its alleged mistake in bid, where there is an unexplained and untraceable discrepancy in the labor, material and equipment costs that causes a relatively wide range of uncertainty in the possible intended bid price, ranging from less than one percent to 5.7 percent below the next low bid price.

67:279

■ **Low bids**
■■ **Error correction**
■■■ **Price adjustments**
■■■■ **Propriety**

Low bid was properly corrected to include amount omitted due to an extension error in calculating home office overhead where clear and convincing evidence established both the existence of the mistake and the amount the bidder actually intended to include in its bid calculations for the overhead, and the bid will remain low by approximately 12.6 percent.

68:232

■ **Low bids**
■■ **Error correction**
■■■ **Price adjustments**
■■■■ **Propriety**

Agency's decision to permit correction of low bid will not be questioned unless it lacks a reasonable basis. Correction is proper where the work sheets submitted to support the allegations of mistake establish the mistake and the claimed intended bid by clear and convincing evidence.

69:81

■ **Non-responsive bids**
■■ **Post-bid opening periods**
■■■ **Clarification**
■■■■ **Propriety**

A nonresponsive bid cannot be made responsive by actions taken or explanation made after bid opening.

66:492

■ **Payment bonds**
■■ **Justification**

Protest of payment bond requirement in invitation for bids (IFB) for security guard services is denied since it is within the agency's discretion to require bonding even in an IFB set aside for small businesses; the agency's requirement for uninterrupted performance of the security guard services is a reasonable basis for imposing the bonding requirement, especially where previous contractors had a history of unsatisfactory performance and of not paying wages due employees.

70:165

■ **Potential contractors**
■■ **Exclusion**
■■■ **Propriety**

Agency violated provisions of Federal Acquisition Regulation governing the distribution of amendments and caused the improper exclusion of the protester from the competition where (1) unreasonable actions by agency personnel resulted in the agency mailing an amendment setting a new bid opening date to the protester's former address, which in turn caused the protester to receive the amendment 1 hour prior to bid opening; (2) the protester did not fail to avail itself of a reasonable opportunity to obtain the amendment; and (3) only one responsive bid was submitted and four prospective bidders were eliminated from the competition because of the agency's actions.

70:563

■ **Potential contractors**
■■ **Exclusion**
■■■ **Propriety**

Where agency failed to send the protester two material solicitation amendments in violation of applicable regulatory requirement governing the dissemination of solicitation materials, and the record shows significant deficiencies in the contracting agency's procedures in sending out solicitation amendments which contributed to the protester's exclusion from the competition and resulted in the receipt of only two responsive bids, the protester was improperly excluded from the competition in violation of the Competition in Contracting Act of 1984, which requires "full and open" competition.

70:567

■ **Sureties**
■■ **Financial capacity**
■■■ **Misleading information**

Agency properly rejected low bid on the basis that the individual bid bond sureties were not responsible where the contracting officer reasonably determined that the proposed sureties claimed excessively overvalued assets and supported those claims with documents containing material omissions and inconsistencies.

69:76

■ **Suspended/debarred contractors**
■■ **Bids**
■■■ **Rejection**
■■■■ **Propriety**

Because the Federal Acquisition Regulation requires that bids received from firms suspended at the time of bid opening from contracting with the government be rejected, such firms may not be considered for award even though they may no longer be suspended at the time of award. Prior inconsistent decision, B-215784, December 3, 1984, is overruled.

66:300

■ **Terms**
■■ **Materiality**
■■■ **Integrity certification**

Bidder's argument that amendment adding a requirement to complete a certificate of procurement integrity is not a material change to the solicitation is denied where the certification requirement binds the contractor to detect and report violations of the procurement integrity provisions and thus imposes a substantial legal burden on the bidder.

70:383

■ **Terms**
■■ **Materiality**
■■■ **Integrity certification**

Contracting officer reasonably added requirement for certification of procurement integrity to invitation for bids prior to reinstatement of statutory requirement for such certification since bid opening and contract award would occur after the effective date of the statute requiring certification.

70:383

■ **Terms**
■■ **Materiality**
■■■ **Integrity certification**

Completed Certificate of Procurement Integrity is properly required under solicitation contemplating award of an indefinite quantity contract with a minimum quantity of $50,000, where the estimated value of the orders to be placed exceeded $100,000, as reflected by solicitation's evaluation

provision which was based on specified maximum quantities which the solicitation estimated would fall within a range of $1,000,000 to $5,000,000.

70:676

■ **Terms**
■■ **Materiality**
■■■ **Integrity certification**

Bid was properly rejected as nonresponsive for failure to submit required Certificate of Procurement Integrity because completion of the certificate imposes material legal obligations on the bidder to which it is not otherwise bound.

70:676

■ **Two-step sealed bidding**
■■ **Offers**
■■■ **Rejection**
■■■■ **Propriety**

Protester's technical proposal under step one of two-step sealed bids improperly was rejected without the opportunity for revision where several of the evaluated deficiencies were in error and the actual design and informational deficiencies may not have been such that the proposal failed to meet the solicitation's essential requirements. A contracting agency generally must make reasonable efforts to qualify as many technical proposals as possible under step one in order to obtain full and open price competition under step two.

66:26

■ **Two-step sealed bidding**
■■ **Offers**
■■■ **Rejection**
■■■■ **Propriety**

Contracting agency acts improperly where, under step one of a two-step sealed bid acquisition, it rejects a technical proposal as unacceptable for failure to meet requirements that were either unstated in the solicitation or, at best, ambiguously stated.

66:139

■ **Unbalanced bids**
■■ **Materiality**
■■■ **Responsiveness**

The apparent low bid for a contract contemplating a 5-month base period and 2 option years is mathematically unbalanced where there is an 85 percent differential between the first and second option years, and the bidder cannot explain why its bid is structured so differently from both the other bids and the government's cost comparison estimate. Since the agency has a reasonable doubt that acceptance of the bid, which does not become low until into the second option year, could ultimately result in the lowest overall cost to the government, the bid is properly rejected as materially unbalanced.

66:413

■ **Unbalanced bids**
■■ **Materiality**
■■■ **Responsiveness**

The apparent low bids for a contract contemplating award for a 1-year base period and four 1-year options are mathematically unbalanced where there are price differentials of 107 percent and 51 percent, respectively, between the base year bids and the fourth option year bids and the price differential between bid performance periods is attributable primarily to the bidders' discretionary decision to complete paying for equipment in the early years of contract performance. Since the agency has a reasonable doubt that the acceptance of those bids which do not become low until the fourth and fifth years of the contract ultimately would result in the lowest overall cost to the government, the bids properly are rejected as materially unbalanced.

67:68

■ **Unbalanced bids**
■■ **Materiality**
■■■ **Responsiveness**

Low bid for operation and maintenance contract is materially unbalanced where price for initial 60-day mobilization period amounts to approximately 63 percent of overall price for the firm, 1-year performance period in the contract as awarded, and 22 percent of the potential 5-year contract period.

69:149

■ **Unbalanced bids**
■■ **Materiality**
■■■ **Responsiveness**

The apparent low bid on a contract for a 3-month base period and three 1-year options properly was determined to be materially unbalanced where there is an unexplained price decrease for the final option period, the bid would not become low until the fifth month of the final option period, and there is reasonable doubt that acceptance of the bid would result in the lowest overall cost to the government because the government determined that it was likely that the final option period may not be exercised due to funding uncertainty.

70:120

■ **Use**
■■ **Criteria**

General Accounting Office affirms prior decision in which it reviewed, and sustained, a challenge to a contracting agency's decision to solicit competitive proposals instead of sealed bids. The Competition in Contracting Act of 1984 (CICA) did not leave to the complete discretion of the contracting officer which competitive procedure to use, but provides in determining which procedure is appropriate under the circumstances that sealed bids "shall" be solicited where four criteria are met, all of which were present here.

67:16

■ Use
■■ Criteria

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (Supp. IV 1986), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

68:406

■ Use
■■ Criteria

Where all elements enumerated in the Competition in Contracting Act, 10 U.S.C. § 2304(a)(2) (1988), for the use of sealed bidding procedures are present, agencies are required to use those procedures and do not have discretion to employ negotiated procedures.

70:127

Small Purchase Method
■ Purchases
■■ Propriety

Protest concerning agency's failure to solicit protester for appraisal services procured under small purchase procedures is sustained, where record shows that agency failed to obtain maximum practicable competition by not disclosing basic procurement information to protester and other solicited appraisers, and then proceeding with an expedited award based on single price quote received.

68:146

■ Quotations
■■ Late submission

Where request for quotations issued under small purchase procedures did not contain a late quotations provision but substantial activity had transpired in evaluating quotations prior to the buyer's receipt of the protester's late quotation, the contracting agency was not required to consider the late quotation.

68:575

■ Quotations
■■ Modification
■■■ Acceptance time periods

Agency's request for clarification of a firm's quotation and acceptance of revised quotation is not legally objectionable under the informal procedures permitted for a small purchase. The language requesting quotations by a certain date cannot be construed as establishing a firm closing date for the receipt of quotations absent a late quotation provision expressly providing that quotations must be received by that date to be considered.

68:433

■ Requests for quotations
■■ Amendments
■■■ Notification

Where an apparently noncompetitive solicitation, i.e., one specifying a brand name product only, becomes competitive, the procuring agency generally must advise the manufacturer that it intends to consider offers for equivalent products and allow the firm an opportunity to amend its offer.

66:16

■ Requests for quotations
■■ Contractors
■■■ Notification

Protest challenging contracting agency's failure to solicit incumbent contractor in a small purchase, small business set-aside procurement is sustained where contracting officer deliberately decided not to send copy of solicitation to incumbent based solely on remarks purportedly made by incumbent to another contracting official during conversation concerning incumbent's performance under then-current contract.

70:307

Socio-Economic Policies
■ Disadvantaged business set-asides
■■ Use
■■■ Administrative discretion

Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that 5 percent of contract funds are to be made available for contracts with small disadvantaged businesses.

67:381

■ Disadvantaged business set-asides
■■ Use
■■■ Administrative discretion

It is not legally objectionable for solicitations issued after June 1, 1987, but prior to March 21, 1988, to be set aside for small disadvantaged business (SDB) concerns even though the product or service in question has been previously acquired successfully under a small business set-aside. Such solicitations are consistent with the interim rule implementing the Department of Defense SDB set-aside program in effect at the time those solicitations were issued; a subsequent interim rule, which does provide an exclusion from the SDB set-aside program for those procurements which have been previously set aside for small businesses, applies only to solicitations issued on or after March 21, 1988.

67:382

■ **Disadvantaged business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Where agency erroneously relies on past procurement history and issues solicitation on unrestricted basis which results in a protest and subsequent agency determination, shortly before closing date for receipt of proposals, to set procurement aside for small disadvantaged businesses (SDB), claim for proposal preparation costs is denied since there is no evidence of bad faith on the agency's part; mere negligence or lack of due diligence by the agency, standing alone, does not provide a basis for the recovery of proposal preparation costs.

70:343

■ **Disadvantaged business set-asides**
■■ **Use**
■■■ **Procedures**

Department of Defense (DOD) set-aside program for small disadvantaged businesses which does not contain an exclusion for procurements which have been previously set aside for small businesses is a legally permissible implementation of section 1207 of DOD Authorization Act, which directs that five percent of contract funds are to be made available for contracts with small disadvantaged businesses and specifically allows the use of less than full and open competitive procedures to meet that goal.

67:357

■ **Disadvantaged business set-asides**
■■ **Use**
■■■ **Procedures**

Department of Defense (DOD) contracting activities making contract awards under DOD set-aside program for small disadvantaged businesses are not required to comply with justification and approval requirements of Competition in Contracting Act of 1984 (CICA) since set-aside program, which implements the procedures in section 1207(e) of the DOD Authorization Act, falls within the statutory exception to the procedural requirements of CICA, including the justification and approval requirement of 10 U.S.C. § 2304(f).

67:357

■ **Labor standards**
■■ **Overtime**
■■■ **Federal procurement regulations/laws**
■■■■ **Retroactive applications**

Fixed-price construction contracts executed before January 1, 1986, may not be modified without consideration to delete the requirement for payment of premium rates for overtime worked in excess of 8 hours a day in order to conform to Pub. L. No. 99-145, which eliminated the requirement from contracts executed after January 1, 1986. Neither the statute nor its legislative history reflects congressional intent to have the statute applied retroactively.

66:51

■ **Labor standards**
■■ **Supply contracts**
■■■ **Manufacturers/dealers**
■■■■ **Determination**

General Accounting Office does not consider whether a bidder qualifies as a manufacturer or regular dealer under the Walsh-Healey Act. By law, such matters are for determination by the contracting agency in the first instance, subject to review by the Secretary of Labor, if a large business is involved.

68:92

■ **Labor surplus set-asides**
■■ **Geographic restrictions**
■■■ **Contractors**
■■■■ **Eligibility**

A bidder does not have to have its offices physically located in a labor surplus area (LSA) to qualify for award under a solicitation restricted to LSA concerns, since the restriction only requires substantial performance in an LSA.

67:331

■ **Preferred products/services**
■■ **American Indians**

Bureau of Indian Affairs' determination that a firm meets eligibility criteria—100 percent Indian ownership and control—for responding to Buy Indian Act procurement is not objectionable where agency reasonably finds that an Indian was the sole stockholder, director, officer, and manager of the corporation.

67:206

■ **Preferred products/services**
■■ **American Indians**

Determination of Bureau of Indian Affairs that joint venture comprised of Indian-owned concern and concern not Indian-owned does not qualify as a 51 percent Buy Indian Act concern, as required by the solicitation, is not unreasonable where, although the Indian firm controls 51 percent of the joint venture, only 55 percent of the Indian firm is owned by Indians and the aggregate total of Indian ownership of the joint venture therefore amounts to only 28 percent.

69:398

■ **Preferred products/services**
■■ **Domestic products**
■■■ **Applicability**

Clause requiring domestic forgings was properly included in a Department of Defense solicitation for items that are considered "final drive gears" on combat support vehicles, where the agency does

not find the quantity being acquired is greater than that required to maintain the domestic mobilization base for these items.

70:146

■ **Preferred products/services**
■■ **Domestic products**
■■■ **Compliance**

Contract awards to offeror, whose offer indicated it did not intend to comply with the Department of Defense Federal Acquisition Regulation Supplement § 208.7801 *et seq.* requirements for domestic forging, are not void *ab initio,* where agency and awardee were confused as to the applicability of the requirements and appeared to be acting in good faith.

70:147

■ **Preferred products/services**
■■ **Domestic products**
■■■ **Compliance**

Agency improperly evaluated proposed digital facsimile system as a domestic end product for Buy American Act purposes, and protest on that ground is sustained, where the imported facsimile machine underwent some manufacturing operations in the United States but the essential nature of the machine was not altered, so that it remained a foreign component.

70:473

■ **Preferred products/services**
■■ **Domestic products**
■■■ **Construction contracts**

Under a construction contract, elevator dispatching system which is to be incorporated into the building constitutes construction material under the Buy American Act. Therefore, awardee's foreign made group overlay controls, as components of the system, do not violate the act's prohibition against the use of foreign construction material.

69:211

■ **Preferred products/services**
■■ **Domestic products**
■■■ **Interpretation**

Domestically performed processing operations on imported horsehair do not constitute "manufacturing" for purposes of the Buy American Act, 41 U.S.C. § 10a *et seq.* (Supp. IV 1986), since they do not result in a fundamental change to the foreign component.

69:307

■ **Preferred products/services**
■■ **Domestic sources**
■■■ **Foreign products**
■■■■ **Price differentials**

Agency correctly determined that the foreign parts fabricated from domestic steel are the components of lock sets offered by the protester as end items where the parts are needed to manufacture the lock sets. Consequently, a Buy American Act differential properly was applied to the protester's bid.

66:251

■ **Preferred products/services**
■■ **Domestic sources**
■■■ **Foreign products**
■■■■ **Price differentials**

Buy American Act differential is not applicable to items that are included in the Memorandum of Agreement between the United States and Israel as items for which application of the Act has been waived. Restriction on waiver of the Act for mobilization base items does not apply where quantity of items acquired exceeds that required to maintain the mobilization base.

66:297

■ **Preferred products/services**
■■ **Domestic sources**
■■■ **Foreign products**
■■■■ **Price differentials**

Allegation that solicitation requirement that materials and supplies be Philippine sourced conflicts with a Balance of Payments Clause which establishes a ceiling of $156,000 for non-qualifying country items is denied, since the clauses read together require Philippine products, then U.S. products and if such items are not available, non-qualifying country products up to $156,000 in value.

69:49

■ **Preferred products/services**
■■ **Domestic sources**
■■■ **Foreign products**
■■■■ **Price differentials**

Since overhead and profit are not a part of the test to determine whether the cost of domestic components exceeds 50 percent of the cost of all components for purposes of the Buy American Act, 41 U.S.C. § 10a *et seq.* (Supp. IV 1986), protester, whose foreign component costs are greater than its domestic component costs, is not entitled to a preference under the act.

69:307

■ **Preferred products/services**
■■ **Foreign/domestic product distinctions**

Procuring agency properly applied the restriction contained in the annual Department of Defense Appropriations Act by requiring offerors to supply fish which had been caught by American fishing vessels, brought to American ports and processed in American plants. The restriction in the act does not permit the purchase of foreign-caught but American-processed fish.

69:274

■ **Preferred products/services**
■■ **Foreign/domestic product distinctions**

Domestically performed processing operations on imported horsehair do not constitute "manufacturing" for purposes of the Buy American Act, 41 U.S.C. § 10a *et seq.* (Supp. IV 1986), since they do not result in a fundamental change to the foreign component.

69:307

■ **Preferred products/services**
■■ **Foreign/domestic product distinctions**

Agency improperly evaluated proposed digital facsimile system as a domestic end product for Buy American Act purposes, and protest on that ground is sustained, where the imported facsimile machine underwent some manufacturing operations in the United States but the essential nature of the machine was not altered, so that it remained a foreign component.

70:473

■ **Preferred products/services**
■■ **Handicapped persons**

Decision by Committee for Purchase from the Blind and Other Severely Handicapped to include item on list of commodities and services to be procured from workshops for blind or severely handicapped individuals is not subject to review by General Accounting Office in light of exclusive authority vested in the Committee under the Wagner-O'Day Act to establish and maintain the procurement list in accordance with the overall purpose of the act.

67:307

■ **Service contracts**
■■ **Regulations**
■■■ **Applicability**

Protest is sustained where the procuring agency unreasonably disregarded the Department of Labor's determination that the Service Contract Act was applicable to the agency's procurement and in proceeding to receive proposals in the face of Labor's determination.

70:35

■ **Small business 8(a) subcontracting**
■■ **Contract awards**
■■■ **Administrative discretion**

Allegation that Small Business Administration did not perform proper study of impact of 8(a) subcontract on incumbent small business is denied where impact study furnished by agency shows that proper study was made and that 8(a) decision is consistent with findings.

66:655

■ **Small business 8(a) subcontracting**
■■ **Contract awards**
■■■ **Administrative discretion**

Section 8(a) subcontracting program is a noncompetitive procedure established by statute, and contracting agencies' broad discretion to determine appropriateness of 8(a) award is not limited by regulations on small business set-aside procurements.

66:655

■ **Small business 8(a) subcontracting**
■■ **Contract awards**
■■■ **Administrative discretion**

Contracting officer's determination not to agree to award of a section 8(a) contract to a firm proposed for debarment by the Department of Labor is within the agency's broad discretion in section 8(a) contracting and, therefore, is legally unobjectionable, where the agency did not violate applicable regulations, and there is no showing of fraud or bad faith on the part of government officials.

67:115

■ **Small business 8(a) subcontracting**
■■ **Contract awards**
■■■ **Administrative discretion**

General Accounting Office will review procurements conducted competitively under section 8(a) of the Small Business Act since award decisions are no longer purely discretionary and are subject to Federal Acquisition Regulation.

70:139

■ **Small business 8(a) subcontracting**
■■ **Contract awards**
■■■ **Delays**
■■■■ **Pending protests**

In light of agency's broad discretion to decide to contract or not contract through the section 8(a) program, there is no legal basis to object to agency's suspension of negotiations with an 8(a) firm pending resolution of protest by another 8(a) firm involving allegations of conflict of interest on the part of the agency's technical project officer in selecting the 8(a) firm for negotiations or to the issu-

ance of a task order for these services within the scope of an existing contract with a third 8(a) contractor.

69:189

■ **Small business 8(a) subcontracting**
■■ **Use**
■■■ **Administrative discretion**

Determination whether to set aside a procurement under section 8(a) of the Small Business Act, and the propriety of the 8(a) award itself, are matters within the discretion of the contracting agency and the Small Business Administration. Such an award will not be reviewed by the General Accounting Office absent a showing of possible fraud or bad faith on the part of government officials or that regulations have not been followed.

68:130

■ **Small business set-asides**
■■ **Cancellation**
■■■ **Justification**

Cancellation of small business-small purchase set-aside under a request for quotations (RFQ) was proper where protester, the only small business submitting a quote, conditioned its compliance with the RFQ's 10-day completion schedule in telephone call to agency after submission of quote; although protester disputes agency's interpretation that it qualified quote, based on record agency's interpretation was reasonable.

70:586

■ **Small business set-asides**
■■ **Contract awards**
■■■ **Price reasonableness**

Award to large business which submitted low quote on small business-small purchase set-aside was improper, where the procuring agency did not specifically determine, or have any evidence to indicate, that the second low quote from a small business, which was only 6 percent higher than the price of the large business awardee, was unreasonable.

69:170

■ **Small business set-asides**
■■ **Contract awards**
■■■ **Price reasonableness**

Contracting officer may not ignore prior procurement history, government estimate, and other relevant evidence in determining whether small business price received was in fact fair and reasonable.

69:477

■ **Small business set-asides**
■■ **Offers**
■■■ **Evaluation**
■■■■ **Risks**

In procurement set aside for small business concerns, where protester's and awardee's proposals were both rated "blue/exceptional," and protester's evaluated cost was significantly lower than awardee's, agency's rejection of protester's proposal because of "high risk" based on agency's assessment of protester's financial capability, protester's intent or ability to comply with the solicitation's "Limitations on Subcontracting" clause, protester's capacity to form a contract, and protester's contract performance history, was improper in part because the risk assessment resulted in a circumvention of the requirements of the Small Business Act and in part because the risk assessment is unsupported by the record.

70:689

■ **Small business set-asides**
■■ **Subcontracting restrictions**

In a small business set-aside procurement, small business contractor who proposes to subcontract less than 50 percent of its personnel costs to another firm complies with the limitation on subcontracting of services for small business concerns.

68:137

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Contracting officer's decision to procure medical services on an unrestricted basis, rather than through a small business set-aside, is not an abuse of discretion where the activity had not previously procured such services from a contractor and the contracting officer reasonably concluded that there was no reasonable expectation that offers would be received from two or more responsible small businesses. An expression of interest from a small business, received after issuance of a solicitation, does not demonstrate the unreasonableness of the determination or require the contracting officer to amend the solicitation so as to restrict it to small business concerns.

66:489

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Agency's determination that it could not expect to receive offers from two responsible small business concerns, and therefore not to set the procurement aside, was an abuse of discretion where the qualifications set forth in a *Commerce Business Daily* synopsis issued to determine small business interest and availability were more restrictive than those needed to meet the agency's needs as reflected in the solicitation subsequently issued. Since the solicitation qualifications presumably reflect the agency's needs, small businesses that can meet those needs but could not meet the synopsis criteria improperly were discouraged from responding to the synopsis.

66:559

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Agency determination that it could not expect to receive offers from two responsible small business concerns, based solely on outdated information regarding a solicitation issued 4 years ago, and therefore not to set the procurement aside for small business, was an abuse of discretion where 14 small business concerns responded to the *Commerce Business Daily* synopsis of the procurement.

68:541

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Protest against dissolution of a small business set-aside and solicitation on an unrestricted basis is proper where the contracting officer had rational basis for determination that the prices submitted by eligible small businesses were unreasonably high.

69:625

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

In considering price reasonableness under a small business set-aside, contracting officer has discretion in deciding which factors to consider and a price submitted by an otherwise ineligible large business properly may be considered.

69:625

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Protest is sustained where agency based decision not to set guard services procurement aside for small business concerns on conclusion that small businesses likely would not have resources to perform satisfactorily and on another agency's difficulties in obtaining offers from responsible small businesses, where (1) agency did not investigate any small business's capability to perform, and (2) the other agency's facility is outside the immediate area in which the subject building is located, and information relied upon was from procurement conducted 3 years ago, so that the small business competition in that instance was not a reasonable basis for comparison.

69:730

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Protest challenging contracting agency's failure to solicit incumbent contractor in a small purchase, small business set-aside procurement is sustained where contracting officer deliberately decided not to send copy of solicitation to incumbent based solely on remarks purportedly made by incumbent to

another contracting official during conversation concerning incumbent's performance under then-current contract.

70:307

■ **Small business set-asides**
■■ **Use**
■■■ **Administrative discretion**

Protest that agency improperly determined under Federal Acquisition Regulation § 19.502.2 that offers would be received from two or more small businesses offering "the products of different small business concerns," and that total small business set-aside therefore was improper, is denied; although all small business offerors were expected to offer systems with the same major component, agency had reasonable expectation that small business offerors each would offer a different "product" by virtue of their assembly of component parts into an integrated system.

70:391

■ **Small business set-asides**
■■ **Use**
■■■ **Justification**

Decision to postpone bid opening and amend solicitation to set-aside procurement for small businesses after initially issuing solicitation on an unrestricted basis is proper where agency shows set aside determination based on information discovered after the solicitation was issued was reasonable.

66:222

■ **Small business set-asides**
■■ **Use**
■■■ **Justification**

Protest challenging a contracting officer's decision to set aside a procurement for competition exclusively among small business concerns is denied where, although the contracting officer's decision was based only on advice from other agency officials that the technical data were adequate for competition and that a set-aside would be appropriate, the record shows that after the solicitation was issued two specific small business concerns indicated that they expected to compete.

66:257

■ **Small business set-asides**
■■ **Use**
■■■ **Justification**

Protest that contracting officials had agreed, as part of settlement of earlier protest, to conduct unrestricted procurement for support services contract and, therefore, agency's issuance of request for proposals as a set-aside for exclusive small business participation was improper is denied. Inherent in any settlement agreement was that (1) future procurement would be conducted in accord with Federal Acquisition Regulation (FAR) and therefore, (2) in accordance with the FAR, if sufficient number of small businesses showed interest in competing for the contract, the procurement would be set aside for exclusive small business participation.

68:428

■ **Small business set-aside**
■■ **Use**
■■■ **National defense interests**
■■■■ **Applicability**

Planned Emergency Producer provision in regulation concerning when a set-aside for small business is appropriate does not apply where the procurement is for a component that is not on an established planning list.

66:258

■ **Small business set-aside**
■■ **Use**
■■■ **Procedural defects**

Agency decision not to set aside procurement for small disadvantaged business (SDB) concerns is unreasonable where agency made no effort to ascertain SDB interest and capabilities and it appears that the agency reasonably should have expected to obtain offers from at least two responsible SDBs and make award at a price not exceeding the fair market price by more than 10 percent.

69:374

■ **Small business set-aside**
■■ **Use**
■■■ **Resolicitation**

Where reprocurement is for the account of a defaulted contractor, the statutes and regulations governing regular federal procurements are not strictly applicable. Thus, where the original solicitation was restricted to small businesses, the contracting officer was not required to conduct a similarly restricted procurement when reprocuring because Federal Acquisition Regulation authorizes contracting officers to use any appropriate method or procedure.

68:622

■ **Small business set-aside**
■■ **Use**
■■■ **Restrictions**

Under current statutory scheme established by the Competition in Contracting Act and subsequent legislation, all small business set-asides, whether made unilaterally by procuring agency or based on joint determination by agency and Small Business Administration, are regarded as in furtherance of the Small Business Act. Therefore, statutory limitation on set-aside programs under the Small Business Act applies to unilateral as well as joint set-asides.

66:400

■ **Small business set-aside**
■■ **Use**
■■■ **Restrictions**

Statute that prohibits setting aside more than 30 percent of the total dollar amount of contracts "for construction and refuse systems and related services," although literally imposing the limitation on the aggregate dollar amount for both categories, must be read as prohibiting the setting

aside of more than 30 percent of the total dollar amount for each of the two industry categories in light of the clear congressional intent to do so which is made evident by related provisions of the statute.

66:400

■ **Small business set-asides**
■■ **Withdrawal**
■■■ **Propriety**

Contracting agency may reasonably withdraw a small business set-aside, and resolicit the requirement on an unrestricted basis, where the only proposal received was properly determined to be technically unacceptable.

69:665

■ **Small businesses**
■■ **Competency certification**
■■■ **Adequacy**

Protest is denied where, although the Small Business Administration's denial of a certificate of competency (COC) references a basis for COC denial ultimately determined to be incorrect, it also references a correct, independent basis for denial.

69:584

■ **Small businesses**
■■ **Competency certification**
■■■ **Applicability**

The Small Business Administration's Certificate of Competency program addresses a small business concern's responsibility for purposes of receiving a government contract and does not apply where the firm is not otherwise qualified to receive award.

68:277

■ **Small businesses**
■■ **Competency certification**
■■■ **Applicability**

Agency was not required to refer rejection of protester's offer based on grounds of technical unacceptability to Small Business Administration for certificate of competency determination where firm's proposal was determined not to be within competitive range, since in rejecting firm's offer agency did not reach the question of offeror's responsibility.

70:570

■ **Small businesses**
■■ **Competency certification**
■■■ **Bad faith**
■■■■ **Allegation substantiation**

Where Small Business Administration (SBA) has declined to exercise its certificate of competency (COC) jurisdiction because protester is a manufacturer offering a foreign item, we will review the

contracting officer's initial determination of nonresponsibility to determine whether it was unreasonable or made in bad faith.

67:375

■ **Small businesses**
■■ **Competency certification**
■■■ **Effects**

While the reasons underlying Small Business Administration's decision to issue certificates of competency (COCs) to the protester to supply manufactured products may constitute information bearing on protester's responsibility to supply products imported in final form, which the agency must consider in its reevaluation of the protester's responsibility, the issuance of the COCs, standing alone, does not compel a finding that the protester is responsible.

67:376

■ **Small businesses**
■■ **Competency certification**
■■■ **Eligibility**
■■■■ **Criteria**

Where agency properly found a small business concern's offer to be technically unacceptable, without questioning the offeror's ability to perform or any other traditional element of responsibility, agency is not required to refer its determination to exclude the concern's proposal to the Small Business Administration under certificate of competency procedures.

69:193

■ **Small businesses**
■■ **Competency certification**
■■■ **Eligibility**
■■■■ **Criteria**

Contracting agency is required to refer its finding that small business bidder is nonresponsible to the Small Business Administration (SBA) for consideration under certificate of competency procedures despite the fact that agency is located outside the United States, since statutory requirement for referral to SBA is unrelated to agency's location.

70:108

■ **Small businesses**
■■ **Competency certification**
■■■ **Reconsideration**
■■■■ **Additional information**

There is no legal requirement that the contracting agency request Small Business Administration (SBA) reconsideration of a nonresponsibility determination where, following determination that bidder is nonresponsible and SBA declination to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by bidder and reasonably determines that reversal of the nonresponsibility determination is not warranted.

68:390

■ **Small businesses**
■■ **Competency certification**
■■■ **Reconsideration**
■■■■ **Additional information**

There is no legal requirement that the contracting agency again refer the question of an offeror's responsibility to the Small Business Administration (SBA) where, following agency determination that offeror was nonresponsible and SBA refusal to issue certificate of competency, the contracting officer reconsiders the nonresponsibility determination in light of new information submitted by offeror and reasonably determined that reversal of the nonresponsibility determination is not warranted.

69:279

■ **Small businesses**
■■ **Contract award notification**
■■■ **Notification procedures**
■■■■ **Pre-award periods**

Protest is sustained where, contrary to the Federal Acquisition Regulation (FAR), agency awarded a contract set aside for small business to a firm ultimately determined to be other than small without giving notice of the proposed award to other offerors for the purpose of size status protests or executing a written determination of urgency prior to award. Moreover, considering that the contract is for a 4-year period and the basis on which the awardee certified itself as a small business concern was found unpersuasive by the Small Business Administration, the continued performance of the contract would defeat a primary purpose of the Small Business Act.

68:69

■ **Small businesses**
■■ **Contract award notification**
■■■ **Notification procedures**
■■■■ **Pre-award periods**

Protest is sustained where agency, without notice to unsuccessful offerors, awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, based on agency's desire to make immediate award in order to avoid the administrative inconvenience of applying for an exception from a rumored funding freeze.

69:476

■ **Small businesses**
■■ **Contract awards**
■■■ **Non-responsible contractors**
■■■■ **Competency certification**

In awarding a subcontract for the Department of Energy, a private management and operating contractor is not required to submit a nonresponsibility determination to the Small Business Administration for certificate of competency consideration.

69:509

■ **Small businesses**
■■ **Contract awards**
■■■ **Non-responsive contractors**
■■■■ **Competency certification**

Where bids submitted under invitation for bids (IFB) for supply of printing press are permitted to expire for lack of funds but agency's need subsequently becomes urgent as a result of which agency orally solicits price and delivery terms from prior bidders, rejection of low offer on basis that locally-based, factory-trained service personnel would not be "available" from the protester essentially was a determination that it lacked the ability to satisfy the prior IFB's specifications which served as the point of reference for the oral solicitation. Since agency found protester nonresponsible without referring the matter to the Small Business Administration for possible issuance of a certificate of competency, protest is sustained.

66:647

■ **Small businesses**
■■ **Contract awards**
■■■ **Size status**
■■■■ **Misrepresentation**

Protest is sustained where, contrary to the Federal Acquisition Regulation (FAR), agency awarded a contract set aside for small business to a firm ultimately determined to be other than small without giving notice of the proposed award to other offerors for the purpose of size status protests or executing a written determination of urgency prior to award. Moreover, considering that the contract is for a 4-year period and the basis on which the awardee certified itself as a small business concern was found unpersuasive by the Small Business Administration, the continued performance of the contract would defeat a primary purpose of the Small Business Act.

68:69

■ **Small businesses**
■■ **Contract awards**
■■■ **Size status**
■■■■ **Misrepresentation**

In the absence of any evidence of bad faith, awardee's bid is responsive when listing only itself in the small disadvantaged business self-certification and as principal on the bid bond even though awardee's teaming agreement with another concern is interpreted by protester as creating a joint venture.

68:594

■ **Small businesses**
■■ **Contract awards**
■■■ **Size status**
■■■■ **Misrepresentation**

Protest of reopening of discussions with original offerors that remained in the competitive range is denied where agency terminated award to the protester under small business set-aside due to Small

Business Administration's final determination that protester was other than small since conducting a new procurement in such circumstances is not required.

69:44

■ **Small businesses**
■■ **Contract awards**
■■■ **Size status**
■■■■ **Misrepresentation**

Protest is sustained where agency, without notice to unsuccessful offerors, awarded a contract under a small business set-aside to a firm ultimately determined by the Small Business Administration to be other than small, based on agency's desire to make immediate award in order to avoid the administrative inconvenience of applying for an exception from a rumored funding freeze.

69:476

■ **Small businesses**
■■ **Contract awards**
■■■ **Sole sources**
■■■■ **Propriety**

Receipt of only one bid on a small business set-aside does not preclude award so long as award price is determined to be reasonable.

66:562

■ **Small businesses**
■■ **Corporate entities**
■■■ **Modification**
■■■■ **Effects**

Where firm's proposal under Small Business Innovation Research program initially is found acceptable for award, but firm subsequently undergoes a restructuring, the agency has a reasonable basis for reevaluating the firm's technical capability and financial responsibility to perform the project originally proposed; fact that reevaluation delays award process to end of fiscal year, and funds are reallocated so that award cannot be made to the firm, does not evidence improper action on agency's part.

67:154

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Eligibility**
■■■■ **Determination**

Protest is sustained where procuring agency awarded a contract set aside for small and disadvantaged business (SDB) concerns to a firm which was determined by the Small Business Administration (SBA) not to be socially or economically disadvantaged. Since SBA determined that the awardee was a concern which was ineligible for award because it was not controlled by a qualifying disad-

vantaged person, the continued performance of the contract is inconsistent with the purpose of the SDB set-aside program.

68:499

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Eligibility**
■■■■ **Determination**

Agency properly determined that joint venture protester did not qualify as a small disadvantaged business (SDB) where agency reasonably found that SDB member of joint venture did not control at least 51 percent of venture as evidenced by the non-SDB member's provision of financial resources; greater obligation for losses and liabilities; provision of the project manager empowered to resolve disputes between the venturers; and other indicia of majority control.

68:593

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Eligibility**
■■■■ **Determination**

Agency properly determined that awardee qualified as small disadvantaged business (SDB) where it reasonably found that awardee, though teamed with a non-disadvantaged small business, met the small size requirements; retained control of its management and daily business; was solely responsible for contract performance and all contacts with the agency; and would receive 100 percent of the contract profits.

68:594

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Eligibility**
■■■■ **Determination**

Agency properly rejected joint venture under small disadvantaged business (SDB) set-aside where agency reasonably determined that SDB member of joint venture did not control at least 51 percent of venture as evidenced by the SDB member's lack of the financial capability to obtain necessary bonds, lack of funds to handle its financial commitments, lack of experience and technical resources to handle its portion of the contract, and the non-SDB member's maintenance of all record keeping for the venture.

69:245

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Eligibility**
■■■■ **Determination**

Procuring agency properly did not set aside procurement for small disadvantaged business (SDB) concerns where the agency determined that there was no expectation of receiving offers from two or

more SDBs which would be eligible for award as manufacturers/producers or regular dealers as required by the Walsh-Healey Act.

70:45

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Preferences**
■■■■ **Computation**

Protest against the application of the small disadvantaged business evaluation preference to only the cost adjustment factors in a procurement for natural gas is denied where the method employed constitutes a reasonable application by the Air Force of the 10 percent preference called for under its regulations, to a contract which incorporates index pricing, by limiting the preference to those portions of the contract which are actually priced by the offerors, and for which the amount paid does not fluctuate.

69:233

■ **Small businesses**
■■ **Disadvantaged business set-asides**
■■■ **Preferences**
■■■■ **Eligibility**

Where agency issues proposed regulation which establishes eligibility of small disadvantaged business (SDB) dealers for obtaining SDB evaluation preference, issuance of final rule, based on comments received, which further restricts eligibility requirements, without request for further public comment, is not improper.

69:676

■ **Small businesses**
■■ **Preferred products/services**
■■■ **Certification**

Bidder's failure to certify that only end items that are manufactured or produced by small business concerns will be furnished does not affect the responsiveness of a bid where such small business certification is not required for the type of contract to be awarded.

68:411

■ **Small businesses**
■■ **Preferred products/services**
■■■ **Certification**

Bidder's failure under a small business set-aside to certify that it is a small business does not require rejection of its bid as nonresponsive since information regarding a bidder's size is not required to determine whether a bid meets the solicitation's material requirements.

68:524

■ **Small businesses**
■■ **Preferred products/services**
■■■ **Certification**

Requirement that bidder under a small business set-aside procurement for supplies perform at least 50 percent of the cost of manufacturing the supplies is a material term of the solicitation and bid which took exception to that requirement by indicating that 100 percent of manufacturing would be subcontracted thus properly was rejected as nonresponsive.

69:20

■ **Small businesses**
■■ **Preferred products/services**
■■■ **Certification**

Bidder's failure under a small business set-aside to certify that all end items to be furnished will be manufactured or produced by a small business does not require rejection of its bid as nonresponsive where bidder is obligated by operation of another solicitation clause to furnish only small business end items in its performance of the contract.

68:524

■ **Small businesses**
■■ **Responsibility**
■■■ **Competency certification**
■■■■ **GAO review**

Where Small Business Administration (SBA) has declined to exercise its certificate of competency (COC) jurisdiction because protester is a manufacturer offering a foreign item, we will review the contracting officer's initial determination of nonresponsibility to determine whether it was unreasonable or made in bad faith.

67:375

■ **Small businesses**
■■ **Responsibility**
■■■ **Competency certification**
■■■■ **GAO review**

The General Accounting Office will not question a contracting agency's determination that a small business concern is nonresponsible, or the agency's subsequent reassessment of new information regarding the concern's responsibility, where, following the agency's referral of the nonresponsibility determination to the Small Business Administration (SBA), the protester fails to apply to the SBA for a certificate of competency despite urging by the contracting agency that it do so.

69:1

■ **Small businesses**
■■ **Responsibility**
■■■ **Competency certification**
■■■■ **Negative determination**

Where solicitation did not advise offerors that financial condition would be considered in the evaluation of proposals, small business concern's financial condition related solely to its responsibility; accordingly, agency's rejection of its proposal on the basis of inadequate financial capacity but under the guise of a comparative, "best value" evaluation effectively constituted a finding of nonresponsibility which the agency was required to refer to the Small Business Administration.

69:741

■ **Small businesses**
■■ **Responsibility**
■■■ **Negative determination**
■■■■ **Effects**

Under the Small Business Act a contracting agency is required to refer its nonresponsibility determination regarding a small business offeror to the Small Business Administration for certificate of competency consideration, even though the solicitation was issued under small purchase procedures.

68:442

■ **Small businesses**
■■ **Responsibility**
■■■ **Negative determination**
■■■■ **Effects**

General Accounting Office sustains protest of low small business bidder which did not receive an award because the contracting agency did not think it "prudent" to contract with the firm whose prior contract for the same item had been terminated because of unsatisfactory performance. Although not denominated as such, the agency's action was a determination of nonresponsibility which by statute must be referred to the Small Business Administration for consideration under the certificate of competency procedure.

69:570

■ **Small businesses**
■■ **Responsibility**
■■■ **Negative determination**
■■■■ **Prior contract performance**

Although an agency may use traditional responsibility factors, like prior performance, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's offer as unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the offer but instead effectively constituted a finding of nonresponsibility.

67:612

■ **Small businesses**
■■ **Responsibility**
■■■ **Negative determination**
■■■■ **Prior contract performance**

Although an agency may use traditional responsibility factors, like management and staff capabilities and company experience, as technical evaluation factors where its needs warrant a comparative evaluation of proposals, an agency's rejection of a small business firm's proposal as technically unacceptable under such factors was improper where the agency's decision did not reflect a relative assessment of the proposal but instead effectively constituted a finding of nonresponsibility.

70:679

■ **Small businesses**
■■ **Responsibility**
■■■ **Negative determination**
■■■■ **Reconsideration**

Where preaward financial survey conducted approximately 5 months before award contains numerous informational deficiencies and a concurrently prepared plant facilities report contains negative information only with respect to products protester manufactured, the contracting agency should reevaluate its determination that protester was not responsible to supply products which require no manufacturing.

67:376

■ **Small businesses**
■■ **Size determination**
■■■ **GAO review**

Protest that awardee is not a small business and is therefore ineligible for contract award is dismissed because challenges of the size status of particular firms are for review solely by the Small Business Administration, not the General Accounting Office.

70:256

■ **Small businesses**
■■ **Size status**
■■■ **Self-certification**
■■■■ **Good faith**

Contracting officer properly accepted, at face value, the awardee's self-certification that it was a small business, in the absence of information that reasonably impeached the awardee's certification.

69:364

■ **Small businesses**
■■ **Size status**
■■■ **Subcontracts**
■■■■ **Effects**

Where proposal to provide services set aside for small business contains information indicating that the offeror is using a large business subcontractor to such an extent that the large business might be considered to have a controlling role, the contracting officer should refer the offeror's size status to the Small Business Administration for its determination.

66:585

Special Procurement Methods/Categories
■ **Architect/engineering services**
■■ **Contract awards**
■■■ **Administrative discretion**

The Architect of the Capitol acted reasonably in selecting the most highly qualified firm for negotiations leading to award, at a fair and reasonable price, of a contract for the conservation of murals at the Library of Congress; the agency was not required to base its ranking of interested firms on price, and acted properly in evaluating qualifications based on responses to qualifications questionnaires sent the firms and recommendations from listed references.

68:261

■ **Architect/engineering services**
■■ **Contractors**
■■■ **Evaluation**

The Federal Acquisition Regulation does not require the presence of an architect on all architect-engineer boards. The regulation only requires that government members of the board collectively have experience in architecture, engineering, construction and acquisition matters.

68:683

■ **Architect/engineering services**
■■ **Contractors**
■■■ **Evaluation**

Protest that firm was improperly excluded from further consideration in architect-engineer acquisition is denied where record shows that preselection committee had reasonable basis for recommending firms which it ultimately recommended to the source selection board and judgment of preselection committee was consistent with stated evaluation criteria.

69:69

■ Architect/engineering services
■■ Contractors
■■■ Price negotiation
■■■■ Termination

Protest that in procuring architect-engineer services under the Brooks Act contracting agency improperly terminated negotiations with protester is denied where record clearly shows that agency and protester could not come to a mutually acceptable agreement.

69:34

■ Architect/engineering services
■■ Contractors
■■■ Price negotiation
■■■■ Termination

Protest that after accepting the price breakdown in protester's proposal the contracting agency reversed its decision to protester's prejudice because protester would not have proceeded with further negotiations if it had known the breakdown was unacceptable is denied since at the time the agency did not have complete pricing data and the protester should have been aware that negotiations would be terminated if no agreement could be reached.

69:35

■ Architect/engineering services
■■ Definition

Amendment to the Federal Property and Administrative Services Act of 1949, 40 U.S.C. § 541 (1982) (the Brooks Act), clarifying the definition of architectural and engineering services subject to specialized Brooks Act procedures modifies prior General Accounting Office decisions interpreting the scope of the definition.

68:555

■ Architect/engineering services
■■ Federal procurement regulations/laws
■■■ Applicability

Contracting agency may solicit mapping services by competitive proposals instead of Brooks Act procedures, where such approach is permitted by applicable statutes, and services may be adequately and properly performed by other than an architecture/engineering firm and are unrelated to an architectural/engineering project.

66:436

■ **Architect/engineering services**
■■ **Federal procurement regulations/laws**
■■■ **Applicability**

Contracting agency must solicit traditional surveying and mapping services by Brooks Act procedures instead of competitive proposals, since the services may be logically or justifiably performed by architectural engineering firm, whether or not related to architectural-engineering project.

68:696

■ **Architect/engineering services**
■■ **Indefinite quantities**

The Federal Acquisition Regulation does not prohibit the use of an indefinite-quantity contract for the acquisition of other than commercial items or prohibit the issuance of a cost-plus-fixed fee indefinite-quantity contract.

70:554

■ **Communications systems/services**
■■ **Contract awards**
■■■ **Authority delegation**

Where the General Services Administration (GSA) authorized the contracting agency to procure new telephone equipment, but the authorization specifically excluded purchase of a private branch exchange (PBX) system, the contracting agency properly referred the protester's proposal of a PBX system to GSA for a delegation of procurement authority (DPA). When GSA denied the contracting agency's DPA request, award could not be made to the protester because it was not authorized.

68:154

■ **Communications systems/services**
■■ **Contract awards**
■■■ **Authority delegation**

Protest that it was unreasonable for the General Services Administration (GSA) to deny the procuring agency a delegation of procurement authority (DPA) to purchase the protester's private branch exchange telephone system will not be reviewed by the General Accounting Office as the decision whether to issue a DPA is committed by law to GSA, subject to review by the Director of the Office of Management and Budget.

68:154

■ **Communications systems/services**
■■ **Evaluation**
■■■ **Technical acceptability**

The contracting agency reasonably determined that the protester offered a private branch exchange (PBX) system in response to a procurement to replace existing, leased telephone equipment, where: (1) the protester specifically stated that it was offering a "PBX/Integrated Data Voice switch" in its best and final offer; (2) there were many references to a PBX switch in the protester's proposal and attached descriptive literature; and (3) the protester admits that the distinction between PBX and

key systems has become blurred and stated that it referred to its proposed switch as a PBX switch as a "sales answer" to the contracting agency in its proposal.

68:154

■ **Computer equipment services**
■■ **Federal supply schedule**
■■■ **Non-mandatory purchases**

An announcement in the *Commerce Business Daily* of plans to procure an item under a nonmandatory automatic data processing schedule contract is a device to test the market to determine whether the government's needs will be met at the lowest overall cost by procuring from the schedule. The announcement must make the government's needs sufficiently clear to assure that vendors will propose available alternatives, but it need not describe evaluation factors in the detail required in a solicitation.

66:430

■ **Computer equipment/services**
■■ **Computer software**
■■■ **Response times**
■■■■ **Evaluation**

Agency reasonably accepted awardee's proposed use of a computer as meeting request for proposal response time requirements in the absence of credible evidence that the proposed system failed to meet these requirements.

70:256

■ **Computer equipment/services**
■■ **Contract terms**
■■■ **Compliance**
■■■■ **Computer software**

Procuring agency failed to conduct meaningful discussions with the protester where the agency's technical concerns, which resulted in the elimination of the protester from the competitive range, were discovered during an on-site demonstration of the protester's software conducted after receipt of best and final offers and the agency failed to point out these concerns to allow the protester the opportunity to explain or retest the questioned aspects of the software.

69:252

■ **Computer equipment/services**
■■ **Federal supply schedule**
■■■ **Non-mandatory purchases**

Agency's rejection of protester's automatic data processing equipment proposed as equivalent to that described in a *Commerce Business Daily* announcement of intent to acquire equipment from another vendor under a nonmandatory automatic data processing schedule contract is proper, where the protester's equipment is not capable of performing all of the functions necessary to meet the agency's needs.

66:430

■ **Computer equipment/services**
■■ **Federal supply schedule**
■■■ **Non-mandatory purchases**

Purchase under non-mandatory automatic data processing schedule contract from firm which agency reasonably determines to be only source available to supply the desired product is not objectionable where procurement was conducted in accordance with applicable regulations and protester has not shown that there is no reasonable basis for the sole-source award.

68:188

■ **Computer equipment/services**
■■ **Federal supply schedule**
■■■ **Non-mandatory purchases**

Award of a contract for maintenance of automatic data processing equipment under a nonmandatory, General Services Administration schedule is proper where agency has determined that the scheduled items provide the lowest overall cost alternative.

70:302

■ **Computer equipment/services**
■■ **Federal supply schedule**
■■■ **Off-schedule purchases**
■■■■ **Advertising**

An announcement in the *Commerce Business Daily* (CBD) of plans to procure an item under a nonmandatory ADP schedule contract is a device to test the market to determine whether the government's needs will be met at the lowest overall cost by procuring from the schedule. The agency is not "locked into" all the specific features of the product or service synopsized in the CBD.

70:303

■ **Computer equipment/services**
■■ **Multiple/aggregate awards**
■■■ **Contract awards**
■■■■ **Propriety**

An agency decision to procure photocopier machines and related services on a total package basis was legally unobjectionable where the agency reasonably believed that this method of contracting would: (1) increase competition for certain categories of copiers; (2) facilitate maintenance and servicing of machines; (3) reduce the user activity's costs (related to storage space, dealing with the contractor, and performance of routine functions); and (4) allow greater flexibility in redistributing copiers to meet changing user needs.

68:57

■ **Construction contracts**
■■ **Quarters**
■■■ **Real property**
■■■■ **Ownership**

Where solicitation for construction and lease of off-post military family housing requires that offerors submit evidence of site ownership or access to site ownership through held options, contracting agency improperly relaxed its requirements by accepting from an offeror a "letter of intent" to acquire property in the future as evidence of legal access to real property.

66:302

■ **Federal supply schedule**
■■ **Multiple/aggregate awards**
■■■ **Mandatory use**

Protest that multiple award schedule should have been issued is denied where specification for item exists and selectivity is not necessary for ordering offices to meet their needs.

66:680

■ **Federal supply schedule**
■■ **Multiple/aggregate awards**
■■■ **Price reasonableness**

Finding of price unreasonableness under multiple-award Federal Supply Schedule solicitation was reasonable where proposal did not offer either most favored customer pricing—prices equal to or lower than lowest commercial prices—when evaluated on a product-by-product basis or lowest net price available to the government.

69:421

■ **Federal supply schedule**
■■ **Offers**
■■■ **Rejection**
■■■■ **Propriety**

Under multiple-award Federal Supply Schedule (FSS) solicitation, where agency determined that protester offered required most favored customer pricing—prices equal to or lower than offeror's lowest commercial prices—for certain percentage of large number of items and solicitation provided for possible award on a product-by-product basis, outright rejection of proposal for unreasonable pricing was improper; agency should have given protester opportunity through discussions to establish which items were priced acceptably, requested best and final offer, and included protester on FSS for all properly priced items.

69:451

■ **Federal supply schedule**
■■ **Price adjustments**
■■■ **Reduction**

A contractor under a General Services Administration (GSA) non-mandatory automatic data processing schedule contract may offer a price reduction at any time and by any method without approval by GSA, and under the contract's terms the price reduction generally will remain in effect for the remainder of the contract.

68:188

■ **Federal supply schedule**
■■ **Price adjustments**
■■■ **Reduction**

A contractor under a nonmandatory automatic data processing schedule contract may offer a price reduction at any time and by any method without approval by General Services Administration, and under the contract's terms the price reduction generally will remain in effect for the remainder of the contract.

70:303

■ **Federal supply schedule**
■■ **Terms**
■■■ **Purchase orders**
■■■■ **Quantity restrictions**

Only reasonable reading of a Federal Supply Schedule contract is that an overall maximum order limitation (MOL) on any order is to apply to all the items listed on that contract, including those which do not have specific MOLs. Since the order for the lease of equipment exceeded the overall MOL, the General Accounting Office recommends that it be terminated.

69:438

■ **Federal supply schedule**
■■ **Use**
■■■ **Propriety**

Contracting agency may acquire items under a Federal Supply Schedule (FSS) contract where incidental, non-FSS items are also being acquired in the same procurement so long as the acquisition is made at the lowest aggregate price and the cost of the non-FSS items is insignificant compared to the total cost of the procurement. Where agency solicits a fully integrated system, a significant portion of which is not available under FSS, agency cannot reasonably conclude that items to be acquired are FSS items and, therefore, agency is required to procure entire system on open market.

69:456

■ In-house performance
■■ Cost estimates
■■■ Computation errors
■■■■ Non-prejudicial allegation

There is no basis to question an agency's decision to retain services in-house rather than to contract for them as the result of an Office of Management and Budget Circular No. A-76 cost comparison where the protester makes no credible showing that the cost comparison's outcome likely would have been different had the agency calculated the government's estimated costs for the insurance of vessels in the manner advanced by the protester.

66:54

■ In-house performance
■■ Cost estimates
■■■ GAO review

Protest that agency's in-house cost estimate was understated is denied where record contains no conclusive evidence that agency's estimate was not based on the full statement of work.

66:202

■ In-house performance
■■ Cost evaluation
■■■ Government advantage
■■■■ Allegation substantiation

General Accounting Office will consider protest of agency's determination, based on comparison of in-house and contract costs, not to purchase particular services from workshop designated by Committee for Purchase from the Blind and Other Severely Handicapped pursuant to Wagner-O'Day Act—even though the act does not compel the government to purchase services—for purposes of assuring fair treatment of the offeror, since the agency advised offeror that award decision would be based on those cost comparison procedures.

66:202

■ In-house performance
■■ Cost evaluation
■■■ Government estimates
■■■■ Computation errors

Cost comparison showing cost of the low commercial offer exceeded the government's estimated cost of in-house performance is invalid, and protest on that basis is sustained, where the solicitation's statement of work included work that the government excluded from its estimate and that was more costly than the difference between the government estimate and the low bid.

67:166

■ **In-house performance**
■■ **Evaluation criteria**
■■■ **Cost estimates**

Protest of determination to perform trash pickup service and operation of a construction debris landfill in-house rather than by contract is denied where the protester has not shown that the agency's prorated allocation of certain government equipment operating costs, as adjusted under an administrative appeal, was inaccurate or violated Office of Management and Budget Circular A-76 procedures for determining the cost of in-house operation versus contracting.

69:46

■ **Multi-year leases**
■■ **Quarters**
■■■ **Lease payments**
■■■■ **Statutory restrictions**

The Air Force may enter into agreements with the Federal Republic of Germany without a proviso specifically limiting yearly payments for rent, utilities, maintenance and operation per family housing unit to $16,800, the maximum amount currently provided by law, since estimated costs are well within the statutory limit, and in light of other provisions in the lease which provide a safeguard against exceeding the limit in any event.

66:176

■ **Multi-year procurement**
■■ **Contract durations**
■■■ **Time restrictions**
■■■■ **Lump-sum appropriation**

Twenty-year agreement between the United States Information Agency and a West German copyright agency, though binding for only 1 year, was properly carried out for 11 years following the first year since yearly lump-sum appropriations were available for payment and USIA affirmatively continued the agreement for those years.

66:556

■ **Multi-year procurement**
■■ **Fiscal-year appropriation**
■■■ **Time restrictions**

Twenty-year agreement between the United States Information Agency (USIA) and a West German copyright agency was only valid for the first year of the agreement since USIA had no authority to enter into a multi-year agreement under a 1-year appropriation. The agreement violated the Antideficiency Act, 31 U.S.C. § 1341, since it created obligations in advance of appropriations.

66:556

■ **Multi-year procurement**
■■ **Fiscal-year appropriation**
■■■ **Time restrictions**

Proposed multiyear contract for the supply, storage, and rotation of sulfadiazine silver cream by the Philadelphia Defense Personnel Support Center of the Defense Logistics Agency (DLA) is not permissible. The Antideficiency Act, 31 U.S.C. § 1341(a)(1)(B) (1982), prohibits multiyear procurement, *i.e.,* a procurement which obligates the United States for future fiscal years, without either multiyear or no-year funding or specific statutory authority. The storage and rotation portion of the proposed contract satisfies neither of those conditions. Nothing in 10 U.S.C. § 2306(a) (1982), cited by DLA, constitutes authority for multiyear procurement. A "subject to availability clause" does not permit a multiyear procurement using annual funds.

67:190

■ **Options**
■■ **Contract extension**
■■■ **Use**
■■■■ **Propriety**

Where an award is justified on basis of urgency, the inclusion in the contract of options to extend the contract is not justified.

66:232

■ **Options**
■■ **Contract extension**
■■■ **Use**
■■■■ **Propriety**

When solicitation deficiencies prevented offers from being evaluated on an equal basis, but termination and resolicitation of the basic contract is not possible, the procuring activity should not exercise options, but resolicit using a revised solicitation. However, since the protester participated in the competition and did not complain of an allegedly deficient evaluation until after award, it is not entitled to recover either proposal preparation costs or the costs of filing and pursuing the protest.

66:243

■ **Options**
■■ **Contract extension**
■■■ **Use**
■■■■ **Propriety**

When agency's exercise of an option is based on an informal price analysis that considered best prices offered under original solicitation, market stability, and other factors, protest that analysis is insufficient is without legal merit.

66:463

■ Options
■■ Contract extension
■■■ Use
■■■■ Propriety

An agency is not required to issue a new solicitation to test the market before exercising an option simply because a protester states that it is likely that it would offer a lower price when prices have already been tested by a competition in which the protester participated.

66:463

■ Options
■■ Contract extension
■■■ Use
■■■■ Propriety

Competition in Contracting Act provision requiring suspension of performance if an agency receives notice of a protest within 10 calendar days of award does not apply to the exercise of an option; the law makes no mention of such a requirement, and there is nothing in the legislative history of the Act indicating that Congress intended the provision to apply.

66:464

■ Options
■■ Contract extension
■■■ Use
■■■■ Public notification

Under the Federal Acquisition Regulation, 48 C.F.R. § 5.202(a)(11), requirements for publication in the *Commerce Business Daily* do not apply to the proposed exercise of an option under an existing contract that was itself synopsized in the detail required by statute and regulation.

66:463

■ Requirements contracts
■■ Additional work/quantities
■■■ Interagency agreements

Under the Economy Act, 31 U.S.C. § 1535 (1988), where the ordering agency reasonably determines that amounts are available, that the receiving activity is able to provide or get by contract the ordered goods or services, that ordered goods or services cannot be provided by contract as conveniently or cheaply by a commercial enterprise, and that placement of the order is in the best interest of the government, an agency may purchase its requirements under another agency's contract.

70:448

■ Requirements contracts
■■ Use
■■■ Criteria

Contracting agency is not required to include minimum order guarantee in requirements contract. Agency's agreement to procure a specified percentage of its requirements constitutes adequate con-

sideration, and inclusion of estimated quantities in solicitation provides a reasonable basis for offerors to prepare price proposals.

66:680

■ **Requirements contracts**
■■ **Validity**
■■■ **Determination**

Solicitation for natural gas from wellhead producers and its transmission via the interstate pipeline to local distributing companies reasonably was found not to be a contract for utility services within the meaning of the Department of Labor's regulatory exemption from the application of the Walsh-Healey Act and thus the Walsh-Healey Act is applicable to the procurement.

70:44

■ **Research/development contracts**
■■ **Contract awards**
■■■ **Foreign sources**

Agency did not violate statutory prohibition against contracting with foreign corporations for research and development where proposal of United States firm, while found acceptable, was not evaluated as essentially equal from a technical standpoint to successful proposal of foreign firm.

69:3

■ **Service contracts**
■■ **Commercial products/services**
■■■ **Use**
■■■■ **Indefinite quantities**

Federal Acquisition Regulation (FAR) does not prohibit the use of an indefinite quantity contract for the acquisition of other than commercial items. Maintenance services, sold to the general public in the course of normal business operations based on market prices, constitute a commercial product as defined in FAR.

70:139

■ **Service contracts**
■■ **Contract awards**
■■■ **Urgent needs**
■■■■ **Justification**

Where the agency discovered just prior to award of a contract under a competitive small business set-aside solicitation that appropriated funds would not be available to fund the contract, and the agency determined that its need for the required services was urgent, the agency acted reasonably in awarding a concession contract that would not require appropriated funds to the offeror who had been low under the solicitation.

66:232

■ **Service contracts**
■■ **GOCO plants**
■■■ **Use**

When protester chooses to subcontract a portion of dry cleaning work that it could perform at a government-owned facility with government-furnished equipment, its resulting higher prices do not establish that the government is improperly using appropriated funds to subsidize or defray the cost of the dry cleaning.

66:148

■ **Service contracts**
■■ **Options**
■■■ **Rate changes**
■■■■ **Restrictions**

Agency-drafted clause which places a ceiling on recoverable cost increases during option years as the result of Service Contract Act wage rate increases is inconsistent with Federal Acquisition Regulation clause which allows pass-through of the total increase and allows another clause to be used only if it accomplishes the same purpose. 62 Comp. Gen. 542 (1983) and B-213723, June 26, 1984 overruled in part.

69:707

■ **Service contracts**
■■ **Personal services**
■■■ **Criteria**

A contract which results in a direct employer-employee relationship between a federal agency and the contractor's personnel is prohibited under current civil service directives. Hence, a federal agency may not properly contract with a commercial firm for the assignment of contractor personnel to the agency's offices to act, for all practical purposes, as duly appointed federal employees in performing personal services for the agency.

66:420

■ **Service contracts**
■■ **Personal services**
■■■ **Criteria**

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing operators for nuclear facilities does not involve the performance of inherently governmental activities. The Commission's guidelines are so comprehensive and detailed regarding all aspects of the testing procedures that the contract employees exercise minimal discretionary authority and make limited value judgments in preparing recommendations for Commission employees who decide whether to grant these operator licenses.

70:682

■ **Service contracts**
■■ **Personal services**
■■■ **Criteria**

The Nuclear Regulatory Commission's use of contract employees to perform testing procedures involved in licensing nuclear plant operators does not involve the improper use of personal services contracts because the contract employees are not subject to continuous supervision and control by employees of the Commission.

70:682

■ **Service contracts**
■■ **Rate changes**
■■■ **Administrative policies**
■■■■ **GAO review**

When Army policy is to provide low cost laundry and dry cleaning to service members, the General Accounting Office (GAO) has no legal basis to question directive which specifically states that installation commanders, rather than bidders, will establish prices for such services. GAO generally does not review executive branch policies in its bid protest function.

66:148

■ **Service contracts**
■■ **Sewage services**
■■■ **Municipalities**
■■■■ **Mandatory use**

Provision of Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1982), requiring federal agencies to comply with local requirements respecting control and abatement of solid waste, does not require that Travis Air Force Base utilize the city of Fairfield, California's exclusive franchisee for refuse collection. Although Travis is within the Fairfield city limits, it is a major federal facility that should be treated as though it is a separate municipality, which is entitled to contract for its own refuse collection services.

66:238

■ **Service contracts**
■■ **Sewage services**
■■■ **Municipalities**
■■■■ **Mandatory use**

Provision of Resource Conservation and Recovery Act, 42 U.S.C. § 6961 (1988), requiring federal agencies to comply with local requirements respecting control and abatement of solid waste, does not require the El Toro Marine Air Station to use Orange County, California's exclusive permittee for refuse collection. Although the air station is within the unincorporated limits of Orange County, it is a major federal facility under the guidelines of the Environmental Protection Agency and should be treated as though it were a separate municipality entitled to contract for its own refuse collection services.

70:193

■ **Service contracts**
■■ **Telecommunications**

Requirement for long-distance telephone service for federal inmates comes within the scope of the FTS2000 telecommunications services contracts. Where the long distance service does not differ in any technical respect from that being provided under the FTS2000 contracts, the contracts specifically provide for additional users, and the contracts cover telephone services related to official government business, including telephone calls by inmates.

70:20

■ **Service contracts**
■■ **Terms**

Contracting officer properly determined—consistent with the view of the Department of Labor, the agency charged with implementing the Walsh-Healey Act—that the Walsh-Healey Act does not apply to contract for rental of personal property since such a contract does not involve "furnishing" equipment within the meaning of the act. 19 Comp. Gen. 486 (1939), affirmed.

69:238

■ **Service contracts**
■■ **Wage rates**
■■■ **GAO review**

The General Accounting Office does not review Department of Labor wage determinations issued in connection with solicitations subject to the Service Contract Act.

68:203

■ **Subcontracts**
■■ **Contract awards**
■■■ **Evaluation criteria**
■■■■ **Application**

Protest that selection of a subcontractor violated established selection factors is sustained, where solicitation set forth three inconsistent bases for award and the prime contractor, acting for the government, used none of the listed bases to select a subcontractor.

66:538

■ **Subcontracts**
■■ **Contract awards**
■■■ **GAO review**

General Accounting Office will consider protests by potential subcontractors of a prime contractor where the subcontractor selection is in effect by the government. Where the prime contract provides for selection by government employees, and provisions of the prime contract, the actual selection procedures, and the subcontract establish that the prime contractor acts as a mere conduit for the government to obtain items from another firm and primarily to handle the administrative procedures of subcontracting, the procurement is by the government.

66:538

Specification
■ Brand name specifications
■ ■ Ambiguous specifications
■ ■ ■ Salient characteristics
■ ■ ■ ■ Equivalent products

Where a solicitation specifies a brand name product only, but lists salient characteristics for the product, the manufacturer should assume that the agency will also consider offers for equivalent products.

66:16

Specifications
■ Ambiguity allegation
■ ■ Specification interpretation

Offeror's failure to request clarification or to protest regarding ambiguous specifications before the closing date for receipt of initial proposals does not preclude relief where the ambiguity was not apparent on the face of the solicitation.

66:139

■ Ambiguity allegation
■ ■ Specification interpretation

Solicitation called for the submission of bids on a brand name or equal basis, and the brand name manufacturer submitted a bid on its model called for in the solicitation. Award was thereafter made to bidder offering a product which more closely resembled brand name manufacturer's less expensive model, based on agency's different, but reasonable interpretation of purchase description. Since brand name manufacturer's less expensive model was sufficient to meet government's needs, it was prejudiced by specifications which it reasonably interpreted as requiring its more expensive model, and agency should have canceled solicitation and resolicited requirement on less restrictive basis.

67:161

■ Ambiguity allegation
■ ■ Specification interpretation

Offerors must be given sufficient detail in an RFP to allow them to compete intelligently on a relatively equal basis. Where the specifications are not free from ambiguity and do not describe the contracting agency's minimum needs accurately, the solicitation should be corrected and reissued.

68:102

■ Ambiguity allegation
■ ■ Specification interpretation

Specification language requiring that cables be concealed in walls "where practicable" and that conduits be similarly concealed "wherever possible" clearly indicates that agency desired concealment, with reasonable exceptions; protester's interpretation that contractor had discretion to decide that

none of the cable or conduit would be concealed is unreasonable since it gives no effect to agency's clear intent.

68:244

■ **Ambiguity allegation**
■■ **Specification interpretation**

Solicitation which requires bidders to determine for themselves applicable sections of directives, instructions and regulations incorporated by reference in their entirety into solicitation does not impose an undue burden on bidders, and does not constitute a solicitation defect, where all documents are made available to bidders for their examination and there is no evidence that bidders cannot readily discern the applicable sections by reviewing the cited materials.

68:642

■ **Ambiguity allegation**
■■ **Specification interpretation**

Where the solicitation given to protester only solicited offers for a designated model manufactured by the protester and did not indicate that equal products would be acceptable, but award was made to another offeror for its model, the specifications misled and prejudiced the protester, who assertedly could have proposed less expensive models conforming to the agency's needs.

70:652

■ **Brand name/equal specifications**
■■ **Equivalent products**
■■■ **Acceptance criteria**

Failure of an "equal" product to meet all of the salient characteristics required by solicitation "brand name" requirement properly resulted in the rejection of the bid as nonresponsive.

68:426

■ **Brand name/equal specifications**
■■ **Equivalent products**
■■■ **Acceptance criteria**

Where protester argues awardee did not meet experience requirement that proposed software system, "without modifications, must have been implemented and operating" at one site for 6 months, but protester likewise proposed a system which was not in its entirety in use at any one site for 6 months, and agency has determined that awardee's system will satisfy its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

70:105

■ **Brand name/equal specifications**
■■ **Equivalent products**
■■■ **Acceptance criteria**

Protest alleging noncompliance of brand name product with specification requirements in a negotiated brand name or equal procurement need not be filed by the closing date for receipt of proposals; it may be timely filed within 10 working days of the date on which the protester learned of the

procuring agency's determination that the brand name product was compliant with the specifications. Since an agency may properly specify specifications that go beyond those of the designated brand name and may reject the offer of a brand name product that does not comply, the protester need not file a "defensive" protest but properly may await an agency determination that is adverse to the protester's interest.

70:242

■ Brand name/equal specifications
■■ Equivalent products
■■■ Acceptance criteria

Protest alleging noncompliance of brand name product with certain solicitation specifications is denied where the record demonstrates compliance with each specification requirement.

70:242

■ Brand name/equal specifications
■■ Equivalent products
■■■ Acceptance criteria

Where the solicitation given to protester only solicited offers for a designated model manufactured by the protester and did not indicate that equal products would be acceptable, but award was made to another offeror for its model, the specifications misled and prejudiced the protester, who assertedly could have proposed less expensive models conforming to the agency's needs.

70:652

■ Brand name/equal specifications
■■ Equivalent products
■■■ Salient characteristics
■■■■ Descriptive literature

A bid offering an "equal" product under a brand name or equal solicitation must contain sufficient descriptive literature to permit a determination that the product possesses the salient characteristics specified in the solicitation, a requirement that is not met by a bid that merely parrots back the salient characteristics specified.

66:181

■ Brand name/equal specifications
■■ Equivalent products
■■■ Salient characteristics
■■■■ Descriptive literature

"Equal" bid in response to brand name or equal solicitation was properly rejected as nonresponsive where inadequate descriptive material was submitted to establish that offered item met the salient characteristics listed in the solicitation.

66:504

■ **Brand name/equal specifications**
■■ **Equivalent products**
■■■ **Salient characteristics**
■■■■ **Minor deviations**

Discrepancy of 10 lbs. between 410 lbs. X-ray screening machine bid and 400 lbs. IFB requirement in a brand name or equal purchase description should have been waived as a minor informality since it represented an inconsequential variation as the machine still met the agency's minimum needs, and where brand name manufacturer or other bidders failed to show that they would be prejudiced by a waiver.

66:211

■ **Brand name/equal specifications**
■■ **Modification**
■■■ **Salient characteristics**

Where an agency solicits a brand name or equal product, the agency may specify characteristics that go beyond those of the designated brand name product when those characteristics represent the essential needs of the agency. In such cases, where, in effect, a modified brand name product is required, a procuring agency must reject the brand name product if it does not show compliance with, or takes exception to, the modified salient characteristics.

66:505

■ **Brand name/equal specifications**
■■ **Salient characteristics**
■■■ **Sufficiency**

Solicitation called for the submission of bids on a brand name or equal basis, and the brand name manufacturer submitted a bid on its model called for in the solicitation. Award was thereafter made to bidder offering a product which more closely resembled brand name manufacturer's less expensive model, based on agency's different, but reasonable interpretation of purchase description. Since brand name manufacturer's less expensive model was sufficient to meet government's needs, it was prejudiced by specifications which it reasonably interpreted as requiring its more expensive model, and agency should have canceled solicitation and resolicited requirement on less restrictive basis.

67:161

■ **Brand name specifications**
■■ **Equivalent products**
■■■ **Acceptance criteria**

Fact that a manufacturer has been granted exclusive rights to use a brand name as a trademark does not affect the law to be applied in determining whether an agency can properly accept an equivalent product when the words "or equal" have inadvertently been omitted from a brand name solicitation.

66:16

■ **Brand name specifications**
■■ **Equivalent products**
■■■ **Acceptance criteria**

Contracting agency reasonably and properly accepted offers of valves other than the brand name models specified in the solicitation, even though the offeror has never produced the items, where the Products Offered clause permitted offers of alternates that are physically, mechanically, electronically, and functionally interchangeable with the brand-name models and the offers contained both drawings complying with the requirement for interchangeability and first article test procedures ensuring satisfactory production.

66:613

■ **Defects**
■■ **Brand name/equal specifications**
■■■ **Omission**

Although inadvertent omission of "or equal" language renders a brand name or equal solicitation defective, the agency may make an award under it if the government's needs are met and no offeror is prejudiced.

66:16

■ **Design specifications**
■■ **Competitive restrictions**
■■■ **Waiver**

Agency may only waive the proscription contained in Federal Acquisition Regulation § 36.209 against a design firm or its affiliates contracting to construct a project it designed where there is a reasonable basis for concluding that an overriding governmental interest exists or that no purpose would be served by the application of the restriction in the procurement. Where a particular building design process minimized any potential competitive advantage, the contracting officer could determine a waiver is justified.

70:375

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Allegation substantiation**
■■■■ **Evidence sufficiency**

Protest that specification for copiers unduly restricts competition is sustained when agency does not establish that requirement that copiers use dry toner only is necessary to meet the government's needs.

68:368

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Allegation substantiation**
■■■■ **Evidence sufficiency**

Protest that specification is unduly restrictive is denied where agency offers reasonable justification for specification and protester fails to rebut agency's showing.

68:447

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Brand name specifications**

Protest that proprietary specification for burners and controls for hot water generators unduly restricts competition is sustained when agency does not justify requirement that contractor obtain equipment to be replaced and installed from one particular manufacturer. Specifications should be stated in a manner that permits consideration of other equipment that is capable of meeting the government's actual needs.

66:208

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Design specifications**
■■■■ **Burden of proof**

Protest that agency improperly used a design specification based on drawings duplicating competitor's equipment design is sustained where agency fails to establish *prima facie* support for the restriction beyond fact that the specified design will cure defects in the competitor's currently installed equipment but the purpose of the procurement is total replacement of the current equipment.

66:174

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Design specifications**
■■■■ **Justification**

Contention that specification in IFB overstated contracting agency's minimum needs by requiring that wiring harness for thermal targets have special power-saving circuitry is without merit where there is no reasonable basis to conclude that the specification imposed that requirement.

66:127

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Design specifications**
■■■■ **Justification**

Protest that specification is unduly restrictive is denied where agency offers reasonable justification for specification and protester fails to rebut agency's showing.

68:447

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Design specifications**
■■■■ **Overstatement**

An agency had a reasonable basis to cancel and resolicit a request for proposals (RFP), under which award was to be made to the low-priced acceptable offeror, after the receipt of proposals and disclosure of prices, where the major required item was solicited in the RFP on a "brand name" rather than on a "brand name or equal" basis and an acceptable equal item was proposed, because the RFP overstated the agency's requirements, which caused a reasonable possibility of prejudice to the competitive system since actual and potential offerors did not have the opportunity to compete on the government's actual requirements.

70:345

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Design specifications**
■■■■ **Overstatement**

Protest is sustained on basis that solicitation requirement for level 3 drawings, which include detailed data on manufacturing processes, exceeded agency's actual needs, where record shows that agency's need for drawings was to support emergency repair and overhaul of the valves, for which full production data is not needed.

70:399

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **GAO review**

Agency should have amended solicitation specifications to allow for the offer of alternative equipment that the agency had determined would meet its minimum needs. Protest that the specifications were unduly restrictive is denied, however, where the protester clearly understood from the agency's best and final offer request that its alternative equipment would be acceptable if the agency's size limitations could be met, and the protester responded with a corrected best and final offer that the agency reasonably believed was for the alternative equipment, but rejected because it was not low. Although the protester asserts that its offered price was actually for the equipment originally specified, its assumption that the agency would understand this, and request another round of

best and final offers to give it an opportunity to submit a price for the alternative equipment, was unreasonable.

66:101

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **GAO review**

General Accounting Office will not question an agency's determination of its minimum needs absent a clear showing that the determination is unreasonable. Protester which merely seeks to redraw request for quotations to reflect its own needs rather than those of agencies conducting joint acquisition has not demonstrated that agencies' determination is unreasonable.

66:117

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **GAO review**

Protest that requirement for 128 kilobytes (128K) of memory for transient digitizers unduly restricts competition is sustained where the record fails to show that the specification is reasonably related to contracting agency's current needs, since the 128K memory capacity cannot be utilized by the agency given current technology and even if the necessary technology becomes available in the near future, the agency lacks any definite plans to use it.

69:750

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **GAO review**

Contention that requirement for a DR11 compatible high speed parallel port for transient digitizers improperly restricts competition is sustained where the contracting agency in effect concedes that compatibility feature is not required to meet its minimum needs.

69:751

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Geographic restrictions**
■■■■ **Justification**

Protest is sustained where agency determined that urgency required that competition be limited to local gravel sources, and then failed to solicit offer from protester solely due to his non-local mailing address, even though agency was fully aware that protester owned local gravel pit.

68:659

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Geographic restrictions**
■■■■ **Justification**

Requirement that offers to provide public pay telephones cover specific General Services Administration regions only unduly restricts competition where requirement excludes Regional Bell Operating Companies from competing in their regular course of business and otherwise is not a legitimate need of the agency.

69:62

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Justification**
■■■■ **Sufficiency**

A blanket solicitation requirement in a small business set-aside that all individual sureties provide a security interest consisting of a first deed of trust on the unencumbered value of real property listed on an affidavit of individual surety, or obtain a subrogation agreement from the party holding a first deed of trust on encumbered real property, as well as a requirement to furnish proof of title and an appraisal of value of the real property, is not reasonably related to the minimum needs of the agency and is restrictive of competition where there are no unusual circumstances justifying the requirement.

67:184

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Justification**
■■■■ **Sufficiency**

Protest that a solicitation requirement for 100 percent in-process inspection testing of hammer heads exceeds the contracting agency's minimum needs is denied where the record shows that the testing requirement is necessary to minimize safety risks to hammer users.

68:41

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Justification**
■■■■ **Sufficiency**

Solicitation which limits the award of contracts for a given group of courses to a single academic institution in the United States European Command is not legally objectionable where, after consideration of logistical, demographic and economic factors on a theater-wide basis, the procuring agency concludes that its solicitation is the most practicable and will most advantageously fulfill the needs of the military student population.

68:672

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Justification**
■■■■ **Sufficiency**

Solicitation requirement that offerors complete original equipment manufacturer's (OEM's) maintenance training prior to preaward survey is unobjectionable where OEM, the only source of acceptable spare parts, will make parts available only to firms with training and there would be risk of delay in contract performance if training was not completed prior to award.

69:418

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Performance specifications**
■■■■ **Geographic restrictions**

Requirement for regional contracts for paint and rubber removal and restriping of airfields which include up to 34 airfields in a single contract award unduly restricts competition where record does not establish that the requirement meets a legitimate need of the agency.

69:511

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Performance specifications**
■■■■ **Justification**

A protest that the contracting agency unduly restricted competition by providing functional specifications instead of detailed design specifications is without merit when six offerors submit samples that pass an initial inspection indicating that they can perform the required functions. To ensure that specifications are stated in terms that will permit the broadest field of competition, agencies may require offerors to use their own inventiveness and ingenuity in devising approaches to meet the minimum needs of the government.

66:309

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Performance specifications**
■■■■ **Justification**

Contracting agency may state its minimum needs in terms of performance, rather than design, specifications requiring offerors to use their own inventiveness or ingenuity in devising approaches that will meet the government's requirements; the agency need not specify in the solicitation the manner in which offerors are to fulfill the performance requirements, or advise a technically acceptable offeror during discussions that another approach is superior.

68:249

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Performance specifications**
■■■■ **Management services**

Agency is not required to separately purchase custodial services for several buildings where the agency's overall needs can be most effectively provided through a consolidated procurement approach involving award of the total requirement for services necessary to operate and maintain the buildings to one contractor.

66:12

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Performance specifications**
■■■■ **Management services**

When contracting agency maintains that literal application of experience requirements in solicitation would create a sole-source procurement and that the transition to performance by a firm not meeting requirements was achieved without problems, the experience requirements exceeded the agency's minimum needs. The General Accounting Office recommends that the agency resolicit, requiring only the individual and corporate experience necessary for performance.

66:289

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Pre-qualifications**
■■■■ **Design specifications**

In procurements with prequalification requirements, contracting agencies have a statutorily imposed duty to specify in writing and make available upon request all requirements that a potential offeror or its product must satisfy to become qualified, such requirements to be limited to those least restrictive to meet the agencies' needs. By advising an offeror that no specifications, plans or drawings were available for required ballscrews, when the agency had a specification control drawing, the agency effectively precluded the offeror from any opportunity to qualify, in violation of its duty to facilitate qualification and competition.

66:134

■ **Minimum needs standards**
■■ **Competitive restrictions**
■■■ **Sureties**
■■■■ **Financial information**

Solicitation provision which requires offerors providing individual sureties to submit a certified public accountant's certified balance sheet(s) and income statement(s) with a signed opinion for each surety is not legally objectionable as unduly restrictive of competition where the accuracy of sure-

ties' net worths is often called into question by offerors' failure to submit sufficient supporting information.

69:10

■ **Minimum needs standards**
■■ **Determination**
■■■ **Administrative discretion**

Protest that specifications are not economically sound and are not in the best interest of the government will not be considered where the protester does not show that these specifications adversely affect it in some way, since the method an agency chooses to accomplish its needs raises an issue of policy, and is a matter for the agency to decide.

67:3

■ **Minimum needs standards**
■■ **Determination**
■■■ **Administrative discretion**

Where protester argues awardee did not meet experience requirement that proposed software system, "without modifications, must have been implemented and operating" at one site for 6 months, but protester likewise proposed a system which was not in its entirety in use at any one site for 6 months, and agency has determined that awardee's system will satisfy its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

70:105

■ **Minimum needs standards**
■■ **Determination**
■■■ **Administrative discretion**

Where protester argues awardee's proposal did not meet several solicitation requirements concerning required database management system, but protester likewise proposed a system that did not comply with several of the requirements, and agency has determined based upon its prior experience with awardee that the awardee's system satisfies its minimum needs, contracting officials have treated both offerors equally and there is no basis to sustain protest against award.

70:313

■ **Minimum needs standards**
■■ **Risk allocation**
■■■ **Performance specifications**

Protest challenging requirements that contractor furnish various supplies for which the solicitation does not provide specific compensation is without merit where the protester does not show that the risks imposed are unreasonable. The mere presence of risk in a solicitation does not render it inappropriate, and offerors are expected to consider the degree of risk in calculating their prices.

67:3

■ **Minimum needs standards**
■■ **Risk allocation**
■■■ **Performance specifications**

Protest allegation that solicitation provision, which requires contractor to lodge its employees in a privately operated facility, places undue cost risk on offerors is denied where the solicitation provides that the contractor's costs of lodging will be reimbursed by the government and any other costs to the contractor are easily calculable.

69:147

■ **Minimum needs standards**
■■ **Risk allocation**
■■■ **Performance specifications**
■■■■ **Utility services**

Protest that agency should estimate its need for utility services rather than provide offerors information on historical usage is denied where the solicitation contains sufficient information for offerors to compete intelligently and on equal terms. There is no legal requirement that specifications eliminate all risk for the contractor.

66:12

■ **Minimum needs standards**
■■ **Total package procurement**
■■■ **Propriety**

An agency determination to award a single contract for brand-name intravenous (IV) solutions and IV administration sets under a total package approach is reasonable where such approach was necessary to meet the agency's minimum need that the solutions and sets be compatible and will achieve economies of scale.

67:531

■ **Minimum needs standards**
■■ ***Total package procurement***
■■■ **Propriety**

An agency's decision to procure its immediate minimum need for modification kits and associated engineering services to upgrade jet engines on a total package basis rather than break out components for separate competitive procurements will not be disturbed where the agency reasonably determined that due to the magnitude and complexity of the upgrade program the purchase of the kits and engineering services on a total package basis is essential to maintain standardization and configuration control of the parts.

70:53

■ **Performance specifications**
■■ **Modification**
■■■ **Contractors**
■■■■ **Notification**

An agency which relaxes a material solicitation requirement at one offeror's request is required to issue a written amendment to all offers. However, even where the protester is not apprised of the material change, its protest is denied, where cost is the award determinative factor and the potential cost impact on the protester's proposal is $90,000 and the awardee's cost is $262,000 less than the protester's cost.

67:33

Tables of Statutes, etc.

United States Statutes

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

United States Code

See also U.S. Statutes at Large

Constitution of the U.S.

Published Decisions of the Comptrollers General

Decisions of the Comptrollers of the Treasury

	Page
9 Comp. Dec. 10	66:626
14 Comp. Dec. 310	67:511
23 Comp. Dec. 221	67:74
23 Second Comp. Dec. 221	67:74
27 Comp. Dec. 344	67:420

Decisions Overruled or Modified

	Page
B-82108, Jan. 17, 1949	70:616
B-82565, June 1, 1949	70:616
B-129612, July 1, 1957	70:200
B-163107, May 18, 1973	70:486
B-166141, Feb. 27, 1969	70:200
B-171947.24, June 16, 1972	67:188
B-171947.36, Nov. 16, 1972	67:188
B-175499, Apr. 21, 1972	69:73
B-184908, May 26, 1976	70:486
B-189288, Nov. 23, 1977	67:188
B-189295, Aug. 16, 1977	69:574
B-189826, Apr. 7, 1978	66:677
B-190617, Feb. 16, 1978	67:408
B-194496, Jan. 17, 1980	67:107
B-199526, Feb. 23, 1981	70:200
B-200165, B-200165.2, Dec. 31, 1980	67:421
B-208877, May 17, 1983	67:107
B-210555.23, May 18, 1987	70:196
B-212465, Oct. 19, 1983	67:107
B-213660, May 3, 1984	68:307
B-213723, June 26, 1984	69:707
B-215709, Oct. 24, 1984	69:574
B-215784, Dec. 3, 1984	66:300
B-216293, Dec. 21, 1984	67:522
B-216640, Mar. 13, 1985	68:681
B-216640, Sept. 18, 1985	68:681
B-217114, Mar. 26, 1987	70:463
B-217114, Feb. 29, 1988	70:463
B-217114, Aug. 12, 1988	70:463
B-217114.3, Feb. 10, 1987	70:463
B-217114.5, June 8, 1990	70:463
B-217114.6, July 24, 1990	70:463
B-222700, Oct. 17, 1986	69:545
B-229890, Mar. 3, 1988	68:451
B-233393, Nov. 9, 1988	68:451
B-236110, Jan. 26, 1990	70:200
7 Comp. Gen. 348	68:329
10 Comp. Gen. 102	70:263
10 Comp. Gen. 116	70:263
11 Comp. Gen. 469	70:263
12 Comp. Gen. 241	70:263
17 Comp. Gen. 174	70:263
27 Comp. Gen. 211	70:616
29 Comp. Gen. 269	70:263
35 Comp. Gen. 708	70:263
37 Comp. Gen. 343	67:419
37 Comp. Gen. 357	68:1
40 Comp. Gen. 186	70:263
41 Comp. Gen. 285	70:463
41 Comp. Gen. 320	70:263
47 Comp. Gen. 84	69:73
49 Comp. Gen. 548	68:167
50 Comp. Gen. 220	66:497
50 Comp. Gen. 556	68:143
51 Comp. Gen. 23	70:263
52 Comp. Gen. 493	66:677
52 Comp. Gen. 504	67:87
53 Comp. Gen. 159	67:230
54 Comp. Gen. 87	70:378
54 Comp. Gen. 1054	69:38
55 Comp. Gen. 1035	68:681
56 Comp. Gen. 525	68:167
57 Comp. Gen. 664	70:463
58 Comp. Gen. 741	67:188
59 Comp. Gen. 502	69:287
60 Comp. Gen. 357	68:399
60 Comp. Gen. 493	68:681
60 Comp. Gen. 580	67:87
60 Comp. Gen. 591	68:158
61 Comp. Gen. 191	66:501
61 Comp. Gen. 649	70:616
62 Comp. Gen. 339	68:470
62 Comp. Gen. 542	69:707
63 Comp. Gen. 123	67:436
64 Comp. Gen. 189	66:47
64 Comp. Gen. 655	67:221
64 Comp. Gen. 789	68:222
64 Comp. Gen. 830	67:421
65 Comp. Gen. 328	68:451
65 Comp. Gen. 447	66:627
65 Comp. Gen. 749	66:480
65 Comp. Gen. 858	70:463
66 Comp. Gen. 31	70:39
66 Comp. Gen. 367	70:39
67 Comp. Gen. 404	67:615
67 Comp. Gen. 443	70:210

Opinions of the Attorneys General

Decisions of the Court

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