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TABLE OF DECISION NUMBERS

	Page
B–131587 Sept. 18	191
B–133972 Sept. 2	154
B–141529 Sept. 3	159
B–144605 Sept. 30	229
B–153485 Sept. 24	205
B–168629 Sept. 3	163
B–168712 Sept. 24	209
B–169094 Sept. 4	167
B–169172 Sept. 16	184
B–169537 Sept. 3	164
B–169813 Sept. 15	177
B–169835 Sept. 18	193
B–170081 Sept. 1	151
B–170093 Sept. 28	222
B–170104 Sept. 30	232
B–170112 Sept. 15	180
B–170198 Sept. 2	156
B–170210 Sept. 9	174
B–170261 Sept. 24	215
B–170352 Sept. 4	173
B–170395 Sept. 30	236
B–170451 Sept. 29	226
B–170459 Sept. 24	220
B–170751 Sept. 23	202

Cite Decisions as 50 Comp. Gen.—.

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

[B-170081]

Contracts—Mistakes—Item Not for Evaluation

A mistake in the per linear foot unit price of cable, a price that would not be used for bid evaluation purposes but would be applicable should the quantity of the lump-sum purchase of cable be increased or decreased, and which relating to bid responsiveness would require bid rejection if not furnished, may be corrected and the contract reformed to reflect the intended bid price. Section 1-2.406-1 of the Federal Procurement Regulations does not limit bid examination to those factors to be considered in the bid evaluation, and in view of the possibility that the unit price would have a substantial impact on the price ultimately to be paid should the right reserved to increase or decrease the length of cable purchased be exercised, the contracting officer should have compared unit prices, and when aware of the wide range of prices offered, verified the erroneous unit price.

To the Secretary of the Interior, September 1, 1970:

Reference is made to a letter dated June 15, 1970, from the Assistant Secretary for Administration forwarding pertinent papers relative to the claim for relief by British Insulated Callender's Cables Limited (BICC) on account of a mistake in its bid submitted pursuant to invitation for bids No. DS-6662R, issued by the Bureau of Reclamation, Denver, Colorado. BICC was awarded the contract under that invitation on August 4, 1969.

The procurement was for the furnishing, installing, and testing of three 3-phase, 525-kilovolt, high- or medium-pressure oil cable systems, in accordance with applicable specifications, at the Grand Coulee Third Powerplant, Coulee Dam, Washington. The bidding schedule appeared at pages "b" through "d" of the invitation. On page "b," bidders were required to insert a lump-sum price for the three systems, which included 57,860 linear feet of single-conductor cable, based on the length between terminations of the single-conductor cables in the potheads without "snaking." Also appearing on page "b" was the following:

The Government, in order to adjust to actual field conditions, reserves the right to increase or decrease the single-conductor lengths of the cable systems from the quantities so specified, for an increase or decrease in the lump-sum price offered at the rate of $———* per linear foot of single-conductor cable so increased or decreased. The increase or decrease in the total quantity of single-conductor required will not exceed 10 percent.

At the bottom of the page appeared this notation:

*Although this unit price will not be used in comparison of offers, it must be stated by the offeror.

On page "c" bidders were required to insert a price for "TOTAL FOR APPLICABLE SPARE PARTS FOR THE SCHEDULE (as specified and as listed hereinafter under 'Spare Parts')," and immediately beneath that a price for "TOTAL FOR THE SCHEDULE (including applicable spare parts)."

On page "d" there were required to be inserted prices for each of 11 items of spare parts, plus a total for all 11 items. On the list of spares,

item 3 was "150 feet of single-conductor cable on a reel and protected to permit use of the cable after extended storage."

BICC's bid included a price of $2,940 for item 3 on the list of spare parts, or $19.60 per linear foot. However, in the above-quoted paragraph concerning variation in the length of the single-conductor cable, BICC inserted a figure of $1.96 per linear foot. The substance of BICC's claim is that the latter price is in error and that it should have read $19.60 per linear foot. The other bidders inserted prices of $18.50, $24.65, $30.11, $40, $40.70, and $45 per linear foot for this item. BICC notified the Bureau of Reclamation by letter dated September 30, 1969, approximately 8 weeks after award, of the typographical error in the placement of the decimal point. It appears that the Bureau had been verbally advised of this error in late August 1969.

The record demonstrates to our satisfaction that a mistake was made by BICC in its bid as submitted; we are also convinced that $19.60 per linear foot is the price BICC intended to insert in the indicated paragraph. The only doubt concerning the propriety of reformation in this case appears to center on the fact that the error concerned an item which was not to be considered in bid evaluation. Consequently, the question arises whether this is a matter as to which the contracting officer should be charged with constructive notice of the possibility of a mistake, with the result that appropriate price verification should have been requested of BICC prior to making award to that company. See section 1-2.406-1 of the Federal Procurement Regulations (FPR).

In this connection, it should be observed that the abstract prepared at the time bids were opened does not reflect the prices inserted by the various bidders for purposes of eventual increase or decrease in the length of cable required. Furthermore, the contracting officer has reported that because these prices were not used in comparing offers, "the reasonableness of the unit price stated was not considered at the time of award." On the other hand, the wording of the footnote on page "b" of the schedule indicates to us that the Bureau considered the matter of insertion of a price per linear foot to relate to responsiveness, so that a failure to state a price per linear foot would have resulted in rejection of the bid. In addition, it is quite clear that the Government would very possibly exercise the reserved right to increase or decrease the length of cable. Therefore, while the price inserted in the space provided would have no immediate impact on price at the time of bid evaluation, it was quite possible that the figure bid would have a substantial impact on the price ultimately paid by the Government.

FPR, section 1-2.406-1, cited above, states that "After the opening of bids, contracting officers shall examine all bids for mistakes." While in the vast majority of cases this obligation is fully discharged by a con-

sideration of the prices offered for the products or services to be procured, the regulatory duty of examination does not appear to be limited only to those factors which are considered in bid evaluation.

In the circumstances presented by this case, we believe that the contracting officer did have an error detection duty with respect to the prices quoted by the various bidders in the paragraph concerning increase or decrease in the length of cable. Our conclusion is grounded on the fact that inclusion of such a price was seemingly treated as a matter of responsiveness, thus requiring some attention by the contracting officer to determine the responsiveness of each individual bid. This consideration is supported by the substantial possibility that the initial contract price will be varied upward or downward based upon the price inserted by the contractor in the quoted paragraph.

There is next for consideration the question whether BICC's price of $1.96 per linear foot should reasonably have raised a suspicion of error in the mind of the contracting officer. In our opinion, even upon the most cursory examination of the bids of BICC and the other bidders, the contracting officer should have suspected that BICC made a mistake. The BICC price per linear foot should have stood out in bold contrast to the prices quoted by the other bidders. Once having observed this gross disparity, the contracting officer could have readily confirmed his suspicion by referring to BICC's offered price for 150 feet of cable in the spare parts section of the bidding schedule on page "d." At this juncture he could, and should, have made a request for price verification from BICC, stating the reasons for his request. See FPR, section 1-2.406-1.

Since no verification was sought from BICC, we believe that there is a proper basis for reformation of the contract. Therefore, the BICC contract may be amended appropriately.

In view of the potential impact of the price per linear foot on the price ultimately to be paid by the Government under this contract, we think that the invitation in this case should have been drafted in such a way as to provide maximum assurance that award to the lowest evaluated bidder would result in the lowest cost of actual performance. For example, the unit price of cable (per linear foot) could have been included in the bidding schedule itself, and it could have been expressly stated that 57,860 feet was only an estimate to be utilized for bid evaluation purposes. It could have been further stated that, as long as the actual length of cable provided to the Government under the contract did not vary from the estimate by more than 10 percent, the contract price would be adjusted in accordance with the bidder's stated unit price.

The original bid and pertinent papers are returned as requested.

[B-133972]

Leaves of Absence—Civilians on Military Duty—"To Enforce the Law"—Strikes

The duties performed by civilian employees who as Reserves of the Armed Forces and National Guardsmen were called into active military service pursuant to Presidential Proclamation 3972, dated March 23, 1970, to carry out the work of striking Postal Service employees, are considered military aid to enforce the law within the meaning of 5 U.S.C. 6323(c), as the military service was performed in order to cause the laws relating to the Post Office to have force and to protect the mail; therefore, the employees are entitled because of such service to the military leave prescribed by 5 U.S.C. 6323(c), and their pay should be adjusted to comply with 5 U.S.C. 5519 by crediting military pay against the civilian compensation payable to the employees.

To Robert J. Schullery, Department of Transportation, September 2, 1970:

Further reference is made to your letter of July 15, 1970, requesting our decision as to whether active military duty performed by certain employees of your agency during the postal strike in New York falls within the purview of military aid to enforce the law as intended by subsection 2(a) of Public Law 90-588, approved October 17, 1968, 5 U.S.C. 6323(c). You state that such a determination is necessary in order that the pay accounts of these employees may be adjusted, if appropriate, to comply with subsection 2(b) of Public Law 90 588, 5 U.S.C. 5519, requiring that the military pay (other than a travel, transportation, or per diem allowance) received during any period of leave granted under such law shall be credited against the pay payable to the employee in his civilian position.

The employees involved, Reserves of the Armed Forces and National Guardsmen, were called into active military service pursuant to Presidential Proclamation 3972, March 23, 1970, which reads in pertinent part as follows:

WHEREAS certain employees of the Postal Service are engaged in an unlawful work stoppage which has prevented the delivery of the mails and the discharge of other postal functions in various parts of the United States; and

WHEREAS, as a result of such unlawful work stoppage the performance of critical governmental and private functions, such as the processing of men into the Armed Forces of the United States, the transmission of tax refunds and the receipt of tax collections, the transmission of Social Security and welfare payments, and the conduct of numerous and important commercial transactions, has wholly ceased or is seriously impeded; and

WHEREAS the continuance of such work stoppage with its attendant consequences will impair the ability of this nation to carry out its obligations abroad, and will cripple or halt the official and commercial intercourse which is essential to the conduct of its domestic business:

NOW, THEREFORE, I, RICHARD NIXON, President of the United States of America, pursuant to the powers vested in me by the Constitution and laws of the United States and more particularly by the provisions of Section 673 of Title 10 of the United States Code, do hereby declare a state of national emergency, and direct the Secretary of Defense to take such action as he deems necessary to carry out the provisions of the said Section 673 *in order that the*

laws of the United States pertaining to the Post Office Department may be executed in accordance with their terms. [Italic supplied.]

In accordance with the terms of the proclamation, the Reserves and Guardsmen primarily carried out civilian duties usually performed by employees of the Post Office Department rather than duties of a police or military character.

Subsection 6323(c) of Title 5, United States Code, provides in part as follows:

> (c) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title (except a substitute employee in the postal field service) or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—
> (1) is a member of a Reserve component of the Armed Forces, as described in section 261 of title 10, or the National Guard, as described in section 101 of title 32; and
> (2) performs, for the purpose of providing military aid to enforce the law—
> (A) Federal service under section 331, 332, 333, 3500, or 8500 of title 10, or other provision of law, as applicable, or
> * * * * * * *
> is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year.

Section 333 of Title 10, United States Code, provides in pertinent part as follows:

> The President, by using the militia or the armed forces, or both, or by any other means, shall take such measures as he considers necessary to suppress, in a State, any * * * unlawful combination, or conspiracy, if it—
> * * * * * * *
> (2) opposes or obstructs the execution of the laws of the United States * * *.

Title 39, United States Code, provides for a Post Office Department. The carriage of letters is a Federal function and the Department's employees are Federal employees and as such subject to the antistrike provisions of law. 5 U.S.C. 3333; 5 *id.* 7311; 18 *id.* 1918.

Presidential Proclamation 3972 declared a state of national emergency on the basis of an illegal work stoppage in the Postal Service and directed the Secretary of Defense to take such action as necessary in order that the laws of the United States Post Office Department might be executed in accordance with their terms.

To "enforce" a law usually means to cause an arrest and to enforce by "actual force and punishment" but it does not necessarily imply this; it may mean "to give effect to, to cause to have force." *Meridian Limited* v. *Sippy*, 128 P. 2d 884, 888 (1942). Also, the term "law enforcement" is not limited to enforcement of the criminal law. *Bristol-Myers Co.* v. *F.T.C.*, 284 F. Supp. 745, 747 (1968).

The record indicates that the military service in question was performed in order to cause the laws relating to the Post Office to have force. Also, in order to carry out this function the Reserves and

National Guardsmen were instructed to protect the mail entrusted to them and not to allow unauthorized persons to take, harm, or tamper with the mail in their care.

In view of the above, the military service performed by the employees involved should be regarded as military aid to enforce the law. Therefore, the employees are entitled to military leave in accordance with the provisions of 5 U.S.C. 6323(c), and their pay should be adjusted as provided in 5 U.S.C. 5519.

[B-170198]

Pay—Retired—Disability—Disability Retirement and Promotion Simultaneously Effective—Computation of Retired and Severance Pay

An officer of the uniformed services whose physical disability was not considered disqualifying prior to a physical examination qualifying him for a promotion denied by a physical evaluation board, upon his subsequent simultaneous transfer as a second lieutenant to the temporary disability retired list under 10 U.S.C. 1202 and advancement to the grade of first lieutenant under clause (4) of 10 U.S.C. 1372, he is entitled to retired pay and disability severance pay computed on the basis of the higher grade; and, since the first determination of physical disability did not disqualify the officer for service, the disqualifying disability for which he was retired may be considered as having been discovered as a result of a physcal examination for promotion within the purview of clause (4) of 10 U.S.C. 1372.

To J. J. Burkholder, United States Marine Corps, September 2, 1970:

Further reference is made to your letter of June 10, 1970 (file reference RP–JJB–pg), with enclosures, requesting a decision whether retired pay may be paid on and after December 1, 1967, to First Lieutenant Myles P. Wonson, Jr., 09 82 56, U.S. Marine Corps, retired, as a first lieutenant rather than as a second lieutenant, and whether retired pay for the period January 1, 1968, to November 15, 1969, and disability severance pay may be paid to First Lieutenant Norman M. Labutti, 09 42 97, U.S. Marine Corps Reserve, retired, as a first lieutenant rather than as a second lieutenant, under the circumstances disclosed. Your letter was forwarded here under date of June 26, 1970, by the Disbursing Branch, Fiscal Division, Headquarters United States Marine Corps, and has been assigned control number DO–MC–1084 by the Department of Defense Military Pay and Allowance Committee.

In the case of Lieutenant Wonson, you state that he was transferred to the temporary disability retired list in the grade of second lieutenant with a 60–percent disability rating, VA Code 7121, on December 1, 1967, under 10 U.S.C. 1202 and was advanced to the grade of

first lieutenant effective that date under clause (4) of 10 U.S.C. 1372. You say that he was eligible for promotion to the grade of first lieutenant on the active list on August 27, 1967.

You further state that Lieutenant Wonson was first admitted to the sicklist on August 12, 1966, with a primary diagnosis of "thrombophlebitis migrane, etiology undetermined." The same diagnosis was made by a medical board on May 23, 1967, which recommended his assignment to 6 months of limited duty. A physical examination for promotion on July 22, 1967, found him qualified for promotion to the grade of first lieutenant; but a letter from the Chief, Bureau of Medicine and Surgery, dated August 16, 1967, to the Commandant of the Marine Corps stated that "From a review of the Medical Board Report on 23 May 1967, together with Lieutenant Wonson's medical record, he is not physically qualified for promotion at this time inasmuch as he has a disease rather than injury."

You say that a medical board on October 19, 1967, again diagnosed his illness as indicated above and recommended that he appear before a physical evaluation board. It is stated that the recommended findings of that board were that the officer was unfit to perform the duties of his grade because of physical disability, "thrombophlebitis migrane, etiology undetermined," and that such disability was considered to be 60 percent under the Standard Schedule for Rating Disabilities used by the Veterans Administration, Code Number 7121.

With respect to Lieutenant Labutti, you state that he was transferred to the temporary disability retired list in the grade of second lieutenant with a 30-percent disability rating, VA Code 7345, on January 1, 1968, under 10 U.S.C. 1202, and he was advanced to the grade of first lieutenant effective that date under clause (4) of 10 U.S.C. 1372. You say that he was discharged from that list on November 15, 1969, under 10 U.S.C. 1203 and 1210(e) and that he was eligible for promotion to the grade of first lieutenant on the active list on September 8, 1967.

It is further stated that Lieutenant Labutti was first admitted to the sicklist on December 28, 1966, with a primary diagnosis, "infectious hepatitis." You say that this same diagnosis was made by a medical board on July 3, 1967, which recommended that he be retained in the hospital for 3 months' further treatment. It is reported that a physical examination for promotion on October 3, 1967, disclosed that he was not qualified for performance of all duties of his grade and a medical board on October 17, 1967, again diagnosed his illness as "infectious hepatitis." That report was forwarded to a physical evaluation board on October 27, 1967.

It is stated that the recommended findings of the physical evalua-

tion board were that the officer was unfit to perform the duties of his grade because of physical disability, "infectious hepatitis," and that such disability was considered to be 30 percent under the Standard Schedule for Rating Disabilities used by the Veterans Administration, Code Number 7345.

Since the disabilities for which the two officers were retired were discovered prior to their physical examinations for promotion, you ask whether those disabilities are considered as being discovered as the result of their physical examinations for promotion within the meaning of clause (4) of 10 U.S.C. 1372.

Section 1372 of Title 10, U.S. Code, provides, in pertinent part, that unless entitled to a higher grade under some other provision of law, any member of an armed force whose name is placed on a temporary disability retired list under 10 U.S.C. 1202 is entitled to:

> (4) The temporary grade to which he would have been promoted had it not been for the physical disability for which he is retired, if eligibility for that promotion was required to be based on cumulative years of service or years of service in grade and the disability was discovered as a result of his physical examination for promotion.

Clause (4) of section 1372 is derived from the fifth proviso of section 402(d) of the Career Compensation Act of 1949, 63 Stat. 818.

In commenting on the Court of Claims construction of the fifth proviso of section 402(d) of the Career Compensation Act of 1949, which provision was considered by that court in the cases of *Leonard* v. *United States*, 131 Ct. Cl. 91 (1955) and *Fredrickson* v. *United States*, 133 Ct. Cl. 890 (1956), we said that the opinion of the Court of Claims is consistent with the view that the statute auhorizes the retired pay of the higher grade, even though the identical disability was found during some earlier examination, if its disqualifying nature was first determined to exist during the promotion physical examination and therefore was "found to exist as a result of a physical examination given in connection with effecting a * * * promotion." That conclusion, we said, appears to be a tenable and permissible construction of the statute. See 36 Comp. Gen. 492, 497 (1957). The phrase "found to exist" as used in section 402(b) of the 1949 act is equivalent to "discovered" as set forth in clause (4) of section 1372. See 40 Comp. Gen. 240, 241 (1960).

The Court of Claims and this Office have consistently viewed clause (4) of section 1372 as requiring a definite degree of connection between the physical examination and a prospective promotion in order to meet the conditions prescribed in that clause. In other words, the physical examination must have a direct and substantial bearing in connection with effecting a promotion. See *Williams* v. *United States*, 145 Ct. Cl. 513 (1959), and *Brandt* v. *United States*, 155 Ct. Cl. 345 (1961). See, also, 40 Comp. Gen. 240 (1960), and 41 Comp. Gen. 749 (1962).

It appears from the record that Lieutenant Wonson and Lieutenant Labutti each was given a physical examination for promotion to the grade of first lieutenant prior to the effective date of his retirement and that it was determined that they were not physically qualified to perform the duties of that grade. In this connection, the Bureau of Medicine and Surgery letter of August 16, 1967, relating to Lieutenant Wonson, is viewed as a review of, and thus directly related to, the physical examination of July 22, 1967.

While the disabilities for which both officers were retired were discovered prior to their physical examinations for promotion, it seems that the same primary disabilities were not considered disqualifying at that time, at least not until their physical examinations taken in connection with their promotions to first lieutenant. Compare the case of Lieutenant Craighead in 36 Comp. Gen. 492, 497.

In the circumstances, the officers' disqualifying disabilities for which they were retired may be considered as having been "discovered as a result of * * * physical examination for promotion" within the purview of clause (4) of 10 U.S.C. 1372. Accordingly, the officers are entitled to have their retired pay, and Lieutenant Labutti is entitled to have his disability severance pay, computed on the basis of the grade of first lieutenant.

[B-141529]

Public Lands—Acquisition—Subway Construction

In the development of a rail rapid transit system, the Board of Directors of the Washington Metropolitan Area Transit Authority—an instrumentality created by Compact with the consent of Congress—may acquire lands under the administration of the National Park Service of the Department of Interior, and should cash be paid for the appraised value of the parklands, the cash is for deposit into the Treasury in accordance with 31 U.S.C. 484. However, if congressional approval is sought to use the money to replace surface parklands, the amount received by the Department may be held in escrow for a period not to exceed 2 years. Furthermore, under the provisions of the Compact, the Board has the authority to purchase land to replace the surface parklands needed for transit purposes.

To the Secretary of the Interior, September 3, 1970:

Consideration has been given to your letter of June 16, 1970, in which you presented several questions arising out of the development of a rail rapid transit system by the Washington Metropolitan Area Transit Authority (Authority) in the Washington Metropolitan Area which necessitates the use of certain lands now under the administration of the National Park Service of the Department of the Interior.

The Authority was created as an instrumentality and agency of each of the signatory parties to the Washington Metropolitan Area Transit Authority Compact as a body corporate and politic with the powers

and duties granted in the Compact and such additional powers and duties as might thereafter be conferred upon it pursuant to law. (Article III, section 4 of the Compact.) Under the provisions of section 5(a) of Article III of the Compact, the Authority is governed by a Board of six Directors (Board) consisting of two directors for each signatory. The substance of the Compact as well as the consent of the Congress thereto is included in Public Law 89–774, approved November 6, 1966, 80 Stat. 1324 *et seq.*

Among the enumerated powers of the Authority are those contained in Article V, subsection 12(d), specifically referred to in your letter, which provides that the Authority may—

> Construct, acquire, own, operate, maintain, control, sell and convey real estate and personal property and any interest therein by contract, purchase, condemnation, lease, license, mortgage, or otherwise but all of said property shall be located in the Zone and shall be necessary or useful in rendering transit service or in activities incidental thereto.

The Washington Metropolitan Area Zone is created by Article III, section 3 of the Compact, and embraces the District of Columbia; the cities of Alexandria, Falls Church, and Fairfax; the counties of Arlington and Fairfax and political subdivisions of the Commonwealth of Virginia located within those counties; and the counties of Montgomery and Prince Georges in the State of Maryland and political subdivisions in the State of Maryland located in those counties.

Article XV, section 68 of the Compact provides, in pertinent part, that—

> * * * any highway *or other public facility* or any facilities of a public utility company which will be dislocated by reason of a project deemed necessary by the Board to effectuate the authorized purposes of this Title shall be relocated if such facilities are devoted to a public use, and the reasonable cost of relocation, if substitute facilities are necessary, shall be paid by the Board from any of its monies. [Italic supplied.]

Article XVI, section 74, provides:

> The Board is authorized to locate, construct, and maintain any of its transit and related facilities, in, upon, over, under, or across any streets, highways, freeways, bridges, and any other vehicular facilities, subject to the applicable laws governing such use of such facilities by public agencies. In the absence of such laws, such use of such facilities by the Board shall be subject to such reasonable conditions as the highway department or other affected agency of a signatory party may require; provided, however, that the Board shall not construct or operate transit or related facilities upon, over, or across any parkways or park lands *without the consent of, and except upon the terms and conditions required by, the agency having jurisdiction with respect to such parkways and park lands,* but may construct or operate such facilities in a subway under such parkways or park lands *upon such reasonable terms and conditions as may be specified by the agency having jurisdiction with respect thereto.* [Italic supplied.]

Article XVI, subsection 82(a), provides:

> The Authority shall have the power to acquire by condemnation, whenever in its opinion it is necessary or advantageous to the Authority to do so, any real or personal property, or any interest therein, necessary or useful for the transit

system authorized herein, except property owned by the United States, by a signatory, or any political subdivision thereof, or by a private transit company.

The stated policy of the National Park Service is to require that any parklands used for nonpark services must be replaced by other suitable lands to be available for park purposes. Your letter presented three proposed methods for replacement of surface parklands and asked whether our Office would interpose objection to the use of funds under the three methods proposed which are:

1. The Board to pay to the National Park Service in cash the appraised value of surface parklands used for transit purposes.
2. The purchase by the Board of lands suitable for development as parks for exchange with the Service for surface parklands needed for transit purposes.
3. The creation of parklands by the Board and their exchange with the Service for parklands needed for transit purposes. For example, assume the transit line tunnels under a parking lot or a structure. The proposal under this method is that the Board would acquire the fee in the property and restore the surface to a parklike condition in exchange for other surface parklands that may be needed along the right of way.

If the answer to the first proposal is in the affirmative, you ask whether the payment would be appropriate for crediting into the Land and Water Conservation Fund pursuant to the act of September 3, 1964, 78 Stat. 897, as amended by the act of July 15, 1968, Public Law 90–401, 16 U.S.C. 4601–4 *et seq.*, and available for subsequent appropriations by the Congress for the acquisition of parklands. As to this question, our examination of the applicable laws leads us to the conclusion, which we understand is informally shared by your office, that even if the first proposal is approved, it would not be appropriate to credit any payment into the Land and Water Conservation Fund. That conclusion is required, since no provision is made for crediting any payment, such as is here involved, to that fund.

In answer to the first proposal, therefore, we are of the opinion that if the Board were to pay to the National Park Service in cash the appraised value of surface parklands used for transit purposes, the amount received would be required to be paid into the Treasury in accordance with the provisions of 31 U.S.C. 484. See also 16 U.S.C. 452. Under the circumstances, however, we would not object if the amount received were placed in an escrow account in the Treasury for a reasonable period not exceeding 2 years to enable you to seek congressional authorization to use the money to replace surface parklands.

Insofar as proposals 2 and 3 are concerned, we realize these involve questions which are primarily for determination by the Board. However, representatives of our Office have met with the General Counsel and the Associate General Counsel of the Washington Metropolitan Area Transit Authority. Also, we have received a letter from the Authority which concluded with the statement that, because of the pressing nature of this matter, anything which could be done by the

General Accounting Office to expedite action would be greatly appreciated. Subsequently, a meeting was held with representatives of our Office and a representative of your Solicitor's Office and representatives of the National Park Service. Everyone concerned appears anxious to proceed under authority of existing law if possible.

We offer our opinion that the Compact provides sufficient authority for the replacement of surface parklands in accordance with your proposals 2 and 3, and we would not object to the use of funds of the Authority under these proposals. It should be noted here that under the provisions of Article XVI, section 70(b), the financial transactions of the Board are subject to audit by the United States General Accounting Office in accordance with the principles and procedures applicable to commercial corporate transactions and under such rules and regulations as may be prescribed by the Comptroller General of the United States.

Briefly, our reasons for believing that the Compact provides sufficient authority for the replacement of surface parklands are as follows: An overall view of the background national and State legislation, including the present Compact, shows a very definite intention that within the specific and general authorization provided, the contemplated transit system should proceed. Section 85 of the Compact expressly states that it is the legislative intent that the provisions of Title III thereof be "reasonably and liberally" construed.

We believe that a reasonable and liberal construction of section 74 of the Compact, which provides that the Board shall "not construct or operate transit or related facilities upon, over, or across any parkways or parklands without the consent of, and except upon the terms and conditions required by, the agency having jurisdiction with respect to such parkways and parklands, but may construct or operate such facilities in a subway under such parkways or parklands upon such reasonable terms and conditions as may be specified by the agency having jurisdiction with respect thereto," would permit the National Park Service to require replacement of surface parklands by way of relocation or otherwise as one of the terms or conditions for the use of the parklands, particularly—insofar as relocation is concerned—when section 74 is read in conjunction with section 68 quoted above. A reasonable and liberal construction of the term "public facility," as used in section 68 of the Compact, would include public parklands. Thus the expenses of parkland relocation could be paid by the Board in accordance with the provisions of that section.

There are also for consideration the provisions of subsection 12(m) of the Compact, which provide that the Authority may exercise, subject to the limitations and restrictions imposed, all powers reasonably necessary or essential to its declared objects and purposes. This is in addition to all other powers and duties.

Further, in connection with the authority of the National Park Service to accept lands from the Authority to replace parklands needed for transit purposes, we have been informally advised that the National Capital Planning Commission may acquire lands for park purposes and transfer such lands to the jurisdiction of the National Park Service.

Your letter is answered accordingly.

[B–168629]

Bidders—Qualifications—Experience—Specialized, Etc.

Under a letter request, the first step of a two-step procurement, which contained a "Bidder's Technical Qualification Clause" stating technical proposals would be accepted only from those contractors who have manufactured and can demonstrate at an operating airfield a Solid State Conventional Instrument Landing System, the evaluation of the capabilities of a prime contractor and its subcontractor—a French firm who manufactured and demonstrated the system in France—although within the policy enunciated in paragraph 4–117 of the Armed Services Procurement Regulation, which recognizes the integrity and validity of contractor team arrangements, was contrary to the intent of the clause, and the proposal premised on the subcontractor's system should not have been considered. Therefore, in future procurements, the clause should specify permissible relationships or refer to the ASPR provision.

To the Secretary of the Air Force, September 3, 1970:

Reference is made to a letter dated August 5, 1970, from the Chief, Contract Placement Division, Directorate of Procurement Policy, DCS/S&L (SPPLA), furnishing a report on the protest of American-Standard, Incorporated, under invitation for bids (IFB) No. 33657–70–B–0166, issued by the Aeronautical Systems Division, Wright-Patterson Air Force Base, Ohio.

Enclosed is a copy of our decision of today to American-Standard. Although we denied that firm's protest, we believe one aspect of this procurement warrants comment.

The letter request for technical proposals which constituted the first step of this procurement contained the following "Bidders Technical Qualification Clause":

3. This procurement will be accomplished in two distinct steps: (1) solicitation, submission and evaluation of detailed technical proposals *WITHOUT PRICING* to determine acceptability of the products offered, and (2) issuance of a formal Invitation for Bids *ONLY* to those firms having acceptable technical proposals. Bidders who cannot comply with the attached Bidders Qualification Clause should not submit a Technical Proposal.

BIDDERS TECHNICAL QUALIFICATION CLAUSE

SOLID STATE INSTRUMENT LANDING SYSTEM

Technical proposals will be accepted only from those contractors who have manufactured and can demonstrate at an operating airfield a Solid State Conventional Instrument Landing System. The system must be comprised of at least the following components: A two-frequency (capture effect), dual equipment VHF localizer station; a single-frequency, dual equipment UHF glideslope station; and a VHF marker beacon station. The system must have successfully passed a flight check for Category I signal quality conducted by the FAA or

other International Civil Aviation Organization recognized flight checking agency. Inspection of such a system by the Government will be conducted by Government engineers and Technicians. The inspection will be part of the evaluation of technical proposals. Further information on the arrangement for such an inspection is contained in Attachment Nr. 1.

Texas Instruments, Inc., as a prime contractor, submitted a technical proposal which described in detail a team arrangement it had made with Thomson-CSF, a French firm, for performance of this procurement. The administrative report furnished our Office by your Department states: "The arrangement under which [Texas Instruments and Thomson-CSF] participated was cleared with the local Staff Judge Advocate Office." Texas Instruments met the requirements of the above-quoted "Bidders Technical Qualification Clause" by demonstrating in France an ILS system manufactured there by its team member, Thomson-CSF. It is clear from the record that the acceptability of Texas Instruments' technical proposal, and thus its eligibility to bid on the second step of this procurement, was premised in large part upon the capabilities of its subcontractor.

We recognize that Armed Services Procurement Regulation (ASPR) 4–117 enunciates a general policy of recognizing the integrity and validity of contractor team arrangements such as that of Texas Instruments and Thomson-CSF, and that it was in the light of that policy that the capabilities of both the prime contractor and its subcontractor were considered in the evaluation of technical proposals. However, it is our opinion that the procuring activity's intention did not find adequate expression in the "Bidders Technical Qualification Clause," which provided that technical proposals would "be accepted only from those *contractors* who have manufactured and can demonstrate at an operating airfield a Solid State Conventional Instrument Landing System." Therefore, we recommend that in future procurements in which it is intended that the requirements of such qualification clauses may be satisfied by varying contractor relationships (such as those recognized by ASPR 4–117), such clauses specifically (or by reference to ASPR 4–117) describe those relationships which are permissible. [Italic supplied.]

The enclosures to the letter of August 5 are returned.

[B–169537]

Property—Public—Damage, Loss, Etc.—Freight Charges—Delivery Accomplishment

The freight charges claimed on an overseas shipment that moved under a Government bill of lading identifying the shipment as frozen foods, and which was refused at destination when it was discovered the shipment contained meat as the vessel had made several stops at ports considered to be infected areas for meat products, may not be allowed, even though part of the shipment was re-

turned to the origin point in the United States, the meat having been jettisoned at sea because its return was prohibited under a Department of Agriculture regulation, as the Consignee's Certificate of Delivery on the Government bill of lading was not and could not have been accomplished without delivery of the shipment—a condition precedent to liability for freight charges.

To the Oceanic Steamship Company, September 3, 1970:

Reference is made to your letters of January 27 and August 7, 1970, which will be considered as a request for review of the action taken by our Transportation Division in disallowing a claim (bill No. 4754, our TK–877331) by the Oceanic Steamship Company, a subsidiary of Matson Navigation Company (hereafter referred to as Matson), for $616.27 as freight charges on a shipment of frozen foods from Pier 35, San Francisco, California, destined for delivery to the USNS *ELTANIN* at Auckland, New Zealand, under Government bill of lading No. E–7135585 dated January 21, 1968.

Government bill of lading E–7,135,585 was executed January 21, 1968, by Oceanic Steamship Company (Matson Navigation Company, Agents) and signed by R. Monte, acknowledging receipt of "247 pcs. freeze foods" as shown on the sheets attached to the bill of lading for delivery to Auckland, New Zealand. The attached sheets show that the shipment consisted of frozen meat, vegetables, shrimp, fish, and poultry. The vessel used to transport the cargo, the SS *MARIPOSA*, Voyage 89, made at least three stops at foreign ports prior to its arrival at Auckland; namely, Bora Bora and Papeete (Tahiti), Society Islands and Rarotonga, Cook Islands. All three of the named ports were considered infected areas for meat products by both the United States and New Zealand Governments. Each of the three ports had been considered contaminated for more than a year prior to the transportation involved. Delivery was not performed because the New Zealand Government prohibited unloading of the cargo. Later the portion of the shipment other than the meats was returned to the Defense Supply Agency, Oakland, California. The remainder (the meat portion of the shipment) was jettisoned at sea on March 19, 1968, after the U.S. Department of Agriculture, pursuant to the provisions of part 94, Title 9 of the Code of Federal Regulations, prohibited the return of the meat portion of the shipment to the United States.

The Military Sea Transportation Service forwarded your bill for transportation charges of $616.27 to this Office for direct settlement since the Consignee's Certificate of Delivery was not accomplished. Your claim for such charges was disallowed by our Transportation Division by Settlement Certificate dated September 24, 1968, and such settlement was reaffirmed by its letter dated January 8, 1970. The action taken by our Transportation Division in disallowing the claim

was based upon the decision of the United States Supreme Court which held that the Government bill of lading's specific conditions for payment of freight charges can only be satisfied by delivery of the shipment to destination citing *Alcoa Steamship Co., Inc.* v. *United States*, 338 U.S. 421 (1949), and *Strickland Transportation Co.* v. *United States*, 223 F. 2d 466 (5th Cir. 1955).

In requesting review of the matter, you assert that you had no knowledge the shipment contained meat products since the shipment was tendered as frozen foods, and that it was only when discharge was attempted at Auckland that it was discovered that the shipment consisted chiefly of meat. You express the opinion that the real reason the shipment was not allowed into New Zealand was the lack of an entry permit from the New Zealand Government, and that it was the duty of the shipper to obtain such entry permit. With your letter of August 7, 1970, you enclose a copy of the applicable regulations for the prevention of the introduction into New Zealand of diseases affecting stock made under that country's Stock Act of 1908, which may be cited as the Stock Importation Amending Regulations 1966, as well as a copy of a letter dated February 26, 1968, from the Director of Animal Health, N.Z. Department of Agriculture, Wellington, New Zealand.

The cited regulations make certain exceptions to authorize the importation of cooked meat and meat in sealed containers provided a prior permit is obtained but specifically prohibit the importation of raw meat or cooked meat which may have been exposed to infection. From the record available it must be concluded that the stopping at the contaminated ports would have frustrated delivery at New Zealand even if a prior entry permit had been obtained.

There is no question that the "CONSIGNEE'S CERTIFICATE OF DELIVERY" on Government bill of lading No. E-7,135,585 *was not*, and, under the circumstances, *could not* have been, accomplished. It now appears clear that the "goods or vessel lost or not lost" provision in the standard ocean carrier's commercial bill of lading would have entitled Matson to payment of the freight charges involved had the shipment been a commercial one. However, the Supreme Court emphasized the fact in the *Alcoa* case, 338 U.S. 421, at page 427 that, under the terms of the Government bill of lading,

> * * * Without receipt of the goods, the bill was not, and could not have been, filled in under the strict terms of the standard form which we have stressed, so as to be "properly accomplished" for purposes of payment to the carrier.

Also, in the *Strickland* case cited above, at page 468, concerning shipments under Government bills of lading, the Court of Appeals, Fifth Circuit, stated:

> The Bill of Lading cannot be "properly accomplished" until there has been a receipt of the shipment by the consignee at destination. Delivery of the shipment is a condition precedent to liability for freight.

Consequently, there appears to be no proper legal basis for the payment of the freight charges involved. Accordingly, the disallowance of your claim must be, and is, sustained.

[B–169094]

Vessels—Sales—American *v.* Foreign Purchasers

In the sale for scrapping of vessels from the national defense fleet, sections 5 and 6 of the Merchant Marine Act of 1920, affording preference to United States citizens, remain in effect and are applicable to sales for scrapping or otherwise, for notwithstanding sections 508 and 510(j) of the 1936 Merchant Marine Act authorizing the sale of surplus vessels contain no preference provisions, the Maritime Administration continued to accord preference to United States citizens, and the addition of section 510(j) to the 1936 act by amendment in 1965 did not repeal the preference aspects of the 1920 act by implication, an interpretation in accord with *Amell* v. *United States*, 384 U.S. 158. Furthermore, the histories of the 1936 act and the 1965 amendment do not indicate an intent to deprive domestic firms of the preference obtained under the 1920 act.

To the Administrator, Maritime Administration, September 4, 1970:

Reference is made to the protest of the Shipwrecking Committee of the Institute of Scrap Iron and Steel against the Maritime Administration (MarAd) program of selling surplus Government-owned vessels to foreigners for scrapping outside the United States, which was the subject of a report dated August 21, 1970, from the Acting Administrator.

The Government-owned vessels involved in the subject scrapping program have been placed by the Secretary of Commerce in the national defense reserve fleet pursuant to section 11 of The Merchant Ship Sales Act of 1946, 50 U.S.C. Appendix 1744, and section 510(j) of the Merchant Marine Act of 1936, as amended, 46 U.S.C. 1160(j). The national defense reserve fleet is located at six different rivers and ports and, as of June 30, 1969, consisted of a total of 1,017 vessels.

It is reported that since February 5, 1970, 25 invitations for bids have been issued by MarAd soliciting bids for the purchase of vessels for scrapping or nontransportation use. Of these 25 solicitations, 15 were limited to United States citizens and 10 were open to both citizens and foreigners. The solicitations which were open had first been restricted to citizens, and either no bids had been received or the bids received did not in the judgment of MarAd represent fair and reasonable prices. Of immediate concern to the Shipwrecking Committee is invitation for bids No. PD–X–879, issued July 21, 1970, for seven surplus vessels from the Hudson and James River reserve fleets, which was open to both domestic and foreign bidders. Bids were opened on

August 18, 1970. However, award has been delayed until September 8, 1970, pending a decision by our Office on the protest.

It is the contention of the Institute and Shipwrecking Committee (hereinafter referred to as the protestor), that in the sale for scrapping of vessels from the national defense reserve fleet, citizens are entitled to a preference under the provisions of sections 5 and 6 of the Merchant Marine Act of 1920, 46 U.S.C. 864 and 865, respectively, and under section 809 of the Merchant Marine Act of 1936, 46 U.S.C. 1213, and that MarAd is failing to afford citizens such preference under recent sales, including the proposed sale under invitation for bids No. PD-X-879. Sections 5 and 6, respectively, of the 1920 act, as codified, provide, in pertinent part, as follows:

§ 864. Sale of vessels; terms and conditions.

In order to accomplish the declared purposes of this act, and to carry out the policy declared in section 861 of this title, the Secretary of Commerce is authorized and directed to sell, as soon as practicable, consistent with good business methods and the objects and purposes to be attained by this act, at public or private competitive sale after appraisement and due advertisement, to persons who are citizens of the United States except as provided in section 865 of this title, all of the vessels acquired by the commission under former sections 862 and 863 of this title or otherwise. * * *

§ 865. Sale to aliens.

The Secretary of Commerce is authorized and empowered to sell to aliens, at such prices and on such terms and conditions as he may determine, not inconsistent with the provisions of section 864 of this title (except that completion of the payment of the purchase price and interest shall not be deferred more than ten years after the making of the contract of sale), such vessels as he shall, after careful investigation, deem unnecessary to the promotion and maintenance of an efficient American merchant marine; but no such sale shall be made unless the Secretary, after diligent effort, has been unable to sell, in accordance with the terms and conditions of said section, such vessels to persons citizens of the United States, and has determined to make such sale; and he shall make as a part of his records a full statement of his reasons for making such sale. * * *

Although these provisions contain no reference to sales for scrapping, the protestor cites 42 Comp. Gen. 69 (1962) in support of its position that they are applicable to such sales. In the cited decision, involving an offer to negotiate the purchase for scrapping of 150 vessels, we advised the Administrator of MarAd, pursuant to his request, as follows:

The laws authorizing the sale of such vessels by the Maritime Administration are section 508 of the Merchant Marine Act, 1936, as amended, 46 U.S.C. 1158, and section 5 of the Merchant Marine Act, 1920, as amended, 46 U.S.C. 864. Section 508 requires sales "after appraisement and due advertisement, and upon competitive sealed bids." Section 5 requires sales "at public or private competitive sale after appraisement and due advertisement." It is thus mandatory upon the Maritime Administration to obtain competition through due advertisement before it may dispose of surplus vessels under either section 508 or section 5.

Further, the protestor points out that section 204(a) of the 1936 act, 46 U.S.C. 1114, and Executive orders cited in the note at 46 U.S.C.A. 1111, transferred to the Secretary of Commerce all the "functions, powers, and duties" vested in the former Shipping Board by the 1920 act.

As stated above, it is the protestor's position that section 809 of the 1936 act, 49 Stat. 2015, also indicates a general preference for citizens in the award of all contracts under that act. Section 809 provides as follows:

> Contracts under this Act shall be entered into so as to equitably serve, insofar as possible, the foreign-trade requirements of the Atlantic, Gulf, and Pacific ports of the United States. In awarding contracts under this Act, preference shall be given to persons who are citizens of the United States and who have the support, financial and otherwise, of the domestic communities primarily interested.

In this connection, the protestor points out that sections VIII and IX of the subject solicitation warn bidders of the applicability of the 1936 act. Furthermore, it is noted by the protestor that section 809 refers to "contracts under this Act," whereas other sections of title VIII of the act specify titles thereof. Therefore, it is contended that the preference under section 809 is to be afforded to citizens in the award of all contracts, including contracts of sale for scrapping.

Basically, it is MarAd's argument that any preference requirement for citizens under sections 5 and 6 of the 1920 act was abrogated in 1965 by Public Law 89-254, which added section 510(j) to the 1936 act. This provision, which appears at 46 U.S.C. 1160(j), states as follows:

> Any vessel heretofore or hereafter acquired under this section, or otherwise acquired by the Secretary of Commerce under any other authority shall be placed in the national defense reserve fleet established under authority of section 1744 of appendix to Title 50, and shall not be traded out or sold from such reserve fleet, except as provided for in subsections (g) and (i) of this section. This limitation shall not affect the rights of the Secretary of Commerce to dispose of a vessel as provided in other sections of this subchapter or in subchapter VII or XI of this chapter.

MarAd argues that section 510(j) had the effect of repealing by implication sections 5 and 6 of the 1920 act. We believe it is clear, as MarAd contends, that such section resulted in section 508 of the 1936 act, 46 U.S.C. 1158, being the basic authority available for sales of the type here at issue. It is significant to note that section 508 covers sales, the same areas covered by sections 5 and 6. It might be argued, therefore, that section 508 superseded or repealed by implication the earlier sections. Since section 508 contains no provision for a preference for citizens, there is some basis—which we reject—for arguing that section 508 does not contemplate a preference. Nevertheless, MarAd continued after the enactment of section 508, and for that matter, even after the enactment of section 510(j), to give first preference to citizens in scrap sales. We think this shows that MarAd considered that the preference provision of the 1920 act remained in effect and applied to sales, for scrapping or otherwise, after 1936, since such preference without legislative authorization would appear in conflict with the requirement for advertisement and competitive sealed bids. We agree that it did remain in effect. That being the case, we find no basis for

concluding that section 510(j), which clearly makes no reference whatever to the matter of preference, could in 1965, by implication or otherwise, have repealed the preference aspects of sections 5 and 6 of the 1920 act.

The courts do, of course, recognize that statutes may be repealed in whole or in part by implication. Sutherland, *Statutory Construction*, 3d edition, contains the following pertinent statements at section 2012:

> The legislature is presumed to intend to achieve a consistent body of law. In accordance with this principle subsequent legislation is not presumed to effectuate a repeal of the existing law in the absence of that expressed intent, and conversely, where a consistent body of laws cannot be maintained without the abrogation of a previous law, a repeal by implication of previous legislation * * * is readily found in the terms of a later enactment.
>
> * * * * * * *
>
> When a subsequent enactment covering a field of operation coterminous with a prior statute cannot by any reasonable construction be given effect while the prior law remains in operative existence because of irreconcilable conflict between the two acts, the latest legislative expression prevails and prior law yields to the extent of the conflict.

And at section 2014 the same authority states:

> The heart of the rules of interpretation and construction is to give harmonious operation and effect to all of the acts upon a subject, where such a construction is reasonably possible, even to the extent of superimposing a construction of consistency upon the apparent legislative intent to repeal, where the two acts can, in fact, stand together and be given a coterminous operation. Where the repealing effect of a statute is doubtful, the statute is to be strictly construed to effectuate its consistent operation with previous legislation.

Also, the court in *United States* v. *24 Cans Containing Butter*, (CCA 5) 148 F. 2d 365 (1945), in noting that implied repeal is never favored, stated at page 367:

> It is not for the courts, unless the conflict between the two acts is inescapable and compelling, to exclude from the coverage of an act matters which its terms expressly include, on the theory that another act, whose general purpose seems inconsistent has impliedly repealed or limited the act under review. Only where it is found that it is not possible for both acts to co-exist can an act be held to repeal or limit another, *and then only in respect to the precise point of conflict.* [Italic supplied.]

See also to the same effect, *Lietz* v. *Flemming*, (CCA 6) 264 F. 2d 311 (1959); and *Gardner* v. *The Danzler*, (CCA 4) 281 F. 2d 719 (1960).

However, we believe that the majority opinion of the Supreme Court in *Amell* v. *United States*, 384 U.S. 158 (1966), which also involved a maritime matter, is most important. That case involved a suit for wages brought by employees of the United States who worked on Government vessels. The suit was brought in the Court of Claims under the Tucker Act. A 6-year statute of limitations is applicable to proceedings in that tribunal. The Court of Claims agreed with the position of the Government that the suit should have been brought in a district court under the Suits in Admiralty Act, 46 U.S.C. 741–752,

to which a 2-year statute of limitations applies. The latter statute, first enacted in 1920, as amended in 1960, authorizes any appropriate nonjury proceeding *in personam* against the United States in a district court in cases where a proceeding could be maintained in admiralty if the vessel were privately owned or operated. Under the Tucker Act, which antedates the Suits in Admiralty Act by a significant period, suits may be brought in the Court of Claims on a claim founded on a contract, express or implied, with the United States.

The Government contended that the Suits in Admiralty Act specifically repealed the Tucker Act *so far as the two conflicted.* This the Supreme Court conceded. The Court, however, noted that cases of this kind had regularly been brought in the Court of Claims at least until 1960. In that year the jurisdictional provision of the Suits in Admiralty Act, 46 U.S.C. 742, was amended. S. Rept. No. 1894, 86th Congress, states that the new language "restates in brief and simple language the new existing exclusive jurisdiction conferred on the district courts, both on their admiralty and law sides, over cases against the United States which could be sued on in admiralty if private vessels, persons, or property were involved."

The majority of the Court did not find this language a sufficient basis for considering the former practice repealed by implication. In reaching its conclusion, the Court noted that the legislative history surrounding the 1960 enactment contained no discussion whatever concerning claims brought by Government-employed seamen, even though maritime labor unions, who take an active interest in nautical legislation, would surely have been privy to any decision by the Congress to lower the statutory period of limitations for such seamen.

We believe a significant analogy can be drawn between the interest of the maritime unions in nautical legislation and the interest of the shipwrecking industry and unions representing its employees in legislation of the type under consideration here. We think it equally appropriate to note here that the legislative histories of the 1936 act and the 1965 amendments contain no indication of any intent to deprive domestic firms of the preference they had obtained under sections 5 and 6 of the 1920 act, and certainly the industry and unions representing its employees would have been privy to such congressional intent.

In this regard, we believe the opposite congressional intent is manifested at page 11 of H. Rept. No. 1277, 74th Congress, to accompany H.R. 8555, 1936 act, June 20, 1935, and at page 5 of S. Rept. No. 807, 79th Congress, to accompany H.R. 3603, December 4, 1945, The Merchant Ship Sales Act of 1946. From the latter, we quote the following:

At the same time those vessels which are of no substantial utility now or in the future are to be scrapped under a continuing scrapping program, which will include the retirement of tonnage as it becomes of no real utility for a modern

merchant marine or for national security. In this connection it may be stated that the committee has recognized the desirability of establishing and maintaining a shipbreaking industry in this country and the desirability of encouraging the maintenance of key shipyards and key personnel essential to an efficient, modern shipbuilding industry.

In addition, we believe it is clear that the only purpose of section 510(j) was to extend the limitations of section 11(a) of The Merchant Ship Sales Act of 1946, 50 U.S.C. App. 1744, beyond the 1950 date established therein. In this connection, see the colloquy between Congressman William S. Mailliard and the Honorable Nicholas Johnson, Administrator of the Maritime Commission, beginning on page 82, H. Rept. No. 728, 89th Congress, June 15, 1965.

We see no validity in MarAd's argument that section 5 of the 1920 act did not apply to the sale of ships for scrapping. In the first place, that provision does not define sales or distinguish between sales for scrap or for use. Further, sales for scrap were made during the period between 1920 and the enactment of section 508 in 1936. Also, it is clear from the report submitted by the Maritime Administrator in connection with our decision at 42 Comp. Gen. 69 (1962), *supra*, that the Maritime Administration considered both section 5 of the 1920 act and section 508 of the 1936 act authority for sales for scrap.

In view of our conclusion that the preference requirement of sections 5 and 6 of the 1920 act is viable law and applicable to the sales here in question, we do not believe an extended discussion of the respective views on the effect of section 809 of the 1936 act is necessary. However, we do not agree with the MarAd view that the preference requirement in the latter section relates only to the establishment and operation of steamship lines. Briefly, we believe it is significant to note that section 809, 46 U.S.C. 1195, speaks in terms of "contracts under this Act," in contrast to the other sections of title VIII, which refer to the specific titles of the act with which they are concerned. Furthermore, we cannot agree with MarAd's argument that section 809 was intended to cover the subject matter of section 7 of the 1920 act, which deals with the operation of steamship lines. In this connection, we note that section 705 of the 1936 act specifically covers that subject matter and specifically incorporates the provisions of section 7 of the 1920 act. It is also significant to note that section 705 adopts the provisions of section 5 of the 1920 act.

Our decision herein is limited to the conclusion that there is a legal requirement for preference to be afforded to United States citizens in sales for scrapping. As agreed, we have not considered the question whether such a preference was in fact afforded to citizens under the subject solicitation.

[B-170352]

International Organizations—Transfer of Federal Employees, Etc.—Reemployment Guarantees

An employee of the Federal Government who transferred to a public international organization with reemployment rights under 5 U.S.C. 3582(b), prior to the enactment of the Federal Employees Salary Act of 1970, is not entitled to the retroactive salary adjustment authorized by the act for employees on the rolls on the effective date of the act—April 15, 1970—a condition precedent to entitlement. However, since under section 3582(b) an employee who transfers to a public international organization is guaranteed that upon reemployment the compensation payable will not be less than if the employee had remained on the Government rolls, any salary adjustment required upon reemployment may include the retroactive salary payment the employee would have received if on the rolls on April 15, 1970.

To Vladimir Oleynik, United States Department of Labor, September 4, 1970:

This is in reply to your letter of July 14, 1970, transmitting a voucher and schedule of payments for $167.78 on behalf of Mrs. Mary D. Carres, representing a retroactive pay adjustment for the period December 28, 1969, to April 14, 1970, when Mrs. Carres transferred from your Department to a public international organization. You request our decision as to whether Mrs. Carres and other employees of your Department, who were separated by transfer to international organizations prior to the enactment of the Federal Employees Salary Act of 1970, are entitled to the retroactive pay provisions of the act.

Section 5 of the Federal Employees Salary Act of 1970, Public Law 91-231, enacted April 15, 1970, 84 Stat. 197, 5 U.S.C. 5332 note, provides in pertinent part as follows:

Sec. 5(a) Retroactive pay, compensation, or salary shall be paid by reason of this Act only in the case of an individual in the service of the United States (including service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this Act * * *

Since Mrs. Carres was separated from the Government service on April 14, 1970, she may not be said to have been in the service of the United States on the date of enactment of the act. However, the record indicates that Mrs. Carres transferred under the provisions of Public Law 85-795, now codified in 5 U.S.C. 3581 to 3584 (Supp. V). She therefore has reemployment rights under 5 U.S.C. 3582(b) which, as amended by section 502 of the Foreign Assistance Act of 1969, 83 Stat. 805, 825, provides with respect to a reemployed employee that:

* * * On reemployment, he is entitled to be paid, under such regulations as the President may prescribe and from appropriations or funds of the agency from which transferred, an amount equal to the difference between the pay, allowances, post differential, and other monetary benefits paid by the international organization and the pay, allowances, post differential, and other monetary benefits that would have been paid by the agency had he been detailed

to the international organization under section 3343 of this title. Such a payment shall be made to an employee who is unable to exercise his reemployment right because of disability incurred while on transfer to an international organization under this subchapter and, in the case of any employee who dies while on such a transfer or during the period after separation from the international organization in which he is properly exercising or could exercise his reemployment right, in accordance with subchapter VIII of chapter 55 of this title. This subsection does not apply to a congressional employee nor may any payment provided for in the preceding two sentences of this subsection be based on a period of employment with an international organization occurring before the first day of the first pay period which begins on or after the date of enactment of the Foreign Assistance Act of 1969.

The following comments concerning amendments made by section 502 appear at page 63 of H. Rept. No. 91–611, November 6, 1969:

Detailed employees remain on the active rolls of their Federal agencies and receive their pay and allowances directly from their agencies. Policies of most international organizations prohibit or place severe restrictions on acceptance of compensation by their staff members from external sources. Under this amendment, however, the difference, if any, would be paid to the employees only upon reemployment by the Federal agency. It may be argued that the anticipation of a deferred payment for services rendered to an international organization constitutes an effective tie or relationship to the Government but this relationship exists in any case since it is understood that the employee will return to his Government's service and while he is working for the international organization his retirement and other benefits are protected.

Recognizing that provision has been made for considering periods of employment with international organizations as Federal employee service for the specific purpose of retaining insurance, health, and retirement benefits, it is nevertheless clear that a distinction is to be made between those employees transferred to international organizations and those who are detailed. Detailed employees remain on the Government rolls and receive pay as being in the service of the United States. Those transferred are guaranteed that their pay will not be less than if they had remained on the Government rolls, but such guarantee is effective only upon condition of reemployment. If an employee earns as much as or more while serving with an international organization than he would have earned as a Federal employee, no payment under the guarantee would be required. And if he earns less without being reemployed, no payment would be authorized.

Accordingly, the pay of Mrs. Carres being for adjustment under the provisions of 5 U.S.C. 3582(b), as amended, to include the retroactive portion if required, the question presented is answered in the negative and the voucher, which is returned, may not be certified for payment.

[B–170210]

Quarters Allowance—Dependents—Quarters Occupancy Prevented by "Competent Authority"

Although paragraph 30221 of the Department of Defense Pay and Allowances Entitlements Manual and 37 U.S.C. 403(d) provide for the payment of a basic allowance for quarters when because of orders by competent authority the dependents of a member of the uniformed services are prevented from occupying

assigned quarters, where the Government arranges for the movement of the household goods of an Army officer to family-type quarters designated adequate and the move is not accomplished by the effective date stated in the assignment orders, the payment of a basic allowance for quarters with dependents to the officer may not be continued beyond the effective date of the quarters assignment, as the transportation contract does not constitute the "competent authority" required to create entitlement to the allowance after the effective date of the assignment.

To Captain H. D. Flynn, Department of the Army, September 9, 1970:

Further reference is made to your letter (file reference MEDES-CF), dated May 12, 1970, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $33.03 in favor of Second Lieutenant Orbra Ray Johnson, SSAN 454-64-4553, representing basic allowance for quarters with dependents for the period April 22, 1970, through April 30, 1970. Your letter was forwarded to this Office by the Office of the Comptroller of the Army and has been assigned DO Number A-1082 by the Department of Defense Military Pay and Allowance Committee.

The following facts were set forth in your letter as being pertinent to the case. By Special Order Number 85, issued by Headquarters, Presidio of San Francisco, California, dated April 21, 1970, Lieutenant Johnson was assigned family type Government quarters, designated as "Adequate," effective April 22, 1970, and such orders state "Move to be made at Government expense." It appears that on the effective date of quarters assignment, the member contacted the transportation officer, Presidio of San Francisco, to arrange for transportation of his household goods from his off-post private residence and from storage to the assigned quarters. The member was advised by that officer that his household goods at his San Francisco residence could not be moved until April 27, 1970, and that those goods in storage would be moved on May 1, 1970. Despite the fact that his quarters allowance was terminated April 21, 1970, he did not move into his assigned quarters until May 1, 1970, and he claims entitlement to a quarters allowance for the additional period.

You request a decision on the following questions:

a. Does the contract between the Transportation Officer and the moving company for delivery of household goods of a service member represent the competent authority as contained in paragraph 30221 DOD Pay Manual which prevents a family from occupying family type quarters when delivery of the household goods are at a date later than the date of assignment by the installation commander and when the quarters are not provided with a minimum of essential furnishings necessary for the good health and well-being of a member's family?

b. Is the attached voucher properly payable?

The portion of paragraph 30221 of the Department of Defense Pay and Allowances Entitlements Manual, to which you make reference, provides in pertinent part:

a. When entitled to BAQ. A member with dependents who is entitled to basic

pay is entitled to BAQ at the rates prescribed for members with dependents when:

* * * * * * *

(2) Adequate Government quarters are not furnished for his dependents, or his dependents are prevented by competent authority from occupying such quarters, even though the member is assigned quarters for himself.

The above-quoted portion of the DODPM is based upon certain provisions contained in section 403 of Title 37, U.S. Code. Subsection (b) of that section provides that, except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating, and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, the restriction contained therein is qualified by subsection (d), which provides that a member assigned Government quarters may not be denied the basic allowance for quarters if, "because of orders of competent authority, his dependents are prevented from occupying those quarters."

In our decision of July 22, 1968, 48 Comp. Gen. 28, we stated that:

It has long been established that quarters and rental allowances are payable to a member of a military service as reasonable commutation in money when he is not furnished public quarters and he must provide his own. Also, it has been the policy of the uniformed services to provide family units to the extent that exigencies of the service will allow. Thus, within certain limitations, the law authorizes transportation of an officer's dependents to his station to reside with him. Also, the law permits payment of basic allowance for quarters where, because of the member's military assignment, adequate quarters are not available or he is not permitted to have his dependents at his permanent post of duty, even though he is assigned quarters for himself.

It is believed that neither the provisions of law contained in 37 U.S.C. 403(d) nor the quoted regulations contemplate the type of situation involved in this case. No military orders were issued to the member which prevented his dependents from occupying the quarters which were assigned for their use. Their reasons for not occupying such quarters prior to May 1, 1970, had nothing to do with the adequacy of such quarters but were due solely to the fact that all of their household goods were not moved into the assigned quarters until that date. It is our view that the foregoing provisions of law and regulations apply to situations in which dependents, who are not residing in Government quarters, are denied permission by virtue of military orders from moving to and living with the member at his duty station for reasons deemed adequate by the order issuing authority. See 34 Comp. Gen. 436 (1955) and B-129805, October 9, 1958.

While it appears that Lieutenant Johnson did not move his family into the assigned Government quarters until May 1, due to the failure of the transportation officer to have his household goods moved promptly, the special orders issued to him made a definite assignment

of adequate family-type quarters on a specific date. Such assignment defeats his right to receive a basic allowance for quarters, effective the date of the assignment. See Table 3-2-8, Rule 1, DODPM.

There being no basis for payment of the voucher accompanying your request, it is being retained in the files of this Office.

[B-169813]

Bids—Discarding All Bids—"One Responsive Bid" Clause

The cancellation, pursuant to paragraph 2-404.1(b)(viii) of the Armed Services Procurement Regulation as being in the best interest of the Government, of an invitation for bids that contained a "One Responsive Bid" clause to assure adequate price competition, and the resolicitation of the procurement when the low bid was determined to be nonresponsive and the only other bid received excessively priced, was in accord with paragraph 2-404.2(e), ASPR, which authorizes the rejection of unreasonably priced bids, and was proper, even though initially the reasons for cancellation of the invitation should have been advanced, as paragraph 2-404.1(b)(viii) is not self-executing, and the clause should not have been used as it only created uncertainty and was superfluous because mere recitation of the clause did not establish a sufficient reason for bid rejection and resolicitation of the procurement.

To the American Air Filter Company, Inc., September 15, 1970:

Further reference is made to your telegram of July 17, 1970, and subsequent correspondence, protesting the cancellation of invitation for bids (IFB) No. DACA87-70-B-0005 and the issuance of request for proposals (RFP) No. DACA87-71-R-0004 for the same items by the United States Army Engineer Division, Huntsville, Alabama. You protest any award under the RFP, and request that it be canceled and the IFB be reinstated for the purposes of an award to you as lowest responsive bidder. We are advised that proposals under the RFP were received on July 17, 1970, and that award was made thereunder on August 7, 1970, to North American Rockwell.

The invitation was issued on January 30, 1970, and requested bids on 22 combustion engine air filters. The details concerning this advertised procurement were set forth in our decision 50 Comp. Gen. 8, July 6, 1970, copy of which was furnished to you. You had protested award to the low bidder under the invitation on the basis that its bid was nonresponsive. Our decision of July 6, 1970, concluded that the bid submitted by Filter Products Division, Air-Maze Plant, North American Rockwell, was nonresponsive and should not be considered for an award. As a result of this decision, only your bid remained for consideration under the invitation.

On July 6, 1970, all bids under the invitation were rejected and resolicitation action was initiated by RFP-0004, which incorporated the terms and conditions of IFB -0005 and the original delivery schedule.

Cancellation was stated as being effected in accordance with paragraph 2–404.1(b)(viii) of the Armed Services Procurement Regulation (ASPR) and as being in the best interest of the Government.

Your telegram of July 7, 1970, to the contracting officer asked the following questions:

1. WHY WAS AMERICAN AIR FILTER'S BID REJECTED? ASPR 2–404.3 REQUIRES NOTICE OF REJECTION.
2. WHAT IS REASON FOR CANCELLATION OF SUBJECT IFB?
3. REQUEST YOU CITE ASPR PARAGRAPH AUTHORIZING INCLUSION OF THE "ONE RESPONSIVE BID" CLAUSE ON PAGE 6 OF THE SUBJECT IFB.

By telegram of July 13, 1970, the contracting office advised you as follows:

1. BIDS WERE REJECTED AND IFB WAS CANCELLED IN ACCORDANCE WITH ASPR 2–404.1(B)(VIII) and the "ONE RESPONSIVE BID" CLAUSE OF THE IFB.
2. THIS CLAUSE WAS INCLUDED IN THE IFB TO ASSURE THE GOVERNMENT AN AWARD UNDER COMPETITIVE CIRCUMSTANCES.

By telegram of July 14, 1970, to the contracting office, you requested clarification, and by telegram of July 15, 1970, the contracting office advanced further justification (noted *infra*) for the action taken.

The primary issue raised by your questioning of the action taken is whether the cancellation of the invitation was proper under the circumstances. The administrative bases for cancellation of invitation –0005 were stated in the contracting officer's report as follows:

a. In accordance with the "One Responsive Bid" clause, the single responsive bid was rejected because there was no assurance of adequate price competition. The invitation contained a provision for "One Responsive Bid" as follows: "In the event only one responsive bid is received for a responsive bidder, the Government reserves the right to cancel this solicitation and resolicit by whatever procedures are then appropriate." This provision was devised by Huntsville Division for use in the SAFEGUARD program to provide for an award under competitive circumstances. This provision is not in conflict with any provision of ASPR and no objection was made to the clause by any bidder during the bidding period. With the decision of the Comptroller General concluding that the NAR bid was nonresponsive, one responsive bid remained.

b. As of the date of cancellation of the solicitation it was apparent that the performance period of the proposed supply contract would need to be compressed at a potential increase in cost to meet the contractual delivery schedule in the existing construction contract for which the supplies were being provided. The invitation did not provide for consideration of all factors of cost to the Government due to the delay in award of 39 days past 28 May 1970, which was the date the Government assumed it would make an award. The Government could not, based on information on 6 July 1970, extend delivery dates to accommodate this 39-day slippage, as the original delivery dates were based on construction need dates. Further, the Government was contractually committed to the construction contractor to furnish the filters on a schedule derived from these delivery dates and the construction contractor had reiterated the need to hold this delivery schedule. Thus, the effect of this delay as of 6 July 1970, was to reduce the performance time available to the supplier by 39 days from the performance time provided under the invitation upon which bids were based. The cost to the Government of this reduced performance time was not provided for in the invitation.

c. It could not be determined that the AAF bid price was fair and reasonable. The bid price of AAF, $198,572, for 22 units could not be determined as fair and reasonable by the contracting officer. The Government estimate for the Combustion Air Engine Filters was $137,280 for the 22 units on the solicitation. Further,

the bid price of AAF was 27% higher than the bid price of NAR and included in the NAR bid was payment of a royalty to AAF. It was recognized that the Comptroller General declared the bid of NAR non-responsive; however, use of the bid price as a basis of comparison is valid since the government had conducted a favorable preaward survey in which it was found that an acceptable product conforming to the specifications had been offered.

With respect to the "One Responsive Bid" clause, cited in the contracting officer's telegram of July 13, 1970, we are advising the Secretary of the Army by letter of today that the mere recitation of the clause does not establish a sufficient reason for rejection of the bid and resolicitation of the requirement. See ASPR 2-404.2(e). Moreover, we can appreciate your uncertainty as to the bases for the cancellation when faced with the further advice in the telegram of July 13 that cancellation was in accordance with ASPR 2-404.1(b)(viii), which authorizes such action "for other reasons * * * in the best interest of the Government." We agree that this subparagraph is not self-executing; the reasons why cancellation is in the best interest of the Government must be stated. In this connection, the contracting office's telegram of July 15, 1970, in addition to reemphasizing its reliance on the "One Responsive Bid" clause, advanced in general terms the two reasons requiring cancellation, which are treated more extensively in paragraphs "b" and "c" of the contracting officer's report, quoted above.

While we believe that these reasons should have been advanced initially, we cannot agree with your apparent contention that the citation of ASPR 2-404.1(b)(viii) demonstrates that these other reasons did not exist and cannot support the action taken. (We note that it was the contracting officer's belief that citation of ASPR 2-404.1(b)(viii) was appropriate since it was considered to encompass all reasons for cancellation.)

Of the reasons advanced in the contracting officer's report, we focus only on his above-quoted paragraph "c" and the determination that your price was unreasonable. Section 2305(c) of Title 10, United States Code, provides that all bids may be rejected if the head of the agency determines that rejection is in the public interest; and such right is also reserved by paragraph 10 of the solicitation instructions and conditions. ASPR 2-404.2(e), implementing the authority to reject bids, provides that any bid may be rejected if the contracting officer determines in writing that it is unreasonable as to price. Our Office and the courts have held that the rejection of bids is a matter of administrative discretion and that a request for bids does not import an obligation to accept any of the bids received, including the lowest conforming one. See B-168562, January 14, 1970; B-126211, January 9, 1956; 36 Comp. Gen. 364, 365 (1956). From our review of the record, we must conclude that the contracting officer's determina-

tion that your price was unreasonable was not an abuse of his broad discretion in this area. See 47 Comp. Gen. 103 (1967); 39 *id.* 396 (1959). Accordingly, we can interpose no legal objection to the cancellation and resolicitation of the requirement.

For the foregoing reasons, your protest is denied.

[B-170112]

Military Personnel—Record Correction—Payment Basis—Interim Civilian Earnings

In the computation of the active duty pay and allowances due an enlisted member of the uniformed services incident to the correction of his military records under 10 U.S.C. 1552 to show that his discharge was null and void and that he has remained on active duty until voluntarily retired under 10 U.S.C. 8914, the deduction of interim civilian earnings is required, notwithstanding the member retired earlier than required by the decision of the court in 419 F. 2d 714. Moreover, the fact that the Correction Board's recommendation against offsetting interim earnings was administratively approved is without effect, as there is no discretionary power to make determinations of specific amounts to be paid pursuant to a military records correction since payment depends solely upon a proper application of statutes and regulations to the facts shown in a corrected record.

Military Personnel—Record Correction—Payment Basis—Unemployment Compensation

The payment for a period of active duty incident to the correction of the military records of a member of the uniformed services is not subject to a deduction for the unemployment compensation received by the member during the period between premature discharge from duty and retirement, as the rule in 35 Comp. Gen. 241 to the effect unemployment compensation is not deductible from the back pay of a civilian employee restored to duty because of direct refund by the employee is for application. Therefore, since the unemployment compensation received by the member does not come within the purview of "interim civilian earnings" for the purpose of the administrative directive that such earnings are deductible in Correction Board cases, the amount of unemployment compensation deducted from the pay adjustment made to the member is for refund to him.

To Major N. C. Alcock, Department of the Air Force, September 15, 1970:

Your letter dated June 4, 1970, file reference MPECA, with enclosures, forwarded here by letter dated June 22, 1970, Headquarters United States Air Force, requests an advance decision as to the propriety of payment to Staff Sergeant George J. Geiger, 165 16 8250, of $2,423.63 representing interim civilian earnings and unemployment compensation withheld from a payment of active duty pay and allowances made to him incident to the correction of his military records. Your request was approved and assigned Air Force Request No. DO-AF-1083 by the Department of Defense Military Pay and Allowance Committee.

You say that Sergeant Geiger was discharged from the Air Force on August 7, 1963, under the provisions of Air Force Regulation 39–14, at which time he had active service totaling 19 years, 2 months, and 3 days. He questioned the validity of such discharge by a suit in the United States District Court for the District of Columbia, but the case was dismissed on the Government's cross-motion for summary judgment.

On July 22, 1969, the United States Court of Appeals, District of Columbia Circuit, ruling on an appeal filed by Sergeant Geiger (*Geiger* v. *Brown*, 419 F. 2d 714) concluded that his discharge from the Air Force "was unavailing to effect his separation from that service prior to expiration of his then current term of enlistment" and, in reversing the judgment of the lower court, it remanded the case for further proceedings consistent with its holding. In accordance therewith, the United States District Court for the District of Columbia by an Order on Mandate, dated November 6, 1969, vacated its prior judgment and declared Sergeant Geiger's discharge on August 7, 1963, null and void.

On November 6, 1969, Sergeant Geiger applied to the Air Force Board for the Correction of Military Records for the correction of his military records to show that he was not discharged on August 7, 1963, but remained on active duty until eligible for retirement for years of service and then retired. His attorney represented to the Correction Board that, in consideration of there being no offsets for interim civilian earnings against the active duty pay due Sergeant Geiger as a result of the correction of the military records, it was desired that such records show Sergeant Geiger was not discharged but that he was retired at the earliest possible date, i.e., 20 years' service, and that thereafter he be deemed to be in a retired status. The Litigation Division of the Office of The Judge Advocate General, Department of the Air Force, concurred with this representation and recommended that no offsets for interim civilian earnings be made against the active duty pay which would be due Sergeant Geiger.

On January 28, 1970, the Correction Board after consideration of the unappealed Order on Mandate of the United States District Court of the District of Columbia, the representations of counsel, and the facts as shown in the official record, recommended that Sergeant Geiger's military records be corrected to show that he was not discharged from the United States Air Force on August 7, 1963, but continued on active duty until June 30, 1964, when he was released from active duty and voluntarily retired effective July 1, 1964, under the provisions of 10 U.S.C. 8914. The Board further recommended that in the computation of any amounts found due as a result of this cor-

rection of military records, deduction would not be made for interim civilian earnings, if any, for the period commencing August 7, 1963, to June 30, 1964. By memorandum dated February 6, 1970, to the Chief of Staff, United States Air Force, the Assistant Secretary of the Air Force, Manpower and Reserve Affairs, directed that all necessary and appropriate action be taken in accordance with the recommendations of the Board.

It appears that in determining the amount due Sergeant Geiger as a result of the correction of his military records, consideration was given to our decision dated April 2, 1970, 49 Comp. Gen. 656. In that decision we concluded that, in view of a memorandum dated March 12, 1969, from the Assistant Secretary of Defense to the Secretaries of the military departments, directing that appropriate action be taken to require the deduction of interim civilian earnings in correction board cases such as this, a stipulation by the officers there involved as to the payment they were to receive by reason of the correction of their records, or any determination by the correction board as to the basis on which their money claims would be settled, was without effect to prevent the offset of interim civilian earnings.

You say that because of doubt raised by this decision, an amount equivalent to Sergeant Geiger's then reported interim civilian earnings plus unemployment compensation aggregating $2,423.63, received by him during the period of extended active duty, was withheld from the retroactive retired pay then still unpaid to him. Also, you say that later documentation establishes that the amount of offset, if applicable, should be $2,129.63 instead of $2,423.63, since the unemployment compensation received by Sergeant Geiger was $798 rather than $1,092, as originally reported.

You suggest that the factual situation in this case is different from that considered in the decision of April 2, 1970, and could support a "no off-set" provision in that the agreement which the Correction Board was seeking to put into effect was based on a relinquishment by Sergeant Geiger of the right, as established by the United States Court of Appeals, to be considered as being on active duty to the date of expiration of his then current term of enlistment. In this connection, you say that Sergeant Geiger in effect relinquished this right under the Court order to remain on active duty until November 6, 1964, the end of his current period of enlistment. You point out that if this earlier separation from active duty had not been agreed to, Sergeant Geiger would have been entitled to active duty pay and allowances through November 6, 1964, assuming that would have been the date of separation.

The statutory authority for the payment by a department concerned

of allowances, compensation, emoluments, or other pecuniary benefits, if found to be due on a claim presented by a member whose military or naval records are corrected, is contained in 10 U.S.C. 1552(c). Memorandum dated March 12, 1969, from the Assistant Secretary of Defense to the Assistant Secretaries of the military departments (financial management) requires the deduction of interim civilian earnings received from civilian employment in effecting settlement of back pay and allowances found due a member or former member of the uniformed services by reason of the correction of his military or naval records in certain cases pursuant to 10 U.S.C. 1552.

The conclusion in the decision of April 2, 1970, followed the holding in decision of July 7, 1954, 34 Comp. Gen. 7, that the Secretaries of the Army, Navy, Air Force, and Treasury are not vested with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of military or naval records pursuant to section 207 of the Legislative Reorganization Act of 1946, as amended (now codified in 10 U.S.C. 1552); and, therefore, the amounts authorized to be paid under section 207(b) of the act depend solely upon a proper application of the statutes and regulations to the facts as shown by the corrected record in each particular case. See, also, 40 Comp. Gen. 502; 42 *id.* 582; 44 *id.* 144; and 45 *id.* 47.

In our opinion, the fact that Sergeant Geiger requested voluntary retirement prior to the date of the expiration of his enlistment affords no basis for departing from the conclusion reached in the decision of April 2, 1970. In the case considered in that decision, as in this case, the members concerned were entitled under the decision of the court to continue in an active duty status beyond the date of retirement but requested the Correction Board to correct the record to show their earlier retirement with the understanding that there would be no offset of civilian earnings against the active-duty back pay and allowances.

Therefore, no effect may be given to the Assistant Secretary's direction that no deduction should be made for interim civilian earnings for the period August 7, 1963, to June 30, 1964. Such direction does not relate to a record correction within the purview of 10 U.S.C. 1552 but rather a determination of the specific amount to be paid as the result of the records correction in Sergeant Geiger's case.

Under the law and regulations, the Air Force is authorized to pay to Sergeant Geiger pay and allowances for the constructive period of active duty, August 7, 1963, to June 30, 1964, as reflected by his corrected military records, subject, of course, to the deduction of interim civilian earnings for the corresponding period as required by the Memorandum of March 12, 1969. The amount payable to Sergeant Geiger, as based on the corrected record, is for determination in the first instance by the appropriate Air Force disbursing officer.

With respect to the amount withheld from Sergeant Geiger, in decision of October 28, 1955, 35 Comp. Gen. 241, which involved the application of the act of June 10, 1948, ch. 447, 62 Stat. 354, 5 U.S.C. 652 (1952 ed.), in the case of a Postal Service employee restored to his former position, the act requiring a deduction of "amounts earned by him through other employment during such period," we held that unemployment compensation received from the Oklahoma Employment Security Commission during the involved period may be required to be refunded to that Commission and, therefore, no deduction should be made from the back pay to which the employee was entitled following his restoration. We see no reason why the principle of that decision should not be applicable in military back pay cases such as this. Therefore, the unemployment compensation received by Sergeant Geiger does not come within the purview of the term "interim civilian earnings" for the purposes of the memorandum of March 12, 1969, and the amount involved, $1,092, may be refunded to Sergeant Geiger.

Your question is answered accordingly and the voucher is returned, payment thereon being authorized on the basis indicated above.

[B-169172]

Contracts—Data, Rights, Etc.—Restrictive Data Rights *v.* Procurement Methods

The "engineering critical" designation assigned by agreement to replacement parts for engines developed at costs shared by the manufacturer and Government to preclude the use of the data for competitive purposes because of the difficulty to determine the rights of the parties, relating to restricted data rights and not to procurement methods, additional sources of supply may be developed by instituting appropriate tests and qualification procedures, provided the rights of the manufacturer are not infringed. Paragraph 1-313 of the Armed Services Procurement Regulation requires the competitive procurement of spare parts, and it would be contrary to the concept of "maximum practical competition" to hold that an "engineering critical" item may not be procured competitively without regard to the willingness and ability of other than the sole source supplier to produce the parts without infringement of the proprietary rights.

To the Secretary of the Air Force, September 16, 1970:

By letter dated May 27, 1970, with enclosures, the Chief Contract Placement Division, Directorate/Procurement Policy, Deputy Chief of Staff/Systems and Logistics, furnished our Office with a report on the protest by the Jet Avion Corporation against the sole source procurement from the original manufacturer of combustion chamber clamps used as replacement parts in Pratt and Whitney J-57 (Pratt and Whitney Part No. 488125) and TF-33 (Pratt and Whitney Part No. 488124) jet airplane engines.

The protest was supplemented by letter from the attorneys for Jet

Avion dated May 5, 1970, amplifying the protest to cover contracts for the modification of existing clamps to a new configuration, and specifically protesting an emergency procurement of such modified clamps from a licensee of the original manufacturer.

The protest alleges generally that an "engineering critical" designation applied to the subject clamps by the original manufacturer under an earlier Navy contract (contract No. NOw 62-0773-i) should not be regarded as requiring sole source procurement so long as parts offered by other manufacturers "meet the requisite standards of reliability," i.e., a source which "has satisfactorily manufactured the parts in the past" or "a source whose ability to provide parts of the requisite reliability and interchangeability can be assured by means of data, tests, etc." As evidence that Jet Avion meets these requirements and therefore should be considered as a source for the subject clamps, the attorneys for Jet Avion point out that in late 1968 and early 1969 Jet Avion actually was awarded contracts for emergency requirements of 600 J-57 jet engine clamps and 450 TF-33 jet engine clamps, which contracts were satisfactorily performed allegedly at prices below those customarily charged by Pratt and Whitney.

The attorneys also state that following these awards, a comparative analysis of Jet Avion and Pratt and Whitney TF-33 clamps selected at random was conducted by the San Antonio Air Materiel Area (SAAMA) Propulsion Branch and the determination made that the Jet Avion TF-33 clamp was "equal if not superior to the PWA clamp." Although no J-57 clamps were tested, the Chief, Propulsion Branch, stated that the J-57 clamp "is an almost identical clamp" which could be expected to be "similar in quality" to the TF-33 clamp.

In spite of the prior contracts and the favorable engineering analysis by the SAAMA Propulsion Branch, Jet Avion was notified on June 10, 1969, by the Director, Procurement and Production, Headquarters, San Antonio Air Materiel Area, as follows:

> Pratt and Whitney part numbers 488124 and 488125, combustion chamber clamps are procurement method coded "Engineering Critical" by the Navy and Pratt and Whitney in accordance with MIL-STD-789 and USAF and U.S. Navy Agreement Relating to the Implementation of this Military Standard on "Procurement Method Coding of Aeronautics Spare Parts." SAAMA's engineering staff concurs with the "Engineering Critical" designation applied to PWAS P/H's 488124 and 488125. Accordingly, until such time as your firm is listed as an approved vendor source by the Navy and/or Pratt and Whitney Aircraft, we will be unable to procure referenced clamps from Jet Avion Corporation.

Thereafter, procurement responsibility for spare parts for the J-57 and TF-33 jet aircraft engines was transferred to the Oklahoma City Air Materiel Area (OCAMA). That activity, by letter dated September 11, 1969, advised Jet Avion that procurement of critical items

could only be accomplished from sources approved by the original manufacturer. That letter stated, in pertinent part, as follows:

> These clamps have been determined to be critical items from an engine operational and reliability standpoint. Therefore, it has been determined that subject combustion chamber clamp should be procured from only those sources qualified and approved by the prime contractor in accordance with established policy regulating the source coding of engine spare parts. In this respect, this item is coded 8AV (sole source from prime contractor) on the critical parts list as jointly approved by the prime contractor and the U.S. Navy. It is OCAMA's decision to abide by this coding.

Apparently as a result of Jet Avion's interest, a joint Air Force-Navy Ad Hoc Committee was established to consider the feasibility of competitive breakout of spare parts, including the subject clamps, for Pratt and Whitney engines. Also, while procurements for the purchase and modification of the subject clamps were pending at the time the Jet Avion protest was filed, and while the protest was initially directed at opening up these procurements to competition, such procurements have since been made, on the basis of urgency, on a noncompetitive basis by the placement of contracts with Pratt and Whitney and with Lawson Manufacturing Company, a source approved by Pratt and Whitney, and we are advised that no additional procurements are presently contemplated.

A complicating factor is that the clamps originally procured and supplied in 1968 and 1969 by Jet Avion were not equipped with a heat shield, while the current version of the clamps is equipped with a "snap in heat shield." This change in configuration, incidentally, is advanced by the cover letter to the administrative report as the sole basis for denial of the Jet Avion protest on the ground that the current version of the heat shield has never been furnished by Jet Avion.

While the above-summarized events may affect the interests of Jet Avion as regards its efforts to become qualified by the Air Force as a supplier or modifier of the subject clamps, the issue for our consideration is whether competitive procurement of spare parts designated "engineering critical" by the Air Force is permissible without the necessity of removing that designation by joint Air Force-Navy action so long as parts supplied by suppliers other than those approved by the original manufacturer are able to pass appropriate qualification tests.

The briefs submitted by Jet Avion's attorneys cite decisions of our Office, 10 U.S.C. 2304(g), Armed Services Procurement Regulation (ASPR) 1-300.1, 3-101, and 1-102(c), as setting forth the general requirement that maximum practicable competition should be obtained by the Government even in negotiated procurements for items where it is determined that "because of such factors as the need for extremely high reliability, [replacement parts] are not susceptible of procure-

ment on an unlimited competitive basis." The attorneys' briefs also cite ASPR 1-313 and the Department of Defense High Dollar Spare Parts Breakout Program, contained in Air Force Regulation (AFR) 57-6, section 1-300.1 (March 1969), as carrying that general competitive requirement into the area of high reliability spare parts. We have often stated that, absent sufficiently documented reasons, competition in all aspects of Government procurement is the desired goal and that continuing vigilance should be exercised in an effort to maximize competition.

The briefs conclude that the only thing required by the cited authorities and the Navy-Pratt and Whitney engineering criticality agreement justifying competitive procurement even of "engineering critical" items is that the items meet the governing standards of reliability without the use of restricted technical data. As evidence that the Jet Avion clamps actually meet the requirements, the briefs point to the past Air Force procurement of Jet Avion clamps and maintain that this experience provides a good indication that the Jet Avion claims would successfully pass any Air Force qualification tests. Accordingly, the briefs request that the Air Force either be directed to approve Jet Avion as an additional source for combustion chamber clamps or, in the alternative, that testing or qualification procedures immediately be instituted by the Air Force.

The Air Force administrative report, on the other hand, cites AFR 57-6, paragraph 4-104.2, which requires that the Department of Defense procuring activity originally assigning a procurement method code be interrogated before assigning a different code to a given item, and states that "Such interrogation action was taken through SAAMA message 241325Z June 1969 and was confirmed by NAVAIRSYSCOMHQ message 272112Z June 1969." In this regard, the contracting officer's statement of facts and findings attached to the Air Force report takes the position that a procurement method code of 8AV purportedly requiring sole source procurement from the prime manufacturer in accordance with AFR 57-6 has been and is assigned to the subject clamps by joint Navy-Pratt and Whitney action. The report also mentions a July 15, 1965, agreement between Air Force and Navy with regard to procurement method coding of aeronautical replenishment spare parts, apparently to absolve the Air Force from responsibility in changing any procurement method codes assigned to combustion chamber clamps. The report also cites Exhibit H of Navy contract NOW 62-0773 with Pratt and Whitney, which embodies the agreement between the Navy and Pratt and Whitney as to the criteria for establishing engineering criticality, to the effect that responsibility for the determination of engineering criticality rests with Pratt and Whitney, which designed the engines.

A brief discussion of the development of the term "engineering critical" is necessary. In a briefing presented in April 1970 by the Department of the Navy to Air Force representatives, the meaning and intended effect of that term from the Navy's point of view was discussed. This briefing was also presented to a representative of our Office, and a copy of the briefing paper has been furnished our Office for its use in resolving the protest. The briefing paper stated, initially, that past engine development and continuing engineering costs for Pratt and Whitney engines had been financed partially by the company and partially by the Government, and that the intermix of these developmental costs made the determination of rights in data, necessitated by later attempts at competitive breakout of spare parts for replenishment procurement, virtually impossible. This fact led to the negotiation of an agreement between Pratt and Whitney and the Navy, which provided that data relating to parts designated by agreement to be "engineering critical" would bear a restrictive legend precluding the Government from using such data for competitive procurement purposes, without making a determination that the data was developed at private expense and, hence, its use is restricted.

The briefing paper further stated that the Pratt and Whitney-Navy agreement was contained in contracts involving jet engine parts from Pratt and Whitney from 1962 until January 1968, at which time MIL-STD-789 became effective. MIL-STD-789, according to the Navy, provided for full Government funding of development and continuing engineering costs and the incorporation of standard rights in data clauses (requiring development at private expense to justify the conveyance to the Government of only limited rights in data) in Pratt and Whitney contracts. The Navy further states that MIL-STD-789 established the procedures for assigning Procurement Method Codes, the criteria for which are similar to those used in determining the engineering criticality of a part, but that, contrary to the Air Force position, the parts have not been coded under MIL-STD-789 because the engineering criticality criteria are still applicable.

The import of the Navy briefing paper is that although the determination of engineering criticality is based on "manufacturing considerations," the term "engineering critical" relates solely to the dissemination or the nondissemination of manufacturing data and not to the sources from which parts are to be procured. In this regard, the briefing paper stated:

> The major thrust of the Jet Avion protest appears to be that it is possible for an activity such as that company to develop the data and capability necessary to produce "Engineering Critical" parts equivalent to those furnished by the prime engine contractor. The Navy does not deny such a possibility and has so indicated in a letter from NAVAIR to AFLC [Air Force Logistics Command] dated 23 May 1967. * * *.

The May 23, 1967, letter was prompted by a complaint on the part of Pratt and Whitney that the Air Force had competitively procured certain "engineering critical" parts. That letter stated, in pertinent part:

> * * * The terms of the "engineering critical" agreement do not govern the method of parts procurement by the Government. Rather, the authority of the Government to use technical data is governed. Therefore, parts designated "engineering critical" can be purchased competitively by the Government, but the technical data bearing legends establishing the part involved as "engineering critical" may not be employed by the Government in effecting such purchase. * * *.

Further evidence of the Navy position is found in NAVAIRSYSCOMHQ message of 272112Z June 1969, which is relied on by the Air Force as evidence of the initial assignment of a noncompetitive procurement method code and the subsequent confirmation of that assignment by Navy. As will be noted from a pertinent quotation from that message, it does not provide justification for noncompetitive procurement, but rather states guidelines to be followed for competitive procurement. In part that message reads:

> IN ACCORDANCE WITH REF B [the May 27, 1967, letter from NAVAIR to AFLC quoted above] ANY ACTIVITY PROCURING PARTS DEPICTED ON DRAWINGS BEARING AN ENGINEERING CRITICAL LEGEND (1) MUST DETERMINE PARTS AVAILABLE FROM ALTERNATE SOURCES NOT SET FORTH ON SAID DRAWING WILL PERFORM IN SERVICE OPERATION AS WELL AS SAME PARTS PROCURED FROM DESIGN ACTIVITY, (2) NOT USE DESIGN ACTIVITY ENGINEERING TECHNICAL DATA INCLUDING DOCUMENTATION REFERENCED THEREON FOR SOLICITATION OF BIDS OR IN OTHER PROCUREMENT ACTIONS SO LONG AS PART IS DESIGNATED "ENGINEERING CRITICAL" AND (3) TAKE INTO ACCOUNT OTHER FACTORS SET FORTH IN REF B.

We believe that it would be contrary to the concept of "maximum practical competition" to hold that "engineering critical" items may not be procured competitively because of the Pratt and Whitney-Navy agreement or the assignment of a certain "procurement method code" without regard to the willingness and the ability of Jet Avion or other sources to produce the items without the invasion of contract or proprietary rights. The position of our Office with regard to the procurement of high reliability spare parts and the import of ASPR 1–313 (requiring competitive procurement of spare parts except where adequate unlimited rights data, test results, and quality assurance procedures are not available) is succinctly set forth in B–166435, July 1, 1969, wherein it is stated:

> We find no reason to ascribe to these provisions [ASPR 1–313] a mandate to effect sole source awards regardless of the capabilities of producers who, for various reasons, had not supplied the identical parts in the past. In other words, we feel that the assurances of reliability and interchangeability of spare parts may be obtained through competitive negotiation procedures as well as from sole source buys from the current manufacturer of the end item.

It seems to us that some confusion exists with regard to the procurement by the Air Force of engine parts designated "engineering

critical" by the Navy. The Air Force position seems to be that no engineering critical parts may be competitively procured without authorization by the Navy or approval of alternate part sources by Pratt and Whitney. In this respect, based on our review, it appears that the Air Force requested Navy concurrence for the competitive procurement of the subject clamps but such request was denied. The Navy takes the position that engineering criticality relates only to rights in data and that so long as restricted data is not released and assurances that data in the hands of a proposed alternate source was not pirated or obtained, no impediment to competitive procurement of "engineering critical" parts exists. This was the import of the Navy message, above quoted, which was relied on by the Air Force to justify continued sole source procurement.

Further, the Air Force maintains that a procurement method code of 8 AV has been assigned to the parts in question apparently by the Navy while Jet Avion's attorneys point out the code "8," under MIL-STD-789, relates merely to a contractor recommended code as opposed to a procurement method code. The Navy's position, however, as stated in its June 27, 1970, message quoted above, is that procurement method coding as such was not utilized in this instance because the standard used was one of "engineering criticality," a standard similar to but not identical to the one used in procurement method coding.

Finally, while maintaining that Navy procurement method coding and the absence of Navy approval of competitive procurement require the continued sole source procurement by the Air Force, the Air Force concedes that competitive procurement of "engineering critical" parts is feasible where other qualified sources exist. Thus, the contracting officer's statement dated May 15, 1970, advises:

> We acknowledge that fact that some critical items can be competed, however, these are items where other qualified approved sources are known. * * * However, with two or more approved sources, engineering critical items could be competitive.

In our view, the implication of these statements is that alternate source qualification is not an Air Force responsibility.

Further, indications of the Air Force's position as to the competitive character of these clamps may be found in AFLC/MCP messages of March 27 and April 3, 1970, wherein these statements appear:

> * * * Pertaining to Sole Source Procurement of TF-33/J-57 Engine Combustion Chamber Clamps. Reference is made to messages on subject matter, MCPP 131703Z Mar 70 and AFSPPL 171736Z Mar 70. In the absence of information requested by this HQ sole source procurement of the item does not appear to be justified. You are authorized to compete the present urgent requirement of 1291 each between Pratt and Whitney and Jet Avion.
>
> * * * * * * *
>
> a. Compete the clamp between P&W, Jet Avion and any other known source able to supply qualified items of this nature.

b. If contract is to be awarded to any source other than P&W you will be required to contract for 1st article test and qualification. The test you outline in your message cited above as Phase I & Phase IIB is to be the test accomplished. Inasmuch as the C-141 fleet is averaging approximately 200 hrs a month it is believed that thru the use of a lead-the-force aircraft the test can be completed in approximately 6 wks. This Headquarters will not condone the expenditure of $264,000 and approximately 6 months for testing by P&W as advocated in your message as the preferred method of accomplishing the substantiation test. * * * The foregoing is based upon the following assumptions & facts.

* * * * * * *

c. Jet Avion is FAA certified and has previously supplied clamps to the Air Force and most major airlines throughout the world.

d. Previous AF (SAAMA) engineering evaluation even though limited verified the Jet Avion Clamp to be equal to or superior in quality to the P&W clamp and actual usage experience has never indicated otherwise to our knowledge.

* * * * * * *

f. The Navy has agreed that the Government has the right to compete the clamp so long as we do not use the P&W limited rights data for reprocurement purposes. This does not preclude the use of the data within the government for qualification and testing purposes.

The foregoing highlights the fact that the designation "engineering critical" has perpetuated a sole source position without clear justification therefor. However, as the concept of engineering criticality was conceived and administered by the Navy, we think that the Navy's opinion of its effect on the limitation of competition must be given weight. Accordingly, in view of the reported position of the Navy, that engineering criticality relates to restricted data rights as opposed to procurement method, we can see no present impediment to qualification by the Air Force of additional sources of supply for the subject clamps by appropriate test and qualification procedures, provided Pratt and Whitney's data rights are not infringed in any subsequent procurement action.

We recommend, therefore, that a qualification test program be instituted by the Air Force to measure the acceptability of clamps tendered by alternate sources since we conclude from the record that the existence of an engineering criticality designation does not, in and of itself, preclude the qualification of alternate sources of supply.

[B-131587]

Defense Department—Teachers Employed in Areas Overseas—Leaves of Absence

When teachers in the Department of Defense Overseas Dependents' Schools are absent from duty without authorization, a pay deduction for scheduled workdays only would be in accord with Public Law 86-91, as amended, 20 U.S.C. 901-907, enacted to eliminate the many difficulties resulting from the application of civil service laws and regulations to overseas teachers whose conditions of employment are significantly different from those of full-time civil service employees. Therefore, the Secretary of Defense having broad authority under section 4

of the act (20 U.S.C. 902) to regulate the entitlement of teachers to compensation and the payment of such compensation, the current regulations may be amended to eliminate the requirement for the deduction of salary for all days from the time a teacher is absent without proper authorization until a return to duty.

To the Secretary of Defense, September 18, 1970:

By letter dated February 26, 1970, the Assistant Secretary of Defense (Comptroller) requested our opinion as to the legality of a proposed amendment to a regulation governing the deduction of pay for unauthorized absences of teachers in the Department of Defense Overseas Dependents' Schools.

The Assistant Secretary advises that the current regulation governing such matters requires the deduction of salary for *all* days from the time a teacher is absent without proper authorization until he returns to duty. Such regulation is based upon the rule set out in our decision at 16 Comp. Gen. 807 (1937), as follows:

> Where, however, the leave without pay is taken without obtaining appropriate authorization prior to the taking of such leave, the established rule is that, in the absence of a statute specifically providing otherwise, the employee is considered in a non-pay status for the entire period during which he absents himself from duty, and in such cases deduction of pay is required for all days coming within that period, including Sundays and holidays irrespective of whether occurring immediately prior to the day on which the employee reports for duty.

The Assistant Secretary states that application of the current regulation may result in lost pay for as many as 11 authorized nonwork-days when a teacher is absent without leave on a scheduled workday. This statement is explained by the Assistant Secretary as follows:

> The teachers are paid a school year salary at a daily rate for the calendar days (excluding Saturdays and Sundays) within the school year. For the school year from 18 August 1969 through 5 June 1970, pay could be received for 210 days. These consist of 189 workdays (including 180 student attendance days), 7 legal holidays and 14 administratively authorized nonwork days. The administratively authorized nonwork days (for which no leave is charged) are the Friday after Thanksgiving, eight days during the two-week Christmas school holiday, and five days for the spring (Easter) holiday.
>
> If a teacher is absent one workday on approved leave without pay immediately preceding a holiday (for example, 29 August 1969; 26 November 1969; or 19 December 1969), pay for one day is deducted. If absent on those same days without obtaining prior authorization and return to work is on the next scheduled workday after the holiday, pay deductions would be (a) two days for the Labor Day weekend, 29 August and 1 September 1969, (b) three days at Thanksgiving, 26 through 28 November 1969, and (c) eleven days for the Christmas school holiday, 19 December 1969 through 2 January 1970. If absence without leave is on the workday immediately following the holiday, pay for one day is deducted.

Due to the wide variance in financial penalty which results under current regulation, as illustrated above, the Assistant Secretary proposes to amend the regulation to provide that pay will be deducted

only for scheduled workdays on which a teacher is absent from duty without proper authorization.

The pay of overseas teachers is governed entirely by the provisions of Public Law 86–91, as amended, 20 U.S.C. 901–907. Section 4 of that act, now 20 U.S.C. 902, authorizes the Secretary of Defense to prescribe regulations governing, *inter alia*, the entitlement of teachers to compensation and the payment of compensation to teachers.

The primary reason for enacting Public Law 86–91 was to eliminate the many difficulties resulting from application of civil service laws and regulations to overseas teachers whose conditions of employment are significantly different from those of most full-time civil service employees. H. Rept. No. 357, 86th Congress. In the present case, it appears that the rule enunciated in 16 Comp. Gen. 807 and applicable to most civil service employees is not suitable for application to overseas teachers.

In view of the purpose of Public Law 86–91 and of the broad authority vested in the Secretary of Defense under that act, we are not required to object to amending the regulation along the lines proposed by the Assistant Secretary of Defense.

[B–169835]

Contracts — Specifications — Restrictive—Particular Make—Use Limited to Unavailability of Adequate Specifications

Where the technical data necessary for the drafting of a purchase description for electronic receivers was lacking, the use of a brand name or equal specification, listing 47 salient characteristics that had to be met by any "equal" product offered was not improper, nor did the evaluation of the equal product on the basis of whether the long list of features was met operate to make the salient characteristics the complete purchase description prescribed by section 1–1.307–2 of the Federal Procurement Regulations in the absence of a clear and accurate description of technical requirements. Therefore, the invitation for bids not constituting a satisfactory purchase description, the low bid that complied with only six of the stated 47 characteristics and contained a statement that specifications would be met was properly rejected.

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics

A low bidder who after bid opening objected to the use of a brand name or equal invitation which listed 47 salient characteristics that did not include technical data for the electronic receivers to be purchased, on the basis the unlisted data could have been quickly summarized and a purchase description prepared that would meet the requirements of section 1–1.307–2 of the Federal Procurement Regulations for a clear and accurate description of the technical requirements, should have lodged his complaint before bids were opened. The invitation for bids clearly stated the salient characteristics and other criteria on which bids were to be evaluated, and the bidder having participated in the brand name or equal procurement to the point of bid opening is deemed to have acquiesced in the evaluation criteria set out in the invitation.

Contracts—Specifications—Samples—Preproduction Sample Requirement—Brand Name or Equal Items

When the purpose of a first article provision in a brand name or equal invitation is to assure that the product offered will perform in accordance with the salient characteristics stated and not to reveal defects which could be corrected by conveying general design information as to how a conforming product could be constructed, whether a bidder proposes to manufacture a model which would attain the performance characteristics of the brand name product is for determination by evaluating the information submitted with an offer in accordance with the brand name or equal clause and not for determination during first article testing.

Contracts — Specifications—Restrictive—Particular Make—Description Availability

Data contained in literature that was not prepared to quote back the salient features of a brand name model but was published to disseminate the information to the public does not constitute sufficient descriptive literature for the purpose of determining whether a product equals the brand name. Furthermore, an offer to conform does not satisfy the descriptive literature requirement of a brand name or equal clause for detailed information, and the submission of data after bid opening may not be considered under the fundamental principle of the competitive bidding system that the responsiveness of a bid must be determined from the bid without reference to extraneous aids or explanation submitted after bid opening, in fairness to those bidders whose offers strictly complied with all the solicitation requirements.

To Systems Technology, Inc., September 18, 1970:

Reference is made to your letter of May 19, 1970, and subsequent correspondence concerning your protest under invitation for bids (IFB) No. CG-03-248-A, which was issued on February 26, 1970, by the United States Coast Guard for the procurement of 500 HF Fixed Frequency (Strip) Receivers, Galaxy Electronics Model FFR-230 or equal, 350 Rack Panel Adapters, Galaxy Electronics Model RPA-530, or equal, and associated software. The Coast Guard states that the receivers in question are to be used for monitoring the international distress frequency at locations throughout the world, for monitoring military and civil working frequencies, for search and rescue operations, and for logistics and administrative purposes at remote locations. The receivers are considered to be highly developed, sophisticated equipment and are not stock items.

It is reported that the Coast Guard began collecting information on the receivers based upon anticipated requirements for the devices approximately 2 years prior to the subject procurement. However, a definite specification was not developed during this period because firm operational requirements for the receivers had not been received from using activities. When a firm requirement was received in November 1969 for installation and operation of the devices by January 1, 1971, the Coast Guard determined that it did not have an adequate number of technical personnel to use the accumulated research data

on the receivers to write a comprehensive purchase description in time to have the equipment in use by the stated date. Accordingly, the record indicates that on February 12, 1970, the Coast Guard formally determined that the brand name or equal method of advertising should be employed to fulfill this requirement in accordance with the following provisions of Federal Procurement Regulations (FPR) 1-1.307-5 (a)(2):

§ 1-1.307-5 Limitations on use of "brand name or equal" purchase descriptions. "Brand name or equal" purchase descriptions may be used only under the circumstances in (a) or (b) of this § 1-1.307-5:

(a) When a suitable formal Government specification or standard or industry standardization document approved for agency use is not available, and a purchase description of the type referred to in § 1-1.307-3 is inadequate or unavailable, and a purchase description meeting the general requirements of § 1-1.307-2 cannot be prepared because—

* * * * * * *

(2) Public exigency or military necessity precludes timely development.

The salient features of the Galaxy models were set forth in 47 separate entries in the solicitation together with the provisions of the "Brand Name or Equal" clause, which is set forth in FPR 1-1.307-6 as follows:

(a) If items called for by this invitation for bids have been identified in the Schedule by a "brand name or equal" description, such identification is intended to be descriptive, but not restrictive, and is to indicate the quality and characteristics of products that will be satisfactory. Bids offering "equal" products will be considered for award if such products are clearly identified in the bids and are determined by the Government to be equal in all material respects to the brand name products referenced in the invitation for bids.

(b) Unless the bidder clearly indicates in his bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the invitation for bids.

(c)(1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the invitation for bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity. CAUTION TO BIDDER. The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the requirements of the invitation for bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the invitation for bids, he shall (i) include in his bid a clear description of such proposed modifications and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the invitation for bids will not be considered.

427-072 O—71——4

When bids were opened on April 16, 1970, it was determined that your concern had submitted the lowest bid of the five bids received. Further examination of your bid revealed that you offered your SCR-12 Single Channel SSB Receiver as a product equal to the referenced brand name, and that you submitted a data sheet with your bid which set forth certain characteristics of that model. A letter dated March 31, 1970, from the president of your company was attached to the data sheet and contained the following statement:

Attached is a data sheet describing the Systems Technology, Inc. SCR-12 Single Channel SSB Receiver. While the general description here does not repeat every detail of the specification, the SCR-12 meets or exceeds all the requirements of the specification without exception.

The Coast Guard concluded that your data sheet indicated that the SCR-12 complied with only six of the salient characteristics which were listed in the IFB, and that the statement contained in your letter did not constitute descriptive literature for the purpose of evaluating your offer with respect to the other salient features. In view thereof, and inasmuch as the Coast Guard Electronics Branch did not possess any other data concerning your device, the contracting officer rejected your bid as being technically nonresponsive. Thereafter, a contract was awarded to Galaxy Electronics, Inc., as the lowest responsive bidder.

After you were informed of the Coast Guard's determination in this matter you submitted additional descriptive literature and an operating model to demonstrate that your receiver was equal to the Galaxy models. The contracting officer advised you that consideration of data submitted after bid opening was prohibited, and affirmed his determination that your offer was nonresponsive and could not be considered for award. The contracting officer also determined that the bid submitted by the second lowest bidder, Scientific Radio Systems, Inc., could not be considered for award because that concern had submitted inadequate descriptive literature concerning its "equal" product.

On June 29, 1970, the Coast Guard advised our Office that it was proceeding with an award on that date to Galaxy Electronics, Inc., the third lowest bidder, in order to meet the requirement for having the receivers in operation by January 1, 1971.

You maintain that the Coast Guard should not have advertised the requirement on a brand name or equal basis. In this regard you state that the list of salient features in the IFB constituted a complete performance specification which was an entirely satisfactory purchase description and that there was no need to mention the Galaxy brand name.

The Coast Guard reports that the salient features alone did not

constitute a comprehensive purchase description of the needs of the Government for the subject procurement and that the reference to the brand name was intended to describe certain additional characteristics as follows:

By citing the brand name, the Government completed the description of its needs. The Galaxy model specified the general design, configuration, and level of quality of the receiver, which include the following examples:

Electrical	Mechanical
Quality of electronics parts	Ventilation
Electronic part variability time, temperature, and humidity	Component fastenings
Fusing, type and accessibility	Composition of chassis
Wiring, type/installation/shielding	Type of metal/materials used
Solder(ing), type	Fabrication
Power circuit filtering	Cable harnessing
	Cables passing through chassis
	Location of components

Reliability

Reaction to shock and vibration

Reaction to abnormal voltage or temperature conditions

A comprehensive purchase description would encompass the above elements. In order to write a comprehensive purchase description, each facet of operation of the item must be researched so that details can be specified for each. A typical electrical description provides for the type of internal wiring material to be used, the MIL-SPEC to be met, the number of strands per wire, the minimum gage wiring and the coating and shielding of wiring. A typical mechanical description provides for the type of chassis fabrication and the external and internal fastenings with associated gage and diameter of each. A typical reliability description provides for the degree of shock and vibration to be met in accordance with a MIL-SPEC and a certain mean time between failure in accordance with a designated specification.

In response to this statement you maintain that the procuring activity was precluded from evaluating an equal product on the basis of features which were not set forth in the list of salient features of the Galaxy models; that if these aspects were important to the Coast Guard it could have summarized these features within a half a day for inclusion in a standard purchase description; that it could have used the first article testing procedure to assure that an "equal" product would comply with any requirements which the Government had not described adequately; and that these features are irrelevant, since a meeting of the performance requirements specified as salient features renders these other aspects satisfactory even though they may be different from the Galaxy equipment.

FPR 1-1.307-5 states that a brand name or equal purchase description shall not be used unless a suitable formal Government specification or standard or industry standardization document approved for agency use is not available and a purchase description meeting the general requirements of FPR 1-1.307-2 cannot be prepared. FPR 1-1.307-2 provides as follows:

§ 1-1.307-2 General requirements.

Except as otherwise provided in §§ 1-1.307-3 and 1-1.307-4, purchase descriptions shall clearly and accurately describe the technical requirements or desired

performance characteristics of the supplies or services to be procured; and, when appropriate, the testing procedures which will be used in determining whether such requirements or characteristics are met. When necessary, preservation, packaging, packing, and marking requirements shall be included. Purchase descriptions may contain references to formal Government specifications and standards which are to form a portion of the purchase description." [Italic supplied.]

FPR 1–1.307–4(b) stipulates that a brand name or equal purchase description should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government.

Since FPR 1–1.307–2 obviously excepts brand name or equal procurements from the requirement that purchase descriptions shall contain a clear and accurate description of the technical requirements of the goods to be procured, we must conclude that a brand name or equal purchase description which consists only of a listing of salient characteristics will not meet the criteria which are to be met in a standard purchase description.

In this connection, we note that the unlisted features of the brand name product, which the Coast Guard believes should have been included in a nonbrand name description of their needs for this procurement, appear to show how the various components of the Galaxy models are structurally arranged and interrelated to produce the performance levels set forth in the list of salient features. Clearly, such information would convey vital engineering data to those potential bidders who desired to know how the salient performance characteristics were attained in the Galaxy models in order to design an "equal" product. It is difficult to perceive how an adequate nonbrand name purchase description, conforming to the requirements of FPR 1–1.307–2, and permitting the maximum number of potential bidders consistent with the requirement of full and fair competition, could be written without some reference to design features of the type which the Coast Guard maintains were denoted by merely referencing the brand name.

While we agree with your position that an offered product could not be rejected for failing to show strict compliance with the unlisted features of the brand name product, we are unable to accept your conclusion that an evaluation of an equal product on the basis of whether that product meets the salient characteristics necessarily operates to make the salient characteristics a complete purchase description in accordance with the requirements of FPR 1–1.307–2, or to render use of a brand name purchase description improper. We perceive no logical relationship between these statements. Whether a list of salient characteristics constitutes a complete purchase description is not determined by the method of evaluation of an "equal" product but whether

the list is a clear and accurate description of the technical requirements for the supplies. As noted above, the Coast Guard maintains that the subject list of salient characteristics is not as complete a description of the items as would have been prepared had sufficient time been available to prepare a purchase description in accordance with FPR 1–1.307–2; and the history of the development of brand name or equal procurements clearly indicates that the procedure was intended for use in such case. In this regard, it is the well-established position of this Office that the drafting of proper specifications, including the use of brand name or equal purchase descriptions, and the factual determination of whether a product offered thereunder conforms to those specifications, are matters primarily within the jurisdiction of the procuring agency. In such matters involving a difference of expert technical opinion, we will accept the judgment of the technical personnel of the agency involved, unless such judgment is shown to be clearly in error. 49 Comp. Gen. 195 (1969). Based on our examination of the record, we cannot conclude that the Coast Guard's technical determination that a comprehensive purchase description for the receiver would include particular engineering and material requirements, or that its decision to follow brand name or equal procedures because the list of salient features of the Galaxy models lacked the details needed for a complete purchase description, is clearly and unmistakably in error.

You also rely on our holding in 49 Comp. Gen. 274 (October 27, 1969) for the proposition that our Office considers it improper to use a brand name or equal purchase description when a detailed description of an agency's needs is listed in the solicitation. You contend that this conclusion should be applied to the present case, since the salient features of the Galaxy model encompass nearly four pages of the schedule. However, an examination of the invitation in the cited case reveals that there was no formal listing of salient features as in the instant solicitation, and that the description of technical requirements was set forth in 36 pages which included several references to Federal and military specifications. Such description appeared to constitute a complete statement of all pertinent design and performance criteria which would be needed for full and fair competition. Since the description of agency needs in the instant case did not cover the general details of the devices or contain references to Federal specifications, we believe the cited case is readily distinguishable from the instant procurement.

In regard to your statement that any unlisted data of the Galaxy models considered important by the Coast Guard could have been quickly summarized and included in a standard purchase description,

we must accept the Coast Guard's determination that a comprehensive purchase description setting forth the agency's complete needs would encompass various details relating to design, configuration, materals, and quality which could not be prepared in the time available. Whether these characteristics could have been quickly summarized for inclusion in the list of salient characteristics in the matter you allege is problematical. In this regard, it would seem to be the position of the Coast Guard that such features were not essential to its needs, given the limited time available for procurement of the items.

In any event, it is our opinion that questions of this nature must be raised prior to bid opening if they are to be considered on their merits by this Office. Here the invitation for bids clearly stated the salient characteristics and other criteria on which bids were to be evaluated. Under such circumstances, it is our opinion that a bidder who participates in a brand name or equal procurement to the point of bid opening must be deemed to have acquiesced in the evaluation of his bid, along with all others, under the criteria set out in the invitation. Accordingly, that portion of your protest which asks that the contract awarded to Galaxy Electronics, Inc., be canceled because use of the brand name or equal method of procurement was improper must be denied.

Concerning your allegation that the Coast Guard could have used the first article approval provision to correct the equipment in any respect in which the purchase description failed to state the Government's requirements adequately, the Coast Guard maintains that the purpose of the first article test was to assure that the article performed in accordance with the salient features, and not for the purpose of revealing defects which could then be corrected by conveying general design information as to how a conforming product could be constructed. We concur with this position. Whether a bidder proposed to manufacture a model which would attain the performance characteristics of the brand name product was to be determined by evaluating the information submitted with his offer in accordance with the brand name or equal clause, and not during first article testing. To accept your position in this matter would render meaningless the descriptive data requirements of the clause.

You also allege that the data you submitted with your offer was sufficient to permit the Coast Guard to ascertain that your product was the equal of the referenced Galaxy models, and that rejection of your bid was therefore improper under the brand name or equal method of bid evaluation. You state that the contracting officer found your model was responsive to six of the salient characteristics by merely accepting a point-by-point repetition of those characteristics in your data sheet.

Accordingly, you maintain that your unconditional promise to conform to all other salient characteristics should be considered a point-by-point repetition of those features, and therefore sufficient to comply with the descriptive data requirements of the invitation.

The contracting officer states that his finding that your device was in compliance with six of the salient characteristics was not based upon a repetition of those characteristics in your data sheet, and that the data was not prepared for this procurement but was in the form of published literature disseminated to the public. A close examination of your literature indicates that it shows only salient features 1.3.2 in the manner you allege. With respect to the five other salient features in question, your data sheet does not contain a precise repetition of the salient features but indicates performance levels from which compliance with the salient features may be determined. For purposes of illustration, salient feature 1.3.19, Image Rejection, and the data contained in your literature sheet for Image Rejection, are quoted as follows:

1.3.19 Image Rejection: 60 db or greater, 2–16 Mhz; 38 db or greater, 16–30 Mhz.
SCR–12 Image Rejection
Better than 60 db, 2–17 Mhz
Better than 40 db, 17–30 Mhz

In this perspective, we cannot conclude that the data contained in your literature was prepared for the purpose of repeating salient features of this procurement. In this connection, it should be noted that our Office has held that a data sheet which was prepared to merely quote back all the salient features of a brand name model would not constitute sufficient descriptive literature for the purpose of determining whether a product was equal to the brand name under a brand name or equal clause. B–168805, May 5, 1970; B–167757, October 24, 1969.

Although you contend that your promise to conform should be accepted as sufficient information to show compliance with the features of the referenced brand name, such an offer does not satisfy the descriptive literature requirement of the brand name or equal clause. See B–161343, June 30, 1967; 41 Comp. Gen. 366 (1961). In this connection, it should be noted that the brand name or equal clause references cuts, illustrations, drawings, and other "information" as the types of descriptive material to be furnished in connection with the evaluation of an "equal" product. Accordingly, we do not believe that a mere promise to conform may logically be regarded as constituting "information" within the contemplation of that clause.

Regarding your contention that the descriptive data and operating model which you submitted after bid opening should have been con-

sidered, it is a fundamental principle of the competitive bidding system that the responsiveness of a bid must be determined from the contents of the bid itself, without reference to extraneous aids or explanations submitted after bid opening, in fairness to those bidders whose offers strictly complied with all the solicitation requirements. 45 Comp. Gen. 221 (1965).

For the reasons set forth above, your protest must be denied.

[B-170751]

Contracts—Negotiation—Addenda Acknowledgment Requirement

The acknowledgment of a substantive amendment received after the closing time for receipt of proposals under a negotiated invitation for proposals issued pursuant to the public exigency authority in 10 U.S.C. 2304(a)(2), and which provides for award on the basis of initial proposals, may be accepted and the proposal considered in view of the fact negotiation procedures are more flexible than those used for advertised procurements. However, as the late acceptance of the addendum involves actions that constitute discussion within the meaning of 10 U.S.C. 2304(g) and paragraph 3-805.1(a) of the Armed Services Procurement Regulation, negotiations must be conducted with all offerors within a competitive range to obtain "best and final" offers, for notwithstanding the urgency of the procurement, an award may no longer be made on the basis of the initial proposals received.

To the Secretary of the Navy, September 23, 1970:

Reference is made to letter FAC 0211E dated September 10, 1970, with enclosures, from the Commander, Naval Facilities Engineering Command, and a supplemental report, with enclosure, of September 11, 1970, from the Head, Contract Procedures Branch, Naval Facilities Engineering Command, furnishing a report on the protest of Schirmer's Landscape Nursery, Inc. The protest concerns the proposal of Smith Grading and Paving Company, Inc. (Smith), under negotiated invitation for proposals (IFP) No. N62467-71-C-0072, issued by the Commanding Officer, Southern Division, Charleston, South Carolina.

The IFP was issued on August 24, 1970, under the authority of 10 U.S.C. 2304(a)(2), which authorizes the negotiation of contracts where the public exigency will not permit the delay incident to formal advertising. The date set for the receipt of proposals was August 28, 1970. The IFP solicited proposals for a construction contract to repair damaged reentry body magazines at the Polaris Missile Facility Atlantic, Charleston, South Carolina. Paragraph 8 of the Instructions to Proposers reads as follows:

Award of Contract. Upon receipt of proposals the Government will review them and may call upon the proposers for clarification or additional data and may conduct oral or written negotiations with some or all of those submitting proposals. All proposers are advised that award may be made without discussion or further negotiation of proposals received and, hence, proposals should be submitted initially on the most favorable terms from a price and technical standpoint. The

Government may, when in its interest, reject any or all proposals or waive any informality in proposals received.

We assume that the language that "the Government * * * may conduct oral or written negotiation with some or all" has reference to offerors within a competitive range. In addition, pargaraph 1 on the reverse side of Standard Form 20, a part of the IFP, cautioned prospective offerors as follows:

* * * Bids that do not reference all addenda * * * may be considered informal. * * *.

On August 26, 1970, the solicited offerors were telephonically advised by the procurement activity that Addendum No. 1 to the IFP had been issued. That addendum contained the following statement:

Each bidder shall refer in his bid to all addenda; failure to do so may constitute an informality in the bid.

A memorandum for the file dated September 4, 1970, sets out the substance of the telephone conversations with the prospective offerors as follows:

1. On the afternoon of 26 August 1970 the undersigned called each of the proposers for the subject contract to advise them that Addendum No. 1 had been mailed and the addendum changed the Base Course Thickness from 3" to 4½" compacted and that this was the only change. Each proposer was advised that the addendum should be acknowledged in the proposal. For Smith Grading and Paving Company, Inc. the addendum was discussed with Mr. C. D. Smith, Jr. [President of Smith].

The memorandum then furnishes an account of the events subsequent to the time established for submission of proposals.

2. Approximately one hour after the closing time for receipt of proposals, Mr. Edward Grover, Superintendent for Smith Grading and Paving Co., Inc. called the undersigned and advised that he had forgotten to acknowledge the addendum in his proposal, but that he had considered it in making the proposal and that he had called this office on the morning prior to the closing time for proposals and had the addendum read to him since he had not, at that time, seen the mailed copy. This phone call can be neither confirmed or denied.

3. Mr. Grover was advised to confirm his acknowledgment of the addendum and that a ruling as to its acceptability would be made. He was also advised that there was some variance between his proposal price and the governmnt estimate and he should review and confirm his proposal.

It should be pointed out at this juncture that the offer submitted by Smith contained the notation "ADD" in the appropriate space in IFP provided for acknowledgment of receipt of addenda. In response to a request for confirmation of Mr. Grover's acknowledgment of the addendum on behalf of Smith, that offeror by letter dated August 31, 1970, to the procurement activity, advised as follows:

This will confirm our verbal conversation with you August 28, 1970, that we were aware of addendum No. 1 that read, "Change base course thickness from 3 inches to 4½ inches compacted." This was omitted from our proposal by mistake, but our price was based on the specifications as amended by addendum No. 1.

We have thoroughly viewed our proposal and we feel that it is correct to the best of our knowledge.

If we are awarded this work, we will strive to complete it in strict accordance with the plans and specifications.

We are advised by the procurement activity that the implementation of the drawing change required by the addendum would "add approximately $3,000 to the value of the contract." Hence, the addendum effects a material and significant change in the contract requirements.

The protestant summarizes the bases for its protest as follows:

We are advised that the apparent low bidder, Smith Grading & Paving Company, either (1) did not effectively acknowledge Addendum No. 1 to Specification No. 06-71-0072 or (2) that they completely failed to acknowledge receipt of said specification. In either event we feel that our client has been substantially and materially prejudiced by the bidding procedure involved in this procurement.

Since we believe that the notation "ADD" in Smith's proposal may not be considered as an acknowledgment of the addendum, there is for resolution the question whether the failure of the offeror to acknowledge receipt of the addendum in a negotiated procurement precludes consideration of its proposal.

It is a well-established rule that the failure of a bidder under a formally advertised procurement to acknowledge, prior to bid opening, receipt of an addendum which effects a material change renders the bid nonresponsive. 42 Comp. Gen. 490 (1963), and the cases cited therein. However, in 47 Comp. Gen. 459 (1968), involving a somewhat similar case, we held that, in view of the flexibility attendant to negotiation procedures, the failure of an offeror to acknowledge receipt of an addendum would not necessarily preclude consideration of the affected proposal. We observed that in the normal negotiated procurement, the acknowledgment of the receipt of an addendum as well as any changes in the proposal price of a given offeror brought about by the addendum properly might be the subject of negotiations provided other offerors or the Government were not prejudiced. In conclusion, we stated that:

* * * strict application of the late addendum rule is not appropriate in every case involving a negotiated procurement, dependent, of course, upon the particular and unique circumstances involved.

See, also, B-165608, February 12, 1969.

The requests for proposals in the above-cited cases, as does the IFP in this case, provided that the Government may make award on an initial proposal basis without discussion or negotiation with offerors and, also, that failure to acknowledge receipt of addenda might result in rejection of the proposal. In these cited decisions, we held that the rejection of offers, wherein there were failures to timely acknowledge addenda, was proper in view of the necessity for making prompt awards and the fact that awards were made on an initial proposal basis.

It is clear that Smith's telephonic addendum acknowledgment, the

subsequent request by the procurement activity that Smith confirm both his acknowledgment of the addendum and his proposal price, and Smith's later confirming letter constituted negotiations or "discussions" within the meaning of 10 U.S.C. 2304(g) and Armed Services Procurement Regulation 3-805.1(a). Under the cited statute and regulation, written or oral discussions are required to be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, unless award is contemplated on an initial proposal basis. Although the IFP specifically provides that an award may be made on an initial proposal basis, once discussions have been initiated with one offeror subsequent to the receipt of initial proposals, award no longer may be made on the basis of initial proposals. See B-165837, March 28, 1969.

We believe that the concept of awarding of contracts by the negotiation process dictated the very actions taken by the procurement activity in this case. In this regard, in 47 Comp. Gen., *supra*, at page 461, we recognized that the negotiation process should be utilized to cure a failure to acknowledge an addendum "provided other offerors or the Government are not prejudiced thereby."

Since we concluded that Smith's proposal may be considered for award on the basis that Smith's obligation under the addendum has been negotiated, there is imposed a concomitant obligation on the Government to conduct negotiations with the other offerors. In B-166052(1), May 20, 1969, we construed the above-cited statutory and regulatory provisions as requiring that, if discussions have been conducted with one offeror, then discussions shall also be conducted with all responsible offerors whose proposals are within a competitive range, price and other factors considered. See, also, 46 Comp. Gen. 191 (1966); B-158528, April 26, 1967. In view of the reported urgency of this procurement, we invite your attention to 49 Comp. Gen. 156 (1969) and B-168671, March 2, 1970, wherein we did not question a procurement activity's actions in requesting the submission of "best and final" offers within 3 hours and 1 day, respectively.

Accordingly, Smith's offer may be considered for award provided other offerors in a competitive range are given an opportunity to submit their "best and final" offers. See in this regard 48 Comp. Gen. 663, 667-668 (1969).

[B-153485]

Courts—District of Columbia—Court of General Sessions—Transcripts

The cost of a transcript in a civil matter for an indigent litigant at Government expense ordered by the District of Columbia Court of General Sessions in connection with an appeal may not be paid by the Federal Government on the basis the United States Court of Appeals for the District of Columbia Circuit

held in *Lee* v. *Habib* that the United States must pay for transcripts that are needed to resolve a substantive question when an indigent litigant is allowed to appeal in *forma pauperis* to the Appeals Court. The *Lee* case holding that 11 D.C. Code 935 makes 28 U.S.C. 753(f) applicable to the Court of General Sessions does not enlarge the authority to furnish transcripts at Federal expense to include the civil litigation of private parties, as both the *Lee* case and cited *Tate* case involved criminal actions brought by the United States in the U.S. Branch of the Court of General Sessions, whereas in civil cases the Court functions as a local or municipal court.

To the Chief Judge, District of Columbia Court of General Sessions, September 24, 1970:

Your letter of June 16, 1970, raises a question concerning payment for transcripts for indigent litigants.

The facts and circumstances giving rise to the matter as disclosed by your letter are set forth below.

On January 22, 1970, the United States Court of Appeals for the District of Columbia Circuit held in *Lee* v. *Habib*, No. 22,203, that "the United States must pay for transcripts for indigent litigants allowed to appeal in *forma pauperis* to the District of Columbia Court of Appeals if the trial judge or a judge of the DCCA certifies that the appeal raises a substantial question the resolution of which requires a transcript." Judge Edmund Daly of the District of Columbia Court of General Sessions has now entered an order in *Pickett* v. *Williams*, C.A. No. L&T 74757-69, in connection with an appeal taken in that action ordering the preparation of a transcript at Government expense pursuant to the *Lee* decision.

You are presently attempting to make the administrative arrangements necessary for the execution of this order and other similar orders which may be expected to be entered in other actions. You advise that a preliminary search of applicable documents and consultations with appropriate officials have disclosed no appropriation specifically earmarked for payment by the United States of the cost of transcripts in civil cases arising in the Court of General Sessions. You state, however, that the decision of the United States Court of Appeals is quite specific in requiring that such payment be made, and insofar as the District of Columbia Court of General Sessions is concerned, the mandate of the Court of Appeals must, of course, be carried out.

In light of the foregoing, you request our decision—

* * * on this issue, specifically as to the appropriation that is or may be made available for the payments of transcripts in civil actions litigated in the District of Columbia Court of General Sessions, and as to the method that may be employed by the Court or by the parties to effect payment for such transcripts out of appropriated funds to the respective court reporters.

The basis for the holding of the United States Court of Appeals in the *Lee* case was that 11 D.C. Code 935 makes 28 U.S.C. 753(f) applicable to the District of Columbia Court of General Sessions.

Insofar as payment for transcripts by the United States for indigents in civil proceedings in United States district courts is concerned, 28 U.S.C. 753(f) provides, in part, as follows:

> Each reporter may charge and collect fees for transcripts requested by the parties, including the United States, at rates prescribed by the court subject to the approval of the Judicial Conference. He shall not charge a fee for any copy of a transcript delivered to the clerk for the records of court. Fees for transcripts furnished in criminal or *habeas corpus* proceedings to persons allowed to sue, defend, or appeal in *forma pauperis* shall be paid by the United States out of money appropriated for that purpose. * * * *Fees for transcripts furnished in other proceedings to persons permitted to appeal in forma pauperis shall also be paid by the United States if the trial judge or a circuit judge certifies that the appeal is not frivolous (but presents a substantial question).* The reporter may require any party requesting a transcript to prepay the estimated fee in advance except as to transcripts that are to be paid for by the United States. [Italic supplied.]

As to 11 D.C. Code 935 making 28 U.S.C. 753(f) applicable to the Court of General Sessions so as to entitle an indigent litigant to a transcript at the expense of the United States, in B–153485, dated March 17, 1964, we pointed out that this code section (11 D.C. Code 935) merely authorizes the General Sessions Court reported to charge the United States for transcripts furnished and that it does not literally or by implication enlarge the authority of 28 U.S.C. 753(f) with respect to the furnishing of transcripts at Federal expense. We are still of this view.

In support of its holding in the *Lee* case the court cited *Tate* v. *United States*, 123 U.S. App. D.C. 261, 359 F. 2d 254 (1966). In the *Tate* case the United States Court of Appeals for the District of Columbia held that 11 D.C. Code 935 makes the fee provision in 28 U.S.C. 753(f) applicable to the Court of General Sessions, and that, hence, a defendant prosecuted in the United States side of the Court of General Sessions who is allowed to appeal in *forma pauperis* to the District of Columbia Court of Appeals is entitled to a transcript at the expense of the United States. In the *Tate* case, however, the court made the following statement:

> * * * We make it clear at the outset that we confine our discussion to prosecutions brought by and in the name of the United States.

In light of the *Tate* case we held in 48 Comp. Gen. 569 (1969) that the Administrative Office of the United States Courts may use appropriations available to it to pay costs incurred pursuant to the authority in 28 U.S.C. 753(f) to pay for transcripts for defendants prosecuted by and in the name of the United States in the United States Branch of the District of Columbia Court of General Sessions. Although not so stated therein, our decision in 48 Comp. Gen. 569 was based primarily on the fact that in the *Tate* case the United States not only brought the prosecution but chose the court in which the case would be tried, i.e., the Court of General Sessions rather than

the United States District Court. Thus, insofar as 28 U.S.C. 753(f) is concerned, we followed somewhat the same reasoning in 48 Comp. Gen. 569 as we did in 45 Comp. Gen. 785 (1966), wherein we held the Criminal Justice Act of 1964 applicable to the United States Branch of the District of Columbia Court of General Sessions. That is to say, one of the premises for our holding in the last-cited decision was that the United States determined whether a defendant in a criminal case was to be tried in the United States District Court or the Court of General Sessions. In that decision, we stated that it was difficult to reach the conclusion that the Congress intended a defendant's entitlement under the Criminal Justice Act to be dependent upon whether the United States should choose to prosecute him in one court rather than another. The same reasoning would seem to apply to 28 U.S.C. 753(f) insofar as criminal prosecutions are concerned.

Insofar as civil cases are concerned, there is not a United States Branch of the District of Columbia Court of General Sessions. Moreover, in civil cases in the District of Columbia involving private parties, the United States has no choice as to which court such case will be tried. If there is any choice as to which court in the District of Columbia a civil case involving private litigants may be tried, the discretion appropriately would be in one of the parties to the litigation.

Thus, while 28 U.S.C. 753(f) (as well as the Criminal Justice Act of 1964) may reasonably be considered applicable to the United States Branch of the District of Columbia Court of General Sessions, in our opinion the cited code provision is not applicable to civil cases involving private litigants where the Court of General Sessions exercises the functions of a local or municipal court without any Federal involvement whatsoever.

Further, in connection with the matter, we have been advised by the Director of the Administrative Office of the United States Courts that "there is no authority to use the Federal Judicial appropriations as the source of funds to pay for transcripts furnished indigents" in cases such as the instant one, and that the Administrative Office does not budget for such costs.

Since, in our opinion, 28 U.S.C. 753(f) is not applicable to civil cases (or to criminal cases to which the United States is not a party) brought in the District of Columbia Court of General Sessions, costs of transcripts for indigent litigants involved in such cases may not be paid from Federal funds. Moreover, the financing of these costs in such cases would appear to be more closely related to the District of Columbia Government than to the Federal Government.

While we recognize that the case in question and others like it might present problems, we cannot overlook the fact that the appro-

priation and use of public funds, including revenues of the District of Columbia, are constitutional prerogatives of the Congress; and we have found no appropriation of the Federal Government or of the District of Columbia Government which appears available for the purpose in question.

The question presented is answered accordingly.

[B-168712]

Contracts — Specifications — Restrictive—Particular Make—"Or Equal" Not Solicited

The solicitation of proposals on a brand name basis without an "or equal" provision in accordance with paragraph 1-1206.1(b) of the Armed Services Procurement Regulation under the negotiation authority contained in 10 U.S.C. 2304(a)(7), and pursuant to a "Determination and Findings" that the sole source procurement of the sterilizers to be purchased is justified, is restrictive of competition unless no other item will meet the Government's minimum requirements or none other but the sole source manufacturer can produce an acceptable sterilizer. Therefore, as there is nothing particularly unique about the design or manufacture of the brand name sterilizer, the fact that it has been proven satisfactory in use does not justify the sole source procurement. Although the justification for the procurement is a final determination, the sole source solicitation stated in the request for proposals should be eliminated.

To the Director, Defense Supply Agency, September 24, 1970:

Reference is made to a letter dated February 16, 1970, from an Assistant Counsel, furnishing our Office with an administrative report on the protest by Spectronics Corporation under request for proposals No. DSA120-70-R-1081, issued by the Defense Personnel Support Center (DPSC), Philadelphia, Pennsylvania. In addition, by letter dated May 21, 1970, and by telephonic communication of August 24, 1970, the Assistant Counsel furnished us with supplementary information concerning the protest.

The subject RFP was issued on December 16, 1969, pursuant to the required "Determination and Findings" (D&F) executed by the contracting officer on December 8, 1969. On June 26, 1970, RFP amendment No. 0001 extended the date set for receipt of proposals to July 3, 1970. The RFP originally described the procurement as consisting of 360 sterilizers "SURGICAL INSTRUMENT AND DRESSING Pressure, Electrically and Fuel Burner Heated, Corrosion-Resisting Metal, Automatic Control, 110 volt, 60 cycle, A-C." It was also stated that the items:

Shall be in accordance with the specifications contained in Purchase Description No. 7 dated 24 November 1969. Amendment No. 3 dated 28 September 1960.

However, the reference to purchase description No. 7 was deleted by amendment 0001, and the following was substituted therefor: "Shall

be Scientific Equipment Manufacturing Corp. Model R–816." The absence of the usual phrase "or equal" is explained by reference to the provision in paragraph 1–1206.1(b) of the Armed Services Procurement Regulation (ASPR):

The words "or equal" should not be added when it has been determined in accordance with (a) above that only a particular product meets the essential requirements of the Government, as, for example, * * * (ii) procurement negotiated under 3–207 for specified medicines or medical supplies where it has been determined that only a particular brand name product will meet the essential requirements of the Government; * * *.

The negotiation authority for this procurement is contained in 10 U.S.C. 2304(a)(7) which provides:

(a) Purchases of and contracts for property of services covered by this chapter shall be made by formal advertising in all cases in which the use of such method is feasible and practicable under the existing conditions and circumstances. If use of such method is not feasible and practicable, the head of an agency, subject to the requirements for determinations and findings in section 2310, may negotiate such a purchase or contract, if—

(7) the purchase or contract is for medicine or medical supplies;

The regulatory implementation of this statutory authority is found in ASPR 3–207, subsection 2 of which states as follows:

The authority of this paragraph 3–207 shall be used only when the following two requirements have been satisfied:

(i) such supplies are peculiar to the field of medicine, including technical equipment such as surgical instruments, surgical and orthopedic appliances, X-ray supplies and equipment, and the like, but not including prosthetic equipment; and

(ii) whenever it is determined to be practicable, such advance publicity as is considered suitable with regard to the supplies involved and other relevant considerations shall be given for a period of at least 15 days before making a purchase of or contract for supplies or services, under this authority of this paragraph 3–207, for more than $10,000.

The D&F indicates that procurement of these supplies by negotiation is necessary because:

It is the professional medical determination by the Defense Medical Materiel Board dated 27 August 1969, that only the above product as manufactured by Scientific Equipment Manufacturing Corp. meets the minimum requirements of the Government. This Sterilizer is available only from Scientific Equipment Mfg. Corp.

The procurement history of this item is fully summarized in the contracting officer's report dated February 12, 1970:

As the nomenclature indicates, the sterilizer being purchased must be suitable for sterilizing, under steam pressure, dental, laboratory, and surgical instruments as well as dressings, supplies, and flasked solutions. The item was first standardized by the DMMB 27 March 1963 on the basis of the American Sterilizer Company's military model of their commercial model No. 8816M. The significant difference between these two models is that, in the military model, the electrical and mechanical controls, wiring, etc., were moved to the sides of the unit so that under field conditions, with no electric power source available, the unit could be ready for use with a field burner assembly employing a solid hydrocarbon or gasoline as fuel. Based upon essential characteristics established by DMMB and information furnished by the American Sterilizer Company, Purchase Description No. 1 was promulgated on 28 October 1963. Various additional changes in the specification were made, culminating in the Military Specification MIL–S–

36338(DM) dated 30 November 1964. This became MIL-S-36338A 10 February 1967, incorporating all changes which came about through production experience, for the most part through waivers and deviations requested by the contractors.

While the military specification development was in progress, purchase of approximately 4,083 sterilizers was accomplished from January, 1964, through February, 1968. Three firms received awards for the item. American Sterilizer Company, a large business, was awarded contracts for 305 sterilizers before it stopped bidding in 1966. Scientific, a small business firm until 8 August 1968, received awards for approximately 2,066 sterilizers. Spectronics, then, as now, a small business, received the balance, or about 1,712 items, under the contracts listed on page 2 of the protest letter of January 24. Between revisions to the MIL Spec itself, necessary modifications were accomplished by Purchase Descriptions, P.D. No. 6, dated 21 March 1968, revised requirements for rack, trays, and liners, allowed a cylindrical reservoir as an alternate, established U.L. requirements for the line cord, clarified performance requirements for the selector valve and modified the test for sterilization of solutions. This specification change was issued in connection with RFP R-3073. However, before the intended purchase of 245 sterilizers was made, the item was made Limited Standard and the procurement was cancelled. After an item is made Limited Standard by the DMMB, the item is no longer centrally procured; however, depot stocks of the item can be used until exhausted. The decision to make the sterilizer Limited Standard was made on 10 June 1968 and was directly related to the bad experience encountered in field use of the item. Toward the end of 1966, complaints began to come in from depots and using activities concerning the sterilizer manufactured by Spectronics. The defects complained of involved, for the most part, faulty design and poor workmanship. Perhaps the most significant defect was the faulty design of the selector valve which caused the unit to malfunction. So widespread was this problem that the contractor, Spectronics, was required to furnish correction kits consisting of parts, tools, manuals, and instructions, for all delivered and undelivered units. Spectronics furnished 942 correction kits to the Government. The balance was installed in the field by the using activities and the undelivered quantities were installed by the contractor. Other sterilizers were returned to depots for credit or repair. It is significant that the cost to the Government just to install the selector valve is estimated at $15,000.00. The contractor's costs are unknown. The repair kit was developed in coordination with Spectronics and was an expediency to get the units to function. While the selector valve replacement appeared to work satisfactorily and thus made the units useable, other areas of complaint remained unchanged. For example, problems remained regarding steam leakage through door sealing during operation; and poor design of low water cut off caused lag in activation thus damaging the chamber. The approach to these problems, aside from practical answers such as the repair kit, was to improve the specification. However, when it became clear that the specification was not sufficiently definitive to prevent the procurement of sub-standard supplies for the system, the DMMB reclassified the item to Limited Standard.

Because of the needs of the services, it became necessary to reinstate the item during the summer of 1969. Due to a lack of assurance that the specification would produce an acceptable item, and because of a satisfactory history of performance by the Scientific item under all of the expected field conditions, the DMMB, under the authority of paragraph VA6 of DoD Directive 5154.18 dated May 26, 1965, designated Model R816 sterilizer, manufactured by Scientific, as the sole source item.

Although the DMMB had designated sole source, DPSC nevertheless has continued its efforts to develop sufficient data for a competitive specification. In this effort a draft document has been prepared. While it was intended to issue a specification for the present procurement consisting primarily of the sole source designation, through error the draft specification was attached instead. Since it is intended to coordinate this specification with industry prior to use, to avoid the types of problems encountered in the past, this Purchase Description is being withdrawn and the purchase will proceed on the brand name designation, as intended. It is estimated that it will take approximately four months to prepare and coordinate the specification. After that, interested firms may offer qualification samples for DPSC and professional (DMMB) evaluation. A number of areas

still being considered for possible inclusion in the specification are indicted in the following list:

a. Possibility of adding a water-sight gage to reflect the water level in the reservoir.

b. Use of silicone impregnated material for door gaskets.

c. Designation of a pressure requirement to lock the door.

d. Introduction of an operational test to insure left and/or right operation of the door.

e. Modification of design for bracing of front panel when shell is removed.

f. Redesign manual filler/vent valves.

g. Assure ready accessibility of temperature control calibration adjustment.

h. Consideration of audible signal for end of cycle period.

It is anticipated that when the current proposed specification is fully coordinated and revised as necessary, an adequate competitive procurement document will result.

The report also includes the following statement:

In the present case, a professional determination has been made that this complex piece of equipment should be bought only from Scientific. The determination was made with knowledge of the history of the item, which shows that the only consistently acceptable sterilizer supplied in the past four years has been manufactured by Scientific. There is the further knowledge that when the sterilizer is needed to sterilize dressings or surgical instruments, its function is critical. Put a different way, there is no other safe and acceptable method of sterilizing the supplies and instruments, and if the sterilizer should malfunction, on board ship for example where repair facilities are limited, the use of these valuable instruments would be lost. While it is regrettable that sole source determinations must be made, it is obvious that there are occasions when such a determination is necessary. Rather than suggesting any impropriety or purpose of evasion, the history of the procurement of the sterilizer indicates a continuing effort to procure the item on a competitive basis with as definitive a specification as possible. It is considered that the plan outlined above is the best method for attaining the stated goal. Although the number of sterilizers being purchased is not great in comparison with previous procurements, the number to be purchased under this solicitation has been reduced to 205 so that the impact of the procurement is at the absolute minimum. The reduced figure represents the actual stated needs of the services and no provision has been made for the anticipated draw-down which should increase when word of availability is received by the services. Meanwhile, the coordination and revision of the specification and the professional evaluation of any samples will proceed. When such evaluation indicates that another firm is able to produce a professionally acceptable sterilizer under our specification, the sole source determination will be rescinded.

Concerning the restriction of this procurement to a sole source of supply, the action has been taken pursuant to a determination by the Defense Medical Materiel Board (DMMB) under the authority contained in paragraph V.A.6 of Department of Defense Directive 5154.18, May 26, 1965, which gives the DMMB authority to:

Determine those items for which sources of supply must be limited to selected producers to meet service professional requirements and designate the acceptable source of supply.

Under this directive, a DMMB determination concerning a professional medical end item would constitute a technical or scientific decision as to the minimum needs of the Government. See B–150387, July 9, 1963.

That portion of the D&F constituting the "findings" states as follows:

b. In view of the above, it is in the best interest of the Government to negotiate sole source based on professional evaluations, that only the above item meets the professional medical requirements of the military services.

On the basis of these findings, the Defense Personnel Support Center (DPSC) contracting officer in his "determination" stated that the use of a negotiated contract is justified because:

The purchase is for medicines or medical supplies for which procurement by formal advertising is not feasible and practicable.

This determination is final under 10 U.S.C. 2310(b) which reads as follows:

(b) Each determination or decision under clauses (11)-(16) of section 2304 (a), section 2306(c), section 2306(g)(1), section 2307(c) or section 2313(c) of this title and *a decision to negotiate contracts under clauses* (2), (7), (8), (10), (12), or for property or supplies under clause (11) of section 2304(a), *shall be based on a written finding by the person making the determination or decision, which finding shall set out facts and circumstances that* (1) are clearly illustrative of the conditions described in clauses (11)-(16) of section 2304(a), (2) clearly indicate why the type of contract selected under section 2306(c) is likely to be less costly than any other type or that it is impracticable to obtain property or services of the kind or quality required except under such a contract, (3) support the findings required by section 2306(g)(1), (4) clearly indicate why advance payments under section 2307(c) would be in the public interest, (5) clearly indicate why the application of section 2313(b) to a contract or subcontract with a foreign contractor or foreign subcontractor would not be in the public interest, or (6) *clearly and convincingly establish with respect to the use of clauses* (2), (7), (8), (10), (12), and for property or supplies under clause (11) of section 2304(a), *that formal advertising would not have been feasible and practicable. Such a finding is final* and shall be kept available in the agency for at least six years after the date of the determination or decision. A copy of the finding shall be submitted to the General Accounting Office with each contract to which it applies. [Italic Supplied.]

Although we may be precluded by this statute from disturbing the bases upon which the procurement was justified, we have serious reservations concerning the sole source aspect of the contemplated award.

As stated above, the procurement of the desired sterilizers on a brand name rather than on an "or equal" basis stemmed from the DMMB determination and ASPR 1-1206.1(b). Decisions of our Office have considered that ASPR section, and we believe it relevant to comment on those decisions. In B-148288, June 1, 1962, we referred to ASPR 1-1206 and held:

These regulations appear to be in accord with the decisions of this Office which are directed to prohibiting the solicitation of bids or proposals on any basis which will unduly or unnecessarily restrict competition. In effect, they prohibit contracting agencies from limiting bids or proposals to one or more named brands unless no other item will meet the agency's needs or *no other manufacturer is capable of producing a similar item which will meet the agency's needs.* * * *. [Italic Supplied.]

In discussing the available sources of supply for the item in question, we noted that:

* * * Subsequent information indicating that other manufacturers might be capable of producing acceptable items made it mandatory, in our opinion, that such manufacturers be given the opportunity to compete. * * *.

Citing that decision, in B–152158, November 18, 1963, we took the same view against the unnecessary and improper restriction of competition attendant to a negotiated procurement on a brand name basis and stated:

> We agree that the Armed Services Procurement Regulation, sec. 1–1206, prohibits the solicitation of proposals on any basis which will unduly or unnecessarily restrict competition; however, this regulation also provides in sec. 1–1206.1 (b) that a purchase description utilizing a brand name only may be used where no other item or manufacturer will meet the agencies' needs. In this regard where proposals are solicited on a brand name basis without an "or equal" provision and subsequent information indicates that *other manufacturers may be able to produce acceptable items*, it has been our opinion that such manufacturers must be given the opportunity to compete. See B–148288, June 1, 1962. [Italic Supplied.]

Continuing this line of reasoning, in B–165555, January 24, 1969, we did not object to the use of a brand name pursuant to ASPR 1–1206 since the brand name designee was the only manufacturer which had the proven ability to furnish the desired item.

Other decisions of our Office, set out below, have considered various bases for restricting competition to a single source of supply:

1. Time is of the essence and, as such, would not permit testing of a product offered by a source other than a sole source to meet the delivery schedule. B–167661(1), May 5, 1970; B–158550, June 29, 1966; B–158705, June 6, 1966; B–151310, June 25, 1963.

2. Item desired is unique and is the only known item which would meet the Government's needs. B–166325, May 28, 1969; B–163099, April 19, 1968; B–151310, *supra;* 33 Comp. Gen. 524 (1954).

3. Data unavailable for competitive procurement. B–161031, June 1, 1967; B–151416, June 26, 1963.

4. Necessity that the desired item manufactured by one source be compatible and interchangeable with existing equipment. B–152158, *supra.*

With the foregoing in mind, it is pertinent to observe here that it has been represented to our Office that there is nothing particularly unique about the design or manufacture of the sterilizer in question. In fact, we have been advised that the desired sterilizer is one of the simplest type of portable sterilizers available. In addition, we were informed that, at the time the procurement was instituted, only three firms manufactured the type of sterilizer desired. Since, as stated above, the Spectronics sterilizer had experienced field failures, and the American Sterilizer Company did not wish to bid, a sole source procurement was requested by DMMB. Also, we note that a proposed military specification designed to broaden competition for future procurements is before industry for comments.

We believe that a satisfactory basis has not been established by the record to support the contemplated sole source procurement. It is

clear that several companies have the ability to manufacture the desired sterilizer. The fact that a sterilizer manufactured by one company has proven satisfactory in use is not sufficient to justify a sole source procurement of the same sterilizer to the exclusion of others. See B-166555, June 3, 1969. We have learned that several Government agencies procure similar portable sterilizers by formal advertising or competitive negotiation. We recognize that the sterilizers will be used on board ship and, for that reason, other brands might require some adjustments and modifications. But this factor alone may not justify the elimination of other sterilizers from competition. See 47 Comp. Gen. 175, 181 (1967), wherein we stated, quoting from 44 Comp. Gen. 27 (1964):

> * * * the question of whether a company is at any point in time a sole source of a given item is difficult to resolve, since another firm may have private intentions to enter the market at the first opportunity, or one may be willing to alter its commercial or standard equipment in order to compete for a particular procurement or business. * * *

We appreciate that DPSC may have no option other than to adhere to the judgment of DMMB. However, in view of the particular aspects of this protest as discussed above, we recommend the elimination of the sole source restriction stated in RFP-1081. Since we regard this matter as one involving a procurement responsibility of your Agency, we would appreciate advice as to the actions contemplated or taken with reference to the procurement of the subject sterilizers.

[B-170261]

Contracts—Negotiation—Requests for Proposals—Distribution Limitation

The fact that the proposal timely submitted by a firm in response to a notice of the procurement in the Commerce Business Daily had not been obtained from the procuring agency does not justify the refusal to consider the offer on the basis of unfairness to the firms who had acquired a request for proposals (RFP) from the limited number made available on a "first received, first served" basis but were not permitted to compete because of the belief sufficient competition had been secured from the firms selected to receive an RFP, and unfairness to those firms unable to obtain the RFP. Although a purchasing agency may limit the number of prospective contractors solicited, this authority is not justification for not considering the unsolicited offer and for failing to obtain maximum competition. Therefore, the proposal refused may be resubmitted and all offerors who had submitted proposals afforded an opportunity to revise their proposals.

To the Secretary of the Army, September 24, 1970:

Reference is made to a letter dated August 24, 1970, with enclosures, from the Deputy for Procurement, Office of the Assistant Secretary, reporting on the protest of Interax, Inc., under request for proposals (RFP) No. DADA17-70-R-9005, issued by the U.S. Army Medical

Research and Development Command, Washington, D.C. The attorneys for the protestant contend that the contracting officer has improperly refused to consider the proposal submitted by Interax under that RFP.

The contracting officer states that on January 29, 1970, systems analysis personnel submitted to him the names of seven firms which they had selected for receipt of the RFP on the basis of their known technical capability and competence. After evaluating the nature of the proposed procurement, the dollar amount involved, the need for adequate competition, and the amount of time required of the Source Selection Board to evaluate each proposal received, the contracting officer states that he decided, in accordance with Armed Services Procurement Regulation (ASPR) 1-1002.1, to limit the number of solicitations to 50 copies. We are advised that 53 copies were actually prepared.

The April 9, 1970, issue of the Commerce Business Daily contained a synopsis of the RFP entitled "A Study to Develop Data Automation Requirements." The synopsis indicated that the RFP was to be issued on April 15, 1970, and that a preproposal conference would be held on May 8, 1970, and that offers were due on June 8, 1970. The synopsis made reference to Note 24 of the Numbered Note System, which explained that the RFP's were available in a limited number and would be furnished to the requester on a "first received, first served" basis.

A total of 198 prospective contractors responded to the notice in the Commerce Business Daily. Many of these firms subsequently indicated that they were not interested in submitting a proposal. We are advised that by April 14, 1970, the entire available supply of 53 RFP's had been exhausted. Seven of these were sent to the firms originally selected by systems analysis personnel, and the remaining 46 were distributed on a "first received, first served" basis. After the supply of RFP's had been exhausted, the contracting officer advised 45 requesters of this fact. We are advised that Interax was not among the 45 requesters who were unable to obtain a copy of the RFP.

On May 8, 1970, the preproposal conference was held as scheduled. Mr. Smith of Interax appeared at this conference. The contracting officer states that this was the first indication he had that Interax was interested in the RFP. After consultation with legal counsel, the contracting officer advised Mr. Smith that Interax was not among those firms solicited, and that any proposal submitted by them would not be considered to have been in response to the RFP.

Thereafter, seven proposals were received and accepted for evaluation on June 8, 1970. The contracting officer determined that this was a sufficient number of proposals to insure that the procurement would be on a competitive basis to the maximum practical extent.

However, on that same day, Mr. Smith of Interax timely tendered copies of his firm's proposal in response to the RFP to the contracting officer. The contracting officer states that he advised Mr. Smith that it would be improper for him to accept Interax's proposal and that to do so would be unfair to the 45 other prospective contractors who had relied in good faith upon the contracting officer's statement that additional proposals would not be accepted. We understand that Interax obtained a copy of the RFP from the Computer Planning Corporation which had received a copy of the RFP but declined to submit a proposal. The contracting officer accepted custody of the Interax proposal subject to a determination by legal counsel as to whether he might be obligated to accept it.

The record indicates that on June 18, 1970, legal counsel concluded that "the policy considerations strongly favor not evaluating the proposal from Interax, and unless you independently determine that it is in the best interest of the Government to evaluate it, I recommend that it not be evaluated." Based on this advice, the contracting officer by letter of June 22, 1970, returned Interax's proposal with the advice that it could not be "accepted for evaluation." This letter stated in pertinent part as follows:

> The essence of your position is that our acceptance of your proposal (it being in response to one of the fifty Requests for Proposals) will not be a violation of the distribution limit established by this office.
>
> Federal statutes allow for the limited distribution of RFP's. The purpose is, of course, to limit the number of firms approached. The intent is not that the fifty copies (as in this case) be passed from hand to hand until fifty interested firms are found. The number of RFP's determined proper and sufficient for a particular competitive procurement assumes that some firms will respond and some will not. Maintaining the limited number of RFP's is not a goal in itself but serves as a means of limiting the number of firms solicited, at the same time allowing ample competition. To accept your proposal merely because you have obtained one of the RFP's would be to lose sight of the intended effect of the statutes. Also, it would not be fair to other interested prospective contractors who could not receive copies of the RFP due to limited distribution.
>
> I have enclosed all the copies of your firm's proposal which Mr. Smith delivered to us.

By letter dated July 8, 1970, the attorneys for Interax protested the refusal of the contracting officer to consider its proposal. This letter states in part as follows:

> RFP DADA17-R-9005 was sent to a limited number of potential contractors. Interax, Inc. did not receive a copy of the RFP. Interax, Inc. noted the solicitation in the "Commerce Business Daily" and requested a copy of the RFP. This request was denied allegedly because no copies were available at the time the Purchasing and Contract Office received the request by Interax, Inc. Interax, Inc., however, obtained a copy of the RFP from Computer Planning Corporation which received a copy directly from the Army but did not intend to bid. Interax, Inc. responded to the RFP and submitted its proposal to the proper office before the close of business on the date set in the RFP for receipt of proposals. * * *.

The issue for our determination is whether the proposal timely submitted by Interax in response to the RFP must be accepted and evalu-

ated. The Judge Advocate, U.S. Army Medical Research and Development Command, in a memorandum dated August 17, 1970, states that the contracting officer is not required to accept and evaluate the proposal of Interax. The position of the Judge Advocate as summarized in the above-cited memorandum is as follows:

9. In summary then, it is my opinion that:

"a) Neither the statutes, regulations, or any other authorities specifically *require* the contracting officer to accept and evaluate *all* proposals, where, as here, the administrative costs of Source Selection Board evaluation could exceed the total estimated amount of the procurement.

"b) Since the contracting officer did *not* 'solicit' a proposal from Interax but, on the contrary, clearly told them, well in advance, that their proposal would not be accepted, there was neither express nor implied promise to accept and evaluate under the rule of *Heyer Products, supra* [177 F. Supp. 251 (1959)].

"c) Since there was no regulatory *requirement* to evaluate and since no such requirements arose due to solicitation, the decision was one which was properly within the discretion of the contracting officer.

"d) Under the facts of the instant case wherein 1) Interax had been told, as had all other interested firms, that proposals would be accepted only from those first 53 firms solicited; 2) Interax was told that they could submit a proposal through, or in affiliation with, Computer Planning Corporation, and that in such case their proposal *would* be accepted and evaluated; 3) The Contracting Officer determined that the seven proposals received and evaluated were sufficient, considering the nature and dollar value of this procurement, to insure adequate competition as required by law; that the Contracting Officer did not abuse his discretion by refusing to accept and evaluate the proposal submitted by Interax."

The Judge Advocate contends that it would not be violative of the spirit of full competition to refuse to consider Interax's proposal and that the test should be whether, as in our decision B-152001, January 10, 1964, there has been sufficient competition to show that the procurement was reasonable and nondiscriminatory. In the cited decision, we held that the solicitation of 13 sources was sufficient to have met the requirements of ASPR 3-102(c) even though there were other qualified sources available. However, that decision did not deal with the refusal of a contracting agency to consider a proposal which was timely submitted by a firm which was not solicited. The question involved here is not whether a procuring agency may limit distribution of RFP's but whether a procuring agency can refuse to consider a proposal which was timely submitted on the basis that it would be unfair to other interested firms who were denied copies of the RFP and hence an opportunity to compete.

The contracting officer is of the opinion that he may limit the number of proposals to be evaluated, provided that such limitation is in good faith, without abuse of discretion, and to the end that the procurement will be made to the best advantage of the Government, price and other factors considered. However, the contracting officer also states that this appears to be a question of first impression and that no authority can be found which either requires or forbids the contracting officer from accepting for evaluation a proposal received from a firm other than one to whom an RFP was furnished.

Interax urges that there is an obligation on the part of the contracting officer to accept and evaluate each and every proposal received, whether or not it had been solicited by the contracting officer for proposal purposes. Interax contends that the contracting officer has no authority to refuse to consider proposals submitted by firms other than those receiving a copy of the RFP directly from the Army. Further, Interax states that there is no statutory or ASPR bar to using an RFP sent initially to another source or to using one obtained pursuant to the Freedom of Information Act, 5 U.S.C. 552.

Upon review of the entire record before us, it is our opinion that the proposal submitted by Interax should have been accepted and considered for evaluation. The fact that adequate competition would exist without considering Interax's proposal would not justify the procuring activity's refusal to accept the timely proposal submitted by Interax. The spirit and intent of the law requiring maximum competition would not be served unless Interax's proposal is accepted and considered. See 10 U.S.C. § 2304(g); ASPR 1-300.1; 3-101; 3-102(c).

We believe that this statutory and regulatory requirement for maximum competition would be compromised if Interax—the eighth offeror—would be excluded from participating in the procurement because it was either not directly solicited or not the initial recipient of an RFP. Of course, the requirement for maximum competition consistent with the nature of the procurement does not require the purchasing activity to solicit an excessive number of prospective contractors. Such a requirement would be costly and burdensome to the Government in the preparation, distribution, and evaluation of the proposals. Where the number of prospective contractors is excessive, the purchasing agency may limit the number of prospective contractors solicited pursuant to ASPR 2-205; 3-503. However, the authority to limit the number of prospective contractors solicited may not be relied upon to deny competitive opportunity to an unsolicited offeror. Although the purchasing agency is permitted to limit the number of prospective contractors solicited, the purpose of such limitation is to restrict the Government's administrative burden and to make it unnecessary to solicit all potential sources where the resulting costs would be inconsistent with the value of the procurement.

Considering that 53 copies of the RFP were distributed, it would seem to follow that the acceptance and consideration of 53 proposals submitted in response to the RFP would have been required even under the arguments advanced by the Judge Advocate. We cannot subscribe to the proposition advanced that an invitation to compete is a prerequisite to the Government's obligation to fairly consider a proposal. Rather, we feel that the law and regulations, properly construed, require that any offer timely and properly submitted in re-

sponse to a notice in the Commerce Business Daily be fairly and objectively considered in competition with others received in response to direct solicitations by the procuring agency. Neither do we see that any "unfairness" would result in the case of those firms which were unable to obtain for their own use copies of the RFP if Interax's proposal is accepted and considered. We attribute this "unfairness" to the 53-copy limitation imposed by the procuring agency and not to the fact that Interax obtained a copy of the RFP from a solicited source.

We have been advised that no award has been made under the RFP. In view of our conclusion that Interax's proposal should have been accepted and considered for evaluation, we concur in the Department's recommendation to authorize the contracting officer to permit Interax to resubmit its proposal for evaluation and consideration for award. However, it will be necessary to afford all offerors who submitted proposals an opportunity to revise their proposals. See 10 U.S.C. 2304(g) and ASPR 3-805.

[B-170459]

Transportation—Dependents—Military Personnel—Dependency Status—Child in *Ventre Sa Mere*

Although a child in *ventre sa mere* on the effective date of the permanent change-of-station orders of the father, a member of the uniformed services, may not be considered his dependent for the purposes of 37 U.S.C. 406(a) authorizing transportation at Government expense of persons dependent upon a member on the effective date of change-of-station orders, in view of the beneficial purposes of the statute, regulations may be issued to authorize reimbursement for the cost of travel to a member's new station of his child born after the effective date of his change-of-station orders if his wife's travel to the new station at Government expense prior to the birth of the child is precluded by departmental regulations due to the advanced stage of her pregnancy.

To the Secretary of the Army, September 24, 1970:

Further reference is made to letter of July 14, 1970, from the Office of the Secretary of the Army (Deputy for Reserve Affairs) requesting a decision whether a child in *ventre sa mere* may be considered a dependent for the purpose of entitlement to transportation at Government expense when such child is not born until after the effective date of permanent change-of-station orders of the military member father. The request was assigned Control No. 70-38 by the Per Diem, Travel and Transportation Allowance Committee.

In the letter of July 14, 1970, it is said that paragraph M7000 of the Joint Travel Regulations, Volume 1, provides that members of the uniformed services are entitled to transportation of dependents at Government expense upon permanent change of station except

when dependency does not exist on the effective date of the order directing the permanent change of station. However, when travel of dependents is delayed until after the effective date of permanent change-of-station orders for the purpose of waiting for the birth of a child, question arises whether such child is in existence as a dependent on the effective date of such orders so as to entitle the member to its transportation at Government expense.

The letter mentions that in 34 Comp. Gen. 415 (1955), we held that the right of an illegitimate child to the 6 months' death gratuity authorized by the act of June 4, 1920, was not defeated by the fact that the child was unborn on the date of notification of the death of the member, citing *In re Seabolt*, 113 F. 766, 771. In that decision, we quoted from the *Seabolt* case, which held that a child in *ventre sa mere* is a child while yet unborn, and that from the time of conception the infant "is in esse for the purpose of taking any estate which is for his interest." Similarly, it has been held that an unborn child in esse at the time of an accident has a right of action for workmen's compensation against the employer of its father because of the father's injuries suffered in the accident. *Routh* v. *List & Weatherly Constr. Co.*, 257 P. 721 (Kansas 1927).

Those decisions relate to the child's entitlement to claim in its own right the payments concerned. Since the permanent change-of-station benefits provided by 37 U.S.C. 406(a) are authorized for the member and not for his dependents in their own right, such decisions are not controlling in this case.

Admittedly, for the purpose of the transportation provided by 37 U.S.C. 406(a), the term "dependent" is defined in 37 U.S.C. 401 as including the member's unmarried children under 21 years of age without other limitation.

However, the purpose of the statutes authorizing transportation of dependents at Government expense is to relieve a member of the Armed Forces of the burden of personally defraying the expenses of moving his dependents between stations when such move is made necessary by an ordered change of station. And it consistently has been held that the transportation is limited to such persons as are dependent upon the member on the effective date of the orders. See 37 Comp. Gen. 715.

Accordingly, it must be concluded that generally a child in *ventre sa mere* on the effective date of change of permanent station orders may not be considered to be a dependent for the purposes of 37 U.S.C. 406(a) and with the exception hereafter noted, your question is answered in the negative.

Having in mind the beneficial purposes of the statute, and notwithstanding the fact that no transportation cost would be incurred for

the child if the mother traveled to the new station prior to its birth, we would not be required to object to the promulgation of regulations authorizing reimbursement for the cost of travel to the member's new station of his child born after the effective date of his change-of-station orders if his wife's travel to the new station at Government expense prior to the birth of the child is precluded by departmental regulations due to the advanced stage of her pregnancy.

[B-170093]

Contracts—Negotiation—Disclosure of Price, Etc.—Auction Technique Prohibition

While the Government's failure to establish a common cutoff date under a request for proposals for computer time and services prevented the closing of negotiations, the contracting officer's refusal to negotiate a price reduction was proper in view of discussions constituting negotiations during which vital information concerning the successful offeror's proposal was erroneously but innocently revealed, for to permit a price reduction under the circumstances would compromise the Federal Procurement system by allowing the auction technique precluded by section 1-3.805-1(b) of the Federal Procurement Regulations. Although the contract awarded is not required to be terminated, in view of the procedural deficiencies in the procurement the contract option should not be exercised unless it is impracticable to reprocure the services on an equal competitive basis.

Equipment—Automatic Data Processing Systems—Computer Service—Evaluation Propriety

A point system evaluation of proposals for computer time and services under which the number of points to be awarded for basic costs is to be determined from an offeror's "pricing out," or cost for the requirements stated in the sample problem included in the solicitation that is not considered indicative of cost differences between suppliers for every proposed computer application contemplated under the contract, but, rather, typical of the work to be performed, is a proper method of evaluation, notwithstanding the amount of memory or core size was not frozen in the sample, as the factors frozen are of greater significance as to price than the variations in the core size of the sample.

To the Computer Network Corporation, September 28, 1970:

This is in reply to your telegram of June 18, 1970, and to counsel's supporting letters of June 24 and August 17, 1970, protesting the award of a contract to U.S. Time-Sharing, Inc. (U.S. Time), under Department of Labor request for proposals No. L/A 70-8.

You have requested our Office to instruct the Department of Labor to refrain from exercising any further options available under the contract since you believe that you were improperly denied an opportunity to negotiate, that there was an invalid comparison of prices offered, and that U.S. Time's proposal was in effect nonresponsive.

The solicitation contemplated the award of a contract for computer time and services to provide the Department with temporary avail-

ability of a system with hardware and software characteristics, both of which would be similar to those in the system presently being installed by the Department. The solicitation specified that a minimum hardware configuration and mandatory software requirements were to be available in the offeror's system. It was contemplated that this duplicate hardware and software capability would expedite the conversion of existing systems into the Department's new central data processing system.

The solicitation provided that proposals would be evaluated on the basis of the following point system:

	Range
Turnaround time (increase in cost factor for less than 2 hrs.)	0–15 points
Turnaround time (increase in cost factor for less than 4 hrs.)	0–10 points
Equipment and Operating System Compatibility	0–25 points
Basic Cost (based on less than 6 hrs. turnaround)	0–20 points
Systems engineering support	0–15 points
Operational support	0–10 points
Distance from DOL	0– 5 points
Total	0–100 points

Inasmuch as suppliers of computer time charge for services according to their uniquely developed algorithms, it is difficult to compare costs. The number of points to be awarded for basic cost was, therefore, to be determined on the basis of the offeror's "pricing out," or cost for, the requirements stated in a sample problem included in the solicitation. The Department reports that the sample problem is not indicative of cost differences between suppliers for every proposed computer application contemplated under the contract; rather, it is generally typical of the work contemplated.

The sample problem established as constant the time allowed and the number of inputs to the computer; however, the amount of memory or core size was not frozen and was for determination by the individual offeror. You contend that unless memory is fixed at a set figure, the basis for comparing prices is vitiated. The Department disagrees with your position and states that those factors which were frozen in the sample problem are of far greater significance as to price than variations in the core size, and that care was taken to insure that differences in core size would have a relatively small impact upon price computations.

The Department's report to this Office establishes that U.S. Time's pricing of the sample problem is less than yours, and it appears that even if your memory values were substituted in U.S. Time's algorithm

where variables were permitted, the new resulting cost for the sample problem would still be less than your proposed cost. Moreover, it appears that the variability of the core size had only a slight impact upon price since very small differences resulted from substituting both U.S. Time's and your memory values in the other's algorithm. Since the establishment of factors for evaluation of proposals for computer time requires the exercise of expert technical judgment by the agency, and since the evaluations with the different core sizes did not significantly affect your competitive position, we perceive no compelling reason to question the method outlined in the solicitation for comparing basic costs.

You also argue that in any event you assumed that at the very minimum offerors would be required to perform the sample problem with at least the core sizes set forth in section III of the solicitation, requiring availability of certain mandatory programs and minimum hardware configuration in the offeror's total system. Counsel contends that U.S. Time's failure to abide with such core sizes renders its proposal nonresponsive. It is the Department's position, and our review substantiates such position, that the solicitation contained no language to the effect that the mandatory programs or minimum hardware configuration were required to be utilized to that degree in the solution of the sample problem. Moreover, it is reported that in pricing out the compile step in the sample problem the core size utilized by you (120K) did not measure up to the solicitation's mandatory availability level of 150K. We see no basis for concluding that either your proposal or that of U.S. Time should have been determined to be unacceptable in this respect.

It is also your position that the contracting officer improperly denied your firm an opportunity to discuss your offer of a reduction in price, which you state is evident from the sequence of events leading up to the award as outlined in the administrative report. You state that the refusal to negotiate was contrary to Federal Procurement Regulations (FPR) 1-3.101(d) which requires negotiated procurements to be conducted on a competitive basis to the maximum practical extent.

The administrative report shows that the four proposals received in response to the solicitation were opened by the contracting officer on May 7, 1970. Thereafter, they were forwarded to the Computer System Division of the Departmental Data Processing Center for evaluation. During technical evaluation of your proposal, a discrepancy was noted in the application of your algorithm to the sample problem and discussions were conducted, whereupon you changed your algorithm and your proposal was evaluated on the basis of a lower price than you

had originally offered. Thereafter, technical discussions were again held to eliminate additional discrepancies in your proposal. While your counsel contends that these discussions did not constitute negotiations, since they were held with technical personnel within the Department, we note that your proposal was in fact evaluated by the contracting officer as revised by these discussions.

As a result of the technical evaluation of proposals, two of the four offerors were eliminated from further consideration. At the time the evaluations were forwarded to the contracting officer, you had been given a point score of 79.6 while U.S. Time had obtained a score of 78. In reviewing the technical evaluation of proposals, the contracting officer noted that the score given to U.S. Time afforded no consideration to the statement in its proposal that no premium would be charged for less than 6 hours' turnaround time. Since the company included its standard commercial rates in its proposal, which conflicted with the above offer of no premium for less than 6 hours' turnaround time, the contracting officer decided to request clarification. U.S. Time advised him that it did not intend to charge such a premium, notwithstanding the contrary implication from its commercial rates. After assigning corrected point values to reflect this clarification, U.S. Time was ranked highest with 91 points to Comet's 79.6 (U.S. Time's score was subsequently reduced to 88 upon a change in proposed location of facility from Rosslyn to Reston, both in Virginia).

Thereafter, it appears that you requested a meeting with the contracting officer, apparently upon the advice that you were no longer in line for award. The agency reports that extensive and frequent meetings were held with you during the latter part of May through June 5, 1970. On May 27, 1970, you requested an opportunity to discuss a reduction in your price; however, the contracting officer declined to discuss any price modification in your proposal on the basis that you had obtained certain "inside" information during the meetings that would have been more appropriate for debriefing, and which had been made available to you with the implicit understanding that negotiations were at an end. It is further reported that prior to your request to modify your price, sufficient information was erroneously, but innocently, released to you at the end of May which would have enabled you to accurately determine the extent of reduction in pricing out the sample problem and/or reduction in premium for quick turnaround time that you would be required to make in order to yield a point value that would win the award.

Obviously, had the contracting officer established a common cutoff

date prior to his revelatory action, as provided for in FPR 1-3.805-1 (b), there would be no basis for protesting any refusal thereafter to negotiate. We have taken the position that until a common cutoff date for further modification of proposals is established for all offerors, it cannot be said that negotiations are closed or that modifications made either voluntarily or as a result of Government request should not be considered. 48 Comp. Gen. 536 (1969). While in the present case negotiations were never properly closed through the establishment of a common cutoff date, we believe that at the time you requested an opportunity to modify your price the contracting officer could not have entertained any further modifications by you for the purpose of bettering the offer submitted by U.S. Time, since vital information concerning U.S. Time's proposal had been revealed to you. To have permitted such modifications in those circumstances would have compromised the integrity of the Federal Procurement system by allowing that type of auction technique which the procurement regulations required the contracting officer to avoid. See FPR 1-3.805-1 (b).

For the reasons stated above, we are unable to conclude that the contract awarded to U.S. Time should be terminated. There is enclosed for your information, however, a copy of our letter of today to the Secretary of Labor wherein we point out the deficiencies in the procedures followed in this case, and advise against exercise of the option under the contract unless it is determined that it is impracticable to reprocure such services on an equal competitive basis.

[B-170451]

Pay—Increases—Comparable to Classified Employees—Adjustment

The fact that a reemployed civilian who while on military furlough served on active military duty was on a civilian roll on April 15, 1970, the date of enactment of the Federal Employees Salary Act of 1970, Public Law 91-231, does not entitle him under the act to a retroactive adjustment in basic pay for the active military duty performed during the period January 1, 1970, through March 15, 1970, as the act provides compensation increases for Federal classified employees only. However, although Public Law 90-207, December 16, 1967, provides for an increase in basic pay for military personnel whenever the General Schedule of compensation for Federal classified employees is increased, the Secretary of Defense in implementing the 1970 act pursuant to Executive Order No. 11525 prescribed that a member must have been on active duty on April 15, 1970, to be entitled to a retroactive adjustment in pay.

To Lieutenant Colonel C. R. Winder, United States Marine Corps, September 29, 1970:

Further reference is made to your letter dated July 14, 1970, your reference CA-CRW-ajm, requesting an advance decision in the case

of Captain Robert A. Jones, 010 20 32, USMCR, as to whether he may be paid the difference in basic pay for active duty served from January 1, 1970, through March 15, 1970, under the retroactive provisions of the Federal Employees Salary Act of 1970, Public Law 91-231, April 15, 1970, 5 U.S.C. 5332 note, by virtue of the fact that he was employed by the Department of Health, Education, and Welfare on April 5, 1970, and was on the rolls of that Department on April 15, 1970. Your letter was forwarded to this Office by the Disbursing Branch, Fiscal Division, Headquarters United States Marine Corps, and has been assigned control number DO-MC-1088 by the Department of Defense Military Pay and Allowance Committee.

It appears from the enclosures attached to your letter that Captain Jones was on military furlough from the Department of Health, Education, and Welfare and served on active duty as a member of the Marine Corps Reserve from January 1, 1970, through March 15, 1970. He returned to Federal service at the Department of Health, Education, and Welfare on April 5, 1970, and was carried on the rolls of that Department on April 15, 1970. In your request for an advance decision you state:

> The basis for doubt is whether service as a Civil Service employee on 15 April 1970 may be considered for the purpose of creating a right to retroactive basic pay for the period 1 January through 15 March 1970 under section 5(a) of the Federal Employees Salary Act of 1970 (Public Law 91-231, 84 Stat. 195) and implementing regulations.

The Federal Employees Salary Act of 1970 authorizes increases in rates of basic pay, basic compensation, and salaries of certain classes of civilian employees of the United States. These classes of officers and employees are specifically listed in the act. That act, by itself, does not authorize an increase in the basic pay for members of the uniformed services and the regulation to which you refer, Federal Personnel Manual Letter No. 531-40, June 23, 1970, is applicable to civilian employees of the Government, not military personnel.

An increase in the monthly basic pay of members of the uniformed services, whenever the General Schedule of compensation for Federal classified employees is increased, is authorized by section 8(a) of the act of December 16, 1967, Public Law 90-207, 81 Stat. 649, 654, 37 U.S.C. 203 note. Section 8(b)(2) of that act provides that any such increase shall carry the same effective date as that applying to compensation adjustments provided General Schedule employees. Therefore, when the Federal Employees Salary Act of 1970 authorized an increase in the rates of compensation for General Schedule Federal classified employees, the President issued Executive Order No. 11525, dated April 15, 1970, effective January 1, 1970, which, in section 1,

set forth the new rates of monthly basic pay for members of the uniformed services. Section 2 of the same Executive order provides as follows:

(a) A person who became entitled after December 31, 1969, but before the date of enactment of the Federal Employees Salary Act of 1970, to payment for items such as lump-sum leave, reenlistment and variable reenlistment bonus, continuation pay, any type of separation pay, or six months' death gratuity, shall not be entitled to any increase in any such payment by virtue of this order.

(b) Authority to prescribe other rules for payment of retroactive compensation shall be exercised for the uniformed services by the Secretary of Defense. Entitlement to retroactive pay under such rules shall be subject to the provisions of section 5 of the Federal Employees Salary Act of 1970, and shall conform as nearly as may be practicable to the provisions of Section 7 of the Act of December 16, 1967, 81 Stat. 654.

Section 5(a) of the 1970 act provides as follows:

(a) Retroactive pay, compensation, or salary shall be paid by reason of this Act only in the case of an individual in the service of the United States (including service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this Act, except that such retroactive pay, compensation, or salary shall be paid—

(1) to an officer or employee who retired, during the period beginning on the first day of the first pay period which began on or after December 27, 1969, and ending on the date of enactment of this Act, for services rendered during such period; and

(2) in accordance with subchapter VIII of chapter 55 of title 5, United States Code, relating to settlement of accounts, for services rendered, during the period beginning on the first day of the first pay period which began on or after December 27, 1969, and ending on the date of enactment of this Act, by an officer or employee who died during such period.

Such retroactive pay, compensation, or salary, shall not be considered as basic pay for the purposes of subchapter III of chapter 83 of title 5, United States Code, relating to civil service retirement, or any other retirement law or retirement system, in the case of any such retired or deceased officer or employee.

Section 7 of the 1967 act provides as follows:

Sec. 7. This Act becomes effective as of October 1, 1967. However, a member, except as provided in section 6 of this Act, is not entitled to any increases in his pay and allowances under section 1 or section 4 for any period before the date of enactment of this Act unless he is on active duty on the date of enactment of this Act. * * *

In accordance with section 2(b) of Executive Order No. 11525, which specifically authorizes the Secretary of Defense to prescribe the rules for payment of retroactive compensation for members of the uniformed services, the Deputy Secretary of Defense in a memorandum dated April 21, 1970, for the Assistant Secretary of Defense (Comptroller) prescribed rules implementing that order. Rule 2 of the memorandum provides as follows:

2. A person is not entitled to any increase in his basic pay by virtue of that Order for any period before April 15, 1970 unless he was on active duty on that date. * * *.

In line with that rule, entitlement to a retroactive increase in the basic pay received by Captain Jones for active duty performed by him as a Marine Corps Reserve officer during the period January 1

to March 15, 1970, is not authorized since he was not on active military duty on April 15, 1970.

[B-144605]

Military Personnel—Separation—Consent, Etc., Requirement

While the purpose of 10 U.S.C. 1163(a) is to prevent an officer of a Reserve component of the uniformed services with at least 3 years' commissioned service from being arbitrarily separated without the officer's consent, unless the separation is recommended by a board of officers convened by an authority designated by the Secretary concerned, there is nothing in the section to preclude an officer who has not consented to separation from waiving consideration by a board of officers.

Pay—Readjustment Payment to Reservists on Involuntary Release—What Constitutes Involuntary—Pregnancy

Under 10 U.S.C. 687(a), a member of a Reserve component, or a member of the Army or Air Force without component, who is relieved from active duty "involuntarily," is entitled to readjustment pay, and since it is mandatory under Air Force Regulation 36-12, which establishes procedures governing the separation of officers, to discharge a woman officer when a determination is made by a medical officer that she is pregnant, she is considered involuntarily separated and entitled to readjustment pay whether she is separated with or without her consent, the sole determining factor being that of pregnancy. Therefore, a Reserve officer separated without her consent by reason of pregnancy who waived the hearing and board recommendations in 10 U.S.C. 1163(a), having been involuntarily separated, is entitled to readjustment pay.

To the Secretary of Defense, September 30, 1970:

Further reference is made to letter dated July 15, 1970, from the Assistant Secretary of Defense (Comptroller) requesting a decision on two questions dealing with the matter of whether a female officer of a Reserve component who, without her consent, is separated for reasons of pregnancy, may be considered to be "involuntarily" separated so as to entitle her to readjustment pay "if she waives consideration by a board of officers referred to in 10 U.S.C. 1163(a)." The questions are stated and discussed in Department of Defense Military Pay and Allowance Committee Action No. 444, which accompanied that letter.

The questions presented are as follows:

1. May a female officer of a reserve component, without consenting to separation, waive consideration by the board of officers referred to in 10 USC 1163(a)?
2. If the answer to (1) is in the affirmative, would the separation without recommendations by the board of officers be considered involuntary for the purpose of entitlement to readjustment pay?

Concerning the separation of an officer of a Reserve component, 10 U.S.C. 1163(a) provides as follows:

(a) An officer of a reserve component who has at least three years of service as a commissioned officer may not be separated from that component without

his consent except under an approved recommendation of a board of officers convened by an authority designated by the Secretary concerned, or by the approved sentence of a court-martial. * * *

Under the provisions of 10 U.S.C. 687(a), except for members covered by subsection (b), a member of a Reserve component or a member of the Army or the Air Force without component who is relieved from active duty "involuntarily" under the circumstances there prescribed, is entitled to a readjustment payment computed on the basis there indicated. Subsection (b)(1) of section 687, the part of that subsection applicable here, precludes payment of readjustment pay to a member who is relieved from active duty at his request.

In our decision of January 27, 1961, B-144605, cited in the Committee Action, we considered the question of entitlement to readjustment pay in the case of a female Air Force Reserve officer who refused to tender her resignation on account of pregnancy as prescribed in section III, AFR 36-36, March 27, 1953, then in effect, and whose discharge was effected pursuant to the approved recommendations of a board of officers convened under 10 U.S.C. 1163(a) and section III of AFR 36-36. We held that since the officer was discharged pursuant to the procedure prescribed in the regulations in compliance with section 1163(a) of Title 10, her discharge was considered involuntary for the purpose of payment of readjustment pay. In this connection, see paragraph 40411 and Rule 7, Table 4-4-7, Department of Defense Military Pay and Allowances Entitlements Manual.

Air Force Regulation 36-12, currently in effect—somewhat similar to AFR 36-36 mentioned above—establishes procedures governing the separation of officers of the Air Force and paragraphs 40a and 41 of that regulation, cited in the Committee Action, provide in pertinent part as follows:

a. *Pregnancy*:
(1) *General:*
(a) A woman officer will be discharged from the service with the least practicable delay when a determination is made by a medical officer that she is pregnant. * * *

* * * * * * *

41. Disposition Board. A nonprobationary Reserve officer shall not be involuntarily discharged, except pursuant to an approved recommendation of a board of officers (hereinafter referred to as a "disposition board" or "disposition boards"), unless a request for waiver of hearing is submitted in writing (attachments 15 and 16). Therefore, a nonprobationary Reserve officer who declines to tender a resignation or to apply for discharge, or who does not submit a waiver to a hearing, will have his/her case referred to a disposition board.

In commenting on paragraph 40a of the regulation, it is stated in the Committee Action that there is no alternative to separation, either with or without consent, the sole determining factor being that of

pregnancy. Unless the officer makes application for separation with her consent, it is stated that she must be separated involuntarily in the manner authorized under 10 U.S.C. 1163(a), even though both a hearing and board recommendations are *pro forma*, there being no alternative to separation under the circumstances.

The Committee Action further states that the practical effect of paragraph 41 of the regulation is that the question of separation is referred to a board of officers for consideration under the statute only if the officer refuses consent to separation (i.e., resignation, or application for discharge), and/or refuses to submit a waiver for hearing before a board. It is stated that as a result, if the officer does submit a waiver for hearing, she is separated without approved recommendations of a board.

It is reported that the Air Force position is that a female nonprobationary Reserve officer is entitled to request or waive, in writing, any or all of the following: namely, (a) to have her case heard by a board of not less than three officers, (b) to appear in person before such a board, (c) to be represented by legal counsel and (d) to submit statements in her own behalf. In this connection, a request to waive a hearing before a board of officers in pregnancy cases is outlined in attachment 15—mentioned in paragraph 41—which the officer is required to execute. The officer there acknowledges (attachment 15), among other things, that she is subject to involuntary discharge from all appointments held by her and that she will be eligible for readjustment pay provided she is otherwise eligible. The Committee Action states that the intent of AFR 36–12 is not to render a woman officer ineligible for readjustment pay if she elects to waive a hearing before a board of officers, merely because of that waiver.

While the apparent purpose of section 1163(a) of Title 10 is to prevent an officer of a Reserve component with at least 3 years' commissioned service from being arbitrarily separated without his or her consent, we find nothing in that section which would preclude such an officer, without consenting to separation, from waiving consideration of her case by a board of officers to which she is entitled as provided in that section. Accordingly, question 1 is answered in the affirmative.

Paragraph 40a of Air Force Regulation 36–12 expressly requires that when a determination is made by a medical officer that a woman officer is pregnant, she will be discharged from the service. It would seem that a female officer in this situation is to be separated, with or without her consent, the sole determining factor being that of pregnancy. In other words, her separation is mandatory in the circumstances. It would seem that a mere waiver by the officer of her right to a hearing

and board proceedings under 10 U.S.C. 1163(a) would not render an otherwise involuntary release voluntary.

It is our view that a female officer who is separated without her consent by reason of pregnancy, and without a hearing and board recommendations which she waived, may be considered to have been separated involuntarily for purposes of entitlement to readjustment pay. Question 2 is answered in the affirmative.

[B-170104]

Pay—Retired—Increases—Cost-of-Living Increases—Active Duty Recall

In recomputing retired pay under 10 U.S.C. 1401a and 1402(a) for a member of the uniformed services who served on active duty for 2 years subsequent to retirement, the Consumer Price Index changes should be reflected by increasing retired pay by only the percent that the applicable base index exceeds the index for the calendar month immediately preceding the month in which the active duty pay rate upon which retired pay is based became effective. 48 Comp. Gen. 398 and B-166335, June 4, 1969, modified.

To the Secretary of Defense, September 30, 1970:

Further reference is made to letter dated June 17, 1970, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to the proper method to be used in recomputing retired pay under 10 U.S.C. 1401a and 1402(a) for a member of the Armed Forces who has served on active duty for 2 years subsequent to retirement. Three alternate suggested methods of computation are incorporated in the question for decision as presented in Committee Action No. 442 of the Military Pay and Allowance Committee. That question is as follows:

When recomputing retired pay under the provisions of 10 USC 1402(a) for a member who has served on active duty for 2 years subsequent to retirement, which of the following methods should be used in applying Consumer Price Index (CPI) increases authorized by 10 USC 1401a?

a. Retired pay increased by all CPI adjustments which have been authorized under 10 USC 1401a(b) subsequent to the effective date of the active duty pay rate upon which the recomputed retired pay is based.

b. Retired pay increased by only the percent that the applicable base index exceeds the index for the calendar month immediately preceding the month in which the active duty pay rate upon which retired pay is based became effective.

c. Retired pay recomputed upon the applicable active duty basic pay rate only without increasing such pay by any CPI increase.

Subsections (b), (c), (d) and (e) of 10 U.S.C. 1401a (as amended, effective October 31, 1969, by Public Law 91-179) are as follows:

(b) The Secretary of Defense shall determine monthly the percent by which the index has increased over that used as the basis (base index) for the most recent adjustment of retired pay and retainer pay under this subsection. If the

Secretary determines that, for three consecutive months, the amount of the increase is at least 3 per centum over the base index, the retired pay and retainer pay of members and former members of the armed forces who become entitled to that pay before the first day of the third calendar month beginning after the end of those three months shall, except as provided in subsection (c), be increased, effective on that day, by the per centum obtained by adding 1 per centum and the highest per centum of increase in the index during those months, adjusted to the nearest one-tenth of 1 per centum.

(c) Notwithstanding subsection (b), if a member or former member of an armed force becomes entitled to retired pay or retainer pay based on rates of monthly basic pay prescribed by section 203 of title 37 that became effective after the last day of the month of the base index, his retired pay or retainer pay shall be increased on the effective date of the next adjustment of retired pay and retainer pay under subsection (b) only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(d) If a member or former member of an armed force becomes entitled to retired pay or retainer pay on or after the effective date of an adjustment of retired pay and retainer pay under subsection (b) but before the effective date of the next increase in the rates of monthly basic pay prescribed by section 203 of title 37, his retired pay or retainer pay shall be increased, effective on the date he becomes entitled to that pay, by the percent (adjusted to the nearest one-tenth of 1 percent) that the base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

Under the provisions of subsection (a) of section 1402, Title 10, U.S. Code (as amended by the act of October 2, 1963, Public Law 88–132, 77 Stat. 210, 214) a member of an armed force who has become entitled to retired pay and who thereafter serves on active duty, is entitled upon release from that active duty to recompute his retired pay by multiplying the monthly basic pay (subject to footnote 1) of the grade in which he would be eligible to retire if he were retiring upon that release from active duty, by 2½ percent for each of the years of service credited to him in computing retired pay, plus his years of active service after becoming entitled to retired pay, but not to exceed 75 percent of the pay upon which the computation is based. Footnote 1 of section 1402a reads as follows:

[1] For a member who has been entitled, for a continuous period of at least two years, to basic pay under the rates of basic pay in effect upon that release from active duty, compute under those rates. For a member who has been entitled to basic pay for a continuous period of at least two years upon that release from active duty, but who is not covered by the preceding sentence, compute under the rates of basic pay replaced by those in effect upon that release from active duty. For any other member, compute under the rates of basic pay under which the member's retired pay or retainer pay was computed when he entered on that active duty.

Under subsections (b) and (c) of section 1402 of Title 10, a member who incurs a physical disability while serving on active duty after retirement may elect, as provided in subsection (d), to receive either (1) the retired pay to which he became entitled when retired, increased by any applicable adjustments in that pay under section 1401a of Title 10 after he initially became entitled to that pay, or (2) retired pay computed as there stated on the highest monthly basic pay that he received while on active duty after retirement.

The Committee Action sets out examples of retired pay which would result from the application of each of the three methods quoted above and states that the retired pay shown in the examples is computed on the July 1, 1968, basic pay rates. For comparison purposes, there are also shown examples of entitlement of members who receive retired pay based on the July 1, 1968, basic pay rates by virtue of statutes other than 10 U.S.C. 1402(a). The following examples in the Committee Action assume a member in pay grade E–7 with 24 years of service creditable as a multiplier:

Member Initially Retired 1 January 1969:
1 Jan 69 $530.40×60% =$318.24
1 Feb 69 318.24+2.1%= 324.92
1 Nov 69 324.92+5.3%= 342.14
CURRENT RETIRED PAY $342.14

Member Released From Active Duty 1 January 1969 and entitled to Recomputation of Retired Pay under 10 USC 1402(d)
1 Jan 69 $530.40×60% =$318.24
I Feb 69 318.24+2.1%= 324.92
1 Nov 69 324.92+5.3%= 342.14
CURRENT RETIRED PAY $342.14

Member Released From Active Duty 1 October 1969 and entitled to Recomputation of Retired Pay under 10 USC 1402(a) (Using Method a above):
1 Oct 69 $530.40×60%+4.0%=$330.97
1 Nov 69 330.97+5.3%=348.51
CURRENT RETIRED PAY $348.51

Member Released from Active Duty 1 January 1970 and entitled to Recomputation of Retired Pay under 10 USC 1402(a) (Using Method a above):
1 Jan 70 $530.40×60%+4.0%+5.3%=$348.51
CURRENT RETIRED PAY $348.51

Member Released From Active Duty 1 October 1969 and entitled to Recomputation of Retired Pay under 10 USC 1402(a) (Using Method b above):
1 Oct 69 $530.40×60%+2.1%=$324.92
1 Nov 69 324.92+5.3%=342.14
CURRENT RETIRED PAY $342.14

Member Released From Active Duty 1 January 1970 and entitled to Recomputation of Retired Pay under 10 USC 1402(a) (Using Method b above):
1 Jan 70 $530.40×60%+2.1%+5.3%=$342.14
CURRENT RETIRED PAY $342.14

Member Released From Active Duty 1 October 1969 and entitled to Recomputation of Retired Pay under 10 USC 1402(a) (Using Method c above):
1 Oct 69 $530.40×60% =$318.24
1 Nov 69 318.24+5.3%= 335.11
CURRENT RETIRED PAY $335.11

Member Released From Active Duty 1 January 1970 and entitled to Recomputation of Retired Pay under 10 USC 1402(a) (Using Method c above):
1 Jan 70 $530.40×40×60%=318.24
CURRENT RETIRED PAY $318.24

In commenting on the examples, the Committee Action states that retired pay computed under method "a" is greater than the retired pay of a serviceman retired under the same basic pay rate but under some other provision of law. Concerning method "b," it is stated that the member would generally be entitled to the same rate of retired pay as his counterpart. With respect to method "c," it is stated that the member would be entitled to a lower rate of retired pay than his counterpart and, depending upon the date of release from active duty, there may be a difference in retired pay for those persons whose retired pay is recomputed under 10 U.S.C. 1402(a), even though the same rate of basic pay is used in computing retired pay.

In our decision of June 4, 1969, B–166335, referred to in the Committee Action, there was considered the case of an enlisted man who retired on December 1, 1965, for length of service, and who thereafter was recalled to active duty August 1, 1966, for 2 years and reverted to the retired list on August 1, 1968. The question considered in that decision involved the proper rate of active duty pay to be used in recomputing the member's retired pay and whether that pay should be increased by any CPI adjustment. Since the member, when released from active duty, was in receipt of active duty pay at the rates prescribed in Executive Order No. 11414, which became effective July 1, 1968, he had received pay at those rates for less than 2 years; and we said that he was entitled, under the second sentence in footnote 1 of section 1402(a), to have his retired pay recomputed at the rate of basic pay prescribed in section 1, Public Law 90–207, effective October 1, 1967—the 1967 rates of basic pay were replaced by the 1968 rates.

For the reasons indicated in the decision of June 4, 1969, we concluded that the enlisted man's situation did not appear to bring him within the purview of either subsection (c) or (d) of section 1401a so as to require application of only a partial CPI increase in the computation of his retired pay. We held that he was entitled, effective August 1, 1968, to have his gross retired pay increased by 3.9 percent under the CPI increase which became effective April 1, 1968. We said that his case is the same as if he had initially retired on October 1, 1967, with retired pay computed on active duty pay rates then in effect.

The legislative history of section 2 of Public Law 90–207, approved December 16, 1967, 81 Stat. 652, which amended section 1401a of Title 10, and added subsections (c) and (d) to that section, includes the following statement on page 12 of S. Rep. No. 808 (to accompany H.R. 13510, which became Public Law 90–207):

(2) The bill modifies the CPI formula in such a manner that those who are on active duty and receive statutory increases and subsequently retire, will be limited when they receive a CPI increase while on the retired list, to that portion

of the CPI increase that has occurred since the last statutory increase in his basic pay. For example, if an individual retires February 1, 1968, under the new pay rates authorized in this legislation, and thereafter a CPI increase is authorized for those on the retired list on April 1, 1968 (which is based on a 3-percent increase occurring between September 1966 and April 1968), the person would receive only that portion of the CPI increase which has occurred since October 1, 1967, the date of his statutory increase, and April 1968.

(3) The third element in the legislative recommendations is to provide that whenever there is a 3-percent CPI increase and there have been no statutory active duty pay increases, persons subsequently retiring under these same pay scales will have their initial retired pay increased by the same percentage of increase as was accorded those retiring prior to the CPI adjustment and subsequent to the statutory pay increase. * * *.

Neither the law (section 2 of Public Law 90–207) nor its legislative history contains any specific statement as to whether the partial CPI adjustment formula prescribed in subsections (c) and (d) of section 1401a was intended to be applicable to those members covered by section 1402(a). As noted above, however, if subsection (c) and (d) of section 1401a are not applied but instead subsection (b) of that section (method "a" in Committee Action No. 442) is used in fixing the CPI increase for 1402(a) members (those released to inactive service without disability following active service after retirement) such members would, at least in some cases, receive greater retired pay than other members whose retired pay is based on the same basic pay rate and who were not recalled to active duty. It appears most unlikely that the Congress intended such result.

Since recomputation of retired pay under method "c" would preclude any CPI adjustment relating to a period prior to release to inactive duty on the retired list, we believe that this method would be contrary to the purpose and intent of 10 U.S.C. 1401a.

With respect to method "b," while the language of subsection (c) and (d) of section 1401a is uncertain insofar as its applicability to members covered by section 1402(a) is concerned, we believe that the application of that method in cases of the type described in the question presented would be consistent with the purpose and intent of section 1401a. Accordingly, we conclude that method "b" should be used in computing CPI increases in such cases. To the extent that the conclusions reached in 48 Comp. Gen. 398 and B–166335, June 4, 1969, mentioned above, are inconsistent with this decision, they are modified accordingly.

[B–170395]

Military Personnel—Record Correction—Payment Basis—Interim Civilian Earnings

The amount of civilian earnings for deduction from the gross pay and allowances determined to be due incident to the correction of military records, pursuant to 10 U.S.C. 1552, is the gross and not the net amount left after the deduction of

Federal and State income taxes and the Social Security tax withheld from the interim civilian earnings of the member of the uniformed services. To limit the deduction from the back pay and allowances found to be due a member to civilian earnings after taxes would be tantamount to refunding the taxes withheld from the interim civilian compensation earned, and the question of whether taxes should be refunded is for determination by the taxing authorities concerned.

To Lieutenant Colonel C. R. Winder, United States Marine Corps, September 30, 1970:

Your letter dated June 24, 1970, file reference CA–CRW–ajm 7220, with enclosures, forwarded here by letter dated June 17, 1970, Headquarters United States Marine Corps, requests an advance decision as to whether the gross or net civilian earnings of First Sergeant Thaddeus H. Kaminski, 64 41 38, United States Marine Corps Fleet Reserve, should be deducted from the amount of military pay and allowances determined to be due as a result of the correction of his naval records. Your request was approved and assigned Control No. DO–MC–1087 by the Department of Defense Military Pay and Allowance Committee.

Pursuant to the decision and recommendation of the Board for Correction of Naval Records, Sergeant Kaminski's naval record was corrected to show that he was not discharged under honorable conditions by reason of unfitness on September 18, 1967, but was retained on active duty under valid extensions of enlistment until June 9, 1969, when he was transferred to the Fleet Marine Corps Reserve and released from active duty.

The Correction Board recommended that the Department of the Navy pay to Sergeant Kaminski, or other proper party or parties, as a result of the correction of his naval record, all monies lawfully found to be due. A voucher submitted with your letter shows that the amount found to be due is $15,817.44.

You say that in line with memorandum dated March 12, 1969, from the Department of Defense advising that civilian earnings should be offset in cases where a decision of the Board for Correction of Naval Records restored members to active duty, Sergeant Kaminski was requested to furnish information as to the gross civilian wages earned by him from September 19, 1967, to June 9, 1969. In reply to this request, Sergeant Kaminski submitted information showing that his gross civilian earnings during the period involved were $10,186.95, and that his net civilian earnings after deduction of Federal and State income tax withholdings and Social Security tax were $6,943.17.

You refer to our decisions of April 2, 1970, 49 Comp. Gen. 656, and March 10, 1969, 48 Comp. Gen. 580, as to the propriety of subjecting back pay and allowances found due a member or former member of the uniformed services by reason of a correction of his military or

naval records pursuant to 10 U.S.C. 1552 to a deduction of earnings received from civilian employment during the corresponding period. You also refer to 32 CFR 723.10(c)(1) which directs that, in the settlement of claims by the Department of the Navy in cases arising under 10 U.S.C. 1552, earnings received by an involved member from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement.

You say, however, that it is not clear whether under decisions and regulations the gross or net amount of the civilian earnings should be deducted from the gross pay and allowances determined to be due Sergeant Kaminski. As indicated above, the difference between the gross and net civilian earnings in this case consists entirely of Federal and State taxes, aggregating $3,243.78.

The regulations here concerned do not provide for the deduction of net civilian earnings but require deduction of earnings received from civilian employment. Such a requirement is substantially the same as that contained in section 6(b)(1) of the act of August 24, 1912, as amended by the act of June 10, 1948, 62 Stat. 355, 5 U.S.C. 652(b)(1) (1952 ed.) (now codified in 5 U.S.C. 5596(b)(1) (Supp. V)) providing for the deduction of any amounts earned by a civilian employee "through other employment during such period" from the back pay due him for a period of removal or suspension upon reinstatement or restoration to duty on the ground that his removal or suspension was unjustified or unwarranted. In decision B-131439, dated October 8, 1957, construing the provisions of section 6(b)(1) we said that—

> Mr. McCarthy also questions deductions from back pay of his gross earnings (before the deduction of income taxes) from other employment during the period of suspension or separation, it being his contention that the deduction should be for "interim net earnings" which, in his opinion, would exclude income taxes on the amounts earned. The phrase "interim net earnings" appears in the back pay statute provisions of the act of August 26, 1950, *supra*, which are inapplicable here (38 Comp. Gen. 225 *supra*). The statutory provision here applicable [act of June 10, 1948, *supra*] requires that there be deducted "any amounts earned by him through other employment." Clearly, the deduction must be the total amounts earned without reduction by the amount of income taxes thereon.

No reason is apparent for applying the military regulations differently in this case. In this respect, it may be noted that to limit the deductions from Sergeant Kaminski's back pay and allowances to his civilian earnings after taxes would be tantamount to refunding to him the income and other taxes concerned. The question of whether those taxes, or any part thereof, should be refunded to him is for determination by the taxing authorities concerned.

Accordingly, it is our view that the regulations require the deduction of the gross civilian earnings of $10,186.95 in this case. The voucher and supporting papers are returned for payment on that basis.

INDEX

JULY, AUGUST, AND SEPTEMBER 1970

LIST OF CLAIMANTS, ETC.

	Page
Admiral Systems Corp	11
Agency for International Development, Administrator	89
Alcock, N. C	125, 148, 180
American Air Filter Co., Inc	8, 177
American-Standard, Inc	163
Arent, Fox, Kintner, Poltkin & Kahn	54
Associated Dairy Products Co	94
Attorney General	128
Belcher, Phyllis A	148
British Insulated Callender's Cables Ltd	151
Burkholder, J. J	156
Burress, J. W	137
Carres, Mary D	173
Chapel of the Astronauts, Inc	63
Computer Network Corp	222
Cromer, D. W	99
Data-Control Systems, Inc	114
Defense Supply Agency, Director	28, 209
District of Columbia Court of General Sessions, Chief Judge	205
District of Columbia Government, Mayor-Commissioner	66
Economic Sciences Corp., Inc	59
Edwards, Ralph, Sportswear, Inc	48
Fairchild Hiller Corp	1
Ferriell, Howard, & Sons, Inc	42
Firestone Tire and Rubber Co	140
Flynn, H. D	174
Geiger, George J	180
Griffin, G. W	46
Henderson Engineering Co., Inc	137
Industrial Technological Associates, Inc	16
Informatics, Inc	54
Institute of Scrap Iron and Steel	167
Interax, Inc	215
Irish, Jack A	89
Jaynes, David W	99
Jet Avion Corp	184
Johnson, Orbra Ray	174
Jones, Robert A	226
Kaiser Steel Corp	71
Kaminski, Thaddeus H	236
Kennedy, W. E	44
Labutti, Norman M	156
Lane, Thomas M	108
Lawson, Richard K	44
Limbaugh, Limbaugh & Russell	48
Longley Construction Co., Inc	76
Maritime Administration, Administrator	167
National Aeronautics and Space Administration, Administrator	1, 63
National Maritime Union of America, National Vice President	93
Naumann, David W	36
Navy Regional Finance Center, Commanding Officer	36
Oceanic Steamship Co	164
Office of Economic Opportunity, Director	117
Oleynik, Vladimir	173
Olson, Robert N	125
Pacific Shipwrights, Inc	67
San ColMar Industries, Inc	39
Schirmer's Landscape Nursery, Inc	202
Schullery, Robert J	108, 154
Secretary of Agriculture	110
Secretary of the Air Force	11, 76, 163, 184
Secretary of the Army	8, 67, 114, 215, 220
Secretary of Commerce	66
Secretary of Defense	80, 191, 229, 232
Secretary of the Interior	151, 159
Secretary of the Navy	16, 42, 83, 202
Secretary of Transportation	59
Selman, Richard J	22
Sharratt, S. H	22
Southwest Engineering Co., Inc	105
Spectronics Corp	209
Swack, G. R	22
Systems, Technology, Inc	193
United States Civil Service Commission, Chairman	82, 98
Urbanetics, Inc	117
Washington Metropolitan Area Transit Authority	159
Winder, C. R	226, 236
Witte and Witte	39
Wonson, Myles P., Jr	156
Wood-Ivey Systems Corp	50
Youngdale, J. R., Construction Co	76

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

UNITED STATES STATUTES AT LARGE

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

	Page
1953, Aug. 5, 67 Stat. 373	131
1966, Nov. 6, 80 Stat. 1324	160
1967, 16 Dec., 81 Stat. 654	37
1969, Dec. 24, 83 Stat. 408	131
1970, Apr. 15, 84 Stat. 195	37

UNITED STATES CODE

See, also, U.S. Statutes at Large

	Page
5 U.S. Code 552	219
5 U.S. Code 652 (1952 ed.)	184
5 U.S. Code 1071 note	99
5 U.S. Code 1152(b)	86
5 U.S. Code 2061 note	99
5 U.S. Code 3333	155
5 U.S. Code 3581	173
5 U.S. Code 3582(b)	173
5 U.S. Code 3584	173
5 U.S. Code 5332 note	100, 149, 173, 227
5 U.S. Code 5337	82
5 U.S. Code 5341	67
5 U.S. Code 5342(a)	93
5 U.S. Code 5519	154
5 U.S. Code 5523(b)	91
5 U.S. Code 5525	109
5 U.S. Code 5531	48
5 U.S. Code 5534	48
5 U.S. Code 5584	47
5 U.S. Code 5595	46
5 U.S. Code 5596(b)(1)	238
5 U.S. Code 6301	99
5 U.S. Code 6323(c)	154
5 U.S. Code 7311	155
5 U.S. Code 8332(c)	81
5 U.S. Code 8332(e)	81
5 U.S. Code 8332(j)	82
5 U.S. Code 8333(a)	81
5 U.S. Code 8345(d)	81
10 U.S. Code Ch. 67	81
10 U.S. Code 333	155
10 U.S. Code 509	37
10 U.S. Code 687(a)	230
10 U.S. Code 687(b)	230
10 U.S. Code 687(b)(1)	230
10 U.S. Code 1163(a)	229
10 U.S. Code 1202	156
10 U.S. Code 1203	157
10 U.S. Code 1210(e)	157
10 U.S. Code 1372	157
10 U.S. Code 1401a	232
10 U.S. Code 1401a(b)	232
10 U.S. Code 1401a(c)	232
10 U.S. Code 1401a(d)	232
10 U.S. Code 1401a(e)	232
10 U.S. Code 1402(a)	232
10 U.S. Code 1402(b)	234
10 U.S. Code 1402(c)	234
10 U.S. Code 1402(d)	234
10 U.S. Code 1552	125, 183, 238
10 U.S. Code 1552(c)	183
10 U.S. Code 2304	112
10 U.S. Code 2304(a)(2)	202
10 U.S. Code 2304(a)(7)	210
10 U.S. Code 2304(a)(10)	19, 55, 69
10 U.S. Code 2304(a)(11)	115
10 U.S. Code 2304(g)	8, 20, 69, 112, 117, 186, 205, 219
10 U.S. Code 2305(c)	179
10 U.S. Code 2310(b)	213
10 U.S. Code 5149	23
10 U.S. Code 5149(a)	24
10 U.S. Code 5149(b)	23
10 U.S. Code 5149(c)	24
10 U.S. Code 6148(a)	100
10 U.S. Code 8442	126
10 U.S. Code 8447(b)	126
10 U.S. Code 8451(a)	127
10 U.S. Code 8914	181
15 U.S. Code 637(b)(7)	70
16 U.S. Code 452	161
16 U.S. Code 4601-4	161
18 U.S. Code 1918	155
18 U.S. Code 3006A	130
18 U.S. Code 3006A(e)	130
18 U.S. Code 4244	130
20 U.S. Code 901	193
20 U.S. Code 902	193
20 U.S. Code 907	193
25 U.S. Code 47	95
28 U.S. Code 753(f)	206
31 U.S. Code 484	161
37 U.S. Code 202	23
37 U.S. Code 202(i)	24

United States CODE—Continued

	Page
37 U.S. Code 202(k)	23
37 U.S. Code 202(l)	23
37 U.S. Code 203 note	101, 227
37 U.S. Code 204(g)(1)	101
37 U.S. Code 204(g)(2)	101
37 U.S. Code 204(l)	100
37 U.S. Code 308(a)	37
37 U.S. Code 308(f)	38
37 U.S. Code 401	221
37 U.S. Code 403	176
37 U.S. Code 403(b)	176
37 U.S. Code 403(d)	176
37 U.S. Code 434	85
37 U.S. Code 435	85
37 U.S. Code 436(a)	85, 221
37 U.S. Code 436(b)	85
37 U.S. Code 436(c)	85
37 U.S. Code 436(e)	83
37 U.S. Code 436(h)	83
37 U.S. Code 552	150
37 U.S. Code 552(a)	150
37 U.S. Code 552(b)	150
37 U.S. Code 554(b)	84
37 U.S. Code 559(c)	149
40 U.S. Code 276a	103
40 U.S. Code 303b	64
40 U.S. Code 471	112
40 U.S. Code 471 note	123
41 U.S. Code 151 note (1952 ed.)	124
41 U.S. Code 321	106
42 U.S. Code 402	82
42 U.S. Code 2473(b)(3)	64
42 U.S. Code 2701 note	88
42 U.S. Code 2732	98
42 U.S. Code 2733	98
42 U.S. Code 2734(b)	93
46 U.S. Code 741	170
46 U.S. Code 742	171
46 U.S. Code 752	170
46 U.S. Code 834	168
46 U.S. Code 865	168
46 U.S. Code 1111	168
46 U.S. Code 1114	168
46 U.S. Code 1152	87
46 U.S. Code 1152 note	87
46 U.S. Code 1154	86
46 U.S. Code 1158	168
46 U.S. Code 1160(j)	167
46 U.S. Code 1195	172
46 U.S. Code 1213	168
50 U.S. Code App. 1744	167

CONSTITUTION OF THE UNITED STATES

	Page
Art. 4, sec. 3, cl: 2	64

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL

	Page
10 Comp. Gen. 395	65
11 Comp. Gen. 355	65
14 Comp. Gen. 169	65
16 Comp. Gen. 807	192
17 Comp. Gen. 854	44
17 Comp. Gen. 786	65
19 Comp. Gen. 640	65
20 Comp. Gen. 46	65
20 Comp. Gen. 310	110
21 Comp. Gen. 425	65
21 Comp. Gen. 510	65
22 Comp. Gen. 563	65
23 Comp. Gen. 962	67
24 Comp. Gen. 89	67
26 Comp. Gen. 484	99
30 Comp. Gen. 82	83
30 Comp. Gen. 356	93
33 Comp. Gen. 521	214
34 Comp. Gen. 7	183
34 Comp. Gen. 415	221
34 Comp. Gen. 496	176
34 Comp. Gen. 703	67
35 Comp. Gen. 241	184
36 Comp. Gen. 384	179
36 Comp. Gen. 482	67
36 Comp. Gen. 492	158
36 Comp. Gen. 705	11
37 Comp. Gen. 110	11
37 Comp. Gen. 251	76
37 Comp. Gen. 368	96
37 Comp. Gen. 715	221
37 Comp. Gen. 785	13
38 Comp. Gen. 532	14
39 Comp. Gen. 133	130
39 Comp. Gen. 178	127
39 Comp. Gen. 366	82, 180
40 Comp. Gen. 126	13
40 Comp. Gen. 240	158
40 Comp. Gen. 502	183
40 Comp. Gen. 503	113
41 Comp. Gen. 366	201
41 Comp. Gen. 460	81
41 Comp. Gen. 706	101
41 Comp. Gen. 749	158
42 Comp. Gen. 69	168
42 Comp. Gen. 342	109
42 Comp. Gen. 420	13, 204
42 Comp. Gen. 582	183
43 Comp. Gen. 206	14
43 Comp. Gen. 358	111, 123
44 Comp. Gen. 27	235
44 Comp. Gen. 144	180
44 Comp. Gen. 430	61
45 Comp. Gen. 47	183
45 Comp. Gen. 71	113
45 Comp. Gen. 221	202

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL—Continued

	Page
45 Comp. Gen. 538	127
45 Comp. Gen. 780	137
45 Comp. Gen. 785	208
46 Comp. Gen. 191	112, 205
46 Comp. Gen. 556	112
47 Comp. Gen. 29	8, 123
47 Comp. Gen. 103	52, 180
47 Comp. Gen. 175	215
47 Comp. Gen. 252	61
47 Comp. Gen. 279	116
47 Comp. Gen. 336	112, 123
47 Comp. Gen. 448	113
47 Comp. Gen. 459	204
47 Comp. Gen. 496	14
47 Comp. Gen. 732	42
48 Comp. Gen. 28	176
48 Comp. Gen. 314	20, 61
48 Comp. Gen. 372	49
48 Comp. Gen. 398	236
48 Comp. Gen. 536	70, 117, 125, 226
48 Comp. Gen. 555	14
48 Comp. Gen. 569	207
48 Comp. Gen. 580	237
48 Comp. Gen. 593	113
48 Comp. Gen. 663	69, 205
48 Comp. Gen. 702	58
49 Comp. Gen. 97	109
49 Comp. Gen. 98	115
49 Comp. Gen. 156	205
49 Comp. Gen. 195	199
49 Comp. Gen. 229	61, 121
49 Comp. Gen. 274	199
49 Comp. Gen. 299	84
49 Comp. Gen. 463	58
49 Comp. Gen. 541	75
49 Comp. Gen. 581	81
49 Comp. Gen. 656	182, 237
50 Comp. Gen. 1	125
50 Comp. Gen. 8	177
50 Comp. Gen. 59	123

DECISIONS OF THE COMPTROLLER OF THE TREASURY

	Page
17 Comp. Dec. 153	99

DECISIONS OVERULED OR MODIFIED

	Page
45 Comp. Gen. 780	135
48 Comp. Gen. 398	236
B-157954, Dec. 15, 1965, unpublished decision	114
B-166335, June 4, 1969, unpublished decision	236

DECISIONS OF THE COURTS

	Page.
Alcoa Steamship Co., Inc. *v.* United States, 338 U.S. 421	166
Amell *v.* United States, 384 U.S. 158	170
Armstrong *v.* McGough, 247 S.W. 790	109
Brandt *v.* United States, 155 Ct. Cl. 345	158
Bristol-Myers Co. *v.* F.T.C., 284 F. Supp. 745	155
Caster *v.* United States, 319 F. 2d 850	131
Elm Spring Farm, Inc., et al. *v.* United States, 127 F. 2d 920	80
Fredrickson *v.* United States, 133 Ct. Cl. 890	158
Gardner *v.* The Danzler (CCA 4) 281 F. 2d 719	170
Gast, United States *v.*, 297 F. Supp. 620	135
Geiger *v.* Brown, 419 F. 2d 714	181
Gratiot, United States *v.*, 14 Pet. 526, 39 U.S. 526	64
Haislip *v.* United States, 152 Ct. Cl. 339	127
Holcombe, United States *v.*, 277 F. 2d 143	80
Holder *v.* United States, 285 F. Supp. 380	136
Howell, United States *v.*, 318 F. 2d 162	80
Lee *v.* Habib, USCA DC No. 22, 203	206
Leonard *v.* United States, 131 Ct. Cl. 91	158
Lietz *v.* Flemming (CCA 6) 264 F. 2d 311	170
Mempa *v.* Rhay, 389 U.S. 128	135
Meridian Limited *v.* Sippy, 128 P. 2d 884	155
Metro Novelty Manufacturing Co., Inc., United States *v.*, 125 F. Supp. 713	40
Monroe Cattle Co. *v.* Becker, 147 U.S. 47	109
Monroe, C. N., Mfg. Co. *v.* United States, 143 F. Supp. 449	41
Pickett *v.* Williams, C. A. No. L&T 74757-69	206
Posey, Dennis C., United States *v.*, USDC Dist. of Nev., Docket No. LV-1199	135
Routh *v.* List & Weatherly Constr. Co., 257 P. 721	221
Schoenbrod *v.* United States, 187 Ct. Cl. 627	112
Seabolt, In re, 113 F. 766	221
Sherwood Brothers, Inc. *v.* District of Columbia, 113 F. 2d 162	109
Simon *v.* Commissioner of Internal Revenue, 176 F. 2d 230	109
Splawn *v.* Fitzharris, 297 F. Supp. 44	137
Standard Oil Co. of Calif. *v.* Johnson, Treas. of Calif., 316 U.S. 481	80
Stone *v.* United States, 358 F. 2d 503	131
Street *v.* United States, 133 U.S. 299	109
Strickland Transportation Co. *v.* United States, 223 F. 2d 466	166
Tate *v.* United States, 123 U.S. App. D.C. 261, 359 F. 2d 254	207
24 Cans Containing Butter, United States *v.*, (CCA 5) 148 F. 2d 365	170
Williams *v.* United States, 145 Ct. Cl. 513	158

INDEX DIGEST

JULY, AUGUST, AND SEPTEMBER 1970

ABSENCES

Leaves of absence. (*See* Leaves of Absence)

ADVERTISING

Advertising *v.* negotiation distinctions — Page

While rigid rules applicable to formally advertised procurements generally require award to lowest (price) responsive, responsible bidder, flexibility inherent in concept of negotiation permits award to be made to best advantage of Govt., price and other factors considered. Therefore, utilization in "competitive negotiation" of price as factor in selection of contractor will not adversely affect selection of qualified contractor by Forest Service for performance of firefighting services 110

ALLOWANCES

Evacuation allowances

Overseas civilian employees

Under broad authority in 5 U.S.C. 5523(b), special allowances, prescribed by Standardized Regs. incident to evacuation of dependents at overseas post of duty, may be paid to employee in behalf of dependents who are not at his post at time of evacuation but who are directly affected by orders. However, as payments of additional allowances for unusual expenses must be attributable to post evacuation order, when dependents are absent for personal reasons at time evacuation order issues, with no intention of returning to post for duration of evacuation, employee is not entitled to special allowance, having incurred no unusual expenses; but if an absent dependent is prevented from returning by reason of evacuation order issued during his absence, unusual expenses incurred are payable from time intended return is blocked 89

Separate maintenance allowance paid at lower rate than special allowance authorized when dependents are evacuated from overseas post of employee involves situations where dependents are not permitted to reside at employee's post under circumstances known well in advance to allow for reasonable planning and, therefore, serves different purpose than special allowances authorized incident to evacuation of dependents who, intending to reside at employee's post, are prevented from so doing by emergency under circumstances which do not permit orderly planning of employee's household. Furthermore, sec. 262.32 of Standardized Regs. prohibits payment of separation allowance for period that is less than 90 days—a limitation that does not apply to special allowance 89

Military personnel

Quarters allowance. (*See* Quarters Allowance)

Temporary lodging allowance

Military personnel. (*See* Station Allowances, military personnel, temporary lodgings)

APPROPRIATIONS Page

Availability

Indigent persons

Court costs

Cost of psychiatric examination of indigent criminal defendant for purpose of establishing insanity at time offense is committed is payable from funds appropriated for implementation of Criminal Justice Act of 1964 by Administrative Office of U.S. Courts, and cost of examination, to determine defendant's mental competency to stand trial for purposes of 18 U.S.C. 4244 is expense to be borne by Dept. of Justice in accordance with guidelines issued by Judicial Conference of U.S. in recognition of distinction between two purposes served by psychiatric examination. Where examination serves dual purpose, cost to determine competency to stand trial should be borne by Justice and additional expense to determine insanity at time of offense to Criminal Justice Act appropriation 128

Justice Department

Litigation expenses

Probational proceedings

Where probationer charged with violation of probation conditions moves for psychiatric examination, examination fee is payable by Dept. of Justice when psychiatric services involve 18 U.S.C. 4244 proceeding to determine defendant's mental competency for purpose of continuing hearing for revocation of probation 128

In view of *Mempa* v. *Rhay*, 389 U.S. 128 (1967), involving right to counsel in probation revocation coupled with deferred sentencing proceeding, 45 Comp. Gen. 780 (1966) need no longer be considered controlling in connection with proceedings involving deferred sentencing, whether or not such proceedings are coupled with revocation of probation, but decision remains in effect insofar as simple revocation of probation proceedings are concerned. Whether cost of psychiatric examination is for payment under Criminal Justice Act or under 18 U.S.C. 4244, depends on purpose of examination; that is, whether it is intended to establish insanity of defendant at time of offense or serves as tool for his defense.. 128

Psychiatric examinations

Psychiatric examination of criminal defendant to determine his mental competency to understand proceedings against him or assist in his own defense authorized by subsec. (e) of Criminal Justice Act of 1964, 18 U.S.C. 3006A(e), providing for investigative, expert, or other services necessary to adequate defense to 18 U.S.C. 4244, and subpoena of witnesses at no cost to defendant authorized under Rule 17(b) of Federal Rules of Criminal Procedure when defendant is financially unable to pay fees of witness whose presence is necessary to adequate defense are distinct services for payment purposes. Services pursuant to 1964 act are payable by Administrative Office of U.S. Courts and those rendered in accordance with Rule 17(b) are payable by Dept. of Justice.. 128

BIDDERS
Page
Qualifications
Experience
Specialized, etc.

Under letter request, first step of two-step procurement, which contained "Bidder's Technical Qualification Clause" stating technical proposals would be accepted only from those contractors who have manufactured and can demonstrate at operating airfield a Solid State Conventional Instrument Landing System, evaluation of capabilities of prime contractor and its subcontractor—French firm who manufactured and demonstrated system in France—although within policy enunciated in par. 4–117 of Armed Services Procurement Reg., which recognizes integrity and validity of contractor team arrangements, was contrary to intent of clause, and proposal premised on subcontractor's system should not have been considered. Therefore, in future procurements, clause should specify permissible relationships or refer to ASPR provision 163

Small business concerns
Certification referral procedure

In negotiation of procurement, exception in 10 U.S.C. 2304(g) to conducting discussions with all responsible offerors within competitive range may not be invoked by contracting officer to make award to other than low responsible offeror where price is sole evaluation factor and, therefore, award to second low offeror, incumbent contractor, without obtaining Certificate of Competency (COC) on low offeror, a small business concern considered nonresponsible on factors relating to capacity and credit, was illegal and award should be canceled. No award should have been made unless SBA refused to issue COC or did not respond to referral within 15 days, or in alternative if low proposal was unacceptable without clarification, discussions should have been conducted with all offerors within competitive range 67

BIDS
Alternative
Unsolicited

Low alternate bid offering to use polyethylene bags with Kraft paper overwrap in lieu of cartons to ship fuel-resistant baffle material satisfying packaging and packing requirements set forth in applicable military specifications and included in invitation for bids, neither of which spelled out type of material or construction of container, was responsive bid, acceptance of which was proper. Invitation for bids did not require use of fiberboard cartons and military specifications require only that materials be packed in manner to insure acceptance by common carrier and provide protection against damage during shipment. Furthermore, overwrapped polyethylene bags constitute "containers" within meaning of "Glossary of Packaging Terms" and par. 1–1204 of Armed Services Procurement Reg 140

Bid forms
Initialing bid changes

Bid sent by certified mail that was not directed to bid opening room or did not list information required by invitation, and which although timely delivered to mail room, as shown by Post Office Dept. form

BIDS—Continued Page
Bid forms—Continued
Initialing bid changes—Continued

considered acceptable documentary evidence, was not identified until after bids were opened, may be considered on basis that failure to recognize from corporate name and size of envelope that envelope contained bid constitutes Govt. mishandling, and that lapse of time between receipt, opening, and delivery of bid was unreasonable for certified mail, and fact that price alteration was uninitialed does not require rejection of low bid where intended bid price is not in doubt and remained low, and there is no indication bidder had opportunity to reclaim and alter bid---------- 71

Block bidding
Prevention

Quantity Limitation Prohibition Clause intended to prevent block bidding that was included in invitation for bids to manufacture flight jackets for delivery at several destinations which provided each bidder may submit one quantity *only* at one price for each item bid, and may stipulate maximum/minimum quantity acceptable for each item or overall procurement caused no ambiguity in invitation, and offer bidding on first 7,470 for each destination and then including this same quantity with additional 1,000 for next increment of 8,470 each and so on until each additional 1,000 added thereon reached total procurement quantity of 16,470 each, offered more than one price for quantity and violation of clause may not be waived under par. 2–405 of Armed Services Procurement Reg. as informality---------- 48

Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
"Buying in" basis. (*See* Bids, prices, "buying in" basis)
Cancellation. (*See* Bids, discarding all bids)
Competitive system
Ambiguous bids

Unsolicited insertion of plant part numbers in low bid to furnish engine air filters without express statement that specifications would be complied with created ambiguity that may not be resolved by reference to "catalog cut sheets" and other data available to Govt. before bid opening, as reliance on this information would afford bidder option to affect responsiveness of bid—an option detrimental to the competitive bidding system. Therefore, as contracting officer cannot determine whether bidder offered conforming article or that part numbers were included for purpose of internal control, bid is considered qualified bid and may not be considered for award---------- 8

"Buy Indian Act"

Grant of preferential treatment by negotiating contract without competition with dairy corporation that is 51 percent owned by persons of Indian descent; that is located 30 miles from Indian reservation, but will employ Indian help; and that is financed by Small Business Administration loan, conforms to reasonable criteria established to accomplish purposes of so-called Buy Indian Act (25 U.S.C. 47), to acquire products and services from Indian industry, and to loan criteria established by Administration. Fact that minority owner is non-Indian and will furnish expertise and managerial ability does not impute that firm is "straw"

BIDS—Continued Page
Competitive system—Continued
"Buy Indian Act"—Continued

organization or is unqualified as Indian industry. Therefore, firm may be considered eligible if prior to award it obtains required interstate shipper's permit 94

"Buying in" prices

Where low bid price had been confirmed, negating existence of mistake, suspicion of "buying in" does not require rejection of bid because low bidder submitted unprofitable price. Par. 1-311(a) of Armed Services Procurement Reg. in defining "buying in" as practice of attempting to obtain contract award by knowingly offering price or cost estimate less than anticipated costs with expectation of recovering any losses, either during contract performance or in future "follow-on" contracts, does not provide for bid rejection and, therefore, there is no legal basis upon which award may be precluded or disturbed because low bidder submitted unprofitable price 50

Effect of erroneous awards

Where invitation for bids provided for consideration of late bid modification only if delay was due to Western Union, and par. 2-303.4 of Armed Services Procurement Reg., in effect at time, provided for consideration only if late receipt of modification was caused by Govt. mishandling, inconsistency of provisions was prejudicial to bidders and detrimental to competitive bidding system. Therefore, contract award made on basis of regulation to low bidder at its reduced telegraphic price pursuant to par. 2-305 of regulation, although second low bidder's telegraphic modified bid price was lower, both modifications having been timely received by Western Union but not delivered until after bid opening, should be canceled and procurement resolicited only from two involved concerns 42

Negotiated contracts. *(See* Contracts, negotiation, competition*)*
Preservation of system's integrity

Data contained in literature that was not prepared to quote back salient features of brand name model but was published to disseminate information to public does not constitute sufficient descriptive literature for purpose of determining whether product equals brand name. Furthermore, offer to conform does not satisfy descriptive literature retirement of brand name or equal clause for detailed information, and submission of data after bid opening may not be considered under fundamental principle of competitive bidding system that responsiveness of bid must be determined from bid without reference to extraneous aids or explanation submitted after bid opening, in fairness to those bidders whose offers strictly complied with all solicitation requirements 193

Delivery provisions
Packaging and packing requirements
Deviation acceptability

Low alternate bid offering to use polyethylene bags with Kraft paper overwrap in lieu of cartons to ship fuel-resistant baffle material satisfying packaging and packing requirements set forth in applicable military specifications and included in invitation for bids, neither of which spelled out type of material or construction of container, was responsive bid, acceptance of which was proper. Invitation for bids did not require use of fiberboard cartons and military specifications require only that

BIDS—Continued Page
Delivery provisions—Continued
Packaging and packing requirements—Continued
Deviation acceptability—Continued

materials be packed in manner to insure acceptance by common carrier and provide protection against damage during shipment. Furthermore, overwrapped polyethylene bags constitute "containers" within meaning of "Glossary of Packaging Terms" and par. 1–1204 of Armed Services Procurement Reg---- 140

Discarding all bids
Needs of Government not properly stated

Invitation for bids that states required man-year level of effort to perform engineering services for systems and program definition of combat systems maintenance training facility at erroneously fixed rather than estimated level, fails to show Govt.'s minimum needs and, therefore, successful contractor would be unable to produce results required in view of correlation between level of effort and ultimate work product. Failure to accurately reflect man-year level of effort required constitutes compelling reason for canceling invitation comtemplated by par. 2–404.1(a) of Armed Services Procurement Reg. and for readvertisement of procurement. However, cancellation emphasizes need for effective administrative definition and expression of Govt.'s requirements during procurement planning process---- 50

"One Responsive Bid" clause

Cancellation, pursuant to par. 2–404.1(b)(viii) of Armed Services Procurement Reg. as being in best interest of Govt., of invitation for bids that contained "One Responsive Bid" clause to assure adequate price competition, and resolicitation of procurement when low bid was determined to be nonresponsive and only other bid received excessively priced, was in accord with par. 2–404.2(e), ASPR, which authorizes rejection of unreasonably priced bids, and was proper, even though initially the reasons for cancellation of invitation should have been advanced, as par. 2–404.1(b)(viii) is not self-executing, and clause should not have been used as it only created uncertainty and was superfluous because mere recitation of clause did not establish sufficient reason for bid rejection and resolicitation of procurement---- 177

Resolicitation
Limitation

Where invitation for bids provided for consideration of late bid modification only if delay was due to Western Union and par. 2–303.4 of Armed Services Procurement Reg., in effect at time, provided for consideration only if late receipt of modification was caused by Govt. mishandling, inconsistency of provisions was prejudicial to bidders and detrimental to competitive bidding system. Therefore, contract award made on basis of regulation to low bidder at its reduced telegraphic price pursuant to par. 2–305 of regulation, although second low bidder's telegraphic modified bid price was lower, both modifications having been timely received by Western Union but not delivered until after bid opening, should be canceled and procurement resolicited only from two involved concerns---- 42

BIDS—Continued Page

Evaluation

Method of evaluation defective, etc.

Evaluation factors uncertain

Request for proposals that failed to include evaluation criteria or indicate criteria's relative importance because of erroneous belief these standards were inapplicable to civilian procurement was defective and was not in accordance with sound procurement policy and public interest. Also scoring of offer by comparision with predetermined score, overlooked that primary consideration in negotiated procurement is discussion with all offerors in competitive range and that borderline cases should not automatically be excluded from consideration, and as result maximum competition was not obtained. Request for proposals should be amended to establish omitted criteria and offerors permitted to submit additional information or revise proposals, and if within competitive range, afforded opportunity for discussion to extent required by sec. 1–3.802(c) of Federal Procurement Regs---------- 59

Negotiation

Factors other than price

Authority in sec. 1–3.805 of Federal Procurement Regs. to negotiate research and development, or cost-reimbursable, or special service contracts without price competition based solely on determination that particular contractor would furnish services of higher quality than any other contractor, does not cover selection of air tanker operators by Forest Service to fight forest fires as such service is not within categories contemplated by regulation for exception to price competition, and failure to include price as factor of contractor selection violates spirit and intent of Federal Property and Administrative Services Act and implementing regulations. Although it would not be in best interest of Govt. to disturb contracts awarded and options exercised, price inclusion in future offers will be required. B–157954, Dec. 15, 1965, modified---- 110

Forms

Bid forms. (*See* Bids, bid forms)

Late

Mishandling determination

Bids received at one place for delivery to another place

Bid sent by certified mail that was not directed to bid opening room or did not list information required by invitation, and which although timely delivered to mailroom, as shown by Post Office Dept. form considered acceptable documentary evidence, was not identified until after bids were opened, may be considered on basis that failure to recognize from corporate name and size of envelope that envelope contained bid constitutes Govt. mishandling, and that lapse of time between receipt, opening, and delivery of bid was unreasonable for certified mail, and fact that price alteration was uninitialed does not require rejection of low bid where intended bid price is not in doubt and remained low, and there is no indication bidder had opportunity to reclaim and alter bid----------

BIDS—Continued Page

Late—Continued

Telegraphic modifications

Delay due to Western Union

Bid reduction received at base exchange telegraph office operated under contract for Western Union, which although timely received could not be delivered before opening of bids as telephone line to procurement office was busy, may not be considered in determining low bid. Both invitation provisions and par. 2-303 of Armed Services Procurement Reg. provide for consideration of late telegraphic modification when delay is due to Govt. mishandling but preclude consideration of late telegraphic bids or modification when delay is caused by telegraph company, and under contract, post exchange, instrumentality of U.S. for some purposes, and its employees act as agent of Western Union, and delay, therefore, is attributable to Western Union, and price reduction may not be considered---------- 76

Inconsistent provisions

Where invitation for bids provided for consideration of late bid modification only if delay was due to Western Union and par. 2-303.4 of Armed Services Procurement Reg., in effect at time, provided for consideration only if late receipt of modification was caused by Govt. mishandling, inconsistency of provisions was prejudicial to bidders and detrimental to competitive bidding system. Therefore, contract award made on basis of regulation to low bidder at its reduced telegraphic price pursuant to par. 2-305 of regulation, although second low bidder's telegraphic modified bid price was lower, both modifications having been timely received by Western Union but not delivered until after bid opening, should be canceled and procurement resolicited only from two involved concerns---------- 42

Mistakes

Allegation after award. (*See* Contracts, mistakes)

Negotiation

Generally. (*See* Contracts, negotiation)

Prices

Block bidding. (*See* Bids, block bidding)

"Buying in" basis

Where low bid price had been confirmed, negating existence of mistake, suspicion of "buying in" does not require rejection of bid because low bidder submitted unprofitable price. Par. 1-311(a) of Armed Services Procurement Reg. in defining "buying in" as practice of attempting to obtain contract award by knowingly offering price or cost estimate less than anticipated costs with expectation of recovering any losses, either during contract performance or in future "follow-on" contracts, does not provide for bid rejection and, therefore, there is no legal basis upon which award may be precluded or disturbed because low bidder submitted unprofitable price---------- 50

Qualified

Ambiguous bid

Unsolicited insertion of plant part numbers in low bid to furnish engine air filters without express statement that specifications would be complied with created ambiguity that may not be resolved by reference to "catalog cut sheets" and other data available to Govt. before bid opening, as reliance on this information would afford bidder option to

BIDS—Continued Page
Qualified—Continued
Ambiguous bid—Continued
affect responsiveness of bid—an option detrimental to the competitive bidding system. Therefore, as contracting officer cannot determine whether bidder offered conforming article or that part numbers were included for purpose of internal control, bid is considered qualified bid and may not be considered for award 8

Sales. (*See* Sales)
Specifications. (*See* Contracts, specifications)
Two-step procurement
Technical proposals
Qualification requirements

Under letter request, first step of two-step procurement, which contained "Bidder's Technical Qualification Clause" stating technical proposals would be accepted only from those contractors who have manufactured and can demonstrate at operating airfield a Solid State Conventional Instrument Landing System, evaluation of capabilities of prime contractor and its subcontractor—French firm who manufactured and demonstrated system in France—although within policy enunciated in par. 4–117 of Armed Services Procurement Reg., which recognizes integrity and validity of contractor team arrangements, was contrary to intent of clause, and proposal premised on subcontractor's system should not have been considered. Therefore, in future procurements, clause should specify permissible relationships or refer to ASPR provision 163

COLLEGES, SCHOOLS, ETC.

Teachers employed by Defense Department overseas. (*See* Defense Department, teachers employed in overseas areas)

COMPENSATION

Additional
Environmental pay differential
Constitutes basic pay

Environmental pay differential for dirty work having been authorized for Dist. of Columbia wage employees by proper wage fixing authority in accordance with 5 U.S.C. 5341, and in conformity with commercial practices, differential may be considered basic pay, whether stated separately or included in scheduled rates, for purposes of computing wage board overtime and Sunday rates prescribed in 5 U.S.C. 5544, the Civil Service Retirement Deductions authorized in 5 U.S.C. 8334, and for determining annual rate of pay for group life insurance provided in Federal Personnel Manual, Supp. 870–1, subch. 83–3a, and differential may be paid to employees while in leave status 66

Double
Military retired pay and civilian retirement

A retired member of uniformed services, whose military service upon retirement from civilian employment is not used to establish civil service annuity eligibility but is only used in computation of annuity to increase amount payable, may withdraw his waiver of retired pay and have pay reinstated as no double benefit would result from same

COMPENSATION—Continued Page
Double—Continued
Military retired pay and civilian retirement—Continued

service by terminating use of military service to compute civil service annuity and reinstating retired pay, and 5 U.S.C. 8332(e) provides that civil service retirement does not affect right of employee to retired pay, pension, or compensation in addition to annuity payable upon retirement from Federal civilian service 80

Downgrading
Saved compensation
Temporary promotions

Employee demoted from GS–5, step 9, to GS–4, step 10, with salary retention pursuant to 5 U.S.C. 5337, who accepts temporary promotion and then returns to same grade to which initially demoted has not forfeited entitlement to salary retention authorized for 2 years by sec. 5337, retention period to commence on date of demotion, Sept. 16, 1968. Temporary promotion did not affect running of salary-retention period, as employee by virtue of temporary promotion is not considered as having become "entitled to a higher rate of basic pay by operation of" the classification law within meaning of 5 U.S.C. 5337—a bar to salary-retention coverage 82

Increases
Retroactive
Employee separated prior to effective date of increase

Employee of Federal Govt. who transferred to public international organization with reemployment rights under 5 U.S.C. 3582(b), prior to enactment of Federal Employees Salary Act of 1970, is not entitled to retroactive salary adjustment authorized by act for employees on rolls on effective date of act—Apr. 15, 1970—condition precedent to entitlement. However, since under sec. 3582(b) employee who transfers to public international organization is guaranteed that upon reemployment compensation payable will not be less than if employee had remained on Govt. rolls, any salary adjustment required upon reemployment may include retroactive salary payment employee would have received if on rolls on Apr. 15, 1970 173

Military service furlough during retroactive period

Fact that reemployed civilian who while on military furlough served on active military duty was on civilian roll on Apr. 15, 1970, date of enactment of Federal Employees Salary Act of 1970, Pub. L. 91–231, does not entitle him under act to retroactive adjustment in basic pay for active military duty performed during period Jan. 1, 1970, through Mar. 15, 1970, as act provides compensation increases for Federal classified employees only. However, although Pub L. 90–207, Dec. 16, 1967, provides for increase in basic pay for military personnel whenever General Schedule of compensation for Federal classified employees is increased, Secretary of Defense in implementing 1970 act pursuant to E. O. No. 11525 prescribed that member must have been on active duty on Apr. 15, 1970, to be entitled to retroactive adjustment in pay 226

COMPENSATION—Continued Page

Severance pay

Eligibility

Retired members of the uniformed services

Upon reduction in force as civilian employee of U.S., retired member of uniformed services may not be paid severance pay, as 1965 authorizing act (5 U.S.C. 5595) excludes payment of severance pay to person subject to Civil Service Retirement Act or any other retirement law or system applicable to Federal officers or employees or members of uniformed services who at time of separation have fulfilled requirements for immediate annuity—a term including retired pay—and prohibition against payment of severance pay is applicable without regard to when member first becomes entitled to military retired pay, or whether he is eligible under Dual Compensation Act of 1964 (5 U.S.C. 5531–5534) to receive military retired pay concurrently in whole or in part with compensation of his civilian office or position 46

Overpayments

Erroneous payments of severance pay made under 5 U.S.C. 5595 to retired members of uniformed services, who employed as civilians by U.S. were reduced in force, may be waived under provisions of act of Oct. 21, 1968, Pub. L. 90–616 46

Vessel employees

Crews. (*See* Vessels, crews, compensation)

Wage board employees

Environmental differential payments

Environmental pay differential for dirty work having been authorized for Dist. of Columbia wage employees by proper wage fixing authority in accordance with 5 U.S.C. 5341, and in conformity with commercial practices, differential may be considered basic pay, whether stated separately or included in scheduled rates, for purposes of computing wage board overtime and Sunday rates prescribed in 5 U.S.C. 5544, the Civil Service Retirement Deductions authorized in 5 U.S.C. 8334, and for determining annual rate of pay for group life insurance provided in Federal Personnel Manual, Supp. 870–1, subch. 83–3a, and differential may be paid to employees while in leave status 66

Withholding

Union dues

Discontinuance

Timely mailed revocation of dues allotment to employee organization made pursuant to 5 U.S.C. 5525, which was received in payroll office on Monday, Mar. 2, first workday after Mar. 1 deadline set by Civil Service Commission, 5 CFR 550.308, constitutes compliance with regulation under rule that when act is to be performed by certain date and last day of period falls on Sunday, requirement is complied with if act is performed on following day. Therefore, discontinuance of allotment having become effective at beginning of first full pay period following Mar. 1 deadline, dues deducted subsequent to revocation are for collection from employee organization and repayment to employee 108

Page

CONGRESS

Constitutional authority

Property matters

Lease of land adjacent to Visitors' Information Center at John F. Kennedy Center, Fla., for construction of nondenominational chapel from funds raised by public subscription is pursuant to Art. IV, sec. 3, cl. 2 of Constitution of U.S., a congressional and not executive function, unless otherwise specifically provided by statute, and leasing authority in sec. 203(b)(3) of National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(b)(3)), does not appear to be intended as specific authority for execution of proposed 30-year lease. Therefore, because of nature of its use, land within Federal enclave should not be leased without congressional approval of chapel construction, and payment of annual rental has no significance in considering lack of specific authority to lease land 63

CONTRACTORS

Conflicts of interest

Developmental or prototype items

Determination and findings of conflict of interest in procurement of analysis and design services to update obsolescent automatic data processing equipment, and proposal that design contract ban successful contractor from participating in future procurement of hardware, satisfies requirement in Dept. of Defense Directive 5500.10, Rules for Avoidance of Organizational Conflicts of Interest, that contractor "agrees to prepare and furnish complete specifications," not withstanding design contract does not constitute whole specifications and exclusion from ban of purchase of data processing equipment to be handled by other than procuring agency. However, to carry out intent of Directive, ban should extend to date of award of first production contract rather than specific date proposed 54

CONTRACTS

Bids, generally. (*See* **Bids**)

Brand name or equal. (*See* **Contracts, specifications, restrictive, particular make**)

Conflicts of interest

Research and development contracts. (*See* **Contracts, research and development, conflicts of interest prohibition**)

Cost-plus

Evaluation factors

Use of point system

Although offeror's estimated prices are not deciding factor in selecting successful contractor under cost-reimbursement type contract negotiated pursuant to ASPR 3–805.2, contracting agency that during evaluation of proposals received under request for quotations soliciting preparation of Govt. publication on cost-plus-a-fixed-fee basis eliminates 25 points assigned to factor of reasonableness of cost in evaluation criteria, is required under ASPR 3–805.1 to continue negotiations with all offerors within competitive range. Therefore, award made solely on basis of technical superiority as being in best interest of Govt. without further negotiation with offerors who have necessary qualifications to perform procurement should be canceled 16

CONTRACTS—Continued Page

Data, rights, etc.

Restrictive data rights *v.* procurement methods

"Engineering critical" designation assigned by agreement to replacement parts for engines developed at costs shared by manufacturer and Govt. to preclude use of data for competitive purposes because of difficulty to determine rights of parties, relating to restricted data rights and not to procurement methods, additional sources of supply may be developed by instituting appropriate tests and qualification procedures, provided rights of manufacturer are not infringed. Par. 1–313 of Armed Services Procurement Reg. requires competitive procurement of spare parts, and it would be contrary to concept of "maximum practical competition" to hold that "engineering critical" item may not be procured competitively without regard to willingness and ability of other than sole source supplier to produce parts without infringement of proprietary rights---------- 184

De minimis rule

Negotiated contracts

Since to properly terminate close of negotiations, offerors must be advised that negotiations are being conducted; asked for their "best and final" offer and not merely to confirm prior submission; and informed that any revision of proposal must be submitted by common cutoff date, cutoff date prescribed by sec. 1–3.805–1(b) of Federal Procurement Regs., is considered essential and not *de minimis* requirement, and purposes of establishing common cutoff date would be frustrated if proposal revision were permitted after common cutoff date without opening new negotiations on basis that this procedure would be favorable to Govt---------- 117

Labor stipulations

Davis-Bacon Act

Classification of workmen

Erroneous

Classification of workmen who installed "Orangeburg" fiber ducts as conduit for underground electrical wiring as laborers under contract including wage determination for electricians and laborers, and disputes clause was violation of Davis-Bacon Act, 40 U.S.C. 276a, and referral of erroneous classification to Secretary of Labor under disputes clause when contractor disagreed with contracting officer's determination based on prevailing area practice but refused to submit contrary evidence did not violate contract or prejudice contractor because it had not been advised of referral, and Secretary's confirmation, even though based on record only, that classification was erroneous—determination that is not subject to review—entitles laborers who were not supervised by journeyman electrician to wage adjustment as electricians and not electrician apprentices---------- 103

Mistakes

Contracting officer's error detection duty

Notice of error

Lacking

Request for relief under sec. 17 of Armed Services Procurement Reg. authorizing extraordinary contractual actions to facilitate national

CONTRACTS—Continued Page
Mistakes—Continued
Contracting officer's error detection duty—Continued
Notice of error—Continued
Lacking—Continued

defense made after contract completion and final payment on basis bid underpricing was due to unforeseen production difficulties and misleading vendor quotes is for denial where occurrence of mistake "so obvious it was or should have been apparent" is not demonstrated, and record establishes price bid was adequately verified and was intended, and only subsequent events resulted in unprofitable contract. Even assuming existence of bona fide mistake, fact that price bid greatly exceeded Govt.'s estimate intended as funding allocation, or that prior procurements for lesser quantities were priced much higher than group of bids in price range of successful bid did not place contracting officer on actual or constructive notice of error---------- 39

Item not for evaluation

A mistake in per linear foot unit price of cable, price that would not be used for bid evaluation purposes but would be applicable should quantity of lump-sum purchase of cable be increased or decreased, and which relating to bid responsiveness would require bid rejection if not furnished, may be corrected and contract reformed to reflect intended bid price. Sec. 1-2.406-1 of Federal Procurement Regs. does not limit bid examination to those factors to be considered in bid evaluation, and in view of possibility that unit price would have substantial impact on price ultimately to be paid should right reserved to increase or decrease length of cable purchased be exercised, contracting officer should have compared unit prices and when aware of wide range of prices offered, verified erroneous unit price---------- 151

Negotiation
Addenda acknowledgment requirement

Acknowledgment of substantive amendment received after closing time for receipt of proposals under negotiated invitation for proposals issued pursuant to public exigency authority in 10 U.S.C. 2304(a)(2), and which provides for award on basis of initial proposals, may be accepted and proposal considered in view of fact negotiation procedures are more flexible than those used for advertised procurements. However, as late acceptance of addendum involves actions that constitute discussion within meaning of 10 U.S.C. 2304(g) and par. 3-805.1(a) of Armed Services Procurement Reg., negotiations must be conducted with all offerors within competitive range to obtain "best and final" offers, for notwithstanding urgency of procurement, award may no longer be made on basis of initial proposals received---------- 202

Administrative determination
Finality

Solicitation of proposals on brand name basis without "or equal" provision in accordance with par. 1-1206.1(b) of Armed Services Procurement Reg. under negotiation authority contained in 10 U.S.C. 2304(a)(7), and pursuant to "Determination and Findings" that sole source procurement of sterilizers to be purchased is justified, is restrictive of competition unless no other item will meet Govt.'s minimum requirements or none other

CONTRACTS—Continued Page

Negotiation—Continued

Administration determination—Continued

Finality—Continued

but sole source manufacturer can produce acceptable sterilizer. Therefore, as there is nothing particularly unique about design or manufacture of brand name sterilizer, fact that it has proven satisfactory in use does not justify sole source procurement. Although justification for procurement is final determination, sole source solicitation stated in request for proposals should be eliminated 209

Auction technique prohibition

Cutoff notice of negotiations

While Govt.'s failure to establish common cutoff date under request for proposals for computer time and services prevented closing of negotiations, contracting officer's refusal to negotiate price reduction was proper in view of discussions constituting negotiations during which vital information concerning successful offeror's proposal was erroneously but innocently revealed, for to permit price reduction under circumstances would compromise Federal Procurement system by allowing auction technique precluded by sec. 1-3.805-1(b) of Federal Procurement Regs. Although contract awarded is not required to be terminated, in view of procedural deficiencies in procurement, contract option should not be exercised unless it is impracticable to reprocure services on equal competitive basis 222

Awards

Erroneous

Price competition

Authority in sec. 1-3.805 of Federal Procurement Regs. to negotiate research and development, or cost-reimbursable, or special service contracts without price competition based solely on determination that particular contractor would furnish services of higher quality than any other contractor, does not cover selection of air tanker operators by Forest Service to fight forest fires as such service is not within categories contemplated by regulation for exception to price competition, and failure to include price as factor of contractor selection violates spirit and intent of Federal Property and Administrative Services Act and implementing regulations. Although it would not be in best interest of Govt. to disturb contracts awarded and options exercised, price inclusion in future offers will be required. B-157954, Dec. 15, 1965, modified 110

Price one factor in determination

While rigid rules applicable to formally advertised procurements generally require award to lowest (price) responsive, responsible bidder, flexibility inherent in concept of negotiation permits award to be made to best advantage of Govt., price and other factors considered. Therefore, utilization in "competitive negotiation" of price as factor in selection of contractor will not adversely affect selection of qualified contractor by Forest Service for performance of firefighting services 110

CONTRACTS—Continued Page

Negotiation—Continued

Changes during negotiation

Notification

Where offers received under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), relative to contracting for experimental, developmental, or research work, were unacceptable and individual conferences were held with all offerors to clarify requirements for procurement of System-Multiplex-Analog, Data Acquisition Record and Reproduce Facility, and to give each contractor opportunity to justify any deviation offered and to modify proposal submitted, reopening of negotiations to inform offerors in competitive range of specification changes negotiated at individual conferences after date set for final offers that incorporated conference agreements was proper means of correcting suspected and discovered deficiencies in negotiation process and of overcoming presumption of unfairness raised because of inability of one offeror to meet specifications---------- 114

Competition

Competitive range formula

Cost-type contract

Although offeror's estimated prices are not deciding factor in selecting successful contractor under cost-reimbursement type contract negotiated pursuant to ASPR 3-805.2, contracting agency that during evaluation of proposals received under request for quotations soliciting preparation of Govt. publication on cost-plus-a-fixed-fee basis eliminates 25 points assigned to factor of reasonableness of cost in evaluation criteria, is required under ASPR 3-805.1 to continue negotiations with all offerors within competitive range. Therefore, award made solely on basis of technical superiority as being in best interest of Govt. without further negotiation with offerors who have necessary qualifications to perform procurement should be canceled---------- 16

Information disclosure

Since to properly terminate close of negotiations, offerors must be advised that negotiations are being conducted; asked for their "best and final" offer and not merely to confirm prior submission; and informed that any revision of proposal must be submitted by common cutoff date, cutoff date prescribed by sec. 1-3.805-1(b) of Federal Procurement Regs. is considered essential and not *de minimis* requirement, and purposes of establishing common cutoff date would be frustrated if proposal revision were permitted after common cutoff date without opening new negotiations on basis that this procedure would be favorable to Govt---- 117

Discussion with all offerors requirement

Fact that under 10 U.S.C. 2304(g) written or oral discussion should be conducted with all responsible offerors whose proposals are within competitive range that encompasses both price and technical considerations does not permit use of any procedure that would disclose information during negotiation period to unfair competitive advantage of any proposer---------- 1

CONTRACTS—Continued Page

Negotiation—Continued

Competition—Continued

Discussions with all offerors requirement—Continued

Request for proposals that failed to include evaluation criteria or indicate criteria's relative importance because of erroneous belief these standards were inapplicable to civilian procurement was defective and was not in accordance with sound procurement policy and public interest. Also, scoring of offer by comparison with predetermined score overlooked that primary consideration in negotiated procurement is discussion with all offerors in competitive range and that borderline cases should not automatically be excluded from consideration, and as result maximum competition was not obtained. Requests for proposals should be amended to establish omitted criteria and offerors permitted to submit additional information or revise proposals, and if within competitive range, afforded opportunity for discussion to extent required by sec. 1–3.802(c) of Federal Procurement Regs..... 59

In negotiation of procurement, exception in 10 U.S.C. 2304(g) to conducting discussions with all responsible offerors within competitive range may not be invoked by contracting officer to make award to other than low responsible offeror where price is sole evaluation factor and, therefore, award to second low offeror, incumbent contractor, without obtaining Certificate of Competency (COC) on low offeror, a small business concern considered nonresponsible on factors relating to capacity and credit, was illegal and award should be canceled. No award should have been made unless SBA refused to issue COC or did not respond to referral within 15 days, or in alternative if low proposal was unacceptable without clarification, discussions should have been conducted with all offerors within competitive range..... 67

Acknowledgment of substantive amendment received after closing time for receipt of proposals under negotiated invitation for proposals issued pursuant to public exigency authority in 10 U.S.C. 2304(a)(2), and which provides for award on basis of initial proposals, may be accepted and proposal considered in view of fact negotiation procedures are more flexible than those used for advertised procurements. However, as late acceptance of addendum involves actions that constitute discussion within meaning of 10 U.S.C. 2304(g) and par. 3–805.1(a) of Armed Services Procurement Reg., negotiations must be conducted with all offerors within competitive range to obtain "best and final" offers, for notwithstanding urgency of procurement, award may no longer be made on basis of initial proposals received..... 202

Maximum possible extent

"Engineering critical" designation assigned by agreement to replacement parts for engines developed at costs shared by manufacturer and Govt. to preclude use of data for competitive purposes because of difficulty to determine rights of parties, relating to restricted data rights and not to procurement methods, additional sources of supply may be developed by instituting appropriate tests and qualification procedures, provided rights of manufacturer are not infringed. Par. 1–313 of Armed

CONTRACTS—Continued Page

Negotiation—Continued

Competition—Continued

Maximum possible extent—Continued

Services Procurement Reg. requires competitive procurement of spare parts, and it would be contrary to concept of "maximum practical competition" to hold that "engineering critical" item may not be procured competitively without regard to willingness and ability of other than sole source supplier to produce parts without infringement of proprietary rights 184

Fact that proposal timely submitted by firm in response to notice of procurement in Commerce Business Daily had not been obtained from procuring agency does not justify refusal to consider offer on basis of unfairness to firms who had acquired request for proposals (RFP) from limited number made available on "first received, first served" basis but were not permitted to compete because of belief sufficient competition had been secured from firms selected to receive RFP, and unfairness to those firms unable to obtain RFP. Although purchasing agency may limit number of prospective contractors solicited, this authority is not justification for not considering unsolicited offer and for failing to obtain maximum competition. Therefore, proposal refused may be resubmitted and all offerors who had submitted proposals afforded opportunity to revise their proposals 215

Prices

While rigid rules applicable to formally advertised procurements generally require award to lowest (price) responsive, responsible bidder, flexibility inherent in concept of negotiation permits award to be made to best advantage of Govt., price and other factors considered. Therefore, utilization in "competitive negotiation" of price as factor in selection of contractor will not adversely affect selection of qualified contractor by Forest Service for performance of firefighting services 110

Conflicts of interest prohibition

Determination and findings of conflict of interest in procurement of analysis and design services to update obsolescent automatic data processing equipment, and proposal that design contract ban successful contractor from participating in future procurement of hardware, satisfies requirement in Dept. of Defense Directive 5500.10, Rules for Avoidance of Organizational Conflicts of Interest, that contractor "agrees to prepare and furnish complete specifications," notwithstanding design contract does not constitute whole specifications and exclusion from ban of purchase of data processing equipment to be handled by other than procuring agency. However, to carry out intent of Directive, ban should extend to date of award of first production contract rather than specific date proposed 54

CONTRACTS—Continued Page

Negotiation—Continued

Cutoff date

Reopening of negotiations

Where offers received under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), relative to contracting for experimental, developmental, or research work, were unacceptable and individual conferences were held with all offerors to clarify requirements for procurement of System-Multiplex-Analog, Data Acquisition Record and Reproduce Facility, and to give each contractor opportunity to justify any deviation offered and to modify proposal submitted, reopening of negotiations to inform offerors in competitive range of specification changes negotiated at individual conferences after date set for final offers that incorporated conference agreements was proper means of correcting suspected and discovered deficiencies in negotiation process and of overcoming presumption of unfairness raised because of inability of one offeror to meet specifications 114

Since to properly terminate close of negotiations, offerors must be advised that negotiations are being conducted; asked for their "best and final" offer and not merely to confirm prior submission; and informed that any revision of proposal must be submitted by common cutoff date, cutoff date prescribed by sec. 1–3.805–1(b) of Federal Procurement Regs. is considered essential and not *de minimis* requirement, and purposes of establishing common cutoff date would be frustrated if proposal revision were permitted after common cutoff date without opening new negotiations on basis that this procedure would be favorable to Govt 117

Same for all proposers

Failure to establish common cutoff date for negotiation of cost-plus-award-fee contract for final hardware design and development of Applications Technology Satellites (ATS) project with two offerors who had been awarded parallel contracts for preliminary analysis and feasibility studies of ATS, and premature distribution for evaluation of first final proposal received resulted in defective selective procedures prejudicial to contractor denied opportunity to compete on equal time basis and possibly overcome its price disadvantage, a situation compounded by premature distribution of proposal for cost evaluation. Therefore, proposed award to offeror advantaged by longer negotiation period should be reconsidered 1

Determination and findings

Basis of negotiation

Solicitation of proposals on brand name basis without "or equal" provision in accordance with par. 1–1206.1(b) of Armed Services Procurement Reg. under negotiation authority contained in 10 U.S.C. 2304(a)(7), and pursuant to "Determination and Findings" that sole source procurement of sterilizers to be purchased is justified, is restrictive of competition unless no other item will meet Govt.'s minimum requirements or none other but sole source manufacturer can produce acceptable sterilizer. Therefore, as there is nothing particularly unique about design or manufacture of brand name sterilizer, fact that it has proven satisfactory in use does not justify sole source procurement. Although justification for procurement is final determination, sole source solicitation stated in request for proposals should be eliminated 209

CONTRACTS—Continued Page

Negotiation—Continued

Disclosure of price, etc.

Auction technique prohibition

While Govt.'s failure to establish common cutoff date under request for proposals for computer time and services prevented closing of negotiations, contracting officer's refusal to negotiate price reduction was proper in view of discussions constituting negotiations during which vital information concerning successful offeror's proposal was erroneously but innocently revealed, for to permit price reduction under circumstances would compromise Federal Procurement system by allowing auction technique precluded by sec. 1–3.805–1(b) of Federal Procurement Regs. Although contract awarded is not required to be terminated, in view of procedural deficiencies in procurement, contract option should not be exercised unless it is impracticable to reprocure services on equal competitive basis..... 222

Evaluation factors

Criteria

Request for proposals that failed to include evaluation criteria or indicate criteria's relative importance because of erroneous belief these standards were inapplicable to civilian procurement was defective and was not in accordance with sound procurement policy and public interest. Also, scoring of offer by comparison with predetermined score overlooked that primary consideration in negotiated procurement is discussion with all offerors in competitive range and that borderline cases should not automatically be excluded from consideration, and as result maximum competition was not obtained. Request for proposals should be amended to establish omitted criteria and offerors permitted to submit additional information or revise proposals, and if within competitive range, afforded opportunity for discussion to extent required by sec. 1–3.802(c) of Federal Procurement Regs..... 59

Firefighting contracts

Factors other than price

Authority in sec. 1–3.805 of Federal Procurement Regs. to negotiate research and development, or cost-reimbursable, or special service contracts without price competition based solely on determination that particular contractor would furnish services of higher quality than any other contractor, does not cover selection of air tanker operators by Forest Service to fight forest fires as such service is not within categories contemplated by regulation for exception to price competition, and failure to include price as factor of contractor selection violates spirit and intent of Federal Property and Administrative Services Act and implementing regulations. Although it would not be in best interest of Govt. to disturb contracts awarded and options exercised, price inclusion in future offers will be required. B–157954, Dec. 15, 1965, modified..... 110

CONTRACTS—Continued Page

Negotiations—Continued

Evaluation factors—Continued

Point rating

Competitive range formula

Although offeror's estimated prices are not deciding factor in selecting successful contractor under cost-reimbursement type contract negotiated pursuant to ASPR 3-305.2, contracting agency that during evaluation of proposals received under request for quotations soliciting preparation of Govt. publication on cost-plus-a-fixed-fee basis eliminates 25 points assigned to factor of reasonableness of cost in evaluation criteria, is required under ASPR 3-805.1 to continue negotiations with all offerors within competitive range. Therefore, award made solely on basis of technical superiority as being in best interest of Govt. without further negotiation with offerors who have necessary qualifications to perform procurement should be canceled---------- 16

Disclosure of evaluation base

In awarding contract to highest offeror under request for proposals to conduct survey of minority firms on basis of point rating that was not structured to inform offerors of evaluation criteria to be used and relative importance of each factor, and without giving other offerors in competitive range the opportunity to discuss weaknesses, excesses, or deficiencies of their original proposals as required by sec. 1-3.805-1 of Federal Procurement Regs., principles of negotiated competitive procurement were not observed. However, contract having been completed, it would not be in best public interest to take any remedial action; but to insure that Govt. will obtain most advantageous contract available in future procurements, such procedures should be corrected---------- 117

Propriety of evaluation

Point system evaluation of proposals for computer time and services under which number of points to be awarded for basic costs is to be determined from offeror's "pricing out," or cost for requirements stated in sample problem included in solicitation that is not considered indicative of cost differences between suppliers for every proposed computer application contemplated under contract, but, rather, typical of work to be performed, is proper method of evaluation, notwithstanding amount of memory or core size was not frozen in sample, as factors frozen are of greater significance as to price than variations in core size of sample-- 222

Public exigency

Failure to meet conditions

Acknowledgment of substantive amendment received after closing time for receipt of proposals under negotiated invitation for proposals issued pursuant to public exigency authority in 10 U.S.C. 2304(a)(2), and which provides for award on basis of initial proposals, may be accepted and proposal considered in view of fact negotiation procedures are more flexible than those used for advertised procurements. However, as late acceptance of addendum involves actions that constitute discussion within meaning of 10 U.S.C. 2304(g) and par. 3-805.1(a) of Armed Services Procurement Reg., negotiations must be conducted with all offerors within competitive range to obtain "best and final" offers, for notwithstanding urgency of procurement, award may no longer be made on basis of initial proposals received---------- 202

CONTRACTS—Continued Page
Negotiation—Continued
Requests for proposals
Distribution limitation

Fact that proposal timely submitted by firm in response to notice of procurement in Commerce Business Daily had not been obtained from procuring agency does not justify refusal to consider offer on basis of unfairness to firms who had acquired request for proposals (RFP) from limited number made available on "first received, first served" basis but were not permitted to compete because of belief sufficient competition had been secured from firms selected to receive RFP, and unfairness to those firms unable to obtain RFP. Although purchasing agency may limit number of prospective contractors solicited, this authority is not justification for not considering unsolicited offer and for failing to obtain maximum competition. Therefore, proposal refused may be resubmitted and all offerors who had submitted proposals afforded opportunity to revise their proposals 215

Sole source basis
Broadening competition

"Engineering critical" designation assigned by agreement to replacement parts for engines developed at costs shared by manufacturer and Govt. to preclude use of data for competitive purposes because of difficulty to determine rights of parties, relating to restricted data rights and not to procurement methods, additional sources of supply may be developed by instituting appropriate tests and qualification procedures, provided rights of manufacturer are not infringed. Par. 1-313 of Armed Services Procurement Reg. requires competitive procurement of spare parts, and it would be contrary to concept of "maximum practical competition" to hold that "engineering critical" item may not be procured competitively without regard to willingness and ability of other than sole source supplier to produce parts without infringement of proprietary rights 184

Solicitation of proposals on brand name basis without "or equal" provision in accordance with par. 1-1206.1(b) of Armed Services Procurement Reg. under negotiation authority contained in 10 U.S.C. 2304(a)(7), and pursuant to "Determination and Findings" that sole source procurement of sterilizers to be purchased is justified, is restrictive of competition unless no other item will meet Govt.'s minimum requirements or none other but sole source manufacturer can produce acceptable sterilizer. Therefore, as there is nothing particularly unique about design or manufacture of brand name sterilizer, fact that it has proven satisfactory in use does not justify sole source procurement. Although justification for procurement is final determination, sole source solicitation stated in request for proposals should be eliminated 209

Options
Not to be exercised
Procedural deficiencies in procurement

While Govt.'s failure to establish common cutoff date under request for proposals for computer time and services prevented closing of negotiations, contracting officer's refusal to negotiate price reduction was proper in view of discussions constituting negotiations during which vital information concerning successful offeror's proposal was erroneously but

CONTRACTS—Continued Page
Options—Continued
Not to be exercised—Continued
Procedural deficiencies in procurement—Continued

innocently revealed, for to permit price reduction under circumstances would compromise Federal Procurement system by allowing auction technique precluded by sec. 1-3.805-1(b) of Federal Procurement Regs. Although contract awarded is not required to be terminated, in view of procedural deficiencies in procurement, contract option should not be exercised unless it is impracticable to reprocure services on equal competitive basis 222

Prices
Underpricing
Subsequent developments

Request for relief under sec. 17 of Armed Services Procurement Reg. authorizing extraordinary contractual actions to facilitate national defense made after contract completion and final payment on basis bid underpricing was due to unforeseen production difficulties and misleading vendor quotes is for denial where occurrence of mistake "so obvious it was or should have been apparent" is not demonstrated, and record establishes price bid was adequately verified and was intended, and only subsequent events resulted in unprofitable contract. Even assuming existence of bona fide mistake, fact that price bid greatly exceeded Govt.'s estimate intended as funding allocation, or that prior procurements for lesser quantities were priced much higher than group of bids in price range of successful bid did not place contracting officer on actual or constructive notice of error 39

Proprietary, etc., data. (*See* Contracts, data, rights, etc.)
Protests
Filing before or after award

Under procedure in 4 CFR 20.1, bid protest may be filed with U.S. GAO before as well as after award of contract and, therefore, in filing protest to award under request for proposals, regulation does not require, as prerequisite to standing or timeliness, that award should have been made or that offeror should have been informed of unacceptability of his proposal 59

Research and development
Conflicts of interest prohibition

Determination and findings of conflict of interest in procurement of analysis and design services to update obsolescent automatic data processing equipment, and proposal that design contract ban successful contractor from participating in future procurement of hardware, satisfies requirement in Dept. of Defense Directive 5500.10, Rules for Avoidance of Organizational Conflicts of Interest, that contractor "agrees to prepare and furnish complete specification," notwithstanding design contract does not constitute whole specifications and exclusion from ban of purchase of data processing equipment to be handled by other than procuring agency. However, to carry out intent of Directive, ban should extend to date of award of first production contract rather than specific date proposed 54

CONTRACTS—Continued Page

Research and development—Continued

Technical deficiencies of proposals

Correction

Where offers received under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), relative to contracting for experimental, developmental, or research work, were unacceptable and individual conferences were held with all offerors to clarify requirements for procurement of System-Multiplex-Analog, Data Acquisition Record and Reproduce Facility, and to give each contractor opportunity to justify any deviation offered and to modify proposal submitted, reopening of negotiations to inform offerors in competitive range of specification changes negotiated at individual conferences after date set for final offers that incorporated conference agreements was proper means of correcting suspected and discovered deficiencies in negotiation process and of overcoming presumption of unfairness raised because of inability of one offeror to meet specifications 114

Sales, generally. (*See* Sales)

Sole source procurements. (*See* Contracts, negotiation, sole source basis)

Specifications

Adequacy

Timeliness of bidder's protest

Low bidder who after bid opening objected to use of brand name or equal invitation which listed 47 salient characteristics that did not include technical data for electronic receivers to be purchased, on basis unlisted data could have been quickly summarized and purchase description prepared that would meet requirements of sec. 1-1.307-2 of Federal Procurement Regs. for clear and accurate description of technical requirements, should have lodged his complaint before bids were opened. Invitation for bids clearly stated salient characteristics and other criteria on which bids were to be evaluated, and bidder having participated in brand name or equal procurement to point of bid opening is deemed to have acquiesced in evaluation criteria set out in invitation 193

Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)

Conformability of equipment, etc., offered

Ambiguous bids

Unsolicited insertion of plant part numbers in low bid to furnish engine air filters without express statement that specifications would be complied with created ambiguity that may not be resolved by reference to "catalog cut sheets" and other data available to Govt. before bid opening, as reliance on this information would afford bidder option to affect responsiveness of bid—an option detrimental to the competitive bidding system. Therefore, as contracting officer cannot determine whether bidder offered conforming article or that part numbers were included for purpose of internal control, bid is considered qualified bid and may not be considered for award 8

CONTRACTS—Continued Page

Specifications—Continued

Deviations

Informal *v.* substantive

Block bidding

Quantity Limitation Prohibition Clause intended to prevent block bidding that was included in invitation for bids to manufacture flight jackets for delivery at several destinations which provided each bidder may submit one quantity *only* at one price for each item bid, and may stipulate maximum/minimum quantity acceptable for each item or overall procurement caused no ambiguity in invitation, and offer bidding on first 7,470 for each destination and then including this same quantity with additional 1,000 for next increment of 8,470 each and so on until each additional 1,000 added thereon reached total procurement quantity of 16,470 each, offered more than one price for quantity and violation of clause may not be waived under par. 2–405 of Armed Services Procurement Reg. as informality 48

Information

Brand name or equal item

Data contained in literature that was not prepared to quote back salient features of brand name model but was published to disseminate information to public does not constitute sufficient descriptive literature for purpose of determining whether product equals brand name. Furthermore, offer to conform does not satisfy descriptive literature requirement of brand name or equal clause for detailed information, and submission of data after bid opening may not be considered under fundamental principle of competitive bidding system that responsiveness of bid must be determined from bid without reference to extraneous aids or explanation submitted after bid opening, in fairness to those bidders whose offers strictly complied with all solicitation requirements 193

Failure to furnish something required

Addenda acknowledgment

Legal relationship of parties altered

Amendment to invitation issued to implement Defense Procurement Cir. No. 74 entitled "Subcontractor Cost or Pricing Data and Audit Requirements," that recognized exemptions equivalent to those provided in so-called Truth in Negotiations Act, is material amendment, whether or not impact on price is demonstrable, or legal obligations imposed are new or being clarified, and failure to acknowledge amendment may not be waived as minor informality under ASPR 2–405, even though amendment was not received. Amendment altered legal relationship of parties, even though not necessarily varying actual work to be performed, by making submission of cost or pricing data, and prime contractor's responsibility for defective subcontractor data mandatory instead of discretionary 11

Negotiated procurement

Acknowledgment of substantive amendment received after closing time for receipt of proposals under negotiated invitation for proposals issued pursuant to public exigency authority in 10 U.S.C. 2304(a)(2),

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

Addenda acknowledgment—Continued

Negotiated procurement—Continued

and which provides for award on basis of initial proposals, may be accepted and proposal considered in view of fact negotiation procedures are more flexible than those used for advertised procurements. However, as late acceptance of addendum involves actions that constitute discussion within meaning of 10 U.S.C. 2304(g) and par. 3-805.1(a) of Armed Services Procurement Reg., negotiations must be conducted with all offerors within competitive range to obtain "best and final" offers, for notwithstanding urgency of procurement, award may no longer be made on basis of initial proposals received 202

Blanket offer to conform to specifications

Where technical data necessary for drafting of purchase description for electronic receivers was lacking, use of brand name or equal specification, listing 47 salient characteristics that had to be met by any "equal" product offered was not improper, nor did evaluation of equal product on basis of whether long list of features was met operate to make salient characteristics complete purchase description prescribed by sec. 1-1.307-2 of the Federal Procurement Regs. in absence of clear and accurate description of technical requirements. Therefore, invitation for bids not constituting satisfactory purchase description, low bid that complied with only six of stated 47 characteristics and contained statement that specifications would be met was properly rejected 193

Data contained in literature that was not prepared to quote back salient features of brand name model but was published to disseminate information to public does not constitute sufficient descriptive literature for purpose of determining whether product equals brand name. Furthermore, offer to conform does not satisfy descriptive literature requirement of brand name or equal clause for detailed information, and submission of data after bid opening may not be considered under fundamental principle of competitive bidding system that responsiveness of bid must be determined from bid without reference to extraneous aids or explanation submitted after bid opening, in fairness to those bidders whose offers strictly complied with all solicitation requirements 193

Minimum needs requirement

Cancellation and reinstatement of invitation

Invitation for bids that states required man-year level of effort to perform engineering services for systems and program definition of combat systems maintenance training facility at erroneously fixed rather than estimated level, fails to show Govt.'s minimum needs and, therefore, successful contractor would be unable to produce results required in view of correlation between level of effort and ultimate work product. Failure to accurately reflect man-year level of effort required constitutes compelling reason for canceling invitation contemplated by par. 2-404.1(a) of Armed Services Procurement Reg. and for readvertisement of procurement. However, cancellation emphasizes need for effective administrative definition and expression of Govt.'s requirements during procurement planning process 50

CONTRACTS—Continued Page
Specifications—Continued
Restrictive
Particular make
Description availability

Low bidder under total small business set-aside for brand name or equal product who submitted descriptive data of "or equal" item after bid opening—data not publicly available prior to bid opening—was properly rejected as being nonresponsive on basis that descriptive data could have been specially prepared after bid opening for procurement, thus giving bidder control over responsiveness of his bid after bid opening—situation readily distinguishable from acceptable one of permitting bidder to furnish, after bids are opened, descriptive material in existence and publicly available prior to opening of bids 137

Since "Brand Name or Equal" clause permits purchasing activity to consider other information reasonably available to it in determining whether "or equal" product is equal to brand name item, and nothing in clause precludes bidder from making descriptive data in existence prior to bid opening—such as published catalog—available to procuring activity after bid opening—use of preexisting data to secure details of product offered by bidder obliged to furnish model indicated in his bid does not create objectionable situation where bidder could make nonresponsive bid responsive after bid opening. However, procuring agency has no obligation to go to bidder after bid opening, or to make any unreasonable effort to obtain descriptive data. Contrary dictum in B–158601, May 2, 1966, and other similar cases, is not rule 137

Data contained in literature that was not prepared to quote back salient features of brand name model but was published to disseminate information to public does not constitute sufficient descriptive literature for purpose of determining whether product equals brand name. Furthermore, offer to conform does not satisfy descriptive literature requirement of brand name or equal clause for detailed information, and submission of data after bid opening may not be considered under fundamental principle of competitive bidding system that responsiveness of bid must be determined from bid without reference to extraneous aids or explanation submitted after bid opening, in fairness to those bidders whose offers strictly complied with all solicitation requirements 193

Design *v.* performance criteria

When purpose of first article provision in brand name or equal invitation is to assure that product offered will perform in accordance with salient characteristics stated and not to reveal defects which could be corrected by conveying general design information as to how conforming product could be constructed, whether bidder proposes to manufacture a model which would attain performance characteristics of brand name product is for determination by evaluating information submitted with an offer in accordance with brand name or equal clause and not for determination during first article testing 193

"Or equal" not solicited

Solicitation of proposals on brand name basis without "or equal" provision in accordance with par. 1–1206.1(b) of Armed Services Pro-

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
"Or equal" not solicited—Continued

curement Reg. under negotiation authority contained in 10 U.S.C. 2304(a)(7), and pursuant to "Determination and Findings" that sole source procurement of sterilizers to be purchased is justified, is restrictive of competition unless no other item will meet Govt.'s minimum requirements or none other but sole source manufacturer can produce acceptable sterilizer. Therefore, as there is nothing particularly unique about design or manufacture of brand name sterilizer, fact that it has proven satisfactory in use does not justify sole source procurement. Although justification for procurement is final determination, sole source solicitation stated in request for proposals should be eliminated..... 209

Salient characteristics

Low bidder who after bid opening objected to use of brand name or equal invitation which listed 47 salient characteristics that did not include technical data for electronic receivers to be purchased, on basis unlisted data could have been quickly summarized and purchase description prepared that would meet requirements of sec. 1–1.307–2 of Federal Procurement Regs. for clear and accurate description of technical requirements, should have lodged his complaint before bids were opened. Invitation for bids clearly stated salient characteristics and other criteria on which bids were to be evaluated, and bidder having participated in brand name or equal procurement to point of bid opening is deemed to have acquiesced in evaluation criteria set out in invitation..... 193

Use limited to unavailability of adequate specifications

Where technical data necessary for drafting of purchase description for electronic receivers was lacking, use of brand name or equal specification, listing 47 salient characteristics that had to be met by any "equal" product offered was not improper, nor did evaluation of equal product on basis of whether long list of features was met operate to make salient characteristics complete purchase description prescribed by sec. 1–1.307–2 of the Federal Procurement Regs. in absence of clear and accurate description of technical requirements. Therefore, invitation for bids not constituting satisfactory purchase description, low bid that complied with only six of stated 47 characteristics and contained statement that specifications would be met was properly rejected..... 193

Samples
Preproduction sample requirement
Brand name or equal items

When purpose of first article provision in brand name or equal invitation is to assure that product offered will perform in accordance with salient characteristics stated and not to reveal defects which could be corrected by conveying general design information as to how conforming product could be constructed, whether bidder proposes to manufacture a model which would attain performance characteristics of brand name product is for determination by evaluating information submitted with an offer in accordance with brand name or equal clause and not for determination during first article testing..... 193

CONTRACTS—Continued Page
Subcontractors
Data pricing, etc.
"Truth-in-Negotiations" Act

Amendment to invitation issued to implement Defense Procurement Cir. No. 74 entitled "Subcontractor Cost or Pricing Data and Audit Requirements," that recognized exemptions equivalent to those provided in so-called Truth in Negotiations Act, is material amendment, whether or not impact on price is demonstrable, or legal obligations imposed are new or being clarified, and failure to acknowledge amendment may not be waived as minor informality under ASPR 2–405, even though amendment was not received. Amendment altered legal relationship of parties, even though not necessarily varying actual work to be performed, by making submission of cost or pricing data, and prime contractor's responsibility for defective subcontractor data mandatory instead of discretionary-- 11

Unprofitable
Relief

Request for relief under sec. 17 of Armed Services Procurement Reg. authorizing extraordinary contractual actions to facilitate national defense made after contract completion and final payment on basis bid underpricing was due to unforeseen production difficulties and misleading vendor quotes is for denial where occurrence of mistake "so obvious it was or should have been apparent" is not demonstrated, and record establishes price bid was adequately verified and was intended, and only subsequent events resulted in unprofitable contract. Even assuming existence of bona fide mistake, fact that price bid greatly exceeded Govt.'s estimate intended as funding allocation, or that prior procurements for lesser quantities were priced much higher than group of bids in price range of successful bid did not place contracting officer on actual or constructive notice of error---------- 39

COURTS
Costs
Government liability
Indigent persons
Appropriation chargeable

Psychiatric examination of criminal defendant to determine his mental competency to understand proceedings against him or assist in his own defense authorized by subsec. (e) of Criminal Justice Act of 1964, 18 U.S.C. 3006A(e), providing for investigative, expert, or other services necessary to adequate defense to 18 U.S.C. 4244, and subpoena of witnesses at no cost to defendant authorized under Rule 17(b) of Federal Rules of Criminal Procedure when defendant is financially unable to pay fees of witness whose presence is necessary to adequate defense are distinct services for payment purposes. Services pursuant to 1964 act are payable by Administrative Office of U.S. Courts and those rendered in accordance with Rule 17(b) are payable by Dept. of Justice-- 128

Cost of psychiatric examination of indigent criminal defendant for purpose of establishing insanity at time offense is committed is payable from funds appropriated for implementation of Criminal Justice Act of 1964 by Administrative Office of U.S. Courts, and cost of examination to determine defendant's mental competency to stand trial for purposes of 18 U.S.C. 4244 is expense to be borne by Dept. of Justice in accordance with guidelines issued by Judicial Conference of U.S. in recognition of

COURTS—Continued Page
Costs—Continued
Government liability—Continued
Indigent persons—Continued
Appropriation chargeable—Continued
distinction between two purposes served by psychiatric examination. Where examination serves dual purpose, cost to determine competency to stand trial should be borne by Justice and additional expense to determine insanity at time of offense to Criminal Justice Act appropriation..... 128
Transcripts
Cost of transcript in civil matter for indigent litigant at Govt. expense ordered by Dist. of Columbia Court of General Sessions in connection with appeal may not be paid by Federal Govt. on basis U.S. Court of Appeals for Dist. of Columbia Circuit held in *Lee* v. *Habib* that U.S. must pay for transcripts that are needed to resolve substantive question when indigent litigant is allowed to appeal in *forma pauperis* to Appeals Court. *Lee* case holding that 11 D.C. Code 935 makes 28 U.S.C. 753(f) applicable to Court of General Sessions does not enlarge authority to furnish transcripts at Federal expense to include civil litigation of private parties, as both *Lee* case and cited *Tate* case involved criminal actions brought by U.S. in U.S. Branch of Court of General Sessions, whereas in civil cases Court functions as local or municipal court..... 205
Criminal Justice Act of 1964
Expense limitation
Where expert services authorized by subsec. (e) of Criminal Justice Act of 1964 are requested by indigent defendant's counsel, and expenses incurred exceed $300 maximum allowable under act, Dept. of Justice is not obligated under Rule 17(b) of Federal Rules of Criminal Procedure to pay all or part of expenses. Proper approach to limitation imposed by act is not to disregard limitation but to amend subsec. (e) of 1964 act..... 128
Psychiatric examinations
Cost of psychiatric examination of indigent criminal defendant for purpose of establishing insanity at time offense is committed is payable from funds appropriated for implementation of Criminal Justice Act of 1964 by Administrative Office of U.S. Courts, and cost of examination to determine defendant's mental competency to stand trial for purposes of 18 U.S.C. 4244 is expense to be borne by Dept. of Justice in accordance with guidelines issued by Judicial Conference of U.S. in recognition of distinction between two purposes served by psychiatric examination. Where examination serves dual purpose, cost to determine competency to stand trial should be borne by Justice and additional expense to determine insanity at time of offense to Criminal Justice Act appropriation..... 128
Fee payable to psychiatrist appointed on indigent defendant's motion to conduct mental examination for testifying at trial is payable by Administrative Office of U.S. Courts from appropriations made to implement Criminal Justice Act of 1964, as psychiatrist testified as expert witness and not as lay witness whose fees are prescribed by Rule 17(b) of Federal Rules of Criminal Procedure. Purpose of 1964 act is to assure adequate representation in Federal courts of accused persons with insufficient means, and end product of adequate defense is not infrequently representation at trial, and that is so for consulted expert as well as for counsel..... 128

COURTS—Continued Page

District of Columbia

Court of General Sessions

Transcripts

Cost of transcript in civil matter for indigent litigant at Govt. expense ordered by Dist. of Columbia Court of General Sessions in connection with appeal may not be paid by Federal Govt. on basis U.S. Court of Appeals for Dist. of Columbia Circuit held in *Lee* v. *Habib* that U.S. must pay for transcripts that are needed to resolve substantive question when indigent litigant is allowed to appeal in *forma pauperis* to Appeals Court. *Lee* case holding that 11 D.C. Code 935 makes 28 U.S.C. 753(f) applicable to Court of General Sessions does not enlarge authority to furnish transcripts at Federal expense to include civil litigation of private parties, as both *Lee* case and cited *Tate* case involved criminal actions brought by U.S. in U.S. Branch of Court of General Sessions, whereas in civil cases Court functions as local or municipal court------ 205

Probational proceedings

Psychiatric examinations

Where probationer charged with violation of probation conditions moves for psychiatric examination, examination fee is payable by Dept. of Justice when psychiatric services involve 18 U.S.C. 4244 proceeding to determine defendant's mental competency for purpose of continuing hearing for revocation of probation---------- 128

Right to legal representation

In view of *Mempa* v. *Rhay*, 389 U.S. 128 (1967), involving right to counsel in probation revocation coupled with deferred sentencing proceeding, 45 Comp. Gen. 780 (1966) need no longer be considered controlling in connection with proceedings involving deferred sentencing, whether or not such proceedings are coupled with revocation of probation, but decision remains in effect insofar as simple revocation of probation proceedings are concerned. Whether cost of psychiatric examination is for payment under Criminal Justice Act or under 18 U.S.C. 4244, depends on purpose of examination; that is, whether it is intended to establish insanity of defendant at time of offense or serves as tool for his defense---------- 128

DEBT COLLECTIONS

Waiver

Civilian employees

Compensation overpayments

Severance pay

Erroneous payments of severance pay made under 5 U.S.C. 5595 to retired members of uniformed services, who employed as civilians by U.S. were reduced in force, may be waived under provisions of act of Oct. 21, 1968, Pub. L. 90-616---------- 46

DEFENSE DEPARTMENT Page

Teachers employed in areas overseas

Leaves of absence

When teachers in Dept. of Defense Overseas Dependents' Schools are absent from duty without authorization, pay deduction for scheduled workdays only would be in accord with Pub. L. 86–91, as amended, 20 U.S.C. 901–907, enacted to eliminate many difficulties resulting from application of civil service laws and regulations to overseas teachers whose conditions of employment are significantly different from those of full-time civil service employees. Therefore, Secretary of Defense having broad authority under sec. 4 of act (20 U.S.C. 902) to regulate entitlement of teachers to compensation and payment of such compensation, current regulations may be amended to eliminate requirement for deduction of salary for all days from time teacher is absent without proper authorization until return to duty 191

DETAILS

Military personnel

Distinction between detail and assignment

Legislative history of Pub. L. 90–179, which authorized detailing two officers—a Navy officer (10 U.S.C. 5149(b)) and a Marine officer (10 U.S.C. 5149(c))—as Assistant Judge Advocates General of Navy, entitled to rank and grade of rear admiral (lower half) or brigadier general while so serving, unless entitled to higher rank or grade under another provision of law, evidencing no intent that captain or officer of lesser rank receive pay of rear admiral (lower half) or brigadier general, as appropriate, the two Navy captains not detailed but assigned as Assistant Judge Advocates General to avoid creating entitlement to flag rank within meaning of 10 U.S.C. 5149(b), having been denied grade of rear admiral (lower half) and its benefits, may not be paid under 37 U.S.C. 202(1) at that grade 22

DISTRICT OF COLUMBIA

Courts. (*See* Courts, District of Columbia)

Employees

Wage board

Environmental pay differential status

Environmental pay-differential for dirty work having been authorized for Dist. of Columbia wage employees by proper wage fixing authority in accordance with 5 U.S.C. 5341, and in conformity with commercial practices, differential may be considered basic pay, whether stated separately or included in scheduled rates, for purposes of computing wage board overtime and Sunday rates prescribed in 5 U.S.C. 5544, the Civil Service Retirement Deductions authorized in 5 U.S.C. 8334, and for determining annual rate of pay for group life insurance provided in Federal Personnel Manual, Supp. 870–1, subch. 83–3a, and differential may be paid to employees while in leave status 66

ECONOMIC OPPORTUNITY PROGRAM Page

Enrollees

Training

District of Columbia government

Status for leave purposes

Enrollees in a work-training program conducted by District of Columbia government under title I, part B, of Economic Opportunity Act of 1964, who are given appointments as employees of District government and, therefore, are covered by Annual and Sick Leave Act of 1951, upon transfer to Federal positions may have unused annual and sick leave balances accumulated and accrued as District employees transferred to their Federal positions, and their service with District used to establish annual-leave-earning categories, for although officers and employees of District of Columbia government are not Federal employees, they are specifically included in Annual and Sick Leave provisions of 5 U.S.C. 6301 *et seq*---------- 98

EDUCATION

Teachers overseas

Defense Department teachers. (*See* **Defense Department, teachers employed in areas overseas**)

EQUIPMENT

Automatic Data Processing Systems

Computer service

Evaluation propriety

Point system evaluation of proposals for computer time and services under which number of points to be awarded for basic costs is to be determined from offeror's "pricing out," or cost for requirements stated in sample problem included in solicitation that is not considered indicative of cost differences between suppliers for every proposed computer application contemplated under contract, but, rather, typical of work to be performed, is proper method of evaluation, notwithstanding amount of memory or core size was not frozen in sample, as factors frozen are of greater significance as to price than variations in core size of sample-- 222

FEES

Witnesses

Payment

Appropriation chargeable

Psychiatric examination of criminal defendant to determine his mental competency to understand proceedings against him or assist in his own defense authorized by subsec. (e) of Criminal Justice Act of 1964, 18 U.S.C. 3006A(e), providing for investigative, expert, or other services necessary to adequate defense to 18 U.S.C. 4244, and subpoena of witnesses at no cost to defendant authorized under Rule 17(b) of Federal Rules of Criminal Procedure when defendant is financially unable to pay fees of witness whose presence is necessary to adequate defense are distinct services for payment purposes. Services pursuant to 1964 act are payable by Administrative Office of U.S. Courts and those rendered in accordance with Rule 17(b) are payable by Dept. of Justice---------- 128

Fee payable to psychiatrist appointed on indigent defendant's motion

FEES—Continued Page
Witnesses—Continued
Payment—Continued
Appropriation chargeable—Continued
to conduct mental examination for testifying at trial is payable by Administrative Office of U.S. Courts from appropriations made to implement Criminal Justice Act of 1964, as physchiatrist testified as expert witness and not as lay witness whose fees are prescribed by Rule 17(b) of Federal Rules of Criminal Procedure. Purpose of 1964 act is to assure adequate representation in Federal courts of accused persons with insufficient means, and end product of adequate defense is not infrequently representation at trial, and that is so for consulted expert as well as for counsel 128

GENERAL ACCOUNTING OFFICE
Decisions
"Dictum"
To categorize views of U.S. GAO concerning areas in agency's procurement practices brought to light by protest where revisions are desirable as "dictum"—abbreviation of obiter dictum which means remark or opinion uttered by the way—appears futile when it is obvious that any administrative actions taken that are contrary to such stated positions may result in disallowance of credit in disbursing officer's account 59

GRATUITIES
Reenlistment bonus
Extension of enlistment
Pay increase rate applicability
Member of uniformed services who extended 4-year enlistment on Apr. 14, 1970, under 10 U.S.C. 509 for 26 months effective Apr. 15, 1970, date of issuance of E.O. No. 11525, making new pay rates authorized by Pub. L. 90–207 and Pub. L. 91–231 retroactively effective to Jan. 1, 1970, is entitled to have reenlistment bonus earned under 37 U.S.C. 308(a) computed at new pay rates as Defense Dept. implementation of Executive order, which restricts use of increased rates in computation of reenlistment bonus when entitlement occurs after Dec. 31, 1969, but before Apr. 15, 1970, has no application to member who beginning his extended enlistment on Apr. 15, 1970, is entitled to computation of reenlistment bonus under par. 10905 of Dept. of Defense Military Pay and Allowances Manual 36

HOLIDAYS
Sundays
Deadline for required actions
Timely mailed revocation of dues allotment to employee organization made pursuant to 5 U.S.C. 5525, which was received in payroll office on Monday, Mar. 2, first workday after Mar. 1 deadline set by Civil Service Commission, 5 CFR 550.308, constitutes compliance with regulation under rule that when act is to be performed by certain date and last day of period falls on Sunday, requirement is complied with if act is performed on following day. Therefore, discontinuance of allotment having become effective at beginning of first full pay period following Mar. 1 deadline, dues deducted subsequent to revocation are for collection from employee organization and repayment to employee... 108

INDIAN AFFAIRS Page

Contracting with Government

Preference to Indian concerns

Grant of preferential treatment by negotating contract without competition with dairy corporation that is 51 percent owned by persons of Indian descent; that is located 30 miles from Indian reservation, but will employ Indian help; and that is financed by Small Business Administration loan, conforms to reasonable criteria established to accomplish purposes of so-called Buy Indian Act (25 U.S.C. 47), to acquire products and services from Indian industry, and to loan criteria established by Administration. Fact that minority owner is non-Indian and will furnish expertise and managerial ability does not impute that firm is "straw" organization or is unqualified as Indian industry. Therefore, firm may be considered eligible if prior to award it obtains required interstate shipper's permit---------- 94

INTERIOR DEPARTMENT

National Park Service

Land disposition

Replacement

In development of rail rapid transit system, Board of Directors of Washington Metropolitan Area Transit Authority—instrumentality created by Compact with consent of Congress—may acquire lands under administration of National Park Service of Dept. of Interior, and should cash be paid for appraised value of parklands, cash is for deposit into Treasury in accordance with 31 U.S.C. 484. However, if congressional approval is sought to use money to replace surface parklands, amount received by Dept. may be held in escrow for period not to exceed 2 years. Furthermore, under provisions of Compact, Board has authority to purchase land to replace surface parklands needed for transit purposes---------- 159

INTERNATIONAL ORGANIZATIONS

Transfer of Federal employees, etc.

Reemployment guarantees

Employee of Federal Govt. who transferred to public international organization with reemployment rights under 5 U.S.C. 3582(b), prior to enactment of Federal Employees Salary Act of 1970, is not entitled to retroactive salary adjustment authorized by act for employees on rolls on effective date of act—Apr. 15, 1970—condition precedent to entitlement. However, since under sec. 3582(b) employee who transfers to public international organization is guaranteed that upon reemployment compensation payable will not be less than if employee had remained on Govt. rolls, any salary adjustment required upon reemployment may include retroactive salary payment employee would have received if on rolls on Apr. 15, 1970---------- 173

LEAVES OF ABSENCE

Civilians on military duty

"To enforce the law"

Strikes

Duties performed by civilian employees who as Reserves of Armed Forces and National Guardsmen were called into active military service pursuant to Presidential Proc. 3972, dated Mar. 23, 1970, to carry out work of striking Postal Service employees are considered military aid

LEAVES OF ABSENCE—Continued Page
Civilians on military duty—Continued
"To enforce the law"—Continued
Strikes—Continued

to enforce law within meaning of 5 U.S.C. 6323(c), as military service was performed in order to cause laws relating to Post Office to have force and to protect mail; therefore, employees are entitled because of such service to military leave prescribed by 5 U.S.C. 6323(c), and their pay should be adjusted to comply with 5 U.S.C. 5519 by crediting military pay against civilian compensation payable to employees 154

Transfers
District of Columbia government employees

Enrollees in a work-training program conducted by District of Columbia government under title I, part B, of Economic Opportunity Act of 1964, who are given appointments as employees of District government and therefore, are covered by Annual and Sick Leave Act of 1951, upon transfer to Federal positions may have unused annual and sick leave balances accumulated and accrued as District employees transferred to their Federal positions, and their service with District used to establish annual-leave-earning categories, for although officers and employees of District of Columbia government are not Federal employees, they are specifically included in Annual and Sick Leave provisions of 5 U.S.C. 6301 *et seq* 98

MARITIME MATTERS
Subsidies
Construction-differential
Rate applicable

Construction-differential subsidy rate ceiling applicable to subsidy grants made pursuant to Merchant Marine Act of 1936, as amended, is pursuant to title V of act, and its legislative history, determinable by rate in force at time ship construction contract is awarded and not at rate in effect at time administrative action is taken to effectuate grant and therefore, for contracts entered into prior to reversion of temporary subsidy rate of 55 percent of domestic bid prices to 50 percent, applicable construction-differential subsidy rate is higher rate, even though final administrative action was not taken before subsidy rate revision downward 86

Vessels
Sales
American *v.* foreign purchasers

In sale for scrapping of vessels from national defense fleet, secs. 5 and 6 of Merchant Marine Act of 1920, affording preference to U.S. citizens, remain in effect and are applicable to sales for scrapping or otherwise, for notwithstanding secs. 508 and 510(j) of 1936 Merchant Marine Act authorizing sale of surplus vessels contain no preference provisions, Maritime Administration continued to accord preference to U.S. citizens, and addition of sec. 510(j) to 1936 act by amendment in 1965 did not repeal preference aspects of 1920 act by implication, an interpretation in accord with *Amell* v. *United States*, 384 U.S. 158. Furthermore, histories of 1936 act and 1965 amendment do not indicate intent to deprive domestic firms of preference obtained under 1920 act 167

MILITARY PERSONNEL Page

Dependents

Transportation. (*See* Transportation, dependents, military personnel)

Details. (*See* Details, military personnel)

Disability retired pay. (*See* Pay, retired, disability)

Dual benefits

Retired pay and civilian severance pay

Upon reduction in force as civilian employee of U.S., retired member of uniformed services may not be paid severance pay as 1965 authorizing act (5 U.S.C. 5595) excludes payment of severance pay to person subject to Civil Service Retirement Act or any other retirement law or system applicable to Federal officers or employees or members of uniformed services who at time of separation have fulfilled requirements for immediate annuity—a term including retired pay—and prohibition against payment of severance pay is applicable without regard to when member first becomes entitled to military retired pay, or whether he is eligible under Dual Compensation Act of 1964 (5 U.S.C. 5531–5534) to receive military retired pay concurrently in whole or in part with compensation of his civilian office or position ---------- 46

Missing, interned, etc., persons

Pay. (*See* Pay, missing, interned, etc., persons)

Pay. (*See* Pay)

Promotions. (*See* Pay, promotions)

Quarters allowance. (*See* Quarters Allowance)

Record correction

Existing record basis only

Fact that Correction of Military Records Board on Apr. 11, 1969, directed change of records pursuant to 10 U.S.C. 1552, to show that Air Force captain had not been twice passed over for promotion to temporary grade of major, and that if selected for promotion by next regularly scheduled board, promotion was to be effective from date first selection board convened, although at same time denying his request for promotion, does not entitle officer promoted pursuant to 10 U.S.C. 8442 and 8447(b) on June 27, 1969, effective Feb. 20, 1968, to increased pay prior to June 27, 1969, for until promoted, no date could be established for commencement of higher pay, and Correction Board limited to making changes in existing record, its attempt to control future contingent event of promotion is not within purview of 10 U.S.C. 1552---- 125

Payment basis

Interim civilian earnings

In computation of active duty pay and allowances due an enlisted member of uniformed services incident to correction of military records under 10 U.S.C. 1552 to show that discharge was null and void and that he had remained on active duty until voluntarily retired under 10 U.S.C. 8914, deduction of interim civilian earnings is required, notwithstanding member retired earlier than required by decision of court in 419 F. 2d 714. Moreover, fact that Correction Board's recommendation against offsetting interim earnings was administratively approved is without effect as there is no discretionary power to make determinations of specific amounts to be paid pursuant to military

MILITARY PERSONNEL—Continued Page
Record correction—Continued
Payment basis—Continued
Interim civilian earnings—Continued
records correction since payment depends solely upon proper application of statutes and regulations to facts shown in corrected record----- 180
Amount of civilian earnings for deduction from gross pay and allowances determined to be due incident to correction of military records, pursuant to 10 U.S.C. 1552, is gross and not net amount left after deduction of Federal and State income taxes and Social Security tax withheld from interim civilian earnings of member of uniformed services. To limit deduction from back pay and allowances found to be due member to civilian earnings after taxes would be tantamount to refunding taxes withheld from interim civilian compensation earned, and question of whether taxes should be refunded is for determination by taxing authorities concerned---------- 236
Unemployment compensation
Payment for period of active duty incident to correction of military records of member of uniformed services is not subject to deduction for unemployment compensation received by member during period between premature discharge from duty and retirement, as rule in 35 Comp. Gen. 241 to effect unemployment compensation is not deductible from back pay of civilian employees restored to duty because of direct refund by employee is for application. Therefore, since unemployment compensation received by member does not come within purview of "interim civilian earnings" for purpose of administrative directive that such earnings are deductible in Correction Board cases, amount of unemployment compensation deducted from pay adjustment made to member is for refund to him---------- 180
Reenlistment bonus. (*See* Gratuities, reenlistment bonus)
Separation
Consent, etc., requirement
While purpose of 10 U.S.C. 1163(a) is to prevent officer of Reserve component of uniformed services with at least 3 years' commissioned service from being arbitrarily separated without officer's consent, unless separation is recommended by board of officers convened by authority designated by Secretary concerned, there is nothing in section preclude officer who has not consented to separation from waiving consideration by board of officers---------- 229
Under 10 U.S.C. 687(a), member of Reserve component, or member of Army or Air Force without component, who is relieved from active duty "involuntarily," is entitled to readjustment pay, and since it is mandatory under Air Force Reg. 36–12, which establishes procedures governing separation of officers, to discharge woman officer when determination is made by medical officer that she is pregnant, she is considered involuntarily separated and entitled to readjustment pay, whether she is separated with or without her consent, sole determining factor being that of pregnancy. Therefore, Reserve officer separated without her consent by reason of pregnancy who waived hearing and board recommendations in 10 U.S.C. 1163(a), having been involuntarily separated, is entitled to readjustment pay---------- 233
Temporary lodging allowance. (*See* Station Allowances, military personnel, temporary lodgings)

MISCELLANEOUS RECEIPTS Page

Special account *v.* miscellaneous receipts

Proceeds from sales, etc.

Public lands for subway

In development of rail rapid transit system, Board of Directors of Washington Metropolitan Area Transit Authority—instrumentality created by Compact with consent of Congress—may acquire lands under administration of National Park Service of Dept. of Interior, and should cash be paid for appraised value of parklands, cash is for deposit into Treasury in accordance with 31 U.S.C. 484. However, if congressional approval is sought to use money to replace surface parklands, amount received by Dept. may be held in escrow for period not to exceed 2 years. Furthermore, under provisions of Compact, Board has authority to purchase land to replace surface parklands needed for transit purposes 159

OFFICERS AND EMPLOYEES

Allowances

Evacuation. (*See* Officers and Employees, overseas, dependents, evacuation)

Compensation. (*See* Compensation)

Dependents

Separation allowances

Special *v.* maintenance

Separate maintenance allowance paid at lower rate than special allowance authorized when dependents are evacuated from overseas post of employee involves situations where dependents are not permitted to reside at employee's post under circumstances known well in advance to allow for reasonable planning and, therefore, serves different purpose than special allowances authorized incident to evacuation of dependents who, intending to reside at employee's post, are prevented from so doing by emergency under circumstances which do not permit orderly planning of employee's household. Furthermore, sec. 262.32 of Standardized Regs. prohibits payment of separation allowance for period that is less than 90 days—a limitation that does not apply to special allowance 89

Downgrading

Saved compensation. (*See* Compensation, downgrading, saved compensation)

Leaves of absence. (*See* Leaves of Absence)

Overseas

Dependents

Evacuation

Special allowance payments

Under broad authority in 5 U.S.C. 5523(b), special allowances, prescribed by Standardized Regs. incident to evacuation of dependents at overseas post of duty, may be paid to employee in behalf of dependents who are not at his post at time of evacuation but who are directly affected by orders. However, as payments of additional allowances for unusual expenses must be attributable to post evacuation order, when dependents are absent for personal reasons at time evacuation order issues, with no intention of returning to post for duration of evacuation, employee is not entitled to special allowance, having incurred no unusual expenses; but

OFFICERS AND EMPLOYEES—Continued Page
Overseas—Continued
Dependents—Continued
Evacuation—Continued
Special allowances payments—Continued

if an absent dependent is prevented from returning by reason of evacuation order issued during his absence, unusual expenses incurred are payable from time intended return is blocked ---------- 89

Severence pay
Compensation. (*See* Compensation, severance pay)
Transfers
International organizations

Employee of Federal Govt. who transferred to public international organization with reemployment rights under 5 U.S.C. 3582(b), prior to enactment of Federal Employees Salary Act of 1970, is not entitled to retroactive salary adjustment authorized by act for employees on rolls on effective date of act—Apr. 15, 1970—condition precedent to entitlement. However, since under sec. 3582(b) employee who transfers to public international organization is guaranteed that upon reemployment compensation payable will not be less than if employee had remained on Govt. rolls, any salary adjustment required upon reemployment may include retroactive salary payment employee would have received if on rolls on Apr. 15, 1970 ---------- 173

Travel expenses. (*See* Travel Expenses)
PAY
Active duty
Grade or rank
Rear admirals
Assigned not detailed

Legislative history of Pub. L. 90–179, which authorized detailing two officers—a Navy officer (10 U.S.C. 5149(b)) and a Marine officer (10 U.S.C. 5149(c))—as Assistant Judge Advocates General of Navy, entitled to rank and grade of rear admiral (lower half) or brigadier general while so serving, unless entitled to higher rank or grade under another provision of law, evidencing no intent that captain or officer of lesser rank receive pay of rear admiral (lower half) or brigadier general, as appropriate, the two Navy captains not detailed but assigned as Assistant Judge Advocates General to avoid creating entitlement to flag rank within meaning of 10 U.S.C. 5149(b), having been denied grade of rear admiral (lower half) and its benefits, may not be paid under 37 U.S.C. 202(1) at that grade ---------- 22

Record correction. (*See* Military Personnel, record correction)
Deductions
Pay adjustment upon restoration to duty

In computation of active duty pay and allowances due an enlisted member of uniformed services incident to correction of military records under 10 U.S.C. 1552 to show that discharge was null and void and that he had remained on active duty until voluntarily retired under 10 U.S.C. 8914, deduction of interim civilian earnings is required,

PAY—Continued Page
Deductions—Continued
Pay adjustment upon restoration to duty—Continued
notwithstanding member retired earlier than required by decision of court in 419 F. 2d 714. Moreover, fact that Correction Board's recommendation against offsetting interim earnings was administratively approved is without effect as there is no discretionary power to make determinations of specific amounts to be paid pursuant to military records correction since payment depends solely upon proper application of statutes and regulations to facts shown in corrected record..... 180
Payment for period of active duty incident to correction of military records of member of uniformed services is not subject to deduction for unemployment compensation received by member during period between premature discharge from duty and retirement, as rule in 35 Comp. Gen. 241 to effect unemployment compensation is not deductible from back pay of civilian employee restored to duty because of direct refund by employee is for application. Therefore, since unemployment compensation received by member does not come within purview of "interim civilian earnings" for purpose of administrative directive that such earnings are deductible in Correction Board cases, amount of unemployment compensation deducted from pay adjustment made to member is for refund to him..... 180
Increases
Comparable to classified employees
Adjustment
Although members of uniformed services are authorized pay increases by Pub. L. 90–207, dated Dec. 16, 1967, whenever General Schedule of compensation for Federal classified employees is increased, Secretary of Defense in implementing Federal Employees Salary Act of 1970, under authority of sec. 2(b) of E. O. No. 11525, having determined that member is not entitled to increase pursuant to 1970 act unless he was in active duty status on date of its enactment—Apr. 15, 1970—Naval Reserve officer injured while on active duty for training from Mar. 9, to Mar. 22, 1970, who continues on basis of disability to receive benefits provided by 10 U.S.C. 6148(a) and 37 U.S.C. 204(i), through Apr. 14, 1970, not having been in active duty status on Apr. 15, 1970, is not entitled to retroactive increase..... 99
Fact that reemployed civilian who while on military furlough served on active military duty was on civilian roll on Apr. 15, 1970, date of enactment of Federal Employees Salary Act of 1970, Pub. L. 91–231, does not entitle him under act to retroactive adjustment in basic pay for active military duty performed during period Jan. 1, 1970, through Mar. 15, 1970, as act provides compensation increases for Federal classified employees only. However, although Pub. L. 90–207, Dec. 16, 1967, provides for increase in basic pay for military personnel whenever General Schedule of compensation for Federal classified employees is increased, Secretary of Defense in implementing 1970 act pursuant to E.O. No. 11525 prescribed that member must have been on active duty on Apr. 15, 1970, to be entitled to retroactive adjustment in pay.. 226

PAY—Continued Page

Increases—Continued

Effective date

Under Executive Order No. 11525

Member of uniformed services who extended 4-year enlistment on Apr. 14, 1970, under 10 U.S.C. 509 for 26 months effective Apr. 15, 1970, date of issuance of E.O. No. 11525, making new pay rates authorized by Pub. L. 90-207 and Pub. L. 91–231 retroactively effective to Jan. 1, 1970, is entitled to have reenlistment bonus earned under 37 U.S.C. 308(a) computed at new pay rates as Defense Dept. implementation of Executive order, which restricts use of increased rates in computation of reenlistment bonus when entitlement occurs after Dec. 31, 1969, but before Apr. 15, 1970, has no application to member who beginning his extended enlistment on Apr. 15, 1970, is entitled to computation of reenlistment bonus under par. 10905 of Dept. of Defense Military Pay and Allowances Manual 36

Missing, interned, etc., persons

Pay increases

Widow and designated beneficiary of Air Force captain held to be in missing in action status from Mar. 28, 1969, until that status was terminated on Mar. 19, 1970, on basic of evidence establishing his death, may be paid increase in basic pay provided by Federal Employees Salary Act of 1970, and implemented by E.O. No. 11525, for period Jan. 1, 1970, retroactive effective date of act, through Mar. 19, 1970, absent contrary determination under 37 U.S.C. 556(c) by Secretary of Air Force. While Dept. of Defense Memorandum implementing Executive order permits retroactive increase in pay for any active service performed in case of person "who died" after Dec. 31, 1969, but before Apr. 15, 1970, such authority together with sec. 5 of salary act on which it is based is considered to have reference to termination of pay because of death 148

Promotions

Effective date

Record correction effect

Fact that Correction of Military Records Board on Apr. 11, 1969, directed change of records pursuant to 10 U.S.C. 1552, to show that Air Force captain had not been twice passed over for promotion to temporary grade of major, and that if selected for promotion by next regularly scheduled board, promotion was to be effective from date first selection board convened, although at same time denying his request for promotion, does not entitle officer promoted pursuant to 10 U.S.C. 8442 and 8447(b) on June 27, 1969, effective Feb. 20, 1968, to increased pay prior to June 27, 1969, for until promoted, no date could be established for commencement of higher pay, and Correction Board limited to making changes in existing record, its attempt to control future contingent event of promotion is not within purview of 10 U.S.C. 1552 125

PAY—Continued Page

Readjustment payment to reservists on involuntary release

What constitutes involuntary

Pregnancy

Under 10 U.S.C. 687(a), member of Reserve component, or member of Army or Air Force without component, who is relieved from active duty "involuntarily," is entitled to readjustment pay, and since it is mandatory under Air Force Reg. 36–12, which establishes procedures governing separation of officers, to discharge woman officer when determination is made by medical officer that she is pregnant, she is considered involuntarily separated and entitled to readjustment pay, whether she is separated with or without her consent, sole determining factor being that of pregnancy. Therefore, Reserve officer separated without her consent by reason of pregnancy who waived hearing and board recommendations in 10 U.S.C. 1163(a), having been involuntarily separated, is entitled to readjustment pay 229

Rear admirals, etc.

Officers serving as Judge Advocates General

Assigned not detailed

Legislative history of Pub. L. 90–179, which authorized detailing two officers—a Navy officer (10 U.S.C. 5149(b)) and a Marine officer (10 U.S.C. 5149(c))—as Assistant Judge Advocates General of Navy, entitled to rank and grade of rear admiral (lower half) or brigadier general while so serving, unless entitled to higher rank or grade under another provision of law, evidencing no intent that captain or officer of lesser rank receive pay of rear admiral (lower half) or brigadier general, as appropriate, the two Navy captains not detailed but assigned as Assistant Judge Advocates General to avoid creating entitlement to flag rank within meaning of 10 U.S.C. 5149(b), having been denied grade of rear admiral (lower half) and its benefits, may not be paid under 37 U.S.C. 202(1) at that grade 22

Record correction. (*See* **Military Personnel, record correction**)

Reservists

Pay increases

Active duty requirement

Although members of uniformed services are authorized pay increases by Pub. L. 90–207, dated Dec. 16, 1967, whenever General Schedule of compensation for Federal classified employees is increased, Secretary of Defense in implementing Federal Employees Salary Act of 1970, under authority of sec. 2(b) of E. O. No. 11525, having determined that member is not entitled to increase pursuant to 1970 act unless he was in active duty status on date of its enactment—Apr. 15, 1970—Naval Reserve officer injured while on active duty for training from Mar. 9 to Mar. 22, 1970, who continues on basis of disability to receive benefits provided by 10 U.S.C. 6148(a) and 37 U.S.C. 204(i), through Apr. 14, 1970, not having been in active duty status on Apr. 15, 1970, is not entitled to retroactive increase 99

PAY—Continued Page

Retired

Concurrent military retired and civilian severance pay

Upon reduction in force as civilian employee of U.S., retired member of uniformed services may not be paid severance pay as 1965 authorizing act (5 U.S.C. 5595) excludes payment of severance pay to persons subject to Civil Service Retirement Act or any other retirement law or system applicable to Federal officers or employees or members of uniformed services who at time of separation have fulfilled requirements for immediate annuity—a term including retired pay—and prohibition against payment of severance pay is applicable without regard to when member first becomes entitled to military retired pay, or whether he is eligible under Dual Compensation Act of 1964 (5 U.S.C. 5531–5534) to receive military retired pay concurrently in whole or in part with compensation of his civilian office or position 46

Disability

Disability retirement and promotion simultaneously effective

Computation of retired and severance pay

Officer of uniformed services whose physical disability was not considered disqualifying prior to physical examination qualifying him for promotion denied by physical evaluation board, upon his subsequent simultaneous transfer as second lieutenant to temporary disability retired list under 10 U.S.C. 1202 and advancement to grade of first lieutenant under cl. (4) of 10 U.S.C. 1372, is entitled to retired pay and disability severance pay computed on basis of higher grade; and since first determination of physical disability did not disqualify officer for service, disqualifying disability for which he was retired may be considered as having been discovered as result of physical examination for promotion within purview of cl. (4) of 10 U.S.C. 1372 156

Increases

Cost-of-living increases

Active duty recall

In recomputing retired pay under 10 U.S.C. 1401a and 1402(a) for member of uniformed services who served on active duty for 2 years subsequent to retirement, Consumer Price Index changes should be reflected by increasing retired pay by only percent that applicable base index exceeds index for calendar month immediately preceding month in which active duty pay rate upon which retired pay is based became effective. 48 Comp. Gen. 398 and B–166335, June 4, 1969, modified 232

Waiver for civilian retirement benefits

Revocation

A retired member of uniformed services whose military service upon retirement from civilian employment is not used to establish civil service annuity eligibility but is only used in computation of annuity to increase amount payable may withdraw his waiver of retired pay and have pay reinstated, as no double benefit would result from same service by terminating use of military service to compute civil service annuity and reinstating retired pay; and 5 U.S.C. 8332(e) provides that civil service retirement does not affect right of employee to retired pay, pension, or compensation in addition to annuity payable upon retirement from Federal civilian service 80

POST OFFICE DEPARTMENT Page

Strikes

Duty performance by military reservists

Duties performed by civilian employees who as Reserves of Armed Forces and National Guardsmen were called into active military service pursuant to Presidential Proc. 3972, dated Mar. 23, 1970, to carry out work of striking Postal Service employees are considered military aid to enforce law within meaning of 5 U.S.C. 6323(c), as military service was performed in order to cause laws relating to Post Office to have force and to protect mail; therefore, employees are entitled because of such service to military leave prescribed by 5 U.S.C. 6323(c), and their pay should be adjusted to comply with 5 U.S.C. 5519 by crediting military pay against civilian compensation payable to employees 154

PROPERTY

Public

Damage, loss, etc.

Freight charges

Delivery accomplishment

Freight charges claimed on overseas shipment that moved under GBL identifying shipment as frozen foods and which was refused at destination when it was discovered shipment contained meat as vessel had made several stops at ports considered to be infected areas for meat products, may not be allowed, even though part of shipment was returned to origin point in U.S., meat having been jettisoned at sea because its return was prohibited under Dept. of Agriculture regulation, as Consignee's Certificate of Delivery on GBL was not and could not have been accomplished without delivery of shipment—condition precedent to liability for freight charges 164

Private use

Authority

Lease of land adjacent to Visitors' Information Center at John F. Kennedy Center, Fla., for construction of nondenominational chapel from funds raised by public subscription is pursuant to Art. IV, sec. 3, cl. 2 of Constitution of U.S., a congressional and not executive function, unless otherwise specifically provided by statute, and leasing authority in sec. 203(b)(3) of National Aeronautics and Space Act of 1958, as amended (42 U.S.C. 2473(b)(3)), does not appear to be intended as specific authority for execution of proposed 30-year lease. Therefore, because of nature of its use, land within Federal enclave should not be leased without congressional approval of chapel construction, and payment of annual rental has no significance in considering lack of specific authority to lease land 63

PUBLIC LANDS

Acquisition

Subway construction

In development of rail rapid transit system, Board of Directors of Washington Metropolitan Area Transit Authority—instrumentality created by Compact with consent of Congress—may acquire lands under administration of National Park Service of Dept. of Interior, and should cash be paid for appraised value of parklands, cash is for deposit into Treasury in accordance with 31 U.S.C. 484. However, if congressional approval is sought to use money to replace surface parklands, amount

PUBLIC LANDS—Continued Page
Acquisition—Continued
Subway construction—Continued

received by Dept. may be held in escrow for period not to exceed 2 years. Furthermore, under provisions of Compact, Board has authority to purchase land to replace surface parklands needed for transit purposes_ 159

QUARTERS ALLOWANCE
Dependents
Quarters occupancy prevented by "competent authority"

Although par. 30221 of the Dept. of Defense Pay and Allowances Entitlements Manual and 37 U.S.C. 403(d) provide for payment of basic allowance for quarters when because of orders by competent authority the dependents of member of uniformed services are prevented from occupying assigned quarters, where Govt. arranges for movement of household goods of Army officer to family-type quarters designated adequate and move is not accomplished by effective date stated in assignment orders, payment of basic allowance for quarters with dependents to officer may not be continued beyond effective date of quarters assignment as transportation contract does not constitute "competent authority" required to create entitlement to allowance after effective date of assignment---------- 174

RETIREMENT
Civilian
Service credits
Military service
Effect of social security benefits

When retired member of uniformed services employed as civilian becomes eligible for old age and survivor insurance benefits under Social Security Act, 42 U.S.C. 402, withdrawal of his waiver of military pay and exclusion of his military service from computation of his civil service annuity would not result in payment of double benefit if military service had not been used to establish civil service annuity eligibility but was used only in computation of annuity amount payable--------- 80

Waiver of retired pay

A retired member of uniformed services whose military service upon retirement from civilian employment is not used to establish civil service annuity eligibility but is only used in computation of annuity to increase amount payable, may withdraw his waiver of retired pay and have pay reinstated as no double benefit would result from same service by terminating use of military service to compute civil service annuity and reinstating retired pay, and 5 U.S.C. 8332(e) provides that civil service retirement does not affect right of employee to retired pay, pension, or compensation in addition to annuity payable upon retirement from Federal civilian service---------- 80

SALES
Disclaimer of warranty
Erroneous description
Relief generally

Under invitations for bids to dispose of surplus property on "as is" and "where is" basis, bidders advised that estimated weight of items offered were not guaranteed and urged to inspect property are not

SALES—Continued Page
Disclaimer of warranty—Continued
Erroneous description—Continued
Relief generally—Continued

entitled to price adjustment for weight shortages if descriptive information used by holding activity was best available, or if not available, weight estimate was based on visual inspection of property because it would not have been feasible to weigh individual items. However, relief may be granted where contracting officer had actual or constructive notice of misdescription before award, or holding activity unexplainedly almost tripled weight which had been accurately shown in rough draft of sales writeup---------- 28

Property descriptions
Rule

Rule to be derived from past decisions of Comptroller General relating to claims for alleged misdescription of surplus property where no guarantee provisions were incorporated in invitation is that holding authority, including property disposal officer, should be held to use of best information available, accuracy of which may be relied on if not internally inconsistent, but if information is contradictory or inconsistent, holding activity has duty to select on some reasonable basis descriptive information to be used. If no information is available, holding activity has duty to develop description of property on reasonable basis, taking into consideration circumstances and effort in relation to probable value. Errors in judgment or typographical errors by holding activity would not *per se* violate rule---------- 28

SOCIAL SECURITY
Coverage
Retired military personnel
Employment by Federal Government

When retired member of uniformed services employed as civilian becomes eligible for old age and survivor insurance benefits under Social Security Act, 42 U.S.C. 402, withdrawal of his waiver of military pay and exclusion of his military service from computation of his civil service annuity would not result in payment of double benefit if military service had not been used to establish civil service annuity eligibility but was used only in computation of annuity amount payable---------- 80

STATION ALLOWANCES
Military personnel
Temporary lodgings
Advance return of dependents from overseas

Temporary lodging allowance payable to member of uniformed services on basis he incurs more than normal expenses for use of hotel accommodations and public restaurants for prescribed period immediately preceding departure from overseas station on permanent change of station may not be authorized incident to advance return of member's dependents under 37 U.S.C. 406(e) and (h), as temporary lodging allowance is permanent station allowance that may not be used to supplement transportation allowances prescribed by subsecs. 406(e) and (h) for movement of dependents, baggage, and household effects in unusual or emergency circumstances, or when Secretary concerned

STATION ALLOWANCES—Continued Page
Military personnel—Continued
Temporary lodgings—Continued
Advance return of dependents from overseas—Continued
determines movement is in best interest of member, his dependents, or U.S. without regard to issuance of change-of-station orders---------- 83

STATUTORY CONSTRUCTION
Court interpretation
Effect
In sale for scrapping of vessels from national defense fleet, secs. 5 and 6 of Merchant Marine Act of 1920, affording preference to U.S. citizens, remain in effect and are applicable to sales for scrapping or otherwise, for notwithstanding secs. 508 and 410(j) of 1936 Merchant Marine Act authorizing sale of surplus vessels contain no preference provisions, Maritime Administration continued to accord preference to U.S. citizens, and addition of sec. 510(j) to 1936 act by amendment in 1965 did not repeal preference aspects of 1920 act by implication, an interpretation in accord with *Amell* v. *United States*, 384 U.S. 158. Furthermore, histories of 1936 act and 1965 amendment do not indicate intent to deprive domestic firms of preference obtained under 1920 act---------- 167

SUBSIDIES
Vessels. (*See* Maritime Matters, subsidies)

SUNDAYS
(*See* Holidays, Sundays)

TRANSPORTATION
Dependents
Military personnel
Dependency status
Child in *ventre sa mere*
Although child in *ventre sa mere* on effective date of permanent change-of-station orders of father, member of uniformed services, may not be considered dependent for purposes of 37 U.S.C. 406(a) authorizing transportation at Govt. expense of persons dependent upon member on effective date of change-of-station orders, in view of beneficial purposes of statute, regulations may be issued to authorize reimbursement for cost of travel to member's new station of child born after effective date of change-of-station orders if wife's travel to new station at Govt. expense prior to birth of child is precluded by departmental regulations due to advanced stage of her pregnancy---------- 220

Freight
Charges
Delivery requirement
Freight charges claimed on overseas shipment that moved under GBL identifying shipment as frozen foods and which was refused at destination when it was discovered shipment contained meat as vessel had made several stops at ports considered to be infected areas for meat products, may not be allowed, even though part of shipment was returned to origin point in U.S., meat having been jettisoned at sea because its return was prohibited under Dept. of Agriculture regulation, as Consignee's Certificate of Delivery on GBL was not and could not have been accomplished without delivery of shipment—condition precedent to liability for freight charges---------- 164

TRAVEL EXPENSES Page

Temporary duty

Return to official station on workdays

Employee ordered to temporary duty at point 100 miles from his residence which is located near his permanent headquarters who, although his orders do not so provide, voluntarily returns to residence on workdays after close of business, as well as on nonworkdays, may be reimbursed travel expenses for days he returns to home in amount not to exceed expenses allowable had he remained at his temporary duty station, even though sec. 6.4 of Standardized Govt. Travel Regs. makes no reference to return to headquarters on workdays while on temporary duty, as there is no reason why rule applicable to nonworkdays may not be extended to voluntary returns on workdays after close of business if not specifically prohibited 44

UNEMPLOYMENT COMPENSATION

Military personnel restored to duty

Deduction from pay adjustment

Payment for period of active duty incident to correction of military records of member of uniformed services is not subject to deduction for unemployment compensation received by member during period between premature discharge from duty and retirement, as rule in 35 Comp. Gen. 241 to effect unemployment compensation is not deductible from back pay of civilian employee restored to duty because of direct refund by employee is for application. Therefore, since unemployment compensation received by member does not come within purview of "interim civilian earnings" for purpose of administrative directive that such earnings are deductible in Correction Board cases, amount of unemployment compensation deducted from pay adjustment made to member is for refund to him 180

UNIONS

Federal service

Dues

Deduction discontinuance

Timely mailed revocation of dues allotment to employee organization made pursuant to 5 U.S.C. 5525, which was received in payroll office on Monday, Mar. 2, first workday after Mar. 1 deadline set by Civil Service Commission, 5 CFR 550.308, constitutes compliance with regulation under rule that when act is to be performed by certain date and last day of period falls on Sunday, requirement is complied with if act is performed on following day. Therefore, discontinuance of allotment having become effective at beginning of first full pay period following Mar. 1 deadline, dues deducted subsequent to revocation are for collection from employee organization and repayment to employee.. 108

VESSELS Page

Construction

Subsidies. (*See* **Maritime Matters, subsidies, construction-differential**)

Crews

Compensation

Increases

Retroactive

Where new labor-management agreement is not reached prior to expiration of old agreement, retroactive compensation adjustment under new agreement is considered "practice" in maritime industry within contemplation of 5 U.S.C. 5342(a), which establishes compensation of crewmembers employed aboard research vessels. However, in addition to this criteria, sec. 5342(a) requires as basis for retroactive payment of compensation that administrative determination be made that adjustment would be in public interest, and as union agreement providing for wage adjustments within 30 days of MSTS announcement is based on determination that retroactive adjustment would not be in public interest, retroactive effect may not be given to wage increases granted by 5 U.S.C. 5342(a) while provision remains in force..... 93

Sales

American *v.* foreign purchasers

In sale for scrapping of vessels from national defense fleet, secs. 5 and 6 of Merchant Marine Act of 1920, affording preference to U.S. citizens, remain in effect and are applicable to sales for scrapping or otherwise, for notwithstanding secs. 508 and 510(j) of 1936 Merchant Marine Act authorizing sale of surplus vessels contain no preference provisions, Maritime Administration continued to accord preference to U.S. citizens, and addition of sec. 510(j) to 1936 act by amendment in 1965 did not repeal preference aspects of 1920 act by implication, an interpretation in accord with *Amell* v. *United States*, 384 U.S. 158. Furthermore, histories of 1936 act and 1965 amendment do not indicate intent to deprive domestic firms of preference obtained under 1920 act..... 167

WASHINGTON METROPOLITAN AREA TRANSIT AUTHORITY

Land acquisition

Subway construction

In development of rail rapid transit system, Board of Directors of Washington Metropolitan Area Transit Authority—instrumentality created by Compact with consent of Congress—may acquire lands under administration of National Park Service of Dept. of Interior, and should cash be paid for appraised value of parklands, cash is for deposit into Treasury in accordance with 31 U.S.C. 484. However, if congressional approval is sought to use money to replace surface parklands, amount received by Dept. may be held in escrow for period not to exceed 2 years. Furthermore, under provisions of Compact, Board has authority to purchase land to replace surface parklands needed for transit purposes..... 159

WORDS AND PHRASES Page

"Containers"

Low alternate bid offering to use polyethylene bags with Kraft paper overwrap in lieu of cartons to ship fuel-resistant baffle material satisfying packaging and packing requirements set forth in applicable military specifications and included in invitation for bids, neither of which spelled out type of material or construction of container, was responsive bid, acceptance of which was proper. Invitation for bids did not require use of fiberboard cartons and military specifications require only that materials be packed in manner to insure acceptance by common carrier and provide protection against damage during shipment. Furthermore, overwrapped polyethylene bags constitute "containers" within meaning of "Glossary of Packaging Terms" and par. 1–1204 of Armed Services Procurement Reg---------- 140

WORDS AND PHRASES

"Orangeburg"

Classification of workmen who installed "Orangeburg" fiber ducts as conduit for underground electrical wiring as laborers under contract including wage determination for electricians and laborers, and disputes clause was violation of Davis-Bacon Act, 40 U.S.C. 276a, and referral of erroneous classification to Secretary of Labor under disputes clause when contractor disagreed with contracting officer's determination based on prevailing area practice but refused to submit contrary evidence did not violate contract or prejudice contractor because it had not been advised of referral, and Secretary's confirmation, even though based on record only, that classification was erroneous—determination that is not subject to review—entitles laborers who were not supervised by journeyman electrician to wage adjustment as electricians and not electrician apprentices---------- 103

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