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[B-179255]

Funds—Foreign—Exchange Rate—Contract Underpayments—Dollar Devaluation

The additional cost due to the devaluation of the dollar to a corporation in the business of producing drafting and engineering instruments, measuring devices and precision tools to obtain supplies from abroad to meet contractual commitments to the Government may not be reimbursed to the corporation by increasing any bid price open for acceptance or any contract price since the devaluation of the dollar is attributable to the Government acting in its sovereign capacity and the Government is not liable for the consequences of its acts as a sovereign; no provision was made for a price increase because the cost of performance might be increased; and under the "firm-bid rule," a bid generally is irrevocable during the time provided in the invitation for bids for the acceptance of a bid.

Claims—Reporting to Congress—Limitation on Use of Act of April 10, 1928—Extraordinary Circumstances

Reporting a claim to the Congress under the Meritorious Claims Act of 1928 (31 U.S.C. 236) for the additional cost to a corporation to meet its contractual commitments to the Government by reason of the devaluation of the dollar would not be justified because the claim contains no elements of unusual legal liability or equity. The remedy afforded by the act is limited to extraordinary circumstances, and the cases reported by the GAO to the Congress generally have involved equitable circumstances of an unusual nature and which are unlikely to constitute a recurring problem, since to report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances.

To Lutz Superdyne, Inc., September 4, 1973:

Reference is made to your letters of July 10 and August 7, 1973, requesting advice as to what recourse is available to avoid substantial losses resulting from the devaluation of the American dollar in the world marketplace.

You state that your corporation is in the business of producing and importing drafting and engineering instruments, measuring devices and precision tools. Further, you state that certain specific items are not produced in this country. Therefore, you state that to meet your contractual commitments to the Government it is necessary for you to purchase such products abroad.

It is due to these foreign purchases that your corporation is experiencing losses. You claim that you have bid on Government solicitations on the basis of the then current exchange rate with West Germany. However, since submission of your bids (or award of the contracts involved), there has been a 15-to-20-percent cost increase due to the devaluation of the American dollar. It is based upon this set of circumstances that you request advice as to relief that may be available to avoid such unforeseen losses.

The devaluation of the dollar is attributable to the Government acting in its sovereign capacity. *See* B-175674, May 30, 1972. It is well settled that the Government is not liable as a contractor for the conse-

quences of its acts as a sovereign. See *Horowitz* v. *United States*, 61 Ct. Cl. 1025 (1925); *The Sunswick Corp.* v. *United States*, 75 F. Supp. 221, 109 Ct. Cl. 772 (1948). Also, where a Government contract contains an express stipulation as to the amount of compensation to be paid, and no provision is made for any increase in the event performance becomes more expensive or difficult, the fact that the cost of performance is increased by factors which do not constitute undue interference by the Government as a contractor does not entitle the contractor to additional compensation. *See* B-175674, *supra*, and cases cited therein. As was stated in *Penn Bridge Co.* v. *United States*, 59 Ct. Cl. 892, 896 (1924)—

* * * Contractual rights once fixed in a proper contract executed by authority are inviolate. They may be forfeited by one party or the other, construction is permissible if the terms are ambiguous, *but in the absence of ambiguity or forfeiture of rights by conduct, such a contract cannot but be enforced as written.* [Italic supplied.]

Further, under the "firm-bid rule," a bid generally is irrevocable during the time provided in the invitation for bids for the acceptance of the bid. 49 Comp. Gen. 395 (1969).

In view of the foregoing, there would appear to be no legal authority for granting your corporation an increase in any bid price open for acceptance or any contract price because of the extra cost of contract performance due to the devaluation of the dollar.

As your letter of July 10, 1973, requests advice as to any possible avenue of relief, we have also considered whether your claim should be referred to the Congress pursuant to the Meritorious Claims Act of 1928 (31 U.S. Code 236).

The Meritorious Claims Act provides that when a claim is filed in this Office that may not be lawfully adjusted by use of an appropriation theretofore made, but which claim, in our judgment, contains such elements of legal liability or equity as to be deserving of the consideration of Congress, it shall be submitted to the Congress with our recommendations. The remedy is an extraordinary one and its use is limited to extraordinary circumstances.

The cases we have reported for the consideration of the Congress generally have involved equitable circumstances of an unusual nature and which are unlikely to constitute a recurring problem, since to report to the Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances. *See* B-175278, April 12, 1972.

Undoubtedly other contractors who deal with Government have found themselves in your situation. Also, devaluation of the dollar has occurred in the past and may occur again in the future. Therefore,

we find your claim to be neither unusual in nature nor a nonrecurring situation.

For the reasons stated above, we find no element of unusual legal liability or equity which would justify us in reporting it to the Congress for its consideration under the Meritorious Claims Act.

[B-139416]

Transportation—Boats—Components and Accessories

The definition of the term "household goods" contained in paragraph M8000-2 of the Joint Travel Regulations, promulgated under the authority in 37 U.S.C. 406(b), may not be revised to enlarge the term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding the lack of preciseness of the term "household goods," the term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of a permanent nature—used in and about a place of residence for the comfort and accommodation of the members of a family, and the term is not viewed as encompassing such items as boats, airplanes, and housetrailers.

To the Secretary of the Navy, September 5, 1973:

This is in reference to a letter to this Office, dated May 2, 1973, from the Assistant Secretary of the Navy requesting a decision as to whether the definition of "household goods" contained in paragraph M8000-2 of the Joint Travel Regulations (JTR) may be revised to include boat components and accessories as acceptable items for shipment as household goods. This request was assigned Control No. 73-26 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Assistant Secretary of the Navy refers to our decision, 44 Comp. Gen. 65 (1964), indicating that although pertinent statutory authority governing the transportation of household goods excludes an automobile, nevertheless, we said we would not object to the inclusion in an amendment of the Joint Travel Regulations, of automobile spare parts, tires, etc., as acceptable items in household shipments. It was stated further that it was common knowledge that such items, when not in use on the member's automobile, are usually kept in the house or garage along with other household goods and generally are treated by the member as household goods. A decision is requested, based upon this rationale, as to whether paragraph M8000-2 of the JTR may be revised to include boat components, such as outboard motors, seat cushions, life jackets and other boat gear, as acceptable items for shipment as household goods.

Under the provisions of 37 U.S. Code 406(b), in connection with a change of temporary or permanent station, a member is entitled to transportation at Government expense of baggage and household effects or reimbursement therefor, subject to the provisions of sec-

tion 406(c), to such conditions and limitations as the Secretaries concerned may prescribe. Promulgated pursuant thereto, paragraph M8000–2 of the JTR currently in effect defines the term "household goods" as furniture and furnishings or equipment, clothing, baggage, personal effects, professional books, papers and equipment under the conditions described in subparagraph 3, and all other personal property associated with the home and person. Based upon our decision in 44 Comp. Gen. 65, *supra*, beginning with change 145, effective November 19, 1964, the term has also included spare parts for a privately owned motor vehicle (extra tires and wheels, tire chains, tools, battery charges, accessories, etc.). The term "household goods," however, continues to exclude, among other things, privately owned motor vehicles and boats.

Our decision, B–139416, dated June 1, 1959, to the Secretary of the Air Force, concerned the shipment of outboard motors under the provisions of paragraph M8000–2 of the JTR. We pointed out in that decision that "baggage" and "household effects" are general terms, not lending themselves to precise definition, but varying in scope depending upon the context in which they are used. We said further that in ordinary and usual usage, however, they refer to particular kinds of personal property associated with the home and the person, and notwithstanding the lack of preciseness of the terms, it long has been held under various statutes that certain items, including boats in whole or in part, must be considered beyond their scope. We concluded that the exclusion of boats from shipments of household effects at Government expense was to be regarded as excluding the motor as well.

Reaffirming this principle, we stated in our decision, 44 Comp. Gen. 65, *supra:*

> As generally understood, the term "household goods" refers to furniture and furnishings or equipment—articles of a permanent nature—*used in and about a place of residence for the comfort and accommodation of the members of a family.* Thus, notwithstanding the lack of preciseness of the term, it long has been considered that various items, such as boats, airplanes and house trailers do not come within its scope. [Italic supplied.]

In decision 52 Comp. Gen. 479 (1973), we considered a request for decision from the Assistant Secretary of the Navy (Manpower and Reserve Affairs) as to whether the term "household goods" as defined in paragraph M8000–2 of the JTR might be redefined to include all personal property associated with the home and person which would be accepted and shipped by a carrier at the rates established in the appropriate tariffs for household goods. In denying such change in the definition of household goods, we pointed out that the comparable lists of excluded items in paragraph C1100, Volume 2, JTR and in section 1.2h Office of Management and Budget Circular A–56 Revised, August 1971 (currently contained in paragraph 2–1.4h, FPM

R 101-7, Federal Travel Regulations, May 1973) pertaining to civilian employees closely parallel paragraph M8000-2 of the JTR, previously referred to. We pointed out that in view of the small number of requests for advance decisions received in recent years as to whether certain items might be shipped at Government expense, it would seem that neither undue hardship nor significant administrative problems had been generated by current definitions. It was suggested that the Department of the Navy in cooperation with the General Services Administration, the Department of State and our Office, give consideration to a more detailed review of this matter to establish a basis to support modifications of existing definitions.

In defining the term "household goods" in paragraph M8000-2, JTR, relating to members of the uniformed services, the regulation expressly excludes "boats." Also, paragraph C1100, Volume 2, JTR, relating to civilian employees of the Department of Defense, expressly excludes "boats" and "outboard motors" as not coming within the definition of household goods.

While there may be some basis for following the rationale in 44 Comp. Gen. 65 (1964), cited above, so as to include, in the definition of household goods, items such as outboard motors, etc., for shipment as household goods, it is our view that it would be inappropriate at this time to authorize such an amendment to the JTR. As indicated above, we have taken the view that boats, including outboard motors, are excluded as household goods. B-139416, June 1, 1959. Moreover, in our decision of February 5, 1973, 52 Comp. Gen. 479, cited above, we said that the question of redefining the term "household goods" to include all personal property associated with the home and person which would be shipped by a household goods carrier requires a more detailed review and study of the matter before further broadening the definition of household goods. As suggested in that decision, we will be glad to cooperate with the Department of the Navy, General Services Administration and the Department of State concerning this matter. At that time, consideration can be given to the advisability of including items such as outboard motors, etc., as coming within the scope of the definition of household goods.

Accordingly, for the reasons indicated, the question presented must be answered in the negative.

[B-177436]

Contracts—Data, Rights, etc.—Trade Secrets—Protection

The repair process, alleged to be a protectible trade secret, for the removal and replacement of the rear flange of the J-57 engine combustion chamber outer rear case which was contained in a request for proposals does not violate the proprietary rights of the former contractor who had been awarded prior contracts on a sole source basis where the evidence indicates the contracting

agency developed the process independently from any information submitted in an unsolicited proposal, and notwithstanding the contractor initially implemented the process. Even should a process merit protection as a trade secret, use of the process is not precluded when it is obtained by means of independent development. Furthermore, under ASPR 4–106.1(e) (4), even though information in an unsolicited proposal submitted without a restrictive legend may only be used for the evaluation of the proposal, the Government is not limited in its use of the information if it is obtainable from another source without restriction.

To Sellers, Conner and Cuneo, September 10, 1973:

By letter dated March 28, 1973, and prior correspondence written on behalf of T.K. International, Incorporated (T.K.), you protest the issuance of request for proposals (RFP) F34601–73–R–2561, at Tinker Air Force Base, Oklahoma, on the grounds that the agency's description of its requirements violates T.K.'s proprietary rights in data it submitted to the Air Force.

For the reasons stated below, we have not concluded that the process described in the solicitation violates T.K.'s proprietary rights and therefore we find no reason to disturb the Air Force procurement.

The subject RFP, issued on October 27, 1972, solicited offers for performance of a repair process requiring the removal and replacement of the rear flange of the J–57 engine combustion chamber outer rear case. The statement of work contained in the solicitation incorporates seven essential steps in the repair process which you contend are revealed in violation of T.K.'s proprietary rights. They are as follows:

1. Material: All replacement material shall be in accordance with AMS 5653 or AMS 5648.
2. Remove aft flange by machining.
3. Manufacture replacement flange of specified material.
4. Weld on new flange by electron beam process.
5. Machine flange to specified tolerances.
6. Perform radiographic inspection of weld joint.
7. Inspect item for conformity with required dimensions.

You state that all prior contracts for this repair work have been awarded to T.K. on a sole-source basis incorporating Air Force Work Specification SANEP 68–313, November 8, 1968, as modified. You have noted that this Air Force specification was issued after the agency received (in August 1968), evaluated, and discussed Automatic Welding Company's (Automatic) proposal for rear flange replacement and that it fully incorporates the allegedly proprietary process developed by Automatic. (Automatic was a corporate predecessor to T.K.)

You contend that the T.K. process defines the only economically feasible repair procedure for the J–57 case and therefore constitutes a protectible trade secret. *Imperial Chemical Industries Ltd.* v. *Na-*

tional Distillers and Chemical Corp., 342 F. 2d 737 (1965). In this connection, you note that Armed Services Procurement Regulation (ASPR) 4-106.1(e) provides for protection against the disclosure of trade secrets submitted in an unsolicited proposal. Further, you assert that prior to the issuance of the instant solicitation the Air Force recognized the confidential nature of the relationship with T.K. in connection with this repair process: (1) by stamping a work specification with a proprietary legend; (2) by attempting to negotiate the purchase of the T.K. process; and (3) by recalling pursuant to your protest letter of September 27, 1971, similar specifications issued under a solicitation in an effort to qualify additional repair procedures and sources. It is your conclusion that these events confirm that a confidential relationship between the parties was established when Automatic made its initial submission and was formally recognized and affirmed by proper contractual action prior to the formulation or issuance of any Air Force solicitation. In this connection you cite our decision B-154079, October 14, 1964, wherein we recognized that an express disclosure agreement was not a prerequisite to the existence of a confidential relationship between the Government and a contractor.

The Air Force believes that T.K. has no protectible proprietary interest in the subject repair process for two basic reasons. First, the agency contends that the broad idea or concept of rear flange replacement and the essential steps in the replacement process were conceived and developed by Air Force personnel prior to Automatic's initial disclosure of its process to the agency. Second, in the Air Force's view such disclosures as were made to that agency were unrestricted disclosures and therefore cannot form the basis for a claim of proprietary rights.

With respect to the Air Force's contention that it had independently developed the essentials of the J-57 repair process, it is reported that in April 1966 a deficiency report was prepared which described the defective condition of the outer rear case flange and recommended that "consideration be given to procurement and replacement of the aft section of the case." According to the Air Force this indicates that agency personnel had developed the basic form of the process (removal of the old flange and its replacement) nearly 2 years before the initial Automatic submissions.

Furthermore, the agency cites an evaluation report dated September 12, 1966, which indicates that the replacement flange would have to be welded in place and then machined. This report also refers to "special fixtures" and "extensive machinery" which the Air Force alleges refers to the process of milling the repaired area to the required tolerances.

In addition, the Air Force points to a Value Engineering Change Proposal (VECP) submitted by North American Aviation in February 1967, which describes a similar repair process and refers to an additional element of the disputed process, that is, the material from which the replacement flange is to be fabricated. While this VECP used tungsten gas welding as opposed to the electron beam welding, it was rejected by the Air Force because it did not restore the case to a "like new" condition and it was not considered economically feasible.

Another document cited by the Air Force is an agency memo dated July 9, 1968. This document refers to a repair process involving the electron beam welding of a replacement flange and indicates the necessity for a dimensional inspection to certain sketches. This, the Air Force believes, illustrates the fact that the agency independently conceived the idea of using this type of welding in the process. Moreover, the Air Force points out that an Automatic letter dated August 23, 1968, evidences that the company learned of the necessity for complete replacement of the aft end of the case from Air Force personnel on July 17, 1968. We are also referred to a document dated September 11, 1968, in response to the above-cited July 9 memo which indicates that a prototype repair was accomplished on two sample cases using replacement flanges obtained from cases with defects in other areas. The replacements were welded to serviceable case bodies using the electron beam process. (This report notes, however, that the resulting outside diameter was too small and had to be resized.) In addition, the inspection results given in a laboratory report dated August 29, 1968, indicate that the weld area was inspected by using ultrasonic and X-rays (radiographic inspection).

Our attention is also directed to a series of correspondence beginning with an Air Force letter dated May 29, 1968, to Pratt & Whitney wherein the concept of fabricating a new replacement flange is discussed.

Based on the above-cited evidence and the Air Force's view that the radiographic inspection process as well as many of the other steps involve procedures which by 1968 were general shop practices, it is that agency's opinion that the T.K. process is not unique and not subject to protection as a trade secret. Also, the Air Force states that the original Automatic process was ineligible for proprietary protection because the process lacked certain required procedures, such as reforming and resizing and heat treating, without which the repair cannot be successfully accomplished.

You disagree with the Air Force's conclusion in this matter since you believe that none of the various documents cited by the Air Force evidences the existence of a successful repair process. In this regard

you note that although some of the elements of T.K.'s process may have been known, a workable repair process was not developed until the issuance of Air Force work specification, 68–313, dated November 8, 1968. It is your position that this specification was not developed independently by the Air Force, but it was developed from Automatic's unsolicited proposal which was submitted more than 2 months before the Air Force specification was issued.

You support this position by noting the similarity between the Air Force specification and the Automatic process. You argue that even if the Air Force was cognizant of all the elements of the repair process the fact that it had not developed a workable repair process prior to that agency's receipt of the Automatic unsolicited proposal refutes the Air Force position. In support of this position you cite *Forest Laboratories, Inc.* v. *Formulation, Inc.*, 299 F. Supp. 202 (E.D. Wis. 1969) and other cases which hold that a protectible trade secret may consist of a combination of common commercially available elements as long as that combination produces a result not before achieved. Accordingly, it is your conclusion that the similarity between the T.K. and Air Force processes along with the fact that the agency had not, prior to November 1968, developed a feasible repair method results in the presumption that the Air Force did, in fact, adopt and use T.K.'s proprietary process.

Although the record appears to substantiate your position that the Air Force had not accomplished the repair in a completely satisfactory manner prior to the submission of the Automatic proposal it is also evident that the essential elements of the process had by that time been developed by the Air Force. We are in agreement with the principle that a trade secret need not consist of unique elements as long as the combination of elements is unique. However, in this case, since all of the steps appear to have been previously and independently developed by the Air Force and since the operation sequence appears to have been in large part determined by normal shop practice (i.e. the old flange must be removed before a replacement can be installed; dimensions are best brought into tolerance after welding) we are unable to conclude that the subject repair process may be considered to be proprietary to T.K. Even assuming that the nature of the process is such as to merit protection as a trade secret, it is elemental that a person is not precluded from using such a process if he comes by it honestly, such as, by independent development. *See* Restatement, Torts, section 757. In our view the fact that T.K. may have been the first to successfully implement the process does not necessarily prove that it first developed the process. Successful implementation may result from the employment of skilled personnel to perform the steps rather than from the intellectual development of the steps themselves. Also, we do not agree with your

contention that the similarity of the Automatic repair process to that contained in the later Air Force work specification establishes that the agency adopted the Automatic process, since the record shows that the Air Force also was actively engaged in developing a repair process when Automatic submitted its process.

Although the Air Force work statement dated February 18, 1970, covering the repair of the J–57 combustion chamber outer rear case, which you have submitted is stamped "PROPRIETARY," we do not believe this establishes Air Force recognition of T.K.'s proprietary rights to the repair process. In this connection, the Air Force reports that the initial Automatic repair process was submitted to the Air Force without a proprietary legend or any written indication that the material should be treated as proprietary. In such instances, Armed Services Procurement Regulation (ASPR) 4–106.1(e)(4) provides that unsolicited proposals which are submitted without restrictive legend are to be marked by the agency and its contents not disclosed or used for any purpose other than the proposal's evaluation. It must be pointed out, however, that the ASPR notice specifies that it should not be construed as to impose any liability upon the Government for disclosure of the proposal, and that it does not limit the Government's right to use information contained in the proposal if it is obtainable from another source without restriction. Based on the record, we cannot conclude that the subject repair process was not independently developed by the Air Force.

Concerning the sole-source contracts awarded to T.K. for J–57 repairs we are informed that four sole-source awards were justified because of urgency in three cases and because of a possible interruption of an adequate flow of equipment in the other case. It is by no means certain that these awards were prompted by an Air Force recognition of T.K.'s alleged proprietary rights.

Likewise, it appears that although the Air Force withdrew certain information as a result of T.K.'s protest letter of September 9, 1971, the agency specifically advised that its review of the matter indicated that the data contained in its own independently developed general work and qualification specification did not infringe upon T.K.'s proprietary data. It is apparent, therefore, that the Air Force did not intend to create the impression that it would recognize the alleged proprietary nature of the T.K. process. Similarly we do not consider the discussions held on December 19, 1970, concerning the possible purchase by the Air Force of the T.K. process to be persuasive because the record indicates that the subject was raised only once by an Air Force buyer and no actual offer was made.

Accordingly, we do not believe that the evidence you have submitted affords an adequate basis for this Office to disturb a competitive pro-

curement. *See* 52 Comp. Gen. 773 (1973). Therefore, your protest must be denied.

[B-178207]

Contracts—Protests—Authority To Consider—Appeal Before Contract Appeals Board

Where there is no dispute as to the facts, but rather the question raised is one of law—that is whether a contract came into existence—it is not inappropriate for the General Accounting Office to consider the protest of the contractor alleged to have defaulted under a contract awarded by the Air Force, notwithstanding the contractor also appealed the contracting officer's determination to terminate the alleged contract for default to the Armed Services Board of Contract Appeals.

Contracts—Offer and Acceptance—Contract Execution—What Constitutes

The contention that no contract came into existence under the second step of a two-step procurement conducted pursuant to 10 U.S.C 2305(c) for housing construction because the bid accepted orally was not effective before the expiration of the Davis-Bacon Wage Rate Determination and the bid itself, or the alternative allegation that the bid was nonresponsive and also contained a bid price error and, therefore, there was no contract to terminate for default is refuted by the record which evidences the oral notification of contract approval made subsequent to written notification of an award made subject to such approval was in compliance with the invitation for bids. Furthermore, failure to describe the actual amount of work to be performed by the contractor did not make its bid nonresponsive as the invitation did not require this information, and the variances between the price bid and the Government's estimate and other bids submitted were insufficient to place the contracting officer on constructive notice of error.

To Hudson, Creyke, Koehler, Brown and Tacke, September 11, 1973:

We refer to you letter dated March 16, 1973, and subsequent correspondence, protesting on behalf of Urban Systems Development Corporation (USDC) against the award of a contract to it under invitation for bids (IFB) F25600-73-B-0020, issued at Offutt Air Force Base, Nebraska (hereafter Offutt).

The principal contention in this protest is that no contract came into existence because the Air Force failed to effectively accept USDC's bid before the applicable Davis-Bacon Wage Rate Determination expired on February 2, 1973, and before its bid expired on February 6, 1973. Alternatively, USDC argues that its bid was not responsive to the invitation and that a mistake occurred in the formulation of its bid price.

IFB-0020 constituted the second step of a two-step formally advertised procurement for the design and construction of 300 family housing units. USDC's bid was the lowest of the four received, and as a result of a favorable preaward survey, award to USDC was recommended.

Several communications were exchanged between Offutt and USDC between the time of bid opening and mid-February 1973, when USDC

attempted to withdraw its bid. USDC contends that the communications from Offutt did not constitute an acceptance of its bid, while the Air Force maintains that USDC's bid was accepted. Since the Air Force was of the opinion that a contract had come into existence, it did not consent to the withdrawal of USDC's bid. USDC then protested to our Office.

After the protest was filed, the Air Force issued to USDC a Notice to Proceed with performance, which the latter refused to do on the basis that it had no contract. On April 11, 1973, the contracting officer notified USDC that its contract was terminated for default pursuant to the clause "Termination for Default-Damages for Delay-Time Extensions" incorporated by reference into the solicitations and purported contract. USDC appealed from this decision to the Armed Services Board of Contract Appeals (ASBCA), before which it submitted a motion to dismiss on the grounds that no contract came into being and that therefore the ASBCA lacks jurisdiction.

As a result of these events, two forums have been presented with the issue of whether a contract came into existence. The ASBCA has taken the position that the determination of whether a contract was formed is within its jurisdiction because such a determination is necessary to ascertain whether there was an effective Disputes Article which provided for appeal to the ASBCA. See, *e.g.*, *Blackstone Mfg. Co., Inc.*, ASBCA No. 11763, March 29, 1968, 68–1 BCA para. 6961.

Our decision B–169147, April 10, 1972, concerned a contract which had been terminated for default after commencement of performance. The default termination was appealed to the Interior Board of Contract Appeals, which dismissed the appeal without prejudice to its reinstatement following our decision (requested by the contractor) as to whether a contract had come into existence. After observing that the resolution of certain factual disputes was "essential to a determination of the existence of a contract and the terms thereof," we stated:

> Since Linegear [the contractor] undertook performance of the subject contract and was defaulted, we do not believe our Office is the proper forum to resolve the factual disputes. Whether the default termination was valid will necessarily involve consideration of the same facts that have been referred to in connection with the question of validity of the contract. Under the disputes clause of the purported contract any dispute concerning a question of fact arising under the contract is to be determined by the Interior Board of Contract Appeals and such determination is final and conclusive if it meets the standards of review of the Wunderlich Act, 41 U.S.C. 321–322. Also, in this connection see *Vitro Corp. of America*, ASBCA No. 14448, January 21, 1972.
>
> Since the same facts are determinative of both the validity of the default termination and the validity of the contract, and in view of the finality which attaches to Board determinations of factual issues, we believe that any decision by our Office at this time would be premature and unwarranted. Accordingly, we must decline to rule on your request for relief.

The instant case is distinguishable from the decision quoted immediately above in that here, the facts "essential to the determination of the existence of a contract and the terms thereof" are not in dispute. In our view, there exists only a question of law, i.e., whether a contract came into existence, to be resolved on the basis of the facts of record. Therefore, we deem it appropriate for our Office to consider the issue presented.

The invitation for bids was issued upon Standard Form 21, Bid Form (Construction Contract) which provides in part:

> The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within ___ calendar days (60 calendar days unless a different period be inserted by the bidder) after the date of opening of bids, he will within 10 calendar days (unless a longer period is allowed) after receipt of the prescribed forms, execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety.

Additionally, paragraph 4 of Standard Form 22, Instructions to Bidders (Construction Contract), advised all bidders:

> If the successful bidder, upon acceptance of his bid by the Government within the period specified therein for acceptance (sixty days if no period is specified) fails to execute such further contractual documents, if any, and give such bond(s) as may be required by the terms of the bid as accepted within the time specified (ten days if no period is specified) after receipt of the forms by him, his contract may be terminated for default. In such event he shall be liable for any cost of procuring the work which exceeds the amount of his bid, and the bid guarantee shall be available toward offsetting such difference.

Paragraph 23 of the Information to Bidders contained in IFB–0020 further provided:

> BID ACCEPTANCE PERIOD (1960 APR): Bids offering less than sixty (60) days for acceptance by the Government from the date set for the opening of bids will be considered nonresponsive and will be rejected.

USDC did not specify in its bid a longer period for acceptance, and therefore, you contend that the bid would expire on February 6, 1973, which was 60 days after the bid opening held on December 8, 1972.

USDC was determined to be the low, responsible bidder. On January 11, 1973, the contracting officer mailed to USDC a Standard Form 23 Construction Contract and appropriate bond forms under cover of a letter dated January 10, 1973, which read in its entirety:

> 1. Subject form is attached for your signature.
> 2. This contract is subject to the written approval of *The Secretary* or his duly authorized representatives and is not binding until approved; therefore, release of any information regarding this contract shall not be made until an approved award is communicated.

USDC executed the Standard Form 23 and returned it on January 17, 1973. The contract was then signed by the contracting officer who submitted it to the Strategic Air Command Assistant Deputy

Chief of Staff (Logistics) for his approval, which was obtained on January 26, 1973.

In the meantime, USDC's payment and performance bonds had not been received at Offutt, whose representative inquired of USDC about them on January 22, 1973. The Offutt representative was told the bonds would be promptly provided. On January 30, 1973, Offutt advised the unsuccessful bidders by letter that the contract had been awarded to USDC. On January 31, 1973, a member of the contracting officer's staff called USDC to advise that it had been awarded the contract and that the payment and performance bonds still had not been received. Additional calls were made on February 7 and 9, 1973, in an effort to obtain the bonds.

The bonds (which had been executed on January 23) were received by Offutt on the morning of February 13, 1973, whereupon the procuring activity mailed to USDC its fully executed copy of the contract. Early in the evening of the same day, USDC transmitted a telegram to the procuring activity in which USDC advised that it considered its bid to have expired without acceptance, requested that its bid be considered withdrawn, and further alleged that its bid was nonresponsive and reflected a mathematical error. USDC's telegram was telephonically received by Offutt the following day, February 14. On February 15, USDC received the executed contract documents and on February 16, Offutt received the written copy of USDC's telegram.

Your primary contention is that the governing provisions of statute, regulation, and IFB-0020 required a *written* acceptance of USDC's bid; that USDC's bid was not accepted in writing while the bid was available for acceptance; and that, therefore, no contract came into existence between USDC and the Government.

The conduct of the instant two-step formally advertised procurement was governed by 10 U.S. Code 2305(c), which provides in pertinent part that:

> Awards shall be made with reasonable promptness by giving written notice to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered.

Similarly, Armed Services Procurement Regulation (ASPR) 2-407 states:

> 2-407 Award.
> 2-407.1 General. Unless all bids are rejected, award shall be made by the contracting officer, within the time for acceptance specified in the bid or extension thereof, to that responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered. If a proposed award requires approval of higher authority such award shall not be made until approval has been obtained. Awards shall be made by mailing or otherwise furnishing to the bidder a properly executed award document (see Section XVI, Parts 1 and 4) or notice of award on such form as may be prescribed by the procuring activity. When a notice of award is issued, it shall be followed as soon as possible by the formal award.* * *. All provisions of the

invitation for bids, including any acceptable additions or changes made by the bidder in the bid, shall be clearly and accurately set forth (either expressly or by reference) in the award document, since the award is an acceptance of the bid, and the bid and the award constitute the contract.

We also observe that Standard Form 21, Bid Form (Construction Contract) imposes upon the bidder the obligation to execute a contract and give performance and payment bonds "upon written acceptance of this bid * * *."

The contracting officer's letter dated January 10, 1973, forwarded contract and bond forms for signature, and advised USDC that "This contract" was subject to approval by higher authority and was "not binding until approved." Written approval by higher authority was obtained on January 26, 1973, and approval of the award was communicated by telephone to USDC on January 31, 1973—all during the period in which USDC's bid was open for acceptance and before expiration of the applicable Davis-Bacon Wage Rate Determination.

USDC maintains that the contracting officer's January 10 letter did not effectively accept the bid because "the letter did not express a present intent on the part of the Government to be bound" and that the oral notification of award approval given on January 31 also was ineffective in view of the requirement that bid acceptances be in writing.

However, the contracting officer's letter of January 10 clearly placed USDC on notice that an award to it was being processed subject to the administrative step of obtaining approval from higher authority. USDC then executed the contract and returned it to Offutt. From the time of the subsequent oral notification that approval of the award had been obtained until the attempted bid withdrawal on February 13, the actions of both parties were consistent with an understanding that USDC had been awarded a contract.

We note, for example, that on February 7 and 9—after the scheduled expiration date of its bid—USDC responded positively to inquiries by Offutt concerning the missing payment and performance bonds. Under the terms of the solicitation, quoted on page 3, *supra*, USDC was obligated to give the bonds only upon the acceptance of its bid. USDC's assurances, made after February 6, that it would provide the bonds are therefore consistent with an understanding that its bid had been accepted.

We believe it would be a distortion of the facts to conclude that the Government did not effectively communicate its acceptance of USDC's bid within the time allowed. Therefore, upon consideration of all the facts and circumstances, we are of the opinion that USDC's bid was effectively accepted, thereby creating a contract between USDC and the Government.

With regard to the responsiveness of USDC's bid, you observe that as required by ASPR 7-603.15 and 18-104, IFB-0020 provided:

ADDITIONAL GENERAL PROVISIONS (CONSTRUCTION CONTRACT)

* * * * * * *

90. PERFORMANCE OF WORK BY THE CONTRACTOR (1965 JAN)
The contractor shall perform on the site, and with his own organizations, work equivalent to at least fifteen percent (15%) of the total amount of work to be performed under the contract.* * *.

The invitation for bids did not require bidders to describe the actual amount of the work which they proposed to perform with their own organizations. However, you have furnished USDC's work sheets in support of your allegation that USDC intended to perform only approximately 7.5 percent of the work with its own organization. You maintain USDC's bid should be rejected as nonresponsive since the bid was based upon a method or operation inconsistent with the requirement of paragraph 90 of the Additional General Provisions, quoted above.

In support of your contention, you cite our decision which is reported at 45 Comp. Gen. 177 (1965), in which we upheld the rejection of a bid as nonresponsive where the bidder did not offer to perform the required minimum amount of work with its own forces. Our 1965 decision, however, dealt with a bidder who inserted on the face of its bid a figure inconsistent with the solicitation requirements. In contrast, IFB-0020 did not require any entry by bidders in this regard, and there was nothing upon the face of USDC's bid which deviated from the IFB's requirements. Regardless of the basis upon which USDC calculated its bid, or whether that basis was mistaken, the bid submitted by USDC was entirely responsive to the IFB. Therefore, USDC's alleged error with respect to the amount of work to be performed with its own forces affords no basis for the rejection of its bid as nonresponsive.

Finally, you request that USDC be permitted to correct an error in its bid price, first alleged on February 13, 1973, which in our view was after award of the contract. As we observed in our decision, B-178688, July 10, 1973:

Our Office has consistently stated that where a mistake in bid is alleged after award of a contract, in the absence of any mutual mistake, as here, we will grant relief only when the contracting officer was on actual or constructive notice of the error or probability of error prior to award. 52 Comp. Gen. 706 (1973); 45 *id.* 700 (1966).

IFB-0020 included certain additive items and a deductive alternate item to be taken into consideration in the evaluation of bids. USDC alleges that in arriving at its base bid price, it excluded the amounts for these items (approximately $255,000) even though the figure from which the deduction was made included nothing for those items.

Therefore, USDC states, its base bid of $5,889,000 was about $255,000 below what it should have been, which was approximately $6,144,000.

We do not believe it is necessary for us to determine whether this mistake actually occurred for even if the existence of the error is conceded, the circumstances are not such as to have placed the contracting officer on constructive notice of error. USDC's base bid compared as follows to the Government's estimate and the other base bids received:

USDC	$5,889,000
Government Estimate	6,098,000
National Homes Construction	6,429,000
Selden Devel. Management	6,864,000
Lueder Constr. Co.	7,143,000

USDC's base bid, therefore, was approximately 3.5 percent below the Government estimate and 8.5, 14 and 17.5 percent below the base bids of National, Selden and Lueder, respectively. USDC's allegedly intended base bid of $6,144,000 would have compared similarly, since it would have been less than 1 percent above the Government estimate, and 4.4, 10.5 and 14 percent below the National, Selden and Lueder bids, respectively.

Under these circumstances, especially the small variance between USDC's base bid and the Government estimate, we are unable to conclude that the contracting officer was placed upon constructive notice of the alleged error. *See* B–178731, August 3, 1973; B–178813, July 13, 1973, copies enclosed. Therefore, no relief may be granted from the alleged mistake in contract.

In view of the foregoing, your protest is denied. The original worksheets enclosed with your letter of March 28, 1973, are returned.

[B–174928]

Guam—Employees—Customs and Quarantine Officers—Overtime Services for Federal Government

Payment for the overtime services provided by Guam customs and quarantine officers at Andersen Air Force Base, Guam, on a 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus an overhead surcharge, which is claimed by the Territory of Guam, pursuant to Public Law 9–47 that imposes a basic charge equivalent to the hourly wage rate of the officer performing the service, plus an administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of the laws and regulations enforced by the officers as Federal agencies are subject as other carriers to the charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to the extent that their operations are subject to customs inspections generally. However, a determination should be made that the surcharge is reasonable and does not constitute an unconstitutional tax upon the United States Government.

To J. A. Treinen, Department of the Air Force, September 14, 1973:

Reference is made to your letter of December 10, 1971 (attention ACF) forwarded here by letter dated January 5, 1972, from Headquarters Air Force Accounting and Finance Center, requesting an advance decision as to the propriety of payment by the United States Air Force to the Government of Guam for overtime services provided by Guam customs and quarantine officers at Andersen Air Force Base, Guam.

Public Law 9-47, enacted March 15, 1967, by the Territory of Guam, and codified as section 47136 of the Government Code of Guam (1970), imposes a charge on "all air and sea carriers and other persons" for the services of customs and quarantine officers when required beyond regular working hours. The basic charge is equivalent to the hourly wage rate of the officer performing the service and this amount is paid over to such officer. Public Law 9-47 further imposes a surcharge of 25 percent of the wage rate, which the Government of Guam claims is reimbursement for administrative overhead occasioned by the use of its customs and quarantine officials outside of regular hours.

The request for our advance decision reads in part:

> Guam customs and quarantine officers are charged with the duty of enforcing federal customs, quarantine, gun control and vehicle safety laws (49 USCA 789 and federal agency directives unavailable to us), as well as customs and quarantine laws of Guam (sections 47100-47136, Government Code of Guam). Because the federal and territorial laws are enforced simultaneously, the overtime services on which charges are based are not divisible into "federal time" and "territorial time." From the standpoint of time allocation, Guam customs officials have no responsibilities with regard to federal customs duties since Guam is a "free port" (19 USCA 1202, headnote 2). Consequently, their only function as customs officers is to assure compliance with federal and territorial laws concerning illegal entry of persons and property. It is significant to note, however, that another major function of these officers in behalf of the Government of Guam is to assist in the enforcement of a Guam use tax, by reporting all property imported by terminating passengers to the Guam Director of Revenue and Taxation.
>
> * * * * * * *
>
> Andersen Air Force Base has long been a major military air traffic center. As such, it is subject to incoming traffic from foreign countries at all hours seven days weekly. Guam customs officials, working in shifts, are on duty 24 hours daily, at the Base Terminal. In 1960 the Government of Guam was charging "carriers and similar agencies" (including the Air Force) for overtime services rendered by Port Security personnel. The practice was voluntarily terminated in June 1960 because the authority to so charge was questionable (*see* Attachment 2). The practice was reinstated in July 1971, pursuant to the 1967 enabling statute cited above * * *. To date, payments totaling $551.89 have been disbursed with the understanding that further payments would be withheld pending receipt of your decision in the matter. Should that decision be favorable, refund will be requested.
>
> It is understood that the Air Force pays for services of federal customs officials at other installations where the services are requested at irregular hours. The present case is distinguishable in that a non federal agency is involved, and the services involve three indivisible and significantly self-serving functions - enforcement of federal and Guam customs and quarantine laws, and enforcement of Guam use tax laws. Additionally, the services are not requested as in those cases

at other installations. It is unknown to what extent, if any, the Government of Guam may be compensated by other federal agencies for these same "services" in enforcing federal laws as delegated.

Finally, the submission questions whether the Air Force may be considered an "air carrier" or "other person" within the application of the charges imposed by Guam Public Law 9–47.

On April 7, 1972, we requested the opinion of the Attorney General of Guam concerning the issues raised in the submission. At the same time, we also requested the views of the Deputy Assistant Secretary for Territorial Affairs, Department of the Interior. By letter dated March 13, 1973, we were advised by the Acting Attorney General of Guam that Public Law 9–47 is construed to include the Federal Government as a carrier subject to charges for overtime customs and quarantine services. The Acting Attorney General also states that in addition to enforcement of certain territorial laws and regulations, the Guam customs and quarantine officers enforce a number of Federal laws and regulations, listed in his letter. Such Federal enforcement is undertaken either pursuant to formal delegation by the Federal Governmnt or on a *de facto* basis, sustained by the courts, resulting from the absence of cognizant Federal officials within the Territory. Enforcement of certain of these Federal laws and regulations has been delegated by the Federal Government specifically with respect to military flights at Andersen Air Force Base. The Acting Attorney General concludes:

> I do not regard the 25% administrative overhead and overtime charge as a tax upon the United States Government. It will be noted that the fee upon which the 25% administrative charge is based is paid directly to the officers who are on the scene and who are performing the inspection. The 25% administrative charge relates to charges borne by the Government of Guam other than the actual salaries of the inspecting officers. Therefore, these charges are not a tax, but rather a rough estimate of additional government cost occasioned by the use of these customs officers outside of regular hours.
>
> Since the time spent on "Federal Enforcement" cannot be differentiated from the time spent on "Guam Enforcement", and since Guam and Federal Enforcement tend to overlap in the subjects covered, I see no means of differentiating charges on the basis of the duties performed by the customs officers at any given time. These inspection duties must be performed by these officers, whether under Federal Law or under Guam Law, and it is upon the fact that the duties are necessary that the charges are based. Therefore, I am of the opinion that the charges imposed upon air and sea carriers and other persons, including the United States Air Force, are justified by local law and are not prohibited by the Organic Act. * * *.

By letter dated June 14, 1973, the Director of Territorial Affairs, Department of the Interior, forwarded to us a memorandum by the Department's Associate Solicitor, General Legal Services, which comments upon our letter from the Acting Attorney General of Guam. This memorandum expresses the opinion that the Air Force is chargeable only for overtime services rendered by Guam officers which are attributable to enforcement of Federal laws and regulations, as opposed to those of the Territory. The memorandum also notes that no basis has

been provided for differentiating between Federal enforcement and Guam enforcement; and, similarly, that there is lacking any apparent basis for relating the 25 percent surcharge to Guam's actual administrative costs in providing overtime services.

The question raised is whether the service charges and surcharges as assessed by the Territory of Guam pursuant to Guam Public Law 9–47 are in the nature of an unconstitutional tax as applied to the Federal Government or its department and agencies. It is clear that a United States Territory may not impose a tax upon its sovereign in the absence of express statutory permission. *Domenech* v. *National City Bank of New York*, 294 U.S. 199 (1935). However, the United States is not exempt from payment of reasonable compensation for services rendered or convenience provided to it. *See, e.g.*, 50 Comp. Gen. 343, 344 (1970) and authorities cited therein.

Applying the foregoing principles to the instant matter, it is necessary at the outset to determine what service or convenience, if any, the Air Force derives in return for the charges imposed by Guam Public Law 9–47. The materials submitted to us, discussed above, appear to approach this question by reference to the nature and source i.e., Federal versus territorial—of the laws and regulations enforced by the Guam officers. However, this approach is not, in our opinion, dispositive. The Air Force is not responsible for the enforcement of territorial laws; nor is it the agency which would have had original responsibility for the Federal enforcement functions performed by the Guam officers. Moreover, there is no indication that Guam seeks reimbursement from the Air Force for performance of any of its territorial or Federal enforcement activities on a regular basis, i.e., during normal working hours. On the contrary, it is evident that the service or convenience for which Public Law 9–47 imposes charges is the availability of the Guam officers to perform their enforcement functions—whatever the nature and source of such functions on an overtime basis. Thus Guam Public Law 9-47 is similar to a Federal statute which provides that carriers be assessed charges equivalent to the compensation of Federal customs inspectors for inspections conducted outside of normal working hours, and that such amounts be paid over to the customs inspectors. *See* 19 U.S. Code 267.

The submission indicates that Andersen Air Force Base is subject to incoming traffic from foreign countries at all hours, 7 days a week, and that the Guam customs and quarantine officers are on duty at the Base Terminal at all times. While the submission does not specifically so state, we assume that such incoming traffic cannot clear the base Terminal without processing through the Guam officers and, accordingly, that the availability of these officers for only 40 hours a week would seriously impede operations at Andersen.

For the foregoing reasons, it appears to us that the availability of the Guam officers at Andersen on a 24-hour basis provides a substantial service to the Air Force, irrespective of the laws and regulations which they enforce. We also believe that the Air Force may properly pay for this service. Our Office has held that Federal agencies are subject as other carriers to the charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, *supra*, to the extent that their operations are subject to customs inspections generally. 6 Comp. Gen. 237; B–41643, May 25, 1944. We have also authorized payment of such charges by Federal agencies where customs inspections were performed by employees of the Panama Canal. 11 Comp. Gen. 10, 13 (1928). The latter decisions relied upon the utility in terms of Federal transportation operations of having available such overtime services.

It remains to consider whether the specific charges imposed by Guam Public Law 9–47 represent reasonable costs for the provision of overtime services. As stated previously, these charges consist of two elements: the wages of the customs and quarantine officers performing overtime services, and a 25 percent surcharge thereon. The wage element represents an actual cost to Guam and is, therefore, clearly a proper charge. The 25 percent surcharge represents by the terms of the statute "reimbursement for administrative overhead and overtime * * *." The Acting Attorney General of Guam describes the 25 percent amount as a "rough estimate" of additional costs to Guam occasioned by the use of the officers outside of regular hours. We recognize that it would be difficult to delineate fully and precisely the actual components of such administrative cost. In view of this, as well as the representations contained in the statute and the Acting Attorney General's letter, we would not object to payment of the 25 percent surcharge unless it is administratively determined that the 25 percent figure is so unreasonable—in relation to the services rendered—as to constitute a tax on the United States.

For the reasons stated herein, it is our opinion that the Air Force is authorized to pay the charges imposed by Guam Public Law 9–47 unless the charges are determined to be unreasonable. The voucher presented with the request for our advance decision is returned herewith and payment thereon is authorized, subject to the foregoing, if otherwise correct.

[B–156550]

Officers and Employees—Secret Service—Retirement Under District of Columbia Police Plan

Since under 18 U.S.C. 3056, the Secret Service in addition to protecting the President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection,

as well as time spent in directly protecting the President on temporary or intermittent assignments, toward the accumulation of the requisite 10 years prescribed by section 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under the Policemen and Firemen's Retirement and Disability Act, even though the authority to transfer deposits from the Civil Service Retirement and Disability Fund to the general revenues of D.C. specifies full-time agents protecting the President. Approval of future eligibility revisions to participate in the D.C. Police Retirement Plan is the responsibility, pursuant to section 4–535, of the D.C. Commissioner, and should additional transfers affect the integrity of the Policemen and Firemen's Retirement and Disability Fund, this might be the basis of remedial legislation.

To the Commissioner of the District of Columbia, September 21, 1973:

We refer to the letter of August 10, 1973, from Mr. Donald H. Weinberg, Chairman, Police and Firemen's Retirement and Relief Board, in which he raised certain questions regarding the Policemen and Firemen's Retirement and Disability Act, approved September 1, 1916, 39 Stat. 718, as amended, now codified at sections 4–521 to 4–535 of title 4, District of Columbia Code. Mr. Weinberg was specifically concerned with whether certain members of the United States Secret Service are entitled to coverage under the provisions of that act.

Section 4–522 of title 4, D.C. Code, provides as follows:

§ 4–522. United States Secret Service Division—Transfer of Civil Service retirement funds—Credit for prior service with other police units.

Whenever any member of the United States Secret Service Division has actively performed duties other than clerical for ten years or more directly related to the protection of the President, such member shall be authorized to transfer all funds to his credit in the Civil Service Retirement and Disability Fund continued by sections 8331(5) and 8348 of title 5, U.S. Code, to the general revenues of the District of Columbia and after the transfer of such funds the salary of such member shall be subject to the same deductions for credit to the general revenues of the District of Columbia as the deductions from salaries of other members under sections 4–521 to 4–535, and he shall be entitled to the same benefits as the other members to whom such sections apply. Any member of the United States Secret Service Division appointed from the Executive Protective Service and assigned to duties directly related to the protection of the President shall receive credit for periods of prior service with the Metropolitan Police force, the United States Park Police force, or the Executive Protective Service toward the required ten years or more service.

Mr. Weinberg indicated that since October 1940 the only members of the Secret Service that have been certified by the Secret Service as eligible to transfer their funds under the provisions of the above-cited section have been special agents who have been engaged full time in the protection of the President. Recently, however, the Secret Service has suggested new criteria for determining eligibility for participation in the District of Columbia Police Retirement Plan. These suggested criteria would add positions other than special agents to the protection-of-the-President category and allow time performed in temporary assignments to be cumulative towards the 10-year eligibility requirements in section 4–522. These new positions are as follows:

1. Special officers attached to the Office of Protective Forces whose assignments include the provision of security for the temporary residences of the

President and who are used to augment Presidential protective details during visits of the President to such temporary residences; and

2. All security specialists assigned to the Technical Security Division, Office of Protective Intelligence, except those security specialists assigned to the Technical Development and Planning Branch.

It is Mr. Weinberg's belief that only agents engaged full time in the protection of the President are entitled to coverage under the provisions of section 4–522 and that temporary short term assignments protecting the President should not be cumulative toward the 10-year requirement. In that regard the following questions were presented:

1. Are Secret Service employees in the positions of Security Officer and Security Specialist legally entitled to retirement annuities under the provisions of the Policemen and Firemen's Retirement and Disablity Act?

2. Can temporary assignments to Presidential protection be cumulative toward the basic 10 year requirement?

3. In the event that the criteria for eligibility of Secret Service personnel under the Act is revised in the future, who has the legal authority to approve such revisions, the Commissioner of the District of Columbia or the Secretary of the Treasury?

In a letter dated July 16, 1973, to Mr. Weinberg, the Deputy Director of the Secret Service outlined the suggested criteria which would entitle additional members of the Secret Service to coverage under section 4–522 as follows:

* * * The two major oragnizational units within the Secret Service charged with the duty of performing protective responsibilities are the Office of Protective Forces and the Office of Protective Intelligence. Under the suggested criteria, the Special Agents, including supervisory agents, assigned to the Office of Protective Forces and the Office of Protective Intelligence are engaged in duties directly related to the protection of the President. Assignment as a Special Agent under the supervision of the Assistant Director, Protective Forces or Assistant Director, Protective Intelligence, would be countable toward the requisite 10 years establishing eligibility for transfer of funds.

During special events, such as the Inauguration, election years, and periods of Presidential travel, Special Agents from other organizational units are assigned on a temporary basis to a protective function either to augment a protective detail or for the purpose of conducting advance security arrangements or other protection related activities. Time utilized by such Special Agents detailed on a temporary basis to a protective function is, under the suggested criteria, countable time for purposes of Police retirement.

The Secret Service is charged with the enforcement of 18 U.S.C. 871, relating to threats against the President. Further, it is often necessary for Secret Service agents in the field offices to perform protective intelligence investigations involving persons who may be of security interest because of mental aberration or other factors. Time utilized by such Special Agents in the performance of the foregoing functions is countable for purposes of retirement under the District system.

* * * Under present criteria, a class of employees known as Special Officers assigned to the Office of Protective Forces whose duties relate to the provision of security for the temporary residences of the President and who are used to augment Presidential protective details are authorized to count such time toward the 10 year requirement for eligibility. These Special Officers are utilized by the Secret Service in lieu of Special Agents in protective assignments at temporary Presidential residences to provide continuing security at such locations. * * *.

As a result of the assassination of President Kennedy, extensive recommendations were made by the Warren Commission to broaden the scope, resources and practices of the Secret Service relative to Presidential protection. One of the functions which has been considerably augmented both at the White House, temporary residences and during periods of Presidential travel, has been in

the area of technical security. These technical security personnel, assigned to the Office of Protective Intelligence, and with offices located in the White House complex, perform a variety of duties relative to the installation and maintenance of technical security equipment, the continuous surveillance of areas occupied by the Chief Executive for surreptitious listening devices, explosives and other intrusions that could compromise security. They are responsible for the examination of all mail and other items which are directed to the President and they are assigned, on a continuing basis, to augment Presidential protective details during Presidential movements or at temporary residences of the President. In view of the duties performed by Security Specialists assigned to the Technical Security Division, exclusive of the Technical Security and Planning Branch such Specialists are, under current criteria, authorized to count such time toward the requisite 10 year requirement for eligibility. * * *.

The provision of the Policemen and Firemen's Retirement and Disability Act which is now codified as section 4-522 originated as an amendment to the original act of September 1, 1916, from the floor of the Senate in 1940. During consideration in the House of Representatives it was explained that the amendment extended retirement coverage to "the members of the United States Secret Service Police who actually guard or protect the President of the United States, not clerical forces in that group but those actually engaged in the active guarding or protection of the Chief Executive." *See* remarks of Mr. Randolph, 86 Cong. Rec., part 12, p. 13050. Thus, the phrase "service in connection with the protection of the President" was in effect defined as "active guarding or protection" of the President. The term "active guarding" was not, however, further defined.

Under section 3056 of Title 18, U.S. Code, the Secret Service, in addition to its responsibilities relating to the protection of the President and other designated individuals, has numerous criminal investigative functions. The majority of Secret Service Personnel are engaged in the performance of those functions not related to the protection of the President. In the absence of a definite expression of congressional intent to the contrary, we believe that under the current wording of the statute all those members of the Secret Service, other than clerical, whose job-connected activities are related to the area of protection of the President, as opposed to those engaged in other areas of responsibility, are entitled to count their time spent in such activities toward the accumulation of the requisite 10 years under section 4-522. In that regard, we see no basis for excluding time spent on only a temporary or intermittent basis assigned to protective work.

Therefore, it is our view that the criteria proposed by the Secret Service is within the purview of section 4-522 as now written and that employees who are found eligible to participate in the District of Columbia Police Retirement Plan under that criteria may properly do so. It is therefore our view that questions 1 and 2 should be answered in the affirmative.

As to the third question, section 4–535 of title 4, D.C. Code, provides as follows:

§ 4–535. Delegation of functions by Commissioner—Regulations.

(a) The Commissioner is hereby vested with full power and authority to delegate from time to time to his designated agent or agents any of the functions vested in him by sections 4–521 to 4–535.

(b) The Commissioner is authorized to promulgate such rules and regulations as he may deem necessary to carry out the purposes of sections 4–521 to 4–535.

Thus, under that section you, as Commissioner of the District of Columbia, have the ultimate authority to promulgate and approve regulations necessary to carry out the purposes of the Policemen and Firemen's Retirement and Disability Act. This would appear to include final approval of criteria for eligibility to participate in the retirement plan consistent with law and the intent of Congress.

We are mindful of the fact that at the time the 1940 amendment was adopted, the Civil Service Retirement accounts of only some 15 secret service men would be transferred (*see* Senator Barclay's remarks of September 30, 1940, 86 Cong. Rec., part 12, p. 12797) and that under the criterion herein discussed some 125 additional transfers would be made. If such additional transfers will adversely affect the integrity of the fund this may afford a basis for remedial legislation. However, under the law as now written we think that the responses presented herein are required.

[B–167602]

Compensation—Overtime—Early Reporting and Delayed Departure—Administrative Approval Requirement

Preliminary and postliminary duties being compensable as overtime under 5 U.S.C. 5542 only if the performance of the overtime had been approved by an official properly delegated in writing to authorize the duties—mere tacit expectation that work will be performed is insufficient approval—and if the amount of time involved is not considered *de minimus*, time spent by security policemen and guards in the preliminary and postliminary duties of changing into and out of uniform, picking up and replacing belt, ammunition, and revolver, standing inspection for physical fitness, receiving special instructions and assignments, and walking to an assigned post, although considered work, is not compensable as overtime where the record does not evidence approval of the work by proper authority and establishes the duties not only did not follow a consistent pattern but were so nominal they must be considered to be within the *de minimus* rule.

To Lorenzo G. Baca, September 21, 1973:

We refer to your letter of August 11, 1972, requesting overtime compensation for the period from January of 1959 to July 1, 1966, for preliminary and postliminary duties performed while employed by

the General Services Administration (GSA) as a security policeman at the Albuquerque Operations Office, Atomic Energy Commission.

Your claim, initially filed with this Office on January 27, 1969, was disallowed by Settlement Certificate dated March 19, 1969. That disallowance was predicated on the fact that performance of the duties involved had never been authorized or approved by an official having authority to authorize and approve overtime. Claims of other guard members which were submitted with your claim were similarly disallowed. Those settlements were later reviewed pursuant to a congressional request; however, no basis was found to alter the actions taken.

These preliminary and postliminary duties for which overtime compensation is claimed are: changing into and out of uniform, picking up and replacing belt, ammunition and revolver, standing inspection for physical fitness, receiving special instructions and assignments, and walking to your assigned guard post.

During the period of the claim guards were under the jurisdiction of the GSA which furnished security guard service for the Albuquerque Operations Office. Guards employed at that station were assigned to 8-hour tours of duty without a nonpaid lunch break. In order to provide continued coverage at each guard post, guards were required to be at their assigned posts ready for duty at the time designated for the beginning of their shifts. Although the guards were allowed to wear their basic uniforms between work and home they were required to keep their caps, badges and belts, as well as their revolvers and ammunition at a central location in the Albuquerque Operations Office installation. The GSA has reported to us that the guards would normally sign in at the front gate before the beginning of their shifts so that they could walk to the central location, obtain uniform items and weapons and receive special instructions at that place and then walk to their assigned posts, if necessary, before the time their shifts were to begin. After guards were relieved they would return the indicated uniform items and weapons to the central location before they were free to go home.

In discussing the disallowances, we indicated that we did not regard time involved in changing into and out of uniform as compensable working time even when required by an agency, and that, in view of the small size of the guard force and the informality with which inspection was accomplished and assignments given, the time involved in performing those and the few other functions involved was so nominal as to be *de minimus*. We pointed out, moreover, that payment of overtime compensation under 5 U.S. Code 5542 must be predicated on the performance of overtime work authorized and approved by an official having delegated authority, and that whereas such authoriza-

tion and approval could be established where supervisors having such authority actively induced employees to perform work, it could not be established where they merely had knowledge of and tacitly approved early reporting procedures.

In requesting our further consideration of your claim, you rely on the holdings of the Court of Claims in *Bates* v. *United States*, 196 Ct. Cl. 362 (1971), and in *Baylor* v. *United States*, 198 Ct. Cl. 331 (1972). Both decisions were rendered subsequent to our previous consideration of your claim.

The Court of Claims in *Bates* and *Baylor* held that time spent changing into and out of uniform was compensable as overtime hours of work although in those cases the employees involved were not permitted to wear their uniforms to and from their homes. The court in those cases considered uniform changing time together with the performance of other preliminary and postliminary duties as compensable time. In view of those and other recent decisions of the Court of Claims, it appears that time spent by you in putting on your badge, cap and belt and in picking up your ammunition and revolver would properly be considered as work. Whether such time is compensable as overtime, however, is contingent upon authorization and approval by an official to whom such authority has been delegated and upon the amount of time involved being of substantial length so that it would not be considered *de minimus*.

The *Bates* case was decided on the basis of a Government stipulation admitting that certain officials had been delegated authority to authorize or approve the overtime work there in question. However, in the *Baylor* case whether or not the necessary authorization had been given by an appropriate official was, as in your case, very much in issue. The court there explained that under the applicable case law, whether work had been officially authorized or approved was a matter of "legal line drawing." Whereas work that is required by an official regulation is clearly authorized or approved, a tacit expectation that work be performed is insufficient. Where there is more than a tacit expectation, and where employees have been induced by appropriate superiors to perform additional duties, overtime has been held to have been authorized and approved. An "appropriate official" in this context is one having authority to order or approve overtime. In this regard, the Court of Claims in *Kenneth D. Anderson et al.* v. *United States*, Ct. Cl. No. 151–68, decided May 11, 1973, recognized that in order to establish that overtime work had been ordered or approved, a proper written delegation of authority to the person alleged to have authorized or approved the work must be shown.

In attempting to determine where on the above spectrum the circumstances in your case lie we requested a report from GSA with

respect to the specific information necessary to that determination. In response, GSA has advised:

By letter dated June 7, 1973, the Denver regional office advised that all written records and files that would have a direct bearing on the claim of Mr. Baca were destroyed or transferred to Region 7 at the time of the regional realignment in 1972. Officials in Region 7 were also requested to supply any pertinent information but unfortunately, relevant records were not available there. The Denver report does state, however, that Guards have never been required to perform preliminary and postliminary duties in Region 8. This implies that authorized GSA officials in Region 8 (which included Albuquerque during the period under consideration), did not encourage or induce the performance of the activities in question.

The unavailability of the relevant records precludes conclusive answers to the questions raised in your letter, particularly the question pertaining to official approval, directly or indirectly, of preliminary and postliminary duties which Mr. Baca claims to have performed. * * *

Your letter indicates that the preliminary and postliminary duties performed were ordered by Mr. Decater Brown who you state was the "approving official." Due to the absence of records, we are unable to verify whether Mr. Brown had been delegated authority to order and approve overtime or whether he did in fact order or approve the preliminary and postliminary duties involved.

With regard to the length of time used by guards at the Albuquerque Operations Office for performance of preliminary and postliminary duties, the reports furnished this Office in connection with the original settlements indicate that there was no consistent pattern of early reporting which would support a finding that the guards concerned regularly reported to work at any given time prior to the beginning of their shifts or that they remained after the end of their shifts to perform postliminary duties. The record also does not support a conclusion that the amount of time required for preliminary and postliminary activities which may be considered work was in excess of a few minutes each day. Therefore, any preliminary and postliminary work performed would be considered *de minimus* and would not provide a basis for allowing you any additional compensation.

Where, as here, a claim is based on statements by a claimant that cannot be verified or corroborated by Government records which have been destroyed in accordance with law, the burden does not rest upon this Office to refute claims presented, but is on claimants to furnish evidence satisfactorily proving the validity of the claim. 31 Comp. Gen. 340 (1952).

On the record before us, we are thus constrained to uphold the denial of your claim.

[B–177023]

Pay—Additional—Proficiency Pay—Prohibition as to Awards

The payment under 37 U.S.C. 307 of superior performance proficiency pay by the Air Force at $30 per month and by the Army at $50 per month to senior noncom-

missioned officers entitled to the special pay rate provided in 37 U.S.C. 203(a) for such officers in the Army, Navy, Air Force and Marine Corps, should be discontinued since Public Law 90-207, effective October 1, 1967, amended section 203(a) to provide the new special pay rate, regardless of years of service, in lieu of basic pay at the rate of E-9, with appropriate years of service, plus proficiency pay at the rate of $150 per month, thus eliminating any award of proficiency pay. The improper payments of superior performance proficiency pay having been based on a misinterpretation of the law, and having been accepted in good faith, need not be collected and may be waived under the provisions of 10 U.S.C. 2774 (Public Law 92-453).

To the Secretary of Defense, September 26, 1973:

Our Field Operations Division has questioned the validity of payments of proficiency pay being made under 37 U.S. Code 307 to the Sergeant Major of the Army and the Chief Master Sergeant of the Air Force who, as you know, are the senior noncommissioned officers in those services. A review of the pay records for the occupants of these positions reveals that the following members, who served and are serving as Sergeant Major of the Army and Chief Master Sergeant of the Air Force, have received proficiency pay while so serving during the periods indicated and in the amounts shown:

	Army	
George W. Dunaway	9/1/68–9/30/70	$750.00 (25 mos at $30)
Silas L. Copeland	10/1/70–6/30/73	$990.00 (33 mos at $30)
Leon L. Danautreve	7/1/73–Current (8/31/73)	$100.00 (2 mos at $50)
	Air Force	
Richard D. Kisling	1/1/72–Current (8/31/73)	$600.00 (20 mos at $30)

As you also know, footnote 1 of section 1(1) of the act of December 16, 1967, Public Law 90-207, 81 Stat. 649, 650, effective October 1, 1967, amended 37 U.S.C. 203(a), to establish a special rate of pay for the Sergeant Major of the Army, Senior Enlisted Advisor of the Navy (now called Master Chief Petty Officer of the Navy, Chief Master Sergeant of the Air Force and Sergeant Major of the Marine Corps, each of whom is the senior noncommissioned officer in his respective service. Section 3 of the act of October 2, 1972, Public Law 92-455, 86 Stat. 761, 37 U.S.C. 203, established the same rate of pay for the Master Chief Petty Officer of the Coast Guard, the senior noncommissioned officer of that service.

Prior to the enactment of Public Law 90-207, members serving as the senior noncommissioned officers in the Army, Navy, Air Force and

Marine Corps were paid basic pay at the rate of E–9 with appropriate years of service, plus proficiency pay at the rate of $150 per month. The special pay rate established by Public Law 90–207 for such senior noncommissioned officers was $844.20, regardless of cumulative years of service, which amount was exactly $150 more than the monthly rates for grade E–9 with over 26 or over 30 years of service in effect at that time ($694.20). Subsequent military pay increases have increased that special pay rate to its current level, $1,355.40, or $240.30 more than the highest current pay rate for grade E–9 ($1,115.10).

The legislative history of Public Law 90–207 clearly shows that it was intended that by establishing the special basic pay rate for the senior noncommissioned officer in each service equal to the highest E 9 rate plus $150 proficiency pay, such noncommissioned officers would no longer be awarded additional proficiency pay. In this regard, Senate Report No. 808, 90th Congress, 1st session, page 8, states in pertinent part as follows regarding H.R. 13510, which became Public Law 90–207:

> At the present time in the Army, Navy, Air Force, and Marine Corps there is one enlisted man who has been designated as the senior noncommissioned officer in each of the services. This noncommissioned officer is the principal enlisted adviser to the Chiefs of Staff of the Army and Air Force, Chief of Naval Operations, and the Commandant of the Marine Corps. For many years the Marine Corps has designated such a position. It is relatively new, however, in the other services.
>
> Under the existing arrangement, each senior noncommissioned officer receives the basic pay of an E–9 with his years of service *together with proficiency pay of $150 per month.*
>
> Under the bill a special pay rate is proposed of $844.20 per month. This enlisted person will receive this pay while serving in this position regardless of his years of service for pay pusposes. *The proficiency pay of $150 per month which has been received as an interim measure will be rescinded.* As a result, the bill will not cause any increase in total active duty compensation for the senior noncommissioned officer. [Italic supplied.]

See also in this regard House Report No. 787, 90th Congress, 1st session, page 8.

Similar rationale was used in support of Public Law 92–455 authorizing the special pay rate for the Master Chief Petty Officer of the Coast Guard. *See* House Report No. 92–1278, 92d Congress, 2d session, page 2.

It appears that with enactment of Public Law 90–207, effective October 1, 1967, the pay of the senior noncommissioned officers of the Army, Navy, Air Force and Marine Corps was adjusted to reflect the new special pay rate and to discontinue the $150 per month proficiency pay, in accordance with the intent of that legislation. However, the Army (beginning in September 1968) and the Air Force (beginning in January 1972) began paying superior performance proficiency pay at the rate of $30 per month to the Sergeant Major of the Army and the Chief Master Sergeant of the Air Force in addition to the special rate of basic pay applicable to those positions.

Beginning in July 1973 the Army increased the rate of proficiency pay being paid to the Sergeant Major of the Army to $50 per month. The Air Force rate remains at $30 per month. We have been informed such proficiency pay is not being paid to the Master Chief Petty Officer of the Navy, the Sergeant Major of the Marine Corps or the Master Chief Petty Officer of the Coast Guard.

We also note that paragraph IV.D.1.e(2) of Department of Defense Directive 1304.14 specifically provides that superior performance proficiency pay will be paid on a "competitive basis." Since there is only one senior noncommissioned officer position in each service, it is difficult to see how a competitive basis can be established for award of proficiency pay to a member serving in such a position.

Accordingly, we find no proper basis for the payment of proficiency pay to any of the senior noncommissioned officers of the armed services entitled to the special rate of basic pay applicable to those positions under 37 U.S.C. 203(a). Payments of such proficiency pay now being made to the Sergeant Major of the Army and the Chief Master Sergeant of the Air Force should be discontinued immediately.

Since it appears that prior payments of proficiency pay to the individuals concerned were based on a misinterpretation of the law, no action need be taken to collect the improper payments if they were correct in other respects. Moreover, these payments presumably were accepted in good faith by the members and, in any event, they apparently would be proper for waiver under the provisions of 10 U.S.C. 2774.

[B–178795]

Contracts—Mistakes—Cancellation—Unconscionable to Take Advantage of Mistake

The fact that the low bidder under an invitation for bids to furnish fitting assemblies verified its bid price prior to award does not preclude relief after award from a mistake in bid where it would be unconscionable to require contract performance, even though the contractor's potential loss would not be very great or that the mistake was due to negligence in obtaining a complete set of specifications and, therefore, the contract awarded may be canceled. Furthermore, under ASPR 2–406.3(e)(2), a contracting officer is not required to accept a low bid which is very far below other bids or the Government's estimated price, notwithstanding bid verification, and as the low bid was approximately 26 percent of the next two higher bids for the production unit and one-twelfth of the next higher bid for the first article, for application is the unconscionability theory that where a mistake is so great it could be said the Government was obviously getting something for nothing relief should be allowed.

To the Director, Defense Supply Agency, September 26, 1973:

This is in reference to the letter dated July 25, 1973 (DSAH–G), from your Assistant Counsel, reporting on the request by Empire Manufacturing Company (Empire) that its contract, DSA700–73–C–5158, for fitting assemblies, be canceled because of a mistake in its bid.

Empire alleges that it failed to obtain and consider all specifications referenced in the invitation prior to submitting its bid, and therefore its bid price covers only a portion of the items in the specified fitting assembly. We have concluded for reasons hereinafter stated that Empire should not be held to its erroneous bid as to do so would be unconscionable.

The record shows that on March 1, 1973, Empire submitted the low bid of $10.00 for each assembly and that the next two higher bids were $38.00 and $39.54. In addition, Empire's first article bid price was also $10.00, while the next low on this item was $125.00. Accordingly, the contracting officer advised Empire of the bid prices of the second and third low bidders and the considerably higher prices previously paid for the subject assembly. Subsequently, Empire advised the contracting officer by telephone and in writing that its bid prices were correct. The contracting officer reports that after this verification he no longer suspected a mistake. On March 23, he awarded a contract to Empire.

It appears that the invitation schedule contained an item description which incorporated by reference the applicable specifications and drawings. (Elsewhere, the solicitation provided the necessary instruction for obtaining copies of the specifications.) The item description also referenced a particular Military Standard for the purpose of effecting a revision in the specification as related to this standard.

Empire first alleged a mistake to your agency by letter dated April 16, 1973. The company stated that its bid only covered the item described in the Military Standard and that it did not consider that the listed specifications required additional items for a complete assembly. The company also submitted a supplier's question, which listed only the item described in the Military Standard, as evidence of its mistake.

As a general rule, award of a contract following verification of a bid pursuant to a contracting officer's request results in a binding contract. 18 Comp. Gen. 942, 947 (1939) and 27 *id.* 17 (1947). However, this Office has authorized relief, despite a bid vertification, where the mistake was so great that it was considered unconscionable to hold the firm to its contract. B–150382, February 20, 1963, and B–170691, January 28, 1971.

With regard to this case, your contracting officer points out that the contractor (1) has provided no information on the cost of supplying the complete fitting assembly required by the contract; (2) knowingly submitted a bid without having obtained essential specifications and a drawing; (3) unequivocally verified its bid price to the contracting officer before the award was made; and (4) would not suffer

a great loss if it performed the contract. Under the circumstances, the contracting officer recommends that no relief should be granted on the basis of an unconscionable price. In this connection, our guidance is requested as to when relief may be granted from a mistake in bid after award solely on the basis of an unconscionable price.

In response to the contracting officer's comments, the contractor notes that he did furnish our Office with a copy of a supplier quotation dated April 26, 1973. The contractor states in this regard that:

> The Contracting Officer * * * emphasizes that I have not provided information as to our cost of supplying the complete fitting assembly. May I respectfully state that he did not request it but I did send a copy to your office and a copy is going to Mr. Wilson along with a copy of this letter.
>
> * * * as you can see by observation of Enclosure "A" [the supplier quotation] our cost of $25.00 per assembly exclusive of test cost, packaging cost, inspection cost, handling cost, freight cost, and certain component costs, make the next lowest bid of $38,00 suspicious as being overly low unless they make their own parts and even then it seems to me to be too low.

Concerning the failure to obtain a complete set of specifications and a drawing, the contractor blames its oversight on the fact that the solicitation merely referenced the essential specifications and did not list the parts to be purchased. We agree with the contracting officer that a prudent bidder would have carefully read the solicitation and have listed and reviewed all the required specifications prior to bidding. In this connection, instructions for obtaining copies of the specifications were set forth in the solicitation. However, we do not believe that the contractor's negligence in failing to obtain the complete set of specifications precludes the granting of relief for mistake. Mistakes in bids frequently are caused by negligence on the part of bidders. Nevertheless, relief for such mistakes may be granted in appropriate circumstances.

Furthermore, as stated above, the fact that the bidder verified its bid prior to the award does not preclude relief from a mistake in bid after award if it would be unconscionable to require the contractor to perform the contract at the bid price. B–170691, *supra*. In this connection, pursuant to Armed Services Procurement Regulation 2–406.3 (e) (2), a contracting officer need not accept a low bid which is very far below the other bids and the Government's estimated price, notwithstanding a verification from the bidder.

Finally, while the dollar amount of the loss a contractor may suffer as a result of performing a contract under a mistaken bid should be considered in determining whether enforcement of the contract by the Government would be unconscionable, we believe that unconscionability may exist even where the potential dollar loss is relatively small.

Unconscionability is grounded on the theory that where a bidder's mistake "is so great that it could be said the Government was *obviously* getting something for nothing" relief should be allowed. *See* B-177432, December 21, 1972.

Here the low bid was approximately 26 percent of the next two higher bids for the production units and less than one-twelfth of the next higher bid for the first article unit. Although the total amount of the contractor's potential loss on the 116 units required by the contract could not be very great, we believe that it would be unconscionable for the Government to insist upon performance of the contract at these bid prices. Accordingly, the contract should be canceled.

The file transmitted with the report of July 25 is returned.

[B-178805]

Contracts—Mistakes—Price Adjustment—Contracting Officer's Error Detection Duty

The acceptance of a bid at the aggregate amount quoted—a bid which stated "Bid based on award of all items" and offered a prompt payment discount—under an invitation for 37 items of electrical parts and equipment to be bid on individually and the bid to show a total net amount, without verification of the aggregate bid although it was substantially below the total net amounts shown in other bids and the next lowest bid was verified, entitles the supplier of the items, pursuant to the purchase order issued, to an adjustment in price to the next lowest aggregate bid, less the discount offered, since the contracting officer considered there was the possibility of error in the higher bid he should have suspected the lower bid likewise was erroneous, and the supplier having been overpaid on the basis of item pricing, a refund is owing the Government for the difference between the amount paid the supplier and the next lowest bid.

To the Secretary of Agriculture, September 28, 1973:

Reference is made to letter dated May 30, 1973, with enclosures, from the Director, Office of Plant and Operations, requesting a decision as to the action to be taken concerning an error alleged by the Graybar Electric Company, Inc., to have been made in its bid upon which purchase order No. RB-20349-ARS-72 is based.

By invitation for bids No. 311-RB-ARS-72, the Agricultural Research Service requested bids for furnishing various electrical parts and equipment. The invitation contained 37 items, each to be bid individually, with a total net amount for all items to be indicated by the bidder. On page BS-1 of the invitation, bidders were advised that the Government reserves the right to make award on the basis of either the low aggregate bid (Total Net Amount), by group of items, or on an item-by-item basis. Also, it was stated that a bidder may indicate a To-

tal Net Amount for award on an aggregate basis; that the Total Net Amount may be equal to or less than the sum of the individual amounts for items 1 through 37; and that if the bidder does not indicate a Total Net Amount, the sum of the amounts bid on items 1 through 37 shall be considered the Total Net Amount.

In response, Graybar submitted a bid wherein it inserted a unit price for each item and an aggregate total price of $7,129.50 for items 1 through 37. Below its aggregate bid price it inserted "Bid based on award of all items." Graybar offered a prompt payment discount of 2 percent for payment within 20 days. On June 29, 1972, purchase order No. RB–20349–ARS–72 was issued to Graybar and it called for delivery of items 1 through 37 for the lump sum of $7,129.50.

It is reported that on November 28, 1972, representatives of Graybar visited the contracting office and alleged that an error in addition was made in its bid in that the total net amount for items 1 through 37 should have been shown as $9,657.83 instead of $7,129.50. One of Graybar's representatives stated that the error in bid was not noticed until the accounting office for the Agricultural Research Service contacted him regarding an overpayment of $2,178.11 on purchase order No. RB–20349–ARS–72. The overpayment occurred because Graybar was paid for the supplies and equipment delivered on the basis of the extended unit prices set forth opposite items 1 through 37 rather than on the basis of the aggregate total bid price.

Graybar has requested that the contract be amended to provide for an aggregate total bid price of $9,657.83 for items 1 through 37. It contends that at the time of award no effort was made by the contracting officer in the evaluation of the total figure of its bid to determine why it was substantially below the total net amounts shown in the other bids.

The abstract of bids shows that four bidders, Graybar, Interstate Electric Supply Co, Inc., Prince Georges Electrical Supply, Inc., and Dominion Electrical Supply Co., quoted unit prices for all 37 items and that each bidder entered a "Total Net Amount" in its bid. Graybar entered in its bid a Total Net Amount of $7,129.50; Interstate entered a Total Net Amount of $9,130; Dominion entered a Total Net Amount of $7,741.02; and Prince Georges Supply entered a Total Net Amount of $4,602.14. The record indicates that the contracting officer requested both Dominion and Prince Georges to verify their bids; that Dominion alleged that it intended to quote a unit price of $95.36 instead of $43.05 for item 37(a) of its bid; and that if Dominion's bid is corrected to

reflect its intended bid price for item 37(a), the Total Net Amount for items 1 through 37 would be $9,885.73. In response to a request for verification of its bid, Prince Georges Supply alleged that the correct Total Net Amount for items 1 through 37 is $11,964.51 rather than $4,602.14 as shown in its bid. Prince Georges Supply stated that in adding up the extended unit prices for items 1 through 37 it failed to include in the total the extended unit prices for items 37(a), 37(b), and 37(c).

The contracting officer has indicated that the amount of the Graybar aggregate bid was not considered to be notice of the possibility of an error in the bid. However, the record indicates that Dominion was requested by the contracting officer to verify the amount of its $7,741.02 aggregate bid which was $611.52 higher than Graybar's aggregate bid. Since the contracting officer considered that there was the possibility of an error in the higher bid, we believe it follows that the lower bid likewise should have been suspected of being in error. Consequently, the Graybar bid should not have been accepted without verification.

Therefore, Graybar is entitled to relief up to the amount of the next lowest aggregate bid ($9,130) less a prompt payment discount of 2 percent offered by that bidder. Accordingly, Graybar should be requested to refund the difference between the amount paid and the next low bid.

[B-178965]

Pay—Retired—Annuity Elections for Dependents—Mandatory—Dependents Denied

The legislative history of the Survivor Benefit Plan, as added by Public Law 92-425, which provides for participation in the Plan by members of the Armed Forces when they become entitled to retired or retainer pay if they are married or have a dependent child, discloses that administrative officers are required to fully explain the details and benefits of the Plan to retiring service personnel and their spouses, a responsibility that implies the officers should determine whether there is an eligible spouse or dependent child. Therefore, where a member states in his election certificate that he does not have a spouse or child eligible for an annuity under the Plan, the service records of the member should be examined to verify the representation, and if there is no contrary evidence, the member's election may be accepted, and the election being irrevocable, the Government has a good acquittance should it be posthumously discovered that the member had an eligible spouse or child at the time of retirement.

To the Secretary of Defense, September 28, 1973:

Further reference is made to a letter dated June 18, 1973, from the Acting Assistant Secretary of Defense (Comptroller), requesting a

decision regarding the obligation of the Government to pay an annuity under the provisions of the Survivor Benefit Plan, 10 U.S. Code 1447-1455, as added by Public Law 92-425, under certain circumstances. A copy of the Department of Defense Military Pay and Allowance Committee Action No. 474, setting forth and discussing the questions was attached.

The questions posed in the Committee Action are:

If upon becoming entitled to retired or retainer pay, member states that he does not have a spouse or child eligible for an annuity under the Survivors Benefit Plan, and is accordingly relieved from reduction in retired or retainer pay on that basis; but it is discovered upon his death that he did in fact have an eligible spouse or child at the time of his retirement:

a. Does the statement relieve the Government of the obligation to pay an annuity to the surviving spouse and child; and

b. If the answer to a. above is negative, should the charges which were not withheld from retired pay be offset from the annuity; and

c. If the answer to b. above is affirmative, should the amount be considered delinquent and interest charges also be assessed?

The brief discussion of the question in the committee action expresses the view that it would appear that a false statement by a retiring member with regard to the existence of an eligible beneficiary under the Plan would be tantamount to his having elected not to provide for coverage for such a spouse or child.

The Survivor Benefit Plan applies to members of the Armed Forces when they become entitled to retired or retainer pay. Section 1448 of Title 10, U.S. Code provides in pertinent part that:

(a) The Plan applies to a person who is married or has a dependent child when he becomes entitled to retired or retainer pay unless he elects not to participate in the Plan before the first day for which he is eligible for that pay. If a person who is married elects not to participate in the Plan at the maximum level, that person's spouse shall be notified of the decision. An election not to participate in the Plan is irrevocable if not revoked before the date on which the person first becomes entitled to retired or retainer pay. * * *

and section 1455 provides in pertinent part that,

The President shall prescribe regulations to carry out this subchapter. * * * Those regulations shall—

(1) provide that, when the notification referred to in section 1448(a) of this title is required, the member and his spouse shall, before the date the member becomes entitled to retired or retainer pay, be informed of the elections available and the effects of such elections; * * *.

A review of the legislative history of the act of September 21, 1972, discloses that the act was the culmination of a long recognized need for the protection of military widows and dependent children. As a result, spouses are to be brought in at the decision making level in order that all of the ramifications of nonparticipation in the Plan may be explained.

In House Report No. 92–481, to accompany H.R. 10670, which became the act of September 21, 1972, Public Law 92–425, 86 Stat. 706, 10 U.S.C. 1447–1455, it is stated on pages 8–9 that,

> * * * the Committee is concerned that in a relatively few cases survivors may unknowingly be left in a situation of great hardship because a retiree, for one reason or another, did not join the program or otherwise provide an adequate annuity for his dependents.
>
> It is the intention of the Committee, therefore, that regulations designed to carry out this provision of the bill provide for counseling by competent officers for those about to retire who elect not to participate or elect to participate at less than the maximum level. It is further the intention of the Committee that the spouse of the member concerned will be present at the counseling session if possible or provided separate counseling as necessary to be made fully aware of the options available and the election made by her husband. It is the intention of the Committee that in satisfaction of this requirement counseling officers shall certify, in the event the retiree elects not to participate or to participate at less than the maximum level, that counseling has been provided and shall present the spouse with a statement that specifies she has been counseled and indicates the counseling officer's satisfaction that she fully understands the implications of her husband's election. * * *
>
> This new survivor annuity program makes a significant addition to the estate of the military retiree, and the Committee does not want a benefit of this magnitude lost to an individual service family through lack of awareness. It therefore wishes responsibility clearly placed on administrative officers to see that full counseling has been provided * * *.

It is clear from the above that members are not to be permitted to simply participate in the Plan at less than the maximum level or not to participate at all without positive action being taken by administrative officers to insure that the details of the Plan and its benefits are fully explained and understood by retiring service personnel. Consistent with this responsibility it is the implied responsibility of those officers to determine whether there is an eligible spouse or dependent child.

Thus, in cases where a member states in his election certificate that he does not have a spouse or child eligible for an annuity under the Plan, the service records of that member should be administratively examined to determine the accuracy of his representations. If, after such an examination, there is no evidence of record which would tend to cast doubt on the truthfulness of those representations, such an election may be accepted. And, since an election under the Plan becomes irrevocable under the plain terms of the statute upon becoming eligible to receive retired or retainer pay, it is our view that the Government would gain a good acquittance in the matter should it be posthumously discovered that the member did in fact have an eligible spouse or child at the time of his retirement. *Cf.* 37 Comp. Gen. 131 (1957).

Accordingly, question (a) is answered in the affirmative subject to the conditions herein stated and your other questions require no answer.

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Geographical location restriction

Although basic principle underlying Federal procurement is to maximize full and free competition, legitimate restrictions on competition may be imposed when needs of procuring agency so require, and Home Port Policy to perform ship repairs in vessel's home port to minimize family disruption is not illegal restriction since useful or necessary purpose is served. Therefore low bidder under two invitations to perform drydocking and repair of utility landing craft in San Diego area who offered to perform at Terminal Island properly was denied contract awards. However, where all or most of vessel's crew are unmarried, home port restriction does not serve to foster Home Port Policy and, therefore, if feasible determination can be made prior to issuance of solicitation that geographical restriction has no applicability, it should not be imposed.. 102

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"Firm Bid Rule"

Application of rule

Bid that failed to list subcontractors which was submitted under solicitation for retreading of pneumatic tires that limited subcontracting to not more than 50 percent of work and that called for listing of subcontractors for purpose of establishing bidder responsibility may be considered. It is only when subcontractor listing relates to material requirement of solicitation that bid submitted without listing is nonresponsive, and fact that invitation imposed 50 percent limitation on subcontracting does not convert subcontracting listing requirement to matter of bid responsiveness since purpose of listing is to determine bidder capability to perform, information that may be submitted subsequent to bid opening. Furthermore, "Firm Bid Rule" was not violated since bidder may not withdraw its bid and bid acceptance will result in binding contract 27

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Fact that low bidder under IFB to furnish fitting assemblies verified its bid price prior to award does not preclude relief after award from mistake in bid where it would be unconscionable to require contract performance, even though contractor's potential loss would not be very great or that mistake was due to negligence in obtaining complete set of specifications and, therefore, contract awarded may be canceled. Furthermore, under ASPR 2-406.3(e)(2), contracting officer is not required to accept low bid which is very far below other bids or Govt.'s estimated price, notwithstanding bid verification, and as low bid was approximately 26 percent of next two higher bids for production unit and one-twelfth of next higher for first article, for application is unconscionability theory that where mistake is so great it could be said Govt. was obviously getting something for nothing relief should be allowed..... 187
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Two-step procurement

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Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(e) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidence oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted were insufficient to place contracting officer on constructive notice of error 167

Technical proposals

Criteria sufficiency

Where specifications for two-step procurement of high take-off angle antennas and ancillary items did not call for separate ladder and low bidder under Step II proposed to furnish ladder that would be integral part of antennae structure and only other bidder offered separate ladder on basis of prior experience, bidders were not competing on equal basis and contracting agency's acceptance of low bid without issuing amendment to specifications to establish criteria requires cancellation of Step II of invitation for bids and reopening of Step I phase of procurement on basis of amended specifications to assure equal bidding basis. Fact that two-step procedure combines benefits of competitive advertising with feasibility of negotiation does not obviate necessity for adherence to stated evaluation criteria and basis or essential specification requirements 47

CEREMONIES AND CORNERSTONES

Dedication

Expense reimbursement

Since holding of dedication ceremonies and laying of cornerstones connected with construction of public buildings and public works are traditional practices, costs of which are chargeable to appropriation for construction of building or works, expense of engraving and chrome plating of ceremonial shovel used in ground breaking ceremony would be reimbursable and chargeable in same manner as any resaonable expense incurred incident to cornerstone laying or dedication ceremony but for fact evidence has not been furnished as to who authorized the chrome plating and engraving of shovel; where shovel originated; subsequent use to be made of shovel; and why there was 1-year lag between ground breaking ceremony and plating and engraving of shovel. 119

CHECKS Page

Delivery

Banks

Retired pay

Although permissive authority in 31 U.S.C. 492(b) for issuance by disbursing officers, in accordance with regulations prescribed by Secretary of the Treasury, of composite checks to banks or financial institutions for credit to accounts of persons requesting in writing that recurring payments due them be handled in this manner includes issuance of Military Retired Pay checks, composite checks should not be issued without determination, pursuant to regulations to be prescribed by Secretary, of continued existence and/or eligibility of persons covered, and if provided by regulation deposits may be made to joint accounts as well as single accounts 75

Forgeries

Endorsement

Rubber-stamp

Reclamation action for proceeds of original check endorsed by unauthorized use of rubber-stamp imprint of payee's name should be continued against the cashing bank, a Georgia institution, since check issued to an out-of-State payee was negotiated on an endorsement made by an "unauthorized signature" within meaning of that term as prescribed by Uniform Commercial Code adopted by Georgia, and improper negotiation was due to no fault of payee who had been issued and cashed a substitute check and, therefore, passage of valid title to bank was precluded. Fraudulent negotiation was made possible by bank's failure to identify negotiator of check rather than by unauthorized endorsement. Use of rubber stamp—a rarity for individuals—and fact that check was drawn to out-of-State payee required greater degree of care to identify endorser than was exercised by endorsing bank 19

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Proposed novation agreement among contractor—wholly owned subsidiary of large concern—awarded two Govt. contracts for hydraulic turbines and other items, subcontractor who assumed responsibility to complete contracts upon the closing down of subsidiary plant and sale to foreign corporation of those assets not needed to perform contracts, and the Govt. may be approved if in best interest of Govt. Although novation agreement will contravene Anti-Assignment Act, 41 U.S.C. 15, since exception in ASPR 26-402(a) that permits recognition of third party as successor in interest to Govt. contract is not applicable as subcontractor's interests in contracts are not "incidental to the transfer" of subsidiary, there is no objection to recognition of assignment if it is administratively determined to be in best interest of Govt 124

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Claims against carrier

Claim acquired by assignment pursuant to Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240, against carrier for loss of antique Imari and Kutani Japanese porcelains in transit of Air Force officer's household goods property was recovered by setoff against carrier who has denied liability because porcelains were not declared to have extraordinary value; loss was not listed at time of delivery; and shipment being only one in van it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since valuation placed on shipment was intended to include porcelains, separate bill of lading listing was not required, clear delivery receipt may be rebutted by parol evidence; and carrier's receipt of more goods at origin than delivered establishes *prima facie* case of loss in transit 61

Doubtful

Military matters

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retire pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions 94

Submission to General Accounting Office

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO 148

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Where there is no dispute as to facts, but rather question raised is one of law—that is whether contract came into existence—it is not inappropriate for GAO to consider protest of contractor alleged to have defaulted under contract awarded by Air Force, notwithstanding contractor also appealed contracting officer's determination to terminate alleged contract for default to Armed Services Board of Contract Appeals 167
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Contention after contract award that it was not impossible to draft specifications for procurement of airport surveillance radar equipment and that procurement should have been formally advertised rather than negotiated under 41 U.S.C. 252(c)(10) is an allegation of an impropriety in solicitation that was apparent prior to date for receipt of proposals, and protest not having been filed under U.S. General Accounting Office Interim Bid Protest Procedures and Standards prior to closing date for receipt of proposals to permit remedial action was untimely filed, particularly in view of fact protestant was uniquely qualified to call procuring agency's attention to reasons why it believed it was not impossible to draft adequate specifications 5
Timeliness
Untimely protest consideration basis
Since improprieties alleged in solicitation procedures for furnishing of reinforced plastic weathershields on multiyear basis—price leak, reopening negotiations, and change from RFP to IFB for bids procedure—were apparent prior to opening of bids, exception taken after bid opening to procedure was untimely filed pursuant to GAO Interim Bid Protest Procedures and Standards, 4 CFR 20.2(a). However, in accordance with sec. 20.2(b), which provides that "The Comptroller General, for good cause shown, or where he determines that protest raises issues significant to procurement practices or procedures, may consider any protest which is not filed timely," merits of protest are for consideration 139

CONTRACTS—Continued Page

Purchase orders. (*See* **PURCHASES, Purchase orders**)

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

Specifications

Conformability of equipment, etc., offered

Technical deficiencies

Negotiated procurement

Low proposal to fabricate a Satellite Communication Earth Station that was technically totally deficient, and which omitted required detailed information that was not corrected by accompanying "blanket" offer of compliance as statement was an inadequate substitution for omitted information, was an unacceptable proposal that was not susceptible of being made acceptable without major revision. Fact that proposal was lowest offer submitted does not require negotiations prescribed by 10 U.S.C. 2304(g) with all responsible offerors who submit proposals within a competitive range, even though "competitive range" encompasses both price and technical considerations and either factor can be determinative of whether an offeror is in a competitive range, since price alone need not be considered when proposal is totally unacceptable 1

Two-step procurement

Where specifications for two-step procurement of high takeoff angle antennas and ancillary items did not call for separate ladder and low bidder under Step II proposed to furnish ladder that would be integral part of antennae structure and only other bidder offered separate ladder on basis of prior experience, bidders were not competing on equal basis and contracting agency's acceptance of low bid without issuing amendment to specifications to establish criteria requires cancellation of Step II of invitation for bids and reopening of Step I phase of procurement on basis of amended specifications to assure equal bidding basis. Fact that two-step procedure combines benefits of competitive advertising with feasibility of negotiation does not obviate necessity for adherence to stated evaluation criteria and basis or essential specification requirements 47

Descriptive data

Disclosure requirement

Bid to furnish services, labor and material for installation of automated fuel handling system accompanied by descriptive literature required by invitation but containing proprietary data restriction was not submitted in accordance with par. 2-404.4 of Armed Services Procurement Reg. (ASPR), which provides that bids prohibiting disclosure of sufficient information to permit competing bidders to know essential nature and type of products offered on those elements of bid which relate to quantity, price, and delivery terms are nonresponsive bids, and regulation implementing 10 U.S.C. 2305 providing for public disclosure of bids has force and effect of law. In addition to nonresponsiveness of bid under standards of ASPR 2-404.4, bid was unacceptable on basis the phrase "or equal" in specification soliciting cable had been misinterpreted.. 24

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required

Addenda acknowledgment

Evidence

Failure to acknowledge amendment to invitation for construction of Naval and Marine Corps Reserve Center which is not considered to be minor informality or irregularity in bid to permit correction under par. 2-405(iv)(B) of Armed Services Procurement Reg. may not be waived on basis bidder's working papers establishes amendment was considered in bid computation since acknowledgment was required to be received before bid opening, nor does use of "may" in stating that failure to acknowledge amendment would constitute grounds for bid rejection mean contracting officer has waiver discretion, furthermore, to permit bidder to determine value of invitation amendment would be inappropriate as as it would give him option to become eligible for award by citing costs that would bring him within the *de minimis* doctrine, or to avoid award by placing larger cost value on effects of amendment..... 64

Information

Essentiality

Contention that no contract came into existence under second step of two-step procurement conducted pursuant to 10 U.S.C. 2305(c) for housing construction because bid accepted orally was not effective before expiration of Davis-Bacon Wage Rate Determination and bid itself, or alternative allegation that bid was nonresponsive and also contained bid price error and, therefore, there was no contract to terminate for default is refuted by record which evidences oral notification of contract approval made subsequent to written notification of award made subject to such approval was in compliance with IFB. Furthermore, failure to describe actual amount of work to be performed by contractor did not make its bid nonresponsive as invitation did not require this information, and variances between price bid and Govt.'s estimate and other bids submitted were insufficient to place contracting officer on constructive notice of error..... 167

License approval

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened..... 36

CONTRACTS—Continued Page
Specifications—Continued
Proprietary data use. (*See* CONTRACTS, Data, rights, etc.)
Restrictive
Geographical location
Although basic principle underlying Federal procurement is to maximize full and free competition, legitimate restrictions on competition may be imposed when needs of procuring agency so require, and Home Port Policy to perform ship repairs in vessel's home port to minimize family disruption is not illegal restriction since useful or necessary purpose is served. Therefore, low bidder under two invitations to perform drydocking and repair of utility landing craft in San Diego area who offered to perform at Terminal Island properly was denied contract awards. However, where all or most of vessel's crew are unmarried, home port restriction does not serve to foster Home Port Policy and, therefore, if feasible determination can be made prior to issuance of solicitation that geographical restriction has no applicability, it should not be imposed..... 102
Justification
Although visual inspection of carlot quantities of produce at growing areas is unduly restrictive of competition, use of such source inspection by Defense Supply Agency in its solicitation issued under negotiating authority of 10 U.S.C. 2304(a)(9), concerned with procurement of perishable or nonperishable subsistence supplies, was justified in view of wide latitude in prescribed standards and, therefore, rejection of noncomplying low bidder under two solicitations for carlot quantities of fresh vegetables was proper. However, attention of Director of agency is being drawn to the June 25, 1973 GAO audit report in which recommendation is made that consideration be given to possibility of drafting more exacting specifications so that number of items requiring field inspection might be reduced..... 112
Superior product offered
Negotiated procurement
Determination to make award for airport surveillance radar equipment on basis of initial proposals—exception to requirement for discussions with all offerors within competitive range—is discretionary in nature, and lacking adequate price competition, since only one of two offers submitted was fully acceptable, the procuring agency properly considered exceptions to discussion had not been satisfied and conducted negotiations with offeror whose initial proposal, although technically unacceptable overall was susceptible of being upgraded to acceptable level—a determination that was not influenced by the fact a reduction in initial price made offer the lowest submitted. Therefore, award to low offeror was not arbitrary, notwithstanding technical superiority of competing offer since request for proposals did not make technical considerations paramount..... 5

CONTRACTS—Continued Page

Subcontractors

Listing

Bidder responsibility *v.* bid responsiveness

Bid that failed to list subcontractors which was submitted under solicitation for retreading of pneumatic tires that limited subcontracting to not more than 50 percent of work and that called for listing of subcontractors for purpose of establishing bidder responsibility may be considered. It is only when subcontractor listing relates to material requirement of solicitation that bid submitted without listing is nonresponsive, and fact that invitation imposed 50 percent limitation on subcontracting does not convert subcontracting listing requirement to matter of bid responsiveness since purpose of listing is to determine bidder capability to perform, information that may be submitted subsequent to bid opening. Furthermore, "Firm Bid Rule" was not violated since bidder may not withdraw its bid and bid acceptance will result in binding contract 27

Subcontracts

Small Business Act authority. (*See* **SMALL BUSINESS ADMINISTRATION, Contracts, Subcontracting**)

Tax matters

Contract provision v. sovereign immunity theory

Room rental transient tax included pursuant to sec. 84–33 of Montgomery Co. (Maryland) Code in invoices for housing and subsistence furnished under contract to outpatient participants in NIH Leukemia Program may not be certified for payment, even though Govt. is not exempt from tax on theory of sovereign immunity since relationship between Govt. and transients created under contract is insufficient to effectuate shift in burden of tax directly to Govt. in view of fact all applicable Federal, State, and local taxes and duties were included in contract price. However, future contracts for sleeping accommodations in Montgomery Co. may provide for Govt. to pay transient tax applicable to individuals furnished housing and subsistence as beneficiaries 69

Termination

Convenience of Government

Erroneous awards

Award for separate contract line items of fork lift trucks on basis of permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by invitation for bids and, therefore, was nonresponsive to mandatory requirement that first production units be delivered no earlier than a minimum of 365 days after approval of first article test report—requirement intended to assure delivery of spares, repair parts, and publication concurrently with first production units - should be terminated, procurement resolicited with delivery provisions informing bidders as to permissible deviations and consequences of nonconformity in accordance with competitive bidding system, and appropriate congressional committees informed, pursuant to sec. 236 of the Legislative Reorganization Act, of action taken on this recommendation. Furthermore, soliciation makes no provision that in event an alternate delivery schedule is unacceptable required schedule will govern. Modified by 53 Comp. Gen.___ (B–178625, November 8, 1973) 32

Trade secrets. (*See* **CONTRACTS, Data, rights, etc., Trade secrets**)

COURTS Page

Judgments, decrees, etc.

Acceptance as precedent by General Accounting Office

Edward P. Chester, Jr. et al. *v.* United States, 199 Ct. Cl. 687

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B-165038 and other contrary decisions 94

Supreme Court

Constitutionality of legislation construed

Effect on payment of claims

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93-64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO 148

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement 148

CUSTOMS Page

Services in foreign ports

Performed by Guam employees

Overtime charges

Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9 47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 175

DAMAGES

Property. (*See* PROPERTY, Damages)

DEBT COLLECTIONS

Waiver

Military personnel

Authority to waive

Public Law 92–453 (10 U.S.C. 2774)

Payment under 37 U.S.C. 307 of superior performance proficiency pay by Air Force at $30 per month and by Army at $50 per month to senior noncommissioned officers entitled to special pay rate provided in 37 U.S.C. 203(a) for such officers in Army, Navy, Air Force and Marine Corps, should be discontinued since P.L. 90–207, effective Oct. 1, 1967, amended sec. 203(a) to provide new special pay rate, regardless of years of service, in lieu of basic pay at rate of E–9, with appropriate years of service, plus proficiency pay at rate of $150 per month, thus eliminating any award of proficiency pay. Improper payments of superior performance proficiency pay having been based on a misinterpretation of law, and having been accepted in good faith, need not be collected and may be waived under provisions of 10 U.S.C. 2774 (P.L. 92–453) 184

DEPARTMENTS AND ESTABLISHMENTS

Administrative determinations. (*See* ADMINISTRATIVE DETERMINATIONS)

Commercial activities

Government-owned contractor-operated facility

Status

Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Commercial activities—Continued
Government-owned contractor-operated facility—Continued
Status—Continued

Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "Arsenal Statute." Furthermore, where GOCO plants are operated under cost reimbursement type contracts and fixed-price competition with COCO sources is precluded, cost comparisions are necessarily utilized; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A–76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates..... 40

Private *v.* Government procurement
Policy determination

Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A–76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does not make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207–208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense..... 86

Although OMB Cir. A–76 expresses general policy preference for contracting with private, commercial enterprises, it also provides for use of Govt-furnished services when "service is available from another agency," and allows Govt. operation of a commercial activity "to maintain or strengthen mobilization readiness." Therefore, provision of circular are regarded as matters of executive policy which do not establish such legal rights and responsibilities that would come within decision functions of GAO..... 86

Regulations. (*See* **REGULATIONS**)

DETAILS
Intergovernmental Personnel Act implementation
Federal employee benefit status

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371–3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with permanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. Therefore, on basis of interpretation of similar provisions in Government Employees Training Act, agency should determine, taking cost to Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment..... 81

DISCRIMINATION Page

Sex. (*See* **NONDISCRIMINATION**)

DISTRICT OF COLUMBIA

Firemen and policemen

Retirement

Secret Service personnel coverage

Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation... 177

EDUCATION

Federal aid, grants, etc., to States. (*See* **STATES, Federal aid, grants, etc., Educational institutions**)

EVIDENCE

Parol

Claim acquired by assignment pursuant to Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240, against carrier for loss of antique Imari and Kutani Japanese porcelains in transit of Air Force officer's household goods properly was recovered by setoff against carrier who has denied liability because porcelains were not declared to have extraordinary value; loss was not listed at time of delivery; and shipment being only one in van it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since valuation placed on shipment was intended to include porcelains, separate bill of lading listing was not required, clear delivery receipt may be rebutted by parol evidence; and carrier's receipt of more goods at origin than delivered establishes *prima facie* case of loss in transit..... 61

FAMILY ALLOWANCES

Separation

Female members

Entitlement to allowance

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO..... 148

FEDERAL AID, GRANTS, ETC.
To States. (*See* **STATES, Federal aid, grants, etc.**)

FRAUD
False claims
False signatures
Checks

Reclamation action for proceeds of original check endorsed by unauthorized use of rubber-stamp imprint of payee's name should be continued against the cashing bank, a Georgia institution, since check issued to an out-of-State payee was negotiated on an endorsement made by an "unauthorized signature" within meaning of that term as prescribed by Uniform Commercial Code adopted by Georgia, and improper negotiation was due to no fault of payee who had been issued and cashed a substitute check and, therefore, passage of valid title to bank was precluded. Fraudulent negotiation was made possible by bank's failure to identify negotiator of check rather than by unauthorized endorsement. Use of rubber stamp—a rarity for individuals—and fact that check was drawn to out-of-State payee required greater degree of care to identify endorser than was exercised by endorsing bank 19

FUNDS
Appropriated. (*See* **APPROPRIATIONS**)
Foreign
Exchange rate
Contract underpayments
Dollar devaluation

Additional cost due to devaluation of dollar to corporation in business of producing drafting and engineering instruments, measuring devices and precision tools to obtain supplies from abroad to meet contractual commitments to Govt. may not be reimbursed to corporation by increasing any bid price open for acceptance or any contract price since devaluation of dollar is attributable to Govt. acting in its sovereign capacity and Govt. is not liable for consequences of its acts as a sovereign; no provision was made for price increase because cost of performance might be increased; and under "firm-bid rule," bid generally is irrevocable during time provided in IFB for acceptance of a bid 157

Reporting claim to Congress under Meritorious Claims Act of 1928 (31 U.S.C. 236) for additional cost to corporation to meet its contractual commitments to Govt. by reason of devaluation of dollar would not be justified because claim contains no elements of unusual legal liability or equity. Remedy afforded by act is limited to extraordinary circumstances, and cases reported by GAO to Congress generally have involved equitable circumstances of unusual nature and which are unlikely to constitute recurring problem, since to report to Congress a particular case when similar equities exist or are likely to arise with respect to other claimants would constitute preferential treatment over others in similar circumstances 157

GENERAL ACCOUNTING OFFICE Page

Contracts

Protest procedures. (*See* CONTRACTS, Protests)

Decisions

Advance

Voucher accompaniment

While no voucher as required by 31 U.S.C. 82d accompanied request from certifying officer for decision concerning propriety of reimbursing cost of providing food to protectors of life and Federal property in emergency situation, problem being a general one, requested decision is addressed to head of agency under broad authority of 31 U.S.C. 74, which directs U.S. GAO to provide decisions to heads of departments on any question involving propriety of making a payment..... 71

Jurisdiction

Commercial activities of Government

Although OMB Cir. A–76 expresses general policy preference for contracting with private, commercial enterprises, it also provides for use of Govt-furnished services when "service is available from another agency," and allows Govt. operation of a commercial activity "to maintain or strengthen mobilization readiness." Therefore, provision of circular are regarded as matters of executive policy which do not establish such legal rights and responsibilities that would come within decision functions of GAO..... 86

Recommendations

Reporting to Congress

Award for separate contract line items of forklift trucks on basis of permitted alternate delivery schedule that offered delivery 90 days earlier than prescribed by invitation for bids and, therefore, was nonresponsive to mandatory requirement that first production units be delivered no earlier than a minimum of 365 days after approval of first article test report—requirement intended to assure delivery of spares, repair parts, and publication concurrently with first production units—should be terminated, procurement resolicited with delivery provisions informing bidders as to permissible deviations and consequences of nonconformity in accordance with competitive bidding system, and appropriate congressional committees informed, pursuant to sec. 236 of the Legislative Reorganization Act, of action taken on this recommendation. Furthermore, solicitation makes no provision that in event an alternate delivery schedule is unacceptable required schedule will govern. Modified by 53 Comp. Gen. ____ (B–178625, November 8, 1973)..... 32

GUAM Page

Employees

Customs and quarantine officers

Overtime services for Federal Government

Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accomodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9–47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 173

INTERGOVERNMENTAL PERSONNEL ACT

Assignment of Federal employees

Per diem *v.* station allowances

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371–3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with permanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. Therefore, on basis of intrepretation of similar provisions in Government Employees Training Act, agency should determine, taking cost of Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment 81

LICENSES

State and municipalities

Government contractors

License requirement in a Govt. solicitation is matter of bidder responsibility since bidder has duty to ascertain its legal authority to perform Govt. contract within a State, and requirement not relating to bid evaluation need not be submitted before bid opening. Therefore, low bidder who did not submit licensing and registration information with its bid to furnish taxi and pick-up services is considered to be responsive bidder. A State may enforce its license requirements provided State law is not opposed to or in conflict with Federal policies or laws, or does not interfere with execution of Federal powers. Also, equipment information intended to determine bidder capacity and ability to perform service contract is matter of bidder responsibility, not bid responsiveness, as is fact that bidder was in the ambulance business and not taxi business at time bids were opened 36

LICENSES—Continued Page

State and municipalities—Continued

Government contractors—Continued

Requirement in several invitations for bids that bidder have license to conduct guard service business in State of N.Y. or that contractor be licensed as qualified guard service company in Va., County of Fairfax, and Md., Montgomery County, is not restrictive of competition but proper exercise of procurement responsibility for when contracting officer is aware of local licensing requirements, he may take reasonable step of incorporating them into solicitation to assure that bidder is legally able to perform contract by requiring bidder to comply with specific known State or local license requirements in order to establish bidder responsibility. While it may be possible for unlicensed company to provide adequate guard service, it is not unreasonable for contracting officer to believe that appropriate performance of guard service could be obtained only from licensed agencies 51

MEALS

Furnishing

General rule

Cost of providing food to Federal Protective Services officers of GSA who were kept in readiness pursuant to 40 U.S.C. 318 in connection with unauthorized occupation of Bureau of Indian Affairs building is reimbursable on basis of emergency situation which involved danger to human life and destruction of Federal property, notwithstanding that expenditure is not "necessary expense" within meaning of Independent Agencies Appropriation Act of 1973; that 31 U.S.C. 665 precludes one from becoming voluntary creditor of U.S.; and general rule that in absence of authorizing legislation cost of meals furnished to Govt. employees may not be paid with appropriated funds. However, payment of such expenses in future similar cases will depend on circumstances in each case 71

MILEAGE

Military personnel

Release from active duty

Last duty station outside United States

Normal *v.* approved separation point

Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150-1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled 105

Travel by privately owned automobile

Ferry transportation constitutes transoceanic travel

Since there is no highway system in Goose Bay area, Canada, over which member could drive his automobile to new U.S. duty station

MILEAGE—Continued Page

Military Personnel—Continued

Travel by privately owned automobile—Continued

Ferry transportation constitutes transoceanic travel—Continued

without using long distance ferries—Goose AFB to Lewisporte, Newfoundland, overland to Port-aux-Basques, then by ferry to Sydney, Nova Scotia—pars. M4159–3 and M7003–3c of JTR, pursuant to 37 U.S.C. 404 and 406, may be changed to treat long distance ferry transportation as transoceanic travel, thus necessitating amending distance tables used in computing mileage between AFB and bases on island portion of Newfoundland and continental U.S. duty stations to eliminate mileage over ferry routes. Furthermore, under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may be used in absence of availability of American vessels, and if member must arrange for vehicle transportation, travel orders should authorize arrangement and his reimbursement voucher attest to nonavailability of U.S.-registered vessels..... 131

Travel by privately owned automobile

More than one employee traveling

Permanent duty travel

Although agency cannot require two or more employees to travel together in private automobile of one of the employees on permanent duty travel, if employees find it convenient to do so and proper administrative determination is made that arrangement is advantageous to Govt., pursuant to sec. 2.3c(2) of OMB Cir. A–56, higher mileage rate may be authorized up to 12 cents per mile on same basis rate scale is graduated in sec. 2.3b of Cir. when authorized members of employee's family accompany him. Therefore, employee on house-hunting trip incident to permanent change of station who transports another employee to same location for same purpose, even though separate travel was authorized and administrative regulation is silent concerning joint travel, may be paid at rate of 8 cents per mile, rate specified in sec. 2.3b for employee traveling with one member of his immediate family..... 67

MILITARY PERSONNEL

Annuity elections for dependents. (*See* **PAY, Retired, Annuity elections for dependents**)

Discrimination

Between the sexes

Removal

Distinction between dependents of male and female members of uniformed services having been removed by Supreme Court of U.S. in *Frontiero* v. *Richardson*, decided May 14, 1973, and by enactment of P.L. 93–64, effective July 1, 1973, language in par. M1150–9 of JTR reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of date of decision, May 14, 1973. Also recommended is amendment of par. M7151–2 by deleting reference to lawful "wife" and substituting the word "spouse," but since use of the term "dependent" in pars. M7151–2 and M7107 of JTR is not discriminatory in light of *Frontiero* decision, no change in language of paragraphs is required..... 116

Family allowances. (*See* **FAMILY ALLOWANCES**)

Mileage. (*See* **MILEAGE**)

Orders. (*See* **ORDERS**)

MILITARY PERSONNEL—Continued Page

Overpayments

Misinterpretation of the law

Payment under 37 U.S.C. 307 of superior performance proficiency pay by Air Force at $30 per month and by Army at $50 per month to senior noncommissioned officers entitled to special pay rate provided in 37 U.S.C. 203(a) for such officers in Army, Navy, Air Force and Marine Corps, should be discontinued since P.L. 90–207, effective Oct. 1, 1967, amended sec. 203(a) to provide new special pay rate, regardless of years of service, in lieu of basic pay at rate of E–9, with appropriate years of service, plus proficiency pay at rate of $150 per month, thus eliminating any award of proficiency pay. Improper payments of superior performance proficiency pay having been based on a misinterpretation of law, and having been accepted in good faith, need not be collected and may be waived under provisions of 10 U.S.C. 2774 (P.L. 92–453)..... 184

Pay. (*See* **PAY**)

Per diem. (*See* **SUBSISTENCE, Per diem, Military personnel**)

Quarters allowance. (*See* **QUARTERS ALLOWANCE**)

Reserve Officers' Training Corps

Recruiting duties

Reimbursement entitlement

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools– matter of 2 hours and 3 hours duty on separate days– and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c)..... 145

Retirement

Involuntary *v.* voluntary

Court's interpretation in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions..... 94

MILITARY PERSONNEL—Continued Page

Separation

Election of separation point

Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150–1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled 105

Status of permanent change of station orders

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44

Subsistence

Per diem. (*See* **SUBSISTENCE, Per diem**)

Transportation

Dependents. (*See* **TRANSPORTATION, Dependents, Military personnel**)

Household effects. (*See* **TRANSPORTATION, Household effects**)

Travel expenses. (*See* **TRAVEL EXPENSES**)

NONDISCRIMINATION

Discrimination alleged

Basis of sex

Removal of differential treatment

Distinction between dependents of male and female members of uniformed services having been removed by Supreme Court of U.S. in *Frontiero* v. *Richardson*, decided May 14, 1973, and by enactment of P.L. 93–64, effective July 1, 1973, language in par. M1150–9 of JTR reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of date of decision, May 14, 1973. Also recommended is amendment of par. M7151–2 by deleting reference to lawful "wife" and substituting the word "spouse," but since use of the term "dependent" in pars. M7151–2 and M7107 of JTR is not discriminatory in light of *Frontiero* decision, no change in language of paragraphs is required 116

NONDISCRIMINATION—Continued Page

Discrimination alleged—Continued

Basis of sex—Continued

Removal of differential treatment—Continued

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93–64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C. 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of constitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO 148

Although *Frontiero* decision has no effect on dependency status of service members married to each other as prescribed by 37 U.S.C. 420, since member may not be paid increased allowance on account of dependent for any period during which dependent is entitled to basic pay, differential treatment accorded male and female members in assigning quarters requires amendment of DOD Directive to prescribe entitlement to both male and female members to basic allowance for quarters at the without dependent rate when adequate public quarters for dependents are not available, notwithstanding availability of adequate single quarters; to reflect that neither husband nor wife occupying Govt. quarters for any reason who has only the other spouse to consider as dependent is entitled to basic allowance for quarters in view of 37 U.S.C. 420; and to provide that when husband and wife are precluded by distance from living together and are not assigned Govt. quarters, each is entitled to quarters allowance as prescribed for members without dependents 148

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement 148

Regulations relating to payment of basic allowances for quarters that require that female member of military service must provide more than one-half of support for dependent child before she may receive payment of basic allowances for quarters may be revised to authorize payment of allowance for dependent child of female member on same basis as

NONDISCRIMINATION—Continued Page
Discrimination alleged—Continued
Basis of sex—Continued
Removal of differential treatment—Continued
that prescribed for male member in view of fact that although *Frontiero* decision by Supreme Court was concerned with right of female member to receive allowances and benefits on behalf of civilian husband, rationale and language of decision connote intent by court that decision should be broadly applied---------- 148
Since act of July 9, 1973, P.L. 93-64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims---------- 148

OFFICERS AND EMPLOYEES
Compensation. (*See* **COMPENSATION**)
Conflict of interest statutes
Award of Government contracts
Award by AF of domestic cargo airlift contract negotiated under 10 U.S.C. 2304(a)(16) pursuant to Class Determinations and Findings to Govt. corporation that is to be transferred to individual to whom award is contemplated and who is currently operating the activity pending Civil Aeronautics Board approval is not improper in view of fact contract will contain termination provision in event approval is withheld; OMB Cir. A-76 and implementing Defense Directives although favoring contracting with private, commercial enterprises allow Govt. operation of commercial activity "to maintain or strengthen mobilization readiness;" services of intended buyer during Govt. control does not make him "officer or employee" within conflict of interest statutes, 18 U.S.C. 205, 18 U.S.C. 207-208; there is no evidence of unfair competition; and contracting agency has broad discretionary authority to award contract in interest of national defense---------- 86
Death or injury
Transportation of remains
Cost of transporting remains of deceased Forest Service employee from Juneau, Alaska, where employee had completed agreed tour of duty, to Missoula, Mont., may not be reimbursed to decedent's widow in absence of specific authority for Govt. to assume expense. Since deceased employee had completed tour of duty 5 U.S.C. 5742(b)(1), authorizing Govt. to defray expense of preparing and transporting remains of civilian employees who die while in travel status, has no application, and furthermore, authority in secs. 1 or 7 of Administrative Expenses Act of 1946, which prescribes travel and transportation expenses in connection with transfer to and from duty station outside continental limits of U.S., and sec. 1.11d of OMB Cir. No. A-56, which provides for return travel and transportation of employees serving under agreements has application only to living individuals---------- 120

OFFICERS AND EMPLOYEES—Continued Page

Details. (*See* **DETAILS**)

Meals furnished. (*See* **MEALS**)

Overtime. (*See* **COMPENSATION, Overtime**)

Reemployment or reinstatement

Travel and transportation expenses

Phrase "in the same manner" contained in 5 U.S.C. 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to former employee separated by reduction in force or transfer of function and reemployed within 1 year, as though employee had been transferred in interest of Govt. without break in service to reemployment location from separation location when construed in conjunction with 5 U.S.C. 5724(c), which provides similar expenses for employees transferred from one agency to another because of reduction in force or transfer of function, permits payment of costs in whole or in part by gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under sec. 5724a(c) or sec. 5724(c), they may be paid by gaining or losing agency within 1-year period. 51 Comp. Gen. 14, 52 *id.* 345, and B-172594, June 8, 1972, overruled 99

Secret Service

Retirement under D.C. police plan

Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation 177

Transfers

Relocation expenses

House sale

Title in wife's name

Employee who subsequent to receiving notice of transfer but prior to actual date of transfer marries and thereafter establishes residence in dwelling which was owned and occupied by his wife at time he was officially informed of transfer, and employee and his wife were occupying dwelling at time of transfer is not precluded under sec. 4.1 of OMB Cir. A–56 from being reimbursed expenses of selling the dwelling incident to move to new official station since literal language of sec. 4.1 permitting reimbursement of expenses of sale of dwelling at old official station only if employee acquired interest in dwelling and if dwelling was his actual residence at time he was informed of transfer is not for application where employee had established bona fide residence in his wife's home prior to transfer 90

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Relocation expenses—Continued

Transportation for house hunting

Employees traveling together

Although agency cannot require two or more employees to travel together in private automobile of one of the employees on permanent duty travel, if employees find it convenient to do so and proper administrative determination is made that arrangement is advantageous to Govt., pursuant to sec. 2.3c(2) of OMB Cir. A–56, higher mileage rate may be authorized up to 12 cents per mile on same basis rate scale is graduated in sec. 2.3b of Cir. when authorized members of employee's family accompany him. Therefore, employee on house-hunting trip incident to permanent change of station who transports another employee to same location for same purpose, even though separate travel was authorized and administrative regulation is silent concerning joint travel, may be paid at rate of 8 cents per mile, rate specified in sec. 2.3b for employee traveling with one member of his immediate family..... 67

Successive changes

Employee whose spouse did not perform round-trip house hunting travel authorized pursuant to 5 U.S.C. 5724a(a)(2) in connection with his Sept. 3, 1972 transfer to Atlanta, Ga., from Jackson, Miss., where his family remained until his second transfer in Mar. 1973 to Richmond, Va., to which point his wife was authorized and did travel on house hunting trip, may be reimbursed for entire round-trip air fare from Jackson to Richmond, notwithstanding cost exceeded round-trip fare between Atlanta and Richmond, determination that is in accord with 27 Comp. Gen. 167 and 48 *id.* 651, approving reimbursement to employees who before they moved their household goods or dependents to new station were transferred a second time..... 123

Travel expenses. (*See* **TRAVEL EXPENSES**)

Without compensation

ROTC personnel

Recruiting duties

Reimbursement entitlement

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c)..... 145

ORDERS

Canceled, revoked, or modified

Expenses prior to change

Reserve Marine officer detached from duty upon completion of basic training at Quantico and ordered to report for temporary duty on Apr. 15, 1970, at Camp Lejeune for 8 weeks of instruction, then to be attached to designated division at camp, whose orders were amended Apr. 9, 1970, to change his permanent duty station upon completion of temporary duty from Camp Lejeune to Okinawa were not received by him until Apr. 27, 1970, is entitled to per diem for entire period of temporary duty --Apr. 16 through June 4---since his entitlement to per diem became fixed upon issuance of amendatory order on Apr. 9, 1970, changing his permanent duty station, and since he was in temporary duty status while at Camp Lejeune, it is immaterial that he was not timely notified of amendatory order as he fully complied with basic order, as amended 78

Dependents' travel

Officer of uniformed services whose dependents traveled to selected retirement home prior to issuance of retirement orders that were canceled at his request prior to effective date, and then traveled to officer's new permanent duty station located in corporate limits of his old station is entitled to monetary allowance for both moves. When orders that direct permanent change of station, including orders directing release from active duty or retirement, are canceled or modified before their effective date for convenience of Govt. and/or in circumstances over which member has no control, benefits prescribed by 37 U.S.C. 406a accrue, and fact the officer withdrew retirement request is immaterial since Govt. was under no obligation to accept request and apparently did so primarily for convenience of Govt 55

Intent determination

Permanent or temporary duty

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44

PAY

Additional

Proficiency pay

Prohibition as to awards

Payment under 37 U.S.C. 307 of superior performance proficiency pay by Air Force at $30 per month and by Army at $50 per month to senior noncommissioned officers entitled to special pay rate provided in 37 U.S.C. 203(a) for such officers in Army, Navy, Air Force and Marine

PAY—Continued Page

Additional—Continued

Proficiency pay—Continued

Prohibition as to awards—Continued

Corps, should be discontinued since P.L. 90–207, effective Oct. 1, 1967, amended sec. 203(a) to provide new special pay rate, regardless of years of service, in lieu of basic pay at rate of E–9, with appropriate years of service, plus proficiency pay at rate of $150 per month, thus eliminating any award of proficiency pay. Improper payments of superior performance proficiency pay having been based on a misinterpretation of law, and having been accepted in good faith, need not be collected and may be waived under provisions of 10 U.S.C. 2774 (P.L. 92–453)---------- 184

Retired

Annuity elections for dependents

Effect of judgment increasing retired pay

Since ruling in *Edward P. Chester, Jr., et al.* v. *United States*, 199 Ct. Cl. 687, only establishes that higher active duty pay rate was required to be used in computing plaintiff's retired pay entitlement, and 10 U.S.C. 1436(b) makes no provision for voluntary reduction of annuity elected under Retired Serviceman's Family Protection Plan in circumstances of retroactive increase in active duty pay, only costs of annuity may be recomputed on basis of higher retired pay rate, and retroactive change in annuity elected, or withdrawal from Plan may not be retroactively authorized. However, pursuant to 10 U.S.C. 1436(b) retired member may apply prospectively for annuity reduction, or under 10 U.S.C. 1552 military records may be retroactively changed to correct error or remove injustice---------- 94

Mandatory

Dependents denied

Legislative history of Survivor Benefit Plan, as added by P.L. 92–425, which provides for participation in Plan by members of Armed Forces when they become entitled to retired or retainer pay if they are married or have dependent child, discloses that administrative officers are required to fully explain details and benefits of Plan to retiring service personnel and their spouses, responsibility that implies officers should determine whether there is an eligible spouse or dependent child. Therefore, where member states in his election certificate that he does not have spouse or child eligible for annuity under Plan, service records of member should be examined to verify representation, and if there is no contrary evidence, member's election may be accepted, and election being irrevocable, Govt. has good acquittance should it be posthumously discovered that member had eligible spouse or child at time of retirement.. 192

Assignment

Banking facilities for deposit

Although permissive authority in 31 U.S.C. 492(b) for issuance by disbursing officers, in accordance with regulations prescribed by Secretary of the Treasury, of composite checks to banks or financial institutions for credit to accounts of persons requesting in writing that recurring payments due them be handled in this manner includes issuance of Military Retired Pay checks, composite checks should not be issued without determination, pursuant to regulations to be prescribed by Secretary, of continued existence and/or eligibility of persons covered, and if provided by regulation deposits may be made to joint accounts as well as single accounts---------- 75

PAY—Continued Page

Retired—Continued

Increases

Members retained on active duty after retirement date

Officers of AF and other military services whose monthly basic pay increased while they were held on active duty beyond mandatory retirement for physical evaluation purposes are entitled, to extent feasible, to computation of disability retired pay at higher basic pay in effect on their respective dates of retirement and to adjustment for underpayments that resulted because retired pay had been computed at lower rates in effect on their mandatory retirement dates, and they also may have credit for the additional active duty for longevity purposes, in view of *Edward P. Chester et al.* v. *United States*, 199 Ct. Cl. 687, which held that Regular Coast Guard officers continued on active duty for physical evaluation were entitled to "no less" than members entitled to compute their retired pay at the July 1 higher rates because they were not precluded from volantarily retiring on June 30, their mandatory retirement dates. Retroactive application of *Chester* case is restricted by Oct. 9, 1940 barring act, and doubtful cases should be submitted to GAO. Overrules 43 Comp. Gen. 742, B–153784, Sept. 17, 1969, B–172047, Feb. 23, 1972, and other similar decisions 135

Voluntary *v.* involuntary retirement

Court's interpretation in *Edward P. Chester, Jr., et al*, v. *United States*, 199 Ct. Cl. 687, that words "shall if not earlier retired be retired on June 30," which are contained in mandatory retirement provision, 14 U.S.C. 288(a), did not absolutely forbid Coast Guard officers mandatorily retired on June 30 in 1968 or 1969, as well as officers held on active duty beyond mandatory June 30 date, from retiring voluntarily under 14 U.S.C. 291 or 292, and that officers were entitled to compute their retired pay on higher rates in effect on July 1, will be followed by GAO. Therefore, under *res judicata* principle, payment to claimants for periods subsequent to court's decision may be made at higher rates in effect July 1. Payments to other claimants in similar circumstances, in view of fact court's decision is original construction of law changing GAO's construction, may be made both retroactively and prospectively, subject to Oct. 9, 1940 barring act, and submission of doubtful cases to GAO. Overrules B–165038 and other contrary decisions 94

PRESIDENT

Secret Service protection

Annuities for Secret Service personnel

Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation 177

PROPERTY Page

Private

Damage, loss, etc.

Carrier's liability

Articles of high v. extraordinary value

Claim acquired by assignment pursuant to Military Personnel and Civilian Employees' Claims Act, 31 U.S.C. 240, against carrier for loss of antique Imari and Kutani Japanese porcelains in transit of Air Force officer's household goods properly was recovered by setoff against carrier who has denied liability because porcelains were not declared to have extraordinary value; loss was not listed at time of delivery; and shipment being only one in van it could not have been misdelivered. However, although of high value, antique porcelains are not articles of extraordinary value and since valuation placed on shipment was intended to include porcelains, separate bill of lading listing was not required, clear delivery receipt may be rebutted by parol evidence; and carrier's receipt of more goods at origin than delivered establishes *prima facie* case of loss in transit 61

Public

Damage, loss, etc.

Measure of damages

Restoration of claimant's position

Inclusion of overhead by AF installation in damages collected from REA Express for the Govt.'s repair of radar sets damaged in transit was not improper because overhead constituted 43 percent of damages assessed since law is concerned with restoration of claimant to position he would have occupied had there been no loss or damage to its shipment, and overhead cost assessed is sustained by cost accounting records. Moreover, courts in addition to direct cost of labor and materials have included overhead in damages allowed, and REA previously accepted overhead charged when overhead represented 20 percent of repair costs. Courts also require any enhancement of value by reason of repair to be proved defensively by competent evidence and, therefore, consideration may not be given to REA's unsupported allegation that value of radar sets was enhanced by repair job 109

PUBLIC BUILDINGS

Dedication ceremonies

Expenses

Since holding of dedication ceremonies and laying of cornerstones connected with construction of public buildings and public works are traditional practices, costs of which are chargeable to appropriation for construction of building or works, expense of engraving and chrome plating of ceremonial shovel used in ground breaking ceremony would be reimbursable and chargeable in same manner as any reasonable expense incurred incident to cornerstone laying or dedication ceremony but for fact evidence has not been furnished as to who authorized the chrome plating and engraving of shovel; where shovel originated; subsequent use to be made of shovel; and why there was 1-year lag between ground breaking ceremony and plating and engraving of shovel 119

PURCHASES Page

Purchase orders

Mistakes

Correction

Acceptance of bid at aggregate amount quoted—bid which stated "Bid based on award of all items" and offered prompt payment discount—under invitation for 37 items of electrical parts and equipment to be bid on individually and bid to show a total net amount, without verification of aggregate bid although it was substantially below total net amounts shown in other bids and next lowest bid was verified, entitles supplier of items, pursuant to purchase order issued, to adjustment in price to next lowest aggregate bid, less discount offered, since contracting officer considered there was possibility of error in higher bid he should have suspected lower bid likewise was erroneous, and supplier having been overpaid on basis of item pricing, refund is owing Govt. for difference between amount paid supplier and next lowest bid .. 190

QUARTERS ALLOWANCE

Dependents

Children

Female members

Regulations relating to payment of basic allowances for quarters that require that female member of military service must provide more than one-half of support for dependent child before she may receive payment of basic allowances for quarters may be revised to authorize payment of allowance for dependent child of female member on same basis as that prescribed for male member in view of fact that although *Frontiero* decision by Supreme Court was concerned with right of female member to receive allowances and benefits on behalf of civilian husband, rationale and language of decision connote intent by court that decision should be broadly applied 148

Female members

Entitlement restrictions removed

Claims procedure

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement.... 148

QUARTERS ALLOWANCE—Continued Page
Dependents—Continued
Husband's dependency
Frontiero **case effect**
Distinction between dependents of male and female members of uniformed services having been removed by Supreme Court of U.S. in *Frontiero* v. *Richardson*, decided May 14, 1973, and by enactment of P.L. 93–64, effective July 1, 1973, language in par. M1150–9 of JTR reading "A person is not a dependent of a female member unless he is, in fact, dependent on her for over one-half of his support," may be deleted and made effective as of date of decision, May 14, 1973. Also recommended is amendment of par. M7151–2 by deleting reference to lawful "wife" and substituting the word "spouse," but since use of the term "dependent" in pars. M7151–2 and M7107 of JTR is not discriminatory in light of *Frontiero* decision, no change in language of paragraphs is required 116
Government quarters
Husband and wife service members
Although *Frontiero* decision has no effect on dependency status of service members married to each other as prescribed by 37 U.S.C. 420, since member may not be paid increased allowance on account of dependent for any period during which dependent is entitled to basic pay, differential treatment accorded male and female members in assigning quarters requires amendment of DOD Directive to prescribe entitlement to both male and female members to basic allowance for quarters at the without dependent rate when adequate public quarters for dependents are not available, notwithstanding availability of adequate single quarters; to reflect that neither husband nor wife occupying Govt. quarters for any reason who has only the other spouse to consider as dependent is entitled to basic allowance for quarters in view of 37 U.S.C. 420; and to provide that when husband and wife are precluded by distance from living together and are not assigned Govt. quarters, each is entitled to quarters allowance as prescribed for members without dependents 148
Leave or travel status
Unused accrued leave payments
Sex discrimination removal
Since act of July 9, 1973, P.L. 93–64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims 148

RECORDS Page

Contractors

Confidential nature

Contents of impact statement prepared by SBA prior to determining to set-aside subcontracting of mortuary services pursuant to contract entered into under authority of sec. 8(a) of Small Business Act with another Govt. agency are not for release since Comptroller General's Order No. 1.3, Jan. 4, 1968, exempts from disclosure commercial or financial information which is privileged or confidential, exemption that pertains to information which would not customarily be made public by person from whom it was obtained by Government 143

"Public Information Law"

Application

Contractor records

Cancellation of request for proposals for cartridges on basis out-of-pocket costs for performance in a contractor-owned and -operated (COCO) plant compared unfavorably with out-of-pocket costs incurred in Govt-owned contractor-operated (GOCO) plants, and award to GOCO facility was in accord with terms of solicitation that conformed with par. 1-300.91(a) of Army Ammunition Command Procurement Instruction, which in turn is consistent with 10 U.S.C. 4532(a), "Arsenal Statute." Furthermore, where GOCO plants are operated under cost reimbursement type contracts and fixed-price competition with COCO sources is precluded, cost comparisons are necessarily utilized; internal records of GOCO plant are not within disclosure provisions of 5 U.S.C. 552; and as GOCO activity is not Govt. commercial or industrial activity for purposes of BOB Cir. A-76, Federal taxes, depreciation, insurance, and interest are not for inclusion in GOCO cost estimates 40

REGULATIONS

Construction

Agency determination

Acceptance

Under SBA regulation that provided procurements will not be selected pursuant to sec. 8(a) of Small Business Act program authority to subcontract contracts entered into by SBA with other Govt. agencies- "where small business concerns are dependent in whole or in significant part on recurring Govt. contracts," reliance of SBA on use of sales rather than profit as measuring standard to determine contractor under expiring contract for mortuary services was ineligible for sec. 8(a) subcontract award must be accorded greatest deference in line with *Allen M. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F. 2d 261, even though Administration's interpretation of its regulation was merely one of several reasonable alternatives and may not appear as reasonable as some other 143

Force and effect of law

Armed Services Procurement Regulation

Bid to furnish services, labor and material for installation of automated fuel handling system accompanied by descriptive literature required by invitation but containing proprietary data restriction was not submitted

REGULATIONS—CONTINUED Page

Force and effect of law—Continued

Armed Services Procurement Regulation—Continued

in accordance with par. 2–404.4 of Armed Services Procurement Reg. (ASPR), which provides that bids prohibiting disclosure of sufficient information to permit competing bidders to know essential nature and type of products offered on those elements of bid which relate to quantity, price, and delivery terms are nonresponsive bids, and regulation implementing 10 U.S.C. 2305 providing for public disclosure of bids has force and effect of law. In addition to nonresponsiveness of bid under standards of ASPR 2–404.4, bid was unacceptable on basis the phrase "or equal" in specification soliciting cable had been misinterpreted 24

RETIREMENT

Civilian

Annuities

Secret Service personnel

Since under 18 U.S.C. 3056, Secret Service in addition to protecting President has numerous criminal investigation functions, security officers and specialists may count time spent in activities related to Presidential protection, as well as time spent in directly protecting President on temporary or intermittent assignments, toward accumulation of requisite 10 years prescribed by sec. 4–522 of title 4, D.C. Code, for entitlement to retirement annuities under Policemen and Firemen's Retirement and Disability Act, even though authority to transfer deposits from Civil Service Retirement and Disability Fund to general revenues of D.C. specifies full-time agents protecting President. Approval of future eligibility revisions to participate in D.C. Police Retirement Plan is responsibility, pursuant to sec. 4–535, of D.C. Commissioner, and should additional transfers affect integrity of Policemen and Firemen's Retirement and Disability Fund, this might be basis of remedial legislation 177

SMALL BUSINESS ADMINISTRATION

Authority

Small business concerns

Set-asides appeal authority

When appeal by Administrator, Small Business Adm. (SBA) to the Secretary of Navy, pursuant to 15 U.S.C. 644, of naval installation's disregard of recommendation to restrict solicitation for mess attendant services to small business concerns was upheld, amendment—after due notice to offerors of unrestricted solicitation to restrict procurement to small business was proper since reversal of initial determination that there was no reasonable expectation that award could be made to small business concern at reasonable price (ASPR 1–706.5(a)(1)), as well as awarding fair proportion of Govt. purchases to small business concern (ASPR 1–702(a)) gave effect to 15 U.S.C. 644. Immaterial to SBA authority to appeal was lack of controversy between contracting officer and small business specialist, and fact that unrestricted solicitation had been released to public 58

SMALL BUSINESS ADMINISTRATION—Continued Page

Contracts

Awards to small business concerns. (*See* **CONTRACTS, Awards, Small business concerns**)

Subcontracting

Contractor eligibility determination

Under SBA regulation that provided procurements will not be selected pursuant to sec. 8(a) of Small Business Act program authority to subcontract contracts entered into by SBA with other Govt. agencies "where small business concerns are dependent in whole or in significant part on recurring Govt. contracts," reliance of SBA on use of sales rather than profit as measuring standard to determine contractor under expiring contract for mortuary services was ineligible for sec. 8(a) subcontract award must be accorded greatest deference in line with *Allen M. Campbell Co.* v. *Lloyd Wood Construction Co.*, 446 F. 2d 261, even though Administration's interpretation of its regulation was merely one of several reasonable alternatives and may not appear as reasonable as some other 143

Legality

Legality of SBA's determination that concerns owned and controlled by socially or economically disadvantaged persons should be beneficiaries of subcontracting of contracts entered into with other Govt. agencies pursuant to sec. 8(a) of Small Business Act was sustained in *Ray Baillie Trash Hauling, Inc.* v. *Kleppe*, in which U.S. Court of Appeals, 5th Circuit, on Apr. 18, 1973, held that sec. 8(a) "clearly constitutes specific authority to dispense with competition," and since determination to initiate subcontracting set-aside is matter within jurisdiction of SBA and contracting agency, GAO is unable to object to proposed award for mortuary services to eligible disadvantaged concern 143

Set-asides

Impact statement to justify set-aside

Contents of impact statement prepared by SBA prior to determining to set-aside subcontracting of mortuary services pursuant to contract entered into under authority of sec. 8(a) of Small Business Act with another Govt. agency are not for release since Comptroller General's Order No. 1.3, Jan. 4, 1968, exempts from disclosure commercial or financial information which is privileged or confidential, exemption that pertains to information which would not customarily be made public by person from whom it was obtained by Government 143

STATES

Federal aid, grants, etc.

Airport development costs

Facilities use by Government

Payment by civilian agency of landing fees assessed by Missoula County Airport Commission who had received Federal assistance under 1946 Federal Airport Act is not prohibited since sec. 11(4) of act only exempted military aircraft from paying landing and take-off fees, and then only if use of facilities was not substantial. Furthermore, Commission received no Federal assistance under 1970 Airport and Airway Development Act, sec. 18(5) of which replaced sec. 11(4) of 1946 act to exempt all Govt. aircraft from paying for use of airport facilities developed with Federal financial assistance and to authorize, if use was substantial, payment of charge based on reasonable share, proportional to use, of cost of operating and maintaining facilities used 84

STATES—Continued Page

Federal aid, grants, etc.—Continued

Educational institutions

Student assistance programs

The Second Supplemental Appropriations Act, 1973, P.L. 93-50, approved July 1, 1973, although not specifically providing funds for the increase from 54 to 68 percent authorized for sec. 3(b) School Assistance in Federally Affected Areas, is considered by reason of raising limitation on fund availability for sec. 3(b) students during fiscal year 1973, as having appropriated the additional funds, thus bringing the availability for obligation of 1973 funds, notwithstanding prohibition against availability of appropriations beyond current year, and failure to extend availability of impact aid funds, prescribed for 1973 by so-called "Continuing Resolution," P.L. 92-334, approved July 1, 1972, within intent of the Public Works for Water and Power Appropriation Act, 1974, approved Aug. 16, 1973, P.L. 93-97, extending period for obligation of appropriations contained in Second Supplemental Appropriations Act, 1973, for period of 20 days following enactment of 1974 act..... 129

Intergovernmental Personnel Act implementation

Federal employee status

Under Intergovernmental Personnel Act of 1970 (5 U.S.C. 3371-3376), Federal employees temporarily assigned to State and local governments and institutions of higher education are not entitled to both per diem and change of station allowances for same assignment, even though 5 U.S.C. 3375 permits payment of both benefits associated with permanent change of station and those normally associated with temporary duty status, since nothing in statute or its legislative history suggests both types of benefits may be paid incident to same assignment. Therefore, on basis of interpretation of similar provisions in Government Employees Training Act, agency should determine, taking cost to Govt. into consideration, whether to authorize permanent change of station allowances or per diem in lieu of subsistence under 5 U.S.C. Ch. 57, subch. I to employees on intergovernmental assignment..... 81

Taxes. (*See* **TAXES**)

STATUTES OF LIMITATION

Claims

Military matters and personnel

Sex discrimination removed

On bases of Supreme Court ruling in *Frontiero* v. *Richardson*, decided May 14, 1973, to effect that differential treatment accorded male and female members of uniformed services with regard to dependents violates Constitution, and P.L. 93-64, enacted July 9, 1973, which deleted from 37 U.S.C. 401 sentence causing differential treatment, regulations relating to two types of family separation allowances authorized in 37 U.S.C 427 should be changed to authorize family separation allowances to female members for civilian husbands under same conditions as authorized for civilian wives of male members, and for other dependents in same manner as provided for male members with other dependents. Since *Frontiero* case was original construction of contitutionality of 37 U.S.C. 401 and 403, payments of family allowance may be made retroactively by services concerned, subject to Oct. 9, 1940 barring act, and submission of doubtful claims to GAO..... 148

STATUTES OF LIMITATION—Continued Page

Claims—Continued

Military matters and personnel—Continued

Sex discrimination removed—Continued

As *Frontiero* decision, decided May 14, 1973, in which Supreme Court ruled on inequality between male and female military members with regard to quarters allowances, was original construction of constitutionality of 37 U.S.C. 401 and 403, decision is effective as to both active and former members from effective date of statute, subject to barring act of Oct. 9, 1940 (31 U.S.C. 71a). Documentation required from female members to support their claims should be similar to that required of male members under similar circumstances and should be sufficient to reasonably establish member's entitlement to increased allowances. Although claims for 10-year retroactive period may be processed by services concerned, since filing claim in administrative office does not meet requirements of barring act, claims about to expire should be promptly submitted to GAO for recording, after which they will be returned to service for payment, denial or referral back to GAO for adjudication. Doubtful claims should be transmitted to GAO for settlement 148

Since act of July 9, 1973, P.L. 93-64, repealed provision of 37 U.S.C. 401 relating to proof of dependency by female member, quarters allowance prescribed in 37 U.S.C. 501(b) for inclusion in computation of male member's unused accrued leave that is payable at time of discharge, may be allowed female members on basis they are entitled to same treatment accorded male members who are not normally required to establish that their wives or children are in fact dependent on them for over one-half their support. Allowance may be paid retroactively by service concerned, subject to Oct. 9, 1940 barring act, but claims about to expire should be transmitted to GAO pursuant to Title 4, GAO 7, as should doubtful claims 148

SUBSISTENCE

Per diem

Military personnel

Headquarters

Permanent or temporary

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44

SUBSISTENCE—Continued Page

Per diem—Continued

Military personnel—Continued

Reserve officers' training corps

Recruiting duties

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c) 145

Training duty periods

Entitlement to per diem

Reserve Marine officer detached from duty upon completion of basic training at Quantico and ordered to report for temporary duty on Apr. 15, 1970, at Camp Lejeune for 8 weeks of instruction, then to be attached to designated division at camp, whose orders were amended Apr. 9, 1970, to change his permanent duty station upon completion of temporary duty from Camp Lejeune to Okinawa were not received by him until Apr. 27, 1970, is entitled to per diem for entire period of temporary duty—Apr. 16 through June 4—since his entitlement to per diem became fixed upon issuance of amendatory order on Apr. 9, 1970, changing his permanent duty station, and since he was in temporary duty status while at Camp Lejeune, it is immaterial that he was not timely notified of amendatory order as he fully complied with basic order, as amended 78

TAXES

Guam taxation of Federal Government

Constitutionality

Payment for overtime services provided by Guam customs and quarantine officers at Andersen AFB, Guam, on 24-hour, 7-days-a-week rotating basis to accommodate incoming foreign traffic, plus overhead surcharge, which is claimed by Territory of Guam, pursuant to P.L. 9-47 that imposes basic charge equivalent to hourly wage rate of officer performing service, plus administrative surcharge of 25 percent, on "all air and sea carriers and other persons" may be paid, irrespective of laws and regulations enforced by officers as Federal agencies are subject as other carriers to charges imposed for overtime Federal customs inspections under 19 U.S.C. 267, to extent that their operations are subject to customs inspections generally. However, determination should be made that surcharge is reasonable and does not constitute an unconstitutional tax upon U.S. Government 173

TAXES—Continued Page

State

Government immunity

Tax clause in contract effect

Room rental transient tax included pursuant to sec. 84-33 of Montgomery Co. (Maryland) Code in invoices for housing and subsistence furnished under contract to outpatient participants in NIH Leukemia Program may not be certified for payment, even though Govt. is not exempt from tax on theory of sovereign immunity since relationship between Govt. and transients created under contract is insufficient to effectuate shift in burden of tax directly to Govt. in view of fact all applicable Federal, State, and local taxes and duties were included in contract price. However, future contracts for sleeping accommodations in Montgomery Co. may provide for Govt. to pay transient tax applicable to individuals furnished housing and subsistence as beneficiaries... 69

TRANSPORTATION

Automobiles

Military personnel

Ferry transportation

Constitutes transoceanic travel

Since there is no highway system in Goose Bay area, Canada, over which member could drive his automobile to new U.S. duty station without using long distance ferries—Goose AFB to Lewisporte, Newfoundland, overland to Port-aux-Basques, then by ferry to Sydney, Nova Scotia—pars. M4159-3 and M7003-3c of JTR, pursuant to 37 U.S.C. 404 and 406, may be changed to treat long distance ferry transportation as transoceanic travel, thus necessitating amending distance tables used in computing mileage between AFB and bases on island portion of Newfoundland and continental U.S. duty stations to eliminate mileage over ferry routes. Furthermore, under 10 U.S.C. 2634(a), Canadian Pacific Railroad ferries may be used in absence of availability of American vessels, and if member must arrange for vehicle transportation, travel orders should authorize arrangement and his reimbursement voucher attest to nonavailability of U.S.-registered vessels..... 131

Boats

Components and accessories

Definition of term "household goods" contained in par. M8000-2 of Joint Travel Regs., promulgated under authority in 37 U.S.C. 406(b), may not be revised to enlarge term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding lack of preciseness of term "household goods," term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of permanent nature— used in and about place of residence for comfort and accommodation of members of family, and term is not viewed as encompassing such items as boats, airplanes, and housetrailers..... 159

Dependents

Military personnel

Advance travel of dependents

Amendment or revocation of orders

Officer of uniformed services whose dependents traveled to selected retirement home prior to issuance of retirement orders that were canceled at his request prior to effective date, and then traveled to officer's

TRANSPARTATION—Continued Page
Dependents—Continued
Military personnel—Continued
Advance travel of dependents—Continued
Amendment or revocation of orders—Continued
new permanent duty station located in corporate limits of his old station is entitled to monetary allowance for both moves. When orders that direct permanent change of station, including orders directing release from active duty or retirement, are canceled or modified before their effective date for convenience of Govt. and/or in circumstances over which member has no control, benefits prescribed by 37 U.S.C. 406a accrue, and fact the officer withdrew retirement request is immaterial since Govt. was under no obligation to accept request and apparently did so primarily for convenience of Govt ---------- 55
Change of station status
Member's separation
Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer ---------- 44
Release from active duty
Payment basis
Entitlement to expenses incurred for travel of Navy member's wife who accompanied him via commercial air from his overseas station in Hawaii, where his orders made no provision for her travel and authorized him to proceed to Brooklyn, N.Y. Naval Station for separation to his home of record, Niagara Falls, N.Y., depends on whether her presence overseas was command sponsored. If so, reimbursement may be made for cost of Govt. air from Hickam AFB to Travis AFB, the initially contemplated debarkation point, and for mileage from Hawaii residence to Hickam AFB, and from Travis AFB to home of record. If not command sponsored, there is no entitlement to overseas transportation at Govt. expense and transportation within continental U.S. is limited in view of par. M7003-3b(3), JTR, to monetary allowance for distance between New York, N.Y., aerial port of debarkation, and Niagara Falls ---------- 105
Household effects
Damage, loss, etc. (*See* **PROPERTY, Private, Damage, loss, etc.**)
Delivery
Attempted first delivery
Supplemental billing for alleged attempted first delivery of employee's household effects, where alleged advance notice of consignee's inability to accept delivery as originally scheduled is not rebutted by record that does not suggest telephonic cancellation of original delivery date was inadequate or not in compliance with any tariff provision relating to

TRANSPORTATION—Continued Page
Household effects—Continued
Delivery—Continued
Attempted first delivery—Continued
formal requisites of notice, may not be certified for payment. Furthermore, hold-up delivery message left with employee of transfer and storage concern presenting supplemental billing is inputed to concern, and also no Govt. agent was at fault; no notice of attempted delivery, as required by bill of lading, was left at designated place of delivery; no inquiry was made as to when redelivery should be made, and no request was made for further instructions 127
Limitation on definition of term
Definition of term "household goods" contained in par. M8000-2 of Joint Travel Regs., promulgated under authority in 37 U.S.C. 406(b), may not be revised to enlarge term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding lack of preciseness of term "household goods," term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of permanent nature used in and about place of residence for comfort and accommodation of members of family, and term is not viewed as encompassing such items as boats, airplanes, and housetrailers 159
Military personnel
Commercial means
Reimbursement
Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150-1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled 105
Remains
Death of employee other than on temporary duty
Cost of transporting remains of deceased Forest Service employee from Juneau, Alaska, where employee had completed agreed tour of duty, to Missoula, Mont., may not be reimbursed to decedent's widow in absence of specific authority for Govt. to assume expense. Since deceased employee had completed tour of duty 5 U.S.C. 5742(b)(1), authorizing Govt. to defray expense of preparing and transporting remains of civilian employees who die while in travel status, has no application, and furthermore, authority in secs. 1 or 7 of Administrative Expenses Act of 1946, which prescribes travel and transportation expenses in connection with transfer to and from duty station outside continental limits of U.S., and sec. 1.11d of OMB Cir. No. A-56, which provides for return travel and transportation of employees serving under agreements has application only to living individuals 120

TRAVEL EXPENSES Page

Actual expenses

Reimbursement basis

Criteria

Administrative determination that criteria established by sec. 7 of Standardized Government Travel Regs. and par. C8151-8154 of Joint Travel Regs. providing for payment of actual expenses prescribed by 5 U.S.C. 5702 had not been satisfied and, therefore, employees on temporary duty in support of disaster recovery operations in areas damaged by hurricane Agnes in 1972 were not entitled to reimbursement on basis of actual expenses is a determination that may not be set aside in absence of evidence it was not made in accordance with governing law and regulations, or that it was arbitrary or capricious. Authorization for payment of actual expenses does not create entitlement to expenses since approval was outside scope of official's authority and those dealing with Govt. personnel are deemed to have notice of limitations on authority 11

Military personnel

Release from active duty

Expenses, generally

Military officer transferred under permanent change of station orders from overseas to Fort Benjamin Harrison for separation who moved dependents to new duty station where they resided in rented off-base housing until his discharge is not entitled to travel expenses and dislocation allowance for dependents since the Fort at no time was officer's permanent duty station, notwithstanding his transfer was deemed permanent change of station and he was reassigned to serve as executive officer, and member on temporary duty while at the Fort is entitled only to per diem for 90 days he was at the Fort. Whether duty assignment is permanent or temporary is determined by considering orders, and character, purpose, and duration of assignment, and officer's orders evidencing detachment from overseas duty for separation, permanent change of station orders and interim assignment as executive officer did not change character of separation transfer 44

Normal v. approved debarkation point

Navy member who incident to his separation reported to Hickam AFB, Honolulu, Hawaii, and is authorized, at his request, to travel to Brooklyn, N.Y. Naval Station, located near his home of record, Niagara Falls, N.Y., for separation in lieu of Treasure Island, and who used commercial air although directed to travel by Govt. aircraft, if available, is considered to have terminated his overseas travel at Travis AFB, debarkation point for Treasure Island, and to be entitled to mileage allowance pursuant to M4157(1)(c) and M4150-1, JTR, for distance between Travis AFB and Treasure Island and then to his home of record, but not to reimbursement for his overseas travel since he was directed to use Govt. transportation, which was available at time he traveled .. 105

Reemployment after separation

Liability for expenses

Phrase "in the same manner" contained in 5 U.S.C. 5724a(c), which authorizes payment of travel, transportation, and relocation expenses to former employee separated by reduction in force or transfer of function and reemployed within 1 year, as though employee had been transferred in interest of Govt. without break in service to reemployment location from separation location when construed in conjunction with 5 U.S.C. 5724(e), which provides similar expenses for employees transferred from one agency to another because of reduction in force or

TRAVEL EXPENSES—Continuel Page

Reemployment after separation—Continued

Liability for expenses—Continued

transfer of function, permits payment of costs in whole or in part by gaining or losing agency, as agreed upon by agency heads. Therefore, whether relocation benefits are prescribed under sec. 5724a(c) or sec. 5724(e), they may be paid by gaining or losing agency within 1-year period. 51 Comp. Gen. 14, 52 *id.* 345, and B-172594, June 8, 1972, overruled 99

WOC employees

Reimbursement basis for expenses

Local duty

Cadet in ROTC at University of Detroit who under invitational orders performed recruiting duties at two Detroit high schools—matter of 2 hours and 3 hours duty on separate days—and returned each time to University is not entitled to per diem allowance, having used Govt. transportation and not having incurred any additional subsistence expenses. ROTC cadets have no military status nor are they Govt. employees, and unless utilized as consultants or experts, they are considered persons serving without pay and such person under 5 U.S.C. 5703(c) may be allowed transportation expenses and per diem only while en route and at his place of service or employment away from home or regular place of business. However, since cadet at University of Detroit incurred no additional subsistence expenses incident to recruiting duties he is not considered to have been in travel status within meaning of 5 U.S.C. 5703(c) 145

VOLUNTARY SERVICES

Meals, etc.

Appropriation availability

Cost of providing food to Federal Protective Services officers of GSA who were kept in readiness pursuant to 40 U.S.C. 318 in connection with unauthorized occupation of Bureau of Indian Affairs building is reimbursable on basis of emergency situation which involved danger to human life and destruction of Federal property, notwithstanding that expenditure is not "necessary expense" within meaning of Independent Agencies Appropriation Act of 1973; that 31 U.S.C. 665 precludes one from becoming voluntary creditor of U.S.; and general rule that in absence of authorizing legislation cost of meals furnished to Govt. employees may not be paid with appropriated funds. However, payment of such expenses in future similar cases will depend on circumstances in each case 71

WORDS AND PHRASES

"Household goods"

Definition of term "household goods" contained in par. M8000-2 of Joint Travel Regs., promulgated under authority in 37 U.S.C. 406(b), may not be revised to enlarge term to include boat components, such as outboard motors, seat cushions, life jackets, and other boat gear, as acceptable items for shipment as household goods. Notwithstanding lack of preciseness of term "household goods," term in its ordinary and usual usage is generally understood as referring to furniture and furnishings or equipment—articles of permanent nature—used in and about place of residence for comfort and accommodation of members of family, and term is not viewed as encompassing such items as boats, airplanes, and housetrailers 159

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