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[B-164371]

Leaves of Absence—Lump-Sum Payments—Rate at Which Payable—Increases

Civil Service Commission seeks General Accounting Office concurrence in application of 47 Comp. Gen. 773 (1968) to prevailing rate employees. Retroactive adjustments to wages of prevailing rate employees are governed by 5 U.S.C. 5344 which places limitations on those categories of employees entitled to such adjustments. Employees separated prior to date wage increase is ordered into effect may have wages and/or lump-sum leave payments adjusted only if they died or retired between effective date of increase and date increase ordered into effect (and then only for services rendered during this period) or if they are in the service of the Government actively or on terminal leave status on date increase is ordered into effect.

In the matter of prevailing rate employees—lump-sum leave payments, February 4, 1975:

This matter involves a request by the Civil Service Commission (CSC), for our concurrence in its application of the holding in 47 Comp. Gen. 773 (1968) to employees whose rates of pay are adjusted under the Act of August 19, 1972, Public Law 92–392, 86 Stat. 564, codified as 5 U.S. Code §§ 5341–5349 (Supp. II 1972). These employees are generally known as prevailing rate or wage board employees.

In 47 Comp. Gen. 773 (1968), we held that when a General Schedule civil service employee was to be separated from Government service, and was to receive a lump-sum payment for accrued annual leave, that payment should be adjusted to reflect a general salary increase granted under the act of December 16, 1967, Public Law 90–206, 81 Stat. 613, that became effective during the period that would have benefited the employee had he remained on the rolls until exhausting his accrued annual leave. That decision was based on provisions of Public Law 90–206 and on 5 U.S.C. § 5551(a) which now provides, in pertinent part that:

> An employee * * * who is separated from the service or elects to receive a lump-sum payment for leave * * * is entitled to receive a lump-sum payment for accumulated and current accrued annual or vacation leave to which he is entitled by statute. The lump-sum payment shall equal the pay the employee or individual would have received had he remained in the service until expiration of the period of the annual or vacation leave. The lump-sum payment is considered for taxation purposes only.

For purposes of this section, "employee" includes both General Schedule and Wage Board employees. It is important to note when the adjustment of the lump-sum leave payment is to be made. In the above decision, we stated that:

> However, the final adjustment in the amount of lump-sum leave payment due the employee for the period covered by the new salary rate should not be made until the effective date of the new salary rates promulgated by the President. 47 Comp. Gen. 773, 774.

It is also necessary to consider 5 U.S.C. § 5344, which provides:

(a) Each increase in rates of basic pay granted, pursuant to a wage survey, to prevailing rate employees is effective not later than the first day of the first pay period which begins on or after the 45th day, excluding Saturdays and Sundays, following the date the wage survey is ordered to be made.
(b) Retroactive pay is payable by reason of an increase in rates of basic pay referred to in subsection (a) of this section only when—
(1) the individual is in the service of the Government of the United States, including service in the armed forces, or the government of the District of Columbia on the date of the issuance of the order granting the increase; or
(2) the individual retired or died during the period beginning on the effective date of the increase and ending on the date of issuance of the order granting the increase, and only for services performed during that period.

This section was enacted in its present form as part of Public Law 92–392, but the basic provisions were first made part of the Prevailing Rate pay system by the act of September 2, 1958, Public Law 85–872, 72 Stat. 1696, 5 U.S.C. 1181 (1964 ed.). The current section has two functions: the setting of an effective date for Prevailing Rate wage increases, and the delineation of those categories of employees that are entitled to receive retroactive pay adjustments when Prevailing Rate wage increases are actually ordered into effect. It is clear from the legislative history of Public Law 85–872 that, at that time, there were frequently long delays between the time a wage survey was ordered, and the time the new wage rates were finally ordered into effect. The effective date was set as it now stands to prevent the wages of Prevailing Rate employees from unnecessarily lagging behind the wages of employees in the private sector. The provisions regarding retroactive payments were necessary to make it clear that these payments could be made, in spite of the general rule that wages cannot be adjusted retroactively.

The legislative histories of Public Law 85–872 and Public Law 92–392 are both silent regarding the effect of retroactive wage adjustments on lump-sum leave payments made to employees leaving Government service. In fact there is very little explanation of the meaning or intent of the retroactive pay provisions in the history of either act. The only statement that is of assistance is found in the House report on the bill that became Public Law 92–392, H. Report 92–339, July 8, 1971. On page 16 of that report, with regard to retroactive increases, it states:

* * * Also, an individual who retires or dies during the period beginning on an effective date of the rate increase under subsection (a) and ending on the date of issuance of the order by the lead agency granting the rate increase will be paid retroactive pay *only for services actually performed during that period.* * * * [Italic supplied.]

A similar provision regarding retroactivity is found in the Federal Salary Act of 1967, Public Law 90–206, 5 U.S.C. 5332 note. This act granted the General Schedule salary increase involved in 47 Comp.

Gen. 773 (1968). Section 218 of that act, found at 81 Stat. 638 provides in pertinent part:

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

(1) to an officer or employee who retired, during the period beginning on the first day of the first pay period which began on or after October 1, 1967, and ending on the date of enactment of this title, for services rendered during such period. * * *

Similar provisions are contained in the note following 5 U.S.C. § 5332, note 5, of the General Schedule Pay Rates. In 47 Comp. Gen. 773 (1968), the individual employee involved was "in the service of the United States" on the date of the enactment of Public Law 90–206. He retired April 30, 1968, more than 4 months after the enactment of the statute, and 2 months before the effective date of the salary increase. The date of his retirement did not fall within the period covered by the exception which granted limited retroactive pay to retirees.

We have considered 5 U.S.C. § 5344 (Supp. II, 1972) on only two prior occasions. Once explicitly in 50 Comp. Gen. 266 (1970), relating to retroactive pay and wage increases granted under the "Monroney Amendment," which is now codified as 5 U.S.C. § 5343(d)(1) (Supp. II, 1972), which has no applicability in the instant matter. In the other case, B–168346, December 30, 1969, the section was considered only implicitly and was not directly cited. In that case, two employees were separated as a result of a reduction-in-force (RIF). Prior to their receipt of the notification that they were to be separated, a wage survey was ordered. Under the terms of the predecessor of 5 U.S.C. § 5344 (Supp. II, 1972) the effective date of the wage increase was about 30 days prior to their separation. Approximately 3 to 4 months later both employees were hired by different Government agencies in the same wage survey area. The new wage rates were ordered into effect several months after the men were rehired. We held that the severance pay and lump-sum leave payments received by the men should be retroactively adjusted to reflect the wage increase. This was possible because the men were actually in the service of the United States on the day the order was issued granting the wage increase. Their service was not continuous, but the statute does not so require.

We are now asked to consider the case of Wage Board employees who have retired or were otherwise separated prior to the date a wage increase under Public Law 92–392 is ordered into effect. Since any adjustment would have to be made when the new wage rates are actually ordered into effect, such adjustments would be retroactive adjustments and would be governed by 5 U.S.C. § 5344(b) (Supp. II,

1972). Under subsection 2 of that section, an employee who retires or dies between the effective date of a wage increase and the day the increase is ordered into effect will receive a retroactive adjustment to his pay, but it will be limited to the pay received during that period for services actually performed by the employee. There will be no adjustment of any lump-sum leave payment that might have been received.

Alternatively, subsection 1 of 5 U.S.C. § 5344(b) (Supp. II, 1972), provides that an employee may receive a retroactive adjustment in his pay if he is "in the service of the Government" on the day the wage increase is ordered into effect. Normally, when an employee is separated, he receives a lump-sum payment for accrued annual leave. We have long held that the period of time that is included in or covered by such a payment is not "service" for any purpose. *See* 24 Comp. Gen. 511, 514 (1945), answer to question 5; 24 *id.* 659, 622, (1945) answer to question 8; and 31 *id.* 215, 221 (1951) answer to question 6(b). Therefore, if an employee who has been separated receives a lump-sum payment for accumulated and current accrued annual leave, he may not have that payment retroactively adjusted, even if the leave for which he was paid would have extended beyond the date the new wage rate was ordered into effect.

It is possible, although not usual, for an employee to be placed on "terminal leave" instead of receiving a lump-sum payment at the time of his separation. This practice is now the exception rather than the rule because it has long been our position that the administrative authority to grant an employee terminal leave immediately prior to separation from the service, when it is known in advance that the employee is to be separated, is limited to cases where the exigencies of the service require such action. *See* 34 Comp. Gen. 61 (1954). However, if the requirements justifying terminal leave can be met, and such leave extends to or beyond the date when a new wage rate is ordered into effect, then an employee's pay, including any lump-sum leave payment received, may be retroactively adjusted to reflect the new wage rate in accordance with 5 U.S.C. 5344(b)(1).

Accordingly, we cannot concur in the application of the holding in 47 Comp. Gen. 773 (1968) to employees whose rates of pay are adjusted under Public Law 92-392, except in the limited circumstances set forth above.

[B-182181]

Transportation—Household Effects—House Trailer Shipments—Commercial Transportation—Transported by Dealer

Payment for transportation of a newly purchased mobile home on a commercial rate basis may be made not to exceed the constructive cost of transporting the employee's household goods where the mobile home was transported by the dealer,

even though the dealer was not listed by the Interstate Commerce Commission as a commercial transporter since the dealer was operating under color of State license or other State sanction permitting the towing and transportation of the trailer.

In the matter of the transportation of mobile home, February 4, 1975:

This matter was submitted for an advance decision by a Finance and Accounting Officer of the Department of the Army, and was forwarded to our Office by the Per Diem, Travel and Transportation Allowance Committee, under Control No. 74–35 on September 4, 1974.

The subject matter of the request is the propriety of paying the reclaim voucher of Ms. Violet M. Eves, a civilian employee of the Department of the Army. The claim arose out of the transfer of Ms. Eves' official duty station from Hermiston, Oregon, to Tooele, Utah, and involves the following circumstances.

On March, 9, 1973, Ms. Eves was given a notice of reduction in force at her old official duty station. Subsequent to such notice and apparently prior to her separation, she was able to secure a position at her new official duty station. A transfer was requested on April 2, 1973, and her reporting date at the new official duty station was set for on or about April 16, 1973.

The record shows that Ms. Eves had owned an all-electric mobile home since June 1972 and that when she was informed that all-electric trailer space was hard to find in Tooele, she sold the all-electric unit and purchased a gas unit on April 1, 1973, from the B & E Mobile Homes, Inc., Hermiston, Oregon. The travel order of April 2, 1973, UMAD 45–73, authorized the transportation of a mobile home from Hermiston, Oregon, to Tooele, Utah. The record shows that B & E Mobile Homes, Inc. delivered Ms. Eves' trailer at Tooele, Utah, on May 10, 1973, and charged her a delivery fee of $1,030.95 which was calculated for 711 miles at $1.45 per mile.

The travel voucher submitted to the Finance and Accounting Officer shows that a claim was made for $1,030.95 for moving the mobile home and that only $67.76 of that amount was paid on the basis of Volume 2, Joint Travel Regulations (JTR), paragraph C10202–3a. The amount of $67.76 was obtained by calculating 616 miles, which Ms. Eves traveled with her privately owned vehicle and for which she was reimbursed at 8 cents per mile, instead of at 11 cents per mile as the above-cited regulation requires. Ms. Eves reclaimed the balance of $963.19.

The governing regulation under which Ms. Eves' allowances are payable is Volume 2, JTR. The pertinent provisions applicable in this case are paragraph C10202 and paragraph C1100.

Paragraph C10202 provides in part as follows:

573-467 O - 75 - 2

C10202 *REIMBURSEMENT FOR TRANSPORTATION OF MOBILE HOMES IN LIEU OF SHIPMENT OF HOUSEHOLD GOODS*

* * * * * * *

2. *MOVEMENT OF MOBILE HOME BY COMMERCIAL TRANSPORTER*

a. *Allowed Reimbursement.* When a mobile home is transported by a commercial transporter, reimbursement is allowed for:

1. the carrier's charges for actual transportation of the mobile home is an amount not exceeding the Interstate Commerce Commission, or similar State regulatory body, tariffs applicable for a mobile home of the size and type, and for the distance transported;

2. ferry fares; bridge, road, and tunnel tolls; taxes; charges or fees fixed by a State or municipal authority for permits to transport mobile homes in or through its jurisdiction; and carrier's service charges for obtaining such permits.

At the time that the employee pays the carrier's bill he should insure that the bill itemizes all charges.

* * * * * * *

3. *MOVEMENT OTHER THAN BY COMMERCIAL TRANSPORTER*

a. *Entitlement.* When a mobile home is transported by means other than a commercial transporter, such as when it is towed by a privately owned vehicle, an allowance of $0.11 per mile shall be made to cover the official distance and ferry fares; bridge, road, and tunnel tolls; permit fees; and other expenses. No allowances other than the $0.11 per mile shall be made for transportation of the mobile home but payment of the mileage allowance for use of a privately owned vehicle may be made in addition to the $0.11 allowance. * * *

* * * * * * *

5. *LIMITATION ON REIMBURSEMENT.* The reimbursement allowable under subpar. 2, 3, or 4 will not exceed the constructive expense that would have been allowed by the Government for transportation and 60 days temporary storage of the maximum weight of household goods for which the employee has eligibility.

Paragraph C1100 provides the following definitions for the terms "commercial transporter" and "privately owned motor vehicle."

COMMERCIAL TRANSPORTER. The term "commercial transporter" means a transporter who is operating pursuant to the Interstate Commerce Act in interstate commerce or under appropriate State statutes in intrastate commerce.

PRIVATELY OWNED MOTOR VEHICLE. "Privately owned motor vehicle" and "privately owned vehicle" mean a motor vehicle not owned by the Government which is in the possession of and used by the employee and/or his immediate family for the primary purpose of providing personal transportation. Excluded are trailers, airplanes, or any vehicle intended for commercial use.

The Finance and Accounting Officer has supplied our Office with information that the Interstate Commerce Freight Tariff Number 10–F, covering transportation of mobile homes does not list the B & E Mobile Homes, Inc., as a commercial transporter registered with the Commission. His reluctance to allow the claim was apparently based on this finding. We note, however, that the mobile home was transported across State lines and for some 711 miles by a business corporation which must have had either a special permit to transport the trailer by the State of its domicile or the towing vehicle's license must have been invoked as a State sanction permitting the towing and transportation of the trailer. Moreover, since the towing vehicle was neither in the possession of nor was it used by the employee and her immedi-

ate family, we cannot find that the transportation of Ms. Eves' trailer was done by private as opposed to commercial means.

Accordingly, in the circumstances of this case, payment may be made, if otherwise correct, for $839, the stated cost for commercial movement of a mobile trailer of the size here involved, less the $67.76 already paid and providing it does not exceed the limitation in subparagraph 5 of the regulation quoted above.

[B-182727]

Telephones—Private Residences—Prohibition—Military Members

Air Force member who incurs telephone relocation charges in connection with an ordered move from quarters is not entitled to reimbursement for such expense in view of the prohibition contained in 31 U.S.C. 679 (1970) and so much of 52 Comp. Gen. 69 (1972) which allows payment for such telephone installation expenses is modified accordingly.

In the matter of telephone relocation charges, February 5, 1975:

This action is in response to a letter dated November 7, 1974, with enclosures, reference ACF, from the Accounting and Finance Officer, Comptroller, Headquarters 2750th Air Base Wing (AFLC), Wright-Patterson Air Force Base, Ohio, forwarded here by the Director of Accounting Operations, Air Force Accounting and Finance Center, Headquarters United States Air Force, requesting an advance decision concerning reimbursement from appropriated funds for payment of telephone relocation charges claimed on a voucher submitted by Staff Sergeant Edwin L. Gillette, USAF, 194-38-4998.

The file indicates that, as a result of a base renovation project, Sergeant Gillette was ordered to vacate his on-base quarters and was relocated to other on-base quarters. The movement was solely for the purpose of vacating quarters to allow their renovation and was not in connection with a permanent change of station. As a result of this move, Sergeant Gillette was required to relocate the telephone in his new quarters and he incurred a telephone relocation charge of $16. He has now submitted a claim for reimbursement for this expense.

The submission states that in decision B-141573, dated January 5, 1960, this Office specifically held that appropriated funds could not be used in payment of charges for relocating telephones in private residences of certain enlisted personnel of the Army. The submission points out that in a later decision, B-175439, dated August 4, 1972 (52 Comp. Gen. 69), we allowed a claim for $125.50 for expenses incurred incident to the relocation of a housetrailer under similar circumstances and that such allowance included an $8 charge for telephone relocation. In this connection, the submission directs attention to the provisions of 31 U.S. Code 679, which prohibit the expenditure of appropriated

funds for this purpose and asks the question whether our August 4, 1972 decision, B-175439, is appropriate authority for the payment of telephone relocation charges incurred by military members.

Section 679 of Title 31, U.S. Code (1970), provides in part:

Except as otherwise provided by law, no money appropriated by any Act shall be expended for telephone service installed in any private residence or private apartment * * *

In B-141573, decided January 5, 1960, we had before us the matter of telephone relocation charges occasioned by the fact that extensive rehabilitation of family quarters at Fort Belvoir, Virginia, made necessary the movement of certain enlisted personnel and their families to other quarters. In denying the claim we stated:

As previously held in a long line of decisions, the language codified at 31 U.S.C. 679 leaves no doubt but that payment from appropriated funds of any part of the expense of furnishing telephone service to Government personnel in their private residences is not allowed. See 35 Comp. Gen. 28, 30 and decisions cited therein. Clearly, the reconnections here involved were a part of the telephone service received by these members in their homes.

Accordingly, in view of the clear prohibition of 31 U.S.C. 679, the charges involved cannot be paid from appropriated funds.

In 52 Comp. Gen. 69 (1972) this Office had for consideration a claim for various expenses incurred in the relocation of a housetrailer. While we authorized payment of the expenses incurred, the thrust of our consideration in that case related to reimbursement of expenses which were incurred by a member which would not have been required but for the mandatory relocation by order of the Base Commander and the limitations imposed on allowing the individual item were apparently overlooked.

Since it is clear that under the provisions of 31 U.S.C. 679 telephone relocation charges are items of expense which may not be reimbursed out of appropriated funds, our decision of August 4, 1972, 52 Comp. Gen. 69, is modified accordingly and may not be considered as authority for payment of such claims.

Accordingly, since Sergeant Gillette's claim is squarely within the facts of our decision B-141573, payment is not authorized and the voucher in this case will be retained in this Office.

[B-127474]

Leaves of Absence—Annual—Holidays—Charging Precluded—Within Regularly Scheduled Tour of Duty—Employees Receiving Premium Pay

Employees of Veterans Administration (VA) hospital, charged annual leave on holidays they did not work because they were paid premium pay under 5 U.S.C. 5545(c)(1) should have leave restored since decision 35 Comp. Gen. 710 (1956) interpreting section 5545(c)(1) states that a charge against leave for absence on

a holiday within the regularly scheduled tour of duty is required only where standby on such holiday was required of employees and was thus considered in arriving at the percentage of premium pay and standby was not required of employees on holidays in question.

In the matter of Veterans Administration employees' premium pay, February 7, 1975:

This action is at the request of Mr. D. Lee Alcorn, Mr. Rodger D. Eppler, Mr. John H. Gary, Jr., and Mr. Charles B. Reed, employees of the Veterans Administration, who appeal the decision of the Veterans Administration (VA) to charge them annual leave for holidays during which they did not work on the basis that they were being paid premium pay.

The record shows that the employees are X-ray technicians employed at the Veterans Administration Hospital, Dallas, Texas. The employees are paid premium pay in addition to their base pay pursuant to 5 U.S. Code 5545(c)(1) (1970) because they are required to be on standby status for periods beyond their regular duty hours. The record shows further that although the standby duty is necessary, the X-ray technicians are seldom called back to the hospital for active duty.

Pursuant to a memorandum dated June 12, 1974, from the Director, Field Operations, Region 5, VA, to the Director, Veterans Administration Hospital, Dallas, the employees were charged annual leave for having not worked on two separate holidays in 1974, Washington's Birthday and Memorial Day. It also appears that the VA intends to charge the employees annual leave for all holidays not worked by them in the past. The employees appeal the VA's ruling and ask that we overrule our decision 35 Comp. Gen. 710 (1956) since the reasoning in that decision is apparently being used by the VA as the basis for charging the claimants annual leave for having not worked on days designated as national holidays.

Section 5545(c)(1) of Title 5, U.S. Code, states the following with respect to compensation for standby duty:

(c) The head of an agency, with the approval of the Civil Service Commission, may provide that—

(1) an employee in a position requiring him regularly to remain at, or within the confines of, his station during longer than ordinary periods of duty, a substantial part of which consists of remaining in a standby status rather than performing work, shall receive premium pay for this duty on an annual basis instead of premium pay provided by other provisions of this subchapter, except for irregular, unscheduled overtime duty in excess of his regularly scheduled weekly tour. Premium pay under this paragraph is determined as an appropriate percentage, not in excess of 25 percent, of such part of the rate of basic pay for the position as does not exceed the minimum rate of basic pay for GS-10 (or, for a position described in section 5542(a)(3) of this title, of the basic pay of the position), by taking into consideration the number of hours of actual work required in the position, the number of hours required in a standby status at or within the confines of the station, the extent to which the duties of the position are made more onerous by night, Sunday, or holiday work, or by being extended over periods of more than 40 hours a week, and other relevant factors * * *

In our decision at 35 Comp. Gen. 710, *supra*, in which we explained the above provision, we stated in part:

> The Federal Employees Pay Act of 1945, as amended by section 208(a) of the act of September 1, 1954, 68 Stat. 1105, 5 U.S.C. 926, provides in section 401(1) that premium compensation may be authorized to employees having longer than ordinary tours of duty, a substantial part of which is performed in a standby status. All hours of duty, including the time in a standby status, are included in their regularly scheduled hours of duty. The amount of premium compensation to be paid under section 401(1) is based on certain designated factors including "the extent to which the duties * * * are made more onerous by * * * holiday work." Clearly, the Congress contemplated that employees receiving premium compensation because of considerations including the necessity for holiday work would, in fact, be required to work on holidays. To hold that such employees may be excused from work without charge to leave on a holiday falling within their regularly scheduled tours of duty would directly contradict the basis for authorizing the premium. * * *
>
> Accordingly, we agree with your view that administrative regulations prescribed under the authority given in section 30.801 of the Annual and Sick Leave Regulations, L–1–30, of the Federal Personnel Manual, may properly require that employees receiving premium compensation under section 401(1), in part because their positions require holiday work, should be charged leave for holidays not worked when such holidays fall within their regularly scheduled tours of duty.

The rule in this decision has been restated in Federal Personnel Manual (FPM) Supplement 990–2, Book 550, § 1–8b(2) (July 12, 1971), as follows:

> (2) *Holiday absence.* (a) An employee paid additional annual pay under section 5545(c)(1) of title 5, United States Code, and the Commission's regulations for regularly scheduled standby duty is charged leave for absence on holidays that fall within his regular tour of duty.

It is clear from our decision 35 Comp. Gen. 710, *supra*, that since section 5545(c)(1) provides that the amount of premium pay shall be determined from factors including the extent to which the employee's duties are made more onerous by holiday work, an employee would have to be charged leave for his absence if he took the day off on a holiday which was considered in setting his premium pay. However, it appears from a report by the Hospital Director of the Veterans Administration Hospital in Dallas that holiday pay was not considered in arriving at the appropriate percentage of standby premium pay to be paid the claimants for the holidays for which they were charged leave. Apparently, the claimants were not all required to remain on standby duty during all of the holidays designated by 5 U.S.C. 6103 (1970). Rather, it appears that, due to the reduced hospital workload on holidays, it was only necessary for one X-ray technician to be on standby duty. Since section 5545(c)(1) provides for premium pay for that standby duty required of an employee, it would follow that where an employee was not scheduled to perform standby duty on a holiday and, thus, the computation of his premium pay did not take into account the extent to which performing work on that holiday would have been made more onerous to him, section 5545(c)(1) would not require

that the employee work on the holiday or be charged leave for his absence. The above conclusion is consistent with FPM Supplement 990–2, Book 550, § 1–8b(2), cited above, which requires a charge of annual leave for absence on holidays within an employee's regular tour of duty, as that provision, which is based on our interpretation at 35 Comp. Gen. 710, *supra*, assumes that the setting of the premium pay took into consideration the necessity of holiday work. In the instant case, since standby duty was not required of the employees on the holidays in question and was, therefore, not considered in the setting of their premium pay, no charge to leave was required to be made. Decision 35 Comp. Gen. 710, *supra*, is amplified to the extent stated herein.

Accordingly the Veterans Administration should restore the leave charged to the employees.

[B–180391]

Quarters Allowance—Basic Allowance—Dependents—Husband and Wife Both Members of Armed Services

Female service member married to and residing with male member who receives basic allowance for quarters (BAQ) at the with dependent rate on account of children of a previous marriage is not entitled to BAQ at the with dependent rate for a child of the present marriage since, although this child is not claimed as a dependent by the other member, the child must be considered a dependent of the spouse who is receiving BAQ at the with dependent rate by virtue of other dependents and may not provide a basis for allowing both spouses to receive BAQ at the with dependent rate.

Transportation—Dependents—Military Personnel—Children—Mother and Father Members of Uniformed Services

Where child of marriage of female and male service members travels to a new location incident to change of permanent station of both members to same location, since child is female member's dependent under item 3, paragraph M1150–9, 1 Joint Travel Regulations, even though male member receives basic allowance for quarters (BAQ) at the with dependent rate which includes such child (which precludes female member's BAQ at the with dependent rate for such child) she may receive travel allowance for the child.

Transportation—Dependents—Military Personnel—Dislocation Allowance—Husband and Wife Both Members of Uniformed Services

Where female and male service members are married and reside in the same household and incident to a change of permanent station for each member the household is moved and the members continue to reside in the same household, only one dislocation allowance may be paid for such movement, and since the male member already has received such allowance, the female member's claim must be denied. However, upon repayment of the dislocation allowance previously received by male (junior) member, a dislocation allowance may be paid to the female (senior) member.

In the matter of dislocation, travel and quarters allowances, February 12, 1975:

This action is in response to a request for an advance decision received from the Finance and Accounting Officer, Headquarters III Corps and Fort Hood, Fort Hood, Texas, concerning the claim of Captain Annetta H. Cooke, USA, 466–72–3652, for dislocation, travel and quarters allowances on account of her son, Travis L. Cooke, who also is the son of First Lieutenant Quentin V. Cooke, USA, 548–60–6099, to whom she is married and with whom she resides. The request has been assigned PDTATAC Control No. 74–2 by the Pier Diem, Travel and Transportation Allowance Committee.

The record shows that by Special Orders No. 181, dated June 30, 1973, issued by Headquarters, US Forces Support District Rheinland Pfalz, Baumholder Personnel Service Company, APO New York 09034, Captain Cooke was transferred on a change of permanent station from Germany to Fort Hood, Texas, with a reporting date of September 21, 1973.

In addition, the record shows that by Special Orders No. 179, dated June 28, 1973, issued by Headquarters, 8th Infantry Division, APO New York 09111, First Lieutenant Cooke also was transferred on a change of permanent station from Germany to Fort Hood, Texas, with a reporting date of September 19, 1973.

Lieutenant Cooke was paid a dislocation allowance of $175.80 on voucher No. 801999 in September 1973 incident to his change of permanent station to Fort Hood. Lieutenant Cooke listed Captain Annetta Cooke and his son, Travis, as dependents; however, he did not claim travel allowances for them.

Captain Cooke now has presented a voucher claiming Travis as a dependent for the purpose of payment of her travel and a dislocation allowance entitlements incident to her change of permanent station from Germany to Fort Hood. She claims $84.49 for the cost of an airline ticket for her son. In addition, it is stated that Captain Cooke now desires to claim her son as a dependent in order to entitle her to basic allowance for quarters (BAQ) at the with dependent rate.

Since neither parent claimed Travis Cooke as a dependent before, the following questions are asked:

a. Which service member, Captain Cooke or Lieutenant Cooke, is entitled to claim their son, Travis, as a dependent?

b. May Captain Cooke and Lieutenant Cooke both claim Travis as a dependent for the purpose of receiving a dislocation allowance at the with dependent rate since payment of the dislocation allowance is not based upon any actual expenses incurred?

With respect to the first question it was held in a recent decision, B–180328, October 21, 1974, that when officers who are married have a

child and the husband is receiving BAQ at the with dependent rate on account of his children of a previous marriage, the birth of this child does not entitle the wife to be paid BAQ at the with dependent rate. That conclusion is currently required by Rule 14 of Table 3-2-4 of the Department of Defense Military Pay and Allowances Entitlements Manual (DODPM) as revised May 22, 1974.

In the present case, the record shows that Lieutenant Cooke is receiving BAQ at the with dependent rate on account of minor children from a previous marriage. Since the child born of his marriage to Captain Cooke is also his dependent, that child is automatically included in the class of dependents for which he is receiving BAQ payments, even though he does not specifically claim that minor child for BAQ purposes.

While Note 5, Table 3-2-4, DODPM (change 36, May 22, 1974) indicates that when members married to each other have a child or children of their marriage and each member has no other dependents they may elect which member will receive BAQ with dependents, and in the absence of a joint determination entitlement to BAQ with dependents for such child or children will rest with the senior member, such election or determination is not specifically authorized where one of the members also has a dependent apart from the marriage, in which event that member will be afforded BAQ with dependents.

Consequently, since Lieutenant Cooke already receives BAQ with dependents for dependents apart from his marriage to Captain Cooke, and such allowance also includes Travis Cooke, his dependent resulting from marriage to Captain Cooke, she may not receive BAQ with dependents because of this child.

In decision B-180328, *supra*, the spouse entitled to BAQ at the with dependent rate was in fact senior in rank. In this case the senior member has been paid at the without dependent rate and the junior member at the with dependent rate. Those payments are proper under the current regulations because the junior member had an existing entitlement to BAQ at the with dependent rate at the time of the birth of the child. However, it would not be objectionable if the members were permitted to select which of the two would receive the with dependent rate and which the without dependent rate in order that the members may receive a larger total payment.

With regard to Captain Cooke's claim for travel allowance for Travis L. Cooke, since it appears that her son is considered to be her dependent in accord with item 3, paragraph M1150-9, 1 Joint Travel Regulations, and payment for such travel has not been made to Lieutenant Cooke, Captain Cooke may be paid for her son's travel from Germany to Texas, if otherwise proper. Question a is answered accordingly.

Section 407(a) of Title 37, U.S. Code (1970), provides that:

(a) Except as provided by subsections (b) and (c) of this section, under regulations prescribed by the Secretary concerned, a member of a uniformed service—

(1) whose dependents make an authorized move in connection with his change of permanent station;

(2) whose dependents are covered by section 405(a) of this title; or

(3) without dependents, who is transferred to a permanent station where he is not assigned to quarters of the United States; is entitled to a dislocation allowance equal to his basic allowance for quarters for one month as provided for a member of his pay grade and dependency status in section 403 of this title. * * *

Promulgated pursuant to the above statutory authority paragraph M9000 of Volume 1 of the Joint Travel Regulations provides that the purpose of a dislocation allowance is to partially reimburse a member with or without dependents for the expenses incurred in relocating his household upon a permanent change of station or incident to an evacuation. Paragraph M9001 defines a member with dependents to include a member in a pay grade higher than E-4 who has dependents entitled to transportation in connection with a permanent change of station. Paragraph M9002 indicates that for a member with dependents the amount payable as a dislocation allowance is an amount equal to the applicable monthly rate of BAQ of the member on the effective date of his permanent change of station orders. Paragraph M9003 provides that a dislocation allowance is payable to a member with dependents whenever his dependents relocate their household in connection with a permanent change of station.

Dislocation allowances first were authorized by § 2(12) ch. 20, of the Career Incentive Act of 1955, 69 Stat. 18, approved March 31, 1955, now codified at 37 U.S.C. § 407(a). Regarding these allowances, in H. R. Report No. 90, 84th Cong., 1st Sess. 11 (1955), it is stated that:

In a great many cases, these moving expenses have resulted in severe monetary hardship to service families. At the present time there is no means for even partial reimbursement for such extra costs as lease forfeitures, temporary living charges in hotels and boarding houses pending establishment of a normal household, breakage and depreciation of household goods in transit, to name but a few. * * *

* * * * * * *

Thus the proposed legislation provides for a reasonable means of partially reimbursing a serviceman for expenses in connection with moving his family and household to a new duty station. It would simply authorize him to be paid an extra month's quarters allowance if his dependents actually move in connection with official orders directing a permanent change of station. * * *

In S. Report No. 125, 84th Cong. 1st Sess. 17 (1975), it is stated:

The reason for authorization of the dislocation allowance is the variety of non-reimbursable costs which are incurred in connection with the move of dependents on a permanent change of station.

That legislative history shows that while the dislocation allowance is not based upon any specific expenses having been incurred by a member, the purpose of the allowance is to provide reimbursement for expenses normally incurred in connection with the movement of a

member's household incident to a change of permanent station. When husband and wife are members of the uniformed services who reside in the same household and incident to a change of permanent station the household is moved, and both members continue to reside in the household, there would appear to be no justification for the payment of more than one dislocation allowance since only one change of residence for the family of the members is involved.

Since Lieutenant Cooke has received a dislocation allowance based on the movement of the household from Germany to Texas, a dislocation allowance may not be authorized for Captain Cooke, for movement of the household. Question b is answered accordingly. However, it would not be objectionable to pay a dislocation allowance to Captain Cooke, which would be a greater amount than that received by Lieutenant Cooke, upon repayment of the dislocation allowance previously received by him.

[B-182005]

Leaves of Absence—Sick—Recredit of Prior Leave—Break in Service

Although substitute teachers in District of Columbia do not earn sick leave under D.C. Teachers' Leave Act of 1949 or Annual and Sick Leave Act of 1951, service as substitute in D.C. is service for purpose of leave regulations which provided during period in question that sick leave could be recredited after separation from service of less than 52 continuous calendar weeks. Former substitute reemployed by Department of Health, Education, and Welfare is, therefore, entitled to recredit of sick leave earned prior to substitute teaching, but amount for recredit is limited by Sick Leave Act of 1936 which, until 1952, limited accrued sick leave to 90-day maximum.

In the matter of recredit of accrued sick leave, February 18, 1975:

This action is in response to a letter dated July 18, 1974, from a finance and accounting officer in the Department of the Army (forwarded to our Office as an enclosure in letter of August 5, 1974, from the Acting Executive Officer of the Office of the Comptroller, Department of the Army), requesting an advance decision concerning the propriety of retroactively recrediting Mr. Jacob B. Lishchiner, presently a civilian Army employee, with accrued sick leave and sick leave allegedly earned while he was serving as a substitute teacher in the District of Columbia.

From October 13, 1941, when he accepted an appointment in the United States Treasury Department, until December 26, 1952, when he left his position with the United States Air Force, Mr. Lishchiner was, except for a period from October 22, 1945, to July 29, 1946, a full-time employee of the Federal Government, allegedly accruing 875 hours of sick leave. Mr. Lishchiner then served as a substitute teacher in the District of Columbia from October 12, 1953, to January 23, 1955, and

is now claiming that he accrued an additional 80 hours of sick leave during this period. (Mr. Lishchiner also was temporarily employed by the United States Post Office during part of the period from December 7, 1953, to January 10, 1954.) On January 24, 1955, he was hired by the Department of Health, Education, and Welfare (HEW) and was subsequently transferred without a break in service to a position with the Army at Picatinny Arsenal where he is presently employed.

Mr. Lishchiner has now requested that he be recredited with both the 875 hours of sick leave he claims he had accrued upon his separation from the Air Force on December 26, 1952, as well as the additional 80 hours of sick leave allegedly "earned" as a District of Columbia substitute teacher from October 12, 1953, to January 23, 1955.

In his letter of July 18, 1974, the finance and accounting officer asked the following specific questions in relation to the foregoing:

a. Did Mr. Lishchiner earn sick leave as a substitute teacher for the District of Columbia assuming that substitute teaching is considered Federal Service for the purposes of continuity of service. If he did so earn sick leave, what amount did he earn, and can it now be recredited?

b. If substitute teachers are not under the District of Columbia Leave Act, does the lapse of the period from December 26, 1952 to January 24, 1955 (in excess of one year) prevent recrediting Mr. Lishchiner's sick leave of 875 hours at this time.

c. Assuming Mr. Lishchiner had 875 hours of unused sick leave credit at the time he resigned from the Air Force, could this full amount be carried forward for recrediting of sick leave at this time in view of the limitations of the Sick Leave Act of 1936.

Concerning the question of whether substitute teachers in the District of Columbia earn sick leave, it is clear that they are not now and never have been so entitled to accrue sick leave under the act which is applicable generally to employees of the United States and District of Columbia Governments, namely the Annual and Sick Leave Act of 1951, as amended, 5 U.S. Code § 6301 *et seq.* In this regard, section 202 of the act, presently 5 U.S.C. § 6301, is specific in removing substitute teachers in the District of Columbia from the coverage of the act. During the period in question, section 202 provided in pertinent part as follows:

(a) Except as provided in subsection (b), this title shall apply to all civilian officers and employees of the United States and of the government of the District of Columbia * * *.

(b) (1) This title shall not apply to—

(A) teachers and librarians of the public schools of the District of Columbia;

(B) part-time officers and employees * * * for whom there has not been established a regular tour of duty each administrative workweek * * *.

However, the District of Columbia Teachers' Leave Act of 1949, approved October 13, 1949, 63 Stat. 842, (31 D.C. Code 691) did authorize District of Columbia teachers to be credited with paid cumulative sick leave and provided in pertinent part as follows:

* * * all teachers and attendance officers in the employ of the Board of Education of the District of Columbia shall be entitled to cumulative leave with pay for personal illness, presence of contagious disease or other death in the home, or pressing personal emergency, in accordance with such rules and regulations as the said Board of Education may prescribe. Such cumulative leave with pay shall be granted at the rate of one day for each month from September through June of each year, both inclusive. The total cumulation shall not exceed sixty days for probationary and permanent teachers and attendance officers, and the total cumulation shall not exceed ten days for temporary teachers and attendance officers.

SEC. 2. In addition to the cumulative leave provided by the first section of this Act each probationary and permanent teacher shall be credited on July 1, 1949, with one day of leave with pay for each complete year of service in the public schools of the District of Columbia prior to July 1, 1949 * * *.

* * * * * * *

SEC. 6. The Board of Education is hereby authorized to employ substitute teachers and attendance officers for service during the absence of any teacher or attendance officer on leave with pay and to fix the rate of compensation to be paid such substitutes.

SEC. 7. The Board of Education is hereby authorized to prescribe such rules and regulations as it may deem necessary to carry this Act into effect. The term "teacher" used in this Act shall include all employees whose salaries are fixed by article I of title I of the District of Columbia Teachers' Salary Act of 1947. The term "attendance officers" shall include all employees whose salaries are fixed by class 32 in article II of title I of the District of Columbia Teachers' Salary Act of 1947.

Although this statute did not specifically provide that substitute teachers were not entitled to earn sick leave, a careful reading of the statute indicates that it was not intended to apply to substitutes. Section 1 of the act does provide that "all teachers * * * in the employ of the Board of Education of the District of Columbia shall be entitled to cumulative leave with pay for personal illness * * *" but that section only refers specifically to probationary, permanent and temporary teachers. Furthermore, use of the term "substitute teachers" in section 6 indicates that temporary teachers and substitute teachers are not, in fact, one and the same. The term "teacher" as used in the act is defined in section 7 (31 D.C. Code 697) to include "all employees whose salaries are fixed by article I of title I of the District of Columbia Teachers' Salary Act of 1947." Examination of the District of Columbia Teachers' Salary Act of 1947, approved July 7, 1949, ch. 208, section 1, 61 Stat. 248 (which was later repealed as of July 1, 1955, by the District of Columbia Teachers' Salary Act of 1955, approved August 5, 1955, 69 Stat. 530), reveals that article I of title I makes no reference to the salaries of substitute teachers, which subject was dealt with in title V of the act. Although the District of Columbia Teachers' Leave Act of 1949 has subsequently been amended and the Teachers' Salary Act of 1947 has since been repealed, the applicable law as it relates to such leave for substitutes has not been changed since 1949.

Consequently, it appears that during the period in question from October 1953 to January 1955, substitute teachers in the District of Columbia were not legally entitled to be credited with paid sick leave. This view is in accordance with the position we adopted in B–113052,

February 12, 1953, concerning the applicability of the 1949 Leave Act to the use of sick leave by several District of Columbia teachers in which we stated in pertinent part the following:

> Referring to the case of Mary R. Vail, it appears that she had no service as a school teacher prior to her appointment as a temporary teacher on September 1, 1952, *other than a short period of service as a substitute teacher on a per diem when actually employed basis which did not entitle her to earn leave.* [Italic supplied.]

Furthermore, we have learned that the District of Columbia Board of Education neither credited substitute teachers with paid sick leave in the period from 1953 to 1955 nor does it do so today but, rather, substitutes have been and presently are employed on a per diem basis.

In accordance with the foregoing, it is the opinion of this Office that Mr. Lishchiner did not earn and is not now entitled to be credited with any sick leave for the period during which he was employed as a substitute teacher in the District of Columbia from October 12, 1953, to January 23, 1955.

The second question submitted asks whether Mr. Lishchiner can now be recredited with the sick leave he accrued during his Federal employment prior to his appointment as a substitute teacher or whether "the lapse of the period from December 26, 1952 to January 24, 1955 (in excess of one year) prevent(s) recrediting Mr. Lishchiner's sick leave * * * at this time." Although we note that during the period in question Mr. Lishchiner was also employed as a seasonal employee with the Post Office from December 7, 1953, to January 10, 1954, for the purpose of this inquiry we will disregard this brief period of employment.

When an employee is reemployed after a break in service, his right to recredit of sick leave is determined under the applicable laws and regulations in effect at the time of his reemployment. *See* B-146610, September 13, 1961. Although the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. § 6301 *et seq.*, has no specific provisions concerning recrediting of sick leave, section 206 of that act, now 5 U.S.C. § 6311, authorizes the Civil Service Commission to prescribe such rules and regulations as may be necessary for the administration of the act. The pertinent regulations in effect at the time of Mr. Lishchiner's employment by HEW were contained at 5 C.F.R. 30.702 and provided in pertinent part as follows:

> (a) Upon reemployment of an employee subject to this act who was separated on or after January 6, 1952, without a break in service, or a break of not more than 52 continuous calendar weeks, the employee's sick leave account shall be certified to the employing agency for credit or charge to his account.

Mr. Lishchiner left his position with the Air Force on December 26, 1952, and was employed as a substitute teacher in the District of Columbia on October 12, 1953, a period less than 1 full year (52 continuous

calendar weeks). Insofar as Mr. Lishchiner was appointed by HEW on January 24, 1955, immediately after his separation from the District of Columbia, it is readily apparent that if employment as a substitute teacher in the District of Columbia is determined to be within the scope of the term "service" as used in 5 C.F.R. 30.702(a), Mr. Lishchiner would now be entitled to have his prior sick leave recredited since he would not have experienced a "break in service" of more than "52 continuous calendar weeks."

As stated previously, Mr. Lishchiner's employment by the District of Columbia as a substitute teacher was not subject to the Annual and Sick Leave Act of 1951, pursuant to which 5 C.F.R. 30.702 was issued. However, this fact alone does not necessarily imply that such employment does not constitute "service" within the scope of that term as used in the regulations so as to avoid a break in service of more than 1 year. In this regard our decision in 47 Comp. Gen. 308 (1967) is relevant. That case involved an employee of the Office of the Architect of the Capitol, Mr. Robert J. Wallace, and the question of whether accumulated sick leave could be recredited to his account. After a period of full-time employment with the Office, Mr. Wallace was voluntarily separated and within 1 year was subsequently reemployed by the Office under several temporary appointments during which he was paid on a "when-actually-employed" basis. Later when Mr. Wallace was transferred to a full-time position on the staff of the Office of the Architect of the Capitol, he requested that he be recredited with the sick leave he earned during his initial full-time employment with the Office. Although we concluded that Mr. Wallace's temporary employment was not subject to the Annual and Sick Leave Act of 1951, we stated the following in regard to his request for recredit:

> In 31 Comp. Gen. 485, it was held that an employee serving under a when-actually-employed appointment does not necessarily forfeit the sick leave he has previously accrued in that if subsequently assigned to a position having a regularly scheduled tour of duty his accrued sick leave may be used in accordance with the Annual and Sick Leave Regulations. Counting the periods of temporary employment there was no single break in Mr. Wallace's service which was as much as 52 weeks in length.
>
> We understand from the Civil Service Commission that the term "break in service" as used in the above regulation was intended to refer to an actual separation from the Federal service. That view appears to be supported by the wording of past regulations and we perceive no objection thereto.
>
> Since Mr. Wallace's service was not interrupted by an actual break of 52 weeks, his sick leave should have been recredited to him upon reemployment in a regular position on July 14, 1956. * * *

Since the Annual and Sick Leave Act of 1951 applies equally to both employees of the United States and those of the District of Columbia (5 U.S.C. § 6301), and since we determined in the above case that Mr. Wallace's temporary employment in the Office of the Architect of the Capitol did constitute "service" within the meaning of 5 C.F.R. 30.702,

even though such service was specifically excluded from the coverage of the act (5 U.S.C. § 6301(b) (1) (B)), it logically follows that Mr. Lishchiner's employment by the District Government, although specifically excluded from the application of the act itself, can also be considered "service" for the purposes of 5 C.F.R. 30.702.

Apparently, the Civil Service Commission which promulgated the regulation in question is in agreement with our interpretation. In this regard the Director of the Commission's New York Regional Office stated the following in a letter dated September 10, 1973, to the civilian personnel officer at Picatinny Arsenal:

> The key question in this case is whether Mr. Lishchiner's service as a D.C. substitute teacher from October 12, 1953 to January 23, 1955, was Federal or D.C. Government service; if it was then there was no break-in-service, for sick leave recredit purposes, of more than one year. As previously noted * * * it was District of Columbia service, and this is equivalent to Federal service under leave provisions. Since the gap between the termination of his Air Force employment as of December 24, 1952, and his employment by the District of Columbia starting October 12, 1953, was less than one year upon employment by HEW on January 24, 1955, he was entitled to recredit of the previously accumulated sick leave in question.

Furthermore, our conclusion as regards Mr. Lishchiner is in accordance with our holding in B-113052, *supra*, in which we considered, among other matters, whether sick leave earned by a temporary teacher in the District of Columbia during a prior appointment was available for use at the beginning of the school year although the continuous service of the teacher was interrupted by a period of substitute service in excess of 1 year. In our decision which made reference to 5 C.F.R. 30.702, we held that the teacher in question had not forfeited her sick leave by reason of her service as a substitute since she was continuously on the rolls as a school teacher, and we voiced no objection to her being placed on sick leave as of the beginning of the school year.

In accordance with the foregoing, it is the opinion of our Office that all of the sick leave properly creditable to Mr. Lishchiner when he left the Air Force on December 26, 1952, can now be recredited to his account since at no time did he suffer a "break in service" of more than 52 continuous calendar weeks.

However, as suggested in question 3, the proper amount of sick leave for recredit remains to be determined. Prior to January 6, 1952, which was the effective date of the Annual and Sick Leave Act of 1951, there was a statutory limit on the amount of sick leave that could be accrued by a Government employee. Section 2 of the Sick Leave Act of March 14, 1936, ch. 141, 49 Stat. 1162 (5 U.S.C. 30g (1948)), provides in pertinent part as follows:

> On and after January 1, 1936, cumulative sick leave with pay, at the rate of one and one-quarter days per month, shall be granted to all civilian officers and employees, the total accumulation not to exceed ninety days * * *

At the end of 1951 while the above quoted provision was still in effect, Mr. Lishchiner could only have legally accumulated a maximum of 720 hours of sick leave (90 days). In other words, until the Annual and Sick Leave Act of 1951 became effective on January 6, 1952, the amount of sick leave that could accrue during or at the end of a calendar or leave year could not exceed 90 days, with any leave in excess of that amount to be forfeited. *See* 22 Comp. Gen. 986 (1943). Therefore, assuming Mr. Lishchiner had accumulated the maximum amount of accrued sick leave at the end of 1951, 720 hours, and assuming further that no sick leave was used during 1952, Mr. Lishchiner could have accumulated, at most, an additional 104 hours (13 days) of sick leave during 1952 for an absolute maximum of 824 hours of sick leave for possible recrediting at this time.

In accordance with the foregoing, it is the opinion of this Office that up to 824 hours of sick leave can now be recredited to Mr. Lishchiner's account, the precise amount to be determined in accordance with prescribed procedure.

[B-181953]

Pay—Service Credits—Constructive—Medical and Dental Officers—Retired Pay Computation

Since 37 U.S.C. 205 only reduces constructive service credit for professional education of medical and dental officers by amount of service during period of member's professional education with which member is otherwise credited and since 10 U.S.C. 1405 restricts right of officers to count inactive service after May 1958 for retirement multiplier purposes, these provisions should be interpreted to permit such officer who was in the Reserves during professional training to receive the same amount of constructive service toward retirement he would be entitled to had he not been in the Reserves. However, any credit he might otherwise have accrued during the same period by reason of Reserve membership would not be for use in determining the multiplier for computation of retired pay.

In the matter of constructive service credits to medical and dental officers for retired pay computation purposes, February 19, 1975:

This action is in response to a letter dated July 30, 1974, from the Assistant Secretary of Defense (Comptroller), requesting an advance decision concerning the interpretation which should be given to certain provisions of the act of April 30, 1956, ch. 223, 70 Stat. 119, (10 U.S. Code 3294), and the act of May 20, 1958, Public Law 85-422, 72 Stat. 122, (37 U.S.C. 205), which relate to the service creditable to certain medical and dental officers for the purpose of computing their retired pay entitlement.

The Assistant Secretary states in his letter that the act of April 30, 1956, *supra*, was enacted for the purpose of reversing the alarming rate of losses among career medical and dental officers of the Armed Forces. The Assistant Secretary goes on to say that in order to achieve this, the act provided additional compensation to such officers through construc-

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tive service credits for pay longevity purposes. However, it is stated that section 3[2] of the act provides that the constructive service credit must be reduced by the amount of service otherwise creditable to medical and dental officers which covers any part of that professional education or internship.

With regard to the act of May 30, 1958, *supra*, the Assistant Secretary states that among other things it amended the law relating to the computation of retired pay, the effect of which was that all service, including the constructive service authorized by the 1956 act for medical and dental officers and inactive time for Reserve membership prior to June 1, 1958, would be used in determining the multiplier used in computing retired pay. However, it is pointed out that the 1958 act required that service in a Reserve component on or after June 1, 1958, could be credited only to the extent of participation as actual active service, active duty for training, day for day credit for each drill performed, credit for correspondence courses completed, and 15 days' gratuity credit for each year as a member in an active status Reserve component.

The Assistant Secretary states that a question has been raised concerning a possible inequity which may arise in certain circumstances when these two statutes are read together, whereby a member of a Reserve component receiving his professional education could be penalized in relation to a similarly situated officer who had not been in the Reserves during his professional education and internship. The following example was used to illustrate the potential inequity:

> * * * Both [officers A and B] attended dental school from 1 June 1958 to 31 May 1962. They both were commissioned in the dental corps and entered on active duty 10 June 1962. They both will retire after 20 years continuous active duty. Officer A did not become a member of a reserve component during the period of his educational training and accordingly received a four full years of constructive credit for pay longevity purposes in accordance with P.L. 84–497. Officer B was a member of a reserve component for two years during his educational training. Accordingly, his constructive credit for pay longevity purposes is reduced by two years since his two years in the reserves is "otherwise credited" under P.L. 85–422. Retired pay for both officers will be computed as follows:
>
> *Officer A*
> 2½% of basic pay at time of retirement, multiplied by 24 (20 years plus 4 years constructive credit) =60% of basic pay.
> *Officer B*
> 2½% of basic pay at time of retirement multiplied by 22 (20 years plus two years constructive credit, plus 30 days representing gratuitous credit of 15 days for each of his two years as a member of a Reserve component) =55% of basic pay.

Thus, if, as suggested in the Assistant Secretary's letter, the act of April 30, 1956, is interpreted as requiring a period of Reserve membership to be substituted for the allowable amount of constructive service credit even though such Reserve membership status is not itself

counted "toward retirement" under Public Law 85-422, there would be an actual loss of virtually all credits toward retirement which would otherwise accrue for any period during which the member was both serving in the Reserves and receiving his professional training.

The Assistant Secretary suggests as a possible alternative interpretation of the statutes in question to only require a reduction of any Reserve service credits otherwise authorized which occur during any part of a member's professional education or internship which is credited as constructive service for retirement multiplier purposes. This would eliminate the "double counting" of both Reserve service and constructive service but would not penalize medical and dental officers with Reserve service.

With regard to the foregoing, the Assistant Secretary points out that if the first interpretation is correct, then remedial legislation will be necessary in order to correct the inequity. Further, that while such proposed legislation has already been prepared, our interpretation of these statutes is requested in order to determine whether it will be necessary to have such corrective legislation introduced in Congress.

Section 2 of the act of April 30, 1956, ch. 223, 70 Stat. 121, amended section 202 of the Career Compensation Act of 1949, 37 U.S.C. 233—which on codification became in part clauses (7) and (8) of 37 U.S.C. 205(a)—to authorize physicians and dentists of the uniformed services to be credited with either 4 or 5 years of constructive service, representing the required period of professional training and, in some cases, internship, in the computation of the rate of basic pay to which they would be entitled upon entry into military service. However, another portion of section 2 of that act—which was codified as 37 U.S.C. 205(b)—provided: "that the service authorized to be credited to an officer under this clause shall be reduced by the amount of any service otherwise credited under this section which covers any part of the period of the officer's professional education or internship."

The legislative history of the 1956 act makes it clear that Congress intended to place medical and dental officers in a position comparable to their line officer contemporaries. In this regard, the following statement is contained in S. Report No. 1756, 84th Cong., 2nd Sess. 8 (1956) concerning the constructive service credit provision of the then proposed bill:

> * * * By recognizing the period of professional education for longevity pay purposes, medical and dental officers would be in the same pay bracket for their grade as their line officer contemporaries who entered military service at the same time as the medical and dental officers entered their professional schools. * * *

Also in this connection, *see* 37 Comp. Gen. 237 (1957) and cases cited therein.

The legislative history of the 1956 act further shows that the intent of Congress in enacting the provisions now contained in 37 U.S.C. 205(b) was to insure that periods of time for which constructive service was to be counted for basic pay longevity purposes under the act could not be counted more than once in any case where there was otherwise creditable service for the same period. In this connection, the following statements are contained in H.R. Report No. 1806, 84th Cong., 2d Sess. 11 (1956):

> Section 2 of the bill amends the Career Compensation Act of 1949 so that physicians and dentists of the uniformed services will be credited with 4 years—and in the case of physicians who have completed an internship, 5 years—constructive service credit for their professional education in computing their cumulative years of service for purposes of determining their basic pay. Under this section, a medical officer entering on active duty after completing an internship would, even though he had had no prior service, be credited with 5 years of service for pay purposes. A physician who had a military internship could not count such service twice under this section. *Likewise, a person who had been a member of a Reserve component (not on active duty) while in medical school or while undergoing a civilian internship could not count such period twice for pay purposes under this section.* [Italic supplied.]

Section 11 of the act of May 30, 1958, Public Law 85–422, 72 Stat. 130, added section 1405 to Title 10, U.S. Code, which currently provides in pertinent part that for the purposes of the sections of Title 10, relating to retirement from an armed force and therein enumerated, the years of service to be used as a multiplier in computing retired pay, are as follows:

> (1) his years of active service;
> (2) the years of service credited to him under section 205(a) (7) and (8) of title 37;
> (3) the years of service, not included in clause (1) or (2) with which he was entitled to be credited, on the day before the effective date of this section, in computing his basic pay; and
> (4) the years of service, not included in clause (1), (2), or (3), with which he would be entitled to be credited under section 1333 of this title, if he were entitled to retired pay under 1331 of this title.

In S. Report No. 1472, 85th Cong., 2d Sess. 25 (1958), to accompany H.R. 11470, which eventually became Public Law 85–422, the following statement is made:

> The effect of this rule is to eliminate, with one exception, the future accumulation of years of nonactive service for use as a multiplier in the computation of retired pay. However, such years accumulated before the effective date of this act will continue to be credited. * * *

Congress in enacting the 1958 military pay bill neither eliminated the longevity concept of military pay nor did it delete section 202 of the Career Compensation Act of 1949. Rather, it made conforming changes in the retirement laws with respect to the crediting of service for computing retired pay by adding section 1405 to Title 10, U.S. Code. In this regard, it is to be observed that the provisions of clause (2) of that section specifically authorize the crediting of all medical and

dental professional education and internship for retired pay purposes, and that clause (4) provisions are only creditable when and to the extent that they are "not included in clauses (1), (2) or (3)."

Thus, the applicable law provides for the determination of the multiplier in computing retired pay by adding to active service the constructive service which is involved in this case. To that total may be added certain Reserve service credits but only if the credit for such service has not been allowed as active service or constructive service.

It is reasonably clear that Public Law 85–422 was not intended to alter the principle of "comparable treatment" used for purposes of computing basic pay and adopt a different method to compute retired pay whereby medical and dental officers who did not enter military service until the completion of their professional education would be placed in a position superior to that of their own contemporaries who entered Reserve service before or during their professional training.

Accordingly, it is the view of this Office that, in the circumstances enumerated in the Assistant Secretary's letter, a medical or dental officer who was in the Reserves for a period of time during which he also was receiving his educational training would be entitled to receive the same amount of constructive service credit with which he would have been credited had he not been in the Rerserves. However, any credit he might otherwise have accrued during the same period by reason of his Reserve membership would not be for use in determining the multiplier for computing retired pay.

In view of the foregoing, we conclude that remedial legislation is not required.

[B–182943]

Subsistence—Per Diem—Temporary Duty—At Former Permanent Duty Station—Prior to Reporting to New Duty Station

Claim of Atomic Energy Commission employee for per diem is allowable for temporary duty at former permanent duty station (Germantown, Md.) before reporting for duty at new permanent duty station (Las Vegas, Nev.) since employee did not accomplish permanent change of station move to Las Vegas solely because of urgent need for services at former station and has vacated residence at former duty station, entered real estate purchase contract at new station and shipped household goods to new station in reliance on official notification of transfer.

In the matter of per diem during temporary duty assignment at former permanent duty station, February 20, 1975:

This matter concerns the request of a certifying officer for an advance decision as to the propriety of paying the claim of Leon Silverstrom, an employee of the Atomic Energy Commission (AEC), Germantown, Maryland, for per diem in lieu of subsistence while performing temporary duty at Germantown.

According to the submission from the certifying officer, Mr. Silverstrom entered into a temporary duty status at Germantown shortly after his appointment and authorized transfer to another position with the AEC at Las Vegas, Nevada. This appointment and the accompanying change in permanent duty station were formalized by documents issued during early November 1974, with an effective date of transfer of December 1, 1974. Upon receiving notice that his reporting date in Las Vegas would be December 1, 1974, Mr. Silverstrom terminated his apartment lease, traveled to Las Vegas on a house hunting trip and signed a real estate purchase contract, vacated his apartment, and delivered his household goods for shipment to Las Vegas.

Soon after these events occurred Mr. Silverstrom was unexpectedly called upon by AEC Commissioner William A. Anders, who is now Chairman of the new Nuclear Regulatory Commission (regulatory successor to the AEC), for immediate temporary assistance in carrying out the organizational transition from the AEC to the new Commission. The beginning date of this temporary assignment closely coincided with the date Mr. Silverstrom was scheduled to begin duty in Las Vegas, December 1, 1974. Because his services were urgently needed by Commissioner Anders, Mr. Silverstrom did not report for duty in Las Vegas on December 1, 1974, but remained at his old duty station for an additional period of time. We have informally been advised that he began his authorized travel to Las Vegas, on or about January 2, 1975, and has recently entered upon his duties there.

Inasmuch as Mr. Silverstrom's temporary duty was performed at Germantown, which remained his permanent duty station until he entered upon his new assignment in Las Vegas, a question was raised as to whether the payment of per diem for temporary duty at Germantown would be proper under the Federal Travel Regulations and decisions of this Office.

It is clear under the Federal Travel Regulations (FPMR 101–7), May 1973, para. 187.6a, that per diem in lieu of subsistence may not be allowed at an employee's permanent duty station. In addition, under FTR para. 2–1.4, the effective date of a transfer from one duty station to another is the date on which the employee reports for duty at the new station. Construing these two provisions together would appear to impose a mandatory requirement that in all cases an employee must actually report for duty at the new duty post before it could be regarded as a permanent duty station, so as to entitle the employee to per diem at another place (including the former permanent duty station) where temporary duty is performed.

Various Comptroller General decisions have, however, recognized that special circumstances justify exceptions to the general rule that precludes per diem at the permanent duty station. For example, excep-

tions have been made when an employee incurred expenses for lodging and meals because permanent quarters were relinquished in reliance on a valid transfer order effective on a date certain and travel to the permanent duty station could not be performed because of mechanical trouble on the only available flight to his new station (B–140423, September 24, 1959) or because of an airline strike that prevented travel to an overseas duty post (B–160366, January 12, 1967). Another decision allowed per diem to a new employee while performing temporary duty in the same area where she had been recruited and before she actually began duty at a permanent station in another area. The allowance was based on the fact that she had taken significant steps (securing housing and moving household goods) to establish residence at the permanent duty station designated by her appointment documents. *See* B–147047, November 9, 1961.

The facts presented in the instant case warrant application of the exceptional circumstances rule to allow payment of per diem at the permanent duty station. We agree with the AEC's General Counsel whose opinion was included in the submission, that Mr. Silverstrom reasonably relied on the travel orders issued by AEC authorizing his permanent change of station to Las Vegas on December 1, 1974, and significantly changed his position by vacating his apartment near Germantown, entering into a real estate purchase contract in Las Vegas, and shipping his household goods to Las Vegas. It appears that he had no choice but to incur the subsistence expenses claimed when suddenly ordered to perform a stint of temporary duty at his old station on an emergency basis.

Therefore, under the circumstances in this case, we have no objection to paying Mr. Silverstrom per diem in lieu of subsistence while performing temporary duty in Germantown from December 1, 1974, the date he was scheduled to report for duty in Las Vegas, to the date he completed his temporary duty in Germantown.

[B–181165]

Contracts—Negotiation—Wage Increases—Agency's *v.* Protester's Version

Considering statements advanced by protester and procuring agency concerning contention that agency directed protester to raise proposed wage rates during negotiations to protester's competitive disadvantage, it is concluded that agency's view of negotiations—that its comments were in the nature of concern only over lowness of wage rates proposed—is more reasonably consistent with described events than protester's version.

Contracts—Negotiation—Requests for Proposals—Specification Requirements

Prudent offeror in negotiated procurement should have realized that, in accordance with request for proposals direction for offerors to submit proposals on

most favorable terms from technical and cost considerations, price, especially with regard to fixed-price award ultimately selected, would still have significant importance in selecting proposed contractor, notwithstanding prior agency expressions of concern about lowness of wage rates proposed by offeror for cost-type award contemplated earlier in procurement.

Contracts—Negotiation—Offers or Proposals—Qualifications of Offerors—Experience

Since "similar or related" as used in "Qualifications" evaluation standard of request for proposals permits rational interpretation that phrase means similar experience from "functional or operational" viewpoint as well as similar experience from purely "content" viewpoint, "Qualifications" rating given successful offeror, which lacked similar "content" experience but possessed similar "functional" experience, cannot be questioned.

Contracts—Protests—Contracting Officer's Affirmative Responsibility Determination—General Accounting Office Review Discontinued—Exceptions—Fraud

Complaint questioning affirmative responsibility determination because of contractor's alleged lack of financial resources cannot be considered in view of policy not to review affirmative responsibility determinations absent allegation of fraud or bad faith.

Contracts—Protests—Timeliness—Negotiated Contract

Complaint (filed May 1, 1974) relating to solicitation defects is untimely under protest procedures because it was not filed prior to final closing date for negotiated procurement on April 17, 1974; complaint relating to alleged improper negotiation procedures is untimely filed since it was not made within 5 days from date basis of complaint was known. Consequently, complaints are not for consideration.

In the matter of Technology, Inc., February 24, 1975:

This protest questions the rationale supporting the award of a negotiated, fixed-price contract. For the reasons set forth, it is our view that the award is not subject to question.

On February 19, 1974, request for proposals (RFP) No. 641–4–2041 was issued by the National Center for Toxicological Research (Center) of the Department of Health, Education, and Welfare (HEW), for diet preparation services for laboratory animals. A cost-plus-fixed-fee (CPFF) contract was anticipated for the work, but the RFP also advised that consideration would be given to other contract types if proposed.

Evaluation criteria for the RFP were, as pertinent:

		Weight
(a)	Plan for accomplishing the work * * *	40
(b)	Qualifications of the offeror and key personnel	30
	Offeror—Special notation should be made of similar or related programs performed for the Government * * *	10
	Personnel—Information is required which will show the composition of the work group, its general qualifications, and recent experience with similar projects * * *	20
(c)	Understanding the scope of the work * * *	30

The only information in the RFP about the importance of cost as an evaluation factor was as follows:

> * * * it is important that * * * proposal[s] be submitted initially on the most favorable terms from * * * technical and cost standpoints. (Paragraph A(7) of the RFP's General Instructions.)

On March 21, 1974, three proposals for the work were received from Program Resources, Inc. (PRI), Technology, Inc., and the University of Arkansas.

Initial proposals were then scored. The scores as of March 26, 1974, were:

Technology	74.25
PRI	73.50
University of Arkansas	62.50

Cost analysis was also made of the received proposals. PRI's CPFF proposal was considered to have a number of proposed costs which needed to be reduced. The company also proposed a fixed-priced proposal.

The Center's cost analyst did not take exception to any cost element in Technology's CPFF proposal, although the analyst was concerned about the salaries proposed for technicians and whether Technology could retain personnel with the proposed salaries.

Prior to commencing negotiations with PRI and Technology, the Center outlined the areas to be covered in negotiations as follows:

I. *PRI*
  (a) Type of contract in order of preference:
    (i) Firm Fixed Price
    (ii) Fixed Price, Indefinite Quantity
    (iii) Cost Sharing (with fee)
    (iv) Cost-Plus-Fixed-Fee

* * * * * * *

  (c) reduction in price/cost * * *

* * * * * * *

II. *Technology*
  (a) Type of Contract, in order of preference: (there followed the listing of types as set forth for PRI)

* * * * * * *

  (c) Adjustment in price based on the cost analyst's comment about low salaries for technicians * * *

The Center reports that negotiations were then held with each offeror during the week prior to April 5, 1974. Each offeror made a verbal presentation of its proposal.

All three offerors were requested to submit "best and final" proposals by April 5, 1974. Final proposals received on April 5 were then scored with the following results:

PRI	81.4
Technology	81.4

(University of Arkansas did not respond)

The narrative accompanying the final scores shows that PRI rated the highest score because it "understood the scope of work only slightly better than Technology, Inc." and its proposed project director appeared to be better qualified than Technology's project director. PRI and Technology received identical scores under the "Qualifications" evaluation standard of the RFP. PRI received such a score, as later explained by the Center, because the company "demonstrated [its] ability to perform on an operations-type contract as they are presently operating the NCTR [computer facility] data center under contract"—although the company had "no direct experience in diet preparation."

By contrast, Technology, although possessing a sound understanding of the scope of the work, did not appear "to have in-depth knowledge as did PRI." Technology's strong points related to its experience on programs involving experiments using laboratory animals and the company's interest in establishing and implementing a sound quality control program.

Notwithstanding the submission of "best and final" proposals as of April 5, negotiations with Technology and PRI were subsequently continued. Both offerors were informed, among other things, of the Government's objective to negotiate a fixed-price or cost-sharing contract rather than the cost-plus-fixed-fee type. Discussion with Technology also covered "salaries proposed for technicians which appear[ed] to be quite low."

All parties eventually agreed on a fixed-price, indefinite quantity contract which would be based on the Government estimate of the number of animal feeder boxes (489,534) to be filled. A revised date (April 17, 1974) was set for the submission of final offers based on this contract type. The Center states that prior to the submission of final proposals, both offerors were told that "price could be the deciding factor (in selecting the successful offeror)."

Best and final offers were submitted by both concerns on April 17. On April 22, 1974, a contract for the services was awarded to PRI, since its technical proposal was considered "superior to that submitted by Technology" and its price was the lowest received.

Technology complains that the Center, by questioning the company's proposed salaries during negotiations, directed Technology to raise its final fixed-price offer to such a degree that PRI, rather than Technology, submitted the lowest-priced offer.

Technology further contends that it should have been told to "consider raising its rates—'but at its own risk' since, as it turn[ed] out, this was a highly-competitive procurement."

The Center rejects the suggestion that it directed PRI to raise its labor rates. It insists that it expressed legitimate concern only over the rates, and it contends that Technology: (1) downgraded the effect of

increasing its labor rates during negotiations by stating: "[t]hese increased [labor] costs have been offset to a great degree with a reduction in the number of man-months originally proposed"; and (2) emphasized the desirability of the increases during negotiations by stating: "In order to provide the best possible assurance of maintaining a project staff with a low factor of attrition we have * * * made [labor wage rate] adjustments that we think will be necessary." Further, the Center asserts that once a fixed-price contract type was agreed to, "no other discussion was held concerning labor rates * * *."

Considering the statements advanced by both sides, we are inclined to agree that the view proposed by the Center—that its comments to Technology were in the nature of expressions of legitimate concern over the wage rates proposed by Technology—is more reasonably consistent with the described events than that advanced by Technology. Further, we think a prudent offeror should have realized that, in accordance with the RFP direction for offerors to submit proposals on the "most favorable terms" from "technical and cost" considerations, price, especially with regard to a fixed-price award of the type finally decided on here, would still have significant importance in selecting the proposed contractor, notwithstanding prior agency expressions of concern about the lowness of wage rates proposed for the cost-type award earlier contemplated.

Issue is also taken with the way in which the Center evaluated PRI's resources under the "Qualifications" criterion of the RFP. Specifically, Technology contends that PRI should not have received a score equal to Technology's score under that criterion because of PRI's lack of experience in "similar or related" programs involving experiments with laboratory animals.

HEW has furnished us with a supplemental report which compares the work requirements involved in PRI's operation of the computer facility at the Center to the services which are being required under the subject contract. HEW states that the comparison "highlight[s] the functional requirements for completing the diet preparation contract and show[s], where similarity exists, how performance of the data systems contract [by PRI] constitutes 'experience in similar or related programs.' "

Technology does not take specific exception to HEW's latest analysis. Consequently, and since we think the phrase "similar or related" permits a rational interpretation that the phrase means similar experience from a functional or operational viewpoint (that is: prior similar experience on a large scale "operations" type contract (specifically, data processing)) in addition to meaning similar experience from a purely "content" viewpoint (that is: prior similar experience with experiments on laboratory animals), we cannot question the score given

to PRI in the "Qualifications" area for its demonstrated experience under a functionally similar program.

By letter of today to the Secretary of HEW, however, we are recommending that this phrase, when used in future solicitations, be defined as precisely as possible.

OTHER GROUNDS OF PROTEST

Other grounds of protest are : (1) PRI lacks the financial resources needed to be considered a responsible prospective contractor; (2) the RFP statement referencing a work facility was unclear; (3) the RFP was not properly amended to make clear the proposed final contract type (fixed-price); and (4) certain negotiation procedures followed prior to the final closing date (April 17, 1974) were improper.

ANALYSIS OF ADDITIONAL GROUNDS OF PROTEST

I. In recognition of the announced GAO position not to review protests which question affirmative responsibility decisions in the absence of an allegation of fraud or bad faith, (See, for example, *Matter of United Hatters*, 53 Comp. Gen. 931 (1974), ground of protest (1) cannot be considered.

II. (Protest grounds 2 and 3)—these grounds of protest relate to solicitation defects. Since the defects were not protested prior to the final closing date for receipt of proposals on April 17, 1974, this part of the protest is untimely under 4 C.F.R. § 20.2(a) (1974) and will not be considered.

III. (Protest ground 4)—this ground relates to negotiation procedures which the protester was aware of no later than April 17, 1974, the date established for receipt of best and final offers. The company's protest was received at GAO on May 1, 1974, or more than 5 working days after the basis of protest was known on April 17. Consequently, this aspect of the protest is untimely. *See* 4 C.F.R. § 20.2(a).

Consequently, the protest is denied.

[B-181519]

Bids—Mistakes—Correction—Unit Price Error

Bid which stated monthly price for estimated square footage to be serviced instead of unit price based upon square footage is correctable as clerical error apparent on face of bid since correct unit price is determinable from bid by division of monthly price by estimated square feet stated in bid and no other intended unit price is logical or reasonable.

Bonds—Bid—Surety—Underwriting Limitation

Submission with bid of required bid guarantee issued in excess of Treasury Department underwriting limitation (and not reinsured) does not render bid non-

responsive as bid bond in excess of such limit is not void *per se* and amount of authorized bond limit is sufficient to cover difference between low acceptable bid and second low acceptable bid, and Government is accordingly protected by valid surety obligation. Failure of bond to reflect surety's liability limit is waived as minor informality because power of attorney of attorney-in-fact signing bid for surety expressly stated surety's liability limit by attorney.

Bids—Signatures—Agents—Status

Allegation that bidder, whose bid included properly executed certification by corporate secretary under corporate seal that signer of bid was authorized to do so, must submit additional evidence indicating Board of Directors authorized execution of bid is rejected, as contracting officer, who has primary responsibility to determine sufficiency of evidence of signer's authority, indicates certification execution was adequate and in conformance with bid and protester has not submitted evidence why this conclusion is unreasonable.

Contractors—Responsibility—Contracting Officer's Affirmative Determination Accepted—Exceptions—Conflict of Interest

General Accounting Office (GAO) will not review affirmative responsibility determination even though it is alleged that fraud and/or conflict of interest charges involving prospective contractor can be resolved by objective standards, since factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of contracting officer which is not readily susceptible to reasoned review. While foregoing rule as to GAO scope of review would not preclude taking exception to award where legal effect of contracting officer's findings showed violation of law such as to taint procurement, no such violation of law is shown by contracting officer's findings in this case.

In the matter of Atlantic Maintenance Company, February 24, 1975:

Atlantic Maintenance Company (Atlantic) has filed a protest with this Office against an award to any other bidder under invitation for bids (IFB) No. DAAA25-74-B-0477, issued on May 10, 1974, by the United States Army, Frankford Arsenal, Philadelphia, Pennsylvania. The Army has in the interim periodically extended the contract of the incumbent, Atlantic.

The invitation, a total small business set-aside, was issued to procure the services, materials, supplies, and equipment necessary to accomplish all custodial services for the Arsenal for fiscal year 1975. Each bidder was instructed, *inter alia*, to indicate in its bid its unit price per square foot per month for the estimated quantity of 1,123,000 square feet per month, and also its total contract price determined by multiplying the number of square feet per month by the number of months (12) duration, multiplied by the rate per square foot. Bidders were also required to submit a certificate of authority to bind their respective corporations, and an acceptable Bid Guarantee in the amount of twenty percent of the bid price or $3,000,000, whichever was less.

On June 10, 1974, opening date, four bids were received as follows:

Bidder	Unit	Unit Price	Total Amount
1. Kentucky Building Maintenance, Inc.	Job	$.0324	$436,622.40
2. Suburban Industrial Maintenance, Inc.	Job	41,400	496,800.00
3. Atlantic Maintenance Co.	Job	.041	552,516.00
4. Clarkie's, Inc.	Job	.055 per sq. ft.	741,480.00

On June 17, 1974, Atlantic filed this protest against award to either Kentucky or Suburban on the grounds that the bids of both Kentucky and Suburban were nonresponsive, both Kentucky and Suburban were nonresponsible prospective contractors, and the bids of both Kentucky and Suburban were invalid bids because they did not bind the corporations and thus neither bid could "ripen" into a proper award. For reasons discussed below, the protest against an award to Suburban is denied.

With regard to Kentucky, during the pendency of this protest we were advised by the Army by letter of November 6, 1974, that it had permitted Kentucky to withdraw its bid on the basis of clear and convincing evidence of a mistake in bid. Therefore, on the basis that Kentucky was no longer in line for award under this IFB, Atlantic withdrew its protest against Kentucky by letter of November 29, 1974. Accordingly, this aspect of Atlantic's protest, as well as the Army's request for an advisory opinion on Atlantic's arguments concerning alleged *ultra vires* acts of Kentucky, is academic and will not be considered further.

With respect to its protest against Suburban, Atlantic argues that Suburban's bid is nonresponsive because it did not provide a unit price per square foot per month as required but rather a total monthly price, and that if this is an alleged error, it cannot be remedied under the applicable regulation as an apparent clerical error because it is susceptible to at least two different reasonable interpretations as to the manner of mistake and intended unit price. It is also contended that the bid is nonresponsive because the Government would not be able to add or reduce the square feet to be serviced under a unit bid price of $41,400 monthly, rather than a square foot unit price, and therefore the Government's option to change the work volume under the contract has been eliminated by Suburban's method of bidding. In addition, it is argued that Suburban's bid should be considered nonresponsive in this regard because it purposefully used this manner of bidding so it could claim a mistake and withdraw its bid if it so desired.

Atlantic further contends that Suburban's bid is nonresponsive because, although Suburban furnished a bid bond with a penal sum of $99,500 (which satisfied the 20 percent requirement), the corporate surety furnishing the bond had an underwriting limit set forth in Department of the Treasury Circular 570 of $92,000, which Standard Form 24 (Bid Bond) cautioned it could not exceed. Accordingly, it is alleged that the bond as issued is void as a matter of law because it is in excess of the surety's limit and a proper bond was not submitted with the bid as required, and thus the bid is nonresponsive. Also, Atlantic submits that Suburban's bond is void because it does not reflect on its face the surety's liability limit. Finally, it is argued that the bond may not be considered adequate under the rationale of B-176107, November 16, 1972, as unlike the situation in that case, there is no evidence that the surety here had obtained any reinsurance.

Atlantic also contends that Suburban's bid was nonresponsive even though it contained an executed "Certificate of Authority to Bind Corporation," as it did not include any documentary evidence that Suburban's Board of Directors authorized the Suburban agent, Mr. James Butler, to execute the bid for the corporation. In Atlantic's view, such evidence is contemplated by, and implicit in, section B-16 of the solicitation, which required the aforementioned Certificate, and therefore it is argued that Suburban's bid is ineligible for award unless and until Suburban furnishes a copy of the certified minutes of the Suburban Board of Directors dated on or before June 10, 1974, that the Suburban Board by resolution authorized Mr. Butler to execute binding bids on behalf of the corporation.

In response to the first issue presented by Atlantic's protest, the Army considers Suburban's failure to bid a unit price per square foot per month an apparent clerical error on the face of the bid which is correctable by the contracting officer pursuant to Armed Services Procurement Regulation (ASPR) § 2-406.2 (1974 ed.). Since it was necessary to resort only to the bid documents to arrive at Surburan's intended unit price, the Army considers the Suburban bid to be correctable so as to reflect Suburban's intended unit price and, therefore, it considers as incorrect Atlantic's argument that Suburban's bid is nonresponsive because its price of $41,400 would prevent the Army from modifying the estimated square feet to be serviced. The Army points out that correction of Suburban's bid would yield a precise unit figure which would be available for additions, deletions, and determinations of square footage actually cleaned, and this would eliminate the problems envisioned by Atlantic.

With respect to Suburban's bid bond, the Army recognizes that Suburban's surety, International Fidelity Insurance Company, exceeded its underwriting limitation, and has not investigated whether

the surety secured reinsurance. Nevertheless, the Army argues that Suburban's bond is acceptable pursuant to ASPR § 10–102.5(ii) (1974 ed.), which permits acceptance of bid bonds which are less in amount than required by the IFB but which are equal to or greater than the difference between the low bid price and the next higher acceptable bid. Since the price difference between the bids of Suburban and Atlantic is $55,716, the Army considers the bond of Suburban to be valid for at least that amount, and believes the cited regulation should apply.

Concerning the contention that Suburban must also submit additional documentation from Suburban's Board of Directors with respect to its agent authority to sign the bid, the contracting officer considers the certification by Suburban's corporate secretary, under corporate seal, that Mr. Butler was the corporate treasurer when he signed the bid adequate and, therefore, that the bid was properly signed for and on behalf of the corporation, and binding upon the corporation upon acceptance.

In our opinion, the contracting officer did act reasonably in determining that Suburban's bid was responsible and that it made a clerical error which is correctable. Pursuant to ASPR § 2–406.2 (1974 ed.), a "clerical mistake apparent on the face of a bid may be corrected by the contracting officer prior to award, if the contracting officer has first obtained from the bidder written or telegraphic verification of the bid actually intended." The mistake which is apparent is that Suburban failed to insert its unit price per square foot per month, but rather inserted its unit price per square foot per month multiplied by 1,123,000 square feet, the monthly estimate. This is ascertainable from the face of the bid because the bidding formula in question was unit price per square foot per month, times monthly estimate, times 12 months. An examination of the monthly and aggregate figures in Suburban's bid indicates that its monthly bid price is equal to its aggregate price over a 12 month period, the contract term. It is a simple matter to recompute Suburban's unit price per square foot per month, which is $.03686, and correction is consistent with Suburban's total monthly price and its aggregate price, as no other unit figure could be computed from the IFB's bidding formula. See *Matter of Berc Building Maintenance Company*, B–181489, September 6, 1974; B–164453, July 16, 1968. We do not believe it logical that Suburban bid $41,400 as other than its total monthly price, as the bid formula was clearly explained on the same page and as Suburban thereafter followed that formula to arrive at its total bid prices. Therefore we cannot agree with this aspect of Atlantic's argument. 46 Comp. Gen. 77 (1966). Also, we cannot agree that Suburban intended to bid a unit price of $.0414, as the extension of that unit price is considerably

more than the $498,000 aggregate bid of Suburban (which figure is consistent with the bidding formula).

Atlantic also argues that Suburban's unit price method of bidding makes its bid nonresponsibe because Suburban's unit bid price of $41,400 prevents the Government from revising the work to be done by Suburban on the basis of the IFB revision formulas based on square footage. Atlantic's argument is based on the premise that the Army could not correct Suburban's price of $41,400 to its unit price per square foot per month. However, as we do not object to the correction of Suburban's bid price as proposed by the contracting officer, it is clear that the Army can revise Suburban's unit price in conformity with the IFB provisions. Therefore, Atlantic's argument is without merit and Suburban's bid may be corrected upon verification by Suburban as contemplated by ASPR § 2–406.2 (1974 ed.).

With regard to Atlantic's next argument, the IFB provided that failure of a bidder to furnish a bid guarantee with good and sufficient sureties acceptable to the Government in the amount of 20 percent of the bid price may be cause for rejection of the bid. ASPR § 2–404.2(h) (1974 ed.) provides that a bidder's failure to furnish the bid guarantee as required by the IFB shall cause the bid to be rejected except as otherwise provided in ASPR § 10–102.5 (1974 ed.). It is urged by the Army that Suburban's submission of a bond in excess of the corporate surety's underwriting limitation can be waived pursuant to ASPR § 10–102.5(ii) (1974 ed.), as the amount of Suburban's bond as covered by the surety's underwriting limitation is equal to or greater than the difference between the price stated in its bid and the price stated in the next higher acceptable bid. We considered a similar problem in B–176107, November 16, 1972, also involving International, where International submitted a bond of $100,000 even though its underwriting limitation was $69,000, and it obtained reinsurance for the excess amount pursuant to the provisions of Treasury Circular 297, 31 C.F.R. § 223.10–11 (1974). On these facts, we applied ASPR § 10–102.5(ii) and considered the bid guarantee to be valid in the amount of $69,000. Atlantic argues that the cited case does not control in this instance as reinsurance has not been obtained. In our opinion, the principle questions are the validity of the bond and whether the Government can secure protection under ASPR § 10–102.5(ii) (1974 ed.). As indicated in B–176107, *supra*, it is our opinion that a bond issued in excess of the surety's underwriting limit is not *per se* invalid. We are advised by the Department of the Treasury, Fiscal Service, Bureau of Accounts, that the bond, if otherwise valid, is not rendered invalid by reason of its exceeding the limitation set forth in Treasury Circular 570. Rather, such overstatement is a matter between the surety and the Treasury

Department, and may subject the surety to a loss of its Certificate of Authority. 31 C.F.R. § 223.17 (1974). Moreover the exception listed in ASPR § 10–102.5(ii) (1974 ed.) permits the acceptance of an otherwise unacceptable bond if the amount of the guarantee covers the price difference between the low and next low acceptable bids. As this difference is $55,716 in this case, and as the bond is valid up to at least $92,000, we consider the bond acceptable. B–176107, *supra*, does not require rejection of this bond, because reinsurance was obtained in that instance to make the bond comply with the Treasury Department requirements, not to insure the legal obligation of the surety under the bond.

Although the bond fails to properly set forth the liability limit, this does not in our opinion require rejection of the bond. The bond was signed by Frances D. O'Donnell, as Attorney-in-Fact for International, and the Power of Attorney of International stipulates that Mr. O'Donnell is authorized to sign such bid bonds in the sum not to exceed $100,000. In these circumstances, the failure to insert the limit on the face of the bond can be waived as a minor informality. *See*, *e.g.*, 53 Comp. Gen. 431, 434 (1973); 51 *id.* 802 (1972).

Regarding whether Suburban satisfactorily established the authority of Mr. Butler to bind Suburban, the IFB provided in paragraph 2(b) of Standard Form 33A that all offers signed by an agent were to be accompanied by evidence of the agent's authority unless previously supplied. To this end, paragraph B–16 of the IFB required each corporate offeror to execute the following "Certificate of Authority to Bind Corporation:"

> Contractor, if a corporation, should cause the following certificate to be executed under its corporate seal, provided that the same officer shall not execute both the contract and the certificate:
>
> I, ________________, certify that I am the Secretary of the Corporation named as Contractor herein; that ______________ who signed this bid/proposal on behalf of the Contractor, was then ______________ of said corporation; that said bid/proposal was duly signed for and on behalf of said corporation by authority of its governing body and is within the scope of its corporate powers.
>
> AFFIX CORPORATE SEAL: ______________
>
> (Secretary's Signature)

Suburban properly executed this Certificate. ASPR § 20–102(c) (1974 ed.) provides that the evidence required to establish the authority of a particular person to bind a corporation is for the determination of the contracting officer. In this connection, the corporate Secretary, under corporate seal, attested to the corporate authorization underlying Mr. Butler's signature, and the contracting officer believes this is sufficient evidence of actual authority to sign, and is in fact normally acceptable in commercial transactions. Since the solicitation required no more than execution of the Certificate and the contracting officer is satisfied as to Mr. Butler's authority, we see no basis to take exception or require additional proof of authorization.

Atlantic also argues that Suburban's submission of a bid based upon a monthly price of $41,400, rather than the contemplated unit price, so that Suburban could claim a mistake and withdraw its bid if it so desired, puts in issue Suburban's responsibility because this action raises questions about its business integrity. Additionally, Atlantic contends that Suburban is not a responsible prospective contractor as its ability to meet the requirements on this procurement is very questionable because it had never performed a contract of this magnitude or complexity, and does not have the necessary financing, equipment or personnel. Also, Atlantic submits that Suburban is nonresponsible because it submitted a bid bond of a corporate surety which exceeded its underwriting limitation and of which fact Suburban was on constructive notice because the limitation was published in the Federal Register. Moreover, Atlantic argues that since the surety in question has in the past issued bonds in excess of its authority, the surety's alleged lack of integrity in perpetuating this practice should be imputed to its principal, Suburban.

The final points raised by Atlantic relate to the actions of both Suburban and an employee of the Arsenal who performs part-time work for Suburban. The employee in question, Mr. Roosevelt Woodson, is a full-time custodial work inspector for the Arsenal, and has for the past several years also worked part-time for Suburban. Atlantic contends that the mere fact of dual employment, under the instant circumstances, constitutes a conflict of interest on Mr. Woodson's part, and may be violative of criminal statutes and procurement regulations. It argues that many inferences can be drawn from the relationship of Mr. Woodson and Suburban, and questions whether Mr. Woodson aided or advised Suburban in bid preparation or other matters, passed to Suburban information regarding Atlantic's work activity which was of a proprietary or confidential nature, or otherwise improperly assisted Suburban. It submits that Suburban's responsibility is directly connected to these questions on the basis that, if Suburban does maintain an improper relationship with a Government employee, its integrity, and thus responsibility, is affected. In connection with these points, Atlantic has submitted various affidavits allegedly substantiating its allegations, and it maintains that its affidavits have created certain presumptions on its behalf regarding statements made therein not rebutted by corresponding affidavits from the Army, Suburban, or Mr. Woodson. In particular, Atlantic submits several affidavits to the effect that Mr. Woodson, during a September 23, 1974, conversation with Atlantic personnel, acted as a representative of Suburban concerning Suburban's contracting activities and allegedly attempted to interest the Atlantic personnel in a com-

promise which would allow both companies to secure sufficient contract work without competition from the other. Atlantic vigorously argues that this alleged activity by Mr. Woodson for Suburban raises substantial inferences regarding Suburban's contracting operations and, therefore, its business integrity.

With regard to Suburban's manner of bidding, by letter of September 13, 1974 (filed September 17, 1974), Atlantic has submitted for our review the sworn affidavits of an Atlantic owner and Atlantic employee to the effect that, on June 12, 1974, Mr. Butler of Suburban advised the employee (who informed his employer on that date) that the Suburban bid was intentionally submitted in mistaken form so as to enable Suburban to withdraw its bid if it so desired. Atlantic maintains that these affidavits raise substantial questions regarding the responsiveness of Suburban's bid and its integrity as it relates to responsibility.

However, we view the argument in this regard as one relating to Suburban's business integrity and status as a responsible bidder and not as one involving the matter of bid responsiveness. The issue of whether Suburban's bid is responsive because of the mistake has been previously considered in our discussions.

With regard to the questions raised concerning Suburban's status as a responsible prospective contractor, ASPR § 1–904 (1974 ed.) provides that no contract shall be awarded to a firm unless the contracting officer first makes an affirmative determination that the prospective contractor is responsible under the standards set forth in ASPR § 1–903 (1974 ed.) including a satisfactory record of integrity. On February 6, 1975, the contracting officer issued a written determination that Suburban is responsible within the meaning of the applicable regulations, including the following findings:

> e. Allegations have been made by a protestor (The current janitorial contractor) concerning integrity and a conflict of interest. These allegations are based on the employment of Mr. Woodson (a Frankford Arsenal employee) by Suburban. The allegations have been thoroughly investigated and have been found to be totally without merit: (1) Mr. Woodson is a janitorial work inspector and does not have access to data which is not otherwise available to other bidders; (2) He is not an officer or administrative employee of Suburban (Supported by an affidavit from Suburban confirmed by DCASR); (3) He is a part-time janitorial employee of Suburban on non-federal work; (4) Mr. Woodson's activities were purely ministerial and did not involve discretionary act or access to procurement or contractual planning or decisions; (5) No actual conflict of interest exists, and Mr. Woodson's part-time janitorial employment with Suburban does not affect Suburban's integrity; (6) To avoid the appearance of a conflict of interest, Mr. Woodson will resign his position with Suburban Industrial Maintenance Company when, and if, an award is made to Suburban.

In this connection, it is the position of our Office that if pursuant to applicable regulation the contracting officer finds a bidder responsible there is no basis for our review of such determination in the absence of fraud on the part of the contracting officer. *Matter of Central Metal*

Products, Incorporated, 54 Comp. Gen. 66 (1974). The rationale for this rule is that questions of a bidder's capacity to perform turn on the general business judgment of the contracting officer and such judgment is largely subjective and, therefore, not readily susceptible to reasoned review. *Matter of United Hatters, Cap and Millinery Workers International Union*, 53 Comp. Gen. 931 (1974).

Atlantic contends, however, that our review of such determinations should extend not only to the situation where fraud on the part of the contracting officer is alleged, but to the situation where, as here, there are allegations of fraud and/or conflict of interest involving the prospective contractor. This argument is apparently based upon the theory that the resolution of such issues involves a matter of law which is an objective determination susceptible of reasoned review, and in recognition of the fact that in recent cases we have reviewed affirmative responsibility determinations based upon objective responsibility criteria. See *Matter of Yardney Electric Corporation*, 54 Comp. Gen. 509 (1974); *Matter of Data Test Corporation*, 54 Comp. Gen. 499 (1974).

We do not believe that the rule enunciated in the *Yardney* and *Data Test* cases should be extended to the situation involved here because the rationale for the holding in those cases is not applicable. In *Yardney* and *Data Test* the solicitations included specific and definitive guidelines or requirements against which the bidder's compliance, and thus responsibility, could be objectively determined by the contracting officer and reviewed by our Office. While resolution of allegations of fraud and conflict of interest involve determinations which, as legal matters, may be based upon objective standards, the factual basis for such charges and the effect on integrity as that factor relates to responsibility involves the subjective judgment of the contracting officer whose determination should stand in the absence of his fraudulent conduct. In the instant case, since fraud on the part of the contracting officer has neither been alleged nor demonstrated, there is no basis for our Office to review the affirmative responsibility determination relative to Suburban.

Notwithstanding the foregoing rule as to our scope of review of affirmative determinations of responsibility, this Office would not be precluded from taking exception to an award where the legal effect of the contracting officer's findings showed a violation of law such as to taint the procurement. If, for example, the contracting officer's findings showed that conflict of interest statutes had been violated as alleged and that award to Suburban clearly would be contrary to the public interest, our Office would be compelled to object to such an

award despite an affirmative determination of responsibility. Here, however, while Atlantic has alleged that the statutes and implementing regulations regarding conflict of interest have been violated, the contracting officer's findings do not support any such conclusion. The record shows that the Army conducted an investigation of the charges made by Atlantic concerning the conduct of Suburban and a Government employee and found that no actual or apparent conflict of interest existed. The contracting officer's findings confirm, of course, that Mr. Woodson, a custodial inspector at the Frankford Arsenal, is also working part-time for Suburban in a custodial capacity. However, we do not view such dual employment, in the reported circumstances, as a *per se* conflict of interest tainting the procurement.

Accordingly, the protest is denied.

[B-182241]

Bidders—Qualifications—Capacity, etc.—Small Business Concerns

Protest by small business concerns against rejection of their bids on grounds that firms were nonresponsible because they lacked necessary personnel and means to provide required security is sustained because, contrary to administrative position, determination of nonresponsibility for such reasons related to capacity and therefore required a referral to Small Business Administration (SBA) under FPR 1-1.708.2. Furthermore, if SBA issues Certificate of Competency to rejected low bidder, or second low bidder, it is recommended that award to third low bidder be terminated for convenience of Government.

In the matter of Acme Reporting Company; Capital Court Reporters, February 24, 1975:

Invitation for bids (IFB) No. DJ-A-75-5, for reporting services of Grand Jury testimony and related proceedings, was issued by the Department of Justice (Justice) on August 2, 1974. The solicitation contained the following provisions relevant to the protest:

COMPETENCY OF BIDDERS:

Offers will be considered only from such offerors who, upon request and in the opinion of the Department of Justice, can show evidence of ability, experience, equipment, and facilities to render satisfactory service. To be considered for an award, the bidder must be regularly engaged in the service specified. The facility and equipment of the offeror will be subject to inspection and approval by the Department of Justice. The bid may be rejected if, in the opinion of the inspector, such facilities and/or equipment are inadequate for proper performance of the services covered by this solicitation. * * *

SECURITY REQUIREMENTS:

It shall be the responsibility of the United States Attorney's Office to conduct the necessary investigations and grant security clearances required for performance of this contract.

* * * * * * *

> In the event the United States Attorney is unable to obtain or furnish a security clearance for the Contractor by the beginning date of a proceeding, the Government reserves the right to obtain the required services from another source.
>
> * * * * * * *
>
> (b) *Facility Security Requirements*—
>
> The Contractor shall safeguard all elements of the contract classified 'Confidential', or higher, and shall provide and maintain a system of security controls within his own organization in accordance with the requirements of the Department of Defense Industrial Security Manual for Safeguarding Classified Information. (April, 1970 edition), and any amendments to said manual, notice of which is furnished to the Contractor by the Contracting Officer. * * *

(The April 1970 manual has been superseded by a manual bearing the same title dated April 1974, which became effective April 1, 1974. The new manual reflects changes necessitated by the issuance of Executive Order 11652, "Classification and Declassification of National Security Information and Material.")

Four bids were opened on August 22, 1974. Bids were expressed as a percentage of prices set forth in a price schedule, and the bid of Acme Reporting Company (Acme) was low, followed by the bid of Capital Court Reporters (Capital), Ace-Federal Reporters (Ace-Federal), and Metropolitan Reporting Services. Pursuant to a determination and findings (D & F) dated September 11, 1974, the contracting officer found that the bids of both Acme and Capital "must be rejected for lack of capacity to perform services of the magnitude and security protection required by the United States Attorney." In the opinion of the contracting officer the number of full time reporters believed to be employees of the protesters was not sufficient to handle the estimated work load covered by the solicitation. With regard to Capital, the contracting officer also concluded that its equipment for transcribing material and the amount of office space it controls is inadequate for the volume of work anticipated under the contract. Further, Capital's security arrangements were found to be lacking at the time of inspection. With regard to Acme, Justice acknowledged that Acme possesses a secret security clearance granted by the Department of Defense (DOD) and that its Mosler safe conforms to DOD requirements for safeguarding classified information. However, it is Justice's opinion that Acme's "security storage facilities are not large enough to handle the anticipated volume of Grand Jury material," and "a lack of attention to security requirements" was found by a Justice representative during a visit to Acme facilities referred to below. Although performance under the contract was not to begin until October 1, 1974, award was made to the third low bidder Ace-Federal on September 13, 1974, and by letters of the same date both Acme and Capital were notified of

the rejection of their bids. Ace-Federal was notified of the award by letter dated September 20, 1974.

In their letters to our Office, both Acme and Capital protested against the rejection of their respective bids on the basis that the contracting officer's determination of lack of capacity to perform the magnitude of services required and provide the security protection called for in the solicitation was erroneous. Specific rebuttal to the deficiencies cited by United States Attorney for the District of Columbia was provided. These alleged deficiencies, which were based upon on-site inspections conducted on August 29 and 30, 1974, formed the basis for the contracting officer's determination. Further, Acme contends that as a small business concern the question of its responsibility should have been referred to the Small Business Administration (SBA) for possible issuance of a Certificate of Competency (COC) pursuant to Federal Procurement Regulations (FPR) § 1–1.708–2(a) (1964 ed.).

With regard to the latter point, it is Justice's view that deficiencies concerning "security" are excepted from the COC procedure by FPR § 1–1.708–2(a)(4), which provides that the referral procedure need not be followed where the nonresponsibility determination is for a reason other than capacity or credit.

Recognizing that questions of responsibility are matters primarily for determination by the procurement agencies, we have upheld nonresponsibility determinations when the evidence of record reasonably provided a basis for such determinations. 51 Comp. Gen. 703, 709 (1972). However, with regard to a nonresponsibility determination based upon lack of capacity or credit of a small business concern, the contracting officer is required to submit the matter to the SBA before rejecting the bid, unless nonreferral is justified by one of the stated exceptions. FPR § 1–1.708–2. Justice correctly points out that one such exception is provided by subparagraph (4) where the nonresponsibility determination is for a reason other than capacity or credit. Examples of factors indicative of nonresponsibility which do not relate to capacity or credit referred to in subparagraph (5) are lack of integrity, business ethics, or persistent failure to apply necessary tenacity or perseverance to do an acceptable job. Furthermore, subparagraph (5) requires that a determination that a small business concern is nonresponsible for reasons other than deficiencies in capacity or credit must be supported by substantial evidence documented in the contract file, approved by the head of the procuring activity or his designee, and that a copy of the documentation supporting the determination shall be transmitted to SBA.

In the instant case, the evidence supporting Justice's determination concerning Acme's security deficiencies relates primarily to its equipment, facilities, and apparent lack of security procedures. The record contains no support for Justice's conclusionary statement, made after this issue was raised in the course of the protest, that these factors are not related to capacity but are within the noncapacity examples referred to in subparagraph (5). In addition, Justice did not comply with the requirement for transmitting a copy of the documentation to SBA.

In these circumstances, it is our conclusion that rejection of Acme's low bid without referral to SBA was improper. Therefore, we are advising Justice of our opinion that the question of Acme's capacity to provide the personnel and necessary security arrangements must now be submitted to SBA for consideration under the COC procedures. We are also recommending that the question of Capital's capacity be simultaneously submitted to the SBA so that in the event that the SBA is unable to issue a COC to Acme, Capital's eligibility may be determined. If the SBA issues a COC as to the subject services to either Acme or Capital, we are recommending that the remaining portion of Ace-Federal's contract be terminated for the convenience of the Government pursuant to such provisions of the contract and award for such terminated portion be made to the lower bidder receiving the COC.

[B-182249]

Bids—Invitation for Bids—Cancellation—Justification

Where contracting officer canceled initial solicitation partly upon determination that all otherwise acceptable bids were considerably higher than Government estimate, fact that Government estimate used for that determination was within range of reasonably to be anticipated prices as demonstrated by majority of bids received upon resolicitation, and was in line with low but nonresponsive bid received under initial solicitation, substantiates propriety of cancellation.

Bids—Discarding All Bids—Readvertisement Justification—Integrity of Competitive System

While determination to cancel solicitation and resolicit using extended delivery dates should not in general be made where initial delivery dates will satisfy Government requirement, cancellation and resolicitation on basis of extended delivery schedule was not improper where contracting officer found that earlier delivery dates had unnecessarily restricted competition.

In the matter of Westinghouse Electric Corporation, February 25, 1975:

Westinghouse Electric Corporation (Westinghouse) protests the action of the Bonneville Power Administration (BPA) in canceling its initial solicitation for current transformers and resoliciting that requirement subject to an extended delivery schedule.

The original invitation, No. 5014, issued July 15, 1974, solicited prices for item #1, consisting of six current transformers, and item #2, consisting of three transformers. Amendment #1 to the initial solicitation gave bidders the option of making their bid prices subject to price adjustment, while Amendment #2, issued at the request of two of the three original bidders, extended the time for delivery from May 1, 1975, for both items to September 2, 1975, for item #1 and August 1, 1975, for item #2. In connection with issuance of the second amendment, BPA reviewed the scheduling of construction for which the transformers were needed and concluded that the delivery dates for items #1 and #2 could be moved to September and August 1975, respectively, without adversely impacting its construction projects.

Three bids were received in response to the initial solicitation. Brown Boveri, a foreign concern and the low bidder at $16,500 per unit, failed to acknowledge receipt of Amendment #2 and, having bid on the basis of a delivery schedule (14 months after receipt of order) more extended than that solicited, was found to be nonresponsive. The protester's bid, in connection with which it has alleged mistake, was $20,830 per unit, while General Electric Company (GE) bid $25,000 per unit—more than twice the Government's original estimate of $12,000 per unit.

Thereupon, BPA reviewed its original estimate and, having found it unrealistically low, revised its estimate to $16,425, based on a unit price of $14,300 paid by BPA in December 1972 for similar equipment, plus a percentage increase for inflation. The revised estimate nonetheless remained 27 percent below Westinghouse's unit bid of $20,830 and 52 percent below GE's bid of $25,000 per unit.

The basis for BPA's determination to cancel the initial solicitation is explained in the contracting officer's memorandum. Therein the contracting officer states his conclusion that Brown Boveri's low bid was nonresponsive, that the GE bid was unreasonably high and that Westinghouse's bid, which was also substantially in excess of the Government's revised estimate, was subject to withdrawal based on its allegation of mistake. The mistake concerned Westinghouse's failure to include a marked copy of Amendment #1 indicating that it elected to bid on the basis of price escalation.

The contracting officer further found that an extension in delivery dates could be expected to increase competition and result in lower bids. His determination includes the following statement:

> We have also reviewed the delivery requirements for these units. We find that delivery of Item 1 units for Maple Valley of six units is not required until Spring of 1976. Delivery of the 3 units for Monroe under Item 2 is required no later than October of 1975. This would extend the delivery dates in the solicitation by six and two months respectively.

In summary we are faced with a situation where we have one nonresponsive bid, one bid mistake where correction would be questionable and a third bid with an unreasonable price. In addition, our revised delivery requirements could be expected to result in substantially lower prices to the Government. Therefore, I hereby determine that cancellation of the solicitation and readvertisement on a competitive basis is in the best interests of the Government within the meaning of Section 1-2.404-1 of the Federal Procurement Regulations.

The requirement for transformers was resolicited under Solicitation No. 5112 using the extended delivery dates of April 1, 1976, and October 1, 1975, for items #1 and #2, respectively. In addition, the resolicitation permitted award by item or as a whole. The original solicitation had specified a single award for both items. The resolicitation on October 18, 1974, attracted a total of three additional bidders. Of the six bids submitted for item #1, four offered evaluated prices (including Buy-American adjustments where applicable) ranging from approximately $17,000 to $19,000 per unit. Westinghouse raised its price, bidding $23,245 per unit, while GE again submitted its bid at $25,000 per unit. As to the three units comprising item #2, three of the five bids received ranged from approximately $17,540 to $20,000, while the Westinghouse and GE bids were submitted at $23,145 and $25,000 per unit respectively. On October 25, 1974, a determination was made by the contracting officer to proceed with award of item #2 (3 units), in accordance with FPR 1-2.407-8(b)(ii), on the basis that further delay in the award of that item, with the resulting delay in delivery, could not be tolerated. That determination subsequently was approved by the agency. Since delivery of item #1 (6 units) was not deemed as critical, award of that item has not been made.

Westinghouse maintains that it is entitled to award under the initial solicitation and that resolicitation of the requirement was improper. Specifically, Westinghouse states that since all six bids received for item #1 and all five bids received for item #2, when considered on an evaluated basis, were above the Government's revised estimate of $16,425 per unit, BPA improperly rejected its bid under the original solicitation as unreasonably high. In addition, protester maintains that the extension in the dates for delivery under the contract has little effect on performance and as such provided an insufficient basis for cancellation and resolicitation.

With respect to the revision in the delivery schedule under the resolicitation, protester points out that while the delivery dates were extended 6 months and 2 months respectively for items #1 and #2, the actual change in performance time was not nearly so great, given extension of the date for start of performance from September 6, 1974, to October 1, 1974. The protester states:

The basis of resolicitation was an extension of delivery times. The contracting officer's statement says the low Brown-Boveri bid was nonresponsive. It is a pertinent unstated fact that it was so for failure to meet the delivery date. It

should be noted that the net increase in performance time for item 2 between the first and second solicitations is only 12 days. Under No. 5014 it was 330 days from September 6, 1974, to August 1, 1975, (Amend. 2). Under 5112, it is 342 days from October 25, 1974, to October 1, 1975. (The only real extension was on item 1 of approximately 160 days, but this had the longer performance time originally.) If these extensions were necessary for bidders to respond, they should have been obtained prior to the first bidding. BPA certainly knew, or should have, that lead times for a major component (high voltage porcelain) was nearly as long, or as long, as the original delivery time for the complete product. Yet, it determined originally to go ahead to meet its service requirements. Those requirements were not changed. All BPA did was adjust the delivery requirement without any significant change of performance time for item 2. In so doing, it merely eroded the time available for timely installation to get the equipment in service. The only reason for the delivery change was BPA's view of the original bid results.

With respect to the fact that the Government's revised estimate was less than the resolicited bids (as evaluated), we do not believe that this, in itself, demonstrates an abuse of discretion or unreasonableness on the part of the contracting officer in canceling the original solicitation. While it does appear that the Government's original estimate of $12,000 per unit may have been unrealistic, it does not appear that the revised estimate of $16,425 was outside the range of what could reasonably be anticipated in terms of price. We note that the lowest of the unadjusted bids received under the resolicitation was less than the Government's estimate and that bid, when evaluated, was less than $1,000 per unit in excess of the Government estimate, as compared to the protester's bid under the original solicitation which was more than $4,000 above the revised estimate. Moreover, we think that the reasonableness of the Government's revised estimate is substantiated by its proximity to the low but nonresponsive bid of Brown Boveri received under the initial solicitation. In this connection, we have recognized that an administrative determination that the lowest acceptable bid is excessive in amount is properly to be made in light of all facts, including those which may have been disclosed by the bidding. 36 Comp. Gen. 364 (1956). Absent specific evidence that the Government's revised estimate was arbitrarily deduced, we are unable to find any abuse of discretion by the contracting officer in relying, in part, upon that estimate as a basis for cancellation of the initial solicitation.

In fact, the record shows that because the contracting officer felt that the unreasonableness in prices received under the initial solicitation was partially attributable to the delivery schedule, he relied more heavily upon a revision in the delivery schedule than on the unreasonableness of the bids received as the basis for the cancellation. While we recognize that the actual performance time for the three units comprising item #2 was extended by only a few weeks, we are informed that the actual delivery time was understood by the contracting officer to have less impact on competition than the availability of production

time for all nine units (items #1 and #2). In this regard, the contracting officer explains that his expectation of lower prices from the resolicitation was based on the fact that the resolicitation would be within a different time frame, permitting companies which had previously been unable to compete to readjust their production schedules to bid on the resolicited requirement. Although we generally have held that cancellation on the basis of a change in specifications or delivery schedule should be limited to instances in which the original specification or delivery requirement would not serve the Government's actual needs, *see* 49 Comp. Gen. 584 (1970), in this case the contracting officer's determination appears in fact to have been made on a reasonable basis. Having received two bids under the initial solicitation which substantially exceeded the Government's revised estimate, and only one bid that was considered reasonable in amount, which however was nonresponsive for its failure to meet the delivery requirement, the contracting officer reviewed the BPA's delivery time constraints to determine whether the delivery schedule had unduly restricted competition. He concluded that the procurement should be resolicited under a more relaxed delivery schedule in order to increase competition.

Under the circumstances, we are unable to find that the contracting officer acted improperly in canceling the original solicitation and in resoliciting the requirement under an extended delivery schedule. Thus, Westinghouse's protest is denied.

[B-181986]

Bidders—Qualifications—Tenacity and Perseverance—Administrative Determination Accepted—In Absence of Appeal by Small Business Administration

Where Small Business Administration declines to appeal contracting officer's determination of nonresponsibility as to bidder's tenacity, perseverance or integrity, General Accounting Office will no longer undertake to review the contracting officer's determination in the absence of a compelling reason to justify such a review, such as a showing of fraud or bad faith by procuring officials. 49 Comp. Gen. 600, modified.

In the matter of Building Maintenance Specialists, Inc., February 28, 1975:

Building Maintenance Specialists, Inc., a small business concern, was the third low bidder under invitation for bids (IFB) No. DACW38-74-B-0109, issued by the Tulsa District Corps of Engineers, for cleaning services at Millwood Lake, Arkansas. Upon the disqualification of the first and second low bidders, Building Maintenance was considered for award but was subsequently rejected as nonresponsible pursuant to Armed Services Procurement Regulation (ASPR) 1-903.1(iii) (1974 ed.), for its past unsatisfactory performance.

The contracting officer's preaward survey of Building Maintenance revealed two recent instances of unsatisfactory performance. The Chief of the Vicksburg District Corps of Engineers advised that the firm's performance was deficient under contract No. DACW38-73-C-0345, awarded June 22, 1973, for cleanup and mowing services at DeGray Lake, Arkadelphia, Arkansas. Mowing services were not fully performed and the firm's garbage compactor truck was abandoned on the premises filled with its contents. As a result, removal of the truck and performance of other contract work was executed by Government personnel. Also, on May 20, 1974, Building Maintenance was terminated for default since it failed to initiate performance under Louisville District Corps of Engineers contract No. DACW27-74-C-0130, awarded on March 28, 1974, for cleaning and mowing services at the Rough River Lake, Kentucky.

In its rebuttal to the administrative report, the protester argues that it is not at fault for its prior nonperformance. Essentially, the reasons stated in support of this position are that (1) the Government's notice regarding its unacceptable contract performance was inadequate; (2) there was a disagreement over specification requirements; (3) mowing equipment was unavailable because of a steel shortage; and (4) the Government denied the firm access to the job site. The protester believes it was the victim of racial discrimination.

The contracting officer concluded that the past unsatisfactory performance of Building Maintenance was due to its failure to apply the necessary tenacity or perseverance to do an acceptable job. In accordance with ASPR 1-705.4(c)(vi) (1974 ed.) the appropriate Small Business Administration (SBA) Regional Office and the Army Small Business Adviser were furnished documentation relevant to the contracting officer's determination that the firm was not responsible for reasons other than deficiencies in capacity and credit. In this connection, the above regulation provides that SBA may, within 5 days, give notice to the contracting officer of an intent to appeal the matter and within 10 days of such notice SBA is required to provide the head of the procuring activity, or his designee, information and recommendations which would materially bear on any approval action.

SBA's COC Standard Operating Procedure (SOP) 60 04 (1972), Paragraph 11, provides, in part, that in processing tenacity, perseverance and integrity cases, SBA personnel should:

(1) Review the information submitted by the procuring activity.

(2) Discuss the company's performance record with the cognizant Defense Contract Administration Service (DCAS) office. Obtain such documentation as is available.

(3) Obtain the company's view of reasons for delinquencies together with documentation. It should be made clear to the company that SBA may agree with the procuring activity and not pursue the case. Further, if any appeal is made there is no guarantee of contract award.

(4) Discuss the company's performance with resident inspectors or other Government personnel familiar with the concern's operations.
(5) Check as many customers of the company as necessary to help form an opinion as to responsibility.
(6) If feasible, obtain a Commercial Credit report.

In the instant case the SBA Midwestern Regional Office advised the procuring activity that Building Maintenance failed to provide it with any data or information to support a possible appeal. As a result of this failure, SBA declined to appeal the contracting officer's determination of nonresponsibility and it considers the matter closed. On the record before us, we find no basis to question the administrative determination.

In reaching this conclusion, we are persuaded by the fact that the matter of Building Maintenance's responsibility was referred to the SBA for a possible appeal and that the SBA declined to appeal the contracting officer's determination. We believe that the SBA provides bidders with a meaningful and expeditious procedure by which a dispute concerning a bidder's alleged lack of tenacity, perseverance or integrity may be appealed to the head of the procuring agency. Where the SBA finds no basis to appeal the contracting officer's determination, that determination of nonresponsibility generally should be regarded as persuasive.

We have taken a similar position with respect to contracting officer determinations in the area of bidder capacity or credit. *See* B-176804, September 6, 1972; *Society Brand Hat Company*, B-180649, June 24, 1974 and *Unitron Engineering Company*, B-181350, August 20, 1974. As a general rule no useful purpose is served by our review of a contracting officer's determination that a bidder lacks capacity or credit once SBA has declined to issue a certificate of competency to the bidder.

We are aware that in 49 Comp. Gen. 600, 603 (1970) this Office stated that it did not construe SBA's review of the contracting officer's negative determination as to a bidder's tenacity or preseverance as a substitute for our review of the contracting officer's determination even where SBA failed to appeal that determination. In that case the regulations permitted SBA to review a contracting officer's determination that a matter of responsibility involved the bidder's preseverance or integrity rather than its capacity or credit. However, apart from determining whether the contracting officer's determination of nonresponsibility constituted avoidance of the certificate of competency procedure, SBA's standard operating procedures at that time did not call for a review of the adequacy of the tenacity, preseverance or integrity determination. Since 1972 SBA has formally adopted the above quoted standard operating procedures, and we believe these procedures provide an effective process for reviewing agency determinations of tenac-

ity, perseverance and integrity. Our prior decision is modified accordingly.

Henceforth, we will not undertake to review a contracting officer's determination of nonresponsibility based on a small business bidder's lack of tenacity, perseverance or integrity where SBA declines to go forward with an appeal, unless there is a compelling reason to justify our review of the determination, such as a showing of fraud or bad faith on the part of the administrative officials involved. While in the instant case the protester has alleged that racial discrimination influenced the determination, no evidence has been presented to support this allegation and it appears to be based upon speculation by the protester.

Accordingly, the protest is denied.

[B-182015]

Leaves of Absence—Administrative Leave—Fighting Local Fires—Outside Government Installation

The denial of administrative leave to an employee for time spent in fighting a local fire outside of the Government installation was a proper exercise of administrative authority since the Civil Service Commission has not issued general regulations covering the granting of administrative leave, and therefore, each agency has the responsibility for determining the situations in which excusing employees from work without charge to leave is appropriate.

In the matter of administrative leave, February 28, 1975:

This action is a request by the Acting Chief Counsel of the Federal Aviation Administration (FAA), Department of Transportation, for a decision as to whether it is within FAA's authority to grant excused absence, without charge to annual leave or loss of pay, to an employee while he is engaged in firefighting or other rescue activities as a member or officer of a volunteer fire department in whose area the Federal facility employing him is located.

As a general rule, we render formal decisions only to heads of Departments and agencies, disbursing and certifying officers and to claimants who have filed monetary claims with our Office. See 31 U.S. Code 74 and 82d. However, in view of the fact that the problems involved in the instant situation will be of a recurring nature, we are treating the request as if it had been submitted by the Secretary of Transportation under the broad authority provided in 31 U.S.C. 74.

Mr. Charles J. Guenther, an employee of the National Aviation Facilities Experimental Center (NAFEC), located in Atlantic County, New Jersey, in the Townships of Egg Harbor, Galloway and Hamilton, is a member of the all-volunteer township fire department and

since January 1, 1970, the elected fire chief. In such capacity Mr. Guenther became involved in fighting a house fire in the area of one of the volunteer fire companies, which necessitated the absence of Mr. Guenther from duty at the NAFEC for a period of 8 hours. On return to duty Mr. Guenther applied for administrative leave, pursuant to the provisions of FAA regulations published in paragraph 71, Order 3600.4, Section J, entitled Emergency Rescue or Protective Work. This regulation provides that eligible employees who can be spared without interference with essential agency operations and obligations may be authorized excused absence to participate in emergency rescue or protective work during an emergency such as fire, flood, or search operations. However, Mr. Guenther's application for administrative leave was denied by the supervisor and section chief. The FAA states that the NAFEC has entered into reciprocal firefighting agreements with the local firefighting companies pursuant to the provisions of the Act of May 27, 1955, 69 Stat. 66, 42 U.S.C. 1856. However, the agency fire department was not called upon to participate in fighting the fire in question pursuant to the reciprocal firefighting agreement. The duties of Mr. Guenther in NAFEC have no connection with firefighting, and no conflict of interest problems have arisen from his outside firefighting activity. The FAA estimates that Mr. Guenther's average annual absence required by his emergency duties as fire chief amounts to 20 hours.

The question, therefore, is whether an employee who is not a member of the agency's firefighting department should be granted administrative leave for the purpose of fighting a fire in the surrounding community pursuant to activities as a member of the community fire department.

Regulations on the subject of granting excused absence to employees without charge to leave (commonly called administrative leave), applicable only to daily, hourly and piece work employees, e.g. wage board employees, which were issued by the Civil Service Commission under the authority of 5 U.S.C. 6104, are contained in 5 C.F.R. 610.301 *et seq.* Section 610.305 of this regulation provides in part as follows:

> An administrative order may be issued under this subpart when:
>
> * * * * * * *
>
> (c) it is in the public interest to relieve employees from work to participate in civil activities which the Government is interested in encouraging.

Apart from these provisions, the Civil Service Commission has issued no general regulations on the subject of granting excused absence to employees without charge to leave. However, this matter is discussed in FPM Supplement 990–2, Book 630, Subchapter S11 and, under administrative practice and decisions of the General Accounting Office,

similar standards are applied to salaried (General Schedules) employees.

Paragraph (a) of Subchapter S11–5 of Book 630, FPM Supplement 990–2, entitled "ADMINISTRATIVE DISCRETION," contains the following general instructions with regard to the type of absence in question:

> With few exceptions, agencies determine administratively situations in which they will excuse employees from duty without charge to leave and may be administrative regulation place any limitations or restrictions they feel are needed. * * *

Thus, in the absence of statute, an agency may excuse an employee for brief periods of time without charge of leave or loss of pay at the discretion of the agency.

This discretion was limited by a decision of the Comptroller General in 44 Comp. Gen. 643 (1965), to excusing absences without charge to leave or loss of pay when such absence was in connection with furthering a function of the agency. In 32 Comp. Gen. 91 (1952), the Comptroller General found that there was no legal authority for a Federal facility to expend appropriated funds for the purpose of firefighting in civilian communities outside of Federal reservations unless Federal property was endangered by such fires.

To remedy this situation Congress enacted the Act of May 27, 1955, 69 Stat. 66, *et seq.*, 42 U.S.C. 1856 *et seq.*, by which agency and department heads under regulations prescribed by the head of the agency are authorized to enter into mutual aid fire-protection agreements with firefighting units engaged in firefighting activities near Federal installations or activities, and in the absence of any agreement, are authorized to render emergency assistance in extinguishing fires and preserving the life and property from fires within the vicinity of any place at which such agency maintains fire protection facilities. This act merely authorizes firefighting units of a Government installation that have entered into mutual aid agreement to assist local firefighters in fighting local fires. However, in the case at hand the Government installation's firefighting unit was not called upon to assist in fighting the local fire and furthermore, even if the Government installation had been requested to assist in fighting the local fire, the employee involved would not have been affected since he was not employed in the capacity of a firefighter at NAFEC.

Since the scope of authority for the granting of time off without charge to leave in circumstances similar to those in this case is not clearly defined in law and regulations and since the granting of administrative leave is within the discretion of the agency, the General Accounting Office will not question the denial of such leave. *See* 53 Comp. Gen. 582 (1974).

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