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[B-163666]

Contracts—Specifications—Military—"All or None" Bidding Requirement

An "all or none" bidding limitation in an invitation soliciting bids for the purchase of various types of refuse collection, materials-handling trucks with container hoisting devices, and for detachable refuse containers suitable for use with the trucks to be manufactured in accordance with performance type military specifications is not restrictive of competition where the limitation is necessary to insure the purchase of a workable system for the collection and handling of trash and is based upon a bona fide determination that the necessary degree of compatibility of components of the advertised system cannot be otherwise achieved under the referenced military specifications.

To the Anchor Machine Co., Inc., June 3, 1968:

Reference is made to your letters of February 23, 26, and March 20, 1968, protesting the award of a contract to any bidder under invitation for bids No. DAAE07-68-B-0927, issued by the United States Army Tank and Automotive Command, Warren, Michigan. We are advised that bids have been received under the invitation but that the bid opening has been delayed by the procuring activity pending our decision in the matter.

The invitation, issued February 6, 1968, solicited bids for the purchase of various types of refuse collection, materials-handling trucks with container hoisting devices, and for detachable refuse containers suitable for use with the trucks. The advertised trucks and containers are listed in the invitation under five groups (I through V), comprising, as amended, a total of 18 individual items and numerous subitems. The invitation provides that all of the items are to be manufactured in accordance with the several military specifications identified therein. Paragraph 37 of the "ADDITIONAL SOLICITATION INSTRUCTIONS AND CONDITIONS" advised prospective bidders, per amendment No. 2, February 23, 1968, that bids were to be submitted on an "all or none" basis for each of the five groups of items, and that any bid not in conformance with the requirement will be considered nonresponsive. Specifically your protest has reference to the "all or none" requirement of the invitation made applicable to the items included in groups I, V, VI, VIII, and IX. Group I includes materials-handling trucks and refuse containers of different sizes; group V includes tilting frame trucks for container handling and various types of detachable cargo bodies; group VI includes refuse collection trucks of various types and refuse containers; group VIII includes refuse collection trucks with tilt cabs, compaction type, and various sizes of refuse containers; and group IX includes refuse collection trucks similar to those in group VIII and various sizes of refuse containers.

You contend that the "all or none" bid provisions of the invitation are ambiguous and unduly restrictive of competition since only those potential suppliers who are capable of manufacturing or supplying all items within the named groups could participate in the procurement. In the latter regard, you state that there is no justification for the solicitation of bids on an "all or none" basis to insure compatibility of the advertised components, as alleged by the procuring agency, since the refuse containers are to be constructed pursuant to referenced military specifications which, in itself, insures compatibility of the refuse containers with the trucks.

Your letter of March 20, submitted in further support of your protest, states as follows:

> As I indicated to you, we are, to a limited extent, in the refuse hauling truck business. We manufacture specialized closed containers used with our Refuse Compaction System. A properly equipped truck is necessary to handle these special closed containers. Normally, we have the customer furnish this truck to us and we furnish the necessary hoisting equipment and install it on the truck.
>
> It is completely outside of our capability to furnish the vehicles, as per the specifications, for this solicitation. We are principally a manufacturer of containers, regardless of size or configuration, etc., and build them for both commercial use and to the Military Specification applicable to this solicitation. We can offer containers in compliance with specification MIL–R–22827B at extremely competitive prices and completely compatible with the user's hauling equipment, regardless of its type, make or manufacture. It is for these foregoing reasons that we have entered our protest relative to the present "method of award."

The procuring activity has advised us that it agrees with your contention that the "all or none" bidding provisions are restrictive of competition insofar as they relate to group I, and that the invitation will be amended to remove the limitation as to group I prior to bid opening. However, with regard to your protest against the "all or none" requirement as it is applicable to the remaining groups of the invitation, the procuring activity is convinced that the "all or none" bidding limitation is necessary in order to insure the purchase by the Government of a workable system for the collection and handling of trash and rubbish. Each of the advertised refuse collection systems is comprised of a truck, a cargo body, and a number of containers, all of which must be compatible with each other. The military specifications referenced in the invitation are performance-type specifications which are designed to permit the purchase of an indefinite number of styles and designs of refuse collection systems available from several known sources, but which, do not of themselves, insure compatibility between the different manufacturers' styles as you allege. The contracting officer states in this regard that:

> * * * even though there may be in given instances interchangeability of containers and trucks between the various systems, the trucks of one supplier, for example, will not necessarily fit and match with and pick up and handle the containers of a second supplier. To assure compatibility between the various parts of a refuse collection system, "all or none" requirements may be necessary. It

would be pointless, for instance, to purchase containers from one source and trucks from a second source when the handling devices on the trucks furnished by the second source would not match with and pick up and unload the containers of the first supplier.

The administrative justification supporting the requirement for compatibility within the advertised systems which, it is reported, cannot be insured solely by use of the referenced military specifications without application of the "all or none" bidding limitation, is as follows:

a. The Cargo Bodies are drawn up or released from the trucks by a system of matching and mating rails upon which the Cargo Body slides up onto or down from the truck. As the specifications do not prescribe locations or dimensions, the rails and their locations will probably vary from one manufacturer's system to another. Thus, there is no assurance that the Cargo Body of one system will function with the truck of another, in the absence of "all or none" provisions.

b. The motive force lifting the Cargo Body onto the truck and releasing the Cargo Body from the truck may be either a cylinder type or a winch type, both of which are essentially different and may be entirely incompatible with each other.

c. The Compactor within the Cargo Body (Item 009) operates upon a Hydraulic System. The power to operate this system is generated by the truck. The specifications do not call out the types of hoses and connections to be used nor the locations in the Cargo Body through which the hoses and hydraulic connections must pass or terminate. The result is that the hydraulic system of one truck manufacturer cannot be expected to be compatible and function in conjunction with the hydraulic system in a Cargo Body made by another manufacturer.

3. With respect to the Refuse Collection Trucks with front container hoisting devices and their corresponding containers, incompatibility can result, if the "all or none" requirements are not preserved, with respect to the arms of the truck front hoisting mechanism and the corresponding hoisting attachments on the Containers by which the Containers are lifted. In these systems (Items 0010 through 0017, Items 0019 through 0022, and Items 0023 through 0028), the arms on the truck front hoisting mechanism may vary in a number of respects from manufacturer to manufacturer. They may be a pin type, a sleeve type, or pick up the container from the bottom—and still comply with the performance requirements in the truck specifications. Even if the arms on the truck's hoisting device should mate with the hoisting attachments on the container, the container hoisting attachment's location may differ from manufacturer, with the result that the container of one manufacturer might not clear the truck cab of another manufacturer. Further, even if the type of arm on the front hoisting mechanism is of a generally compatible type with the corresponding hoisting attachment on the container, the exact measurements and the configurations of the arm must correspond to the measurements and configurations upon the container hoisting attachments. In all these systems (Items 0010 through 0017, Items 0019 through 0022, and Items 0023 through 0028), new systems are being purchased and it cannot be known until opening who will be the successful bidder and truck manufacturer. Thus, if the trucks and containers are to function as a system without alteration by the Government, as specified, the "all or none" requirements must be retained.

We have held that the formal advertising statute requires that every effort be made to draft invitations for bids in such terms as will permit the broadest field of competition consistent with the Government's actual needs. As to the present procurement, we find no adequate basis for holding that the use of the "all or none" bidding limitation is not based upon a bona fide determination by the procuring activity that the necessary degree of compatibility of components of the advertised systems cannot be otherwise achieved under the referenced military

specifications. In B–151738, August 19, 1963, wherein we considered a protest against an invitation requirement for aggregate bidding in the procurement of oscilloscopes and cameras, we held:

It is well established that the drafting of specifications designed to meet the minimum needs of the Government and the determination as to whether the bids received are responsive to such specifications are matters which are primarily the responsibility of the administrative office requiring the materials or equipment. 21 Comp. Gen. 1132, 1136; B–134846, June 12, 1958. When a specification lends itself to open competition as required by applicable statutes and it is shown, when considering all of the facts, that any restrictive provisions therein are no greater than necessary to protect legitimate interests of the Government, our Office will not intervene.

In view of the unsatisfactory past experience by the Federal Aviation Agency with oscilloscopes and cameras made by miscellaneous manufacturers, and in view of the technical requirements of this procurement, we do not feel that we would be justified in objecting in this instance to the Agency's determination that its interests required the procurement of both the oscilloscopes and the cameras from a single source. Accordingly, we find that the requirement for aggregate bids in the invitation was not in contravention of the statutes requiring open and competitive bidding.

Clearly, in the orderly conduct of the Government's business, the Government as a buyer may not be placed in the position of having to purchase a portion of an advertised system from a potential supplier who is unable or unwilling to supply the entire system but only certain components of the system. Moreover, the technical and/or engineering question as to whether the desired compatibility of components may be attained other than through the purchase of a complete rubbish collection system is not for resolution by our Office. Rather, in accordance with our established rule in areas such as here involved, we must rely upon the technical judgment of the procurement activity.

In view of the facts reported, we must conclude that the "all or none" bidding limitation is not objectionable under the circumstances of this procurement.

Accordingly, for these reasons, your protest is denied.

[B–164146]

Officers and Employees—Transfers—Relocation Expenses—Taxes

An employee transferred between counties in the State of Pennsylvania who incurs the expense of State and county real property transfer taxes in connection with the sale and purchase of residences at his old and new official stations may only be reimbursed the amount of the higher expense as the authority in section 4.2d of the Bureau of the Budget Circular No. A–56 for the reimbursement of transfer taxes is subject to the condition that the same types of costs are not reimbursable at both stations. Even if the employee had paid a State transfer tax incident to one transaction and a local transfer tax in connection with the other, the "same types of costs" principle would prevent reimbursement of both expenses.

To the Chairman, United States Civil Service Commission, June 3, 1968:

Further reference is made to your letter of April 23, 1968, concerning the propriety of reimbursing a transferred employee of the Civil Service Commission the expenses he incurred for State and county real property transfer taxes in connection with his sale and purchase of residences at his old and new official stations.

The case presented for our consideration involves an employee who moved from Harrisburg to Villanova, Pennsylvania, incident to a transfer of official station. In connection with that transfer, the employee is entitled to reimbursement of the expenses he incurred in the sale of his residence at his old official station and in the purchase of a residence at his new official station under 5 U.S.C. 5724a(a) and section 4 of Bureau of the Budget Circular No. A–56. The items of expense in question involve the Pennsylvania State tax, amounting to 1 percent of the purchase price, which is imposed on the transfer of real property and the similar 1 percent tax which is imposed by local governments in the State of Pennsylvania.

In the localities where the employee sold and purchased residences, both State and local transfer taxes were charged. The total transfer tax, amounting to 2 percent of the purchase price, was in each case split between the buyer and seller in accordance with the custom of the areas in which the residences were sold and purchased. Thus, the employee was required to pay 1 percent of the sales price of each residence to cover State and local transfer taxes.

Section 4.2d of Circular No. A–56 specifically authorizes reimbursement of expenses incurred for transfer taxes; however, reimbursement of that expense is subject to the condition that the same types of costs are not reimbursable at both localities, i.e., old and new official stations. Since the employee paid one-half of the total State and local transfer taxes in connection with real estate transactions both at the old and at the new official stations, he is entitled to reimbursement in the amount of the higher expense only. Further, even if the employee had paid a State transfer tax incident to one transaction and a local (county or city) transfer tax in connection with the other transaction, we believe that the provision prohibiting reimbursement of the same types of costs at both localities would prevent reimbursement of both of those expenses. The difference between the State and the local tax on the same transaction is not sufficient to justify a holding that they are not the same types of costs.

For the reasons stated the employee concerned may be reimbursed only the larger of the two amounts he paid for State and local transfer

taxes in connection with his sale and purchase of residences at his old and new official stations.

[B-164147]

Leaves of Absence—Lump-Sum Payments—Transfers—Positions Exempt From Leave Act

An employee who earned leave under a 700 hour temporary appointment in which she worked a regular tour of duty, upon conversion to a temporary-intermittent position which is not subject to the leave statute (5 U.S.C. 6301, *et seq.*), but under which she retains the same title and grade, may receive a lump sum leave payment under the rule in 33 Comp. Gen. 85, 88, enunciating the principle that an employee may be paid for annual leave that is not legally transferable. The principle in 37 Comp. Gen. 523 that a lump sum leave payment may not be made unless a separation actually takes place is applicable only to situations involving continuing programs under which employees are required to return to full-time employment after a period of intermittent employment.

To G. L. Abney, United States Department of Agriculture, June 3, 1968:

We refer to your letter of April 22, 1968, requesting a decision concerning the propriety of certifying for payment a voucher transmitted therewith in favor of Miss Ruth L. Carpenter, an intermittent employee of the Farmers' Home Administration covering a lump-sum payment for annual leave.

The question involved is whether Miss Carpenter is to be regarded as having been separated from the service for the purpose of receiving a lump-sum leave payment upon her conversion from a 700-hour temporary appointment (Cash Clerk, GS-530-02) in which she worked a regular tour of duty and was subject to the statutory leave provisions (5 U.S.C. 6301, *et seq.*) to a temporary-intermittent position which was not subject to such statutory leave provisions and to which she could not transfer the annual leave to her credit immediately prior to such conversion. See 5 U.S.C. 6301(2)(ii).

You call attention to our decision in 37 Comp. Gen. 523 which held that no lump-sum leave payment could be made unless a separation actually takes place whereas the decision in 33 Comp. Gen. 85, 88, recognizes the propriety of making a lump-sum leave payment when an employee transfers from a position subject to the leave statute to a position not covered by such leave statute. You point out that in the present case the employee's title and grade remains the same after her conversion but that her type of appointment was changed from one that was subject to the leave statute to one that is not subject to the leave statute.

The principle enunciated in the decision appearing in 37 Comp. Gen. 523 is applicable only to situations involving continuing pro-

grams under which employees are required to return to full-time employment after a period of intermittent employment and, therefore, such principle is not controlling in the present case. Rather, we consider that the principle enunciated in 33 Comp. Gen. 85, 88, should be applied in the present case since it was not legally permissible to transfer the annual leave to the credit of the employee upon her appointment to the intermittent position. *Cf.* 39 Comp. Gen. 308. Accordingly, the voucher which is returned herewith may be certified for payment if otherwise correct.

[B–164081]

States—Federal Aid, Grants, Etc.—Educational Agencies Affected by Federal Activities—Other Federal Payments

Notwithstanding the restriction on the use of 1968 funds appropriated by Public Law 90–132 to the Office of Education under the heading "School Assistance in Federally Affected Areas" to carry out legislative enactments after June 30, 1967, section 204 of Public Law 90–247 dated January 2, 1968, eliminating the requirement in Public Law 874, 81st Congress, that payments to local educational agencies be reduced by amounts "derived from other Federal payments" is effective. The retroactive aspect of section 208 of Public Law 90–247, prescribing that section 204 of the act "shall be deemed to have been enacted prior to June 30, 1967, and shall be effective for fiscal years beginning thereafter," overcoming the appropriation restriction and, therefore, Public Law 874 educational payments are not required to be reduced by the amount of any other Federal payments.

To the Secretary of Health, Education, and Welfare, June 4, 1968:

This is in reply to your letter of May 2, 1968, in which you request a decision as to whether funds appropriated by the Department of Health, Education, and Welfare Appropriation Act, 1968, Public Law 90–132, approved November 8, 1967, 81 Stat. 390, to the Office of Education under the heading "School Assistance in Federally Affected Areas" are available for payment to local educational agencies in accordance with the provisions of Public Law 874, 81st Congress, approved September 30, 1950, as amended by sections 201, 203, 204, 205, 206, and 207 of Public Law 90–247 approved January 2, 1968, 81 Stat. 806–809, or whether those funds are available for payment only in accordance with the provisions of Public Law 874 as it existed prior to the inclusion of those amendments.

The question arises because of the proviso in that part of the 1968 appropriation act cited which reads:

Provided further, That no part of this appropriation for payments to local educational agencies for the maintenance and operation of schools shall be available to carry out the provisions of legislation for this purpose enacted after June 30, 1967. 81 Stat. 391.

Public Law 90–247 was approved on January 2, 1968, more than

6 months after the date of June 30, 1967, stated in the quoted proviso, but provides in section 208 that:

> The amendments made by sections 201, 203, 204, 205, 206, and 207 of this part shall be deemed to have been enacted prior to June 30, 1967, and shall be effective for fiscal years beginning thereafter.

You have been unable to find any expression of the legislative intent of that section in its legislative history.

It is stated in your letter that the principal effects of the interpretation of the quoted section 208 in its relation to the quoted appropriation proviso are in the application or nonapplication of two amendments to Public Law 874, 81st Congress, made by Public Law 90–247.

Prior to the enactment of Public Law 90–247, payments to local educational agencies otherwise computed under Public Law 874 were required to be reduced by the amount "derived from other Federal payments" as that term was defined in that law. The requirement for deducting "other Federal payments" as well as the definition of that term was eliminated by section 204 of Public Law 90–247. Pending resolution of the question raised in your letter, the Office of Education on a provisional basis has continued to deduct the amount of such payments.

Section 3(b) of Public Law 874, 81st Congress, as amended, was further amended by section 201(d) of Public Law 89–750 approved November 2, 1966, 80 Stat. 1191, 1210 (Chamizal amendment) which added a sentence that provided a special entitlement for the fiscal year which ended June 30, 1967, to local educational agencies which provided free public education as a result of a change in residence from land transferred to Mexico as part of a relocation of an international boundary of the United States. This entitlement was not funded during the fiscal year 1967 because of a proviso in the 1967 appropriation act, Public Law 89–787, approved November 7, 1966, 80 Stat. 1382, 1384, similar to the quoted proviso of the 1968 appropriation act. Section 205 of Public Law 90–247 amended the sentence which has been added to section 3(b) of Public Law 874, 81st Congress, by adding

> but if, by reason of any other provision of law, this sentence is not considered in computing the amount to which any local educational agency is entitled for the fiscal year ending June 30, 1967, the additional amount to which such agency would have been entitled had this sentence been so considered, shall be added to such agency's entitlement for the first fiscal year for which funds appropriated to carry out this Act may be used for such purpose.

As stated in your letter a decision on these two matters will have a direct bearing on the application of sections 2, 3, and 4(a) of Public Law 874 (81st Congress) (20 U.S.C. 237, 238, 239(a)) which con-

stitute a mandatory grant program, subject to the pro rata reductions of section 5(c) of that law (20 U.S.C. 240(c)).

Our examination of the legislative history of Public Law 90–247 also resulted in our being unable to find any helpful expression of the legislative intent regarding section 208. Our consideration, therefore, turns to the wording used by the Congress.

Section 208 appears under the heading "EFFECTIVE DATE" and by its terms establishes that the sections of the act referred to therein are to be effective commencing with fiscal year 1968 and thereafter. Is the phrase "shall be deemed to have been enacted prior to June 30, 1967" as used in the section necessary to accomplish this purpose? The fact that the answer to this question is obviously in the negative suggests that the phrase was inserted by the Congress to accomplish a purpose beyond the mere establishment of effective dates for the sections covered.

We recognize that the Congress ordinarily might use language including the phrase in question to do no more than set the time from which legislation is to become operative. However, two factors lead us to conclude otherwise with respect to the instant situation.

First, we note that in connection with stipulating the effective dates of other portions of the act, the Congress did not include language dealing with considerations of retroactive enactment. See sections 102, 104(c), 145(c), and 202 (81 Stat. 783, 784, 800, 807).

Second, neither section 208 nor any similar language was, as it passed the House, in H.R. 7819, the original bill which was ultimately enacted as Public Law 90–247. The section was included in the bill as reported out on November 6, 1967, by the Senate Committee on Labor and Public Welfare, at which time the appropriation provision in question was also under consideration.

Considering the language used in sections of Public Law 90–247 other than 208 to establish effective dates, together with the contemporaneous congressional consideration of that act and the appropriation act, we can only conclude that the retroactive enactment aspect of section 208 was specifically designed to overcome the restriction in the appropriation act. To conclude otherwise is to state that the retroactive enactment provision of section 208 is meaningless surplus despite the accomplishment of similar purposes in other portions of the act itself without resort to surplus language, a statement we do not believe justified under the circumstances involved.

It, therefore, follows that the words "shall be deemed to have been enacted prior to June 30, 1967" appearing in section 208 of Public Law 90–247, approved January 2, 1968, has the same effect in relation to the quoted appropriation proviso appearing in Public Law 90–132,

approved November 8, 1967, as its actual enactment prior to June 30, 1967, would have had. Therefore funds appropriated by the Department of Health, Education, and Welfare Appropriation Act, 1968, to the Office of Education under the heading "School Assistance in Federally Affected Areas" are available for payment to local educational agencies in accordance with the provisions of Public Law 874, 81st Congress, as amended by sections 201, 203, 204, 205, 206 and 207 of Public Law 90–247.

[B–163352]

Orders—Effective Date—Leave, Delay En Route to New Station

No legal basis existing for distinguishing between the assignment of a member of the uniformed services to nonrestricted and restricted areas for the purpose of extending the effective date of permanent change-of-station orders until the completion of temporary duty or leave en route, paragraph M3003–1b(1) of the Joint Travel Regulations may be amended under 37 U.S.C. 404(b) to eliminate the distinction, the revision to conform to the rule in 33 Comp. Gen. 458 that the effective date of permanent change-of-station orders is the date upon which travel must commence to accomplish an ordered change, and that the travel is not required to start prior to the performance of temporary duty, use of authorized leave, proceed time, and personal convenience delays. Therefore, a member's entitlement to transportation allowances only for dependents in existence on the effective date of orders remains unaltered under the revised regulation.

To the Secretary of the Army, June 5, 1968:

Further reference is made to letter of December 29, 1967, from the Under Secretary of the Army, requesting a decision whether paragraph M3003–1b(1) of the Joint Travel Regulations may be revised to authorize the determination of the effective date of permanent change-of-station orders to a nonrestricted or a restricted area on the same basis. This request was assigned control No. 68–1 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Under Secretary states in substance that under item 2 of paragraph M3003–1b(1) of the Joint Travel Regulations the effective date of orders involving temporary duty en route to a permanent duty station in a nonrestricted area is extended until after the completion of temporary duty or leave (if authorized and utilized), and that under item 3 of that paragraph the effective date of orders involving temporary duty en route to a permanent duty station in a restricted area is not postponed by such temporary duty en route.

The Under Secretary says that the difference in the method of determining the effective date involving two members under permanent change-of-station orders, at the same temporary duty station en route, appears to create an inequity in entitlement. As an example of this, he describes a situation where two members are transferred at the

same time, with temporary duty en route at the same station—the new permanent station of one member being in a nonrestricted area and the other in a restricted area—and they marry while at that temporary duty station. In those circumstances, he says that only the one who is assigned to the new permanent station in the nonrestricted area is entitled to reimbursement for travel of his dependent wife.

The Under Secretary explains that the above-mentioned items 2 and 3, were based on our decisions, 33 Comp. Gen. 160 and 33 Comp. Gen. 332, and were intended primarily to cover circumstances involving modification, revocation or cancellation of orders. He suggests that since paragraph M7051 of the Joint Travel Regulations now provides a firm entitlement in cases where orders are modified, revoked, or canceled, it is no longer necessary to construct the effective date of orders as presently provided by the regulations. Accordingly, he recommends the revision of paragraph M3003–1b(1) to delete item 3 so that it will read as follows:

b. Effective Date

(1) Definition. The term "effective date of orders," unless otherwise qualified, means the date of the member's relief (detachment) from the old station; except:

1. when leave or delay prior to reporting to the new station is authorized or the member is granted additional travel time to permit travel by a specific mode of transportation, the amount of such leave, delay, or additional travel time will be added to date of relief (detachment) to determine the effective date; or

2. when the orders involve temporary duty at one or more places en route to a permanent duty station, the effective date, for the purpose of dependent travel and shipment of household goods, is the date of relief (detachment) from the last temporary duty station plus leave, delay, or additional travel time allowed for travel by a specific mode of transportation, authorized to be taken after such detachment.

The Under Secretary requests decision whether paragraph M7051 of the Joint Travel Regulations obviates the necessity of retaining item 3 of paragraph M3003–1b(1) and whether we would be required to object to the proposed revision.

The governing statutory authority, 37 U.S.C. 406, provides generally that under regulations prescribed by the Secretaries concerned members of the uniformed services who are ordered to make a permanent change of station shall be entitled to transportation allowances for their dependents.

Paragraph M7051, Joint Travel Regulations, provides, under authority of 37 U.S.C. 406a, that when orders directing a permanent change of station are modified after the date travel of dependents under the orders is commenced and a new permanent station is designated, or the new permanent change-of-station orders are canceled or revoked, transportation of dependents at Government expense is authorized for travel performed for the distance from the place dependents commenced travel, to the place at which they received noti-

fication of the modification, cancellation, or revocation of orders, and thence to the new station or return to the old station, not to exceed the distance from the old station to the first-named station and thence to the last-named station or return to the old station.

Paragraph M7060 of the regulations, first appearing in Change 140, September 1, 1964, provides that when a member acquires a dependent subsequent to the date of his departure (detachment) from his old permanent duty station incident to permanent change-of-station orders but on or before the effective date of those orders he will be entitled to transportation of such dependent from the place where the dependent is acquired to the new permanent station not to exceed the entitlement from the old to the new permanent duty station and that entitlement is without regard to whether temporary duty is directed or performed en route or whether either the old or new station is within or outside the United States.

This Office consistently has held that the effective date of orders directing a permanent change of station is the date on which travel is required to be commenced in order to comply with such orders. 33 Comp. Gen. 458. Members are entitled to permanent change-of-station transportation allowances authorized for dependents only as to dependents in existence on such effective date.

Members who acquire dependents after the effective date of their permanent change-of-station orders have not been considered to be members with dependents for the purpose of permanent change-of-station transportation allowances. Nothing in the provisions of 37 U.S.C. 406a purports to alter the basic statutory premise that only members with dependents are authorized these transportation allowances, and consequently the regulations issued pursuant to those provisions may not be viewed as having that effect. Hence, to the extent that the effective date of orders is material to the determination of whether a member ordered to make a permanent change of station has a dependent for purposes of the provisions of 37 U.S.C. 406(a), we find no basis for a conclusion that paragraph M7051 of the Joint Travel Regulations obviates the requirement for any of the provisions contained in paragraph M3003–1b of the regulations.

We have not questioned regulations by the Secretaries concerned specifying the items of delay for consideration in determining the effective date of permanent change-of-station orders which do not conflict with the legal concept of that date as stated in 33 Comp. Gen. 458—the date upon which travel must commence in order to accomplish the ordered permanent change of station. It long has been recognized that such travel is not required prior to the use of authorized leave, proceed time, and other delays provided for the member's per-

sonal convenience. In addition, we have not objected to regulations delaying the effective date of the orders until the termination of any period or periods necessary to perform temporary duty assignments required by the orders prior to proceeding to the location of the new permanent duty station in an unrestricted area and we see no legal basis for an objection to such regulations solely because the new permanent duty station is in a restricted area.

In our view the proposed revision of paragraph M3003–1b(1) of the Joint Travel Regulations comes within the authority vested in the Secretaries by 37 U.S.C. 404(b) to prescribe the conditions under which travel and transportation are authorized and, accordingly, we have no objection to the proposed revision.

[B–163501]

Public Health Service—Commissioned Personnel—Retired Pay—Concurrent Payments

An officer of the Public Health Service who receives credit for prior service in the Navy and Naval Reserve to determine eligibility for retirement under 42 U.S.C. 212(a)(3) and to compute his retired pay may not upon reaching 60 years of age have the same period of Navy and Naval Reserve service considered in determining eligibility to retired pay benefits under 10 U.S.C. 1331, absent specific statutory authority. The dual use of the service credits would be inconsistent with the pattern of retirement legislation, and neither 10 U.S.C. 1336, authorizing the consideration of service credited for retirement purposes in determining eligibility for the benefits enumerated in the section, nor any other law would permit the dual use of the Navy and Naval Reserve service to provide concurrent payments of retired pay from the Navy and Public Health Service.

To Commander D. G. Sundberg, Department of the Navy, June 7, 1968:

Further reference is made to your letter dated January 15, 1968, (XO:MTP:mlo, 7220/73872), requesting an advance decision as to whether or not former Commander Alfred S. Lazarus, United States Naval Reserve, 73872, is entitled to concurrent payments of retired pay from the United States Navy and the Public Health Service in the circumstances described therein. Your letter was forwarded here by second endorsement of the Comptroller of the Navy under date of February 6, 1968, and was assigned submission No. DO–N–987 by the Department of Defense Military Pay and Allowance Committee.

It is reported in your letter and enclosures that Mr. Lazarus was honorably discharged from the Naval Reserve on August 24, 1954, with 22 years, 2 months and 16 days "satisfactory Federal service." It is stated that at the time of his discharge he had met the service requirements for entitlement to retired pay as provided in 10 U.S.C.

1331(a). He had less than 9 years of extended active duty in the Navy and the Naval Reserve.

Following his service in the Navy and the Naval Reserve, Mr. Lazarus served on active duty in the Commissioned Corps of the Public Health Service from October 1, 1954 through March 31, 1966. After 11 and one-half years of service, by orders dated March 18, 1966, he was retired effective April 1, 1966, under the provisions of "Section 211(a)(3) PHS Act" (42 U.S.C. 212(a)(3)) authorizing retirement after 20 years of active service. His retired pay was authorized by 42 U.S.C. 212(a)(4)(A) and was computed at the rate of 50 percent of the basic pay of a director grade officer with over 30 cumulative years of service. It is reported that he is currently in receipt of such retired pay. You state that for the purpose of retirement eligibility and computation of retired pay from the Public Health Service, Mr. Lazarus was credited with his service in the Navy and the Naval Reserve.

You further state that upon attaining 60 years of age, Mr. Lazarus submitted his application for retired pay benefits from the Navy pursuant to 10 U.S.C. 1331 and that he was authorized retired pay under that law effective November 1, 1967. You say that entitlement to such retired pay is based on the inclusion of the same service in the Navy and Naval Reserve which was used to determine his retirement eligibility and rate of retired pay from the Public Health Service.

You ask whether or not the officer is entitled to retired pay from the Navy under the provisions of 10 U.S.C. 1331 and the holding in our decision reported at 44 Comp. Gen. 235 in addition to retired pay as a Public Health Service officer. If our reply is in the affirmative, you express doubt as to whether the officer may be credited with the same Navy and Naval Reserve service toward his retirement eligibility and in the computation of his retired pay under both 10 U.S.C. 1331 and 42 U.S.C. 212.

In our decision of October 29, 1964, 44 Comp. Gen. 235, cited in your letter, the issue presented was whether active service as a commissioned officer in the Reserve Corps of the Public Health Service may be included by an officer of the Navy in determining eligibility for retirement and in the computation of retired pay under the provisions of 10 U.S.C. 6323—which law authorizes the retirement of an officer of the Navy or the Marine Corps after completing more than 20 years of active service as there indicated. We said that since the term "Armed forces" as defined in 10 U.S.C. 101(4)—and the other statutory provisions of Title 10 there cited—did not include the Public Health Service or the Reserve Corps of the Public Health Service, and since the term "uniformed services" as defined in 37 U.S.C. 101(3) includes the Public Health Service, it was evident that Congress was fully aware and did not intend that the Public Health Service should be considered as

coming within the scope of the term "Armed forces" as used in Title 10, U.S. Code.

We concluded that the officer there mentioned could not include his active service in the Reserve Corps of the Public Health Service to establish eligibility for retirement as an officer of the Regular Navy under the provisions of 10 U.S.C. 6323 (a) and (b). We did say, however, that because of the provisions of 10 U.S.C. 1405(3), the officer's commissioned service in the Reserve Corps of the Public Health Service may be included in determining the multiplier factor prescribed in 10 U.S.C. 6323(e). There is nothing in that decision, however, to support the view that concurrent payment of retired pay is authorized from the Navy and the Public Health Service in the situation presented.

A commissioned officer of the Public Health Service is considered a member of the uniformed services for basic pay purposes (37 U.S.C. 201(a)). Such an officer is entitled to include his active service in any of the uniformed services (42 U.S.C. 212(d)(1)) to establish eligibility for retirement for length of service as a Public Health Service officer under 42 U.S.C. 212(a)(3).

Chapter 67, Title 10, U.S. Code (sections 1331–1337), authorizes payment of retired pay for non-Regular members and former members of the uniformed services who otherwise meet the age and service requirements there mentioned. The same period of time that is creditable as service for retirement purposes under chapter 67 of Title 10 may also be creditable, within specific statutory provisions, in determining eligibility for certain other retirement benefits. Section 1336, Title 10, U.S. Code, provides:

> No period of service included wholly or partly in determining a person's right to, or the amount of, retired pay under this chapter may be excluded in determining his eligibility for any annuity, pension, or old-age benefit, under any other law, on account of civilian employment by the United States or otherwise, or in determining the amount payable under that law, if that service is otherwise properly credited under it.

The quoted provision (section 305) was added to the House bill during the course of the hearings before the Committee on Armed Services, United States Senate, dated May 20 and 27, and June 8, 1948, on H.R. 2744—which became the act of June 29, 1948—and the purpose for such amendment was explained by the Chairman on page 76 of those hearings as follows:

> The purpose of that amendment is to make sure that a Federal employee who has worked as a civilian all of his life, and starts to retire at age 60, and who might simultaneously also qualify for a Reserve retirement, would be entitled to both his civilian and Reserve retirement.

Thus it will be seen that the purpose of section 1336 was to make sure that receipt of retirement pay under chapter 67 in no way interferred with payment of the other benefits mentioned in that section.

While on active duty as a commissioned officer of the Public Health Service, Mr. Lazarus was entitled to pay and allowances as provided for other members of the uniformed service (see Title 37, U.S. Code, and 42 U.S.C. 210(a)) and it appears that when he retired from that service he used his naval service not only to establish his eligibility for retirement but also in computing his retired pay. To permit Mr. Lazarus to use his naval service again in determining eligibility for retirement under chapter 67 would be entirely inconsistent with the pattern of retirement legislation. Neither section 1336 nor any other law of which we are aware would permit him to use his naval service for such a dual purpose.

It is our view that in the absence of a statute expressly authorizing the crediting of the same period of military service for purposes of determining eligibility for retirement pay under both 10 U.S.C. 1331 and 42 U.S.C. 212 (compare 5 U.S.C. 8332(c)), there would be no basis for crediting Mr. Lazarus with his Navy and Naval Reserve service so as to entitle him to retired pay under 10 U.S.C. 1331 when the same service has already been credited to him in determining his right to the retired pay which he is receiving as a commissioned officer of the Public Health Service. The first question presented is answered in the negative and for that reason no answer is required to the other questions.

[B-163755]

Pay—Retired—Disability—Basic Pay Requirement for Entitlement

An enlisted man released from active duty for training on April 22, 1966, as not fit for full duty due to an ankle injury incurred on April 15 in line of duty who failed to report for follow-up medical treatment and performed regular inactive duty training drills prior to placement on the Temporary Disability Retired List on December 15, 1967 under 10 U.S.C. 1202, may not be paid disability retired pay under 10 U.S.C. chapter 61, the right of the non-Regular member to pay and allowances not having been established by a showing of the continued existence of a disability, the requisite of a basic pay status was absent at the time the disability determination was made.

To C. C. Gordon, United States Coast Guard, June 7, 1968:

Further reference is made to your letter of February 29, 1968, requesting a decision whether Fireman Ford M. Meyers, 2065 087, USCGR, may be paid disability retired pay under the provisions of chapter 61, Title 10, U.S. Code.

Fireman Meyers enlisted in the U.S. Coast Guard Reserve on October 7, 1965, for a period of 6 years. On October 25, 1965, he was assigned initial 6 months active duty for training. On April 15, 1966, he injured his ankle, which was determined to have been incurred

in the line of duty and not as a result of misconduct. He was released from active duty for training on April 22, 1966, following a recommendation of an investigating officer that he be released from active duty for training as not fit for duty. An endorsement on the orders releasing Fireman Meyers from active duty stated that he was not physically fit for full duty, although fit for travel to his home.

You say that administrative regulations of the Coast Guard require endorsement of active duty for training orders to show termination of duty and that continued treatment and/or hospitalization is being rendered pursuant to 10 U.S.C. 6148; that a notice of eligibility for benefits there provided for was issued on November 3, 1966; and that the record does not show the date hospitalization was terminated. A letter of November 21, 1966, from the Medical Officer in Charge of the USPHS Hospital at Memphis, Tennessee, indicates that Meyers was treated for his injury on June 2, 1966; that he was advised to return to that hospital again on June 13, 1966, which he failed to do, and again on October 31, 1966; and that Meyers' condition or symptoms between June 3 and October 31, 1966, are unknown, as he was not under treatment there and he did not return as requested for follow-up evaluation. That medical officer's letter recommended that Meyers be ordered to appear before a Board of Medical Survey.

On February 10, 1967, the Board of Medical Survey recommended that he appear before a Physical Evaluation Board, which recommendation was approved by the Commandant on March 9, 1967. You say that the record fails to indicate the date on which Meyers was "fit for duty" or resumed his normal civilian pursuits, and that he testified during the Physical Evaluation Board proceedings that he was unable to retain his civilian occupation following his release to inactive duty and that he had difficulty in obtaining work for any reasonable period of time on account of his disability. The record indicates, however, that he performed inactive duty training (drills) on May 4, June 2, July 3, August 4, September 2, October 4, November 4, and December 4, 1966, but there is no record that he performed any drills during the calendar year 1967.

Active duty for training orders were issued to Meyers for the period February 1 to 10, April 25 to 26 and May 3, 1967, to appear before the Physical Evaluation Board. On November 30, 1967, the Commandant approved his temporary disability retirement effective December 15, 1967, and orders issued December 5, 1967, informed Meyers of his placement on the Temporary Disability Retired List effective December 15, 1967, under the provisions of 10 U.S.C. 1202. Your request for decision is made because of the doubt that Meyers could be considered entitled to receive basic pay when the determination of his qualifica-

tion to be placed on the temporary disability retired list was made.

Your letter recognizes the necessity under the provisions of 10 U.S.C. 1201, 1202, and 1203 that the Secretary make the requisite disability retirement determinations while the member is entitled to receive basic pay. 30 Comp. Gen. 409, 414; 46 *id.* 867. A member who incurs a disability in line of duty under those provisions of law which entitle him to pay and allowances during his disability under the provisions of 37 U.S.C. 204 (g), (h), or (i), is regarded as "entitled to basic pay" within the meaning of 10 U.S.C. 1201, 1202, and 1203. 33 Comp. Gen. 339. We have consistently held, however, that a member is not entitled to active duty pay and allowances solely by virtue of orders recalling a member to active duty for the purpose of providing medical treatment, hospitalization, and institution of retirement proceedings and that such orders do not satisfy the basic pay status requirement for disability retirement proceedings. See 26 Comp. Gen. 107; 27 *id.* 490; 33 *id.* 339.

The provisions of 37 U.S.C. 204 (g), (h) and (i) stem from the act of June 20, 1949, ch. 225, 63 Stat. 201, which provided that a non-Regular member of the armed services who is disabled by injury incurred in line of duty should receive the same pensions, compensation, death gratuity, retirement pay, hospital benefits and pay and allowances as prescribed by law or regulation for members of the Regular services. The statute contemplated that the services will provide the necessary hospital and medical care and disability retirement or severence benefits to non-Regular members as are extended to Regulars and to that end should make the necessary determinations with reasonable promptness following the injury. 43 Comp. Gen. 733; 33 *id.* 339, 346; 47 *id.* 531.

While Meyers was released from active duty as not fit for full duty, he was directed upon arrival at his home to contact Commander, Second Coast Guard District in St. Louis, Missouri, for instructions regarding further medical treatment. However, notwithstanding such indications of a physical disability, he was permitted to and did perform inactive duty training duty drills once a month from May through December 1966, and failed to follow the directive that he report to the USPHS Hospital in Memphis on June 13, 1966.

In decision of March 4, 1958, 37 Comp. Gen. 558, we said that—

> * * * where the injury is such as not to warrant or suggest the institution of disability retirement proceedings at the date of termination of hospitalization, payment of pay and allowances after that date would not appear to be justified in the absence of a showing of physical disability to perform military duty.

We there concluded that when such a member is returned to a duty status, the matter is too doubtful to warrant our approval of payment

of pay and allowances even though the duty recommended be of a limited or restricted nature.

Here the member not only failed to undergo all of the service-provided medical treatment he was directed to receive, but he also performed regular inactive duty training drills. While the statute contemplates that the non-Regular members of the armed services will be entitled to the same medical care and disability retirement benefits accorded Regulars, we doubt that the Congress intended that a continuing pay status, the extent of medical care and the institution of retirement proceedings should be influenced in any way by the discretion and convenience of the non-Regular member.

In the case of Regular members the duty status, treatment, and the institution of retirement proceedings is entirely within the control of the military services. We do not think that the Congress intended that non-Regular members should, by postponing treatment or examination, extend the period of entitlement to full pay and allowances thus permitting the continued payment of such compensation when the right thereto has not been clearly established by a showing of the continued existence of the disability. The Congress intended that prompt action be taken to institute disability retirement proceedings if appropriate or that a final determination disposing of the case be made within a reasonable time under conditions where the services may properly undertake appropriate action.

In the circumstances of this case we think that the disability status of the non-Regular member is not sufficiently established to warrant a conclusion that he continued to be entitled to pay and allowances until a determination was made that he met the requirements of the law entitling him to be placed on the Temporary Disability Retired List with disability retirement pay. Since it is not established that he was in a basic pay status at the time such determination was made, your question is answered in the negative.

[B–164174]

Officers and Employees—Severance Pay—Withholding—Pending Disability Retirement Action

The fact that an employee was separated by a reduction-in-force action on the same day he applied for disability retirement affords no basis to withhold payment of the severance pay authorized in 5 U.S.C. 5595 pending action on the disability retirement without the employee's consent. If the employee does not consent after being informed that upon approval of his retirement, his annuity begins the day following separation and he will be required to refund any severance pay received, absent approval of the retirement application, payment of severance pay to the former employee may be certified.

To Helen S. Groff, Interstate Commerce Commission, June 7, 1968:

Reference is made to your letter of April 26, 1968, reference MDB, requesting an advance decision as to whether a voucher for severance pay in favor of Carl J. Rasmussen, a former employee of your Commission, may be certified for payment.

The employee was separated April 5, 1968, by a reduction-in-force action. The voucher represents severance pay for the period April 7 through 20, 1968, as authorized by section 9 of Public Law 89–301, 5 U.S.C. 5595. You state there is doubt as to the employee's entitlement to severance pay since he filed an application for disability retirement on April 5, 1968, and Public Law 89–301 does not authorize severance pay for an employee who is entitled to an immediate annuity at the time of separation from the service.

Section S14–10, Federal Personnel Manual Supplement 831–1, provides in pertinent part as follows:

> An immediate retirement annuity of any type begins on the day following the employee's separation, or on the day after the employee's salary ceases and he meets the service and age (or disability) requirements. * * *

If the employee's application for disability retirement is approved his annuity will begin on the day following his separation in accordance with the regulation cited above and he will be ineligible to receive severance pay. Also, should the employee be paid severance pay and his disability retirement application be approved later he would be required to repay the sum of any amounts paid. Nevertheless, we are not aware of a basis to withhold payment of the severance pay pending action on the disability retirement application without the employee's consent. We suggest, therefore, that the employee be advised of the situation and asked whether he is agreeable to having the severance pay withheld until action on his retirement application has been completed. Also, in view of the circumstances it would seem to be appropriate to request the Civil Service Commission to expedite action on the disability retirement application.

Accordingly, unless the retirement application has been approved, or the employee consents to a withholding of the severance payment, the voucher returned herewith may be certified for payment.

[B–164259]

Mileage—Travel by Privately Owned Automobile—Dependents—More Than One Automobile—Advance Travel

An employee whose dependents, prior to the effective date of his transfer, travel to his new duty station by privately owned automobile to enroll the children in a full-school term at the new station having been paid 12 cents per mile for his travel by automobile may be authorized additional reimbursement at the rate

of 4 cents per mile under paragraph C6156, Joint Travel Regulations, which provides 16 cents per mile for the use of two automobiles, notwithstanding the regulations do not contain an example involving a family traveling earlier than the employee, the advanced travel for the purpose of school enrollment having been administratively approved as an acceptable reason for authorizing the use of two automobiles.

To Captain Jan W. Brassem, Department of the Air Force, June 7, 1968:

This refers to your letter of February 2, 1968, reference BCRF, requesting our decision as to whether a voucher for $30.60 in favor of Mr. Harvel H. Brown, an employee of your agency, may be paid.

By orders dated August 18, 1967, Mr. Brown was transferred from Whiteman Air Force Base, Missouri, to Ellsworth Air Force Base, South Dakota, effective October 1, 1967. The orders authorized reimbursement of expenses under Public Law 89–516, 80 Stat. 323, 5 U.S.C. 5724, including those for shipment of household goods in anticipation of a permanent change of station.

The employee's dependents traveled to the new station by privately owned automobile during the period August 28 through 30, 1967, so that the employee's children could start a full term of school at the new duty station. The employee, who traveled by automobile during the period October 2 through 4, 1967, was paid an allowance for travel by one automobile at the rate of 12 cents per mile for 765 miles. He now seeks additional reimbursement at the rate of 4 cents per mile on the ground that 16 cents per mile can be authorized for the use of two automobiles.

You state that paragraph C6156, Joint Travel Regulations (JTR), which outlines conditions under which the use of a second vehicle may be authorized, cites an example involving a family traveling at a later date than the employee. However, since the regulations do not contain an example where the family travels earlier than the employee, you express doubt as to whether the voucher may be paid. Paragraph C6156, JTR, is in accord with subsection 2.3b, Bureau of the Budget Circular No. A–56, revised October 12, 1966.

We note that before 1966 the regulations cited did not include specific examples covering the use of two automobiles, although reimbursement for such use was proper under certain circumstances prior to 1966. See 32 Comp. Gen. 342; 38 *id.* 542.

We believe the examples in the regulations were intended to illustrate the normal circumstances under which the members of the family could travel separately when the Government's interest so required, and do not preclude reimbursement for separate travel in a situation such as here involved. We note that prior to the promulgation of the cited regulations mileage for the use of two automobiles was authorized when the employee's dependents traveled to the new station before

him because it was necessary for members to be at the old and new stations to properly handle the sale of the residence at the old station and the purchase of a resident at the new station. See B–137998, December 9, 1958.

In view of the above and since an administrative official has approved the advance travel for the purpose of school enrollment as an acceptable reason for the authorization of two automobiles, the voucher which is returned herewith may be paid if otherwise proper.

[B–164281]

Pay—Retired—Grade, Rank, Etc., at Retirement—Service in Higher Rank Than at Retirement

The holding in *Harry Russell Miller* v. *United States*, 180 Ct. Cl. 872, that a retired enlisted member of the Coast Guard is entitled under 14 U.S.C. 362 to compute his retired pay on the basis of a higher grade satisfactorily held in the Navy should not be extended to similar or related statutes. The matter is too doubtful to warrant extending the rule of the case in view of the reservation expressed by the court concerning the correctness of General Accounting Office decisions under section 511 of the Career Compensation Act that a retired member of one branch of the uniformed services who held a higher grade in another branch of the service is not entitled to retired pay computed on the pay of the higher grade, and the differences between the various statutes.

To the Secretary of Defense, June 10, 1968:

Reference is made to letter of May 7, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether the Court of Claims decision in *Harry Russell Miller* v. *United States*, 180 Ct. Cl. 872, in any way affects our decision of July 8, 1953, 33 Comp. Gen. 10, as modified by our decision of April 3, 1967, 46 Comp. Gen. 727, that, with certain exceptions, retired pay of a military member may not be based upon a higher grade previously held by him in a branch of the Armed Forces other than that in which serving at the time of retirement. A discussion pertaining to the question is contained in Department of Defense Military Pay and Allowance Committee Action No. 413.

In 33 Comp. Gen. 10 we held that a member of the uniformed services who is retired or separated from the service for physical disability under the provisions of section 402(d), ch. 681, 63 Stat. 816, 37 U.S.C. 272(d) (1952 ed.), or section 403, 63 Stat. 820, 10 U.S.C. 1212 (1958 ed.), of the Career Compensation Act of 1949, and who satisfactorily held a higher rank, grade, or rating in a branch of the service other than that from which retired or separated, is not entitled to retired pay or severance pay computed on the active duty pay of such higher rank, grade, or rating.

In *Friestedt* v. *United States*, 173 Ct. Cl. 447 (1965), the Court of Claims held that an enlisted member of the Air Force retired for disability was entitled, when advanced on the retired list under 10 U.S.C. 1372(2), to the highest grade (first lieutenant) in which he had served satisfactorily in the Army (when the Air Corps was an integral part of the Army), and that therefore he was entitled to compute his retired pay on the pay for the grade of first lieutenant.

We held in decision of April 3, 1967, 46 Comp. Gen. 727, that the conclusion of the Court of Claims in the *Friestedt* case, that a member of the armed services who served in a higher grade in a branch of the Army other than the Air Corps before September 26, 1947, when the Air Force was established may, upon retiring from the Air Force, have that service considered by the Secretary of the Air Force in determining the member's grade under 10 U.S.C. 1372, warrants modification of our decision in 33 Comp. Gen. 10 only to the extent stated in the later decision.

In *Miller* v. *United States* the Court of Claims held that a retired enlisted member of the Coast Guard is entitled under the provisions of 14 U.S.C. 362 to compute his retired pay on the basis of a higher grade in which he had previously served satisfactorily in the Navy. The Committee Action states that in so holding the court reasoned that it would not be unreasonable to take the position that Congress intended retirement benefits to be based upon the highest military grade held, even though such grade was not held in the service from which retired.

The court stated that its conclusion is not undermined by the fact that Congress had declined on several occasions to amend Title 14 so as to permit retirement based upon the highest grade held in *any* service. The court said that such congressional inaction in the absence of any administrative or judicial construction of section 362 cannot support an inference that the statute would not permit retirement based upon the highest rank attained in any service and that the absence of positive legislative response to the suggested amendment could be attributed as readily to a view that the statute already sanctioned retirement from any service as it could to the view that the statute speaks only to a "same service" requirement.

The court further observed that, in order to determine whether the member's service in another branch was "satisfactory," the Secretary of the Treasury need do no more than address an inquiry to the Secretary of the service concerned. The Committee Action observes that 14 U.S.C. 362, the statute involved in the *Miller* case, has not been specifically considered in our decisions and its wording is not exactly the same as that of the statutory provisions involved in our decisions, but concludes that "the Miller rationale is basically inconsistent with the

reasoning of the Comptroller General in 33 Comp. Gen. 10 and related rulings."

The plaintiff Miller was retired from the Coast Guard on February 1, 1950, in his highest Coast Guard grade. He claimed entitlement to increased retired pay based upon a higher grade he had held many years earlier in the United States Navy. His suit was decided in his favor by virtue of the language contained in the applicable statute, 14 U.S.C. 362, referred to by the court as setting forth "* * * the general proposition that the retirement pay of regular enlisted Coast Guard personnel shall be on the basis of the highest grade or rating while on active duty." In the following sentence the court restricted the scope of its decision in the *Miller* case by setting forth the sole and basic point at issue as follows:

> The question presented is whether the statute permits the computation of retirement pay on the basis of a higher rating held in a service other than that from which retired.

The statutory provisions involved in the *Miller* case, refer only to the "highest grade or rating held * * * while on active duty in which, as determined by the Secretary, his performance of duty was satisfactory." While that language is somewhat similar to the language of section 511 of the Career Compensation Act, 37 U.S.C. 311 (1958 ed.), for example, we consistently have held in cases involving that section that a retired member of one branch of the uniformed services who held a higher grade in another branch of the uniformed services is not entitled to retired pay computed on the pay of such higher grade. See 29 Comp. Gen. 437; 32 *id.* 425; 33 *id.* 10. Compare 42 *id.* 244. In footnote 7 to the Miller decision the court noted that section 362 of the Coast Guard law does not cover the same subject matter as section 511 of the Career Compensation Act and stated that it did not express an opinion on the correctness of the decisions of this Office respecting section 511.

In view of the reservation of the Court of Claims in the *Miller* case concerning the correctness of our decisions under section 511 of the Career Compensation Act and the differences between the various statutes, we think that the matter is too doubtful to warrant our holding that the rule in the *Miller* case should be extended to similar or related statutes. The question presented is answered in the negative.

[B–130608]

Mileage—Military Personnel—As Being in Lieu of All Other Expenses—Sufficiency of Allowance

The insufficiency of the mileage allowance paid to a member of the uniformed services for travel on the day of arrival at an overseas permanent duty station

to cover the expenses of hotel accommodations provides no basis to amend paragraph M4303–2c(4) of the Joint Travel Regulations to authorize payment of a temporary lodging allowance for day of arrival without regard to mileage entitlement. Both allowances designed for the same purpose—the mileage allowance rate including lodging and subsistence—payment of both allowances for the same day would constitute a double allowance.

Station Allowances—Military Personnel—Temporary Lodgings—Day of Arrival at Duty Station

Reimbursement to a member of the uniformed services for hotel expenses incurred on day of arrival at an overseas permanent station may not be authorized by amendment to paragraph M4303–2c(4) of the Joint Travel Regulations to provide payment of a temporary lodging allowance or mileage, whichever is greater. The member in a travel status on day of arrival at his overseas station is only entitled to travel allowances on that day, entitlement to a temporary lodging allowance, considered a permanent station allowance, commencing the day after arrival and, therefore, waiver of mileage entitlement by the member would not operate to entitle him to a temporary lodging allowance on the day of arrival.

To the Secretary of the Air Force, June 11, 1968:

Further reference is made to letter of March 25, 1968, from the Under Secretary of the Air Force requesting a decision whether paragraph M4303–2c(4) of the Joint Travel Regulations may be amended to provide either (a) temporary lodging allowance without regard to entitlement to mileage, or (b) temporary lodging allowance or mileage, whichever is greater, on day of arrival at permanent duty station overseas. The request was assigned PDTATAC Control No. 68–17 by the Per Diem, Travel and Transportation Allowance Committee.

The Under Secretary says that these alternative changes were recommended by the Department of the Navy based on a situation involving the Yokosuka-Tokyo area of Japan. He says that all new arrivals in that area normally travel at personal expense from the port of debarkation to the member's duty station and since the member is entitled to mileage for his travel, he is not entitled to temporary lodging allowance for himself for that day. He says that, as an example, the Department of the Navy cites the case of a member with one dependent in which, on day of arrival, mileage allowance of $2.82 for the member and temporary lodging allowance of $9 for the dependent would be payable. It is contended that such amounts would not cover the expenses incurred on that day by the member and his dependent for occupancy of hotel accommodations.

In his discussion of part (a) of the question the Under Secretary refers to 36 Comp. Gen. 753, in which we held that under applicable statutory provision, mileage is one of the mutually exclusive methods of payment for travel; that it is intended to cover expenses of temporary lodging and, therefore, the payment of mileage and per diem for the same day, even though not for the same part of the day, is precluded.

He says that the mileage allowance is established at a rate to meet the more than normal expenses incurred incident to travel including lodging and subsistence and that the temporary lodging allowance, although a permanent station allowance, is a per diem prescribed to partially reimburse a member for the more than normal expenses incurred at hotels or hotel-like accommodations and public restaurants on initial arrival at an overseas station. Since both allowances are designed for the same purpose doubt exists as to whether both mileage and temporary lodging allowance may be paid for the day of arrival.

The Under Secretary suggests that an affirmative answer to part (b) of the question would not appear to be precluded in case the member may waive his entitlement to mileage in favor of temporary lodging allowance on day of arrival if the latter exceeds the former. In this connection, he cites 30 Comp. Gen. 480 as supporting the proposition that waiver of travel allowance if supported by proper consideration, constitutes a valid contract.

Section 405 of Title 37, U.S. Code, provides as follows:

> Without regard to the monetary limitations of this title, the Secretaries concerned may authorize the payment of a per diem, considering all elements of the cost of living to members of the uniformed services under their jurisdiction and their dependents, including a cost of quarters, subsistence, and other necessary incidental expenses, to such a member who is on duty outside of the United States or in Hawaii or Alaska, whether or not he is in a travel status. However, dependents may not be considered in determining the per diem allowance for a member in a travel status.

Paragraph M4303 of the Joint Travel Regulations, issued pursuant to those statutory provisions, provides that temporary lodging allowances are authorized, within prescribed limitations, for the purpose of partially reimbursing a member for the more than normal expenses incurred at hotels or hotel-like accommodations and public restaurants, upon initial arrival at an overseas station until permanent quarters are available. Paragraph M4303–2a of the regulations provides that the allowance is payable for any day within prescribed time limits when Government quarters are not furnished the member, his dependents, or the member and his dependents, if with dependents, and the member is required to secure hotel or hotel-like accommodations and he, his dependents, or both, occupy accommodations at personal expense. As the Under Secretary says, this is a permanent station allowance. It does not accrue to members in a travel status. See 45 Comp. Gen. 689. It is, however, a per diem, payable for essentially the same purposes as a travel per diem allowance.

Paragraph M4303–2c(4) of the regulations provides that when a member with dependents is entitled to travel per diem with no deduction for quarters, or mileage on day of arrival, no entitlement to temporary lodging allowance for the member himself exists on that day.

This provision is based on the fact that travel allowances (per diem and mileage) are provided to cover increased lodging and subsistence or costs of members in a travel status and, generally, the day of arrival at the permanent station is regarded as a day of travel.

Since the purpose for which the member is paid mileage on day of arrival includes the purpose for which the temporary lodging allowance is payable, it seems apparent that the payment of both for the same day would, as in the case of travel per diem, constitute a double allowance. In addition to that aspect of the matter we are not aware of any legal basis on which overseas permanent station per diem allowances may be authorized for members in a travel status en route to the permanent station. Accordingly, in our opinion, there is no basis on which the regulations may be amended to authorize payment of the temporary lodging allowance to a member in a travel status on the day of arrival at the overseas station without regard to entitlement to mileage. 41 Comp. Gen. 453.

As to part (b) of your question, since, as indicated above, the member is in a travel status on the day of arrival at his permanent overseas station he is entitled to travel allowances on that day and entitlement to permanent station allowances for himself does not commence until the next day. 40 Comp. Gen. 71; 41 *id.* 453. Thus, regardless of the validity of any waiver of travel allowance such a waiver could not operate to entitle the member to temporary lodging allowance on the day of arrival.

The question is answered in the negative.

[B–164270]

Officers and Employees—Transfers—Relocation Expenses—House Purchase—Loan Assumption Fee

The fee collected from veterans under 38 U.S.C. 1818(d) by the Veterans Administration as a condition precedent to the guarantee of a loan which was paid by an employee incident to the purchase of a house in connection with a transfer of duty station may be reimbursed to him as a fee or charge similar to loan application or lender's loan origination fees within the purview of section 4.2d, Bureau of the Budget Circular No. A–56, revised October 12, 1966.

To John W. Sharp, National Aeronautics and Space Administration, June 12, 1968:

Your letter of April 23, 1968, reference AD–RFM–21B, enclosing a voucher for $150 in favor of Mr. Melvin G. Olsen, an employee of the National Aeronautics and Space Administration, requests our decision whether the voucher may be certified for payment.

The amount of the voucher represents an item of expense incurred by Mr. Olsen in the purchase of a dwelling house at Merritt Island, Florida, incident to the change of his official station to the Kennedy Space Center.

The item of expense described in your letter as a "Veterans Administration Funding Fee" is shown by the closing statement in the real estate transaction as being equal to one-half of 1 percent of the loan guaranteed by the Veterans Administration.

The fee is understood by us to be that required by 38 U.S.C. 1818(d) which must be collected from the veteran by the Veterans Administration as a condition precedent to the guarantee of the loan. Thus, it may be reimbursed to the employee as a fee or charge similar to loan application or lender's loan origination fees within the purview of section 4.2d, Bureau of the Budget Circular No. A–56, revised October 12, 1966.

The voucher transmitted with your letter is returned herewith and may be certified for payment if otherwise correct.

[B–164186]

Pay—Additional—Hazardous Duty—More Than One Incentive Pay

Qualified parachute riggers in a jump status who are part of a unit assigned a mission involving the development, testing, and evaluation of parachutes and related equipment do not perform multiple hazardous duties to entitle them to the flight pay prescribed in 37 U.S.C. 301(e) in addition to parachute pay. The in-flight duties of the members who load, inspect, rig, drop, and study experimental equipment are not related to aircrew duties within the meaning of 37 U.S.C. 301(a)(1) and (4), and the members neither performing two or more hazardous duties simultaneously or in rapid succession are not entitled to retain the dual hazardous pay received for aviation and parachute duties, and, therefore, the erroneous flight payments made to them should be recovered.

To Lieutenant J. E. Hatfield, Department of the Navy, June 13, 1968:

Reference is made to your first endorsement dated March 26, 1968, on letter of the Commanding Officer, U.S. Naval Aerospace Recovery Facility, El Centro, California, dated March 21, 1968, forwarded here by second endorsement of the Comptroller of the Navy dated April 29, 1968, requesting an advance decision as to the legality of authorizing dual hazardous duty pay to certain members of his command who are stated to be performing test parachutist duties and aircrew duties in the circumstances described below. The request has been assigned Submission Number DO–N–993 by the Department of Defense Military Pay and Allowance Committee.

It is stated that the Naval Aerospace Recovery Facility, as the U.S. Navy portion of the Department of Defense Joint Parachute Test

Facility, "is assigned the mission to conduct development, test, and evaluation of parachutes and related assemblies; human escape methods and systems; retardation and recovery systems and rescue, survival and personnel safety equipment; stabilization, retardation and recovery systems for laydown type weapons, aircraft, missile and capsule assemblies; special logistics aerial delivery methods, techniques and equipment." The Parachute Department supports this mission in various manners including packing, rigging, fabrication, drop testing, and live jumping.

Due to the nature of the mission certain duties are performed in flight in addition to parachute jumping, including jumpmaster, airborne drop controller, loadmaster, and airborne experimental equipment inspector. Enlisted men assigned to these duties who are rated parachute riggers under orders to duty involving parachute jumping were issued temporary or indefinite flight orders "to duty in a flying status involving operational or training flights as a crew member/noncrew member." It appears that such personnel were paid dual hazardous duty payments during 1965, 1966, and 1967, and that during the 1965 and 1966 administrative audit, supporting documents used to justify dual payments were not questioned. However, report of an on-site examination of documents supporting payment of military pay and allowances dated October 10, 1967, noted discrepancies in the payment of aviation pay for the following reasons:

> Investigation of procedures utilized concerning payment of incentive pay disclosed that enlisted qualified parachutists attached to the Naval Aerospace Recovery Facility were credited with dual hazardous pay for aviation and parachute pay. Verification of supporting evidence to substantiate proper entitlement to dual hazardous pay involving aviation and parachute duties revealed that the parachutists concerned are only entitled to parachute pay.
>
> The enlisted personnel involved are qualified parachutists and the in-flight duties performed were incidental to preparation of performing a successful jump involving testing, research, and development of parachute techniques. Therefore, orders to duty involving flying should not have been issued and the members concerned are not entitled to aviation pay.

You say that these dual payments ceased at the time of the audit and that you have held checkage on previous payments in abeyance pending our decision on the matter.

Prior to October 1, 1963, a member of the uniformed services was entitled to be paid only one incentive pay for hazardous duty, as authorized by subsection (e) of 37 U.S.C. 301, then in effect, for any period of time during which he met the qualifications for more than one incentive pay. By section 8 of the act of October 2, 1963, Public Law 88–132, 77 Stat. 216, subsection (e) was amended to allow not more than two payments of hazardous duty incentive pay for a period of time during which a member qualifies for more than one payment of that pay.

329–854 O—69——3

The legislative history of the 1963 amendment shows that the committees considering the bill, which became Public Law 88–132, were greatly concerned that the proposed legislation could be abused and a representative of the Department of Defense gave assurance that the provision for dual hazardous duty pay would be implemented by regulation in such a way as to prevent any possible abuses.

Section 112, Executive Order No. 11157, June 22, 1964, 29 F.R. 7983, as amended, provides that:

Sec. 112. Under such regulations as the Secretary concerned may prescribe, a member who performs multiple hazardous duties under competent orders may be paid not more than two payments of incentive pay for a period of time during which he qualifies for more than one such payment. Dual payments of incentive pay shall be limited to those members who are required by competent orders to perform specific multiple hazardous duties in order to carry out their assigned missions.

Various regulations and policy statements issued by the military departments concerning entitlement to dual payment of hazardous duty pay have now been compiled as paragraph 20305 of the Department of Defense Military Pay and Allowances Entitlements Manual, which provides in part as follows:

Members who qualify for incentive pay for more than one type of hazardous duty may receive no more than two payments for the same period. Dual incentive pay is limited to those members required by orders to perform specific multiple hazardous duties necessary for successful accomplishment of the mission of the unit to which assigned. A member who is under competent orders to perform more than one hazardous duty, but is entitled to only one type of incentive pay, may receive payment for the hazardous duty for which the higher rate of incentive pay is authorized, even though that hazardous duty is not the primary duty of his current assignment.

a. *Conditions of Entitlement.* The hazardous duties for which dual incentive pay is made must be interdependent and performed either simultaneously or in rapid succession while carrying out the duties required to accomplish the mission of the unit involved. Members must meet minimum requirements for each of the hazardous duties, except when injury or incapacity as the result of performance of hazardous duty is involved.

Article C–7403, Bureau of Naval Personnel Manual, provides the following qualifications for aircrewmen:

(1) The training of Aircrewmen is accomplished in the fleet, in certain shore based activities designated by the Chief, Bureau of Naval Weapons, and in those Naval Air Training Command activities designated by the Chief of Naval Air Training.

(2) An Aircrewman is a member normally of an aviation rating who meets the following requirements:

(a) Is a volunteer for aircrew duty.

(b) Is qualified according to the physical and psychological requirements established by the Bureau of Medicine and Surgery at the time of designation and annually thereafter.

(c) Successfully completes the course of instruction and meets the operational standards for designation as Aircrewman prescribed by the Chief of Naval Operations.

(3) Commanding officers are authorized to designate as Aircrewman (AC) enlisted personnel who satisfactorily meet the requirements specified in paragraph (2) above.

It is provided in Article A–4304(3) of that manual that:

(3) Temporary flight orders may be issued only to the following enlisted personnel whose duties require frequent and regular participation in aerial flights:

(a) Aviation ratings and strikers for aviation ratings.

(b) Students undergoing training which specifically requires their participation in frequent and regular flights.

(c) Other ratings who are specifically assigned as regular members of flight crews, such as Hospital Corpsmen who are regular assigned crew members of Search and Rescue and Hospital Evacuation flights and flight orderlies.

This does not include personnel detailed to duty as couriers, sentries and messengers, etc.

Subparagraph (5) of that Article provides that:

(5) Non-crew member flight orders may be issued to personnel under the following conditions:

(a) Enlisted personnel under instruction in an established school or course in which airborne instruction is part of the curriculum and clearly contributes to the technical knowledge of the trainee. This includes personnel participating in a prescribed course of instruction in an aircraft squadron to qualify as an aircrewman in the type aircraft of that squadron.

(b) Enlisted personnel whose duties require frequent and regular participation in aerial flights for such purposes as installation, test, research, or evaluation of airborne technical equipment which cannot be performed by other persons already under flight orders.

(c) The assignment of non-crew members to duty involving flying is of a temporary nature. In all cases the flight orders will terminate when the project or instruction is completed.

It is clear, from the foregoing, that in order to be entitled to dual hazardous duty incentive payments, a member must be actually involved in the performance of two or more hazardous duties simultaneously or in rapid succession while carrying out the duties required to accomplish the mission of his unit, any one of which hazardous duties would place him in a status entitling him to incentive pay for that duty.

In order to be entitled to incentive pay for hazardous duty involving frequent and regular participation in aerial flights, a member must be a crew member or noncrew member in a flying status who is actually performing the duties of a crew member or a noncrew member. If he is flying as a passenger or as a person being transported to an air position from which he may perform his assigned duties as observer, parachutist, high altitude tester of aviation equipment, etc., a right to flying pay is not established. See 43 Comp. Gen. 667 and 44 *id.* 426. The personnel here involved are qualified parachute riggers in a jump status who are part of a unit which has been assigned a mission involving the development, testing and evaluation of parachutes and related equipment. In addition to the flights normally required to place a parachutist in position for a live parachute jump, these men are required to load, inspect, rig, drop, and study experimental equipment. Part of their duties are performed in flight and while it appears that they give certain directions concerning the positioning of the plane involved and other matters necessary for the proper release

and study of the test equipment, it is not shown that they perform any flight duties relating to the airplane or which contribute to its safe and efficient operation.

Notwithstanding the detailed information as to the qualifications for, and duties of, jumpmaster, airborne drop controller, loadmaster, and airborne experimental equipment inspector and the flight orders which were issued by the commander to individuals employed in those capacities, we must conclude that the record furnished us does not establish that the personnel involved were in fact acting as crew members or noncrew members within the meaning of 37 U.S.C. 301(a)(1) and (4) while carrying out the mission of their unit so as to entitle them, pursuant to subsection (e), to flight pay in addition to parachute pay.

Accordingly, payment of flight pay under the circumstances involved was erroneous and appropriate steps should be taken to recover the overpayments so made.

[B–158651]

Contracts—Mistakes—Allegation After Award—Rule

A contractor who subsequent to contract performance alleged a mistake in the bid that had been confirmed on several occasions and denied a price adjustment under Public Law 85–804, which authorized contract modification without consideration to facilitate the national defense, is not entitled to contract modification under the general rule that a contract may not be amended or modified without a compensating benefit to the Government. Repeated advice to the contractor of suspected bid error, fulfilled the Government's responsibility to obtain bid verification, and a bidder having the responsibility of estimating the price at which a contract could be performed at a reasonable profit, the Government was not required in a preaward survey to review the contractor's pricing estimates.

To the Tar Heel Engineering and Manufacturing Company, June 14, 1968:

Reference is made to your letter of March 2, 1966, and to subsequent correspondence and conferences, concerning a claim of your company in the amount of $92,865.64, based upon an alleged mistake in bid on 712 ¼-ton, two wheel, amphibious cargo trailers (M100), delivered by your company under contract No. DA–20–113–AMC–04491 (T) dated October 30, 1964, as amended.

The contract was awarded by the United States Army Tank Automotive Center, Procurement and Production Directorate, Warren, Michigan (ATAC), pursuant to invitation for bids No. AMC–20–113–65–0216(T) dated August 7, 1964, as amended. Bids were requested at f.o.b. origin prices on four items covering an aggregate quantity of 712 M100 trailers. Three bids were received as of Septem-

ber 8, 1964, the scheduled bid opening date. Your bid, which was the lowest received, offered delivery of 712 units at a price of $278.20 per trailer and at a total price of $198,078.40. One of the other bidders quoted a price of $442.09 per trailer on 712 units. The remaining bidder did not bid on all four items but it quoted a price of $440 per trailer on 458 units (item No. 1), and a price of $445 per trailer on 25 additional units (item No. 2). On a previous procurement of M100 trailers in a reportedly larger quantity than 712 units the Government had paid a price of $406.14 per trailer.

The contracting officer found it necessary to request a preaward survey of your company for the purpose of determining your qualifications or responsibility to perform the proposed contract. The form used in requesting the survey indicated that evidence or verification in writing should be obtained with respect to a number of elements, including "Unit price which is out of line with other bids received." A favorable preaward survey report was transmitted to the contracting officer by letter dated October 14, 1964, from the Birmingham Procurement District Office, Birmingham, Alabama, and the report was accompanied by a letter dated October 3, 1964, from the President of your company, stating that:

> This is to confirm the price on IFB-AMC-20-113-65-0216(T) by Tar Heel Engineering and Manufacturing Company of Spring Hope, N.C. of $278.20 per unit. The total contract price is $198,078.40. This is also to further advise that I am familiar with the specifications and delivery requirements and that both will be adhered to.

That letter has been referred to as merely a routine bid verification. However, the evidence in the case shows that your company was informed that a bid verification was necessary because the bid appeared to be too low and was out of line with other bids received and the price previously paid by the Government for M100 trailers.

Notwithstanding the written confirmation of your bid and your alleged understanding of the specifications and delivery requirements of the amended invitation for bids, the contracting officer still believed that there was a possibility that a serious mistake had been made in the bid. A meeting was therefore arranged to take place at the Birmingham Procurement District Office to discuss with representatives of your company its plan for producing the trailers at the bid price of $278.20 per trailer. The meeting was held on October 19, 1964, with your company being represented by Mr. D. Therman Edwards, President, Mr. Devon Edwards, Chairman of the Board of Directors, and Dr. Julius A. Warren, Director. The Government was represented by five officials of the Birmingham Procurement District, including Mr. Don H. Goodwin, industrial engineer, who acted as the chairman of the preaward survey group which per-

formed the survey of your company; and by Mr. Joseph F. Martin, and ATAC contract price analyst.

Your plan for producing the trailers at the bid price of $278.20 per trailer was discussed and your representatives reportedly convinced the Government that you were satisfied with the bid and wanted the contract regardless of statements made by the Government representatives that the quoted unit price of $278.20 appeared to be too low in view of the fact that two other bidders had quoted unit prices ranging from $440 to $445. As the result of the meeting, the Birmingham Procurement District considered that there had been a sufficient verification of your bid and the procurement office was advised that the District was therefore reaffirming its favorable survey report.

The contract was awarded to your company on October 30, 1964, and it appears that by supplemental agreements, including contract modification No. 20, under which the sum of $2,495.56 was allowed for changes in shipping requirements, the total contract price of $198,078.40 was increased to $202,237.35. Prior to the completion of contract deliveries, it was estimated by an accounting firm engaged by your company that you would incur a loss of $55,235.05 in performing the contract. However, when the contract was fully completed, it was determined by you that a loss of $53,593.75 had been incurred in connection with the performance of the contract.

It was indicated in your letter of March 2, 1966, that the United States Army Mobility Command had denied your request for a contract price adjustment under Public Law 85–804, approved August 28, 1958, 72 Stat. 972, 50 U.S.C. 1431, Executive Order No. 10789, dated November 14, 1958, and the implementing section XVII, Armed Services Procurement Regulation (ASPR). You had requested a contract price increase of $80,776.44, covering an estimated book loss of $55,235.05, plus 10 percent of total estimated performance costs ($255,413.85), or $25,541.39, for profit. During hearings before the Mobility Command's Contract Price Adjustment Board the amount requested as a contract price increase was reduced from $80,776.44 to $78,280.88, with the difference of $2,495.56 representing the addition to the contract price which was allowed under contract modification No. 20.

It was alleged that your cost estimates on some items were too low, that you omitted certain costs in the computation of your bid price and that the cost of contract performance had increased as the result of difficulties experienced with one of your suppliers, the Anthony Company of Streator, Illinois. You stated that your company was a small business concern, that the contract was your first job and that you had had no previous experience as a supplier to the armed

services. You also stated that your ability to continue as a reliable supplier of goods and services to the Government and to commercial customers was directly dependent upon obtaining some financial relief under contract No. DA-20-113-AMC-04491(T).

The denial of your request for a contract price adjustment is supported by a memorandum of decision dated February 14, 1966, designated as the Mobility Command's Contract Adjustment Board Decision No. 34. The memorandum of decision, beginning at subparagraph 3f, states in part as follows:

f. In spite of Birmingham Procurement District's favorable recommendation and Tar Heel's bid confirmation, ATAC was apprehensive that Tar Heel's bid was too low and that it could not perform at its bid price. A meeting was called at Birmingham Procurement District, attended by three representatives from Tar Heel and an ATAC price analyst.

g. The meeting lasted the afternoon of 19 October 1964. The ATAC price analyst reported, "The briefing began by the ATAC representative explaining to the contractor's representatives that their quoted price of $278.20 appeared to be too low, based on a previous contract price of $406.14 for a larger quantity and other quotations received under IFB AMC-20-113-65-0216(T) which ranged from $440 to $445 per trailer." He warned contractor that it was likely to incur a substantial loss in performing the contract.

h. At this meeting, the contractor submitted his plan for producing the items at the bid price and vigorously solicited an award. After extended discussion of all elements of performance, the contractor convinced the Government representatives that it wanted the contract, at the price it bid, regardless of the Government's opinion of the apparent low bid.

i. At the Contract Adjustment Board meeting on 26 January 1966, Tar Heel's president stated contractor would probably have sought a Certificate of Competency from the Small Business Administration compelling the contracting officer to give it an award, had he made an unfavorable determination upon Tar Heel's capability.

j. Evidence reflected in the case file and disclosed at the MOCOM Contract Adjustment Board hearing reflect that a significant part of the contractor's loss resulted when a principal supplier reneged on his price to Tar Heel. In addition, contractor acknowledged that it overestimated the efficiency of its labor force and failed to anticipate the expense which resulted from extensive time and effort on the part of its officers to oversee contract performance.

4. In spite of the Government's warnings before award that its price was too low, Tar Heel insisted that $278.20 was its intended price. Only after giving the contractor full notice of its apprehensions did the Government make the award at $278.20. The award to Tar Heel was made in good faith and resulted in a valid and binding contract which should not be amended. In fact, the case file fails to indicate any mistake in bid. The loss suffered by contractor appears to have been the result of an overestimate of its own efficiency and its subcontractor's reliability and an underestimate of the difficulties of contract performance.

5. It is a matter of regret when a contractor incurs a loss as substantial as Tar Heel's. However, there can be no guaranty of freedom from risk of such a loss in the performance of Defense contracts, and Public Law 85-804 was not intended to provide such a guaranty. It is noted that ASPR 17-204.1 states, "The mere fact that losses occur under a Government contract is not, by itself, a sufficient basis for the exercise of the authority conferred by the Act."

Our Office is granted no authority under the provisions of Public Law 85-804, and related Executive orders, to amend or modify contracts without consideration on the basis that such action would facilitate the national defense. However, we are authorized to consider claims based upon alleged mistakes in bids and to allow additional com-

pensation in those cases where it is determined that a mistake was actually made in a bid and that the contracting officer knew or should have known of the mistake and should have requested a verification of the bid before issuing an award notice. There may be circumstances under which a request for a bid verification might not be considered to be adequate, but it must be emphasized that, in order for us to grant any relief to your company, it would be necessary for us to conclude that the acceptance of your bid which was affirmed on October 3, 1964, and reaffirmed during the meeting on October 19, 1964, at the Birmingham Procurement District Office, did not result in the consummation of a valid and binding contract. Since we are not granted the authority to modify or amend contracts without consideration, we are required to apply the general rule that agents and officers of the Government have no authority, without a compensating benefit to the Government, to modify existing contracts, or to waive contract rights which have vested in the United States. See 40 Comp. Gen. 684, 688.

After we had obtained certain documents from the Department of the Army concerning the action taken by the Army Mobility Command on your request for a contract price adjustment under the provisions of Public Law 85–804, we requested additional information from the Department of the Army in regard to the question whether a mistake in bid had actually been made and the extent to which either the ATAC contract price analyst or any of the members of the preaward survey team might have known or could be presumed to have known that mistakes were made in your bidding estimates. A departmental report was submitted by letter dated May 17, 1966, and your attorney, Mr. John E. Davenport, was furnished copies of pertinent material in our files relating to the departmental recommendation for disallowance of your claim. Mr. Davenport then requested that we suspend action on the case since he desired to submit additional evidence in support of the claim.

The referenced report at subparagraph 3g of the Army Mobility Command's Contract Adjustment Board Decision No. 34 was prepared on November 17, 1965, by Mr. Joseph F. Martin, the ATAC contract price analyst. Mr. Martin indicated that your representatives were advised on at least two occasions during the meeting of October 19, 1964, that it is not the policy of the Government to put contractors out of business by awarding contracts at unrealistically low prices. His report also referred to various questions which were discussed at the meeting, such as whether the quotations of your proposed suppliers had been verified, whether your estimate for direct labor cost was adequate, whether you had made a sufficient allowance in your bid price of $278.20 per trailer for salaries to be paid to your engineering

personnel and whether your proposed production facilities would be ready within sufficient time for you to meet the delivery requirements of the proposed contract.

The file submitted with the May 17, 1966, report of the Department of the Army included an additional report of April 28, 1966, from Mr. Martin, which is as follows:

1. At the preaward meeting of 26 October 1964, at the Birmingham Procurement District with the Tar Heel Engineering & Manufacturing Company, I recollect that inbound freight costs were discussed and that the contractor had indicated that they were included in the cost of material. I do not recollect nor do my notes of the meeting indicate any discussion relative to loading and packing cost.
2. Overhead costs were discussed at length. Tar Heel Engineering & Manufacturing Company was for all purposes a "paper" organization at this time. All parties recognized that estimates for projecting overhead were little more than conjecture, since Tar Heel had no previous manufacturing experience nor was it a fully equipped manufacturing facility at this time. Tar Heel representatives did state that additional anticipated in-house business such as refurbishing of oil tank pumps, manufacturing of medical equipment, and metal furniture parts would draw a proportionate share of the overhead.
3. Tar Heel advised it was going to lease shop machines and tooling for manufacturing at approximately $5,000.00 under this IFB in addition to what they had on hand. My notes and Tar Heel's cost breakdown reflect an allowance of $10.00 per unit for the proposed tooling and equipment cost. My notes and Tar Heel's bill of material cost indicate that the contractor did include material cost of $18.74 for miscellaneous hardware.
4. Army Tank Automotive Center's previous procurement of these trailers was by formal advertising. Therefore, Army Tank Automotive Center had no concrete visibility of what costs went into these advertised prices. I had no way of knowing whether the cost elements which Tar Heel presented as his estimates were too low, other than a comparison with the previous unit price of $406.14 and other quotations under this IFB ranging from $440.00 to $445.00 per unit. On the basis of the previous price and other bids received, I felt Tar Heel's overall price was much too low and told them this repeatedly during the meeting.

It appears that, when preparing the report of April 28, 1966, Mr. Martin failed to realize that the original of his typewritten report of November 17, 1965, bears an initialed change to show that the meeting at the Birmingham Procurement District Office was held on October 19, 1964, and not on October 26, 1964. It does not appear to be material whether the meeting was actually held on October 19, 1964, but your attorney has referred to the discrepancy in the dates as shown in Mr. Martin's two reports in regard to what was discussed at the meeting.

The record before us originally indicated that, during the performance of the preaward survey under the supervision of Mr. Don H. Goodwin, summaries of assumed direct and indirect costs amounting to $183,838 were furnished to the Government representatives. Copies of letters and telegrams from proposed suppliers, which presumably were furnished to the Government's representatives, show that in some cases the prices quoted to your firm were f.o.b. origin prices. It was contended at conferences in our Office that the Government's representatives should have known that the cost estimate for purchased parts did not include applicable freight charges. It was also contended

that the Government's representatives should have known that there was an error in the estimate of $9,000 for salaries to be paid to company officials, since that amount would have been sufficient only for the salary proposed to be paid to the president of your company during a 9-month contract performance period, and the Government representatives were on notice of the fact that you intended to employ an additional engineer, Mr. Carl H. Woodward, in a supervisory capacity, if you received a contract award for the production and delivery of the 712 M100 trailers.

By letter dated August 21, 1967, your attorney submitted documents described as your presentation, exhibits, affidavits, brief and argument in the matter. Your claim was increased to $92,865.64 and the revised claim was computed on a basis different from that set forth in your previous request for a contract price adjustment under Public Law 85–804. An attempt was made to show that errors in your bidding estimates amounted to the sum of $92,865.64 and that such errors consisted of various underestimates and omissions of costs in arriving at your bid price of $278.20 per trailer, with an adjustment having been made in connection with the costs of obtaining certain parts from the Anthony Company, the firm previously referred to as having refused to make delivery at prices which you assumed to have been agreed upon prior to the date on which your bid was submitted. However, we were advised that you would be willing to settle the case for the originally claimed amount of $80,776.44.

It was contended that your estimate of material costs did not include the cost of necessary trailer tarpaulin covers which amounted to $5,589.20 and that there were a number of other omitted items and underestimates of cost in the computation of the bid price of $278.20 per trailer which should have been apparent to the members of the Government's preaward survey team and to the ATAC contract price analyst who attended the October 19, 1964, meeting.

Exhibit J of your presentation purports to show that freight costs of $12,423.50 were omitted from the bidding estimates and that the cost of omitted parts was $37,922.98, including $10,474.20 as the net additional cost of parts furnished by the Anthony Company as a subcontractor, but not formally quoted on by Anthony before the contract was awarded to your company. The exhibit also purports to show that "Overhead error and omissions" and "Labor error and omissions" resulted in additional costs of performance aggregating the respective amounts of $34,329.75 and $8,189.41.

It was stated that the cost of omitted parts amounted to $38.551 per trailer and it was suggested that any experienced price analyst should have been aware of the fact that the amount estimated for purchased parts ($180 per trailer), did not include either the separate cost of

$5,589.20 for trailer covers or the cost of several of the trailer parts, now alleged to be in the aggregate of over $38 per trailer.

In regard to the alleged freight costs of $12,423.50, it was indicated in testimony before the Army Mobility Command's Contract Adjustment Board that a considerable amount of freight cost was incurred in the procurement of steel for the Anthony Company and it does not therefore appear that all of the alleged freight costs may be said to be related to any mistake which was made in your bid. It also appears from the testimony before the Board that, during the meeting of October 19, 1964, it was indicated that the M100 trailer is lighter and smaller than the M416 trailer which had been purchased by the Government at prices of approximately $245 to $250 per trailer under contracts with the Anthony Company and the Johnson Furnace Company of Bellevue, Ohio. The president of your company considered that a price of $278.20 for the M100 trailer would be adequate in view of those previous contract prices for deliveries of M416 trailers. However, there was raised a question at the meeting as to whether the M416 trailers were produced without causing financial losses to the contractors involved.

It was contended in your attorney's brief that the verification of your bid price of $278.20 per trailer was of little or no importance in view of the cases of 35 Comp. Gen. 136, and *United States* v. *Metro Novelty Manufacturing Company*, 125 F. Supp. 713. He stated as his belief that all participants at the Birmingham meeting knew that you were in serious trouble, that this knowledge was reaffirmed by Mr. Don H. Goodwin, surveyor, when he questioned your company about the component parts of the M100 trailer during a preproduction conference, and that Mr. Goodwin stated at such time that he knew and had known that you could not perform within the bid without losing a substantial amount of money. In the circumstances, we requested and received an additional report from the Department of the Army. Your comments and those of your attorney on the substance of that supplemental report and an accompanying statement from Mr. Goodwin have been received and considered.

The facts of the case indicate that neither Mr. Goodwin nor Mr. Martin made a complete analysis of the cost data submitted by you to the preaward survey personnel or made available at the meeting of October 19, 1964. During the preaward survey, some of the items of your proposal package and material requirements were compared with the related requirements of the invitation for bids and your proposed suppliers' quotations were listed in the preaward survey report. The preaward survey personnel were concerned primarily with the question as to your ability or capability to obtain the necessary supplies and to meet the technical requirements of the advertised specifications, and

it appears that they did not believe that they were required to make a complete review of your pricing estimates since the contract was to be awarded on the basis of formal advertising for bids and there had been adequate competition in connection with the proposed procurement.

It was nevertheless necessary, in accordance with the contracting officer's request, to obtain from you a verification of your price of $278.20 per trailer. You confirmed the bid price and your complete understanding of the requirements of the proposed contract. The Government still believed that there was a possibility of a serious mistake in your bid and you were furnished a further opportunity to check the bid and either to confirm the bid or to allege that errors had been made in your pricing estimates, if any such errors had been discovered. At such point, according to the record before us, whenever any question was raised as to whether a cost estimate was accurate or complete, your representatives indicated that the actual or apparent underestimate on the particular cost element would not have seriously affected your bid price, and they insisted that such price should still be considered as your intended bid price.

You do not question this basic understanding of the circumstances attending the request made by the Government for verification of your bid, and the affirmation and reaffirmation of your bid by letter dated October 3, 1964, and during the meeting of October 19, 1964. However, you have taken exception to Mr. Goodwin's statement that you indicated that you would be willing to absorb a nominal loss if it meant the successful commencement of a local business. We have no basis for determining which party has correctly shown what was actually said at the meeting on October 19, 1964, regarding that question, and it will be assumed for the purpose of this decision that you expected to complete the proposed contract without suffering a loss on the transaction.

Mr. Goodwin refers to the estimate of $9,000 for salaries to be paid to company officials as one of the estimates which were discussed with your representatives. Evidently all parties concerned knew that the estimate covered only the salary to be paid to Mr. D. Therman Edwards, the president of your company, over a 9-month period, and they also knew that such an amount would be insufficient to cover the salaries of company officials directly involved in the performance of the proposed contract, particularly if Mr. Carl H. Woodard was to be employed as a company engineer to assist Mr. Edwards. You appear to have been given a sufficient warning to the effect that the $9,000 estimate was too low if additional management personnel were to be employed, and it is also apparent that it would make no difference so far as concerns your mistake in bid claim whether the Government requested you to obtain an agreement from Mr. Woodard to accept a

position with your company if you received the contract award. The Government's suggestion that Mr. Woodard be employed, or its verification of such an employment arrangement, would not appear to have been an unusual circumstance, since the question whether a prospective Government contractor has the necessary management personnel, or the ability to obtain such employees, is one of the elements normally to be considered in determining the prospective contractor's qualifications or responsibility to perform a specific contract.

As another example of questioned cost estimates, Mr. Goodwin has indicated that your attention was invited to the fact that your estimates for parts did not cover all parts of the M100 trailer. Your purported response was that this was an oversight and that some of the items were to be procured under proposed subcontracts which would be based upon the furnishing of subassemblies which would later be installed as an assembly to the end item. In such circumstances, as in the case of the $9,000 overhead cost estimate, above referred to, it would not appear to be reasonable to assume that either Mr. Goodwin or any other cognizant Government official knew or should have known of any mistake in your bid and sought to take advantage of the mistake.

Your attorney has emphasized that part of Mr. Goodwin's report which discusses the fact that you had used drawings for the M416 trailer. However, your attorney has not referred to the fact that Mr. Goodwin also stated that, when this was brought to your attention, you indicated that you were fully aware of the differences between the M416 trailer and the M100 trailer. Apparently the two trailers are in many respects similar in design and it is also apparent that Mr. Goodwin was warranted in accepting the explanation given in the matter.

Admittedly there was not performed in this case the type of bid verification which your attorney considers to have been required in view of the suspicion that an error was made in your bid. He suggests that it was the duty of the preaward survey personnel and the ATAC contract price analyst to make a complete examination of your bidding estimates and, apparently, to find any omitted elements of cost in your estimates, because the Government suspected that a mistake was made in your bid. The United States Army Tank Automotive Command has taken a contrary position in regard to that matter, and stated that the Government lacks the personnel capability, both from the aspects of the time required and the skills involved, to go thoroughly into production plans and to assure itself and a bidder that every production cost element which should go into a bid has been provided for.

Sometimes in cases of negotiated contracts, as distinguished from contracts awarded pursuant to formal advertising, the Government

will make a complete analysis of proposed prices. Also, in some cases involving formal advertising, a contractor will be requested to check and verify bid prices on one or more of several items of a bid if the total bid is out of line with other bids received. However, in this case there was involved only one basic item of equipment and you were requested to confirm your bid price after full disclosure of the Government's reasons for suspecting that a mistake might have been made in your bid. In *Saligman, et al.* v. *United States*, 56 F. Supp. 505, the court considered that the employment of experts to assist a contracting officer of the Government is for the benefit of the Government and not for the benefit of a bidder. We agree with the position taken by the United States Army Tank Automotive Command in this case that it was not the responsibility of either the preaward survey personnel or the ATAC contract price analyst to determine before contract award whether every production cost element had been considered in connection with your quoted price of $278.20 per trailer.

If a contracting officer has any reason to suspect that an error of a serious nature has been made in a bid, the award of a contract following verification of the bid upon request of the contracting officer, or upon receipt by the bidder of a warning from any responsible procurement official that a mistake might have been made, results in a valid and binding contract. See *Alabama Shirt & Trouser Company* v. *United States*, 121 Ct. Cl. 313. However, in *United States* v. *Metro Novelty Manufacturing Company*, *supra*, it was held in effect that the request for bid verification should place the bidder on notice as to the basis upon which the Government suspects that a mistake might have been made. We have taken a similar position in decisions, including 35 Comp. Gen. 136, which is cited by your attorney. Also, ASPR 2-406.3(a)(1) establishes a procedure for bid verification which is consistent with the ruling in the *Metro Novelty* case. In our opinion, the action taken by the procurement office in this case met all of the essential requirements for obtaining bid verification where the Government suspects that an error has been made in the bidder's quoted price or prices.

Errors of omissions and inaccuracies in your bidding estimates may have occurred but it was your responsibility to estimate the price at which you could perform the proposed contract at a reasonable profit. If you made a mistake in your bid, but failed to discover a mistake and allege such mistake prior to contract award, notwithstanding the fact that you were afforded every reasonable opportunity to check the bid before acceptance thereof, the Government cannot be held responsible for the resulting loss. See *Frazier-Davis Construction Company* v. *United States*, 100 Ct. Cl. 120, 163; *Edwin Dougherty and*

M. H. Ogden v. *United States*, 102 Ct. Cl. 249; *Saligman, et al.* v. *United States, supra.*

The record in this case reasonably indicates that the acceptance of your bid, as affirmed on October 3, 1964, and again on October 19, 1964, was made in entire good faith, no error having been alleged until after award of the contract; and that the Government fulfilled its responsibility for obtaining a bid verification when it was suspected that a mistake might have been made because your quoted price was much lower than those quoted by other bidders and the price paid by the Government on a previous procurement of M100 trailers. Consequently it must be held that the acceptance of your bid consummated a valid and binding contract. See *United States* v. *Pursell Envelope Company*, 249 U.S. 313; *American Smelting and Refining Company* v. *United States*, 259 U.S. 75.

Accordingly, your claim in the matter is hereby denied.

[B-163494]

Medical Treatment—Dependents of Military Personnel—Transportation Reimbursement

An Air Force officer stationed overseas whose wife under orders travels by privately owned automobile to and from a hospital for medical treatment may not be paid a mileage allowance for the round-trip transportation, reimbursement under 10 U.S.C. 1040 and paragraph M7107, Joint Travel Regulations being limited to actual expenses, whether a dependent travels alone or with an attendant, absent specific authorization for commuted payments, such as mileage, monetary allowances in lieu of transportation, or per diem. A member who transports a dependent to a medical facility in his privately owned vehicle for which he is entitled to a travel allowance would not be entitled to an additional amount on behalf of the dependent, the travel allowance being in lieu of actual expenses.

Medical Treatment—Dependents of Military Personnel—Escort Duty—Travel Expenses

The travel of members of the uniformed services who act as escorts and accompany dependents to medical facilities is regarded under 10 U.S.C. 1040 as travel on public business if directed by competent orders, and the members are entitled to travel and transportation allowances in accordance with paragraph M6401 of the Joint Travel Regulations.

To First Lieutenant John Rovegno, Department of the Air Force, June 14, 1968:

Reference is made to your letter dated January 8, 1968, and attached letter, forwarded here by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 68-13), in which you request a decision whether Captain Leo B. Metz, United States Air Force, is entitled to reimbursement for the travel of his

dependent wife under the circumstances disclosed. Consideration of a related question is also requested.

By Special Order T-1594, dated December 12, 1967, Headquarters 40th Tactical Group (USAFE), APO New York 09293, Patricia C. Metz, dependent wife of Captain Leo B. Metz, was authorized to proceed on or about Dcember 14, 1967, from Aviano Air Base, Italy, to the U.S. Army Hospital, Vicenza, Italy, for the purpose of obtaining further medical treatment and/or hospitalization, and to return to Aviano Air Base. The order states that travel by Government transportation was considered to be impractical and not in the best interest of the Government or patient.

The voucher submitted for payment shows that Mrs. Metz traveled by privately owned vehicle from Aviano Air Base, to the U.S. Army Hospital, Vicenza, Italy, and returned to Aviano Air Base in one day, December 14, 1967, for which travel allowances at the rate of 6 cents a mile is claimed.

In your letter, you question whether mileage allowance at the rate of 6 cents a mile or any other entitlement accrued for the travel performed by Mrs. Metz. Doubt is expressed since paragraph M7107, Joint Travel Regulations, authorizes dependents' transportation to and from medical facilities, but does not specifically state that monetary allowances are payable for personally procured transportation. You therefore request a determination as to the payment authorized for the travel performed.

If payment on any basis is held to be proper, you request a determination as to the entitlement of a member who is authorized under competent orders in accordance with paragraph M6400, Joint Travel Regulations, to travel as the attendant for his dependent to and from the medical facility. Specifically, if both the member (sponsor) as attendant and the dependent (patient) travel by privately owned automobile or by personally procured commercial transportation, you ask whether both travelers would be entitled to allowances and if not, you ask whether the member would have the option of electing for which of the travelers he may submit a claim for reimbursement. You say that such an election would be of importance in circumstances in which a sponsor (attendant) is attending more than one dependent patient since, under an election, he would be entitled to a monetary allowance in lieu of transportation for his travel versus the entitlement established for each dependent traveling with him.

Section 1040(a), Title 10, U.S. Code, as added by Public Law 89-140, August 28, 1965, 79 Stat. 579, provides, in pertinent part, that transportation at the expense of the United States is authorized to the nearest appropriate medical facility in which adequate medical care is

available for a dependent who is with a member of the uniformed services stationed outside of the United States on active duty for more than 30 days, and who requires medical attention which is not available in the locality. The dependent may also be transported at the expense of the United States from such medical facility back to the member's duty station or such other place as may be determined to be appropriate under the circumstances. The law provides further that if a dependent is unable to travel unattended, round trip transportation and travel expenses may be furnished necessary attendants.

Section 1040(d) provides that the transportation and travel expenses authorized by that section shall be furnished in accordance with joint regulations to be prescribed by the Secretaries named therein. It provides further that such regulations shall require the use of transportation facilities of the United States insofar as practical.

Paragraph M7107–1, Joint Travel Regulations, promulgated pursuant to authority contained in 10 U.S.C. 1040, provides, in pertinent part that, when determined by competent authority that a dependent accompanying a member who is on active duty for more than 30 days and stationed outside the United States, requires medical care not available in the locality of the member's overseas duty station, the member's commanding officer or other officer designated by the service concerned, may authorize or approve transportation of the dependent to the nearest appropriate medical facility where adequate medical care is available.

Upon termination of hospitalization or medical care, transportation of the dependent is authorized either to the member's duty station or to such other place determined appropriate under the circumstances by the order-issuing authority. Paragraph M7107–2 provides that travel and transportation allowances are authorized for the travel of necessary attendants when performed under competent orders as provided in chapter 6, part I.

Paragraph M6400, chapter 6, part I, Joint Travel Regulations, provides, in pertinent part, that travel of attendants with dependents under authority of paragraph M7107 of the regulations will be authorized only when the order-issuing authority has determined that travel by the dependents is necessary and the dependents are incapable of traveling alone. Paragraph M6401 of the regulations provides that members of the uniformed services assigned to escort or attendant duty will be entitled to travel and transportation allowances prescribed by chapter 4, Joint Travel Regulations, while performing such travel and temporary duty.

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The legislative history of Public Law 89–140 (S. Rept. No. 585, 89th Cong., 1st sess., to accompany H.R. 7595 (enacted as Public Law 89–140)), shows that the purpose of the legislation was to authorize transportation at Government expense for dependents of members of the uniformed services who are accompanying members at posts of duty outside the United States where required medical care is not available locally. A letter from the Secretary of the Navy submitting the draft of the proposed legislation, was quoted in the report.

The letter referred to decision of our Office, 39 Comp. Gen. 495, in which we held that neither the Dependents' Medical Care Act, 70 Stat. 250, 10 U.S.C. 1076, nor the Career Compensation Act of 1949, 37 U.S.C. 253 (1952 ed.), authorized the transportation of dependent patients at Government expense. The letter stated that the Department of Defense has construed the opinion as applying only to the use of commercial transportation and has continued to move dependent patients by Government transportation when such transportation was available. It stated further that the enclosed draft law would authorize the transportation of dependent patients and necessary attendants at Government expense.

In 39 Comp. Gen. 495, we stated that the right of dependents to travel at Government expense between medical facilities was not provided for in the Dependents Medical Care Act, nor was it necessarily implied as one of the benefits granted therein. We stated further that the Joint Travel Regulations limit travel of dependents at Government expense to travel incident to a permanent change of station of the member. We also held that the travel performed by members as attendants for their dependents did not appear to have been travel on "public business" but appeared to be primarily for the convenience and benefit of the member and his dependent and therefore reimbursement for such travel was not authorized.

Section 1040 of Title 10, United States Code, now provides authority for "transportation of the dependents at the expense of the United States" to the nearest appropriate medical facility and return and also provides authority for the round-trip transportation and travel expenses of the necessary attendants.

It has been well established that commuted payments, such as mileage, monetary allowances in lieu of transportation, or per diem lawfully may be made for authorized travel only if based upon a specific statutory authorization. A statutory assumption by the Government of an obligation to pay necessary travel expenses without an express authorization for the payment of commuted allowances has consistently been construed as authority for reimbursement on an actual expense basis only. 47 Comp. Gen. 405, and decisions cited therein.

In our decision, 47 Comp. Gen. 405, cited above, we construed the phrase "transported at the expense of the United States to and from that place" in section 703(b) of Title 10, U.S. Code, as not containing specific authorization for the payment of commuted travel and transportation allowance. We cited the legislative history of that act as indicating that the sole purpose of that phrase was to provide necessary transportation at no expense to the member incident to the leave authorized by that act upon a voluntary extension of the member's tour of duty. A similar construction is required of the phrase "transported at the expense of the United States" contained in 10 U.S. Code 1040, in view of the identical language and the fact that the legislative history of that section also shows its purpose was to provide transportation of dependents between medical facilities at no expense to the member or dependent.

Accordingly, it must be held that under the provisions of section 1040 and paragraph M7107, Joint Travel Regulations, reimbursement for a dependent's travel under competent orders to a medical facility is authorized only on an actual expense basis, whether traveling alone or with an attendant. Since there is no showing of the actual expenses incurred for Mrs. Metz' transportation, no payment is authorized on the voucher presented which will be retained here.

With respect to the travel expenses of attendants, since the Congress has now authorized the transportation of dependents to medical facilities at Government expense under the prescribed circumstances and also authorized transportation and travel expenses for necessary attendants, it would appear that such travel of necessary attendants who are members of the uniformed services is properly to be regarded as travel on public business if directed by competent orders.

The provision in section 1040(a) that transportation and travel expenses may be furnished necessary attendants does not appear to have been intended as a restriction on the travel and transportation allowances authorized in 37 U.S.C. 404 and chapter 4, Joint Travel Regulations, for members traveling on public business pursuant to competent orders. *Cf.* 21 Comp. Gen. 377 and 40 *id.* 226. Consequently such member attendants are entitled to reimbursement on that basis as provided in paragraph M6401 of the Joint Travel Regulations.

Of course, a member who transports a dependent in his privately owned vehicle for which he is entitled to a travel allowance would not be entitled to an additional amount on behalf of the dependent, the travel allowance being in lieu of actual expenses. The questions presented are answered accordingly.

[B-164212]

Bids—Unbalanced—Procurement Readvertised

An invitation contemplating a 1 year requirements type contract for test, repair, and overhaul of diesel engines and the evaluation of bids on the basis of estimates violates the advertising requirements of free and open competition, where an unbalanced bid offering token prices for services and parts that have substantial value on the theory that the services and parts while being given full weight for evaluation purposes would not represent a major portion of the required work cannot be determined to be the low bid, and the invitation may be canceled under paragraph 2-404.1(b)(viii) of the Armed Services Procurement Regulation in the interest of the Government and to preserve the integrity of the competitive bidding system.

Contracts—Specifications—Restrictive—Unwarranted

The use of the original manufacturer's repair parts in the overhaul of diesel engines required because it is considered impossible to administratively qualify each part before it is installed should be relaxed to permit bidders to offer parts that have demonstrated consumer acceptability or have been successfully supplied under past Government contracts, the parts warranty required of the prime contractor providing the Government reasonable assurance of the quality and reliability of the parts furnished, and the evidence of past Government contracts or satisfactory general commercial use serving the same purpose as the testing and approval of each part by the contracting agency before it is installed in the engine being overhauled.

To the Secretary of the Navy, June 18, 1968:

By letter dated May 2, 1968, the Deputy Commander, Purchasing, Naval Supply Systems Command, requested the views of our Office concerning the protests of the Korody-Colyer Corporation and the Lou Conde Company under invitation for bids No. N00123-68-B-1311, issued by the Naval Purchasing Office, Los Angeles, California.

The subject invitation contemplates a 1-year requirements type contract for the test, repair and overhaul of an estimated 780 small boat diesel engines. The overhaul work contemplated by the invitation is to be performed on a fixed price basis, with fixed prices quoted by bidders for both parts and labor. The evaluation of bids is to be accomplished on the basis of estimates of the total number of engines to be inspected and overhauled and estimates of the number and types of parts to be required. The invitation identifies by "GM Diesel Group No." and by "GM Diesel Part No." the parts and components to be used in engine overhaul.

The invitation requires in section 2.1.1(a) that only new, unused, genuine original manufacturer's parts or components may be used in the repair and overhaul of the engines, and that no substitute manufacturer's parts will be accepted. The contracting officer advises that this requirement was included in the invitation to assure a suitable degree of parts reliability and because the contract is essentially for repair and overhaul work and not for the purchase of parts. He observes that although other manufacturers might be able to supply

engine parts equal to the original manufacturer's parts, the qualification of such other parts either at the contract's inception or during performance would impose "an impossible administrative burden under this operation considering the many parts which would be involved on a day-to-day basis."

Seven bids were received and opened in response to the invitation on March 19, 1968, among them a bid from Lou Conde. The apparent low bid was submitted by Commercial Engine Service & Sales, Inc. (Commercial), the incumbent contractor. It is noted that this firm's bid was low by approximately $130,000. The contracting officer determined that Commercial had submitted an unbalanced bid, i.e., token prices were submitted for certain services and parts having substantial value, apparently on the theory that those services and parts while being given full weight for purposes of evaluation would not represent a major portion of the work actually to be required under the contract. The unbalanced bidding of Commercial was protested by Lou Conde.

Also, Korody-Colyer protested the invitation requirement for the use of original manufacturer's parts in the overhaul of the engines. Award has been postponed pending receipt of the views of our Office on both of the above protests.

With regard to the unbalanced bid submitted by Commercial, the contracting officer points out that there were indications that all bids received were unbalanced to some extent, but that the low bid of Commercial was unbalanced to a much greater degree than the others with respect to the prices quoted ($1) for engine disassembly work set out in item 2 and with respect to the prices quoted for certain repair parts set out in item 7. With reference to item 7, the contracting officer cites as an example item 7AA–16, blower assembly, as to which Commercial bid $1 per unit or less than one-three hundredths of the normal cost of the item. The contracting officer states that the quantities estimated in item 2 for disassembly appear to be realistic and further states that in practice virtually every engine torn down for inspection is later overhauled. He therefore concludes that some of the costs of tearing down the engines were probably figured into the prices quoted by Commercial for overhaul work under item 3, and that neither competition nor the total cost to the Government is significantly affected.

Item 7 lists parts and components which are not considered as a part of a normal 100 percent overhaul but are to be provided and installed only when ordered by the naval inspector. For a significant number of parts listed under item 7, Commercial quoted nominal prices, while quoting realistic prices for other parts under item 7. The contracting officer advises that Commercial bid a price of roughly

$2,500 for approximately $80,000 worth of parts, based on the estimated quantities set out in the invitation.

On noting the unbalanced nature of the Commercial bid, the contracting officer sought confirmation of the bid as well as verification of the estimated quantities contained in the invitation. Commercial, by letter dated March 29, 1968, admitted that its bid was unbalanced in some respects, but agreed to be bound by all its quoted prices. With regard to the item 7 estimates, it was determined that 7 parts for which Commercial quoted nominal prices should be deleted, 3 should be increased, 6 should be reduced, and the remainder were estimated correctly.

It is the position of the contracting officer that there is no clear indication that competition was significantly affected by the unbalancing with regard to item 7 because of the fact that the Commercial bid would probably still have been low if realistic prices had been quoted for all listed parts. Also, the contracting officer states that unbalanced bidding in and of itself is not illegal. Nevertheless, it is pointed out that administration of a contract based on the Commercial bid would become a "nightmare" because it would enable the naval inspector to order nominally priced parts not actually needed because of the savings involved, leading to constant disputes between the contractor and the Government as to whether or not a particular part or assembly is necessary for adequate overhaul. For example, it is pointed out that item 7AA–16, a complete blower assembly, is priced in the Commercial bid at $1 while its actual cost is normally in excess of $300. In addition to the complete assembly, item 7 lists its component parts, which apparently frequently can be used instead of the complete assembly. Since the complete assembly, as priced in the Commercial bid, would cost less than its component parts, the fear is expressed by the contracting officer that complete blower assemblies would be ordered on a "very large portion of the engines shipped under this contract" because of its low nominal cost of $1.

In the light of the foregoing, the contracting officer therefore proposes to cancel the invitation since it is uncertain, to some extent, who is the actual low bidder. He intends to issue a new invitation requiring that the manufacturer's current list prices, less any discount offered by bidders, will be paid for the parts now listed in item 7. Item 7 will then be evaluated on the basis of the average dollar value of parts estimated to be required for the overhaul of a single engine multiplied by the estimated quantity of engines to be overhauled.

Rejection of all bids is permitted by 10 U.S.C. 2304(c) where it is determined that rejection is in the public interest. Also, ASPR 2–404.1(b)(viii) permits cancellation of an invitation after opening

where it "is clearly in the best interest of the Government." Further, the right to reject all bids is specifically reserved to the Government by paragraph 10(b) of the solicitation instructions and conditions.

Our Office has consistently held that, while the interest of the Government and the integrity of the competitive bidding system require that invitations be canceled only for cogent and compelling reasons, there necessarily is reserved in the contracting officials a substantial amount of discretion in determining whether or not an invitation should be canceled.

Also, in situations in which an evaluation formula permits bidders to bid low on items known from past experience or on the basis of speculation to be purchased infrequently and high on items frequently purchased, our Office has held that such evaluation formulas violate the advertising requirements of free and open competition and that invitations containing such formulas should be canceled. See 43 Comp. Gen. 159; 44 *id.* 392. Accordingly, we conclude that the proposed invitation cancellation is proper under the reported circumstances.

Concerning the protest of the invitation requirement for original manufacturer's repair parts, the letter of Korody-Colyer dated February 2, 1968, and addressed to the U.S. Navy Purchasing Office, Los Angeles, California, makes reference to an 8-page single spaced document listing contract numbers, Federal stock numbers, Korody-Colyer part numbers, and quantities of parts supplied under previous contracts with both the Defense Construction Supply Center, Columbus, Ohio, and with the U.S. Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania. Korody-Colyer maintains that the parts supplied under its prior contracts include "all of the high mortality or the fast moving items normally replaced in engine overhauls," and in fact maintains that Korody-Colyer parts are presently in the naval supply system by virtue of prior Navy contracts. Korody-Colyer thus concludes that if the parts required for the overhaul work here involved were furnished by the Government rather than by the contractor, "virtually every one of the parts which we propose to supply would probably be from the Korody-Colyer Corporation and would be delivered from your supply system in the Korody-Colyer package."

In addition to the administrative burden of qualifying other than original manufacturer's parts mentioned earlier, a report from the Supervisor of Shipbuilding, San Diego, California, the requisitioning activity, takes the position that the use of original manufacturer's parts "assures the Government that new parts are manufactured to the engine manufacturer's specifications and therefore incorporate the current improvements of the manufacturer." The report of the requisitioning activity also maintains that the supplying of repair parts

as Government-furnished material is not feasible because of time considerations.

The drafting of specifications to meet the minimum needs of the Government is primarily a function of the contracting agency, and our Office will not substitute its judgment for that of the contracting agency absent a clear showing of abuse of discretion. In view of the fact that competition among prospective prime contractors does not appear to have been impaired by the requirement for only original manufacturer's parts, and in view of the major administrative problems which could possibly be anticipated in the event the specification was broadened, we cannot conclude that the present requirement is clearly in violation of the formal advertising statute.

However, we believe that it may be possible to relax somewhat the restrictive effect of the requirement for original manufacturer's parts. While we were not furnished with a copy of the 8-page list referred to by Korody-Colyer, and therefore cannot verify its accuracy, there seems to little question that Korody-Colyer, and possibly other parts manufacturers, are capable of supplying at least some of the parts included in the instant solicitation. In fact, the contracting officer's statement assumes that other manufacturers can supply adequate parts but cites the real problem of the administrative impossibility of the Government inspector either qualifying each part before installation in an engine being overhauled or qualifying suppliers proposed by prospective prime contractors before award.

In this regard, paragraph 7.10.1 on page 42 of the invitation requires that new parts and components be covered by the most favorable commercial warranties offered generally by the manufacturer. Additionally, the following comments concerning the qualification of diesel engine parts were made by our Office in decision B–161521(2) dated April 29, 1968:

> It would appear that techniques other than the preparation of a complete specification or submission of the original manufacturer's drawing might be sufficient for determining the equivalency of such relatively commonplace items as commercial diesel engine parts. Among possible alternative methods for protecting the Government's interest in insuring that a part proposed by an alternate producer will perform the same task as the original manufacturer's part is the submission of evidence of satisfactory use by commercial activities, or approval for use by a commercial user's association on the basis of successful use by members. If, as we assume, many of the items purchased by DCSC [Defense Construction Supply Center, Defense Supply Agency] are used by private industry, in construction and elsewhere, it would seem that satisfactory commercial use might be considered as a workable standard of evaluation.

It would appear that the parts warranty required of the prime contractor would provide the Government with reasonable assurance of quality and reliability. If further assurance is needed, evidence of past Government contracts or of satisfactory general commercial use would appear to serve essentially the same purpose as testing and

approval by the requisitioning activity of each part proposed to be used by the prime contractor. Accordingly, it is suggested that consideration be given to relaxing the present invitation requirement to permit prime contractors to supply parts having demonstrated commercial acceptability, or which have been successfully supplied under past Government contracts, as an alternative to supplying original manufacturer's parts. Enforcement of this possible relaxed requirement could be assured under the parts warranty clause, or if necessary, by means of an additional invitation requirement that satisfactory evidence of commercial acceptability or prior Government experience be furnished to the requisitioning activity before other than original manufacturer's parts are qualified for use.

We are furnishing copies of this decision to each of the three bidders involved in these protests.

[B-164393]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions

The final settlement date for the purchase of a newly constructed residence occurring more than 1 year after the effective date of an employee's permanent change of duty station, pursuant to section 4.1d of the Bureau of the Budget Circular No. A-56, the employee is not entitled to reimbursement of otherwise allowable expenses incurred in the purchase of the residence, notwithstanding delivery of the completed residence was delayed because of adverse weather conditions and an inadequate supply of labor.

To Bessie G. Loss, National Aeronautics and Space Administration, June 18, 1968:

We refer to your letter of May 20, 1968, your reference BFH, by which you request our advance decision whether you may properly certify for payment the enclosed voucher of Mr. William N. Ember, an employee of the National Aeronautics and Space Administration, to reimburse him certain costs he incurred in connection with his transfer from Cleveland, Ohio, to Washington, D.C., which was effective July 25, 1966.

Mr. Ember contracted to purchase a residence which was under construction on January 9, 1967. The sales contract involved provided that the residence would be completed and delivered within approximately 365 days from the date the seller accepted the contract (paragraph 20). However, you say that delivery of the completed residence which was scheduled for July 1967, was delayed because of adverse weather conditions and inadequate labor, resulting in completion on August 29, 1967. The final settlement date was September 7, 1967, which was more than 1 year after the effective date of Mr. Ember's transfer.

In view of the facts of this case you request our decision whether reimbursement of otherwise allowable expenses Mr. Ember incurred in the purchase of the residence in question is precluded by section 4.1d of Bureau of the Budget Circular No. A–56. That section provides:

> The settlement dates for the sale and purchase or lease termination transactions for which reimbursement is requested are not later than one year after the date on which the employee reported for duty at the new official station, except that an appropriate extension of time may be authorized by the head of the department or his designee when settlement is necessarily delayed because of litigation.

The facts presented in this case are similar to those involved in our decision B–160799, May 20, 1968. See also B–163700, May 6, 1968. In accordance with the rules stated in the enclosed decisions, the settlement date for purchase of the residence in this case must be considered as September 7, 1967. Since that date was more than 1 year after the effective date of his transfer, the employee is not entitled to reimbursement of the expenses claimed.

Therefore, the voucher which is returned together with supporting papers may not properly be certified for payment.

[B–164097]

Contracts—Labor Stipulations—Davis-Bacon Act—Minimum Wage Determinations—Prospective Wage Rate Increase

Under an invitation containing a prevailing minimum wage determination by the Secretary of Labor to cover laborers and mechanics to be employed on a proposed flood control project, the fact that bids are scheduled to be opened a few days before the occurrence of an automatic escalation of wage rates pursuant to a labor agreement with the union is no reason to postpone the scheduled opening of bids. The Davis-Bacon Act, 40 U.S.C. 276a, does not provide for the modification or adjustment of advertised prevailing minimum wage rates for laborers and mechanics employed on construction projects, nor does the specification of minimum wages in the invitation constitute a representation that labor can be obtained at such rates.

To the Standard Dredging Corporation, June 20, 1968:

Further reference is made to your telegram dated April 22, 1968, protesting against the wage rate determination contained in invitation for Bids No. DACW17–68–B–0051 as being unfair to contractors bound by an agreement with Local 25, Marine Division, International Union of Operating Engineers, and requesting that this Office arrange for a postponement of the date set for the opening of bids.

The invitation, which was for shoal removal at Canal 43, Central and Southern Florida Flood Control Project, was issued by the Jacksonville District Corps of Engineers, Department of the Army, on April 1, 1968, with opening set for April 25, 1968. (An advance notice to bidders had been distributed on March 22, 1968). Inasmuch as the proposed construction contract was subject to the Davis-Bacon Act,

as amended, 40 U.S.C. 276a, the specifications included in the invitation contained, as required thereby, a provision stating the minimum wages to be paid various classes of laborers and mechanics, based upon the wages determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics employed on projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed. The prevailing wage determination of the Secretary of Labor used in this instance was Decision No. AH–12,434, dated March 14, 1968.

Bids were opened as scheduled and seven bids were found to have been submitted. The Norfolk Dredging Co. was low bidder with a bid of $998,000. Your bid at $1,098,800 was third low. On May 6, 1968, award was made to Norfolk Dredging Co.

You say that the wage rates contained in the invitation were the same as those fixed by your agreement with the union, but that under the terms of that agreement, which provides for automatic escalation every 3 years, those rates expired on April 30, 1968. It thus appears that you have requested postponement of bid opening solely because the wage rate determination in effect at the time of the issuance of the invitation for bids did not reflect wage increases negotiated with the union which became effective May 1. 1968, about 45 days after the determination was issued and 5 days after the day set for bid opening.

The original Davis-Bacon Act of March 3, 1931, 46 Stat. 1494, required that Government construction contracts contain a provision that the rate of wages for laborers and mechanics employed on the work be not less than the prevailing rate for similar work. By the act of August 30, 1935, 49 Stat. 1011, there was substituted the requirement, still in force, that the advertised specifications for such contracts contain a minimum wage rate provision. No provision was made for any modification or adjustment of the advertised minimum wage rates, and it has been held by the Supreme Court that the specification of minimum wage rates does not constitute a representation by the Government that labor can be obtained by the contractor at such rates. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171.

Since the minimum rates required to be fixed in the advertised specifications for the contract, it is clear that such rates are to be based on the prevailing rates existing at the time the contract is advertised. Under the current procedures of the Department of Labor, prevailing wage rates in the construction industry are determined periodically for various areas of the country, and until such determinations are modified by later determinations or expire by their own terms they represent the correct rates to be used in advertising for bids on contracts in those areas. We are aware of no authority for considering as

"prevailing" a rate which is not in fact being paid at the time a contract specification is advertised in a solicitation of bids, however definite the belief may be that it will thereafter become the prevailing rate.

Inasmuch as the regulations of the Secretary of Labor, 29 CFR 5.4 (a), provide that wage determinations shall be effective for 120 calendar days, wage rate determination No. AH–12,434 was properly included in the advertised specifications for the subject contract, and we are of the view that the prospective wage rate increase furnished no legal reason for postponing the bid opening.

In the circumstances the award made was a valid and proper one, and your protest must be denied.

[B–164243]

Highways—Construction—Federal Aid Highway Program—Cost Contributions—Damage Award

Although a damage award is not considered a recognizable element of cost to be shared by the Federal Government under a Federal-aid highway agreement, if the Federal Highway Administrator determines the evidence supporting the contractor's claim was properly evaluated and the amount of damages awarded constituted a reasonable cost element of the project, the agreement may be modified to recognize that the additional costs awarded the contractor stemmed from reliance upon an erroneous "soil profile" furnished bidders by the State, and that this information no doubt contributed to an unrealistically low initial contract price.

To T. R. McVey, Department of Transportation, June 20, 1968:

By letter of April 23, you requested our opinion as to the propriety of certifying for payment a voucher covering the amount of $652,500 claimed by the Commonwealth of Pennsylvania on Federal Aid Project I–81–1(4)45 under the following facts and circumstances.

On June 21, 1960, the Federal Government and the Commonwealth of Pennsylvania, Department of Highways, entered into a project agreement covering construction of a portion of the National System of Interstate and Defense Highways (Interstate System) designated as project No. I–81–1(4)45. The agreement stipulated the estimated total cost of the project at $5,641,000 of which 90 percent or $5,076,900 was to be borne by the Federal Government. The agreement further stipulated that Federal funds were obligated for the project at not to exceed the amount shown therein.

The amounts stated in the project agreement were based upon a contract for construction in the amount of $4,531,280.13 which had been awarded by the State Department of Highways, with Federal concurrence, to the firm C. J. Lagenfelder & Son, Inc., plus amounts of $453,119.87 for engineering and contingency costs and $656,600 for right-of-way acquisitions for the total of $5,641,000.

As the result of a dispute which arose between the parties to the contract, the contractor, pursuant to contract provisions for settling disputes, brought an action against the State before the Pennsylvania Board of Arbitration of Claims requesting additional compensation.

The Board awarded $880,296.82 to the contractor and the State appealed to the Court of Common Pleas of Dauphin County, Pennsylvania. The court found that the facts as determined by the Board were supported by substantial evidence and that its conclusions of law were consistent with the facts determined. It was the considered judgment of State legal advisers that a petition for writ of certiorari to the Supreme Court of Pennsylvania would result either in denial or, if granted, affirmance of the rulings by the Board and Dauphin County Court. The case was settled for $725,000 on the basis that a writ of certiorari would not be sought.

The essential claim of the contractor arose out of rock excavation encountered on the project substantially in excess of that shown to be required by a soil profile furnished by the State Department of Highways.

The bid proposal for the contract in question consisted of a copy of the contract, the construction drawings, and specifications. In addition to the bid proposal, the State also advised bidders that, upon request, the Department of Highways would supply bidders with a copy of a "soil profile" and Langenfelder, the ultimate contractor, obtained a copy. This soil profile had been prepared for the Department by engineers who had also prepared an accompanying "soil survey report." The soil survey report, which was not made available to bidders, included a statement that the depth to top of rock as shown on the soil profile might be greatly in error.

The Department of Highways argued that bidders were on notice that the soil profile was not to be relied upon and was not to be considered a part of the plans nor as a factor in computing bid prices.

The contractor successfully contended that the soil profile furnished by the Department was in error and that since sufficient time for him to conduct his own investigation of subsurface conditions was not allowed, the Department's failure to furnish the report indicating error in the soil profile was tantamount to fraud by concealment.

In light of the fact that the contractor's claim was allowed by proper administrative process and affirmed by a court of competent jurisdiction, we cannot take issue on the question of the State's legal obligation. Nor, on the basis of the record before us, can we question the vigor of the State's defense or the soundness of the determination for settling the claim without seeking further review.

Under the agreement between the Commonwealth of Pennsylvania and the Federal Government covering the project in question, the

maximum Federal obligation is fixed. The agreement establishes the basis upon which the Federal contribution toward construction of the project will be made. The project itself is a State project, the Federal Government not being a party to the contract for construction and the State not acting as agent for the Federal Government. The Federal Government, therefore, is not liable to contractors for wrongful acts or omissions of States in connection with their contracts. See *D. R. Smalley & Sons, Inc.* v. *United States*, 178 Ct. Cl. 593, 372 F. 2d 505. We find no reasonable basis for finding that the Federal Government would nevertheless be liable to a State for increased project costs occasioned by its own negligence.

In our opinion, however, the real question posed by the instant situation is not whether the Federal Government is legally liable for a proportionate share of the amount for which the contractor's claim was settled by the Commonwealth of Pennsylvania, but rather, it is whether authority exists for a voluntary modification of the project agreement by the Federal Government to recognize the additional cost incurred by the State.

Ordinarily, where excess costs are incurred by reason of State negligence giving rise to justified claims for damages, it would not be appropriate to increase correspondingly the Federal contribution, since such increased costs are generally avoidable and would not be incurred but for the State's improper action or inaction. Here, though, there is at least room for arguing that the State's actions served to result in a contract price which initially was unrealistically low. If the State had not withheld the soil survey report, there is reason to conjecture that the initial contract price would have been higher. In other words, rather than being faced with a situation where the State's actions have resulted in otherwise avoidable increased costs, we have a situation where the State was not allowed to take advantage of a possibly lower contract price arrived at on the basis of misinformation. Moreover, and perhaps most significant, if the Board of Arbitration was correct on the facts, once the contract was entered into, there was no way in which the State could have avoided the additional amount it was required to pay, such additional amount having stemmed from the very basis upon which the contract was awarded.

There is no indication in the record that the State's action in awarding the contract was, in fact, fraudulently conceived, despite the legal conclusion that a constructive fraud was perpetrated on the contractor. In view of the Federal Government's approval of the contract award and of the close relationship existing between the Federal Government and the various States in prosecution of the Federal-aid highway program, the Federal Government might well recognize by appropriate modification of its project agreement an increase in costs which flowed

inevitably, in light of soil conditions encountered by the contractor, from the circumstances surrounding award of the contract. Whether the increased costs should be so recognized would depend upon administrative conclusions concerning the factual basis upon which the Board of Arbitration made its award and the propriety thereof.

In the final analysis what we have here is a situation where the State and the Federal Government have agreed to the construction of a State highway project with the Federal Government agreeing to reimburse the State a portion of the costs involved at certain stipulated approved amounts. Under section 106 of Title 23, United States Code, approval of the project constituted a contractual obligation of the Federal Government for payments of its proportional contribution thereto and this obligation was reduced to precise terms in the formal project agreement called for by section 110. A State court has decreed that the State is liable to the contractor involved for an amount significantly in excess of the costs upon which the Federal-State agreement for cost-sharing was based. It is true that the State, being bound by court ruling, is caught in the middle, if the Federal Government refuses to recognize the propriety of the State court ruling. But the Federal Government is not a vital party to the contractor's action against the State; and to require a modification by the Federal Government of the project agreement on the basis of State court conclusions with which it does not agree is to place the Federal Government in a similarly untenable position.

In our opinion, the Federal Government may not properly be denied by State court rulings of its administrative control over the expenditure of Federal funds where such rulings relate to elements of cost beyond those in which the Federal Government has agreed to share. See *Commonwealth of Massachusetts* v. *Conner*, (1966) 248 F. Supp. 656, 659, affirmed 366 F. 2d 778, where the court states: "* * * Certainly it is not plain from the wording of Act whether he [the Secretary of Commerce] must, as Massachusetts contends, accept a state court judgment as final * * *." See also 9 Comp. Gen. 175 wherein we held in 1929 under then existing Federal-aid road legislation that there is no obligation on the part of the United States to pay to a State any sum in addition to the approved estimate for construction of a Federal-aided highway.

However, if the Federal Highway Administrator, after consideration of the facts and circumstances which led to the successful prosecution of the contractor's claim against the State, determines that the Board of Arbitration properly evaluated the evidence before it and that the amount of damages agreed upon constitutes a reasonable cost element of the project involved, we find no legal objection to an

appropriate modification of the project agreement to reflect such determinations. *Cf.* our decisions of October 11, 1967, B–162539; and 47 Comp. Gen. 309 to the Federal Highway Administrator, wherein we concluded that the Federal Government should share in recoveries made by States in antitrust proceedings related to Federal-aid highway contracts.

The question presented is answered accordingly; the papers accompanying your letter are returned.

[B–164314]

Subsistence — Per Diem — Temporary Duty — Dependents — En Route to New Station

An employee whose dependents traveled with him incident to a change of official duty station and a stopover for consultation is entitled under section 2.2b of Bureau of the Budget Circular No. A–56 to payment of per diem on account of his family restricted to that allowable for uninterrupted travel between the old and new duty stations, the rationale of section 6.10 of the Standardized Government Travel Regulations applying in measuring the employee's entitlement to reimbursement for per diem on account of his family.

To A. D. Cox, United States Department of Agriculture, June 20, 1968:

We refer to your letters of May 9 and 22, 1968, with enclosures, requesting our decision whether you may certify for payment a reclaim voucher in favor of Mr. Franklin J. Olson, an employee of the Agricultural Research Service. The voucher is for $77 and represents per diem for Mr. Olson's wife and two children for travel in connection with a permanent change of station.

By travel order dated September 13, 1967, Mr. Olson was authorized travel from Belleville, Michigan, to Honolulu, Hawaii, incident to a change of official station and a stopover at Oakland, California, for consultation purposes. The travel order authorized transportation of Mr. Olson's immediate family consisting of his wife and two children ages 10 and 7.

The employee and his family, traveling together, departed Belleville, Michigan, at 4 p.m. on September 22, 1967, and arrived in San Francisco at 10:30 a.m. on September 23. After performing temporary duty at Oakland, Mr. Olson and his family departed San Francisco at 9 a.m. on September 26 and arrived in Honolulu at 10:55 a.m. the same day. For the total time involved, including the stopover in Oakland, Mr. Olson claimed per diem in the amount of $112 for the three members of his family under section 2.2b of Bureau of the Budget Circular No. A–56, Revised October 12, 1966.

The administrative office determined that if the employee's family had performed uninterrupted travel from Belleville to Honolulu the total time involved for per diem purposes for the family would have been 1¼ days. Therefore, the employee was allowed only $35 per diem for the members of his family.

Since section 2.2b of Circular No. A–56 appears to be silent on the issue involved you have requested our decision in the matter.

In our decision of February 5, 1968, B–163122, involving a similar question, we ruled as follows:

> * * * when an employee's spouse interrupts his or her continuous travel between an old and new official station so that he or she can accompany the employee on temporary duty assignments the rationale of section 6.10 of the Standardized Government Travel Regulations must be applied in measuring an employee's entitlement to reimbursement for per diem in lieu of subsistence on account of the spouse's travel.
>
> Thus in the case presented by your letter the employee is entitled to be reimbursed the cost of the spouse's transportation by a usually traveled route between Hawaii and El Ferrol, Spain, and the per diem in lieu of subsistence allowable would be that payable had the spouse's travel between those points been uninterrupted.

That rule is applicable to the facts of this case. Therefore, we hold that the payment of per diem on account of Mr. Olson's immediate family properly was restricted to that allowable for uninterrupted travel between the old and new duty stations.

The voucher which is returned herewith may not be certified for payment.

[B–133972]

Leaves of Absence—Civilians on Military Duty—Excess Leave

The granting of excused absence under 5 U.S.C. 6323 without loss of pay or charge to leave for days civilian employees of the Government are on active duty as military reservists or as members of federalized National Guard units may not exceed the 15 days in a calendar year authorized by the section, the authority of heads of agencies to excuse employees without loss of pay or charge to leave for nonfederalized State National Guard duty not extending to section 6323 duty. Therefore, a bulletin to the effect that an employee absent on military duty under section 6323 for emergency duties such as civil disorders for more than 15 days in a calendar year may not be further excused from his civilian position without loss of pay or charge to leave is recommended.

To the Chairman, United States Civil Service Commission, June 21, 1968:

Further reference is made to your letter of May 6, 1968, concerning the granting of excused absence without loss of pay or charge to leave to civilian employees of the Government for days on which they are absent from their regular duties as a result of being called to short periods of active duty as military reservists or as members of federalized National Guard units in connection with the control of civil disorders.

You propose to issue a bulletin to read in part as follows:

A Federal employee who is ordered into *active military service* of the United States pursuant to an Executive order Federalizing his National Guard unit may be carried in a military leave status for not to exceed 15 calendar days, provided the military leave has not been used previously during the current calendar year. These Guardsmen may also be carried in an annual leave status to the extent of their accrued annual leave during the period of active military leave. *In no case, however, would it be appropriate to excuse without loss of pay or charge to annual leave an employee who has been ordered to active duty in the service of the United States. (27 Comp. Gen. 245, 251; 35 id. 255.)*

Under the provisions of 5 U.S.C. 6323, military reservists and members of the National Guard who are civilian employees of the Federal Government are entitled to not in excess of 15 days of leave for use when they are called to active duty or required to perform certain training duties. Military leave granted under that section would embrace emergency active duty as reservists or as members of federalized National Guard units in connection with the control of civil disorders. In addition to such military leave, we have held (consistent with 5 U.S.C. 5534) that it is proper to grant annual leave to employees on active military duty as reservists or National Guardsmen. 37 Comp. Gen. 255.

Heads of agencies may exercise their authority to excuse employees without loss of pay or charge to leave when employees are called for nonfederalized State National Guard duty to which 5 U.S.C. 6323 is not applicable. B–152149, August 2, 1963. Although the absences here in question might be considered as being similar, the Congress has specifically provided for excused absence without charge to leave for certain Reserve and National Guard duty. We do not believe that the discretionary authority which agency heads have to excuse employees when absent without charge to leave may be used to increase the number of days an employee is excused for the purpose of participating in Reserve and National Guard activities which otherwise are covered by 5 U.S.C. 6323. Therefore, even though an employee is absent on military duty covered by that section for more than 15 days in any calendar year, he may not be further excused from his civilian position without loss of pay or charge to leave. In that connection we note that the bill H.R. 16951, 90th Congress, which was introduced on May 1, 1968, would authorize up to 22 days of excused absence for employees who are called to full time active duty as members of the National Guard in connection with riots or civil disorders.

We understand that some Federal employees who were called to active duty as reservists or members of federalized National Guard units in connection with the disorders in April of this year may have been granted excused absences by their agencies. Therefore, we concur

in the issuance of a bulletin along the lines proposed. However, we believe it is more appropriate to include in your proposed bulletin a reference to this decision rather than those now cited.

[B–160565]

Travel Expenses—Overseas Employees—Transfers—Agency Within the United States

The Government agency acquiring the services of an overseas employee who incident to his return to the United States for separation and reemployment without a break in service is entitled to reimbursement of travel expenses by both the losing and acquiring agency in accordance with 46 Comp. Gen. 628 may, if the transfer is not for the convenience of the employee, pursuant to section 2.5 of the Bureau of the Budget Circular No. A–56, authorize payment of the subsistence expenses incurred while occupying temporary quarters at the new station, miscellaneous expenses, and per diem for the employee's family incident to travel from residence to new duty station, not to exceed the per diem payable for direct travel from the old to the new station.

Travel Expenses—Overseas Employees—Transfers—Agency Within the United States

An overseas employee under separation orders to a place of residence which is more distant from the overseas duty station than the place at which he is employed without a break in service after his departure from the overseas duty point is only entitled to reimbursement by the losing agency for travel costs to place of residence. Although the employee is not entitled to travel or transportation costs from residence to the new duty station, no collection is required for costs paid to residence in excess of costs for direct travel from the overseas to the new station. Under Bureau of the Budget Circular No. A–56 the acquiring agency may pay the miscellaneous expenses allowance and reimburse the employee for subsistence while occupying temporary quarters. However, no per diem allowance for travel time of the employee's family is allowable.

Transportation—Household Effects—Overseas Employees—Transfers—Agency Within the United States

If the transportation of an employee's household effects from his overseas duty station has been delayed until after his transfer to a duty station within the United States without a break in service, the losing agency is responsible for the payment of transportation costs not to exceed the cost of returning the goods to the employee's residence and the gaining agency is responsible for payment of the balance of the costs up to the cost of direct transportation from the old to the new station.

Officers and Employees—Transfers—Service Agreements—Overseas Employees Transferred to United States

An overseas employee returned to the United States for separation upon reemployment without a break in service is not required under section 1.3c of the Bureau of the Budget Circular No. A–56 to execute an employment agreement to remain in the service. However, the acquiring agency, either by regulation or otherwise, may require an employee to execute an employment agreement.

To the Secretary of the Air Force, June 21, 1968:

Further reference is made to the letter of the Under Secretary of the Air Force, dated February 13, 1968, which was assigned Per Diem, Travel, and Transportation Allowance Committee Control No. 68–10, concerning the division of costs and the benefits allowable when employees are returned from overseas to the United States for separation and are thereafter reemployed without a break in service.

The Under Secretary refers to our decision of January 24, 1967, 46 Comp. Gen. 628, involving the provision contained in 5 U.S.C. 5724(e) which requires that:

> When an employee transfers from one agency to another, the agency to which he transfers pays the expenses authorized by this section.

In 46 Comp. Gen. 628, we held in pertinent part as follows:

> Concerning the third proposal, it is our understanding that the employee would be returned to the place of his actual residence or some other point in the United States for separation. At the time of such return travel he would not have been employed by the new (acquiring) agency to which he later transfers. See 44 Comp. Gen. 767. In such a case it would be proper for the old (losing) agency to pay the expenses incurred in traveling to the place of actual residence or some other selected point in the United States but not to exceed the constructive cost of travel to the place of actual residence.
>
> If after arriving at the place of actual residence the employee then transfers to a new (acquiring) agency without a break in service it would be proper for the acquiring agency to pay the expenses of his travel from the place of actual residence or other selected point to the duty station for the position to which he transfers. The allowable cost could not exceed the cost of direct travel from the old to the new duty station, less the cost incurred by the losing agency for return travel as indicated above. * * *

You ask whether the travel involved in that situation is considered to be travel for which the transfer of station benefits provided by the act of July 21, 1966, Public Law 89–516, 5 U.S.C. 5724, would be allowable.

In 46 Comp. Gen. 628, above, the acquiring agency was permitted to pay the cost of additional travel from the place of residence to the new duty station subject to limitations as set forth therein. No specific reference was made in that decision to the transfer benefits provided for under Public Law 89–516, now 5 U.S.C. 5724a. We believe, however, that if payment of travel costs is not precluded under the provisions of 5 U.S.C. 5724(h) pertaining to transfers primarily for the convenience or benefit of the employee or at his request, the acquiring agency in such case may authorize reimbursement to the employee for subsistence expenses while occupying temporary quarters in accordance with section 2.5 of Bureau of the Budget Circular No. A–56. Also, the miscellaneous expenses allowance would be payable, and per diem for the family would be allowable for travel from the residence to the new duty station, not to exceed in any event per diem for travel time direct from old to the new duty station.

In a similar situation, except that the employee and his family have traveled under separation orders to a place of residence which is more distant from the overseas duty station than the place at which he is employed without a break in service after his departure from the overseas duty point, all costs to place of residence under those orders are payable by the losing agency. No costs of travel or transportation are allowable from the residence to the new duty station; however, no collection is required for costs paid to the residence which are in excess of costs which would have been incurred for direct travel from the overseas station to the new duty station. See 44 Comp. Gen. 767. It would be permissible in such case, however, for the acquiring agency to pay the miscellaneous expenses allowance and to reimburse the employees for subsistence while occupying temporary quarters under Circular No. A–56. No per diem allowance for travel time of the family will be allowable.

If transportation of the employee's household effects has been delayed until after the transfer, the losing agency would pay the costs of such transportation not to exceed the cost of returning such goods to the employee's residence and the gaining agency would pay the balance of such costs up to the cost of direct transportation from old to new station.

The law does not require that an employee execute an agreement to remain in the Government service in the case of such transfers. The employee is required to execute an agreement for continued service in connection with such transfers only to the extent that the agency involved by regulation or otherwise requires such an agreement. 47 Comp. Gen. 122.

[B–164171]

Contracts—Discounts—Commencement of Discount Period

The payment by the Government of a voucher for supplies having been made within 20 days of evidence of inspection and acceptance of the supplies on DD Form 250 in accordance with the terms of the contract, the Government is not required to refund the prompt payment discount taken, even though the original voucher was received more than 20 days prior to payment, as delivery of the supplies was not completed until the required information was documented, at which time the discount period commenced. The determination by the contracting officer that the discount was not earned is one of fact and is not determinative of an issue that requires legal interpretation of the terms and conditions of the contract.

To Captain A. G. Metcalfe, Defense Supply Agency, June 21, 1968:

By letter dated April 26, 1968 (DSAH–CFF), the Chief, Accounting and Finance Division, Office of the Comptroller, transmitted your undated letter (DCRN–FO), with enclosures, wherein an advance decision is requested with respect to a voucher stated in favor of the

Harrington Shirt Corporation in the amount of $5,574.24, representing refund of the prompt payment discount (8 percent, 20 days) taken by the Government on partial shipment No. 22 (partial payment No. 20) under contract No. DSA100–1779.

The circumstances pertaining to partial shipment No. 22 under contract No. –1779 are reported as follows:

a. Supplies were inspected on 29 June 1966 and shipped the same day.
b. The invoice DD 250 for the questioned shipment was received at the office designated for payment by the Government 30 June 1966.
c. The supplies were inchecked at Lackland Air Force Base (destination) 15 July 1966.
d. The *signed* source inspection copy of DD 250 was not received at Lackland Air Force Base until 5 August 1966.
e. Acceptance of the supplies was made on 8 August 1966.
f. Payment was made on 18 August 1966 (230) and a discount of $5,574.24 which was 8% of the invoiced amount was taken.

However, doubt arises as to the propriety of refund of the discount taken since the contractor has argued that more than 20 days had elapsed since receipt of the original invoice. It is your recommendation that refund should not be made because the discount was properly earned by the Government. The bases for your position are stated by you as follows:

a. The Material Inspection and Receiving Report (DD Form 250) was required by the contract. This requirement appears on page 1 of the Change Order (DD Form 1319) executed on 3 January 1966, (003) (the contract was also executed on 3 January 1966 (003)) "Material Inspection and Receiving Report (DD Form 250)" (see Article 33, DSA Form 222, "Additional Provisions and Alterations to General Provisions, Standard Form 32, June 1964 Edition, Supply Contract" (Incorporated by reference)).
b. DSA Form 222 Article 33 "Material Inspection and Receiving Report (July 1958)." At the time of each delivery under this contract the contractor shall prepare and furnish to the Government, in the manner and to the extent required by the Contracting Officer, a Material Inspection Report (DD Form 250). The Government shall furnish the required forms to the Contractor upon request. (ASPR 7–105.7).
c. The DD Form 1319 also places the burden of distribution of completely executed DD Forms 250 upon the contractor as per the instructions of the Contracting Officer.
d. DCRSC Form 525.1A contains the "Instructions of Contractor for Distribution of Material Inspection and Receiving Report (DD Form 250) Domestic" which were given by the Contracting Officer to the contractor applicable to this contract.
e. These "Instructions" clearly require a DD Form 250 which has been *signed* by the Quality Control Representative of the Government to be shipped with the goods to the consignee.
f. The contractor did not comply with requirements of the contract in that he did not follow the instructions of the Contracting Officer regarding the distribution of the *signed* inspection copy of the DD 250. This is evidenced by the DD 250 for partial shipment No. 22 contained in the file which indicates that a signed source inspection copy of the DD 250 was not received by the consignee until 5 August 1966 (217).
g. Since a signed inspection copy of the DD 250 was required to be delivered with the goods to the consignee, delivery could not be complete without it. Delivery was complete upon receipt of the signed inspection copy of the DD 250 by the consignee on 5 August 1966 (217).

4. The Administration Contracting Officer, Mr. Peter Conte, made a Finding of Fact and Determination pursuant to the Disputes article of the contract on

30 August 1967 (attached Exhibit "C"). This Finding of Fact and Determination was in favor of the contractor and stated the questioned discount was not earned by the Government and therefore should be refunded to the contractor. The ACO predicated his decision upon Volume III, Supply Operators Manual, DSAM 4140.2, paragraph 303111 which is an internal regulation prescribing the course of action to be taken when material is received by destination without accompanying documentation. (The text of the above cited regulation is recited in attached Finding of Fact and Determination marked Exhibit "C".)

The contracting officer made a finding of fact under the contract disputes clause when the contractor claimed refund of the discount taken. He determined that the discount was not earned by the Government and therefore should be refunded. The decision was predicated on volume III, Supply Operators Manual, DSAM 4140.2, paragraph 303111, which is an internal regulation prescribing the action to be taken when material is received at destination without accompanying documentation, such as an executed DD form 250.

The contract required destination deliveries with inspection at origin and acceptance at destination. Concerning discounts, the contract provided that time would be computed from date of delivery at destination or date a *correct invoice* is received in the office specified by the Government, whichever is later.

Paragraph 7 of the General Provisions, incorporated by reference into the contract, provides, in pertinent part, as follows:

The Contractor shall be paid, upon the submission of properly certified invoices or vouchers, the prices stipulated herein for supplies *delivered and accepted or services rendered and accepted, less deductions, if any, as herein provided.* * * * [Italic supplied.]

In addition to the above, article 5(a) provides:

(a) All supplies (which term throughout this clause includes without limitation raw materials, components, intermediate assemblies, and end products) shall be subject to inspection and test by the Government, to the extent practicable at all times and places including the period of manufacture, *and in any event prior to final acceptance.* [Italic supplied.]

Moreover, contract modification No. 1, dated January 3, 1966, incorporated article 33 of the General Provisions (Supply Contract) (June 1964 edition), which reads in part:

At the time of each delivery under this contract the Contractor shall prepare and furnish to the Government, in the manner and to extent required by the Contracting Officer, a Material Inspection and Receiving Report (DD Form 250 or comparable form). The Government shall furnish the required forms to the Contractor upon request. (ASPR 7-105.7)

The modification further provided with reference to the use of DD form 250 that:

Effective 3 January 1966, the contractor, under the guidance and instructions of the Quality Assurance Representative of the applicable DCAS Activity cited in the contract, shall be responsible for the complete execution and distribution of DD Forms 250. All inquiries relative to the forms will be directed to the DCAS Activity. You may have in your possession sets of DD Forms 250, together with instructions for completion and distribution, which were furnished by this Center. These forms and instructions are to be used to the maximum extent practicable

except where a shipment is authorized to be made in accordance with Article 43C entitled "Shipment, Prior Authorization," of the "Supplemental General Provisions," DPSC Form 502–3; when used, contractor shall assure that the proper "Invoice Routing" office is reflected in Block 33 of the forms.

SHIPMENT, PRIOR AUTHORIZATION The following is added to Article 43C of "Supplemental General Provisions," DPSC Form 502–3: In the event shipment is authorized by the contracting officer, the contractor shall attach to his invoice or invoice copies of DD Form 250, a copy of the applicable satisfactory test report(s) evidencing completion of testing requirements prior to submission to the "Invoice Routing" office for payment. * * *

Under these provisions, payment is not authorized to be made until the supplies have been inspected and accepted as conforming to the contract. Hence, the invoice requesting payment on partial shipment No. 22 should not have been submitted on DD form 250 until that form had been properly executed to evidence contract compliance with the above-quoted provisions.

The question whether the contractor, under these circumstances, is entitled to refund of discount is one involving the legal interpretation of the terms and conditions of the contract and, as such, involves a matter of law rather than of fact. *Crowder* v. *United States*, 255 F. Supp. 873 (1964), affirmed 362 F. 2d 1011. 41 U.S.C. 322. In this respect, the contracting officer himself pointed out in his findings of fact, which held that the discount was unearned by the Government, that there is no controversy as to the date the supplies arrived at destination. We find nothing in his determination dealing with any dispute as to fact between the contracting officer and the contractor. Therefore, we agree with your view that the contracting officer's determination that the contractor is entitled to refund of the discount is not determinative of the legal issue in this case.

Generally, and in the absence of specific stipulations otherwise, a discount period is to be considered as beginning to run from date the articles are in fact delivered to the purchaser. 30 Comp. Gen. 10. However, in a situation, as here, where specific contract stipulations require that a *correct invoice* must be received by the designated Government activity, payment is not authorized to be made for supplies delivered to the Government until such correct invoice is received on DD form 250 properly executed. Under the terms and conditions of the contract, a "correct invoice" which may be properly processed for payment is one which evidences acceptance of the supplies as conforming by means of DD form 250. In 17 Comp. Gen. 470 (quoting the syllabus) we held as follows:

Where contract provided for discount for payment within a specified number of days from date of invoice, and payment was made within the specified number of days after receipt of a proper invoice, refund of the discount deducted is unauthorized, notwithstanding the payment as made was not within the specified number of days after date of original invoice, the invoice having been properly and timely returned by the Government for certification by the contractor in the manner required by the contract.

See, also, *Thos. Somerville Company* v. *United States*, 99 Ct. Cl. 329.

Accordingly, we conclude that the discount was properly earned since the correct invoice on the properly executed DD form 250 was paid within the 20-day discount period specified in the contract. Therefore, payment of the voucher, which is being retained in our Office, is not authorized. See B–118449, June 23, 1954, and B–162605, October 30, 1967.

[B–164237]

Bids—Acceptance Time Limitation—Failure To Comply

Two bid acceptance provisions in an invitation, one standard form 33, entitled "Solicitation, Offer and Award," prescribing that a bid will be open for 60-calendar days unless a different period is specified by the bidder in the blank space provided, the other, standard form 33A, entitled "Solicitation Instructions and Conditions," which stated that an offer of less than a 90 day acceptance period would be rejected are not inconsistent where the 90-day reference in the instructions is not intended to relieve a bidder of the responsibility of selecting an acceptance period. Therefore, a low bid submitted without specifying a different acceptance period automatically offered a 60 day bid accceptance period, and the bid nonresponsive to the 90 day acceptance period requirement may not be considered for award.

To the Secretary of the Army, June 24, 1968:

We refer to a report dated May 23, 1968, from the Acting Director of Procurement and Production, U.S. Army Materiel Command, relative to the protest of Atlantic Maintenance Inc., of Maryland, against award to any other bidder under invitation for bids No. DAAA13–68–B–0065, issued on March 26, 1968, by the Procurement Division, Fort Detrick, Maryland.

The invitation, as modified by amendment No. 1 dated April 9, 1968, requested bids no later than April 25, 1968, for furnishing janitorial services for item 1, covering eighteen (18) buildings in which the services were to be provided during evening hours; and item 2, covering eight (8) buildings in which the services were to be performed during daytime working hours. The Government reserved the right to make multiple awards and bidders were permitted to submit lump-sum bids for all twenty-six buildings. The invitation contained standard form 33A (July 1966), entitled "Solicitation Instructions and Conditions," and standard form 33 (July 1966), entitled "Solicitation, Offer and Award." Of relevance to our consideration here, the "Offer" portion of the latter form provides as follows:

In compliance with the above, the undersigned offers and agrees, if this offer is accepted within———calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

In addition to the 19 paragraphs of instructions and conditions contained in standard form 33A, the procuring activity issued supplemental instructions and conditions. Paragraph 34 thereof imposed the following condition:

> Bids Acceptance Period (APRIL 1960)
> Bids offering less than 90 days for acceptance by the Government from the date set for opening of bids will be considered non-responsive and will be rejected.

Eleven bids were received, and the bid of the Nash Janitorial Service in the amount of $37,224 was recorded as low overall. Atlantic Maintenance, Inc., of Maryland's bid in the amount of $40,920 was second low overall. Of the eleven bids received, nine bidders, including Nash Janitorial Service, failed to complete the bid acceptance space. We have been informally advised that the same bid acceptance period provisions were provided in last year's procurement of these services, and that only two of five bidders participating completed the bid acceptance space.

By letter dated May 3, 1968, Atlantic Maintenance, Inc., of Maryland, contends that in accordance with paragraph 34 of the supplemental conditions the bid of the Nash Janitorial Service is nonresponsive since that firm failed to insert the figure "90" in the bid acceptance period space. The contracting officer takes exception to this view on the ground that under the invitation as prepared by the procuring activity such action was unnecessary. Accordingly, the contracting officer proposes that award be made to Nash Janitorial Service. This recommendation is concurred in by Headquarters, U.S. Army Munitions Command and Headquarters, U.S. Army Materiel Command.

Considering the construction of the invitation advanced in support of the proposed award to Nash Janitorial Service, primary reliance is placed on paragraph 19 "Order of Precedence" of standard form 33A, which provides that:

> 19. In the event of an inconsistency between provisions of this solicitation, the inconsistency shall be resolved by giving precedence in the following order: (a) the Schedule; (b) Solicitation Instructions and Conditions; (c) General Provisions; (d) other provisions of the contract, whether incorporated by reference or otherwise; and (e) the specifications.

As expressed in a Memorandum of Law dated May 15, 1968, from counsel for the contracting officer, it urged that:

> The ninety (90) day acceptance period requirements takes precedence over the printed paragraph concerning acceptance period which appears on the front of Standard Form 33 * * *, since the former comes within category (b) maintained in said Condition No. 19, whereas the latter comes within category (d) of said Condition No. 19. Said Condition No. 19 * * * is the controlling condition for the purpose of resolving this protest * * *.

Further, emphasis is placed on the fact that nine bidders did not fill in the acceptance period space on standard form 33 and it is suggested that such action is indicative of the reasonableness of the procuring

activity's interpretation. This point is amplified in a letter dated May 10, 1968, from the Assistant Chief, Counsel, U.S. Army Munitions Command to Headquarters, U.S. Army Materiel Command, as follows:

> It is submitted that in the face of the caveat set forth in the invitation, to attribute to the bidder (and others who did not fill in the blank space) any intention other than to submit a responsive bid would be unconscionable. The integrity of the competitive bidding system requires strict construction of bids submitted but that requirement includes also the necessity for fairness to all bidders and to the interests of the government. * * *

As the contracting officer's report dated May 10, 1968, points out, the use of standard form 33 was required under Armed Services Procurement Regulation (ASPR) 16–101.1(i). The "Offer" portion of that form is designed to constitute, in the case of formally advertised procurements, the bidder's assent to all provisions of the invitation. With particular regard to bid acceptance terms, the language and structure of the "Offer" portion clearly afford the bidder an option as to the duration of the Government's right to accept. The parenthetical phrase that a bid will remain open for "60 calendar days" if no other time is specified by the bidder similarly presents an option, and also reflects a normal period for evaluation of the bids by the Government. It is apparent that nothing in the "Offer" portion of standard form 33 prevents a bidder from providing an acceptance period greater or less than 60 days. Further, while the bidder may affirmatively select an acceptance period, it is equally evident that in legal effect, noncompletion of the acceptance period space affords the Government 60 calendar days from date of bid opening to accept the bid.

Of course, the bidder's options with respect to acceptance periods may be limited by the requirements of the Government. We have recognized that the procuring activities may properly provide for a minimum acceptance period. In this connection paragraph 34 of the subject invitation was added pursuant to ASPR 2–201(xv) which provides in part that:

> When considered necessary by the contracting officer, a requirement that all bids must allow a period for acceptance by the Government of not less than a minimum period stipulated in the invitation for bids, and that bids offering less than the minimum stipulated acceptance period will be rejected. The minimum period so stipulated should be no more than reasonably required for evaluation of bids and other pre-award processing. * * *

By letters dated June 5, and June 12, 1968, the attorney for Atlantic has correctly observed that when an invitation provision requires a bid to remain open for acceptance for a specified period to be considered for award, our Office has taken the position that such provision is material and noncompliance therewith renders the bid nonresponsive. See 46 Comp. Gen. 418; 39 Comp. Gen. 779, and cases cited therein. We note also that the procuring activity has not ques-

tioned the materiality of paragraph 34 of the supplemental conditions.

Considering now the effect of paragraph 34 on the "Offer" portion of standard form 33, we acknowledge at the outset that the clause is a "caveat," but we do not believe it to be more than that. The language of the clause, which is prescribed by ASPR 2-201(xv), is confined to an appraisal of the substantive results of a failure to afford the Government the specified acceptance period. We cannot agree that the clause is designed to relieve a bidder of the responsibility in preparing its bid of selecting an acceptance period. We have recognized in previous decisions that the terms of minimum bid acceptance provisions may vary, and it is the bidder's responsibility to consider such terms in the preparation of its bid and respond accordingly. See B-160224, January 25, 1967; B-161628, July 20, 1967.

Admittedly, any questions of responsiveness arising out of the instant invitation could have been avoided if the procuring activity had struck out the parenthetical "60 calendar days" in the "Offer" portion of standard form 33 and inserted in lieu thereof the "90" day minimum acceptance period specified in paragraph 34, or other appropriate action. Further, when a minimum acceptance period is specified, we acknowledge that it is unlikely that a bidder will intentionally offer less than full compliance therewith. By letter dated May 15, 1968, Nash Janitorial Service has confirmed this fact in the advice that it has "always left the Bid Acceptance space blank as we always accept whatever calendar days are specified in the schedule." While the procuring activity's inaction has perpetuated a situation which places a premium on attentiveness, such circumstance is not in our opinion a proper basis for finding an "inconsistency" to alter thereby the operative effect of a failure to insert "90" calendar days in the bid acceptance space.

Accordingly, we must agree with the position advanced by the attorney for Atlantic that:

> Since "a different period" was not inserted by Nash Janitorial, its bid acceptance period automatically is considered to be 60 days by virtue of the specific language in the bid acceptance portion of the offer.

Moreover, it must be stressed that the terms of the invitation, thus construed, are the controlling manifestation of the bidder's intent even though it is recognized that the nonresponsiveness results from inadvertence or mistake. See 46 Comp. Gen. 418, 422. Also, see B-150611, February 25, 1963, and B-141169, November 12, 1959.

Although we have been informally advised that appropriate steps have been taken to avoid a recurrence of the foregoing circumstances, we must conclude that the bid of the Nash Janitorial Service is nonresponsive, and should not be considered for award.

[B-164371]

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

5 U.S.C. 5551 prescribing that a lump sum leave payment shall equal the pay an employee would have received had he remained in the service until the expiration of his annual leave, an employee retired effective April 30, 1968, who was separated from the service after the enactment of Public Law 90-206 is entitled to the salary increase authorized by section 212 of the act which will become effective with the first pay period commencing after July 1, 11968. However, the final adjustment in the amount of the 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.

To R. T. Erickson, United States Department of the Interior, June 24, 1968:

We refer to your letter of May 8, 1968, reference 4-360, relative to the amount payable as a lump-sum leave payment to a former employee of the Bureau of Reclamation who retired effective April 30, 1968. Your letter is in part as follows:

We have forwarded his final payment to the Regional Disbursing Office for processing which includes Lump Sum payment for 718 hours annual leave (carry over at the end of the 1967 leave year) plus 24 hours for 3 holidays which will occur during the projected leave period. Payment for the entire 742 hours is being made at the rate of $16,657.00 per annum ($8.01 per hour), which was the salary Mr. Cahoon was receiving immediately prior to the effective date of his retirement. Mr. Cahoon is claiming entitlement to the adjusted rate effective the first pay period on or after July 1, 1968 in accordance with the 1967 Federal Pay Act, Public Law 90-206, December 16, 1967.

* * * * * * *

1. Since Mr. Cahoon was on the rolls on the date of enactment of the 1967 Pay Act may I certify for payment Mr. Cahoon's claim for the amount as determined by the President for that portion of his Lump Sum payment extending beyond the first pay period after July 1, 1968?
2. If question No. 1 is answered in the negative then is he entitled to the 3% increase which is included in the act as a guaranteed minimum, for that portion of his Lump Sum payment extending beyond the first pay period after July 1, 1968?
3. Several employees have retired or will be leaving the government service prior to the effective date of the next salary adjustment. If question No. 1 is answered in the affirmative and since underpayment will not result from an administrative error discovered at a later date (see 26 CG 102 at page 106) may I process adjustments without claims from employees who are not in the government service when the adjusted rate becomes known and who have been paid a Lump Sum for a period which extends beyond the first pay period after July 1, 1968?

5 U.S.C. 5551 provides in part that:

* * * 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 * * *.

On the date of Mr. Cahoon's separation Public Law 90-207 already had been enacted and the provisions of that law requiring the pay

adjustment in July 1968 were then in being. While the exact amount of such adjustment was dependent upon a Presidential determination the requirement for making the adjustment is mandatory upon the President. Thus, had Mr. Cahoon remained in the service until the expiration of the period over which his lump-sum leave payment is computed, he clearly would have been entitled to whatever salary increase becomes effective the first day of the first pay period commencing after July 1, 1968, as authorized by section 212 of Public Law 90–206, 5 U.S.C. 5304 note. Therefore, in line with the decisions cited in your letter 43 Comp. Gen. 440, and 26 Comp. Gen. 102) it is our opinion that the employee should be given the benefit of the pay adjustment which will become effective with the first pay period commencing in July of this year.

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.

Accordingly, the first question presented in your letter is answered in the affirmative and it follows that the second question requires no answer.

The third question is answered in the affirmative.

[B–164515]

Compensation—Wage Board Employees—Coordinated Federal Wage System

In view of the designation under the Coordinated Federal Wage System contained in chapter 532 of the Federal Personnel Manual of a lead agency in each wage area to conduct a wage survey and develop wage schedules for use by all agencies in the area, an individual agency no longer may exercise discretion as to whether a particular schedule should be placed in effect and, therefore, instructions may be issued to require each agency in a wage area to place a new wage schedule in effect on the date decided upon by the lead agency, provided the date is not earlier than the date the lead agency actually prescribes the schedule.

To the Chairman, United States Civil Service Commission, June 24, 1968:

We refer to your letter of June 4, 1968, requesting our decision concerning the propriety of implementing instructions covering the Coordinated Federal Wage System which are set forth in Chapter 532 of the Federal Personnel Manual to include a requirement that each agency in a given wage area make new wage schedules resulting from wage surveys effective on the same date even though on occasion this would require individual agencies to apply the new wage schedules retroactively.

We understand that under the Coordinated Federal Wage System a particular agency is designated as a lead agency for each wage area and that such agency conducts the wage survey and develops wage schedules for use by all agencies in such area. Under the coordinated system an individual agency no longer may exercise discretion as to whether a particular schedule should be placed in effect and the schedule decided upon and made effective by the lead agency is the schedule applicable for the whole area. In view thereof and in order to achieve the desired degree of uniformity it appears to be entirely appropriate to implement the instructions to require that each agency in a wage area place the new schedule in effect on the date decided upon by the lead agency provided such date is not earlier than the date the lead agency actually prescribes the schedule. Your submission is answered accordingly.

[B-163529]

Storage—Household Effects—Military Personnel—Nontemporary Storage—Death of Dependents

The authority in paragraph M8303-2 of the Joint Travel Regulations entitling a member of the uniformed services stationed overseas on the date of death of a sole or all dependents who had resided with him overseas to the nontemporary storage of household goods, not to exceed the prescribed weight limitation, until the date of his next arrival in the United States (U.S.) for permanent duty may not be extended to a member located at a permanent duty station in the U.S. at the time of death of his sole or all dependents. The regulation promulgated pursuant to the unusual or emergency circumstances provision of 37 U.S.C. 406(e) having been superseded by subsection 406(h) relating to the individual movement of dependents and effects from overseas areas, the regulation may not be amended to apply to members on duty in the U.S.

To the Secretary of the Air Force, June 25, 1968:

Further reference is made to letter of January 30, 1968, from the Under Secretary of the Air Force requesting a decision whether the Joint Travel Regulations, Volume 1, Chapter 8, may be amended to provide for shipment and nontemporary storage of household goods not in excess of the prescribed weight limitation when the sole dependent, or all of the dependents, of a member of the uniformed services die at his permanent duty station in the United States. The request was assigned PDTATAC Control No. 68-7 by the Per Diem, Travel and Transportation Allowance Committee.

The Under Secretary states that paragraph M8303-2 of the Joint Travel Regulations provides that upon the death in an overseas area of a sole dependent, or of all dependents, authorized to reside therein, a member otherwise entitled to transportation of household goods shall be entitled to nontemporary storage of such household goods as are in the overseas area at date of death, not to exceed the prescribed

weight limitation, until the date of his next arrival in the United States for permanent duty.

He states that the recommendation for amending the regulations was made by the Department of the Army for the reason that members have the same problems when the wife dies in the United States as they do when she dies in an overseas area and the entitlement to shipment or nontemporary storage of household goods under such circumstances should be the same.

He further states that paragraph M8303-2 was promulgated pursuant to the unusual or emergency circumstances provision of 37 U.S. Code 406(e), but that doubt exists as to whether any of the provisions of 37 U.S.C. 406 authorize the amendment to the Joint Travel Regulations proposed by the Department of the Army.

Section 406(b) of Title 37, U.S. Code, provides for transportation, including drayage, of baggage and household effects in connection with a temporary or permanent change of station. As an alternative to shipment, section 406(d) of the same title provides for nontemporary storage of baggage and household effects in facilities of the United States, or in commercial facilities when it is considered to be more economical to the United States. Any other movement within the United States or restorage of the effects at Government expense would not be authorized prior to further permanent change of station orders except as may be provided under 37 U.S. Code 406(e). 45 Comp. Gen. 771.

As an exception to the orders requirement, subsection (e) of section 406 provides that when orders directing a permanent change of station have not been issued, or when they have been issued but cannot be used as authority for the transportation of dependents, baggage and household effects, the Secretaries may authorize the movement of the dependents, baggage and household effects and prescribe transportation in kind, reimbursement therefore, or a monetary allowance in place thereof, as authorized under subsection (a) or (b) of that section in cases involving unusual or emergency circumstances including those set forth in clauses (1), (2), and (3) of that section.

Nontemporary storage of household effects is authorized as an alternative to their shipment and the transportation of household effects provided by 37 U.S.C. 406(e) is authorized only in unusual or emergency circumstances. Based on the legislative history of section 406(e) we expressed the opinion in decision of July 16, 1958, 38 Comp. Gen. 28, that the term "unusual or emergency circumstances" had reference to conditions of a general nature arising at overseas duty stations which cannot readily be foreseen and which change in an unexpected manner. We said, therefore, that it was not clear that

Congress, in enacting the law, intended to authorize the advance return [to the United States] at Government expense of dependents and household effects of members on an individual case basis merely because the member encounters financial difficulties, has marital troubles, desires to return dependents to the United States to attend school, or because of illness of relatives, etc. We pointed out that virtually all members may be found with one or more of such problems during their service.

In that regard we referred to prior decisions holding that conditions of a personal nature such as financial difficulties, illness of a mother-in-law, inadequate educational facilities, death of a brother-in-law, or return of dependent to attend school may not be considered as the unusual or emergency circumstances contemplated by the statutes.

The statute is concerned primarily with emergencies deemed to require the movement of dependents, not the member, and we said that basically it authorizes the Secretaries to issue regulations providing for the early return of dependents and household effects only because of actual conditions of an emergency nature arising at overseas duty stations which justify such return and which generally could not arise, or are most unlikely to arise in the case of members serving in the United States. We recognized, however, that under certain circumstances such conditions might be considered to include serious illness among dependents requiring specialized treatment not available at the member's duty station and the serious adverse effect of weather, climate, or living conditions on the health of dependents amounting to a serious illness not treatable at the duty station.

In decisions of September 23, 1965, 45 Comp. Gen. 159, and October 28, 1965, 45 Comp. Gen. 208, we held that 37 U.S.C. 406(e) was applicable in the case of unusual or emergency circumstances arising in the United States. Those decisions, however, do not represent any change in the views expressed in 38 Comp. Gen. 28, as to what may be viewed as constituting the unusual or emergency circumstances contemplated by the statute.

The limitations imposed by the unusual or emergency circumstances requirements of section 406(e) were found to be too restrictive to meet the needs of the services. Consequently, a new subsection (h) was added to 37 U.S.C. 406 by Public Law 88–431, approved August 14, 1964, to authorize, among other things, the advance return of dependents and household effects of military members from overseas areas in individual cases, when such return is determined to be in the best interest of the member or his dependents and the United States.

H. Rept. No. 415, 88th Cong., dated June 18, 1963, to accompany H.R. 4739, which became Public Law 88–431, says that examples of

situations warranting the advance return of dependents would include such compelling personal reasons as marital difficulties, extreme financial difficulties, death or serious illness of close relatives, and other situations in which the appropriate commander determines that the best interest of the Government and the member or dependent will be served.

We understand that paragraph M8303–2 of the Joint Travel Regulations was promulgated by a Joint Determination issued in June of 1964. However, it first appeared in Volume 1 of the Joint Travel Regulations as Change 140 of September 1, 1964, or after the enactment of Public Law 88–431.

Presumably, the Secretaries in promulgating paragraph M8303–2 considered that in cases where a member's dependents die at an overseas station, the difficulty of adequately disposing of unneeded household effects locally, or, in the alternative, the cost of returning them to the United States, or the financial burden which would result from continued maintenance of rented dependent quarters and the reduction in his basic allowance for quarters and overseas station per diem to those authorized for a single member, were circumstances which afforded a basis for invoking the emergency provisions of 37 U.S.C. 406(e). Those circumstances and others of a similar nature, however, seem clearly to relate to the interest of the member and the United States in an individual case and not to a need to move household effects because of emergency circumstances of a general nature.

The movement of dependents and household effects for such reasons in individual cases is specifically authorized by 37 U.S.C. 406(h). To the extent, therefore, that 37 U.S.C. 406(e) may have afforded any basis for moving dependents and household effects for such reasons, it must be regarded as having been entirely superseded by the provisions of 37 U.S.C. 406(h). Accordingly, it is our view that since August 14, 1964, section 406(h) has constituted the sole authority for paragraph M8303–2 of the Joint Travel Regulations.

In that view of the matter and since 37 U.S.C. 406(h) has no application to members on duty in the United States, your question must be answered in the negative.

[B–164242]

Contracts—Negotiation—Limitation on Negotiation—Propriety

Under Request for Quotations (RFQ) transformed from a noncompetitive to a competitive procurement, where a partial emergency award was made to the sole source manufacturer of voltmeters pending evaluation of an "equal" item offered at a lower price, the decision to consider the "equal" product having relaxed the specifications, amendment of the RFQ, with notice and opportunity to the original manufacturer to compete is required by paragraphs 3–805.1(b) and

(e) of the Armed Services Procurement Regulation. The failure to give the original manufacturer an "equitable opportunity to negotiate" on the balance of the procurement not justified under paragraph 3-805.1a(v), in view of the detailed presentation of the competing equipment, an award to the offeror of the "equal" item on a quotation revised to include provisioning data and publications without charge is prohibited by paragraph 3-805.1(a).

To the Secretary of the Navy, June 25, 1968:

Reference is made to a letter dated June 10, 1968, from the Deputy Commander, Purchasing, Naval Supply Systems Command, furnishing a report on the protest of Cimron Division, Lear Siegler, Inc., concerning the failure of the Aviation Supply Office (ASO), Philadelphia, to negotiate with that firm for procurement of 37 Digital Voltmeters.

On March 31, 1967, Request for Quotations (RFQ) N00383-67-503466Q was issued by ASO for 71 Digital Voltmeters described as Cimron Division Part Number 7300A-631. The procurement was synopsized in the Commerce Business Daily for subcontracting purposes, and in response thereto a competitor of Cimron offered to supply the Government with equipment manufactured by the competitor which it alleged was equal to the Cimron unit specified. Technical data was furnished by the competitor to support its position. Such data was forwarded to cognizant technical personnel for a decision regarding its equivalency to the Cimron unit and, since it was felt that such a decision could be reached on a timely basis, the procurement was temporarily suspended. However, by November 1967 information was still unavailable as to the acceptability of the competitor's equipment and a sample unit was requested from the corporation for testing purposes. By that time emergency fleet requirements for 34 units dictated the making of a partial award to Cimron which was effected on December 19, 1967. The contracting officer states that on March 18, 1968, the competitor's equipment was approved but that a requirement had arisen for certain provisioning data and publications considered to be essential to the maintenance and support of its equipment in the field. The competitor thereafter offered to furnish these materials at no cost to the Government.

It is the position of the contracting officer that, pursuant to the Armed Services Procurement Regulation (ASPR) 3-805.1(a)(v), a contract may be let to the competitor for the additional 37 units without affording Cimron an opportunity to negotiate. The regulation provides, in pertinent part, as follows:

3-805 Selection of Offerors for Negotiation and Award.
3-805.1 *General.*
(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors (including technical quality where technical

proposals are requested) considered, except that this requirement need not necessarily be applied to:

* * * * * * *

(v) procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. *Provided, however*, that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. * * * .

(b) * * * Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see (a) above) shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. * * *.

* * * * * * *

(e) When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposal or request for quotations, and a copy shall be furnished to each prospective contractors. See 3–505 and 3–507. Oral advice of change or modification may be given if (i) the changes involved are not complex in nature, (ii) all prospective contractors are notified simultaneously (preferably by a meeting with the contracting officer), and (iii) a record is made of the oral advice given. In such instances, however, the oral advice should be promptly followed by a written amendment verifying such oral advice previously given. The dissemination of oral advice of changes or modifications separately to each prospective bidder during individual negotiation sessions should be avoided unless preceded, accompanied, or immediately followed by a written amendment to the request for proposal or request for quotations embodying such changes or modifications.

From the foregoing it is apparent that the RFQ solicited a quotation from Cimron for an item manufactured only by Cimron, and it must therefore be assumed Cimron's quotation was submitted in the belief that only items manufactured by Cimron would be acceptable and that the procurement was therefore noncompetitive. It follows that the decision to consider quotations based upon items determined to be equal to those manufactured by Cimron operated not only to relax the specification requirements but also to transform the procurement from a noncompetitive to a competitive one. In such circumstances, it is our opinion that the provisions of ASPR 3–805.1(b) and (e) require amendment of the RFQ, notice of the amendment to the supplier initially solicited, and an equitable opportunity for the supplier to amend his quotation to reflect such changes as he may consider appropriate in the light of the changes accomplished by the amendment to the RFQ. That the failure to permit Cimron to amend its quotation cannot be considered the "equitable opportunity to negotiate" contemplated by ASPR 3–805.1(b) appears to be established by the fact that Cimron, unlike its competitor, was not given any oppor-

tunity to submit a quotation on an item "equal to" Cimron Part Number 7300A–631, or to submit a quotation based on supplying the named part number on a competitive basis.

Additionally, the record indicates that the contract proposed to be awarded to the competitor would include certain provisioning data and publications which were not included in the competitor's original proposal. Consequently, any contract resulting therefrom would be awarded without negotiation on the basis of the competitor's revised—as opposed to the initial—proposal, which is strictly prohibited under ASPR 3–805.1(a) unless an equitable opportunity to revise is also given to Cimron.

Furthermore, it is apparent that the Government was so uncertain as to the technical aspects of the competitor's equipment that it was necessary to request the corporation to supply a model of its equipment for test purposes nearly 6 months after receipt of its initial quotation. We believe this action, in effect, constitutes a request for a further detailed presentation by the competitor and we therefore are unable to agree with the contracting officer that the provisions of ASPR 3–805.1(a)(v) justify the failure to negotiate with Cimron.

For the above reasons we believe further opportunity must be afforded offerors to negotiate on an equitable basis.

The file forwarded with the letter of June 10 from the Deputy Commander, Purchasing, NAVSUP, is returned.

[B–164309]

Pay—Additional—Hostile Fire Pay—Cadets and Midshipmen

Cadets and midshipmen of the Academies who are not members of the uniformed services within the purview of 37 U.S.C. 101(23) and who are paid pursuant to section 201(c) at the rate of 50 percent of the basic pay of a commissioned officer in pay grade O–1 with 2 or less years of service computed under section 205, if sent to Vietnam for orientation and training would not be entitled to the hostile fire pay prescribed by section 310(a), the rule in 30 Comp. Gen. 31 concerning flight pay to the effect that special pay is dependent upon a status of entitlement to basic pay, applying equally to hostile fire pay entitlement.

To the Secretary of Defense, June 25, 1968:

Reference is made to letter of May 7, 1968, from the Assistant Secretary of Defense (Comptroller) requesting decision whether cadets and midshipmen at the Academies will be entitled to special pay for duty subject to hostile fire if they are sent to Vietnam this summer for orientation and training and are otherwise entitled. A discussion pertaining to the matter is contained in Department of Defense Military Pay and Allowance Committee Action No. 411.

Section 201(c) of Title 37, U.S. Code, provides:

(c) A cadet at the United State Military Academy, the United States Air Force Academy, or the Coast Guard Academy, or a midshipman at the United States Naval Academy, is entitled to monthly pay at the rate of 50 percent of the basic pay of a commissioned officer in pay grade 0–1 with two or less years of service computed under section 205 of this title.

Section 310(a) of Title 37, U.S. Code, provides:

(a) Except in time of war declared by Congress, and under regulations prescribed by the Secretary of Defense, a member of a uniformed service may be paid special pay at the rate of $65 a month for any month in which he was entitled to basic pay and in which he—

(1) was subject to hostile fire or explosion of hostile mines;

(2) was on duty in an area in which he was in imminent danger of being exposed to hostile fire or explosion of hostile mines and in which, during the period he was on duty in that area, other members of the uniformed services were subject to hostile fire or explosion of hostile mines; or

(3) was killed, injured, or wounded by hostile fire, explosion of a hostile mine, or any other hostile action.

A member covered by clause (3) who is hospitalized for the treatment of his injury or wound may be paid special pay under this section for not more than three additional months during which he is so hospitalized.

Section 101(3) of Title 37, U.S. Code, provides:

(3) "uniformed services" means the Army Navy, Air Force, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service;

Section 101(23) of Title 37, U.S. Code, provides:

(23) "member" means a person appointed or enlisted in, or conscripted into, a uniformed service;

Section 3062(c) of Title 10, U.S. Code, provides:

(c) The Army consists of—

(1) The Regular Army, the Army National Guard of the United States, the Army National Guard while in the service of the United States and the Army Reserve; and

(2) all persons appointed or enlisted in, or conscripted into, the Army without component.

Similar provisions are contained in 10 U.S.C. 8062(d) with respect to the composition of the Air Force.

Subsections 5001(a) (1) and (3) of Title 10, U.S. Code, provide:

(a) In this subtitle:

(1) "Navy" means the United States Navy. It includes the Regular Navy, the Fleet Reserve, and the Naval Reserve.

* * * * * * *

(3) "Member of the naval service" means a person, male or female, appointed or enlisted in, or inducted or conscripted into, the Navy or the Marine Corps.

Section 3075 of Title 10, U.S. Code, provides:

(a) The Regular Army is the component of the Army that consists of persons whose continuous service on active duty in both peace and war is contemplated by law, and of retired members of the Regular Army.

(b) The Regular Army includes—

(1) the officers and enlisted members of the Regular Army;

(2) the professors, registrar, and cadets of the United States Military Academy; and

(3) the retired officers and enlisted members of the Regular Army.

Similar provisions are contained in 10 U.S.C. 8075 with respect to the Regular Air Force.

Section 5012(a) of Title 10, U.S. Code, provides:

(a) The Navy, within the Department of the Navy, includes, in general, naval combat and service forces and such aviation as may be organic therein. The Navy shall be organized, trained, and equipped primarily for prompt and sustained combat incident to operations at sea. It is responsible for the preparation of naval forces necessary for the effective prosecution of war except as otherwise assigned and is generally responsible for naval reconnaissance, antisubmarine warfare, and protection of shipping.

Sections 4342(d), 9342(d), and 6953 of Title 10, U.S. Code, respectively, provide that cadets at the United States Military Academy and the United States Air Force Academy, and midshipmen at the United States Naval Academy, shall be appointed by the President. Sections 4349(b) and 9349(a) of Title 10, U.S. Code, provide that an Army or Air Force cadet shall perform duties at such places and of such type as the President may direct. No specific similar provision has been found with respect to midshipmen at the Naval Academy, although they are required to agree that they will complete the 4-year course of instruction at the Naval Academy. See 10 U.S.C. 6959(a) and 6966.

For the reasons stated in decision of July 28, 1950, 30 Comp. Gen. 31, we held that midshipmen of the U.S. Navy are not entitled to increased pay for flying duty performed after the effective date of the Career Compensation Act of 1949, ch. 681, 63 Stat. 802, nor to continue to receive flying pay under the saved pay provisions of section 515 of that act, 37 U.S.C. 315 (1958 ed.). Section 102(b) of that act, 37 U.S.C. 101(23), defined the term "member" as meaning a commissioned officer, commissioned warrant officer, warrant officer, flight officer, and enlisted person, including a retired person, of the uniformed services. In that decision we said that the saved pay provisions of section 515 pertained to "members" of the uniformed services, noting that the definition of "members" contained in section 102(b) did not include midshipmen, and that:

* * * There is no intimation in the act or in its legislative history that the word "member" as used in the so-called saved pay provisions was intended to include other than those designations listed in the definition. In this connection, section 201(a) of the act, 63 Stat. 805, provides basic pay for "members of the uniformed services" listing monthly rates of pay for commissioned officers, warrant officers, and enlisted persons only. The pay and allowances of midshipmen are fixed in a separate section, not as a "member" of the uniformed services as that term is used in the statute. In reference to section 201(a) it is stated, at page 15 of Senate Report 733, July 20, 1949, on H.R. 5007—which became the Career Compensation Act of 1949—that, "This subsection prescribes pay grade for *all* personnel of all the services included in the bill." [Italic supplied.] Also, on February 9, 1950, Mr. Vinson, Chairman of the Committee on Armed Services, House of Representatives, introduced H.R. 7246, 81st Congress, a bill to amend the Career Compensation Act of 1949, so as to include, *inter alia*, the word "midshipmen" in the definition of "member" in section 102(b) of the said act,

The Committee Action concludes that under the provisions of the Career Compensation Act midshipmen at the United States Naval Academy were not "members" of the uniformed services entitled to basic pay within the meaning of that term as used in section 201(a) of that act, which provided basic pay for members of the uniformed services. It points out that that section, along with other provisions of the Career Compensation Act, was replaced by section 1 of the act of September 7, 1962, Public Law 87-649, the purpose of which was to codify the provisions of the Career Compensation Act as Title 37, United States Code, and to restate, without substantive change, the law replaced by the codification; that section 203(a) of Title 37, which replaced section 201(a) of the 1949 law, sets forth in tabular form rates of monthly basic pay for members of the uniformed services: commissioned officers, warrant officers, and enlisted members only.

The Committee Action also shows that the definition of the term "member" in section 102(b) of the old law and 101(23) of the new law includes commissioned officer, commissioned warrant officer, warrant officer, and enlisted person, including a retired person; and that there is no suggestion in the legislative history of the codification of Title 37 that any substantive change was effected by that codification in connection with that provision of law. It may be noted that section 12(a) of Public Law 87-649, 37 U.S.C. prec. 101 note, states that "it is the legislative purpose to restate, without substantive change, the law replaced" by sections 1-11 of that act.

The Committee Action states that it would seem reasonable to conclude that the reasoning in 30 Comp. Gen. 31 would apply with equal force today if a midshipman of the U.S. Naval Academy should claim entitlement to incentive pay for duty involving flight under 37 U.S.C. 301(a)(1), since entitlement to such pay is dependent upon a status of entitlement to basic pay, and that equivalent considerations would appear to be involved in the question of entitlement to hostile fire pay under 37 U.S.C. 310.

We agree with the Committee Action conclusion and hence the question posed is answered in the negative. In our opinion nothing contained in 10 U.S.C. 3075 or 8075 requires or suggests that any different answer is appropriate.

[B-164257]

Bids—Late—Hand Carried Delay

The actions of a bid opening officer having established a 2 p.m. deadline for the opening of bids under several invitations as required by paragraph 2-402.1(a) of the Armed Services Procurement Regulation, a hand-carried bid which could have been timely filed but was delivered at 2:15 p.m. is considered a late bid under paragraph 2-303.1, notwithstanding the bidder had been orally advised that the

opening of bids under the invitation it was bidding on would be delayed 10 minutes to complete the opening of bids under another invitation. To hold otherwise would introduce an element of uncertainty into the bidding procedure. Therefore, even if the late hand-carried bid was delivered before other bids under the same invitation had been opened and prices revealed, it may not under paragraph 2-303.5 be considered.

To McClure & Trotter, June 26, 1968:

We refer to your letters of May 8 and 31, 1968, protesting the contracting officer's determination that General Steel Tank Company's bid under advertised solicitation No. M00027-68-B-0150 issued March 13, 1968, by the United States Marine Corps, Headquarters, Washington, D.C., for the procurement of 25 tactical airfield fuel dispersing systems was received late and was therefore not for consideration.

The subject solicitation as amended provided for bid opening at 2:00 p.m. Daylight Saving Time, May 2, 1968.

At approximately 1:58 p.m. the bid opening officer removed the bids contained in the bid depository box near the entrance to the bid opening room, proceeded to the room, and commenced to open the first of three sets of bids scheduled for opening at 2:00 p.m. on that date. Upon completion of action on the two bid sets not here in question, the bid opening officer announced the start of bid opening for the subject solicitation, and began to read the name of the first bidder. At this time a representative of General Steel Tank Company placed a sealed envelope upon the table with the other bids. The time was noted as 2:15 and the envelope was retained unopened for further consideration by the contracting officer.

The May 17, 1968, report from the Headquarters, United States Marine Corps, Department of the Navy (Code CSG-1-11d), to this Office recommends that the subject bid be considered late and accordingly rejected.

As attorney for General Steel Tank Company, you allege that shortly before the 2:00 p.m. deadline, Mrs. Ensor, the contract specialist whose name was listed upon the solicitation form as the individual to contact for information, advised three representatives of General Steel Tank Company then present in her office that "There is no hurry, there has been a 10-minute delay in opening these bids." This statement you contend operates as an oral postponement of the bid opening under such decisions of this Office as B-158464, March 28, 1966.

Alternatively, you argue that since the Government caused the delay in submitting your client's bid, said bid is for consideration, citing 34 Comp. Gen. 150.

You further contend that under ASPR 2-402.1(a), the bid opening officer cannot be considered as deciding the time for the opening of the subject bid set had arrived until the action on the two prior sets

was completed and the opening of the subject bid set was announced.

Dealing with this last allegation first, we believe ASPR 2-402.1(a) imposed upon the bid opening officer a duty to decide when the 2:00 p.m. deadline for the receipt of bids for all three of the bid sets arrived. This the bid opening officer did by removing all bids from the bid depository box outside the bid opening room at 1:58 p.m., on May 2, 1968, and placing them in the room for public opening. By this action the specified deadline for the receipt of all three bid sets was established, and for the fortuitous circumstance that the actual opening of one bid set occurred later than that of the other sets does not alter this determination of the deadline for the receipt of bids.

To permit the opposite view would introduce an unnecessary element of uncertainty into the bidding procedures, for bidders would not know in advance when the final time for acceptance of bids would occur, due to such variables as the number of bids involved in the prior bid sets. Since we believe it is to the Government's advantage to establish the time for bid opening in advance with as much precision as possible, we interpret ASPR 2-402.1(a) to mean that the bid opening officer's decision to commence opening bids at 2:00 p.m. prohibited the consideration of a bid submitted by General Steel Tank Company at 2:15 p.m. even though no bid prices from that particular set had been read.

Regarding the alleged 10-minute postponement of bid opening, we believe that the record shows words of Mrs. Ensor were intended to convey the information that the physical act of opening the bid set in which your client was interested would occur after the other two bid sets were opened. However, it does not follow that the 2:00 p.m. time for the receipt of bids stated on the solicitation was in any manner changed by the circumstance that certain other bid sets were to be opened first. The cases you cite where a bid opening was postponed involved a knowing decision of the contracting officer to set back the time for the receipt of bids, and a communication of this information to prospective bidders. Here, Mrs. Ensor did not act to postpone the time for the receipt of bids, but instead she advised your client of a slight time interval which could be expected between the receipt of bids and the reading of the third bid set.

This same information was posted upon the wall near the bid opening room, notifying bidders of the 2 p.m. deadline for receipt of bids under the three solicitations, and setting forth the scheduled order of opening.

As to your contention that your client's late bid should be accepted because the delay was Government caused, the cases which have permited this, such as 34 Comp. Gen. 150, concerned positive acts of the Government directly causing an unanticipated delay. In the cited

case, there was evidence of "extraordinary delay caused by Government personnel" when the bidder attempted to secure a pass to enter the base and deposit his bid.

Here, a statement of a Government employee was apparently misunderstood by representatives of General Steel Tank Company. This misunderstanding is as much the result of your client's actions as it is the Government's. In any case, your client had ample opportunity to properly deposit his bid into the designated depository upon his arrival at the installation. Instead he chose to retain the bid in his possession until what he mistakenly believed to be the last possible moment. Just why he made this decision is not revealed in the record, but we see no reason to grant special consideration to a party who was present on the premises with every opportunity to submit a timely bid, but who did not do so.

Finally, even assuming for purposes of argument that Mrs. Ensor's words operated to extend the time for the receipt of bids to 10 minutes past the original 2 p.m. deadline, your client's bid would not be for consideration, for it was delivered into the custody of the bid opening officer at 2:15 p.m., some 5 minutes later than your assumed deadline.

The rules and regulations regarding the receipt of hand carried bids impose upon the bidders the prime responsibility to see that bids reach the designated office before the time fixed for the opening of bids. Note, in this connection that ASPR 2-303.1 defines late bids as those received after the "exact time" set for the opening, even those "received only one or two minutes late," and prohibits the consideration of such late bids, while ASPR 2-303.5 states simply:

Hand Carried Bids. A late hand carried bid, or any other late bid not submitted by mail or telegram, shall not be considered for award.

In keeping with the clear mandate of these regulations, this Office has consistently refused to permit consideration of hand delivered bids after the time set for the final receipt of bids even where no bids have been opened. B-137550, December 18, 1958 and B-164073, April 24, 1968.

Your client's lack of knowledge of other bid prices and good faith are, under the circumstances, not relevant. Further, it is the opinion of this Office that competition is strengthened by insuring that only those bids received before the time stated are for consideration. While this may operate harshly in certain instances, any relaxation of the rule would inevitably create confusion and disagreements as to its applicability under varying circumstances and would increase the opportunity for frauds. B-130889, March 26, 1957.

Accordingly, your protest is denied.

[B-163771]

Family Allowances—Separation—Type 2—Common Residence—Management and Control by Member

A member of the uniformed services who while serving aboard a ship that is away from home port is in receipt of the temporary lodging allowance provided by paragraph M4303 of the Joint Travel Regulations, which is intended to partially reimburse him for housing his family in hotel or hotel-like accommodations overseas pending completion of arrangements for living quarters, is not entitled to the concurrent payment of the type 2 family separation allowance authorized under 37 U.S.C. 427(b)(2) for ship duty and under subparagraph (3) for temporary duty. The member not separated from a household subject to his management and control cannot incur the additional expenses contemplated by section 427(b) by reason of "enforced separation" and, therefore, he is not eligible for type 2 family separation allowance.

Station Allowances—Military Personnel—Temporary Lodgings—Concurrent Payment of Family Separation Allowance

Upon the termination of the assignment of Government quarters at a permanent station overseas due to the closing of a military installation, a member of the uniformed services in receipt of family separation allowance, type 1, under 37 U.S.C. 427(a) may in addition for the period prior to departure to his new station be paid a temporary lodging allowance in 10-day increments under paragraph M4303. The allowances do not duplicate each other, the type 1 family separation allowance is in substance the member's basic allowance for quarters intended to cover the cost of permanent quarters, whereas the temporary lodging allowance is a per diem supplementing the basic allowance for quarters to compensate him for the additional expense of maintaining separate quarters for himself.

To the Secretary of Defense, June 27, 1968:

Reference is made to letter of March 6, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision whether a member is entitled to concurrent payment of family separation allowance (type II) under 37 U.S.C. 427(b)(2) and (3), and temporary lodging allowance when he otherwise meets the conditions entitling him to both allowances. A further informal request was made for a determination as to whether it is proper to pay temporary lodging allowance to members who are in receipt of family separation allowance (type I), under the circumstances set forth in that request.

The circumstances pertaining to the first request are set forth and discussed in Committee Action No. 148, by the Military Pay and Allowance Committee, Department of Defense. The Committee presents the following question:

Can a member be entitled to concurrent payments of family separation allowance type II (Ship or temporary duty) and temporary lodging allowance?

The Committee states that in order to substantiate payment of family separation allowance (ship or temporary duty), a member must sign and submit DD Form 1561, a "Statement to Substantiate Payment of Family Separation Allowance." It stated further that when a member signs this form, he is certifying that he is maintaining a residence for his dependents.

An example cited as involving the problem presented is that of a member assigned to duty and serving aboard a ship (either temporary or permanent) which is away from its home port, Yokosuka, Japan. The member and his dependents have only recently arrived in Yokosuka and no Government quarters are available. He is therefore entitled to reimbursement for accommodations, as authorized by paragraph M4303 of the Joint Travel Regulations, if he must obtain the same pending assignment of Government quarters or pending completion of arrangements for other permanent living arrangements.

The Committee indicates that under applicable regulations there would be no legal objection to concurrent entitlement to basic allowance for quarters and the temporary lodging allowance. However, it expresses doubt as to the member's entitlement to family separation allowance, type II, in addition to temporary lodging allowance where the member is not maintaining any other residence for his dependents, in view of the purpose of the temporary lodging allowance as a partial reimbursement for housing expenses.

Further, it cites our decision of February 9, 1968, 47 Comp. Gen. 431, in which we held that payment of the family separation allowance is contemplated only in circumstances where the member is maintaining a household for his dependents, subject to his management and control, and with attending liability and responsibility for its upkeep, circumstances not existing if the dependents reside as guests or visitors with relatives or friends, or where secondary dependents such as parents are living in an independent household not subject to the member's management and control.

It was said in that decision that there was nothing in our decisions or the legislative history of section 427(b) to justify the view that a certificate by a member that he is maintaining a residence for his dependents may be broadly interpreted to mean that regardless of the arrangements made by the member for the maintenance of his family during his absence aboard a ship, he is considered as meeting in full the head of the household residence requirements.

The Committee considers the situation presented here as somewhat similar to that considered in the decision cited above, in that the payment to a member of a temporary lodging allowance on account of dependents occupying hotel accommodations would have some effect to minimize the normal duties and responsibilities of the member as the head of a household similar to that in which dependents occupy the dwelling of a parent.

In the informal request, a determination is requested as to whether it is proper to pay temporary lodging allowance to a member who is in receipt of family separation allowance, type I, because he is on duty at a military installation which has been closed, and he is required to

terminate quarters furnished by the Government, pending departure to a new duty station. It was stated further that there are no Government quarters available in the area and an authorization has been received to pay members temporary lodging allowance in 10-day increments.

The pertinent provisions of paragraph M4303, Joint Travel Regulations, promulgated pursuant to 37 U.S.C. 405, authorize temporary lodging allowances at the rates prescribed, for the purpose of partially reimbursing a member for the more than normal expenses incurred upon arrival at a permanent duty station outside the United States. This allowance is authorized for periods not to exceed the maximum number of days prescribed therein, when Government quarters are not furnished to the member, his dependents, or the member and his dependents, if with dependents, and the member is required to secure hotel or hotel-like accommodations and use public restaurants at personal expense. The allowance continues pending assignment of Government quarters or completion of arrangements for other permanent living accommodations. A similar allowance is authorized not to exceed the maximum period prescribed, after termination of assignment of quarters or the surrender of other living accommodations immediately prior to departure on permanent change of station from a station outside the United States.

In addition to any other allowances or per diem to which he may otherwise be entitled, a member with dependents on duty outside the United States is entitled under section 427(a) of Title 37, United States Code, to an allowance equal to the basic allowance for quarters payable to a member of equal pay grade without dependents, if his dependents are not authorized transportation at Government expense to his overseas station, they do not reside at or near that station, and there are no Government quarters or other facilities under military jurisdiction available for assignment to him. Section 427(b) provides, in pertinent part, that in addition to other allowances or per diem otherwise due, including that authorized in subsection (a), a member who is in pay grade above E–4, with 4 years' service or less, and who is entitled to a basic allowance for quarters, is entitled to a monthly allowance equal to $30, if:

(2) he is on duty on board a ship away from the home port of the ship for a continuous period of more than 30 days; or
(3) he is on temporary duty away from his permanent station for a continuous period of more than 30 days and his dependents do not reside at or near his temporary duty station.

The purpose of the allowance authorized by section 427(a) is to compensate a member for the additional expense he must incur by reason of having to procure and maintain quarters for himself overseas or in Alaska in addition to the quarters he necessarily maintains

elsewhere for his dependents. See 44 Comp. Gen. 572. The rationale of the allowance in section 427(b) is to reimburse the member for the additional expenses incurred by his dependents due to the "enforced separation" from the serviceman while he is absent from his household for any substantial period of time. As stated in our decision dated February 9, 1968, 47 Comp. Gen. 431, the legislative history of section 427(b) shows its intent was to "offset, in a modest way, the additional expenses of plumbers, electricians, carpenters, and general handymen which the family budget must bear when the husband is absent."

In the question raised by the Committee, the member is entitled to temporary lodging allowance during the period he was on board the vessel away from its home port for a period of over 30 consecutive days, only by reason of his dependents being temporarily required to stay at hotel or hotel-like accommodations near his home port overseas. During this temporary transient period, the member is not maintaining a permanent-type residence for his dependents subject to his management and control and involving the liability and responsibility for its physical repair and upkeep within the contemplation of the provisions of 37 U.S.C. 427(b). Those functions rest with the management of the hotel or hotel-like facility. Accordingly, it is our conclusion that in view of the intent or purpose of the provisions of section 427(b) of Title 37, United States Code, a member who is in receipt of temporary lodging allowance during the period he is performing the duty specified in items (2) or (3) of that section, and not otherwise maintaining a residence for his dependents, would not be eligible during that period for family separation allowance type II (ship or temporary duty). Your question is answered accordingly.

The question raised in the informal request pertains to the entitlement to the temporary lodging allowance of a member who is in receipt of family separation allowance (type I), authorized under the provisions of 37 U.S.C. 427(a). It is presumed that he met all the requirements for family separation allowance, type I, upon the termination of the assignment of Government quarters at his permanent station overseas due to the closing of the installation.

The family separation allowance (type I) is, in substance the member's basic allowance for quarters. It is intended to cover the cost of permanent rental of quarters. The temporary lodging allowance is a per diem which supplements the basic allowance for quarters to cover, in part, the increased costs of temporary quarters in hotels, etc. The allowances do not duplicate each other.

In such circumstances and since the payment of family separation allowance, type I, is authorized in addition to any allowance or per diem to which a member may otherwise be entitled, there would appear to be no basis for objection to the concurrent payment of family

separation allowance (type I) and temporary lodging allowance in 10-day increments, if he otherwise qualifies for such allowance under the provisions of paragraph M4303, Joint Travel Regulations.

[B–164383]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitation on Property Transactions

An employee who reported to a new duty station on October 17, 1966, signed an agreement on September 30, 1967 to purchase a home to be constructed, and completed purchase of the home on March 21, 1968, may not be reimbursed the expense of a loan origination charge, the purchase agreement entered into within 1 year of the transfer not constituting "settlement" where the conditions of the agreement that the purchaser obtain a loan and the seller complete the house within 6 months were not consummated within 1 year of the date of the employee's transfer, as required by section 4.1d of the Bureau of the Budget Circular No. A–56.

To William F. Locke, United States Department of the Interior, June 27, 1968:

Reference is made to your letter of May 20, 1968, requesting our decision on two questions relative to the propriety of certifying a voucher in favor of Mr. John B. McLeod, an employee of your agency, who is claiming reimbursement for expenses of $536 incurred in connection with the purchase of a house incident to his transfer from Yosemite National Park, California, to San Francisco, California.

You state the employee reported for duty October 17, 1966, at his new station, signed an agreement September 30, 1967, to purchase a home to be constructed, and completed the home purchase March 21, 1968. You also state the employee is claiming reimbursement for a loan origination charge in excess of the 1 percent limitation imposed by the Federal Housing Administration regulation contained in 24 CFR 203.27. You ask (1) whether settlement was effected within the 1 year limitation period in subsection 4.1d of Bureau of the Budget Circular No. A–56, Revised October 12, 1966, and (2) if settlement was made within the time limitation should payment of the loan origination fee be limited to 1 percent of the original amount of the mortgage.

We do not find any basis under the regulation for the view that the signing of the customary agreement for the purchase of real estate is tantamount to "settlement" as that term is ordinarily used and understood. B–163700, May 6, 1968. It is, therefore, necessary in a contract for the purchase of a house to be constructed to examine the purchase agreement to determine when the transaction was consummated. B–160799, May 20, 1968. In this case examination of the purchase agreement indicates consummation of the transaction was contingent on such factors as the purchaser obtaining a loan and the seller completing the house within 6 months. In view of this we may not con-

sider the date of the purchase contract as the settlement date. Since the conditions in the purchase agreement were not met within 1 year of the date of the transfer, as evidenced by the closing statement of March 21, 1968, the voucher, returned herewith, may not be certified for payment.

Our reply to your first question renders unnecessary a response to your second question.

[B-163741]

Bidders—Qualifications—Manufacturer or Dealer—Review

The determination that a bidder offering portable dry honing machines did not qualify as a regular dealer pursuant to the Walsh-Healey Act, 41 U.S.C. 35 *et seq.*, was correctly considered under paragraph 12-603.2(a) of the Armed Services Procurement Regulation by the contracting officer rather than under subparagraph (b) pertaining to machine tools. However, review of the determination is not for the consideration by the United States General Accounting Office but by the Department of Labor, the Secretary of Labor having vested in the procurement agency the initial responsibility to determine whether a bidder qualifies as a manufacturer or dealer, subject to the review of the Department, which has the final authority.

Bidders—Qualifications—Manufacturer or Dealer—Notice of Disqualification

Although the contracting officer in applying eligibility requirements to determine if a bidder is a "regular dealer" pursuant to the Walsh-Healey Act, 41 U.S.C. 35 *et seq.*, is not required to notify a disqualified bidder of the right to appeal an adverse determination to the Department of Labor for final determination, the integrity of the competitive bidding system requires that each bidder have his bid and regular dealer eligibility fairly and completely considered. Therefore, amendment of paragraph 12-603.2(a) of the Armed Services Procurement Regulation is recommended to require notification to a bidder that does not qualify as a regular dealer.

To the Vacu-Blast Corporation, June 28, 1968:

Reference is made to your letter of March 2, 1968, with enclosures, and supplemental correspondence, protesting on your behalf and on behalf of Chamberlain's Vacu-Blast Sales Company, Incorporated, against rejection of the latter firm's bid under invitation for bids No. N00383-68-B-0373, and award of a contract to Zero Manufacturing Company, by the United States Navy Aviation Supply Office, Philadelphia, Pennsylvania. Since the validity of Zero's contract was challenged, it was afforded an opportunity to submit evidence in support thereof. Its views were submitted in a report dated May 28, 1968.

The subject invitation was issued on October 12, 1967, for 153 portable dry honing machines. The following bids were received and opened on November 13, 1967:

Bidder	*Unit Bid Prices*
Chamberlain's	$ 650
Zero	1,154
Vacu-Blast	1,650
Cyclone	2,695

Because the contracting officer suspected an error in Chamberlain's bid, he requested verification by letter dated November 16, 1967. Chamberlain confirmed its bid price by letter of November 21, 1967.

On November 29, 1967, the contracting officer requested a preaward survey of Chamberlain, with a specific request for advice as to whether Chamberlain qualified as a regular dealer as represented in its bid; specific information as to Chamberlain's relationship with your firm, and the basis for its bid price was also requested. In its report dated December 20, 1967, the survey team recommended award to Chamberlain. However, the contracting officer requested additional information from the survey team on the question of Chamberlain's status as a regular dealer. Under date of January 26, 1968, the following additional information was furnished:

(a) Chamberlain's Vacu-Blast Sales Co., maintains a complete stock of spare parts for dry honing machines.
(b) One (1) of each dry honing machine is maintained on display and would be available for quick sale. If an order is received for more than one unit, the order is placed with Vacu-Blast Corp., Abilene, Kansas for manufacture and direct shipment to customer.

As a result, on February 8, 1968, Chamberlain's bid was rejected because the contracting officer concluded, among other things, that it did not qualify as a "regular dealer" under Armed Services Procurement Regulation 12-603.2(a), which provides in pertinent part, as follows:

(a) Except as set forth in (b) below, as used in 12-601 a regular dealer is a person who owns, operates, or maintains a store, warehouse, or other establishment in which materials, supplies, articles, or equipment of the general character described by the specifications and required under the contract are bought, kept in stock, and sold to the public in the usual course of business. In order to qualify as a regular dealer, a bidder must be able to show before the award:
(i) that he has an establishment or leased or assigned space in which he regularly maintains a stock of goods in which he claims to be a dealer; if the space is in a public warehouse, it must be maintained on a continuing, and not on a demand, basis;
(ii) that the stock maintained is a true inventory from which sales are made; the requirement is not satisfied by a stock of sample or display goods, or by a stock consisting of surplus goods remaining from prior orders, or by a stock unrelated to the supplies which are the subject of the bid, or by a stock maintained primarily for the purpose of token compliance with the Act from which few, if any, sales are made.

Award was made to Zero Manufacturing Company on February 10, 1968. Under the terms of the contract, the acquisition of materials or components for, or the commencement of production of, the item being procured is at the risk of the contractor until such time as he has received first article approval. We understand that first article approval was given about June 5, 1968.

In telegrams dated February 14, 1968, addressed to the contracting officer, ASO, you and Chamberlain protested rejection of the latter's bid. In letters dated March 2 and 4, 1968, you and Chamberlain, respec-

tively, set forth the basis of the protest. Basically, the contention is that the contracting officer erroneously applied the definition of "regular dealer" contained in ASPR 12–603.2(a), when subparagraph (b) of section 12–603.2 should have been applied. The latter paragraph provides that for certain specific products, such as machine tools, there are alternative definitions of "regular dealer," the qualifications for which are listed in the regulations of the Secretary of Labor, 41 CFR 50–201.101(b). Subparagraph (2) of the latter regulation provides that a machine tool dealer may qualify as a "regular dealer" if he possesses, either through contract or agreement with a manufacturer, the responsibility for selling that manufacturer's products with respect to a specific territory and is authorized to offer its products and to negotiate and conclude contracts for the furnishing thereof. You contend that since the items being procured are "in the category of special industrial machinery, similar to machine tools and other capital goods processing equipment," and since Chamberlain sells the item as your representative, it qualifies as a regular dealer under ASPR 12–603.2 (b). In support of your argument that these items should be considered "machine tools," you state that it comes within the Webster Dictionary definition cited by the contracting officer, is so recognized by other agencies of the Government, as well as private industry, and is not regularly stocked by either manufacturers or their representatives.

The contracting officer contends that he correctly applied the usual definition of "regular dealer" as the item being procured is not a machine tool so as to make the alternative definition applicable. In this connection, he points out that dry honing machines are listed under class 4940, "Miscellaneous Maintenance and Repair Shop Specialized Equipment," in "DOD Procurement Coding Manual, Volume 1"; that the item is not listed in classes 3411 to 3419 referred to in ASPR 7–702.12, which include machine tools; and that the item being procured does not fit the definition of a "machine tool" as defined in Webster's Third International Dictionary, unabridged, 1967. As additional evidence that the dry honing machine is not a "machine tool," the contracting officer points out that when Chamberlain completed Standard Form 129, Bidder's Mailing Application, it checked type 1 regular dealer which is defined the same as in ASPR 12–603.2 (a), rather than type 2 regular dealer which includes "machine tools." Chamberlain also listed classes 4940, 5345, and 5350 as the classes of equipment it was interested in bidding on.

The Walsh-Healey Act, 41 U.S.C. 35, *et seq.*, provides that, with certain exceptions not here material, every contract exceeding $10,000 in amount entered into by any Government agency for the procurement of supplies shall contain a stipulation that the contractor is a manu-

facturer or regular dealer in such supplies and that any breach of such stipulation shall constitute grounds for cancellation of the contract. The act, as amended, further provides (41 U.S.C. 38) that the Secretary of Labor shall have authority to administer the provisions of the act and to make such rules and regulations as may be necessary to that end. Under that authority the Secretary of Labor has issued certain regulations appearing at 41 CFR 50–201.101(b) and 50–201.104. These regulations have been supplemented by ASPR 12–601 to 12–604, inclusive.

Under the act and implementing regulations, a bidder to be eligible for award of a contract exceeding $10,000 must establish that it is a manufacturer of, or a regular dealer in, the supplies to be furnished under the invitation. See ASPR 1–903.1(v). The Secretary of Labor, authorized by the act to administer the provisions thereof, and to prescribe the rules and regulations with respect thereto, has vested in the procurement agency the initial responsibility to determine whether a bidder qualifies as a manufacturer or regular dealer, subject to review by the Department of Labor which has the final authority. See "Rulings and Interpretations," No. 3 (Walsh-Healey Public Contracts Act), section 29; 37 Comp. Gen. 676.

Under the foregoing law and regulations the authority to review determinations as to whether particular firms are regular dealers is with the Department of Labor, not our Office. B–162807, December 27, 1967. Accordingly, any disagreement you may have with the determination made by the contracting officer that Chamberlain was not a "regular dealer" under the statutory requirements of the Walsh-Healey Act and implementing regulations should be taken up with the Department of Labor.

Unless that determination is reversed, it is not necessary for our Office to rule on the merits of the other reasons advanced by the contracting officer as requiring rejection of Chamberlain's bid.

The regulation concerning the contracting officer's responsibility for applying the eligibility requirements under the Walsh-Healey Act does not require him to notify a disqualified bidder of the latter's right to appeal the contracting officer's adverse determination to the Department of Labor for final determination in the kind of situation considered here. Since we believe that the integrity of the competitive bid system requires that each bidder have his bid and eligibility fairly and completely considered, we are suggesting to the Secretary of the Department of Defense that consideration be given to an amendment of the regulation to require such notification.

In view of the foregoing, there is no basis upon which our Office may properly disturb the contract awarded to Zero Manufacturing Company.

APPENDIX

GENERAL ACCOUNTING OFFICE BID PROTEST PROCEDURES

(From Title 4, Code of Federal Regulations, issued August 30, 1968)

Section 20.1 Procedure for protest.

An interested party wishing to protest the proposed award of a contract, or the award of a contract, by an agency of the Federal Government whose accounts are subject to settlement by the U.S. General Accounting Office may do so by addressing a telegram or letter to the Comptroller General of the United States, U.S. General Accounting Office, Washington, D.C. 20548, identifying the procurement or sale and the agency concerned and stating the specific grounds upon which the protest is based. To assist in expediting resolution of the protest the protester is requested to provide simultaneously to the contracting officer of the agency involved in the protest a copy of the telegram or letter addressed to the Comptroller General.

Section 20.2 Notice of protest.

When it appears, upon initial consideration, that the protest may require action by the General Accounting Office which would adversely affect the interests of (a) the contractor, or of (b) any bidders or offerors who, in the opinion of the General Accounting Office, appear to have a substantial and reasonable prospect of receiving the award, notice and a reasonable opportunity to present views will be given to such contractor or bidders (offerors) prior to reaching a decision on the protest unless the Comptroller General or the Assistant Comptroller General certifies that time and circumstances do not permit. The party filing a protest, and those parties entitled to the above notice, may request a conference with the General Accounting Office attorney who has been assigned primary responsibility for handling the protest.

Section 20.3 Furnishing of information on protests.

The General Accounting Office will, upon request, furnish to any party mentioned in the preceding paragraph any information relating to the protest submitted by any party or Government agency except to the extent that disclosure of such information would be inconsistent with the regulations set forth in 4 CFR 81.6.

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Nepotism
Leave replacement designated by fourth-class postmaster to perform his duties during his absence on sick or annual leave or on leave without pay has not been appointed or employed in civilian position within meaning of 5 U.S.C. 3110, which restricts making or advocacy of appointment, employment, advancement, or promotion of relatives by public officials, leave replacement, not necessarily same person each time, not having been appointed to position postmaster continues to hold while on leave of absence, but only performing temporary service on intermittent basis---------- 636
Restriction in 5 U.S.C. 3110(a)(3) to making or advocating of appointment, employment, advancement, or promotion of nieces, nephews, uncles, aunts, brothers-in-law and sisters-in-law by public officials should be construed to also exclude spouses of such persons, notwithstanding legislative history of section evidences no such intent, as section imposing limitation or restriction should be construed in strict or limited sense---------- 636
Exception to restriction in 5 U.S.C. 3110 on appointment, employment, advancement, or promotion made or advocated by public official of class of relatives enumerated in section applies only in situation in which public official after Dec. 15, 1967, undertakes or recommends such action for relative appointed by him prior to Dec. 16, 1967------ 636
APPROPRIATIONS
Availability
Cards
Greeting
Rule that seasonal greeting cards constitute personal expense to Govt. personnel is not changed by fact that names of officers and employees sending cards are not included and nothing attached to cards indicates compliments of any individual, nor is personal nature of cost of cards changed because trust fund rather than appropriated funds is charged. Therefore, cost of printing and mailing seasonal greeting cards by National Park Service personnel is expense that is not chargeable to "Fund 14X8037 National Park Service, Donations," receipt account in trust fund series established for deposit of cash accepted as donations under 16 U.S.C. 6 for purposes of national park and monument system. 314
Construction, etc.
Improvements on leased property
Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section---------- 61

APPROPRIATIONS—Continued Page

Availability—Continued

Construction, etc.—Continued

Improvements on leased property—Continued

Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees 61

Contracts

Future needs

Under contract negotiated pursuant to 10 U.S.C. 2304(a)(13), for generator sets to be purchased during 12-month period, and subject to minimum and maximum quantity, as well as dollar limitations, funding of last two purchases was not inconsistent with provisions of Armed Services Procurement Reg., nor in violation of appropriation provisions at secs. 3732, 3679, and 3690 of Revised Statutes, even though sufficient funds to cover maximum quantities orderable were not available at time contract was executed, contract, indefinite quantity and not requirements contract, Govt. was not required to obligate more than cost of minimum quantity, and issuance of purchase orders analogous to situation in *Leiter* v. *U.S.*, 271 U.S. 204, regarding lease renewal option, which did not go into funding, is not authority for concluding last two purchase orders were illegally issued 155

Court admission fees

Admission fee paid by Govt. attorney to practice before bar of U.S. Court of Appeals, required by court as arbiter of applicant's qualifications to practice before it, is personal to attorney, privilege being life one unless debarred regardless whether attorney remains in Govt. service, and because aside from capacity in which attorney serves Govt. he is also officer of court with obligations to court and public. Therefore, attorney on notice that nature of Govt. employment requires him to qualify before Federal courts including Supreme Court, as well as in State or other court, may not be reimbursed admission fee absent specific authority to charge appropriated funds for expense. 22 Comp. Gen. 460, reaffirmed 116

Photographs

When use of employees' photographs facilitates accomplishing purposes of Govt., general rule that cost of photographs of individual employees of Govt. is personal expense that is not chargeable to public funds in absence of definite indication as to necessity for expenditures in accomplishment of some purpose for which appropriation was made is not for application, therefore, cost of photographs distributed by area Director of Equal Employment Opportunity Commission (EEOC), not for personal publicity but to publicize activities and functions of agency constitutes proper charge against 1967 fiscal year funds appropriated to EEOC, appropriation in affect at time photographs were taken, as publicity engendered by publication of photographs increased cooperation with agency and facilitated accomplishing its purposes .. 321

APPROPRIATIONS—Continued Page
Availability—Continued
Refreshments
Governmental interest objective
Cost of serving coffee or other refreshments at meetings is not "necessary expense" contemplated by that term as used in appropriation acts, and unless specifically made available, appropriations may not be charged with cost that is considered in nature of entertainment. Although this rule also applies to purchase of equipment used in preparing refreshments, small amount expended by agency to purchase coffeemakers, cups, and holders for use in serving coffee at meetings designed to improve management relationships will not be questioned in view of administrative belief interests of Govt. will be promoted through use of equipment---------- 657
State imposed fees
Fee imposed by Montana State Statute to certify Bur. of Reclamation water and waste water operators responsible for implementing Federal water pollution programs may not be paid by Bureau from appropriated funds, absent authority for payment of such fees in Federal Water Pollution Control Act, in view of principle, based on supremacy clause, Art. VI, cl. 2, of Constitution, that State cannot require Federal employees to obtain licenses or permits in performance of official duties when they are engaged in occupations which are subject of State regulations applicable to general public---------- 577
Federal aid to States. (*See* **States, Federal aid, grants, etc.**)
Foreign aid
Prohibitions
Purchase or acquisition of weapons
Prohibition in Foreign Assistance and Related Agencies Appropriation Act, 1968—known as Conte-Long amendments—against use of funds to finance "purchase or acquisition" sophisticated weapons system by or for any underdeveloped country, other than those specifically exempted, unless President determines such purchase or acquisition is vital to national security, and so reports to Congress, applies to military grant aid as well as to foreign military sales program. Legislative history of act evidences intent to prevent selling and giving sophisticated weapons to underdeveloped countries in order to conserve resources for economic and social programs, and to prevent arms race. Therefore, to exempt military grant aid from prohibition would defeat its purpose-- 418
Limitations
Removal by subsequent enactment
Notwithstanding restriction on use of 1968 funds appropriated by Pub. L. 90–132 to Office of Education under heading "School Assistance in Federally Affected Areas" to carry out legislative enactments after June 30, 1967, sec. 204 of Pub. L. 90–247, dated Jan. 2, 1968, eliminating requirement in Pub. L. 874, 81st Cong., that payments to local educational agencies be reduced by amounts "derived from other Federal payments" is effective. Retroactive aspect of sec. 208 of Pub. L. 90–247, prescribing that sec. 204 of act "shall be deemed to have been enacted prior to June 30, 1967, and shall be effective for fiscal years beginning thereafter," overcoming appropriation restriction and, therefore, Pub. L. 874 educational payments are not required to be reduced by amount of any other Federal payments---------- 707

APPROPRIATIONS—Continued

Page

Obligations

Contracts

Future needs

Under contract negotiated pursuant to 10 U.S.C. 2304(a)(13), for generator sets to be purchased during 12-month period, and subject to minimum and maximum quantity, as well as dollar limitations, funding of last two purchases was not inconsistent with provisions of Armed Services Procurement Reg., nor in violation of appropriation provisions at secs. 3732, 3679, and 3690 of Revised Statutes, even though sufficient funds to cover maximum quantities orderable were not available at time contract was executed, contract, indefinite quantity and not requirements contract, Govt. was not required to obligate more than cost of minimum quantity, and issuance of purchase orders analogous to situation in *Leiter* v. U.S., 271 U.S. 204, regarding lease renewal option, which did not go into funding, is not authority for concluding last two purchase orders were illegally issued 155

Private property improvement, repair, etc. (*See* **Property, private, Federal funds for improvements, repairs, etc.**)

ARCHITECT AND ENGINEERING CONTRACTS

(*See* **Contracts, architect, engineering, etc., services**)

ATOMIC ENERGY COMMISSION

Employees

Travel status

Escorts of security shipments

Employees of Atomic Energy Commission, designated escorts to protect security shipments, who perform continual, long distance, 24 hours a day travel are in "work while traveling" status within contemplation of sec. 222(a) of Federal Salary Act of 1967, and 8 hours of day attributable to eating and sleeping, employees are entitled to payment of regular compensation for 8 hours and overtime for 8 hours for each full day of travel. However, under sec. 222(a), employees would not be entitled to compensation for periods of waiting at official station or at any other point of duty 607

An escort of Atomic Energy Commission security shipments whose day's travel does not exceed 16 hours, including "off-duty" periods while traveling, is entitled to compensation for all hours involved, including those in "off-duty" status 607

Atomic Energy Commission escort of security shipments in travel status for 22 hours and in off-duty status for 2 hours during which time he was not traveling is entitled to payment for 16 hours, deduction of 8 hours from 24-hour day which is attributable to eating and sleeping including 2 hours off-duty time, and additional off-duty time, while traveling is compensable at regular or overtime rates as appropriate 607

Time spent by civilian employee traveling on official business in overnight stay at hotel or motel is not covered by sec. 222(a) of Federal Salary Act of 1967. Therefore, escort of Atomic Energy Commission security shipment who stayed overnight in hotel or motel from midnight to 6 a.m., then traveling from 6 a.m. to 6 p.m. without interruption of travel for purpose of having meal, is entitled to payment for 12 hours spent in travel, compensated at regular or overtime rates as appropriate. 607

ATTORNEYS Page

Fees

Court admission fees

Government attorney

Admission fee paid by Govt. attorney to practice before bar of U.S. Court of Appeals, required by court as arbiter of applicant's qualifications to practice before it, is personal to attorney, privilege being life one unless debarred regardless whether attorney remains in Govt. service, and because aside from capacity in which attorney serves Govt. he is also officer of court with obligations to court and public. Therefore, attorney on notice that nature of Govt. employment requires him to qualify before Federal courts including Supreme Court, as well as in State or other court, may not be reimbursed admission fee absent specific authority to charge appropriated funds for expense. 22 Comp. Gen. 460, reaffirmed 116

AUTOMATIC DATA PROCESSING SYSTEMS

(*See* Equipment, automatic data processing systems)

AWARDS

Suggestions, etc.

Inventions

Prior to act of September 1, 1954

Adoption and use of employee's invention prior to act of Sept. 1, 1954 (5 U.S.C. 4501–4506), repealing and superseding 1946 incentive awards authority does not bar paying incentive award to employee, even though ordinarily statutes are not retroactively effective, 1954 act being continuation and expansion of 1946 act, inventions that arose during period covered by older act may be processed for awards under terms and conditions of 1954 act, which neither limits time for consideration of ininvention for award, nor limits award to sum authorized under 1946 act 3

BAILMENTS

Liability of bailee

Unauthorized property use

Excess production overrun of shirts manufactured from quantity of Govt-furnished material requested by contractor is property of Govt. and no compensation or material credit may be allowed contractor for unauthorized use of Govt.'s material under bailment, nor may shirts be retained and paid for as "seconds," even though overrun may have been occasioned by subcontracting work to accelerate deliveries, subcontracting having been approved on basis of "no additional cost to Govt.," and one-half of 1 percent quantity variation furnishing contractor reasonable protection prescribed by par. 1–325.1 of Armed Service Procurement Reg.—which also precludes establishment of standard or usual percentage quantity variation and requires that overrun or underrun be based on normal commercial practices—quantity variation provisions of contract are for enforcement thus enabling Govt. to control flow of end items 111

BANKRUPTCY

Wage Earners' Plans

Government both debtor and creditor

Where U.S. is both debtor and creditor at time civilian employee or member of uniformed services files Ch. 13, Wage Earner's Plan case, absent judicial determination to contrary, Govt.'s priority under 31 U.S.C. 191, may be asserted in Ch. 13 Wage Earner's time extension plan case, set-off to be accomplished in accordance with Title 4 of GAO Policy and Procedures Manual sec. 7520.10, unless wage earner is not insolvent. However, filing of Wage Earner's Plan would, for purposes of set-off, be considered *prima facie* evidence of insolvency 522

BANKRUPTCY—Continued Page

Wage Earners' Plans—Continued

Immunity of United States effect

Although in *U.S.* v. *Krakover*, 377 F. 2d 104, court held that under doctrine of sovereign immunity Ch. 13, bankruptcy proceeding, Wage Earner's Plan case, is not enforceable against U.S. court concluded that this should not deprive Federal employees of Ch. 13 benefits and that payment to trustee of part of wages of employee under appropriate order will protect trustee and creditors without infringing on immunity of U.S. Therefore, procedure under which accounting and finance officers are required to pay part of wages of employee in response to court order issued in Ch. 13, Wage Earner's Plan case—binding on employee—may be continued without violating 31 U.S.C. 203, prohibiting assignment of claims against U.S., or without depriving Govt. of good acquittance---------- 522

BIDDERS

Qualifications

Administrative determinations

Propriety

Determination by contracting officer under request for proposals that Canadian subcontractor was nonresponsible having been reported deficient in technical capability and ability to meet delivery schedules does not evidence abuse of administrative discretion judged on basis of information available to him at time of determination, therefore, exclusion of subcontractor from negotiations and award to another offeror were proper even though prime contractor should have been notified before award of nonresponsibility determination and requested to clarify information questioning determination, but should not have been requested after determination was made to extend its offer. However, determination of nonresponsibility does not preclude consideration of subcontractor for future procurements, and guidelines for determining responsibility of Canadian firms should be promugated-- 373

Review

Contracting officer who notwithstanding verification of low bid suspiciously out of line with other bids and Govt.'s estimate is still doubtful of reasonableness of low bid price, as well as bidder's—small business concern—financial capacity, experience, and ability to subcontract work on proposed research tunnel and, therefore, unable to make preaward determination of bidder responsibility required by administrative regulation, upon refusal of Small Business Admin. to issue certificate of competency, properly considered low bidder nonresponsible, determination found upon review by GAO under its audit authority to be supported by record, and contracting officer having acted within scope of his authority, his rejection of low bidder as nonresponsible is not subject to judicial review---------- 291

Although not authorized to review Small Business Admin. (SBA) determination or to direct issuance of certificate of competency, GAO is not precluded from reviewing rejection of small business concern as nonresponsible, whether or not SBA issued certificate of competency, as question upon review of all pertinent information and evidence available to contracting officer and SBA is whether bid rejection was proper, and where record justifies doubt of contracting officer and

BIDDERS—Continued Page

Qualifications—Continued

Administrative determinations—Continued

Review—Continued

SBA, it is immaterial that record might also support determination of bidder responsibility, in view of fact that prospective contractor has burden to affirmatively demonstrate responsibility, and contracting officer is not required to independently gather information to resolve doubt, instead any doubt should be resolved against bidder---------- 291

License requirement

Bidders not licensed prior to bidding

License requirements in total small business set-aside invitation for transportation of household effects and related services under three delivery schedules relating to bidder responsibility and not to bid evaluation, bidders who at time of bid opening had required State license for performance of one schedule and Interstate Commerce Commission permits pending for other two delivery schedules may be considered for award of all schedules. If compliance with "Permits and Licenses" clause of invitation had been required at time of bid opening, or bidding participation had been limited to permit holders, restrictions determinative not of bidder responsibility but of procurement responsibility and convenience, partial award pending ICC operating approval, if considered necessary, would be proper---------- 539

Manufacturer or dealer

Experience qualification

Requirements in RFP that prospective contractors show evidence of being in "regular" business of designing and manufacturing centrifuge systems, and evidence of previous production of similar system that had been accepted by Govt. within past 5 years were misstated as Walsh-Healey Public Contracts Act does not require contractor to be "regular" manufacturer. In addition preaward protest of rejected proponent should have been submitted by contracting officer to Secretary of Labor or contractor advised of his right to review by him, and notwithstanding experience qualification in RFP involved capacity within meaning of Small Business Act, contracting officer's determination of manufacturer ineligibility was not subject to review by Small Business Admin. Although it is not in the best interest of the Govt. to cancel contract awarded, to avoid similar errors in future, correction action is recommended---------- 518

Notice of disqualification

Although contracting officer in applying eligibility requirements to determine if bidder is "regular dealer" pursuant to Walsh-Healey Act, 41 U.S.C. 35, *et seq.*, is not required to notify disqualified bidder of right to appeal adverse determination to Dept. of Labor for final determination, integrity of competitive bidding system requires that each bidder have his bid and regular dealer eligibility fairly and completely considered. Therefore, amendment of par. 12–603.2(a) of Armed Services Procurement Reg. is recommended to require notification to bidder that does not qualify as regular dealer---------- 793

BIDDERS—Continued Page

Qualifications—Continued

Manufacturer or Dealer—Continued

Review

Determination that bidder offering portable dry honing machines did not qualify as regular dealer pursuant to Walsh-Healey Act, 41 U.S.C. 35, *et seq.*, was correctly considered under par. 12–603.2(a) of Armed Services Procurement Reg. by contracting officer rather than under subpar. (b) pertaining to machine tools. However, review of determination is not for consideration of U.S. General Accounting Office but by Dept. of Labor, Secretary of Labor having vested in procurement agency initial responsibility to determine whether bidder qualifies as manufacturer or dealer, subject to review by Dept. of Labor, which has final authority ---------- 793

Subcontractors

Canadian firms

Determination by contracting officer under request for proposals that Canadian subcontractor was nonresponsible having been reported deficient in technical capability and ability to meet delivery schedules does not evidence abuse of administrative discretion judged on basis of information available to him at time of determination, therefore, exclusion of subcontractor from negotiations and award to another offeror were proper even though prime contractor should have been notified before award of nonresponsibility determination and requested to clarify information questioning determination, but should not have been requested after determination was made to extend its offer. However, determination of nonresponsibility does not preclude consideration of subcontractor for future procurements, and guidelines for determining responsibility of Canadian firms should be promulgated ---------- 373

Responsibility *v.* bid responsiveness

Labor surplus area priority

A concern who at time of responding to Request for Proposals and two invitations for bids, each solicitation containing labor surplus area set-aside, was in third priority preference group—small business concern in persistent labor surplus area—and who only after bids and proposals were opened furnished certificate of eligibility to obtain first priority preference, may not be considered for award under any solicitations, as "certified eligible" small business concern certification is one of responsiveness and not responsibility. Therefore, preference information was required to be submitted with concerns bids and before date fixed for receipt of proposals, for notwithstanding flexibility inherent in negotiation, ability and willingness to perform set-aside cannot be contributed to "negotiation" in usual sense of word ---------- 543

Although under labor surplus area provisions, bidder may change area of performance if classification of area is changed by Labor Dept., change does not result in priority preference. In view of fact that bidder is precluded from taking unilateral action affecting previously stated area of performance and that authorized change does not affect relative position of priority, labor surplus area provisions are considered unrelated to responsibility ---------- 543

Small business concerns. (*See* **Contracts, awards, small business concerns**)

BIDS Page

Acceptance time limitation

Failure to comply

Two bid acceptance provisions in invitation, one standard form 33, entitled "Solicitation, Offer and Award," prescribing that bid will be open for 60-calendar days unless different period is specified by bidder in blank space provided, other, standard form 33A, entitled "Solicitation Instructions and Conditions," which stated that offer of less than 90 day acceptance period would be rejected are not inconsistent where 90-day reference in instructions is not intended to relieve bidder of responsibility of selecting acceptance period. Therefore, low bid submitted without specifying different acceptance period automatically offered 60 day bid acceptance period, and bid nonresponsive to 90 day acceptance period requirement may not be considered for award---------- 769

All or none

Specifications requirement

"All or none" bidding limitation in invitation soliciting bids for purchase of various types of refuse collection, materials-handling trucks with container hoisting devices, and for detachable refuse containers suitable for use with trucks to be manufactured in accordance with performance type military specifications is not restrictive of competition where limitation is necessary to insure purchase of workable system for collection and handling of trash and is based upon bona fide determination that necessary degree of compatibility of components of advertised system cannot be otherwise achieved under referenced military specifications---------- 701

Awards. (*See* Contracts, awards)

Bid shopping. (*See* Contracts, subcontracts, bid shopping)

Bonds. (*See* Bonds)

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

Buy American Act

Evaluation

Balance of Payments Program restrictions

Low "all or none" bid on three items of invitation containing labor surplus set-aside and "Balance of Payments Program" clause, which proposed that 20, 40, and 100 percent of three items bid on would be manufactured in U.S., or 53 percent of total bid, properly was rejected as nonresponsive. Under balance of payments provisions of invitation, prescribed pursuant to Buy American Act, 41 U.S.C. 10a–d, a product is considered manufactured in U.S. when cost of manufacture exceeds 50 percent of all components of an end product and, therefore, "all or none" offer may not be evaluated collectively so as to characterize two foreign origin items as domestic by denominating last item as 100-percent domestic to arrive at total domestic quantity percentage in excess of 50 percent---------- 676

Foreign product determination

Component *v.* end product

Establishment of criteria by which contracting officers as well as contractors may have guidance as to what is "component" and what is "end product" within meaning of standard "Buy American Act" clause incorporated in contracts pursuant to par. 6–104.5 of Armed Services Procurement Reg. is not within province of U.S. GAO, except to extent application of terms to facts of particular case may serve such purpose-------- 21

BIDS—Continued Page

Buy American Act—Continued

Rejection

Unjustified

Cancellation of invitation that incorporated by reference Buy American clause in par. 6–104.5 of Armed Services Procurement Reg. because Buy American Certificate and Certification of Independent Price Determination requirements inadvertently omitted from invitation were considered essential was unjustified in view of fact that acceptance of bid under invitation would bind bidder to furnish domestic end products fixed by clause, and that Independent Price Determination, going to responsibility of bidder and not responsiveness of bid, could be furnished after bids were opened. Therefore, canceled invitation should be reinstated and submitted bids evaluated---------- 624

Combination

Evaluation. (*See* **Bids, evaluation, aggregate** *v.* **separable items, prices, etc., single** *v.* **multiple awards)**

Competitive system

Alternate bids

Restrictions contained in invitation for bids that precluded consideration of more economical and practical method of river dredging to be accomplished by means of alternate rehandling operations and use of other than Govt. furnished disposal areas, although invitation provided for negotiation of alternate disposal areas after contract award, were unjustified, and alternate bidding method not *per se* invalid nor considered bidding on different job but rather bidding on common basis with other bidders, meeting needs of Govt., restrictions on bidder's customary internal operations, even if intended to encourage other bidders, were inconsistent with full and free competition contemplated by 10 U.S.C. 2305 and, therefore, invitation should be canceled and reissued or modified. However, if full and free competition required under sec. 2305 creates dredging procurement problems, matter should be presented to Congress---------- 236

Borrowers under loan agreements

Award of construction contract to cooperative—low bidder utilizing funds borrowed from Rural Electrification Admin. (REA)—nonresponsive to invitation because of substituting less costly and less protective combination of builder's risk insurance for cost of materials and contractor's bond for remaining costs in lieu of construction bond to cover entire contract price was inconsistent with advertised bidding principles and adversely affects free competition, notwithstanding waiver of required bond was considered "in best interests of borrower," and aided in promotion of project. Although award made in good faith and not contrary to 7 U.S.C. 904, granting broad discretion to REA Administrator, will not be disturbed, if less costly form of protection is adequate, future invitations should provide for alternative protection in lieu of performance bond---------- 4

Commercial specifications availability

Invitation that referenced commercial specifications needed in preparation of bids is not defective invitation that precludes full and free competition contemplated by 10 U.S.C. 2305(b), where invitation was completed for bid preparation and evaluation purposes upon receipt of specifications by bidders responsible for obtaining referenced specifications---------- 611

BIDS—Continued Page

Competitive system—Continued

Compliance requirement

Award of contract to furnish computer time for estimated number of hours to bidder whose equipment performed more efficiently on basis that notwithstanding higher hourly charges ultimate cost to Govt. would be significantly less than if work would be performed at lower hourly charges offered by other bidders should be canceled, invitation although providing for evaluation of bids on basis of difference in equipment speeds in failing to relate speeds to estimated job mixes or applications did not provide full and free competition contemplated by 41 U.S.C. 253, for bidders uninformed of "performance factors" to be used in evaluation of bids could not intelligently prepare their bids..... 272

To comply with competitive bidding statutes, proposed order by Office of Federal Contract Compliance, Dept. of Labor, to require contractors and subcontractors to submit before contract award acceptable "affirmative action program" for compliance with equal employment opportunity conditions of E.O. No. 11246 of Sept. 24, 1965, under invitations that do not outline details of acceptable action program, should be implemented by regulations defining minimum requirements to be met by bidder's program, and any other standards or criteria by which acceptability of program will be judged..... 666

Defective specifications

Rejection of low bid to furnish cable in accordance with military specifications that are based on sole source brand name cable because offered cable required use of adapters and connectors to make it interchangeable with brand name cable in use, where bidders had not been informed of interchangeability requirement and rejected cable possessed characteristics similar to brand name and would perform equally as well, was erroneous and recourse should have been made to brand name "or equal" clause to overcome difficulties in drafting detailed specifications. Therefore, due to failure to advise bidders of need for interchangeability of cables or logistic problem that would result from procurement of other than brand name, advertised specifications are inconsistent with full and free competition required by 10 U.S.C. 2305(a) and invitation should be canceled..... 175

Federal aid, grants, etc.

Equal Employment Opportunity Programs

Invitation that without furnishing details requires bidders to submit an acceptable "affirmative action program" to assure compliance with Equal Employment Opportunity Program is defective, as invitations are designed to secure firm bid commitments upon which award can be made and are not intended as first step for subsequent negotiation procedure, and, therefore, such invitation is incompatible with 23 U.S.C. 112 prescribing competitive bidding for federally assisted highway construction, and similar statutory provisions..... 666

Military specifications

"All or none" bidding limitation

"All or none" bidding limitation in invitation soliciting bids for purchase of various types of refuse collection, materials-handling trucks with container hoisting devices, and for detachable refuse containers suitable

BIDS—Continued Page

Competitive system—Continued

Military specifications—Continued

"All or none" bidding limitation—Continued

for use with trucks to be manufactured in accordance with performance type military specifications is not restrictive of competition where limitation is necessary to insure purchase of workable system for collection and handling of trash and is based upon bona fide determination that necessary degree of compatibility of components of advertised system cannot be otherwise achieved under referenced military specifications---- 701

Standardization requirements

Establishment of military specification standardizing proprietary swivel hook for use in tire chain assemblies without including in test program competitive product does not satisfy 10 U.S.C. Ch. 145, which contemplates fullest practicable cooperation and participation of industry in standardization development, and although in view of urgent need for tire chains, it would not be in public interest to interfere with current procurement of item, integrity of competitive bidding system requires suspension of further use of military specifications that restrict procurement of chain assemblies or spare parts to those concerns using proprietary hook until other competitive articles are tested and evaluated---- 12

Negotiated contracts. (*See* **Contracts, negotiation, competition**)

Preservation of system's integrity

An invitation comtemplating 1-year requirements type contract for test, repair, and overhaul of diesel engines and evaluation of bids on basis of estimates violates advertising requirements of free and open competition, where unbalanced bid offering token prices for services and parts that have substantial value on theory that services and parts while being given full weight for evaluation purposes would not represent major portion of required work cannot be determined to be low bid, and invitation may be canceled under par. 2-404.1(b)(viii) of Armed Services Procurement Reg. in interest of Govt. and to preserve integrity of competitive bidding system---- 748

Subcontractor utilization

To permit low bidder under invitation for extension and modernization of Federal building and post office to list inactive affiliates as subcontractors would place bidder in guise of subcontractor in control of specialty work, free to bid shop among *bona fide* subcontractors, thereby obtaining competitive advantage over bidders listing themselves or *bona fide* subcontractors and, therefore, low bid was properly rejected as nonresponsive, even though invitation did not require specialty work to be performed by listed subcontractors. In any event, acceptance of low bid was precluded by failure of one of listed subcontractors to meet competency requirements of invitation---- 644

Where occurrence of number of errors and inconsistencies in preparation of subcontractor listing form did not have adverse effect on competition or cause any misinterpretation that affected bid prices or prejudiced bidders' interest under invitation for extension and modernization of Federal building and post office, cancellation of invitation is not required by par. 1-2.404-1(b)(1) of Federal Procurement Regs. However, future solicitations should correlate subcontractor listing form and specifications so there is no doubt as to what is required of listed party-- 644

BIDS—Continued Page

Competitive system—Continued

Subcontractors

Antitrust immunity

Fixing of prices and allocation of coal sold to European prime contractors by American export association of subcontractors claiming Webb-Pomerene Act, 15 U.S.C. 61–65, immunity to antitrust laws is restrictive of competitive negotiation required by par. 3–102(c) of Armed Services Procurement Reg., as requirement is not dependent upon or subject to antitrust laws and, notwithstanding contract awarded is fixed-price contract, control exercised by Army over every aspect of procurement extinguished distinction between prime and subcontractors and Govt. ultimately bearing excessive subcontracting costs has been prejudiced by noncompetitive activities of subcontractors. However, although contract is voidable at option of Govt., practical reasons preclude disturbing award, but future coal procurements should be on fully competitive basis 223

Discontinuance of practice by American subcontractors supplying anthracite coal to European prime contractors at Army bases overseas of fixing prices and allocating coal quantities to their common export firm under antitrust immunity of Webb-Pomerene Act, recommended in 47 Comp. Gen. 223 in order to obtain maximum practicable competition will not jeopardize Army's ability to procure coal and, therefore, in Request for Proposals, "certificate of independent price determination" clause should be modified to preclude restriction of competition, and "competition in subcontracting" clause made effective by removal of exemptive language relating to sales agencies. Also recommended is modification of noncompetitive discounts clause to particularize quantity discounts which are and are not economically and competitively justified, and elimination of sole-source effect of exclusive purchase conditions imposed by exporter 562

Contracts, generally. (*See* **Contracts**)

Delivery provisions

Evaluation. (*See* **Bids, evaluation, delivery provisions**)

Deviations from advertised specifications. (*See* **Contracts, specifications, deviations**)

Discarding all bids

Notice

Low bidders orally advised of reason for discarding all bids and readvertising river dredging procurement and furnished letter that did not restate reason for canceling invitation but informed bidders work would be "readvertised under revised plans and specifications with substantial change in scope of work" were not prejudiced, statement in letter coming within category of par. 2–404.1(b)(ii) of Armed Services Procurement Reg. listing as reason for rejecting bids and readvertising procurement, determination that "specifications have been revised," and possibility of subsequent change in position of contracting agency is not sufficient to be prejudicial to bidders 103

BIDS—Continued Page

Discarding all bids—Continued

Reinstatement

Cancellation of invitation unjustified

Cancellation of invitation that incorporated by reference Buy American clause in par. 6–104.5 of Armed Services Procurement Reg. because Buy American Certificate and Certification of Independent Price Determination requirements inadvertently omitted from invitation were considered essential was unjustified in view of fact that acceptance of bid under invitation would bind bidder to furnish domestic end products fixed by clause, and that Independent Price Determination, going to responsibility of bidder and not responsiveness of bid, could be furnished after bids were opened. Therefore, canceled invitation should be reinstated and submitted bids evaluated 624

Savings to the Government

Restrictions contained in invitation for bids that precluded consideration of more economical and practical method of river dredging to be accomplished by means of alternate rehandling operations and use of other than Govt. furnished disposal areas, although invitation provided for negotiation of alternate disposal areas after contract award, were unjustified, and alternate bidding method not *per se* invalid nor considered bidding on different job but rather bidding on common basis with other bidders, meeting needs of Govt., restrictions on bidder's customary internal operations, even if intended to encourage other bidders, were inconsistent with full and free competition contemplated by 10 U.S.C. 2305 and, therefore, invitation should be canceled and reissued or modified. However, if full and free competition required under sec. 2305 creates dredging procurement problems, matter should be presented to Congress 236

Uncertainty

Determination to reject all bids for river dredging and to readvertise procurement premised on possibility of substantial savings that might be effected by indefinitely postponing dredging shallow areas of river is proper exercise of administrative discretion, absent evidence of abuse, and notwithstanding uncertainty of eventual savings, remoteness of possibility of savings is not unreasonable ground for changing specifications and, therefore, determination by contracting agency of present needs must be accepted. However, while protests are denied, rejection of all bids appears to have been consequence of inadequate initial appraisal and/or review of dredging requirements and it is recommended that review of administrative procedures is warranted 103

Specifications restrictive

Rejection of low bid to furnish cable in accordance with Military Specifications that are based on sole source brand name cable because offered cable required use of adapters and connectors to make it interchangeable with brand name cable in use, where bidders had not been informed of interchangeability requirement and rejected cable possessed characteristics similar to brand name and would perform equally as well, was erroneous and recourse should have been made to brand name "or equal" clause to overcome difficulties in drafting detailed specifications. Therefore, due to failure to advise bidders of need for interchangeability of cables or logistic problem that would result from procurement

BIDS—Continued Page
Discarding all bids—Continued
Specifications restrictive—Continued
of other than brand name, advertised specifications are inconsistent with full and free competition required by 10 U.S.C. 2305(a) and invitation should be canceled---------- 175
Evaluation
Aggregate *v.* separable items, prices, etc.
Single *v.* multiple awards
Award of single janitorial service contract at higher cost than award of multiple contracts would have cost on basis that aggregate award would permit centralized management by contractor having superior performance record and Govt. administration of one contract, and that savings effected by making multiple awards would be minimal compared with magnitude of contract, is not justified absent offset of higher price by administrative savings and inclusion in invitation of provisions for such award and establishment of administrative cost savings for use in evaluating bids pursuant to par. 2–201(b)(xix) of Armed Services Procurement Reg., and as award may be justified on basis of reference in 10 U.S.C. 2305(c) to "price and other factors considered" only when low bidder is not qualified, should low bidder on several of invitation items qualify and be willing to accept award, these items should be deleted from contract and reawarded---------- 233
Under invitation for numerous items which provided "that the contract will be awarded for each item" unless provision is made in contract for award on all-or-none basis, consideration of combination bids that offer lower overall cost to Govt. than award on item-by-item basis is not precluded, 41 U.S.C. 253(b) and sec. 1–2.407 of Federal Procurement Regs. providing that award of contract shall be made on basis of most favorable cost to Govt., assuming responsiveness of bid and responsibility of bidder. Therefore, invitation permitting award on item-by-item basis or any combination of items for which lump-sum price has been proposed by bidders, combination bids are required to be considered for evaluation purposes, absent showing such bids would not be in best interests of Govt---------- 658
All or none
Balance of Payments Program restrictions
Low "all or none" bid on three items of invitation containing labor surplus set-aside and "Balance of Payments Program" clause, which proposed that 20, 40, and 100 percent of three items bid on would be manufactured in U.S., or 53 percent of total bid, properly was rejected as nonresponsive. Under balance of payments provisions of invitation, prescribed pursuant to Buy American Act, 41 U.S.C. 10a–d, a product is considered manufactured in U.S. when cost of manufacture exceeds 50 percent of all components of an end product and, therefore, "all or none" offer may not be evaluated collectively so as to characterize two foreign origin items as domestic by denominating last item as 100-percent domestic to arrive at total domestic quantity percentage in excess of 50 percent---------- 676

BIDS—Continued Page

Evaluation—Continued

All or none—Continued

Low on each item requirement

Under invitation for bids (IFB) contemplating requirements type contract which expressly made Art. 27 of General Services Administration form inapplicable and inadvertently omitted substitute special "all or none" clause required by par. 5A-2.201-73 of GSA Procurement Regs., to effect each item of "all or none" bid must be low in price, an "all or none" bid low as to aggregate bid price but not low on each item was improperly rejected on basis omitted provision was incorporated into IFB by operation of law under *Christian* doctrine. Low bidder on notice of exclusion of Art. 27 and under no obligation to affirm exclusion, properly assumed its "all or none" bid was not required to be low on all items. However, notwithstanding defective solicitation, cancellation of contracts awarded would not be in best interests of Govt---------- 682

Alternate bases bidding

Acceptance

Two solicitations, one for gaseous nitrogen which permitted alternate bids conditioned upon receipt of award under another solicitation for liquid oxygen and nitrogen that restricted alternate bids due to inclusion of small business set-aside, may be considered as one for purpose of evaluating alternate bids. General rule against acceptance of bids conditioned upon award under another separate solicitation is not for application when bidders are advised of acceptability of alternate bids and participate on this basis. Therefore, low aggregate alternate bid submitted by small business firm being more beneficial to Govt. than combination of item bids upon same quantities, awards may be made on basis of low aggregate bid for gaseous nitrogen and portion of small business set-aside, and to low bidder under each separate invitation for balance of set-aside---------- 453

Delivery provisions

Alternate schedules

Although it is inappropriate in formally advertised procurements to permit bidders to submit alternate delivery schedules, where Govt. in Request For Proposals (RFP) invites alternate delivery schedules on basis of furnishing or waiving first article requirement and provides for disregard of 21-day or less delivery difference in alternate schedules, failure to consider low offer based on waiving first article requirement in favor of 18-day shorter delivery schedule involving furnishing first article was inconsistent with RFP and purpose of "negotiation," par. 1-1903(a) of Armed Services Procurement Reg. not restricting evaluation of delivery differences between alternate delivery schedules that offer to furnish or to waive first article requirement. Although due to emergency of procurement, award will not be disturbed, guidelines to preclude recurrence of situation are suggested---------- 448

Estimates

Requirements contract

An invitation contemplating 1-year requirements type contract for test, repair, and overhaul of diesel engines and evaluation of bids on basis of estimates violates advertising requirements of free and open competition, where unbalanced bid offering token prices for services and parts

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Evaluation—Continued
Estimates—Continued
Requirements contract—Continued
that have substantial value on theory that services and parts while being given full weight for evaluation purposes would not represent major portion of required work cannot be determined to be low bid, and invitation may be canceled under par. 2–404.1(b)(viii) of Armed Services Procurement Reg. in interest of Govt. and to preserve integrity of competitive bidding system 748
Sufficiency of evaluation base
Award of contract to furnish computer time for estimated number of hours to bidder whose equipment performed more efficiently on basis that notwithstanding higher hourly charges, ultimate cost to Govt. would be significantly less than if work would be performed at lower hourly charges offered by other bidders should be canceled, invitation although providing for evaluation of bids on basis of difference in equipment speeds in failing to relate speeds to estimated job mixes or applications did not provide full and free competition contemplated by 41 U.S.C. 253, for bidders uninformed of "performance factors" to be used in evaluation of bids could not intelligently prepare their bids 272
Factor other than price
Administrative costs
Award of single janitorial service contract at higher cost than award of multiple contracts would have cost on basis that aggregate award would permit centralized management by contractor having superior performance record and Govt. administration of one contract, and that savings effected by making multiple awards would be minimal compared with magnitude of contract, is not justified absent offset of higher price by administrative savings and inclusion in invitation of provisions for such award and establishment of administrative cost savings for use in evaluating bids pursuant to par. 2–201(b)(xix) of Armed Services Procurement Reg., and as award may be justified on basis of reference in 10 U.S.C. 2305(c) to "price and other factors considered" only when low bidder is not qualified, should low bidder on several of invitation items qualify and be willing to accept award, these items should be deleted from contract and reawarded 233
Justification
Purchase of dictating equipment under multiple-award Federal Supply Schedule contract from other than low bidder justified on basis of higher trade-in value, more extensive and dependable maintenance and repair service, that equipment would better serve actual needs of using agency, and that one feature of equipment alone would result in cost saving which would absorb price difference within few years, saving that would continue in subsequent years, satisfies requirements of par. 101–26.408–3 of Federal Property Management Reg., and purchase more advantageous to Govt., price and other factors considered, comes within contemplation of 41 U.S.C. 253(b) 135

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Evaluation—Continued

Incorporation of terms by reference

Christian **doctrine**

Under invitation for bids (IFB) contemplating requirements type contract which expressly made Art. 27 of General Services Administration form inapplicable and inadvertently omitted substitute special "all or none" clause required by par. 5A–2.201–73 of GSA Procurement Regs., to effect each item of "all or none" bid must be low in price, an "all or none" bid low as to aggregate bid price but not low on each item was improperly rejected on basis omitted provision was incorporated into IFB by operation of law under *Christian* doctrine. Low bidder on notice of exclusion of Art. 27 and under no obligation to affirm exclusion, properly assumed its "all or none" bid was not required to be low on all items. However, notwithstanding defective solicitation, cancellation of contracts awarded would not be in best interests of Govt..... 682

Negotiated contract

Aggregate *v.* separable items, prices, etc.

Item error. (*See* **Contracts, negotiation, mistakes, item error in aggregate bid**)

Negotiation

Criteria establishment

Determination to evaluate proposals for furnishing tape recorders, spare parts, and use documentation on only common basis offered, price of recorder, rather than on basis of points assigned to cost, management, and technical criteria established after issuance of request for proposals was not proper exercise of administrative discretion, for unlike management and technical evaluations, cost evaluations can be objectively measured on overall costs and, therefore, negotiation of procurement with only one of five offerors was not in accord with par. 3–804 of Armed Services Procurement Reg. requiring clarification of defectively priced proposals. However, even in applying defective cost evaluation technique, one of rejected proposals coming within "competitive range" contemplated by 10 U.S.C. 2304(g) should have been considered as it was not so technically inferior as to preclude meaningful negotiation. Although award made will not be disturbed, steps should be taken to avoid recurrence of similar negotiation procedures..... 252

Qualified bids. (*See* **Bids, qualified**)

Failure to furnish something required. (*See* **Contracts, specifications, failure to furnish something required**)

Labor surplus area performance. (*See* **Contracts, awards, labor surplus areas**)

Late

Hand carried delay

Actions of bid opening officer having established 2 p.m. deadline for opening of bids under several invitations as required by par. 2–402.1(a) of Armed Services Procurement Reg., hand-carried bid which could have been timely filed but was delivered at 2:15 p.m. is considered late bid under par. 2–303.1, notwithstanding bidder had been orally advised that opening of bids under invitation it was bidding on would be delayed 10 minutes to complete opening of bids under another invitation. To hold otherwise would introduce element of uncertainty into bidding procedure. Therefore, even if late hand-carried bid was delivered before

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Hand carried delay—Continued
other bids under same invitation had been opened and prices revealed, it may not under par. 2–303.5 be considered---------- 784
Mistakes
Allegation after award. (*See* **Contracts, mistakes**)
Evidence of error
Denied opportunity to present
Although bidder alleging error was denied opportunity prior to award to furnish evidence of bid error as required by par. 2–406 of Armed Services Procurement Reg., price adjustment may not be approved, absent evidence of intended bid price. Worksheets showing total bid price of $616,128, reduced to $616,000 for purpose of bidding, rounding out of figures and gross price deduction make it difficult to determine to what extent bidder would have included amount claimed in bid price. However, appropriate steps should be taken to assure that in future par. 2–406 is complied with and bidder requesting correction of bid error is given opportunity prior to award to furnish to contracting officer, evidence of error and bid actually intended for consideration by appropriate authority---------- 507
Verification
Government responsibility
Contractor who subsequent to contract performance alleged mistake in bid that had been confirmed on several occasions and denied price adjustment under Pub. L. 85–804, which authorized contract modification without consideration to facilitate national defense, is not entitled to contract modification under general rule that contract may not be amended or modified without compensating benefit to Govt. Repeated advice to contractor of suspected bid error, fulfilled Govt.'s responsibility to obtain bid verification, and bidder having responsibility of estimating price at which contract could be performed at reasonable profit, Govt. was not required in preaward survey to review contractor's pricing estimates---------- 732
Prior to allegation of error
Contracting officer who inquired if low bid greatly out of line with Govt.'s estimate and next low bid was considered satisfactory, if bid figures had been checked, and if job could be performed at bid price quoted, satisfied verification requirements of par. 2–406.3(e)(1) of Armed Services Procurement Reg. and sufficiently warned bidder of possibility of mistake in bid, as specific request for bid verification is not necessary where bidder's attention has been invited to checking bid prices and contracting officer is advised bid has been verified and no error found. Therefore, acceptance of bid without knowledge of error having consummated valid and binding contract, there is no entitlement to additional compensation on basis of mistake in bid alleged year after contract award---------- 616
In absence of allegation of mistake in bid, where bidder knew bid was substantially lower than Govt.'s estimate and next low bid, and he had been furnished abstract of bids, par. 2–406.3(e)(1) of Armed Services Procurement Reg., requiring bidder alleging mistake be advised to make written request for modification or withdrawal of bid, is not for application, as there is no requirement in regulation that bidder be

BIDS—Continued Page
Mistakes—Continued
Verification—Continued
Prior to allegation of error—Continued
advised of legal rights if no mistake in bid has been alleged, nor does contracting officer have duty to advise bidder of any administrative procedure under which consideration could be given to request for bid correction or permission to withdraw bid---------- 616
Opening
Postponement
Wage rate changes
Under invitation containing prevailing minimum wage determination by Secretary of Labor to cover laborers and mechanics to be employed on proposed flood control project, fact that bids are scheduled to be opened few days before occurrence of automatic escalation of wage rates pursuant to labor agreement with union is no reason to postpone scheduled opening of bids. The Davis-Bacon Act, 40 U.S.C. 276a, does not provide for modification or adjustment of advertised prevailing minimum wage rates for laborers and mechanics employed on construction projects, nor does specification of minimum wages in invitation constitute representation that labor can be obtained at such rates---------- 754
Time for opening determination
Actions of bid opening officer having established 2 p.m. deadline for opening of bids under several invitations as required by par. 2–402.1(a) of Armed Services Procurement Reg., hand-carried bid which could have been timely filed but was delivered at 2:15 p.m. is considered late bid under par. 2–303.1, notwithstanding bidder had been orally advised that opening of bids under invitation it was bidding on would be delayed 10 minutes to complete opening of bids under another invitation. To hold otherwise would introduce element of uncertainty into bidding procedure. Therefore, even if late hand-carried bid was delivered before other bids under same invitation had been opened and prices revealed, it may not under par. 2–303.5 be considered---------- 784
Options
Exercise of option. (*See* **Contracts, options**)
Peddling
Subcontracts. (*See* **Contracts, subcontracts, bid shopping**)
Prices
Basis for award
Under invitation for numerous items which provided "that the contract will be awarded for each item" unless provision is made in contract for award on all-or-none basis, consideration of combination bids that offer lower overall cost to Govt. than award on item-by-item basis is not precluded, 41 U.S.C. 253(b) and sec. 1–2.407 of Federal Procurement Regs. providing that award of contract shall be made on basis of most favorable cost to Govt., assuming responsiveness of bid and responsibility of bidder. Therefore, invitation permitting award on item-by-item basis or any combination of items for which lump-sum price has been proposed by bidders, combination bids are required to be considered for evaluation purposes, absent showing such bids would not be in best interests of Govt---------- 658

BIDS—Continued Page

Qualified

Check accompanying bid

Negotiation of bid deposit check accompanying high bid under surplus sales invitation having been conditioned on receiving contract award, rejection of bid as nonresponsive was proper, for in qualifying check its use as either negotiable instrument, or as draft, check, or demand note, as well as acceptance as bid bond, was precluded and, therefore, qualification constituted material exception to invitation which contemplated negotiability of bid deposits and not promises to pay under certain conditions, and adequate competition having been secured under invitation to establish that fair market value of surplus materials would be obtained in making award to highest responsive bidder, nonresponsive bid was not for evaluation and comparison, and award is considered to have been made in good faith and in best interests of Govt 401

Progress payments

Low bid of small business concern in which progress payments were requested in an accompanying letter that is considered part of bid, in amount of 75 percent of total costs prescribed for small business concerns in Armed Services Procurement Reg. (ASPR) Appendix E–503, which was submitted in response to invitation that did not provide for small business set-aside but incorporated by reference 70 percent Progress Payment Clause in ASPR App. E–510.1, is qualified bid and deviation deliberately taken is not trivial or minimal but modifies legal obligation of parties concerning payment, notwithstanding negligible effect on price and precatory nature of term "request" and, therefore, bid deviation is not minor informality or irregularity that may be waived under ASPR 2–405 by contracting officer 496

Fact that Armed Services Procurement Reg. (ASPR) Appendix E–505 contemplates request for and granting of "unusual" progress payments at percentages in excess of customary 70 percent provided in ASPR App. E–510.1, does not have effect of putting contracting officer on notice that request for 75 percent of total cost progress payments provided in ASPR App. E–503 under invitation including 70 percent Progress Payment Clause is possible minor informality or irregularity that may be waived within meaning of ASPR 2–405, as ASPR App. E–505, while permitting requests for progress payments in excess of customary 70 percent has reference to requests from contractors and does not grant similar rights to bidders or prospective contractors 496

Bid accompanied by letter requesting authorization of larger progress payments than provided for in invitation is qualified bid that does not reserve to bidder option after bid opening to waive condition and accept contract or refuse to accept contract, notwithstanding the word "request" is precatory in nature, as word is susceptible of two possible meanings depending on existing circumstances, or that word "authority" is deemed precatory in nature rather than demand and, therefore, qualified bid was properly rejected 496

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Rejection

Propriety

Although not authorized to review Small Business Admin. (SBA) determination or to direct issuance of certificate of competency, GAO is not precluded from reviewing rejection of small business concern as nonresponsible, whether or not SBA issued certificate of competency, as question upon review of all pertinent information and evidence available to contracting officer and SBA is whether bid rejection was proper, and where record justifies doubt of contracting officer and SBA, it is immaterial that record might also support determination of bidder responsibility, in view of fact that prospective contractor has burden to affirmatively demonstrate responsibility, and contracting officer is not required to independently gather information to resolve doubt, instead any doubt should be resolved against bidder---------- 291

Small business concerns. (*See* Contracts, awards, small business concerns)

Specifications. (*See* Contracts, specifications)

Submission

Time limitation

Sufficiency

Although commercial specifications incorporated by reference in invitation for aircraft recording system only became available from commercial publisher 7 days before bid opening time, two bidders to whom procurement was limited were not prejudiced, notwithstanding period allotted for preparation and submission of bids was less than 15 bidding days prescribed by par. 2–202.1 of Armed Services Procurement Reg. for procurement of standard commercial articles and services, as bidders had participated in procurement efforts of contracting agency and aware of technical requirements and complexities of recording system they could have prepared responsive bids within the time allotted for preparation and submission of bids---------- 611

Tie

Procedure for resolving

To break tie in equal low bids under total set-aside for small business, consideration after bid opening of utilization of labor in performance of contract, and award to "certified eligible" bidder with approved plan to employ disadvantaged workers is permissible where selection of contractor is made in accordance with par. 2–407.6 of Armed Services Procurement Reg., prescribing priority preference for breaking equal low bids, and where consideration of factors outside bid is in best interests and to advantage of Govt. However, for purpose of resolving tie bids, future invitations that do not involve labor surplus area set-asides will require bidders to furnish evidence of priority status---------- 664

Unbalanced

Procurement readvertised

An invitation contemplating 1-year requirements type contract for test, repair, and overhaul of diesel engines and evaluation of bids on basis of estimates violates advertising requirements of free and open competition, where unbalanced bid offering token prices for services and parts that have substantial value on theory that services and parts while being given full weight for evaluation purposes would not represent major portion of required work cannot be determined to be low bid, and invitation may be canceled under par. 2–404.1(b)(viii) of Armed Services Procurement Reg. in interest of Govt. and to preserve integrity of competitive bidding system---------- 748

BONDS Page

Performance

Alternative protection

Award of construction contract to cooperative—low bidder utilizing funds borrowed from Rural Electrification Admin. (REA)—nonresponsive to invitation because of substituting less costly and less protective combination of builder's risk insurance for cost of materials and contractor's bond for remaining costs in lieu of construction bond to cover entire contract price was inconsistent with advertised bidding principles and adversely affects free competition, notwithstanding waiver of required bond was considered "in best interests of borrower," and aided in promotion of project. Although award made in good faith and not contrary to 7 U.S.C. 904, granting broad discretion to REA Administrator, will not be disturbed, if less costly form of protection is adequate, future invitations should provide for alternative protection in lieu of performance bond---------- 4

Contract termination prior to furnishing bond

Termination of contract for convenience of Govt. because contractor failed to meet condition of contract, furnishing of performance bond within time prescribed, although administrative matter, contractor having furnished satisfactory bond despite notice of termination before expiration of extended due date, contracting officer should have considered feasibility of withdrawing termination notice, thereby eliminating expense of reprocurement as well as possible convenience termination costs. However, although replacement contract will not be disturbed, procurement personnel should be informed of rights and liabilities of Govt. and its contractors to preclude recurrence of similar situations-- 1

No substitute for faithful performance

Refusal of Small Business Administration (SBA) to grant certificate of competency to bidder proposing to perform only managerial and supervisory functions under construction contract and to subcontract actual construction work because of inability to meet requirements of SBA directive to perform "significant portion of contract, measured in dollar value, with its own facilities and personnel on its own payroll" is persuasive with respect to nonresponsibility of bidder and under 15 U.S.C. 637(b), determination must be given legal finality, and bidder's offer to furnish performance bond may not be accepted as substitute for faithful performance of contract---------- 360

BUY AMERICAN ACT

Bids. (*See* Bids, Buy American Act)

Contracts. (*See* Contracts, Buy American Act)

CERTIFYING OFFICERS Page

Submissions to Comptroller General

Law *v.* procedural questions

When submission under 31 U.S.C. 82d, authorizing certifying officers "to applying for and obtain decision by Comptroller General on any question of law involved in payment on any vouchers presented to them for certification" does not involve question of law but concerns proper disposition of court costs awarded to U.S., reply to request is required to be made to head of Federal agency involved 70

CHECKS

Cashing

Conditioned

Negotiation of bid deposit check accompanying high bid under surplus sales invitation having been conditioned on receiving contract award, rejection of bid as nonresponsive was proper, for in qualifying check its use as either negotiable instrument, or as draft, check, or demand note, as well as acceptance as bid bond, was precluded and, therefore, qualification constituted material exception to invitation which contemplated negotiability of bid deposits and not promises to pay under certain conditions, and adequate competition having been secured under invitation to establish that fair market value of surplus materials would be obtained in making award to highest responsive bidder, nonresponsive bid was not for evaluation and comparison, and award is considered to have been made in good faith and in best interests of Govt 401

Dishonored

Penalty charges

Disposition

Although generally penalty charges collected by Govt. of District of Columbia under Pub. L. 89–208 to cover cost of handling dishonored checks are, absent provision in law for disposition of funds, for deposit to credit of District, charges collected by District Unemployment Compensation Board are not. Since Board receives its administrative funds from Bur. of Employment Security, U.S. Dept. of Labor, pursuant to 42 U.S.C. 502, and returns unused grants to Bureau, cost of handling dishonored checks is borne from Federal grant funds, and, consequently, penalty charges collected by Board are for deposit in Treasury as miscellaneous receipts of U.S., unless statutory authority is obtained to to otherwise dispose of collections 674

CLAIMS

Assignment

Wage Earners' Plans

Although in *U.S.* v. *Krakover*, 377 F. 2d 104, court held that under doctrine of sovereign immunity Ch. 13, bankruptcy proceeding, Wage Earner's Plan case, is not enforceable against U.S., court concluded that this should not deprive Federal employees of Ch. 13 benefits and that payment to trustee of part of wages of employee under appropriate order will protect trustee and creditors without infringing on immunity of U.S. Therefore, procedure under which accounting and finance officers are required to pay part of wages of employee in response to court order issued in Ch. 13, Wage Earner's Plan case—binding on employee—may be continued without violating 31 U.S.C. 203, prohibiting assignment of claims against U.S., or without depriving Govt. of good acquittance.. 522

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Defenses

Doctrine of *res judicata*

Dismissal by U.S. Court of Claims of suit filed by retired Army officer (Ct. Cl. No. 111–64) for increased retired pay which was based on fact that he should have been advanced on retired list under 10 U.S.C. 3964 to rank of major rather than to rank of captain constitutes judicial determination on merits and judgment having become final, matter is now *res judicata* and, therefore, officer's claim for increased retired pay may not be considered under rule in 5 Comp. Gen. 334, and in view of 28 U.S.C. 2519, prescribing that final judgment of Court of Claims against plaintiff bars any further claim against U.S. arising out of matters involved in case or controversy---------- 573

Evidence to support

Decedents' estates

Payments due minor children

Natural guardian of minor child of deceased member of uniformed services in documenting claim for 6 months' death gratuity in excess of $1,000 prescribed by par. 40504(b)(5), Dept. of Defense Military Pay and Allowances Entitlements Manual, should cite State statute involved, and facts bringing payment to guardian within purview of State statute in which persons concerned reside should be furnished in affidavit form, and care should be exercised to determine that parent understands requirements of law permitting payment to parents of small amounts due minors, if matter is free from doubt, to avoid expense of obtaining legal guardianship---------- 209

COLLEGES, SCHOOLS, ETC.

Grants-in-aid

Educational programs

Notwithstanding restriction on use of 1968 funds appropriated by Pub. L. 90–132 to Office of Education under heading "School Assistance in Federally Affected Areas" to carry out legislative enactments after June 30, 1967, sec. 204 of Pub. L. 90–247, dated Jan. 2, 1968, eliminating requirement in Pub. L. 874, 81st Cong., that payments to local educational agencies be reduced by amounts "derived from other Federal payments" is effective. Retroactive aspect of sec. 208 of Pub. L. 90–247, prescribing that sec. 204 of act "shall be deemed to have been enacted prior to June 30, 1967, and shall be effective for fiscal years beginning thereafter," overcoming appropriation restriction and, therefore, Pub. L. 874 educational payments are not required to be reduced by amount of any other Federal payments---------- 707

Tuition, etc., payments

Military personnel

A U.S. Military Academy 1967 graduate, considered member of Regular Army pursuant to 10 U.S.C. 3075(b)(2), who on convalescent leave because of injuries incurred while on temporary detail is receiving full pay and allowances from Academy, is not eligible under par. 4(a) Army Regs. 621–5 for financial assistance provided active duty personnel to attend civilian school or college, as the cadet, neither enlisted man nor warrant officer, is unable to qualify for assistance as commissioned officer, for until physical condition is determined and he is commissioned there is no assurance he would be able to meet the at least 2 years active service after completion of training requirement imposed on commissioned officers of uniformed services---------- 187

COMPENSATION Page

Double

Concurrent civilian and active military service

Incompatibility

Fee-basis medical services rendered to an eligible veteran for disabilities identified on an Outpatient Medical Treatment Identification Card by military physician on active duty with Armed Forces who is engaged in limited medical practice after hours with permission of his commanding officer may not be paid by Veterans Administration in absence of statutory authority under rule that concurrent Federal civilian employment and active duty military service are incompatible..... 505

Concurrent military retired and civilian service pay

Disability retirement

Members removed from temporary disability retired list

Reappointment of Regular Air Force and Regular Army commissioned or warrant officers determined to be physically fit to perform duties of office, grade or rank whose names are removed from temporary disability retired list for sole purpose of being retired is contrary to provisions of 10 U.S.C. 1211(a) (1) and (2), and absent authority for reappointment of officers who have not been recalled and who contemplate no active duty, employment of officers in civilian capacity in Federal Govt. and payment to them from either appropriated or nonappropriated funds for civilian position is not contemplated by law.. 141

Retired pay deduction for less than a day's salary

Notwithstanding Regular officer of uniformed services retired after completion of at least 30 years of active service is employed by nonappropriated fund instrumentality only intermittently as flight instructor on hourly basis with no guaranteed minimum, he is subject to operation of Dual Compensation Act and pursuant to 5 U.S.C. 5532, reduction of full day's retired pay is required if officer receives any compensation for that day, even as little as pay for 1 hour as flight instructor, for absent recognition of fractional parts of day in retirement of military personnel, fractional part of day's retired pay may not be equated with hours of work in position for which officer is paid salary for less than full day or at hourly rate..... 185

Concurrent military retired pay and disability compensation. (*See* Officers and Employees, death or injury, disability compensation and retired pay)

Holidays

Duty status

Ten-hour workday

Wage board employees assigned to weekly tours of four 10-hour days—8 hours regular time and 2 hours overtime—who are relieved or prevented from working because of occurrence of holiday within purview of 5 U.S.C. 6104, are entitled only to basic compensation for any 10-hour day on which holiday occurs, sec. 6104 prescribing same pay for holiday on which no work is performed "as for day in which ordinary day's work is performed." Therefore, employees are only entitled to compensation at straight time for entire 10-hour day on which they did not work because of holiday, absent authority for paying overtime compensation under Work Hours Act of 1962, 5 U.S.C. 5544, for any part of employees scheduled hours of duty on holidays on which no work is performed..... 358

COMPENSATION—Continued Page
Holidays—Continued
Separation prior to a holiday
Payment of compensation for holiday on which no services are performed predicated on employee having been in pay status at close of business immediately preceding holiday, when employment relationship validly had been terminated by reason of resignation or retirement prior to holiday, former employee is not entitled to pay for holiday, nor is employee separated and entitled to lump-sum payment under 5 U.S.C. 5551, in amount equal to pay he would receive had he remained in service until expiration of period covered by leave payment, whose period of projected annual terminal leave for lump-sum payment extended through close of business on July 3, 1967, entitled to compensation for July 4 holiday ---- 147
Increases
Retroactive
Nonworkdays between separation and reemployment
Employee separated by resignation, as required by employing Govt. agency, on Friday, Dec. 15, 1967, in order to accept employment on Monday, December 18, 1967, in another Govt. agency may be considered, in view of various situations in which nonworkdays falling between continuous periods of service are not regarded in interrupting service, as being "in service of United States" within purview of sec. 218(a) of Federal Salary Act of 1967, which provides that to be entitled to retroactive compensation prescribed by act, individual must have been on rolls of agency on Dec. 16, 1967, date of enactment of act and, therefore, employee is entitled to payment in amount of retroactive increase authorized by act for period Oct. 8 through Dec. 15, 1967 ---- 386
Military personnel (*See* Pay)
Overtime
Early reporting and delayed departure
Guards
Duty-free lunch period
Guards scheduled for daily duty tours of 8 hours and 15 minutes who have 30-minute duty-free lunch period, although required to remain on call in Govt. building in which employed to be available in event of emergencies, are in actual work status only 7 hours and 45 minutes on each daily tour of duty and, therefore, guards are not entitled to overtime compensation on basis of *Albright* v. *U.S.*, 161 Ct. Cl. 356, in which decision court found guards did not have relieved duty-free lunch periods ---- 311
Standby, etc., time
Trial vessel trips
Lack of sleeping space
Civilian employees assigned to duty in connection with trial runs of Navy ships were properly paid on basis of two-thirds rule, that is, for 16 hours in 24-hour period—other 8 hours presumed to have been utilized for eating and sleeping—in absence of evidence work was performed during 22½ hours shown in record. Fact that employees did not have assigned sleeping spaces due to lack of space does not constitute status of standby entitling employees to overtime compensation for 6½ hours in excess of 16 hours per day attributable to sleeping time,

COMPENSATION—Continued Page
Overtime—Continued
Standby, etc., time—Continued
Trial vessel trips—Continued
Lack of sleeping space—Continued
one and a half hours per day having been deducted for eating time from 8 hours per day presumed to be eating and sleeping time under two-thirds rule---- 438
Two-thirds rule
Eating and sleeping
Under Navy regulations, civilian employees assigned to trial ship run are considered to be in standby status that begins at time of embarkation and ends at time of disembarkation, entitling them to compensation for standby time as if actual work was performed. When standby time covers period of 24 consecutive hours, 8 hours is set aside for sleeping and eating, unless actual work is performed during 8-hour period, and employees are paid for 16 hours of 24 hours on basis of two-thirds rule. Therefore, employees who were paid for more than 16 hours per day while serving in standby status on trial runs, unless it can be established work in excess of 16 hours per day actually was performed, have been overpaid and collection of overpayments should be made---- 438
Travel time
Performance of duty status
Employees of Atomic Energy Commission, designated escorts to protect security shipments, who perform continual, long distance, 24 hours a day travel are in "work while traveling" status within contemplation of sec. 222(a) of Federal Salary Act of 1967, and 8 hours of day attributable to eating and sleeping, employees are entitled to payment of regular compensation for 8 hours and overtime for 8 hours for each full day of travel. However, under sec. 222(a), employees would not be entitled to compensation for periods of waiting at official station or at any other point of duty---- 607
An escort of Atomic Energy Commission security shipments whose day's travel does not exceed 16 hours, including "off-duty" periods while traveling, is entitled to compensation for all hours involved, including those in "off-duty" status---- 607
Atomic Energy Commission escort of security shipments in travel status for 22 hours and in off-duty status for 2 hours during which time he was not traveling is entitled to payment for 16 hours, deduction of 8 hours from 24-hour day which is attributable to eating and sleeping including 2 hours off-duty time, and additional off-duty time while traveling is compensable at regular or overtime rates as appropriate--- 607
Time spent by civilian employee traveling on official business in overnight stay at hotel or motel is not covered by sec. 222(a) of Federal Salary Act of 1967. Therefore, escort of Atomic Energy Commission security shipment who stayed overnight in hotel or motel from midnight to 6 a.m., then traveling from 6 a.m. to 6 p.m. without interruption of travel for purpose of having meal, is entitled to payment for 12 hours spent in travel, compensated at regular or overtime rates as appropriate---- 607

COMPENSATION—Continued Page
Payments
Heads of agencies. (*See* Departments and Establishments, heads, salary payment basis)
Premium pay
Basic compensation determination
Retirement and life insurance contributions
Retroactive collection of increased retirement and life insurance deductions to cover standby premium pay which was made part of base pay by Pub. L. 89–737, approved Nov. 2, 1966, and implemented by Civil Service Reg. on Mar. 3, 1967, may be waived for separated employees who are not annuitants, unless demand for increased benefits is made at some future time, but may not be waived for retirees and employees still on rolls who are entitled to increased benefits arising from inclusion of premium pay within term "basic pay" and, therefore, collection of deductions for premium pay received by retirees and current employees should be instituted to go back to effective date of act-- 694
Severance pay
Disability retirement
Fact that employee was separated by reduction-in-force action on same day he applied for disability retirement affords no basis to withhold payment of severance pay authorized in 5 U.S.C. 5595 pending action on disability retirement without employee's consent. If employee does not consent after being informed that upon approval of retirement, annuity begins day following separation and he will be required to refund any severance pay received, absent approval of retirement application, payment of severance pay to former employee may be certified---------- 719
Eligibility
Reassignment refused
Payment of severance pay to employees who resigned because they were unable to accept reassignment to other areas upon agency reorganization of regional offices which resulted in excess of personnel in competitive positions need not be recovered if primary purpose of proposed transfers was to meet responsibility to employees rather than to agency, and advice to employees of proposed reduction in force, encouraging them to seek positions with other Govt. agencies, together with effort made by employing agency to seek positions in other areas in region for employees, evidences administrative intent to make job offers to employees rather than to reassign them without option to refuse reassignment, and that separations were involuntary and not removal for cause---------- 56
Generally. (*See* Officers and Employees, severance pay)
Standby, etc., time. (*See* Compensation, overtime, standby, etc., time)
Wage board employees
Coordinated Federal Wage System
In view of designation under Coordinated Federal Wage System contained in chapter 532 of Federal Personnel Manual of lead agency in each wage area to conduct wage survey and develop wage schedules for use by all agencies in area, individual agency no longer may exercise discretion as to whether particular schedule should be placed in effect and, therefore, instructions may be issued to require each agency in

COMPENSATION—Continued Page

Wage board employees—Continued

Coordinated Federal Wage System—Continued

wage area to place new wage schedule in effect on date decided upon by lead agency, provided date is not earlier than date lead agency actually prescribes schedule ---- 774

Withholding

Commission of criminal offenses

Retainer pay of fleet reservist arrested and indicted for mail theft while employed as career substitute postal carrier is not subject to administrative set-off under 5 U.S.C. 5511, which authorizes involuntary withholding of civilian employee's salary upon removal for cause, general rule being that retired or retainer pay is not subject to administrative set-off without debtor's consent and, therefore, sec. 5511 is applicable only to final pay due former member in his civilian position ---- 400

Debt liquidation

Bankruptcy proceedings

Where U.S. is both debtor and creditor at time civilian employee or member of uniformed services files Ch. 13, Wage Earner's Plan case, absent judicial determination to contrary, Govt.'s priority under 31 U.S.C. 191, may be asserted in Ch. 13 Wage Earner's time extension plan case, set-off to be accomplished in accordance with Title 4 of GAO Policy and Procedures Manual sec. 7520.10, unless wage earner is not insolvent. However, filing of Wage Earner's Plan would, for purposes of set-off, be considered *prima facie* evidence of insolvency ---- 522

CONFERENCES

Meetings. (*See* **Meetings**)

CONSTITUTIONALITY OF ACTS

State

License, permit, etc., fees

Fee imposed by Montana State Statute to certify Bur. of Reclamation water and waste water operators responsible for implementing Federal water pollution programs may not be paid by Bureau from appropriated funds, absent authority for payment of such fees in Federal Water Pollution Control Act, in view of principle, based on supremacy clause, Art. VI, cl. 2, of Constitution, that State cannot require Federal employees to obtain licenses or permits in performance of official duties when they are engaged in occupations which are subject of State regulations applicable to general public ---- 577

CONTRACTORS

Foreign

Responsibility determinations

Determination by contracting officer under request for proposals that Canadian subcontractor was nonresponsible having been reported deficient in technical capability and ability to meet delivery schedules does not evidence abuse of administrative discretion judged on basis of information available to him at time of determination, therefore, exclusion of subcontractor from negotiations and award to another offeror were proper even though prime contractor should have been notified before award of nonresponsibility determination and requested to clarify information questioning determination, but should not have been requested after determination was made to extend its offer. However, determination of nonresponsibility does not preclude consideration of subcontractor for future procurements, and guidelines for determining responsibility of Canadian firms should be promulgated ---- 373

CONTRACTS Page

Amendments

Divisibility of an amendment

Amendment to contract, which contained liquidated damage provision, to provide for payment of accepted components of automated mail processing system, to purchase additional unit, culler-stacker, and to waive accrued liquidated damages by extending delivery date is divisible into three distinct, unrelated agreements, each agreement to be individually supported by legally sufficient consideration, and retention and use of accepted components of system, although not producing significant savings, consitutes consideration for agreement to pay, and price of culler-stacker is consideration for purchase, even though exorbitant, extravagant promise for inadequate consideration constituting legally sufficient consideration. However, extension of delivery date, absent evidence performance delay was beyond contractor's control and that Govt. waived liquidated damages, is unsupported by consideration and liquidated damages are assessable under contract amendment from original delivery date ---------- 170

Amounts

Indefinite

What constitutes

Under contract negotiated pursuant to 10 U.S.C. 2304(a)(13), for generator sets to be purchased during 12-month period, and subject to minimum and maximum quantity, as well as dollar limitations, funding of last two purchases was not inconsistent with provisions of Armed Services Procurement Reg., nor in violation of appropriation provisions at secs. 3732, 3679, and 3690 of Revised Statutes, even though sufficient funds to cover maximum quantities orderable were not available at time contract was executed, contract, indefinite quantity and not requirements contract, Govt. was not required to obligate more than cost of minimum quantity, and issuance of purchase orders analogous to situation in *Lieter* v. *U.S.*, 271 U.S. 204, regarding lease renewal option, which did not go into funding, is not authority for concluding last two purchase orders were illegally issued ---------- 155

While in ordinary usage there is little distinction between contract including option for additional amount and indefinite quantity contract, expressions are employed in Armed Services Procurement Reg. as particular terms of art to distinguish between two different kinds of option contracts, and use of indefinite quantity contract described in par. 3–409.3 for negotiation of commercial items, without time or quantity limitations, in purchase of minimum quantity of generator sets, with right to order during 1-year period additional quantities up to eight times minimum was appropriate, as option contract described in par. 1–1501, *et seq.*, which does limit time and quantities, is intended for use in advertising or negotiating for items not readily available on open market, where requirements beyond minimum quantities are foreseeable and later orders may represent less than minimum economic production quantities, which considering start-up costs, production lead time, etc., could preclude adequate competition ---------- 155

Issuance without securing competition of purchase orders for generator sets during last 2 months of 12-month contract negotiated under 10 U.S.C. 2304(a)(13) for indefinite quantity of sets, as provided in par.

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Amounts—Continued

Indefinite—Continued

What constitutes—Continued

3–409.3 of Armed Services Procurement Reg., did not violate advertising statute at sec. 3709 of Revised Statutes (41 U.S.C. 5), or 10 U.S.C. 2304(g), regarding competition to extent feasible in negotiation of contracts, absent evidence of possibility that another supplier could have furnished sets at lower price ---------- 155

Architect, engineering, etc., services

Fees

Limitation

Design, location, etc., changes

Where site and nature of project are so changed as to render virtually useless any architect-engineer (A–E) work done prior to administrative determination to affect change, it would be unreasonable to carry forward against new project any charge made against fee limitation imposed by 41 U.S.C. 254(b) that was incurred under original project, for even though purpose of project may remain unchanged, subsequent alteration of conceptual design of building and its location at some point gives rise to new project for purpose of applying statutory fee limitation ---------- 61

Awards

Cancellation

Erroneous awards

Bid evaluation base

Award of contract to furnish computer time for estimated number of hours to bidder whose equipment performed more efficiently on basis that notwithstanding higher hourly charges, ultimate cost to Govt. would be significantly less than if work would be performed at lower hourly charges offered by other bidders should be canceled, invitation although providing for evaluation of bids on basis of difference in equipment speeds in failing to relate speeds to estimated job mixes or applications did not provide full and free competition contemplated by 41 U.S.C. 253, for bidders uninformed of "performance factors" to be used in evaluation of bids could not intelligently prepare their bids ---------- 272

Cancellation not required

Award of construction contract to cooperative—low bidder utilizing funds borrowed from Rural Electrification Admin. (REA)—nonresponsive to invitation because of substituting less costly and less protective combination of builder's risk insurance for cost of materials and contractor's bond for remaining costs in lieu of construction bond to cover entire contract price was inconsistent with advertised bidding principles and adversely affects free competition, notwithstanding waiver of required bond was considered "in best interests of borrower," and aided in promotion of project. Although award made in good faith and not contrary to 7 U.S.C. 904, granting broad discretion to REA Administrator, will not be disturbed, if less costly form of protection is adequate, future invitations should provide for alternative protection in lieu of performance bond ---------- 4

Negotiation pursuant to 10 U.S.C. 2304(a)(11) of one contract under two requests for proposals (RFP), which incorporated by reference

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Erroneous awards—Continued
Cancellation not required—Continued
brand name or equal clause was restrictive of competition where under first RFP only one offer was received in response to limited competition that did not meet competition contemplated by 10 U.S.C. 2304(g) and, therefore, constituted sole-source procurement, and where rejection of only other proposal under second RFP for failure to meet salient characteristics of brand-name item indicated preference for brand name. Although award will not be disturbed, performance specifications should be drafted in order to obtain, whether by advertising or negotiation, adequate and effective competition in future---------- 409

Although it is inappropriate in formally advertised procurements to permit bidders to submit alternate delivery schedules, where Govt. in Request For Proposals (RFP) invites alternate delivery schedules on basis of furnishing or waiving first article requirement and provides for disregard of 21 day or less delivery difference in alternate schedules, failure to consider low offer based on waiving first article requirement in favor of 18 day shorter delivery schedule involving furnishing first article was inconsistent with RFP and purpose of "negotiation," par. 1–1903(a) of Armed Services Procurement Reg. not restricting evaluation of delivery differences between alternate delivery schedules that offer to furnish or to waive first article requirement. Although due to emergency of procurement, award will not be disturbed, guidelines to preclude recurrence of situation are suggested---------- 448

Invitation for electric equipment which contained a "brand name or equal" clause that did not list "interchangeability" as salient characteristic, and clauses that required submission and testing of bid samples that would in addition to other factors be evaluated for interchangeability is misleading invitation. Although award was made to low bidder whose descriptive literature and sample model were determined to meet salient characteristics itemized in purchase description, no corrective action is required due to delivery conditions. However, appropriate steps should be taken to insure that misleading provisions are deleted from future brand name or equal invitations, and that brand-name model specified in invitation meets salient characteristics desired by Govt.--- 501

Requirements in RFP that prospective contractors show evidence of being in "regular" business of designing and manufacturing centrifuge systems, and evidence of previous production of similar system that had been accepted by Govt. within past 5 years were misstated as Walsh-Healey Public Contracts Act does not require contractor to be "regular" manufacturer. In addition preaward protest of rejected proponent should have been submitted by contracting officer to Secretary of Labor or contractor advised of his right to review by him, and notwithstanding experience qualification in RFP involved capacity within meaning of Small Business Act, contracting officer's determination of manufacturer ineligibility was not subject to review by Small Business Admin. Although it is not in the best interest of the Govt. to cancel contract awarded, to avoid similar errors in future, correction action is recommended---------- 518

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Single *v.* multiple awards
Award of single janitorial service contract at higher cost than award of multiple contracts would have cost on basis that aggregate award would permit centralized management by contractor having superior performance record and Govt. administration of one contract, and that savings effected by making multiple awards would be minimal compared with magnitude of contract, is not justified absent offset of higher price by administrative savings and inclusion in invitation of provisions for such award and establishment of administrative cost savings for use in evaluating bids pursuant to par. 2–201(b)(xix) of Armed Services Procurement Reg., and as award may be justified on basis of reference in 10 U.S.C. 2305 (c) to "price and other factors considered" only when low bidder is not qualified, should low bidder on several of invitation items qualify and be willing to accept award, these items should be deleted from contract and reawarded 233
Equal or tie bids
To break tie in equal low bids under total set-aside for small business, consideration after bid opening of utilization of labor in performance of contract, and award to "certified eligible" bidder with approved plan to employ disadvantaged workers is permissible where selection of contractor is made in accordance with par. 2–407.6 of Armed Services Procurement Reg., prescribing priority preference for breaking equal low bids, and where consideration of factors outside bid is in best interests and to advantage of Govt. However, for purpose of resolving tie bids, future invitations that do not involve labor surplus area set-asides will require bidders to furnish evidence of priority status 664
Erroneous
Effect on subsequent actions
Under request for quotations contemplating cost-plus-incentive-fee contract for aircraft maintenance services, contract to contain option for continuation of services, determination that cost estimates submitted were unrealistic, making it impossible for offerors to qualify for incentive fees, and award without further negotiation of fixed-fee contract instead on basis of fee floors and rates for employee insurance benefits, only areas of difference between offerors within competitive price range, was improper and not in accord with 10 U.S.C. 2304(g), requiring that offerors within competitive range be informed of areas in which their proposals are deficient and be given opportunity to justify reasonableness of their cost estimates or to revise those estimates and/or fee floors to satisfy Govt.'s requirements. However, although practical considerations militate against cancellation of contract, contract option should not be renewed but new contract negotiated 336
Labor surplus areas
Classification changes
Although under labor surplus area provisions, bidder may change area of performance if classification of area is changed by Labor Dept., change does not result in priority preference. In view of fact that bidder is precluded from taking unilateral action affecting previously stated area of performance and that authorized change does not affect relative

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Labor surplus areas—Continued
Classification changes—Continued
position of priority, labor surplus area provisions are considered unrelated to responsibility---------- 543
Qualification of bidder
Priority changes
A concern who at time of responding to Request for Proposals and two invitations for bids, each solicitation containing labor surplus area set-aside, was in third priority preference group—small business concern in persistent labor surplus area—and who only after bids and proposals were opened furnished certificate of eligibility to obtain first priority preference, may not be considered for award under any solicitations, as "certified eligible" small business concern certification is one of responsiveness and not responsibility. Therefore, preference information was required to be submitted with concern's bids and before date fixed for receipt of proposals, for notwithstanding flexibility inherent in negotiation, ability and willingness to perform set-aside cannot be contributed to "negotiation" in usual sense of word---------- 543
Small business concerns
Certifications
Denial
Contracting officer who notwithstanding verification of low bid suspiciously out of line with other bids and Govt.'s estimate is still doubtful of reasonableness of low bid price, as well as bidder's—small business concern—financial capacity, experience, and ability to subcontract work on proposed research tunnel and, therefore, unable to make preaward determination of bidder responsibility required by administrative regulation, upon refusal of Small Business Admin. to issue certificate of competency, properly considered low bidder nonresponsible, determination found upon review by GAO under its audit authority to be supported by record, and contracting officer having acted within scope of his authority, his rejection of low bidder as nonresponsible is not subject to judicial review---------- 291
Refusal of Small Business Administration (SBA) to grant certificate of competency to bidder proposing to perform only managerial and supervisory functions under construction contract and to subcontract actual construction work because of inability to meet requirements of SBA directive to perform "significant portion of contract, measured in dollar value, with its own facilities and personnel on its own payroll" is persuasive with respect to nonresponsibility of bidder and under 15 U.S.C. 637(b), determination must be given legal finality, and bidder's offer to furnish performance bond may not be accepted as substitute for faithful performance of contract---------- 360
More than one solicitation
Two solicitations, one for gaseous nitrogen which permitted alternate bids conditioned upon receipt of award under another solicitation for liquid oxygen and nitrogen that restricted alternate bids due to inclusion of small business set-aside, may be considered as one for purpose of evaluating alternate bids. General rule against acceptance of bids conditioned upon award under another separate solicitation is not for application when bidders are advised of acceptability of alternate bids

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Awards—Continued

Small business concerns—Continued

More than one solicitation—Continued

and participate on this basis. Therefore, low aggregate alternate bid submitted by small business firm being more beneficial to Govt. than combination of item bids upon same quantities, awards may be made on basis of low aggregate bid for gaseous nitrogen and portion of small business set-aside, and to low bidder under each separate invitation for balance of set-aside 453

Set-asides

Withdrawal

Planned emergency producer veto

Total small business set-asides under solicitations listing aerial delivery slings by different Federal Stock Numbers (FSN) may not be vetoed under par. 1–706.1(c)(ii) of Armed Services Procurement Reg. by large business concern designated "Planned Emergency Producer" for items other than those being solicited on basis procurement is different sizes of "one" item manufactured in accordance with common specification. Concern not a planned producer for items being solicited not only does not have right to veto set-asides, but procurement is not subject to item veto of regulation, word "item" as used in regulation being synonymous to use attributed to word in implementation of Defense Cataloging and Standardization Act, 10 U.S.C. 2451–2456, wherein each separate item of supply used recurrently is assigned FSN item identification, and act also required conformity of slings to common basic specification 462

As dictionary definition describing word "item" as "individual particular or detail singled out from group of related particulars or details" is meaning of word as used in implementation of Defense Cataloging and Standardization Act under which each separate and distinct item of supply used recurrently is required to be classified, described, and given item Federal Stock Number (FSN), which identifies item from every other item of supply, solicitations for various sizes of aerial delivery slings properly identified each size with individual FSN, and procurement is not subject to par. 1–706.1(c)(ii) of Armed Services Procurement Reg., which precludes small business set-asides when large business planned emergency producer of "item" desires to participate in procurement 462

Size

Conclusiveness of determination

Determinations of Small Business Administration (SBA) in prescribing small business size standards for various industries and designating within any industry concerns which are small business concerns for purpose of Govt. procurement are binding on procurement officials of Govt., and ordinarily GAO will not question size standard. However, determination of what size standard should apply to particular procurement is vested initially in procuring agency and upon appeal in SBA under its power to determine size standards for Govt. procurement 462

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Small business concerns—Continued
Subcontracting limitation
Refusal of Small Business Administration (SBA) to grant certificate of competency to bidder proposing to perform only managerial and supervisory functions under construction contract and to subcontract actual construction work because of inability to meet requirements of SBA directive to perform "significant portion of contract, measured in dollar value, with its own facilities and personnel on its own payroll" is persuasive with respect to nonresponsibility of bidder and under 15 U.S.C. 637(b), determination must be given legal finality, and bidder's offer to furnish performance bond may not be accepted as substitute for faithful performance of contract---------- 360
To other than lowest bidder
Other factors considered
Award of single janitorial service contract at higher cost than award of multiple contracts would have cost on basis that aggregate award would permit centralized management by contractor having superior performance record and Govt. administration of one contract, and that savings effected by making multiple awards would be minimal compared with magnitude of contract, is not justified absent offset of higher price by administrative savings and inclusion in invitation of provisions for such award and establishment of administrative cost savings for use in evaluating bids pursuant to par. 2–201(b)(xix) of Armed Services Procurement Reg., and as award may be justified on basis of reference in 10 U.S.C. 2305(c) to "price and other factors considered" only when low bidder is not qualified, should low bidder on several of invitation items qualify and be willing to accept award, these items should be deleted from contract and reawarded---------- 233
Bid shopping. (*See* **Contracts, subcontracts, bid shopping**)
Bids, generally. (*See* **Bids**)
Buy American Act
Foreign products
Component *v.* end product
Where cost of foreign batteries required in modification kits as part of diesel electric units represents approximately 1 percent of all components of unit, battery is not considered "end product" subject to restrictions of Buy American Act (41 U.S.C. 10a–d), but "component" of unit. To exclude batteries from definition of component in Buy American Act clause included in contract pursuant to par. 6–104.5 of Armed Services Procurement Reg. on basis batteries are not directly incorporated in diesel electric units and therefore do not lose their identity or are not substantially changed in form would be too narrow definition of component. Therefore, use of foreign batteries in diesel units is not considered violation of Buy American clause of contract---------- 21
Consideration
Delivery time extension
Amendment to contract, which contained liquidated damage provision, to provide for payment of accepted components of automated mail processing system, to purchase additional unit, culler-stacker, and to waive accrued liquidated damages by extending delivery date is divisi-

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Consideration—Continued

Delivery time extension—Continued

ble into three distinct, unrelated agreements, each agreement to be individually supported by legally sufficient consideration, and retention and use of accepted components of system, although not producing significant savings, constitutes consideration for agreement to pay, and price of culler-stacker is consideration for purchase, even though exorbitant, extravagant promise for inadequate consideration constituting legally sufficient consideration. However, extension of delivery date, absent evidence performance delay was beyond contractor's control and that Govt. waived liquidated damages, is unsupported by consideration and liquidated damages are assessable under contract amendment from original delivery date---------- 170

Cost-plus

Cost-plus-incentive-fees

Deficient proposals

Under request for quotations contemplating cost-plus-incentive-fee contract for aircraft maintenance services, contract to contain option for continuation of services, determination that cost estimates submitted were unrealistic, making it impossible for offerors to qualify for incentive fees, and award without further negotiation of fixed-fee contract instead on basis of fee floors and rates for employee insurance benefits, only areas of difference between offerors within competitive price range, was improper and not in accord with 10 U.S.C. 2304(g), requiring that offerors within competitive range be informed of areas in which their proposals are deficient and be given opportunity to justify reasonableness of their cost estimates or to revise those estimates and/or fee floors to satisfy Govt.'s requirements. However, although practical considerations militate against cancellation of contract, contract option should not be renewed but new contract negotiated---------- 336

Cost-type

Reimbursement costs

Insurance

Claim of insurance company for unpaid premiums on policies providing for retrospective determination of earned premiums covering workmen's compensation, public liability and other required insurance that is reimbursable under cost-type contracts may be paid notwithstanding "No Cost Settlement Agreement" that included mutual releases, and lack of privity between Govt. and insurance company. Contracting officer under sec. 10–554 of Army Procurement Procedure—which has force and effect of law—having responsibility upon termination or completion of cost-reimbursable-type contract to obtain insurance credits due contractor or to assume contractor's insurance obligations, liability of Govt. for unpaid insurance premiums is mandatory and must be read into termination settlement---------- 457

Damages

Government liability

Breach of contract

Additional costs incurred by contractor to install television surveillance system at Cape Kennedy due to delays occasioned by launch activities, where contract did not contain "Suspension of Work" clause or other provisions to cover delay but did require contractor to ascertain

CONTRACTS—Continued Page
Damages—Continued
Government liability—Continued
Breach of contract—Continued
work conditions, constitute claim for breach of contract damages within settlement jurisdiction of GAO. However, as cause of delay was evident at time contract was executed, no fault or negligence is attributable to Govt. and, therefore, there is no legal liability on part of Govt. to pay contractor increased costs---------- 475
While every contract implies promise that neither party to contract will prevent, hinder, or delay performance, nature and scope of such promise must be gathered from particular contract, its content, and surrounding circumstances. Where contract imposes responsibility on contractor to ascertain conditions that could affect work or cost, failure of contractor to consider delays attributable to normal operations that are evident at time contract is executed does not relieve contractor from performing work without additional costs to Govt., and delays occasioned by no fault or negligence on part of Govt. do not constitute breach of contract imposing legal liability on Govt. for increased costs--- 475
Liquidated
Delivery date extension erroneous
Amendment to contract, which contained liquidated damage provision, to provide for payment of accepted components of automated mail processing system, to purchase additional unit, culler-stacker, and to waive accrued liquidated damages by extending delivery date is divisible into three distinct, unrelated agreements, each agreement to be individually supported by legally sufficient consideration, and retention and use of accepted components of system, although not producing significant savings, constitutes consideration for agreement to pay, and price of culler-stacker is consideration for purchase, even though exorbitant, extravagant promise for inadequate consideration constituting legally sufficient consideration. However, extension of delivery date, absent evidence performance delay was beyond contractor's control and that Govt. waived liquidated damages, is unsupported by consideration and liquidated damages are assessable under contract amendment from original delivery date---------- 170
Shipment *v.* performance failure
Under contract for power circuit breakers that provided for delivery of one unit for Govt. testing and acceptance before remaining units were shipped, and which included provision to charge liquidated damages for failure of contractor to perform or to ship within time specified, mere shipment of defective breakers after notice initial unit had failed acceptance testing did not stop accrual of liquidated damages, reference in liquidated damages clause of contract to "failure to perform" relating to basic contract obligation to produce units capable of meeting performance requirements. Therefore, shipment of units not being decisive event on which application of liquidated damage clause depends, Govt., notwithstanding long delay in getting acceptable power circuit breakers into operation is entitled to liquidated damages for period of delay---------- 263

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Davis-Bacon Act. (*See* **Contracts, labor stipulations, Davis-Bacon Act)**

Discounts

Commencement of discount period

Payment by Govt. of voucher for supplies having been made within 20 days of evidence of inspection and acceptance of supplies on DD Form 250 in accordance with terms of contract, Govt. is not required to refund prompt payment discount taken, even though original voucher was received more than 20 days prior to payment, as delivery of supplies was not completed until required information was documented, at which time discount period commenced. Determination by contracting officer that discount was not earned is one of fact and is not determinative of issue that requires legal interpretation of terms and conditions of contract---- 765

Disputes

Conflict between administrative report and contractor's allegations

Where contract is neither ambiguous or equivocal, it is not necessary to resolve conflicting statements by resorting to parol evidence rule, or principle that all prior negotiations and communications are merged in executed contract, nor is there need to follow rule that administrative version of disputed facts is for acceptance unless presumption of correctness is overcome---- 627

Contract Appeals Board decision

Finality

Findings by Armed Services Board of Contract Appeals that use of other than paving equipment specified in invitation to construct corrosion control facility would be inadequate for performance of contract awarded, and that contractor had mistakenly interpreted that specifications permitted use of alternate equipment on trial basis, are factual findings that are final and binding, subject to provisions of Wunderlich Act of May 11, 1954, 41 U.S.C. 321---- 378

Equal employment opportunity requirements. (*See* **Contracts, labor stipulations, nondiscrimination)**

Federal Supply Schedule

To other than the low bidder

Justification

Purchase of dictating equipment under multiple-award Federal Supply Schedule contract from other than low bidder justified on basis of higher trade-in value, more extensive and dependable maintenance and repair service, that equipment would better serve actual needs of using agency, and that one feature of equipment alone would result in cost saving which would absorb price difference within few years, saving that would continue in subsequent years, satisfies requirements of par. 101-26.408-3 of Federal Property Management Reg., and purchase more advantageous to Govt., price and other factors considered, comes within contemplation of 41 U.S.C. 253(b)---- 135

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Government property

Unauthorized use

Production overrun

Excess production overrun of shirts manufactured from quantity of Govt-furnished material requested by contractor is property of Govt. and no compensation or material credit may be allowed contractor for unauthorized use of Govt.'s material under bailment, nor may shirts be retained and paid for as "seconds," even though overrun may have been occasioned by subcontracting work to accelerate deliveries, subcontracting having been approved on basis of "no additional cost to Govt.," and one-half of 1 percent quantity variation furnishing contractor reasonable protection prescribed by par. 1-325.1 of Armed Services Procurement Reg.—which also precludes establishment of standard or usual percentage quantity variation and requires that overrun or underrun be based on normal commercial practices—quantity variation provisions of contract are for enforcement thus enabling Govt. to control flow of end items 111

Increased costs

Cost greater than contemplated

Specifications enforced

Low bidder, having obtained corrosion control facility construction contract by submitting bid that conformed to specifications but who deliberately planned to disregard using paving equipment prescribed in invitation in belief specifications would not be enforced, when compelled to conform in accordance with specifications may not recover additional amount expended by alleging bid mistake, absent showing contracting officer was chargeable with notice that required equipment was unobtainable and that it was unreasonable for him in light of his experience with similar projects not to check subitems to suggest possible areas of error to contractor when he found overall price differential did not require verification. Therefore, contractor having accepted award without objection is estopped from questioning validity of contract upon failing to have contract interpreted and enforced as hoped 378

Government activities

Delays

Recovery of stand-by costs and related expenses incurred by contractor in connection with delayed performance of contract for grading timber access road and constructing footbridge is limited in absence of contractual provision for payment of delayed costs to additional expenses directly attributable to changed work authorized under Changes clause of contract which disrupted contract, and in accordance with so-called *Rice* doctrine, *U.S.* v. *Rice*, 317 U.S. 61, payment may not be made for consequential expenses incurred incident to unchanged work .. 95

Work suspension

Additional costs incurred by contractor to install television surveillance system at Cape Kennedy due to delays occasioned by launch activities, where contract did not contain "Suspension of Work" clause or other provisions to cover delay but did require contractor to ascertain work conditions, constitute claim for breach of contract damages within settlement jurisdiction of GAO. However, as cause of delay was evident at time contract was executed, no fault or negligence is attributable to Govt. and, therefore, there is no legal liability on part of Govt. to pay contractor increased costs 475

CONTRACTS—Continued Page

Increased costs—Continued

Government activities—Continued

Work suspension—Continued

While every contract implies promise that neither party to contract will prevent, hinder, or delay performance, nature and scope of such promise must be gathered from particular contract, its content, and surrounding circumstances. Where contract imposes responsibility on contractor to ascertain conditions that could affect work or cost, failure of contractor to consider delays attributable to normal operations that are evident at time contract is executed does not relieve contractor from performing work without additional costs to Govt., and delays occasioned by no fault or negligence on part of Govt. do not constitute breach of contract imposing legal liability on Govt. for increased cost.. 475

Labor costs

Under personal service contract with Govt., contractor who pursuant to Service Contract Act of 1965 is required to pay minimum wage rates specified in Fair Labor Standards Act of 1938, as amended, is not entitled to price adjustment for subsequent wage increase prescribed by Fair Labor Standards Amendment of 1966, neither amendment nor contract providing for adjustment to cover wage increase, and contractor having based its bid on assumption that labor could be obtained for period of contract at no more than the then current minimum wage fixed by act, voluntarily assumed risk of increased costs, whether occasioned by change in law or otherwise, and fact that increase in wage rates was result of Govt. action does not afford contractor greater rights than if contract had been with any other party..... 313

Labor stipulations

Davis-Bacon Act

Applicability

Criteria

Determination pursuant to Atomic Energy Commission Regs., implementing Federal Procurement Regs., not to require payment of Davis-Bacon Act wage rates in performance of reactor system assembly for Loss of Fluid Test (LOFT) Experiment on basis "LOFT" will not be assembled on site of proposed containment and control facility, nor be installed in that building and, therefore, not constituting construction of conventional reactor, assembly work is not subject to act, will not be disturbed, Commission having responsibility of administering and enforcing contracts, interpretation of its regulations that assembly work is not "construction work" or "public work," but experimental work is authoritative, absent reason for Dept. of Labor holding that fact reactor is part of mobile system to be used for experimental work does not remove its assembly and fabrication from coverage of Davis-Bacon Act. 192

Minimum wage determinations

Prospective wage rate increase

Under invitation containing prevailing minimum wage determination by Secretary of Labor to cover laborers and mechanics to be employed on proposed flood control project, fact that bids are scheduled to be opened few days before occurrence of automatic escalation of wage rates pursuant to labor agreement with union is no reason to postpone scheduled opening of bids. The Davis-Bacon Act, 40 U.S.C. 276a, does not provide for modification or adjustment of advertised prevailing minimum wage rates for laborers and mechanics employed on construction projects, nor does specification of minimum wages in invitation constitute representation that labor can be obtained at such rates..... 754

CONTRACTS—Continued Page

Labor stipulations—Continued

Nondiscrimination

"Affirmative action programs"

Invitation that without furnishing details requires bidders to submit an acceptable "affirmative action program" to assure compliance with Equal Employment Opportunity Program is defective, as invitations are designed to secure firm bid commitments upon which award can be made and are not intended as first step for subsequent negotiation procedure, and, therefore, such invitation is incompatible with 23 U.S.C. 112 prescribing competitive bidding for federally assisted highway construction, and similar statutory provisions 666

To comply with competitive bidding statutes, proposed order by Office of Federal Contract Compliance, Dept. of Labor, to require contractors and subcontractors to submit before contract award acceptable "affirmative action program" for compliance with equal employment opportunity conditions of E.O. No. 11246 of Sept. 24, 1965, under invitations that do not outline details of acceptable action program, should be implemented by regulations defining minimum requirements to be met by bidder's program, and any other standards or criteria by which acceptability of program will be judged 666

Service Contract Act of 1965

Relief for increased wages

Under personal service contract with Govt., contractor who pursuant to Service Contract Act of 1965 is required to pay minimum wage rates specified in Fair Labor Standards Act of 1938, as amended, is not entitled to price adjustment for subsequent wage increase prescribed by Fair Labor Standards Amendment of 1966, neither amendment nor contract providing for adjustment to cover wage increase, and contractor having based its bid on assumption that labor could be obtained for period of contract at no more than the then current minimum wage fixed by act, voluntarily assumed risk of increased costs, whether occasioned by change in law or otherwise, and fact that increase in wage rates was result of Govt. action does not afford contractor greater rights than if contract had been with any other party 313

Labor surplus area awards. (*See* **Contracts, awards, labor surplus areas**)

Leases. (*See* **Leases**)

Mistakes

Acceptance of contract with knowledge of mistake

Low bidder, having obtained corrosion control facility construction contract by submitting bid that conformed to specifications but who deliberately planned to disregard using paving equipment prescribed in invitation in belief specifications would not be enforced, when compelled to conform in accordance with specifications may not recover additional amount expended by alleging bid mistake, absent showing contracting officer was chargeable with notice that required equipment was unobtainable and that it was unreasonable for him in light of his experience with similar projects not to check subitems to suggest possible areas of error to contractor when he found overall price differential did not require verification. Therefore, contractor having accepted award without objection is estopped from questioning validity of contract upon failing to have contract interpreted and enforced as hoped .. 378

CONTRACTS—Continued Page

Mistakes—Continued

Acceptance of contract with knowledge of mistake—Continued

Although bidder alleging error was denied opportunity prior to award to furnish evidence of bid error as required by par. 2–406 of Armed Services Procurement Reg., price adjustment may not be approved, absent evidence of intended bid price. Worksheets showing total bid price of $616,128, reduced to $616,000 for purpose of bidding, rounding out of figures and gross price deduction make it difficult to determine to what extent bidder would have included amount claimed in bid price. However, appropriate steps should be taken to assure that in future par. 2–406 is complied with and bidder requesting correction of bid error is given opportunity prior to award to furnish to contracting officer, evidence of error and bid actually intended for consideration by appropriate authority ---------- 507

Allegation after award

Rule

Contractor who subsequent to contract performance alleged mistake in bid that had been confirmed on several occasions and denied price adjustment under Pub. L. 85–804, which authorized contract modification without consideration to facilitate national defense, is not entitled to contract modification under general rule that contract may not be amended or modified without compensating benefit to Govt. Repeated advice to contractor of suspected bid error, fulfilled Govt.'s responsibility to obtain bid verification, and bidder having responsibility of estimating price at which contract could be performed at reasonable profit, Govt. was not required in preaward survey to review contractor's pricing estimates ---------- 732

Allegation before award. (*See* **Bids, mistakes**)

Item error in aggregate bid

Under negotiated procurement providing for award of requirements contract in aggregate to lowest bidder, where contracting officer is not required to compare bid prices on individual items, and where 13-percent difference between low aggregate offer and next lowest aggregate offer is not sufficient to place contracting officer on notice of probability of error, alleged mistake in bid price of one item may not be corrected, no mutual mistake having been made in drawing of contract, which reflecting intended agreement of parties is considered to have been awarded in good faith, and fact that error was mistake in judgment on part of bidder, and that actual requirements of Govt. substantially exceeded estimated requirements does not provide legal basis for reforming contract or for granting relief by increase in price ---------- 365

Verification prior to allegation of error

Adequacy of information

Contracting officer who inquired if low bid greatly out of line with Govt.'s estimate and next low bid was considered satisfactory, if bid figures had been checked, and if job could be performed at bid price quoted, satisfied verification requirements of par. 2–406.3(e)(1) of Armed Services Procurement Reg. and sufficiently warned bidder of possibility of mistake in bid, as specific request for bid verification is not necessary where bidder's attention has been invited to checking bid prices and contracting officer is advised bid has been verified and no error

CONTRACTS—Continued Page
Mistakes—Continued
Verification prior to allegation of error—Continued
Adequacy of information—Continued
found. Therefore, acceptance of bid without knowledge of error having consummated valid and binding contract, there is no entitlement to additional compensation on basis of mistake in bid alleged year after contract award---- 616
Negotiation
Addenda acknowledgment requirement
Where first two low offerors under solicitation issued pursuant to 10 U.S.C. 2304(a)(2) failed to acknowledge amendment, award to next highest offeror without negotiation in accordance with right reserved to Govt. to make award "based on initial offers received without discussion of such offers" was proper. Although strict application of late addendum rule is not appropriate in every case involving negotiated procurement, contract having been negotiated under public exigency exception to formal advertising in view of urgency of procurement, and offerors having been advised that failure to acknowledge receipt of amendment "may result in rejection of your offer," and that award of contract may be based on initial offers, contract awarded is not subject to question---- 459
Awards
Initial proposal basis
Negotiation procedures unlike formal advertising procedures designed to be flexible and informal, reservation in request for proposals to award contract on basis of initial proposals was not irrevocable determination, and having invoked 10 U.S.C. 2304(a)(10) authority, contracting officer should have negotiated late price reduction that replaced low offer as required by par. 3-805.1 of Armed Services Procurement Reg., par. 3-506, respecting acceptance of late offer, not precluding negotiation, and exercise of contract option within discretion of Govt., price reduction is not considered attempt to "buy-in," absent evidence of "inside" knowledge or fraud on part of offeror. However, no law or regulation having been violated, contract awarded is legal, but future recurrence of situation should be prevented and contract option not exercised unless advantageous to Govt---- 279
Propriety
Failure to negotiate with all offerors
Under request for quotations contemplating cost-plus-incentive-fee contract for aircraft maintenance services, contract to contain option for continuation of services, determination that cost estimates submitted were unrealistic, making it impossible for offerors to qualify for incentive fees, and award without further negotiation of fixed-fee contract instead on basis of fee floors and rates for employee insurance benefits, only areas of difference between offerors within competitive price range, was improper and not in accord with 10 U.S.C. 2304(g), requiring that offerors within competitive range be informed of areas in which their proposals are deficient and be given opportunity to justify reasonableness of their cost estimates or to revise those estimates and/or fee floors to satisfy Govt.'s requirements. However, although practical considerations militate against cancellation of contract, contract option should not be renewed but new contract negotiated---- 336

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Negotiation—Continued

Changes, etc.

Specifications

Under Request for Quotations (RFQ) transformed from noncompetitive to competitive procurement, where partial emergency award was made to sole source manufacturer of voltmeters pending evaluation of "equal" item offered at lower price, decision to consider "equal" product having relaxed specifications, amendment of RFQ, with notice and opportunity to original manufacturer to compete is required by pars. 3-805.1 (b) and (e) of Armed Services Procurement Reg. Failure to give original manufacturer "equitable opportunity to negotiate" on balance of procurement not justified under par. 3-805.1a(v), in view of detailed presentation of competing equipment, award to offeror of "equal" item on quotation revised to include provisioning data and publications without charge is prohibited by par. 3-805.1(a)---------- 778

Competition

Adequate

Negotiation pursuant to 10 U.S.C. 2304(a)(11) of one contract under two requests for proposals (RFP), which incorporated by reference brand name or equal clause was restrictive of competition where under first RFP only one offer was received in response to limited competition that did not meet competition contemplated by 10 U.S.C. 2304(g) and, therefore, constituted sole-source procurement, and where rejection of only other proposal under second RFP for failure to meet salient characteristics of brand-name item indicated preference for brand name. Although award will not be disturbed, performance specifications should be drafted in order to obtain, whether by advertising or negotiation, adequate and effective competition in future---------- 409

Competitive range formula

Refusal of Air Force in selecting source for furnishing electronic data processing equipment (EDPE), to be purchased by General Services Admin. (GSA) under the Federal Supply System, to discuss technical deficiencies of proposal that offered lower price than that of only proposal out of four considered acceptable violated 10 U.S. Code 2304(g), which provides for written or oral discussions with all responsible offerors submitting proposals within competitive range, price and other factors considered, when negotiated procurement exceeds $2,500, and authority of GSA to coordinate and provide for economic and efficient acquisition of EDPE neither impairing selection right of an agency nor exempting selection from procurement laws and regulations, further discussions should be conducted on low proposal, which having met all requirements except one portion of demonstration test is within competitive range, and on any other proposals satisfying the "within a competitive range" requirement---------- 29

Maximum possible extent

Fixing of prices and allocation of coal sold to European prime contractors by American export association of subcontractors claiming Webb-Pomerene Act, 15 U.S.C. 61-65, immunity to antitrust laws is restrictive of competitive negotiation required by par. 3-102(c) of Armed Services Procurement Reg., as requirement is not dependent upon or subject to antitrust laws and, notwithstanding contract awarded

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Maximum possible extent—Continued
is fixed-price contract, control exercised by Army over every aspect of procurement extinguished distinction between prime and subcontractors and Govt. ultimately bearing excessive subcontracting costs has been prejudiced by noncompetitive activities of subcontractors. However, although contract is voidable at option of Govt., practical reasons preclude disturbing award, but future coal procurements should be on fully competitive basis 223
Discontinuance of practice by American subcontractors supplying anthracite coal to European prime contractors at Army bases overseas of fixing prices and allocating coal quantities to their common export firm under antitrust immunity of Webb-Pomerene Act, recommended in 47 Comp. Gen. 223 in order to obtain maximum practicable competition will not jeopardize Army's ability to procure coal and, therefore, in Request for Proposals, "certificate of independent price determination" clause should be modified to preclude restriction of competition, and "competition in subcontracting" clause made effective by removal of exemptive language relating to sales agencies. Also recommended is modification of noncompetitive discounts clause to particularize quantity discounts which are and are not economically and competitively justified, and elimination of sole-source effect of exclusive purchase conditions imposed by exporter 562
Purchase orders under an indefinite quantity contract
Issuance without securing competition of purchase orders for generator sets during last 2 months of 12-month contract negotiated under 10 U.S.C. 2304(a)(13) for indefinite quantity of sets, as provided in par. 3–409.3 of Armed Services Procurement Reg., did not violate advertising statute at sec. 3709 of Revised Statutes (41 U.S.C. 5), or 10 U.S.C. 2304(g), regarding competition to extent feasible in negotiation of contracts, absent evidence of possibility that another supplier could have furnished sets at lower price 155
Cost-plus-incentive-fee contracts
Deficient proposals
Under request for quotations contemplating cost-plus-incentive-fee contract for aircraft maintenance services, contract to contain option for continuation of services, determination that cost estimates submitted were unrealistic, making it impossible for offerors to qualify for incentive fees, and award without further negotiation of fixed-fee contract instead on basis of fee floors and rates for employee insurance benefits, only areas of difference between offerors within competitive price range, was improper and not in accord with 10 U.S.C. 2304(g), requiring that offerors within competitive range be informed of areas in which their proposals are deficient and be given opportunity to justify reasonableness of their cost estimates or to revise those estimates and/or fee floors to satisfy Govt.'s requirements. However, although practical considerations militate against cancellation of contract, contract option should not be renewed but new contract negotiated 336

CONTRACTS—Continued Page

Negotiation—Continued

Discretionary authority

Negotiation procedures unlike formal advertising procedures designed to be flexible and informal, reservation in request for proposals to award contract on basis of initial proposals was not irrevocable determination, and having invoked 10 U.S.C. 2304(a)(10) authority, contracting officer should have negotiated late price reduction that replaced low offer as required by par. 3-805.1 of Armed Services Procurement Reg., par. 3-506, respecting acceptance of late offer, not precluding negotiation, and exercise of contract option within discretion of Govt., price reduction is not considered attempt to "buy-in," absent evidence of "inside" knowledge or fraud on part of offeror. However, no law or regulation having been violated, contract awarded is legal, but future recurrence of situation should be prevented and contract option not exercised unless advantageous to Govt 279

Evaluation factors

Administrative determination

Determination by contracting officer under request for proposals that Canadian subcontractor was nonresponsible having been reported deficient in technical capability and ability to meet delivery schedules does not evidence abuse of administrative discretion judged on basis of information available to him at time of determination, therefore, exclusion of subcontractor from negotiations and award to another offeror were proper even though prime contractor should have been notified before award of nonresponsibility determination and requested to clarify information questioning determination, but should not have been requested after determination was made to extend its offer. However, determination of nonresponsibility does not preclude consideration of subcontractor for future procurements, and guidelines for determining responsibility of Canadian firms should be promulgated 373

Delivery schedules

Although it is inappropriate in formally advertised procurements to permit bidders to submit alternate delivery schedules, where Govt. in Request for Proposals (RFP) invites alternate delivery schedules on basis of furnishing or waiving first article requirement and provides for disregard of 21 day or less delivery difference in alternate schedules, failure to consider low offer based on waiving first article requirement in favor of 18 day shorter delivery schedule involving furnishing first article was inconsistent with RFP and purpose of "negotiation," par. 1-1903(a) of Armed Services Procurement Reg. not restricting evaluation of delivery differences between alternate delivery schedules that offer to furnish or to waive first article requirement. Although due to emergency of procurement, award will not be disturbed, guidelines to preclude recurrence of situation are suggested 448

"Or equal" products

Under solicitation for replacement of cylinder lining originally furnished in diesel engines which sought "product equal in all material respects to original manufacturer's product," and required offerors to furnish both their own drawings and manufacturer's original ones, rejection of low proposal offering evidence of successful commercial operation in lieu of manufacturer's original drawings because of inability

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
"Or equal" products—Continued
to compare two products and evaluate offered replacement was legally correct. Although rewritten solicitation now permits drawings or other data to be furnished if adequate descriptive data is unobtainable, it is recommended that proposals under revised solicitation be considered on individual merits, and where information furnished reasonably supports independent determination of equivalency, that award be made without regard to absence of original manufacturer's drawings---------- 603
Point rating
Competitive range formula
Determination to evaluate proposals for furnishing tape recorders, spare parts, and use documentation on only common basis offered, price of recorder, rather than on basis of points assigned to cost, management, and technical criteria established after issuance of request for proposals was not proper exercise of administrative discretion, for unlike management and technical evaluations, cost evaluations can be objectively measured on overall costs and, therefore, negotiation of procurement with only one of five offerors was not in accord with par. 3–804 of Armed Services Procurement Reg. requiring clarification of defectively priced proposals. However, even in applying defective cost evaluation technique, one of rejected proposals coming within "competitive range" contemplated by 10 U.S.C. 2304(g) should have been considered as it was not so technically inferior as to preclude meaningful negotiation. Although award made will not be disturbed, steps should be taken to avoid recurrence of similar negotiation procedures---------- 252
Limitation on negotiation
Propriety
Negotiation procedures unlike formal advertising procedures designed to be flexible and informal, reservation in request for proposals to award contract on basis of initial proposals was not irrevocable determination, and having invoked 10 U.S.C. 2304(a)(10) authority, contracting officer should have negotiated late price reduction that replaced low offer as required by par. 3–805.1 of Armed Services Procurement Reg., par. 3–506, respecting acceptance of late offer, not precluding negotiation, and exercise of contract option within discretion of Govt., price reduction is not considered attempt to "buy-in," absent evidence of "inside" knowledge or fraud on part of offeror. However, no law or regulation having been violated, contract awarded is legal, but future recurrence of situation should be prevented and contract option not exercised unless advantageous to Govt---------- 279
Under request for quotations contemplating cost-plus-incentive-fee contract for aircraft maintenance services, contract to contain option for continuation of services, determination that cost estimates submitted were unrealistic, making it impossible for offerors to qualify for incentive fees, and award without further negotiation of fixed-fee contract instead on basis of fee floors and rates for employee insurance benefits, only areas of difference between offerors within competitive price range, was improper and not in accord with 10 U.S.C. 2304(g), requiring that offerors within competitive range be informed of areas in which their proposals are deficient and be given opportunity to justify reasonableness of their

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Negotiation—Continued

Limitation on negotiation—Continued

Propriety—Continued

cost estimates or to revise those estimates and/or fee floors to satisfy Govt.'s requirements. However, although practical considerations militate against cancellation of contract, contract option should not be renewed but new contract negotiated---------- 336

Under Request for Quotations (RFQ) transformed from noncompetitive to competitive procurement, where partial emergency award was made to sole source manufacturer of voltmeters pending evaluation of "equal" item offered at lower price, decision to consider "equal" product having relaxed specifications, amendment of RFQ, with notice and opportunity to original manufacturer to compete is required by pars. 3–805.1 (b) and (e) of Armed Services Procurement Reg. Failure to give original manufacturer "equitable opportunity to negotiate" on balance of procurement not justified under par. 3–805.1a(v), in view of detailed presentation of competing equipment, award to offeror of "equal" item on quotation revised to include provisioning data and publications without charge is prohibited by par. 3–805.1(a)---------- 778

Mistakes

Item error in aggregate bid

Under negotiated procurement providing for award of requirements contract in aggregate to lowest bidder, where contracting officer is not required to compare bid prices on individual items, and where 13-percent difference between low aggregate offer and next lowest aggregate offer is not sufficient to place contracting officer on notice of probability of error, alleged mistake in bid price of one item may not be corrected, no mutual mistake having been made in drawing of contract, which reflecting intended agreement of parties is considered to have been awarded in good faith, and fact that error was mistake in judgment on part of bidder, and that actual requirements of Govt. substantially exceeded estimated requirements does not provide legal basis for reforming contract or for granting relief by increase in price---------- 365

Notice of disqualification

Determination by contracting officer under request for proposals that Canadian subcontractor was nonresponsible having been reported deficient in technical capability and ability to meet delivery schedules does not evidence abuse of administrative discretion judged on basis of information available to him at time of determination, therefore, exclusion of subcontractor from negotiations and award to another offeror were proper even though prime contractor should have been notified before award of nonresponsibility determination and requested to clarify information questioning determination, but should not have been requested after determination was made to extend its offer. However, determination of nonresponsibility does not preclude consideration of subcontractor for future procurements, and guidelines for determining responsibility of Canadian firms should be promulgated---------- 373

CONTRACTS—Continued Page
Negotiation—Continued
Public exigency
Failure to meet conditions
Where first two low offerors under solicitation issued pursuant to 10 U.S.C. 2304(a)(2) failed to acknowledge amendment, award to next highest offeror without negotiation in accordance with right reserved to Govt. to make award "based on initial offers received without discussion of such offers" was proper. Although strict application of late addendum rule is not appropriate in every case involving negotiated procurement, contract having been negotiated under public exigency exception to formal advertising in view of urgency of procurement, and offerors having been advised that failure to acknowledge receipt of amendment "may result in rejection of your offer," and that award of contract may be based on initial offers, contract awarded is not subject to question---- 459
Options
Indefinite *v.* requirements contract
Under contract negotiated pursuant to 10 U.S.C. 2304(a)(13), for generator sets to be purchased during 12-month period, and subject to minimum and maximum quantity, as well as dollar limitations, funding of last two purchases was not inconsistent with provisions of Armed Services Procurement Reg., nor in violation of appropriation provisions at secs. 3732, 3679, and 3690 of Revised Statutes, even though sufficient funds to cover maximum quantities orderable were not available at time contract was executed, contract, indefinite quantity and not requirements contract, Govt. was not required to obligate more than cost of minimum quantity, and issuance of purchase orders analogous to situation in *Leiter* v. *U.S.*, 271 U.S. 204, regarding lease renewal option, which did not go into funding, is not authority for concluding last two purchase orders were illegally issued---------- 155
While in ordinary usage there is little distinction between contract including option for additional amount and indefinite quantity contract, expressions are employed in Armed Services Procurement Reg. as particular terms of art to distinguish between two different kinds of option contracts, and use of indefinite quantity contract described in par. 3-409.3 for negotiation of commercial items, without time or quantity limitations, in purchase of minimum quantity of generator sets, with right to order during 1-year period additional quantities up to eight times minimum was appropriate, as option contract described in par. 1-1501 *et seq.*, which does limit time and quantities, is intended for use in advertising or negotiating for items not readily available on open market, where requirements beyond minimum quantities are foreseeable and later orders may represent less than minimum economic production quantities, which considering start-up costs, production lead time, etc., could preclude adequate competition---------- 155
Patents. (*See* **Patents**)

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Payments

Discounts for prompt payment. (*See* **Contracts, discounts**)

Progress

Request

Low bid of small business concern in which progress payments were requested in an accompanying letter that is considered part of bid, in amount of 75 percent of total costs prescribed for small business concerns in Armed Services Procurement Reg. (ASPR) Appendix E–503, which was submitted in response to invitation that did not provide for small business set-aside but incorporated by reference 70 percent Progress Payment Clause in ASPR App. E–510.1, is qualified bid and deviation deliberately taken is not trivial or minimal but modifies legal obligation of parties concerning payment, notwithstanding negligible effect on price and precatory nature of term "request" and, therefore, bid deviation is not minor informality or irregularity that may be waived under ASPR 2–405 by contracting officer 496

Fact that Armed Services Procurement Reg. (ASPR) Appendix E–505 contemplates request for and granting of "unusual" progress payments at percentages in excess of customary 70 percent provided in ASPR App. E–510.1, does not have effect of putting contracting officer on notice that request for 75 percent of total cost progress payments provided in ASPR App. E–503 under invitation including 70 percent Progress Payment Clause is possible minor informality or irregularity that may be waived within meaning of ASPR 2–405, as ASPR App. E–505, while permitting requests for progress payments in excess of customary 70 percent has reference to requests from contractors and does not grant similar rights to bidders or prospective contractors 496

Bid accompanied by letter requesting authorization of larger progress payments than provided for in invitation is qualified bid that does not reserve to bidder option after bid opening to waive condition and accept contract or refuse to accept contract, notwithstanding the word "request" is precatory in nature, as word is susceptible of two possible meanings depending on existing circumstances, or that word "authority" is deemed precatory in nature rather than demand and, therefore, qualified bid was properly rejected 496

Price adjustment

Changes

Unchanged work

Recovery of stand-by costs and related expenses incurred by contractor in connection with delayed performance of contract for grading timber access road and constructing footbridge is limited in absence of contractual provision for payment of delayed costs to additional expenses directly attributable to changed work authorized under Changes clause of contract which disrupted contract, and in accordance with so-called *Rice* doctrine, *U.S.* v. *Rice*, 317 U.S. 61, payment may not be made for consequential expenses incurred incident to unchanged work 95

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Privity

Contractor costs

Insurance premiums

Claim of insurance company for unpaid premiums on policies providing for retrospective determination of earned premiums covering workmen's compensation, public liability and other required insurance that is reimbursable under cost-type contracts may be paid notwithstanding "No Cost Settlement Agreement" that included mutual releases, and lack of privity between Govt. and insurance company. Contracting officer under sec. 10–554 of Army Procurement Procedure—which has force and effect of law—having responsibility upon termination or completion of cost-reimbursable-type contract to obtain insurance credits due contractor or to assume contractor's insurance obligations, liability of Govt. for unpaid insurance premiums is mandatory and must be read into termination settlement 457

Subcontractors

Concept

Fixing of prices and allocation of coal sold to European prime contractors by American export association of subcontractors claiming Webb-Pomerene Act, 15 U.S.C. 61–65, immunity to antitrust laws is restrictive of competitive negotiation required by par. 3–102(c) of Armed Services Procurement Reg., as requirement is not dependent upon or subject to antitrust laws and, notwithstanding contract awarded is fixed-price contract, control exercised by Army over every aspect of procurement extinguished distinction between prime and subcontractors and Govt. ultimately bearing excessive subcontracting costs has been prejudiced by noncompetitive activities of subcontractors. However, although contract is voidable at option of Govt., practical reasons preclude disturbing award, but future coal procurements should be on fully competitive basis 223

Requirements

What constitutes

Under contract negotiated pursuant to 10 U.S.C. 2304(a)(13), for generator sets to be purchased during 12-month period, and subject to minimum and maximum quantity, as well as dollar limitations, funding of last two purchases was not inconsistent with provisions of Armed Services Procurement Reg., nor in violation of appropriation provisions at secs. 3732, 3679, and 3690 of Revised Statutes, even though sufficient funds to cover maximum quantities orderable were not available at time contract was executed, contract, indefinite quantity and not requirements contract, Govt. was not required to obligate more than cost of minimum quantity, and issuance of purchase orders analogous to situation in *Leiter* v. *U.S.*, 271 U.S. 204, regarding lease renewal option, which did not go into funding, is not authority for concluding last two purchase orders were illegally issued 155

While in ordinary usage there is little distinction between contract including option for additional amount and indefinite quantity contract, expressions are employed in Armed Services Procurement Reg. as particular terms of art to distinguish between two different kinds of option contracts, and use of indefinite quantity contract described in par.

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What constitutes—Continued
3–409.3 for negotiation of commercial items, without time or quantity limitations, in purchase of minimum quantity of generator sets, with right to order during 1-year period additional quantities up to eight times minimum was appropriate, as option contract described in par. 1–1501 *et seq.*, which does limit time and quantities, is intended for use in advertising or negotiating for items not readily available on open market, where requirements beyond minimum quantities are foreseeable and later orders may represent less than minimum economic production quantities, which considering start-up costs, production lead time, etc., could preclude adequate competition 155
Sales. (*See* Sales)
Service Contract Act. (*See* Contracts, labor stipulations, Service Contract Act of 1965)
Small business concerns. (*See* Contracts, awards, small business concerns)
Specifications
Addenda acknowledgment. (*See* Contracts, specifications, failure to furnish something required, addenda acknowledgment)
Adequacy
Correction recommended
Rejection of low bid to furnish cable in accordance with Military Specifications that are based on sole source brand name cable because offered cable required use of adapters and connectors to make it interchangeable with brand name cable in use, where bidders had not been informed of interchangeability requirement and rejected cable possessed characteristics similar to brand name and would perform equally as well, was erroneous and recourse should have been made to brand name "or equal" clause to overcome difficulties in drafting detailed specifications. Therefore, due to failure to advise bidders of need for interchangeability of cables or logistic problem that would result from procurement of other than brand name, advertised specifications are inconsistent with full and free competition required by 10 U.S.C. 2305(a) and invitation should be canceled 175
Invitation for electric equipment which contained a "brand name or equal" clause that did not list "interchangeability" as salient characteristic, and clauses that required submission and testing of bid samples that would in addition to other factors be evaluated for interchangeability is misleading invitation. Although award was made to low bidder whose descriptive literature and sample model were determined to meet salient characteristics itemized in purchase description, no corrective action is required due to delivery conditions. However, appropriate steps should be taken to insure that misleading provisions are deleted from future brand name or equal invitations, and that brand-name model specified in invitation meets salient characteristics desired by Govt 501

CONTRACTS—Continued Page
Specifications—Continued
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
Changes, revisions, etc.
After bid opening
Propriety
Restrictions contained in invitation for bids that precluded consideration of more economical and practical method of river dredging to be accomplished by means of alternate rehandling operations and use of other than Govt. furnished disposal areas, although invitation provided for negotiation of alternate disposal areas after contract award, were unjustified, and alternate bidding method not *per se* invalid nor considered bidding on different job but rather bidding on common basis with other bidders, meeting needs of Govt., restrictions on bidder's customary internal operations, even if intended to encourage other bidders, were inconsistent with full and free competition contemplated by 10 U.S.C. 2305 and, therefore, invitation should be canceled and reissued or modified. However, if full and free competition required under sec. 2305 creates dredging procurement problems, matter should be presented to Congress 236
Delays
Reimbursement
Recovery of stand-by costs and related expenses incurred by contractor in connection with delayed performance of contract for grading timber access road and constructing footbridge is limited in absence of contractual provision for payment of delayed costs to additional expenses directly attributable to changed work authorized under Changes clause of contract which disrupted contract, and in accordance with so-called *Rice* doctrine, *U.S. v. Rice*, 317 U.S. 61, payment may not be made for consequential expenses incurred incident to unchanged work 95
Conformability of equipment, etc.
Bid acceptance time. (*See* Bids, acceptance time limitation)
Information deviating from specifications
Under solicitation that provided no exception to furnishing new outer cylinders for aircraft, rejection of low proposal offering to furnish "overhauled certified" cylinders was proper, notwithstanding delayed award information, and was within purview of par. 1-1208 of Armed Services Procurement Reg. which authorizes procurement of used and reconditioned material and former Govt. surplus material, and in view of fact that word "overhauled" in industry and in Govt. engineering and procurement areas is accepted to indicate condition other than new and to imply repaired condition, and that low confirmed prices offered support conclusion new material was not proposed and would not be used in performance of contract, contracting officer is considered not to have had duty to "ferret" out unique meaning of and company policy attached to use of words "overhauled certified." However, in future procurements, award information should issue promptly 390

CONTRACTS—Continued Page

Specifications—Continued

Consolidation

Total small business set-asides under solicitations listing aerial delivery slings by different Federal Stock Numbers (FSN) may not be vetoed under par. 1–706.1(c)(ii) of Armed Services Procurement Reg. by large business concern designated "Planned Emergency Producer" for items other than those being solicited on basis procurement is different sizes of "one" item manufactured in accordance with common specification. Concern not a planned producer for items being solicited not only does not have right to veto set-asides, but procurement is not subject to item veto of regulation, word "item" as used in regulation being synonymous to use attributed to word in implementation of Defense Cataloging and Standardization Act, 10 U.S.C. 2451–2456, wherein each separate item of supply used recurrently is assigned FSN item identification, and act also required conformity of slings to common basic specification---------- 462

Defective

Commercial specifications availability

Invitation that referenced commercial specifications needed in preparation of bids is not defective invitation that precludes full and free competition contemplated by 10 U.S.C. 2305(b), where invitation was completed for bid preparation and evaluation purposes upon receipt of specifications by bidders responsible for obtaining referenced specifications---------- 611

Deviations

Deliberate

Low bidder, having obtained corrosion control facility construction contract by submitting bid that conformed to specifications but who deliberately planned to disregard using paving equipment prescribed in invitation in belief specifications would not be enforced, when compelled to conform in accordance with specifications may not recover additional amount expended by alleging bid mistake, absent showing contracting officer was chargeable with notice that required equipment was unobtainable and that it was unreasonable for him in light of his experience with similar projects not to check subitems to suggest possible areas of error to contractor when he found overall price differential did not require verification. Therefore, contractor having accepted award without objection is estopped from questioning validity of contract upon failing to have contract interpreted and enforced as hoped---------- 378

Informal *v.* substantive

Bid acceptance time

Two bid acceptance provisions in invitation, one standard form 33, entitled "Solicitation, Offer and Award," prescribing that bid will be open for 60-calendar days unless different period is specified by bidder in blank space provided, other, standard form 33A, entitled "Solicitation Instructions and Conditions," which stated that offer of less than 90 day acceptance period would be rejected are not inconsistent where 90-day reference in instructions is not intended to relieve bidder of responsibility of selecting acceptance period. Therefore, low bid submitted without specifying different acceptance period automatically offered 60 day bid acceptance period, and bid nonresponsive to 90 day acceptance period requirement may not be considered for award---------- 769

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued
Deliberate deviation
Low bid of small business concern in which progress payments were requested in an accompanying letter that is considered part of bid, in amount of 75 percent of total costs prescribed for small business concerns in Armed Services Procurement Reg. (ASPR) Appendix E–503, which was submitted in response to invitation that did not provide for small business set-aside but incorporated by reference 70 percent Progress Payment Clause in ASPR App. E–510.1, is qualified bid and deviation deliberately taken is not trivial or minimal but modifies legal obligation of parties concerning payment, notwithstanding negligible effect on price and precatory nature of term "request" and, therefore, bid deviation is not minor informality or irregularity that may be waived under ASPR 2–405 by contracting officer 496
Failure to bid on addendum
Failure to acknowledge amendments to invitation for building construction that affect both price and work quantity, where low bidder alleges failure was inadvertent and amendments had been considered in bid preparation, may not be waived as informality within purview of par. 2–405 of Armed Services Procurement Reg., and amendments providing for substantial increase in work to be performed, conflicting contentions as to price need not be resolved. Fact that bidder's representative remained silent to query before bid opening concerning receipt of amendments does not affect bid deviation, silence not having evidentiary attribute of positive oral affirmation, nor may statements made after bid opening be considered, as bid responsiveness must be established as of bid opening time 597
Failure to return invitation to bid attachments
Failure to return several pages containing material and substantive provisions of invitation for installation of roof ventilators with low bid, which on its face stated intent to comply with terms of invitation and which acknowledged amendments to invitation on bid form included in invitation does not require rejection of bid as nonresponsive where return of invitation was not requested, and low bidder in its proposal to perform contract in strict accordance with standard forms 23–A and 19–A, and specifications, schedules, drawings, and conditions of invitation offered total compliance and, therefore, low bid should be considered for award 680
Invitation to bid provisions
Cancellation of invitation that incorporated by reference Buy American clause in par. 6–104.5 of Armed Services Procurement Reg. because Buy American Certificate and Certification of Independent Price Determination requirements inadvertently omitted from invitation were considered essential was unjustified in view of fact that acceptance of bid under invitation would bind bidder to furnish domestic end products fixed by clause, and that Independent Price Determination, going to responsibility of bidder and not responsiveness of bid, could be furnished after bids were opened. Therefore, canceled invitation should be reinstated and submitted bids evaluated 624

CONTRACTS—Continued Page

Specifications—Continued

Deviations—Continued

Informal *v.* substantive—Continued

"New material" clause

Under solicitation that provided no exception to furnishing new outer cylinders for aircraft, rejection of low proposal offering to furnish "overhauled certified" cylinders was proper, notwithstanding delayed award information, and was within purview of par. 1–1208 of Armed Services Procurement Reg. which authorizes procurement of used and reconditioned material and former Govt. surplus material, and in view of fact that word "overhauled" in industry and in Govt. engineering and procurement areas is accepted to indicate condition other than new and to imply repaired condition, and that low confirmed prices offered support conclusion new material was not proposed and would not be used in performance of contract, contracting officer is considered not to have had duty to "ferret" out unique meaning of and company policy attached to use of words "overhauled certified." However, in future procurements, award information should issue promptly ---------- 390

Subcontracting percentages

Listing of category of specialty work to be performed under prime contract precluded by sec. 5B–2.202–70(a) of General Services Administration Procurement Regs. when category is less than 3½ percent of estimated cost of entire contract, discrepancy in listing or failure to list subcontractor for a less than 3½ percent category of specialty work under a prime contract for the extension and modification of a Federal building and post office may be waived as not affecting the responsiveness of the bid ---------- 644

Failure to furnish something required

Addenda acknowledgment

Bid nonresponsive

Failure to acknowledge amendments to invitation for building construction that affect both price and work quantity, where low bidder alleges failure was inadvertent and amendments had been considered in bid preparation, may not be waived as informality within purview of par. 2–405 of Armed Services Procurement Reg., and amendments providing for substantial increase in work to be performed, conflicting contentions as to price need not be resolved. Fact that bidder's representative remained silent to query before bid opening concerning receipt of amendments does not affect bid deviation, silence not having evidentiary attribute of positive oral affirmation, nor may statements made after bid opening be considered, as bid responsiveness must be established as of bid opening time ---------- 597

Negotiated procurements

Where first two low offerors under solicitation issued pursuant to 10 U.S.C. 2304(a)(2) failed to acknowledge amendment, award to next highest offeror without negotiation in accordance with right reserved to Govt. to make award "based on initial offers received without discussion of such offers" was proper. Although strict application of late addendum rule is not appropriate in every case involving negotiated procurement, contract having been negotiated under public exigency exception to formal advertising in view of urgency of procurement, and offerors having been advised that failure to acknowledge receipt of

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required—Continued
Addenda acknowledgment—Continued
Negotiated procurements—Continued
amendment "may result in rejection of your offer," and that award of contract may be based on initial offers, contract awarded is not subject to question 459
Bid bond
Loan project
Award of construction contract to cooperative—low bidder utilizing funds borrowed from Rural Electrification Admin. (REA)—nonresponsive to invitation because of substituting less costly and less protective combination of builder's risk insurance for cost of materials and contractor's bond for remaining costs in lieu of construction bond to cover entire contract price was inconsistent with advertised bidding principles and adversely affects free competition, notwithstanding waiver of required bond was considered "in best interests of borrower," and aided in promotion of project. Although award made in good faith and not contrary to 7 U.S.C. 904, granting broad discretion to REA Administrator, will not be disturbed, if less costly form of protection is adequate, future invitations should provide for alternative protection in lieu of performance bond 4
Information
Invitation to bid attachments
Failure to return several pages containing material and substantive provisions of invitation for installation of roof ventilators with low bid, which on its face stated intent to comply with terms of invitation and which acknowledged amendments to invitation on bid form included in invitation does not require rejection of bid as nonresponsive where return of invitation was not requested, and low bidder in its proposal to perform contract in strict accordance with standard forms 23–A and 19–A, and specifications, schedules, drawings, and conditions of invitation offered total compliance and, therefore, low bid should be considered for award 680
License approval
License requirements in total small business set-aside invitation for transportation of household effects and related services under three delivery schedules relating to bidder responsibility and not to bid evaluation, bidders who at time of bid opening had required State license for performance of one schedule and Interstate Commerce Commission permits pending for other two delivery schedules may be considered for award of all schedules. If compliance with "Permits and Licenses" clause of invitation had been required at time of bid opening, or bidding participation had been limited to permit holders, restrictions determinative not of bidder responsibility but of procurement responsibility and convenience, partial award pending ICC operating approval, if considered necessary, would be proper 539
Military
"All or none" bidding requirement
"All or none" bidding limitation in invitation soliciting bids for purchase of various types of refuse collection, materials-handling trucks with container hoisting devices, and for detachable refuse containers suitable

CONTRACTS—Continued Page

Specifications—Continued

Military—Continued

"All or none" bidding requirement—Continued

for use with trucks to be manufactured in accordance with performance type military specifications is not restrictive of competition where limitation is necessary to insure purchase of workable system for collection and handling of trash and is based upon bona fide determination that necessary degree of compatibility of components of advertised system cannot be otherwise achieved under referenced military specifications ---------- 701

Standardization propriety

Establishment of military specification standardizing proprietary swivel hook for use in tire chain assemblies without including in test program competitive product does not satisfy 10 U.S.C. Ch. 145, which contemplates fullest practicable cooperation and participation of industry in standardization development, and although in view of urgent need for tire chains, it would not be in public interest to interfere with current procurement of item, integrity of competitive bidding system requires suspension of further use of military specifications that restrict procurement of chain assemblies or spare parts to those concerns using proprietary hook until other competitive articles are tested and evaluated ------ 12

"New material" clause

Exception

Under solicitation that provided no exception to furnishing new outer cylinders for aircraft, rejection of low proposal offering to furnish "overhauled certified" cylinders was proper, notwithstanding delayed award information, and was within purview of par. 1–1208 of Armed Services Procurement Reg. which authorizes procurement of used and reconditioned material and former Govt. surplus material, and in view of fact that word "overhauled" in industry and in Govt. engineering and procurement areas is accepted to indicate condition other than new and to imply repaired condition, and that low confirmed prices offered support conclusion new material was not proposed and would not be used in performance of contract, contracting officer is considered not to have had duty to "ferret" out unique meaning of and company policy attached to use of words "overhauled certified." However, in future procurements, award information should issue promptly ---------- 390

Preparation

Bidder participation

Although commercial specifications incorporated by reference in invitation for aircraft recording system only became available from commercial publisher 7 days before bid opening time, two bidders to whom procurement was limited were not prejudiced, notwithstanding period allotted for preparation and submission of bids was less than 15 bidding days prescribed by par. 2–202.1 of Armed Services Procurement Reg. for procurement of standard commercial articles and services, as bidders had participated in procurement efforts of contracting agency and aware of technical requirements and complexities of recording system they could have prepared responsive bids within the time allotted for preparation and submission of bids ---------- 611

CONTRACTS—Continued Page
Specifications—Continued
Restrictive
Discarding all bids. (See Bids, discarding all bids, specifications restrictive)
Disposal areas under dredging contracts
Restrictions contained in invitation for bids that precluded consideration of more economical and practical method of river dredging to be accomplished by means of alternate rehandling operations and use of other than Govt. furnished disposal areas, although invitation provided for negotiation of alternate disposal areas after contract award, were unjustified, and alternate bidding method not *per se* invalid nor considered bidding on different job but rather bidding on common basis with other bidders, meeting needs of Govt., restrictions on bidder's customary internal operations, even if intended to encourage other bidders, were inconsistent with full and free competition contemplated by 10 U.S.C. 2305 and, therefore, invitation should be canceled and reissued or modified. However, if full and free competition required under sec. 2305 creates dredging procurement problems, matter should be presented to Congress 236
Particular make
Description availability
Under solicitation for replacement of cylinder lining originally furnished in diesel engines which sought "product equal in all material respects to original manufacturer's product," and required offerors to furnish both their own drawings and manufacturer's original ones, rejection of low proposal offering evidence of successful commercial operation in lieu of manufacturer's original drawings because of inability to compare two products and evaluate offered replacement was legally correct. Although rewritten solicitation now permits drawings or other data to be furnished if adequate descriptive is unobtainable, it is recommended that proposals under revised solicitation be considered on individual merits, and where information furnished reasonably supports independent determination of equivalency, that award be made without regard to absence of original manufacturer's drawings 603
"Or equal" not solicited
Rejection of low bid to furnish cable in accordance with military specifications that are based on sole source brand name cable because offered cable required use of adapters and connectors to make it interchangeable with brand name cable in use, where bidders had not been informed of interchangeability requirement and rejected cable possessed characteristics similar to brand name and would perform equally as well, was erroneous and recourse should have been made to brand name "or equal" clause to overcome difficulties in drafting detailed specifications. Therefore, due to failure to advise bidders of need for interchangeability of cables or logistic problem that would result from procurement of other than brand name, advertised specifications are inconsistent with full and free competition required by 10 U.S.C. 2305(a) and invitation should be canceled 175

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Salient characteristics

Negotiation pursuant to 10 U.S.C. 2304(a)(11) of one contract under two requests for proposals (RFP), which incorporated by reference brand name or equal clause was restrictive of competition where under first RFP only one offer was received in response to limited competition that did not meet competition contemplated by 10 U.S.C. 2304(g) and, therefore, constituted sole-source procurement, and where rejection of only other proposal under second RFP for failure to meet salient characteristics of brand-name item indicated preference for brand name. Although award will not be disturbed, performance specifications should be drafted in order to obtain, whether by advertising or negotiation, adequate and effective competition in future 409

Invitation for electric equipment which contained a "brand name or equal" clause that did not list "interchangeability" as salient characteristic, and clauses that required submission and testing of bid samples that would in addition to other factors be evaluated for interchangeability is misleading invitation. Although award was made to low bidder whose descriptive literature and sample model were determined to meet salient characteristics itemized in purchase description, no corrective action is required due to delivery conditions. However, appropriate steps should be taken to insure that misleading provisions are deleted from future brand name or equal invitations, and that brand-name model specified in invitation meets salient characteristics desired by Govt.... 501

Unwarranted

Requirement to use original manufacturer's repair parts in overhaul of diesel engines because it is considered impossible to administratively qualify each part before it is installed should be relaxed to permit bidders to offer parts that have demonstrated consumer acceptability or have been successfully supplied under past Govt. contracts, parts warranty required of prime contractor providing Govt. reasonable assurance of quality and reliability of parts furnished, and evidence of past Govt. contracts or satisfactory general commercial use serving same purpose as testing and approval of each part by contracting agency before it is installed in engine being overhauled 748

Wage determinations

Davis-Bacon Act. (*See* **Contracts, labor stipulations, Davis-Bacon Act, minimum wage determinations**)

Subcontractors

Government control

Fixing of prices and allocation of coal sold to European prime contractors by American export association of subcontractors claiming Webb-Pomerene Act, 15 U.S.C. 61–65, immunity to antitrust laws is restrictive of competitive negotiation required by par. 3–102(c) of Armed Services Procurement Reg., as requirement is not dependent upon or subject to antitrust laws and, notwithstanding contract awarded is fixed-price contract, control exercised by Army over every aspect of procurement extinguished distinction between prime and subcontractors and Govt. ultimately bearing excessive subcontracting costs has been

CONTRACTS—Continued Page

Subcontractors—Continued

Government control—Continued

prejudiced by noncompetitive activities of subcontractors. However, although contract is voidable at option of Govt., practical reasons preclude disturbing award, but future coal procurements should be on fully competitive basis ---------- 223

Privity. (*See* Contracts, privity)

Subcontracts

Bid shopping

Bidder affiliates listed as subcontractors

To permit low bidder under invitation for extension and modernization of Federal building and post office to list inactive affiliates as subcontractors would place bidder in guise of subcontractor in control of specialty work, free to bid shop among *bona fide* subcontractors, thereby obtaining competitive advantage over bidders listing themselves or *bona fide* subcontractors and, therefore, low bid was properly rejected as nonresponsive, even though invitation did not require specialty work to be performed by listed subcontractors. In any event, acceptance of low bid was precluded by failure of one of listed subcontractors to meet competency requirements of invitation ---------- 644

Listing of subcontractors

Listing of category of specialty work to be performed under prime contract precluded by sec. 5B–2.202–70(a) of General Services Administration Procurement Regs. when category is less than 3½ percent of estimated cost of entire contract, discrepancy in listing or failure to list a subcontractor for a less than 3½ percent category of specialty work under a prime contract for the extension and modification of a Federal building and post office may be waived as not affecting the responsiveness of the bid ---------- 644

Where occurrence of number of errors and inconsistencies in preparation of subcontractor listing form did not have adverse effect on competition or cause any misinterpretation that affected bid prices or prejudiced bidders' interest under invitation for extension and modernization of Federal building and post office, cancellation of invitation is not required by par. 1–2.404–1(b)(1) of Federal Procurement Regs. However, future solicitations should correlate subcontractor listing form and specifications so there is no doubt as to what is required of listed party ---------- 644

Tax matters

Social security taxes

Increase as requiring contract adjustment

Increase in social security taxes resulting from medicare program provided by Social Security Act Amendments of 1965, and designated "excise tax" on wages is not "Federal excise tax or duty on transactions or property covered by this contract" contemplated by contract clause in sec. 1–11.401–1 of Federal Procurement Regs. entitled "Federal, State and Local Taxes," which authorizes price adjustment for tax increases that occur after date of contract. Therefore, increase in social security taxes subsequent to execution of construction contract is not payable as contract change, tax clause employing phrase "transactions or property" in connection with subject matter of the contract and its

CONTRACTS—Continued Page
Tax matters—Continued
Social security taxes—Continued
Increase as requiring contract adjustment—Continued
purposes does not apply to social security tax increases, neither considered property nor transaction in sense of doing or performing business, but tax levied "upon relation of employment." 163
Termination
Convenience of Government
Propriety of termination
Termination of contract for convenience of Govt. because contractor failed to meet condition of contract, furnishing of performance bond within time prescribed, although administrative matter, contractor having furnished satisfactory bond despite notice of termination before expiration of extended due date, contracting officer should have considered feasibility of withdrawing termination notice, thereby eliminating expense of reprocurement as well as possible convenience termination costs. However, although replacement contract will not be disturbed, procurement personnel should be informed of rights and liabilities of Govt. and its contractors to preclude recurrence of similar situations 1
Insurance premiums unpaid
Claim of insurance company for unpaid premiums on policies providing for retrospective determination of earned premiums covering workmen's compensation, public liability and other required insurance that is reimbursable under cost-type contracts may be paid notwithstanding "No Cost Settlement Agreement" that included mutual releases, and lack of privity between Govt. and insurance company. Contracting officer under sec. 10–554 of Army Procurement Procedure—which has force and effect of law—having responsibility upon termination or completion of cost-reimbursable-type contract to obtain insurance credits due contractor or to assume contractor's insurance obligations, liability of Govt. for unpaid insurance premiums is mandatory and must be read into termination settlement 457
COORDINATED FEDERAL WAGE SYSTEM
Implementation
In view of designation under Coordinated Federal Wage System contained in chapter 532 of Federal Personnel Manual of lead agency in each wage area to conduct wage survey and develop wage schedules for use by all agencies in area, individual agency no longer may exercise discretion as to whether particular schedule should be placed in effect and, therefore, instructions may be issued to require each agency in wage area to place new wage schedule in effect on date decided upon by lead agency, provided date is not earlier than date lead agency actually prescribes schedule 774
COURTS
Costs
Awarded to United States
Disposition
Court costs awarded National Labor Relations Board under Pub. L. 89–507, approved July 18, 1966 (28 U.S.C. 2412), are for deposit into Treasury as miscellaneous receipts under 31 U.S.C. 484, absent authority in 1966 act or any other law making available for expenditure by Federal agency moneys derived from judgment for costs awarded to U.S. pursuant to 1966 act 70

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Court of Claims

Decisions

Effect given by General Accounting Office

Holding in *Harry Russell Miller* v. *U.S.*, 180 Ct. Cl. 872, that retired enlisted member of Coast Guard is entitled under 14 U.S.C. 362 to compute retired pay on basis of higher grade satisfactorily held in Navy should not be extended to similar or related statutes. Matter is too doubtful to warrant extending rule of case in view of reservation expressed by court concerning correctness of GAO decisions under sec. 511 of Career Compensation Act that retired member of one branch of uniformed services who held higher grade in another branch of service is not entitled to retired pay computed on pay of higher grade, and differences between various statutes ---------- 722

Judgments, decrees, etc.

Acceptance as precedent by General Accounting Office

Berkey *v.* United States, 176 Ct. Cl. 1

Ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that amount of accumulated retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired officer of uniformed services adjudicated incompetent who died intestate while receiving care in Veterans Hospital may be paid to decedent's son will be followed by Comptroller General as court's construction that sec. 3203(b)(1), barring payment of accumulated lump sum in event of incompetent's death, has no application to payment of retired pay—not considered gratuity—to members of immediate family of decedent, eliminates discrimination, and results in uniform disposition of accumulated retired pay withheld under 38 U.S.C. 3203(a)(1) from both competent and incompetent retired members. Application suspended by B–156913, June 24, 1968, unpublished decision ---------- 25

Under ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired member of uniformed services adjudged incompetent who died while receiving care in Veterans Hospital is payable to members of immediate family of decedent as forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving competent or incompetent retired member. Therefore distribution of withheld retired pay in both categories—competent and incompetent—should be on same basis, and claims similar to *Berkey* case handled as indicated in 40 Comp. Gen. 666; and 41 *id.* 218 is reversed. Application suspended by B–156913, June 24, 1968, unpublished decision ---------- 25

Res judicata

Judgment on the merits

Dismissal by U.S. Court of Claims of suit filed by retired Army officer (Ct. Cl. No. 111–64) for increased retired pay which was based on fact that he should have been advanced on retired list under 10 U.S.C. 3964 to rank of major rather than to rank of captain constitutes judicial determination on merits and judgment having become final, matter is now *res judicata* and, therefore, officer's claim for increased retired pay may not be considered under rule in 5 Comp. Gen. 334, and in view of 28 U.S.C. 2519, prescribing that final judgment of Court of Claims against plaintiff bars any further claim against U.S. arising out of matters involved in case or controversy ---------- 573

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Res judicata—Continued
Subsequent claims
Under doctrine of *res judicata*, which applies to repetitious suits involving same cause of action, valid judgment on merits constitutes absolute bar to subsequent action on same claim or demand as cause of action had been extinguished in court proceedings---------- 573
CUSTOMS
Employees
Overtime services
Reimbursement
Exemption granted by act of June 3, 1944, to 19 U.S.C. 1451, imposing on owners or operators of vessels and other conveyances entering U.S. at night, Sundays, and holidays, requirement to pay extra compensation and expenses of customs officers assigned to duty in connection with entering, may not be extended, absent congressional approval, to proposed monorail system for operation between El Paso, Texas, and Jaurez, Mexico, specific listing in 1944 act of highway vehicles, bridges, tunnels, ferries, motor vehicles, trolley cars, and foot travelers as exceptions to 19 U.S.C. 1451, implying exclusion from exceptions authorized of other modes of transportation, such as monorails, trains, vessels, airplanes, and pipelines---------- 148
DAMAGES
Contracts. (*See* Contracts, damages)
DAVIS-BACON ACT
(*See* Contracts, labor stipulations, Davis-Bacon Act)
DECEDENTS' ESTATES
Administration
Costs
Small estates
The $1,000 limitation prescribed in par. 40504(b)(5), Dept. of Defense Military Pay and Allowances Entitlements Manual, on payment of 6 months' death gratuity to parent as natural guardian of minor child may be exceeded to conform to amounts prescribed by statutes of States in which claimants reside where means are provided for Govt. to obtain good acquittance. Therefore, death gratuity due minor son of deceased member of uniformed services may be paid to mother supporting claim in behalf of child with affidavit substantially complying with requirements of California Code, upon determination showing of compliance with $2,000 limitation imposed on payment of money and personal property includes death gratuity, and that any insurance proceeds due, plus other amounts, will not cause either $2,000 limitation or $2,500 restriction on total estate to be exceeded---------- 209
Natural guardian of minor child of deceased member of uniformed services in documenting claim for 6 months' death gratuity in excess of $1,000 prescribed by par. 40504(b)(5), Dept. of Defense Military Pay and Allowances Entitlements Manual, should cite State statute involved, and facts bringing payment to guardian within purview of State

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Administration—Continued
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Small estates—Continued
statute in which persons concerned reside should be furnished in affidavit form, and care should be exercised to determine that parent understands requirements of law permitting payment to parents of small amounts due minors, if matter is free from doubt, to avoid expense of obtaining legal guardianship ---------- 209
As 6 months' death gratuity payment is not considered asset of estate of deceased member of uniformed services but in nature of survivor insurance that is payable in accordance with Federal law to persons listed in 10 U.S.C. 1477, principal concern of Govt. is to obtain good acquittance when payment to minor is involved, therefore, when State statute provides for good acquittance, payment of death gratuity due minor child of deceased member of uniformed services may be made to natural guardian of child upon compliance with requirements of law of State in which claimants reside, thereby avoiding cost of obtaining legal guardianship in settling of small estates ---------- 209
Pay, etc., due military personnel
Amounts withheld from hospitalized veterans
Retired pay *v.* pensions, etc.
Insane and incompetent members
Ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that amount of accumulated retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired officer of uniformed services adjudicated incompetent who died intestate while receiving care in Veterans Hospital may be paid to decedent's son will be followed by Comptroller General as court's construction that sec. 3203(b)(1), barring payment of accumulated lump sum in event of incompetent's death, has no application to payment of retired pay—not considered gratuity—to members of immediate family of decedent, eliminates discrimination, and results in uniform disposition of accumulated retired pay withheld under 38 U.S.C. 3203(a)(1) from both competent and incompetent retired members. Application suspended by B-156913, June 24, 1968, unpublished decision ---------- 25
Under ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired member of uniformed services adjudged incompetent who died while receiving care in Veterans Hospital is payable to members of immediate family of decedent as forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving competent or incompetent retired member. Therefore, distribution of withheld retired pay in both categories—competent and incompetent—should be on same basis, and claims similar to *Berkey* case handled as indicated in 40 Comp. Gen. 666; and 41 *id.* 218 is reversed. Application suspended by B-156913, June 24, 1968, unpublished decision ---------- 25

DEFENSE DEPARTMENT Page

Procurement

Cataloging and standardization of procurement

Total small business set-asides under solicitations listing aerial delivery slings by different Federal Stock Numbers (FSN) may not be vetoed under par. 1-706.1(c)(ii) of Armed Services Procurement Reg. by large business concern designated "Planned Emergency Producer" for items other than those being solicited on basis procurement is different sizes of "one" item manufactured in accordance with common specification. Concern not a planned producer for items being solicited not only does not have right to veto set-asides, but procurement is not subject to item veto of regulation, word "item" as used in regulation being synonymous to use attributed to word in implementation of Defense Cataloging and Standardization Act, 10 U.S.C. 2451-2456, wherein each separate item of supply used recurrently is assigned FSN item identification, and act also required conformity of slings to common basic specification 462

As dictionary definition describing word "item" as "individual particular or detail singled out from group of related particulars or details" is meaning of word as used in implementation of Defense Cataloging and Standardization Act under which each separate and distinct item of supply used recurrently is required to be classified, described, and given item Federal Stock Number (FSN), which identifies item from every other item of supply, solicitations for various sizes of aerial delivery slings properly identified each size with individual FSN, and procurement is not subject to par. 1-706.1(c)(ii) of Armed Services Procurement Reg., which precludes small business set-asides when large business planned emergency producer of "item" desires to participate in procurement 462

DELEGATION OF AUTHORITY

Between agencies

Automatic Data Processing equipment

Right reserved to Federal departments and agencies in Pub. L. 89-306, which authorizes General Services Admin. (GSA) to coordinate and provide for economic and efficient purchase, lease, maintenance, operation and utilization of automatic data processing equipment (ADPE), to select types and configurations of equipment does not encompass authority to procure equipment, legislative history of act evidencing intent that GSA function as sole purchaser of ADPE equipment for Govt., subject to direction and control of President and Bur. of Budget, and if purchase function was not intended to be placed exclusively in GSA, there would have been no need to limit delegation of authority in sec. 111(b)(2) of act to purchase ADPE equipment to period during which single purchase concept could be implemented 275

DEPARTMENTS AND ESTABLISHMENTS

Administrative determinations. (*See* **Administrative determinations**)

Heads

Salary payment basis

Although heads of departments and agencies who have pay computed on monthly or annual basis, and who have elected to be paid semimonthly, have been considered as having semimonthly pay period, law

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Heads—Continued
Salary payment basis—Continued
as recently codified specifies that pay period in such cases shall be one calendar month and codification is to be accepted as correct statement of law in that regard so far as determining compensation benefits..... 485
Health programs
Immunization of employees against diseases
Under 5 U.S. Code 7901, authorizing head of agency to establish health service programs by contract or otherwise, within limits of available appropriations if in interest of U.S., immunization against specific diseases without charge to employee may be approved, section 7901(c)(4) prescribing preventive programs relating to health, upon recording, pursuant to Budget Bur. Cir. No. A–72, by appropriate official of reasonable basis to support determination for immunization of employees. However, probability of substantial savings to Govt. through preventing loss or impairment of services is more evident in case of influenza immunizations than immunizations for tetanus and smallpox..... 54
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DISTRICT OF COLUMBIA
Checks
Dishonored
Penalty charges for handling
Although generally penalty charges collected by Govt. of District of Columbia under Pub. L. 89–208 to cover cost of handling dishonored checks are, absent provision in law for disposition of funds, for deposit to credit of District, charges collected by District Unemployment Compensation Board are not. Since Board receives its administrative funds from Bur. of Employment Security, U.S. Dept. of Labor, pursuant to 42 U.S.C. 502, and returns unused grants to Bureau, cost of handling dishonored checks is borne from Federal grant funds, and, consequently, penalty charges collected by Board are for deposit in Treasury as miscellaneous receipts of U.S., unless statutory authority is obtained to otherwise dispose of collections..... 674
DOCUMENTS
Incorporation by reference
Christian doctrine
Under invitation for bids (IFB) contemplating requirements type contract which expressly made Art. 27 of General Services Administration form inapplicable and inadvertently omitted substitute special "all or none" clause required by par. 5A–2.201–73 of GSA Procurement Regs., to effect each item of "all or none" bid must be low in price, an "all or none" bid low as to aggregate bid price but not low on each item was improperly rejected on basis omitted provision was incorporated into IFB by operation of law under *Christian* doctrine. Low bidder on notice of exclusion of Art. 27 and under no obligation to affirm exclusion, properly assumed its "all or none" bid was not required to be low on all items. However, notwithstanding defective solicitation, cancellation of contracts awarded would not be in best interests of Govt..... 682

DONATIONS Page

Conditional

Dept. of State officer who when administratively reimbursed travel expenses incurred incident to attending in official capacity American Bar Association's National Institute on Marine Resources is not allowed $7.50 air insurance fee may not recover amount from contribution made to Dept. under 22 U.S.C. 809 to cover "actual" travel expenses of officer, and even if gift had not been conditioned, insurance cost personal to officer, Dept. could only accept reimbursement for cost of air insurance for its own benefit, and as Bar Association is not one of acceptable donors described in 26 U.S.C. 501(c)(3), officer may not under 5 U.S.C. 4111 accept $7.50 as contribution from private source 319

EDUCATION

(*See* Colleges, Schools, Etc.)

ENLISTMENTS

Fraudulent

Pay and allowance claim

Period of fraudulent entry determination

Under proposed revision of Army Reg. 635–206 transferring from unit commander to commander exercising general court-martial authority responsibility for determining whether or not enlistment into military service was fraudulent, enlisted man who continues to perform duty between time unit commander recommends investigation of his enlistment until his fraudulent entry into service is established is entitled to pay and allowances for period as there is no authority to avoid contract of enlistment until commander exercising court-martial authority determines member's entry into service was fraudulent 671

Travel incident to extension

Reimbursement

Payment of mileage or monetary allowance to members of uniformed services in lieu of transportation for travel performed at personal expense pursuant to special leave provided by 10 U.S.C. 703(b), which authorizes transportation to and from duty station "at expense of United States" incident to extension of enlistment for at least 6 months, may not be authorized by revising par. M5501 of Joint Travel Regs., as amended, absent specific authority in sec. 703(b) for payment of commuted travel and transportation allowances and, therefore, travel performed by members at personal expense while on leave pursuant to 10 U.S.C. 703(b) may be reimbursed only on actual expense basis 405

ENTERTAINMENT

Refreshments

Cost of serving coffee or other refreshments at meetings is not "necessary expense" contemplated by that term as used in appropriation acts, and unless specifically made available, appropriations may not be charged with cost that is considered in nature of entertainment. Although this rule also applies to purchase of equipment used in preparing refreshments, small amount expended by agency to purchase coffeemakers, cups, and holders for use in serving coffee at meetings designed to improve management relationships will not be questioned in view of administrative belief interests of Govt. will be promoted through use of equipment. 657

EQUAL EMPLOYMENT OPPORTUNITY Page
Contract provision. (*See* Contracts, labor stipulations, nondiscrimination)
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Automatic Data Processing Systems
Authority
Right reserved to Federal departments and agencies in Pub. L. 89–306, which authorizes General Services Admin. (GSA) to coordinate and provide for economic and efficient purchase, lease, maintenance, operation and utilization of automatic data processing equipment (ADPE), to select types of configurations of equipment does not encompass authority to procure equipment, legislative history of act evidencing intent that GSA function as sole purchaser of ADPE equipment for Govt., subject to direction and control of President and Bur. of Budget, and if purchase function was not intended to be placed exclusively in GSA, there would have been no need to limit delegation of authority in sec. 111(b)(2) of act to purchase ADPE equipment to period during which single purchase concept could be implemented---------- 275
Selection and purchase
Negotiation procedures
Refusal of Air Force in selecting source for furnishing electronic data processing equipment (EDPE), to be purchased by General Services Admin. (GSA) under the Federal Supply System, to discuss technical deficiencies of proposal that offered lower price than that of only proposal out of four considered acceptable violated 10 U.S. Code 2304(g), which provides for written or oral discussions with all responsible offerors submitting proposals within competitive range, price and other factors considered, when negotiated procurement exceeds $2,500, and authority of GSA to coordinate and provide for economic and efficient acquisition of EDPE neither impairing selection right of an agency nor exempting selection from procurement laws and regulations, further discussions should be conducted on low proposal, which having met all requirements except one portion of demonstration test is within competitive range, and on any other proposals satisfying the "within a competitive range" requirement---------- 29
Use by private parties
Upon concurrence by Administrator of General Services Administration (GSA), who under 40 U.S.C. 759 has primary responsibility for purchase and utilization of automatic data processing equipment (ADPE) for Federal Govt., Administrator of Veterans' Affairs (VA) or his designee may grant revocable license that conforms to criteria established in GAO decisions, to a private party to use Govt-owned computers on reimbursable basis when equipment is not in use by VA, and feasibility of making arrangements under which Govt-owned ADPE equipment might be made available to public during periods in which equipment is not in use is being considered by GSA Administrator----- 387
Employee use
Cost of serving coffee or other refreshments at meetings is not "necessary expense" contemplated by that term as used in appropriation acts, and unless specifically made available, appropriations may not be charged with cost that is considered in nature of entertainment. Although this rule also applies to purchase of equipment used in preparing refreshments, small amount expended by agency to purchase coffeemakers,

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Employee use—Continued

cups, and holders for use in serving coffee at meetings designed to improve management relationships will not be questioned in view of administrative belief interests of Govt. will be promoted through use of equipment.. 657

EVIDENCE

Silence

Value of silence

Failure to acknowledge amendments to invitation for building construction that affect both price and work quantity, where low bidder alleges failure was inadvertent and amendments had been considered in bid preparation, may not be waived as informality within purview of par. 2-405 of Armed Services Procurement Reg., and amendments providing for substantial increase in work to be performed, conflicting contentions as to price need not be resolved. Fact that bidder's representative remained silent to query before bid opening concerning receipt of amendments does not affect bid deviation, silence not having evidentiary attribute of positive oral affirmation, nor may statements made after bid opening be considered, as bid responsiveness must be established as of bid opening time---------- 597

FAMILY ALLOWANCES

Separation

Government furnished quarters occupancy

Emergency evacuation

Member of uniformed services who must continue to maintain and pay rental for private housing in anticipation of return of dependents evacuated to Govt. housing facilities at temporary safe haven for relatively short period pending further transportation to designated place pursuant to par. M7101-1 of Joint Travel Regs., or return to place from which evacuated, during which time he occupies single-type quarters at permanent station may continue to be credited in pay account with basic allowance for quarters on account of dependents and type 2 family separation allowance until dependents are authorized to return to member's permanent duty station or arrive at designated place contemplated by par. M7101-1, in view of fact that occupancy of Govt. quarters by member and dependents will be of short duration and will have resulted from circumstances beyond their control. 46 Comp. Gen. 869, modified---------- 355

Type 1

Entitlement

Upon termination of assignment of Govt. quarters at permanent station overseas due to closing of military installation, member of uniformed services in receipt of family separation allowance, type 1, under 37 U.S.C. 427(a) may in addition for period prior to departure to new station be paid temporary lodging allowance in 10-day increments under par. M4303. The allowances do not duplicate each other, type 1, family separation allowance is in substance member's basic allowance for quarters intended to cover cost of permanent quarters, whereas temporary lodging allowance is per diem supplementing basic allowance for quarters to compensate him for additional expense of maintaining separate quarters for himself---------- 788

FAMILY ALLOWANCES—Continued Page

Separation—Continued

Type 2

Common residence

Management and control by member

Fact that member of uniformed services who is in receipt of quarters allowance continues to support dependents during assignment separation and intends to visit them when possible does not entitle him to monthly family separation allowance prescribed by 37 U.S.C. 427(b), and unless record shows member is maintaining household for dependents—whether primary or secondary—subject to his management and control, so attendant liabilities and responsibilities rest on him, family separation allowance may not be paid. It is not sufficient for family separation allowance purposes that dependents reside in household of friends or relatives during enforced separation. To continue to receive family separation allowance members should execute revised certificate, subject to redetermination of entitlement ---------- 431

Where due to misunderstanding, certificate of member of uniformed services with respect to maintaining residence for dependents has been broadly interpreted to mean that regardless of arrangements made by member for maintenance of family during his absence aboard ship or overseas, he is considered as meeting in full head of household and residence requirements for family separation allowance entitlement in 37 U.S.C. 427(b), exceptions to payments in cases where dependents do not live in household subject to member's management and control, will be removed. However, future certificates should state that family residence is subject to member's management and control and that he will promptly report discontinuance of such arrangement. Also, regulations should be amended accordingly, and doubtful cases of entitlement referred to GAO for consideration ---------- 431

Common residence rule for determining entitlement to $30 monthly family separation allowance authorized by 37 U.S.C. 427(b) appearing to have been basic consideration of Congress in authorizing allowance, even though showing of actual expenses is not required, 47 Comp. Gen. 431, holding allowance is not payable during periods of involuntary separation of member of uniformed services from family if primary dependents are living in residence that is not subject to management and control and for which he is not responsible, is sustained and should be implemented if Congress fails to authorize such payments prior to adjournment of second session of 90th Congress. Questions that arise concerning sec. 427, which cannot be resolved under decisions of Comptroller General may be submitted ---------- 583

Member of uniformed services who while serving aboard ship that is away from home port is in receipt of temporary lodging allowance provided by par. M4303 of Joint Travel Regs., which is intended to partially reimburse him for housing family in hotel or hotel-like accomodations overseas pending completion of arrangements for living quarters, is not entitled to concurrent payment of type 2 family separation allowance authorized under 37 U.S.C. 427(b)(2) for ship duty and under subpar. (3) for temporary duty. Member not separated from household subject to his management and control cannot incur additional expenses contemplated by sec. 427(b) by reason of "enforced separation" and, therefore, he is not eligible for type 2 family separation allowance ---------- 788

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Fact that enlisted member of U.S. Marine Corps continued to receive payment of family separation allowance while on 30 days' emergency leave from permanent overseas duty station does not entitle him to continuation of allowance while on 3-month temporary duty assignment following leave period at activity within 34 miles of residence during which period he occupied common household with wife, because for application is rule that family separation allowance prescribed by 37 U.S.C. 427(b)(2) for member assigned to ship is for suspension when he resides with dependents while performing temporary duty in excess of 30 days ---------- 67
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Attorneys
Court admission fees
Government attorneys
Admission fee paid by Govt. attorney to practice before bar of U.S. Court of Appeals, required by court as arbiter of applicant's qualifications to practice before it, is personal to attorney, privilege being life one unless debarred regardless whether attorney remains in Govt. service, and because aside from capacity in which attorney serves Govt. he is also officer of court with obligations to court and public. Therefore, attorney on notice that nature of Govt. employment requires him to qualify before Federal courts including Supreme Court, as well as in State or other court, may not be reimbursed admission fee absent specific authority to charge appropriated funds for expense. 22 Comp. Gen. 460, reaffirmed ---------- 116
License, permit, etc., fees
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Fee imposed by Montana State Statute to certify Bur. of Reclamation water and waste water operators responsible for implementing Federal water pollution programs may not be paid by Bureau from appropriated funds, absent authority for payment of such fees in Federal Water Pollution Control Act, in view of principle, based on supremacy clause, Art. VI, cl. 2, of Constitution, that State cannot require Federal employees to obtain licenses or permits in performance of official duties when they are engaged in occupations which are subject of State regulations applicable to general public ---------- 577
Parking
Disposition
Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting

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Space on a monthly basis
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Where employee rents parking space on monthly basis at official headquarters and utilizes space for personal use and for purposes of official travel, he may be reimbursed under 5 U.S.C. 5704 on pro rata basis for those days on which he uses his automobile, based on monthly parking rate paid, upon administrative determination use of rental parking space is necessary because of official business and is advantageous to Govt. However, if advantage or necessity is conjectural, Govt. should not assume cost of parking---- 219
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Prohibition in Foreign Assistance and Related Agencies Appropriation Act, 1968—known as Conte-Long amendments—against use of funds to finance "purchase or acquisition" sophisticated weapons system by or for any underdeveloped country, other than those specifically exempted, unless President determines such purchase or acquisition is vital to national security, and so reports to Congress, applies to military grant aid as well as to foreign military sales program. Legislative history of act evidences intent to prevent selling and giving sophisticated weapons to underdeveloped countries in order to conserve resources for economic and social programs, and to prevent arms race. Therefore, to exempt military grant aid from prohibition would defeat its purpose- 418

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Adoption
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Adoption of orphan by Army officer having been in conformity with adoption laws of Vietnam, it will be recognized in other States to extent it is not repugnant to public policy of State, and officer having compiled with requirements for issuance of passport and for classification of minor child as eligible orphan for visa under Immigration and Naturalization Act of 1952, as amended, adopted child is considered dependent of officer within meaning of 37 U.S.C. 401, and officer is entitled to child's transportation at Govt. expense incident to permanent change of station and he, therefore, may be paid monetary allowance in lieu of transportation_ 349
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Trust
Erroneous disbursements
Rule that seasonal greeting cards constitute personal expense to Govt. personnel is not changed by fact that names of officers and employees sending cards are not included and nothing attached to cards indicates compliments of any individual, nor is personal nature of cost of cards changed because trust fund rather than appropriated funds is charged. Therefore, cost of printing and mailing seasonal greeting cards by National Park Service personnel is expense that is not chargeable to "Fund 14X8037 National Park Service, Donations," receipt account in trust fund series established for deposit of cash accepted as donations under 16 U.S.C. 6 for purposes of national park and monument system_____ 314
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to light by protest is not "dictum"—term used as abbreviation of "obiter dictum" that means remark or opinion uttered by way—and recommendation may not be disregarded as comment which is not essential and is less authoritative than actual decision to protestant. Therefore, any action by procuring agency that is contrary to recommendation may result in disallowance of credit in disbursing officer's accounts---------- 236
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When submission under 31 U.S.C. 82d, authorizing certifying officers "to apply for and obtain decision by Comptroller General on any question of law involved in payment on any vouchers presented to them for certification" does not involve question of law but concerns proper disposition of court costs awarded to U.S., reply to request is required to be made to head of Federal agency involved---------- 70
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Claim of civilian employee of Defense Supply Agency for reimbursement of cost of repairing damage to hearing aid, which occurred without negligence in normal execution of employee's duties as test driver while using Govt-furnished crash helmet and safety glasses, is for consideration of Secretary of Defense or his designee under Military Personnel and Civilian Employees' Claims Act of 1964, and any settlement upon approval by Secretary or his designee of employee's claim for personal property damage would be final and conclusive as it is not within jurisdiction of GAO to consider damage claims for loss of or damage to personal property of Defense Dept. employees---------- 316
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Bid rejection
Contracting officer who notwithstanding verification of low bid suspiciously out of line with other bids and Govt.'s estimate is still doubtful of reasonableness of low bid price, as well as bidder's—small business concern—financial capacity, experience, and ability to subcontract work on proposed research tunnel and, therefore, unable to make preaward determination of bidder responsibility required by administrative regulation, upon refusal of Small Business Admin. to issue certificate of competency, properly considered low bidder nonresponsible, determination found upon review by GAO under its audit authority to be supported by record, and contracting officer having acted within scope of his authority, his rejection of low bidder as nonresponsible is not subject to judicial review---------- 291
Although not authorized to review Small Business Admin. (SBA) determination or to direct issuance of certificate of competency, GAO is not precluded from reviewing rejection of small business concern as nonresponsible, whether or not SBA issued certificate of competency, as question upon review of all pertinent information and evidence available to contracting officer and SBA is whether bid rejection was proper, and where record justifies doubt of contracting officer and SBA, it is immaterial that record might also support determination of

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Additional costs incurred by contractor to install television surveillance system at Cape Kennedy due to delays occasioned by launch activities, where contract did not contain "Suspension of Work" clause or other provisions to cover delay but did require contractor to ascertain work conditions, constitute claim for breach of contract damages within settlement jurisdiction of GAO. However, as cause of delay was evident at time contract was executed, no fault or negligence is attributable to Govt. and, therefore, there is no legal liability on part of Govt. to pay contractor increased costs---------- 475
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Establishment of criteria by which contracting officers as well as contractors mah have guidance as to what is "component" and what is "end product" within meaning of standard "Buy American Act" clause incorporated in contracts pursuant to par. 6-104.5 of Armed Services Procurement Reg. is not within province of U.S. GAO, except to extent application of terms to facts of particular case may serve such purpose--- 21
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Critical military skills
Reenlistment for purpose of college training
Navy enlisted members who are discharged and reenlist in order to acquire obligated 6-year period of service required to enroll for college under Navy Enlisted Scientific Education Program which leads to baccalaureate degree and officer candidate training for appointment as commissioned officer are not entitled to variable reenlistment bonus payments authorized by 37 U.S.C. 308(g). Purpose of bonus is to induce first-term enlisted members possessing skills in critically short supply to reenlist and nlt to induce members to enter service educational programs leading to appointments as commissioned officers. Although payments made to members reenlisting to meet obligated service requirements for college training will not be questioned, further payments, including yearly installments on account of reenlistments already entered into, should be promptly discontinued---------- 414
Six months' death
Children
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The $1,000 limitation prescribed in par. 40504(b)(5), Dept. of Defense Military Pay, and Allowances Entitlements Manual, on payment of 6 months' death gratuity to parent as natural guardian of minor child maybe exceeded to conform to amounts prescribed by statutes of States in which claimants reside where means are provided for Govt. to obtain good acquittance. Therefore, death gratuity due minor son of deceased member of uniformed services may be paid to mother supporting claim in behalf of child with affidavit substantially complying with re-

GRATUITIES—Continued Page
Six months' death—Continued
Children—Continued
Payment to natural guardian, etc.—Continued
quirements of California Code, upon determination showing of compliance with $2,000 limitation imposed on payment of money and personal property includes death gratuity, and that any insurance proceeds due, plus other amounts, will not cause either $2,000 limitation or $2,500 restriction on total estate to be exceeded 209
Natural guardian of minor child of deceased member of uniformed services in documenting claim for 6 months' death gratuity in excess of of $1,000 prescribed by par. 40504(b)(5), Dept. of Defense Military Pay and Allowances Entitlements Manual, should cite State statute involved, and facts bringing payment to guardian within purview of State statute in which persons concerned reside should be furnished in affidavit form, and care should be exercised to determine that parent understands requirements of law permitting payment to parents of small amounts due minors, if matter is free from doubt, to avoid expense of obtaining legal guardianship 209
As 6 months' death gratuity payment is not considered asset of estate of deceased member of uniformed services but in nature of survivor insurance that is payable in accordance with Federal law to persons listed in 10 U.S.C. 1477, principal concern of Govt. is to obtain good acquittance when payment to minor is involved, therefore, when State statute provides for good acquittance, payment of death gratuity due minor child of deceased member of uniformed services may be made to natural guardian of child upon compliance with requirements of law of State in which claimants reside, thereby avoiding cost of obtaining legal guardianship, in settling of small estates 209
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Although U.S. is entitled to pro rata share of actual damages, less out-of-pocket expenses, recovered by State Highway Dept. in antitrust proceedings in which award of treble damages was made on basis award of actual damages reduced cost of federally aided highway projects that incorporated products on which fixed prices were conspired, Federal Govt. may not share in recovery of punitive damages, such damages not reflecting upon cost of highway projects, for absent specific authority, partnership arrangement under which Federal-aid highway program is prosecuted does not reach beyond project costs shared by Federal and State Govts 309
Cost contributions
Damage award
Although damage award is not considered recognizable element of cost to be shared by Federal Govt. under Federal-aid highway agreement, if Federal Highway Administrator determines evidence supporting contractor's claim was properly evaluated and amount of damages awarded constituted reasonable cost element of project, agreement may be modified to recognize that additional costs awarded contractor

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Contruction—Continued

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stemmed from reliance upon erroneous "soil profile" furnished bidders by State, and that this information no doubt contributed to unrealistically low initial contract price---------- 756

Relocation costs

Safety programs

Retroactive modification of highway relocation contracts by Corps of Engineers to permit compliance with Highway Safety Act, Pub. L. 89–564, and to charge increased costs as project expenses, may not be authorized, absent authority in act, which provides for Federal assistance to States to coordinate and accelerate national highway safety programs, to include in relocation contracts, liberal cost criteria contained in Pub. L. 87–874. Therefore, before increased costs of highway safety programs may be retroactively assumed by Corps of Engineers, and charged to project involved, special authority should be requested from Congress---------- 535

HOLIDAYS

Compensation. (*See* **Compensation, holidays**)

Hours of work basis

Ten-hour workday

Wage board employees assigned to weekly tours of four 10-hour days—8 hours regular time and 2 hours overtime—who are relieved or prevented from working because of occurrence of holiday within purview of 5 U.S.C. 6104, are entitled only to basic compensation for any 10-hour day on which holiday occurs, sec. 6104 prescribing same pay for holiday on which no work is performed "as for day in which ordinary day's work is performed." Therefore, employees are only entitled to compensation at straight time for entire 10-hour day on which they did not work because of holiday, absent authority for paying overtime compensation under Work Hours Act of 1962, 5 U.S.C. 5544, for any part of employees scheduled hours of duty on holidays on which no work is performed---------- 358

HUSBAND AND WIFE

Divorce

Validity

Foreign

Although generally for purpose of paying quarters allowances (BAQ) to members of uniformed services who remarry after obtaining Mexican divorce, judicial determination of validity of second marriage is required under laws of jurisdiction where marriage is performed, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, has been regarded as constituting judicial determination for cases falling squarely within that case, and, therefore, officer who prior to Sept. 1, 1967, effective date of revision of New York State divorce law, remarried in State of N.Y. would be entitled to BAQ, if one of parties was domiciled in State, but *Rosenstiel* decision having no application in jurisdictions other than N.Y. State, if marriage occurred outside State, officer would not be entitled to BAQ, even if one of parties had been N.Y. domiciliary. However, after Sept. 1, 1967, because of uncertainty of sec. 250 added to Domestic Relations Law, *Rosenstiel* case no longer will be viewed as constituting judicial determination of validity of Mexican divorce---------- 286

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Bureau of Indian Affairs authorized under 5 U.S.C. 4109 to pay necessary expenses of training employees pursuant to sec. 4105 may in negotiating fixed price contract with university to design and coordinate educational workshops to be subcontracted, and to perform all administrative functions of program, provide for contractor to pay transportation cost and per diem of Bureau participants in workshops. However, as amounts payable to contractor for travel expenses and per diem may not exceed amounts that would be directly payable to employees under 5 U.S.C. 4109(a), reimbursement to contractor should be on actual expense basis, and amounts reimbursed charged to fiscal year appropriation available at time travel expenses were incurred by employees..... 662
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Death while hospitalized
Retired pay disposition
Ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that amount of accumulated retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired officer of uniformed services adjudicated incompetent who died intestate while receiving care in Veterans Hospital may be paid to decedent's son will be followed by Comptroller General as court's construction that sec. 3203(b)(1), barring payment of accumulated lump sum in event of incompetent's death, has no application to payment of retired pay—not considered gratuity—to members of immediate family of decedent, eliminates discrimination, and results in uniform disposition of accumulated retired pay withheld under 38 U.S.C. 3203(a)(1) from both competent and incompetent retired members. Application suspended by B–156913, June 24, 1968, unpublished decision..... 25
Under ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired member of uniformed services adjudged incompetent who died while receiving care in Veterans Hospital is payable to members of immediate family of decedent as forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving competent or incompetent retired member. Therefore distribution of withheld retired pay in both categories—competent and incompetent—should be on same basis, and claims similar to *Berkey* case handled as indicated in 40 Comp. Gen. 666; and 41 id. 218 is reversed. Application suspended by B–156913, June 24, 1968, unpublished decision..... 25
Retired pay
The 50 per centum reduction in retired pay of incompetent members of uniformed services required by 38 U.S.C. 3203(a)(1) after 6 months of Veterans Admin. hospital care continues upon discharge from hospitalization after receiving maximum hospital benefits at VA hospital to enter either convalescent center or private nursing home operating

INSANE AND INCOMPETENTS—Continued Page
Military personnel—Continued
Hospitalization, etc., in veterans facilities—Continued
Retired pay—Continued
under contract with Administration, care given members "at expenses of U.S." coming within meaning of "institutional or domiciliary care furnished by Veterans Admin." as contemplated by sec. 3203(a)(1), and no retired pay having been paid members during period of convalescent or nursing care, payment of one-half retired pay due incompetents may be made to persons designated to receive payment---------- 89

INSURANCE
Car rentals
Collision damage waiver
Employee who incident to official business rented automobile which he obtained by use of Govt. credit card, and who under rental agreement is required to pay $100 for damages to vehicle which occurred without negligence on his part may be reimbursed expenditure absent administrative requirement that he purchase collision damage waiver, and on basis of general policy of Govt. not to carry insurance, and in absence of administrative instructions in matter, employee is not considered to have failed to use reasonable discretion contemplated in 35 Comp. Gen. 553 when he did not apply for damage waiver---------- 145
Life
Civilian employees. (*See* **Officers and Employees, life insurance**)

INTERIOR DEPARTMENT
National Park Service
Christmas cards
Rule that seasonal greeting cards constitute personal expense to Govt. personnel is not changed by fact that names of officers and employees sending cards are not included and nothing attached to cards indicates compliments of any individual, nor is personal nature of cost of cards changed because trust fund rather than appropriated funds is charged. Therefore, cost of printing and mailing seasonal greeting cards by National Park Service personnel is expense that is not chargeable to "Fund 14X8037 National Park Service, Donations," receipt account in trust fund series established for deposit of cash accepted as donations under 16 U.S.C. 6 for purposes of national park and monument system. 314

LEASES
Repairs and improvements
Limitations
Rule
Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section---------- 61

LEASES—Continued Page
Repairs and improvements—Continued
Limitations—Continued
Rule—Continued
Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees---------- 61
LEAVES OF ABSENCE
Civilians on military duty
Excess leave
Granting of excused absence under 5 U.S.C. 6323 without loss of pay or charge to leave for days civilian employees of Govt. are on active duty as military reservists or as members of federalized National Guard units may not exceed 15 days in calendar year authorized by section, authority of heads of agencies to excuse employees without loss of pay or charge to leave for nonfederalized State National Guard duty not extending to sec. 6323 duty. Therefore, proposed bulletin to effect that employee absent on military duty under sec. 6323 for emergency duties such as civil disorders for more than 15 days in calendar year may not be further excused from civilian position without loss of pay or charge to leave is recommended---------- 761
Lump-sum payments
Rate at which payable
Increases
5 U.S.C. 5551 prescribing that lump sum leave payment shall equal pay employee would have received had he remained in service until expiration of annual leave, employee retired effective Apr. 30, 1968, who was separated from service after enactment of Pub. L. 90–206 is entitled to salary increase authorized by sec. 212 of act which will become effective with first pay period commencing after July 1, 1968. However, final adjustment in amount of lump sum leave payment due employee for period covered by new salary rate should not be made until effective date of new salary rates promulgated by President------ 773
Termination prior to a holiday
Payment of compensation for holiday on which no services are performed predicated on employee having been in pay status at close of business immediately preceding holiday, when employment relationship validly had been terminated by reason of resignation or retirement prior to holiday, former employee is not entitled to pay for holiday, nor is employee separated and entitled to lump-sum payment under 5 U.S.C. 5551, in amount equal to pay he would receive had he remained in service until expiration of period covered by leave payment, whose period of projected annual terminal leave for lump-sum payment extended through close of business on July 3, 1967, entitled to compensation for July 4 holiday---------- 147

LEAVES OF ABSENCE—Continued Page

Lump-sum payments—Continued

Transfers

Positions exempt from leave act

Employee who earned leave under 700 hour temporary appointment in which she worked regular tour of duty, upon conversion to temporary-intermittent position which is not subject to leave statute (5 U.S.C. 6301, *et seq.*), but under which she retains same title and grade, may receive lump sum leave payment under rule in 33 Comp. Gen. 85, 88, enunciating principle that employee may be paid for annual leave that is not legally transferable. Principle in 37 Comp. Gen. 523 that lump sum leave payment may not be made unless separation actually takes place is applicable only to situations involving continuing programs under which employees are required to return to full-time employment after period of intermittent employment 706

Military personnel

Lost time periods

Enlisted man restored to duty to make up lost time as provided by 10 U.S.C. 972, having resumed his obligated service contract, his enlistment extends beyond normal expiration term of service to include make good days and, therefore, fixes new termination date, though period of confinement may have commenced during extended period. However, restoration to duty status to make up lost time does not continue indefinitely when status changes from duty to confinement, whether pretrial or purusuant to court-martial sentence. Therefore, member placed in pretrial confinement during make good lost time period extending from date enlistment expired, August 26, 1965, to adjusted expiration date, Dec. 24, 1965, is not entitled to pay and allowances subsequent to new termination date. 37 Comp. Gen. 488, modified 487

Travel expenses. (*See* **Travel Expenses, military personnel, leaves of absence**)

Without pay status

Pay claims. (*See* **Pay, absences without leave**)

Sick

Recredit of prior leave

Break in service

Employee who between voluntary separation in 1953 from post in which he had accumulated sick leave and his reemployment in 1956 to position subject to Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. 6301, served under several temporary appointments on when-actually-employed basis during which time he was not subject to leave act, is entitled to recredit of sick leave accumulated prior to separation in 1953 as of date of reemployment in 1956, term "break in service" in sec. 30.702(a) of Civil Service Regs. providing for recredit of sick leave upon reemployment having reference to actual separation from Federal service. Therefore, any leave without pay (LWOP) charged to employee after reemployment may now be charged to recredited sick leave and employee paid for LWOP period from account to which balances of salary funds from prior years have been transferred 308

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Dependents of military personnel
Escort duty
Travel expenses
Travel of members of uniformed services who act as escorts and accompany dependents to medical facilities is regarded under 10 U.S.C. 1040 as travel on public business if directed by competent orders, and members are entitled to travel and transportation allowances in accordance with par. M6401 of Joint Travel Regs---- 743
Transportation reimbursement
Air Force officer stationed overseas whose wife under orders travels by privately owned automobile to and from hospital for medical treatment may not be paid mileage allowance for round-trip transportation, reimbursement under 10 U.S.C. 1040 and par. M7107, Joint Travel Regs. being limited to actual expenses, whether dependent travels alone or with attendant, absent specific authorization for commuted payments, such as mileage, monetary allowances in lieu of transportation, or per diem. Member who transports dependent to medical facility in his privately owned vehicle for which he is entitled to travel allowance would not be entitled to additional amount on behalf of dependent, travel allowance being in lieu of actual expenses---- 743
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Under 5 U.S. Code 7901, authorizing head of agency to establish health service programs by contract or otherwise, within limits of available appropriations if in interest of U.S., immunization against specific diseases without charge to employee may be approved, section 7901(c)(4) prescribing preventive programs relating to health, upon recording, pursuant to Budget Bur. Cir. No. A–72, by appropriate official of reasonable basis to support determination for immunization of employees. However, probability of substantial savings to Govt. through preventing loss or impairment of services is more evident in case of influenza immunizations than immunizations for tetanus and smallpox---- 54
MEETINGS
Intraagency
Refreshments
Cost of serving coffee or other refreshments at meetings is not "necessary expense" contemplated by that term as used in appropriation acts, and unless specifically made available, appropriations may not be charged with cost that is considered in nature of entertainment. Although this rule also applies to purchase of equipment used in preparing refreshments, small amount expended by agency to purchase coffeemakers, cups, and holders for use in serving coffee at meetings designed to improve management relationships will not be questioned in view of administrative belief interests of Govt. will be promoted through use of equipment---- 657

MILEAGE Page

Actual expenses

Travel by privately owned conveyances

Boats

Employee who is authorized to travel by common carrier incident to official change of station moves at his expense by privately owned boat, although not entitled to reimbursement on mileage allowance basis under sec. 3.5 of Standardized Govt. Travel Regs., absent reference to boat travel in 5 U.S.C. 5704 prescribing payment of mileage allowance for official travel by privately owned conveyances, is, however, entitled to reimbursement of actual expenses pursuant to 5 U.S.C. 5706, and upon furnishing information of amount of gas and oil consumed in traveling to new duty station, employee may be reimbursed on actual expense basis in amount not to exceed cost of common carrier transportation, as provided in sec. 3.5a of travel regulations---------- 325

Military personnel

As being in lieu of all other expenses

Sufficiency of allowance

Insufficiency of mileage allowance paid to member of uniformed services for travel on day of arrival at overseas permanent duty station to cover expenses of hotel accommodations provides no basis to amend par. M4303-2c(4) of Joint Travel Regs. to authorize payment of temporary lodging allowance for day of arrival without regard to mileage entitlement. Both allowances designed for same purpose—mileage allowance rate including lodging and subsistence—payment of both allowances for same day would constitute double allowance---------- 724

Reimbursement to member of uniformed services for hotel expenses incurred on day of arrival at overseas permanent station may not be authorized by amendment to par. M4303-2c(4) of Joint Travel Regs. to provide payment of temporary lodging allowance or mileage, whichever is greater. Member in travel status on day of arrival at overseas station is only entitled to travel allowances on that day, entitlement to temporary lodging allowance, considered a permanent station allowance, commencing day after arrival and, therefore, waiver of mileage entitlement by member would not operate to entitle him to temporary lodging allowance on day of arrival---------- 724

Mixed modes of transportation

Carrier mileage *v.* highway distance

Although par. M7003-3a of Joint Travel Regs., prescribing that when travel of dependents of members of Uniformed services is performed entirely or in part by privately owned conveyances, official highway distance is official distance for mileage payment purposes does not contain provision similar to that in par. M4155-2a, providing that mode of transportation used by member between duty station and local common carrier terminal may be disregarded in determining whether travel is performed by common carrier, in computing mileage payments for travel by identical means, no distinction between member and dependents is required. However, where incident to permanent change of station, dependents travel by privately owned conveyance to air terminal that is not local common carrier terminal for old duty station, member is not entitled to mileage allowance based on official carrier mileage, but only to payment on basis of official highway distance---------- 469

MILEAGE—Continued Page

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Release from active duty

Last duty station outside of United States

Constructive costs

Member of uniformed services separated overseas for own convenience who returns to U.S. within 1 year by way of different port of debarkation than one from which he elected to receive travel allowances prescribed by M4159–5b of Joint Travel Regs. when "no travel" is performed incident to separation is not entitled to additional mileage, travel allowance having been fixed upon members' election of constructive costs. Therefore, member having been paid mileage from last overseas duty station to nearest port of embarkation and from nearest port of debarkation to place to which he elected to receive travel allowances, is not entitled to mileage adjustment on basis he traveled greater distance from port of debarkation used than distance for which he was paid mileage ---------- 77

Travel by privately owned automoblie

Dependents

More than one automobile

Advance travel

Employee whose dependents, prior to effective date of his transfer, travel to his new duty station by privately owned automobile to enroll children in full-school term at new station having been paid 12 cents per mile for his travel by automobile may be authorized additional reimbursement at rate of 4 cents per mile under par. C6156, Joint Travel Regs., which provides 16 cents per mile for use of two automobiles, notwithstanding regulations do not contain example involving family traveling earlier than employee, advanced travel for purpose of school enrollment having been administratively approved as acceptable reason for authorizing use of two automobiles ---------- 720

Travel by privately owned boat

Common carrier cost limitation

Employee who is authorized to travel by common carrier incident to official change of station moves at his expense by privately owned boat, although not entitled to reimbursement on mileage allowance basis under sec. 3.5 of Standardized Govt. Travel Regs., absent reference to boat travel in 5 U.S.C. 5704 prescribing payment of mileage allowance for official travel by privately owned conveyances, is, however, entitled to reimbursement of actual expenses pursuant to 5 U.S.C. 5706, and upon furnishing information of amount of gas and oil consumed in traveling to new duty station, employee may be reimbursed on actual expense basis in amount not to exceed cost of common carrier transportation, as provided in sec. 3.5a of travel regulations ---------- 325

MILITARY PERSONNEL

Annuity elections for dependents. (*See* **Pay, retired, annuity elections for dependents**)

Cadets, midshipmen, etc.

Dependents' transportation. (*See* **Transportation, dependents, military personnel, cadets, midshipmen, etc.**)

Service credits. (*See* **Pay, service credits, cadet, midshipman, etc.**)

MILITARY PERSONNEL—Continued Page

Cadets, midshipmen, etc.—Continued

Status

Training under hostile fire

Cadets and midshipmen of Academies who are not members of uniformed services within purview of 37 U.S.C. 101(23) and who are paid pursuant to sec. 201(c) at rate of 50 percent of basic pay of commissioned officer in pay grade O–1 with 2 or less years of service computed under sec. 205, if sent to Vietnam for orientation and training would not be entitled to hostile fire pay prescribed by sec. 310(a), rule in 30 Comp. Gen. 31 concerning flight pay to effect that special pay is dependent upon status of entitlement to basic pay, applying equally to hostile fire pay entitlement---------- 781

Chief of Staff

Term expiration and retirement

A major general in Regular Army advanced to grade of general under 10 U.S.C. 3034(b) without vacating Regular grade, upon appointment on July 3, 1964, for not more than 4 years as Chief of Staff, who is eligible for voluntary retirement under sec. 3918 and is also subject on July 12, 1968 to mandatory retirement provisions of sec. 3923, reverts to permanent grade of major general on active list following expiration of term as Chief of Staff on July 2, 1968, if not reappointed, and in view of 10 U.S.C. 1404 and Uniform Retirement Date Act (5 U.S.C. 8301), if officer is not placed on retired list on July 1, 1968, or sooner, effective date of retirement for other than disability may not be earlier than Aug. 1, 1968---------- 696

Army Chief of Staff whose 4-year statutory period of service expires July 2, 1968, upon application for retirement in June 1968 and placement on retired list effective July 1, 1968, under 10 U.S.C. 3918, would be entitled to receive retired pay computed in accordance with footnote 1, Formula B, 10 U.S.C. 3991, at highest rate of basic pay applicable to him while serving as Chief of Staff—rate in effect June 30, 1968—whether or not that rate is greater or less than basic rate applicable on date of retirement that is authorized in footnote 2 of section---------- 696

Upon retirement effective July 1, 1968, an Army Chief of Staff whose appointment to 4-year term on July 3, 1964 expires July 2, 1968, may be recalled to active duty in his retired grade pursuant to 10 U.S.C. 3504, assuming confirmation under 10 U.S.C. 3962, to complete 4-year term as Chief of Staff, and may be paid as Chief of Staff for July 1 and 2, 1968, and officer when released from such active duty will be entitled to recompute retired pay under method prescribed in 10 U.S.C. 1402(a)- 696

Civilian service employment

Incompatibility with active military service

Fee-basis medical services rendered to an eligible veteran for disabilities identified on an Outpatient Medical Treatment Identification Card by military physician on active duty with Armed Forces who is engaged in limited medical practice after hours with permission of his commanding officer may not be paid by Veternas Administration in absence of statutory authority under rule that concurrent Federal civilian employment and active duty military service are incompatible-- 505

MILITARY PERSONNEL—Continued Page

Deceased

Estates. (*See* **Decedents' Estates, pay, etc., due military personnel**)

Dependents

Annuity elections options. (*See* **Pay, retired, annuity elections for dependents**)

Death

Household goods disposition

Authority in par. M8303–2 of Joint Travel Regs. entitling member of uniformed services stationed overseas on date of death of sole or all dependents who had resided with him overseas to nontemporary storage of household goods, not to exceed prescribed weight limitation, until date of his next arrival in the U.S. for permanent duty may not be extended to member located at permanent duty station in U.S. at time of death of sole or all dependents. Regulation promulgated pursuant to unusual or emergency circumstances provision of 37 U.S.C. 406(e) having been superseded by subsec. 406(h) relating to individual movement of dependents and effects from overseas areas, regulation may not be amended to apply to members on duty in U.S. ---------- 775

Dislocation allowance. (*See* **Transportation, dependents, military personnel, dislocation allowance**)

Education

Transportation

Unavailability of high school facilities to child of member of uniformed services 2 years after member who on 3 year overseas assignment was aware of lack prior to departure is not unusual or emergency circumstances contemplated by 37 U.S.C. 406(e) for advance transportation of dependents, and par. M7103–2(5) of Joint Travel Regs. may not be construed other than authority for advance return of dependents to U.S. upon certification by overseas commander that lack of educational facilities or housing was beyond control of member and condition arose after dependents departure for overseas duty station, nor regulations amended, either under 37 U.S.C. 406(e) regarding unusual or emergency conditions or sec. 406(h) providing for advance travel when in best interests of member or dependents and U.S., to authorize advance return of children where lack of educational facilities was known before departing for overseas station ---------- 151

Proof of dependency for benefits

Children

Divorced daughter of officer of uniformed services under 21 years of age who has custody of minor child with obligation to support and care for child without any assistance from husband, and who resides and is dependent on her father for support is a "dependent" of officer within meaning of term as used in 37 U.S.C. 401 and, therefore, he is entitled to a station allowance increase ---------- 407

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

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

Divorce. (*See* **Husband and Wife**)

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Dual payments

Allowances

Insufficiency of mileage allowance paid to member of uniformed services for travel on day of arrival at overseas permanent duty station to cover expenses of hotel accommodations provides no basis to amend par. M4303–2c(4) of Joint Travel Regs. to authorize payment of temporary lodging allowance for day of arrival without regard to mileage entitlement. Both allowances designed for same purpose—mileage allowance rate including lodging and subsistence—payment of both allowances for same day would constitute double allowance---------- 724

Reimbursement to member of uniformed services for hotel expenses incurred on day of arrival at overseas permanent station may not be authorized by amendment to par. M4303–2c(4) of Joint Travel Regs. to provide payment of temporary lodging allowance or mileage, whichever is greater. Member in travel status on day of arrival at overseas station is only entitled to travel allowances on that day, entitlement to temporary lodging allowance, considered a permanent station allowance, commencing day after arrival and, therefore, waiver of mileage entitlement by member would not operate to entitle him to temporary lodging allowance on day of arrival---------- 724

Hazardous duty

Qualified parachute riggers in jump status who are part of unit assigned mission involving development, testing, and evaluation of parachutes and related equipment do not perform multiple hazardous duties to entitle them to flight pay prescribed in 37 U.S.C. 301(e) in addition to parachute pay. The in-flight duties of members who load, inspect, rig, drop, and study experimental equipment are not related to aircrew duties within meaning of 37 U.S.C. 301(a)(1) and (4), and members neither performing two or more hazardous duties simultaneously or in rapid succession are not entitled to retain dual hazardous pay received for aviation and parachute duties, and, therefore, erroneous flight payments made to them should be recovered---------- 728

Enlistments. (*See* **Enlistments**)

Erroneous payments. (*See* **Payments, erroneous, military pay and allowances**)

Extraordinary heroism

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Family allowances. (*See* **Family Allowances**)

Gratuities. (*See* **Gratuities**)

Household effects

Storage. (*See* **Storage, household effects, military personnel**)

Transportation. (*See* **Transportation, household effects, military personnel**)

Leave. (*See* **Leaves of Absence, military personnel**)

Mileage. (*See* **Mileage, military personnel**)

MILITARY PERSONNEL—Continued Page

Missing, interned, etc., persons

Dislocation allowance to relocate dependents

Entitlement to payment of dislocation allowance authorized by 37 U.S.C. 407, predicated on orders directing permanent change of station for members of uniformed services, determination that member in active service is in missing status is not proper basis to authorize payment of dislocation allowance under sec. 554, which only authorizes travel and transportation of dependents and household and personal effects of member who is in missing status. Therefore, dependents of members missing in action, who are issued travel orders under 37 U.S.C. 554 incident to member's missing status and not because of member's permanent change of station, may not be paid dislocation allowance, whether or not they had relocated their households incident to member's permanent change of station to restricted area ---------- 556

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

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

Per diem. (*See* **Subsistence, per diem, military personnel**)

Promotions

Pay. (*See* **Pay, promotions**)

Quarters allowance. (*See* **Quarters Allowance**)

Reenlistment bonus. (*See* **Gratuities, reenlistment bonus**)

Reserve Officers' Training Corps

Programs at educational institutions

Employment of retired members

Retired member of uniformed services performing instructional and administrative duties pursuant to 10 U.S.C. 2031(d) in connection with Junior ROTC program who had waived military retired pay in order to have military service added to Federal civilian service to obtain greater civil service retirement annuity is entitled under sec. 2031(d)(1) to difference between military retired pay to which he would be entitled but for waiver and active duty pay and allowances he would receive if ordered to active duty, even though difference when added to member's civil service retirement annuity exceeds active duty pay and allowances he would receive if ordered to active duty, member's waiver not changing qualification for employment in ROTC program, nor barring him from participation in program, and, therefore, "retired pay" he would be entitled to but for waiver is within contemplation of term as used in 10 U.S.C. 2031(d) ---------- 87

Reservists

Inactive duty training, etc.

Return to civilian occupation while disabled

Non-Regular member of Armed Forces who is disabled by injury incurred while performing active duty training may continue to receive pay and allowances authorized by 37 U.S.C. 204(g)-(i) when he resumes civilian occupation, upon determination, preferably by service medical personnel and made in accordance with standards established for regular members, that injury precludes reservist from performing normal military duties of grade or rank, notwithstanding member is awaiting final action on retirement proceedings, or that he did not resume normal civilian occupation but because of disability took other employment ---- 531

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Retired

Civilian and military benefits

Service credits. (*See* **Pay, service credits, dual benefits, civilian and military retired benefits**)

Civilian service

Double compensation. (*See* **Compensation, double, concurrent military retired and civilian service pay**)

National Guard service

Regular and Reserve retired lists

To transfer retired Regular Army officers who have completed service as State Adjutants General or Assistant Adjutants General, and are federally recognized in Reserve general officer grades, to Retired Reserve would create anomalous situations of having officers on two separate retired lists, namely, Regular Army retired list and Retired Reserve list, a situation not within contemplation of 10 U.S.C. 1374(b), 3352(a), and 3375. Therefore, absent statutory authority to transfer and fix rights of transferred officers so as to make one retired status compatible with other, officers may not hold two retired statuses simultaneously_ 654

Pay. (*See* **Pay, retired**)

Retirement

Active duty continued

Service credits. (*See* **Pay, service credits, active duty after retirement**)

Chief of Staff

Rank and effective date

A major general in Regular Army advanced to grade of general under 10 U.S.C. 3034(b) without vacating Regular grade, upon appointment on July 3, 1964, for not more than 4 years as Chief of Staff, who is eligible for voluntary retirement under sec. 3918 and is also subject on July 12, 1968 to mandatory retirement provisions of sec. 3923, reverts to permanent grade of major general on active list following expiration of term as Chief of Staff on July 2, 1968, if not reappointed, and in view of 10 U.S.C. 1404 and Uniform Retirement Date Act (5 U.S.C. 8301), if officer is not placed on retired list on July 1, 1968, or sooner, effective date of retirement for other than disability may not be earlier than Aug. 1, 1968_____ 696

Eligibility determinations

Dual use of service credits

An officer of Public Health Service who receives credit for prior service in Navy and Naval Reserve to determine eligibliity for retirement under 42 U.S.C. 212(a)(3) and to compute retired pay may not upon reaching 60 years of age have same period of Navy and Naval Reserve service considered in determining eligibility to retired pay benefits under 10 U.S.C. 1331, absent specific statutory authority. The dual use of service credits would be inconsistent with pattern of retirement legislation, and neither 10 U.S.C. 1336, authorizing consideration of service credited for retirement purposes in determining eligibility for benefits enumerated in section, nor any other law would permit dual use of Navy and Naval Reserve service to provide concurrent payments of retired pay from Navy and Public Health Service_____ 713

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Retirement—Continued

Separation point elected by retiree

Member of uniformed services who upon retirement is separated for his convenience at activity other than appropriate place of separation, pursuant to proposed revision of par. M4157–1 of Joint Travel Regs. (JTR), may be paid travel allowances for distance from last duty station to elected separation activity and then to home of selection not to exceed distance from last duty station to home of selection via separation activity at which he normally would be retired, subject to limitations in par. M4158–2, JTR, that member who is retired from service may elect his home and receive travel allowances thereto from last duty station provided travel to selected home is completed within 1 year after termination of active duty, and provided advance payment of travel allowances is not authorized 166

Temporary retired list removal

Requirements for retirement

Members of Regular components of Army and Air Force subject to removal from temporary disability retired list upon determination of "fit-for-duty" who without return to active duty desire to retire—airmen or enlisted men for length of service under 10 U.S.C. 8914 or 3914, commissioned or warrant officers pursuant to secs. 8911, 3911, or 1293, or mandatory provisions of Title 10 for age or length of service—may not without reenlistment or reappointment acquire new retirement status and have retired pay computed according to applicable law in force on effective date of retirement, retired status of member terminating upon removal from temporary disability retired list for other than transfer to permanent disability retired list or separation from service, he has no active status and must be either reappointed or reenlisted as provided in 10 U.S.C. 1211 to establish eligibility for retirement 141

Reappointment of Regular Air Force and Regular Army commissioned or warrant officers determined to be physically fit to perform duties of office, grade or rank whose names are removed from temporary disability retired list for sole purpose of being retired is contrary to provisions of 10 U.S.C. 1211(a) (1) and (2), and absent authority for reappointment of officers who have not been recalled and who contemplate no active duty, employment of officers in civilian capacity in Federal Govt. and payment to them from either appropriated or nonappropriated funds for civilian position is not contemplated by law .. 141

Saved pay

Temporary promotions. (*See* **Pay, promotions, temporary, saved pay**)

Separation

Election of separation point

Proposed revision of par. M4157–1, Joint Travel Regs., to permit members of uniformed services to be transferred to and separated from service at place of own choosing and for own convenience as alternative to separation from place prescribed by regulation, and to travel from alternate separation point to home of record or place from which called to active duty may be adopted, revision adequately protecting public interest by limiting cost to Govt. for travel and per diem to cost from member's last permanent duty station to appropriate separation activity.

MILITARY PERSONNEL—Continued Page
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However, no per diem payable to member at last permanent duty station for period of processing separation, no per diem would be payable at alternate separation center elected by member ---------- 166
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Civilian schools
Eligibility
A U.S. Military Academy 1967 graduate, considered member of Regular Army pursuant to 10 U.S.C. 3075(b)(2), who on convalescent leave because of injuries incurred while on temporary detail is receiving full pay and allowances from Academy, is not eligible under par. 4(a) Army Regs. 621–5 for financial assistance provided active duty personnel to attend civilian school or college, as the cadet, neither enlisted man nor warrant officer, is unable to qualify for assistance as commissioned officer, for until physical condition is determined and he is commissioned there is no assurance he would be able to meet the at least 2 years active service after completion of training requirement imposed on commissioned officers of uniformed services ---------- 187
Travel expenses. (*See* Travel Expenses, military personnel)
Veterans. (*See* Veterans)
MISCELLANEOUS RECEIPTS
Special account *v.* miscellaneous receipts
Court costs
Court costs awarded National Labor Relations Board under Pub. L. 89–507, approved July 18, 1966 (28 U.S.C. 2412), are for deposit into Treasury as miscellaneous receipts under 31 U.S.C. 484, absent authority in 1966 act or any other law making available for expenditure by Federal agency moneys derived from judgment for costs awarded to U.S. pursuant to 1966 act ---------- 70
Penalty charges
Dishonored checks
Although generally penalty charges collected by Govt. of District of Columbia under Pub. L. 89–208 to cover cost of handling dishonored checks are, absent provision in law for disposition of funds, for deposit to credit of District, charges collected by District Unemployment Compensation Board are not. Since Board receives its administrative funds from Bur. of Employment Security, U.S. Dept. of Labor, pursuant to 42 U.S.C. 502, and returns unused grants to Bureau, cost of handling

MISCELLANEOUS RECEIPTS—Continued Page
Special account *v.* miscellaneous receipts—Continued
Penalty charges—Continued
Dishonored checks—Continued
dishonored checks is borne from Federal grant funds, and, consequently, penalty charges collected by Board are for deposit in Treasury as miscellaneous receipts of U.S., unless statutory authority is obtained to otherwise dispose of collections---------- 674
NATIONAL GUARD
Federal or State status
Retired Regular officers
Status upon completion of guard services
To transfer retired Regular Army officers who have completed service as State Adjutants General or Assistant Adjutants General, and are federally recognized in Reserve general officer grades, to Retired Reserve would create anomalous situation of having officers on two separate retired lists, namely, Regular Army retired list and Retired Reserve list, a situation not within contemplation of 10 U.S.C. 1374(b), 3352(a), and 3375. Therefore, absent statutory authority to transfer and fix rights of transferred officers so as to make one retired status compatible with with other, officers may not hold two retired statuses simultaneously--- 654
NATIONAL PARK SERVICE
(*See* Interior Department, National Park Service)
OFFICERS AND EMPLOYEES
Appointments. (*See* Appointments)
Attorneys
Court admission fees
Admission fee paid by Govt. attorney to practice before bar of U.S. Court of Appeals, required by court as arbiter of applicant's qualifications to practice before it, is personal to attorney, privilege being life one unless debarred regardless whether attorney remains in Govt. service, and because aside from capacity in which attorney serves Govt. he is also officer of court with obligations to court and public. Therefore, attorney on notice that nature of Govt. employment requires him to qualify before Federal courts including Supreme Court, as well as in State or other court, may not be reimbursed admission fee absent specific authority to charge appropriated funds for expense. 22 Comp. Gen. 460 reaffirmed-- 116
Awards for suggestion, ect. (*See* Awards, suggestions, etc.)
Baggage transportation. (*See* Transportation, baggage)
Compensation. (*See* Compensation)
Contributions from sources other than United States
Acceptance
Dept. of State officer who when administratively reimbursed travel expenses incurred incident to attending in official capacity American Bar Association's National Institute on Marine Resources is not allowed $7.50 air insurance fee may not recover amount from contribution made to Dept. under 22 U.S.C. 809 to cover "actual" travel expenses of officer, and even if gift had not been conditioned, insurance cost personal to officer, Dept. could only accept reimbursement for cost of air insurance for its own benefit, and as Bar Association is not one of acceptable donors described in 26 U.S.C. 501(c)(3), officer may not under 5 U.S.C. 4111 accept $7.50 as contribution from private source---------- 319

OFFICERS AND EMPLOYEES—Continued Page

Death or injury

Disability compensation and retired pay

Air Force sergeant who subsequent to retirement pursuant to 10 U.S.C. 8914 is injured while employed as civilian by Govt. is not entitled to retired pay for period he receives disability compensation under Federal Employees' Compensation Act of 1916, as amended, sec. 7(a) of act, 5 U.S.C. 8116(a), prohibiting concurrent receipt of civilian disability compensation and military or naval retired pay, and provision in act of July 4, 1966, amending 1916 act to effect that receipt of retirement benefits will not impair employee's right to disability compensation relating only to Federal civilian retirement programs, concurrent payment of civilian disability compensation and military retired pay may not be authorized ---------- 9

Debts to United States

Wage Earners' Plans

Where U.S. is both debtor and creditor at time civilian employee or member of uniformed services files Ch. 13, Wage Earners' Plan case, absent judicial determination to contrary, Govt.'s priority under 31 U.S.C. 191, may be asserted in Ch. 13 Wage Earner's time extension plan case, set-off to be accomplished in accordance with Title 4 of GAO Policy and Procedures Manual sec. 7520.10, unless wage earner is not insolvent. However, filing of Wage Earners' Plan would, for purposes of set-off, be considered *prima facie* evidence of insolvency ---------- 522

Dependents

Status

Brothers

Definition of "immediate family" in sec. 1.2d of Bur. of Budget Cir. No. A–56 excluding relationship of brother, and employee may not be reimbursed for travel and transportation expenses incurred for brother incident to change-of-duty station, even though employee is sole source of brother's support, and dependency is recognized for income tax and insurance purposes, attendance at Govt. school for dependents, and that employee might be held responsible in certain legal actions stemming from acts of brother ---------- 121

Fees imposed by States

Prohibition

Fee imposed by Montana State Statute to certify Bur. of Reclamation water and waste water operators responsible for implementing Federal water pollution programs may not be paid by Bureau from appropriated funds, absent authority for payment of such fees in Federal Water Pollution Control Act, in view of principle, based on supremacy clause, Art. VI, cl. 2, of Constitution, that State cannot require Federal employees to obtain licenses or permits in performance of official duties when they are engaged in occupations which are subject of State regulations applicable to general public ---------- 577

Illness

Travel expenses. (*See* Travel Expenses, illness)

OFFICERS AND EMPLOYEES—Continued Page

Inventions

Use by Government

Adoption and use of employee's invention prior to act of Sept. 1, 1954 (5 U.S.C. 4501–4506), repealing and superseding 1946 incentive awards authority does not bar paying incentive award to employee, even though ordinarily statutes are not retroactively effective, 1954 act being continuation and expansion of 1946 act, inventions that arose during period covered by older act may be processed for awards under terms and conditions of 1954 act, which neither limits time for consideration of invention for award, nor limits award to sum authorized under 1946 act 3

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

Liability

Government losses

Embezzlement

Retainer pay of fleet reservist arrested and indicted for mail theft while employed as career substitute postal carrier is not subject to administrative set-off under 5 U.S.C. 5511, which authorizes involuntary withholding of civilian employee's salary upon removal for cause, general rule being that retired or retainer pay is not subject to administrative set-off without debtor's consent and, therefore, sec. 5511 is applicable only to final pay due former member in his civilian position .. 400

Life insurance

Contributions

Premium pay within term "basic pay"

Retroactive collection of increased retirement and life insurance deductions to cover standby premium pay which was made part of base pay by Pub. L. 89–737, approved Nov. 2, 1966, and implemented by Civil Service Reg. on Mar. 3, 1967, may be waived for separated employees who are not annuitants, unless demand for increased benefits is made at some future time, but may not be waived for retirees and employees still on rolls who are entitled to increased benefits arising from inclusion of premium pay within term "basic pay" and, therefore, collection of deductions for premium pay received by retirees and current employees should be instituted to go back to effective date of act 694

Premiums a personal expense

Dept. of State officer who when administratively reimbursed travel expenses incurred incident to attending in official capacity American Bar Association's National Insitutute on Marine Resources is not allowed $7.50 air insurance fee may not recover amount from contribution made to Dept. under 22 U.S.C. 809 to cover "actual" travel expenses of officer, and even if gift had not been conditioned, insurance cost personal to officer, Dept. could only accept reimbursement for cost of air insurance for its own benefit, and as Bar Association is not one of acceptable donors described in 26 U.S.C. 501(c)(3), officer may not under 5 U.S.C. 4111 accept $7.50 as contribution from private source 319

Medical treatment. (*See* **Medical Treatment, officers and employees**)

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

Military duty

Leave. (*See* **Leaves of Absence, civilians on military duty**)

OFFICERS AND EMPLOYEES—Continued Page

Moving expenses. (*See* **Officers and Employees, transfers, relocation expenses**)

Nepotism

Restrictions

Leave replacement designated by fourth-class postmaster to perform his duties during his absence on sick or annual leave or on leave without pay has not been appointed or employed in civilian position within meaning of 5 U.S.C. 3110, which restricts making or advocacy of appointment, employment, advancement, or promotion of relatives by public officials, leave replacement, not necessarily same person each time, not having been appointed to position postmaster continues to hold while on leave of absence, but only performing temporary service on intermittent basis---- 636

Restriction in 5 U.S.C. 3110(a)(3) to making or advocating of appointment, employment, advancement, or promotion of nieces, nephews, uncles, aunts, brothers-in-law and sisters-in-law by public officials should be construed to also exclude spouses of such persons, notwithstanding legislative history of section evidences no such intent, as section imposing limitation or restriction should be construed in strict or limited sense---- 636

Exception to restriction in 5 U.S.C. 3110 on appointment, employment, advancement, or promotion made or advocated by public official of class of relatives enumerated in section applies only in situation in which public official after Dec. 15, 1967, undertakes or recommends such action for relative appointed by him prior to Dec. 16, 1967---- 636

Overtime. (*See* **Compensation, overtime**)

Parking fees. (*See* **Fees, parking**)

Per diem. (*See* **Subsistence, per diem**)

Personal property damage, loss, etc. (*See* **Property, private, damage, loss, etc., personal property**)

Photographs

Cost reimbursement

When use of employees' photographs facilitates accomplishing purposes of Govt., general rule that cost of photographs of individual employees of Govt. is personal expense that is not chargeable to public funds in absence of definite indication as to necessity for expenditures in accomplishment of some purpose for which appropriation was made is not for application, therefore, cost of photographs distributed by area Director of Equal Employment Opportunity Commission (EEOC), not for personal publicity but to publicize activities and functions of agency constitutes proper charge against 1967 fiscal year funds appropriated to EEOC, appropriation in affect at time photographs were taken, as publicity engendered by publication of photographs increased cooperation with agency and facilitated accomplishing its purposes---- 321

Post office employees. (*See* **Post Office Department, employees**)

Privately owned automobiles

Travel expenses. (*See* **Travel Expenses, vehicles, use of privately owned**)

Relocation expenses. (*See* **Officers and Employees, transfers, relocation expenses**)

OFFICERS AND EMPLOYEES—Continued Page

Resignation

Acceptibility

Administrative determination

Although ordinarily when resignation of civilian employee is accepted, reason for resignation is also accepted, this does not mean reason for resignation is acceptable to Govt. for purpose of term "and acceptable to the department concerned" in sec. 1.3c(1), Bur. of Budget Cir. No. A–56. To permit payment of travel and transportation expenses of employee who failed to fulfill service agreement to remain in Govt. service for 12 months following effective date of transfer, agency concerned is required to make determination of acceptability of reason for resignation ---------- 503

Voluntary *v.* involuntary

Voluntary resignation in lieu of facing charges for misconduct by civilian employee within 12-month period he agreed in writing to remain in Govt. service following effective date of his transfer, unless separated for reasons beyond his control and acceptable to department concerned, is not resignation for "reason beyond his control" so as to make payment of transfer expenses he incurred, permissible under sec. 1.3c(1), Bur. of Budget Cir. No. A–56 ---------- 503

Retirement. (*See* **Retirement, civilian**)

Service agreements

Transfers. (*See* **Officers and Employees, transfers, service agreements**)

Severance pay

Compensation. (*See* **Compensation, severance pay**)

Reemployment

Deferred annuity effect on resumption of pay

Employee involuntarily separated from service and awarded severance pay under sec. 9(b) of Pub. L. 89–301, who will be entitled to deferred civil service annuity at age 62, may be reemployed in temporary position not to exceed 1 year without entitlement to resumption of severance pay upon termination of temporary appointment being affected, notwithstanding he will reach 62 during period of temporary appointment and become entitled to immediate annuity at expiration of temporary appointment, employee not having satisfied requirements for annuity at time of involuntary separation, at which time entitlement to severance pay was determined, he is not subject to prohibition in sec. 9(b)(4) to payment of severance pay to persons entitled to immediate annuity upon separation. Therefore, employee is entitled to both deferred annuity and resumption of severance pay upon separation from temporary position ---------- 72

Resignation

Payment of severance pay to employees who resigned because they were unable to accept reassignment to other areas upon agency reorganization of regional offices which resulted in excess of personnel in competitive positions need not be recovered if primary purpose of proposed transfers was to meet responsibility to employees rather than to agency, and advice to employees of proposed reduction in force, encouraging them to seek positions with other Govt. agencies, together with effort made by employing agency to seek positions in other areas in region for

OFFICERS AND EMPLOYEES—Continued Page

Severance pay—Continued

Resignation—Continued

employees, evidences administrative intent to make job offers to employees rather than to reassign them without option to refuse reassignment, and that separations were involuntary and not removal for cause_ 56

Withholding

Pending disability retirement action

Fact that employee was separated by reduction-in-force action on same day he applied for disability retirement affords no basis to withhold payment of severance pay authorized in 5 U.S.C. 5595 pending action on disability retirement without employee's consent. If employee does not consent after being informed that upon approval of retirement, annuity begins day following separation and he will be required to refund any severance pay received, absent approval of retirement application, payment of severance pay to former employee may be certified__ 719

Training

Transportation and/or per diem

Expenses assumed by and reimbursed to contractor

Bureau of Indian Affairs authorized under 5 U.S.C. 4109 to pay necessary expenses of training employees pursuant to sec. 4105 may in negotiating fixed price contract with university to design and coordinate educational workshops to be subcontracted, and to perform all administrative functions of program, provide for contractor to pay transportation cost and per diem of Bureau participants in workshops. However, as amounts payable to contractor for travel expenses and per diem may not exceed amounts that would be directly payable to employees under 5 U.S.C. 4109(a), reimbursement to contractor should be on actual expense basis, and amounts reimbursed charged to fiscal year appropriation available at time travel expenses were incurred by employees_____ 662

Transfers

Relocation expenses

Appliances

Transportation costs

Household items used until time of departure from old duty station are not items of property contemplated by sec. 1.2h of Bur. of Budget Cir. No. A–56, which precludes from term "household goods and personal effects" items intended for resale or disposal. Therefore, employee who, after moving stove and air-conditioners incident to official change of station, disposes of them as surplus to his needs may be reimbursed cost of transporting items to new duty station since items were part of household for several years and in continuous use until he moved from old duty station_____ 473

Appraisal fees

Employee who had obtained both Federal Housing Admin. (FHA) and Veterans Admin. (VA) appraisals incident to sale of residence at old duty station in order to facilitate sale of residence as the two appraisals were not interchangeable, having sold residence under FHA financing and received reimbursement for FHA appraisal, may not be reimbursed pursuant to sec. 4.2b of Bur. of Budget Cir. No. A–56 for cost of VA appraisal, absent authority for reimbursement of more than one appraisal fee incident to sale by employee of residence at former duty station,

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Appraisal fees—Continued
one appraisal being considered sufficient to enable seller to determine asking price for his property ---- 306
Death or separation of employee
Reimbursement basis
Where transferred employee prior to death or separation through no fault of his own and acceptable to agency incurred or became obligated for expenses in connection with purchase or sale of residence, reimbursement under Pub. L. 89–516 and implementing regulations may be proper, but it is doubtful if reimbursement could be made where no expenses were incurred or binding obligations entered into prior to death or separation without fault of employee. Therefore, cases of this nature should be submitted for separate consideration ---- 189
Duty stations within United States requirement
In view of requirement in sec. 2 of Pub. L. 89–516 and sec. 4.1(a) of Bur. of Budget Cir. No. A–56, that both old and new stations of transferred employee must be located within 50 States, Dist. of Columbia, territories and possessions of U.S., Commonwealth of Puerto Rico, or Canal Zone to entitle him to reimbursement for expenses incurred in buying or selling residence, reimbursement may not be made to employee for cost of selling residence in U.S. incident to change-of-duty station to foreign post of duty, nor may employee be reimbursed for residence purchase expenses upon reassignment to U.S ---- 93
Term "within the continental United States" as used by Bur. of Budget in sec. 1.3c(1) of Cir. No. A–56, and derived from sec. 28 of Administrative Expenses Act of 1946, as added by Pub. L. 89–516, may not be interpreted to mean "to and within the continental United States," absent proper basis to justify interpretation ---- 122
Effective date
Sales agreement prior to July 21, 1966
Civilian employee who before reporting to new duty station on Aug. 26, 1966, and prior to effective date of Pub. L. 89–516, agreed to sell residence at old duty station and accepted deposit of "earnest money" with understanding balance would be paid upon transfer of title, is entitled to closing costs under Bur. of Budget Cir. No. A–56, which provides for allowance of reimbursable expenses incurred on or after July 21, 1966, as sale of residence became final on Aug. 1, 1966, when settlement agreement was executed and title to residence transferred ---- 582
House purchase
Closing charges
If various financing costs incurred by civilian employees incident to permanent change of station in connection with purchase of dwelling and referred to as "placement fee," "commission loan fee," or "origination fee" are interchangeable terms for expense of originating and closing loan as distinguished from "points"—mortgage discounts—part of price for hire of money, fees are reimbursable under sec. 4.2d of Bur. of Budget Cir. No. A–56, which provides for reimbursement of fees for loan applications and lender's loan origination, but not for reimbursement of mortgage discounts or "points" ---- 213

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Relocation expenses—Continued

House purchase—Continued

Loan assumption fee

Fee collected from veterans under 38 U.S.C. 1818(d) by Veterans Administration as condition precedent to guarantee of loan which was paid by employee incident to purchase of house in connection with transfer of duty station may be reimbursed to him as a fee or charge similar to loan application or lender's loan origination fees within purview of sec. 4.2d, Bur. of Budget Cir. No. A–56, revised Oct. 12, 1966__ 727

No house sold at old station

Under Pub. L. 89–516 and implementing Bur. of Budget Cir. No. A–56, authorizing reimbursement of expenses in connection with either sale of residence at old station or purchase of dwelling at new official station within U.S., employee may be reimbursed expenses incurred in connection with change of official station if he does not sell residence at old station but purchases one at new station, or conversely if he incurs expenses incident to selling residence at old station but does not within allowable time limitation purchase residence at new station_____ 93

House sale

Broker's fee

Fact that as agreed to beforehand licensed broker bought residence of transferred employee when difficulty was experienced in disposing of property does not preclude broker from collecting commission. Sec. 4.2a of Bur. of Budget Cir. No. A–56 containing no restriction on payment of brokerage fee where broker purchases residence of transferred employee, absent use of inflated value in setting sales price, expense of commission—no greater than if residence had been purchased by third party—is reimbursable to employee whose settlement sheet reflects his proceeds were reduced by amount of commission_____ 559

Closing charges

Civilian employee who before reporting to new duty station on Aug. 26, 1966, and prior to effective date of Pub. L. 89–516, agreed to sell residence at old duty station and accepted deposit of "earnest money" with understanding balance would be paid upon transfer of title, is entitled to closing costs under Bur. of Budget Cir. No. A–56, which provides for allowance of reimbursable expenses incurred on or after July 21, 1966, as sale of residence became final on Aug. 1, 1966, when settlement agreement was executed and title to residence transferred__ 582

No house purchased at new station

Under Pub. L. 89–516 and implementing Bur. of Budget Cir. No. A–56, authorizing reimbursement of expenses in connection with either sale of residence at old station or purchase of dwelling at new official station within U.S., employee may be reimbursed expenses incurred in connection with change of official station if he does not sell residence at old station but purchases one at new station, or conversely if he incurs expenses incident to selling residence at old station but does not within allowable time limitation purchase residence at new station__ 93

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Relocation expenses—Continued

House sale—Continued

"Official station" location requirement

Although generally cost of selling residence not located at employee's old official station or place from which he commutes on daily basis may not be reimbursed under authority of Pub. L. 89–516, exception to daily commuting rule may be made where employee cannot obtain residence for himself and family in location which permits commuting to work on daily basis. Therefore, employee who unable to find suitable housing at new duty station resides in bachelor quarters at that station and moves family 559 miles from old duty station to within 349 miles of new station to permit him to go home weekends, may be reimbursed upon further change-of-duty station for cost of selling residence located 349 miles from station from which he is transferred 109

Miscellaneous expenses

Civilian employee who incident to transfer from Utah to California sold his permanent type home at old duty station where he purchased new mobile home for use as living quarters at new duty station may be reimbursed use tax levied by State of California not as expense paid in connection with real estate transaction under sec. 4.2g of Bur. of Budget Cir. No. A–56, but as miscellaneous expense under sec. 3.1, which in authorizing reimbursement of use tax imposed on automobiles brought into some jurisdictions does not exclude reimbursement of use taxes on items other than automobiles. Therefore, use tax may be considered in determining amount of miscellaneous expenses allowance reimbursable under sec. 3 of Circular to employee 687

Govt. agency acquiring services of overseas employee who incident to return to U.S. for separation and reemployment without break in service is entitled to reimbursement of travel expenses by both losing and acquiring agency in accordance with 46 Comp. Gen. 628 may, if transfer is not for convenience of employee, pursuant to sec. 2.5 of Bur. of Budget Cir. No. A–56, authorize payment of subsistence expenses incurred while occupying temporary quarters at new station, miscellaneous expenses, and per diem for employee's family incident to travel from residence to new duty station, not to exceed per diem payable for direct travel from old to new station 763

Overseas employee under separation orders to place of residence which is more distant from overseas duty station than place at which he is employed without break in service after departure from overseas duty point is only entitled to reimbursement by losing agency for travel costs to place of residence. Although employee is not entitled to travel or transportation costs from residence to new duty station, no collection is required for costs paid to residence in excess of costs for direct travel from overseas to new station. Under Bur. of Budget Cir. No. A–56 acquiring agency may pay miscellaneous expenses allowance and reimburse employee for subsistence while occupying temporary quarters. However, no per diem allowance for travel time of employee's family is allowable 763

OFFICERS AND EMPLOYEES—Continued Page
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Relocation expenses—Continued
Nonreimbursable
Voluntary resignation
Voluntary resignation in lieu of facing charges for misconduct by civilian employee within 12-month period he agreed in writing to remain in Govt. service following effective date of his transfer, unless separated for reasons beyond his control and acceptable to department concerned, is not resignation for "reason beyond his control" so as to make payment of transfer expenses he incurred, permissible under sec. 1.3c(1), Bur. of Budget Cir. No. A–56 ---------- 503
Overseas employees transferred to the United States
Employees transferred from overseas duty stations to duty stations within continental U.S. by Dept. of Defense agencies, even though they do not agree to remain in Govt. service for 12-month period following transfer are eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, sec. 1.3c of Circular containing statutory regulations with regard to transportation agreements not requiring execution of agreement, and although costs of house hunting trip may not be authorized in connection with transfer to and from continental U.S., payment of subsistence while occupying temporary lodgings is not restricted but is allowable at discretion of agency; however, payment of per diem for dependents and miscellaneous expense allowance are not subject to administrative discretion under terms of controlling regulation ---------- 122
Permanent residence requirement
Trailer status
Expenses incurred by employee for round trip travel between old and new official stations to locate lot of sufficient acreage on which to which to place double size housetrailer may be reimbursed to him under authority in sec. 2.4a, Bur. of Budget Cir. No. A–56, providing for reimbursement of traveling expenses incurred in "seeking permanent residence quarters" at new station, sec. 9.1c of regulations respecting transportation of housetrailers used as residence, recognizing that there may be payment of travel allowances under sec. 2.4 even though trailer used as residence at old station will continue to be employee's residence at new station ---------- 119
Points
If various financing costs incurred by civilian employees incident to permanent change of station in connection with purchase of dwelling and referred to as "placement fee," "commission loan fee," or "origination fee" are interchangeable terms for expense of originating and closing loan as distinguished from "points"—mortgage discounts—part of price for hire of money, fees are reimbursable under sec. 4.2d of Bur. of Budget Cir. No. 1–A–56, which provides for reimbursement of fees for loan applications and lender's loan origination, but not for reimbursement of mortgage discounts or "points." ---------- 213
Same types of cost in buying and selling homes
Employee transferred between counties in State of Pennsylvania who incurs expense of State and county real property transfer taxes in connection with sale and purchase of residences at old and new

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Same types of cost in buying and selling homes—Continued
official stations may only be reimbursed amount of higher expense as authority in sec. 4.2d of Bur. of Budget Cir. No. A–56 for reimbursement of transfer taxes is subject to condition that same types of costs are not reimbursable at both stations. Even if employee had paid State transfer tax incident to one transaction and local transfer tax in connection with other, "same types of costs" principle would prevent reimbursement of both expenses---- 704
"Settlement date" limitation on property transactions
Final settlement date for purchase of newly constructed residence occurring more than 1 year after effective date of employee's permanent change-of-duty station, pursuant to sec. 4.1d of Bur. of Budget Cir. No. A–56, employee is not entitled to reimbursement of otherwise allowable expenses incurred in purchase of residence, notwithstanding delivery of completed residence was delayed because of adverse weather conditions and inadequate supply of labor---- 753
Employee who reported to new duty station on Oct. 17, 1966, signed agreement on Sept. 30, 1967 to purchase home to be constructed, and completed purchase of home on Mar. 21, 1968, may not be reimbursed expense of loan origination charge, purchase agreement entered into within 1 year of transfer not constituting "settlement" where conditions of agreement that purchaser obtain loan and seller complete house within 6 months were not consummated within 1 year of date of employee's transfer, as required by sec. 4.1d of Bur. of Budget Cir. No. A–56---- 792
Taxes
Employee transferred between counties in State of Pennsylvania who incurs expense of State and county real property transfer taxes in connection with sale and purchase of residences at old and new official stations may only be reimbursed amount of higher expense as authority in sec. 4.2d of Bur. of Budget Cir. No. A–56 for reimbursement of transfer taxes is subject to condition that same types of costs are not reimbursable at both stations. Even if employee had paid State transfer tax incident to one transaction and local transfer tax in connection with other, "same types of costs" principle would prevent reimbursement of both expenses---- 704
Temporary quarters
Absences
The "period of not more than 30 days" prescribed in sec. 2.5b(1) of Bur. of Budget Cir. No. A–56 for occupancy at new duty station of temporary quarters at Govt. expense means consecutive days unless occupancy is interrupted for reasons of official necessity, therefore, employee whose family remains at old duty station is not entitled to extension of allowable 30-day period of occupancy for absences from temporary quarters for personal reasons, in computing per diem under sec. 2.5d(2) of circular, reimbursement is not limited to those days employee actually incurred expenses for temporary quarters during allowable period, but employee is entitled to amount actually expended for lodging and subsistence, not to exceed prescribed per diem, amounts expended for meals must be itemized pursuant to sec. 6.12f of Standardized Govt. Travel Regs---- 322

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Temporary quarters—Continued
Automobile parking or storage expenses
Costs of parking or storing automobile which employee occupying temporary quarters incident to change-of-duty station pays separately from lodging expenses are not reimbursable to employee, use of term "subsistence expenses" in Pub. L. 89–516 and implementing Bur. of Budget regulations not extending to garaging of vehicle when employee occupies temporary quarters, and sec. 3.5 of Standardized Govt. Travel Regs. treating garaging or parking of vehicle as transportation expense. 189
Determination
Lacking definition of term "temporary quarters" in Pub. L. 89–516, or Budget Bur. Cir. No. A–56, each case must be treated individually. Upon transfer to new duty station the apartment employee occupies alone for 4 months until he moves to permanent quarters when joined by family at close of school semester is considered temporary quarters and employee is entitled to cost of meals and lodgings for first 30 days at new station, prerequisite for reimbursement under section 2.5 of circular not requiring employee to actively engage in seeking quarters for immediate occupancy. Although reimbursement may not be authorized for period employee was absent on temporary duty, period of entitlement to subsistence costs may be extended for time involved in temporary duty 84
Reimbursement basis
When incident to permanent change-of-duty station employee and/or family are in travel status and temporary quarters status for parts of same day, maximum limitation for temporary quarters allowance under sec. 2.5(d)(2) of Bur. of Budget Cir. No. A–56 should be computed beginning with quarter day after last quarter day for which per diem is paid under sec. 6.1 of Standardized Govt. Travel Regs. However, where travel to new station is under 24 hours, maximum temporary lodging allowance should be computed from beginning of quarter on which per diem ceased, and on day employee moves into permanent quarters, full maxi mum should be used to determine entitlement regardless of time such move occurs 189
Subsistence expenses
Govt. agency acquiring services of overseas employee who incident to return to U.S. for separation and reemployment without break in service is entitled to reimbursement of travel expenses by both losing and acquiring agency in accordance with 46 Comp. Gen. 628 may, if transfer is not for convenience of employee, pursuant to sec. 2.5 of Bur. of Budget Cir. No. A–56, authorize payment of subsistence expenses incurred while occupying temporary quarters at new station, miscellaneous expenses, and per diem for employee's family incident to travel from residence to new duty station, not to exceed per diem payable for direct travel from old to new station 763

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Relocation expenses—Continued

Temporary quarters—Continued

Subsistence expenses—Continued

Overseas employee under separation orders to place of residence which is more distant from overseas duty station than place at which he is employed without break in service after departure from overseas duty point is only entitled to reimbursement by losing agency for travel costs to place of residence. Although employee is not entitled to travel or transportation costs from residence to new duty station, no collection is required for costs paid to residence in excess of costs for direct travel from overseas to new station. Under Bur. of Budget Cir. No. A–56 acquiring agency may pay miscellaneous expenses allowance and reimburse employee for subsistence while occupying temporary quarters. However, no per diem allowance for travel time of employee's family is allowable---- 763

Title insurance

Cost of title insurance purchased by transferred civilian employee in connection with sale of residence at old duty station is reimbursable expense under rule in 46 Comp. Gen. 884, if insurance is of type customarily furnished by seller to purchaser of residence. Therefore, upon determination that custom of furnishing title insurance exists in area of old official station, employee may be reimbursed cost of purchasing title insurance for benefit of purchaser of his residence---------- 559

Transportation for house hunting

Mode of transportation

Round trip travel performed by transferred employee for purpose of house hunting need not be performed by same mode of transportation, reference in secs. 2.4b and 2.4c(3) of Budget Bur. Cir. No. A–56, to "mode of transportation" in singular is not intended to be restrictive but merely to provide for most usual situation as most employees traveling to locate residence generally use same mode of transportation both ways---------- 189

"One round trip" limitation

House hunting trip authorized by Pub. L. 89–516 (5 U.S.C. 5724(a)(2)) at Govt. expense upon employee's change-of-duty station may not be extended over several trips, even though transportation expenses would be allowed only for first trip and per diem for several trips would not exceed 6-calendar days prescribed by sec. 2.4b of implementing regulations, Bur. of Budget Cir. No. A–56, the act authorizing allowances "only for one round trip," and regulations limiting duration of advance round trip to 6-calendar days, including travel time, contemplating only one round trip and not several trips, with per diem extending over 6-day period---- 189

Transportation of household goods, etc.

Resale or disposal purposes

Household items used until time of departure from old duty station are not items of property contemplated by sec. 1.2h of Bur. of Budget Cir. No. A–56, which precludes from term "household goods and personal effects" items intended for resale or disposal. Therefore, employee who, after moving stove and air-conditioners incident to official change of station, disposes of them as surplus to his needs may be reimbursed cost of transporting items to new duty station since items were part of household for several years and in continuous use until he moved from old duty station---------- 473

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Relocation expenses—Continued

What constitutes "official station"

Although generally cost of selling residence not located at employee's old official station or place from which he commutes on daily basis may not be reimbursed under authority of Pub. L. 89–516, exception to daily commuting rule may be made where employee cannot obtain residence for himself and family in location which permits commuting to work on daily basis. Therefore, employee who unable to find suitable housing at new duty station resides in bachelor quarters at that station and moves family 559 miles from old duty station to within 349 miles of new station to permit him to go home weekends, may be reimbursed upon further change-of-duty station for cost of selling residence located 349 miles from station from which he is transferred..... 109

Service agreements

Administrative determination

An overseas employee returned to U.S. for separation upon reemployment without break in service is not required under sec. 1.3c of Bur. of Budget Cir. No. A–56 to execute employment agreement to remain in service. However, acquiring agency, either by regulation or otherwise, may require employee to execute employment agreement..... 763

Failure to fullfill

Employees subject to 12 month transportation agreement executed pursuant to Pub. L. 89–516, that required them to remain in service of concerned department of agency of Dept. of Defense rather than "in Govt. service," may with agency approval be transferred incident to promotion within or outside Defense Dept. prior to expiration of obligated period of service and relieved of obligation to refund transfer costs, promotional transfer, although not reason provided by agreement for not completing required period of service, considered to be in interest of Govt., transportation agreement was not breached. However, employing agency if unwilling to regard promotional transfer as in interest of Govt. may refuse to release employee from obligated period of service, or particular type agreement may be prescribed for promotional transfers that occur prior to completion of agreed period of service..... 125

Voluntary resignation in lieu of facing charges for misconduct by civilian employee within 12-month period he agreed in writing to remain in Govt. service following effective date of his transfer, unless separated for reasons beyond his control and acceptable to department concerned, is not resignation for "reason beyond his control" so as to make payment of transfer expenses he incurred, permissable under sec. 1.3c(1), Bur. of Budget Cir. No. A–56..... 503

Although ordinarily when resignation of civilian employee is accepted, reason for resignation is also accepted, this does not mean reason for resignation is acceptable to Govt. for purpose of term "and acceptable to the department concerned" in sec. 1.3c(1), Bur. of Budget Cir. No. A–56. To permit payment of travel and transportation expenses of employee who failed to fulfill service agreement to remain in Govt. service for 12 months following effective date of transfer, agency concerned is required to make determination of acceptability of reason for resignation..... 503

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Service agreements—Continued
Failure to fulfill—Continued
Under sec. 1.3c(1), Bur. of Budget Cir. No. A–56, which provides that employee who signs agreement to remain in service of Govt. for 12 months following effective date of transfer is not entitled to travel and transportation expenses incident to transfer unless he is separated for reasons beyond his control and acceptable to department concerned, it is necessary for both conditions to be satisfied and documented before expenses incident to transfer may be paid---------- 503
Government *v.* particular agency service
Although Dept. of Defense overseas employees transferred to duty station within continental U.S. are not required to sign transportation agreement in order to be eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, Dept. may pursuant to administrative regulation refuse to approve payment of travel and transportation expenses involved in connection with change of official station from overseas unless and until employee executes agreement to remain in Govt. service or in service of Dept. involved for specified period of time, and as agreement under administrative regulation would not be predicated on specific provision of law or statutory regulation, administrative regulation should conform as closely as possible to Cir. No. A–56 and prescribe acceptable reasons for failure to remain in Govt. service as agreed, and liability of employee for failure to fulfill agreement-------- 122
Employees subject to 12 month transportation agreement executed pursuant to Pub. L. 89–516, that required them to remain in service of concerned department or agency of Dept. of Defense rather than "in Govt. service," may with agency approval be transferred incident to promotion within or outside Defense Dept. prior to expiration of obligated period of service and relieved of obligation to refund transfer costs, promotional transfer, although not reason provided by agreement for not completing required period of service, considered to be in interest of Govt., transportation agreement was not breached. However, employing agency if unwilling to regard promotional transfer as in interest of Govt. may refuse to release employee from obligated period of service, or particular type agreement may be prescribed for promotional transfers that occur prior to completion of agreed period of service---------- 125
Overseas employees transferred to United States
Employee who upon completion of agreed period of overseas duty is transferred to duty station in continental U.S. by agencies within Dept. of Defense is not required to sign new transportation agreement to remain in Govt. service for 12 months subsequent to transfer, absent such requirement in sec. 1.3c of Bur. of Budget Cir. No. A–56 containing statutory regulations with regard to agreements to remain in Govt. service as condition for reimbursement of transfer costs---------- 122
Employees transferred from overseas duty stations to duty stations within continental U.S. by Dept. of Defense agencies, even though they do not agree to remain in Govt. service for 12-month period following transfer are eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, sec. 1.3c of Circular containing statutory regulations with regard to transportation agreements not

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Service agreements—Continued

Overseas employees transferred to United States—Continued

requiring execution of agreement, and although costs of house hunting trip may not be authorized in connection with transfer to and from continental U.S., payment of subsistence while occupying temporary lodgings is not restricted but is allowable at discretion of agency; however, payment of per diem for dependents and miscellaneous expense allowance are not subject to administrative discretion under terms of controlling regulation---------- 122

Although Dept. of Defense overseas employees transferred to duty station within continental U.S. are not required to sign transportation agreement in order to be eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, Dept. may pursuant to administrative regulation refuse to approve payment of travel and transportation expenses involved in connection with change of official station from overseas unless and until employee executes agreement to remain in Govt. service or in service of Dept. involved for specified period of time, and as agreement under administrative regulation would not be predicated on specific provision of law or statutory regulation, administrative regulation should conform as closely as possible to Cir. No. A–56 and prescribe acceptable reasons for failure to remain in Govt. service as agreed, and liability of employee for failure to fulfill agreement---------- 122

An overseas employee returned to U.S. for separation upon reemployment without break in service is not required under sec. 1.3c of Bur. of Budget Cir. No. A–56 to execute employment agreement to remain in service. However, acquiring agency, either by regulation or otherwise, may require employee to execute employment agreement---- 763

Transportation

Dependents. (*See* **Transportation, dependents**)

Household effects. (*See* **Transportation, household effects**)

Travel expenses. (*See* **Travel Expenses**)

ORDERS

Amendment

Retroactive

Travel completed

Approval of special per diem allowances prescribed in 37 U.S.C. 405 to cover cost-of-living when members of uniformed services travel on temporary duty outside U.S. or in Hawaii or Alaska, subsequent to performance of travel would be retroactive determination of both special per diem rate and entitlement to rate contrary to rule that rights of Govt. and member entitled to per diem for travel and temporary duty become fixed under applicable orders and regulations in effect at time duty is performed and such rights may not be changed by administrative action which would retroactively amend member's orders or change applicable regulations. Therefore, Joint Travel Regs. may not be amended to provide for approval of special per diem allowances for foreign travel after travel has been performed---------- 127

ORDERS—Continued Page

Effective date

Leave, delay en route to new station

No legal basis existing for distinguishing between assignment of member of uniformed services to nonrestricted and restricted areas for purpose of extending effective date of permanent change-of-station orders until completion of temporary duty or leave en route, par. M3003-1b(1) of Joint Travel Regs. may be amended under 37 U.S.C. 404(b) to eliminate distinction, revision to conform to rule in 33 Comp. Gen. 458 that effective date of permanent change-of-station orders is date upon which travel must commence to accomplish ordered change, and that travel is not required to start prior to performance of temporary duty, use of authorized leave, proceed time, and personal convenience delays. Therefore, member's entitlement to transportation allowances only for dependents in existence on effective date of orders remains unaltered under revised regulation 710

PATENTS

Devices, etc., used by Government

Use authorization

Foreign invention

Under negotiated release and patent license agreement with assignee of invention covering bore wear reducing additive for ammunition owned by foreign firm, which granted U.S. unconditional right to manufacture, sell, and use article throughout world, sale within territorial limits of U.S. passing title to foreign countries, does not constitute breach of contract, requiring additional payments to licensor under contract or its assignor, territorial limitations of sovereignty precluding country from giving extraterritorial effect to its patent laws. Therefore, agreement not restricting sales to buyers who would use article in U.S., territorial limitation may not be read into contract to prohibit sale of additive ammunition in U.S. for export 627

PAY

Absence without leave

Civil arrest

Unexcused, etc.

Member of uniformed services who at time of conviction for crime by civil authorities was found sane, similar finding made by military authorities, but who subsequently was committed to State hospital for criminally insane, followed by placement on Temporary Disability Retired List, pursuant to 10 U.S.C. 1202, has forfeited entitlement to pay and allowances under 37 U.S.C. 503(a) for period from date of apprehension by civil authorities until placement on Temporary Disability Retired List, member's commanding officer properly declining to excuse absence from duty as unavoidable, and disability of member having been incurred during period of unauthorized absence, he was not in pay status on day preceding date of retirement, prerequisite to physical disability retirement and, therefore, member also is not entitled to retired pay 214

Expiration of enlistment. (*See* Pay, after expiration of enlistment)

PAY—Continued Page

Active duty

After termination of military status

To complete term as Chief of Staff

Upon retirement effective July 1, 1968, an Army Chief of Staff whose appointment to 4-year term on July 3, 1964, expires July 2, 1968, may be recalled to active duty in his retired grade pursuant to 10 U.S.C. 3504, assuming confirmation under 10 U.S.C. 3962, to complete 4-year term as Chief of Staff, and may be paid as Chief of Staff for July 1 and 2, 1968, and officer when released from such active duty will be entitled to recompute retired pay under method prescribed in 10 U.S.C. 1402(a)-- 696

Reservists

Injured in line of duty

Return to civilian occupation while disabled

Non-Regular member of Armed Forces who is disabled by injury incurred while performing active duty training may continue to receive pay and allowances authorized by 37 U.S.C. 204(g)-(i) when he resumes civilian occupation, upon determination, preferably by service medical personnel and made in accordance with standards established for Regular members, that injury precludes reservist from performing normal military duties of grade or rank, notwithstanding member is awaiting final action on retirement proceedings, or that he did not resume normal civilian occupation but because of disability took other employment---------- 531

Additional

Aviation duty. (*See* Pay aviation duty)

Hazardous duty

More than one incentive pay

Qualified parachute riggers in jump status who are part of unit assigned mission involving development, testing, and evaluation of parachutes and related equipment do not perform multiple hazardous duties to entitle them to flight pay prescribed in 37 U.S.C. 301(e) in addition to parachute pay. The in-flight duties of members who load, inspect, rig, drop, and study experimental equipment are not related to aircrew duties within meaning of 37 U.S.C. 301(a)(1) and (4), and members neither performing two or more hazardous duties simultaneously or in rapid succession are not entitled to retain dual hazardous pay received for aviation and parachute duties, and, therefore, erroneous flight payments made to them should be recovered---------- 728

Hostile fire pay

Cadets and midshipmen

Cadets and midshipmen of Academies who are not members of uniformed services within purview of 37 U.S.C. 101(23) and who are paid pursuant to sec. 201(c) at rate of 50 percent of basic pay of commissioned officer in pay grade 0-1 with 2 or less years of service computed under sec. 205, if sent to Vietnam for orientation and training would not be entitled to hostile fire pay prescribed by sec. 310(a), rule in 30 Comp. Gen. 31 concerning flight pay to effect that special pay is dependent upon status of entitlement to basic pay, applying equally to hostile fire pay entitlement---------- 781

PAY—Continued Page

After expiration of enlistment

Confinement, etc., periods

Pay status

Enlisted man restored to duty to make up lost time as provided by 10 U.S.C. 972, having resumed his obligated service contract, his enlistment extends beyond normal expiration term of service to include make good days and, therefore, fixes new termination date, though period of confinement may have commenced during extended period. However, restoration to duty status to make up lost time does not continue indefinitely when status changes from duty to confinement, whether pretrial or pursuant to court-martial sentence. Therefore, member placed in pretrial confinement during make good lost time period extending from date enlistment expired, August 26, 1965, to adjusted expiration date, Dec. 24, 1965, is not entitled to pay and allowances subsequent to new termination date, 37 Comp. Gen. 488, modified---------- 487

Hospitalization and medical care

Army enlisted man who incident to injury reported to be due to own misconduct is hospitalized for period subsequent to expiration of term of enlistment is nevertheless entitled to pay and allowances for period, administrative determination under 10 U.S.C. 1216 that physical condition of member which resulted from corrective surgery at Army hospital at time of injury is disability incurred or aggravated during active service, not result of misconduct and incurred in line of duty, governing his rights, and member having executed medical and hospitalization care affidavit required by 10 U.S.C. 3262, and having been recommended for physical disability retirement, may be regarded as being retained in service for medical treatment and hospitalization within meaning of sec. 3262 so as to entitle him to pay and allowances for period of hospitalization following expiration of enlistment---------- 351

Aviation duty

Excess flying hours

Suspension time effect

Officer of uniformed services who is not subject to minimum flight requirements, upon removal on Aug. 17, 1967 of Dec. 1, 1966 suspension from flying due to physical disqualification which occurred Aug. 4, 1966, nevertheless is eligible for incentive pay prescribed by sec. 105 of E.O. No. 11157 for members whose flying suspension had been removed and flight requirements satisfied, and administrative regulation to deny flight pay if suspension is not removed within either 3-month or 5-month period prescribed by sec. 104 would be inconsistent with this view. Therefore, member entitled to 5 months of flying pay subsequent to month of incapacity, Aug. 1966, having been paid for 3 months, is entitled to flying pay for Dec. and Jan., remainder of maximum period for which excess hours can apply---------- 553

Civilian employees. (*See* **Compensation**)

Deceased members. (*See* **Decedents' Estates, pay, etc., due military personnel**)

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

PAY—Continued Page

Increases

Effective date

Under Public Law 90–207 °

Members of uniformed services entitled pursuant to Pub. L. 90–207, approved Dec. 16, 1967, to pay increases comparable to those prescribed for civilian employees under Federal Salary Act of 1967, second of three-stage upward adjustment that is effective for civilian employees on "first day of first pay period beginning on or after July 1, 1968," may be made effective for military personnel on July 1, 1968, as monthly pay basis fixed by 37 U.S.C. 203(a) meets standard that pay increase for both civilian and military personnel commence on first day of first pay period starting on or after July 1, 1968 ---------- 549

Promotions

Temporary

Acceptance of promotion

Personal act of accepting temporary promotion under 10 U.S.C. 5784 by individuals other than those in "missing status within purview of Missing Persons Act could be met for Navy ensigns and Marine Corps 2nd lieutenants for purpose of achieving earliest possible date of precedence in rank to which temporarily promoted by providing that effective date of temporary promotion would be future date specified in order announcing promotion or later actual date of acceptance by officer, accomplished over his signature ---------- 587

Effective date

Members in a "missing status"

Although in view of absence of language similar to that contained in sec. 5787, acceptance is required to make temporary promotion under 10 U.S.C. 5784 legally effective for purpose of receiving pay and allowances of higher grade, to deny Navy ensigns and Marine Corps 2nd lieutenants in "missing status" benefits of temporary promotions prescribed by sec. 5784 on basis of acceptance requirement would defeat objective of Missing Persons Act. Therefore, pay account of Marine Corps 2nd lieutenant temporarily promoted under sec. 5784 to 1st lieutenant while in missing status may be credited with increased pay and allowances of higher grade from date administratively determined under authority of 37 U.S.C. 556 to be date officer would have accepted promotion ---------- 587

Saved pay

Temporary grade pay higher

Member of uniformed services in permanent enlisted grade E–8, when temporarily appointed warrant officer elects to receive saved pay pursuant to 10 U.S.C. 5596, therefore, when assigned overseas is not eligible to receive hostile fire pay, family separation allowance, and cost-of-living allowance, nor statutory increase in pay grade E–8 that became effective after temporary promotion, may not be paid difference between saved pay and pay of permanent grade which would have accrued if he had not received appointment as temporary officer. However, notwithstanding member's election, 37 U.S.C. 204 requires that when and if pay and allowances of temporary grade equal or exceed those of permanent grade saved under 10 U.S.C. 5596(f), member must be paid pay and allowances of temporary grade ---------- 491

PAY—Continued Page

Promotions—Continued

Temporary—Continued

Termination of temporary appointment

To meet problems arising by reason of absence in 10 U.S.C. 5784, authorizing temporary promotion of Navy ensigns and Marine Corps 2nd lieutenants, of language similar to that contained in sec. 5787 entitling temporarily promoted Navy and Marine Corps officers to pay and allowances of higher grade from date promotion is made, and providing that upon termination or expiration of temporary appointment, officer shall have grade he would hold if he had not received temporary promotion, will require remedial legislation that would be retroactively effective to extent, at least, of rectifying any legal deficiency in superseding appointment actions issued under sec. 5784 to officers serving under prior promotions affected pursuant to sec. 5787---------- 587

Reservists

Active duty. (*See* **Pay, active duty, reservists**)

Payment basis

Actual days served

Reservist of Armed Forces who serves on active duty for training from Feb. 1, through 28, in a nonleap year is not entitled under A–71273, Mar. 2, 1936, to full month's active duty pay and allowances without deduction for 2-constructive days at end of February. Rule in 1936 decision that reservists ordered to duty for period of less than 30 days are not within scope of act of June 30, 1906, which prescribes 30 day calendar month for computing pay of persons paid on annual or monthly basis, and are, therefore, only entitled to pay for actual number of days served, including thirty-first day of month, not having been changed by codification in 37 U.S.C. 1004 of governing statutes, decision of March 2, 1936, is affirmed---------- 515

Training. (*See* **Pay, training, reservists**)

Retired

Active duty

After retirement

Higher grade service

Army sergeant retired in grade E–6 upon own application under 10 U.S.C. 3914 who under orders recalling him to active duty in grade E–7, with his consent, serves only 7 months 6 days of 2-year period because of hardship is entitled to recomputation of retired pay on basis of higher grade, for had he been retired at grade E–7 rather than released from active duty, he would have been eligible under 10 U.S.C. 3961 to retire in that grade, and 10 U.S.C. 1402(a) prescribing computation of retired pay on monthly basic pay of grade in which member would be eligible to retire if retiring upon release from active duty performed subsequent to retirement, sergeant's retired pay properly may be recomputed effective day following release from active duty on monthly basic pay of grade E–7---------- 289

Additional

Extraordinary citations. (*See* **Pay, retired, combat citations**)

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Retired—Continued

Advancement on retired list

Enlisted member advanced to officer grade

Regular chief warrant officer, W–4, relieved from active duty and retired as Air Force reservist in grade of lieutenant colonel under 10 U.S.C. 1201 by reason of permanent physical disability who was also eligible to be retired under 10 U.S.C. 1293, having had more than 20 years' active service, properly is being paid retired pay computed under formula 1 of 10 U.S.C. 1401, formula "most favorable to him," and retired pay may not be computed under formula 4, based on higher Reserve commission grade, to establish "most favorable formula" for him under 10 U.S.C. 1401, formula 4 pertaining exclusively to persons retired as warrant officers, and member having been retired as commissioned officer, formulas 1 and 4 may not be combined to provide greater amount of retired pay, and computation of member's retired pay is restricted to formula 1, 10 U.S.C. 1401 206

Enlisted pay greater

Retired pay of sergeant major discharged for convenience of Govt. on Sept. 30, 1966, in grade E–9 and eligible to retire in that grade, but who on Oct. 1, 1966 is placed at his application pursuant to 10 U.S.C. 1293 on retired list as chief warrant officer W–2, is not restricted to payment on basis of "retired grade" or "any warrant grade satisfactorily held by him on active duty" prescribed by formula 4 of 10 U.S.C. 1401, section also providing for computation of retired pay on basis of most favorable formula for persons entitled to retired pay under sec. 1401 as well as "any other provision of law," and retired pay at enlisted E–9 grade being greater than that payable at warrant officer W–2 grade, member may be paid difference between grades for period during which he was paid lesser amount of retired pay 74

Evidence of satisfactory service in another service

Holding in *Harry Russell Miller* v. *U.S.*, 180 Ct. Cl. 872, that retired enlisted member of Coast Guard is entitled under 14 U.S.C. 362 to compute retired pay on basis of higher grade satisfactorily held in Navy should not be extended to similar or related statutes. Matter is too doubtful to warrant extending rule of case in view of reservation expressed by court concerning correctness of GAO decisions under sec. 511 of Career Compensation Act that retired member of one branch of uniformed services who held higher grade in another branch of service is not entitled to retired pay computed on pay of higher grade, and differences between various statutes 722

Annuity elections for dependents

Beneficiary eligibility

Certification acceptability

Statement from chiropractor certifying that unmarried daughter of member of uniformed services who is over 18 years of age suffers from paralysis may be considered "a certificate of attending physician" to substantiate her eligibility as beneficiary under Retired Serviceman's Family Protection Plan, "practice of chiropractic" constituting practice of medicine within meaning of par. 8b(2)(c) BuPers Instruction 1750.1D, which permits not only attending physician but "appropriate official of a hospital or institution," who may or may not be practicing physician,

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Retired—Continued
Annuity elections for dependents—Continued
Beneficiary eligibility—Continued
Certification acceptability—Continued
to certify to physical incapacity or mental incompetence of beneficiary. Therefore, disability of dependent within scope of chiropractic attention, chiropractor is qualified to express expert opinion as to extent and permanency of disability to which he is certifying---------- 371
Children
Payments to natural guardian
Monthly annuity payments due under Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446, for use and benefit of minor children of deceased member of uniformed services may be paid to mother, granted custody of children when divorced from decedent, as natural guardian of children, notwithstanding $1,000 limitation imposed under par. 40504b(5) Military Pay and Allowances Entitlements Manual on payments to parent as natural guardian will be exceeded, and mother refuses to obtain letters of guardianship appointing her legal guardian of children, absent restriction on receipt of small periodic amounts, even though such payments if projected over period of time may total more than limitation on payments authorized without appointment of legal guardian, provided mother complies with Title 4, sec. 42.3, GAO Policy and Procedures Manual for Guidance of Federal Agencies------ 270
Cost deductions
Consumer Price Index increases
Reduction required in retired pay of officer of uniformed services retired on Apr. 1, 1968 under 10 U.S.C. 6323 to provide annuity under Retired Serviceman's Family Protection Plan is for computation on retired pay based on basic pay rate effective Oct. 1, 1967, without regard to any increase in retired pay to reflect changes in Consumer Price Index, even though pursuant to sec. 1401a(e) officer is entitled to retired pay computed on basic pay rates effective July 1, 1966, plus increases due to changes in Consumer Price Index, sec. 1436(a), providing that reduction of retired pay or retainer pay of person electing annuity shall be computed as of date of eligibility for retirement without regard to any increase in pay to reflect changes in Consumer Price Index-------- 635
Incompetents
Evidence
Annuity election by Sec. of Army pursuant to 10 U.S.C. 1433 on behalf of Reserve commissioned officer diagnosed mentally incompetent in May 1964 and retired at age 60 under 10 U.S.C. 1331, effective May 1, 1967, whose wife as conservatrix of his estate requested election, is not valid election under Retired Serviceman's Family Protection Plan absent evidence to establish that at least 3 years before first day for which retired pay was granted—prior to May 1, 1964—officer was mentally incompetent and could not make annuity election. Therefore, monthly cost of annuity withheld from officer's retired pay may be paid- 483

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Retired—Continued
Combat citations
Enlisted man advanced to rank of officer on retired list
Master sergeant retired under 10 U.S.C. 3914 is awarded 10 percent increase in retired pay by reason of extraordinary heroism performed in line of duty, upon advancement to officer rank of captain on retired list pursuant to 10 U.S.C. 3964, is not eligible to continue receiving 10 percent additional retired pay authorized only for enlisted members, entitlement to increase not attaching by reason of retirement, and 10 U.S.C. 3992, which prescribes formula for recomputation of retired pay for members advanced on retired list, not providing 10 percent increase in retired pay for extraordinary heroism, member's recomputed retired pay may not be increased from date of advancement on retired list to rank of captain by 10 percent---------- 397
Concurrent military retired and disability compensation. (*See* **Officers and Employees, death or injury, disability compensation and retired pay**)
Disability
Basic pay requirement for entitlement
An enlisted man released from active duty for training on Apr. 22, 1966, as not fit for full duty due to ankle injury incurred on Apr. 15 in line of duty who failed to report for follow-up medical treatment and performed regular inactive duty training drills prior to placement on Temporary Disability Retired List on Dec. 15, 1967 under 10 U.S.C. 1202, may not be paid disability retired pay under 10 U.S.C. ch. 61, right of non-Regular member to pay and allowances not having been established by showing of continued existence of disability, requisite of basic pay status was absent at time disability determination was made---------- 716
Disability not the result of active duty
Member of uniformed services who at time of conviction for crime by civil authorities was found sane, similar finding made by military authorities, but who subsequently was committed to State hospital for criminally insane, followed by placement on Temporary Disability Retired List, pursuant to 10 U.S.C. 1202, has forfeited entitlement to pay and allowances under 37 U.S.C. 503(a) for period from date of apprehension by civil authorities until placement on Temporary Disability Retired List, member's commanding officer properly declining to excuse absence from duty as unavoidable, and disability of member having been incurred during period of unauthorized absence, he was not in pay status on day preceding date of retirement, prerequisite to physical disability retirement and, therefore, member also is not entitled to retired pay---------- 214
Temporary retired list
Termination of status
Members of Regular components of Army and Air Force subject to removal from temporary disability retired list upon determination of "fit-for-duty" who without return to active duty desire to retire—airmen or enlisted men for length of service under 10 U.S.C. 8914 or 3914, commissioned or warrant officers pursuant to secs. 8911, 3911, or 1293, or mandatory provisions of Title 10 for age or length of service—may not without reenlistment or reappointment acquire new retirement status and have retired pay computed according to applicable law in force on

PAY—Continued Page
Retired—Continued
Disability—Continued
Temporary retired list—Continued
Termination of status—Continued
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Reappointment of Regular Air Force and Regular Army commissioned or warrant officers determined to be physically fit to perform duties of office, grade or rank whose names are removed from temporary disability retired list for sole purpose of being retired is contrary to provisions of 10 U.S.C. 1211(a)(1) and (2), and absent authority for reappointment of officers who have not been recalled and who contemplate no active duty, employment of officers in civilian capacity in Federal Govt. and payment to them from either appropriated or nonappropriated funds for civilian position is not contemplated by law---------- 141
Effective date
First of month following application
A major general in Regular Army advanced to grade of general under 10 U.S.C. 3034(b) without vacating Regular grade, upon appointment on July 3, 1964, for not more than 4 years as Chief of Staff, who is eligible for voluntary retirement under sec. 3918 and is also subject on July 12, 1968 to mandatory retirement provisions of sec. 3923, reverts to permanent grade of major general on active list following expiration of term as Chief of Staff on July 2, 1968, if not reappointed, and in view of 10 U.S.C. 1404 and Uniform Retirement Date Act (5 U.S.C. 8301), if officer is not placed on retired list on July 1, 1968, or sooner, effective date of retirement for other than disability may not be earlier than Aug. 1, 1968---------- 696
Election of pay computation method
Most favorable formula
Adjustment of retired pay
Retired pay of sergeant major discharged for convenience of Govt. on Sept. 30, 1966 in grade E–9 and eligible to retire in that grade, but who on Oct. 1, 1966 is placed at his application pursuant to 10 U.S.C. 1293 on retired list as chief warrant officer W–2, is not restricted to payment on basis of "retired grade" or "any warrant grade satisfactorily held by him on active duty" prescribed by formula 4 of 10 U.S.C. 1401, section also providing for computation of retired pay on basis of most favorable formula for persons entitled to retired pay under sec. 1401 as well as "any other provision of law," and retired pay at enlisted E–9 grade being greater than that payable at warrant officer W–2 grade, member may be paid difference between grades for period during which he was paid lesser amount of retired pay---------- 74
Restrictions
Regular chief warrant officer, W–4, relieved from active duty and retired as Air Force reservist in grade of lieutenant colonel under 10 U.S.C. 1201 by reason of permanent physical disability who was also eligible to be retired under 10 U.S.C. 1293, having had more than 20 years' active

PAY—Continued Page

Retired—Continued

Election of pay computation method—Continued

Most favorable formula—Continued

Restrictions—Continued

service, properly is being paid retired pay computed under formula 1 of 10 U.S.C. 1401, formula "most favorable to him," and retired pay may not be computed under formula 4, based on higher Reserve commission grade, to establish "most favorable formula" for him under 10 U.S.C. 1401, formula 4 pertaining exclusively to persons retired as warrant officers, and member having been retired as commissioned officer, formulas 1 and 4 may not be combined to provide greater amount of retired pay, and computation of member's retired pay is restricted to formula 1, 10 U.S.C. 1401 ---------- 206

Fleet reservists

Retainer pay withholdings

Retainer pay of fleet reservist arrested and indicted for mail theft while employed as career substitute postal carrier is not subject to administrative set-off under 5 U.S.C. 5511, which authorizes involuntary withholding of civilian employee's salary upon removal for cause, general rule being that retired or retainer pay is not subject to administrative set-off without debtor's consent and, therefore, sec. 5511 is applicable only to final pay due former member in his civilian position ---------- 400

Fractional part of a day

Status

Notwithstanding Regular officer of uniformed services retired after completion of at least 30 years of active service is employed by nonappropriated fund instrumentality only intermittently as flight instructor on hourly basis with no guaranteed minimum, he is subject to operation of Dual Compensation Act and pursuant to 5 U.S.C. 5532, reduction of full day's retired pay is required if officer receives any compensation for that day, even as little as pay for 1 hour as flight instructor, for absent recognition of fractional parts of day in retirement of military personnel, fractional part of day's retired pay may not be equated with hours of work in position for which officer is paid salary for less than full day or at hourly rate ---------- 185

Grade, rank, etc., at retirement

Chief of Staff service higher than Regular service

Army Chief of Staff whose 4-year statutory period of service expires July 2, 1968, upon application for retirement in June 1968 and placement on retired list effective July 1, 1968, under 10 U.S.C. 3918, would be entitled to receive retired pay computed in accordance with footnote 1, Formula B, 10 U.S.C. 3991, at highest rate of basic pay applicable to him while serving as Chief of Staff—rate in effect June 30, 1968—whether or not that rate is greater or less than basic rate applicable on date of retirement that is authorized in footnote 2 of section ---------- 696

Service in higher rank than at retirement

Holding in *Harry Russell Miller* v. *U.S.*, 180 Ct. Cl. 872, that retired enlisted member of Coast Guard is entitled under 14 U.S.C. 362 to compute retired pay on basis of higher grade satisfactorily held in Navy should not be extended to similar or related statutes. Matter is too

PAY—Continued Page

Retired—Continued

Grade, rank, etc., at retirement—Continued

Service in higher rank than at retirement—Continued

doubtful to warrant extending rule of case in view of reservation expressed by court concerning correctness of GAO decisions under sec. 511 of Career Compensation Act that retired member of one branch of uniformed services who held higher grade in another branch of service is not entitled to retired pay computed on pay of higher grade, and differences between various statutes ---------- 722

Hospitalization, etc., in veterans' facilities

Withholding of retired pay. (*See* Pay, retired, withholding, Veterans Administration care and treatment)

Increases

Cost of living increases

Active duty recall

Recall to active duty on July 11, 1966 of Army staff sergeant who had been retired on July 1, 1964 under 10 U.S.C. 3914, and entitlement pursuant to sec. 1402(b) to recompute retired pay in accordance with sec. 1402(d) upon reverting to inactive duty on Mar. 24, 1967, not having terminated member's sec. 3914 retired pay status, absent judicial determination of re-retirement, member's recomputed retired pay may not be further increased by 3.7 percentage cost-of-living increase authorized by sec. 1401a(b), effective Dec. 1, 1966, member although serving on active duty after July 11, 1966, not entitled to recompute retired pay under secs. 1402(b) and (d) until he reverted to inactive status on Mar. 24, 1967, under terms of sec. 1401a(b), requiring him to be entitled prior to Dec. 1, 1966 to retired pay to be increased, there is no basis to increase retired pay recomputed Mar. 24, 1967, by Consumer Price Index increase effective Dec. 1, 1966 ---------- 327

Under Public Law 90-207

While Pub. L. 90-207, approved Dec. 16, 1967, which prescribes pay increases for members of uniformed services comparable to those provided for civilian employees by Federal Salary Act of 1967, does not indicate that all members retired on July 1, 1968, will be entitled to have their retired pay computed at increased rates to be established by act, in computing retired pay of members who will retire on July1, 1968 under different provisions of law, principles in 43 Comp. Gen. 425 and 44 Comp. Gen. 373; *id.* 584, are for application ---------- 549

Members who served in higher grade after retirement

Early release

Army sergeant retired in grade E-6 upon own application under 10 U.S.C. 3914 who under orders recalling him to active duty in grade E-7, with his consent, serves only 7 months 6 days of 2-year period because of hardship is entitled to recomputation of retired pay on basis of higher grade, for had he been retired at grade E-7 rather than released from active duty, he would have been eligible under 10 U.S.C. 3961 to retire in that grade, and 10 U.S.C. 1402(a) prescribing computation of retired pay on monthly basic pay of grade in which member would be eligible to retire if retiring upon release from active duty performed subsequent to retirement, sergeant's retired pay properly may be recomputed effective day following release from active duty on monthly basic pay of grade E-7 ---------- 289

PAY—Continued Page

Retired—Continued

Members who served in higher rank than at retirement

Pay upon release same as higher rank

Army Chief of Staff whose 4-year statutory period of service expires July 2, 1968, upon application for retirement in June 1968 and placement on retired list effective July 1, 1968, under 10 U.S.C. 3918, would be entitled to receive retired pay computed in accordance with footnote 1, Formula B, 10 U.S.C. 3991, at highest rate of basic pay applicable to him while serving as Chief of Staff—rate in effect June 30, 1968—whether or not that rate is greater or less than basic rate applicable on date of retirement that is authorized in footnote 2 of section..... 696

Service credits. (*See* **Pay, service credits**)

Withholding

General rule

Retainer pay of fleet reservist arrested and indicted for mail theft while employed as career substitute postal carrier is not subject to administrative set-off under 5 U.S.C. 5511, which authorizes involuntary withholding of civilian employee's salary upon removal for cause, general rule being that retired or retainer pay is not subject to administrative set-off without debtor's consent and, therefore, sec. 5511 is applicable only to final pay due former member in his civilian position..... 400

Veterans Administration care and treatment

The 50 per centum reduction in retired pay of incompetent members of uniformed services required by 38 U.S.C. 3203(a)(1) after 6 months of Veterans Admin. hospital care continues upon discharge from hospitalization after receiving maximum hospital benefits at VA hospital to enter either convalescent center or private nursing home operating under contract with Administration, care given members "at expenses of U.S." coming within meaning of "institutional or domiciliary care furnished by Veterans Admin." as contemplated by sec. 3203(a)(1), and no retired pay having been paid members during period of convalescent or nursing care, payment of one-half retired pay due incompetents may be made to persons designated to receive payment..... 89

Admission pursuant to 38 U.S.C. 620 of veteran into private non-Veterans Admin. managed nursing home that is under contract with Administration immediately subsequent to approved discharge from maximum hospital benefits provided in VA hospital is tantamount to transfer which has effect of continuous hospitalization within meaning of 38 U.S.C. 3203(a)(1), and reduction in retired pay of veterans prescribed by sec. 3203(a)(1) is for continuation, nursing home having entered into valid contract with Veterans Admin. meets test of "nursing home" prescribed in 38 U.S.C. 620. However, 38 U.S.C. 3203(a)(1) does not apply if nursing home care, whether furnished in private or public nursing home, is not authorized at Govt. expense..... 89

Admission of veterans to private, non-Veterans Admin. managed nursing home under contract with Administration upon discharge from VA institution after receiving maximum hospital benefits prescribed does not begin new period of hospitalization for reduction of retired pay prescribed in 38 U.S.C. 3203(a)(1), whether nursing home has entered into contract with Veterans Admin. or care is furnished at expense of U.S., both situations contemplating furnishing of continued

PAY—Continued Page
Retired—Continued
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Veterans Administration care and treatment—Continued
care by Administration. Therefore, upon transfer to nursing home, hospitalization is considered continuous and is not beginning of new period of hospitalization---------- 89
Military departments in making determination regarding implementation of 38 U.S.C. 3203(a)(1), requiring 50 per centum reduction in retired pay after 6 months of continuous Veterans Admin. hospitalization, and 38 U.S.C. 620 providing for public or private nursing home care under contract or at Govt. expense upon discharge from VA hospital after receiving maximum prescribed hospital benefits, should follow when information is insufficient, lacking or contradictory, procedure prescribed in 31 U.S.C. 74, which authorizes disbursing officers or head of any executive department, or other establishment not under any of executive departments, to apply for decision by Comptroller General upon any question involved in payment to be made by them or under them---------- 89
Disposition of pay upon incompetent's death
Ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that amount of accumulated retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired officer of uniformed services adjudicated incompetent who died intestate while receiving care in Veterans Hospital may be paid to decedent's son will be followed by Comptroller General as court's construction that sec. 3203(b)(1), barring payment of accumulated lump sum in event of incompetent's death, has no application to payment of retired pay—not considered gratuity—to members of immediate family of decedent, eliminates discrimination, and results in uniform disposition of accumulated retired pay withheld under 38 U.S.C. 3203(a)(1) from both competent and incompetent retired members. Application suspended by B–156913, June 24, 1968, unpublished decision---------- 25
Under ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired member of uniformed services adjudged incompetent who died while receiving care in Veterans Hospital is payable to members of immediate family of decedent as forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving competent or incompetent retired member. Therefore distribution of withheld retired pay in both categories—competent and incompetent—should be on same basis, and claims similar to *Berkey* case handled as indicated in 40 Comp. Gen. 666, and 41 Comp. Gen. 218 is reversed. Application suspended by B–156913, June 24, 1968, unpublished decision---------- 25
Saved
Temporary promotions. (*See* **Pay, promotions, temporary, saved pay**)

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Service credits

Active duty after retirement

To complete term as Chief of Staff

Upon retirement effective July 1, 1968, an Army Chief of Staff whose appointment to 4-year term on July 3, 1964 expires July 2, 1968, may be recalled to active duty in his retired grade pursuant to 10 U.S.C. 3504, assuming confirmation under 10 U.S.C. 3962, to complete 4-year term as Chief of Staff, and may be paid as Chief of Staff for July 1 and 2, 1968, and officer when released from such active duty will be entitled to recompute retired pay under method prescribed in 10 U.S.C. 1402(a)------ 696

Cadet, midshipman, etc.

Nonacademy service

In computation of retired pay authorized in 10 U.S.C. 1331–1337 for non-Regular service, full-time nonacademy service of midshipman appointed under sec. 3 of act of Aug. 13, 1946, 60 Stat. 1058, may be used to increase multiplier factor in formula 3, 10 U.S.C. 1401—2½ percent of years of service credited under sec. 1333—absent restriction as to status in which active service must have been performed in order to be creditable service. However, in establishing multiplier factor, credit for inactive midshipman service in Naval Reserve prior to July 1, 1949 may only be included pursuant to that part of clause (4), sec. 1333, that does not refer to service covered by sec. 1332(a)(1), inactive service constituting "service (other than active service) in Reserve component of armed force" only within meaning of that phrase in clause (4), sec. 1333---------- 221

Dual benefits

Civilian and military retired benefits

Retired member of uniformed services performing instructional and administrative duties pursuant to 10 U.S.C. 2031(d) in connection with Junior ROTC program who had waived military retired pay in order to have military service added to Federal civilian service to obtain greater civil service retirement annuity is entitled under sec. 2031(d)(1) to difference between military retired pay to which he would be entitled but for waiver and active duty pay and allowances he would receive if ordered to active duty, even though difference when added to member's civil service retirement annuity exceeds active duty pay and allowances he would receive if ordered to active duty, member's waiver not changing qualification for employment in ROTC program, nor barring him from participation in program, and, therefore, "retired pay" he would be entitled to but for waiver is within contemplation of term as used in 10 U.S.C. 2031(d)---------- 87

Dual credit

Concurrent payments of retired pay

An officer of Public Health Service who receives credit for prior service in Navy and Naval Reserve to determine eligibility for retirement under 42 U.S.C. 212(a)(3) and to compute retired pay may not upon reaching 60 years of age have same period of Navy and Naval Reserve service considered in determining eligibility to retired pay benefits under 10 U.S.C. 1331, absent specific statutory authority. The dual use of service credits would be inconsistent with pattern of retirement legislation, and neither 10 U.S.C. 1336, authorizing consideration of service credited for retirement purposes in determining eligibility

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Service credits—Continued
Dual credit—Continued
Concurrent payments of retired pay—Continued
for benefits enumerated in section, nor any other law would permit dual use of Navy and Naval Reserve service to provide concurrent payments of retired pay from Navy and Public Health Service..... 713
Severance
Early discharge
A lieutenant junior grade officer who having failed of selection for promotion to grade of lieutenant for second time would have been honorably discharged with over 6 years of service, pursuant to 14 U.S.C. 282, on June 30, 1965, had he not requested and been granted discharge on Apr. 1, 1965, properly was paid severance pay computed on basis of over 4 years but less than 6 years of service. There is no authority to allow officer to count as service time between discharge and mandatory release, and, therefore, officer discharged on Apr. 1, 1965, before completing over 6 years of service, and not entitled to credit for con-constructive service, may not be paid difference between severance pay received and amount of severance pay that would have been due had he reached longevity step of over 6 years of service..... 639
Training
Reservists
Less than 30 days training
Reservist of Armed Forces who serves on active duty for training from Feb. 1, through 28, in a nonleap year is not entitled under A-71273, Mar. 2, 1936, to full month's active duty pay and allowances without deduction for 2-constructive days at end of February. Rule in 1936 decision that reservists ordered to duty for period of less than 30 days are not within scope of act of June 30, 1906, which prescribes 30 day calendar month for computing pay of persons paid on annual or monthly basis, and are, therefore, only entitled to pay for actual number of days served, including thirty-first day of month, not having been changed by codification in 37 U.S.C. 1004 of governing statutes, decision of March 2, 1936, is affirmed..... 515
Withholding
Debt liquidation
Bankruptcy of member
Where U.S. is both debtor and creditor at time civilian employee or member of uniformed services files Ch. 13, Wage Earner's Plan case, absent judicial determination to contrary, Govt.'s priority under 31 U.S.C. 191, may be asserted in Ch. 13 Wage Earner's time extension plan case, set-off to be accomplished in accordance with Title 4 of GAO Policy and Procedures Manual sec. 7520.10, unless wage earner is not insolvent. However, filing of Wage Earner's Plan would, for purposes of set-off, be considered *prima facie* evidence of insolvency.. 522
Retired. (*See* **Pay, retired, withholding**)

PAYMENTS Page

Discount on contract payments. (*See* Contracts, discounts)

Erroneous

Military pay and allowances

Validation

Common residence rule for determining entitlement to $30 monthly family separation allowance authorized by 37 U.S.C. 427(b) appearing to have been basic consideration of Congress in authorizing allowance, even though showing of actual expenses is not required, 47 Comp. Gen. 431, holding allowance is not payable during periods of involuntary separation of member of uniformed services from family if primary dependents are living in residence that is not subject to management and control and for which he is not responsible, is sustained and should be implemented if Congress fails to authorize such payments prior to adjournment of second session of 90th Congress. Questions that arise concerning sec. 427, which cannot be resolved under decisions of Comptroller General may be submitted---------- 583

Progress. (*See* Contracts, payments, progress)

PHOTOGRAPHS

Officers and employees

Appropriation availability

When use of employees' photographs facilitates accomplishing purposes of Govt., general rule that cost of photographs of individual employees of Govt. is personal expense that is not chargeable to public funds in absence of definite indication as to necessity for expenditures in accomplishment of some purpose for which appropriation was made is not for application, therefore, cost of photographs distributed by area Director of Equal Employment Opportunity Commission (EEOC), not for personal publicity but to publicize activities and functions of agency constitutes proper charge against 1967 fiscal year funds appropriated to EEOC, appropriation in effect at time photographs were taken, as publicity engendered by publication of photographs increased cooperation with agency and facilitated accomplishing its purposes---------- 321

POST OFFICE DEPARTMENT

Employees

Liability relief

Embezzlement, theft, etc.

Retainer pay of fleet reservist arrested and indicted for mail theft while employed as career substitute postal carrier is not subject to administrative set-off under 5 U.S.C. 5511, which authorizes involuntary withholding of civilian employee's salary upon removal for cause, general rule being that retired or retainer pay is not subject to administrative set-off without debtor's consent and, therefore, sec. 5511 is applicable only to final pay due former member in his civilian position---------- 400

Postmasters

Leaves of absences

Replacements

Leave replacement designated by fourth-class postmaster to perform his duties during his absence on sick or annual leave or on leave without pay has not been appointed or employed in civilian position within meaning of 5 U.S.C. 3110, which restricts making or advocacy of appointment, employment, advancement, or promotion of relatives by public

POST OFFICE DEPARTMENT—Continued Page
Employees—Continued
Postmasters—Continued
Leaves of absences—Continued
Replacements—Continued
officials, leave replacement, not necessarily same person each time, not having been appointed to position postmaster continues to hold while on leave of absence, but only performing temporary service on intermittent basis---------- 636
PRINTING AND BINDING
Christmas cards
Rule that seasonal greeting cards constitute personal expense to Govt. personnel is not changed by fact that names of officers and employees sending cards are not included and nothing attached to cards indicates compliments of any individual, nor is personal nature of cost of cards changed because trust fund rather than appropriated funds is charged. Therefore, cost of printing and mailing seasonal greeting cards by National Park Service personnel is expense that is not chargeable to "Fund 14X8037 National Park Service, Donations," receipt account in trust fund series established for deposit of cash accepted as donations under 16 U.S.C. 6 for purposes of national park and monument system. 314
PROPERTY
Private
Damage, loss, etc.
Personal property
Claims Act of 1964
Claim of civilian employee of Defense Supply Agency for reimbursement of cost of repairing damage to hearing aid, which occurred without negligence in normal execution of employee's duties as test driver while using Govt-furnished crash helmet and safety glasses, is for consideration of Secretary of Defense or his designee under Military Personnel and Civilian Employees' Claims Act of 1964, and any settlement upon approval by Secretary or his designee of employee's claim for personal property damage would be final and conclusive as it is not within jurisdiction of GAO to consider damage claims for loss of or damage to personal property of Defense Dept. employees---------- 316
Federal funds for improvements, repairs, etc.
Limitations
Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section---------- 61

PROPERTY—Continued Page
Private—Continued
Federal funds for improvements, repairs, etc.—Continued
Limitations—Continued
Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees 61
Public
Contractor use
Unauthorized. (*See* **Contracts, Government property, unauthorized use**)
Private use
Authority
Upon concurrence by Administrator of General Services Administration (GSA), who under 40 U.S.C. 759 has primary responsibility for purchase and utilization of automatic data processing equipment (ADPE) for Federal Govt., Administrator of Veterans Affairs (VA) or his designee may grant revocable license that conforms to criteria established in GAO decisions, to a private party to use Govt-owned computers on reimbursable basis when equipment is not in use by VA, and feasibility of making arrangements under which Govt-owned ADPE equipment might be made available to public during periods in which equipment is not in use is being considered by GSA Administrator 387
PUBLIC HEALTH SERVICE
Commissioned personnel
Retired pay
Concurrent payments
An officer of Public Health Service who receives credit for prior service in Navy and Naval Reserve to determine eligibility for retirement under 42 U.S.C. 212(a)(3) and to compute retired pay may not upon reaching 60 years of age have same period of Navy and Naval Reserve service considered in determining eligibility to retired pay benefits under 10 U.S.C. 1331, absent specific statutory authority. The dual use of service credits would be inconsistent with pattern of retirement legislation, and neither 10 U.S.C. 1336, authorizing consideration of service credited for retirement purposes in determining eligibility for benefits enumerated in section, nor any other law would permit dual use of Navy and Naval Reserve service to provide concurrent payments of retired pay from Navy and Public Health Service 713

QUARTERS ALLOWANCE Page

Dependents

Member of armed services

Excess leave period

Army captain whose wife is authorized excess leave without pay and allowances for period between being commissioned and reporting to new duty station, during which time she is neither furnished nor occupies quarters in kind, may be paid increased quarters allowance under 37 U.S.C. 403 on behalf of wife for period she was in excess leave status. Limitation in 37 U.S.C. 420 that member may not be paid increased allowances on account of dependent for any period during which that dependent is entitled to basic pay does not bar payment of all benefits incident to captain's rank that is authorized by sec. 403 for member with dependent. Mere existence of wife's active duty status in itself is not determinative of captain's entitlement to increase in quarters allowance 467

Proof of dependency

Divorce validity

Although generally for purpose of paying quarters allowances (BAQ) to members of uniformed services who remarry after obtaining Mexican divorce, judicial determination of validity of second marriage is required under laws of jurisdiction where marriage is performed, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, has been regarded as constituting judicial determination for cases falling squarely within that case, and, therefore, officer who prior to Sept. 1, 1967, effective date of revision of New York State divorce law, remarried in State of N.Y. would be entitled to BAQ, if one of parties was domiciled in State, but *Rosenstiel* decision having no application in jurisdictions other than N.Y. State, if marriage occurred outside State, officer would not be entitled to BAQ, even if one of parties had been N.Y. domiciliary. However, after Sept. 1, 1967, because of uncertainty of sec. 250 added to Domestic Relations Law, *Rosenstiel* case no longer will be viewed as constituting judicial determination of validity of Mexican divorce ... 286

Entitlement

Submarine duty

Temporary duty ashore

Inadequate quarters

Members of Navy without dependents attached to two-crew nuclear-powered submarines who are temporarily serving ashore for more than 15 days during periods of training and rehabilitation at station where quarters are inadequate for assignment to members on either permanent or temporary duty may be credited with basic allowance for quarters. This conclusion predicated upon current provisions of OPNAV Inst. 11012.2A and par. M4451 of Joint Travel Regs. relating to assignment of quarters to members on temporary duty does not change conclusion in 46 Comp. Gen. 161 that off-board crew members have no right to elect not to occupy Govt. quarters while ashore and instead receive basic allowance for quarters 527

QUARTERS ALLOWANCE—Continued Page

Evacuation of dependents

Government furnished quarters occupancy

Member of uniformed services who must continue to maintain and pay rental for private housing in anticipation of return of dependents evacuated to Govt. housing facilities at temporary safe haven for relatively short period pending further transportation to designated place pursuant to par. M7101–1 of Joint Travel Regs., or return to place from which evacuated, during which time he occupies single-type quarters at permanent station may continue to be credited in pay account with basic allowance for quarters on account of dependents and type 2 family separation allowance until dependents are authorized to return to member's permanent duty station or arrive at designated place contemplated by par. M7101–1, in view of fact that occupancy of Govt. quarters by member and dependents will be of short duration and will have resulted from circumstances beyond their control. 46 Comp. Gen. 869, modified 355

REGULATIONS

Administrative

In lieu of statutory regulation

Although Dept. of Defense overseas employees transferred to duty station within continental U.S. are not required to sign transportation agreement in order to be eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, Dept. may pursuant to administrative regulation refuse to approve payment of travel and transportation expenses involved in connection with change of official station from overseas unless and until employee executes agreement to remain in Govt. service or in service of Dept. involved for specified period of time, and as agreement under administrative regulation would not be predicated on specific provision of law or statutory regulation, administrative regulation should conform as closely as possible to Cir. No. A–56 and prescribe acceptable reasons for failure to remain in Govt. service as agreed, and liability of employee for failure to fulfill agreement 122

Compliance

Failure to comply

Correction recommended

Officer of uniformed services who is not subject to minimum flight requirements, upon removal on Aug. 17, 1967 of Dec. 1, 1966 suspension from flying due to physical disqualification which occurred Aug. 4, 1966, nevertheless is eligible for incentive pay prescribed by sec. 105 of E.O. No. 11157 for members whose flying suspension had been removed and flight requirements satisfied, and administrative regulation to deny flight pay if suspension is not removed within either 3-month or 5-month period prescribed by sec. 104 would be inconsistent with this view. Therefore, member entitled to 5 months of flying pay subsequent to month of incapacity, Aug. 1966, having been paid for 3 months, is entitled to flying pay for Dec. and Jan., remainder of maximum period for which excess hours can apply 553

REGULATIONS—Continued Page

Force and effect of law

Army Procurement Procedure

Claim of insurance company for unpaid premiums on policies providing for retrospective determination of earned premiums covering workmen's compensation, public liability and other required insurance that is reimbursable under cost-type contracts may be paid notwithstanding "No Cost Settlement Agreement" that included mutual releases, and lack of privity between Govt. and insurance company. Contracting officer under sec. 10–554 of Army Procurement Procedure—which has force and effect of law—having responsibility upon termination or completion of cost-reimbursable-type contract to obtain insurance credits due contractor or to assume contractor's insurance obligations, liability of Govt. for unpaid insurance premiums is mandatory and must be read into termination settlement ---------- 457

Scope

Administrative determination

Determination pursuant to Atomic Energy Commission Regs., implementing Federal Procurement Regs., not to require payment of Davis-Bacon Act wage rates in performance of reactor system assembly for Loss of Fluid Test (LOFT) Experiment on basis "LOFT" will not be assembled on site of proposed containment and control facility, nor be installed in that building and, therefore, not constituting construction of conventional reactor, assembly work is not subject to act, will not be disturbed, Commission having responsibility of administering and enforcing contracts, interpretation of its regulations that assembly work is not "construction work" or "public work," but experimental work is authoritative, absent reason for Dept. of Labor holding that fact reactor is part of mobile system to be used for experimental work does not remove its assembly and fabrication from coverage of Davis-Bacon Act ---------- 192

RELEASES

Proper release or acquittance

Decedents' estates

The $1,000 limitation prescribed in par. 40504(b)(5), Dept. of Defense Military Pay and Allowances Entitlements Manual, on payment of 6 month's death gratuity to parent as natural guardian of minor child may be exceeded to conform to amounts prescribed by statutes of States in which claimants reside where means are provided for Govt. to obtain good acquittance. Therefore, death gratuity due minor son of deceased member of uniformed services may be paid to mother supporting claim in behalf of child with affidavit substantially complying with requirements of Calitornia Code, upon determination showing of compliance with $2,000 limitation imposed on payment of money and personal property includes death gratuity, and that any insurance proceeds due, plus other amounts, will not cause either $2,000 limitation or $2,500 restriction on total estate to be exceeded ---------- 209

Natural guardian of minor child of deceased member of uniformed services in documenting claim for 6 months' death gratuity in excess of $1,000 prescribed by par. 40504(b)(5), Dept. of Defense Military Pay and Allowances Entitlements Manual, should cite State statute involved,

RELEASES—Continued Page

Proper release or acquittance—Continued

Decedents' estates—Continued

and facts bringing payment to guardian within purview of State statute in which persons concerned reside should be furnished in affidavit form, and care should be exercised to determine that parent understands requirements of law permitting payment to parents of small amounts due minors, if matter is free from doubt, to avoid expense of obtaining legal guardianship ---------- 209

As 6 months' death gratuity payment is not considered asset of estate of deceased member of uniformed services but in nature of survivor insurance that is payable in accordance with Federal law to persons listed in 10 U.S.C. 1477, principal concern of Govt. is to obtain good acquittance when payment to minor is involved, therefore, when State statute provides for good acquittance, payment of death gratuity due minor child of deceased member of uniformed services may be made to natural guardian of child upon compliance with requirements of law of State in which claimants reside, thereby avoiding cost of obtaining legal guardianship in settling of small estates ---------- 209

Wage Earners' Plans

Although in *U.S.* v. *Krakover*, 377 F. 2d 104, court held that under doctrine of sovereign immunity Ch. 13, bankruptcy proceeding, Wage Earner's Plan case, is not enforceable against U.S., court concluded that this should not deprive Federal employees of Ch. 13 benefits and that payment to trustee of part of wages of employee under appropriate order will protect trustee and creditors without infringing on immunity of U.S. Therefore, procedure under which accounting and finance officers are required to pay part of wages of employee in response to court order issued in Ch. 13, Wage Earner's Plan case—binding on employee—may be continued without violating 31 U.S.C. 203, prohibiting assignment of claims against U.S., or without depriving Govt. of good acquittance ---------- 522

RETIREMENT

Civilian

Annuities

Deferred

Effect on severance pay interruption

Employee involuntarily separated from service and awarded severance pay under sec. 9(b) of Pub. L. 89–301, who will be entitled to deferred civil service annuity at age 62, may be reemployed in temporary position not to exceed 1 year without entitlement to resumption of severance pay upon termination of temporary appointment being affected, notwithstanding he will reach 62 during period of temporary appointment and become entitled to immediate annuity at expiration of temporary appointment, employee not having satisfied requirements for annuity at time of involuntary separation, at which time entitlement to severance pay was determined, he is not subject to prohibition in sec. 9(b)(4) to payment of severance pay to persons entitled to immediate annuity upon separation. Therefore, employee is entitled to both deferred annuity and resumption of severance pay upon separation from temporary position ---------- 72

RETIREMENT—Continued Page
Civilian—Continued
Contributions
Premium pay within term "basic pay"
Retroactive collection of increased retirement and life insurance deductions to cover standby premium pay which was made part of base pay by Pub. L. 89–737, approved Nov. 2, 1966, and implemented by Civil Service Reg. on Mar. 3, 1967, may be waived for separated employees who are not annuitants, unless demand for increased benefits is made at some future time, but may not be waived for retirees and employees still on rolls who are entitled to increased benefits arising from inclusion of premium pay within term "basic pay" and, therefore, collection of deductions for premium pay received by retirees and current employees should be instituted to go back to effective date of act------ 694
Service credits
Military service
Waiver of retired pay
Retired member of uniformed services performing instructional and administrative duties pursuant to 10 U.S.C. 2031(d) in connection with Junior ROTC program who had waived military retired pay in order to have military service added to Federal civilian service to obtain greater civil service retirement annuity is entitled under sec. 2031(d)(1) to difference between military retired pay to which he would be entitled but for waiver and active duty pay and allowances he would receive if ordered to active duty, even though difference when added to member's civil service retirement annuity exceeds active duty pay and allowances he would receive if ordered to active duty, member's waiver not changing qualification for employment in ROTC program, nor barring him from participation in program, and, therefore, "retired pay" he would be entitled to but for waiver is within contemplation of term as used in 10 U.S.C. 2031(d)---------- 87
Military personnel. (*See* **Military Personnel, retirement**)
RURAL ELECTRIFICATION ADMINISTRATION
(*See* **Agriculture Department, Rural Electrification Administration**)
SALES
Bids
Deposits
Unacceptable form
Negotiation of bid deposit check accompanying high bid under surplus sales invitation having been conditioned on receiving contract award, rejection of bid as nonresponsive was proper, for in qualifying check its use as either negotiable instrument, or as draft, check, or demand note, as well as acceptance as bid bond, was precluded and, therefore, qualification constituted material exception to invitation which contemplated negotiability of bid deposits and not promises to pay under certain conditions, and adequate competition having been secured under invitation to establish that fair market value of surplus materials would be obtained in making award to highest responsive bidder, nonresponsive bid was not for evaluation and comparison, and award is considered to have been made in good faith and in best interests of Govt---------- 401

SALES—Continued Page

Disclaimer of warranty

Erroneous description

Material content

Buyer of surplus nickel under an "as is" solicitation who upon receiving delivery of defective metal alleges that disclaimer of warranty provision is unconscionable and should not be enforced, and that agreement after contract award for analysis of nickel is an express warranty of composition of material, is not entitled to replacement of defective nickel or to reimbursement for cost of removing impurities. Analysis agreement containing no warranties by Govt. is not an express warranty subject to sec. 2–316 of Uniform Commercial Code protecting buyers from unexpected and unbargained disclaimer language, and express disclaimer of "as is" provision implying no warranty property delivered would correspond to solicitation description, relief may not be granted to buyer, absent willful misdescription or bad faith by contracting officer---------- 509

SCHOOLS, COLLEGES, ETC.

(*See* **Colleges, Schools, Etc.**)

SET-OFF

Debtor-creditor relationship

Where U.S. is both debtor and creditor at time civilian employee or member of uniformed services files Ch. 13, Wage Earner's Plan case, absent judicial determination to contrary, Govt.'s priority under 31 U.S.C. 191, may be asserted in Ch. 13 Wage Earner's time extension plan case, set-off to be accomplished in accordance with Title 4 of GAO Policy and Procedures Manual sec. 7520.10, unless wage earner is not insolvent. However, filing of Wage Earner's Plan would, for purposes of set-off, be considered *prima facie* evidence of insolvency---- 522

SEWERS

Federal grant to construct

More than one Government agency contributing

Propriety

Federal Aviation Admin. (FAA) grant to city of Juneau, Alaska, incident to construction of sewage system which included percentage of cost provided by Public Health Service (PHS) grant for facility, where both grants were matched by State with same funds, was made without authority and is without legal effect, even though Federal Airport Act does not prohibit grant, Water Pollution Control Act under which PHS grant was made requiring city to pay costs in excess of grant. Therefore, to permit FAA to make grant for same project would require U.S. to contribute more than amount of PHS grant, thereby waiving its right to have grantee complete project without further cost to U.S., and would not satisfy definition in Federal Airport Act that "project costs" are costs "which would not have been incurred otherwise."---- 81

SICK LEAVE Page
(*See* Leaves of Absence, sick)
SMALL BUSINESS ADMINISTRATION
Administrative determinations
Conclusiveness
Although not authorized to review Small Business Admin. (SBA) determination or to direct issuance of certificate of competency, GAO is not precluded from reviewing rejection of small business concern as nonresponsible, whether or not SBA issued certificate of competency, as question upon review of all pertinent information and evidence available to contracting officer and SBA is whether bid rejection was proper, and where record justifies doubt of contracting officer and SBA, it is immaterial that record might also support determination of bidder responsibility, in view of fact that prospective contractor has burden to affirmatively demonstrate responsibility, and contracting officer is not required to independently gather information to resolve doubt, instead any doubt should be resolved against bidder---------- 291
Authority
Bidder experience qualification
Requirements in RFP that prospective contractors show evidence of being in "regular" business of designing and manufacturing centrifuge systems, and evidence of previous production of similar system that had been accepted by Govt. within past 5 years were misstated as Walsh-Healey Public Contracts Act does not require contractor to be "regular" manufacturer. In addition preaward protest of rejected proponent should have been submitted by contracting officer to Secretary of Labor or contractor advised of his right to review by him, and notwithstanding experience qualification in RFP involved capacity within meaning of Small Business Act, contracting officer's determination of manufacturer ineligibility was not subject to review by Small Business Admin. Although it is not in the best interest of the Govt. to cancel contract awarded, to avoid similar errors in future, correction action is recommended---------- 518
Contracts
Awards to small business concerns. (*See* Contracts, awards, small business concerns)
SOCIAL SECURITY
Tax increases
Effect on contracts
Increase in social security taxes resulting from medicare program provided by Social Security Act Amendments of 1965, and designated "excise tax" on wages is not "Federal excise tax or duty on transactions or property covered by this contract" contemplated by contract clause in sec. 1-11.401-1 of Federal Procurement Regs. entitled "Federal, State and Local Taxes," which authorizes price adjustment for tax increases that occur after date of contract. Therefore, increase in social security taxes subsequent to execution of construction contract is not payable as contract change, tax clause employing phrase "transactions or property" in connection with subject matter of the contract and its purposes does not apply to social security tax increases, neither considered property nor transaction in sense of doing or performing business, but tax levied "upon relation of employment"---------- 163

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STATES Page

Federal aid, grants, etc.

Cost contributions

Damage award

Although damage award is not considered recognizable element of cost to be shared by Federal Govt. under Federal-aid highway agreement, if Federal Highway Administrator determines evidence supporting contractor's claim was properly evaluated and amount of damages awarded constituted reasonable cost element of project, agreement may be modified to recognize that additional costs awarded contractor stemmed from reliance upon erroneous "soil profile" furnished bidders by State, and that this information no doubt contributed to unrealistically low initial contract price---------- 756

Educational agencies affected by Federal activities

Other Federal payments

Notwithstanding restriction on use of 1968 funds appropriated by Pub. L. 90–132 to Office of Education under heading "School Assistance in Federally Affected Areas" to carry out legislative enactments after June 30, 1967, sec. 204 of Pub. L. 90–247, dated Jan. 2, 1968, eliminating requirement in Pub. L. 874, 81st Cong., that payments to local educational agencies be reduced by amounts "derived from other Federal payments" is effective. Retroactive aspect of sec. 208 of Pub. L. 90–247, prescribing that sec. 204 of act "shall be deemed to have been enacted prior to June 30, 1967, and shall be effective for fiscal years beginning thereafter," overcoming appropriation restriction and, therefore, Pub. L. 874 educational payments are not required to be reduced by amount of other Federal payments---------- 707

Highways. (*See* **Highways, construction, Federal aid highway program**)

More than one grant for same project

Federal Aviation Admin. (FAA) grant to city of Juneau, Alaska, incident to construction of sewage system which included percentage of cost provided by Public Health Service (PHS) grant for facility, where both grants were matched by State with same funds, was made without authority and is without legal effect, even though Federal Airport Act does not prohibit grant, Water Pollution Control Act under which PHS grant was made requiring city to pay costs in excess of grant. Therefore, to permit FAA to make grant for same project would require U.S. to contribute more than amount of PHS grant, thereby waiving its right to have grantee complete project without further cost to U.S., and would not satisfy definition in Federal Airport Act that "project costs" are costs "which would not have been incurred otherwise"------ 81

Recovery by Federal Government

Antitrust violations

Although U.S. is entitled to pro rata share of actual damages, less out-of-pocket expenses, recovered by State Highway Dept. in antitrust proceedings in which award of treble damages was made on basis award of actual damages reduced cost of federally aided highway projects that incorporated products on which fixed prices were conspired, Federal Govt. may not share in recovery of punitive damages, such damages not reflecting upon cost of highway projects, for absent specific authority, partnership arrangement under which Federal-aid highway program is prosecuted does not reach beyond project costs shared by Federal and State Govts---------- 309

STATION ALLOWANCES Page

Military personnel

Dependents

Children

Divorced daughter

Divorced daughter of officer of uniformed services under 21 years of age who has custody of minor child with obligation to support and care for child without any assistance from husband, and who resides and is dependent on her father for support is a "dependent" of officer within meaning of term as used in 37 U.S.C. 401 and, therefore, he is entitled to a station allowance increase---------- 407

Excess living cost outside United States, etc.

Cost basis

In prescribing supplemental housing allowance for members of uniformed services stationed outside U.S., 37 U.S.C. 405 making no provision for separate housing and cost-of-living allowances, but authorizing "a per diem, considering all elements of cost of living," housing and cost-of-living allowances should not be considered independently in determining per diem rate for particular overseas station and savings of other than housing elements of costs as compared with costs in U.S. should be taken into account. Therefore, proposed supplemental housing allowance regulation should prescribe different per diem rates at given station on basis of different costs incurred by different groups of military personnel, including groups who incur higher or lower than average excess costs. However, until formula for computing housing allowances can be revised, and allowances for each overseas location computed on revised formula, computation and payment of present regular housing and cost-of-living allowances may continue---------- 333

Reimbursement basis

Payment of higher housing per diem rate to members of uniformed services for first 2 months of entitlement after entering on overseas tour of duty and lower rate for remainder of tour for purpose of accelerating reimbursement of moving-in expenses would constitute advance payment of that portion of per diem allocable to accelerated reimbursement, and such payment is not within contemplation of 37 U.S.C. 405 authorizing per diem that considers all elements of cost of living to members stationed outside U.S., regardless of when costs may have to be paid. Therefore, proposal to establish two housing allowance indexes, one applying for preponderance of member's tour which would reflect recurring costs and one applying during first 2 months of tour which would reflect inclusion of nonrecurring expenses may not be legally adopted---------- 362

Temporary lodgings

Concurrent payment of family separation allowance

Member of uniformed services who while serving abroad ship that is away from home port is in receipt of temporary lodging allowance providing by par. M4303 of Joint Travel Regs., which is intended to partially reimburse him for housing family in hotel or hotel-like accomendations overseas pending completion of arrangement for living quarters, is not entitled to concurrent payment of type 2 family separation allowance authorized under 37 U.S.C. 427(b)(2) for ship duty and

STATION ALLOWANCES—Continued Page
Military personnel—Continued
Temporary lodgings—Continued
Concurrent payment of family separation allowance—Continued
under subpar. (3) for temporary duty. Member not separated from household subject to his management and control cannot incur additional expenses contemplated by sec. 427(b) by reason of "enforced separation" and, therefore, he is not eligible for type 2 family separation allowance-- 788

Upon termination of assignment of Govt. quarters at permanent station overseas due to closing of military installation, member of uniformed services in receipt of family separation allowance, type 1, under 37 U.S.C. 427(a) may in addition for period prior to departure to new station be paid temporary lodging allowance in 10-day increments under par. M4303. The allowances do not duplicate each other, type 1 family separation allowance is in substance member's basic allowance for quarters intended to cover cost of permanent quarters, whereas tenporary lodging allowance is per diem supplementing basic allowance for quarters to compensate him for additional expense of maintaining separate quarters for himself---------- 788

Day of arrival at duty station

Insufficiency of mileage allowance paid to member of uniformed services for travel on day of arrival at overseas permanent duty station to cover expenses of hotel accommodations provides no basis to amend par. M4303-2c(4) of Joint Travel Regs. to authorize payment of temporary lodging allowance for day of arrival without regard to mileage entitlement. Both allowances designed for same purpose—mileage allowance rate including lodging and subsistence—payment of both allowances for same day would constitute double allowance---------- 724

Reimbursement to member of uniformed services for hotel expenses incurred on day of arrival at overseas permanent station may not be authorized by amendment to par. M4303-2c(4) of Joint Travel Regs. to provide payment of temporary lodging allowance or mileage, whichever is greater. Member in travel status on day of arrival at overseas station is only entitled to travel allowances on that day, entitlement to temporary lodging allowance, considered a permanent station allowance, commencing day after arrival and, therefore, waiver of mileage entitlement by member would not operate to entitle him to temporary lodging allowance on day of arrival---------- 724

STATUTORY CONSTRUCTION
Effective date

Notwithstanding restriction on use of 1968 funds appropriated by Pub. L. 90-132 to Office of Education under heading "School Assistance in Federally Affected Areas" to carry out legislative enactments after June 30, 1967, sec. 204 of Pub. L. 90-247, dated Jan. 2, 1968, eliminating requirement in Pub. L. 874, 81st Cong., that payments to local educational agencies be reduced by amounts "derived from other Federal payments" is effective. Retroactive aspect of sec. 208 of Pub. L. 90-247, prescribing that sec. 204 of act "shall be deemed to have been enacted prior to June 30, 1967, and shall be effective for fiscal years beginning thereafter," overcoming appropriation restriction and, therefore, Pub. L. 874 educational payments are not required to be reduced by amount of any other Federal payments---------- 707

STORAGE Page

Automobiles. (*See* Transportation, automobiles, storage and parking status)

Household effects

Military personnel

Nontemporary storage

Death of dependents

Authority in par. M8303–2 of Joint Travel Regs. entitling member of uniformed services stationed overseas on date of death of sole or all dependents who had resided with him overseas to nontemporary storage of household goods, not to exceed prescribed weight limitation, until date of his next arrival in the U.S. for permanent duty may not be extended to member located at permanent duty station in U.S. at time of death of sole or all dependents. Regulation promulgated pursuant to unusual or emergency circumstances provision of 37 U.S.C. 406(e) having been superseded by subsec. 406(h) relating to individual movement of dependents and effects from overseas areas, regulation may not be amended to apply to members on duty in U.S. ---------- 775

SUBSISTENCE

Per diem

Constructive costs

Passengers in privately owned vehicles

Official passenger who travels in privately owned vehicle (POV), use of which has not been determined to be advantageous to Govt., is entitled to reimbursement on same basis as operator of vehicle under per diem provisions of sec. 3.5c(2), Bur. of Budget Cir. No. A–7, Revised. Therefore, civilian Joint Travel Regs. may be amended to provide constructive per diem to passengers in POV used for official business as matter of personal preference, per diem limited to amount allowable had passenger used carrier upon which constructive transportation costs are determined ---------- 686

Dependents

Transfer of employee

Govt. agency acquiring services of overseas employee who incident to return to U.S. for separation and reemployment without break in service is entitled to reimbursement of travel expenses by both losing and acquiring agency in accordance with 46 Comp. Gen. 628 may, if transfer is not for convenience of employee, pursuant to sec. 2.5 of Bur. of Budget Cir. No. A–56, authorize payment of subsistence expenses incurred while occupying temporary quarters at new station, miscellaneous expenses, and per diem for employee's family incident to travel from residence to new duty station, not to exceed per diem payable for direct travel from old to new station ---------- 763

Overseas employee under separation orders to place of residence which is more distant from overseas duty station than place at which he is employed without break in service after departure from overseas duty point is only entitled to reimbursement by losing agency for travel costs to place of residence. Although employee is not entitled to travel or transportation costs from residence to new duty station, no collection is required for costs paid to residence in excess of costs for direct travel from overseas to new station. Under Bur. of Budget Cir. No. A–56 acquiring agency may pay miscellaneous expenses allowance and

SUBSISTENCE—Continued Page

Per diem—Continued

Dependents—Continued

Transfer of employee—Continued

reimburse employee for subsistence while occupying temporary quarters. However, no per diem allowance for travel time of employee's family is allowable---------- 763

Military personnel

At separation point

Proposed revision of par. M4157–1, Joint Travel Regs., to permit members of uniformed services to be transferred to and separated from service at place of own choosing and for own convenience as alternative to separation from place prescribed by regulation, and to travel from alternate separation point to home of record or place from which called to active duty may be adopted, revision adequately protecting public interest by limiting cost to Govt. for travel and per diem to cost from member's last permanent duty station to appropriate separation activity. However, no per diem payable to member at last permanent duty station for period of processing separation, no per diem would be payable at alternate separation center elected by member. 166

Special per diem allowances

Approval

Approval of special per diem allowances prescribed in 37 U.S.C. 405 to cover cost-of-living when members of uniformed services travel on temporary duty outside U.S. or in Hawaii or Alaska, subsequent to performance of travel would be retroactive determination of both special per diem rate and entitlement to rate contrary to rule that rights of Govt. and member entitled to per diem for travel and temporary duty become fixed under applicable orders and regulations in effect at time duty is performed and such rights may not be changed by administrative action which would retroactively amend member's orders or change applicable regulations. Therefore, Joint Travel Regs. may not be amended to provide for approval of special per diem allowances for foreign travel after travel has been performed---------- 127

Station per diem allowance. (*See* **Station Allowances, military personnel**)

Temporary duty

Training or school assignment

Duty station vicinity

Officer of uniformed services who incident to orders directing attendance at course of instructions claims per diem on basis of departure from Tachikawa Air Base—permanent duty station—at 5 a.m. by Govt. conveyance for classes at Kishine Barracks, Yokohama, Japan, and return to duty station at 7:15 p.m. same day, may not be paid per diem, Nov. 8, 1954 determination by Headquarters, Far East Air Forces, that per diem is not payable to its personnel for travel and temporary duty performed within area that includes two involved locations never having been rescinded, and notwithstanding conditions of travel and temporary duty in Tokyo area may have changed, and per diem may be paid at permanent duty overseas station under 37 U.S.C. 405 when authorized by regulation, 1954 restriction on basis little or no additional subsistence expense is incurred for travel within vicinity of duty station does not permit payment of per diem claimed. 131

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Per diem—Continued
Military personnel—Continued
Temporary duty—Continued
Travel other than under orders
Members of uniformed services who under 37 U.S.C. 404(e) receive per diem in lieu of subsistence when performing flights from permanent duty station to some other point and return without issuance of orders for specific travel may be reimbursed miscellaneous expenses contemplated by Vol. I, Ch. 4, Part I, Joint Travel Regs. for members in travel status, and regulations amended accordingly, in view of Govt.'s general obligation to make reimbursement for expenses necessarily incurred in performing duty away from permanent duty station. Although, travel orders may not be issued to members covered by sec. 404(e), claims for reimbursement may be paid on certification of appropriate unit commander. B–142359, July 1, 1960, modified---------- 477
Passengers in privately owned automobiles
Reimbursement basis
Official passenger who travels in privately owned vehicle (POV), use of which has not been determined to be advantageous to Govt., is entitled to reimbursement on same basis as operator of vehicle under per diem provisions of sec. 3.5c(2), Bur. of Budget Cir. No. A–7, Revised. Therefore, civilian Joint Travel Regs. may be amended to provide constructive per diem to passengers in POV used for official business as matter of personal preference, per diem limited to amount allowable had passenger used carrier upon which constructive transportation costs are determined---------- 686
Temporary duty
Dependents
En route to new station
An employee whose dependents traveled with him incident to change of official duty station and stopover for consultation is entitled under sec. 2.2b of Bur. of Budget Cir. No. A–56 to payment of per diem on account of his family restricted to that allowable for uninterrupted travel between old and new duty stations, the rationale of sec. 6.10 of Standardized Govt. Travel Regs. applying in measuring employee's entitlement to reimbursement for per diem on account of his family----- 760
TAXES
Contracts. (*See* Contracts, tax matters)
Federal
Social security
Increases. (*See* Social Security, tax increases, effect on contracts)
State
Travel expenses. (*See* Travel Expenses, miscellaneous expenses, State taxes)

TRANSPORTATION Page

Automobiles

Storage and parking status

Costs of parking or storing automobile which employee occupying temporary quarters incident to change-of-duty station pays separately from lodging expenses are not reimbursable to employee, use of term "subsistence expenses" in Pub. L. 89–516 and implementing Bur. of Budget regulations not extending to garaging of vehicle when employee occupies temporary quarters, and sec. 3.5 of Standardized Govt. Travel Regs. treating garaging or parking of vehicle as transportation expense_ 189

Baggage

Overseas employees

Unaccompanied baggage

Cost to civilian employee of transporting "Hi Fi System" incident to return to overseas duty station from home leave is not reimbursable under orders that authorized shipment of baggage, which consists of those articles traveler "bags up" and "lugs along," or has carried for him on journey for comfort or convenience during journey or upon arrival at destination. Therefore, "hi fi" not constituting baggage but household effects comparable to other instruments which are used for residential or social amusement and entertainment, cost of its transportation may not be allowed on basis it is unaccompanied baggage____ 572

Dependents

Advance travel

Use of more than one automobile

Employee whose dependents, prior to effective date of his transfer, travel to his new duty station by privately owned automobile to enroll children in full-school term at new station having been paid 12 cents per mile for his travel by automobile may be authorized additional reimbursement at rate of 4 cents per mile under par. C6156, Joint Travel Regs., which provides 16 cents per mile for use of two automobiles, notwithstanding regulations do not contain example involving family traveling earlier than employee, advanced travel for purpose of school enrollment having been administratively approved as acceptable reason for authorizing use of two automobiles_____ 720

Brothers

Not a dependent

Definition of "immediate family" in sec. 1.2d of Bur. of Budget Cir. No. A–56 excluding relationship of brother, and employee may not be reimbursed for travel and transportation expenses incurred for brother incident to change-of-duty station, even though employee is sole source of brother's support, and dependency is recognized for income tax and insurance purposes, attendance at Govt. school for dependents, and that employee might be held responsible in certain legal actions stemming from acts of brother_____ 121

Military personnel

Advance travel of dependents

School facilities lacking, etc.

Unavailability of high school facilities to child of member of uniformed services 2 years after member who on 3 year overseas assignment was aware of lack prior to departure is not unusual or emergency circumstances contemplated by 37 U.S.C. 406(e) for advance transportation

TRANSPORTATION—Continued Page
Dependents—Continued
Military personnel—Continued
Advance travel of dependents—Continued
School facilities lacking, etc.—Continued
of dependents, and par. M7103–2(5) of Joint Travel Regs. may not be construed other than authority for advance return of dependents to U.S. upon certification by overseas commander that lack of educational facilities or housing was beyond control of member and condition arose after dependents departure for overseas duty station, nor Regulations amended, either under 37 U.S.C. 406(e) regarding unusual or emergency conditions or sec. 406(h) providing for advance travel when in best interests of member or dependents and U.S., to authorize advance return of children where lack of educational facilities was known before departing for overseas station---------- 151
Cadets, midshipmen, etc.
Aviation Candidate Program
Members of Aviation Officer Candidate Program who enlist in Navy in pay grade E–2 and are promoted to E–5 upon arrival at temporary duty station are entitled to transportation of dependents at Govt. expense under orders that designate temporary duty station their permanent station as an officer prior to being commissioned. Fact that ordered change of station is incident to promotion and continued service in higher grade has no bearing on right, either as an officer or enlisted man, to entitlement under par. M7053 of Joint Travel Regs. to transportation of dependents at Govt. expense for travel performed to first permanent station designated subsequent to temporary duty assignment of member- 641
Children
Adopted
Adoption of orphan by Army officer having been in conformity with adoption laws of Vietnam, it will be recognized in other States to extent it is not repugnant to public policy of State, and officer having complied with requirements for issuance of passport and for classification of minor child as eligible orphan for visa under Immigration and Naturalization Act of 1952, as amended, adopted child is considered dependent of officer within meaning of 37 U.S.C. 401, and officer is entitled to child's transportation at Govt. expense incident to permanent change of station and he, therefore, may be paid monetary allowance in lieu of transportation---------- 349
Twenty-one years of age
Fact that unmarried dependent transferred overseas at Govt. expense incident to assignment of member of uniformed services remained overseas after reaching 21, and member's assignment to U.S., only returning to U.S. after member's reassignment to another permanent duty station within U.S., does not defeat entitlement to dependent's transportation under 37 U.S.C. 406(h) saved to member by par. M7055 of Joint Travel Regs. Therefore, member is entitled to transportation of dependent from place at which located overseas to duty station at which member is located at time travel is performed, not to exceed distance from old station overseas to current duty station in U.S. or from last station in U.S. to current station, whichever is greater---------- 691

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel—Continued

Dependents acquired prior to effective date or orders

Member of uniformed services who shortly before issuance of permanent change-of-station orders to restricted area upon completion of unaccompanied tour of duty at overseas station is married and pays cost of wife's travel to U.S. has not met requirements that he have at least 12 months remaining on overseas tour after acquisition of dependent for entitlement to reimbursement for dependent's travel ---------- 445

No legal basis existing for distinguishing between assignment of member of uniformed services to nonrestricted and restricted areas for purpose of extending effective date of permanent change-of-station orders until completion of temporary duty or leave en route, par. M3003-1b(1) of Joint Travel Regs. may be amended under 37 U.S.C. 404(b) to eliminate distinction, revision to conform to rule in 33 Comp. Gen. 458 that effective date of permanent change-of-station orders is date upon which travel must commence to accomplish ordered change, and that travel is not required to start prior to performance of temporary duty, use of authorized leave, proceed time, and personal convenience delays. Therefore, member's entitlement to transportation allowances only for dependents in existence on effective date of orders remains unaltered under revised regulation ---------- 710

Dislocation allowance

Emergency, etc., conditions

Officer of uniformed services whose dependents following evacuation from overseas duty station to temporary safe haven in Europe, pursuant to 37 U.S.C. 405(a), under orders authorizing further transportation to place to be designated within U.S., etc., return instead to duty station, may not be paid dislocation allowance prescribed in 37 U.S.C. 407, for purpose of partially reimbursing member with dependents for expenses incurred in relocating household, par. M9008 of Joint Travel Regs. properly operating to deny member dislocation allowance incident to movement of dependents to temporary safe haven outside U.S., where they did not locate household or establish residence and, therefore, did not incur relocation costs contemplated by 37 U.S.C. 407 ---------- 575

Missing status of member

Entitlement to payment of dislocation allowance authorized by 37 U.S.C. 407, predicated on orders directing permanent change of station for members of uniformed services, determination that member in active service is in missing status is not proper basis to authorize payment of dislocation allowance under sec. 554, which only authorizes travel and transportation of dependents and household and personal effects of member who is in missing status. Therefore, dependents of members missing in action, who are issued travel orders under 37 U.S.C. 554 incident to member's missing status and not because of member's permanent change of station, may not be paid dislocation allowance, whether or not they had relocated their households incident to member's permanent change of station to restricted area ---------- 556

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel—Continued

Medical treatment

Air Force officer stationed overseas whose wife under orders travels by privately owned automobile to and from hospital for medical treatment may not be paid mileage allowance for round-trip transportation, reimbursement under 10 U.S.C. 1040 and par. M7107, Joint Travel Regs. being limited to actual expenses, whether dependent travels alone or with attendant, absent specific authorization for commuted payments, such as mileage, monetary allowances in lieu of transportation, or per diem. Member who transports dependent to medical facility in his privately owned vehicle for which he is entitled to travel allowance would not be entitled to additional amount on behalf of dependent, travel allowance being in lieu of actual expenses---------- 743

To other than duty station

Member of uniformed services who shortly before issuance of permanent change-of-station orders to restricted area upon completion of unaccompanied tour of duty at overseas station is married and pays cost of wife's travel to U.S. has not met requirements that he have at least 12 months remaining on overseas tour after acquisition of dependent for entitlement to reimbursement for dependent's travel---------- 445

Travel between any points authorized

Government's obligation

In view of numerous authorized places where dependents and household goods of members of uniformed services may be located and places to which transportation may be desired on date of separation from service or relief from active duty—permanent changes of station under 37 U.S.C. 406—pars. M7009–1 and M8259–1 of Joint Travel Regs. may be revised to authorize transportation between any prescribed points, provided cost of movement is limited to that which would be involved for distance from last duty station, or from more distant location if authorized under par. M8253, to home of record or place from which called to active duty as elected by member under par. M4157 of regulations—maximum statutory obligation of Government---------- 689

Household effects

First duty station

Transfers between agencies

If transportation of employee's household effects from overseas duty station has been delayed until after transfer to duty station within U.S. without break in service, losing agency is responsible for payment of transportation costs not to exceed cost of returning goods to employee's residence and gaining agency is responsible for payment of balance of costs up to cost of direct transportation from old to new station------- 763

Housetrailer shipments

Pilot car services

Reimbursement of charges for pilot car services required by State law in connection with transportation of mobile dwelling which are assessed under Rule 320 of freight tariff that is designated "Special Service Charges" is not precluded by sec. 9.3a(3) of Bur. of Budget Cir. No. A–56, prohibition in section against payment of special services being directed to special services covered by Rule 170 of tariff, such as packing,

TRANSPORTATION—Continued Page

Household effects—Continued

Housetrailer shipments—Continued

Pilot car services—Continued

unpacking, blocking and unblocking housetrailers, necessary and desirable services for use of mobile dwelling but which, unlike pilot cars required by State law are not essential to point to point transportation of mobile dwelling---------- 107

Military personnel

After acquired

Regulations to authorize transportation of household effects of members of uniformed services between any prescribed points upon separation from service or relief from active duty, cost limited to distance from last duty station, or from more distant location if authorized pursuant to par. M8253 of Joint Travel Regs. to home of record or place from which called to active duty as elected by member under par. M4157, would not be for application to household effects that were not brought into service for use in member's household at some time during his current tour of active duty---------- 689

Transportation between any points authorized

Government's obligation

In view of numerous authorized places where dependents and household goods of members of uniformed services may be located and places to which transportation may be desired on date of separation from service or relief from active duty—permanent changes of station under 37 U.S.C. 406—pars. M7009–1 and M8259–1 of Joint Travel Regs. may be revised to authorize transportation between any prescribed points, provided cost of movement is limited to that which would be involved for distance from last duty station, or from more distant location if authorized under par. M8253, to home of record or place from which called to active duty as elected by member under par. M4157 of regulations—maximum statutory obligation of Government-- 689

Overseas employees

Shipment incident to home leave

Cost to civilian employee of transporting "Hi Fi System" incident to return to overseas duty station from home leave is not reimbursable under orders that authorized shipment of baggage, which consists of those articles traveler "bags up" and "lugs along," or has carried for him on journey for comfort or convenience during journey or upon arrival at destination. Therefore, "hi fi" not constituting baggage but household effects comparable to other instruments which are used for residential or social amusement and entertainment, cost of its transportation may not be allowed on basis it is unaccompanied baggage---- 572

Transfers

Agency within the United States

If transportation of employee's household effects from overseas duty station has been delayed until after transfer to duty station within U.S. without break in service, losing agency is responsible for payment of transportation costs not to exceed cost of returning goods to employee's residence and gaining agency is responsible for payment of balance of costs up to cost of direct transportation from old to new station-------- 763

Storage. (*See* **Storage, household effects**)

TRANSPORTATION—Continued Page

Mileage basis payment. (*See* Mileage)

Trailers

Trailer shipments

Civilian personnel. (*See* Transportation, household effects, house-trailer shipments)

Travel agencies

Use approved

Procurement of transportation through group or charter arrangements made by travel agents for employees traveling on official business between points in U.S. and points in its possessions or foreign countries which results in substantial savings over costs of regular individual air accommodations would be consistent with secs. 1.2 and 3.9 of Standardized Govt. Travel Regs. and, therefore, such arrangements may be used upon administrative determination of substantial savings over cost of regular individual air fare. However, tickets should not be obtained with Govt. transportation requests but should be paid for by traveler and cost reimbursed to him, and appropriate travel advances may be made to employees to cover cost of travel procurement 204

TRAVEL ALLOWANCES

Military personnel

Waiver

Reimubrsement to member of uniformed services for hotel expenses incurred on day of arrival at overseas permanent station may not be authorized by amendment to par. M4303–2c(4) of Joint Travel Regs. to provide payment of temporary lodging allowance or mileage, whichever is greater. Member in travel status on day of arrival at overseas station is only entitled to travel allowances on that day entitlement to temporary lodging allowance, considered a permanent station allowance, commencing day after arrival and, therefore, waiver of mileage entitlement by member would not operate to entitle him to temporary lodging allowance on day of arrival 724

TRAVEL EXPENSES

Actual expenses

Commuted payment authority lacking

Air Force officer stationed overseas whose wife under orders travels by privately owned automobile to and from hospital for medical treatment may not be paid mileage allowance for round-trip transportation, reimbursement under 10 U.S.C. 1040 and par. M7107, Joint Travel Regs. being limited to actual expenses, whether dependent travels alone or with attendant, absent specific authorization for commuted payments, such as mileage, monetary allowances in lieu of transportation, or per diem. Member who transports dependent to medical facility in his privately owned vehicle for which he is entitled to travel allowance would not be entitled to additional amount on behalf of dependent, travel allowance being in lieu of actual expenses 743

Leave incident to enlistment extension

Payment of mileage or monetary allowance to members of uniformed services in lieu of transportation for travel performed at personal expense pursuant to special leave provided by 10 U.S.C. 703(b), which authorizes transportation to and from duty station "at expense of United States" incident to extension of enlistment for at least 6 months, may not be

TRAVEL EXPENSES—Continued Page

Actual expenses—Continued

Leave incident to enlistment extension—Continued

authorized by revising par. M5501 of Joint Travel Regs., as amended, absent specific authority in sec. 703(b) for payment of commuted travel and transportation allowances and, therefore, travel performed by members at personal expense while on leave pursuant to 10 U.S.C. 703(b) may be reimbursed only on actual expense basis---------- 405

Advances

Group or charter travel

Procurement of transportation through group or charter arrangements made by travel agents for employees traveling on official business between points in U.S. and points in its possessions or foreign countries which results in substantial savings over costs of regular individual air accommodations would be consistent with secs. 1.2 and 3.9 of Standardized Govt. Travel Regs. and, therefore, such arrangements may be used upon administrative determination of substantial savings over cost of regular individual air fare. However, tickets should not be obtained with Govt. transportation requests but should be paid for by traveler and cost reimbursed to him, and appropriate travel advances may be made to employees to cover cost of travel procurement---------- 204

Automobiles

Hire. (*See* **Vehicles, rental**)

Illness

Other than employee

Employee who upon arrival at temporary duty station—a scientific conference—abandons official travel due to death in family is not entitled to travel and transportation expenses incurred in returning to headquarters, notwithstanding employee was directed by superior to return, or that he arranged to have employee of another Govt. agency attending conference submit report to his agency, and employee having abandoned assignment for personal reasons, cost of return travel is within scope of long-standing rule that when employee abondons his official travel status because of death or illness of member of family he may be reimbursed only cost of official travel to point of abandonment---------- 59

Military personnel

Circuitous routes

Payment basis

When members of uniformed services and their dependents incident to permanent change of station are authorized travel by other than direct or official route, entitlement to reimbursement for travel and transportation costs may not exceed costs that would be involved for travel by direct or official route to new station. Government's obligation is limited to furnishing transportation or reimbursement therefor from old to new duty station. Therefore, member authorized indirect travel for himself and dependents for personal reasons incident to change of station from overseas to U.S. is not entitled to reimbursement for excess cost involved in circuitous route travel to embarkation point for return to U.S.-------- 440

Air Force officer who incident to permanent change of station from Clark Air Force Base (Philippines) to Wright-Patterson Air Force Base (Ohio) travels under orders with dependents by Govt. air to other than scheduled port of embarkation in Europe for travel on space available

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Circuitous routes—Continued

Payment basis—Continued

basis, then by circuitous route to embarkation point, delaying departure from east coast debarkation port to locate luggage and traveling to California to pick up possessions stored with family before reporting to new duty station, is only entitled to per diem incident to air travel to port of debarkation plus mileage to new station—per diem, and total cost not to exceed cost of normal route travel—and to travel allowance for dependents from port of debarkation to new station, also limited to normal route costs, notwithstanding travel as performed and nonuse of Govt. storage facilities may have resulted in savings to Govt..... 440

Escorts

Dependents

Medical care

Travel of members of uniformed services who act as escorts and accompany dependents to medical facilities is regarded under 10 U.S.C. 1040 as travel on public business if directed by competent orders, and members are entitled to travel and transportation allowances in accordance with par. M6401 of Joint Travel Regs..... 743

Headquarters

Prohibition

Although members of Military Airlift Command crews who in addition to per diem in lieu of subsistence prescribed by 37 U.S.C. 404(e) for round-trip flights from permanent duty station without issuance of orders for specific travel are deemed to be entitled to reimbursement for miscellaneous travel expenses prescribed by par. M3050 of Joint Travel Regs., they are not considered as performing travel and temporary duty within contemplation of paragraph and, therefore, may not be reimbursed for expenses of travel between home or place of abode and place of reporting for regular duty at permanent station..... 477

Leaves of absence

Incident to enlistment extension

Payment of mileage or monetary allowance to members of uniformed services in lieu of transportation for travel performed at personal expense pursuant to special leave provided by 10 U.S.C. 703(b), which authorizes transportation to and from duty station "at expense of United States" incident to extension of enlistment for at least 6 months, may not be authorized by revising par. M5501 of Joint Travel Regs., as amended, absent specific authority in sec. 703(b) for payment of commuted travel and transportation allowances and, therefore, travel performed by members at personal expense while on leave pursuant to 10 U.S.C. 703(b) may be reimbursed only on actual expense basis..... 405

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
Release from active duty
Constructive costs
Member of uniformed services separated overseas for own convenience who returns to U.S. within 1 year by way of different port of debarkation than one from which he elected to receive travel allowances prescribed by M4159–5b of Joint Travel Regs. when "no travel" is performed incident to separation is not entitled to additional mileage, travel allowance having been fixed upon member's election of constructive costs. Therefore, member having been paid mileage from last overseas duty station to nearest port of embarkation and from nearest port of debarkation to place to which he elected to receive travel allowances, is not entitled to mileage adjustment on basis he traveled greater distance from port of debarkation used than distance for which he was paid mileage---------- 77
Transfers
Reimbursement basis
When members of uniformed services and their dependents incident to permanent change of station are authorized travel by other than direct or official route, entitlement to reimbursement for travel and transportation costs may not exceed costs that would be involved for travel by direct or official route to new station. Government's obligation is limited to furnishing transportation or reimbursement therefor from old to new duty station. Therefore, member authorized indirect travel for himself and dependents for personal reasons incident to change of station from overseas to U.S. is not entitled to reimbursement for excess cost involved in circuitous route travel to embarkation point for return to U.S------- 440
Air Force officer who incident to permanent change of station from Clark Air Force Base (Philippines) to Wright-Patterson Air Force Base (Ohio) travels under orders with dependents by Govt. air to other than scheduled port of embarkation in Europe for travel on space available basis, then by circuitous route to embarkation point, delaying departure from east coast debarkation port to locate luggage and traveling to California to pick up possessions stored with family before reporting to new duty station, is only entitled to per diem incident to air travel to port of debarkation plus mileage to new station—per diem, and total cost not to exceed cost of normal route travel—and to travel allowance for dependents from port of debarkation to new station, also limited to normal route costs, notwithstanding travel as performed and nonuse of Govt. storage facilities may have resulted in savings to Govt-------- 440
Travel status
Absent orders
Miscellaneous expenses
Members of uniformed services who under 37 U.S.C. 404(e) receive per diem in lieu of subsistence when performing flights from permanent duty station to some other point and return without issuance of orders for specific travel may be reimbursed miscellaneous expenses contemplated by Vol. I, Ch. 4, Part I, Joint Travel Regs. for members in travel status, and regulations amended accordingly, in view of Govt.'s general obligation to make reimbursement for expenses necessarily incurred in performing duty away from permanent duty station. Although, travel orders may not be issued to members covered by sec. 404(e), claims for reimbursement may be paid on certification of appropriate unit commander. B–142359, July 1, 1960, modified---------- 477

TRAVEL EXPENSES—Continued Page

Miscellaneous expenses

Insurance premiums

Dept. of State officer who when administratively reimbursed travel expenses incurred incident to attending in official capacity American Bar Association's National Institute on Marine Resources is not allowed $7.50 air insurance fee may not recover amount from contribution made to Dept. under 22 U.S.C. 809 to cover "actual" travel expenses of officer, and even if gift had not been conditioned, insurance cost personal to officer, Dept. could only accept reimbursement for cost of air insurance for its own benefit, and as Bar Association is not one of acceptable donors described in 26 U.S.C. 501(c)(3), officer may not under 5 U.S.C. 4111 accept $7.50 as contribution from private source 319

State taxes

Automobile registration, license etc.

Under State statute exempting nonresident vehicle owner from requirement to register his automobile and obtain State license plates unless vehicle would be operated for gain or profit of owner or others, employee who in performance of temporary duty is required to obtain certificate of registration and license plates for his privately owned automobile may be reimbursed expenses he incurred in complying with State statute, employee's use of his vehicle during temporary duty assignment having been advantageous to Govt. in transaction of official business within meaning of sec. 10.5 of Standardized Govt. Travel Regs. 332

Official business

Passengers in privately owned vehicles

Official passenger who travels in privately owned vehicle (POV), use of which has not been determined to be advantageous to Govt., is entitled to reimbursement on same basis as operator of vehicle under per diem provisions of sec. 3.5c(2), Bur. of Budget Cir. No. A–7, Revised. Therefore, civilian Joint Travel Regs. may be amended to provide constructive per diem to passengers in POV used for official business as matter of personal preference, per diem limited to amount allowable had passenger used carrier upon which constructive transportation costs are determined 686

Overseas employees

Transfers

Agency within the United States

Govt. agency acquiring services of overseas employee who incident to return to U.S. for separation and reemployment without break in service is entitled to reimbursement of travel expenses by both losing and acquiring agency in accordance with 46 Comp. Gen. 628 may, if transfer is not for convenience of employee, pursuant to sec. 2.5 of Bur. of Budget Cir. No. A–56, authorize payment of subsistence expenses incurred while occupying temporary quarters at new station, miscellaneous expenses, and per diem for employee's family incident to travel from residence to new duty station, not to exceed per diem payable for direct travel from old to new station 76

Overseas employee under separation orders to place of residence which is more distant from overseas duty station than place at which he is employed without break in service after departure from overseas duty point is only entitled to reimbursement by losing agency for travel

TRAVEL EXPENSES—Continued Page
Overseas employees—Continued
Transfers—Continued
Agency within the United States—Continued
costs to place of residence. Although employee is not entitled to travel or transportation costs from residence to new duty station, no collection is required for costs paid to residence in excess of costs for direct travel from overseas to new station. Under Bur. of Budget Cir. No. A–56 acquiring agency may pay miscellaneous expenses allowance and reimburse employee for subsistence while occupying temporary quarters. However, no per diem allowance for travel time of employee's family is allowable---------- 763
Temporary duty
Assignment interrupted
Return expenses
Illness or death in family
Employee who upon arrival at temporary duty station—a scientific conference—abandons official travel due to death in family is not entitled to travel and transportation expenses incurred in returning to headquarters, notwithstanding employee was directed by superior to return, or that he arranged to have employee of another Govt. agency attending conference submit report to his agency, and employee having abandoned assignment for personal reasons, cost of return travel is within scope of long-standing rule that when employee abandons his official travel status because of death or illness of member of family he may be reimbursed only cost of official travel to point of abandonment---------- 59
Transfers
Dependents
Brother's status
Definition of "immediate family" in sec. 1.2d of Bur. of Budget Cir. No. A–56 excluding relationship of brother, and employee may not be reimbursed for travel and transportation expenses incurred for brother incident to change-of-duty station, even though employee is sole source of brother's support, and dependency is recognized for income tax and insurance purposes, attendance at Govt. school for dependents, and that employee might be held responsible in certain legal actions stemming from acts of brother---------- 121
Trailer placement travel
Expenses incurred by employee for round trip travel between old and new official stations to locate lot of sufficient acreage on which to place double size housetrailer may be reimbursed to him under authority in sec. 2.4a, Bur. of Budget Cir. No. A–56, providing for reimbursement of traveling expenses incurred in "seeking permanent residence quarters" at new station, sec. 9.1c of regulations respecting transportation of housetrailers used as residence, recognizing that there may be payment of travel allowances under sec. 2.4 even though trailer used as residence at old station will continue to be employee's residence at new station-- 119

TRAVEL EXPENSES—Continued Page

Vehicles

Use of privately owned

Registration and license while on temporary duty

Under State statute exempting nonresident vehicle owner from requirement to register his automobile and obtain State license plates unless vehicle would be operated for gain or profit of owner or others, employee who in performance of temporary duty is required to obtain certificate of registration and license plates for his privately owned automobile may be reimbursed expenses he incurred in complying with State statute, employee's use of his vehicle during temporary duty assignment having been advantageous to Govt. in transaction of official business within meaning of sec. 10.5 of Standardized Govt. Travel Regs---------- 332

VEHICLES

Parking fees. (*See* Fees, parking)

Rental

Insurance

Employee who incident to official business rented automobile which he obtained by use of Govt. credit card, and who under rental agreement is required to pay $100 for damages to vehicle which occurred without negligence on his part may be reimbursed expenditure absent administrative requirement that he purchase collision damage waiver, and on basis of general policy of Govt. not to carry insurance, and in absence of administrative instructions in matter, employee is not considered to have failed to use reasonable discretion contemplated in 35 Comp. Gen. 553 when he did not apply for damage waiver---------- 145

VETERANS

Hospitalization, etc.

Nursing home care

The 50 per centum reduction in retired pay of incompetent members of uniformed services required by 38 U.S.C. 3203(a)(1) after 6 months of Veterans Admin. hospital care continues upon discharge from hospitalization after receiving maximum hospital benefits at VA hospital to enter either convalescent center or private nursing home operating under contract with Administration, care given members "at expenses of U.S." coming within meaning of "institutional or domiciliary care furnished by Veterans Admin." as contemplated by sec. 3203(a)(1), and no retired pay having been paid members during period of convalescent or nursing care, payment of one-half retired pay due incompetents may be made to persons designated to receive payment---------- 89

Admission pursuant to 38 U.S.C. 620 of veteran into private non-Veterans Admin. managed nursing home that is under contract with Administration immediately subsequent to approved discharge from maximum hospital benefits provided in VA hospital is tantamount to transfer which has effect of continuous hospitalization within meaning of 38 U.S.C. 3203(a)(1), and reduction in retired pay of veterans prescribed by sec. 3203(a)(1) is for continuation, nursing home having entered into valid contract with Veterans Admin. meets test of "nursing home" prescribed in 38 U.S.C. 620. However, 38 U.S.C. 3203(a)(1) does not apply if nursing home care, whether furnished in private or public nursing home, is not authorized at Govt. expense---------- 89

VETERANS—Continued Page
Hospitalization, etc.—Continued
Nursing home care—Continued
Admission of veterans to private, non-Veterans Admin. managed nursing home under contract with Administration upon discharge from VA institution after receiving maximum hospital benefits prescribed does not begin new period of hospitalization for reduction of retired pay prescribed in 38 U.S.C. 3203(a)(1), whether nursing home has entered into contract with Veterans Admin. or care is furnished at expense of U.S., both situations contemplating furnishing of continued care by Administration. Therefore, upon transfer to nursing home, hospitalization is considered continuous and is not beginning of new period of hospitalization---- 89
Military departments in making determination regarding implementation of 38 U.S.C. 3203(a)(1), requiring 50 per centum reduction in retired pay after 6 months of continuous Veterans Admin. hospitalization, and 38 U.S.C. 620 providing for public or private nursing home care under contract or at Govt. expense upon discharge from VA hospital after receiving maximum prescribed hospital benefits, should follow when information is insufficient, lacking or contradictory, procedure prescribed in 31 U.S.C. 74, which authorizes disbursing officers or head of any executive department, or other establishment not under any of executive departments, to apply for decision by Comptroller General upon any question involved in payment to be made by them or under them---- 89
Retired pay withholdings. (*See* Pay, retired, withholding, Veterans Administration care and treatment)
Medical services
Private
Military physicians on active duty
Fee-basis medical services rendered to an eligible veteran for disabilities identified on an Outpatient Medical Treatment Identification Card by military physician on active duty with Armed Forces who is engaged in limited medical practice after hours with permission of his commanding officer may not be paid by Veterans Administration in absence of statutory authority under rule that concurrent Federal civilian employment and active duty military service are incompatible-- 505
VETERANS ADMINISTRATION
Hospital construction
Leased property
Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section---- 61

VETERANS ADMINISTRATION—Continued Page

Parking facilities

At hospitals

Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees---------- 61

WAGE EARNERS' PLANS

(*See* **Bankruptcy, Wage Earners' Plans**)

WORDS AND PHRASES

"Acquisition"

The word "acquisition" in phrase "purchase or acquisition" as used in Foreign Assistance and Related Agencies Appropriation Act, 1968, is much broader in scope than word "purchase," word generally used to indicate sale of article, in other words to indicate that article was bought, whereas word "acquisition" is considered to mean obtaining article by any means whatsoever---------- 418

"Authority"

Bid accompanied by letter requesting authorization of larger progress payments than provided for in invitation is qualified bid that does not reserve to bidder option after bid opening to waive condition and accept contract or refuse to accept contract, notwithstanding the word "request" is precatory in nature, as word is susceptible of two possible meanings depending on existing circumstances, or that word "authority" is deemed precatory in nature rather than demand and, therefore, qualified bid was properly rejected---------- 496

"Break in service"

Employee who between voluntary separation in 1953 from post in which he had accumulated sick leave and his reemployment in 1956 to position subject to Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. 6301, served under several temporary appointments on when-actually-employed basis during which time he was not subject to leave act, is entitled to recredit of sick leave accumulated prior to separation in 1953 as of date of reemployment in 1956, term "break in service" in sec. 30.702(a) of Civil Service Regs. providing for recredit of sick leave upon reemployment having reference to actual separation from Federal service. Therefore, any leave without pay (LWOP) charged to employee after reemployment may now be charged to recredited sick leave and employee paid for LWOP period from account to which balances of salary funds from prior years have been transferred-------- 308

"Chiropractor"

Statement from chiropractor certifying that unmarried daughter of member of uniformed services who is over 18 years of age suffers from paralysis may be considered "a certificate of attending physician" to substantiate her eligibility as beneficiary under Retired Serviceman's

WORDS AND PHRASES—Continued Page

"Chiropractor"—Continued

Family Protection Plan, "practice of chiropractic" constituting practice of medicine within meaning of par. 8b(2)(c) BuPers Instruction 1750.1D, which permits not only attending physician but "appropriate official of a hospital or institution," who may or may not be practicing physician, to certify to physical incapacity or mental incompetence of beneficiary. Therefore, disability of dependent within scope of chiropractic attention, chiropractor is qualified to express expert opinion as to extent and permanency of disability to which he is certifying---------- 371

"Continental United States"

Term "within the continental United States" as used by Bur. of Budget in sec. 1.3c(1) of Cir. No. A–56, and derived from sec. 28 of Administrative Expenses Act of 1946, as added by Pub. L. 89–516, may not be interpreted to mean "to and within the continental United States," absent proper basis to justify interpretation---------- 122

"Item"

As dictionary definition describing word "item" as "individual particular or detail singled out from group of related particulars or details" is meaning of word as used in implementation of Defense Cataloging and Standardization Act under which each separate and distinct item of supply used recurrently is required to be classified, described, and given item Federal Stock Number (FSN), which identifies item from every other item of supply, solicitations for various sizes of aerial delivery slings properly identified each size with individual FSN, and procurement is not subject to par. 1–706.1(c)(ii) of Armed Services Procurement Reg., which precludes small business set-asides when large business planned emergency producer of "item" desires to participate in procurement---------- 462

"Nonworkdays"

Employee separated by resignation, as required by employing Govt. agency, on Friday, Dec. 15, 1967, in order to accept employment on Monday, December 18, 1967, in another Govt. agency may be considered, in view of various situations in which nonworkdays falling between continuous periods of service are not regarded in interrupting service, as being "in service of United States" within purview of sec. 218(a) of Federal Salary Act of 1967, which provides that to be entitled to retroactive compensation prescribed by act, individual must have been on rolls of agency on Dec. 16, 1967, date of enactment of act and, therefore, employee is entitled to payment in amount of retroactive increase authorized by act for period Oct. 8 through Dec. 15, 1967----- 386

"Overhauled"

Under solicitation that provided no exception to furnishing new outer cylinders for aircraft, rejection of low proposal offering to furnish "overhauled certified" cylinders was proper, notwithstanding delayed award information, and was within purview of par. 1–1208 of Armed Services Procurement Reg. which authorizes procurement of used and reconditioned material and former Govt. surplus material, and in view of fact that word "overhauled" in industry and in Govt. engineering and procurement areas is accepted to indicate condition other than new and to imply repaired condition, and that low confirmed prices offered support conclusion new material was not proposed and would

WORDS AND PHRASES—Continued Page

"Overhauled"—Continued

not be used in performance of contract, contracting officer is considered not to have had duty to "ferret" out unique meaning of and company policy attached to use of words "overhauled certified." However, in future procurements, award information should issue promptly------- 390

"Request"

Bid accompanied by letter requesting authorization of larger progress payments than provided for in invitation is qualified bid that does not reserve to bidder option after bid opening to waive condition and accept contract or refuse to accept contract, notwithstanding the word "request" is precatory in nature, as word is susceptible of two possible meanings depending on existing circumstances, or that word "authority" is deemed precatory in nature rather than demand and, therefore, qualified bid was properly rejected---------- 49