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[B-163447]

Contracts—Increased Costs—Government Activities—Work Suspension

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

Contracts—Damages—Government Liability—Breach of Contract

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

To the Systems Design Corporation, March 1, 1968:

Reference is made to your claim in the amount of $11,000 for additional costs incurred in performing contract No. AF34(601)-27179 dated June 9, 1966, with the Department of the Air Force, which was forwarded here by that Department for settlement.

Item No. 1 of the contract called for the engineering, furnishing and installation of an operational closed circuit television surveillance system at Launch Complex 17, Cape Kennedy AFS, Florida, with delivery 36 days after receipt of the contract. The contract did not contain a "Suspension of Work" clause, and provided under Part XXIV, concerning the installation portion of the work, as follows:

* * * * * * *

D. CONDITIONS AFFECTING THE WORK (JUNE 1964)

The Contractor shall be responsible for having taken steps reasonably necessary to ascertain the nature and location of the work, and the general and local conditions which can affect the work or the cost thereof. Any failure by the Contractor to do so will not relieve him from responsibility for successfully performing the work *without additional expense to the Government*. The Government assumes no responsibility for any understanding or representations concerning conditions made by any of its officers or agents prior to the execution of this contract, unless such understanding or representations by the Government are expressly stated in the contract. [Italic supplied.]

* * * * * * *

N. JOINT TENANCY

The Contractor shall be responsible for coordinating all the required installation activities with the Air Force Eastern Test Range to preclude any interference with NASA and Air Force launch crews.

You state that you based your price for the work upon full and uninterrupted access to the blockhouse and launch pads in the complex, whereas your installation crew was completely barred from the jobsite for several days during your contract period and had but partial access to the launch complex on several other days due to activities and commitments associated with the launching of the Delta 39 and Pioneer space vehicles. You requested adjustment in the contract price for your increased costs attributable to the delays caused by the Government, and the amount of $11,000 has been agreed upon between you and Air Force officials as a reasonable and equitable compensation for such delays. Since the contract did not contain a "Suspension of Work" clause or other provision to cover delays, the Air Force concluded that the agreed amount could not be paid administratively under the terms and conditions of the contract, and your claim was forwarded to this Office for payment on the basis that it was a claim for damages arising from Government-caused delays which appeared to constitute a breach by the Government of the contract.

It has been the consistent position of this Office that where a contract does not contain a "Suspension of Work" clause or other provision expressly granting the contractor a right to compensation for delay, a claim by the contractor for costs incurred through delays caused by the Government is essentially a claim for breach of contract damages which the contracting officer or other administrative officials of the agency concerned have no authority to pay. See 44 Comp. Gen. 353. While this Office has jurisdiction to settle a claim for damages or additional costs based on an alleged breach of the Government's contractual obligations, a basic prerequisite to the allowance of any part of such a claim is the clear establishment of the Government's legal liability in the matter.

The record does not indicate, nor have you contended, that the delays were caused by wrongful actions of the Government or that the launch complex lockouts were unnecessary or constituted an improper exercise of authority by the Government's representatives. Further, there is no indication that the periods of time during which your installation crew did not have access to certain portions of the launch complex were unreasonable under the circumstances or that the Government negligently or unduly delayed reopening the complex to your crew following the launchings.

While it has sometimes been broadly stated that there is in every contract an implied promise that neither party to the contract will do anything to prevent, hinder or delay performance thereof by the other party, the nature and scope of such promise must be gathered from the particular contract, its content, and the surrounding circumstances.

See *Commerce International Company, Inc.* v. *United States*, 167 Ct. Cl. 529. Your contract specifically provided that the contractor would be responsible for having taken steps reasonably necessary to ascertain the general and local conditions which could affect the work or the cost thereof, and any failure to do so would not relieve him from performing the work without additional cost to the Government. Also, it specifically provided that the contractor would be responsible for coordinating all the required installation activities with the Air Force Eastern Test Range to preclude any interference with NASA and Air Force launch crews. The launching of space vehicles is a normal function of the launching complexes at Cape Kennedy and it does not appear unreasonable to conclude that you should have understood, particularly in the light of the above caution, the possibility that such launching operations could affect the progress of your installation crew and thereby delay or increase the cost of the work. The contract required you to coordinate your installation activities so as not to interfere with the launching crews, and the delay incurred through complying with such contractual requirement forms the primary basis for your claim. Since the possibility of such delays was clearly evident at the time of the contract, and the delays were occasioned not through any fault or negligence on the part of the Government or in violation of any affirmative warranty or promise, but in the performance of its normal operations the continuance and priority of which were provided for in the contract, we do not believe that the delay experienced was such as could be considered as a breach by the Government of the contract, under applicable legal principles established by the courts. See *Commerce International Company* v. *United States*, *supra; United States* v. *Howard P. Foley Co.*, 329 U.S. 64; *United States* v. *Rice*, 317 U.S. 61; *Gilbane Building Company* v. *United States*, 166 Ct. Cl. 347.

In the absence of a specific contract provision for compensation for delay occasioned by acts of the Government, or some fault or negligence on the part of the Government in causing it, there is no legal liability on the part of the Government for increased costs attributable to the delays encountered by your installation crew by reason of the launch activities at the worksite, and your claim for reimbursement for such costs must therefore be, and is hereby, disallowed.

[B–162622]

Travel Expenses—Military Personnel—Travel Status—Absent Orders—Miscellaneous Expenses

Members of the uniformed services who under 37 U.S.C. 404(e) receive a per diem in lieu of subsistence when performing flights from a permanent duty station to some other point and return without the issuance of orders for specific

travel may be reimbursed the miscellaneous expenses contemplated by Volume I, Chapter 4, Part I, Joint Travel Regulations for members in a travel status, and the regulations amended accordingly, in view of the Government's general obligation to make reimbursement for expenses necessarily incurred in performing duty away from a permanent duty station. Although travel orders may not be issued to members covered by section 404(e), claims for reimbursement may be paid on the certification of the appropriate unit commander. B-142359, July 1, 1960, modified.

Travel Expenses—Military Personnel—Headquarters—Prohibition

Although members of the Military Airlift Command crews who in addition to the per diem in lieu of subsistence prescribed by 37 U.S.C. 404(e) for round-trip flights from a permanent duty station without the issuance of orders for specific travel are deemed to be entitled to reimbursement for the miscellaneous travel expenses prescribed by paragraph M3050 of the Joint Travel Regulations, they are not considered as performing travel and temporary duty within the contemplation of the paragraph and, therefore, may not be reimbursed for the expenses of travel between home or place of abode and the place of reporting for regular duty at their permanent station.

To the Secretary of the Army, March 4, 1968:

Further reference is made to letter dated September 18, 1967, from the Under Secretary of the Army, requesting a decision whether, through the issuance of travel orders or otherwise, members of the military organizations named in 37 U.S.C. 404(e) may, in addition to the per diem there authorized when away from their permanent station, receive reimbursement for those expenses that are reimbursable to members in a travel status as contemplated by Volume I, Chaper 4, Part I, Joint Travel Regulations. This request was assigned PDTA-TAC Control No. 67-31 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter, the Under Secretary expresses the belief that 37 U.S.C. 404(e) was drafted to permit the payment of per diem allowances to MAC (Military Airlift Command) crews when performance of duty involved absence from duty station under conditions which, if known in advance and covered by orders for specific travel in each case, would have warranted the payment of per diem. He states that such members were required to perform scheduled and unscheduled flights under conditions where the issuance of specific orders for travel in advance thereof was impracticable and he expresses the belief that the legislative intent in enacting that provision of law was not to deny proper reimbursement of travel expenses for this class of duty.

The Under Secretary says that the involved duty is performed under specific orders in each case. He points out that while written travel orders are not issued at that time in cases where it appears that per diem allowances, where warranted, are sufficient to defray the expenses of travel, he believes that where unavoidable delays for mechanical failures, weather, operational requirements, etc., make it mandatory that the member delay under conditions where he will be exposed to other travel expenses specified in Volume I, Chapter 4, Part I, Joint

Travel Regulations, travel orders may be issued in advance or confirmed so as to place the member in a full travel status and permit appropriate reimbursement. He adds that while the duty involved is the operation of aircraft which by its very nature involves movement from place to place, unavoidable delays, whether known of in advance or not, result in additional expenses which should be reimbursed by the Government the same as for members on other classes of duty.

The Under Secretary asks whether travel orders may be issued for members referred to in the above provision of law while on the type of duty specified therein when it is known in advance that delay and exposure to expenses covered by the above regulations will be involved and, in the event our reply is in the affirmative, he asks whether such travel may be confirmed in writing after it has been performed in cases where expenses other than those covered by the per diem allowance are experienced under conditions where it was not possible to secure written orders in advance. In the event our reply to the first question is in the negative, he asks whether the members may be reimbursed under Volume I, Chapter 4, Part K, Joint Travel Regulations, for expenses of local transportation, such as public carrier or cab fares for transportation from airfields to hotels, motels, and other quarters.

Section 404 of Title 37, United States Code, provides that, under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under competent orders when away from his designated post of duty. However, subsection (e) of that section provides that a member who is on duty with, or is undergoing training for, the Military Airlift Command, the Marine Corps Transport Squadrons, the Fleet Tactical Support Squadrons, or the Naval Aircraft Ferrying Squadrons, and who is away from his permanent station, may be paid a per diem in lieu of subsistence in an amount not more than the amount to which he would be entitled if he were performing travel in connection with temporary duty without, in either case, the issuance of orders for specific travel. The latter provision of law stems from section 203 of the act of August 2, 1946, ch. 756, 60 Stat. 859, 37 U.S.C. 112 (1946 ed.), which amended section 12 of the Pay Readjustment Act of 1942, to provide for payment of actual expenses, or a per diem in lieu thereof, at rates not exceeding those prescribed for naval officers in a travel status, to naval personnel on duty with or under training for the Naval Air Transport Service and away from their permanent duty stations, without the issuance of orders for specific travel. That amendment was incorporated, with slight change, to include additional organizations and omit the actual expense reim-

bursement provision, as section 303(d) of the Career Compensation Act of 1949, ch. 681, October 12, 1949, 63 Stat. 815, 37 U.S.C. 404(e).

Also, 37 U.S.C. 408 provides that a member of a uniformed service may be directed, by regulations of the head of the department or agency in which he is serving, to procure transportation necessary for conducting official business of the United States within the limits of his station and that the expenses so incurred by him for train, bus, streetcar, taxicab, ferry, bridge, and similar fares and tolls, or for the use of privately owned vehicles at a fixed rate a mile, shall be defrayed by the department or agency under which he is serving, or the member shall be entitled to reimbursement for the expense.

Regulations applicable to the involved class of travel are contained in Chapter 5, Part D, of the Joint Travel Regulations. Paragraph M5150 authorizes to the members of the specified military commands and organizations, while away from their permanent stations, the per diem allowances as contained in Chapter 4, Parts E and F, of the regulations, without the issuance of orders for specific travel. Paragraph M5151 provides that where orders are not issued, claims will be certified by the appropriate unit commander and such certification will constitute a valid authorization of the claim. Volume I, Chapter 4, Parts E and F of the regulations provide for the payment of per diem to members of the uniformed services for all periods of travel and temporary duty under competent orders in the United States and outside the United States, respectively, except under the circumstances set forth under those parts.

Part I of Chapter 4 of these regulations provides for reimbursement to such members of expenses incurred while in a travel status (see paragraph M3050), such as taxicab, bus, streetcar, subway or other public carrier fares for travel between certain designated places, allowable tips, etc., and Part K implements 37 U.S.C. 408 by providing for reimbursement to the members of expenses incurred while conducting official business within the limits of permanent and temporary duty stations and in the metropolitan areas surrounding those stations, such as train, bus, streetcar, subway, and ferry fares, allowable tips, cost of hire and operation of special conveyance, etc. Paragraph M3050 referred to in the above-mentioned Part I states that members are entitled to travel and transportation allowances only while actually in a "travel status" and that members shall be deemed to be in a travel status while performing travel away from their permanent duty station upon public business, pursuant to competent orders, including necessary delays en route incident to the mode of travel and periods of necessary temporary or temporary additional duty.

While section 404(e) provides that, without the issuance of orders, a member of an organization there mentioned may be paid a per diem

when away from his permanent station in an amount not more than the amount to which he would be entitled if he were performing travel in connection with temporary duty, the provision apparently recognizes and it has long been our view that such a member whose regularly assigned duty consists of performing flights from a permanent station to some other point and return, normally is not to be considered as performing travel and temporary duty as contemplated in Parts E, F and I of Chapter 4.

Consequently, in decision of July 1, 1960, B–142359, we concluded that an officer of the Military Air Transport Service who performed a transport mission from his permanent station to Rio de Janeiro, Brazil, and return, was not entitled to reimbursement for the taxi fare for transportation from the airport to overnight hotel accommodations in Rio de Janeiro. Likewise, in decision of January 28, 1958, B–134631, we said that a MATS transport pilot who performed a scheduled flight from his duty station at McGuire Air Force Base to Thule, Greenland, and return, was not entitled to reimbursement for taxi fare from his home to his duty station in connection with such flight. We said no provision is made, nor does there appear to be authority to include in the Joint Travel Regulations, a provision for reimbursing such members for the expense of traveling from home or place of abode to the place at which they report for their regular duty. It was pointed out that a member who performs such duty normally is not considered as performing travel and temporary duty as contemplated in Parts E and F of Chapter 4 but that paragraph M5150 of the regulations authorizes the per diem prescribed in those parts.

As indicated above, the 1946 amendment provided for reimbursement on an actual expense basis, or the payment of a per diem in lieu thereof, but the actual expense provision was not included in section 303(d) of the Career Compensation Act of 1949, 63 Stat. 815, and it has been our view that under that section and the current section 404(e) of Title 37, U.S. Code, payment was limited to a per diem.

In our decision of July 9, 1965, 45 Comp. Gen. 30, we reconsidered our prior views with respect to reimbursement of certain travel expenses incurred at the permanent or temporary duty station incident to travel and temporary duty. For the reasons there stated, we concluded that a modification of our prior views was justified and that regulations could be issued to provide for reimbursement of certain expenses that we had previously considered as the personal obligation of the traveler. In the light of that decision and having in mind the general obligation of the Government to reimburse a member for expenses necessarily incurred in performing duty away from his permanent duty station, we believe that some modification of our views is

justified with respect to travel performed within the contemplation of section 404(e).

Since Part I of Chapter 4 of the regulations is specifically applicable to members who incur the expenses there described while in a travel status within the contemplation of paragraph M3050 and since members covered by section 404(e) whose regularly assigned duty consists of performing flights from a permanent station to some other point or points and return are not considered as performing such duty in a travel status within the contemplation of paragraph M3050, we are of the opinion that travel orders may not properly be issued for the purpose of reimbursing such members for expenses incurred away from their permanent duty station, as proposed.

While the members concerned are not in a travel status when away from their permanent station, section 404(e) expressly assimilates them to members in a travel status for per diem purposes in certain cases when absent from their duty stations. Presumably because of their assigned duty an authorization for transportation was not included in the law. However, such an omission does not require a conclusion that Congress intended to deny reimbursement for miscellaneous transportation expenses necessarily incurred at locations other than the permanent duty stations in the performance of duty for which they are entitled to a per diem. Accordingly, we will not object to an amendment to Part D, Chapter 5, of the regulations to authorize reimbursement under Part I, Chapter 4, to the extent otherwise deemed appropriate, of expenses described in that part that are necessarily incurred by the members involved while away from their duty stations incident to the performance of the duty for which they are authorized a per diem pursuant to section 404(e). Decision of July 1, 1960, B–142359, is modified accordingly. The regulations may also be amended to provide, as is now provided with respect to the payment of per diem (paragraph M5151), that where orders are not issued for the travel involved, claims for reimbursement of such expenses may be paid on the certification of the appropriate unit commander, if otherwise proper.

As we have indicated, a member of one of the organizations mentioned in section 404(e) whose regularly assigned duty consists of performing flights from a permanent station to some other point and return normally would not be considered as performing travel and temporary duty within the contemplation of paragraph M3050, but would be performing his regularly assigned duty. Consequently, as we held in decision of January 28, 1958, B–134631, there appears to be no authority to include in the Joint Travel Regulations a provision for reimbursing such members for the expense of travel between home or place of

abode and the place where they report for their regular duty at their permanent station.

[B-163393]

Pay—Retired—Annuity Elections for Dependents—Incompetents—Evidence

An annuity election by the Secretary of the Army pursuant to 10 U.S.C. 1433 on behalf of a Reserve commissioned officer diagnosed mentally incompetent in May 1964 and retired at the age of 60 under 10 U.S.C. 1331, effective May 1, 1967, whose wife as conservatrix of his estate requested the election, is not a valid election under the Retired Serviceman's Family Protection Plan absent evidence to establish that at least 3 years before the first day for which retired pay was granted—prior to May 1, 1964—the officer was mentally incompetent and could not make the annuity election. Therefore, the monthly cost of the annuity withheld from the officer's retired pay may be paid.

To Lieutenant Colonel Frank Berrish, Department of the Army, March 4, 1968:

Further reference is made to your letter dated December 21, 1967, requesting an advance decision as to whether in the circumstances described in the case of Lieutenant Colonel Pascal D. Forgione, O360618, AUS, retired, the election made by the Commanding Officer of the Finance Center in that case may be considered a valid election under the provisions of the Retired Serviceman's Family Protection Plan. Your letter was forwarded here by letter dated January 18, 1968, from the Office of the Comptroller of the Army under D.O. number A982 allocated by the Department of Defense Military Pay and Allowance Committee.

Colonel Forgione became 60 years of age on April 18, 1967, and he was placed on the Army of the United States retired list with entitlement to retired pay under 10 U.S.C. 1331 effective May 1, 1967. He had accepted an indefinite appointment as a Reserve commissioned officer on November 22, 1952, which status existed at the time of his transfer to the retired list. There is no evidence that he made an election under the Uniformed Services Contingency Option Act of 1953, ch. 393, 67 Stat. 501, or under 10 U.S.C. 1431 as amended by the act of October 4, 1961, Public Law 87-381, 75 Stat. 810, within the time limitations fixed by those laws.

In May 1964 Dr. Francis H. O'Brien diagnosed Colonel Forgione's mental deterioration as Alzheimer's presenile dementia, which he later concluded began at least 5 years previously. On January 28, 1965, the Probate Court, District of Southington, Connecticut, appointed his wife, Mary J. Forgione, conservatrix of his estate. At the time of his retirement, he was a patient in the Veterans Administration Hospital, Northhampton, Massachusetts, having been admitted in September 1965. In a letter dated October 17, 1967, the Acting Chief, Medical

Service, at that hospital stated that the officer's symptoms of mental deterioration developed gradually to the point where he lost his successful accounting business in February 1964.

On May 10, 1967, Mrs. Forgione executed DA Form 1041 indicating her desire for an election of option 1 with option 4 at one-half reduced retired pay to provide an annuity on her behalf. The form was forwarded for consideration as a request that the Secretary of the Army make an election under the provisions of 10 U.S.C. 1433. On September 11, 1967, the Commanding Officer, Finance Center, U.S. Army—acting for the Secretary of the Army—made the requested election pursuant to paragraph 6-3*e*(1)(*a*), Change 1, dated August 16, 1962, of AR 37-104-1. However, doubt exists as to whether the election may be considered a valid election under the Retired Serviceman's Family Protection Plan and you have requested a decision in the matter.

Not having made an election pursuant to the 1953 act, Colonel Forgione was precluded from making an election of annuity until the enactment of the 1961 amendments. Thereafter under 10 U.S.C. 1431, as amended, an election by him would have permitted payment of an annuity if the election was made at least 3 years before the first day for which retired pay was granted. See 45 Comp. Gen. 112, September 8, 1965. Your doubt in the matter appears to relate to the sufficiency of the evidence which has been furnished, to establish that prior to May 1, 1964, he became mentally incompetent to make an election, so as to constitute the election made on his behalf pursuant to 10 U.S.C. 1433 a valid election.

Insofar as relevant here, 10 U.S.C. 1433 provides:

> If a person who would be entitled to make an election under section 1431 or 1432 of this title is determined to be mentally incompetent by medical officers of the armed force concerned or of the Veteran's Administration, or by a court of competent jurisdiction, and for that reason cannot make the election within the prescribed time, the Secretary concerned may make an election for that person upon the request of his spouse or, if there is no spouse, of his children who would be eligible to be made beneficiaries under section 1435 of this title * * *.

Under the plain terms of the law, the Secretary may make an election only in those cases where a person is determined by proper authority to have been mentally incompetent to make his own election prior to the prescribed time, viz., at least 3 years before the first day for which retired pay is granted. There is no evidence that an official determination of mental incompetence was made by medical officers of the Army or of the Veterans Administration and the Connecticut court first found Colonel Forgione "incapable" on January 28, 1965. Since there is no proper determination that he was mentally incompetent to make an election prior to May 1, 1964, the election made on September 11, 1967, may not be considered a valid election. Accordingly, the voucher submitted with your letter and returned herewith,

representing the monthly cost of the annuity withheld from his retired pay for the period May 1, 1967, through August 31, 1967, may be paid, if otherwise correct.

[B-163376]

Departments and Establishments—Heads—Salary Payment Basis

Although heads of departments and agencies who have pay computed on a monthly or annual basis, and who have elected to be paid semimonthly, have been considered as having a semimonthly pay period, the law as recently codified specifies that the pay period in such cases shall be one calendar month and the codification is to be accepted as a correct statement of the law in that regard so far as determining compensation benefits.

To M. C. Johnson, Small Business Administration, March 8, 1968:

Your letter received here on January 22, 1968, encloses a voucher covering gross earnings in the amount of $41.66, for the Administrator, Small Business Administration, for the period December 16 to 31, 1967, at the increased rate of $29,500 per annum authorized by section 215(a), 81 Stat. 638, 5 U.S.C. 5314, Public Law 90-206, approved December 16, 1967. You ask whether the voucher can be certified for payment as drawn.

You point out that the Administrator has elected to be paid semimonthly instead of monthly. Further, you point out that if such election has the effect of establishing a semimonthly pay period within the meaning of section 220 of Public Law 90-206, 5 U.S.C. 3110 note, it appears the effective date of the increase would be December 16, 1967, but that if his pay period is considered to be on a monthly basis, the effective date of the increase in compensation would appear to be January 1, 1968.

Section 220(a) reads, in pertinent part, as follows:

(3) Sections * * * 215, * * * shall become effective at the beginning of the first pay period which begins on or after the date of enactment of this title.

In determining the pay period of a head of an agency such as the Administrator, Small Business Administration, who is exempted from the biweekly pay periods applicable to Federal employees in general, there are for consideration the provisions of 5 U.S.C. 5505, in pertinent part as follows:

The pay period for an individual in the service of the United States whose pay is monthly or annual covers one calendar month, and the following rules for division of time and computation of pay for services performed govern:

(1) A month's pay is one-twelfth of a year's pay.

(2) A day's pay is one-thirtieth of a month's pay.

(3) The 31st day of a calendar month is ignored in computing pay, except that one day's pay is forfeited for one day's unauthorized absence on the 31st day of a calendar month.

(4) For each day of the month elapsing before entering the service, one day's pay is deducted from the first month's pay for the individual.

This section does not apply to an employee whose pay is computed under section 5504(b) of this title.

The above language is the recodification resulting from Public Law 89–554, approved September 6, 1966, 80 Stat. 476, and is stated to be derived from section 6 of the act of June 30, 1906, 34 Stat. 763, which appeared in 5 U.S.C. 84 (1964 ed.) as follows:

> Where the compensation of any person in the service of the United States (except persons whose compensation is computed in accordance with section 944 of this title) is annual or monthly the following rules for division of time and computation of pay for services rendered are established: Annual compensation shall be divided into twelve equal installments, one of which shall be the pay for each calendar month; and in making payments for a fractional part of a month one thirtieth of one of such installments, or of a monthly compensation, shall be the daily rate of pay. For the purpose of computing such compensation and for computing time for services rendered during a fractional part of a month in connection with annual or monthly compensation, each and every month shall be held to consist of thirty days, without regard to the actual number of days in any calendar month, thus excluding the 31st of any calendar month from the computation and treating February as if it actually had thirty days. Any such person entering the service of the United States during a thirty-one day month and serving until the end thereof shall be entitled to pay for that month from the date of entry to the 30th day of said month, both days inclusive; and any person entering said service during the month of February and serving until the end thereof shall be entitled to one month's pay, less as many thirtieths thereof as there were days elapsed prior to date of entry * * *.

It is noted that the phrase "The pay period for an individual in the service of the United States whose pay is monthly or annual covers one calendar month" as contained in the current codification (5 U.S.C. 5505) did not appear in the 1906 act or 5 U.S.C. 84 (1964 ed.).

Under the language of the 1906 act as codified in 5 U.S.C. 84 (1964 ed.) our decisions recognized that the pay periods of individuals subject thereto could be either monthly or semimonthly. 4 Comp. Gen. 280 and 721; 6 *id.* 202 and 530; 11 *id.* 395; 19 *id.* 237 (answer to question "0"); 20 *id.* 834; 23 *id.* 698; 36 *id.* 580. Moreover, immediately prior to the enactment of the Federal Employees Pay Act of 1945, 5 U.S.C. 901 note, establishing biweekly pay periods for per annum or monthly employees (other than heads of agencies) it was the practice of most agencies to pay annual and monthly employees on a semimonthly basis. Thereafter, we understand that heads of agencies for the most part continued to be paid on a semimonthly basis.

Public Law 89–554 contains the following provision in section 7(a), 5 U.S.C. prec. 101 note, as to the effect of any changes in language in the recodification of Title 5, United States Code:

> The legislative purpose in enacting sections 1–6 [includes section 5505 above] of this Act is to restate, without substantive change, the laws replaced by those sections on the effective date of this Act.

It has been held that where entire legislation is revised and consolidated by codification it will be presumed to bear the same meaning as the original sections of the law in the absence of any indication to the contrary in the legislative history thereof. This is so even when the

language is changed in the course of codification. *Ruth* v. *Eagle-Pitcher Co.*, 225 F. 2d 573.

We find nothing in the legislative history of Public Law 89–554, including the reviser's notes, which reflects an intention to change the original meaning of 5 U.S.C. 84 (section 6 of the act of June 30, 1906) as interpreted by the decisions of our Office.

We are faced, however, with a codification provision which not only includes the exact computation provisions of the 1906 act but has added specific language "The pay period * * * covers one calendar month * * *." This addition is consistent with the requirement in the 1906 act that the annual salary be in 12 equal installments one of which shall be the pay for each calendar month, and the codification provision that "A month's pay is one-twelfth of a year's pay." It would seem the most likely reason for lack of comment in the legislative history or the reviser's notes on the effect of the clarifying language relating to pay periods was that the drafters assumed they were merely restating the law. We are left with the clear statement in the 1966 codification that the pay period covers 1 calendar month, as contrasted to the earlier somewhat incompatible concept under the 1906 statute recognizing a monthly computation requirement but permitting semimonthly payments. In the circumstances, we must conclude that the clear expression concerning the "pay period" in the revised form is to be accepted *hereafter* as the correct statement of the 1906 act. However, since increased compensation under section 215 based on the prior interpretation of the 1906 act became due as of December 16, 1967, the submitted voucher may be certified for payment, if otherwise proper, and increased deductions for life insurance should be applied as of February 16, 1968.

The voucher is returned herewith.

[B–134539]

Pay—After Expiration of Enlistment—Confinement, Etc., Periods—Pay Status

An enlisted man who is 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 the normal expiration term of service to include the make good days and, therefore, fixes a new termination date, even though a period of confinement may have commenced during the extended period. However, the restoration to duty status to make up lost time does not continue indefinitely when a status changes from duty to confinement, whether pretrial or pursuant to a court-martial sentence. Therefore, a member who was placed in pretrial confinement during a make good lost time period extending from the date his enlistment expired, August 26, 1965, to the adjusted expiration date, December 24, 1965, is not entitled to pay and allowances subsequent to the new termination date. 37 Comp. Gen. 488, modified.

315–817 O—68——3

To Lieutenant Colonel Irving C. Hoag, Jr., Department of the Army, March 19, 1968:

Further reference is made to your letter of October 19, 1967 (file reference ALLCO–FA), requesting an advance decision as to the propriety of making payment on a voucher in the net amount of $1,887.38 in favor of Private First Class Charles R. Hall, RA 14785091, representing pay and allowances during the period March 21, 1966, to September 30, 1967, while in military confinement under the circumstances disclosed. Your request was forwarded here on December 22, 1967, by the Office of the Comptroller of the Army and has been assigned D.O. Number A–073 by the Department of Defense Military Pay and Allowance Committee.

It is reported in your letter and enclosures that Private First Class Hall enlisted in the Army for 3 years on August 27, 1962; that during the period January 21 to 27, 1963, he was absent without leave, and that pursuant to two separate court-martial sentences he was in confinement from November 11 to December 18, 1963, and from February 25 to May 9, 1964. This absence and confinement amounted to 120 days.

The record shows that Hall's term of service would have expired on August 26, 1965, but that he was retained in the service to make up 120 days of lost time which advanced the date of expiration of his term of service to December 24, 1965. It is reported that on August 27, 1965, the date following the normal expiration of his term of service, the enlisted man was in a present-for-duty status, having been held to make good time lost. On October 25, 1965, however, he was placed in confinement awaiting trial by court-martial and by court-martial order dated March 21, 1966, he was found guilty as charged and sentenced to be dishonorably discharged from the service, to forfeit all pay and allowances becoming due on and after March 21, 1966, to be confined at hard labor for the term of his natural life, and to be reduced to the lowest enlisted grade.

The record (General Court-Martial Order No. 414, dated May 29, 1967), further shows that the findings of guilty and the sentence as prescribed in the court-martial sentence of March 21, 1966, were set aside on April 12, 1967, and a rehearing was ordered before another court-martial to be designated. It is further reported that on May 2, 1967, the member was restored to duty and retained in confinement as a detained prisoner and that he was still in confinement awaiting rehearing as of October 16, 1967.

An enlisted member of an armed force who was absent from duty for certain specified causes is required to make up lost time upon his return to full duty as provided in the act of July 24, 1956, ch. 692, 70 Stat. 631, now 10 U.S.C. 972, which reads as follows:

An enlisted member of an armed force who—

(1) deserts;

(2) is absent from his organization, station, or duty for more than one day without proper authority, as determined by competent authority;

(3) is confined for more than one day while awaiting trial and disposition of his case, and whose conviction has become final;

(4) is confined for more than one day under a sentence that has become final; or

(5) is unable for more than one day, as determined by competent authority, to perform his duties because of intemperate use of drugs or alcoholic liquor, or because of disease or injury resulting from his own misconduct;

is liable, after his return to full duty, to serve for a period that, when added to the period that he served before his absence from duty, amounts to the term for which he was enlisted or inducted.

The conditions under which an enlisted member is entitled to pay and allowances during confinement while making up lost time is set forth in paragraph 10316b(4), Department of Defense, Military Pay and Allowances Entitlements Manual—January 1, 1967 (formerly contained in paragraph 12142*d*, Army Regulations 37–104, February 15, 1965), which provides as follows:

(4) *Confined While Making Up Lost Time.* If a member's term of enlistment has expired and he has begun to make up lost time, he is entitled to pay and allowances while later confined by court-martial sentence. He is not entitled to pay and allowances while confined after ETS if he had not already started to make up lost time before he was confined.

This regulation is in consonance with our decision of January 23, 1958, 37 Comp. Gen. 488, cited in your submission. When an unexecuted court-martial sentence which includes a forfeiture is set aside and a rehearing is ordered, as in this case, the member's entitlement to pay and allowances is governed by the provisions of paragraph 70509b(1) of the above-mentioned manual which provides in pertinent part, as follows:

* * * When an unexecuted court-martial sentence which includes a forfeiture is set aside or disapproved and a rehearing is ordered, the member is entitled to full pay and allowances (subject to other proper deductions) for the period from the convening authority's action on the original sentence until the convening authority's action on the subsequent sentence. Entitlement to pay and allowances thereafter depends on the terms of the new sentence.

This provision of the regulation appears to stem from 36 Comp. Gen. 512.

You express doubt as to whether the rule set forth in 37 Comp. Gen. 488, cited in your submission, is contrary to the applicable statute authorizing pay and allowances while making good time lost. Your doubt in the matter stems from the fact that a different rule is applied to enlisted members who are in confinement on the date their original term of service expires since pay and allowances are viewed as terminating on that date. You say that it does not seem reasonable or equitable that because Hall was present for duty for 1 or more days after the expiration of the term of his enlistment to make up lost time, he

should continue in a pay status while in confinement for possibly more than 2 years beyond his adjusted expiration date of December 24, 1965.

You suggest that if 37 Comp. Gen. 488 were modified to authorize payment of pay and allowances, less forfeiture, during a period of confinement, up to his adjusted expiration date of term of service, that the equity of treatment which is desired would be obtained. In this light you question the legality of making payment to Hall for the period beyond his adjusted term of service date, namely, December 24, 1965.

It is stated that there is pending before you for payment the pay records of seven other enlisted personnel who were present for duty making up lost time after normal expiration date of enlistment, and then later placed in confinement and that action on these cases will be withheld pending our decision on the present case.

In 37 Comp. Gen. 488 the question presented was whether an enlisted member who was held in the service under the act of July 24, 1956, to make good time lost and who, on the day following the normal expiration date of his enlistment, was performing full duty, but was thereafter confined under sentence of court-martial, was entitled to pay and allowances during such period of confinement. In that decision we said that the statute has the effect of authorizing pay and allowances to an enlisted member while he is being held in the service to make good time lost during his enlistment period, beginning with his initial return to full duty after the expiration of his enlistment. We also said that an enlisted member confined under court-martial sentence during the period he is being held in service after his initial return to full duty may not be regarded as then making good time lost.

In concluding that the enlisted man considered in 37 Comp. Gen. 488 was entitled to pay and allowances during the entire period of his confinement, except as forfeited by court-martial sentence, we said that:

> Such confinement, however, does not affect his status of being held in the service for the purpose of making up the previously lost time as required by the act and he continues to be so held while in confinement. Hence, the enlisted member continues in a pay status while so confined, except to the extent that his pay may be forfeited by court-martial, the same as during his regular enlistment period. An enlisted man contracts for faithful service, but is entitled to pay while in confinement during his regular enlistment period except as forfeited by court-martial sentence, and there appears no basis to conclude that Congress intended to apply a different and more harsh rule to an enlisted man held in service after the expiration of his enlistment to make good time lost.

While, as pointed out in the above decision, an enlisted man is entitled to pay while in confinement during his regular enlistment period (except as may be forfeited by court-martial sentence), it does not necessarily follow that the same member, after being restored to a duty status following the expiration of his enlistment period to make

good time lost during that period, continues indefinitely in a pay status when his status is subsequently changed from duty to confinement whether the confinement be pretrial or pursuant to a court-martial sentence.

The primary purpose of 10 U.S.C. 972 is to require the enlisted man involved to make up the period of time he lost during his enlistment period. Once an enlisted man is restored to duty to make up a fixed number of days that he lost during the enlistment period he is, in effect, resuming his obligated service contract. The number of days lost when added to the term of an enlistment period has the effect of extending that enlistment beyond the normal expiration of his term of service and fixing a new termination date. Upon further consideration of the provisions of 10 U.S.C. 972, we think the conclusion that pay and allowances continue while in confinement through that new termination date is sound. It is our view, however, that the pay of a member in confinement, following restoration to duty to make good time lost, terminates on the date his normal term of service, as extended to make good time lost, would have expired. To the extent that 37 Comp. Gen. 488 is inconsistent with the holding here stated, that decision no longer will be followed.

In view of the foregoing, Private Hall's term of enlistment, as extended to make good time lost, would have expired on December 24, 1965, when he was in pretrial confinement, and his right to pay and allowances terminated on that date. Accordingly, payment on the voucher, covering a period subsequent to December 24, 1965, is not authorized. The voucher and supporting papers will be retained here.

[B-162598]

Pay—Promotions—Temporary—Saved Pay—Temporary Grade Pay Higher

A member of the uniformed services in the permanent enlisted grade E–8, who when temporarily appointed a warrant officer elects to receive saved pay pursuant to 10 U.S.C. 5596, and who, therefore, when assigned overseas is not eligible to receive hostile fire pay, family separation allowance, and cost-of-living allowance, nor the statutory increase in pay grade E–8 that became effective after his temporary promotion, may not be paid the difference between the saved pay and the pay of his permanent grade which would have accrued to him if he had not received his appointment as a temporary officer. However, notwithstanding the member's election, 37 U.S.C. 204 requires that when and if the pay and allowances of the temporary grade equal or exceed those of his permanent grade saved under 10 U.S.C. 5596(f), the member must be paid the pay and allowances of the temporary grade.

To D. F. Bohensky, United States Marine Corps, March 19, 1968:

Further reference is made to your letter dated September 26, 1967, and attachments, requesting a decision as to the entitlement of Warrant Officer Richard B. La Tondre, 098957, USMC, to hostile fire pay,

family separation allowance and cost-of-living allowance under the circumstances described. The request was assigned Control No. DO–MC–976 by the Department of Defense Military Pay and Allowance Committee.

On June 30, 1966, La Tondre, whose permanent status in the Marine Corps is that of an enlisted member (enlisted pay grade E–8) was temporarily appointed a warrant officer (W–1). It has been ascertained informally that such temporary appointment was accomplished under 10 U.S.C. 5596 and that he reported to his overseas duty assignment in Vietnam on March 1, 1967.

With your letter of September 26, 1967, you enclosed a letter dated September 5, 1967, from La Tondre, to you, in which he states that at the time of his appointment to and acceptance of his temporary warrant officer grade he elected saved pay to preclude the loss of pay as a result of his acceptance of the promotion. Also, he states that because he was on saved pay certain pay and allowances were not available to him and that he has computed and arrived at a monetary loss to himself of $1,085.60, which appears to be the difference between his saved pay and the pay and allowances which would have accrued to him in his enlisted grade (E–8) had he not been promoted.

In your letter you say the member submitted a request to end his entitlement to saved pay on April 3, 1967. You request our decision whether he is entitled to the following pay and allowances described in his letter: hostile fire pay, family separation allowance, cost-of-living allowance and statutory increases in pay of his permanent enlisted pay grade, E–8.

Your letter was forwarded here by the Commandant of the Marine Corps by letter dated December 14, 1967, in which he cited our decision in 44 Comp. Gen. 121 and stated that the question involved in the request is whether payment of hostile fire pay, family separation allowance and cost-of-living allowance may be effected in the case of a member in receipt of saved pay and who was not otherwise entitled to those emoluments prior to acceptance of a temporary appointment as a warrant officer.

As we understand it, La Tondre was appointed a temporary warrant officer on June 30, 1966, at which time he "elected" saved pay. He reported to his overseas assignment on March 1, 1967, and was eligible for hostile fire pay, family separation allowance and cost-of-living allowance incident to his appointment as a temporary warrant officer. However, those allowances were not credited to his pay account until he submitted a request to end his entitlement to saved pay.

We have ascertained informally that it is the existing practice of the Navy and Marine Corps, when an enlisted member is temporarily promoted to officer rank, to permit him to "elect" to receive the saved pay of his enlisted rank. If his officer pay later becomes greater than his saved pay, he may revoke his so-called election to receive saved pay. He is not viewed as being entitled to receive the higher officer pay until such time as he revokes his prior election. Further, if it subsequently develops that his officer pay becomes less than his saved pay, he is no longer considered to be entitled to be credited with saved pay. With respect to this, paragraph 10222d(2), Military Pay and Allowances Entitlements Manual, provides that once saved pay is dropped it can never be reinstated.

Section 204 of Title 37, U.S. Code, provides that a member is entitled to the pay of the grade in which assigned or distributed in accordance with his years of service. Therefore, La Tondre is entitled to the pay and allowances of his temporary grade. However, section 5596(f) of Title 10, U.S. Code, provides that a person receiving a temporary appointment under that section may not suffer any reduction in the pay and allowances to which he was entitled because of his permanent status at the time of his temporary appointment, or any reduction in the pay and allowances to which he was entitled under a prior temporary appointment in a lower grade. These savings provisions were derived from the last proviso of section 302(e) of the Officer Personnel Act of 1947, 61 Stat. 830, 34 U.S.C. 3c(e) (1952 ed.), the wording of which is similar to that of section 7(a) of the act of July 24, 1941, as amended by the act of November 30, 1942, 56 Stat. 1023, 34 U.S.C. 350f(a) (1952 ed.).

In construing such statutory provisions we have held that upon temporary appointment a member's pay and allowances of his permanent grade are saved from reduction by reason of the temporary appointment, but are not saved from reduction by reason of subsequent changes in conditions affecting such pay and allowances. Also, we have held that while the pay and allowances to which the member was entitled in his permanent grade at the time of his temporary appointment are not to be reduced by reason of the temporary appointment, the savings provision does not authorize a subsequent increase in the amount of pay and allowances of the permanent grade so that the member would receive more than he was entitled to at the time of the temporary appointment and also more than the pay and allowances to which he would be entitled by reason of his temporary position. 23 Comp. Gen. 21; *id.* 147; 24 *id.* 192; *id.* 739; 29 *id.* 347; *id.* 464; 31 *id.* 180; 32 *id.* 55; 41 *id.* 663; 42 *id.* 750; 44 *id.* 121; 46 *id.* 804.

With respect to La Tondre's claim for the difference between his saved pay and the higher pay and allowances after June 30, 1966, that he would have been entitled to as a member in pay grade E–8, except for his appointment as a warrant officer on that date, in our decision of September 2, 1964, 44 Comp. Gen. 121, we held that a warrant officer in the Navy who received a temporary appointment as lieutenant (jg) entitling him to saved pay and who was subsequently transferred to an overseas duty station was not entitled to a cost-of-living allowance and family separation allowance in addition to the saved pay and allowances, such allowances being for payment, if otherwise proper, only as a part of the pay and allowances of his temporary grade.

Similarly, it follows that hostile fire pay authorized under 37 U.S.C. 310, which is a special pay to members for duty in areas outside the United States subject to hostile fire, may be included in the computation of saved pay only if the member was entitled to the special pay on the date he entered a saved pay status.

Since La Tondre was not entitled to hostile fire pay or the statutory increase effective July 1, 1966, in the pay of his permanent grade (E–8) when he received his temporary officer appointment, he may not be credited with such pay in the computation of his saved pay. As stated above, he is entitled to saved pay or the pay and allowances of his temporary grade, whichever is greater, but not to the difference between the saved pay and the pay of his permanent grade which would have accrued to him if he had not received his appointment as a temporary officer. Thus, his claim as presented is not for allowance. Your question is answered accordingly.

However, for the reasons hereinafter stated La Tondre nevertheless may be entitled to be paid additional pay and allowances.

The so-called election requirement in paragraph 10222d(2), Military Pay and Allowances Entitlements Manual, referred to above, appears to have first appeared in paragraph 044022, Change 119, February 1963, Navy Comptroller Manual. It has been informally ascertained that Change 119 is based on the answer to question 3 in our decision of April 12, 1962, 41 Comp. Gen. 663, 668.

In question 3 we considered the situation of a commissioned warrant officer who was not furnished Government quarters at the time of his temporary appointment to lieutenant (O–3E) so that his saved pay (base pay, subsistence allowance and quarters allowance) exceeded the pay and allowances as a temporary officer. However, upon his temporary appointment to lieutenant, he was assigned Government quarters so that his credit of saved pay and allowances as a commis-

sioned warrant officer (W–4) would be less than the pay and allowances as a lieutenant (O–3E) and such situation would continue until such time as public quarters were no longer available.

The question presented was whether the member could elect to receive the pay of the rank to which appointed or promoted even though the value of the saved pay, as distinguished from the amount payable, may be greater. In our answer we explained that since quarters in kind and the money allowance must be regarded as alternatives of the same basic allowance, such allowance is one of the items properly for consideration in determining whether or not a member is entitled to saved pay.

While the saved pay rate, including the value of the Government quarters, would continue to exceed the pay rate of the temporary grade, the quarters allowance was no longer payable, and, hence, the actual payment of pay and allowances of the temporary grade exceeded the saved pay that would have been payable. Therefore, it was to the member's advantage to be paid the pay and allowances incident to his appointment as a temporary officer. In these circumstances, we said the savings provisions do not deprive members temporarily appointed or temporarily promoted of the pay and allowances provided by law for the higher grade to which appointed, or promoted, and such members who are furnished Government quarters may elect to receive the pay and allowances of the higher grade.

In the last sentence of the next to the last paragraph of that decision we inadvertently said that the pay and allowances of the permanent grade, "omitting" the quarters allowance not actually payable under the circumstances there involved, exceed those of the temporary grade. Actually, the pay and allowances of the temporary grade, omitting the quarters allowance not payable, exceeded the amount payable as saved pay and it was on that basis that we said the member could be paid on the basis of his temporary grade.

Although in that case we said that the officer could elect what was more beneficial to him, our use of the word "elect" was in answer to question 3 as presented and was not intended to imply that the law requires any such election. The law (37 U.S.C. 204) contains no requirement of an election but provides without exception that such a member is entitled to the pay and allowances of the grade to which assigned. Thus, the members concerned are entitled at all times to the pay of their temporary officer grades. Under the provisions of section 5596(f), however, a member receiving a temporary appointment under that section may not suffer a reduction in the pay and allowances of his permanent grade at the time of his temporary appointment as a

result of his temporary appointment. The practical effect of this savings provision is to guarantee that the pay and allowances which the member will receive as a temporary warrant officer will never be less than the pay and allowances he was receiving at the time of his temporary appointment whenever he would qualify for such amounts if he had continued to serve in his permanent enlisted grade.

Consequently, such a member is entitled to the pay and allowances of the temporary grade to which appointed unless the saved pay to which he is otherwise entitled would give him a greater amount, in which event he is automatically entitled to be paid on a saved pay basis. These are statutory rights and any administrative regulation which would restrict such rights by requiring an election by the member to entitle him to the pay of the temporary officer grade or deny him the right to revert to a saved pay basis when payment on that basis would give him a greater amount is without legal effect.

Since the complete record of the officer's service is not now available in this Office, we are unable to compute either his saved pay or his pay and allowances as a warrant officer W-1. However, if and when the pay and allowances of his temporary grade equaled or exceeded the pay and allowances of his permanent grade saved to him under 10 U.S.C. 5596(f) the law requires that he be paid the pay and allowances of his temporary grade, regardless of whether he made an election to be paid on that basis. See 36 Comp. Gen. 13. Also, regardless of any election, the member would automatically revert to a saved pay status when the saved pay exceeds the pay of the temporary grade. 45 Comp. Gen. 763.

La Tondre's pay account should be adjusted in accordance with the foregoing and any additional pay and allowances found to be due credited to his account.

[B-163140]

Bids—Qualified—Progress Payments

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

Contracts—Payments—Progress—Request

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

Bids—Qualified—Progress Payments

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

To Wachtel & Wiener, March 20, 1968:

Your telegram of December 20, 1967, and your letter of January 3, 1968, on behalf of Control Science Corporation (CSC), protested against the award of a contract to another bidder under invitation for bids N00383-68-8, issued by the Aviation Supply Office, Naval Supply Systems Command, Philadelphia, Pennsylvania.

The subject invitation was issued on July 5, 1967, and requested bids on various quantities of components for an airborne radar beacon receiver and transmitter. The invitation incorporated by reference the progress payments provision contained in the Armed Services Procurement Regulation (ASPR) Appendix E-510.1, which allows progress payments in the amount of 70 percent of the contractor's total costs. Page 45 of the invitation provided:

The need for progress payments conforming to regulations (Appendix E, Armed Services Procurement Regulation) will not be considered as a handicap or adverse factor in the award of contracts. Bidders desiring progress payments in accordance with the Progress Payments clause attached hereto, shall include a written request therefor in their bids, and bids including requests for progress payments will be evaluated on an equal basis with bids not including a request for progress payments. If a bid does not contain a request for progress payment provision, the Progress Payment clause will not be included in the contract as awarded.

CSC submitted the low bid in the amount of $290,930 and in a letter accompanying its bid stated as follows:

If Control Science Corporation is awarded a contract as the result of this offer, it is requested that Progress Payments on the basis of 75% of total cost be authorized pursuant to Paragraph E-503, Appendix "E," ASPR.

The ASPR section cited in the CSC letter defines customary progress payments to be 70 percent of total costs, except for certain in-

stances involving contracts with small business concerns in which the allowable percentage is 75 percent. While CSC is a small business concern, the subject invitation did not involve a procurement under which CSC could have qualified, pursuant to ASPR Appendix E–503, for progress payments in the amount of 75 percent of total costs. The contracting officer rejected the CSC bid as nonresponsive on the ground that its request for progress payments on the basis of 75 percent was a material qualification of its bid. The second low bid, in the amount of $295,005, was rejected after the bidder was determined to be nonresponsible, and on December 19, 1967, award was made to the third low bidder, United Telecontrol Electronics, Inc., at a contract price of $320,300.

The substance of your protest is that CSC's request for 75 percent progress payments should have been treated by the contracting officer as a minor informality or irregularity in the bid which the contracting officer was required to waive or correct under ASPR 2–405. You point out that ASPR 2–405 requires the contracting officer to waive or correct any deviation "having no effect or merely a trivial or negligible effect on price, and no effect on quality, quantity, or delivery." In view thereof, you maintain that a 70 percent progress payments provision as opposed to the 75 percent requested would not have had any affect on the price bid by CSC. You argue that since the CSC price would not have been affected by the inclusion of a 65, 70, or 75 percent provision, "the relative standing of the other bidders is not affected at all nor is the integrity of the competitive bidding system compromised in any way."

While not abandoning the argument that CSC was bound to its bid price even if the request for 75 percent progress payments was not granted, you have submitted a letter and enclosure dated February 23, 1968, from the treasurer of CSC, which shows that the projected cost to CSC of performance with 70 percent progress payments would be approximately $145 more than performance with progress payments of 75 percent. You contend, in view of this information, that even if it is argued that the 5 percent difference in the percentages of progress payments involved could result in an increase in the CSC bid price because of additional financing costs, such increase would fall within the *de minimis* rule enunciated in 34 Comp. Gen. 581 and 41 Comp. Gen. 550, and therefore would still be regarded as a minor informality.

Additionally, you note that ASPR Appendix E–505 contemplates the request for, and the granting of, progress payments at percentages in excess of the customary amounts, and you contend therefore that, "The contracting officer must have been aware of ASPR E–505 and

CSC's request tieing ASPR E-503 and 75 percent should have put him on notice of a possible minor informality or irregularity within the meaning of ASPR 2-405."

In conclusion, you allege that the award made to the third low bidder was illegal and you request that it be canceled and award made to CSC.

The report submitted to our Office by the Department of the Navy states that the CSC bid was rejected because it was concluded that the 70 percent progress payments clause was a material term of the invitation and that CSC's bid was "conditioned so that any award thereon would include provision for progress payments computed at 75 percent of certain costs rather than 70 percent of such costs as specified by the IFB." The report also states that the request for 75 percent progress payments was not considered to be "a minor informality or irregularity which the contracting officer may waive under authority set forth at ASPR 2-405." The report cites 46 Comp. Gen. 368 as authority for the conclusion that a cover letter enclosed with and referring to a bid will be considered to be a part of the bid and that a request in such a letter for payment provisions differing from those set out in the invitation must be construed as conditioning the bid, notwithstanding the usual precatory nature of the term "request." As evidence that CSC intended its 75 percent request to condition its bid, the report points out that CSC, in a letter submitted after bid opening, agreed to accept progress payments at 70 percent of total cost.

In substantiation of its position that a bid conditioned on payment provisions differing from those contained in the invitation is nonresponsive, the administrative report cities 38 Comp. Gen. 131, in which a bid requesting partial payments not contemplated by the invitation was rejected. Also cited are B-155827, February 25, 1965, and B-159725, December 23, 1966, for the proposition that, "No exception deliberately taken * * * can be construed trivial or minimal." We find no reasonable bases to disagree with these observations as supporting the rejection action taken.

We are of the opinion that a bid actually conditioned on the receipt of 75 percent progress payments submitted in response to an invitation providing for 70 percent is nonresponsive since it deviated from a material term of the invitation, and that such a deviation cannot be waived as a minor informality because it modifies the legal obligations of the parties concerning payment under the contract contrary to the express terms of the invitation. 38 Comp. Gen. 131, 133. In other words, whether or not the 5 percent difference in progress payments would have had a significant affect on the bid price is not for consideration

because the bidder has, in effect, served notice that he will not accept a contract at his quoted price on the same payment terms propounded to other bidders, but rather, that he will accept a contract at his quoted price only if his payment requirements are met. It is well settled that if a bidder imposes conditions at variance with those extended by the invitation to all bidders, his bid must be rejected as nonresponsive. See B–146039, July 20, 1961.

Also, we cannot agree that the provisions of ASPR Appendix E–505 respecting "unusual" progress payments should have put the contracting officer on notice of a possible minor informality, as contended by CSC, because that section, while permitting requests for progress payments in excess of the customary amounts (70 percent), has reference to requests from contractors and does not, in our opinion, grant similar rights to bidders or prospective contractors.

Accordingly, the question for consideration is whether the statement contained in CSC's cover letter should be interpreted as a condition reserving to CSC the option, after bid opening, of waiving the condition and accepting a contract at 70 percent progress payments or of refusing to accept a contract providing for less than 75 percent progress payments. 46 Comp. Gen. 368, as well as other decisions of our Office, recognizes that while "in the ordinary sense the word 'request' is precatory in nature, its precise meaning must depend upon the existing circumstances." We have also observed that if a bidder's request is in the nature of a mere hope or wish coupled with an intention to accept a contract subject to the invitation payment provisions, it was incumbent on the bidder to clearly express such intention because "it is a rule of long standing that where two possible meanings can be reached from the terms of a bid a bidder may not be permitted to explain what he intended since he would then be in a position to affect the responsiveness of his bid." 36 Comp. Gen. 705; 40 *id.* 393.

While it may be argued that the use of the term "authorized" in the request of CSC for 75 percent progress payments was in recognition of the authority of the contracting officer under ASPR Appendix "E" to either grant or deny the request and thus the request was precatory in terms rather than a demand, we believe that the action of the contracting officer was reasonable under the circumstances. That is to say, the exact meaning of CSC's request was subject to interpretation or explanation after the fact. Since the language used was the deliberate choice of CSC and its effect was at least to tender a condition to the payment terms advertised to other bidders, we must conclude that the bid—though reasonably subject to more than one intelligent meaning—was nonresponsive and properly rejected. *Cf.* 45 Comp. Gen. 809.

Accordingly, your protest must be denied.

[B-163105]

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics

An invitation for electric equipment which contained a "brand name or equal" clause that did not list "interchangeability" as a salient characteristic, and clauses that required the submission and testing of bid samples that would in addition to other factors be evaluated for interchangeability is a misleading invitation. Although an award was made to the low bidder whose descriptive literature and sample model were determined to meet the salient characteristics itemized in the 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 the brand name model specified in the invitation meets the salient characteristics desired by the Government.

To the Secretary of the Air Force, March 27, 1968:

Reference is made to letter AFSPPCA of February 9, 1968, from the Chief, Procurement Operations Division, Directorate of Procurement Policy, Deputy Chief of Staff, Systems and Logistics, reporting on the protest of the General Microwave Corporation against an award of a contract to the Hewlett-Packard Company under invitation for bids F41608-68-B-0292.

The invitation solicited bids for furnishing thermistor mount bolometers described as follows:

Shall be used for measurement of CW or modulated power with standard compensated and uncompensated power bridges. Mount shall be temperature compensated and shall include a 100 ohm negative temperature coefficient thermistor. Frequency Range: 8.2 to 12.4 GHz; Waveguide Size: 1 by 0.5 in.; Waveguide Type: RG-52/U; Flange Type: UG-39/U; Maximum Power: 10 mw; Maximum VSWR: 1.5; Minimum Calibration Factor: .85.
General Microwave
P/N X400

"OR EQUAL"

The standard "brand name or equal" clause and clauses requiring the submission and testing of bid samples were included in the invitation. The clause dealing with the "Applicability of Bid Samples" stated:

(b) Above Bid Samples shall be supplied for evaluation to determine compliance with the brand name item. Testing and evaluation of the Bid Samples shall consist of functional and physical tests for interchangeability, reliability, and performance characteristics. * * *

Hewlett-Packard Company was the low bidder. It offered its model X486A as an equal to the brand name model. Descriptive literature pertaining to its model X486A and a sample of the model were evaluated by Air Force engineers who determined that the model met the salient characteristics itemized in the purchase description. Award was made to Hewlett-Packard on October 18, 1967.

General Microwave protested after award that the Hewlett-Packard model X486A was not interchangeable with its model X400 and was thus not equal to it. In that connection, it relied upon the statement

in the "Applicability of Bid Samples" clause that the bid samples shall be evaluated to determine compliance with the "brand name item" and that the testing and evaluation shall include functional and physical tests for "interchangeability." However, the administrative report takes the position that the Hewlett-Packard model met the salient characteristics itemized in the purchase description and that there was no interchangeability requirement in the invitation so that the requirement for such testing was meaningless.

"Interchangeability" was not listed as one of the salient characteristics itemized in the purchase description. However, the "Applicability of Bid Samples" clause stated that there would be evaluation for "interchangeability." Further, the "bid samples" clause stated that the samples will be tested or evaluated to determine compliance with all characteristics listed for such test or evaluation and that failure of the samples to conform to all such characteristics will require rejection of the offer. Thus, although "interchangeability" was not included as one of the salient characteristics in the purchase description in the invitation, the bid samples clause did reference "interchangeability" as a significant test and evaluation factor. If "interchangeability" was not to be such a factor, the sample testing provision should not have advised bidders of the importance of that requirement. The invitation certainly was misleading in this regard.

In decision B–157857 of January 26, 1966, it was stated:

> * * * Bidders offering "equal" products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. An invitation which fails to list all the characteristics deemed essential, or lists characteristics which are not essential, is defective. * * *

Considering that delivery was to be made within 120 days and that the award was made on October 18, 1967, corrective action need not be taken at this time. However, we suggest that appropriate steps be taken to insure that such misleading provisions as were included in the invitation are deleted from future brand name or equal invitations.

In reviewing the bids received under the invitation, we have observed that while the low bid of Hewlett-Packard for the "equal" model was $149.47 a unit, the bid of General Microwave was $1,250 a unit for the brand name model. Additionally, General Microwave has indicated in its protest that its model X402 is more comparable to the Hewlett-Packard model X486A than its model X400. In view of the substantial spread in bid prices and the allegation that another model is more in line with the offered equal, it appears that the procurement office may have cited one brand model in the invitation when another less sophisticated brand model might have satisfied the salient characteristics. Procurement personnel should be reminded that the

brand name model specified in the invitation should be that which most closely meets the salient characteristics desired by the Government.

[B-163664]

Officers and Employees—Transfers—Relocation Expenses—Nonreimbursable—Voluntary Resignation

The voluntary resignation in lieu of facing charges for misconduct by a civilian employee within the 12-month period he agreed in writing to remain in the Government service following the effective date of his transfer, unless separated for reasons beyond his control and acceptable to the department concerned, is not a resignation for a "reason beyond his control" so as to make the payment of the transfer expenses he incurred permissible under section 1.3c(1), Bureau of the Budget Circular No. A-56.

Officers and Employees—Resignation—Acceptability—Administrative Determination

Although ordinarily when the resignation of a civilian employee is accepted, the reason for the resignation is also accepted, this does not mean the reason for a resignation is acceptable to the Government for the purpose of the term "and acceptable to the department concerned" in section 1.3c(1), Bureau of the Budget Circular No. A-56. To permit payment of the travel and transportation expenses of an employee who failed to fulfill a service agreement to remain in the Government service for 12 months following the effective date of transfer, the agency concerned is required to make a determination of the acceptability of the reason for the resignation.

Officers and Employees—Transfers—Service Agreements—Failure to Fulfill

Under section 1.3c(1), Bureau of the Budget Circular No. A-56, which provides that an employee who signs an agreement to remain in the service of the Government for 12 months following the effective date of his transfer is not entitled to travel and transportation expenses incident to the transfer unless he is separated for reasons beyond his control and acceptable to the department concerned, it is necessary for both conditions to be satisfied and documented before the expenses incident to the transfer may be paid.

To James K. Williams, Treasury Department, March 28, 1968:

We refer to your letter of February 23, 1968, wherein you raise certain questions as to the propriety of certifying for payment a travel voucher covering expenses incurred by an employee of the Bureau of Narcotics incident to his transfer from Miami, Florida, to New Orleans, Louisiana, effective September 18, 1967.

Section 1.3c(1), Bureau of the Budget Circular No. A-56, Revised October 12, 1966, provides that expenses for travel and transportation provided for in the circular shall not be allowed unless the transferred employee agrees in writing to remain in the service of the Government for 12 months following the effective date of his transfer, unless separated for reasons beyond his control and acceptable to the department concerned. This section also provides that in case of violation of the agreement, any moneys expended for travel or transportation will be

recoverable from the individual concerned as a debt due the United States.

The employee signed an agreement whereby he agreed to remain in the service of the Bureau of Narcotics for 12 months following the effective date of transfer, unless separated for reasons beyond his control and acceptable to the Bureau. You point out that certain events indicating misconduct came to the attention of the Commissioner of Narcotics and a supervisory official informed the employee that charges would be filed to dismiss him from the service. The employee was informed of his right to resign in lieu of facing the charges and was given an opportunity to seek counsel and advice. On February 14, 1968, he submitted a resignation form effective February 24, 1968, which was accepted as a voluntary resignation.

You raise the following questions:

1. Should a voluntary resignation, after the employee has been advised of the results of an investigation for misconduct, be construed as being a "reason beyond the control of the employee," which would make the payment of transfer expenses permissible?
2. Does the term, "and acceptable to the department concerned," mean that if the resignation is accepted, then the reason for such resignation is also accepted; and therefore make payment of the transfer expenses permissible?
3. Is it necessary that both conditions, i.e., "separated for reasons beyond his control," and "acceptable to the department concerned," be satisfied, and documented, before the expenses incident to the transfer may be paid?

With regard to question 1, an employee may resign under certain circumstances and nevertheless be considered separated for reasons beyond his control. Such a case may occur when an employee elects to resign rather than be involuntarily separated for failure to pass training school subjects. 30 Comp. Gen. 457. However, where an employee has been advised of the results of an investigation for misconduct and that charges will be filed to dismiss him from the service, he is not faced with an inevitable involuntary separation. He has freedom of action to make a choice between facing the charges when they are filed or resigning, an alternate which he may consider more favorable to himself. Under these circumstances a voluntary resignation may not reasonably be construed as being for a "reason beyond the control of the employee" which would make the payment of transfer expenses permissible. The question is answered in the negative.

Concerning question 2, if a resignation is accepted, then the reason for the resignation would ordinarily be accepted. However, this does not necessarily mean that the reason for the resignation is acceptable to the Government for the purpose of Circular No. A-56, and it is within the discretion of the agency concerned to determine whether the reason is acceptable for that purpose.

Question 3 is answered in the affirmative.

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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

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**)

COMPENSATION—Continued Page

Overtime

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, 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

Payments

Heads of agencies. (*See* **Departments and Establishments, heads, salary payment basis**)

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

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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

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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
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Erroneous awards
Cancellation not required
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
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
Small business concerns
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 evalu-

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
More than one solicitation—Continued
ating 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
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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
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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

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

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

Disputes

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

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Increased costs

Government activities

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

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

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

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 character-

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istics 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
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 subcontract or 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
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

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Payments

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

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

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Sales. (*See* Sales)

Specifications

Adequacy

Correction recommended

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

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 bases procurement is different sizes of "one" item manufactured in accordance with common specification. Concern not 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 467

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

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Specifications—Continued

Failure to furnish something required

Addenda acknowledgment

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 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

"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

Restrictive

Particular make

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

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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
Termination
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
DEFENSE DEPARTMENT
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 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---------- 465
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---------- 465

DEPARTMENTS AND ESTABLISHMENTS Page

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 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

ENLISTMENTS

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

EQUIPMENT

Automatic data processing systems

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

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 II 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.

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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 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
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Military assistance
Purchase or acquisition of weapons
Prohibition
Prohibition in Foreign Assistance and Related Agencies Appropiation 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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Contracts
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 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
GRATUITIES
Reenlistment bonus
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 not 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
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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
LEAVES OF ABSENCE
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,

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Military personnel—Continued
Lost time periods—Continued
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
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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
MILITARY PERSONNEL
Annuity elections for dependents. (*See* **Pay, retired, annuity elections for dependents**)
Dependents
Proof of dependency for benefits
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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
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Extraordinary heroism
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Family separation allowances. (*See* **Family Allowances, separation**)
Gratuities. (*See* **Gratuities**)
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Quarters allowance. (*See* **Quarters Allowance**)
Saved pay
Temporary promotions. (*See* **Pay, promotions, temporary, saved pay**)
Station allowances. (*See* **Station Allowances, military personnel**)
Travel expenses. (*See* **Travel Expenses, military personnel**)

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Compensation. (*See* **Compensation**)
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

Resignation
Acceptability
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

Transfers
Relocation expenses
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

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

Service agreements
Failure to fulfill

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

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Service agreements—Continued
Failure to fulfill—Continued
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
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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
Promotions
Temporary
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
Retired
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,

PAY—Continued Page
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
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
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
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
PAYMENTS
Progress. (*See* **Contracts, payments, progress**)

PROPERTY Page

Public

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

QUARTERS ALLOWANCE

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 captains' entitlement to increase in quarters allowance 467

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 II 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

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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
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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
STATION ALLOWANCES
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.
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

STATION ALLOWANCES—Continued Page
Military personnel—Continued
Excess living cost outside United States, etc.—Continued
Reimbursement basis—Continued
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
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Military personnel
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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 EXPENSES
Military personnel
Circuitous routes
Payment basis
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

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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
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Incident to enlistment extension
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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. Govt.'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
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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

WORDS AND PHRASES Page

"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

"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 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

"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 intitled

WORDS AND PHRASES—Continued Page

"Nonworkdays"—Continued

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 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---------- 496

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