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[B-162312]

Compensation—Holidays—Separation Prior to a Holiday

The payment of compensation for a holiday on which no services are performed predicated on the employee having been in a pay status at the close of business immediately preceding the holiday, when the employment relationship validly has been terminated by reason of resignation or retirement prior to a holiday, a former employee is not entitled to pay for the holiday, nor is an employee separated and entitled to a lump-sum payment under 5 U.S.C. 5551, in an amount equal to the pay he would receive had he remained in the service until the expiration of the period covered by the leave payment, whose period of projected annual terminal leave for the lump-sum payment extended through the close of business on July 3, 1967, entitled to compensation for the July 4 holiday.

To Charles H. Updegrove, Post Office Department, September 12, 1967:

Your letter of August 8, 1967, file reference 9140:ERC:kf, which was transmitted here by the Assistant Postmaster General, Bureau of Finance and Administration on August 16, 1967, requests our decision concerning the propriety of certifying for payment a voucher transmitted therewith in favor of Mr. C. A. Perkins, a former employee of the Post Office Department, covering pay for the holiday, July 4, 1967.

Mr. Perkins was separated from the Post Office Department on May 20, 1967, and the period of his projected annual terminal leave for lump-sum payment purposes extended exactly through the close of business on July 3, 1967, the workday immediately preceding the July 4 holiday.

Your letter also points out that from time to time an employee who is in a pay status resigns, retires, or is separated at the close of business on the day before a legal holiday with no annual leave to his credit. You request advice whether in such a case the employee is entitled to pay for the holiday and if so whether the Form 50 should show the separation as occurring on the holiday or the day preceding the holiday.

The decision cited in your letter (December 29, 1965, 45 Comp. Gen. 291) as well as the subsequent decision of November 4, 1966, 46 Comp. Gen. 383, involved employees whose actual separations from the rolls of the employing agency would not occur until after the holiday. Our decisions held in effect that any such employee who is in a pay status at the close of business immediately preceding the holiday has a vested right to compensation for such holiday at which time he is still on the rolls but performs no duty.

On the other hand, the payment for holidays on which no work is performed is a benefit that is applicable exclusively to *employees* as distinguished from *former employees*. When the employment relationship validly has been terminated by reason of resignation or

otherwise prior to the occurrence of the holiday, the former employee would not be entitled to pay for such holiday. The second question upon which our decision is requested is answered accordingly.

In Mr. Perkins' case, the projected period covered by the lump-sum leave payment ended at the close of business on July 3, the day preceding the holiday. Under the controlling statutory provision (5 U.S.C. 5551) the lump-sum payment to which Mr. Perkins is entitled is an amount equal to the pay he would have received had he remained in the service until the expiration of the period covered by the leave payment. Thus, had Mr. Perkins not been separated from the service until the close of business on July 3 he would have had the same status as the individuals considered in the preceding paragraph and, for the reasons indicated above, he would not have been entitled to pay for the holiday (July 4, 1967).

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

[B–162237]

Customs—Employees—Overtime Services—Reimbursement

The exemption granted by the act of June 3, 1944, to 19 U.S.C. 1451, imposing on owners or operators of vessels and other conveyances entering the United States at night, Sundays, and holidays, the requirement to pay the extra compensation and expenses of the customs officers assigned to duty in connection with the entering, may not be extended, absent congressional approval, to a proposed monorail system for operation between El Paso, Texas, and Juarez, Mexico, the specific listing in the 1944 act of highway vehicles, bridges, tunnels, ferries, motor vehicles, trolley cars, and foot travelers as exceptions to 19 U.S.C. 1451, implying the exclusion from the exceptions authorized of other modes of transportation, such as monorails, trains, vessels, airplanes, and pipelines.

To the Secretary of the Treasury, September 13, 1967:

Further reference is made to the letter dated August 7, 1967, file CC 515.11 I, from Matthew J. Marks, Acting Assistant Secretary, requesting a decision as to whether a proposed monorail system operating across the Rio Grande River between El Paso, Texas, and Juarez, Mexico, would be within the exception in section 451 of the Tariff Act of 1930, as amended, 19 U.S.C. 1451, from the requirement of reimbursement to the Government of the extra compensation of Customs officers and employees authorized by 19 U.S.C. 267 for services performed at night and on Sundays and holidays.

Section 451 of the Tariff Act of 1930, as amended, 19 U.S.C. 1451, has a general requirement that the Secretary of the Treasury collect from all owners or operators of vessels and other conveyances entering the United States at night, Sundays, and holidays the extra compensation and expenses of the Customs officers assigned to duty in

connection with such entering. However, owners and operators of highway vehicles, bridges, tunnels, or ferries, as well as merchandise, baggage, or persons entering or departing by motor vehicle, trolley car, on foot or other means of highway travel between the United States and either Mexico or Canada, were exempted from this requirement by act of June 3, 1944, 58 Stat. 269. The owners or operators of trains, vessels, and aircraft entering the United States at night, Sundays and holidays are required, as provided in section 451 of the Tariff Act of 1930, to reimburse Customs for any additional compensation or expenses incurred.

Your Department's letter states that the proposed facility would be a monorail type of elevated rapid transit system between the central business districts of El Paso and Juarez which system would be supported by pylons and apparently would span the river on such pylons without bridge support.

In the brochure entitled "El Paso-Juarez Monorail System," which you enclosed with your letter, it is explained that since the desired rapid transit system must operate independently of street traffic it must operate either below or above the street. Therefore an elevated rapid transit system was selected since it would be uneconomical to build a subway below the river for the short distance involved and the monorail type of elevated rapid transit system is the most desirable for physical and aesthetic qualities.

The brochure states that the system operates on pneumatic tires with electric power unit and wheels all located within an enclosed rail and that the suspension system is also pneumatic.

A "monorail" is described variously as a single-rail type of railway designed for economy of construction, increased speed and for mountainous regions and as a single rail mounted on trestles constituting the track for railway cars that usually sit astraddle over it or hang suspended from it. See The Encyclopedia Americana (1939), Volume 19, p. 366, and Webster's Third New International Dictionary (1965).

It seems obvious that the monorail system is not a highway vehicle, bridge, or tunnel and as you point out, it is not a ferry—which has been defined as a passenger service operated with the use of vessels—by reason of the statutory definition of the word "vessel" in 19 U.S.C. 1401(a). Also travel on the monorail system would not be by foot within the meaning of the statute.

Neither does it appear that the monorail could be considered a trolley car. "Trolley-car" and "street-car" are synonymous terms and mean a vehicle which draws its power from stationary plants by means of contact with electric wires constructed over, or sometimes under, the rails or road on which it operates. *Thompson* v. *Georgia Power Co.*,

37 S.E. 2d 622, 630 (1946). Street cars are cars which traverse the streets of a town or city and carry passengers who get off and on at various points along the line. They have been considered as vehicles of street travel. *Piedmont Cotton Mills* v. *Georgia Ry. & Electric Co.*, 62 S.E. 52, 62 (1908).

Nor does it appear that a monorail could be considered a motor vehicle. A "motor vehicle" in popular sense is a vehicle suitable for use on a street, roadway or highway. See *American Mut. Liability Ins. Co.* v. *Chaput*, 60 A. 2d 118, 120–121 (1948); *Golding-Keene Co.* v. *Fidelity-Phenix Fire Ins. Co.*, 69 A. 2d 856, 858 (1949). Also, "motor vehicle" is a generic term for all classes of self-propelled surface vehicles not operating on stationary rails or tracks. See *Jernigan* v. *Hanover Fire Ins. Co. of New York*, 69 S.E. 2d 847, 848 (1952).

Section 451 of the Tariff Act of 1930 does not expressly refer to monorails. Nor does it appear that Congress intended that this type of facility when operating between the United States and Canada or United States anod Mexico would be exempt from payment of the extra compensation and expenses of the Customs officers and employees for services performed at night, Sundays, and holidays as set forth in 19 U.S.C. 1451. The Committee report (S. Rept. No. 858, 78th Cong., 2d sess., on S. 1758, p. 2) on the act of June 3, 1944, which created the exemption, states that:

> The bill establishes the principle that whenever the public interest requires that international bridges, tunnels, and ferries be kept open to international traffic during the night and on Sundays and holidays, the necessary customs service should be provided as a public service at the expense of the Government, without making public access to such facilities dependent upon the payment by the owners of the compensation of the customs officials and employees necessarily assigned to duty at such facilities to protect the public revenues and to enforce wartime restrictions.

The exemption granted by the act of June 3, 1944, came about when the United States Supreme Court in *United States* v. *Myers*, 320 U.S. 561 (1944), ruled that the overtime compensation provisions in the Tariff Act of 1930 applied to services at certain international bridges and tunnels involved in that suit. The Committee report (H. Rept. No. 1446, 78th Cong., 2d sess., on S. 1758, p. 2) states the purpose of the bill was to deal with the emergency situation created by the closing on Sundays and holidays of certain international bridges and tunnels on the Mexican and Canadian borders because of requirements of the existing law as interpreted by the Supreme Court in the *Myers* case. Apparently, it was the intent of the Congress to keep the highways (which necessarily include bridges, tunnels, and ferries) open to all users, both commercial and private.

As indicated above owners of trains, vessels, and aircraft are not exempt from the general requirements of 19 U.S.C. 1451 for the

payment of compensation and expenses for Customs services performed at night, Sundays, and holidays. Thus by specifically listing, highway vehicles, bridges, tunnels, ferries, motor vehicles, trolley cars, and on foot as being exceptions to the rule and not mentioning other known modes of transportation such as monorails, trains, vessels, airplanes and pipelines it would appear that only those modes expressly mentioned were to be exempt and implies the exclusion of any other mode of transportation. In this connection see *Collins* v. *City & County of San Francisco*, 247 P. 2d 362 (1952); *Howlett* v. *Doglio*, 83 N.E. 2d 708 (1949); *Connecticut Light & Power Co.* v. *Walsh*, 57 A. 2d 128 (1948); *Shawnee Nat. Bank* v. *United States*, 249 F. 583, 587–588 (1918). This construction of the statute apparently is in accord with the legislative intent which as indicated above was to keep the highways across the international borders open. And whether monorails or any other forms of transportation should be included in the exception is primarily a question of policy for determination by the Congress.

Therefore it is our view that Customs services could not be furnished to the proposed monorail system between El Paso, Texas, and Juarez, Mexico, at night and on Sundays and holidays without payment to the Government by its owner or operator of the extra compensation of Customs officers and employees which may be assigned thereto.

[B–162268]

Transportation — Dependents — Military Personnel — Advance Travel of Dependents—School Facilities Lacking, Etc.

The unavailability of high school facilities to the child of a member of the uniformed services 2 years after the member who on a 3 year overseas assignment was aware of the lack prior to his departure is not the unusual or emergency circumstances contemplated by 37 U.S.C. 406(e) for the advance transportation of dependents, and paragraph M7103–2(5) of the Joint Travel Regulations may not be construed other than authority for the advance return of dependents to the United States upon certification by an overseas commander that the lack of educational facilities or housing was beyond the control of the member and the condition arose after dependents departure for the overseas duty station, nor the regulations amended, either under 37 U.S.C. 406(e) regarding unusual or emergency conditions or section 406(h) providing for advance travel when in the best interests of a member or his dependents and the United States, to authorize the advance return of children where the lack of educational facilities was known before departing for the overseas station.

To the Secretary of the Army, September 13, 1967:

By letter dated August 14, 1967, the Per Diem, Travel and Transportation Allowance Committee forwarded letter of August 3, 1967, from the Under Secretary of the Army requesting decision as to

whether the Joint Travel Regulations as currently written permit advance transportation of dependents due to lack of educational facilities at overseas stations under the circumstances presented. The request has been assigned PDTATAC Control No. 67–24.

In his letter the Under Secretary states that paragraph M7103–2(5) of the Joint Travel Regulations permits approval of advance transportation of dependents in cases where there is a lack of adequate educational facilities when supported by a statement of the approving authority that the inadequacy of such educational facilities was caused by conditions beyond the control of the member and arose after commencement of travel of dependents to the member's overseas duty station. He states further that a question has arisen as to the interpretation of that provision with respect to certain cases where the educational facilities at the overseas stations will be sufficient for a portion of the member's tour but not for the entire tour.

To illustrate the problem, the Under Secretary presents the case of a member with a child entering the 7th grade at the beginning of the next school term, who transfers to an overseas station for a 3-year tour during the summer vacation. The member is aware, at the time of transfer that no facilities exist at that station for children in the 9th and higher grades. When the child has completed the 7th and 8th grades and is ready to enter the 9th grade, the member requests transportation of his dependent child to the United States in accordance with paragraph M7103–2(5) of the regulations on the premise that the lack of educational facilities for high school students in its application to his case "arose after commencement of travel of dependents to the member's overseas station," even though he had knowledge when he traveled from the United States 2 years prior thereto that high school educational facilities were not available at that station.

The Under Secretary asks whether the regulation as currently written will permit transportation of the dependent child in the illustrative case.

If not, he asks further whether the underlying statute is broad enough to permit an appropriate amendment to the regulations to authorize such transportation.

As a general proposition, section 406 of Title 37 of the United States Code, authorizes the transportation of dependents when the member is ordered to make a permanent change of station. Section 406(e) of Title 37 provides, however, that when orders directing a permanent change–of–station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of his dependents, baggage, and household effects, the Secretaries concerned may authorize the movement of the

dependents, baggage, and household effects and prescribe transportation in kind, reimbursement therefor, or a monetary allowance in place thereof, in cases involving unusual or emergency circumstances including those in which the member is serving on permanent duty at stations outside the United States, in Hawaii or Alaska, or on sea duty.

Section 406(e) was derived without substantive change from section 303(c) of the Career Compensation Act of 1949, ch. 681, 63 Stat. 814. In our decision of July 16, 1958, 38 Comp. Gen. 28, we considered the provisions of section 303(c) of the 1949 act under which the Secretaries concerned could, in unusual or emergency circumstances, authorize the movement at Government expense of the dependents and baggage and household effects of a member when orders directing a change of permanent station for the member have not been issued, or when such orders have been issued but cannot be used as authority for the transportation of the dependents, baggage and household effects.

In the decision of July 16, 1958, we expressed the view that basically the statute authorized the Secretaries concerned to issue regulations providing for the early return of dependents and household effects of members from overseas locations only because of actual conditions of an emergency nature arising at overseas duty stations which justified such return and which generally could not arise, or are most unlikely to arise in the case of members serving in the United States.

We said that it was not clear from the language of the act, or the legislative history, that Congress, in enacting the statute, intended to authorize the advance return at Government expense of dependents of members on an individual basis merely because the member encounters financial difficulties, has marital troubles, desires to return dependents to the United States to attend school, or because of illness or death of relatives, etc. In this regard we had previously held that conditions of a personal nature such as financial difficulties, illness, or death of relatives, inadequate educational facilities, may not be considered as unusual circumstances as contemplated by the statute. See B–126678, September 4, 1956; B–130385, February 15, 1957; B–126196, December 7, 1955; and B–130184, January 10, 1957.

Subsequently, by letter dated July 1, 1959, the then Assistant Secretary of the Navy proposed an additional category to be added to paragraph 7009–3 as item 6 of the Joint Travel Regulations then in effect which would provide for advance return of dependents to the United States due to lack of educational facilities or housing for dependents when supported by a certificate by the member's overseas commander that the lack of such educational facilities or housing was caused by conditions beyond the control of the individual and arose after com-

mencement of travel of dependents to the member's duty station. In our decision of August 31, 1959, B–136163, we said the proposed change appears to be in accord with the intent of the statute as construed by our decision of July 16, 1958, 38 Comp. Gen. 28, and we perceived no legal objection to the proposed change.

Such regulation, which is substantially the same as the current regulation, specifically restricts the advance transportation of dependents due to lack of educational facilities for children at the member's overseas station to situations where such lack of facilities could not have been determined before the member departed for such station. Since the member described in the Under Secretary's letter was aware at the time of his departure that no facilities exist for children in the 9th and higher grades, it is clear that the lack of facilities did not arise after the dependent's travel overseas and his case is not within the purview of the regulation as currently written and transportation of the dependent child in the illustrated case is not authorized.

Concerning the Under Secretary's question whether the underlying statute is broad enough to permit an appropriate amendment to the regulations to authorize such transportation, the authority to authorize transportation of dependents in situations where change of station orders had not been issued, was enlarged by the enactment of Public Law 88–431 (now 37 U.S.C. 406(h)) authorizing the return of dependents from overseas to the United States when the Secretary concerned determines it to be in the best interests of the member or his dependents and the United States.

The legislative history of Public Law 88–431, discloses that the primary purpose of the legislation was to provide authority for the advance return of dependents, household goods and privately owned vehicles of military personnel from overseas areas to locations in the United States under such circumstances as unforeseen family problems, marital trouble, and financial problems brought about by circumstances such as confinement or reduction in grade of the member, reasons which we held in 38 Comp. Gen. 28, generally could not be considered as "unusual or emergency circumstances" as contemplated by the provisions of 37 U.S.C. 253(c), then in effect, now recodified in 37 U.S.C. 406(e).

In urging the enactment of Public Law 88–431, the representative of the military departments said (page 3006 of the Hearings (No. 10) held on May 28, 1963, before Subcommittee No. 1, Committee on Armed Services, House of Representatives, on H.R. 4739, which became Public Law 88–431) that under present law, section 7 of the Administrative Expenses Act of 1946, as amended by the act of August 31, 1954 (5 U.S.C. 5729), and regulations issued pursuant thereto, members of

the immediate family and household goods of a civilian employee serving outside the United States may be returned to the United States, prior to return of the employee, at Government expense when determined in the public interest, or if the return is for any other reason the employee may be reimbursed for such expenses upon completion of his agreed period of service. The witness said that it is considered that military personnel should be afforded return transportation benefits at least equivalent to those provided for civilian employees serving overseas, and since military members are required to complete assigned oversea tours of duty, the legislation proposed would in this respect extend to the military members substantially the same rights now provided for civilian employees serving overseas.

With respect to the return transportation benefits provided for civilian employees serving overseas, it appears that under the law then in effect, section 7 of the Administrative Expenses Act of 1946, as amended, expenses of transportation of members of the immediate family of an employee serving at a post outside continental United States to the United States was authorized for compelling personal reasons of a human, humanitarian or personal nature, such as may involve physical or mental health, death of any member of the immediate family or obligation imposed by authority or circumstances over which the individual has no control. The law at that time did not provide authority to pay travel expenses of dependents of civilian employees who were transported to the United States for educational purposes. Thereafter, specific authority to pay such travel expenses was authorized in section 221 of the "Overseas Differentials and Allowances Act" (Public Law 86–707, September 6, 1960), 74 Stat. 794, 5 U.S.C. 5924(4)(B) and implementing regulations contained in the Standardized Regulations (Government Civilians, Foreign Areas).

Based on the foregoing, we must conclude that the present laws governing the transportation of dependents of members of the uniformed services do not provide authority for the advance transportation of dependents to the United States for educational purposes when lack of educational facilities at the overseas station was known when the member was ordered overseas.

Accordingly, the questions are answered in the negative.

[B–160560]

Appropriations—Availability—Contracts—Future Needs

Under a contract negotiated pursuant to 10 U.S.C. 2304(a)(13), for generator sets to be purchased during a 12-month period, and subject to minimum and maximum quantity, as well as dollar limitations, the funding of the last two pur-

chases was not inconsistent with provisions of the Armed Services Procurement Regulation, nor in violation of the appropriation provisions at sections 3732, 3679, and 3690 of the Revised Statutes, even though sufficient funds to cover maximum quantities orderable were not available at the time the contract was executed, the contract, an indefinite quantity and not a requirements contract, the Government was not required to obligate for more than the cost of the minimum quantity, and the issuance of the purchase orders analogous to the situation in *Leiter* v. *United States*, 271 U.S. 204, regarding a lease renewal option, which did not go into funding, is not authority for concluding the last two purchase orders were illegally issued.

Contracts—Options—Indefinite *v.* Requirements Contract

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

Advertising—Necessity or Nonnecessity—Purchase Orders Under an Indefinite Quantity Contract

The issuance without securing competition of purchase orders for generator sets during the last 2 months of a 12-month contract negotiated under 10 U.S.C. 2304 (a) (13) for an indefinite quantity of sets, as provided in paragraph 3-409.3 of the Armed Services Procurement Regulation, did not violate the advertising statute at section 3709 of the Revised Statutes (41 U.S.C. 5), or 10 U.S.C. 2304(g), regarding competition to the extent feasible in the negotiation of contracts, absent evidence of the possibility that another supplier could have furnished the sets at a lower price.

To the Federal Electric Corporation, September 15, 1967:

Reference is made to your letters of December 12, 1966, and April 26, 1967, and the meetings with representatives of this Office regarding your protest against purchase orders numbered 9 and 10, issued under contract No. AF 04(606)-15369.

This contract for various types of mobile generator sets was awarded to Federal Electric Corporation, effective December 20, 1965, by the Sacramento Air Materiel Area, Directorate of Procurement and Production, McClellan Air Force Base, California. The award was negotiated pursuant to 10 U.S.C. 2304(a)(13), as implemented by section 3-213 of the Armed Services Procurement Regulation (ASPR) based on the determinations by the Assistant Secretary of the Air Force that the generator sets are technical equipment which require standardization and interchangeability of parts.

The contract at Part XI reserved to the Government the right to issue orders thereunder for a period not to exceed 12 months from the date of approval. Under Part I of the Schedule of Items the Government was committed to the purchase of 453 units and could order as many as 3,600. Part X of the contract which was completed by the Government at the time of award provided that the minimum dollar amount to be expended under the contract was $2,893,884 and that the maximum dollar amount was $23,114,753.

The following orders have been placed by the Government pursuant to Part XI of the contract.

ORDER NO.	ORDER DATE	QUANTITY
(1)	20 December 1965	453 each
(2)	11 January 1966	6 each
(3)	30 March 1966	292 each
(4)	15 April 1966	662 each
(5)	13 May 1966	8 each
(6)	14 June 1966	101 each
(7)	20 June 1966	199 each
(8)	17 August 1966	43 each
(9)	7 November 1966	443 each
(10)	9 December 1966	426 each
	TOTAL	2,633 each

FEC has questioned the legality of the last two orders (numbered 9 and 10) contending that they were issued in contravention of sections 3732 (41 U.S.C. 11), 3679 (31 U.S.C. 665(a)) and 3690 (31 U.S.C. 712) of the Revised Statutes which respectively provide in part as follows:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment * * *.
>
> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, in advance of appropriations made for such purpose, unless such contract or obligation is authorized by law.
>
> Except as otherwise provided by law, all balances of appropriations contained in the annual appropriation bills and made specifically for the service of any fiscal year shall only be applied to the payment of expenses properly incurred during that year, or to the fulfillment of contracts properly made within that year.

It is FEC's position that orders numbered 9 and 10 violated the appropriation statutes since sufficient funds to cover the maximum quantities orderable under the contract were not available to obligate at the time the contract was executed.

FEC contends that our decision at 42 Comp. Gen. 272 should be applied to the instant procurement and that orders numbered 9 and 10 should be found invalid on the basis of that decision. The facts in 42 Comp. Gen. 272, however, are distinguishable from the facts in the instant case. The contract considered in 42 Comp. Gen. 272 was a

requirements contract which obligated the Government to order from the contractors such requirements as the Government might have. In this connection paragraph 27(b) of the General Provisions of the contract considered in 42 Comp. Gen. 272 provided as follows:

(b) The Government agrees to call on the contractor for *all requirements* for such supplies and services of the Government activity designated in paragraph (a) above. The contractor agrees to furnish such supplies and services when called for by the Government. [Italic supplied.]

There is no provision in the instant contract which obligates the Government to place any orders with FEC for requirements over and above the minimum quantity. This makes the instant contract materially different from the contract considered in 42 Comp. Gen. 272.

Counsel for FEC also cited in his brief the case of *Leiter* v. *United States*, 271 U.S. 204 (1926). In that case the Government entered into several leases. At the time the leases were executed no appropriations were available for the payment of rent after the first fiscal year. On May 29, 1922, before any appropriation had been made out of which the rent might be paid for the next fiscal year, the Government advised the lessor that it would vacate the premises. The lessor denied the Government's right to terminate the leases. The Court upheld the Government's right to terminate the leases on the basis that in so far as the leases extended beyond the current fiscal year, they were in violation of the express provision of the Revised Statutes and created no binding obligation on the Government. The court in the *Leiter* case recognized that if the Government by its duly authorized officers affirmatively continued the lease for the subsequent year and an appropriation were made available for the payment of rent, such continuation of the lease would not be in violation of the appropriation statutes. It is our opinion that the issuance of a purchase order under the instant contract would be analogous to the situation referred to in the *Leiter* case where authorized officers of the Government affirmatively act to continue the lease beyond the fiscal year in which the contract was executed. See 9 Comp. Gen. 6, where we stated that the *Leiter* case reaffirmed the view that in cases of leases for a number of years, from the beginning of the fiscal year following that for which the lease was made, there is held to be merely an option in the Government for renewal from year to year until the end of the term. Therefore, we do not consider the *Leiter* case as authority for concluding that purchase orders numbered 9 and 10 were illegally issued. The *Leiter* case does not go into the matter of funding the contract involved.

In 9 Comp. Gen. 6, also cited in FEC's brief, we considered whether there would be authority for entering into a definite quantity contract for the delivery of 500,000 barrels of cement over a period of 3.5

calendar years. We held that there would not be authority for entering into such contract unless the appropriation for the fiscal year in which the contract was executed was adequate for its fulfillment. In the instant situation if the Air Force had chosen to purchase the units which were the subject of orders numbered 9 and 10 by competitive bidding rather than ordering these units from FEC under the contract, it could have done so without legal liability. See B-160783, March 24, 1967. Consequently, it is our view that 9 Comp. Gen. 6, is not applicable to the instant case.

FEC has also cited 16 Comp. Gen. 37 and 20 Comp. Gen. 572. In 16 Comp. Gen. 37, we permitted a bidder to withdraw his bid because of a mistake. The second question in 16 Comp. Gen. 37 was whether the contract which would be executed in 1937 could be chargeable to the 1936 appropriation on the basis that the requirements were solicited in fiscal year 1936 and an award apparently would have been in fiscal year 1936 if the low bidder had not been permitted to withdraw its bid. We held that payment under any contract entered into after June 30, 1936, on the basis of that advertisement could not be charged to the 1936 appropriation. In view of the material differences in the facts, we find no basis to consider the holding in 16 Comp. Gen. 37 applicable here.

In 20 Comp. Gen. 572 we considered a contract which was renewable at the option of the Government for a period expiring June 30, 1942, and thereafter renewable at the option of the Government for periods of 1 year not to extend beyond June 30, 1946. The contract also provided that if the operations of the contract extended beyond the fiscal year in which it was made, it was understood that the contract was made contingent upon Congress making the necessary appropriations for expenditures after the current year had expired. We held that the Government assumed no obligation beyond the current fiscal year unless and until the option was exercised for the succeeding fiscal year. Although the contract specifically made any extension subject to the appropriation by Congress of the necessary funds, it does not appear that the determination of the contract's validity was dependent upon inclusion of that provision. In our view 20 Comp. Gen. 572 supports the position that the method of funding the instant contract did not violate the appropriation statutes.

Pursuant to our review of the contract, your briefs and the information furnished by the Department of the Air Force, we conclude that the Air Force's funding of the instant contract was consistent with ASPR and did not violate the cited provisions of the appropriation statutes.

The other major aspect of this case concerns FEC's contention that the quantities called for under orders numbered 9 and 10 exceed the quantity guidelines set forth in our decision at 41 Comp. Gen. 682, 686–689, and the maximum quantity limitation set forth in section 1–1504(a) of ASPR. FEC alleges that there is no real distinction between the option type contract set forth in Part 15 of section I of ASPR and the indefinite quantities contract set forth in section 3–409.3 of ASPR. A question has also been presented whether the instant procurement is in violation of the intent of the advertising statutes at section 3709, of the Revised Statutes, 41 U.S.C. 5.

In 41 Comp. Gen. 682 we considered a contract with a "minimum" quantity and a "maximum" four times greater with a right in the Government to order, for a period of 1 year after award, additional quantities up to the stated maximum at the unit price for the minimum. In 41 Comp. Gen. 682, 687, we commented on paragraph 1–350.1 of the Navy Procurement Directives which stated as follows in subparagraph (b):

> * * * consistent with the obtaining of reasonable prices, wide use should be made of "indefinite quantity" or "open end" contracts or other methods for obtaining initial quantities or reorders, without *obligating funds for the quantities for which total requirements may be known*, or for which funds may be available. * * *.

Our comment on the above quoted directive was "An option of the character here involved is not, in our opinion, in the best interest of the Government if the known requirements exceed the minimum quantities on which bids are solicited." We suggested as a practical matter that unless the case is exceptional, the additional quantities to be procured through the exercise of an option should be limited to 25 percent of the basic quantity and that so far as supplies to be specially manufactured are concerned, options should not extend much more than 90 days beyond the date of initial award.

Subsequent to our decision in 41 Comp. Gen. 682, the following provision was included in ASPR sec. 1–1504(a):

> When a solicitation contains an option which requires the offering of additional quantities of supplies at unit prices no higher than those for the initial quantities, it shall provide that the option quantities shall not exceed 50% of the initial quantity.

It is Air Force's position that the quantity limitation would not be applicable since the contract in the instant procurement is of the indefinite quantity type. Option type contracts are covered by Part I of section 15 of ASPR. ASPR 3–409.3 provides for the indefinite quantities type contract and the Air Force contends that the instant contract fully met the requirements of this provision. The ASPR section relating to the indefinite quantities type contract does not contain a quantity limitation as does the ASPR section relating to the option

type contract. In other words it is the Air Force's position that the contract we considered in our decision at 41 Comp. Gen. 682 and the option type contract specified in ASPR are distinguishable from the type of contract contemplated by section 3–409.3 of ASPR. By letter of December 28, 1962, the Assistant Secretary of Defense, Installation and Logistics, commented to our Office on our decision at 41 Comp. Gen. 682 as follows:

> * * * However, I believe it is necessary to distinguish between (i) the use of options discussed in Section I, Part 15 of ASPR as related to supplies or services not readily available on the open market, and (ii) the use of indefinite delivery type contracts discussed in ASPR 3–409 as related to commercial items. There are many commercial types of services and supplies for which it is necessary that a ready source be available on short notice to fill individual orders for supplies or services, or to furnish supplies or services on a continuing basis over extended periods. In many of these cases, requirements may fluctuate widely and cannot be predicted with any degree of certainty. Examples of some of these are purchases of petroleum, warehousing services, and purchase and refrigeration of solid and liquid food supplies, among many others. In these types of situations, minimum and maximum quantities or services generally are prescribed with the minimum usually representing the known established need or initial order. Competing contractors are informed in these cases of the Government's expectations as to volume, particularly where requirements type contracts are involved. If the major portion of potential requirements were contracted for initially, we might find ourselves improperly over-obligating funds in the absence of firm established requirements, or involved in numerous partial termination actions due to miscalculated requirements based purely on estimates subject to wide variation. *In these types of procurements I do not feel we can place any percentage limitation on quantities to be ordered in the future where the percentage figure is derived by comparing potential total orders with the minimum or initial order.* In some instances we do greatly limit the time, as for example, in the supplying of milk to Navy ships at certain ports where competition is obtained from local sources on a quarterly basis. Where prices are relatively stable for extended periods, however, such as in the case of movement and storage of household goods, resolicitations quarterly would not benefit the Government. [Italic supplied.]

We took no exception to the letter of December 28, 1962, from the Assistant Secretary of Defense, a copy of which has been made available to you. We understand that this letter of December 28, 1962, was reviewed by the ASPR Committee when it considered the quantity limitation which was put into ASPR 1–1504(a).

While we agree that in ordinary usage there is no real distinction between a contract including an option for an additional quantity and an indefinite quantity contract permitting the purchaser to order quantities beyond the minimum required—and we used the terms interchangeably in 41 Comp. Gen. 682—it is apparent that the two expressions are employed in ASPR as particular terms of art to distinguish between two different kinds of option contracts. The first, designated as an option contract, is described in ASPR 1–1501 *et seq.* This is intended for use in the case of either advertised or negotiated procurements of items not readily available on the open market, where requirements for the quantities beyond the minimum are foreseeable (which we take to mean possible or likely but not firm or

definite) and where later orders may represent less than minimum economic production quantities which, considering start-up costs, production lead times, etc., could preclude adequate competition. This is the kind of situation we considered in 41 Comp. Gen. 682 and pursuant to that decision ASPR 1–1504(a) limits options in terms of both time and quantities.

On the other hand, the indefinite quantity contracts described at ASPR 3–409.3 are for use only in negotiated procurements of commercial or modified commercial items. The regulation contains no limitations on time or quantity under this type of option and it is significant that we have not objected to the absence of such limitations notwithstanding that in the letter of December 28, 1962, from the Assistant Secretary of Defense, the distinction was specifically pointed out.

A close reading of 41 Comp. Gen. 682 makes it clear that the procurement, to be awarded pursuant to formal advertising, involved firm obligations for relatively limited quantities of two items, selling for roughly $3.00 and $1.50 respectively per unit, which were not readily available on the open market. We there criticized the use of such procedure where the minimum quantity was less than the procuring agency's known requirements at time of award. In that kind of situation it is not unlikely that an increase in the minimum or a limitation on the time in which to exercise the option would result in bids more favorable to the Government.

By contrast, the negotiated contract here at issue involves a modified commercial item at a cost for the minimum quantity alone of almost $3,000,000. Under the circumstances we do not think that such factors as start-up costs and minimum economic production runs would be factors in pricing the contract as would be the case with respect to the procurement described in 41 Comp. Gen. 682. Therefore, regardless of the possible confusion induced by the selection of terminology, we believe there is a legitimate basis for distinguishing the kind of procurement described at ASPR 1–15 from that depicted in ASPR 3–409.3. We conclude that in the circumstances the provisions of the contract were not inconsistent with ASPR or our decisions.

You also contend that the instant contract violated the intent of section 3709 of the Revised Statutes, 41 U.S.C. 5, because purchase orders 9 and 10 were issued without obtaining competition. In this connection it should be noted that section 3709 is an advertising statute while the instant procurement was negotiated under 10 U.S.C. 2304 (a)(13). However, we are cognizant of the fact that competition to the extent feasible is required in negotiation by 10 U.S.C. 2304(g).

We have not found any cases which would indicate that section

3709 contemplates any specific time between advertising and award other than that such time interval should be reasonable. In B–116427, September 27, 1955, it was proposed that bids would be solicited on a 3-year basis for certain transportation services. We considered whether the intent of section 3709 would be served by renewal without advertising. In that situation it was our understanding that the contractor was required to hold an Interstate Commerce Commission certificate as a contract carrier which might be refused to another carrier. We held that if at the time for renewal of the contract no other carrier could obtain a certificate, advertising would serve no useful purpose; hence, it would not be required (citing 28 Comp. Gen. 470). We also observed that if it appeared that competition could be secured, renewal of the existing contract would not be justified in the absence of a showing that lower prices could not otherwise be obtained.

We think it is significant that in this case other potential suppliers of the type of generator sets did not complain about not being given an opportunity to compete for the procurements under purchase orders 9 and 10. In view of the information furnished to our Office by the Air Force regarding your prices for the MB-Teen Generator Sets there apparently would be no possibility of another potential supplier furnishing these generators at a lower price. Therefore, there seems to be no question that lower prices for the specified generators could not have been obtained even if there had been competition for the requirements satisfied under purchase orders 9 and 10.

Accordingly, we conclude that the issuance of purchase orders 9 and 10 under the instant contract rather than formally advertising or otherwise obtaining competition did not constitute a violation of either section 3709 of the Revised Statutes, 41 U.S.C. 5, or 10 U.S.C. 2304(g).

[B–162338]

Contracts—Tax Matters—Social Security Taxes—Increase as Requiring Contract Adjustment

The increase in social security taxes resulting from the medicare program provided by the Social Security Act Amendments of 1965, and designated an "excise tax" on wages is not the "Federal excise tax or duty on the transactions or property covered by this contract" contemplated by the contract clause in section 1–11.401–1 of the Federal Procurement Regulations entitled "Federal, State and Local Taxes," which authorizes a price adjustment for tax increases that occur after the date of a contract. Therefore, the increase in social security taxes subsequent to the execution of a construction contract is not payable as a contract change, the tax clause employing the phrase "transactions or property" in connection with the subject matter of the contract and its purposes does not apply to social security tax increases, neither considered property nor a transaction in the sense of doing or performing business, but a tax levied "upon the relation of employment."

To the Administrator, Veterans Administration, September 18, 1967:

We refer to a letter of August 21, 1967, from the Deputy Administrator requesting a decision on a legal question involved in a contract appeal which is pending before the Veterans Administration Contract Appeals Board.

The Deputy Administrator advises that the contract in question was awarded on June 30, 1965, to Preston Haglin Company, in the amount of $1,356,000, and called for the construction of a new research building for the Veterans Administration Hospital in Minneapolis, Minnesota. On July 30, 1965, the Social Security Admendments of 1965, 79 Stat. 286, 42 U.S.C. 302 note, which established the so-called Medicare program became law. This resulted in increasing the contractor's social security taxes. The question presented for decision is whether this increase in taxes constituted a "Federal excise tax or duty on the transactions or property covered by this contract" within the meaning of the contract clause prescribed by the Federal Procurement Regulations (1–11.401–1) entitled "Federal, State, and Local Taxes." This clause, which was included in the contract as paragraph 14 of the General Conditions, provides, in part, as follows:

1–11.401–1
(c) *Contract clause.*
Federal, State, and Local Taxes
(a) Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and Local taxes and duties.
(b) Nevertheless, with respect to any Federal excise tax or duty on the transactions or property covered by this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and—
(1) Results in the Contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase: *Provided*, That the Contractor if requested by the contracting officer, warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price as a contingency reserve or otherwise; * * *.

On November 25, 1966, in response to the contractor's claim for a price adjustment under the above-quoted tax clause, the contracting officer rendered a final decision in which he stated:

As a result of the review I have decided that although Social Security Tax is a federal excise tax it is a tax on the privilege of employing individuals and not a tax on or in respect to the employers' business or a tax on the property to be provided under the contract. Therefore Paragraph 14 of the General Conditions of the contract specifications do (sic) not apply to the Social Security Tax increase and is not payable as a contract change.

The contractor filed a timely appeal from this decision in accordance with the disputes clause of its contract.

In submitting the matter here for our decision the Deputy Administrator states that the legal issue involved affects not only contracts

entered into by the VA, but also contracts entered into by other agencies governed by FPR 1–11.401–1, as well as contracts of the Department of Defense similarly governed by Armed Services Procurement Regulation 11–401.1. In that connection he notes that while no authoritative precedent binding on all agencies has been found, the General Services Board of Contract Appeals has entered a decision on the issue in *Jacobsen Construction Co.*, GSBCA–2022, 66–2 BCA 5874, October 4, 1966, holding that the tax clause prescribed by FPR 1–11.401–1 did not permit a price adjustment for the payment of the increased social security taxes required by the 1965 act. The Deputy Administrator also notes that the Corps of Engineers Board of Contract Appeals has declined jurisdiction of an appeal on the same question involved here in *Morrison-Knudson Company, Inc., and Bates & Rogers Construction Corp.*, Eng. BCA 2808, July 12, 1967.

The increased social security tax required to be paid by an employer under the Social Security Act Amendments of 1965 is designated by the act as an "excise tax" computed on wages "paid by him with respect to employment." See section 321(c), Public Law 89–97, 79 Stat. 396, and 26 U.S.C. 3111. This tax clearly is not one on the "property" covered by the contract. Accordingly, the question to be resolved is whether the tax is on a "transaction" covered by the contract within the meaning of paragraph 14 of the General Conditions.

Initially, it should be noted that the tax clause in question is a standard one and was incorporated in the Federal Procurement Regulations long before enactment of the Social Security Amendments of 1965. Accordingly, it is plain that the tax clause was not included in the subject contract for the purpose of anticipated special legislation such as the "Medicare" amendments of the 1965 act. See *Jacobsen Construction Company, supra.* Moreover, the social security excise tax has been characterized as one levied "upon the relation of employment" and upon "the right to employ" and as a payroll tax. See *United States* v. *Glenn L. Martin Co.*, 308 U.S. 62 at 65 (1939), and cases cited therein.

"Transaction" has been defined as the "doing or performing of any business; the mangement of an affair." Bouvier's Law Dictionary (Rawle's Third Revision). The word has never been the subject of any exact judicial definition and it is generally construed according to the context in which it appears. 87 C.J.S., *Transaction.* In our opinion, the increased social security taxes paid by the contractor are not Federal excise taxes on "transactions * * * covered by" the contract. While in a broad sense the employment of a person, like innumerable other activities, may be called a "transaction" we do not think this is the kind of transaction contemplated by the tax clause. The employment of the phrase "on the transactions or property covered

by this contract" fairly indicates that the transactions or property referred to are those which are a direct part of the subject matter of the contract or its purpose. This rationale, we think, is implicit in *United States* v. *Glenn L. Martin Co.*, *supra*; and in *Leggett* v. *Missouri State Life Insurance Co.*, 342 S.W. 2d 833 (1960), both of which authorities were cited by the General Services Board of Contract Appeals as controlling its decision in *Jacobsen Construction Co.*, *supra*. In *Jacobsen* the Board stated:

> The Board's attention has been directed to two court decisions which the Board finds control the Board's decision in this dispute. The case of *Leggett* v. *Missouri State Life Insurance Co.*, * * * dealt with the application of social security taxes on the business affairs of an insurance company. The Court, in declaring social security taxes as excises imposed on the privilege of employing persons said: "A privilege tax on the relationship of the employer and employee is not a tax on or in respect to the business in which the employer is engaged." The Court went on to say that the "social security taxes in question were neither taxes on nor in respect to the business of the Old Company account. The fact that the persons upon whose wages the taxes were calculated assisted in and were essential to the operation of the insurance company or of its business does not change the nature of the tax." In support of its decision the Court cited *United States* v. *Glenn L. Martin Co.*, * * * which dealt with a contract for the sale of aircraft and aircraft parts, entered into between the United States and a manufacturer containing a provision that any Federal tax which might thereafter be imposed and made applicable directly upon the production, manufacture, or sale of supplies called for should be added to the sale price stipulated in the contract. Thereafter, the Social Security Act was passed giving rise to the question whether the contract prices should be increased by the amount of the social security taxes paid by the manufacturer. The Supreme Court of the United States held that the "contract was concerned with Federal taxes 'on' the goods to be provided under it, whatever the occasion for the taxes. And a tax 'on' the relationship of employer and employee, is not of the type treated by the contract as a tax 'on' the goods or articles sold; . . . respondent is not entitled to the additional compensation which it seeks."
>
> The Board finds that the payment of social security taxes created by the Social Security Amendment of 1965 are not Federal Excise taxes on transactions covered by the subject contract.

We see no basis upon which a conclusion contrary to the *Jacobsen* case can be reached. Accordingly, you are advised that the social security tax increase resulting from the Social Security Amendments of 1965 does not constitute a Federal excise tax or duty on the transactions or property covered by the subject contract.

The appeal record is returned as requested.

[B–149558]

Military Personnel—Separation—Election of Separation Point

The proposed revision of paragraph M4157–1 of the Joint Travel Regulations to permit members of the uniformed services to be transferred to and separated from the service at a place of their own choosing and for their own convenience as an alternative to separation from the place prescribed by regulation, and to travel from the alternate separation point to home of record or place from which called to active duty may be adopted, the revision adequately protecting the public interest by limiting the cost to the Government for travel and per diem to

the cost from a member's last permanent duty station to the appropriate separation activity. However, no per diem payable to a member at his last permanent duty station for the period of processing his separation, no per diem would be payable at the alternate separation center elected by the member.

Military Personnel—Retirement—Separation Point Elected by Retiree

A member of the uniformed services who upon retirement is separated for his convenience at an activity other than the appropriate place of separation, pursuant to a proposed revision of paragraph M4157–1 of the Joint Travel Regulations (JTR), may be paid travel allowances for the distance from his last duty station to the elected separation activity and then to his home of selection not to exceed the distance from his last duty station to home of selection via the separation activity at which he normally would be retired, subject to the limitations in paragraph M4158–2, JTR, that a member who is retired from the service may elect his home and receive travel allowances thereto from his last duty station provided the travel to the selected home is completed within 1 year after termination of active duty, and provided an advance payment of travel allowances is not authorized.

To the Secretary of the Navy, September 19, 1967:

Further reference is made to letter of June 22, 1967, from the Under Secretary of the Navy, forwarded here by the Per Diem, Travel and Transportation Allowance Committee, requesting decision whether the Joint Travel Regulations may be amended to permit members to be transferred to and separated from the service at a place of their own choosing rather than at the appropriate place of separation prescribed by Navy regulations. The request was assigned PDTATAC Control No. 67–22 by the Per Diem, Travel and Transportation Allowance Committee.

In the letter it is stated that the Navy has numerous requests from members of that service desiring this alternative and that from a morale standpoint the proposed amendment is desirable. The view is expressed that when the member makes a request for separation at a place of his own choosing at the end of his tour of duty, and it is known to the order-issuing authorities that he must be given a change of station, it would be within the intent and meaning of the law, 37 U.S.C. 404, to allow travel allowances from the last or constructive place of duty to the place of separation chosen by the member not to exceed the distance to the separation activity at which the member would normally be separated, and from the actual place of separation to home of record, or place from which called to active duty, etc., not to exceed the distance from the separation activity at which the member would normally be separated to the destination actually elected. Further, it is stated that it is recognized that when a member makes a request for transfer to a post of duty of his own choice in the middle of his tour of duty and is immediately transferred thereto, then the ruling in 42 Comp. Gen. 187, October 1, 1962, would be for application.

291–551 O—68——4

The Under Secretary requests decision whether our Office would be required to object to the attached proposed revision of the Joint Travel Regulations and, if there is no objection to the proposed revision, whether our answer would be the same in similar cases involving retirement rather than separation from the service or release from active duty.

The proposed revision of the regulations is as follows:

Par. M 4157–1, Revised. New Subpars. c and d Added.

c. Travel to and From Place of Separation. A member who is authorized as distinguished from directed, to travel from his last permanent duty station to a separation station of his own choice and for his own convenience and from such separation station to home of record (par. M 1150–3a) or place from which called to active duty (par. M 1150–11), as the member may elect, will be entitled to the travel allowances prescribed in par. M 4150 or M 4159 for such travel not to exceed the travel allowances which would have been allowed had the member been ordered to the appropriate separation activity prescribed by service regulations and separated thereat. While at the separation station in a temporary duty status, the member will be entitled to the applicable per diem allowances prescribed in par. M 4205–5 or M 4256 not in excess of that which would have been allowed had the member been in a temporary duty status at the appropriate separation activity prescribed by service regulations.

d. Travel Allowances from Last Duty Station. When the discharge certificate or orders for release from active duty are delivered to a member at a place other than his duty station, the member having proceeded to that place at his own expense and at his own choice while on authorized leave, the member will be entitled to the travel allowances prescribed in subpars. a or b, whichever are applicable from his last actual or constructive place of duty and not from the place at which he received his discharge certificate or orders releasing him from active duty. For definition of "last duty station," see Par. M 1150–12.

As we understand the quoted provisions of the new subparagraph c, the overall cost to the Government of the travel which it would authorize will be limited to what it would have cost had the member traveled from the last permanent duty station to the appropriate separation activity for separation.

The transportation and travel allowances of members of the armed services upon permanent change of station including the change from last station to home are governed by the Joint Travel Regulations promulgated by the Secretaries pursuant to 37 U.S.C. 404. Paragraph M4157–1 of the regulations provides for travel allowance for the member from last station to home of record or place from which he was ordered to active duty. This provision simply repeats the provisions of 37 U.S.C. 404(a)(3). The obvious purpose of such provisions is to provide the means for the return of the member and his dependents to his home or to the place at which he entered the service from civilian life. 45 Comp. Gen. 661, 662.

Section 2, chapter 10, part C, of the Bureau of Naval Personnel Manual sets forth regulations establishing place of separation for personnel from the naval service under varying circumstances, generally designating the place where normal separation activities can be ac-

complished either at or near the last permanent duty station. Members on separation are entitled under paragraph M4157–1 of the Joint Travel Regulations to mileage from that place, as the last duty station, to the home of record or place from which ordered to active duty.

However, we have long recognized that a member who was directed to a more distant separation center for his personal convenience rather than by reason of the necessities of the service was entitled to mileage to home address not in excess of the mileage to which he would have been entitled for the distance from the appropriate separation center. 27 Comp. Gen. 265, 267; B–71022, February 12, 1948, and B–70401, March 23, 1948. Also, authority for per diem for temporary duty at the more distant separation center presumably would be substantially the same as at the appropriate separation center.

Since it appears that the proposed revision of the regulations adequately protects the public interest in these respects, we have no objection to its issuance. It is understood, of course, that in cases where the appropriate separation activity prescribed by the regulations is at the last permanent duty station, a circumstance that would forestall the payment of per diem for the period of separation processing (see paragraph M4201–4, Joint Travel Regulations), no right to per diem would accrue under subparagraph c of the proposed regulations for the period of separation processing at an alternate separation station elected by the member.

With respect to similar cases involving retirement rather than separation from the service or release from active duty, paragraph M4158–2 of the Joint Travel Regulations provides that a member who is retired from the service may elect his home and receive travel allowances thereto from his last duty station provided travel is completed to the selected home within 1 year after termination of active duty. It further provides that advance payment of travel allowances to the selected home is not authorized. Subject to those limitations, it appears that a member who is retired from the service and who is separated for his convenience at an activity other than the appropriate place of separation might receive allowances under the revised regulations for the distance from his last duty station to separation activity to his home of selection not to exceed the distance from his last duty station to his home of selection via the separation activity at which he normally would be retired.

The questions are answered accordingly.

[B-160886]

Contracts—Consideration—Delivery Time Extension

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

To the Assistant Commissioner, Internal Revenue Service, September 20, 1967:

By letter of January 10, 1967, the Chief, Fiscal Section, Internal Revenue Service, requested a determination as to the validity of an amendment to contract No. Tir-25127, issued by IRS to Pioneer Facilities, Incorporated.

The subject contract was for an automated mail processing system to be installed at the Southeast Service Center, Chamblee, Georgia, and before amendment required installation of a completed system, ready for acceptance testing by January 15, 1966, with liquidated damages of $150 per day to be assessed if the system was not installed and ready for testing by that date. The contract provided for payment only after testing and acceptance of the entire system.

The system, with the exception of a conveyor unit, was delivered to the site on January 26, 1966, 11 days after the date specified in the contract, but was not ready for testing until March 8, 1966. The conveyor unit was not delivered until April 12, 1966, allegedly because the subcontractor from which it was purchased was prevented from delivering on time by defense priority orders. Although the contract called for acceptance testing only after installation of the entire system, testing was begun on March 9, 1966, before installation of the conveyor unit. Initially, all units but the check detector and the envelope opener passed acceptance testing, and the latter two units were later determined to be acceptable. The conveyor unit, however, after it was delivered in April 1966, did not pass acceptance testing, and was ultimately rejected.

Before delivery of the conveyor unit and before acceptance of the check detector and the envelope opener, the contractor requested payment for the units already accepted. Since partial payments were

not permitted under the contract, and since the contractor had yet to deliver all components of the system called for under the contract, a fact finding committee was appointed by the contracting officer "for the purpose of reviewing the entire transaction, making an on-site inspection of the equipment, and making a recommendation as to whether the contract should be terminated, modified, or other appropriate action taken." The fact finding committee determined that since testing and acceptance was being accomplished on a unit by unit basis, and since the Government was actually using the accepted units, the contract should be amended to allow payment for the units already accepted. It was also determined that the contractor's failure to meet the contract delivery date was caused or at least contributed to by the Government, and that an additional unit not included in the original contract (a culler-stacker) was necessary for proper functioning of the system. Accordingly, on June 3, 1966, the contract was amended to provide for acceptance and payment on a component, or module, basis; to extend the delivery date to July 15, 1966; and to provide for the payment of $3,195 for the culler-stacker mentioned above. The amendment is set out in its entirety below:

WHEREAS, the Contractor and the Government entered into contract Tir-25127 under date of September 13, 1965 which, together with any and all amendments, changes, modifications, and supplements thereto, is hereinafter referred to as "the contract;" and

WHEREAS, the contract provides that the Contractor shall manufacture and deliver a complete automated mail sorting system on or before January 15, 1966; and

WHEREAS, certain modules have been delivered by the Contractor, accepted, and utilized by the Government; and

WHEREAS, due to unforeseen problems, delays have occurred that were beyond the control of the Contractor; and

WHEREAS, in the course of on-site operation the Government required, and the Contractor delivered, a culler-stacker designed to collect over and undersized mail;

NOW, THEREFORE, in consideration of the mutual covenants and agreements herein contained and for other good and valuable consideration, the parties hereto do mutually agree to amend said contract as follows:

FIRST: To change the intent of the contract to provide for delivery of modules (identified below) in lieu of a system.

ITEM	MODULES	PRICE
1.	Opening Table	$ 3,000
2.	Sorter	138,280
2A.	MICR sub-assembly	5,000
2B.	Envelope Cutter sub-assembly	2,500
3.	Candler	15,000
4.	Conveyor Extractor	56,000
5.	Culler-Stacker	3,195
		$222,975

SECOND: To change the delivery date from January 15, 1966 to July 15, 1966.

THIRD: To change the contract to provide an additional module identified as item 5, culler-stacker, and to increase the contract amount by $3,195.

FOURTH: To change the payment provision from one payment of $219,780.00 for the complete automated mail sorting system to provide for payment of modules and sub-assembly delivered by the Contractor and accepted by the Government as follows:

ITEM	MODULES	PRICE
1.	Opening Table	$ 3,000
2.	Sorter	138,280
3.	Candler	15,000
5.	Culler-Stacker	3,195
		$159,475

This amendment increases the total contract price from $219,780.00 to $222,975.00.

Except as hereby modified, all terms and conditions of said contract remain unchanged and in full force and effect.

On this basis, payment was made for the units originally accepted plus the culler-stacker added by the amendment. Since there was some question as to whether or not liquidated damages would later be determined to be assessable from the originally required delivery date, the figure of $3,750 was arrived at as potential liquidated damages and withheld from the amount paid the contractor. The amount of the partial payment was $155,725 and the outstanding balance due under the amended contract is $11,250, consisting of the price of the check detector and the envelope opener, plus the $3,750 liquidated damages figure.

Since the amendment was executed some time after the original delivery date had passed and liquidated damages had become assessable under the contract terms, the question of whether or not that portion of the amendment relating to the change in delivery dates was supported by consideration arose, and the matter was referred to our Office. At about the same time the subject contract came to the attention of the Civil Division of our Office in the course of an audit into the effectiveness of automated mail handling systems used by IRS, and an investigation of the circumstances surrounding the contract and the amendment was performed.

The subject amendment contains three agreements between the Government and the contractor. Specifically, it states that modules have been delivered, accepted and used by the Government; that delays beyond the control of the contractor have occurred; and that the Government has found it necessary to require a culler-stacker not included in the original contract. In return for the above considerations, the Government agrees to accept and pay on a module basis as opposed to payment only after acceptance of an entire system, as required by the original contract; to extend the delivery date from January 15 to July 15, 1966; and to pay $3,195 to the contractor for the culler-stacker.

It is well settled that an agent of the Government is without authority to waive vested rights without a corresponding consideration flowing to the Government for the waiver. In this case the Government's right to liquidated damages vested when the delivery date was not met and it therefore cannot later be waived without consideration. Similarly, the Government's contractual right to a complete, acceptable system before making payment under the contract cannot be waived without consideration. While the Government agreed by the amendment to purchase an additional unit (the culler-stacker), it is our opinion that the receipt by the Government of the culler-stacker cannot be said to support the relinquishment of its vested rights to liquidated damages and the receipt of a complete system before making payment. This is so because we feel that it is apparent that each of the three agreements within the amendment is separate and distinct, with no relation to any other agreement contained in the amendment, and that the amendment is therefore divisible. In view of this, each of the three agreements within the amendment must be supported by legally sufficient consideration, with the consideration for any one of the agreements having no effect on the other two. See Williston on Contracts, section 137A (3rd ed.), *Williamsburg Drapery Co.* v. *United States*, 177 Ct. Cl. 776.

With regard to the consideration paid by the Government for the culler-stacker, our Civil Division reports that the original contract called for a culler unit to select out irregularly shaped mail which could not be accommodated by the main sorting system, and that the so-called culler-stacker is merely a metal tray which holds and keeps in sequence envelopes rejected by the culler. The report concludes that the metal tray added by the amendment is in reality worth a fraction of the $3,195 agreed to by the Government. We are disposed to agree with this conclusion, and we accordingly are of the opinion that the agreement to pay $3,195 for the culler-stacker raises serious questions with respect to the management and administration of the procurement. However, it is well settled that the legal sufficiency of a promise or benefit is not dependent upon the adequacy of the bargain. In other words, an extravagant promise for an inadequate consideration will still be held to constitute legally sufficient consideration. See Contracts, 17 Am. Jur. 2d, sections 85, 92, and 102. Accordingly, we conclude that the portion of the amendment dealing with the culler-stacker is supported by consideration.

With regard to the portion of the amendment concerning acceptance and payment on a module basis, the Civil Division reports that contrary to the IRS contention that handling of returns was more efficient because of the use of the accepted modules, there was no significant

savings in terms of cost or time as a result of using those modules. Nevertheless, those modules which passed acceptance testing were retained and used by the Government, and we conclude that the mere retention and use, whether beneficial or not, is sufficient consideration to support the Government's agreement to pay on a module basis.

With regard to the portion of the amendment extending the delivery date, however, we must conclude that there was no consideration and that liquidated damages therefore are assessable. In this regard, the reports submitted to our Office by IRS take the position that the failure to meet the contractually required delivery date rests with the Government rather than with the contractor, and that the portion of the amendment which extends the delivery date is therefore supported by consideration. The investigation performed by our Civil Division, however, reaches the opposite conclusion. Specifically, the IRS reports state that the Government was at fault in supplying preprinted coded envelopes to be read by the "read heads" of the sorting system which were different than the "test envelope" originally furnished the contractor in that they had deficient ink coverage which necessitated extensive and time consuming design changes by the contractor; that the Government failed to provide electric power to the installation site or to complete site preparations until after the contract delivery date; that site preparation, when completed, was inadequate, causing dust interference with certain electronic devices within the system; and that delivery of the conveyor unit was delayed by subcontractor defense priority orders.

The Civil Division investigation, however, discloses that the specification for the envelope ink was provided by the contractor, specifying only that "the code patterns can be printed in regular black ink," with no mention of the density of ink required. The investigation report concludes that if a certain density was required, it was the contractor's duty to notify the Government of the requirement in the specification. Further, the investigation determined that the ink on the "test envelope" was manufactured to the same specifications as the ink on the envelopes later used in initial tests of the system. The investigation also determined that electric power was available at the site but could not be hooked up until the system was installed and that the power was actually hooked up to the system on January 29, 1966, some 4 days before the contractor's electronic engineer arrived to check out the installation. Additionally, the report states that the system was not ready for acceptance testing until 43 days after electric power was connected. With regard to the lateness and/or inadequacy of site preparations, the Civil Division advises that site preparation specifications apparently were not submitted by the contractor as required by the contract, and also points out that any delay in preparing the site or any inadequacy in site preparation had no effect on the contractor's failure

to deliver on time because site preparations, which consisted of floor treatment to reduce dust, did not take place until after delivery of the system. With regard to the late delivery of the conveyor unit the Civil Division states that no effort was made by IRS to verify whether or not any delay experienced by the conveyor subcontractor was caused by defense priority orders, and that the only evidence to this effect is the unsupported statement of the contractor. The Civil Division report also points out that no mention of defense priority orders was made in a memorandum written following a visit to the subcontractor's plant by representatives of IRS and the contractor on December 17, 1965, and that this reason for delay was only advanced by the contractor after a notice of possible default termination was issued.

On the basis of the present record, we cannot conclude that the contractor's failure to meet the contractually required delivery date was due entirely to factors beyond his control, or that there was any consideration flowing to the Government for the waiver of its vested right to liquidated damages for the delay in delivery and installation of the system. Accordingly, we must conclude that the extension of the delivery date was erroneous and that liquidated damages are assessable from the original delivery date.

In this regard it is noted that the IRS reports did not specify how the figure of $3,750 was determined as potential liquidated damages. Therefore, the amount of liquidated damages due the Government should be ascertained and a report made to our Office so that amount can be set off against the amount still owed to the contractor.

Accordingly, we will suspend any payments under the contract pending your determination of the amount of liquidated damages to be assessed.

[B-161080]

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

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

To the Secretary of the Army, September 20, 1967:

Reference is made to letters, with enclosures, dated May 3 and July 14, 1967, from the Director of Procurement and Production, United

States Army Materiel Command, furnishing our Office with reports relative to the protest of the Andrew Corporation under invitation for bids No. DAAGO5–67–B–0589, issued by the United States Army Northwest Procurement Agency, Missile and Electronic Branch, Oakland, California.

The invitation was issued on January 11, 1967, to twenty-six potential suppliers and requested bids for furnishing and commercially packaging and packing item 1—101,000 feet of cable, described on page 10 of the schedule, as follows:

FSN: 6145–752–2490
CABLE, RADIO FREQUENCY, SEMI-RIGID: JETDS Type No. RG–233/U, jacketed, nominal impedance 50 OHMS, Class N, Type 1, Size 1⅝ inch in accordance with Military Specification MIL–C–22931 Rev. A with Supplement 1A dated 26 June 1964 and MIL–C–22931/3A dated 27 March 1964.
PRON: C9–7–08146–01–C9–AI

Bidders were further requested to quote a price for item 2, which provides for special military packaging and packing requirements. Award of item 2 was subject to the right reserved to the Government, in accordance with the clause entitled "Optional Packaging and Packing Requirements," to make award on the basis of the commercial packaging and packing included in the price of item 1 if determined upon evaluation to be in the Government's best interest. The desired delivery schedule was stated to be 120-calendar days from receipt of a contract with a maximum acceptable delivery schedule of 180-calendar days after receipt of the contract.

By February 13, 1967, the scheduled opening date, three bids were received, opened at the specified time, and recorded, as follows:

Bidder	Item No. 1	Item No. 2
Andrew Corporation	$1.42 per foot ($143,420)	$0.04 per foot ($4,040) (delivery 100 days)
Phelps Dodge Electronic Products Corporation	$1.70 per foot ($171,700)	$0.01 per foot ($1,717) (delivery 180 days)
Prodelin, Inc.	$2.66 per foot ($268,660)	n/c (delivery 180 days)

A technical evaluation of the bids indicated that Phelps Dodge offered RG–233/U cable bearing FSN:6145–752–2490 in accordance with the referenced specifications. The Prodelin, Inc., bid indicated that it was quoting on RG–258/U cable (Prodelin catalog 64–1625), in accordance with MIL–C–22931/3A. Similarly, the letter and literature accompanying the Andrew Corporation bid indicated that it proposed to furnish its catalog item, type LJ7–50A, HELIAX coaxial cable, which was described as a modified RG–319/U cable (subsequently designated as RG–378/U by the Navy) in accordance with MIL–C–22931/7A, in lieu of the specified RG–233/U cable.

By letter dated February 15, 1967, the procuring activity requested the United States Army Electronics Command, Fort Monmouth,

New Jersey, to determine whether the cable offered by Andrew was technically acceptable under the specifications. In this regard, the contracting officer advises in his initial report dated April 24, 1967, that it was recognized that "while certain characteristics were perhaps superior to those described by the Government in the subject IFB, some of those characteristics may not have fitted the requirements of the user." By letter dated February 27, 1967, the United States Army Electronics Command advised that the cable offered by Andrew was not acceptable for the following reasons.

1. The radio frequency cable offered by Andrew Corporation, their Part Number LJ7-50A Heliax Coaxial Cable in lieu of Cable RG-233/U is not acceptable as the Andrew cable is neither physically or mechanically interchangeable with RG-233/U cable.
2. Subject IFB is for the procurement of FSN 6145-752-2490 which is for RG-233/U only. The RG-233/U cable is being procured for a specific application where the cable and connectors designed for the cable are already in use in existing end equipment. The same connectors cannot be used on the Andrew cable.

On the basis of this reply, the Chief, Contract Engineering Branch, determined in a letter dated March 1, 1967, that the Andrew cable was not acceptable under the invitation. This action followed a similar determination on March 30, 1967, with respect to the bid of Prodelin, Inc., wherein that bid was rejected because it took exception by offering RG-258/U, which "is in accordance with MIL-C-2293/3A but varies from the required RG-233/U cable in outside dimensions."

By letter dated March 3, 1967, Andrew indicated an intention to protest the action taken by the procuring activity. In view of this advice, the Chief, Contract Engineering Branch, Northwest Procurement Agency, reviewed and reaffirmed his evaluation of nonresponsiveness which was concurred in by the United States Army Electronics Command. On March 13, 1967, a meeting was held with Andrew to explain the Government's position and the reasons for the rejection of its bid. Thereafter, by telegram dated March 15, 1967, formal protest against any award to Phelps Dodge was filed by Andrew with our Office and award has been withheld pending resolution of the protest.

By letter dated March 23, 1967, and subsequent correspondence to our Office, Andrew has questioned the rejection of its bid on two grounds: (1) that the Andrew-type LJ7-50A cable is in material compliance with the specifications and therefore responsive; (2) and, alternatively, that if the Andrew bid is determined to be nonresponsive, such action is attributable to the restrictive nature of the specifications.

Initially, we note that, while the protestant has framed its contentions in the alternative, the question of whether the Andrew bid is in material compliance with the subject specifications can be resolved only upon a determination whether the specifications invited,

rather than, restricted, full and free competition. In this regard, it is well established that the formulation and drafting of specifications which reflect the needs of the Government, and the consequent determination of whether a given product conforms to the specifications, are primarily the responsibility of the contracting agency. 17 Comp. Gen. 554; 38 *id.* 190. Here, we may agree, as protestant points out, that numerous decisions of our Office recognize that in resolving questions of specification conformance, the contracting officer may waive minor variances when such action would not prejudice the rights of other bidders. Such deviations must be minor in character and not matters of substance affecting the price, quantity, or quality of the article offered. However, the determination of the materiality of a particular specification deviation necessarily proceeds on the assumption that the specifications are not, in fact, restrictive of competition. In the absence of the objection that specifications are restrictive, it is clear, in contrast to protestant's suggestion, that deviations relating to dimensions or the design aspects of the product offered may be material if such requirements constitute a legitimate expression of the Government's minimum needs. See 40 Comp. Gen. 458; B–146698, September 26, 1961.

At this point, it is necessary, however, to emphasize that the nonacceptability of the Andrew cable is not based on what may properly be termed technical deficiencies. With respect to the technical capabilities of its cable, Andrew has maintained, in its letter of March 23, 1967, that:

* * * This cable was offered by Andrew Corporation since it is materially equivalent to RG–233/U and in material compliance with MIL–C–22931/3A, and is well recognized in the electronics industry, as well as in Government procurement, as a regularly available competitive product capable of performing an equal function to RG–233/U. More specifically, it is the belief of the undersigned that LJ7–50A (RG–378/U) HELIAX coaxial cable, a semi-flexible radio frequency coaxial cable having a corrugated aluminum outer conductor and air dielectric with a polyethylene jacketing material, meets the specific requirements for the use contemplated by procurement under DAAGO5–67–B–0589. This cable certainly is an electrical equivalent to RG–233/U and possesses substantially similar mechanical characteristics to RG–233/U. If a finding of non-responsiveness were to rest on the fact that LJ7–50A HELIAX has a slightly larger outside diameter, or the fact that LJ7–50A HELIAX is corrugated, such a determination would be erroneous since the differences are non-essential to the functional requirements of the equipment to be purchased under the subject invitation.

* * * * * * *

* * * The only apparent distinction that can be drawn between LJ7–50A HELIAX (RG–378/U) and RG–233/U is the slightly larger outside diameter due to the corrugation configuration of the outer conductor. As has been noted previously, the corrugations permit easier flexing while simultaneously offering higher crush resistance than smooth tubing. The specifications of the subject procurement, then, bar a regularly available competitive product capable of performing an equal function to that advertised, based solely on non-essential mechanical differences, without regard to the functional requirements of the equipment to be purchased.

The procuring activity acknowleges that the Andrew cable is materially equivalent to the requested RG–233/U cable, in that it possesses

similar mechanical characteristics and except for a minor electrical difference is otherwise electrically equivalent to the RG–233/U cable. In this respect, the contracting officer states in his report of April 24, 1967, that:

a. Protestor's allegation is correct if by "functional requirements" conduction of RF current is meant. If "functional requirements" includes direct substitution for RG–233/U and LJ7–50A without additional appropriate adapters, the allegation is not correct. * * *

We are further advised that, while the Andrew cable may exceed the Government's minimum needs with respect to flexing and crush resistance, these factors are irrelevant in view of the rejection of the Andrew bid on the basis of differences in the overall diameters and the outer conductor surface characteristics of the respective cables. In this respect, the record indicates the differences between RG–233/U and the Andrew Corporation LJ7–50A, as follows:

	LJ7–50A	RG–233/U
O.D. of outer conductor	1.830"	1.625"
Overall O.D. of cable	2.00"	1.765"
Surface of outer conductor	corrugated	smooth

These differences are stated to be "quite essential considerations" because each cable manufacturer offers connectors and adapters unique to its product. These fittings are unique in the sense that the cable accommodation, or rear end, of the connector must be specially designed to fit the exact configuration of each manufacturer's cable. However, we understand that the interfaces, or mating ends, of each manufacturer's connectors must conform to certain uniform industry standards. Thus, the contracting officer in his report of April 24, 1967, advises that, "Andrew Corporation Cable LJ7–50A is capable of performing an equal function when equipped with connectors suitable to its size and configuration." It is clear therefore that the rejection of the Andrew bid, and for that matter the bid of Prodelin, Inc., while expressed in terms of size variance was attributable to the requirements for individualized cable connectors which were not stated to be an advertised specification requirement.

Turning now to the contention that the specifications are restrictive, Andrew, initially points out that the details of physical dimensions and performance characteristics contained in paragraphs 6.2 of MIL–C–22913/7A and MIL–C–22931/3A respectively, are merely descriptive of commercially available cables, but that the use of the item description in the invitation designates the cable of one source of supply, that is, Phelps Dodge. The contracting officer concedes that the invitation calls for a cable manufactured exclusively by Phelps Dodge. In this regard, we note that specification, MIL–C–22931/A dated March 27, 1964, referenced in the invitation, is a general specification which covers various classes, sizes, and types of semirigid radio frequency cable. Of relevance to our consideration here, paragraph

1.2.2 lists three types of cables: type I—smooth outer conductor; type II—corrugated outer conductor; type III—braided outer conductor. Supplement 1A dated June 26, 1964, to this specification, lists the detail specifications for use in connection with the general specification. For the 1⅝-inch cable requested in the invitation schedule, the supplement lists two detailed specifications: MIL–C–22931/3—cable, semirigid, radio frequency, class N, type I, size 1⅝ inch; and MIL–C–22931/7—cable, semirigid, radio frequency, class N, type II, size 1⅝ inch. MIL–C–22931/3 dated January 4, 1962, was superseded by specification MIL–C–22931/3A dated March 27, 1964, referenced in the invitation schedule. Paragraph 6.2 of this detailed specification lists in table II three smooth outer conductor, jacketed, commercial cables known to meet the performance requirements of the class N, type 1⅝-inch cables; that is, RG–233/U, designated in the invitation and manufactured by Phelps Dodge; RG–258/U manufactured by Prodelin; and RG–249/U, which is also manufactured by Phelps Dodge but is not relevant here. Similarly, MIL–C–22931/7A dated March 27, 1964, superseding MIL–C–22931/7 (SHIPS), dated January 2, 1962, designates in paragraph 6.2, RG–319/U as a jacketed, commercial cable with a corrugated outer conductor known to meet the performance requirements of class N, type II, size 1⅝-inch cables. The Andrew offer of a modified RG–319/U differs from MIL–C–22931/7A in that the outer conductor, like the Phelps Dodge outer conductor, is made of aluminium rather than copper as designated in the specification. Recognizing that the use of military specifications are mandatory (Armed Services Procurement Regulation (ASPR) 1–1202), it is clear that any restrictive element introduced into a particular cable procurement is not attributable to the specifications as drafted but rather depends, in the instant case, upon the propriety of the exclusive selection of detail specification MIL–C–22931/3A, and the further designation of RG–233/U cable under a Federal stock number which further references and identifies RG–233/U cable.

While we are advised that consideration is presently being given to modifying the specifications, it is protestant's position that, in order to provide all manufacturers an opportunity to compete, the invitation should permit bids in accordance with MIL–C–22931/3A, MIL–C–22931/7A, "or equal." In this respect, we observe that the mere fact that a particular bidder is unable to meet the Government's specifications is not determinative of the question whether a particular specification is restrictive. 30 Comp. Gen. 368; 36 *id.* 251; 33 *id.* 586. However, it is equally well established that the expression of the Government's requirements must reflect the actual and legitimate minimum needs of the procuring activity rather than a mere preference or desire for one manufacturer's product over another. As we stated in our decision at 32 Comp. Gen. 384, 387, as follows:

> The Government advertising statutes consistently have been held to require that every effort should be made by the procurement agencies of the Government to state advertised specifications in terms that will permit the broadest field of competition within the minimum needs required, not the maximum desired. * * *

We believe that the protestant's reliance on the principles enunciated in our decisions dealing with the use of the brand name or equal clause is entirely appropriate. We agree, as the contracting officer points out, that recourse to the "or equal" clause (see 38 Comp. Gen. 380) is not proper when the invitation adequately describes the minimum requirements of the Government. However, authorization to use the clause is intended to overcome practical difficulties encountered in drafting detailed specifications, and the absence of the clause does not insure that the maximum competition consistent with the agency's needs has been achieved. 5 Comp. Gen. 835, 837. In this latter regard, we draw your attention to our decision at 39 Comp. Gen. 101, 108, wherein we stated that:

> A procurement may be made under advertising procedures on the basis of a particular manufacturer's model. It is required in such circumstances, however, that the words "or equal" or words of similar import be added to the description and that *bids offering other products which will perform the job as well must be considered for award on an equal basis.* 38 Comp. Gen. 380; 33 Comp. Gen. 524. We can see no real difference between advertising for a product by its brand name and model number and by detailed drawings which, although they may not indicate name or model number, describe such model by its exact characteristics. [Italic supplied.]

It is the contracting officer's position that the specification requirements provide complete procurement information which enables any interested party to fabricate the advertised cable in accordance with the specified requirements, and the fact that one firm is a sole source at any one point in time does not render the procurement unduly restrictive, citing 44 Comp. Gen. 27. In that case, the protestant alleged that the invitation specification contained restrictive, proprietary features of one manufacturer's product thereby eliminating all others from competition. The proprietary feature there involved represented a "technological advance" over other equipments previously offered. Further, the record indicated that because of the competitive forces active in the trade a desirable, nonpatented feature would normally be incorporated into the items of a number of manufacturers, and that at the time the invitation was prepared it was not known that the new feature was proprietary to one manufacturer. On this basis, we were advised that sole-source procurement could not be justified at the time the invitation was drawn. It was in this context, and in response to the protestant's objection that the invitation was "a clever sales device" rather than an attempt to foster competition, that we observed that:

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

Here, the expression of the Government's needs for cable are clearly distinguishable. There is no suggestion of technological advantage, or that the specifications are "equal to the highest standards presently obtainable" (30 Comp. Gen. 368, 369) since it is acknowledged that the Andrew cable performs an equal function to that of the Phelps Dodge cable, and further that this equality is maintained when each cable is fitted with its own connectors. Moreover, the past procurement history of the cable provided by the United States Army Electronics Command indicates award to Phelps Dodge in every instance and thus negates the validity of any suggestion that competitive forces are, or will become, active. With respect to the observation that complete procurement information permitting manufacture is available, it should be noted that even if other firms are authorized to manufacture a product, such fact—standing alone—is not in itself a sufficient reason for designating one manufacturer to the exclusion of another. See especially 45 Comp. Gen. 462, 468; also see 39 *id.* 101, 107; B–153796, June 25, 1964.

Considering specifically the justification for the "minimum needs" determination in the instant matter, the selection of the Phelps Dodge cable is based on interchangeability and logistics relating to the use of the cable for replacement purposes. In this respect, Andrew has questioned the intended use of the cable to be procured, and challenged the relevancy of the interchangeability factor on the grounds that one manufacturer's cable with appropriate connectors is, in fact, interchangeable with another manufacturer's cable similarly equipped. Further, it is maintained that the cost of connectors and adapters in relation to the cost of the cable cannot substantiate a locked-in purchasing situation which would always result in a sole-source procurement.

In view of Andrew's allegations, the contracting officer requested the requisitioning activity, United States Army Strategic Communications Command, Fort Huachuca, Arizona (STRATCOM), to furnish further information establishing the fact that RG–233/U cable constituted the Government's minimum needs expressed in terms of logistics and interchangeability and to establish the intended use of the cable. In its response by letter dated June 20, 1967, the requisitioning activity advised generally, as follows:

a. The RG–233/U cable as requested is a forecast requirement of stockpile items. The cable will be subject to world-wide use as a replacement or new installations item.

b. Requests to be filled from this stockpile are received from various parts of the world. It is requested by a FSN which is tied to a MIL specification. If this specification is going to be waived or relaxed so that cables of different size and/or configuration can be stockpiled, the requestor will never know exactly what they will receive. If this is the case, connectors and/or adapters can never be requested until the cable has been delivered to the user.

c. When the cable is delivered, an unreasonable delay would occur if a new request had to be initiated and processed in order to obtain a connector to adapt

the new cable into the present system. In fact, this delay would be mandatory as shown in paragraph 1b above, since the type of connector required would not be known and could not be ordered in advance.

d. If the cable stockpiled is held to the type called for under the specification, fittings are normally on hand for replacement purposes. If the cable is to be used for new installations, fittings can be ordered at the same time as the cable.

Further, the procuring activity raised specific questions relating to the use and cost of the cable. The questions and the responses elicited from the requisitioning activity are, in relevant parts, as follows:

Question: Do you specify or requisition this cable by FSN or JCENS type RG–233/U?

Answer: By FSN.

Question: Yearly usage?

Answer: Estimated forecast requirements exceed 50,000 feet per year.

Question: For what types of installations and equipment is RG–233/U cable used?

Answer: This Command's major use of the specified cable is for fixed-plant installations of high frequency radio equipment.

Question: Number and amount of such equipment?

Answer: Substantial, but exact quantities not known.

Question: How wide spread is this equipment throughout the DOD supply system?

Answer: World-wide.

Question: Is this cable to be used for new installations or to replace existing RG–233/U cable?

Answer: The cable will be used for new installations, but the primary use will be replacement.

Question: How wide spread is the use?

Answer: World-wide.

Question: Is the connector built in the equipment of such a type or manner to require only a single type of coaxial cable?

Answer: No, connectors built into the equipment do not require a single type cable.

Question: Are connectors on hand, or are connectors for attachment of cable to equipment procured when additional or replacement cable is procured?

Answer: In some cases connectors are on hand. In other cases they are ordered on the same request with the cable.

Question: Can the cost of procuring and maintaining additional type connectors when compared with the possible cost savings of procuring cables other than RG–233/U (as in the present situation) constitute a valid reason for not procuring other than RG–233/U cable?

Answer: The actual cost of the connector cannot be considered a valid reason—but the cost in time and inconvenience can be considerable as explained in paragraph 1c of the narrative above.

It is our opinion that any distinction drawn between new and replacement use of cable is unsubstantial to support a requirement for interchangeability under the circumstances of this case. The supplemental information received from the requisitioning activity indicates that the subject procurement is intended to meet stockpile requirements for a 2-year period. Moreover, a specific replacement requirement reflecting a need for interchangeability is negated by the acknowledgement that the Andrew cable could perform an equal function with the same economy of fittings as would the Phelps Dodge cable; the advice that existing equipments presently in use do not require the use of any particular manufacturer's cable as long as it is equipped with appropriate adapters; and the statement that the cost of procuring and maintaining additional manufacturer's con-

nectors is not a "valid reason" for not procuring other types of cable. Further, an investigation initiated at our request by the procuring activity failed to provide sufficient information for our Office to consider the possible impact of the introduction of other than RG-233/U cable into the supply system on the inventory supply balance of related cable connectors.

It appears that recourse to a distinction between the intended use of the cable has reference to the location and supply level of the connectors within the supply system in view of the advice that "fittings are normally on hand for replacement purposes. If the cable is to be used for new installations, fittings can be ordered at the same time as the cable." In this respect, it is maintained, in reliance on 40 Comp. Gen. 458, that interchangeability is a factor in the sense that the stocking of connectors provides an immediate utilization of the requisitioned cable without "unreasonable and intolerable delay." Although the cited case involved the issue of responsiveness, we agree that, in addition to the type of equipment being procured, "the circumstances in which the equipment will be utilized, including such considerations as the importance of continuous operation, the availability of spare parts and maintenance services, and similar factors" are relevant to a determination of the Government's legitimate needs. (40 Comp. Gen. 458, 459). According due weight to the importance of continuous logistic support, we cannot, however, agree that the allegation of "unreasonable and intolerable delays" resulting from the introduction of other manufacturer's cables into the system is substantiated on the record before us. In this respect, we note that the unreasonable delay described is premised on the fact that other cables would be introduced into the system under the same Federal stock number. However, there is no question that connectors and adapters could be procured almost simultaneously with the cable either under the same procurement action or under a "call-type" or requirements contract. The assignment of additional Federal stock numbers to any additional cables and fittings introduced into the system, with appropriate advice to the user, would remove the random selection suggested in the report. It appears to us that the problem is one of requisitioning and procurement which is not necessarily related to the formal procurement by advertising of cable alone. This would seem to be especially true since the invitation did not advise bidders in specific terms of the administrative desire for interchangeability or of the logistic problem that would result from the procurement of other than Phelps Dodge cable.

For the foregoing reasons, we must conclude that the advertised specifications are inconsistent with the full and free competition required by 10 U.S.C. 2305(a). Accordingly, the invitation should be canceled.

[B-162090]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Retired Pay Deduction For Less Than a Day's Salary

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

To Lieutenant Commander Garland Casey, September 27, 1967:

This refers to your letter of June 13, 1967, with enclosure, concerning the reduction of your retired pay under the Dual Compensation Act, approved August 19, 1964, Public Law 88-448, 78 Stat. 484, now codified in 5 U.S.C. 5531 *et seq.*, incident to your employment with the Travis Air Force Base Aero Club.

The information of record shows that as an officer of the Regular Navy you were transferred to the retired list on March 1, 1955, pursuant to 34 U.S.C. 383 (1952 ed.), which authorized retirement after completion of at least 30 years of active service.

On July 1, 1966, you were employed as Aero Club Manager, Travis Air Force Base, California, a nonappropriated fund instrumentality under the jurisdiction of the Air Force. On April 30, 1967, you resigned as Aero Club Manager and on the following day, May 1, 1967, you were appointed by the Aero Club as a flight instructor at $5 per hour on an intermittent basis, i.e., you are compensated only for flight instruction on an hourly basis with no guaranteed minimum. We understand that your compensable hours of duty may average about 5 a day but vary and are limited by student bookings, weather conditions and a Federal Aviation Administration limitation of 36 hours a week.

The Department of the Navy reports that beginning July 1, 1967, your retired pay which grosses $535.72 monthly (approximately $17.85 a day) was reduced by $181.44 each month pending receipt of monthly employment certifications from the Aero Club showing the exact dates during the month that you worked and were compensated. You then are paid the difference between the full and the reduced retired pay for days of the month on which you did not work and receive compensation.

You point out that because of the variable conditions under which you work you lose a full day's retirement pay if you receive any compensation at all for that day—perhaps as little as $5. You, therefore, ask whether the moneys paid into the central fund by students for paying flight instructors may be exempted from the operation of

the Dual Compensation Act or an equitable system devised under which a day's retired pay would be deducted only when you are compensated for 8 full hours of work.

The applicable provisions of the United States Code do not permit much flexibility. 5 U.S.C. 5531, applicable to you as a retired officer, provides in part as follows:

(2) "position" means a civilian office * * * (including a temporary, part-time, or *intermittent position*) * * * in the * * * executive * * * branch of the Government * * * (including a Government corporation and *a nonappropriated fund instrumentality under the jurisdiction of the armed forces*) * * * [Italic supplied.]

5 U.S.C. 5532 in pertinent part reads:

(a) For the purpose of this section, "period for which he receives pay" means the full calendar period for which a retired officer of a regular component of a uniformed service receives the pay of a position when employed on a full-time basis, *but only the days for which he actually receives that pay when employed on a * * * intermittent basis.*

(b) A retired officer * * * who holds a position is entitled to receive the full pay of the position *but during the period for which he receives pay, his retired * * * pay shall be reduced* to an annual rate equal to the first $2,000 * * * plus one-half of the remainder, if any. * * *. [Italic supplied.]

The quoted statutory provisions clearly require that the reduction be in the retired pay as distinguished from the salary of the position held. Further, it requires the reduction of retired pay on *each day* an officer receives the salary of the position. In our decision 28 Comp. Gen. 381, to which you apparently refer in your letter, we ruled that we were not aware of "any authority of law whereby a retired officer * * * is entitled to pay * * * for a fractional part of a day. Historically, the law never has recognized fractional parts of a day in matters of retirement * * * of military personnel * * *." See, also, 44 Comp. Gen. 537 at pages 538, 539. Thus, we are unable to equate a fractional part of a day's retired pay with hours of work in a position for which an officer is paid salary for less than a full day or at an hourly rate. As long as you are compensated for your civilian employment, your case comes within the operation of the Dual Compensation Act.

We invite your attention, however, to subsection (d) of 5 U.S.C. 5532 which provides in part as follows:

(d) Except as otherwise provided by this subsection, the Civil Service Commission, subject to the supervision and control of the President, may prescribe regulations under which exceptions may be made to the restrictions in subsection (b) of this section when appropriate authority determines that the exceptions are warranted because of special or emergency employment needs which otherwise cannot be readily met. * * *.

Section 550.603, Federal Personnel Manual, Supplement 990–1 provides as follows:

Prior approval. When a department, agency, or the municipal government of the District of Columbia has special or emergency employment needs which cannot be readily met because of the restrictions in subsection 201(a) of the act, it may request the Commission to approve an exception to the restrictions. In submitting its request for an exception, the department, agency, or the municipal government of the District of Columbia must establish to the satisfaction of the Commission that the employment needs cannot otherwise be readily met.

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

ADVERTISING

Necessity or nonnecessity

Purchase orders under an indefinite quantity contract

Issuance without securing competition of purchase orders for generator sets during last 2 months of 12-month contract negotiated under 10 U.S.C. 2304(a)(13) for indefinite quantity of sets, as provided in par. 3–409.3 of Armed Services Procurement Reg., did not violate advertising statute at sec. 3709 of Revised Statutes (41 U.S.C. 5), or 10 U.S.C. 2304(g), regarding competition to extent feasible in negotiation of contracts, absent evidence of possibility that another supplier could have furnished sets at lower price 155

AGRICULTURE DEPARTMENT

Rural Electrification Administration

Loans to cooperatives

Federal law applicability

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

ALASKA Page

Sewage system construction

Federal aid

Federal Aviation Admin. (FAA) grant to city of Juneau, Alaska, incident to construction of sewage system which included percentage of cost provided by Public Health Service (PHS) grant for facility, where both grants were matched by State with same funds, was made without authority and is without legal effect, even though Federal Airport Act does not prohibit grant, Water Pollution Control Act under which PHS grant was made requiring city to pay costs in excess of grant. Therefore, to permit FAA to make grant for same project would require U.S. to contribute more than amount of PHS grant, thereby waiving its right to have grantee complete project without further cost to U.S., and would not satisfy definition in Federal Airport Act that "project costs" are are costs "which would not have been incurred otherwise."---------- 81

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Per diem. (*See* Subsistence, per diem, military personnel)

ANNUAL LEAVE

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APPROPRIATIONS

Availability

Construction, etc.

Improvements on leased property

Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section---------- 61

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BAILMENTS Page

Liability of bailee

Unauthorized property use

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

BIDS

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Component *v.* end product

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Borrowers under loan agreements

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

Military specifications

Standardization requirements

Establishment of Military Specification standardizing proprietary swivel hook for use in tire chain assemblies without including in test program competitive product does not satisfy 10 U.S.C. Ch. 145, which contemplates fullest practicable cooperation and participation of industry in standardization development, and although in view of urgent

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Evaluation

Factors other than price

Justification

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

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Alternative protection

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

Contract termination prior to furnishing bond

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

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

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Submissions to Comptroller General

Law *v.* procedural questions

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

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Double

Concurrent military retired and civilian service pay

Disability retirement

Members removed from temporary disability retired list

Reappointment of Regular Air Force and Regular Army commissioned or warrant officers determined to be physically fit to perform duties of office, grade or rank whose names are removed from temporary disability retired list for sole purpose of being retired is contrary to provisions of 10 U.S.C. 1211(a)(1) and (2), and absent authority for reappointment of officers who have not been recalled and who contemplate no active duty, employment of officers in civilian capacity in Federal Govt. and payment to them from either appropriated or nonappropriated funds for civilian position is not contemplated by law 144

Retired pay deduction for less than a day's salary

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

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Payment of compensation for holiday on which no services are performed predicated on employee having been in pay status at close of business immediately preceding holiday, when employment relationship validly had been terminated by reason of resignation or retirement prior to holiday, former employee is not entitled to pay for holiday, nor is employee separated and entitled to lump-sum payment under 5 U.S.C. 5551, in amount equal to pay he would receive had he remained in service until expiration of period covered by leave payment, whose period of projected annual terminal leave for lump-sum payment extended through close of business on July 3, 1967, entitled to compensation for July 4 holiday 147

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Where site and nature of project are so changed as to render virtually useless any architect-engineer (A–E) work done prior to administrative determination to affect change, it would be unreasonable to carry forward against new project any charge made against fee limitation imposed by 41 U.S.C. 254(b) that was incurred under original project, for even though purpose of project may remain unchanged, subsequent alteration of conceptual design of building and its location at some point gives rise to new project for purpose of applying statutory fee limitation ---------- 61
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Where cost of foreign batteries required in modification kits as part of diesel electric units represents approximately 1 percent of all components of unit, battery is not considered "end product" subject to restrictions of Buy American Act (41 U.S.C. 10a–d), but "component" of unit. To exclude batteries from definition of component in Buy American Act clause included in contract pursuant to par. 6–104.5 of Armed Services Procurement Reg. on basis batteries are not directly incorporated in diesel electric units and therefore do not lose their identity or are not substantially changed in form would be too narrow definition of component. Therefore, use of foreign batteries in diesel units is not considered violation of Buy American clause of contract ---------- 21
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Consideration—Continued
Delivery time extension—Continued
be individually supported by legally sufficient consideration, and retention and use of accepted components of system, although not producing significant savings, constitutes consideration for agreement to pay, and price of culler-stacker is consideration for purchase, even though exorbitant, extravagant promise for inadequate consideration constituting legally sufficient consideration. However, extension of delivery date, absent evidence performance delay was beyond contractor's control and that Govt. waived liquidated damages, is unsupported by consideration and liquidated damages are assessable under contract amendment from original delivery date---------- 170
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Purchase of dictating equipment under multiple-award Federal Supply Schedule contract from other than low bidder justified on basis of higher trade-in value, more extensive and dependable maintenance and repair service, that equipment will better serve actual needs of using agency, and that one feature of equipment alone would result in cost saving which would absorb price difference within few years, saving that would continue in subsequent years, satisfies requirements of par. 101–26.408–3 of Federal Property Management Reg., and purchase more advantageous to Govt., price and other factors considered, comes within contemplation of 41 U.S.C. 253(b)---------- 135
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Refusal of Air Force in selecting source for furnishing electric data processing equipment (EDPE), to be purchased by General Services Admin. (GSA) under the Federal Supply System, to discuss technical deficiencies of proposal that offered lower price than that of only proposal out of four considered acceptable violated 10 U.S.C. 2304(g), which provides for written or oral discussions with all responsible offerors submitting proposals within competitive range, price and other factors considered, when negotiated procurement exceeds $2,500, and authority of GSA to coordinate and provide for economic and efficient acquisition of EDPE neither impairing selection right of an agency nor exempting selection from procurement laws and regulations, further discussions should be conducted on low proposal, which having met all requirements except one portion of demonstration test is within competitive range, and on any other proposals satisfying the "within a competitive range" requirement---------- 29

Purchase orders under an indefinite quantity contract

Issuance without securing competition of purchase orders for generator sets during last 2 months of 12-month contract negotiated under 10 U.S.C. 2304(a)(13) for indefinite quantity of sets, as provided in par. 3–409.3 of Armed Services Procurement Reg. did not violate advertising statute at sec. 3709 of Revised Statutes (41 U.S.C. 5), or 10 U.S.C. 2304(g), regarding competition to extent feasible in negotiation of contracts, absent evidence of possibility that another supplier could have furnished sets at lower price---------- 155

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Indefinite *v.* requirements contract

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

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Options—Continued

Indefinite *v.* requirements contract—Continued

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

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

Failure to furnish something required

Bid bond

Loan project

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

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Military

Standardization propriety

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

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Exemption granted by act of June 3, 1944, to 19 U.S.C. 1451, imposing on owners or operators of vessels and other conveyances entering U.S. at night, Sundays, and holidays, requirement to pay extra compensation and expenses of customs officers assigned to duty in connection with entering, may not be extended, absent congressional approval, to proposed monorail system for operation between El Paso, Texas, and Juarez, Mexico, specific listing in 1944 act of highway vehicles, bridges, tunnels, ferries, motor vehicles, trolley cars, and foot travelers as exceptions to 19 U.S.C. 1451, implying exclusion from exceptions authorized of other modes of transportation, such as monorails, trains, vessels, airplanes, and pipelines ---------- 148

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

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

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Under ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired member of uniformed services adjudged incompetent who died while receiving care in Veterans Hospital is payable to members of immediate family of decedent as forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving competent or incompetent retired member. Therefore distribution of withheld retired pay in both categories—competent and incompetent—should be on same basis, and claims similar to *Berkey* case handled as indicated in 40 Comp. Gen. 666, and 41 *id.* 218 is reversed---------- 25
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Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees 61

LEAVES OF ABSENCE

Lump-sum payments

Termination prior to a holiday

Payment of compensation for holiday on which no services are performed predicated on employee having been in pay status at close of business immediately preceding holiday, when employment relationship validly had been terminated by reason of resignation or retirement prior to holiday, former employee is not entitled to pay for holiday, nor is employee separated and entitled to lump-sum payment under 5 U.S.C. 5551, in amount equal to pay he would receive had he remained in service until expiration of period covered by leave payment, whose period of projected annual terminal leave for lump-sum payment extended through close of business on July 3, 1967, entitled to compensation for July 4 holiday 147

MEDICAL TREATMENT

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Immunization against diseases

Under 5 U.S.C. 7901, authorizing head of agency to establish health service programs by contract or otherwise, within limits of available appropriations if in interest of U.S., immunization against specific diseases without charge to employee may be approved, section 7901(c)(4) prescribing preventive programs relating to health, upon recording, pursuant to Budget Bur. Cir. A–72, by appropriate official of reasonable basis to support determination for immunization of employees. However, probability of substantial savings to Govt. through preventing loss or impairment of services is more evident in case of influenza immunizations than immunizations for tetanus and smallpox 54

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Member of uniformed services who upon retirement is separated for his convenience at activity other than appropriate place of separation, pursuant to proposed revision of par. M4157–1 of Joint Travel Regs. (JTR), may be paid travel allowances for distance from last duty station to elected separation activity and then to home of selection not to exceed distance from last duty station to home of selection via separation activity at which he normally would be retired, subject to limitations in par. M4158–2, JTR, that member who is retired from service may elect his home and receive travel allowances thereto from last duty station provided travel to selected home is completed within 1 year after termination of active duty, and provided advance payment of travel allowances is not authorized---------- 166
Temporary retired list removal
Requirements for retirement
Members of Regular components of Army and Air Force subject to removal from temporary disability retired list upon determination of "fit-for-duty" who without return to active duty desire to retire—airmen or enlisted men for length of service under 10 U.S.C. 8914 or 3914, commissioned or warrant officers pursuant to secs. 8911, 3911, or 1293, or mandatory provisions of Title 10 for age or length of service—may not without reenlistment or reappointment acquire new retirement status and have retired pay computed according to applicable law in force on effective date of retirement, retired status of member terminating upon removal from temporary disability retired list for other than transfer to permanent disability retired list or separation from service, he has no active status and must be either reappointed or reenlisted as provided in 10 U.S.C. 1211 to establish eligibility for retirement---------- 141
Reappointment of Regular Air Force and Regular Army commissioned or warrant officers determined to be physically fit to perform duties of office, grade or rank whose names are removed from temporary disability retired list for sole purpose of being retired is contrary to provisions of 10 U.S.C. 1211(a)(1) and (2), and absent authority for reappointment of officers who have not been recalled and who contemplate no active duty, employment of officers in civilian capacity in Federal Govt. and payment to them from either appropriated or nonappropriated funds for civilian position is not contemplated by law-- 141

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Separation
Election of separation point
Proposed revision of par. M4157–1, Joint Travel Regs. to permit members of uniformed services to be transferred to and separated from service at place of own choosing and for own convenience as alternative to separation from place prescribed by regulation, and to travel from alternate separation point to home of record or place from which called to active duty may be adopted, revision adequately protecting public interest by limiting cost to Govt. for travel and per diem to cost from member's last permanent duty station to appropriate separation activity. However, no per diem payable to member at last permanent duty station for period of processing separation, therefore, no per diem would be payable at alternate separation center elected by member---------- 166
Service credits
Pay. (*See* Pay, service credits)
Transportation
Dependents. (*See* Transportation, dependents)
Household effects. (*See* Transportation, household effects)
Travel expenses. (*See* Travel Expenses, military personnel)
MISCELLANEOUS RECEIPTS
Special account *v.* miscellaneous receipts
Court costs
Court costs awarded National Labor Relations Board under Pub. L. 89–507, approved July 18, 1966 (28 U.S.C. 2412), are for deposit into Treasury as miscellaneous receipts under 31 U.S.C. 484, absent authority in 1966 act or any other law making available for expenditure by Federal agency moneys derived from judgment for costs awarded to U.S. pursuant to 1966 act---------- 70
OFFICERS AND EMPLOYEES
Attorneys
Court admission fees
Admission fee paid by Govt. attorney to practice before bar of U.S. Court of Appeals, required by court as arbiter of applicant's qualifications to practice before it, is personal to attorney, privilege being life one unless debarred regardless whether attorney remains in Govt. service, and because aside from capacity in which attorney serves Govt. he is also officer of court with obligations to court and public. Therefore, attorney on notice that nature of Govt. employment requires him to qualify before Federal courts including Supreme Court, as well as in State or other court, may not be reimbursed admission fee absent specific authority to charge appropriated funds for expense. 22 Comp. Gen. 460 reaffirmed---------- 116
Compensation. (*See* Compensation)
Death or injury
Disability compensation and retired pay
Air Force sergeant who subsequent to retirement pursuant to 10 U.S.C. 8914 is injured while employed as civilian by Govt. is not entitled to retired pay for period he receives disability compensation under Federal Employees' Compensation Act of 1916, as amended, sec. 7(a) of act, 5 U.S.C. 8116(a), prohibiting concurrent receipt of civilian disability compensation and military or naval retired pay, and provision in act of July 4, 1966, amending 1916 act to effect that receipt of retirement benefits will

OFFICERS AND EMPLOYEES—Continued Page

Death or injury—Continued

Disability compensation and retired pay—Continued

not impair employee's right to disability compensation relating only to Federal civilian retirement programs, concurrent payment of civilian disability compensation and military retired pay may not be authorized. 9

Dependents

Status

Brothers

Definition of "immediate family" in sec. 1.2d of Bur. of Budget Cir. No. A–56 excluding relationship of brother, and employee may not be reimbursed for travel and transportation expenses incurred for brother incident to change-of-duty station, even though employee is sole source of brother's support, and dependency is recognized for income tax and insurance purposes, attendance at Govt. school for dependents, and that employee might be held responsible in certain legal actions stemming from acts of brother 121

Inventions

Use by Government

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

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

Medical treatment. (*See* **Medical Treatment, officers and employees**)

Retirement. (*See* **Retirement, civilian**)

Severance pay

Reemployment

Deferred annuity effect on resumption of pay

Employee involuntarily separated from service and awarded severance pay under sec. 9(b) of Pub. L. 89–301, who will be entitled to deferred civil service annuity at age 62, may be reemployed in temporary position not to exceed 1 year without entitlement to resumption of severance pay upon termination of temporary appointment being affected, notwithstanding he will reach 62 during period of temporary appointment and become entitled to immediate annuity at expiration of temporary appointment, employee not having satisfied requirements for annuity at time of involuntary separation, at which time entitlement to severance pay was determined, he is not subject to prohibition in sec. 9(b)(4) to payment of severance pay to persons entitled to immediate annuity upon separation. Therefore, employee is entitled to both deferred annuity and resumption of severance pay upon separation from temporary position 72

OFFICERS AND EMPLOYEES—Continued Page

Severance pay—Continued

Resignation

Payment of severance pay to employees who resigned because they were unable to accept reassignment to other areas upon agency reorganization of regional offices which resulted in excess of personnel in competitive positions need not be recovered if primary purpose of proposed transfers was to meet responsibility to employees rather than to agency, and advice to employees of proposed reduction in force, encouraging them to seek positions with other Govt. agencies, together with effort made by employing agency to seek positions in other areas in region for employees, evidences administrative intent to make job offers to employees rather than to reassign them without option to refuse reassignment, and that separations were involuntary and not removal for cause-- 56

Transfers

Relocation expenses

Duty stations within United States requirement

In view of requirement in sec. 2 of Pub. L. 89–516 and sec. 4.1(a) of Bur. of Budget Cir. No. A–56, that both old and new stations of transferred employee must be located within 50 States, Dist. of Columbia, territories and possessions of U.S., Commonwealth of Puerto Rico, or Canal Zone to entitle him to reimbursement for expenses incurred in buying or selling residence, reimbursement may not be made to employee for cost of selling residence in U.S. incident to change-of-duty station to foreign post of duty, nor may employee be reimbursed for residence purchase expenses upon reassignment to U.S.---------- 93

Term "within the continental United States" as used by Bur. of Budget in sec. 1.3c(1) of Cir. No. A–56, and derived from sec. 28 of Administrative Expenses Act of 1946, as added by Pub. L. 89–516, may not be interpreted to mean "to and within the continental United States," absent proper basis to justify interpretation---------- 122

House purchase

No house sold at old station

Under Pub. L. 89–516 and implementing Bur. of Budget Cir. No. A–56, authorizing reimbursement of expenses in connection with either sale of residence at old station or purchase of dwelling at new official station within U.S., employee may be reimbursed expenses incurred in connection with change of official station if he does not sell residence at old station but purchases one at new station, or conversely if he incurs expenses incident to selling residence at old station but does not within allowable time limitation purchase residence at new station---------- 93

House sale

"Official station" location requirement

Although generally cost of selling residence not located at employee's old official station or place from which he commutes on daily basis may not be reimbursed under authority of Pub. L. 89–516, exception to daily commuting rule may be made where employee cannot obtain residence for himself and family in location which permits commuting to work on daily basis. Therefore, employee who unable to find suitable housing at new duty station resides in bachelor quarters at that station and moves family 559 miles from old duty station to within 349 miles of new station to permit him to go home weekends, may be reimbursed upon further change-of-duty station for cost of selling residence located 349 miles from station from which he is transferred---------- 109

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Transfers—Continued

Relocation expenses—Continued

Overseas employees transferred to the United States

Employees transferred from overseas duty stations to duty stations within continental U.S. by Dept. of Defense agencies, even though they do not agree to remain in Govt. service for 12-month period following transfer are eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, sec. 1.3c of Circular containing statutory regulations with regard to transportation agreements not requiring execution of agreement, and although costs of house hunting trip may not be authorized in connection with transfer to and from continental U.S., payment of subsistence while occupying temporary lodgings is not restricted but is allowable at discretion of agency; however, payment of per diem for dependents and miscellaneous expense allowance are not subject to administrative discretion under terms of controlling regulation. 122

Permanent residence requirement

Trailer status

Expenses incurred by employee for round trip travel between old and new official stations to locate lot of sufficient acreage on which to place double size housetrailer may be reimbursed to him under authority in sec. 2.4a, Bur. of Budget Cir. No. A–56, providing for reimbursement of traveling expenses incurred in "seeking permanent residence quarters" at new station, sec. 9.1c of regulations respecting transportation of house-trailers used as residence, recognizing that there may be payment of travel allowances under sec. 2.4 even though trailer used as residence at old station will continue to be employee's residence at new station.. 119

Temporary quarters

Lacking definition of term "temporary quarters" in Pub. L. 89–516, or Budget Bur. Cir. No. A–56, each case must be treated individually. Upon transfer to new duty station the apartment employee occupies alone for 4 months until he moves to permanent quarters when joined by family at close of school semester is considered temporary quarters and employee is entitled to cost of meals and lodgings for first 30 days at new station, prerequisite for reimbursement under section 2.5 of circular not requiring employee to actively engage in seeking quarters for immediate occupancy. Although reimbursement may not be authorized for period employee was absent on temporary duty, period of entitlement to subsistence costs may be extended for time involved in temporary duty.... 84

Service agreements

Failure to fulfill

Employees subject to 12 month transportation agreement executed pursuant to Pub. L. 89–516, that required them to remain in service of concerned department or agency of Dept. of Defense rather than "in Govt. service," may with agency approval be transferred incident to promotion within or outside Defense Dept. prior to expiration of obligated period of service and relieved of obligation to refund transfer costs, promotional transfer, although not reason provided by agreement for not completing required period of service, considered to be in interest of Govt., transportation agreement was not breached. However, employing agency if unwilling to regard promotional transfer as in interest of Govt. may refuse to release employee from obligated period of service, or particular type agreement may be prescribed for promotional transfers that occur prior to completion of agreed period of service..... 125

OFFICERS AND EMPLOYEES—Continued Page

Transfers—Continued

Service agreement—Continued

Government *v.* particular agency service

Although Dept. of Defense overseas employees transferred to duty station within continental U.S. are not required to sign transportation agreement in order to be eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, Dept. may pursuant to administrative regulation refuse to approve payment of travel and transportation expenses involved in connection with change of official station from overseas unless and until employee executes agreement to remain in Govt. service or in service of Dept. involved for specified period of time, and as agreement under administrative regulation would not be predicated on specific provision of law or statutory regulation, administrative regulation should conform as closely as possible to Cir. No. A–56 and prescribe acceptable reasons for failure to remain in Govt. service as agreed, and liability of employee for failure to fulfill agreement 122

Overseas employees transferred to United States

Employee who upon completion of agreed period of overseas duty is transferred to duty station in continental U.S. by agencies within Dept. of Defense is not required to sign new transportation agreement to remain in Govt. service for 12 months subsequent to transfer, absent such requirement in sec. 1.3c of Bur. of Budget Cir. No. A–56 containing statutory regulations with regard to agreements to remain in Govt. service as condition for reimbursement of transfer costs 122

Employees transferred from overseas duty stations to duty stations within continental U.S. by Dept. of Defense agencies, even though they do not agree to remain in Govt. service for 12-month period following transfer are eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, sec. 1.3c of Circular containing statutory regulations with regard to transportation agreements not requiring execution of agreement, and although costs of house hunting trip may not be authorized in connection with transfer to and from continental U.S., payment of subsistence while occupying temporary lodgings is not restricted but is allowable at discretion of agency; however, payment of per diem for dependents and miscellaneous expense allowance are not subject to administrative discretion under terms of controlling regulation 122

Travel expenses. (*See* **Travel Expenses**)

ORDERS

Retroactive

Travel orders

Per diem

Approval of special per diem allowances prescribed in 37 U.S.C. 405 to cover cost-of-living when members of uniformed services travel on temporary duty outside U.S. or in Hawaii or Alaska, subsequent to performance of travel would be retroactive determination of both special per diem rate and entitlement to rate contrary to rule that rights of Govt. and member entitled to per diem for travel and temporary duty become fixed under applicable orders and regulations in effect at time duty is performed and such rights may not be changed by ad-

ORDERS—Continued Page
Retroactive—Continued
Travel orders—Continued
Per diem—Continued
ministrative action which would retroactively amend member's orders or change applicable regulations. Therefore, Joint Travel Regs. may not be amended to provide for approval of special per diem allowances for foreign travel after travel has been performed---------- 127
PAY
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Concurrent military retired and civilian service pay. (*See* **Compensation, double, concurrent military retired and civilian service pay**)
Concurrent military retired and disability compensation. (*See* **Officers and Employees, death or injury, disability compensation and retired pay**)
Disability
Temporary retired list
Termination of status
Members of Regular components of Army and Air Force subject to removal from temporary disability retired list upon determination of "fit-for-duty" who without return to active duty desire to retire—airmen or enlisted men for length of service under 10 U.S.C. 8914 or 3914, commissioned or warrant officers pursuant to secs. 8911, 3911, or 1293, or mandatory provisions of Title 10 for age or length of service—may not without reenlistment or reappointment acquire new retirement status and have retired pay computed according to applicable law in force on effective date of retirement, retired status of member terminating upon removal from temporary disability retired list for other than transfer to permanent disability retired list or separation from service, he has no active status and must be either reappointed or reenlisted as provided in 10 U.S.C. 1211 to establish eligibility for retirement------ 141
Reappointment of Regular Air Force and Regular Army commissioned or warrant officers determined to be physically fit to perform duties of office, grade or rank whose names are removed from temporary disability retired list for sole purpose of being retired is contrary to provisions of 10 U.S.C. 1211(a)(1) and (2), and absent authority for reappointment of officers who have not been recalled and who contemplate no active duty, employment of officers in civilian capacity in Federal Govt. and payment to them from either appropriated or nonappropriated funds for civilian position is not contemplated by law---------- 141
Election of pay computation method
Most favorable formula
Adjustment of retired pay
Retired pay of sergeant major discharged for convenience of Govt. on Sept. 30, 1966 in grade E–9 and eligible to retire in that grade, but who on Oct. 1, 1966 is placed at his application pursuant to 10 U.S.C. 1293 on retired list as chief warrant officer W–2, is not restricted to payment on basis of "retired grade" or "any warrant grade satisfactorily held by him on active duty" prescribed by formula 4 of 10 U.S.C. 1401, section also providing for computation of retired pay on basis of most favorable formula for persons entitled to retired pay under sec. 1401 as well as "any other provision of law," and retired pay at enlisted E–9 grade being

PAY—Continued Page
Retired—Continued
Election of pay computation method—Continued
Most favorable formula—Continued
Adjustment of retired pay—Continued
greater than that payable at warrant officer W–2 grade, member may be paid difference between grades for period during which he was paid lesser amount of retired pay ---------- 74
Fractional part of a day
Status
Notwithstanding Regular officer of uniformed services retired after completion of at least 30 years of active service is employed by nonappropriated fund instrumentality only intermittently as flight instructor on hourly basis with no guaranteed minimum, he is subject to operation of Dual Compensation Act and pursuant to 5 U.S.C. 5532, reduction of full day's retired pay is required if officer receives any compensation for that day, even as little as pay for 1 hour as flight instructor, for absent recognition of fractional parts of day in retirement of military personnel, fractional part of day's retired pay may not be equated with hours of work in position for which officer is paid salary for less than full day or at hourly rate ---------- 185
Withholding
Veterans Administration care and treatment
Ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that amount of accumulated retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired officer of uniformed services adjudicated incompetent who died intestate while receiving care in Veterans Hospital may be paid to decedent's son will be followed by Comptroller General as court's construction that sec. 3203(b)(1), barring payment of accumulated lump-sum in event of incompetent's death, has no application to payment of retired pay—not considered gratuity—to members of immediate family of decedent eliminates discrimination and results in uniform disposition of accumulated retired pay withheld under 38 U.S.C. 3203(a)(1) from both competent and incompetent retired members ---------- 25
Under ruling in *Berkey* v. *U.S.*, 176 Ct. Cl. 1, that retired pay withheld pursuant to 38 U.S.C. 3203(a)(1) from retired member of uniformed services adjudged incompetent who died while receiving care in Veterans Hospital is payable to members of immediate family of decedent as forfeiture provisions of 3203(b)(1) are inapplicable to withheld retired pay, considered earned compensation and not gratuity, retired pay is for distribution under 10 U.S.C. 2771, as there is no basis for distinguishing between cases involving competent or incompetent retired member. Therefore distribution of withheld retired pay in both categories—competent and incompetent—should be on same basis, and claims similar to *Berkey* case handled as indicated in 40 Comp. Gen. 666, and 41 *id.* 218 is reversed ---------- 25
The 50 per centum reduction in retired pay of incompetent members of uniformed services required by 38 U.S.C. 3203(a)(1) after 6 months of Veterans Admin. hospital care continues upon discharge from hospitalization after receiving maximum hospital benefits at VA hospital to enter either convalescent center or private nursing home operating under contract with Administration, care given members "at expenses of U.S." coming within meaning of "institutional or domiciliary care furnished

PAY—Continued Page
Retired—Continued
Withholding—Continued
Veterans administration care and treatment—Continued
by Veterans Admin." as contemplated by sec. 3203(a)(1), and no retired pay having been paid members during period of convalescent or nursing care, payment of one-half retired pay due incompetents may be made to persons designated to receive payment---------- 89

Admission pursuant to 38 U.S.C. 620 of veteran into private non-Veterans Admin. managed nursing home that is under contract with Administration immediately subsequent to approved discharge from maximum hospital benefits provided in VA hospital is tantamount to transfer which has effect of continuous hospitalization within meaning of 38 U.S.C. 3203(a)(1), and reduction in retired pay of veterans prescribed by sec. 3203(a)(1) is for continuation, nursing home having entered into valid contract with Veterans Admin. meets test of "nursing home" prescribed in 38 U.S.C. 620. However, 38 U.S.C. 3203(a)(1) does not apply if nursing home care, whether furnished in private or public nursing home, is not authorized at Govt. expense---------- 89

Admission of veterans to private, non-Veterans Admin. managed nursing home under contract with Administration upon discharge from VA institution after receiving maximum hospital benefits prescribed does not begin new period of hospitalization for reduction of retired pay prescribed in 38 U.S.C. 3203(a)(1), whether nursing home has entered into contract with Veterans Admin. or care is furnished at expense of U.S., both situations contemplating furnishing of continued care by Administration. Therefore, upon transfer to nursing home, hospitalization is considered continuous and is not beginning of new period of hospitalization---------- 89

Military departments in making determination regarding implementation of 38 U.S.C. 3203(a)(1), requiring 50 per centum reduction in retired pay after 6 months of continuous Veterans Admin. hospitalization, and 38 U.S.C. 620 providing for public or private nursing home care under contract or at Govt. expense upon discharge from VA hospital after receiving maximum prescribed hospital benefits, should follow when information is insufficient, lacking or contradictory, procedure prescribed in 31 U.S.C. 74, which authorizes disbursing officers or head of any executive department, or other establishment not under any of executive departments, to apply for decision by Comptroller General upon any question involved in payment to be made by them or under them---------- 89
Service credits
Dual benefits
Civilian and military retired benefits

Retired member of uniformed services performing instructional and administrative duties pursuant to 10 U.S.C. 2031(d) in connection with Junior ROTC program who had waived military retired pay in order to have military service added to Federal civilian service to obtain greater civil service retirement annuity is entitled under sec. 2031(d)(1) to difference between military retired pay to which he would be entitled but for waiver and active duty pay and allowances he would receive if ordered to active duty, even though difference when added to member's civil

PAY—Continued Page
Service credits—Continued
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Civilian and military retired benefits—Continued
service retirement annuity exceeds active duty pay and allowances he would receive if ordered to active duty, member's waiver not changing qualification for employment in ROTC program, nor barring him from participation in program, and, therefore, "retired pay" he would be entitled to but for waiver is within contemplation of term as used in 10 U.S.C. 2031(d)---------- 87
PROPERTY
Private
Federal funds for improvements, repairs, etc.
Limitations
Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section---------- 61
Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees---------- 61
Public
Contractor use
Unauthorized. (*See* **Contracts, Government property unauthorized use**)
REGULATIONS
Administrative
In lieu of statutory regulation
Although Dept. of Defense overseas employees transferred to duty station within continental U.S. are not required to sign transportation agreement in order to be eligible for travel and transportation benefits provided in Bur. of Budget Cir. No. A–56, Dept. may pursuant to administrative regulation refuse to approve payment of travel and transportation expenses involved in connection with change of official station from overseas unless and until employee executes agreement to remain in Govt. service or in service of Dept. involved for specified period of time, and as agreement under administrative regulation would not be predicated on specific provision of law or statutory regulation, adminis-

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trative regulation should conform as closely as possible to Cir. No. A–56 and prescribe acceptable reasons for failure to remain in Govt. service as agreed, and liability of employee for failure to fulfill agreement.... 122
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Civilian
Annuities
Deferred
Effect on severance pay interruption
Employee involuntarily separated from service and awarded severance pay under sec. 9(b) of Pub. L. 89–301, who will be entitled to deferred civil service annuity at age 62, may be reemployed in temporary position not to exceed 1 year without entitlement to resumption of severance pay upon termination of temporary appointment being affected, notwithstanding he will reach 62 during period of temporary appointment and become entitled to immediate annuity at expiration of temporary appointment, employee not having satisfied requirements for annuity at time of involuntary separation, at which time entitlement to severance pay was determined, he is not subject to prohibition in sec. 9(b)(4) to payment of severance pay to persons entitled to immediate annuity upon separation. Therefore, employee is entitled to both deferred annuity and resumption of severance pay upon separation from temporary position.... 72
Service credits
Military service
Waiver of retired pay
Retired member of uniformed services performing instructional and administrative duties pursuant to 10 U.S.C. 2031(d) in connection with Junior ROTC program who had waived military retired pay in order to have military service added to Federal civilian service to obtain greater civil service retirement annuity is entitled under sec. 2031(d)(1) to difference between military retired pay to which he would be entitled but for waiver and active duty pay and allowances he would receive if ordered to active duty, even though difference when added to member's civil service retirement annuity exceeds active duty pay and allowances he would receive if ordered to active duty, member's waiver not changing qualification for employment in ROTC program, nor barring him from participation in program, and, therefore, "retired pay" he would be entitled to but for waiver is within contemplation of term as used in 10 U.S.C. 2031(d).... 87
SOCIAL SECURITY
Tax increases
Effect on contracts
Increase in social security taxes resulting from medicare program provided by Social Security Act Amendments of 1965, and designated "excise tax" on wages is not "Federal excise tax or duty on transactions or property covered by this contract" contemplated by contract clause in sec. 1–11.401–1 of Federal Procurement Regs. entitled "Federal, State and Local Taxes," which authorizes price adjustment for tax increases that occur after date of contract. Therefore, increase in social

SOCIAL SECURITY—Continued Page
Tax increases—Continued
Effect on contracts—Continued
security taxes subsequent to execution of construction contract is not payable as contract change, tax clause employing phrase "transactions or property" in connection with subject matter of contract and its purposes does not apply to social security tax increases, neither considered property nor transaction in sense of doing or performing business, but tax levied "upon relation of employment."---------- 163
STATES
Federal aid, grants, etc.
More than one grant for same project
Federal Aviation Admin. (FAA) grant to city of Juneau, Alaska, incident to construction of sewage system which included percentage of cost provided by Public Health Service (PHS) grant for facility, where both grants were matched by State with same funds, was made without authority and is without legal effect, even though Federal Airport Act does not prohibit grant, Water Pollution Control Act under which PHS grant was made requiring city to pay costs in excess of grant. Therefore, to permit FAA to make grant for same project would require U.S. to contribute more than amount of PHS grant, thereby waiving its right to have grantee complete project without further cost to U.S., and would not satisfy definition in Federal Airport Act that "project costs" are costs "which would not have been incurred otherwise."---------- 81
SUBSISTENCE
Per diem
Military personnel
At separation point
Proposed revision of par. M4157–1, Joint Travel Regs., to permit members of uniformed services to be transferred to and separated from service at place of own choosing and for own convenience as alternative to separation from place prescribed by regulation, and to travel from alternate separation point to home of record or place from which called to active duty may be adopted, revision adequately protecting public interest by limiting cost to Govt. for travel and per diem to cost from member's last permanent duty station to appropriate separation activity. However, no per diem payable to member at last permanent duty station for period of processing separation, therefore, no per diem would be payable at alternate separation center elected by member---------- 166
Special per diem allowances
Approval
Approval of special per diem allowances prescribed in 37 U.S.C. 405 to cover cost-of-living when members of uniformed services travel on temporary duty outside U.S. or in Hawaii or Alaska, subsequent to performance of travel would be retroactive determination of both special per diem rate and entitlement to rate contrary to rule that rights of Govt. and member entitled to per diem for travel and temporary duty become fixed under applicable orders and regulations in effect at time duty is performed and such rights may not be changed by administrative action which would retroactively amend member's orders or change applicable regulations. Therefore, Joint Travel Regs. may not be amended to provide for approval of special per diem allowances for foreign travel after travel has been performed---------- 127

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Training or school assignment
Duty station vicinity
Officer of uniformed services who incident to orders directing attendance at course of instructions claims per diem on basis of departure from Tachikawa Air Base—permanent duty station at 5 a.m. by Govt. conveyance for classes at Kishine Barracks, Yokohama, Japan, and return to duty station at 7:15 p.m. same day, may not be paid per diem, Nov. 8, 1954 determination by Headquarters, Far East Air Forces, that per diem is not payable to its personnel for travel and temporary duty performed within area that includes two involved locations never having been rescinded, and notwithstanding conditions of travel and temporary duty in Tokyo area may have changed, and per diem may be paid at permanent duty overseas station under 37 U.S.C. 405 when authorized by regulation, 1954 restriction on basis little or no additional subsistence expense is incurred for travel within vicinity of duty station does not permit payment of per diem claimed 131
TAXES
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Social security
Increases. (*See* **Social Security, tax increases, effect on contracts**)
TRANSPORTATION
Dependents
Brothers
Not a dependent
Definition of "immediate family" in sec. 1.2d of Bur. of Budget Cir. No. A–56 excluding relationship of brother, and employee may not be reimbursed for travel and transportation expenses incurred for brother incident to change-of-duty station, even though employee is sole source of brother's support, and dependency is recognized for income tax and insurance purposes, attendance at Govt. school for dependents, and that employee might be held responsible in certain legal actions stemming from acts of brother 121
Military personnel
Advance travel of dependents
School facilities lacking, etc.
Unavailability of high school facilities to child of member of uniformed services 2 years after member who on 3 year overseas assignment was aware of lack prior to departure is not unusual or emergency circumstances contemplated by 37 U.S.C. 406(e) for advance transportation of dependents, and par. M7103–2(5) of Joint Travel Regs. may not be construed other than authority for advance return of dependents to U.S. upon certification by overseas commander that lack of educational facilities or housing was beyond control of member and condition arose after dependents departure for overseas duty station, nor Regulations amended, either under 37 U.S.C. 406(e) regarding unusual or emergency conditions or sec. 406(h) providing for advance travel when in best interests of member or dependents and U.S., to authorize advance return of children where lack of educational facilities was known before departing for overseas station 151

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Housetrailer shipments
Pilot car services
Reimbursement of charges for pilot car services required by State law in connection with transportation of mobile dwelling which are assessed under Rule 320 of freight tariff that is designated "Special Service Charges" is not precluded by sec. 9.3a(3) of Bur. of Budget Cir. No. A–56, prohibition in section against payment of special services being directed to special services covered by Rule 170 of tariff, such as packing, unpacking, blocking and unblocking housetrailers, necessary and desirable services for use of mobile dwelling but which, unlike pilot cars required by State law are not essential to point to point transportation of mobile dwelling---------- 107
TRAVEL EXPENSES
Illness
Other than employee
Employee who upon arrival at temporary duty station—a scientific conference—abandons official travel due to death in family is not entitled to travel and transportation expenses incurred in returning to headquarters, notwithstanding employee was directed by superior to return, or that he arranged to have employee of another Govt. agency attending conference submit report to his agency, and employee having abandoned assignment for personal reasons, cost of return travel is within scope of long-standing rule that when employee abandons his official travel status because of death or illness of member of family he may be reimbursed only cost of official travel to point of abandonment---------- 59
Military personnel
Mileage. (*See* **Mileage, military personnel**)
Release from active duty
Constructive costs
Member of uniformed services separated overseas for own convenience who returns to U.S. within 1 year by way of different port of debarkation than one from which he elected to receive travel allowances prescribed by M4159–5b of Joint Travel Regs. when "no travel" is performed incident to separation is not entitled to additional mileage, travel allowance having been fixed upon member's election of constructive costs. Therefore, member having been paid mileage from last overseas duty station to nearest port of embarkation and from nearest port of debarkation to place to which he elected to receive travel allowances, is not entitled to mileage adjustment on basis he traveled greater distance from port of debarkation used than distance for which he was paid mileage-- 77
Transfers
Dependents
Brother's status
Definition of "immediate family" in sec. 1.2d of Bur. of Budget Cir. No. A–56 excluding relationship of brother, and employee may not be reimbursed for travel and transportation expenses incurred for brother incident to change-of-duty station, even though employee is sole source of brother's support, and dependency is recognized for income tax and insurance purposes, attendance at Govt. school for dependents, and that employee might be held responsible in certain legal actions stemming from acts of brother---------- 121

TRAVEL EXPENSES—Continued Page

Transfers—Continued

Trailer placement travel

Expenses incurred by employee for round trip travel between old and new official stations to locate lot of sufficient acreage on which to place double size housetrailer may be reimbursed to him under authority in sec. 2.4a, Bur. of Budget Cir. No. A–56, providing for reimbursement of traveling expenses incurred in "seeking permanent residence quarters" at new station, sec. 9.1c of regulations respecting transportation of housetrailers used as residence, recognizing that there may be payment of travel allowances under sec. 2.4 even though trailer used as residence at old station will continue to be employee's residence at new station.. 119

VEHICLES

Parking fees. (*See* **Fees, parking**)

Rental

Insurance

Employee who incident to official business rented automobile which he obtained by use of Govt. credit card, and who under rental agreement is required to pay $100 for damages to vehicle which occurred without negligence on his part may be reimbursed expenditure absent administrative requirement that he purchase collision damage waiver, and on basis of general policy of Govt. not to carry insurance, and in absence of administrative instructions in matter, employee is not considered to have failed to use reasonable discretion contemplated in 35 Comp. Gen. 553 when he did not apply for damage waiver..... 145

VETERANS

Hospitalization, etc.

Nursing home care

The 50 per centum reduction in retired pay of incompetent members of uniformed services required by 38 U.S.C. 3203(a)(1) after 6 months of Veterans Admin. hospital care continues upon discharge from hospitalization after receiving maximum hospital benefits at VA hospital to enter either convalescent center or private nursing home operating under contract with Administration, care given members "at expenses of U.S." coming within meaning of "institutional or domiciliary care furnished by Veterans Admin." as contemplated by sec. 3203(a)(1), and no retired pay having been paid members during period of convalescent or nursing care, payment of one-half retired pay due incompetents may be made to persons designated to receive payment..... 89

Admission pursuant to 38 U.S.C. 620 of veteran into private non-Veterans Admin. managed nursing home that is under contract with Administration immediately subsequent to approved discharge from maximum hospital benefits provided in VA hospital is tantamount to transfer which has effect of continuous hospitalization within meaning of 38 U.S.C. 3203(a)(1), and reduction in retired pay of veterans prescribed by sec. 3203(a)(1) is for continuation, nursing home having entered into valid contract with Veterans Admin. meets test of "nursing home" prescribed in 38 U.S.C. 620. However, 38 U.S.C. 3203(a)(1) does not apply if nursing home care, whether furnished in private or public nursing home, is not authorized at Govt. expense..... 89

VETERANS—Continued Page
Hospitalization, etc.—Continued
Nursing home care—Continued
Admission of veterans to private, non-Veterans Admin. managed nursing home under contract with Administration upon discharge from VA institution after receiving maximum hospital benefits prescribed does not begin new period of hospitalization for reduction of retired pay prescribed in 38 U.S.C. 3203(a)(1), whether nursing home has entered into contract with Veterans Admin. or care is furnished at expense of U.S., both situations contemplating furnishing of continued care by Administration. Therefore, upon transfer to nursing home, hospitalization is considered continuous and is not beginning of new period of hospitalization..... 89
Military departments in making determination regarding implementation of 38 U.S.C. 3203(a)(1), requiring 50 per centum reduction in retired pay after 6 months of continuous Veterans Admin. hospitalization, and 38 U.S.C. 620 providing for public or private nursing home care under contract or at Govt. expense upon discharge from VA hospital after receiving maximum prescribed hospital benefits, should follow when information is insufficient, lacking or contradictory, procedure prescribed in 31 U.S.C. 74, which authorizes disbursing officers or head of any executive department, or other establishment not under any of executive departments, to apply for decision by Comptroller General upon any question involved in payment to be made by them or under them..... 89
VETERANS ADMINISTRATION
Hospital construction
Leased property
Construction of Veterans Admin. (VA) hospital adjacent to university medical school on land leased from university on long-term basis at nominal rental may not be approved under rule that appropriated funds may not be used for permanent improvement of privately owned property in absence of express statutory authority, neither 38 U.S.C. 5001 nor 5012(b) in providing for acquisition of sites and space to implement purposes of sections authorizing construction of hospitals or any permanent type of improvement on leased property, and use of term "otherwise" in sec. 5001 relating to sites for construction of VA hospitals is interpreted to mean acquisition of not less than fee interest in land and to cover situations which do not precisely come within enumerated means of acquiring land that is prescribed in section..... 61
Parking facilities
At hospitals
Funds appropriated to Veterans Admin. (VA) for construction of hospital adjacent to medical school of university may not be used to defray portion of cost of constructing parking structure by university in return for contractual right to use stipulated number of parking spaces, nor may VA lease land from university to construct parking facility, amendment of 38 U.S.C. 5004 although designed to overcome 45 Comp. Gen. 27, respecting disposition of parking fees not affecting conclusion that VA funds may not be used to obtain parking facilities valued in excess of $200,000, by construction or lease without specific approval by appropriate congressional committees..... 61

WORDS AND PHRASES

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"Continental United States"

Term "within the continental United States" as used by Bur. of Budget in sec. 1.3c(1) of Cir. No. A–56, and derived from sec. 28 of Administrative Expenses Act of 1946, as added by Pub. L. 89–516, may not be interpreted to mean "to and within the continental United States," absent proper basis to justify interpretation 122