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[B-166210]

Transportation—Household Effects—Transfers—Successive Changes

An employee who before his immediate family and household effects were transferred to a new duty station was transferred a second time to a station located at a greater distance from his old duty station than the first transfer point is entitled to mileage based on the greater distance from the old to the ultimate duty station for the movement of his family and in determining the commuted payment covering the transportation of the household effects under the principle formerly applied to the shipment of household effects, that is that the "cost to the Government shall not exceed the cost of shipment in one lot by the most economical route from the last official station to the new."

To Harold J. Farrall, United States Department of the Interior, April 2, 1969:

We refer to your letter of February 14, 1969, reference 7–360, concerning the propriety of the travel expense claim of Mr. Forrest D. Doyle which was submitted and paid in connection with Mr. Doyle's transfer of station from Torrington, Wyoming, to Casper, Wyoming, in March 1968.

The pertinent facts giving rise to your doubt as to the propriety of payment of the mileage claimed for the transportation of Mr. Doyle's immediate family and the mileage used in determining the commuted payment covering the transportation of his household effects are set forth in your letter as follows:

> We question the allowance of mileage for Mr. Doyle's family claimed from Cheyenne, Wyoming to Casper, Wyoming, which is 52 more miles than the mileage from Torrington, Wyoming to Casper, Wyoming (the old to new duty stations). Also, we question the use of the commuted rate based on mileage Cheyenne—Casper rather than Torrington—Casper.
>
> On June 19, 1966, Mr. Doyle transferred from Cheyenne, Wyoming to Torrington, Wyoming, a distance of 90 miles. However, his wife and family continued to live in Cheyenne. Mr. Doyle did not commute daily from Cheyenne to Torrington. He stayed in Torrington during the week days and drove to Cheyenne only on weekends. Before the family could move to Torrington, Mr. Doyle was transferred to Casper, Wyoming.
>
> The shortline mileage from Torrington, Wyoming to Casper, Wyoming is 145 miles. The shortline mileage from Cheyenne, Wyoming to Casper, Wyoming is 197 miles. Mr. Doyle's wife and children moved from Cheyenne to Casper on March 20, 1968. His household goods were moved from Cheyenne to Casper on March 17, 1968.

The principle involved in your request for decision is not new. In our decision, 27 Comp. Gen. 267, we held as follows (quoting from the syllabus):

> An employee who was ordered from one official station to another and who, before shipment of his household effects to such new station, was transferred to a third station to which shipment was made within the two-year allowable period is entitled, under Executive Order No. 9805 issued pursuant to the administrative expense statute of August 2, 1946, to reimbursement on a commuted basis for shipment from the first to the third station, only, based upon the shortline distance between such points, irrespective of the actual cost of such single shipment.

You will note that Executive Order No. 9805 cited in the quoted syllabus contained language similar to that appearing in the present regulation in that it provided that the "cost to the Government shall not exceed the cost of shipment in one lot by the most economical route from the last official station to the new." We have consistently followed the above-quoted holding in subsequent cases. See decision of March 9, 1965, B-156164 and decision of April 17, 1964, B-153732.

We see no reason for applying any different rule here, either with respect to travel reimbursement payable on account of the transportation of the employee's household effects or his immediate family from Cheyenne, Wyoming, to Casper, Wyoming. Accordingly, the 197-mile distance—rather than the 144-mile distance—should be used in the computation of the benefits involved.

[B-166156]

Pay—Retired—Effective Date—Age and Service Requirements—Public Law 90-485

Public Law 90-485, approved August 13, 1968 (10 U.S.C. 1331(e)), intended only to exempt non-Regular retirees of the uniformed services from the provisions of the Uniform Retirement Date Act (5 U.S.C. 8301) with respect to the benefits of the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431-1446), the enactment does not affect the principle established in *Seagrave* v. *United States*, 131 Ct. Cl. 790, and accepted in 37 Comp. Gen. 653 to the effect the right of a member retired under section 1331 accrues from the first day of the month following the date the member qualifies by reason of meeting the age and service requirements of section 1331(a) without regard to the date of application for retirement, or accrues from the first day of any subsequent month stipulated by the member, and the principle applies even if a member meets the requirements of section 1331(a) prior to August 13, 1968 but delays application for retired pay until after that date.

To the Secretary of Defense, April 3, 1969:

Further reference is made to letter of February 7, 1969, from the Assistant Secretary of Defense (Comptroller) requesting decision on certain questions that have arisen in the administration of section 2 of Public Law 90-485, 82 Stat. 751, 754, approved August 13, 1968, relating to date of entitlement to retired pay under 10 U.S.C. 1331. There was enclosed a copy of Committee Action No. 428 of the Department of Defense Military Pay and Allowance Committee, setting forth and discussing the several questions presented.

Chapter 67 of Title 10, U.S. Code, contains the authority for the retirement of non-Regular members of a uniformed service. Under the provisions of section 1331(a), contained in chapter 67, a non-Regular member is entitled, "upon application," to retired pay if he meets the requirements enumerated in that section which provides in pertinent part as follows:

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if—

(1) he is at least 60 years of age;
(2) he has performed at least 20 years of service computed under section 1332 of this title;
(3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of a regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and
(4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

Chapter 67 of Title 10 was amended by section 2 of Public Law 90-485, by adding a new subsection (e) to section 1331 as follows:

(e) Notwithstanding section 8301 of title 5, United States Code, the date of entitlement to retired pay under this section shall be the date on which the requirements of subsection (a) have been completed.

The questions presented in Committee Action No. 428 are as follows:

1. What is the earliest date that entitlement to retired pay would commence in those cases where the requirements of 10 U.S.C. 1331(a) have been met on or after 13 August 1968—
a. The date on which the law enumerated requirements of 10 U.S.C. 1331(a) were met; or
b. The date of submission of the application for retired pay?
2. If the answer to 1b is affirmative what would be the effective date of the application; the date the member mails the application or date it was received by the servicing agency?
3. Would the answer to 1 above be the same in the case of a member who meets the requirements prior to 13 August 1968 but delays application for retired pay until after that date?
4. May the member in questions 1 and 2 above elect to have his retired pay commence on any date that is on or after the date of initial eligibility for such pay?
5. If it is determined that the earliest date is 1b above and that a member could elect a later date for commencement of retired pay, would the service performed from the date the member meets the required service and age requirements to the date his retired pay commences, be properly creditable in determining amount of retired pay?

Prior to the act of August 13, 1968, the right to retired pay under chapter 67 was subject to the provisions of the Uniform Retirement Date Act of 1930, 5 U.S.C. 47a (now codified in 5 U.S.C. 8301)—which requires that every retirement (unless otherwise provided by statute) take effect on the first day of the month following the month in which retirement would otherwise be effective. See the answer to question 2 in 38 Comp. Gen. 146, 150, and 43 Comp. Gen. 425, 428 (pertaining to the cases of Colonel Selsor and Colonel MacDonald).

In earlier decisions, this Office had taken the view that the filing of an application for retired pay under 10 U.S.C. 1331 was a condition precedent under the statute and that retired pay was not payable prior to the first day of the month following the month in which application was filed, even though the other requirements of the statute had been met prior to that date. See decision dated April 10, 1956, 35 Comp. Gen. 563 and the decisions there cited. However, as pointed out in the Committee Action, in the light of the holding in *Seagrave* v.

United States, 131 Ct. Cl. 790 (1955), and the action taken by the Court of Claims in similar cases, we held that the right of a member to retired pay under 10 U.S.C. 1331 accrues from the first day of the month following the date the member qualifies by reason of age and service for such pay or on the first day of any subsequent month stipulated by the member in his application, without regard to the date such application was filed. See decision dated April 1, 1958, 37 Comp. Gen. 653, and the answer to question 3 in decision of August 25, 1958, 38 Comp. Gen. 146, 150.

It is stated in the Committee Action that the words "the date on which the requirements of subsection (a) have been completed" appearing in the new subsection (e) of 10 U.S.C. 1331, causes doubt in continuing to follow the rule in 37 Comp. Gen. 653 as to those who meet the enumerated requirements of section 1331(a) on and after August 13, 1968, or those who met the requirements prior to that date but who either did not file the application until on or after that date or filed prior to that date but elected that retired pay commence on or after August 13, 1968. The Committee Action states that in addition to the enumerated requirements of subsection (a), no entitlement to retired pay vests without an application. The view is expressed that if the new subsection is followed, giving literal meaning to each word, it would be interpreted to mean that retired pay under 10 U.S.C. 1331 could start only on the effective date of application, resulting in a rejection of the principle established in the *Seagrave* case and accepted by the Comptroller General in 37 Comp. Gen. 653.

The legislative history of Public Law 90–485 shows that the overall purpose of that law is to liberalize various provisions of the Retired Serviceman's Family Protection Plan (10 U.S.C. 1431–1446) so as to encourage greater participation in that plan by retiring service personnel. The RSFPP law requires that before coverage under the program accrues to an otherwise eligible beneficiary, the member must be entitled to retired pay.

With respect to section 2 of Public Law 90–485, the legislative history shows that it was the congressional desire to include within the coverage of chapter 67, Title 10, those Reserve retirees who attain age 60 and who otherwise meet the requirements of that chapter but who die in the few days between their 60th birthday and the first day of the following month.

The House version of section 2 would have amended section 1437 of Title 10, by clause (8) of section 1 (H.R. 12323) to provide, among other things, for payment of the annuity if the person "(2) applied for retired pay under chapter 67 of this title, to be effective under section 8301 of Title 5 on the first day of the month following the month in which he first met all those [section 1331(a) age and service] requirements; * * * but dies before that day * * *." This language is substantially the same as that in S. 2021, 88th Congress, which passed the Senate on September 24, 1964. No further action apparently was taken on the latter bill. The Senate, however, amended the House version of section 2 (H.R. 12323) and the reasons for not adopting the House provision are set forth on page 21 of S. Rept. No. 1480 dated July 26, 1968 (to accompany H.R. 12323 which became Public Law 90–485), as follows:

Members of the Reserve components retiring under chapter 67 of title 10, United States Code (so-called title III retirees) become eligible for such retirement at age 60 if otherwise qualified. However, by virtue of 5 U.S.C. 8301 (the so-called uniform retirement law), their entitlement to retirement with pay is not effective until the first day of the month following the month in which they reach age 60. If death occurs in the few days between the member's 60th birthday and the effective date of retirement with pay, RSFPP coverage does not accrue under existing law to otherwise eligible beneficiaries. The bill as now written (line 19, p. 8, through line 16, p. 9) would eliminate this problem, but in a cumbersome fashion fraught with administrative difficulty. For clarity and to simplify administration, a more direct and uncomplicated remedy should be enacted. Both the entitlement to retirement with pay under chapter 67, and the effective date of coverage under RSFPP, should occur on the same date, and that date should be the date on which an otherwise eligible member attains age 60, assuming all other statutory requirements have been satisfied. *The simplest way to proceed is to exempt chapter 67 retirements from the provisions of 5 U.S.C. 6/8/301.* Thus, in the event of death and assuming a valid election to participate under RSFPP, survivor protection would be afforded to otherwise eligible chapter 67 retirees on attainment of age 60. [Italic supplied.]

The above objection to the House version was furnished by the Department of Defense in connection with letter dated April 9, 1968, to the Chairman, Senate Armed Services Committee.

It seems clear from the legislative history of Public Law 90–485 that Congress merely intended to exempt chapter 67 retirements (non-Regular retirees) from the provisions of the Uniform Retirement Date Act, 5 U.S.C. 8301. We find nothing in the law or its legislative history on which to impute to the Congress an intention to make any additional change to the long established rule which has been applied in cases of this type. Accordingly, question 1 is answered by stating that the date listed in paragraph a is the correct date and questions 3 and 4 are answered in the affirmative. In the light of the answer to question 1, no answers are required for questions 2 and 5.

[B-165911]

Military Personnel—Reservists—Temporary Duty—Two Successive Orders

A naval reservist who travels from and to his home under orders providing for a 63-day recruiting assignment at a temporary duty station and then under subsequent orders after a 1-day break in service returns to the temporary duty station for a 150-day similar assignment is considered to have had one continuous period of service for determining entitlement to a temporary duty allowance—per diem and monetary allowance in lieu of transportation—and under 37 U.S.C.

404(a) permitting payment of travel and transportation allowances to reservists ordered from home for short periods of active duty—less than 20 weeks—where mess and quarters are not provided, the member may not be paid on the basis that two periods of duty were authorized by the separate orders.

To E. B. Jones, Department of the Navy, April 4, 1969:

Further reference is made to your letter of July 26, 1968, file reference (FO–1/dr), requesting a decision as to whether mileage allowance and per diem are payable to Chief Petty Officer Lee J. Lewis, 4763919, USNR–R, incident to temporary active duty orders of March 29, 1968. The request was assigned Control No. 68–41 by the Per Diem, Travel and Transportation Allowance Committee.

By orders dated March 29, 1968, Headquarters, Eighth Naval District, New Orleans, Louisiana, the member was ordered to report to the Commanding Officer, Naval and Marine Corps Reserve Training Center, Dallas, Texas, for temporary active duty in connection with Naval Reserve Recruiting for 63 days commencing April 29, 1968. First endorsement dated June 30, 1968, to these orders shows that he completed his temporary duty on June 30, 1968, and was detached on that day.

His itinerary shows that on April 29, 1968, he departed from his home, Coppell, Texas, and arrived at his duty station, Dallas, Texas, the same day. On June 30, 1968, he departed from his duty station, Dallas, and arrived at his home, Coppell, 12 miles from Dallas, the next day. By subsequent orders he was ordered to return to Dallas, for 150 days' temporary active duty commencing July 2, 1968. A copy of these orders was not received with your letter, but accompanying endorsements indicate that these orders were issued on June 14, 1968.

In your letter it is stated that it was the intent of the order issuing activity to order members to temporary active duty for periods in excess of 20 weeks but that, in the case of Chief Lewis and numerous similar cases, there was no authority at the time of issuance of orders to order the member to temporary active duty for a period extending beyond June 30, 1968. Also, it is stated that it is presumed that payment of per diem is precluded for the period of 150 days' temporary active duty commencing July 2, 1968.

Your question is whether the member is entitled to payment of temporary duty allowances (per diem and monetary allowance in lieu of transportation) for the 63 days' temporary additional active duty during the period April 29 to June 30, 1968. In this connection you say that while it was the original intent to order the member to temporary active duty beyond June 30, 1968, the temporary active duty commencing July 2, 1968, was authorized by separate orders and, being separated by a 1-day break in service, might be considered a separate period of active duty so as to entitle the member to per diem and mileage allowance for the prior 63-day period.

Section 404(a)(2) and (3) of Title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, a member of the uniformed services is entitled to receive travel and transportation allowances for travel performed or to be performed under orders, including upon call to active duty from his home or from the place from which he was called or ordered to active duty, to his first station and return to that place.

Section 404(a) of Title 37, United States Code, was amended effective January 1, 1968, by section 3 of the act of December 1, 1967, Public Law 90–168, 81 Stat. 525, by adding clause (4) thereto to provide for payment, under regulations prescribed by the Secretaries concerned, or travel and transportation allowances to a member of a uniformed service:

> * * * when away from home to perform duty, including duty by a member of the Army National Guard of the United States or the Air National Guard of the United States, as the case may be, in his status as a member of the National Guard, for which he is entitled to, or has waived, pay under this title.

We have consistently held that clause 4 permits the payment of per diem to reservists ordered from their homes for short periods (less than 20 weeks) of active duty while at the active duty station in cases where a mess and quarters are not provided for them on the same basis that per diem would be payable to members on continuous active duty who are ordered there from their permanent duty stations for the performance of temporary duty. We held that clause 4 provides for the payment of per diem on that basis even though such active duty stations in fact are the members' permanent duty stations. See 48 Comp. Gen. 301; *id.* 517; *id.* 553.

Paragraph M6001 of the Joint Travel Regulations provides that members of the Reserve components called (or ordered) to active duty (or active duty for training) with or without pay will be entitled to the travel and transportation allowances prescribed in chapter 4 of the regulations, as appropriate, for travel to and from the active duty station.

Implementing regulations contained in paragraph 3, SECNAV Instruction 7220.62 dated February 26, 1968, provide for per diem entitlement in the case of a Reserve member ordered to active duty for a period of less than 20 weeks at a location away from the place from which he is ordered to such duty. The regulations further provide that when a Reserve member is called to active duty for a period of 20 weeks or more he is not entitled to per diem while at his primary duty station.

Generally the question of whether a particular assignment is one for which per diem is authorized is a question of fact to be determined by the orders under which the assignment is made, the character of the service and the circumstances under which it is performed. 24 Comp. Gen. 667, 670. While an administrative evaluation of the character of the assignment, as reflected in the orders directing its performance, ordinarily is given considerable weight in such a determination, it is not conclusive in the matter when other available evidence is considered sufficient to indicate the existence of a contrary factual situation. B–139112, May 27, 1959.

As indicated above, you state that it was the intent of the order issuing authority to order the member to temporary active duty for a period in excess of 20 weeks. However, you say that at the time his orders of March 29, 1968, were issued there was no authority to order him to temporary active duty for a period extending beyond June 30, 1968.

In a third endorsement of September 5, 1968, from the Commander, Naval Reserve Training Command, to the Chief of Naval Personnel, it was explained that the orders of March 29, 1968, were issued only for 63 days of temporary active duty on the basis of a letter of May 10, 1967, to the Commandant, Eighth Naval District, authorizing temporary active duty billets for two officers and fifty-seven enlisted men in support of Naval Reserve recruiting during the fiscal year 1968, the authorization for fiscal year 1969 not having been issued at that time.

An authorization of the same number of active duty billets for fiscal year 1969, however, was contained in a letter of April 1, 1968, to the Commandant, Eighth Naval District. That official has reported that it clearly was the intent to retain YNC Lewis on active duty for not less than 140 days when the orders of March 29, 1968, were issued.

Since the Commandant, Eighth Naval District, was notified by the above-mentioned letter of April 1, 1968, of the temporary active duty billets authorized for fiscal year 1969—the same number as for fiscal year 1968—before Lewis reported for duty on April 29, 1968, it would appear that his orders should have been modified before he reported for active duty to provide for a period of not less than 140 days, as intended, rather than issuing separate orders for a further period of active duty after a 1-day break in active service. Thus, Lewis' additional active duty under his orders of June 14, 1968, effective July 2, 1968, did not arise from circumstances not foreseen at the time he reported for duty on April 29, but was merely an assignment to further active duty under the same circumstances, as originally intended. *Cf.* 37 Comp. Gen. 637.

In these circumstances and since it is clear that in Chief Lewis' case the assignment was intended to be for a period in excess of 20 weeks when he reported for duty and that orders properly should have been issued to accomplish this, it is our view that in his case and the other similar cases, the periods of duty authorized by the separate sets of orders should be considered as one continuous period in determining entitlement to per diem and mileage allowance.

Accordingly, your question is answered in the negative.

[B-166382]

Contracts—Specifications—Descriptive Literature—Purpose

The requirement for the inclusion of drawings and descriptive data in bids on dehumidifiers without defining its purpose and effect and without stating noncompliance would preclude bid consideration, and which had as its purpose determining whether the product offered will conceivably meet the specifications and to generally establish what the bidder proposed to furnish, is a requirement directed toward determining the responsibility of a bidder rather than the responsiveness of the bid and there is no valid basis for rejecting the low bid solely for failure to submit drawings and data. However, if an acceptable product cannot be procured without descriptive literature indicating exactly what the bidder proposes to furnish, the invitation should be canceled and reissued in compliance with section 1–2.202–5 of the Federal Procurement Regulations.

To the Administrator, Maritime Administration, April 8, 1969:

Reference is made to a protest by Electro Impulse Laboratory, Inc., to the proposed rejection of its low bid under Invitation for Bids No. BI–MA69–7, covering a quantity of dehumidifiers conforming to Maritime Administration Specification No. RF–MA–4.

In a letter dated March 6, 1969, your Assistant Administrator for Administration has advised that four bids were received in this procurement and that the low bidder and one other failed to submit with their bids preliminary drawings and other descriptive data outlined in the specifications.

The pertinent provisions of the Specifications are:

D. REQUIREMENTS WITH BID

D–1. *PRELIMINARY DRAWINGS.* Each bidder shall submit with his bid two (2) copies each of a drawing or drawings which show:

(a) Plan, elevation and side views of each unit complete with approximate overall dimensions and weight;

(b) General arrangement and approximate dimensions of component parts of each unit;

(c) General details of the manner in which the desiccant will be set up within the unit to dry the entering air and in turn, to be dried itself by the reactivation air;

(d) Wiring diagram, air flow schematic, and description of all controls:

(e) Size and location of discharge and inlet openings;

(f) Calculations of the amount of air to be handled by the unit's blowers (CFM) to produce the required moisture removing capacity of the unit (Subsection B–3). Or in lieu thereof, two copies each of performance data sheets which validate the volume regularly used by the contractor to obtain the given MRC:

(g) The identification symbol of the Invitation to Bid and the size of the unit (Subsection B–2) to which the drawing applies.

In addition to the above, each bidder shall furnish a statement which covers two (2) features of the unit he proposes to furnish:

(1) The actual water removal rate and corresponding amount of air (CFM) which the unit will deliver at its rated back pressure measured in inches of water at the unit's inside air outlet;

(2) The actual energy consumption of the unit under the conditions noted in Subsection B–4, plus a curve which shows energy consumption per pounds of water absorbed for intermediate dry bulb conditions (between 30° F. and 70° F.) of entering air at 35% R.H.

Your report of March 6 takes the position that the dehumidification machinery involved here is a highly specialized piece of equipment and that the required data "is necessary to determine, before award, whether the product offered will conceivably meet the specification requirements and to generally establish what the bidder proposes to furnish." Accordingly, it is proposed that the low bid be rejected as nonresponsive to the invitation.

It is the protestor's position that the supporting literature is required merely to establish technical capabilities and in view of the complete technical specifications which were a part of this invitation the drawings and design information are unnecessary to establish what is being offered.

We have recognized that in procuring highly specialized equipment an administrative agency may require bidders to supply specific descriptive data on specific components of items being procured to enable it to conclude *precisely* what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. 36 Comp. Gen. 415 and B–158740, May 3, 1966. However, from the earliest stages of the development of the present day usage of descriptive data requirements we have taken the position that, if such information must be submitted with the bid, the invitation should define the purpose and effect of the requirement, including the effect to be given to the required data in evaluation of bids and the extent to which it will be embodied in the contract; should contain an affirmative statement to the effect that such material must describe items which would be in strict compliance with the specifications; and should declare that a failure to submit such material with the bid would preclude its consideration. 36 Comp. Gen. 376.

In December 1960, the substance of our views was incorporated in the Federal Procurement Regulations (FPR) at section 1–2.202–5(b), (c), and (d), which provide in pertinent part:

(b) Policy. Bidders shall not be required to furnish descriptive literature as a part of their bids unless the contracting agency deems that such literature is needed to enable it to determine before award whether the products offered meet the specification requirements of the invitation for bids and to establish exactly what the bidder proposes to furnish. It may be appropriate to require descriptive literature in the procurement of highly technical or specialized equipment, or where considerations such as design or style are important in determining acceptability of the product.

(c) Justification. The reasons why acceptable products cannot be procured without the submission of descriptive literature shall be set forth and filed in the case file, except where such submission is required by the formal specifications (Federal, military, departmental, etc.) applicable to the procurement.

(d) Requirements of invitation for bids. When descriptive literature is required, the invitation for bids shall clearly state what descriptive literature is to be furnished, the purpose for which it is required, the extent to which it will be considered in the evaluation of bids, and the rules which will apply if a bidder fails to furnish it before bid opening or if the literature furnished does not comply with the requirements of the invitation for bids. Where descriptive literature is not considered necessary and a waiver of the literature requirements of a specification has been authorized, a statement shall be included in the invitation for bids that notwithstanding the requirements of the specifications, descriptive literature will not be required.

(1) Except as provided in (d)(2) of this section, if bidders are to furnish descriptive literature as a part of their bids, a provision substantially as follows (modified, if appropriate, in accordance with (e)(1) of this section) shall be included in the invitation for bids:

REQUIREMENT FOR DESCRIPTIVE LITERATURE

(a) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to /* /.

* Contracting officer shall insert significant elements such as design, materials, components, or performance characteristics, or methods of manufacture, construction, assembly, or operation, as appropriate.

(b) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid except that if the material is transmitted by mail and is received late, it may be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids.

The invitation in the present case contains neither the clause prescribed by the quoted regulation, nor any other provision complying in any substantial measure with the cited regulation and our recommendation in 36 Comp. Gen. 376. Your report of March 6, however, takes the position that in this case bidders should readily have understood the purpose and the reasons for requiring submission of the data with the bid, and you have cited our decision B–154320, August 5, 1964, in support of the proposition that the mandatory language of the specification clearly implies that the failure to comply will lead to rejection of bids.

While it does appear that in B-154320 the data provisions in the invitation employed mandatory language similar to that in the subject invitation, but otherwise failed to comply in any respect with the requirement in FPR 1-2.202-5(d), the conclusion reached therein was supported only by citation of cases which arose prior to the effective date of the applicable regulation, and there is nothing in that decision to indicate that the regulation was taken into consideration.

As indicated by the provisions of FPR 1-2.202-5(b) and (d), bidders should not be required to furnish descriptive literature with their bids unless it is necessary to know *exactly* what the bidder proposes to furnish, and whether the item which the bidder proposes to furnish will meet the specification requirements. It is our opinion that a provision in the invitiation which requires rejection of a bid which either fails to include such literature or which includes literature that describes an item which does not meet the specification requirements, can be justified only in a procurement where the description in the bidder's literature will operate to define or limit the bidder's obligation under a contract awarded to that bidder. The provisions of FPR 1-2.202-5(d) requiring invitations to state the purpose for which the literature is required, the extent to which it will be considered in evaluating bids, and the result of either furnishing literature which does not comply with invitation requirements, such as the specifications, or the result of failing to furnish such literature, are clearly directed to that end.

As noted above, your administrative report takes the position that the data referred to in this case was necessary to determine whether the product offered would "conceivably" meet the specification requirements and to "generally establish" what the bidder proposes to furnish. Such use would appear to be directed to determining the responsibility of the bidder, rather than the responsiveness of the bid to the specification requirements. Additionally, we note that Specification RF-MA-4 would appear to require that the successful bidder must comply with the specification requirements, rather than the preliminary drawings submitted with his bid, as indicated by the requirement in section C for postaward submission of detailed drawings, and the requirement in section G for submission and approval of a preproduction sample which conforms to every requirement of the specification. In view thereof, it is our opinion the record presents no valid basis for rejecting bids solely for failure to submit preliminary drawings with the bid.

If upon further analysis it is believed that an acceptable product could not be procured without descriptive literature indicating exactly what the bidder proposes to furnish, as opposed to the general justification given in your report, cancellation of the invitation and resolicitation under an invitation which complies fully with FPR 1-2.202-5 would be in order. Otherwise, the low bid of Electro Impulse must be considered for award if otherwise proper.

Electro Impulse is being furnished a copy of this decision.

The documents forwarded with your letter of March 6 are returned.

[B-165084, B-165691]

Contracts—Negotiation—Competition—Discussion With All Offerors Requirement

Action permitting a reduction in price and waiver of first article testing on the basis of previous product acceptability which made the high offer low under an amended request for proposals issued pursuant to the public exigency authority of 10 U.S.C. 2304(a)(2) in order to evaluate the two offers received on a common basis of first article testing is not "clarification" of the offer but negotiation that is not within the exceptions to discussion with all offerors contemplated by paragraph 3-805.1(a)(v) of the Armed Services Procurement Regulation and 10 U.S.C. 2304(g). Although further negotiation was required with the low offeror under the amended proposal, notwithstanding that because of satisfying the first article testing requirement, the offeror possibly would not meet price reduction and delivery schedule, cancellation of the contract is not required due to the advanced stage of production.

Contracts—Negotiation—Sole Source Basis—Additional Procurement

The sole-source procurement and award of a letter contract for additional requirements to the contractor awarded the initial procurement under the public exigency authority of 10 U.S.C. 2304(a)(2) was not an unreasonable exercise of the contractor's discretionary authority to determine the extent of negotiation in view of the emergency status of the procurement and the fact the only other offeror under the initial request for proposals would need time to comply with the first article testing requirement. However, in the future in order to determine the possibility of procurement by competitive negotiation, elements of an anticipated delivery schedule should be formulated with more precision.

To the Burtek, Inc., April 11, 1969:

Reference is made to your telegram of August 19, 1968, and subsequent correspondence in which you protested against awards made to Link Group, General Precision Systems, Inc., Binghamton, New York, pursuant to request for proposals (RFP) No. F33657-68-R-0749 and proposed letter contract F33657-69-C-0471, issued by the Aeronautical Systems Division (ASD), Wright-Patterson Air Force Base, Ohio.

The RFP was promulgated on March 18, 1968, pursuant to Determinations and Findings which cited the public exigency exception listed in 10 U.S.C. 2304(a)(2) as justifying negotiation of a requirement for five Instrument Flight Trainers, Type A/F 37A-T-26A, utilizing solid state amplifiers in lieu of the traditional tube-type amplifiers specified under prior procurements of the T-26A trainers.

The RFP provided for submitting offers on either Bid "A" (first article test required) or Bid "B" (first article test not required) and called for delivery of all items within 330 days after receipt of notice of award on either basis. Link submitted a price of $1,094,250 on the basis of Bid "A," which was nearly $99,000 higher than Burtek's quotation of $995,455 on Bid "B." Since Burtek had never delivered the T–26A trainers in the solid state amplifier configuration, the procuring activity considered it improper to consider its offer under Bid "B," and amended the RFP to provide a common basis of evaluation by requiring all proposals to be based upon first article testing.

The quotations received from Link and Burtek on May 16, 1968, under the amended RFP were $1,094,177 and $963,586, respectively. A Preaward Survey (PAS) was then conducted from June 24 through June 28, 1968, on Burtek, Inc., by two representatives of the Defense Contract Administration Services Office (DCASO) from Oklahoma City, augmented by four ASD technical personnel conversant in the fields of microelectronics and production. The addition of these personnel was deemed necessary due to the requirement for the solid state configuration in the amplifiers which Burtek had never produced. The survey report furnished the contracting officer by DCASO was favorable as to Burtek's capability of meeting the requirements of the schedule, and concluded with a recommendation for award to Burtek. All four of the members of the ASD team, however, submitted negative reports to the contracting officer in which they questioned Burtek's capability of delivering the trainers in accord with the schedule requirements, for the reason that they were not satisfied with Burtek's ability to accomplish the design of the solid state amplifiers within the time proposed.

On the basis of these latter reports, the buying office prepared a Certificate of Non-Responsibility, notwithstanding the DCASO recommendation, and a Certificate of Urgency. These certificates appear to have been prepared on July 12, 1968, but neither was ever executed. At the same time, and apparently for the first time, ASD took note of Link's suggestion contained in its first quotation that the requirements for first article testing, and for reliability and maintainability testing, under the subject RFP could be deleted if approval of identical trainers produced by Link under an existing contract (F33657–67–C–1676) was obtained. The contracting officer thereupon proceeded on July 18, 1968, to request "clarification" from Link concerning the price impact of the deletion of these requirements, since it was informed that this approval has been granted under contract No. F33657–67–C–1676. On July 22, 1968, Link submitted a new quotation of $961,810, reflecting the impact of removing the requirement for first article testing, and the maintainability and reliability testing, and on August 16, 1968, an award was made to Link on the basis of the Company's July 22 quotation, with those requirements of the amended RFP deleted. A sole-source award for 10 additional T-26A flight trainers with the solid state configuration was made to Link on October 10, 1968, under proposed letter contract F33657-69-C-0471, issued pursuant to Determination and Findings citing the requirement's Priority Designator 03 under the Uniform Materiel Movement and Issue Priority System as justifying negotiation of the procurement of the aircraft under 10 U.S.C. 2304(a)(2).

The contracting officer based the propriety of his August 16 award on Armed Services Procurement Regulation (ASPR) 3-805.1(a)(v), quoted as follows:

3-805 SELECTION OF OFFERORS FOR NEGOTIATION AND AWARD.
3-805.1 GENERAL

(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors (including technical quality where technical proposals are requested) considered, *except* that this requirement need not necessarily be applied to:

* * * * * * *

(v) procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. (Provided, however, that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. *In any case where there is uncertainty as to the pricing or technical* aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. Also, when the proposal most advantageous to the Government involves a material departure from the stated requirements, consideration shall be given to offering the other firms which submitted proposals an opportunity to submit new proposals on a technical basis which is comparable to that of the most advantageous proposal, provided that this can be done without revealing to the other firms any information which is entitled to protection under 3-507.1. Paragraph 10(g) of the Solicitation Instructions and conditions (Standard Form 33A) advises offerors that the most favorable initial proposal may be accepted without discussion. [Italic supplied.]

Apparently the contracting officer considered Link to be the lowest *responsible* offeror at the time "clarification" of its proposal was obtained, since the Air Force advised us the nonresponsibility of Burtek had been established preparatory to the override of the positive Pre-Award Survey (PAS) issued by DCASO, and acted on the basis that he was making an award under the "without discussion" provision of ASPR 3-805.1(a)(v), after admittedly conducting a discussion with Link.

After you were furnished a copy of the December 3 Air Force report, you submitted additional comments on your protest which formed the basis of our formal requests, dated December 17, 1968, and January 9, 1969, to the Secretary of the Air Force for supplemental information in the matter. On February 18, 1969, the Air Force advised us that although no formal written determination of Burtek's alleged nonresponsibility had ever been prepared, as required by ASPR 1.904-1, this defect was considered negligible since the contracting officer was able to award to Link on the basis of price alone.

Further inquiries submitted to the Air Force as a result of conferences we held with representatives of your company on February 25 and the Air Force on the succeeding day elicited the following replies:

(1) On February 28, the Air Force advised us that it considered the contracting officer's "clarification" with Link, concerning the price effect of a waiver of first article, reliability and maintainability testing requirements, to be proper, because Burtek was not eligible for waver of the requirement, but it believed the resultant Link price reduction was excessive and that it would have been more consistent with the regulations to have given Burtek an opportunity to reduce its price.

(2) The reliability and maintainability testing requirements for the aircraft and the amplifier could not be considered as severable, and therefore the testing requirements for the trainer could not be waived even though Burtek had successfully completed such a program for trainers utilizing the vacuum tube amplifiers.

Your objections to the decisions described above are briefly summarized as follows:

(1) The Department's clarification of Link's bid constituted negotiation, and therefore, the provisions of ASPR 3-805.1(a), quoted above, and 10 U.S.C. 2304(g), quoted below, required that the Air Force also conduct discussions with your company:

> (g) In all negotiated procurements in excess of $2,500 in which rates or prices are not fixed by law or regulation and in which time of delivery will permit, proposals shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered: Provided, however, That the requirements of this subsection with respect to written or oral discussions need not be applied to procurements in implementation of authorized set-aside programs or to procurements where it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product that acceptance of an initial proposal without discussion would result in fair and reasonable prices and where the request for proposals notifies all offerors of the possibility that award may be made without discussion.

(2) The decision of the contracting officer to waive the first article and reliability and maintainability programs with respect to Link's amended proposal constituted a substantial change in the Government's requirements and therefore should have been the basis of an

amendment to the RFP in accord with ASPR 3–805.1(e), quoted as follows:

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

(3) The Department's citation of ASPR 3–805.1(a)(v) as justification for its award is improper as the section contemplates award to the company having submitted the most favorable initial proposal, and your initial proposal, not Link's, was most favorable to the Government:

When proposals were received on May 16, 1968, in response to the subject RFP, as amended, the cost of your proposal was nearly $130,000 lower than that proposed by Link, and since the Air Force has not forwarded any adverse data indicating your proposal was deficient in some other respect, it was obviously within the competitive price range of Link's offer. Accordingly, ASPR 3–805.1(a) required the Department to conduct discussions (i.e., negotiate) with you, unless your company was considered nonresponsible, or unless one of the exceptions to this requirement listed in ASPR 3–805.1(a) (i through v) could properly be employed. Although the contracting officer appeared to be convinced that your firm lacked the capacity to deliver the requirement in accord with the 10-month delivery schedule, notwithstanding the positive PAS certified by (DCASO), Oklahoma City, so as to render your company nonresponsible, he never documented such a determination as required by ASPR 1–904.1, nor did he refer this determination to the Small Business Administration (SBA), in accordance with ASPR 1–705.4(c) because of your small business status. Consequently your concern could not have been considered nonresponsible for the purposes of this procurement at the time "clarification" was obtained from Link.

In these circumstances we cannot agree with the Air Force position that the exception listed in ASPR 3–805.1(a)(v), justifies the action taken. In this regard we have maintained that 10 U.S.C. 2304(g) operates only to permit acceptance of a proposal exactly as it was initially received, and cannot be relied upon as justification for conducting discussions with only one offeror where other offers within a competitive range, price and other factors considered, were received. 46 Comp. Gen. 191; B–158528, April 26, 1967. In this context the price of Link's proposal as initially received was considerably in excess of the price of your proposal and could not be considered most favorable to the Government, and the "clarification" requested by the Air Force from Link, thereafter, which resulted in a price reduction of nearly $140,000, clearly constituted "negotiation." 45 Comp. Gen. 417, 427; 47 *id.* 252, 262. Since Link's proposal was not the most favorable proposal received, it therefore was not within the exception to the written or oral discussion requirement of 10 U.S.C. 2304(g). As accepted, the Link proposal differed from the proposal submitted both in price and in deleting the first article testing, which was specifically required by the RFP on which proposals were submitted.

With respect to your contention that the RFP should have been amended pursuant to ASPR 3–805.1(e) in view of the Link "clarification" to indicate that offers would be accepted on the basis of first article and reliability testing originally required, we believe that, while such action would have been proper, it was not necessary if this information had been furnished to you by the Air Force during an appropriate discussion conducted pursuant to ASPR 3–805.1(a). In any event we do not believe it was proper to make award to Link on the basis of this modification without notice to you that Link was being offered an opportunity to bid on the basis of such modification, and without giving you an opportunity to modify your bid price in the light of such knowledge, notwithstanding that you may not have been eligible to submit a new price based upon waiver of first article testing or maintainability and reliability testing. B–166072(2), March 27, 1969; 47 Comp. Gen. 778, June 25, 1968.

Because of the advanced status of production under the August 16 award to Link, we feel that it would not be in the interest of the Government to cancel the contract; however, we are advising the Secretary of the Air Force of our views as to the improprieties discussed above.

With respect to the additional requirement of 10 T–26A trainers awarded to Link under letter contract F33657–69–C–0471, pursuant to a determination that the public exigency would not permit the delay incident to advertising, the contracting officer has advised us that the September 1969 required delivery date of the first installment of the trainers did not allow sufficient time to obtain the items in a competitively negotiated procurement. At the time the Determinations and Findings to negotiate noncompetitively were composed in September 1968 the estimated time for delivery under a competitive procurement was considered to be 15 months, or 3 months later than the September 1969 due date, as follows: (1) 5 to 6 months administrative leadtime; (2) plus 8 months (or longer) for first article approval from a producer having a successful background experience in solid state development and production. (Your company, not having this experience, would require a still longer period of time.) (3) 2 additional months before delivery of the first two trainers.

You have cited several of our opinions to the effect that, while the public exigency justification gives a contracting officer a wide range of discretion in determining the extent of negotiation, the contracting officer's exercise of that discretion is subject to our review to ascertain whether the selected basis is reasonable. 44 Comp. Gen. 590. You maintain that unless credence is given to the 5 or 6 month administrative leadtime requirement cited by the Air Force, we should hold the contracting officer's decision to conduct negotiations with Link on a sole-source basis as unreasonable. You contend that a leadtime of this duration would not have been involved if ASD had requested a proposal from your concern in addition to the one obtained from Link, since you were familiar with all procurement requirements.

Apparently, the 5 or 6 month administrative leadtime estimate was based on the 6 month period it took to effect an award under RFP F33657-68-R-0749. This judgment is based on information contained in a letter dated February 26, 1969, from Colonel William J. Tipton, quoted as follows:

> The prior procurement for these trainers which was competed took approximately six (6) months before the award was made. The contracting officer, mindful of the delays incurred in the prior procurement, estimated that it would take between five (5) and six (6) months to accomplish a competitive procurement for the new requirement.

Although we believe the actual administrative leadtime incurred in a competitive procurement involving only your concern and Link would probably have been considerably less than the 6-month estimate suggested, in view of the possibility that additional discussions with the offerors would have been necessary before a contract could have been consummated with either concern we cannot maintain that a competitively negotiated procurement of this sort would not have taken any more time than that involved in a sole-source award. We are also aware that the Department failed to specify the "considerably longer period" for first article approval that your concern would allegedly need in excess of the 8-month approval period estimated for concerns having successful background experience in the solid state field. Apparently, this estimate was based on reports submitted by ASD technical personnel who participated in the preaward survey of your concern. In view thereof, and in view of the considerable range of discretion vested in contracting officers and the urgency status of the procurement, we do not feel that your statement that you could have delivered the trainers within the 10-month time limitation as indicated by the Oklahoma City DCASO team can be considered an adequate basis for objecting to the letter contract award.

Since we cannot hold that you would have been able to meet the required delivery schedule under a competitively negotiated procurement initiated in September or October of 1968, we believe the instant case is distinguishable from the circumstances present in 46 Comp. Gen. 651 (February 6, 1967) in which we held that a sole-source procurement, which was effected upon cancellation of an invitation for bids because of the need for accelerated delivery and awarded to other than the lowest bidder under the canceled IFB, was improper where the lowest bidder could have met the same delivery schedule eventually agreed upon in the sole-source award. We are advising the Secretary of the Air Force, however, that the contracting officer should be requested to formulate the elements of an anticipated delivery schedule with more precision in future urgent procurements in order to be certain that a given procurement could not be competitively negotiated.

[B-166350]

Fees—Bank Drafts, Money Orders, Etc.—Use of Collection Proceeds

The use of collection proceeds to cover the cost of fees for money orders or bank drafts prior to mailing the balance of the collection to depositories with an appropriate accounting adjustment as an optional method to an employee paying the fee from his personal funds and obtaining reimbursement from the appropriation will not contravene the requirements of 31 U.S.C. 484 that the gross amount of moneys received on behalf of the United States must be covered into the Treasury as miscellaneous receipts. The proposed procedure under which the cost of fees for money orders and bank drafts would be charged to the proper appropriation without diminishing the gross amounts ultimately deposited in the Treasury may be adopted after detailed accounting procedures have been developed and approved for promptly effecting the necessary accounting adjustments.

To the Secretary of Agriculture, April 16, 1969:

Reference is made to letter dated March 5, 1969, from your Assistant Secretary for Administration in which, as an optional procedure, it is proposed to utilize from the proceeds of collections amounts sufficient to cover the costs of fees for money orders or bank drafts prior to mailing the balance of the collections to depositories. The proposal contemplates an accounting adjustment during the same accounting period, which would charge available appropriations with the costs of the fees and credit the receipt accounts which otherwise would have been initialy credited with the amounts, including the amounts of those fees.

It is stated that the Department has over 8,000 collection officers who receive funds from various sources for repayment of loans, use of recreation areas, sale of forest products, etc. Many of the collection officers are not located near a Federal Depository and must use mail service to transmit collections.

Before mailing these collections, cash receipts must be converted to a postal money order or a bank draft. Departmental instructions based upon 31 U.S.C. 484 provide that fees charged for these instruments cannot be paid from cash receipts. The employee is required to pay such fees from his personal funds and obtain reimbursement from appropriations.

Because of the belief that employees, even though reimbursed, should not have to pay these fees from personal funds, and because economies in accounting operations could be accomplished, you would like to use the procedure as set out in the first paragraph of this decision as an optional procedure for use by your agencies. The letter states that the result of these transactions would be identical to that of the present procedure where the full amount of receipts are initially deposited in a depository and the employee reimbursed from appropriation accounts for fees paid from personal funds. Your question is whether the proposed procedure meets the requirements of 31 U.S.C. 484.

Section 3617 of the Revised Statutes which has been codified as 31 U.S.C. 484 provides:

> The gross amount of all moneys received from whatever source for the use of the United States, except as otherwise provided in section 487 of this title, shall be paid by the officer or agent receiving the same into the Treasury, at as early a day as practicable, without any abatement or deduction on account of salary, fees, costs, charges, expenses, or claim of any description whatever. But nothing herein shall affect any provision relating to the revenues of the Post Office Department.

The accounting officers of the Government have consistently held that, in the absence of express statutory authority to the contrary, the provisions of that section require that the gross amount of moneys received by an officer on behalf of the United States be covered into the Treasury as miscellaneous receipts. See 45 Comp. Gen. 27; 27*id.* 422; 23*id.* 564.

Your proposed optional procedure would result in charging the cost of the fees for money orders and bank drafts to the appropriation Congress has provided for the purpose and would not result in diminishing the gross amounts ultimately deposited into the Treasury. Accordingly we have no objection to its adoption after detailed accounting procedures for promptly effecting the necessary accounting adjustments have been developed and have been found mutually satisfactory to your accountants and to the representatives of the General Accounting Office. *Cf.* 15 Comp. Gen. 993.

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[B-165573]

Contracts—Modification—Facilitation of Defense Effort—Review Jurisdiction of General Accounting Office

Although a denial of relief under the authority to amend or modify contracts to facilitate the national defense (50 U.S.C. 1431–1435) is not subject to review, the suspicion of a mistake in the only offer made under a request for proposals in response to urging by the procurement office that was more than 50 percent less than the Government's estimate and which the contracting officer failed to verify in accordance with paragraph 2–406 of the Armed Services Procurement Regulation but accepted on the basis of the conjectural manufacturing process guessed at by the Government engineer is a factual finding that is not final in connection with any other form of relief, and the contractor is entitled to a price adjustment based on an audit of actual contract costs, absent proof of what the offer would have been but for the error.

To the Secretary of the Army, April 17, 1969:

Reference is made to a letter, with enclosures, dated November 19, 1968, AMCGC–B, from Headquarters, United States Army Materiel Command, in response to our letter to you of November 13, 1968, requesting a report relative to the claim of the Hamilton Watch Company, Lancaster, Pennsylvania, for an increase in price under contract No. DA–360–38–AMC–3099A, based on a mistake in bid alleged after award.

The claim in question was previously considered by the Army Munitions Command, Frankford Arsenal, on August 30, 1968, under Public Law 85–804, approved August 28, 1958, 50 U.S.C. 1431–1435, which authorizes amendment or modification of contract to facilitate the national defense. While denials of claims under that statute are not subject to review by this Office so far as entitlement to the relief authorized by the statute is concerned, factual findings made in the course of considering such claims are not endowed by any contractual or statutory provision with any attribute of finality which would require them to be considered as binding in connection with the consideration of any other form of remedy, and we therefore may consider the claim as we would any other claim based upon alleged mistake in bid.

The contract involved was awarded on a proposal submitted by Hamilton in response to Request for Proposal (RFP) AMC(A) 36038–66–100(AON), issued by Frankford Arsenal on August 4, 1965, which invited prices for a requirements contract for the production of up to 840,000 Reduction Gears (Item 1) and 210,000 Pinion Shaft Gears (Item 2). The original RFP provided for a deadline of August 26, 1965, for the submission of proposals. In a letter of August 9, 1965, Hamilton replied to this request, "We regret that we will be unable to provide a quotation for the referenced request."

As has been found, and these facts are not in dispute here, on the date set for receipt of proposals none of the companies, including Hamilton, had submitted proposals. The components described in the proposal were urgently needed by Frankford Arsenal to meet its production requirements. On August 23, 1965, the negotiator, by telephone, urged Hamilton to reconsider its prior "no bid" response and to submit an immediate proposal. In order to accommodate the procurement office a proposal was submitted by Hamilton, the only offeror, on August 25, 1965. The amount of its bid was $.025 each for the Reduction Gears (Item 1) and $.042 each for the Pinion Shaft Gears (Item 2). Prior to the solicitation of quotations an independent Government estimate of $.06 for Item 1 and $.10 for Item 2 was furnished to the contracting officer by a Government technical representative. The Government negotiator, having noted that Hamilton's prices were more than 50 percent below the Government estimate, referred the matter to the Government engineer who had earlier made the independent estimate for his consideration and recommendation, and, according to the findings made by the Army Munitions Command, "to reconsider his independent government estimate." At paragraph 12 of those findings, it is stated:

> Upon reviewing the figures the Government engineer advised that he had no prior personal experience with the type of gear being purchased. He advised that his estimate was based upon a multi-operation manufacture. He informed the contracting officer that the gear in question was a clock type gear and apparently the Hamilton engineers who estimated the proposal believed the gear could be blanked out in a one-step automatic stamping machine operation. He further advised that his experience, compared to Hamilton engineers involved in gear manufacture, was such that his independent estimate should be ignored. He advised that based upon a blanking operation the price offered by Hamilton was reasonable.

Based upon the foregoing advice, the contracting officer awarded the contract to Hamilton on September 9, 1965, without requesting a confirmation of price, and immediately placed delivery order No. 1, covering 243,000 Reduction Gears and 61,000 Pinion Shaft Gears for a total price of $9,637, including the cost of initial setup.

Hamilton itself has categorically and unequivocally denied that its proposal was based upon such a one-step stamping operation as suggested by the contracting officer's advisor. Its specific allegations of error are perhaps best summarized, in nontechnical terms, in its counsel's letter to our Office of November 4, 1968, where it is stated:

> As a result of the haste involved, and of having to by-pass standard review procedures, Hamilton's methods engineer made several basic mistakes, including a failure to price certain work items and a gross underestimation of the requirements of others. His largest and most fundamental mistake was in failing to include in the bid the cost of burr removal operations.
>
> Hamilton produces the gears involved in these contracts by first automatically stamping out flat blanks, having the appearance of an ordinary washer. Those blanks are then stacked on arbors, so that the gear teeth on the outside circum-

ference of several blanks can be cut or hobbed at the same time. The stamping process of such thick material leaves burrs, which have to be removed by secondary operations such as grinding and tumbling. None of those secondary burr removal operations, which are described in earlier correspondence attached, were included in Hamilton's bid, due wholly to the oversight of the methods engineer who prepared it.

In addition, the bid failed to include the stacking operation, even though this was specified in the methods proposal. It also failed to make allowance for the additional inspection required by the contract and it substantially underestimated the cost of necessary materials due to the lack of time to obtain a firm quote from prospective suppliers. These mistakes and the cost attributable to them are also set forth in detail in the attached correspondence.

Each of these mistakes or omissions was the direct result of the previously mentioned lack of time to prepare the bid in accordance with Hamilton's standard practices. They are the mistakes which we are confident would have been quickly discovered if a request for verification had been received.

These mistakes made in the preparation of Hamilton's bid were brought to the attention of Hamilton's management by its technical personnel at about the time delivery order No. 1 was completed. Hamilton immediately advised Frankford Arsenal that a mistake had been made in its bid and that it was sustaining extreme financial hardship in performing the contract. A meeting was held at the Arsenal of June 7, 1966, at which time Frankford first informed Hamilton that its bid was the only one received and that its price was only one-half of the Government estimate. When Hamilton requested that its contract price be increased, the contracting officer advised Hamilton that it could file a claim for contract adjustment and that until such time as an adjustment was made it would have to complete the contract at the original price. As instructed, contractor completed performance under the contract, completing deliveries under delivery orders Nos. 2, 3, and 4 in February 1967.

On April 25, 1967, the contractor presented its formal request for relief under Public Law 85–804, in accordance with section 17-204.3 of the Armed Services Procurement Regulation (ASPR). Hamilton's claim, and its present request, is that the contract price be reformed or adjusted to pay to it an additional $53,147.31, which sum represents contractor's costs omitted by the mistake in its bid, plus 10 percent profit, less the amounts already paid or payable. This sum is also the additional amount contractor would have been paid under this contract if its prices under this contract had been the same as its prices under a contract (DAAA25–67–C0564) later negotiated with it by the Arsenal for significant quantities of the same gears in March 1967, on a sole source basis, the prices for Items 1 and 2 being $.078 and $.083 respectively. It should also be noted that a Government technical evaluation was made of the two items on October 9, 1967, estimating the cost of the items if produced at Frankford. According to this study, the costs of the items would have been $.1205 and $.1339 respectively.

We have consistently held that the responsibility for preparation of a bid rests with the bidder. Therefore, a bidder who makes a mistake in a bid which has been accepted in good faith by the Government must bear the consequences unless the mistake was mutual or the contracting officer had either actual or constructive notice of the mistake prior to award. 17 Comp. Gen. 373 and 532; 20 *id.* 652; 23 *id.* 596. It is equally well established, however, that if a material mistake is made by one party to a contract and the mistake is known by the other party, or because of accompanying circumstances the other party had reason to know of the mistake, the latter party has no right to take advantage of the mistake and the party making the mistake has the right to rescission and restitution. See *C. N. Monroe Manufacturing Company* v. *United States*, 143 F. Supp. 449, 451; *Union Painting Company* v. *United States*, 198 F. Supp. 282; *United States* v. *Metro Novelty Manufacturing Company*, 125 F. Supp. 713. See also 44 Comp. Gen. 383, 386.

We are satisfied from the record before us that Hamilton made an error in its proposal as alleged. The contracting officer himself apparently concedes this, and has stated, in effect, that the error was due to the accelerated manner in which the Government requested a proposal from Hamilton and the haste in which Hamilton responded to the request for proposals. Specifically, he stated "It offered a proposal under Government pressure." He recommended that relief be granted to the contractor.

The task of ascertaining what an official in charge of accepting offers should have known or suspected is not always an easy one. However, the test here must be that of reasonableness, i.e., whether under the facts and circumstances of this case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer. The employment of such a test in this matter reveals that Hamilton's offer was more than 50 percent less than the Government's estimate, and the Government's estimator offered only a conjecture as to a possible basis for such a low bid. In these circumstances, even though only one bid was received, we believe that it was unreasonable for the contracting officer to assume that the bid must have been based on the process guessed at by the estimator; the definite possibility of error was still present, and we believe verification of the bid should have been requested before award. See B-157742, October 11, 1965.

Where, as in the instant case, the contracting officer has reason to suspect a mistake, he must take action necessary to reasonably remove any such suspicion. This principle has been explicitly embodied in section 2-406 of ASPR. Section 2-406.1 requires that:

After the opening of bids, contracting officers *shall* examine all bids for mistakes. In cases of apparent mistakes, and in cases where the contracting officer has reason to believe that a mistake *may* have been made, he *shall* request from the bidder a verification of the bid, calling attention to the suspected mistake. [Italic supplied.]

In the instant case it is our opinion that an after the fact Government estimate based on a speculative method of manufacture could not dispel the contracting officer's admitted initial suspicions of a mistake in Hamilton's bid or justify his failure to follow the ASPR requirement for verification. To rule otherwise would permit Government estimates to be rationalized away at any time a contractor made a substantial error, especially in a sole bidder situation, merely by evolving a possible hypothesis which might explain a lower bid.

Since we conclude that the contracting officer was chargeable with notice of Hamilton's error, it follows that Hamilton cannot legally be held to the contract price. In the absence of proof of what Hamilton's bid would have been in the absence of error, we believe that the amount of the adjustment is best determined by an audit of the actual costs under the contract. As bearing on their reasonableness, the estimate made of the cost of producing these two items at Frankford Arsenal is helpful. Also, as stated earlier, contract DAAA-25-67-C0654 was awarded to Hamilton in March 1967 on a sole source basis, the negotiated prices for these identical items being $.078 and $.083 respectively. Applying the prices under that contract to the number of items delivered under the instant contract would result in a price differential in excess of the claimed amount. In addition, Hamilton's claim was audited by the Defense Contract Audit Agency, as well as by the Arsenal, and in both instances the audit reports verified the cost figures submitted by Hamilton. There were earlier attempts made to compromise this matter, but since all such efforts proved fruitless, they have no bearing now as to the amount of the adjustment previously found to be reasonable.

Accordingly, we approve payment of the amount of $53,147.31, in addition to invoices we understand have not yet been paid in the sum of $2,103.68, as the balance due Hamilton as reasonable compensation for the articles delivered under the several purchase orders issued under the contract of September 9, 1965. Reference should be made to this decision in the voucher on which such payment is made.

[B-166032]

Leaves of Absence—Advances—Return to Duty Requirement

The advancement of annual leave to an employee missing at sea at least a month contravenes the rule that an employee may not be advanced annual or sick leave if it is known at the time of the advance that he will not return to duty. While it may not have been known for a certainty at the time of approving the advance of annual leave to the missing employee that he would return to duty, available information indicated his return was a remote possibility, and the court subsequently determining the employee was lost at sea, the presumption of life was conclusively rebutted and payment of salary for the period of annual leave advanced may not be certified.

To T. R. McVey, United States Department of Transportation, April 17, 1969:

We refer to your letter of February 14, 1969, your reference 24–21, which requests our views concerning the propriety of advancing annual leave to Mr. Russell A. Potter covering the period January 12 to 25, 1969.

Mr. Potter, an employee of the National Transportation Safety Board, Department of Transportation, was lost at sea while on a vacation cruise aboard the Lisa Ann II which departed Newport, Rhode Island, for St. Thomas, V.I., on or about December 2 or 3, 1968. The vessel failed to report for refueling at Bermuda on December 10 and has not since been heard from.

We held in our decision of February 11, 1969, 48 Comp. Gen. 527, that missing persons benefits would not be payable in Mr. Potter's case unless an administrative determination is made that the status otherwise giving rise to missing persons benefits was the proximate result of Mr. Potter's employment. While your letter does not so state we presume that no such administrative determination has been made in Mr. Potter's case.

As indicated above, Mr. Potter had been missing at sea for more than a month prior to January 12, 1969, the commencement of the period covered by the annual leave advance. While no positive evidence of Mr. Potter's death had been found, a body believed to have been the skipper of the Lisa Ann II, was located at a position approximately 550 miles ESE of Newport and 475 miles NE of Bermuda on January 6, 1969. Subsequently, the Coast Guard abandoned all further search for the missing vessel. Also, we understand that on April 3, 1969, the Corporation Court of Alexandria determined that as of December 5, 1968, the presumption of life in Mr. Potter's case was conclusively rebutted.

It long has been held that an employee may not be advanced annual or sick leave if it is *known* at the time that he will not return to duty. See 25 Comp. Gen. 874 and 23 *id.* 837. *Cf.* FPM Supplement 990–2 at page 630–9 (S2–5b).

While it may not have been known for a certainty that Mr. Potter would not return to duty at the time annual leave for the period January 12 to 25 was approved, the information available indicated that Mr. Potter's return was at best a remote possibility. In view thereof and of the court's determination in the matter we may not authorize the proposed advance of annual leave. Therefore, certification for payment of salary for the period covered thereby should be withheld.

[B-166452]

Uniforms—Civilian Personnel—Allowances—Term

An employee of the National Park Service who within 1 year after becoming eligible for and receiving full payment of the initial $60 annual uniform allowance provided for male maintenance nonsupervisory employees of the Service is promoted to a supervisory position in which an employee is allowed an annual uniform allowance of $125, if he was required to purchase a substantially different uniform he would be entitled to the $125 allowance from the date of promotion, nothwithstanding the year covered by the payment received had not expired, in view of the fact 5 U.S.C. 5901 and section 4c of the Bureau of the Budget Circular No. A-30 prescribing the $125 annual uniform allowance for supervisory employees contemplate that an employee will remain subject to substantially the same uniform requirements during the annual period to which the limitation applies.

To Harold P. Danz, United States Department of the Interior, April 17, 1969:

We refer to your letter of March 13, 1969, with enclosures, reference S94(WR)AF, requesting our advance decision whether a voucher covering payment of a uniform allowance in favor of Mr. Robert D. Lake, an employee of the National Park Service, Western Region, may be certified for payment.

You report that effective October 6, 1968, the National Park Service established a policy that all maintenance employees would be required to wear uniforms in the performance of their official duties. In connection with such policy administrative standards were prescribed providing for the payment of uniform allowances in accordance with the provisions of 5 U.S.C. 5901–5903 and Bureau of the Budget Circular No. A–30, Revised, August 20, 1966. Under the administrative standards all male maintenance employees in nonsupervisory positions are entitled to an initial uniform allowance of $60, and all employees in supervisory positions are entitled to an initial allowance of $125.

On October 6, 1968, the effective date of the policy, Mr. Lake occupied a nonsupervisory position and, accordingly, was paid an initial uniform allowance of $60 covering the 1-year period from October 6, 1968, to October 6, 1969. Such payment was made in accordance with section 6f of Bureau of the Budget Circular No. A-30, which authorizes payment of the full initial uniform allowance in advance of the year of service.

On January 26, 1969, Mr. Lake was promoted to a supervisory position and, thus, became eligible for the higher uniform allowance of $125 applicable to supervisory employees. In view thereof, Mr. Lake's employing office submitted a voucher requesting payment of an initial allowance of $125 to Mr. Lake covering the period January 26, 1969, to January 26, 1970. You report, however, that such voucher was certified for payment in the amount of only $65 since an amount in excess of $65, together with the $60 allowance previously paid to Mr. Lake, would have resulted in his receiving a total payment in excess of $125 for the 1-year period from October 6, 1968, to October 6, 1969.

In protesting the suspension of $60 from his voucher Mr. Lake points out that after his promotion on January 26, 1969, he no longer was able to wear the uniforms which he purchased with the original $60 uniform allowance. Since he was required to purchase completely new uniforms upon his promotion to the supervisory position, Mr. Lake believes that he is entitled to receive the full $125 allowance which initially is authorized for supervisory employees.

Section 5901 of Title 5, United States Code, authorizes an amount not to exceed $125 to be appropriated annually for each employee who is required by law or regulation to wear a prescribed uniform in the performance of his official duties. The head of the agency concerned is required to (1) furnish to each such employee uniforms at a cost not to exceed $125 a year, or (2) pay to each such employee an allowance for uniforms not to exceed $125 a year. The allowances are required to be paid in accordance with regulations promulgated by the Director of the Bureau of the Budget pursuant to 5 U.S.C. 5903.

In that regard section 4c of Bureau of the Budget Circular No. A-30 provides as follows:

Determining commencement of annual allowances or allotments. The annual period to which the limitation of $125 per employee applies shall begin with the date on which an employee first becomes eligible for a uniform or a uniform allowance under the Act.

The regulations contain no provision covering the case of an employee who within 1 year after becoming eligible for and receiving full payment of an initial uniform allowance is promoted or assigned to another position requiring a different uniform. However, we believe that both the statute and section 4c of the regulations, quoted above, must be construed as contemplating that the employee will remain subject to substantially the same uniform requirements during the annual period to which the $125 limitation applies. To hold otherwise would, in our opinion, constitute an unreasonable and illogical construction of the statute and regulations.

Therefore, in the present case we believe that for purposes of applying the annual limitation of $125 the employee may be regarded as having commenced a new 1-year period on the date (January 26, 1969) that he was promoted to the supervisory position and thereby became eligible for the uniform allowance applicable to supervisors. We emphasize, however, that the above ruling is predicated upon the fact that the employee here involved was required to purchase substantially different uniforms as a result of his promotion.

The voucher is returned herewith and may be certified for payment in accordance with the foregoing.

[B-165977]

Customs—Brokers Fees—Government Shipments

Although reimbursement of a $12 brokerage fee paid by an employee of the United States Forest Service to clear through customs a teledendrometer purchased from a foreign source by the Service may be made to the employee on the basis the Treasury Department, Bureau of Customs, procedure for clearing Government shipments from abroad through customs without incurring the expense of hiring outside customs brokers was misunderstood and the small amount of the fee involved, in the future the procedure of filing customs Form 3461—"Application and Special Permit for Immediate Delivery"—either on an individual or yearly basis, should be followed to clear Government shipments without the expense of using brokers, and any duty payable billed to the agency concerned.

To E. W. Milot, United States Department of Agriculture, April 21, 1969:

This refers to your letter of December 26, 1968, reference 6540, requesting an advance decision from our Office whether you may certify for payment a reclaim voucher for $12 in favor of Mr. Russell R. Reynolds, an employee of the Forest Service, covering reimbursement of a broker's fee paid by him from personal funds incident to having a teledendrometer purchased by the United States Forest Service cleared through the United States Customs at Dallas, Texas. The claim had been disallowed previously by Settlement Certificate of our Office dated October 16, 1967.

The information of record shows that the United States Forest Service, Timber Management Laboratory, Crossett, Arkansas, was notified by the Bureau of Customs that a mail shipment had been received from Sweden and was at the Dallas, Texas, customhouse. The Bureau of Customs advised the Forest Service that the notice, together with invoice and other related papers, should be presented at the customhouse, Dallas, Texas, after arrival of the shipment by the consignee or his duly authorized agent. The notice also stated that "If you are not familiar with customs requirements write or telephone the customs officer at the address indicated before proceeding to the customhouse." Mr. Reynolds, a project leader at Crossett, hired the Railway Express Agency, Inc., of Dallas as an agent to handle the shipment through customs on the basis of Bureau of Customs advice that "If it is not convenient for you to come to Dallas, there are four Customs brokers in this city who offer this service of clearing Customs shipments, for which they charge a fee." The Railway Express Agency charged $12 brokerage fee which Mr. Reynolds paid. Mr. Reynolds feels that the interest of the Government was better served by incurring an obligation of $12 to take care of entry of the shipment into the United States rather than to incur approximately $60 expenses for a Government employee to travel to the customs office in person.

Government departments and agencies having shipments from abroad should make arrangements to clear their shipments through United States Customs without incurring the expense of hiring outside customs brokers (non-Government employees). We have been advised by the Treasury Department, Bureau of Customs, that when a Government agency receives notice that a Government shipment such as here involved has arrived at the customhouse they should request a customs Form 3461 (Application and Special Permit for Immediate Delivery) from the collector of customs. The Form 3461 may be filled out on an individual or yearly basis upon compliance with the customs requirements. When the original customs Form 3461 is filed, we understand the collector of customs will furnish the agency the necessary instructions to follow. Upon receipt of the completed Form 3461 and the absence of other objection the collector of customs will then clear the shipment and if there is any duty payable a bill will be forwarded to the agency concerned. 19 CFR 8.28(c), 8.59. From the foregoing it would appear appropriate that the procedures outlined in the customs regulations should be followed in the future in similar situations in clearing Government shipments through the United States Customs. In that regard, see generally 19 CFR 8.6, 8.8, 8.15(c)(12), 9.4 and 10.103.

You indicate in your letter that authority exists under 28 Comp. Gen. 172 for payment of the claim. That decision involved the expenses of hiring customs brokers to clear shipments of an employee's household effects through *foreign* customs which are administratively approved as necessary and unavoidable expenses incident to the transportation of the effects. The shipment here in question neither consisted of an employee's household effects nor involved the clearance of such effects through *foreign* customs.

In this instance, however, in view of the misunderstanding as to applicable procedures and the small amount involved, the voucher, returned herewith, may be certified for payment if otherwise correct.

[B-166217]

Fees—Physicians—Court Appointed—Examine Narcotics Addicts

When a Federal court authorized to either appoint private physicians or use the Office of the Surgeon General of the Public Health Service, Department of Health, Education, and Welfare (HEW) to examine persons who are voluntarily committed as narcotics addicts under title III of the Narcotic Addict Rehabilitation Act of 1966 (42 U.S.C. 3411–3426), appoints and selects private physicians, the compensation of the court appointed private physicians is payable from the appropriation appearing in annual Judiciary acts under the heading "Travel and Miscellaneous Expenses," for although HEW bears the cost of examinations performed by regular or contract physicians of the Surgeon General's Office, their appropriations are not available for the payment of court selected private physicians over whom they have no control.

To the Attorney General, April 21, 1969:

Reference is made to letter dated February 13, 1969 (and enclosures), from the Director, Office of Budget and Accounts, Administrative Division, Department of Justice, requesting a decision as to what appropriation is available to pay physicians appointed by Federal courts to examine persons who may be voluntarily committed as narcotics addicts under title III of the Narcotic Addict Rehabilitation Act of 1966 (act), 80 Stat. 1444, 42 U.S.C. 3411–3426.

Enclosed with the Director's letter was a memorandum prepared by the Office of Legal Counsel setting forth your Department's views in the matter. We have also received and considered the views of the Department of Health, Education, and Welfare (HEW) and the Administrative Office of the United States Courts.

Each of the above mentioned Federal agencies has expressed the view that its appropriations are not available to pay private physicians appointed by Federal courts under title III of the above-cited act to examine persons who may be drug addicts. In your Department's memorandum it is pointed out that the act provides that the examining physicians shall be paid "out of such funds as may be provided by law," but that there is no suggestion in the act or its legislative history as to which agency's funds should be used for the purpose in question.

The administrative Office of the United States Courts appears to be of the view that HEW should bear the cost of the examination required by section 303 whether the examination is conducted by the Surgeon General or by court appointed private physicians. The Department of Justice expresses the view that while authority may be inferred from the appropriations for HEW and for the Administrative Office of the United States Courts, the latter agency's appropriation may be the better source of funds.

Title III of the Narcotic Addict Rehabilitation Act of 1966, relates to persons not charged with any offense who submit themselves (or are submitted by relatives) to Federal jurisdiction and request commitment for treatment of drug addiction. Section 303 of the act, 42 U.S.C. 3413, reads as follows:

The court shall immediately advise any patient appearing before it pursuant to an order issued under subsection (c) of section 3412 of his right to have (1) counsel at every stage of the judicial proceedings under this subchapter and that, if he is unable because of financial reasons to obtain counsel, the court will, at the patient's request, assign counsel to represent him; and (2) present for consultation during any examination conducted under this section, a qualified physician retained by such patient, but in no event shall such physician be entitled to participate in any such examination or in the making of any report required under this section with respect to such examination. *The court shall also advise such patient that if, after an examination and hearing as provided in this subchapter,* he is found to be a narcotic addict who is likely to be rehabilitated through treatment, he will be civilly committed to the Surgeon General for treatment; that he may not voluntarily withdraw from such treatment; that the treatment (including posthospitalization treatment and supervision) may last forty-two months; that during treatment he will be confined in an institution; that for a period of three years following his release from confinement he will be under the care and custody of the Surgeon General for treatment and supervision under a posthospitalization program established by the Surgeon General; and that should he fail or refuse to cooperate in such posthospitalization program or be determined by the Surgeon General to have relapsed to the use of narcotic drugs, he may be recommitted for additional confinement in an institution followed by additional posthospitalization treatment and supervision. *After so advising the patient, the court shall appoint two qualified physicians, one of whom shall be a psychiatrist, to examine the patient. For the purpose of the examination, the court may order the patient committed for such reasonable period as it shall determine, not to exceed thirty days, to the custody of the Surgeon General for confinement in a suitable hospital or other facility designated by the court.* Each physician appointed by the court shall, within such period so determined by the court, examine the patient and file with the court, a written report with respect to such examination. Each such report shall include a statement of the examining physician's conclusions as to whether the patient examined is a narcotic addict and is likely to be rehabilitated through treatment. Upon the filing of such reports, the patient so examined shall be returned to the court for such further proceedings as it may direct under this subchapter. Copies of such reports shall be made available to the patient and his counsel. [Italic supplied.]

In your Department's memorandum it is stated that the appointment of physicians to conduct examinations under title III is a matter for the particular Federal court. It is further stated that it is the court which decides whether to utilize the services of the Surgeon General to conduct the examination or to appoint private physicians for that purpose and that it is the court which—if it decides on private physicians—selects the private physicians. Thus, it appears that section 303 is interpreted as authorizing the court to utilize the facilities and physicians of the Surgeon General's Office (Public Health Service) of HEW for the purpose of conducting the examination required by section 303 or to appoint private physicians to conduct such examination. Also, we are advised that if physicians of the Surgeon General's Office are used to conduct the examination, HEW bears the cost thereof. However, as indicated above, in cases where the court appoints private physicians to conduct the required examination there is disagreement among the three agencies involved as to whose appropriations are available to pay the fees of the private physicians.

Section 313 of the act, 42 U.S.C. 3423, provides that:

Physicians appointed by the court to examine any person pursuant to this subchapter and counsel assigned by the court to represent any person in judicial proceedings under this subchapter *shall be entitled to reasonable compensation, in an amount to be determined by the court, to be paid, upon order of the court, out of such funds as may be provided by law.* [Italic supplied.]

It is clear from section 313 that if private physicians are appointed by the court to conduct the examination required by section 303, the amount of compensation to be paid such physicians is to be determined by the court and that the Surgeon General would have no authority to fix such compensation. Moreover, while section 313 provides that the compensation authorized therein shall be paid "upon order of the court," there is nothing in the statute involved, or its legislative history, to indicate that the court may order the Surgeon General to make the required payment.

It is clear from what is stated above that the decision whether to appoint private physicians or utilize the Surgeon General's Office to conduct the examination required by section 303 rests with the court and not HEW. Further, while section 314(b) authorizes the Surgeon General to enter into arrangements with any public or private agency or any person, on a reimbursable basis or otherwise, for the examination or treatment of individuals pursuant to title III, it is our view that section 314(b) is applicable only in cases where the Surgeon General is responsible for examining or treating the person involved, i.e., applicable only to the functions of the Surgeon General. In other words section 314(b) authorizes the Surgeon General to contract out services or functions which the Surgeon General would be responsible for performing or providing under title III. Also, while the current HEW appropriations act (Public Law 90–557, 82 Stat. 969, October 11, 1968) appropriates funds to HEW for expenses necessary for carrying out "* * * to the extent not otherwise provided * * * the Narcotic Addict Rehabilitation Act of 1966 * * *," it is again our view that this appropriation is available only for expenses arising out of, or which are a necessary or proper incident of, the functions vested in the Surgeon General under title III of the act.

As indicated above, it is the court which decides whether to utilize the services of the Surgeon General or private physicians to conduct the examination required by section 303, and, if the court decides on private physicians, it selects such physicians and (under section 313) determines the amount they are to be paid for the examination. Accordingly, and in the absence of any statutory language indicating the appropriation to be used to pay the costs in question, it is our view that if the court appoints private physicians to conduct the examination required by section 303, their compensation (for the examination) should be paid from the appropriation appearing in annual Judiciary Appropriation Acts under the heading "Travel and Miscellaneous Expenses." For the fiscal year 1969 this appropriation provision reads, in part, as follows:

For necessary travel and miscellaneous expenses, *not otherwise provided for, incurred by the Judiciary* * * *. Judiciary Appropriation Act, 1969, Pub. L. 90–470, 82 Stat. 685. [Italic supplied.]

To hold that HEW should pay the compensation of the private physicians would require HEW to pay expenses over which it has no control.

A copy of this letter is being furnished the Secretary of Health, Education, and Welfare, and the Director, Administrative Office of the United States Courts.

[B-164384]

Contracts—Specifications—Furnishing More Than Contract Requirements

Under a Federal Supply Schedule contract for one-speed recorders awarded pursuant to an invitation soliciting bids on four speed classes, the approval as acceptable of a two-speed recorder preproduction sample, the delivery of the superior two-speed equipment at no additional cost to the Government, and a subsequent price reduction under the terms of the contract to match the price of the successful bidder on two-speed recorders is not legally objectionable. Even though the two-speed equipment is superior to the one-speed recorder, if the bidder had indicated intent to supply two-speed equipment for the one-speed equipment bid on, it would not have been entitled to an award at a bid price higher than that offered by the two-speed equipment bidder, and it is by virtue of the invitation and award that the bidder may be considered a contractor for two-speed equipment.

To Hedrick and Lane, April 23, 1969:

Reference is made to your letter of September 5, 1968, protesting on behalf of Fidelity Sound Company, Inc., that the 3M Company is being permitted to furnish two-speed portable tape recorders under a Federal Supply Schedule contract when its bid under General Services Administration (GSA) invitation FPNHO-K-27628-A-5-10-68, upon which the contract is based, was for one-speed portable tape recorders.

The invitation solicited bids for furnishing intercommunication sets and sound recording and reproducing equipment for the period July 1, 1968, through June 30, 1969. Among the items upon which bids were solicited were semiprofessional, grade "B," dual track, portable tape recorders in accordance with interim Federal specification W-R-00168a(GSA-FSS) of December 12, 1966, and interim amendment No. 2 of March 29, 1968. Paragraph 1.2.1 of the interim specification provides that the equipment furnished under the specification shall be of the following classes:

Class 1—single speed
Class 2—dual speed
Class 3—three speed
Class 4—four speed

Paragraph 3.7.3 of the specification states:

Tape Speeds. Unless otherwise specified (see 6.1) tape speeds shall be as follows:
Grade B
Class 1—7½

Class 2—3¾, 7½
Class 3—1⅞, 3¾, 7½
Class 4—$^{15}/_{16}$, 1⅞, 3¾, 7½.

Paragraph 6.1(f) provides that tape speed or speeds different from those set out in 3.7.3 may be specified by the Government.

The invitation solicited bids on each of the four classes of tape recorders listed in the specification. The invitation specified the speeds provided in the specification for each class.

The 3M Company bid the same price on class 1 and class 2 equipment, but did not bid on class 3 and class 4 equipment. The price was $144 per unit for delivery in the 48 contiguous States and the District of Columbia and $145.44 per unit for delivery to Alaska, Hawaii and Puerto Rico. The 3M Company stated no exception in its bid to the invitation requirements.

Fidelity Sound Company, Inc., bid on class 2 and class 3 equipment. The respective prices were $118.25 and $118.95 per unit delivered to any of the places specified in the invitation. Fidelity Sound did not bid on class 1 and class 4 equipment.

On June 19, 1968, a contract was awarded to the 3M Company for class 1 equipment and to Fidelity Sound for class 2 and class 3 equipment. The award notices provided, as required in the invitation for bids, that the contractors furnish preproduction samples for inspection and determination as to compliance with the specifications. The 3M Company furnished a preproduction sample of a two-speed tape recorder which was approved. Thereafter, it delivered two-speed equipment under its contract for class 1 equipment.

In September 1968, after learning that the 3M Company was furnishing two-speed equipment in lieu of one-speed equipment, you protested that the award should not have been made to that company. You stated that the award was destructive of the competitive process in that the invitation solicited bids for four different recorders and Fidelity was led into not bidding for class 1 equipment on the assumption that only a single-speed machine could meet that requirement. You stated further that the 3M Company bid under class 1 of a machine meeting the requirements of another class was nonresponsive and that the award to it was therefore illegal.

GSA reported on the protest in a letter of March 14, 1969. GSA stated that the invitation requirement for a single-speed machine was a minimum requirement that could be exceeded by multiple-speed machines. In that connection, GSA refers to our decisions in 38 Comp. Gen. 830 and B–155733, January 4, 1965, which held that a bidder is not precluded from offering a product superior to specification requirements. GSA recognized that the invitation was silent in this respect and states that this will be clarified in future invitations.

It is pointed out that it is unlikely that Fidelity Sound was not aware that it could furnish more speeds than were called for by the specification since it has construed a similar specification in the same manner as the 3M Company in that, under a previous contract and the immediate contract, it has furnished three-speed equipment for Federal stock No. 5835-895-1875 equipment that is described as two-speed equipment. Further, GSA stated that the 3M Company bid was responsive since it stated no exceptions to the invitation. However, GSA has indicated that after the situation came to its attention, it realized that a savings could accrue to the Government by purchasing Fidelity Sound equipment instead of the 3M Company equipment. Therefore, on December 26, 1968, it issued a notice pointing out such fact to ordering offices. Also, it requested the 3M Company to modify the equipment to operate at one speed. The 3M Company declined to do this and has proposed to match the Fidelity Sound price by furnishing class 2 equipment at $118.25 per unit. GSA proposes to accept the offer.

In B-160318, February 16, 1967, it was stated:

> The test to be applied in determining the responsiveness of a bid is whether the bid as submitted is an offer to perform, without exception, the exact thing called for in the invitation, and upon acceptance will bind the contractor to perform in accordance with all the terms and conditions thereof. Unless something on the face of the bid, or specifically a part thereof, either limits, reduces or modifies the obligation of the prospective contractor to perform in accordance with the terms of the invitation, it is responsive. * * *

As noted above, the 3M Company bid did not vary from the terms of the invitation. It was, therefore, responsive and upon acceptance consummated a valid contract.

Under the contract, the 3M Company was required to furnish a preproduction sample for Government approval. The company furnished a two-speed machine which was approved as acceptable since it exceeded the specification requirement for one speed. The two-speed equipment apparently could do everything the one-speed equipment was required to do and more—it could operate at an additional speed. If a contractor chooses to furnish superior equipment at no additional charge to the Government and it is determined to be acceptable, it is certainly in the Government's interest to accept it. Therefore, it was not objectionable from a legal standpoint to permit the 3M Company to furnish two-speed equipment in lieu of one-speed equipment at its bid price for class 1 equipment. Since Fidelity Sound two-speed equipment could be obtained at a lower price than the 3M Company equipment, it would not be practical to order such equipment from the 3M Company. However, as indicated above, the 3M Company has now offered to meet the Fidelity Sound price for two-speed machines.

Article 34, the price reduction clause of the supplemental provisions of the contract, GSA form 1424, provides as follows:

* * * (a) If at any time after the date of the bid or offer the Contractor makes a general price reduction in the comparable price of any article or service covered by the contract to customers generally, an equivalent price reduction based on similar quantities and/or considerations shall apply to the contract for the duration of the contract period (or until the price is further reduced). Such price reduction shall be effective at the same time and in the same manner as the reduction in the price to customers generally. For purpose of this provision, a "general price reduction" shall mean any horizontal reduction in the price of an article or service offered (1) to Contractor's customers generally, or (2) in the Contractor's price schedule for the class of customers; i.e., wholesalers, jobbers, retailers, etc., which was used as the basis for bidding on this contract. (For purposes of determining a "general price reduction" under this clause, sales to States, including the District of Columbia, and other political subdivisions by a Contractor, or reductions in price schedules of the Contractor to such agencies, shall have no application.) An occasional sale at a lower price, or sale of distressed merchandise at a lower price, would not be considered a "general price reduction" under this provision. The Contractor shall invoice the ordering offices at such reduced prices indicating on the invoice that the reduction is pursuant to the "Price Reduction" article of the contract provisions. The contractor, in addition, shall within 10 days of any general price reduction notify the General Services Administration's Contracting Officer of such reduction by letter. Failure to do so may require termination of the contract, as provided in the "Default" clause of the General Provisions. Upon receipt of any such notice of a general price reduction all ordering offices will be duly notified by the Contracting Officer.

In B-148873, August 10, 1962, a similar clause was considered. Our Office stated:

Each Federal Supply Schedule contract contains an appropriate price reduction clause, such as is here involved, which requires a reduction in the contract price under the circumstances listed in the clause. The purpose of this clause is to assure that the Government receives the benefit of any general price reduction that may occur during the contract period. Also, the contractor may make voluntary price reductions at any time and such reductions, in the case of multiple awards, may improve the competitive position of the contractor. * * *

* * * * * * *

* * * The fact that the reduction in contract prices may operate to the advantage of one contractor should not be considered a sufficient reason for refusing to consider the applicability of these provisions. * * *

Although the foregoing holding was stated with regard to multiple awards for the same item, we believe that it has equal application to the immediate situation. Under the contract clause, a contractor is entitled to reduce its price for any article covered by the contract.

The 3M Company has a valid contract and the price reduction tendered by the company is within the contemplation of that contract. Acceptance of the price reduction would be proper in the circumstances. In notifying ordering officers of the price reduction, GSA should advise them that the equipment being offered by the 3M Company is two-speed equipment as is the Fidelity Sound equipment in order that the ordering offices may be aware of the actual circumstances in making a selection of equipment. We have so recommended to GSA today.

If the 3M Company had indicated in its bid that it intended to supply two-speed equipment for one-speed equipment, it would not have been entitled to an award even though the two-speed equipment is superior to one-speed equipment since its bid price was higher than that offered by Fidelity Sound for similar equipment. However, it is by virtue of the invitation itself and the award thereunder that the 3M Company may be considered as a contractor for two-speed equipment.

Accordingly, in view of the foregoing, the protest is denied.

[B-165792]

Contracts—Awards—Cancellation—Erroneous Awards—Cancellation at no Cost to Government

The cancellation in its entirety of a contract erroneously awarded to a nonresponsive bidder who had failed to furnish f.o.b. origin shipping point information is required rather than just the cancellation of the option directed in 48 Comp. Gen. 593, where the cancellation will pose no problem respecting the emergency need for the procurement and the contingent liability of the Government under the canceled contract, in view of the fact the next lowest bidder is willing to purchase the inventory items involved in the canceled contract and to hold the Government harmless from any liability resulting from contract cancellation, and has demonstrated ability to meet delivery requirements that refutes the contracting officer's contrary determination. Upon the immediate cancellation of the entire contract, a prompt award should be made to the lowest bidder.

Bids—Evaluation—Incorporation by Reference—Affirmative Action by Bidder Requirement

The mere insertion by the Government of the symbol "X" in a particular box of an invitation not automatically incorporating the provision in a resulting contract, the identified bid term or condition requires some affirmative action on the part of the bidder to establish his agreement to comply with the bid term or condition and, therefore, the failure of a bidder to respond to a boxed "X" regarding f.o.b. origin shipping point information relating to the responsiveness of his bid, the failure must be treated as though the bidder had taken a deliberate exception to a material provision of the advertised invitation.

To the Secretary of the Navy, April 23, 1969:

Reference is made to letter dated April 4, 1969, with attachments, from the Assistant Secretary of the Navy (Installation and Logistics), reporting on the request for reconsideration of our decision of March 13, 1969, 48 Comp. Gen. 593, by the Admiral Corporation, wherein we sustained the corporation's protest of the award of a contract to the Collins Radio Company on January 28, 1969, under Aviation Supply Office (ASO) invitation for bids N00383-69-B-0553. Supplementary information was informally furnished our Office on April 17, 1969, concerning the capabilities of Admiral to perform any contract which might result from our further consideration of its protest.

In our decision of March 13, 1969, we determined that Collins' failure to furnish with its bid essential information required by section 422 of the invitation for bids, the f.o.b. origin delivery provisions, rendered its bid nonresponsive and that the resulting award to Collins was, therefore, improper and contrary to the well-established principles governing formal advertising. At pages 12 and 13 of our decision we quoted in part from a report from the procurement agency to the effect that, as of February 21, 1969, the estimated cost which the Government might have to bear in the event of termination for convenience could amount to $420,000. Also, prior to the time you submitted your original report to us in this case, we had been informed by your Department that it had been determined to be necessary to make the award of the contract without awaiting our decision because there was an emergency need for at least a portion of the radios covered by the procurement. On the basis of these representations, we concluded that the best interests of the Government would not be served by cancellation of the entire award but that the option portion of the contract should be canceled.

The Assistant Secretary's letter of April 4, in addition to reporting on Admiral's request for reconsideration, separately requests reconsideration of the March 13 decision on the ground that Collins' bid was, in fact, completely responsive to all of the terms and conditions of the invitation for bids and that, therefore, the resulting award created a valid and binding contract for the basic and option quantities. By letter of March 26, 1969, the attorneys for Collins requested reconsideration of the March 13 decision on the same basis.

To iterate briefly, section 422(a) of the invitation entitled "*PLACE OF DELIVERY: ORIGIN*" provided in material part that the successful bidder shall deliver the advertised articles "free of expense to the Government and, at the Government's option, (i) loaded, blocked, and braced on board carrier's equipment, (ii) at the freight station * * * at or near Contractor's plant at:." Bidders were required by the terms of section 422(a)(1) to insert the city or town in which its plant is located. The purpose for which this information was solicited of bidders as part of their sealed bids is almost self-evident in the context of formal competitive advertising. The competitive bidding statute codified at 10 U.S.C. 2305 requires that the award of a contract be made to that responsible bidder submitting the lowest responsive bid, "other factors considered." 37 Comp. Gen. 550. One of the factors for consideration in the selection of a low bid submitted on an f.o.b. origin basis is the cost to the Government of transportation to destination. In such circumstances, the transportation facilities available to each bidder is an essential element in evaluating the

Government's transportation costs applicable to each responsive bidder's offer. The purpose of such evaluation is to fix the exact cost of the item to the Government and to fix beyond question the bidder's obligation to the Government to place the end items at the f.o.b. point selected and identified by him in his bid.

The facesheet of the invitation required the contractor to furnish the procurement items "delivered at the designated point(s)," that is, the point to be identified by the bidder in the space provided by section 422(a)(1). Also, the responsibility for supplies clause, incorporated by reference in the invitation, imposed on the contractor full responsibility for those supplies "until they are delivered to the designated delivery point, regardless of the point of inspection." But Collins did not identify in section 422(a)(1) its f.o.b. origin point.

Collins argued in the first instance that its failure in this regard was not a fatal defect in its bid since the f.o.b. origin point could be ascertained otherwise in its bid. Specifically, Collins argued that the information it supplied in section 511(b) of its bid regarding inspection and acceptance, showing the name of the principal manufacturer and place of principal manufacture as the Collins Radio Company, Cedar Rapids, Iowa, satisfied the requirement in section 422 because for all practical purposes the only response that Collins could give under section 422(a)(1) would be synonymous with its responses to section 511(b). In addition, Collins argued that paragraphs 19–212 and 2–201(b)(xxxii) of the Armed Services Procurement Regulation (ASPR), even though not included in the invitation, required that Collins' business address (Cedar Rapids) stated on the facesheet of the invitation be treated by the contracting officer as satisfying section 422(a)(1). We rejected these arguments in our March 13 decision for the reasons detailed therein.

In its request for reconsideration, Collins restates the arguments which we discussed in our March 13, 1969, decision. We have accordingly carefully reconsidered our opinion as to the nonresponsiveness of the Collins' bid in the light of the various arguments advanced on its behalf but we remain of the view that no substantial legal basis exists for reaching a contrary conclusion.

In its recent submissions, Collins contends that "it cannot be said * * * that the award to Collins is clearly or palpably illegal so as to make the award void *ab initio*," citing B–158126, March 10, 1966. In that case we held:

> * * * the Court of Claims has recently concluded that applicable procurement statutes and regulations confer broad discretion on the contracting officer; that the award of a contract should be upheld if the contracting officer has acted in good faith and if such action is reasonable under the law and regulations; and that a contract should be cancelled as void *ab initio* only if its illegality is clear or palpable. See *John Reiner & Company* v. *United States*, 163 Ct. Cl. 381, 325

THE CLAUSES SET FORTH HERINAFTER THAT ARE MARKED WITH
pany v. *United States*, 163 Ct. Cl. 465, 325 F. 2d 466 (1963); *Coastal Cargo Company, Inc.* v. *United States*, Ct. Cl. No. 467–59 (Oct 15, 1965); and *Warren Brothers Roads Company* v. *United States*, Ct. Cl. No. 302–61 (Dec. 17, 1965). * * *

Collins contends that its bid, read as a whole, offered to comply with the f.o.b. origin terms of the invitation. It points out that block 9 on the facesheet of the invitation made all bids submitted thereunder subject to the attached solicitation instructions and conditions, the schedule, the general provisions incorporated by reference therein and other attached or referenced provisions, etc. Special reference is made to page 5 of the schedule which read in part:

THE CLAUSES SET FORTH HEREINAFTER THAT ARE MARKED WITH AN "X" IN THE SPACE PROVIDED THEREFOR SHALL FORM A PART OF THIS SOLICITATION AND THE RESULTANT CONTRACT.
NOTE TO BIDDERS—BIDDERS ARE CAUTIONED NOT TO INSERT AN "X" IN ANY OF THE SPACES HEREINAFTER PROVIDED FOR THE DESIGNATION OF CLAUSES APPLICABLE TO THIS INVITATION FOR BIDS AND ARE CAUTIONED NOT TO FURNISH ANY INFORMATION REQUESTED BY CLAUSES NOT CHECKED BY THIS ACTIVITY. ONLY SUCH CLAUSES THAT ARE MARKED WITH AN "X" BY THIS ACTIVITY SHALL BE DEEMED A PART OF THIS INVITATION FOR BIDS. THE INSERTION OF AN "X" BY THE BIDDER IN ANY SUCH SPACE OR THE FURNISHING OF INFORMATION NOT REQUESTED MAY RESULT IN REJECTION OF THE BID AS NON-RESPONSIVE.

Collins contends that since section 422 was a part of the schedule and was marked with an "X" that provision automatically became a part of the contract awarded to Collins. The invitation clauses marked with an "X," as stated above, form a part of the invitation for bids and that mark constituted notice to bidders that the terms and conditions so identified were applicable to the solicitation and should be taken into consideration in the preparation of their bids. In this regard, the invitation contained many other terms and conditions which were similarly preceded by a block but which were not identified by an "X" for inclusion in the invitation. It thus appears to us that the use of the symbol "X" merely served to identify those provisions which the bidders should take into consideration in the preparation of their bids and to ignore those terms and conditions not so identified. In this context, it may not be said that the mere insertion by the Government of an "X" in a particular box served to automatically incorporate that provision or term in a resulting contract where that identified bid term or condition required some affirmative action on the part of the bidder to establish his agreement to comply with that bid term or condition. In order to be included in the resulting contract those identified provisions must be a part of the successful bid. Where a section of the invitation requires an insertion of material information such as a price, descriptive data, point of origin, etc., relating to responsiveness of the bid, the failure of the bidder to so provide that information must be treated the same as if the bidder had taken a deliberate exception to a material advertised provision, thereby rendering its bid clearly nonresponsive. Any purported award made under such circumstances would not be in full compliance with all of the terms and conditions stated in the invitation. The underlying rationale for this rule is that a bidder's failure to supply the requested information, in the absence of a curing provision which is not present in this case, would indicate an intent by that bidder not to be bound to those terms and conditions. In such circumstances, those terms cannot be made a part of the resulting contract.

In our decision of March 13 we concluded in part that the place of principal manufacture stated by Collins at section 511 of its bid could not properly be used to satisfy the mandatory requirements of section 422 because ASPR 19–104.1(c)(1) states that the point of inspection and acceptance "shall not control the transportation term." This point was made in response to two inconsistent statements contained in Collins' brief of February 28, 1969, which we noted during our initial consideration of the case. On page 7 of its February 28 brief Collins affirmatively stated that a contracting officer should look to an inspection clause stating the place of principal manufacture to determine the location of the bidder's plant. However, simultaneously Collins stated that the regulation in question merely says that the f.o.b. point of origin may be different from the point of inspection. We agree with this latter contention. We are aware of no relationship between the points of inspection and/or acceptance and the delivery terms of the invitation. In fact ASPR 19–104.1(c)(1) makes this abundantly clear.

More importantly, however, is the fact that the free choice information stated in section 511 as to the place of principal manufacture is, by prior decision of our Office cited in the March 13 decision, subject to change at the bidder's option after the opening of bids. This is true even though bidders were specifically advised that the information requested in section 511 was for bid evaluation purposes and that bids may be rejected for failure to include such information. Our Office has held on numerous occasions that if, despite mandatory language used in a solicitation, the requested data or information is to be used to determine responsibility, *or some other factor not related to responsiveness*, bids which fail to include that data or information may properly be considered for award. 41 Comp. Gen. 755.

In B–155429, November 23, 1964, discussed in the March 13 decision, we agreed with the same Navy procuring activity as is involved in the present case that information as to the place of inspection and acceptance does not relate to the responsiveness of a particular bid and, as such, may be supplied after the opening of bids. For these reasons, the statement in Collins' bid at section 511 that its contemplated place of principal manufacture was Cedar Rapids, Iowa, does not possess the requisite degree of certainty or permanency inherent in the firm bid rule to satisfy the requirement for similar information in section 422. That information cannot be used to supply missing data required by section 422(a)(1) for to do so would permit a second opportunity to bid responsively after bids had been revealed.

Collins also contends in support of its request for reconsideration that our refusal to recognize that the effect of ASPR 19–212 and 2–201 (b)(xxxii) is to render any bid failing to state on f.o.b. origin shipping point fully responsive, if the bidder identifies its plant at which the contract will be performed, is unsupportable and is in clear derogation of the manifest intent of the procuring agency. Collins states specifically that "even though ASPR clause 2–201(b)(xxxii) was not included in the invitation for bids, it together with ASPR 19–212 declared the contracting officer's duty with respect to the determination of the Collins shipping point to the extent there was any doubt about that from the face of the Collins bid." ASPR 19–212 states that the clause prescribed by ASPR 2–201(b)(xxxii) shall be included in solicitations in proper circumstances "to assure application of appropriate freight costs in evaluating bids." Subparagraph "B" of 2–201(b) (xxxii) is a provision advising prospective bidders in part that if they fail to specify a shipping point "the Government will evaluate the bid (or proposal) on the basis of delivery from the plant at which the contract will be performed." Collins concludes in this respect that although it failed to state a shipping point in section 422(a)(1), but specified in section 511 that the place of principal manufacture is Cedar Rapids, Iowa, the contracting officer was obligated by virtue of the regulations to accept Collins' bid based upon evaluation of transportation costs from Cedar Rapids.

As stated, ASPR 2–201(b)(xxxii) is a mandatory bidding term for inclusion in solicitations of this nature (see ASPR 19–212); however, for the reasons stated in the March 13 decision, if that bidding term is inadvertently or intentionally omitted from the solicitation, it may not subsequently be incorporated therein by law under the "*Christian* Doctrine" so as to make a nonresponsive bid responsive. See, in this respect, pages 5 and 6 of the March 13 decision. That regulation, like other bidding terms and conditions included in the solicitation, is to be considered by bidders in preparing their bids and by the Government in evaluation if included in the solicitation and like the other terms and conditions would thereby be incorporated into the resulting contract. As such, subparagraph "B" thereof is not simply, as Collins contends, an instruction to the contracting officer to evaluate bids on a basis other than as specified in the invitation or as contemplated by competing bidders during preparation of their bids. In other words, we agree that the import of the cited regulations would be to render a bid, like Collins in this instance, fully responsive to the delivery terms of the invitation, but by the clear language of those regulations and the applicable case law cited in our decision of March 13, the method of evaluation of bids presented therein is proper for application only in situations where ASPR 2–201(b)(xxxii)B is actually included or incorporated by reference into the invitation.

In a letter of March 17, 1969, the attorney for Admiral points out that our decision not to cancel the entire award was based on the fact that the Government might at some later date become liable for the costs described on pages 12 and 13 of the March 13 decision if the Collins' contract is terminated for the convenience of the Government. In order to overcome these reasons for not canceling the entire contract, Admiral has offered, if awarded the procurement, to hold the Government harmless from liability resulting from cancellation. In its letter of April 18, 1969, to the contracting officer, ASO, Admiral amplified its offer in the March 17 letter as follows:

1. The Contracting Officer may change the delivery dates as specified in the bid for contract quantities to conform to delivery at the exact times specified in Contract N00383–69–C–2038 with Collins Radio Company.
2. The Contracting Officer may amend the contract to provide for the Admiral's assumption of the possible termination costs from cancellation of Contract N00383–69–C–2038 with Collins Radio Company as hereinafter provided.

Admiral Corporation agrees that, if this contract has been awarded to it following the cancellation of Contract N00383–69–C–2038 awarded by ASO to Collins Radio Company, it is willing to assume the cost of all or any part, at Collins election, purchase orders placed by Collins Radio Company with vendors for mechanical and electrical purchased parts totaling $2,371,835.00. Admiral further agrees to purchase from Collins, at Collins election, all or any part of the fabricated parts totaling $555,747.00 being made by Collins at its Cedar Rapids plant at fair and reasonable prices. Pre-Production Engineering Costs not to exceed $13,699.00 incurred up to the date of termination will be paid by Admiral to Collins within 10 days after notification by Collins to Admiral of the vendor orders and in house fabricated parts it wishes to transfer to Admiral Corporation. The amount payable by Admiral will not exceed $2,941,281.00 listed as total costs committed as of 4 April 1969 in Collins' letter to the Comptroller General of March 26, 1969, except that Admiral will indemnify the Government for an additional $35,000.00 to cover any claims by Collins for purchasing, G&A, and profit on vendor materials received by it prior to notice of cancellation.

In the event that Collins transfers or sells all or any part of the material specified above to Admiral, the Government shall not be responsible for any failures or deficiencies in this material, and it shall be Admiral's sole responsibility to deliver acceptable equipments under the contract. Any dispute covering this special provision shall be decided by the Contracting Officer in accordance with the provision of the contract entitled "Disputes."

On March 19, 1969, a copy of Admiral's letter of March 17 was forwarded to your Department for comment. In the contracting officer's "Third Supplement to Statement of Facts" dated April 1, 1969, attached to and made a part of the Assistant Secretary's April 4, 1969, report to us, the contracting officer concluded that Admiral could not, because of practical considerations, possibly meet Collins' contract delivery schedule, using Collins' inventory. In this regard, the contracting officer concludes that:

* * * It has been reported by the DCAS [Defense Contract Administration Service] that Admiral has advised that it has on hand a quantity of ARC-51 components sufficient to fabricate 200 radios and that it should, therefore, have no difficulty in assembling 200 radios in time to meet the July delivery requirements. Admiral has further advised that if award were made to it prior to 11 April, it could exercise options on existing purchase orders with its vendors. It has been asserted by Admiral that even the "long-lead-time" castings could be procured in 60 days (or by mid-June), that it could machine the castings within 30 days and that it, thus, should be able to meet the balance of the July delivery requirements. The DCAS has advised that based upon the above representations it considers that delivery could be made by Admiral as indicated.

6. The prediction made by Admiral that it can meet the entire July delivery requirement (313 sets)is based upon (1) procurement of material in the shortest possible time, (2) the machining of castings in less than the normal time (30 to 45 days), (3) no allowance for normal assembly time after receipt and machining of the castings, (4) no apparent allowance of time for reliability testing following assembly, and (5) most importantly, no allowance of time for correction of defects uncovered in testing or for the retesting of such corrected articles, a common requirement in the fabrication of complex gear such as ARC-51 radios. It is, therefore, not realistic to expect deliveries of the July quantities in excess of 200 or the delivery of the complete quantity required in August. The risk of slippage of delivery in these extremely urgently required radios—many of which are already required—is a risk that the Government should not be required to assume. For these reasons, it is the Contracting Officer's opinion that Admiral's prediction of its ability to meet such delivery requirements and the DCAS concurrence are both overly optimistic and the Contracting Officer cannot make the positive determination of responsibility requisite to an award.

By letter of April 9, 1969, the attorney for Admiral responded to the statements of the contracting officer, quoted above, by stating that those conclusions must have been based on an absence of factual information, error, or as a result of arbitrary action. He further stated that Admiral has sufficient time, if awarded the contract by April 11, 1969—now extended to April 24—to insure delivery of the July requirement (313 sets) without utilization of the components for 200 of the radio sets it currently has in inventory.

The question thus posed by Admiral's offer is whether, under the circumstances, cancellation of the Collins' contract and award of the entire procurement to Admiral would be appropriate and feasible.

Any determination as to Admiral's ability to meet the Collins' contract delivery schedule is necessarily a question of fact. It is a responsibility of our Office to insure that Government procurements are made in accordance with applicable law, and this necessarily involves review of the administrative discretion to the extent necessary to insure that such discretion has been exercised within proper limits. It is our duty to determine from all of the facts and circumstances surrounding the present controversy whether the contracting officer's determination that Admiral is not capable of meeting the delivery schedule in this instance is reasonably supported by the record. In this regard, we have adopted the general rule that we will not substitute our judgment for that of the contracting officer, unless it is shown by convincing evidence that a determination was arbitrary, or not based on substantial evidence. 43 Comp. Gen. 257, 258; 38 *id.* 778.

Any decision regarding the contracting officer's determination that Admiral cannot meet the established delivery schedule must be based upon full consideration of the data and information available to and relied on by him. In this respect, on April 10, 1969, subsequent to receipt of Admiral's letter of April 9 and the Assistant Secretary's letter of April 4, we met with the attorney for Admiral and the Counsel for Naval Supply Systems Command Headquarters to discuss the import of both letters. At that meeting, the contention made by Admiral in its April 9 letter, that the contracting officer's decision is unsupportable, was discussed in considerable detail. Because we felt at the conclusion of the meeting that further information relative to the Defense Contract Administration Services Region, Chicago (DC ASR), recommendation was necessary a representative of our Office visited the DCASR office on April 11, 1969, to develop all pertinent facts relating to Admiral's capacity to meet the Collins' delivery schedule.

The facts, as disclosed by our visit, showed that initially ASO never asked for a recommendation by DCASR as to Admiral's ability to meet Collins' delivery schedule and that neither an affirmative nor a negative recommendation was given at that time. On March 29, 1969, ASO by teletype asked DCASR to review the required contract delivery schedule and determine whether Admiral could meet it in whole or in part. Since Admiral's letter of March 17 stated that it could meet the delivery schedule and requested total or partial cancellation of the award to Collins, and a copy of that letter was made available to the procuring activity shortly before March 29, 1969, it is evident that ASO's teletype message of March 29 to DCASR was generated by receipt of Admiral's request for reconsideration and consideration of the statement made therein.

By teletype message, dated April 3, 1969, substantiating a telephone call on April 2 from DCASR to ASO, DCASR advised that Admiral:

1. * * * CAN DELIVER THE COMPLETE SCHEDULE IN ACCORDANCE WITH REQUIRED DATES USING CURRENT PRODUCTION PERSONNEL, FACILITIES AND TEST EQUIPMENT. BIDDER CURRENTLY HAS IN STOCK APPROXIMATELY 200 UNITS LONG LEAD ITEMS AND REQUIRES NOTICE OF AWARD, IF AWARD IS TO BE MADE, NOT LATER THAN 11 APRIL 1969 IN ORDER TO EXERCISE OPTIONS WITH SUPPLIERS.

* * * * * * *

4. DTA SUPPLIED BY CONTRACTOR REPRESENTATIVES CONSIDERED TO BE CONSERVATIVE AND REALISTIC.

Other results of our investigation show also that Admiral's history of timely deliveries of the radio sets involved here under contracts performed during the past few years has been good.

In addition, our investigation of the DCASR files evidenced, with respect to the argument presented by the contracting officer in support of his negative determination, that the five points specified by him were not supported by the records at DCASR. Specifically, we found:

1. Admiral's vendors for the long lead items have guaranteed delivery of those components clearly in sufficient time for Admiral to meet the July delivery schedule of 313 units; that there never has been a problem with respect to the delivery of other components; and that Admiral has a cushion of 200 components and long leadtime castings currently in-house that can be utilized immediately;

2. the casting machining vendor has guaranteed shipment of 500 finished castings to Admiral by the end of the first month after date of award and 600 per month thereafter, but because of the 200 machined castings already available, Admiral only needs 113 to meet the end-of-July delivery;

3. using its current work force, Admiral now manufactures 15 sets a day, totaling 300 per month, but because subassembly can begin the day award is made and can be incorporated immediately into the longer leadtime items when they become available, Admiral should produce by July 27—counting the 200 cushion—345 sets, leaving 232 sets to allow for slippage and rejection;

4. 14 days is the normal reliability test time and runs concurrently with production so that no identifiable separate time period is required for this phase of manufacture;

5. Contrary to the contracting officer's statement that "most importantly" Admiral has allotted no time for the "common requirement" of correction of defects discovered during testing, we found that no fixed period of corrective time is necessary because operational failure over the last 6 months has averaged only 3.2 percent and 1.1 percent for defects discovered in final electrical testing.

Subsequent to our visit to DCASR, the Assistant Secretary of the Navy sent a team of production experts to DCASR and the Admiral plant for the purpose of "Production Review of Admiral Corporation, Government Electronics Division, Production Capabilities Concerning Current ARC-51 Military Requirements." The results of its review are contained in a report addressed to the Director of Procurement, Office of ASTSECNAV (INSLOG), dated April 15, 1969. The report concludes in pertinent part as follows:

> 2. As a result of discussions with DCASR personnel administering contracts with Admiral, Admiral management personnel, review of pertinent documents, and an on-site review of Admiral's facilities and actual operations, it is the consensus of the team that Admiral can produce the required quantities of items as scheduled in Collins-Radio Company, Contract No. N00383-69-C-2083 if awarded a contract by 18 April 1969. In the event Admiral assumes all or part of Collins-Radio purchased or produced parts, Admiral must recognize and assume the risks involved, and, of course, be held to the contract to which they, Admiral, agreed.

We are aware that a contracting officer is not bound to accept the findings or conclusions reached by DCASR, but is free to consider other sources of information in making his determination. However, we are of the opinion that an affirmative determination of capability made by technical personnel of the Department of Defense who are intimately familiar with the day-to-day operations and abilities of the company under scrutiny—and confirmed by Navy production personnel—should be utilized by the contracting officer to the maximum extent practicable.

The entire matter has been carefully considered by our Office with due regard for the weight which generally should be accorded administrative discretion in determining a bidder's capabilities to perform in accordance with the stated requirements of the Government. However, the present record fails to establish an adequate factual basis for the contracting officer's determination that Admiral does not have the production capability of meeting the delivery schedule established in the Collins' contract.

Relating all of the foregoing to the quoted information on pages 12 and 13 of our decision of March 13, it now appears that the practical effect of complete cancellation of the Collins' contract should pose no real problem with respect to the emergency need for the radios and the contingent liability of the Government for termination costs arising out of that action.

Accordingly, we conclude that the entire Collins' contract should be immediately canceled and a prompt award of the procurement should be made to the Admiral Corporation under the stipulations and conditions contained in the Admiral letter of April 19, 1969.

[B-166142]

Pay—Retired—Foreign Citizenship or Service Effect—Non-Regular Service Members

The retired pay benefits authorized for non-Regular service members of the uniformed services in chapter 67 of Title 10, U.S. Code, viewed as a pension, entitlement to retired pay under 10 U.S.C. 1331 is not dependent on the continuation of military status. Therefore a person eligible to retired pay at age 60 as provided in section 1331 who prior to attaining age 60 acquires foreign citizenship and/or status in a foreign military service does not lose his entitlement to retired pay at age 60, nor is a person in receipt of retired pay pursuant to section 1331 required to forfeit such pay if he becomes a citizen of a foreign country and/or enters the armed forces of the foreign country, provided the foreign country is not one that is engaged in hostile military operations against the United States.

To the Secretary of Defense, April 24, 1969:

Further reference is made to letter dated February 7, 1969, from the Assistant Secretary of Defense (Comptroller), requesting a decision as to the effect, if any, of acquisition of foreign citizenship and/or status in a foreign military service by a person who would be eligible to receive or is presently in receipt of retired pay under the provisions of 10 U.S.C. 1331 *et seq.* A copy of Department of Defense, Military Pay and Allowance Committee Action No. 427 setting forth and discussing the several questions was attached.

The specific questions asked are as follows:

a. Would a person otherwise eligible to receive retired pay at age 60 as provided in 10 U.S.C. 1331 lose entitlement to such pay if, prior to attaining age 60, the person (1) becomes a citizen of a foreign country or (2) enters the armed forces of a foreign country or (3) becomes a citizen of a foreign country and also enters the armed forces of that country?

b. Would a person in receipt of retired pay awarded as provided in 10 U.S.C. 1331, be required to forfeit such pay if he (1) becomes a citizen of a foreign country or (2) enters the armed forces of a foreign country or (3) becomes a citizen of a foreign country and also enters the armed forces of that country?

In the Committee Action discussion it is stated that unlike other military retirement programs, there is no requirement that a person receiving retired pay benefits authorized by chapter 67, Title 10, U.S. Code, continue to serve in any capacity, citing 28 Comp. Gen. 510. The view is expressed that even though acquisition of foreign citizenship and/or military status in a foreign country would require termination of a member's Reserve status, such termination would not affect entitlement to retired pay already established.

Chapter 67 of Title 10, U.S. Code, entitled "RETIRED PAY FOR NON-REGULAR SERVICE," sets forth the eligibility and service requirements which must be met by persons before they shall become entitled to receive retired pay. Section 1331, provides in pertinent part:

(a) Except as provided in subsection (c), a person is entitled, upon application, to retired pay computed under section 1401 of this title, if— —

(1) he is at least 60 years of age;

(2) he has performed at least 20 years of service computed under section 1332 of this title;

(3) he performed the last eight years of qualifying service while a member of any category named in section 1332(a)(1) of this title, but not while a member of the regular component, the Fleet Reserve, or the Fleet Marine Corps Reserve; and

(4) he is not entitled, under any other provision of law, to retired pay from an armed force or retainer pay as a member of the Fleet Reserve or the Fleet Marine Corps Reserve.

* * * * * * *

(d) The Secretary concerned shall provide for notifying each person who has completed the years of service required for eligibility for retired pay under this chapter. The notice must be sent, in writing, to the person concerned within one year after he has completed that service.

(e) Notwithstanding section 8301 of title 5, United States Code, the date of entitlement to retired pay under this section shall be the date on which the requirements of subsection (a) have been completed.

In a decision of October 19, 1943, 23 Comp. Gen. 284, we held that retired pay paid to officers of the Regular Army based upon years of service is deemed to be compensation or pay for their continued service as officers after retirement and payment thereof is authorized only while they remain in the service. Later, a similar conclusion was reached with respect to retired pay to enlisted members of the Regular Navy (38 Comp. Gen. 523), as well as retired pay received by Reserve members under certain provisions of law, viz., 10 U.S.C. 3911, 6323, 8911 and 14 U.S.C. 232. See 41 Comp. Gen. 715. In each of these cases, entitlement to retired pay was deemed to be contingent upon the member remaining in the military service with the attendant obligation to conform to prescribed rules and regulations and to remain subject to recall to active duty. Therefore, the termination of such military status in those cases would operate to deprive a member of entitlement to retired pay.

In contrast, it was concluded in 37 Comp. Gen. 207—which involved a Marine Corps Reserve officer retired for disability under section 4 of the act of August 27, 1940, 54 Stat. 864, as amended, 34 U.S.C. 855c–1 (1946 ed.)—that since a right to retired pay under the law there involved was not dependent on the existence of a military status, the termination of such status could not affect that right and it would not terminate upon acquisition of foreign citizenship. Such retired pay was viewed as being in the nature of a pension. While a disability retirement was there involved, the same rule appears to be applicable in the present case.

A right to retired pay under chapter 67, Title 10, U.S. Code, for non-Regular service accrues to a "person" who meets the statutory conditions and service requirements therein set forth. Like the retired pay mentioned in the preceding paragraph payable under the laws there considered, the retired pay here involved is viewed as being in the nature of a pension. See 29 Comp. Gen. 220; *id.* 424. The termination of the Reserve status of a person otherwise qualified by virtue of the service requirements specified in no way affects his right to receive retired pay upon reaching age 60 since his continued service as a Reservist is not one of the conditions specified by the statute. See 28 Comp. Gen. 510, and 41 Comp. Gen. 131, 134. While it appears that a member may not be permitted to retain a Reserve status having a continued military obligation, in the event that he acquires a military status in a foreign country, neither that action nor the assumption of foreign citizenship by a person qualified under chapter 67, of Title 10, U.S. Code, would terminate his right to retired pay.

Accordingly, your questions are answered in the negative. It is assumed that your questions do not relate to citizenship in, or membership in the military forces of, a foreign country engaged in hostile military operations against the United States and nothing said herein is to be considered as deciding the rights of a person so situated.

[B-165794]

Contractors—Conflicts of Interest—Developmental or Prototype Items

The fact that the low bidder under an invitation for a Terminal, Telegraph-Telephone system had in the development of the system furnished under contract productive drawings used in the preparation of the applicable military specifications does not require that the bidder be barred under Rule 2—"Restrictions on Future Procurements"—of Department of Defense Directive 5500.10 governing the conflicts of interest of contractors who furnish the Government with engineering or technical services in connection with the initiation of new systems, programs, or specifications. The bidder not only did not furnish the "complete specifications" restricted by Rule 2, but the drawings obtained under a production contract awarded by competitive bidding, their use is within the exception to Rule 2 of the Directive relating to "contracts for developmental or prototype items."

Contractors—Conflicts of Interest—Avoidance

Department of Defense Directive 5500.10 (Appendix G of the Armed Services Procurement Regulation) promulgated to avoid conflicts of interest on the part of contractors is not a self-executing regulation but requires notice of its applicability in the solicitation and in the contract, and the exercise of judgment or discretion by the contracting officer, subject to review, and, therefore, the doctrine of *G. L. Christian and Associates* v. *United States*, 312 F. 2d 418, may not be invoked to give the Directive the force and effect of law and to read into the contract mandatory clauses of ASPR that were not included.

Contracts—Awards—Advantage to Government—Award Protested

When a contracting officer determines under paragraph 2-407.9(b)(3)(iii) of the Armed Services Procurement Regulation that a prompt award would be advantageous to the Government, and the award is properly authorized by higher authority, there is no requirement that the award be held up pending a decision by the United States General Accounting Office in accordance with paragraph 2-407.9(b)(2) of the regulation.

To Isidore H. Wachtel, April 25, 1969:

Further reference is made to your telegram of December 11, 1968, and subsequent correspondence, relative to the protest you filed on behalf of Sentinel Electronics, Inc. (Sentinel), against award of a contract to another bidder under Invitation for Bids (IFB) No. DAAB05-69-B-0657.

The subject invitation sought prices for the manufacture and delivery of various ranges of quantities for the Terminal, Telegraph-Telephone AN/TCC-29 and three major subassemblies. The IFB was issued on October 22, 1968, by the Procurement and Production Directorate, United States Army Electronics Command (USAECOM), which was opened on December 2, 1968. Sixty-one firms were solicited and 68 other firms requested and were furnished copies of the solicitation. Of the 23 responsive bids which were received, Stelma Inc., Stamford, Connecticut, was low with a net total price of $601,589.15 and Sentinel was the second low bidder with a net total price of $727,936.33.

The expiration date for Stelma's bid was originally January 2, 1969, which subsequently was extended by it to January 6, 1969. Stelma indicated that their bid prices were based on firm vendor and subcontractor commitments and that an extension beyond the January 6 date would work a financial hardship on it. Therefore, in accordance with section 2–407.9(b)(3)(iii) of the Armed Services Procurement Regulation (ASPR), the contracting officer determined that under the circumstances, a prompt award would be advantageous to the Government, and award of a contract to Stelma was authorized by the Office of the Assistant Secretary of the Army (I&L).

The basis for your protest on behalf of Sentinel is that the failure to prohibit Stelma from bidding or to reject its bid violated the "Rules for the Avoidance of Organizational Conflict of Interest," Department of Defense (DOD) Directive 5500.10, Appendix G, of ASPR. You also complain that the contracting officer should not have made the award without waiting for a decision of our Office in accordance with ASPR 2–407.9(b)(2).

You suggest that the threshold question presented in this protest is "whether Stelma, by its relationship in the AN/TCC–29 program, has an 'unfair competitive advantage' so that it should have been eliminated as a bidder in the above-referenced IFB." A brief review of the procurement history of this item, as reported to our Office by the Department of the Army, is as follows:

The Terminal, Telegraph-Telephone AN/TCC–29 is a transistorized telephone-telegraph carrier terminal, which converts teletypewriter signals to audio signals, thus permitting transmissions through multiplex and radio circuits, and also permits simultaneous voice and teletype transmissions over the same channel. There are three major sub-assemblies of the AN/TCC–29, namely, TH–22/TG Telegraph Terminal, CV–425/U Telegraph-Telephone Signal Converter, and F–316/U Electrical Filter Assembly.

The AN/TCC–29, which replaced the AN/TCC–14 (the non-transistorized predecessor), was originally developed under the auspices of Coles Signal Laboratory, Fort Monmouth, New Jersey, by Kellogg Switchboard. Subsequently, Contracts Nos. DA–36–039–SC–64741, dated 17 June 1955, and DA–36–039–SC–87188, dated 27 March 1961, were placed with Stelma, Inc., the former as an R & D contract for the AN/TCC–29 and the latter to secure 14 each service test models of the TH–22/TG. Neither contract contained any restrictive notification per DOD Directive 5500.10, dated 1 June 1963, ASPR Appendix G, as none were deemed applicable.

The AN/TCC–29 performance specification, MIL–T–55255 dated 20 February 1964, was developed independently by the USAECOM Laboratory.

Manufacturer's Drawings were procured from Stelma, Inc., on Contract No. DA 36–039–SC–87188; however, these drawings could not be used for a production contract due to the many requirement changes and to the fact that these drawings represented production techniques peculiar only to Stelma, Inc.

The first competitive procurement of the AN/TCC–29 was made by USAECOM on 26 June 1964 under Contract No. DA–36–039–AMC–04898(E) to Stelma, Inc. The competitive procurement data package consisted of Specification MIL–T–55255 with seven (7) minor exceptions, AN/TCC–29 model (from Stelma Contract No. DA–36–039–SC–64741), and thirty-six (36) Government specified exceptions to the model. The manufacturer's drawings procured on Contract No. DA–36–039–SC–87188 were not used since they did not represent the item to be delivered. The IFB covered a two-year multi-year requirement. Eighty-two firms were solicited and 37 other firms requested and were furnished copies of the solicitation. Twenty-four responsive bids were received, including bids from Stelma and Sentinel. Stelma was the first low bidder at $576.64 and Sentinel third low bidder at $699.00.

Between June 1964 and December 1968, Stelma produced for the Government in excess of 15,000 each AN/TCC-29's, either as a result of the first production contract and modifications thereto, or as the result of Contract No. DA 36 039-AMC-09016, awarded to Stelma on 25 March 1966, and modifications thereto.

As the result of a contractual requirement on the first production contract, Stelma furnished production drawings for the AN/TCC-29. These drawings were first submitted for acceptance in January 1968 and finally accepted by the Government in November 1968.

These production drawings, Specification MIL-T-55255(EL) with Amendment No. 2, and a procurement model of the AN/TCC-29 from Contract No. DA 36-039-AMC-09016 constituted the procurement data package for the protested formally advertised procurement. * * *

DOD Directive 5500.10, issued on June 1, 1963 (which is now found in Appendix G of ASPR), was an attempt to write a "Code of Conduct" for industrial contractors in certain kinds of technical work to avoid organizational conflicts of interest. It was inspired, in part, by the report of an interdepartmental committee on Government contracting for Research and Development, headed by David E. Bell, then Director of the Bureau of the Budget. The DOD Directive contains four basic rules, with specified exceptions, supplemented by specific examples, governing potential conflicts of interest on the part of contractors who furnish the Government with engineering or technical services in connection with the initiation of new systems or programs or specifications. Broadly speaking, the rules laid down in the code fall into two categories: "Restrictions on Future Procurements (Rules 1, 2, and 3);" and "Restrictions on the Use of Proprietary Data (Rule 4)."

Specifically, you assert that the award to Stelma violated Rule 2, which provides:

2. If a contractor agrees to prepare and furnish complete specifications covering nondevelopmental items to be used in competitive procurement, that contractor shall not be allowed to furnish such items, either as a prime or subcontractor, for a reasonable period of time including, at least, the initial procurement.

Your contention is based upon the allegation that Stelma furnished drawings which were used in the competitive procurement, and had previously participated in development of the item. While you recognize that ASPR 1-113.2 imposes upon the contracting officer the obligation and responsibility for applying the rules of the Directive, you question whether such authority should be supreme and not subject to review. You also urge that under the doctrine of *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1, 312 F. 2d 418, the ASPR provisions in Appendix G have the force and effect of law, so that clauses made mandatory by ASPR would be read into a contract if not physically included, and the question of whether it is being correctly followed is within the jurisdiction of our Office.

Rule 2 is subject to three exceptions, the first of which, considered by the Army to be applicable here, reads as follows:

> a. Contractors who furnish at Government request specifications or data with respect to the product they furnished, even though the specifications or data may have been paid for separately or in the price of the product.

The "specifications" in question, while composed in part of Stelma production drawings, are reported to be military specifications which were prepared by Government personnel and are considered mandatory for procurement purposes. The Stelma drawings included in the bidding documents are reported to be production drawings obtained from Stelma under a production contract which was awarded as the result of competitive bidding on which 24 bids were received, including one from your client. Under these circumstances we feel that Stelma was clearly within the quoted exception to Rule 2, and could not properly have been barred from bidding on the current procurement.

With respect to your contention that the contracting officer's statement, that any competitive advantage enjoyed by Stelma was unavoidable, indicates a misconception of the requirements of the Directive and his responsibilities thereunder, we believe that his position is completely in accord with the following statement in the second paragraph of the "Explanation" under Rule 2 in the Directive:

> In development work it is normal to select firms which have done the most advanced work in the field. It is to be expected that these firms will design and develop around their own prior knowledge. Development contractors can frequently start production earlier and more knowledgeably than firms which did not participate in the development, and this affects the time and quality of production, both of which are important to the Department of Defense. In many instances the Government may have financed such development. Thus, the development contractor may have an unavoidable competitive advantage which is not considered unfair and no prohibition should be imposed.

In the light of this explanation we must conclude that Stelma's developmental contracts fall within exception C to Rule 2, which covers "contracts for developmental or prototype items."

In fact, even without the exception, Rule 2 would appear to be inapplicable, since Stelma did not "prepare and furnish complete specifications."

As to your attempt to invoke the *Christian* doctrine, the Directive is not self-executing, but specifically states in the last sentence of paragraph 2 of the Preamble, that prospective contractors will be advised of the applicability of the rules by a notice in solicitations and by a clause in resulting contracts. The Directive also clearly indicates that the rules established are general and that there applicability in particular cases is to be determined by the contracting officer. The concluding section of the Directive, "Review and Waiver," provides that if a prospective contractor disagrees with a decision reached by the contracting officer in this regard, the contracting officer shall report his decision and the contractor's contentions, through channels, to superior authority for final determination. Since we do not interpret the *Christian* decision as applying to a regulation the applicability of which is dependent upon the exercise of judgment or discretion, we do not feel that it can properly be applied in this case. In the record before us, we must therefore answer in the negative your question, "In other words, can the Directive come in play to prevent a contractor from receiving the award?"

Concerning your complaint that the award should have been held up pending a decision of your protest in accordance with ASPR 2-407.9(b)(2), it was determined by the contracting officer in accordance with ASPR 2-407.9(b)(3)(iii) that prompt award would be advantageous to the Government, and the award was properly authorized by higher authority.

For the reasons stated, we see no legal basis to object to the award to Stelma, and your protest is therefore denied.

[B-166605]

Pay—Missing, Interned, Etc., Persons—Retired Pay

The retired pay checks of an Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside the continental United States by a private firm are to be sent to a bank in the United States, upon his alleged capture by enemy forces may not be issued to the bank or any other person on his behalf for the support of his family. The right of a retired member of the uniformed services terminates upon his death and a power of attorney executed by him is automatically revoked by his death, whether or not the fact of death is known, and in the absence of statutory authority providing otherwise, and because the presumption of death after a lapse of 7 years rule is not applicable, the payment of retired pay on behalf of the missing sergeant must be held in abeyance until it is established that he is not dead.

To Lieutenant Colonel J. E. Farr, Department of the Army, April 25, 1969:

Reference is made to your letter of March 11, 1969, requesting a decision concerning the continued payment of retired pay in the case of Master Sergeant E-7 Jack D. Erskine, U.S. Army (retired). Your request for decision has been assigned D. O. Number A-1032 by the Department of Defense Military Pay and Allowance Committee.

Sergeant Erskine was placed on the retired list under the provisions of 10 U.S.C. 3914 on May 1, 1966. He has accepted employment with the Geotronics Company working outside the continental limits of the United States. An official notice addressed to the Department of State from the American Embassy, Saigon, states that he was allegedly captured on November 13, 1968, and was last seen alive on that date being led away by his captors. You say that there has been no accurate confirmation that he is alive and a prisoner of the Viet Cong, although continuing efforts are being made to establish some type of exchange for Americans being held prisoner or confirmation of identities.

You also say that, when the copy of the official report of his capture was received, action was taken to withhold payment of his retired pay beginning January 1, 1969, except for two allotments for life insurance; that his wife is unable to provide proper support for their three dependent children and she is in need of funds; and that his employer has put aside his wages in a special fund and eventually a portion will be released to his wife.

You call attention to the case of *Acosta* v. *United States*, 162 Ct. Cl. 631 (1963), where the Court of Claims held that the death of a retired member of the Navy was presumed to have occurred at the expiration of 7 years after he disappeared, there being a presumption that he remained alive for 7 years. You say that, if the presumption that a missing person remains alive for 7 years is effective, there is no legal basis to cut off retired pay; that if the presumption of death cannot be effective so as to enable the court to render a decree of death immediately upon a person's disappearance, it is hard to justify the administrators of the Government doing so, which you say "would be the case if retired pay is immediately cut off."

Payment of retired pay to or for a retired member of the armed services is authorized only during the lifetime of the retired member. Where the continued existence of a retired member of the armed services is in question, it has been the consistent practice of the Government not to issue retired pay checks. It has been held that a Government check drawn payable to a person who has died is void. *United States* v. *First National Bank of Coffeyville*, 82 F. 410 (1897).

Where the United States disburses its funds or pays its debts, it is exercising a constitutional function or power and the rights and duties of the United States on commercial paper are governed by Federal rather than local law. *Clearfield Trust Co.* v. *United States*, 318 U.S. 363, 366 (1943). Federal regulations provide that "Powers of attorney are revoked by the death of the grantor * * *." 31 CFR 360.12(e).

Since the right to retired pay of a member of the armed services terminates upon his death and a power of attorney is revoked by death whether the fact of death is known to the United States or not, the protection of the interests of the Government would seem to require that, in the absence of statutory authorization providing otherwise, payment of retired pay to a retired member captured by a hostile force be held in abeyance until such time as it is established that he is not dead.

The presumptions concerning death and time of death in the case of persons whose continued existence is unknown to interested persons and the Government are applied by the courts in the absence of statute only when, after the lapse of 7 years or more, an action is brought in a court of competent jurisdiction which can then decide the matter on the basis of all the circumstances and evidence. The reasoning and holdings of the courts in such cases are not for application at this time in circumstances such as are present in this case.

You say that at the time of his disappearance Sergeant Erskine had authorized the sending of his retired pay check to him in care of the United States National Bank of Portland, Oregon. You state further that the Comptroller General of the United States in decision A-3551, February 3, 1964, abolished in certain cases the submission of reports of existence required for the protection of the Government to prevent the issuance of retired pay checks after the death of the retired member; that he approved the delivery of retired pay checks drawn to the retired member and mailed to responsible banks under a special power of attorney of not more than 12 months' duration; and that no objection was made to the issuance of checks in the retired member's name where they are negotiated under a special power of attorney in fact, limited to a period not exceeding 12 months and reciting that it is not given to carry into effect an assignment of the right to receive payment, either to the attorney in fact or to any other person.

It should be noted, however, that our decision of February 3, 1964, A-3551, did not consider a situation such as is here involved and that the actual death of the grantor of a power of attorney automatically revokes the power of attorney without regard to whether the person or institution granted the power of attorney has notice of the grantor's death. Likewise, it should be noted that in our decision authorization for delivery of a retired pay check to a bank for credit to the account of a retired officer of the Army who has made an assignment thereof under 37 U.S.C. 701 was limited to cases where the retired pay check carries an appropriate legend to the effect that the check is payable only during the life of the retired officer, that the check is not subject to deposit in a joint account, and the bank is appropriately notified that the crediting of the check to a joint account will be at its risk. In addition it should be noted that section 701(c) of Title 37, U.S. Code, specifically prohibits assignment of pay by an enlisted member of the Army and further provides that, if he does so, the assignment is void.

You have furnished no information as to the disposition which has been made of the retired pay checks drawn to the order of Sergeant Erskine which have been mailed to the Portland bank. Presumably, they were endorsed by the bank under a power of attorney and deposited in Sergeant Erskine's bank account from which only he could make withdrawals. If that is so, it is not understood how a continuance of that practice would aid Mrs. Erskine in solving her financial problem since she could not withdraw any funds from that account.

The effect of the foregoing is that, if a retired enlisted member of the Army is in fact dead, the payment of his retired pay is not authorized and a power of attorney previously executed by him is automatically revoked by his death. If a retired member such as Sergeant Erskine is alive but missing, we know of no authority of law for the issuance of retired pay checks to a bank or other person on his behalf for the purpose of support of his family. See *Melville* v. *United States*, 23 Ct. Cl. 74 (1888). In our opinion, if authority is desired to issue retired pay checks for such purposes in circumstances such as exist in this case, it will be necessary to obtain legislative authorization therefor such as is contained in 37 U.S.C. 551–557 for members of the uniformed services who become missing while on active duty.

Your question is answered accordingly.

[B–166610]

Vessels—Construction—Foreign Shipyards—Prohibition

The subcontracting with a Canadian firm of the welding and assembly services for submarine hull cylinders under a prime fixed-price incentive contract that contains a restriction on the construction of major vessel components in a foreign shipyard pursuant to the Tollefson Amendment in the Defense Department Appropriation Acts, as well as the Byrnes Amendment barring the complete construction of naval vessels in foreign shipyards, is not prohibited. The hull components constituting less than 10 percent of the total value of the submarine, and the work to be performed in the foreign shipyard but 39 percent of the value of the hull, the welding and assembly services proposed are not considered the vessel construction contemplated by the appropriation act prohibitions and, therefore, the Navy may consent to the subcontracting of the services to the Canadian firm.

To the Secretary of the Navy, April 28, 1969:

Reference is made to letter dated April 4, 1969 (reference "OOJ: SP: gw N00024–68–C–0232 Ser 32"), from the Vice Commander, Naval Ship Systems Command, concerning the propriety of the Navy's consenting to a proposed subcontract by Ingalls Shipbuilding Corporation with Canadian Vickers, Ltd. (Vickers), for welding and assembly services for submarine hull cylinders.

The facts and circumstances concerning the matter, as disclosed by the letter, are set forth below.

Ingalls Shipbuilding Corporation has requested the Navy's consent to place the subcontract hereafter described under Contract N00024–68–C–0232, which was entered into on June 25, 1968, with the Department of the Navy for the construction of three SS(N) 637 Class nuclear submarines, SS(N) 680, 682, and 683.

The proposed subcontract is for weldment and assembly services for four additional hull cylinders for the SS(N) 680 (nine such cylinders having previously been subcontracted to Vickers) and nine hull cylinders each for the SS(N) 682 and 683. Each hull cylinder requires the assembly and welding together of three prerolled HY 80-steel plates and preformed frames. The basic steel plates are furnished to

Ingalls by the Navy as Government-furnished material under the prime contract and are rolled by Ingalls. The framing is also supplied as Government-furnished material and is preformed by the Portsmouth Naval Shipyard under a contract with Ingalls. The preshaped plates and frames are shipped by rail to Vickers for the necessary welding and assembly. After the completion of this work, the welded hull cylinders will be shipped by freighter to Ingalls where they will be joined together by Ingalls to form a *pro tanto* portion of the pressure hull of the vessel, exclusive of decks, compartments, piping, etc., which, thereafter, will be installed by Ingalls. Each pressure hull is composed of twenty-nine such cylinders.

The prime contract is a fixed-price incentive contract and provides, among other things, in Clause 67(g) of the General Provisions that "the Contractor shall not enter into any subcontracts in excess of $100,000 or expected to exceed $100,000 without the prior written consent of the Contracting Officer." It further provides in Clause 66 that: "In furtherance of the Shipbuilding and Conversion, Navy appropriation requirement of the Department of Defense Appropriation Act, the hull, midbody or other major fixed structural component of the vessels shall not be constructed in a foreign shipyard." Questions have arisen as to (1) whether the proposed subcontracting to Vickers would contravene this clause or the statute on which it is based, and (2) if it is objectionable to consent to a subcontract for more than nine cylinders on one vessel, whether an exception could be made in the case of the SS(N) 680 on which the materials for four additional cylinders have already been shipped to Vickers.

Pursuant to the requirement for subcontract consent, Ingalls has previously requested and received the necessary consent to subcontract with Vickers for the welding and assembly services for nine hull cylinders of the SS(N) 680, and thereafter on January 6, 1969, entered into the implementing subcontract. Before doing so, it solicited bids from Bath Iron Works, General Dynamics Corporation/Electric Boat Division, and Newport News Shipbuilding and Drydock Company. Only Bath Iron Works responded to the solicitation, but its bid was not fully responsive as it lacked the capacity to perform part of the work. In addition, its estimate for performing a lesser amount of work was substantially higher than Vickers' firm fixed-price for all of the work covered by the solicitation.

On March 12, 1969, Ingalls requested further consent from the Navy to subcontract with Vickers for similar welding services on sixteen additional hull cylinders of the SS(N) 680 and twenty-five hull cylinders of the SS(N) 682. In view of its earlier experience, Ingalls did not request bids from other firms. The Navy did not consent to this proposed subcontract. Thereafter, on March 21, 1969, Ingalls submitted the alternative proposal referred to above.

Ingalls asserts that if it is not permitted to subcontract, it will have to lay off 500 submarine outfitters because its in-house welding capability is not adequate to turn out welded cylinders at a sufficient rate to provide productive work for all the outfitters currently employed. In that event, Ingalls has predicted that there will be an increase of approximately $6 million in the cost of performing the contract. To the extent that all or any part of this increase would be an allowable cost of performing the contract, the cost would be shared by the Government and Ingalls in the cost sharing ratio provided in the incentive contract which is 80–20 for costs under target and 60–40 for costs over target. Any allowable cost that Ingalls may incur to Vickers by not going ahead with the contemplated subcontracting may be similarily charged to the contract in this ratio, subject to any claim Ingalls may assert against the Government for improperly withholding its consent to subcontract.

When the Navy entered into the prime contract with Ingalls, the Navy did not contemplate any subcontracting of the welding and assembly of hull cylinders. It is recognized that Vickers is technically qualified to perform the proposed subcontract, that its facilities are adequate for the purpose, that its price is the lowest obtainable, and that there would be a substantial economic advantage both to Ingalls and the Government in having the work performed by Vickers.

The letter states that inasmuch as the prime contract obligates Shipbuilding and Conversation, Navy (SCN) appropriation, consideration must be given to the application of Clause 66 of the contract and of the following provisos in the Department of Defense Appropriation Act, 1968.

> *Provided,* That none of the funds herein provided for the construction and conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or superstructure of such vessel; *Provided further,* That none of the funds herein provided shall be used for the construction of any naval vessel in foreign shipyards.

The former proviso was first included in the Department of Defense Appropriation Act, 1965, and is known as the Tollefson Amendment; the latter proviso was first included in the Department of Defense Appropriation Act, 1968, and is known as the Byrnes Amendment.

Our opinion is requested as to whether under the circumstances outlined above the Navy may properly consent to the subcontracting of four hull cylinders for SS(N) 680 (in addition to the nine already approved for that vessel) and nine hull cylinders each for the SS(N) 682 and 683.

Insofar as the Tollefson Amendment (first of the above-quoted provisos) is concerned, its legislative history discloses that the amendment was aimed specifically at the practice of having a ship midbody constructed in a foreign shipyard, then towed by water to a domestic shipyard where the bow and stern would be affixed thereto. In offering the amendment on the floor of the House, Mr. Tollefson made the following pertinent statements concerning the amendment and its purpose (110 Cong. Rec. 8782, 8783, 8803 and 8804):

Mr. TOLLEFSON. * * *.

* * * * * * *

As most of you know, if an American vessel wants to carry an American flag, it must be built in an American shipyard; otherwise it cannot carry an American flag. Somebody discovered a loophole in the law and found that *there could be built the entire hull of the vessel, leaving off only the bow and the stern, in a foreign shipyard, in Europe.* This was done on a number of occasions before it was brought to the attention of our committee. They sought to get around the provision of the law that ships must be built in American shipyards in order to fly the American flag.

On two occasions our committee propounded legislation which finally closed that loophole, but that legislation applied only to commercial ships and could not apply to naval vessels.

These shipyard operators are intelligent. *They found a similar loophole in the laws governing the construction and conversion of naval vessels, and one of the shipyards bid on two vessels about a year ago and submitted a low bid because they had in mind following the practice of some of the yards that had midsections of commercial vessels built in foreign shipyards. So two of these midsections of naval vessels actually were built in a Japanese shipyard and towed across the Pacific Ocean and finished in a shipyard on the west coast.*

It was this sort of practice which I sought to prevent last year by my amendment. As I say, because of the assurance given by the committee and the Department of the Navy that it would not happen again, I did nothing.

About a month ago I heard a rumor to the effect the same thing was going to take place with respect to an invitation to bid submitted by the Navy Bureau of Ships. I called the Navy Bureau of Ships and asked them if they knew anything about it, and they said, "No," so far as they knew, there was nothing to the rumor. But the next morning I got a call from the Chief of the Bureau of Ships, and he said, "Congressman TOLLEFSON, there is something to this. *One of the yards, we understand, is now preparing to submit a bid under which the mid-body sections, as we call them, will be built in a foreign shipyard.*"

So they are ready to take advantage of this loophole again.

I am aware of the fact that the Navy, on some occasions, for good reasons, wishes to build ships in foreign yards. This they did last year in a Scandinavian yard. My amendment would not prevent that.

I am aware of the fact that emergency repairs must be made in foreign shipyards at times. My amendment would not prevent that.

The only thing my amendment would do is to prevent the construction of what we call these midbody sections in foreign shipyards. That is all it would do.

I hope that the chairman of the subcommittee will not make a point of order against the amendment. I believe he is in accord with what I am trying to do. I am trying to put the provision into the law so that the Bureau of Ships will not commit the same error it almost committed a few weeks ago. I must say that the Bureau of Ships is in accord with what I am trying to do. They have told me so. They only neglected to bear in mind the admonition or the assurance of the Under Secretary of the Navy last year that it would not happen again. When they put out invitations to bids, their specifications were such that the shipyard operator saw the loophole. *They are perfectly willing, so they tell me, to have this kind of prohibition in the legislation, so that the midbody sections will not be built in foreign yards at the expense of our private yards that might wish to bid on the work.*

* * * * * * *

Mr. MAHON. The gentleman from Washington (Mr. TOLLEFSON), showed me a proposed amendment yesterday which I believe read as follows:

Provided that not more than 10 percent of the funds expended in the construction or conversion of any naval vessel shall be expended in foreign countries.

This proposal was submitted to the Navy, and the impression we got from officials of the Department of the Navy was that the provision would have no adverse budgetary effect. It would have permitted a 10-percent leeway in foreign ports for the construction or conversion of naval vessels in foreign countries. This new amendment has no reference to 10 percent. It just prohibits the construction in foreign ports of any major component or any part thereof or any portion of the superstructure, as I understand it. So I am not sure what it means. I certainly believe in the "Buy American" Act, and I want to see ship construction and conversion take place in our own yards rather than overseas.

I do realize that at times oversea construction is mandatory, particularly when a ship gets into serious difficulty in faraway waters.

Mr. TOLLEFSON. Mr. Chairman, will the gentleman yield?

Mr. MAHON. I yield to the gentleman from Washington.

Mr. TOLLEFSON. At the time I was trying to explain the amendment I noticed the gentleman from Texas was engaged in conversation with somebody and did not hear my full explanation. This amendment, as I said a moment ago, will not prohibit the Navy from building ships in foreign yards if for good reason it thinks it ought to, and I agree with them in some cases they should. This will not precude them from repairing ships abroad. Originally I limited it to 10 percent, but I understand in conversation with people on this side that that amendment was subject to a point of order, and it was for that reason I changed the wording.

Let me say again to the gentleman all it does is it applies only to the midbody section. That is all. It has nothing to do with repair of ships abroad or construction there. *It affects only, as does the language of the Merchant Marine Act, the construction of what we call midbodies or midsections in foreign lands and towing them across the ocean and finishing them in our yards.*

* * * * * * *

Mr. TOLLEFSON. *I had thought yesterday that that amendment would take care of the problem, but upon further consideration, I am convinced it will not, because the 10-percent figure I had mentioned in the original intended amendment would not cover the ship-by-ship contracts of construction but would only apply to the overall figure.* In other words, in my original amendment I referred to 10 percent of the total amount, or 10 percent of $1.9 billion. That would result in an item of $190 million-plus which could be used abroad in any way whatsoever. *That would not prevent the construction of these midbody sections in foreign lands. All I am trying to get at is the midsection practice which has been followed in the last several years.*

* * * * * * *

Mr. FORD. Mr. Chairman, I move to strike out the requisite number of words.

Mr. Chairman, let me ask the gentleman from Washington if he would agree to an amendment to the amendment to provide the 10-percent limitation that he originally proposed on yesterday.

Mr. TOLLEFSON. *If it could be properly worded so that the 10-percent limitation would be applied ship by ship, that would be acceptable. But in a short time I would not be able to draft language accordingly and that is why I offered the amendment that I did offer.*

* * * * * * *

Mr. MAHON. Mr. Chairman, this matter was discussed earlier in the afternoon. *We have had an opportunity to confer briefly with officials of the Navy about it.* We are convinced that the amendment is appropriate. I have no objection to it, and I do not believe anyone on this side has.

Mr. TOLLEFSON. May I ask the gentleman from Michigan if the amendment is acceptable to this side?

Mr. FORD. Mr. Chairman, I concur in the observations of the gentleman from Texas [Mr. Mahon] on this amendment. [Italic supplied.]

Also, the Senate Hearings on the Department of Defense Appropriation Act, 1965, disclose that Mr. Cyrus Vance, the then Deputy Secretary of Defense, testified during the Hearings as follows concerning the Tollefson amendment (pages 779, 780, Part 2 of Senate Hearings):

Mr. VANCE. One final matter: A new provision was added to the "Shipbuilding and conversion, Navy" appropriation by amendment on the floor of the House. This provision reads as follows:

"That none of the funds herein provided for the construction or conversion of any naval vessel to be constructed in shipyards in the United States shall be expended in foreign shipyards for the construction of major components of the hull or superstructure of such vessel."

It is our understanding, from a reading of the House debates on the Defense appropriation bill, that the intention of the House, with regard to this provision, is *solely to preclude the subcontracting to a foreign shipyard of an entire "midbody section"* of a naval vessel awarded on a prime contract to a U.S. shipyard. Congressman Tollefson, the author of the amendment, stated very clearly—

"The only thing my amendment would do is prevent the construction of what we call these midbody sections in foreign shipyards. That is all it would do."

On the basis of this understanding, Chairman Mahon and Congressman Ford agreed to the amendment. And, on the same basis, we have no objection to the provision. [Italic supplied.]

It is clear from the above-quoted legislative history of the Tollefson amendment that it was intended to affect only the construction of a substantial part of a vessel in a foreign shipyard and transporting such part to the United States for incorporation into a vessel being constructed in a shipyard here. Note for example Mr. Tollefson's repeated references to "midbody" and "midsection," as well as his reference to the building of "the entire hull of the vessel, leaving off only the bow and stern, in a foreign shipyard * * *." It is also clear from the same legislative history that Mr. Tollefson would have accepted an amendment which would have permitted ship construction work in foreign shipyards in an amount not to exceed 10 percent of the construction cost of the vessel involved; but that he felt he did not have sufficient time to draft language so providing.

It is difficult to draw a clear line as to what does or what does not constitute major components of the hull or superstructure of a vessel, or construction thereof. Without attempting to define precisely the full extent of the application of the Tollefson proviso, we do not believe it reasonably can be applied in this case where the work is substantially less than 10 percent of the overall construction cost of each vessel and where the work itself is significantly less than complete construction of the component involved.

In the instant case, the three steel plates for the hull cylinder would be prerolled and the frames therefor preformed in the United States by the prime contractor (Ingalls) or one of his subcontractors and shipped to Vickers in Canada by rail. Vickers would assemble and weld together the three preshaped steel plates and frames into a cylinder after which the completed cylinder would be shipped back to Ingalls by freighter, and Ingalls would join the cylinders together to form a portion of the hull. Thus Vickers would perform only the welding and assembly operations in connection with the construction of the cylinders.

We are advised that the work to be done on a cylinder by Vickers would constitute but 39 percent of the total value of the cylinder, before the cylinder is made part of the hull. Also, we have been informally advised by the Department of the Navy that the work to be performed by Vickers on each of the three submarines involved would be substantially less than 10 percent of the total construction cost of the particular submarine. In other words on a ship-by-ship basis the cost of the welding and assembly work to be performed by Vickers would be less than 10 percent of the total construction cost of the ship involved.

Inasmuch as the only work to be performed by Vickers on the cylinders for the submarine is the welding and assembly work, and since the cost of such work under the proposed subcontract would be substantially less than 10 percent of the total construction cost of each vessel, we do not believe that such work would constitute "construction of major components of the hull" of the vessels involved within the intent of the Tollefson Amendment, as disclosed by its legislative history.

In reaching the above conclusion, we have not overlooked somewhat similar language contained in the second proviso of section 27 of the Merchant Marine Act of 1920, as amended, 46 U.S.C. 883 (see also 46 U.S.C. 883a). However, whatever construction may be placed on the language used in the Merchant Marine Act proviso would not necessarily be controlling in construing the appropriation proviso involved here. First, while both provisions of law (i.e., the section 27 proviso and the appropriation proviso) refer to the "construction of any major components of the hull or superstructure," section 27 refers to "the entire rebuilding, including the construction of any major components of the hull or superstructure." The appropriation proviso makes no reference to the "entire" construction or conversion of a vessel. Second, the legislative history of the section 27 proviso discloses an intent to expand the interpretation of the language "major components of the hull or superstructure" to include, in addition to midbodies, "any component which relates to, or changes, the configuration of a vessel," (see page 3, S. Rept. No. 1279, 86th Cong., 2d sess.), while no such specific intent is disclosed by the legislative history of the Tollefson Amendment. Third, as indicated above, the legislative history of the Tollefson Amendment shows quite clearly that the Amendment is pointed at complete construction of midbodies abroad but it may also be reasonably implied from such legislative history that the Amendment was not necessarily intended to apply to minor construction on hull components where the cost of such minor construction is less than 10 percent of the total construction cost of the vessel involved.

Insofar as the Byrnes Amendment is concerned (the second of the provisos quoted above), it prohibits using any of the funds in the appropriation for "Shipbuilding and Conversion, Navy" for the construction of any naval vessel in foreign shipyards. In our opinion the welding and assembly of the individual hull cylinders alone in the manner described in the letter of April 4, 1969, would not constitute the construction of a naval vessel, since the cylinders themselves are not vessels nor can the cylinders alone be used as such. Hence, the Byrnes Amendment would not prohibit the proposed subcontract.

Insofar as Clause 66 of the prime contract is concerned, it appears from the language of the clause that it is based primarily on the Tollefson Amendment and that its intended purpose is to prohibit whatever the Amendment may be considered to prohibit. Therefore, in our opinion Clause 66 would not prohibit the proposed subcontract, if the proposed subcontract is not in contravention of the Tollefson Amendment. Hence, in view of what is stated above concerning the Tollefson Amendment, the proposed subcontract would not be in contravention of Clause 66.

In light of the foregoing, it is our view that the Navy may properly consent to the subcontracting of four hull cylinders for SS(N) 680 (in addition to the nine already approved for that vessel) and nine hull cylinders each for the SS(N) 682 and the SS(N) 683.

[B-166093]

Station Allowances—Military Personnel—Temporary Lodgings—Awaiting Arrival of Vessel

A member of the uniformed services who incident to permanent change-of-station orders assigning him to duty on board a ship, occupies hotel or hotel-like accommodations with his family at the home port or is temporarily assigned to the off-ship crew of a two-crew nuclear-powered submarine, is not eligible to receive the temporary lodging allowances prescribed by 37 U.S.C. 405 as a permanent station allowance to partially reimburse a member for the more than normal expenses incurred upon arrival at a permanent station outside the United States. Therefore, as a member is not considered to be at a permanent duty station for the purposes of the temporary lodging allowance until he reports aboard the vessel to which assigned, the Joint Travel Regulations may not be amended to authorize payment of the allowance to a member prior to reporting aboard ship.

To the Secretary of the Army, April 29, 1969:

Further reference is made to letter dated January 13, 1969, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision whether the Joint Travel Regulations may be amended to authorize the payment of temporary lodging allowance to a member of the uniformed services assigned to duty on board a ship when he is required to occupy hotel or hotel-like accommodations at the home port in the circumstances described below. The request for decision was assigned Control No. 69-2 by the Per Diem, Travel and Transportation Allowance Committee.

In the letter it is stated that under current regulations temporary lodging allowances are allowed only for dependents incident to the arrival of the member and dependents at the home port of a vessel to which the member is assigned because the member is considered to be in a travel status until he reports on board the vessel in cases where the vessel is away from the home port at the time of arrival. However, the member is entitled to travel per diem allowance while at the home port awaiting arrival of the vessel, except in the case of a member assigned to a two-crew nuclear-powered submarine. In such case, it is stated, paragraph 4061, Navy Travel Instructions, appears to prohibit payment of per diem for temporary duty with the off-ship crew upon initial reporting prior to reporting aboard ship.

The Assistant Secretary says that it is recognized that except for the restriction in paragraph 4061 Navy Travel Instructions, the member occupying private quarters at the home port prior to reporting on board the vessel would have no need for temporary lodging allowance for himself because the travel per diem allowance would cover his living expenses. He says, however, that in determining the applicable amount of travel per diem payable, the availability of Government quarters and/or mess to the member in a travel status often results in a reduced per diem, and if the member occupies hotel accommodations with dependents he receives no allowance for his portion of the hotel expenses.

The Assistant Secretary says that it has been proposed that the Joint Travel Regulations be amended to authorize the payment of temporary lodging allowance on behalf of a member in the following situations when the member is required to occupy hotel or hotel-like accommodations at the home port of a vessel to which assigned:

(1) when the vessel is away from the home port when the member arrives thereat under permanent-change-of-station orders.

(2) when assigned to a two-crew nuclear-powered submarine and the member, upon arrival at the home port under permanent change-of-station orders, is temporarily assigned to the off-ship crew at the home port pending return of the submarine.

Section 405 of Title 37, United States Code, provides that the Secretaries of the uniformed services may authorize payment to members of the uniformed services on duty outside the continental United States or in Hawaii or Alaska, whether or not in a travel status, of a per diem considering all elements of the cost of living to members and their dependents, including the cost of quarters, subsistence, and other incidental expenses, except that dependents may not be considered in determining the per diem allowance for a member in a travel status.

The purpose of those statutory provisions is to permit payment of allowances to cover the additional living expenses including cost of quarters, subsistence and other incidental expenses a member is required to meet while serving outside the United States. Under that authority, the pertinent provisions of paragraph M4303, Joint Travel Regulations, authorize temporary lodging allowance, at the rates prescribed, for the purpose of partially reimbursing a member for the more than normal expenses incurred upon arrival at a permanent duty station outside the United States.

This allowance is authorized for periods not to exceed the maximum number of days prescribed by the regulations when Government quarters are not furnished to the member, his dependents, or the member and his dependents, if with dependents, and the member is required to secure hotel or hotel-like accommodations and use public restaurants at personal expense. The allowance continues with the prescribed limitations pending assignment of Government quarters or completion of arrangements for other permanent living accommodations. The temporary lodging allowance thus provided is expressly prescribed as a permanent station allowance.

In connection with an assignment to a vessel, the definition of "permanent station" contained in paragraph M1150–10, Joint Travel Regulations, insofar as transportation of dependents and household goods is involved, includes the home port or home yard of the vessel. But as far as the member is concerned, the vessel is the permanent station. In the case of a vessel having two crews, such as a nuclear-powered submarine, the vessel is considered to be the permanent duty station of members of both crews. 45 Comp. Gen. 689.

Consequently, while recognizing that temporary lodging allowance may accrue from the date of the dependents arrival at the home port, it has been held that such allowance, to the extent applicable to the member himself, may not be paid for any period he is in a travel status and prior to reporting aboard the vessel to which assigned, his permanent station. 40 Comp. Gen. 271; 45 *id.* 689; 47 *id.* 724.

Since the permanent station of a member assigned on permanent change of station to a vessel, including two-crew nuclear-powered submarines, is the vessel itself, and entitlement to temporary lodging allowance on behalf of a member may not be considered to accrue prior to his actual reporting under the orders aboard the vessel, we are of the view that there is no legal basis for the proposed change in the Joint Travel Regulations in either of the situations indicated by the Assistant Secretary, but that any allowance of the nature contemplated properly would of necessity be the subject of authorization as a travel allowance in the interest of the member. *Cf.* 48 Comp. Gen. 480.

The questions presented are answered in the negative.

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