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[B-160026]

Officers and Employees—Service Agreements—Overseas Employees—Transfers Between Overseas Duty Stations

Employees who at the time of transfer by their agencies between overseas duty stations located in different territories or countries outside the continental United States had only completed part of an agreed period of service and had less than 12 months of service to perform under an employment agreement are required pursuant to 5 U.S.C. 5724(d) to execute a new agreement for a minimum of 12 months service—1 school year for overseas teachers—in order to be eligible for payment by the Government of the costs of the transfer.

Officers and Employees—Service Agreements—Overseas Employees—Transfers Between Overseas Duty Stations

Although employees with less than 12 months of service to perform under a transportation agreement are not required under 5 U.S.C. 5724(d) to execute a new employment agreement upon transfer by their agency or department between official stations located in the same territory or country outside the United States, the agency or department, by policy or regulation, nevertheless may require their employees to execute a new employment agreement.

Officers and Employees—Transfers—Relocation Expenses—Overseas Employees Transferred Between Overseas Duty Stations

The requirement in section 3.2a of the Bureau of the Budget Circular No. A-56 that an employee execute the employment agreement prescribed by section 1.3c of the Circular in order to be eligible to receive payment of the miscellaneous expense allowance authorized has no application to employees transferred within foreign countries or within territories or possessions of the United States outside the contiguous 48 States and the District of Columbia. Therefore, employees transferred by their agency from one official station to another overseas prior to completing an agreed 12 months of service, whether or not they are required to sign a new employment agreement, are entitled to the miscellaneous expense allowance authorized by section 3.2a, and possibly other benefits prescribed by Circular No. A-56.

To the Secretary of the Air Force, August 1, 1968:

We refer to the letter of the Assistant Secretary of the Air Force, Manpower and Reserve Affairs, dated May 27, 1968, received in our Office July 5, which was assigned Control No. 68-23 by the Per Diem, Travel and Transportation Allowance Committee concerning the execution of transportation agreements by employees of the Government who are transferred by their agencies between overseas duty stations.

The following questions with regard to such transfers are presented in connection with the consideration of certain proposed amendments to Volume II of the Joint Travel Regulations by the Per Diem, Travel and Transportation Allowance Committee:

a. Under the circumstances where an employee is reassigned or transferred from one official station overseas to another official station overseas, but at the time of reporting to the new station less than 12 months service remains to be served under his current agreement, do the provisions of BOB Circular A-56 require the execution of a new agreement for a minimum period of 12 months?

b. If the answer to a. is in the negative, is the employee entitled to the benefits established under P.L. 89–516, to the extent applicable under the circumstances cited in a. above, such as miscellaneous expenses, etc.?

In the decision of May 8, 1968, B–163726, we held that 5 U.S.C. 5724(d) requires that employees who are transferred between official stations in different territories or countries outside the continental United States execute agreements to remain in Government service for 12 months (1-school year in the case of overseas teachers) following such transfer in order to be eligible for payment by the Government of the costs of such transfer. No exception is provided in the controlling provision of law for employees who are transferred between official stations in different territories or countries outside the continental United States after having completed part of an agreed period of service prior to transfer. Therefore, a new agreement for a minimum of 12 months' service (1-school year in the case of overseas teachers) is required in such cases by 5 U.S.C. 5724(d). With regard to employees transferred between official stations located in the same territory or country outside the continental United States, the law does not require the execution of an employment agreement. However, a department or agency may require, by policy or regulation, an agreement to be executed incident to such transfers. Question "a" is answered accordingly.

In regard to question "b" we note that section 3.2a of the Bureau of the Budget Circular No. A–56 authorizes payment of the miscellaneous expense allowance "provided the agreement required in subsection 1.3c is signed." Under our decision referred to above, subsection 1.3c would not be applicable to employees transferred within foreign countries or within territories or possessions of the United States outside the contiguous 48 States and the District of Columbia. Thus, we see no reason why such employees would not be entitled to the miscellaneous expenses allowance even though they are not required to sign an agreement. Also, other benefits might be payable to employees involved under Circular No. A–56 such as those covered by section 2.5 even though an agreement to remain in Government service is not required.

[B–163821]

Quarters Allowance—Government Quarters—Nonoccupancy—Allowance Continuance—Members Without Dependents Duty Station Changes

Members of the uniformed services without dependents who are not assigned or do not occupy Government quarters while in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed

time, are entitled to a basic allowance for quarters during the interim between detachment from the old station and reporting at the new station on the same basis as members with dependents, Public Law 90-207, amending 37 U.S.C. 403(f) prescribing entitlement to the allowance for the period while in a permanent change-of-station status without regard to dependency.

Quarters Allowance—Members Without Dependents—While in a Travel or Leave Status Between Duty Stations

To the extent that members of the uniformed services without dependents are not assigned Government quarters while traveling, or during delays en route, they are entitled to basic allowances for quarters from date of departure from the old station to the date of arrival at the new station overseas, including periods while in a per diem or group travel status for the overseas portion of the travel, the accommodations furnished during such travel not being regarded as the assignment or occupancy of public quarters within the meaning of the quarters allowance authorized by 37 U.S.C. 403(f).

Quarters Allowance—Transit Type Quarters—Basic Allowance Entitlement

On the basis that 37 U.S.C. 403(f), as amended, authorizes payment of a basic quarters allowance to members of the uniformed services without dependents while in a travel or leave status between permanent stations when not assigned Government quarters, section 403(i) of Executive Order No. 11157, dated June 22, 1964, may be amended to apply to members without dependents as well as to members with dependents with respect to the temporary occupancy of Government quarters while in a duty or leave status incident to a change of permanent station, thus permitting the promulgation of administrative regulations to authorize a basic allowance for quarters for not more than 30 days to a member without dependents who occupies transient type quarters while in a duty or leave status incident to a permanent change of station.

Quarters Allowance—Transit Type Quarters—Basic Allowance Entitlement

Absent an administrative regulation to authorize the occupancy of transient type Government quarters for not to exceed 30 days while between permanent duty stations without loss of entitlement to a basic allowance for quarters, a member without dependents who occupies Government quarters while assigned temporary duty at a preembarkation overseas processing point in the United States would not be entitled to the basic allowance for quarters prescribed by 37 U.S.C. 403(f), as amended by Public Law 90-207, regardless of a reduction in per diem because of the occupancy, or direction to utilize Government quarters due to the mission requirements of the temporary duty to be performed en route to his permanent duty station.

Quarters Allowance—Leave or Travel Status—Between Permanent Duty Stations

The fact that a member of the uniformed services occupies accommodations aboard a ship as a passenger en route to his new permanent duty station does not affect his basic allowance entitlement under 37 U.S.C. 403(f), as amended, in view of the rule that accommodations furnished members and their dependents while traveling incident to a change of station are not considered the equivalent of public quarters.

Quarters Allowance—Transit Type Quarters—Basic Allowance Entitlement

The occupancy of transient type Government quarters by a member of the uniformed services without dependents for 28 days while awaiting the arrival at its

home port of the vessel to which assigned does not affect the member's entitlement to a basic allowance for quarters, section 401(d) of Executive Order No. 11157, dated June 22, 1964, which implements 37 U.S.C. 403, defining the term "permanent station" as including the home yard or home port of a ship in which a member is required to perform duty.

Quarters Allowance—Transit Type Quarters—Basic Allowance Entitlement

A member of the uniformed services without dependents who while awaiting the arrival at its home port of the vessel to which ordered is assigned by his squadron to another squadron for the performance of 29 days temporary duty is not entitled to a basic allowance for quarters during the period of temporary duty, in view of the fact the temporary quarters occupied aboard the vessel while performing temporary duty are considered permanent quarters of the United States within the purview of 37 U.S.C. 403 (b) and (f), and because the temporary assignment does not come within the exceptions contained in Executive Order No. 11157, dated June 22, 1964.

Quarters Allowance—Transit Type Quarters—Basic Allowance Entitlement

A transfer from one vessel to another where both vessels are homeported in the same area not constituting a permanent change of station within the purview of section 401(d) of Executive Order No. 11157, implementing 37 U.S.C. 403, and the transfer not coming within the exception contemplated by section 403(i) of the Executive order, which permits the occupancy of Government quarters without loss of basic allowance for quarters (BAQ) while a member is in a leave or duty status incident to a change of permanent station, members of the uniformed services without dependents who occupy transient quarters incident to a transfer from one vessel to another in the same home port are not entitled to BAQ for the period of occupancy of transient quarters.

To the Secretary of Defense, August 2, 1968:

Further reference is made to letter of March 12, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision on several questions pertaining to entitlement of members without dependents to basic allowance for quarters while in a leave or travel status between permanent duty stations under the provisions of 37 U.S.C. 403(f) as amended by section 1(3) of Public Law 90–207, approved December 16, 1967, 81 Stat. 651. The questions and discussion pertaining to the matter are set forth in Committee Action No. 412 of the Department of Defense Military Pay and Allowance Committee.

The Committee refers to section 102 of the act of June 29, 1950, ch. 405, 64 Stat. 288, which, prior to the enactment of Public Law 90–207, had been codified as subsection (f) of section 403, Title 37, U.S. Code. This provided that appropriations may not be used to pay any member without dependents a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay enroute or proceed time. The Committee observes that prior to the passage of the 1950 act members without dependents were generally entitled to a quarters allowance for the

interim following detachment from a permanent station and preceding reporting at a new permanent station, including time on authorized leave, proceed time, time awaiting transportation and travel time.

The Committee referred to the legislative history of section 1(3) of Public Law 90–207, contained in S. Rept. No. 808 by the Committee on Armed Services, 90th Cong., 1st sess., to accompany H.R. 13150, which states:

> * * * The vast majority of career military members have dependents, but the few who do not, experience a loss of income while moving because the statute now precludes their entitlement to the basic allowance for quarters while in a permanent change of station status. The proposed legislation will correct this condition and assure treatment of career military personnel without regard to their dependency status.

In view of the change made by the 1967 amendment of section 403(f) and the stated purpose of such amendment, the Committee requests clarification on various areas of entitlement as reflected in the questions presented in its Committee Action.

Section 403(a) of Title 37, United States Code, provides that except as provided by that section or by another law, members of the uniformed services entitled to receive basic pay are entitled to a basic allowance for quarters. Subsection (b) provides that except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.

Section 403(f) as amended by section 1(3) of Public Law 90–207, provides as follows:

> (f) A member of a uniformed service without dependents who is in pay grade E–4 (four or more years' service), or above, is entitled to a basic allowance for quarters while he is in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, *when he is not assigned to quarters of the United States.* [Italic supplied.]

Subsection (g) of section 403, authorizes the President to prescribe regulations for the administration of the section. Executive Order No. 11157, June 22, 1964, 29 F.R. 7973–7977, as amended, provides in pertinent part of section 403 thereof, as follows:

> Sec. 403. Any quarters or housing facilities under the jurisdiction of any of the uniformed services in fact occupied without payment of rental charges (a) by a member and his dependents or (b) *at his permanent station* by a member without dependents * * * shall be deemed to have been assigned to such member as appropriate and adequate quarters, and no basic allowance for quarters shall accrue to such member under such circumstances unless the occupancy (i) occurs while such member is in a duty or leave status incident to a change of permanent station and is of a temporary nature under standards prescribed by regulations issued by the Secretary of Defense in the case of members of the Army, Navy, Air Force, or Marine Corps, and the reserve components thereof. * * *

The questions presented will be quoted and answered in the order presented.

1. Does 37 U.S.C. 403(f), as amended by section 1(3) of Public Law 90-207, provide entitlement to a basic allowance for quarters to all members without dependents, within its coverage, on the same basis as members with dependents while in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, when not assigned to Government quarters?

Prior to the passage of the act of June 29, 1950, the rule was stated in 23 Comp. Gen. 761, that an officer with or without dependents is entitled to rental allowance during the interim between detachment from permanent station and reporting to the new permanent station, including periods while on leave of absence or while on sick leave from a hospital. This rule, we said, has been applied regardless of the officer's status for rental allowance purposes while at his former permanent station. The above general statement was made on the premise that there was no furnishing of Government housing or quarters during the interim between detachment from the old station and reporting at the new station. See 37 Comp. Gen. 47. Accordingly, question 1 is answered in the affirmative when there is not involved an assignment or occupancy of Government quarters.

2. In the case of members without dependents transferred from the United States to an overseas area, would entitlement to BAQ extend from the date of departure from the old station to the date of arrival at the new station overseas, regardless of the fact that a member might be in a per diem or group travel status for the overseas portion of the travel?

To the extent that members are not assigned to Government quarters while traveling, or during delays en route, they would be entitled to basic allowances for quarters from date of departure from the old station to the date of arrival at the new station overseas, including periods while in a per diem or group travel status for the overseas portion of the travel, the accommodations furnished during such travel not being regarded as the assignment or occupancy of public quarters within the meaning of the quarters allowance laws. See, in this connection, 40 Comp. Gen. 384 and 25 Comp. Gen. 863.

3. In view of entitlement to a reduced per diem rate by virtue of availability of Government quarters while assigned temporary duty at a pre-embarkation overseas processing point in the United States, would the occupancy of "transient type" quarters under conditions of this nature affect entitlement to BAQ?

In discussing question 3, the Committee states that it appears to be a tenable opinion that the occupancy of "transient type" quarters by members without dependents for "not more than 30 consecutive days" at a temporary station, or at a pre-embarkation overseas processing point in the United States, would not adversely affect entitlement to basic allowance for quarters on the premise that provisions similar to those are contained in rules 6 and 7, Table 3-2-5 of the Department

of Defense Military Pay and Allowances Entitlements Manual, governing quarters allowance entitlements of members with dependents. It refers to the discussion in 45 Comp. Gen. 347, which it states appears to support such a "30 day rule" even in the absence of any expresssion in an Executive order or by administrative regulations to effect.

Section 402 of Executive Order No. 11157, dated June 22, 1964, provides that except as otherwise provided by statute, a member shall be entitled to a quarters allowance in accordance with those regulations and any regulations prescribed pursuant thereto.

As indicated above, section 403 of the Executive order provides that any Government quarters in fact occupied without payment of rental charges (a) by a member and his dependents or (b) at his permanent station by a member without dependents shall be deemed to have been assigned and no quarters allowance shall accrue in such circumstances unless the occupancy occurs while the member is in a duty or leave status incident to a change of permanent station and is of a temporary nature under standards prescribed in regulations issued by the Secretary of Defense.

It is to be noted that section 403 makes no exception with respect to temporary occupancy of Government quarters at other than his permanent station by a member without dependents, incident to a change of permanent stations, since the law specifically precluded the payment of a quarters allowance to such members "between permanent duty stations" at the time the Executive order was issued. Section 403(f) of the statute now authorizes a quarters allowance to an otherwise eligible member without dependents while in a travel or leave status between permanent stations, when he is not assigned to Government quarters.

In 45 Comp. Gen. 347, we concluded that under the provisions of section 403 of Executive Order No. 11157, administrative regulations could be issued to authorize a quarters allowance for not more than 30 days to a member without dependents who occupies transient type quarters at his permanent station incident to a permanent change of stations. The decision did not hold, however, that such an allowance would be payable in the absence of appropriate regulations.

While paragraph 403(f) of the statute does not authorize the payment of a quarters allowance to a member without dependents when assigned quarters between permanent stations, in view of the legislative intent to provide for entitlement without regard to the member's dependency status, we are of the opinion that section 403 of the Executive order might be amended so that clause (i) will apply the same to a member without dependents as it does to a member and his dependents with respect to occupancy of a temporary nature while in a duty

or leave status incident to a change of permanent station. Should the Executive order be so amended, we believe administrative regulations could then be promulgated to authorize basic allowance for quarters for not more than 30 days to a member without dependents who occupies transient type quarters while in a duty or leave status incident to a permanent change of station.

In the absence of appropriate regulations as indicated above, it is our view, however, that a member without dependents who occupies Government quarters at a temporary duty station incident to a duty assignment between permanent duty stations is not entitled to a quarters allowance. And this is so regardless of the fact that his per diem is reduced because of such occupancy. Question 3 is answered accordingly.

4. Would it make any difference if the member were TDY enroute and specifically directed to utilize Government quarters because of mission requirements?

Inasmuch as the member would be occupying Government quarters, even if specifically directed to do so, he would not be entitled to basic allowance for quarters under the present regulations. See answer to question 3.

5. Would the answer to Question 3 vary depending upon the period of time involved in the occupancy of such quarters?

As indicated in answers to questions 3 and 4, no entitlement would exist under present regulations, but under appropriate amendments we believe that occupancy of "transient type" quarters for not to exceed 30 days between permanent duty stations could be authorized, without loss of basic allowance for quarters.

6. Under regulations applicable to members with dependents while in a travel or leave status between permanent duty stations entitlement to BAQ exists, but not more than 30 consecutive days at any location where transient quarters are occupied. In view of the intent of Section 1(3) of Public Law 90-207 to assure equal treatment of personnel without regard to their dependency status, would not the "30 day rule" apply to members without dependents, under the same circumstances, even in the absence of any addition to Presidential regulations (37 U.S.C. 403(g)) as to entitlement in this particular area?

A member with dependents who occupies transient type quarters for a period of not more than 30 days incident to a permanent change of station is entitled to a quarters allowance by reason of the provisions of section 403 of Executive Order No. 11157 and the administrative regulations issued pursuant thereto. 45 Comp. Gen. 347. As explained in answer to question 3, we believe regulations may provide similar entitlement for a member without dependents who occupies transient type quarters between permanent stations incident to a permanent change of station. Section 403 of the statute, as amended, however, does not provide for such entitlement in the absence of appropriate regulations. The question is answered in the negative.

7. Would a member occupying quarters aboard a ship as a part of transportation en route be considered as assigned to quarters of the United States for any purpose under the new section 403(f) of title 37, so as to affect entitlement to BAQ?

As stated in the Committee discussion, we have held that accommodations furnished members of the uniformed services and to their dependents while traveling upon change of station are not the equivalent of public quarters so as to deprive the members of basic allowance for quarters. See 20 Comp. Gen. 522 and 25 *id.* 863. Accordingly, a member occupying accommodations aboard a ship as a passenger en route to his new permanent station would nevertheless be entitled to basic allowance for quarters, if otherwise entitled.

8. A member without dependents, otherwise eligible, is detached from last permanent duty station and ordered to a vessel homeported at Pearl Harbor. Member arrives Pearl Harbor, his vessel is not in port, and he reports in the squadron headquarters to await arrival of vessel which arrives 28 days later and member reports on board for duty. In the meantime he occupies "transient type" quarters. Does such occupancy affect his entitlement to BAQ.

Section 401(d) of Executive Order No. 11157, implementing section 403 of Title 37, United States Code, defines the term "permanent station" as including the home yard or the home port of a ship in which a member is required to perform duty. Accordingly, the member would be entitled to basic allowance for quarters while occupying transient type quarters during the 28 days he was awaiting the arrival of his vessel at its home port since he would be at his permanent station for quarters allowance purposes.

9. The same question as above, except upon arrival at homeport the member is assigned by the squadron to another for temporary duty to await arrival of vessel to which ordered, and member is on board temporary vessel for 29 days prior to reporting to vessel to which ordered for permanent duty. Does such occupancy affect his entitlement to BAQ?

Section 403(f) of Title 37, U.S. Code, provides that a member is entitled to basic allowance for quarters under that subsection, if otherwise qualified "when he is not assigned to quarters of the United States." Since quarters aboard a vessel in the performance of temporary duty are considered quarters of the United States within the purview of sections 403 (b) and (f) and such assignment does not come within the exceptions contained in Executive Order No. 11157, the member, not being at his permanent station, would not be entitled to basic allowance for quarters during such period of temporary assignment.

10. In cases of PCS transfer from one vessel to another, both homeported in the same area, may an otherwise eligible member occupy "transient type" quarters at the homeport for periods of not more than 30 consecutive days without affecting his BAQ entitlement?

The exception in section 403, clause (i) of Executive Order No. 11157, which permits occupancy of Government quarters without loss

of basic allowance for quarters, relates to occupancy which occurs while the member is in a leave or duty status incident to a change of permanent station and is of a temporary nature under prescribed standards. In view of the definition of permanent station contained in section 401(d) as mentioned in answer to question 8, it appears that a transfer from one vessel to another, both homeported in the same area, does not constitute a permanent change of station for quarters allowance purposes. Consequently, the occupancy of transient type quarters at the home port incident to such a reassignment would not be incident to a change of station within the contemplation of section 403 of the Executive order and no entitlement to quarters allowance would exist during such period of occupancy.

[B-164811]

Clothing and Personal Furnishings—Special Clothing and Equipment—Tuxedo, Formal Attire, Etc.

The rental charges on formal dress attire required to be worn by United States Secret Service agents for security purposes and not merely to be attired in a socially acceptable manner may be reimbursed to special agents whenever a written determination is made by a proper official of the Service that the utilization of the formal attire is necessary for the proper performance of the duty to which assigned.

To James G. Jeffries, Treasury Department, August 2, 1968:

We refer to your letter of July 9, 1968, File No. 300.0, requesting our decision concerning the legal propriety of the United States Secret Service paying rental charges on formal attire (white tie—tails, winter or summer tuxedo) required to be used by special agents when attending formal functions incident to their furnishing protective service to persons whom they are assigned to protect.

You point out that the necessity for formal attire may occur at the official station of the agent or while he is in travel status and that in many instances an agent does not know at the start of a trip whether the person he is assigned to protect will attend a formal function. You say further that clothing of this type is not normally owned, nor generally used, by special agents except when on an official protective assignment.

We understand that the purpose of wearing formal dress by special agents under the circumstances set forth in your letter is not merely to be attired in a socially acceptable manner. Rather such attire is necessary for security purposes—to be less readily identified as a special agent—and is considered to be necessary for the proper performance of the duty to which such agents are assigned. For that

reason their situation is distinguishable from that considered in 45 Comp. Gen. 272.

Accordingly, our Office will not object to the United States Secret Service paying the rental charges on formal dress attire for the agents in question whenever a written determination is made by a proper official of the Service that the utilization of such formal attire is necessary for the proper performance of the duty to which the agent is assigned.

[B-163767]

Bids—Two-Step Procurement—Technical Proposals—Modification

The use of the two-step formal advertising method of procurement authorized by paragraph 2-501 of the Armed Services Procurement Regulation for the purchase of helicopters, where the Request for Technical Proposals avoided unnecessary restrictive statements of the Government's requirements in order to promote competition, and recognized that potential bidders would have to modify FAA certified helicopters submitted in the first-step in order to meet the specifications was not improper, and the acceptance of a proposal based upon the determination that the necessary modifications to meet the specifications introduced only a minor technical risk and did not cast reasonable doubt on the achievability of the proposal will not be questioned absent fraud, abuse of authority, or arbitrary action in the evaluation of the proposal.

Bids—Two-Step Procurement—Use Basis

The strict rule that all bids must respond fully to the requirements of an invitation so that the contract awarded will be the same contract offered to all bidders is not for application in the evaluation of the technical proposals submitted on complex items in the first-step of a two-step procurement since in order to accomplish the objectives of the two-step procurement procedure authorized by paragraph 2-501 of the Armed Services Procurement Regulation a considerable element of flexibility is required and, therefore, the regulation provides for discussion with any offeror of his proposal, which makes the first-step evaluation procedure more in the nature of a negotiated procedure than of strict formal advertising.

To the Hughes Tool Company, August 5, 1968:

Reference is made to your telegram of March 8, 1968, and subsequent communications protesting the award of a contract for light observation helicopters to Bell Helicopter Company under Invitation for Bids No. DAAJO-68-B-0049(0), a two-step formally advertised procurement.

The history of the award is set forth in the contracting officer's report (which was made available to your counsel) as follows:

In keeping the Secretary of the Army's expressed intention to promote competition in the procurement of Light Observation Helicopters (LOH) (Tab D), the Army, in the summer of 1967, determined to procure its estimated five-year requirement, for Light Observation Helicopters by means of two-step formal advertising under ASPR Section II, Part 5. By so doing the Army was bound to seek maximum competition and to avoid any unnecessarily restrictive statement of the Government's requirements.

Step I of IFB DAAJO1-68-B-0049(0), was initiated by a Request for Technical Proposals (RFTP), issued on 29 August 1967, and encompassed the procurement of the Government's estimated requirements for Fiscal Years 1968, 1969, 1970, and 1971 for a total of approximately Two Thousand Two Hundred Seventy-Nine (2,279) each Light Observation Helicopters, data, publications, repair parts, special tools, training and training aids/devices. This RFTP, together with its amendments and Exhibits, is attached under Tab E. This solicitation required that aircraft proposed in this procurement by contractors conform to Exhibit I to the letter portion of the RFTP, the General Specification for Light Observation Helicopters dated 25 July 1967 (herein referred to as the General Specification). Of the 39 concerns solicited, three firms, Bell Helicopter Company, Fairchild-Hiller, and Hughes Tool Company, Aircraft Division, submitted notices of intent to participate in the competition. Thereafter, at a joint conference held 7 September 1967, they were granted opportunity to question the Government on the RFTP. A copy of the minutes of this conference is included under Tab F. Fairchild-Hiller withdrew prior to submitting an aircraft for flight test. Bell Helicopter Company and Hughes Tool Company, Aircraft Division, submitted aircraft and technical proposals to the Government for evaluation.

The process of determining acceptability of technical proposals during Step I of the competition consisted of evaluation of the proposals by a Source Selection Evaluation Board, consisting of technical personnel of the US Army Materiel Command; review of the Source Selection Evaluation Board's findings and recommendations by a Source Selection Advisory Council consisting of high ranking Army officers, Generals, and General Designees; and final determination on acceptability by a Source Selection Authority, the Commanding General, US Army Materiel Command.

After extensive discussion with bidders concerning their respective proposals and evaluation of data obtained through flight testing of aircraft and data submitted by bidders and generated by US Army Materiel Command technical personnel, the Source Selection Evaluation Board recommended that the technical proposals submitted by Bell Helicopter Company and the protestant be determined to be acceptable. The Source Selection Advisory Council concurred in this recommendation, and the Source Selection Authority, the Commanding General, US Army Materiel Command, on 5 January 1968, by letter (Tab H) to the Commanding General, US Army Aviation Materiel Command, determined both proposals to be acceptable.

Step II, an Invitation for Bids (IFB) under ASPR 2-503.2, was issued on 27 January 1968. This IFB contained requirements for Light Observation Helicopters during Fiscal Years 1968, 1969, 1970, 1971, and 1972; a total of Two Thousand Two Hundred (2,200) helicopters and options for an additional Six Hundred Seventy-Five (675) helicopters. A bid conference, attended by both bidders, was held on 1 February 1968 at which time each was afforded full opportunity to ask questions and make recommendations concerning the IFB. A written summary of comments/questions which were raised at the 1 February 1968 Bidder's Conference was provided to both bidders (Tab J). The Step II IFB was amended to correct errors, clarify the Government's requirement, and to update the IFB. Two responsive bids were received on 26 February 1968. These bids were as follows:

	BHC	HTC
Unit price of helicopters	$ 53,450	$ 59,700
Total bid price for 2,200 helicopters, data, repair parts, special tools and training aids/devices	$123,086,647	$137,519,027
Evaluation factors (ferry and transportation costs)	$ 733,971	$ 944,120
Total Evaluated Bid Price	$123,820,618	$138,463,147

Both bidders were determined qualified to perform the requirements of the IFB by the Government Pre-Award Facilities Survey Team. After securing appropriate approvals and obtaining proper business clearances, award of this five-year, multi-year contract was made to Bell Helicopter Company, the low, responsive, responsible bidder (Tab K), in the amount of $123,086,645.55, with an immediate obligation of $20,752,353.55 for the first program year. After award, a copy of

a TWX, dated 8 March 1968 from Alvord and Alvord, attorneys for Hughes Tool Company, Aircraft Division, (Tab A), was delivered to the Contracting Officer. The TWX was a copy of a Protest of award directed to the Comptroller General.

An addendum to that report further states:

As noted by the Protestant in the initial portion of the "Reply," when the procurement was initiated there were three helicopters known to the Government that were FAA certified utilizing the appropriate engine, and which could conceivably meet the requirements of the RFTP. A review of data available from FAA certification and commercial literature which was available to the general public revealed that none of the three aircraft would meet all the requirements of the RFTP without recertification. Naturally since the Hughes OH-6A was in production under an Army contract and had never been produced commercially, the changes required to this aircraft to meet the new military requirements were fewer than the changes required to the Bell Model 206A, a commercial, production aircraft which had never been manufactured for military use. The areas of change required to the Hughes aircraft submitted for flight test to conform to the technical proposal are listed in the attached statement of the Chairman, LOH Source Selection Evaluation Board. It is noted that 25 areas of change would have been required to the militarized OH-6A Hughes submitted for flight test to make it conform to the technical proposal. Fifty-four areas of change are required to the Bell Model 206A to make it conform to the technical proposal.

In pertinent part the Request for Technical Proposal including its two exhibits (RFTP) provided that the aircraft contemplated for procurement shall conform to the General Specification for Light Observation Helicopter attached thereto as Exhibit I, and that the first step of the invitation would consist of the RFTP, the offerors' responses to the request, evaluation by the Government, discussions of technical proposals to determine the acceptability of the proposal and qualifying flight tests of the offerors' FAA certified helicopters submitted to the Army for testing. It further provided:

Technical proposals submitted under Step One must fully comply, without exception, with requirements set forth in this "Request For Technical Proposals" and the attached Exhibits, and amendments thereto, if any.

The criteria established for Government evaluation of the aircraft requirements for Technical Proposals, and contractor support for testing are as set forth in Exhibit I. The requirements for data to be submitted with Step I are set forth in Exhibit II.

* * * * * * *

In Step Two of this Two-Step Invitation for Bids, the only bids which shall be considered for award are those which are based on technical proposals determined to be acceptable, either initially or as modified as a result of discussions, if any, and aircraft which have been determined by the Government to be acceptable during Step One of this IFB. Firms not submitting an acceptable technical proposal during Step One will not be invited to bid during Step Two.

* * * * * * *

In the first step of this Two-Step procurement, offerors are authorized and encouraged to submit multiple technical proposals representing different models of aircraft meeting the General Specification and other requirements of this Invitation. Each technical proposal and corresponding aircraft will be separately evaluated and the bidder will be notified as to its acceptability. Variations and optional arrangements for each basic aircraft should be set forth in Appendix III of the Detail Specification submitted for that aircraft.

Each bidder shall provide for testing the aircraft described in his technical proposal. * * *

Except as specified in Exhibit I, Part A, paragraph 4.3.4, bidders not submitting an aircraft for test shall be considered non-responsive to this IFB.

The General Specification (Exhibit I) provided under paragraph 1.3 of Part A, Requirements for Technical Proposals, for the listing of proposed deviations to specific requirements of the specification and reserved to the Government the sole right to determine the acceptability of deviations based on the effects on the intended mission, including maintainability and reliability plus other factors as deemed appropriate by the Government. Bidders were required to submit a performance substantiating data report identifying extrapolated or estimated data, and summarizing analysis methods used in predicting performance characteristics required by the General Specification. In order to validate performance and handling qualities of the proposed helicopter and to assure that the proposed helicopter will in fact perform the specified mission, each offeror was required to submit for Government flight test the helicopter generally described in his technical proposal. Paragraph 4.1 provided, with certain exceptions, that the test helicopter be generally configured for the mission role, and incorporate all systems relative to the basic handling qualities and performance characteristics of the proposed helicopter. Paragraph 4.3.2 required the establishment of the adequacy of the helicopter handling qualities with respect to the intended mission and specification requirements, which include an evaluation of proposed deviations. A statement of the criteria for Government evaluation of technical proposals was set forth under paragraph 5.0 as follows:

5.0 *Evaluation Criteria.* The acceptability of submitted technical proposals shall include a complete analytical and administrative analysis of all submitted data as well as results of Government tests to determine compliance with the requirements of the General Specification and the capability of the aircraft to fulfill the intended mission. Deviations to specific requirements will be evaluated individually and the acceptability determined by the procuring activity.

In addition, the overall merits of the submitted data and data obtained from Government tests shall be the basis for determining acceptability of the bidder's proposal with respect to technical risk. For example, should, in the judgment of the Government, the scope of modifications required to correct deficiencies be excessive and cast reasonable doubt as to the ability of the manufacturer to deliver and produce aircraft within required schedules, the technical proposal involved may [be] deemed unacceptable on the basis of technical risk.

The following provisions concerning FAA certification were included in the General Specification under Part B, General Specification and Requirements.

1.1.2 Federal Aviation Agency Certification. The basic helicopter shall be FAA type certified in the normal category under FAR 27, for day or night VFR operation of rotorcraft.

Notes:

1. Aircraft previously certified under CAM 6 will be considered acceptable.

2. FAA certification of the basic aircraft at a gross weight at least as high as the configuration I mission weight defined under paragraph 3.1.3.3 of this specification shall be completed prior to submission of a technical proposal for this procurement. The basic aircraft is defined to include the primary airframe as well as major aircraft systems and subsystems (i.e. rotor system and dynamic components, control system, etc.) but excluding special military requirements of this

specification such as avionics, armament or other equipment peculiar to the military characteristics of the helicopter. This requirement specifically prohibits acceptance of a helicopter not previously FAA certified at a gross weight as high as the configuration I mission weight but does not prohibit modification and subsequent recertification to correct minor deficiencies or inadequacies found to exist through Government evaluation, including flight tests and analysis, during step one of this procurement.

Certification of minor modifications for expansion of the flight envelope (i.e. speed, ceilings, e.g., range, transmission ratings, etc.) after submission of a technical proposal is permissible provided such expansions are fully substantiated with technical data and analysis.

1.1.3 Revised Type Certificate. The manufacturer shall obtain and furnish to the procuring activity 30 days prior to Government acceptance of the first aircraft a revised type certificate of the production model aircraft incorporating changes necessary to meet the requirements of this general specification. Production aircraft shall be FAA certified to the configuration II mission gross weight as defined in paragraph 3.1.3.3. In the event requirements of this specification preclude FAA certification of specific items, the requirements of this specification shall prevail and exceptions to FAA certification shall be listed under this paragraph and provide the Government via an FAA form 970 for each delivered aircraft.

Note: The requirement for a revised type certificate permits only certification of minor modifications after submission of a technical proposal and does not alleviate the requirement for FAA certification of the basic helicopter prior to submission of a technical proposal per paragraph 1.1.2 above. All equipment installations and requirements of this IFB shall be FAA certified unless a conflict between these requirements and FAA regulations exists (i.e. the FAA does not certify armament installations).

Essentially, your protest was originally set out in your letter of March 18, 1968, as follows:

It has only recently become known to Protestant that the aircraft submitted for evaluation by Bell Helicopter Company, Fort Worth, Texas (hereinafter referred to as "Bell"), was a standard Jet Ranger developed by Bell for the commercial market. Examination of the Jet Ranger, FAA-Approved Flight Manual shows that the performance of the Jet Ranger is not adequate to meet the requirements of the IFB. In order to meet the requirements of the specification, the following changes will have to be made:

1. Increase the main rotor diameter by approximately 2 feet.
2. Increase the tail boom length by approximately 1 foot.
3. Increase the length of the tail rotor drive shaft by approximately 1 foot.
4. Change the transmission gear ratio in order to slow down the speed of the main rotor.

It is our understanding that a helicopter with these necessary changes was not in fact tested, although such changes would have to be made in the helicopter proposed by Bell.

Thus, the helicopter proposed by Bell is a "paper" helicopter.

The furnishing by Bell and the testing by the Army of a helicopter materially different from that proposed by Bell in its Technical Proposal makes the Army award to Bell invalid on two grounds.

1. The Bell Technical Proposal is in violation of the General Specifications and Requirements, Part B, mentioned above, because the "basic aircraft" was not certificated in a proper configuration.
2. The Army evaluation is in violation of the requirements for Technical Proposals, Part A, mentioned above, because the improper configuration of the aircraft submitted for testing precluded an evaluation of the aircraft proposed.

As noted above, your counsel has been furnished complete copies of the contracting officer's report on your protest, and the addendum thereto. In your rebuttals to such documents you have taken exception

to various administrative positions stated therein and have presented various contentions and arguments to support your protest. It appears from an analysis of the briefs of record that the basic difference of opinion between you and the administrative office centers on interpretation of the RFTP, and concerns the types of modifications which are authorized, under the terms of the step-one solicitation, to be made in the basic FAA certified helicopter each offeror was required to submit for testing in order to supply the helicopter represented by its technical proposal. It is your position that the type of modifications permitted for evaluation of the test helicopter by the provisions of the solicitation must either exclude those changes which are defined as "major" in FAA regulations concerning certification of aircraft, or be limited to those changes which would be regarded as minor by those schooled in the helicopter art who were called upon to reply to the RFTP. Under such criteria you contend the changes required in the Bell test helicopter are major changes, and such helicopter therefore did not comply with the requirements of paragraph 1.1.2. Further, that the only evaluation of technical risk contemplated by the RFTP is in connection with incorporation of the special military requirements of the specifications, and not in modifications of the test helicopters to meet other performance requirements. In other words, you maintain that the award to Bell was improper on the basis that such firm's step-one proposal was, in effect, nonresponsive for the reason that Bell failed to submit for testing a FAA certified helicopter which did not require major changes in its primary airframe and rotor system in order to comply with the performance specifications, and that one does not have to be an expert or a technician to realize and comprehend such a situation.

The administrative position is that the evaluation criteria set out in the solicitation with respect to technical risk applies to the total helicopter proposed, and that it is evident from reading the RFTP as a whole that the modifications to the FAA certified test helicopter contemplated by paragraph 1.1.2 were those modifications which, in the Government's judgment (formed only after evaluation of all available data) did not render the proposal unacceptable. In such connection the contracting officer reported:

> The Government criteria for "minor" modifications or inadequacies were those whose accomplishment or correction, which, in the judgment of the Government, involved an acceptable technical risk of achievability. By implication, a departure from the already established FAA certified aircraft which would, in the judgment of the Government, involve an unacceptable risk of realization would not be "minor" and would render the technical proposal unacceptable. This interpretation was the one intended and acted upon by the Government in the course of Step I.
>
> * * * The criteria intended and utilized by the Government to determine whether a modification required to be made to an existing FAA certified aircraft

was "minor" was the degree of technical risk introduced thereby. If the scope of the modification were such as to cast reasonable doubt on the achievability of the proposal or on the ability of the proposed aircraft to satisfy Government requirements, the modification would not be "minor," and the proposal, therefore, unacceptable. Technical personnel of the Government were aware of the changes required in the FAA certified Bell Helicopter Company 206A in order for it to perform as proposed, and after evaluation and analysis determined that such changes or modifications were minor. Further, the Army categorically reaffirms that modifications were minor, that the aircraft proposed by Bell Helicopter Company fully meets the needs of the Army, and that the Bell Helicopter Company proposal was acceptable under the specifications as written.

It should be emphasized that the determinations by the Government as to what in fact were "minor" modifications are highly technical in nature. Implicit are considerations as to whether any changes in a complex item like a helicopter involved a high or low technical risk of a bidder's proposed helicopter, if contracted for following Step II, will satisfy the Government's requirement or will be technically achievable. * * *

While you contend that your protest does not involve a disagreement between the Government's and your technical personnel, such view does not seem to be shared by the administrative office as is evidenced by the following excerpt from the addendum to the contracting officer's report:

Notwithstanding the Protestant's assertations to the contrary on page 24 of its "Reply," it appears that Commander Tuck and Mr. Weeks have taken issue with the determination of Government personnel that the modifications required to the Bell ship were "minor" using the Government's definition thereof. The Protestant, on page 8 of its "Reply," states that submitted technical evidence, presumably the opinions of Commander Tuck and Mr. Weeks, stands for the proposition that qualified personnel would not under any circumstances consider the changes included in the Bell proposal to be "minor." While it is difficult to read the opinions of both Commander Tuck and Mr. Weeks as explicitly standing for this proposition, it is assumed that the Protestant has correctly characterized the opinions he has submitted. As set forth in the Administrative Report, the Government's criteria for "minor" involved the degree of technical risk introduced that the proposal would be achievable and satisfy the Government's requirements. Again, as outlined in the Administrative Report, the Government, after an extensive process, determined the technical risk involved in the modifications to be made to the Bell ship to be minimal and acceptable. This is still the technical opinion of the Government, as attested to by the attached opinion of the Chairman of the LOH Source Selection Evaluation Board. It must be assumed that the Protestant has stated that Commander Tuck and Mr. Weeks would not regard the modifications to be made to the Bell ship as minor in any circumstance; obviously, these experts must be stating that the modifications could not be minor even under the Government's criteria of technical risk. Admittedly, the technical experts whose opinions were submitted by the Protestant have not directly stated that the degree of technical risk was excessive. Instead, these experts and the Protestant have approached the problem as if the technical issue in question were the definition of "minor." It is submitted that this is not the case. The criteria by which modifications were to be judged "minor" was contained in the RFTP; that criteria concerned technical risk. Application of the criteria, i.e., the amount of technical risk introduced and whether the extent is acceptable in light of the requirements of the Government is a technical question, and the only technical issue involved in this protest.

While the Protestant's technical experts have not directly taken issue with the Government's application of the criteria of minor contained in the RFTP, to the extent that they and the Protestant have impliedly taken issue with Government's determination by stating the modifications required by the Bell proposal could never be minor, the Government must take issue. It is submitted that the Government's determination that the Bell proposal involved an acceptable degree of technical risk should be accepted. Only the Government and its

personnel were in possession of the data generated in the first step and on which the decision was made. Such a decision, made only after an extensive evaluation process and re-affirmed by the Administrative Report and this Addendum should not be overturned.

As stated in the contracting officer's report, the two-step formal advertising method of procurement was selected in an effort to promote and seek maximum competition, and the RFTP was drafted with the view of avoiding any unnecessarily restrictive statements of the Government's requirements which would unduly limit the competition. It is further stated that the procuring activity was aware of, and accepted, the fact that the three known potential bidders would have to modify their existing FAA certified helicopters to reach the performance and other requirements of the specifications. We cannot conclude, nor do you contend, that the two-step method of formal advertising was improperly selected for the procurement.

In paragraph 2–501 of the Armed Services Procurement Regulation two-step formal advertising is described as a flexible procedure, especially useful in the procurement of complex items requiring technical proposals. "Conformity to the technical requirements" is resolved in step one, which includes the evaluation and, if necessary, discussion of technical proposals to determine their acceptability. Such method requires that the contracting officer work closely with technical personnel and that he utilize their specialized knowledge in determining the technical requirements of the procurement, in determining the criteria to be used in evaluating technical proposals, "and in making such evaluation." The conditions set out in ASPR 2–502(a) for use of two-step formal advertising include the situation when available specifications may be too restrictive to permit full and free competition without technical evaluation, and when definite criteria, such as performance requirements, exist for evaluating technical proposals. Technical evaluation of a proposal is required to be based upon the criteria contained in the RFTP, and a proposal which modifies, or fails to conform to the "essential" requirements, or specifications of, the RFTP shall be considered nonresponsive and categorized as unacceptable.

From such provisions and our repeated recognition of those provisions in a long line of decisions, we do not believe it can be seriously contended that the evaluation of technical proposals and the determination of their acceptability or unacceptability are not matters which require the expert judgment of technical personnel, and it is well settled that such determinations are primarily the responsibility of the procuring agency. It is equally well established that we will not question the technical conclusions of the administrative experts

unless there is clear evidence of fraud, abuse of authority or arbitrary action.

From our analysis of the RFTP, we believe the only proposals which would be subject to summary rejection as nonresponsive without technical evaluation under the RFTP terms were those which did not provide a helicopter for testing and waiver thereof had not been granted, or which included a helicopter for evaluation that had not been previously FAA certified at a gross weight at least as high as the configuration I mission weight. Neither type is represented here. While paragraph 1.1.2, specifically prohibits acceptance of a helicopter which had not been so certified, it also provides that the requirement does not prohibit modification and subsequent recertification to correct minor deficiencies or inadequacies "found to exist through Government evaluation," including flight tests and analysis, during step one of the procurement.

Although it may be, as you contend, that the modifications required in the airframe and rotor system of the Model 206A Jet Ranger helicopter submitted by Bell for testing were not "minor" under FAA certification regulations, and such modifications would ordinarily not be regarded as minor by those schooled in the helicopter art, the RFTP does not state that the FAA definition of changes is for application nor does it define the type or extent of the modifications to the test helicopter that are contemplated. While we are inclined to agree that such use of the word "minor" should ordinarily be considered as indicating those changes or modifications in the test helicopter which would be regarded as minor by industry standards, recognition must be given to those specific provisions of the RFTP which show that the type of acceptable modifications or deviations envisioned were those which, upon evaluation by the Government, were considered technically acceptable in relation to the mission requirements.

We believe that the RFTP, when viewed in its entirety, logically apprised prospective contractors of the Government's need for helicopters meeting specified performance and other mission requirements, and that an offeror must furnish with his technical proposal the FAA certified helicopter on which his proposal is bottomed, together with a listing of proposed modifications thereto which the offeror considered necessary or desirable in meeting the mission requirements. Prospective contractors were further advised that proposed modifications to the test helicopter, as well as proposed deviations to specific requirements of the RFTP, were permissible and would be evaluated by the Government to determine their acceptability. That such evaluation would include the technical risk involved in the offeror's overall pro-

posal, including proposed modifications to the test helicopter, is clearly indicated by paragraph 5.0, as quoted above.

The RFTP also provided for use of extrapolated and estimated data in predicting performance characteristics required by the specifications, and the presentation of summary calculations used in developing estimated and guaranteed performance. The RFTP clearly evidences that the responsiveness and acceptability of a technical proposal on the ultimate helicopter to be delivered was to be dependent upon the Government's evaluation of all submitted material, including extrapolated and estimated data, proposed modifications and deviations, and that the acceptability of a proposal was not to be dependent upon submission of a helicopter whose final performance characteristics and fulfillments of mission requirements could be determined solely from actual testing of that helicopter.

While paragraph 1.1.2 authorized modification of the test helicopter to correct only minor deficiencies or inadequacies found to exist through Government evaluation, we believe the word "minor" must be regarded as having been used in a flexible sense relating to the Government's evaluation of the acceptability of the modification in relation to the mission requirements and the degree of technical risk involved. We believe this view is consistent with the Government's stated requirements, and the competitive purpose of the RFTP as well as the general language used therein which precludes the attachment of rigid or unduly restrictive interpretations to the procuring activity's use of the word "minor" in drafting paragraph 1.1.2.

In summary, the RFTP specifically provided for Goverment evaluation of modifications in the test helicopter submitted with each technical proposal. Government technicians evaluated the proposal submitted by Bell, including the modifications proposed in that firm's test helicopter, the Jet Ranger, and upon determining that the modifications thereto introduced only minor technical risk and did not cast reasonable doubt on the achievability of the proposal, the Government technicians concluded that Bell's proposal was acceptable. We do not find in the record before us any proper grounds for this Office to reject the technical judgment of the administrative experts as to the acceptability of Bell's proposal, nor do we believe that the record supports any other point in your protest upon which the award to Bell could be held clearly illegal.

While your counsel has cited several decisions of our Office stressing the necessity for bids to respond fully to the requirements of the invitation, so that the contract awarded will be the same contract offered to all bidders, we have not applied those strict rules to the evaluation of proposals submitted in the first step of the two-step procurement pro-

cedure. Accomplishment of the stated objectives of this method requires a considerable element of flexibility, and to this end the regulations specifically provide for discussions with any offeror of his proposal, making the first-step evaluation procedure more in the nature of negotiated procurement than of strict formal advertising.

On the record of the subject procurement we are unable to see any reason why the action taken was prejudicial to you, since your proposal also was found acceptable, and there is no indication that you would have made any substantial modifications thereof if you had been advised of the agency's interpretation.

Action by this Office to effect cancellation of Bell's contract, as you request, may be taken only upon a conclusion that the award was so clearly invalid that a court of competent jurisdiction would declare the contract a nullity. We cannot find any basis to support such a conclusion with respect to the subject award.

In view of the foregoing your protest must be denied.

[B-164249]

Bids—Late—Samples

Bid samples forwarded by commercial truck which were not timely delivered due to conditions of local unrest may not be considered under an invitation which in soliciting bids for a requirements contract provided for consideration of late samples only when sent by certified or registered mail and precluded the reapplication of previously submitted samples. Bidders on notice that samples were an integral part of the bid for evaluation purposes, the submission of samples is not considered a mere technicality that may be waived. Therefore, the bidder in using commercial trucking assumed the risk of late delivery, and the samples not having been forwarded as required for consideration under the provisions governing late bids, rejection of the low bid is proper under section 1-2.303-5 of the Federal Procurement Regulations.

To The Stanley Works, August 5, 1968:

We refer to your telegram of May 7, 1968, and your letter of July 9, 1968, protesting the award of a contract under invitation for bids No. FPNTP-A5-70127-A-4-9-68 issued by the General Services Administration.

The invitation, as amended, was for a requirements contract, with guaranteed minimum, for FS Class 5110, planes, for the period August 1, 1968, or date of award, whichever was later, through July 31, 1969. The invitation was issued on March 7, 1968, and bids were opened on April 9, 1968. Three bids were received. Your company was the low bidder on seven of the eight items set forth in the invitation. However, your bid was determined to be nonresponsive because bid samples were not submitted with the bid as required by the invitation.

Pertinent provisions of the invitation (paragraph 14) relating to the submission of bid samples informed bidders that samples must be furnished as a part of the bid and must be received before the time set for opening bids, and that:

> * * * Failure to furnish samples by the time specified in the Invitation for Bids will require rejection of the bid, except that a late sample transmitted by mail will be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids.

In addition, Amendment No. 1 to the invitation for bids advised bidders that:

> Under this procurement, no samples previously submitted to GSA, may be reapplied. See provision in solicitation entitled "Bid Samples." * * *

The record indicates that although samples of the planes upon which you bid were submitted they were not received by GSA until April 17, 1968, 7 days after the date specified for bid opening. Your samples were not sent by mail, but by commercial freight truck.

Your protest is based on the allegation that the samples were delayed in arriving at the GSA sample room "because of racial unrest in Washington, April 5 through April 16." In that connection, you have submitted a copy of a letter dated May 6, 1968, from your carrier, Elkton Trucking Company, stating that your shipment arrived in Washington, D.C. on the weekend of April 6 and ordinarily would have been delivered on April 8. However, due to the unrest, Elkton Trucking Company held off all deliveries to the inner city until the week starting April 15. You contend that the rejection of your bid because of the late arrival of samples is inequitable and contrary to the spirit of the purchasing regulations for two reasons: (1) the requirement for sample submission is nothing more than a technicality and is not basic to the bid because the General Services Administration already has in its possession any number of planes identical in every respect with those called for in the invitation, and (2) while the only specific exception to the requirement that samples must be received before the time set for bid opening is where the samples have been sent by certified mail, the existence of the exception is indicative of a realization on the part of the Government that where it is in any way responsible for late arrival of samples, the bid, if otherwise in order, will be considered as having been submitted on time. In this latter connection, you assert that the Government failed or was unable to maintain law and order in the District and, thus, was as much responsible for the failure of the samples to arrive on time as if they had been sent by mail and the mail had miscarried.

In regard to your first ground of protest, we cannot conclude, as you assert, that the submission of samples in this case is nothing more than a technicality. Under the terms of the invitation bidders were

advised that the failure to submit samples with the bid or the failure of the samples to conform with all characteristics listed for examination would make the bid nonresponsive and require its rejection. The samples were to be tested for "Workmanship" in accordance with applicable Federal specifications and bidders were notified by Amendment No. 1 that no samples previously submitted to General Services Administration could be reapplied. By these provisions the Government clearly put bidders on notice that samples were an integral part of the bid and would be used for evaluation purposes. Under these circumstances the sample submission requirement cannot be considered a mere technicality.

Paragraph 8 of the Instructions and Conditions (Standard Form 33A, July 1966), the terms of which are applicable to the instant case, provides, in pertinent part, that:

(a) Offers * * * received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: (1) they are received before award is made; and either (2) they are sent by registered mail, or by certified mail * * * and it is determined by the Government that the late receipt was due solely to delay in the mails * * * for which the offeror was not responsible; or (3) if submitted by mail * * * it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation * * *.

While you state that the only specific exception to the requirement that samples shall be received before the time set for opening bids is where the samples have been sent by certified or registered mail, you contend, nevertheless, that the existence of the exception is indicative of a realization on the part of the Government that where it is in any way responsible for late arrival of samples, the bid, if otherwise in order, will be considered as having been submitted on time. We cannot agree with the conclusion drawn by you from the existence of the exception noted. Telegraphic bids aside, it should be noted that under the terms of paragraph 8, quoted above, Government-caused delay will constitute grounds for the consideration of late bid *only* when the bid is *mailed*, and then only (with respect to registered or certified mail), when the late receipt is caused by a delay in the mails or when (with respect to mail) the late receipt is due solely to the mishandling by the Government after receipt at the Government installation. In other words, under paragraph 8, again telegraphic bids aside, the only instance when the question of the Government's responsibility for causing the late receipt of a bid is ever relevant is when the bid is *mailed*. This conclusion, moreover, is reinforced by section 1-2.303-5 of the Federal Procurement Regulations which provides that:

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

In view of the clear provisions of paragraph 8 of the Solicitation Instructions and Conditions and FPR 1-2.303-5, we must conclude that you assumed the risk of late delivery when you chose to transmit your samples by commercial freight truck. While these provisions of the regulations and of the invitation for bids may result in the failure of the Government to receive the benefit of lower bids and may seem unduly harsh by bidders affected adversely thereby, the adoption of the principles set forth therein have been determined to be necessary not only to the orderly and timely procurement of supplies and services by the Government, but to the integrity of the competitive bid system as well. Moreover, our conclusion must be based strictly upon legal principles and we are without authority to substitute equitable considerations for the law in cases of this kind.

Accordingly, your protest must be, and is, denied.

[B-163917]

Contracts—Federal Supply Schedule—Term Contract Procurement—Use Propriety

The determination to use a requirements contract to satisfy the needs of the Government for storage and display shelving classified under the Federal Supply Catalog system—the contract to be subject to a maximum order limitation for delivery to a single destination—is a valid determination within the ambit of sound administrative discretion where the term contract conforms to the criteria established in paragraph 101-25.101-4 of the Federal Property Management Regulations and results in overall economy to the Government, and there is no reason to anticipate abuse of the contract's maximum order limitations and year end purchases to avoid returning unexpired appropriations to the Treasury.

Bids—Evaluation—Delivery Provisions—Requirements Contracts

The establishment of weight factors to evaluate bids under an invitation contemplating a requirements contract subject to a maximum order limitation for delivery to a single destination on the basis of previous procurement experience on 71 out of 249 items of shelving classified under the Federal Supply Catalog system to be purchased, and the assignment of a token weight to the remainder of the 249 items is a realistic method of evaluation which does not result in unbalanced bidding. Therefore, even though it would have been preferable to evaluate the bids by using f.o.b. origin prices, there is no objection to an award under the solicitation, bids having been exposed and evaluated on a common basis, and the fact that in future procurements, the most meaningful method of obtaining competitive prices will be used.

To the Penco Products, Inc., August 7, 1968:

Further reference is made to your letter of March 29, 1968, with enclosure, and to subsequent correspondence wherein you request cancellation of solicitation No. 35975, issued by the General Services Administration (GSA).

The solicitation was issued on February 12, 1968, and requested bids on 249 items classified under Federal Supply Catalog Class 7125, steel, clip type, storage and display shelving. Contracts awarded thereunder would provide for the normal supply requirements of all de-

partments of the Government for the period from date of award through March 29, 1969, subject to the maximum order limitation of $80,000 for delivery to a single destination. A separate bid on each item was requested for each of ten geographical zones and, for evaluation purposes, each item was given a weight factor in each zone which was based upon past requirements. Under the solicitation, award was to be made on the basis of the lowest aggregate bid for each zone. Bids were opened on March 4, 1968, and Lear Siegler, Inc., Burroughs Division, was low aggregate bidder as to each of the ten zones.

Your protest presents several basis for questioning the advisability of using a term contract for this commodity. You contend that, while small businesses will offer the lowest prices on small quantities, they are in no position to quote on a term contract. Also, you claim that GSA is paying premium prices on orders exceeding $25,000 and that the time and money saved by use of a term contract is insignificant. It is your position that there will be abuse of the term contract's maximum limitation of $80,000 per order and, further, that there will be annual year-end abuse of the term contract by procuring agencies which procure supplies under such contracts for later use rather than let appropriated funds expire and revert to the Treasury. While you also object to the weight factor, sliding discount scale, and delivery provisions which were used in this procurement, these points will be treated separately below.

With regard to the purported abuse of the maximum order limitations and year-end purchases, we do not consider such arguments as persuasive reasons for discontinuing the use of term contracts, and there appears to be no reason to anticipate greater abuses in these respects as to this particular class of property than any others. Prevention of such practices is a matter of sound fiscal administration and we are not aware that either practice is so prevalent as to be a serious source of waste.

Authority to provide for the needs of all Government agencies for supplies of common use is vested by statute in the Administrator of General Services, and the practice of using term contracts for such needs has been firmly established for many years. In connection with the determination of whether a requirements type contract should be used, the Federal Procurement Regulations (FPR) provide, in pertinent part, as follows:

§ 1-3.409 Indefinite delivery type contracts.

One of the following indefinite delivery type contracts may be used for procurements where the exact time of delivery is not known at time of contracting.

* * * * * * *

(b) Requirements contract—

* * * * * * *

(2) Application. A requirements contract may be used for procurements where it is impossible to determine in advance the precise quantities of the property or services that will be needed by designated activities during a definite period of time. Advantages of this type of contract are:

(i) Flexibility with respect to both quantities and delivery scheduling;

(ii) Supplies or services need be ordered only after actual needs have materialized;

(iii) Where production lead time is involved, deliveries may be made more promptly because the contractor is usually willing to maintain limited stocks in view of the Government's commitment;

(iv) Price advantages or savings may be realized through combining several anticipated requirements into one quantity procurement; and

(v) It permits stocks to be maintained at minimum levels and allows direct shipment to the user.

Generally, the requirements contract is appropriate for use when the item or service is commercial or modified commercial in type and when a recurring need is anticipated.

The criteria governing whether an item can be most advantageously supplied by a requirements contract are stated in the Federal Property Management Regulations (FPMR), as follows:

§ 101–25.101–4 Supply through indefinite quantity requirement contracts.

The following criteria shall govern in determining whether an item can be most advantageously supplied through the medium of indefinite quantity requirement contracts covering specific periods and providing for delivery to use points as needs arise:

(a) The item shall be such a character that—

(1) Handling on a storage and issue basis is not economically sound, under the criteria prescribed in § 101–25.101–2;

(2) Rate of use and frequency of ordering at use points is estimated to be sufficient to warrant the making of indefinite quantity requirement contracts;

(3) It is either not feasible to forecast definite requirements for delivery to specific use point (as in the case of new items initially being introduced into a supply system), or no advantage accrues from doing so; and

(b) Industry distribution facilities are adequate properly to serve the use points involved; and

(c) Conditions exist where any of the following factors require the maintaining of indefinite quantity requirements contracts—

(1) Advantage to the Government is greater than would be secured by definite quantity procurements by individual offices or agencies (the determining consideration being one of overall economy to the Government, rather than one of direct comparison of unit prices of individual items obtainable through other methods of supply); or no known procurement economies would be effected but the requirements of offices or agencies can best be served by indefinite quantity requirements contracts.

(2) Acute competitive bidding problems exist because of highly technical matters which can best be met on a centralized contracting basis.

(3) The item is proprietary or so complex in design, function, or operation as to be noncompetitive and procurement can best be performed on a centralized contracting basis.

In this connection GSA has taken the position that use of a term contract in the present case is in accordance with the criteria established in FPMR § 101–25.101–4. Additionally, it is reported that the experience of GSA with respect to the definite quantity procurement of small quantities of steel shelving indicates that costs for such procurements are higher and the successful bidder is usually a large manufacturer.

We have consistently held that the determination of how best to satisfy the Government's requirements is within the ambit of sound administrative discretion, and we will not substitute our judgment for that of the agency in the absence of a clear showing of abuse of the discretion permitted it. In the present case it is the considered opinion of GSA that an indefinite quantity requirements contract will provide overall economy to the Government in accordance with criteria stated in the above-quoted regulations. Even though unit prices of individual items obtainable through other methods of supply may be less expensive in comparison therewith, we see no valid basis on which to question GSA's determination as to the overall economy to the Government, in view of the broad authority conferred upon it by law.

With regard to the weight factors used in evaluating bids, the record establishes that out of the 249 items on the solicitation in question, GSA has previous procurement experience with 71. Weights for evaluation purposes were applied to those 71 items based on previous procurement experience and the remaining items were each given a token weight of one. You object to GSA's actions in establishing weight factors by means of historical, rather than anticipated, requirements in that such action is unrealistic and misleading to bidders. You also allege that this is an obvious invitation to a bidder who intends aggressively to promote the contract to bid low on those items which have a higher weight and to bid high on the items having a weight of one, and after award to promote the procurement of the more expensive items with prospective users.

It is the position of GSA that although the establishment of weight factors by means of past procurement experience is not ideal, it is the most practicable method available since it is administratively impossible to query each procuring activity in advance with respect to its anticipated requirements. Moreover, it is GSA's belief that the history of unpredicted demands made for the commodity involved indicates that a survey of anticipated requirements would be valueless. GSA's report further states that since the items bearing token weights had never been included on the Federal supply system, and had only recently been added to the specification, GSA has no reason to believe that demand for these items will be of any great substance. In view of the foregoing it does not appear that there is any assurance that use of anticipated requirements as a basis for evaluation would be any more realistic than the method prescribed by the invitation. We therefore find no basis for objecting to the method used in the instant procurement.

With regard to the possibility of unbalanced bids resulting from this method of evaluation, an evaluation of the bids submitted by the low

bidder, as well as by Frick-Gallagher (the previous supplier) and Penco was conducted by GSA. The Administration concluded that no unbalancing of the Lear Siegler bid had occurred and that no reasonable variation in the weights assigned to the new items affected the company's standing as low bidder. The report states, in pertinent part, as follows:

> Generally, bids are unbalanced by bidders offering low prices on items which have unduly high weights and high prices on items which have unduly low weights. By this process, the bidder can offer a low aggregate price for purposes of bid evaluation and yet make large profits on sales of the low weighted items. If Lear Siegler had unbalanced its bid, we would expect that, generally, it would be low on a substantial number of heavily weighted items and high on a substantial number of the low weighted items. Our evaluation discloses no such pricing pattern. Of the 71 classes of items (710 items) on which we had prior experience, and which, therefore, carried the most significant weights, Lear Siegler was low on 65 percent. Of the remaining 178 classes of items which carried only token weights, Lear Siegler was low on 72 percent. As you can see, this is exactly the reverse of the bidding pattern which would be expected if the bid were unbalanced.
>
> We also reviewed the Lear Siegler bids on all items by zones and found absolutely no evidence of a pattern of bidding low on zones having high weights or high in zones having low weights. Attached for your information (Enclosure 4) are graphs showing a random sampling of pricing of various items under the Solicitation.

In your letter of July 25, 1968, you cite Lear Siegler's bid prices on Items 44, 45, 46 and 93, 94, 95 as indicative of unbalancing in its bid, pointing out that it was almost 25 percent low on those items. Since it appears that all of the items referred to were assigned a weight of one for evaluation purposes we are unable to understand how the quotation of low prices on them could be of any material advantage to Lear Siegler or disadvantage to any other bidder. As pointed out in paragraph numbered (2) on page 3 of your letter of March 22, 1968, to the Commissioner of the Federal Supply Service, the objectionable feature of the weighted evaluation basis complained of by you is that it invites bidders to quote high prices on the low weighted items and then attempt to promote increased sales on those items. The fact that Lear Siegler's bid on such items was 25 percent *lower* than others thus would not appear to support the conclusion that its bid was unbalanced.

In the past this Office has found cogent reason for rejecting all bids and canceling an invitation where an invitation tended to produce serious unbalancing of bids by reason of clearly erroneous weight factors so material as to make it doubtful that an award to the low bidder would result in the lowest cost to the Government. See 43 Comp. Gen. 159, and B–161208, August 8, 1967. In view of the evidence presented by GSA indicating that no unbalancing of the Lear Siegler bid has occurred, and its conclusion that a contract awarded to it will provide the required supplies at the lowest prices which are considered

to be reasonable, we do not think it would be proper to object to an award on the basis of unbalanced bidding in this case.

You also object to the wide dollar range for which quantity discounts were requested by the solicitation. You state that when a bidder is asked to give a single quantity discount on a range from $2,000 to $5,999.99 or from $16,000 to $80,000 he must bid rather conservatively since the manufacturing costs and freight rates would be greater at the lower end of each scale. You also contend that through sales promotion techniques a contractor can exert "control" upon using activities who are unaware of the contract's discount provisions and thereby bring the total sales amount within the upper limits of a discount range.

While it is apparent that manufacturing costs and freight weights will vary within each discount range established for this procurement, with the result that conservative discount rates may expect to be offered, it would appear that the same objection could be advanced against any less expansive ranges, and the ranges finally selected therefore become matters of judgment. Since the record indicates that the bids received provided competition resulting in the offering of reasonable prices, and since your objections regarding the deleterious effects of sales promotion are clearly speculative in nature, we do not feel justified in objecting to the judgment of the procuring activity in this regard.

It is also your contention that the determination by GSA to consider only f.o.b. destination prices as a factor in the evaluation process promotes the "padding" of f.o.b. origin prices requested by the solicitation and is therefore not in the best interest of the Government. Inasmuch as the computation of a bidder's delivered unit price must be based on a mere guess of the freight costs since no meaningful representation is provided as to the size of an order, you believe that it would be to a bidder's advantage to "load" the origin price in anticipation of shipments which are large enough to make use of special Government freight rates.

The selection of the appropriate delivery terms for inclusion in solicitations is discussed in the Federal Procurement Regulations § 1-19.202-7. Subparagraph (a) of referenced regulation provides, generally, that the delivery term selected shall be that which is most advantageous to the Government. Further, where alternative terms of delivery are feasible and may provide economy in transportation, it is required that invitations provide for alternative delivery bases. Subparagraph (b) (1) (iv) of the referenced regulation provides that where destinations are unknown, but the general geographic areas are known, invitations shall provide for bids to be submitted on the

basis of delivery "f.o.b. origin" and/or "f.o.b. destination," and bids shall be evaluated on both bases.

In the present case both the above-mentioned regulation and the fact that bids were requested on alternative bases lead us to believe that it is possible to effect economies in transportation through the use of f.o.b. origin prices. However, in attempting to explain its failure to consider such prices in the evaluation of bids, GSA has reported that there was no practicable method of anticipating and determining the additional weight factors for origin prices which would be necessary in such an evaluation, and that such a weight factor would further complicate an already involved solicitation. In our opinion it would have been to the Government's advantage if f.o.b. origin prices were required for evaluation purposes, even if only token weights were applied, as was the case for the 178 items for which no prior procurement experience was had. Further, we do not consider the complications incident to such an evaluation as prohibitive. We are therefore advising the Administration that in future procurements, steps should be taken to assure use of the most meaningful method of obtaining competitive prices in this regard. While in the present case, as stated above, f.o.b. origin prices would have been an appropriate evaluation factor, we will not object to an award under this solicitation because all bids have now been exposed, the bids were evaluated on a common basis, and GSA advises that award may be made on an origin basis when such price appears to be reasonable and will result in a lower overall cost. (For an indication of the type of circumstance which justifies cancellation after bid opening see FPR 1-2.404-1(b).) In this connection, it may also be pointed out that your protest was one which should have been raised and decided prior to submission and/or opening of bids. See B-162566, December 13, 1967; B-151355, June 25, 1963.

For all of the reasons stated above your protest is denied.

[B-164698]

Quarters Allowance—Government Quarters—Husband and Wife Service Members

A husband and wife, members of the uniformed services in pay grades E-5 and E-4, respectively, each member in receipt of a basic allowance for quarters while occupying private quarters, when assigned inadequate Government quarters on a rental basis may continue under 42 U.S.C. 1594j(a) to receive the allowance as members without dependents. However, their combined allowances exceeding the allowance received by the usual military family—one member only in the service—occupying inadequate quarters, the reduction provided by section 1594j(a) when a rental rate exceeds 75 per centum of the quarters allowance may not be applied on the basis of the husband's allowance alone. The manner

or from whom the rental charges are collected is immaterial under the landlord and tenant relationship.

To the Secretary of Defense, August 8, 1968:

Further reference is made to letter dated June 25, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to the proper rate of basic allowance for quarters and rental charge applicable to enlisted members who are husband and wife and who may be permitted to occupy inadequate quarters of the type where occupancy on a rental basis without loss of basic allowance for quarters is authorized under 42 U.S.C. 1594j(a). The question was discussed in Department of Defense Military Pay and Allowance Committee Action No. 416.

Section 1594j(a), Title 42, U.S. Code, provides as follows:

> Notwithstanding the provisions of any other law, members of the Army, Navy, Air Force, Marine Corps, Coast Guard, Coast and Geodetic Survey, and Public Health Service, with dependents, may occupy on a rental basis, without loss of basic allowance for quarters, inadequate quarters under the jurisdiction of any of the uniformed services, notwithstanding that such quarters may have been constructed or converted for assignment as public quarters. The net difference between the basic allowance for quarters and the fair rental value of such quarters shall be paid from otherwise available appropriations: *Provided*, That notwithstanding the fair rental value of such quarters, or of any other housing facilities under the jurisdiction of a department or agency of the United States, no rental charge for occupancy of family units designated as other than public quarters shall be made against the basic allowance for quarters of a member of a uniformed service in excess of 75 per centum of such allowance, except that in no event shall the net rental value charged to the member's basic allowance for quarters be less than the costs of maintaining and operating the housing.

The husband and wife involved, who are in pay grades E–5 and E–4, respectively, presently occupy private quarters, there being no adequate family-type quarters available at their duty stations which are in the same area. Since adequate single-type quarters are not available for the female member, they are each being credited with basic allowance for quarters as a member without dependents. The question arises in connection with the contemplated occupancy of Bellevue Housing which, being designated as inadequate quarters, may be occupied by service members without loss of basic allowance for quarters pursuant to 42 U.S.C. 1594j(a).

It is stated that the monthly rental rates at Bellevue for members in pay grades E–5 and E–4 (over 4 years) have been established at $66.30 for one bedroom housing and $78.75 for two and three bedroom housing. The rates do not exceed 75 per centum of $105, the monthly rate of basic allowance for members with civilian dependents in pay grades E–5 and E–4 (over 4 years). The case of a husband and wife who are both members of the military service in receipt of basic allowance for quarters raises questions as to the application of the provisions of 42 U.S.C. 1594j(a).

While a member who is the husband of a female member of a uniformed service may not, by virtue of 37 U.S.C. 420, be paid increased basic allowance for quarters for her, she nevertheless is his dependent as defined by 37 U.S.C. 401(1). He is entitled to assignment of family-type public quarters for their joint occupancy and likewise they may be accepted as tenants and may occupy, on a rental basis housing facilities under the jurisdiction of the Armed Forces other than public quarters. Thus, unless he is assigned to and occupies public quarters without charge, he is entitled to basic allowance for quarters as a member without dependents during any period when he must rent his quarters in either private or Government housing facilities. 37 U.S.C. 403 (e). So long as the wife, as a member of a uniformed service, is entitled to basic pay and single-type quarters are not available for her and family-type Government quarters are not assigned for their use, she is entitled to basic allowance for quarters as a member without dependents.

The proviso was added to 42 U.S.C. 1594j(a) by section 502 of the Military Construction Authorization Act of 1967, Public Law 89-568, 80 Stat. 753. Prior to the date of enactment of that law, September 12, 1966, any amount could be charged as the fair rental value of quarters designated as inadequate quarters so long as the charge did not exceed the occupant's basic allowance for quarters. In certain areas the charges for occupancy of substandard Government housing, established on the basis of comparability with private units, frequently equaled the basic allowance for quarters which would otherwise be forfeited for occupancy of adequate Government quarters. The House Committee on Armed Services believed this to be inequitable and thus proposed the legislation which was enacted as section 502 of Public Law 89-568. See H. Rept. No. 1763, to accompany S. 3105, 89th Cong., 2d sess. Nothing in the legislative history of that section indicates that any family other than the normal military family—having only one member of a uniformed service—was intended to be covered when the restrictive provision was receiving consideration or that the basic allowance for quarters involved was other than that authorized for a member with civilian dependents.

Should the family unit to which the question applies be permitted to occupy Bellevue Housing the husband and wife would each remain entitled to basic allowance for quarters as members without dependents and thus would be entitled to quarters allowance payments exceeding the basic allowance for quarters to which the husband would otherwise be entitled as a member with dependents—the rate considered by the Congress. Since they would be entitled to receive a greater combined quarters allowance than that received by the usual military family occupying inadequate quarters, there is no legal or equitable basis for

reduction of the rental rate on the basis of the husband's basic allowance alone. Accordingly, they may occupy the housing involved without loss of their authorized basic allowance for quarters without dependents and without any reduction in the established rental rate. Since a mere landlord and tenant relationship would exist, it is immaterial in what manner or from whom the rental charges are collected.

[B-164902]

Officers and Employees—Transfers—Relocation Expenses—"Settlement Date" Limitations on Property Transactions—What Constitutes Litigation

The fact that the ultimate sale of the residence of a transferred employee was delayed more than 1 year after the date of entrance on duty at his new official station, as limited by section 4.1d of Bureau of the Budget Circular No. A-56 on real estate transactions, by reason of the breach of an escrow agreement tantamount to a contract sale and the continued possession of the property by the defaulter does not entitle the employee under the "litigation" exception provided in section 4.1d to the 1-year settlement requirement, to reimbursement for the expenses incurred in selling his residence, the delay in disposing of the residence not stemming from a suit at law within the contemplation of the Budget Circular.

To Maurice F. Row, United States Department of Justice, August 9, 1968:

Your letter of July 19, 1968, enclosed a voucher for $3,529.17 in favor of Mr. Theodore P. Crowley, covering expenses incurred by him in the sale of his residence in Los Angeles, California, following the transfer of his official station from Los Angeles to Phoenix, Arizona, in November 1966, as an employee of the Federal Bureau of Investigation. You ask our decision whether in the light of the facts surrounding the case the voucher may be certified for payment.

Mr. Crowley is said to have entered upon duty at his new official station on November 14, 1966. The expenses for which reimbursement is claimed were incurred in the sale of Mr. Crowley's residence at his old official station and the record shows that the real estate transaction was "settled" on May 15, 1968, more than 1 year after the date of entrance on duty at the new official station, as limited by section 4.1d of Bureau of the Budget Circular No. A-56, except when the period is administratively extended because settlement is delayed by litigation.

The basic question presented by your letter is whether the circumstances which apparently caused a delay in the ultimate sale by Mr. Crowley of his residence in Los Angeles stemmed from "litigation" as that term is used in the Budget Circular.

The record discloses that in November 1966 Mr. Crowley incurred substantial expenses for newspaper advertising of his residence for

sale. On November 21, 1966, he listed his residence with the San Fernando Valley Board of Realtors, Inc., through Jennie Stabile Realty, a member, for sale. On February 10, 1967, he executed an escrow agreement tantamount to a contract of sale with Casey L. Jones and Connie Ann Jones, named as buyers, which agreement was to be closed or settled on or before June 10, 1967. By instructions dated June 28, 1967, of Jennie Stabile Realty, the escrow was canceled.

Thereafter the residence property was listed for sale with several realty brokers but was ultimately contracted to be sold through the broker, White House Properties, on April 13, 1968, to Herbert K. Wunderlich. The sale was closed or settled on May 15, 1968.

We note from Mr. Crowley's statement in the file that he authorized the first prospective buyer, Mr. Jones, to occupy the premises being sold at some date prior to the date of settlement, that on June 9, 1967, he was informed of bankruptcy of Mr. Jones and that apparently Mr. Crowley was unable to obtain possession of the residence until July 8, 1967. Thereafter, notwithstanding Mr. Crowley's apparent diligent efforts to dispose of the property he was unsuccessful until the sale to the Wunderlichs on May 15, 1968.

Mr. Crowley urges that since he could have sued the Joneses on the breach or default of the agreement, presumably in an action in the nature of specific performance, and, apparently, that because the sale of his residence was delayed further, at least until after July 8, 1967, because of the default or breach and the possession of the property by the defaulter, that we should view his case as falling within the purview of the single exception to the 1-year limit established by Bureau of the Budget Circular No. A–56 and find that settlement in the sale of his residence necessarily was delayed because of litigation.

On several occasions we have found it necessary to construe the term "litigation" as used in section 4.1d of the Circular. As defined in Black's Law Dictionary, Fourth Edition, West Publishing Co., 1951, the term "litigation" means a contest in a court of justice for the purpose of enforcing a right; a judicial contest; a judicial controversy; a suit at law. In our decision of May 20, 1968, B–163955, cited in your letter, we said that the term was to be given its usual meaning, i.e., action before a court. In B–163700, May 6, 1968, also cited by you, we agreed with an administrative determination that delays in settlement not stemming from a suit at law could not be viewed as litigation within the meaning of the Budget Circular.

We cannot say on the facts of Mr. Crowley's case that settlement was delayed because of litigation.

Therefore, the voucher, which is returned herewith, may not be certified for payment.

[B-160453]

Military Personnel—Reserve Officers' Training Corps—Programs at Educational Institutions—Employment of Retired Members—Compensation Entitlement

The waiver of retired pay under 38 U.S.C. 3105 by a retired officer in favor of Veterans Administration disability compensation not operating to reduce his legally authorized retired pay, the additional amount the retired officer is entitled to for performing instructional and administrative duties in a private high school that maintains a Junior Reserve Officers' Training Corps program pursuant to 10 U.S.C. 2031(d), is the difference between the retired pay he would be entitled to but for the waiver and the active duty pay and allowances he would receive if ordered to active duty.

To Lieutenant Colonel S. A. Weimer, Jr., United States Marine Corps, August 14, 1968:

Reference is made to your letter of July 2, 1968, requesting a decision as to the proper rate of retired pay to be used for Lieutenant Colonel Byron L. Magness, 050330, USMC, retired, in computing the difference between the retired pay and the active duty pay and allowances he would receive if ordered to active duty. Your request for decision has been assigned control number DO-MC-1012 by the Department of Defense Military Pay and Allowance Committee.

You say that Colonel Magness is employed under the provisions of 10 U.S.C. 2031(d) by a private high school which maintains a Junior Reserve Officers' Training Corps program; that he has executed a waiver under authority of 38 U.S.C. 3105 of "so much of his retired or retirement pay as is equal in amount to such pension or compensation" as he is in receipt of from the Veterans Administration; and that he has waived $147 per month effective May 1, 1968, of his monthly gross retired pay of $641.55 in favor of Veterans Administration compensation.

Subsection 2031(c) of Title 10, U.S. Code, provides that the Secretary of a military department may detail members of the uniformed services on active duty to be administrators or instructors at qualified public and private secondary educational institutions maintaining Junior Reserve Officers' Training Corps units. Subsection 2031(d) provides that instead of, or in addition to, military personnel on active duty, the Secretary of the military department concerned may authorize the employment of retired officers as administrators and instructors in the program, but that retired members so employed are entitled to receive their retired pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty. That subsection further provides that one-half of that additional amount

shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose.

In decision of June 6, 1957, 36 Comp. Gen. 799, we held that a retired commissioned officer, who executed a waiver of retired pay in order to receive disability compensation from the Veterans Administration, had in effect reduced his legally authorized retired pay by the amount of disability compensation within the meaning of a dual compensation statute limiting the amount of retired pay which an employee of the United States could receive in addition to his salary as a civilian employee. There was no bar to the receipt of Veterans Administration disability compensation and salary as a civilian employee, but the simultaneous receipt of retired pay and disability compensation was prohibited except to the extent that so much of his retired pay as was equal to the compensation could be waived. We said that for the purposes of that statute the waiver of retired pay in favor of compensation "operates to reduce the legally authorized retired pay by the amount of the waived retired pay."

You state that doubt in this case arises as the result of our decision of August 4, 1967, 47 Comp. Gen. 87, which you say suggests that subsection 2031(d) should be interpreted to mean that a retired member is in receipt of the full amount of his retired pay even though all or a portion of it is waived.

In the cited 1967 decision we considered the case of a retired member of the uniformed services performing instructional and administrative duties pursuant to the provisions of 10 U.S.C. 2031(d) in connection with the Junior ROTC program who waived his military retired pay in order to have his military service added to his Federal civilian service to obtain a greater civil service retirement annuity. It was our view that it was the intent of Congress that such statutory provisions should apply to "retired members" and "their retired pay" even though the retired member was not actually in receipt of military retired pay, since they were "retired members" in the sense that they earned a right to retired pay by virtue of their military service and were not barred from participation in the Junior ROTC program, and therefore that the amount of retired pay they would be receiving but for the waiver can be viewed as "their retired pay" for the purposes of that statute. We concluded that the retired member was entitled to the difference between the military retired pay to which he would be entitled but for the waiver and the active duty pay and allowances he would receive if ordered to active duty.

While there is no statutory bar as such to the simultaneous receipt of disability compensation and compensation from the high school for the performance of ROTC instructional and administrative duties,

the employment of retired officers by high schools participating in the Junior ROTC program as expressly authorized by law is subject to specific limitations established by the Congress. In the absence of some statutory provision clearly indicating a different intent, we think that the above reasoning is equally applicable under the provisions of 10 U.S.C. 2031(d) to officers who have waived their retired pay in favor of disability compensation. Hence, it is our view that for the purposes of that statute the retired member in this case should be considered to be receiving "retired pay" in the amount of $641.55 a month for the purpose of determining the amount of compensation he is entitled to receive from the high school for his instructional administrative duties under the Junior ROTC program.

[B-148550]

Travel Expenses—Miscellaneous Expenses—Hotel, Etc., Rooms—Cancellation of Reservation—Deposit Reimbursement

Civilian employees and members of the uniformed services subject to the Joint Travel Regulations who are prevented from using an advance hotel room reservation due to the cancellation of orders, change in travel itineraries, or weather conditions may be reimbursed the forfeited advance deposit, the expense being imputable to the travel which required the room reservation. Therefore, the regulations may be amended to prescribe reimbursement for the nonrefundable reservation charge on an actual expense basis and the item included in reimbursement authorized for subsistence expenses on an actual expense basis in unusual circumstances of travel.

To the Secretary of the Army, August 15, 1968:

Further reference is made to letter of December 28, 1967, from the Under Secretary of the Army, forwarded here by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 68-4) on January 10, 1968, requesting a decision relative to a proposed amendment to Volume 1, Chapter 4, Part I, and Volume 2, Chapter 9, Part A, of the Joint Travel Regulations.

The Under Secretary states the Defense Intelligence Agency has requested that consideration be given to amending the Joint Travel Regulations to provide for reimbursement to civilian employees and members of the uniformed services for advance deposits on hotel room reservations which are forfeited when travel orders are canceled, travel itineraries are changed, or when arriving late due to weather conditions or other reasons. The Under Secretary states further that it is common practice and consistent with the laws of some countries to require an advance deposit on reservations; that such deposits are not refundable if reservations are canceled, or not canceled within a specified period prior to the date of the reservation; and consequently,

an employee or a member is financially penalized through no fault of his own when the deposit is forfeited.

The view was expressed in 41 Comp. Gen. 780, continues the Under Secretary, that payment of the charges for the reserved hotel rooms was authorized even though not occupied on the basis that a firm unconditional reservation (contract) to pay for the hotel rooms had been executed; that the reservation having been made, there remained nothing for the hotel to do; and the contract was thus fully performed except for the payment by the Government for the hotel rooms so reserved. The Under Secretary states that this decision appears to involve the Government directly, that the travelers were not a party to the contract, and that payment for the rooms was made from funds authorized for the project flight and as such were not strictly travel funds. He suggests, therefore, that the holding in 41 Comp. Gen. 780 would not be applicable in a situation where there is a contract between the employee or the member and a hotel, and the advance deposit is paid from the individual's personal funds.

The Under Secretary further states that since the cost of a hotel room is considered to be an expense included in the per diem allowance authorized for travel and temporary duty, a hotel reservation charge would appear to be an additional expense of the hotel room and as such within the coverage of the per diem allowance. Accordingly, he continues, while the Joint Travel Regulations, Volume 1, Appendix A, footnote 15, applicable specifically to the Union of Soviet Socialist Republics, increases, by the amount of the reservation charge, the per diem rate for the first day hotel accommodations are occupied, in cases involving canceled orders and no per diem payable there is some doubt whether applicable military and civilian travel expense reimbursement laws provide authority for reimbursing a member or employee for such expense when no travel is performed.

The decision at 41 Comp. Gen. 780, cited by the Under Secretary involved a block reservation for a group of military personnel and civilian employees which the record indicated was made on a contractual basis between the Government and the hotel concerned through official administrative action. The principle of that decision has no application as to the present matter, as there are here involved only agreements between the individual travelers and hotels.

As we understand it, the proposed amendments to the Joint Travel Regulations would provide authorization for reimbursement for nonrefundable advance hotel reservation deposits made by travelers where for reasons beyond their control, the reserved accommodations cannot be used. It is not clear whether it is intended that the traveler would receive such reimbursement in addition to the per diem allowance

otherwise authorized for the travel or that the applicable per diem rate would be increased to the extent of the forfeited loss on days when loss occurs, for after the fact application.

Under the rules of a particular hotel, advance reservation deposits made incident to ordered travel may be forfeited when, because of the cancellation of travel orders, no travel is performed. In such circumstances, travel per diem would not accrue because of the failure of the traveler to enter a travel status. Consequently, he would suffer a loss to the extent of the deposit in the absence of authority for reimbursement of the expense of the unperformed travel on another basis.

Except in unusual circumstances of travel involving high cost conditions where reimbursement for all subsistence expenses may, within prescribed limitations, be authorized on an actual expense basis, provision is made by statute for reimbursement of subsistence expenses of members of the uniformed services (37 U.S.C. 404, 405, 411) and civilian employees (5 U.S.C. 5702, 5707) incurred in the performance of travel away from post of duty on official business in the form of per diem allowances.

Per diem is an allowance authorized in lieu of the reimbursement of subsistence expenses on an actual expense basis and is payable in proper cases without regard to when or whether the actual costs in any individual case are incurred. It clearly is intended to serve for all reimbursable subsistence expenses, and consequently may not properly be supplemented by provision for additional payment on a reimbursement of actual expense basis to cover any subsistence item or items otherwise covered by the per diem payment.

Possibly the incidence of hotel reservation cancellations of the nature and consequence contemplated by the Under Secretary is such as to warrant its inclusion as an item for consideration in the fixing of overall per diem rates of allowance within the contemplation of the subsistence laws. We are of the view, however, that provision by regulation to authorize per diem rates of allowance consisting of the normal per diem rate plus an amount equal to that lost by reason of a reservation cancellation, such rates to be payable only for the days of loss, would be improper in that by indirection it would, in effect, accomplish the payment of per diem and a concurrent reimbursement on an actual expense basis of the item of loss for canceled hotel reservations.

In circumstances somewhat analogous to the situation here considered, in cases where a civilian employee maintained his quarters while absent from his temporary duty station to insure their availability on his return, thereby incurring more than one item of expense for lodgings at different points on the same day, we have indicated that if subsistence expenses are approved for payment on an actual

expense basis, even though after the fact, we will have no objection to the inclusion of the cost of both lodgings as parts of his daily subsistence expenses on such days, reimbursable to the extent otherwise authorized. See B–155141, October 20, 1964, and B–158882, April 27, 1966.

We would not object to an extension of that principle to cases involving forfeited hotel reservation deposits where reimbursement on an actual expense basis has been authorized within the statutory authority of the administrators involved to provide for the reimbursement of subsistence expenses on an actual expense basis in unusual circumstances of travel. Such authorization reasonably could include reimbursement for a deposit made incident to anticipated travel under orders canceled before commencement of the travel, the expense thereof being clearly imputable to the travel requirements existing before the cancellation.

[B–164157]

Travel Expenses—Military Personnel—Reservists—Training—Active *v.* Inactive Duty

A Reserve member who performs inactive duty training at headquarters before and after an active duty training period is not precluded from entitlement to the travel and transportation allowances authorized in 37 U.S.C. 404(a) because of the prohibition in paragraph M6002–2 of the Joint Travel Regulations against payment of travel or transportation allowances for inactive duty training at the headquarters of a Reserve component, absent a requirement for performance of travel immediately preceding or upon detachment from active duty. For consideration, however, is the availability of the reservist for inactive duty training, 37 U.S.C. 204(b), providing that the active duty status of a reservist ordered to duty for more than 30 days is expanded to include travel time.

To the Secretary of the Air Force, August 16, 1968:

Further reference is made to letter of April 10, 1968, from the Under Secretary of the Air Force, forwarded here by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 68–18) on April 16, 1968, requesting a decision relating to the travel entitlements of members of the Reserve components incident to active duty training who perform inactive duty training at their training duty station on the day before or the day after the period of active duty training.

The Under Secretary says the question presented arises because of doubt surrounding the status of the member at the time he performs the travel since paragraph M6002–2 of the Joint Travel Regulations provides that a member is not entitled to travel or transportation allowances for any inactive duty training with or without pay at the city or town in which the headquarters of his Reserve component unit

is located, including travel between his home and the headquarters of his Reserve unit, attendance at weekly drills, or duty in lieu of weekly drills.

The Under Secretary also says that when the member departs from his home prior to the time necessary to put him at the headquarters of his Reserve unit on the day required to commence active duty for training and uses the extra time for scheduled or make-up periods of inactive duty training, question arises whether the travel involved was for the purpose of attending inactive duty training or whether such training was merely coincidental and the travel involved was primarily incident to his active duty orders. In many instances, continues the Under Secretary, members reside so far distant from their inactive duty training station that return travel to their residences is impractical when consecutive duties such as are outlined above are performed.

He also says that the cases involved are further complicated in view of the provisions of 37 U.S.C. 404(f) and related implementations thereof in paragraph M4157 of the Joint Travel Regulations which provide that travel and transportation allowances authorized may be paid on the member's relief from active duty whether or not he performs the travel involved. Under that rule, he says, it would appear immaterial whether the reservist did or did not perform inactive duty training on the day following relief from active duty.

The Under Secretary states if that be so and the active duty terminal travel and transportation allowances are payable even though the member does not perform travel to his home until after completion of inactive duty training for which he is otherwise denied travel and transportation allowances under paragraph M6002–2 of the Joint Travel Regulations, it may be that initial travel to the duty station may be considered as incident to the active duty even though accomplished earlier than necessary in order to perform inactive duty training.

While the case presented involves a situation where the inactive duty station and the place of call to and relief from active duty are at the same place, the Under Secretary requests, if our decision is to the effect that the travel involved is considered to be travel at personal expense for which no reimbursement is authorized, advice whether our decision would be the same if the inactive duty station and the place of commencement or termination of active duty, as applicable, were at different locations.

Section 404(a) of Title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances

for travel performed or to be performed under orders, including upon call to active duty from his home or from the place from which called or ordered to active duty to his first station, and upon release from active duty from his last duty station to his home or the place from which he was called or ordered to active duty, whether or not he is or will be a member of a uniformed service at the time the travel is or will be performed. Subsection (f) provides that the travel and transportation allowances authorized under this section may be paid on the member's separation from the service or release from active duty, whether or not he performs the travel involved.

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. Paragraphs M6002 and M6004 of the regulations provide that the members are not entitled to travel or transportation allowances for any inactive duty training at the city or town in which the headquarters of their Reserve component units are located, including travel between their homes and the headquarters of their Reserve units.

Reservists are entitled, under the applicable regulations, to travel allowances from home to first duty station upon call to active duty and from last duty station to home on release therefrom. There is no requirement that such travel be performed immediately preceding entrance upon active duty or immediately upon detachment therefrom or, for that matter, that it be performed at all upon release from active duty in view of the provisions of 37 U.S.C. 404(f). We know of no reason why the intervention of activities not inconsistent with the need for the performance of travel between home and active duty station should affect such entitlement.

We are of the view, therefore, that the right to travel allowance from home to duty station, and return, under active duty orders would not be affected by the performance of inactive duty training immediately before and after an active duty assignment in the circumstances set forth by the Under Secretary.

In connection with the foregoing, it will be noted that reservists ordered to active duty for a period of more than 30 days are in an active duty status expanded to include the time necessary to travel from their home to first duty station and from last duty station to home by virue of the provisions of 37 U.S.C. 204(b), even though travel may not actually be performed immediately before and after the active duty assignment. See 44 Comp. Gen. 43 at page 49. In view of that fact, it would appear that they would be in an active duty

status on the days questioned by the Under Secretary and that their availability on those days for the performance of inactive duty training would be open to question.

[B-164121]

Pay—Aviation Duty—Suspension From Flying Duty—Administration Action Required

Although an Air Force officer failed to satisfy the requirement for an annual physical examination to qualify for flying pay, his flying orders remained in effect until terminated by the base commander or air tactical unit and, therefore, the suspension of his flight pay absent orders directing the suspension was ineffective and the officer is entitled to the flight pay received to date payment was unofficially suspended and to payment for the period from date of pay suspension until the date his flying status was officially terminated.

To Lieutenant Colonel K. P. Ritter, Department of the Air Force, August 19, 1968:

Further reference is made to your letter of March 21, 1968, requesting an advance decision as to the propriety of making repayment of certain flight pay previously collected and payment of flight pay for the period March 1 to August 31, 1967, to Major Paul D. Marks, FR27026, in the circumstances described therein. The submission was assigned Air Force Request No. DO-AF-995 by the Department of Defense Military Pay and Allowance Committee, and transmitted here on April 19, 1968.

You state that effective July 1, 1962, Major Marks' flying status code was changed from Code 1 to Code 3, the latter code requiring an annual physical examination. You say that during the period July 1962 to July 1964, when Major Marks was stationed at Fort Churchill, Winnipeg, Canada, a physical examination was waived by the Surgeon General for military personnel stationed there and, therefore, the officer was not required to take an annual physical during that period. You report, however, that, when he arrived at Vandenberg Air Force Base, California, on August 10, 1964, he failed to take an annual flight physical examination as prescribed in Air Force Manual 160-1 until May 1, 1967.

It is reported that during the month of January 1967 a routine check of all Vandenberg base personnel in Code 3 was made by the flight records section and it was noted at that time that there was no substantiating record on file to authorize Major Marks to receive flight pay. On February 27, 1967, a Military Pay Order was accomplished by the officer in charge of flight records requesting suspension of Major Mark's flight pay since the flight surgeon's office had no record indicating the officer had completed an annual physical examination

since arriving at Vandenberg Air Force Base on August 10, 1964. On the basis of that Military Pay Order, payment of flight pay was suspended effective March 1, 1967, and on April 26, 1967, the officer was advised "that a collection" of $7,368 had been entered on his military pay record representing "recoupment of flight pay" for the period August 10, 1964, through February 28, 1967. It is stated that an investigation was ordered because of the failure of the officer to complete his annual physical and that collection action was suspended after collection of $884.16 from him.

Major Marks stated, as reported in your letter, that he was not aware, until approximately 6 months after his arrival at Vandenberg Air Force Base of the requirement that Code 3 flight personnel must remain physically qualified before they can receive flight pay. It is reported that he had his last physical (prior to the one taken in May 1967) in June 1962 and his reason for not taking such examination sooner was that he was not notified that he was delinquent until January 1967. He was physically examined on May 1, 1967, and was found to be physically disqualified for flying. By orders dated August 25, 1967, he was suspended from flying status effective September 1, 1967, by reason of physical disqualification for flying duty.

Paragraph 2–29*g*, Air Force Manual 35–13G, states (under NOTE), that an officer in flying status Code 3 who does not complete his annual medical examination by his birthday will be considered as not medically qualified for flying status. It is further stated that the 3-month grounding period will date from the first day of the month following his birthday. Paragraph 2–28 of the same regulation states that the suspending authority will notify the officer before the suspension order becomes effective. Applying those provisions to Major Marks' case, you say that the officer should have been grounded not later than July 1, 1965 (birthdate, June 10, 1965), and that orders suspending him from flight status should have been issued effective October 1, 1965. You state, however, that there is no evidence available to indicate the officer was ever suspended until September 1, 1967.

In view of the doubt in the matter, you ask whether you may repay Major Marks the $884.16 previously collected from him and credit him with flight pay for the period from March 1, 1967, to August 31, 1967, since orders issued suspending the member were not effective until September 1, 1967. If the answer is in the negative, you ask from what date collection of flight pay from the officer should be required.

Accompanying your submission is a copy of a report of investigation of the failure of Major Marks to complete his annual flight physicals. The report notes that there was a breakdown of administrative controls at the installation to remind officers of the necessity of taking physicals.

The investigating officer in his report concluded, among other things, that:

b. It also appears that the procedure used in Base Flight, Personnel, Finance and the Surgeon's Office lack coordination. None of these offices took any steps that would be required prior to the Commander knowing of his responsibility to conduct an investigation as he was required to do pursuant to paragraph 2–29m of AFM 35–13g. Lack of this coordination contributed to Marks being allowed to collect flight pay from 10 August 1964, the date of his arrival at Vandenberg Air Force Base, until 1 May [March] 1967, the date of his physical, without annual physical examinations.

Section 103(a) of Executive Order No. 11157 dated June 22, 1964, promulgated pursuant to 37 U.S.C. 301(a), authorizes payment of incentive pay for flying duty to a member who is required by "competent orders" to participate frequently and regularly in aerial flights and section 113 of the Executive order authorizes the Secretaries concerned to prescribe supplemental regulations to carry out the President's regulations.

With respect to flying status orders, paragraph 2–11, Air Force Manual 35–13G, states that unless "suspended" under paragraph 2–29, the orders that require a rated officer to fly frequently and regularly will be effective as long as he holds a continuous commission in the Air Force or its Reserve components. Paragraph 2–29 lists various reasons for suspending an officer from flying status, including an officer who is physically disqualified as provided in subparagraph *g*. In this category, as noted above, a member who does not complete his annual medical examination is considered as not medically qualified for flying status. Paragraph 2–29 was further amended by change G dated March 10, 1966, by adding a new subparagraph "m" which states that the failure of an officer to accomplish an annual physical examination as prescribed in Air Force Manual 160–1 will be viewed in the same manner as the failure to meet specified annual flight requirements and the officer will be removed from flying status until his annual physical is subsequently accomplished.

While the above regulations leave no doubt that a member in this category is to be suspended from flying status, we find nothing in those regulations which directs an automatic suspension from flying duty in the absense of orders issued by the base commander or air tactical unit expressly suspending the member from flying status. See paragraph 2–29*a*(1)(b) of the same regulations.

Since under the regulations an officers' flying duty orders continue in effect until suspended, it is our view that Major Marks flying status was not officially terminated until September 1, 1967, in accordance with orders dated August 25, 1967, and that he continued in a flying pay status through August 31, 1967, so as to be entitled to the flight pay in question provided he otherwise met the flight requirements. See

37 Comp. Gen. 282. *Cf.* 36 Comp. Gen. 57. Accordingly, the officer is entitled to repayment of the amounts collected from him and you are authorized to credit him with flight pay for the period March 1, to August 31, 1967, if otherwise correct. The Military Pay Order and supporting papers are returned herewith.

[B-126980]

Travel Expenses—Tips—Baggage Handling, Etc.—Government-Owned Equipment—At Hotels

The tips given exclusively for handling Government property at hotels may be reimbursed to members of the uniformed services, and the Joint Travel Regulations amended accordingly, the rule that a tip is an incidental expense item included in a member's per diem applying only to personal baggage. However, reimbursement may not be authorized for tips or fees incurred in handling a member's personal baggage as well as Government property at hotels except to the extent a separate charge or additional cost is experienced for handling the Government property.

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

Further reference is made to letter dated May 15, 1968, from the Assistant Secretary of the Air Force, forwarded here by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 68-22), requesting a decision whether the Joint Travel Regulations may be amended to authorize reimbursement to military personnel for tips at hotels incident to the handling of baggage consisting of Government property.

Paragraph M4402 of the Joint Travel Regulations provides for the reimbursement of customary tips given by military personnel while in a travel status incident to the handling of baggage except at hotels.

In the letter dated May 15, 1968, from the Assistant Secretary, it is stated that the propriety of excluding from reimbursement those tips expended at hotels for handling of personal baggage is recognized since they are considered as one of the incidental expenses included in per diem; however, in certain cases a member attending a meeting or conference, or because of his official position, may be required to have in his possession official documents or other Government-owned material. In this connection, the Assistant Secretary continues, it is contended that it would be proper to reimburse the member for tips expended for the handling of such nonpersonal baggage at hotels.

In the decision of May 4, 1956, 35 Comp. Gen. 618, it was held that tips given to hotel employees for handling baggage of military personnel traveling on official business are one of the incidental expenses included in the per diem allowance and reimbursement as a transportation expense may not be authorized. The Assistant Secretary says it

appears that this decision is premised on the personal baggage of military personnel. He points out that 37 U.S.C. 404 authorizes a travel and transportation allowance for a member incident to official travel and that while this statutory authority does not contain a specific provision to cover the item under discussion, he expresses the view that it is reasonable to conclude that customary tips expended for the handling of Government property is a valid and necessary expense incurred pursuant to official travel and within the scope and intent of the statutory authority.

The Assistant Secretary notes that civilian employees may be reimbursed for tips given for handling baggage consisting of Government property and states that considering a member and a civilian employee traveling under similar circumstances, it would seem inequitable to deny reimbursement to the one and permit reimbursement to the other for the same item of expense incurred by both.

Notwithstanding the foregoing, the Assistant Secretary continues, since there does not appear to be specific statutory authority for reimbursement, the propriety of the proposed revision is in doubt and our decision is requested as to whether we would be required to object to a proposed change in the Joint Travel Regulations, Volume I, which would authorize reimbursement for tips given incident to handling of baggage consisting of Government property at hotels of members.

In the decision of July 31, 1947, 27 Comp. Gen. 52, it was held that porters' fees or tips which are required by regulations to be paid out of the employee's per diem allowance are those primarily incident to the handling of personal baggage and that any necessary charges for handling heavy Government-owned equipment properly are reimbursable as transportation expenses. See also B–163282, February 12, 1968.

In decision of December 17, 1957, 37 Comp. Gen. 408 we considered the claim of a civilian employee for reimbursement of tips at the rate of 25 cents for each handling of special Government equipment in and out of hotels while traveling on official business. It was pointed out that section 5.6 of the Standardized Government Travel Regulations provides that charges or tips at transportation terminals will be allowed for handling Government property carried by the traveler, and that section 6.1 provides that the per diem allowance includes fees and tips to porters and bellboys.

We said that allowances under section 5.6 for handling Government property carried by the traveler contemplated a situation where a separate charge or additional cost is experienced by the traveler by reason of the Government property handled. And, where no extra charge or cost is encountered because of the Government property

handled, allowance is not authorized. In that case, there was no showing by the traveler that a separate or additional charge, by reason of handling the Government property, was made at the hotels. Therefore, it was concluded that payment was not authorized since it would constitute additional reimbursement for expenses included in the per diem.

In line with these decisions, we will not be required to object to a change in the Joint Travel Regulations authorizing reimbursement for tips given exclusively for handling Government property at hotels. Reimbursement may not be authorized for tips or fees for handling a member's personal baggage as well as Government property at hotels except to the extent that it be shown that a separate charge or additional cost was experienced for handling the Government property.

[B-160435]

Pay—Additional—Proficiency Pay—"Superior Performance" Awards

Under 37 U.S.C. 307, which provides that an enlisted member of the uniformed services entitled to basic pay and designated as specially proficient in a military skill may be paid proficiency pay, regulations that do not conform to the intended purpose of the "superior performance" category of award established pursuant to section 307—an incentive for the achievement and maintenance of superior performance by a member in his current pay grade—but prescribe eligibility for an award on the basis of qualifying for promotion to the next higher pay grade are regulations that are not consistent with section 307, and, therefore, payments of proficiency pay in the superior performance category that do not relate to a member's current pay grade but on eligibility for promotion in grade may not be authorized.

Pay—Additional—Proficiency Pay—"Special Award" Criteria

The proficiency pay provided by 37 U.S.C. 307 for enlisted members of the uniformed services qualifying in an occupation or skill may not be paid to members assigned to a headquarters tour of duty as a "Special Award," where the commanding officer is authorized to assign and terminate awards at his discretion or upon transfer of a member from the assignment. An award of a proficiency rating on the basis of a billet occupied, with no criteria established with respect to performance of the duties of a member's rating or assignment does not provide a sufficient basis for payment of proficiency pay.

To C. C. Gordon, United States Coast Guard, August 21, 1968:

Reference is made to your letter of July 15, 1968, with enclosures, requesting an advance decision as to the propriety of payment of proficiency pay to certain members as shown on Personnel Diary 1-69 U.S. Coast Guard Headquarters.

The Diary shows that awards of proficiency pay (Superior Performance, Category H) and (Commandant's Special Award, Category J) were made to certain members in accordance with Commandant Instruction 1430.1c of June 6, 1968, issued puruant to 37 U.S.C. 307.

The Category H awards presumably were made in accordance with the Instruction to members who passed servicewide examination for advancement to or in a petty officer rating and are to be terminated on the day preceding advancement in rating or on the date the advancement eligibility list expires, whichever occurs first. Category J awards were made to members on a billet basis at Coast Guard Headquarters under an authorization by the Commandant.

It appears from your letter that you question the payment of proficiency pay under these awards for the reason that they were made to members without a positive showing that they are specially proficient in a military skill for which the pay is being awarded.

Section 307 of Title 37, United States Code, provides that an enlisted member of the uniformed service who is entitled to basic pay and is designated as being specially proficient in a military skill of the uniformed service concerned may be paid proficiency pay. The proficiency pay originally was authorized by section 209 of the Career Compensation Act of 1949 as added by section 1(8) of the act of May 20, 1958, 72 Stat. 125.

Section 307 further provides that the Secretary concerned shall determine whether enlisted members of a uniformed service under his jurisdiction are to be paid proficiency pay. He shall also designate, from time to time, those skills within each uniformed service under his jurisdiction for which proficiency pay is authorized, and shall prescribe the criteria under which members of the uniformed service are eligible for a proficiency rating in each skill.

Section 307 is administered under regulations prescribed by the Secretary of Defense for the uniformed services under his jurisdiction, and by the Secretary of Transportation for the Coast Guard when the Coast Guard is not operating as a service in the Navy. Section 1001(b) of Title 37 provides in part that regulations of the Secretary concerned relating to pay matters for members of the Coast Guard shall, as far as practicable, conform to regulations approved under subsection (a) for the military departments.

Section 307 confers upon the Secretaries concerned a broad and flexible authority to provide for payment of proficiency pay to enlisted members of the uniformed services. The Secretary of Defense and Secretary of Transportation have authorized two general categories of Proficiency Pay: Specialty Pay and Superior Performance. The first, Specialty Pay, is authorized on the basis of qualification in an occupation or skill critically important to the individual's service. The second, Superior performance, is authorized on the basis of demonstrated outstanding effectiveness or superior performance in the member's assigned duties.

With respect to Superior Performance which is involved here, paragraph 4A–2, Department of Defense Directive No. 1340.2 dated June 26, 1963, prescribing the policies covering the award of proficiency pay to enlisted members under section 307 provides as follows:

2. *Proficiency Pay (Superior Performance)*—To provide an incentive for personnel, not otherwise receiving proficiency pay, to achieve superior performance on the job. This incentive is not intended to act as a substitute for the normal incentive of promotion opportunity, but provides recognition to those who have demonstrated superior performance in the specialty and grade in which they are serving.

Paragraph 4D–2 of the same regulation provides as follows:

2. *Eligibility*—To be eligible for Proficiency Pay (Superior Performance), an enlisted member:

a. Must be on active duty, other than active duty for training as a reserve, and entitled to basic pay.

b. Must have completed a minimum of 24 months active service which, if it includes any period of active duty for training, shall be consecutive service.

c. Must have demonstrated superior performance on the job, in the skill and level in which serving for a minimum period of six months.

d. Must not be in receipt of Proficiency Pay (Specialty).

e. Must meet such other conditions of eligibility as the Secretary of the Military Departments concerned may prescribe.

Paragraph 10803(b), Department of Defense Military Pay and Allowances Entitlements Manual, is as follows:

b. Proficiency Pay (Superior Performance). This type provides an incentive for members not otherwise receiving proficiency pay, to achieve superior performance on the job. It is not a substitute for the normal incentive of promotion opportunity. Eligible members are those who demonstrate superior performance in the specialty and grade in which they are serving.

The purpose of superior performance pay is to provide recognition to those personnel, not otherwise receiving proficiency pay, who have demonstrated superior performance in their assigned duties and to provide an incentive for achieving or continuing such superior performance. It is not a substitute for, and is not to be confused with, the normal promotion which is based on qualifications to serve in a higher grade. The objective is to reward those individuals who perform outstandingly in their particular skills and to provide additional remuneration for those who may not possess the capabilities of leadership in a higher military rank but who are entitled to additional pay for their outstanding proficiency and their skill in the grade in which serving. See page 5, H. Rept. No. 1538, of Committee on Armed Services dated March 20, 1958, to accompany H. Rept. 11470, which subsequently became Public Law 85–422, dated May 20, 1958.

The eligibility criteria for Superior Performance, Advancement Eligibility Qualification, Category H, set forth in enclosure (8) to Commandant Instruction 1430.1c is:

(1) Successfully complete and obtain a passing score in the Servicewide Examination for advancement to or in a petty officer rating, and

(2) Place on an advancement eligibility list established by the Commandant in accordance with Article 5–C–31, Personnel Manual, and
(3) Remain eligible and recommended for advancement in rate.

The regulation provides further that the proficiency rating H–1 shall terminate on the day preceding advancement in rating.

The eligibility criteria quoted above provide for awards of proficiency ratings, category H, based on qualification for promotion to the next higher pay grade and not on the member's proficiency in his present rate. He is not selected for the award because he is performing duties in his rate in a superior manner but because he has qualified for promotion. A superior performance in the member's rate or duty assignment does not appear to be a requirement to qualify for promotion. Therefore, and since the award terminates upon his advancement in rating, it appears that the member is not awarded proficiency pay, category H, because of his outstanding proficiency and skill in the grade in which he is serving but it is awarded because he qualifies for promotion and if not promoted it serves for a time as a substitute for promotion.

In these circumstances, it is our view that the criteria established for category H are not consistent with the language and spirit of the law in that they do not relate the award of proficiency pay to the duties of the member's current pay grade but on eligibility for promotion in grade. This does not conform with Department of Defense regulations and we perceive of no legal basis or justification for such departure. Accordingly, the payments of proficiency pay, category H, to Graves and Devereaux are not authorized.

Payment of category J proficiency pay, Commandant's Special Award, is authorized by enclosure (9) to Commandant Instruction 1430.1c dated June 6, 1968. The enclosure provides that eligibility criteria will be "As specified by the Commandant." Other than this, the instruction contains no requirements the individual must meet to be eligible for award of category J proficiency pay. The enclosure provides further that award authority will be in letter instructions from the Commandant (PE).

Letters dated June 20 and June 25, 1968, from the Commandant of the Coast Guard to the Commanding Officer, U.S. Coast Guard Headquarters, announced the selection of members listed in the letters (including names on the Personnel Diary which you have questioned) for the Commandant's Special Award of Proficiency Rating (J–2) effective July 1, 1968, provided they meet the eligibility requirements contained in paragraph 4 of the Instruction of June 6, 1968. The letter further stated that the rating is authorized for the remainder of the members' tour at Coast Guard Headquarters unless terminated under the instruction, or upon transfer.

Also, by letter dated June 26, 1968, the Commandant authorized the Commanding Officer, Enlisted Personnel, Coast Guard Headquarters, to select five enlisted persons assigned within Coast Guard Headquarters and not otherwise entitled to a proficiency pay rating, for the Commandant's Special Award of proficiency rating (J-2). The letter further authorized the commanding officer to assign and terminate the awards at his discretion or upon transfer from that unit. No proficiency criteria were specified, the letter merely providing that the personnel selected meet the eligibility requirements of paragraph 4 of the Instruction of June 6, 1968.

Paragraph 4 of the Instruction does not provide standards for making a proficiency award except that it shall not be made without the approval and recommendation of the commanding officer. Included in the paragraph are instructions for terminating an award if, in the opinion of the commanding officer, a member has not continued to maintain a satisfactory level of performance of those duties or skills that entitled him to the proficiency rating.

The record does not disclose the five members who were selected under the letter of June 26, but the only standard specified in making the awards was that the members be assigned to Coast Guard Headquarters. We are of the opinion that an award of a proficiency rating on the basis of the billet occupied—no criteria being specified for consideration with respect to the member's performance of the duties of his rating or assignment—does not provide a sufficient basis for payment of proficiency pay.

Therefore, the payment of proficiency pay on the basis of the award of J-2 proficiency ratings to the various members in question as shown on Diary 1-69 is unauthorized.

Your question is answered accordingly.

[B-164459]

Contracts—Specifications—Misdescriptions, Etc.—Construction Contracts

The inclusion of the clause required by paragraph 7-602.45 of the Armed Services Procurement Regulation in all military fixed-price construction contracts to provide that omissions from drawings or specifications, or the misdescription of details of the work necessary to carry out the intent of the drawings and specifications, or details which are customarily performed shall not relieve the contractor from performing the omitted or misdescribed details of the work is not restrictive of the full and free competition contemplated by 10 U.S.C. 2305(a), as well as 41 U.S.C. 253(a). Therefore, in view of the fact that a contracting agency has the primary responsibility for drafting specifications to meet the requirements of the Government, and the clause is reasonable and necessary in the performance of complicated construction contracts, the general usage of the clause will not be questioned.

To the Zinger Construction Company, Inc., August 21, 1968:

Reference is made to your letter of May 24, 1968, requesting our decision as to the legality of a contract clause apparently used in Government construction contracts. You enclose, as an example of its use, a copy of one page of an unidentified invitation for bids which included the clause under paragraph SP–2b (Contract Drawings, Maps and Specifications). The clause reads as follows:

> b. Omissions from the drawings or specifications or the misdescription of details of work which are manifestly necessary to carry out the intent of the drawings and specifications, or which are customarily performed, shall not relieve the contractor from performing such omitted or misdescribed details of the work but they shall be performed as if fully and correctly set forth and described in the drawings and specifications.

You state that the use of such a clause is illegal; that "this paragraph 'b' is unfair to all bidders and could only result in increased costs to the government; that it is a loophole for preferenced contractors;" and is contrary to the holdings in several unspecified court cases.

It is provided at 41 U.S.C. 253(a) and 10 U.S.C. 2305(a)—statutes governing procurement by formal advertising by the civilian and military departments, respectively—that "invitations for bids shall permit such full and free competition as is consistent with the procurement of types of property and services necessary to meet the requirements of the agency concerned." The purpose of these statutes requiring the award of contracts to the lowest responsible bidder after advertising is to give all bidders equal right to compete for Government contracts and to secure for the Government the benefits which flow from free and unrestricted competition. See *United States* v. *Brookridge Farm*, 111 F. 2d 461. To permit bidders to compete on equal terms, the invitations must be sufficiently definite to permit the preparation and evaluation of bids on a common basis, and it is axiomatic that bidders cannot compete on an equal basis as required by law unless they know of and compute their bids in accordance with the objective factors comprising the bases upon which their bids will be evaluated. In 36 Comp. Gen. 380, 385, we held in this regard as follows:

> The "basis" of evaluation which must be made known in advance to the bidders should be as clear, precise and exact as possible. Ideally, it should be capable of being stated as a mathematical equation. In many cases, however, that is not possible. At the minimum, the "basis" must be stated with sufficient clarity and exactness to inform each bidder prior to bid opening, no matter how varied the acceptable responses, of objectively determinable factors from which the bidder may estimate within reasonable limits the effect of the application of such evaluation factor on his bid in relation to other possible bids. By the term "objectively determinable factors" we mean factors which are made known to or which can be ascertained by the bidder at the time his bid is being prepared. Factors which are based entirely or largely on a subjective determination to be announced by representatives of the contracting agency at the time of or subsequent to the

opening of bids violate the principle for the reason that they are not determinable by the bidder at the time his bid is being prepared.

The United States Army Corps of Engineers, in a letter dated June 19, 1968, from the General Counsel, reported to our Office that the challenged provision is required to be included in all military fixed-price construction contracts by paragraph 7–602.45 of the Armed Services Procurement Regulation (ASPR). We are also informed that contract provisions substantially similar to the challenged clause have appeared regularly in Government contracts from the early part of this century, and that in 1966 the ASPR Committee denied a request by the Associated General Contractors of America to discontinue its use for reasons somewhat similar to those reported in this instance, as follows, by the General Counsel of the Corps of Engineers:

In documents as complex and lengthy as plans and specifications for construction contracts, it is to be expected that there will be errors or omissions which have escaped notice by Government contracting personnel. Some of these will not be obvious until construction has proceeded to an advanced degree of completion; others will be readily apparent to a contractor who is studying the plans and specifications with a view towards preparing his bid. In the absence of a clause such as this, the contractor who spots an obvious discrepancy could remain silent until after contract award and then seek an equitable adjustment under the Changes clause. When such a clause is in a construction contract, a contractor cannot take advantage of the Government in such a situation but will be held to perform at the stated contract price.

This clause does not, as the Zinger letter indicates, constitute a complete shifting to the contractor of the burden of erroneous specifications, for the Contract Appeals Boards have interpreted it in such a manner as to hold contractors responsible for what they knew or reasonably should have known to be erroneous specifications, precluding them from taking advantage of the Government, but at the same time protecting contractors by granting adjustments when the errors were not patent. This issue was discussed at length in Phelps Construction Company of Wyoming, ASBCA #10276, 65–1 BCA 4761 (1965), with respect to a clause similar in effect, entitled "Scope of Work." That Scope of Work clause required the contractor to perform all work necessary to carry out the intent of the drawings and specifications or which is customarily performed for such work. The drawings and specifications furnished to Phelps showed lintels over all windows except basement windows. The customary practice was to install such lintels over all windows. Nevertheless, the Board of Contract Appeals granted an equitable adjustment for the work involved in placing lintels over the basement windows. It noted that the purpose of such a clause was to caution bidders that the drawings and specifications need not spell out every "nut and bolt" necessary to perform the contract and that the relative cost of the lintels placed it in the nuts and bolts category, but held that when the drawings specifically required lintels to be furnished and installed over some windows, the Scope of Work clause would not be interpreted as requiring contractor to furnish and install lintels over other windows where the drawings did not so specify. The Board also pointed out that too broad a construction of such a clause would run contrary to three concepts: (1) contingency items should be reduced; (2) there is an implied warranty by the Government that if its specifications are followed the desired result will be obtained; (3) a contractor is required by his contract to follow the specifications. Conversely, the Board noted the duty of a contractor to inquire about patent errors or omissions.

For your information, we enclose copies of the referenced Armed Services Board of Contract Appeals (ASBCA) decision and an earlier decision, ASBCA Nos. 5056, 5057, involving a dispute which arose over the interpretation of the questioned contract clause.

We have often observed that the drafting of proper specifications to meet the requirements of the Government is a matter primarily within the province of the contracting agency. Therefore, and in view of the interpretation placed upon the clause by the ASBCA, as stated above, and the apparent reasonableness and necessity for the clause in complicated construction contracts, our Office is not inclined to question its general usage by the construction agencies of the Government. While the clause requires the submission of bids for services not specifically itemized, the language of the clause clearly limits its application to the misdescription and omission of details which any knowledgeable bidder will normally consider and include in his bid. Further, in this respect, we are not aware of any court decisions, such as you allege, which interpret the clause differently from the cited ASBCA decisions.

[B–164808]

Bids—Evaluation—Tax Inclusion or Exclusion

An attachment to a low bid stating the prices quoted included provisions for payment of the then current State of Washington business and occupation tax but that "no provision has been made for the payment of any other Washington tax" is considered part of the bid, and the bid submitted on a tax-excluded basis regarding future increases in the business tax or newly imposed State taxes is nonresponsive to the invitation which contained a tax clause requiring the contract price to include all applicable taxes and provided for an adjustment in the contract price only in the event of changes in the Federal excise tax or duty and not for changes in State or local taxes.

To William E. Brown, August 21, 1968:

Reference is made to your letter of July 22, 1968, regarding the protest of the Westinghouse Electric Corporation against the award of a contract to Allis-Chalmers under invitation for bids DS–6608.

The subject invitation—the second step of a two-step procurement—solicited bids to furnish, install and test three generators and provide spare parts for the Grand Coulee Third Powerplant. Two bids were received from the eligible bidders under the first step. Allis-Chalmers bid $22,286,000 with a warranted efficiency of 98.65 percent for the generators. Westinghouse bid $22,044,000 with a warranted efficiency of 98.37 percent. Paragraph B–7a(2) of the invitation special requirements provided that there would be deducted from each bid price $6,000 per generator for each $\frac{1}{100}$ of 1 percent the warranted efficiency exceeded 98.25 percent. In accordance therewith, $720,000 was deducted from the Allis-Chalmers bid price and $216,000 was deducted from the Westinghouse bid price. As a result, the Allis-Chalmers bid was evaluated at $21,566,000, whereas the Westinghouse bid was eval-

uated at $21,828,000. On that basis, Allis-Chalmers was the low evaluated bidder.

In a letter attached to the Allis-Chalmers bid, it was stated:

Enclosed herewith is one (1) completed set of Standard Form 33, Bidding Schedule, Warranted Characteristics and form titled, "Representations by Offeror Pursuant to the 'Buy American' Act." This data constitutes Allis-Chalmers formal offer to furnish, install and test the generators required under Solicitation No. DS-6608.

This enclosed price data, together with the following, comprise our complete offer.

(a) Bureau of Reclamation letter of January 19, 1968, to all Prospective Offerors.

(b) Bureau of Reclamation Solicitation No. DS-6608, issued together with Amendments Nos. 1, 2 and 3.

(c) Allis-Chalmers letter of April 1, 1968, and its accompanying Technical Proposal No. 26-61-021.

(d) Bureau of Reclamation letter of May 17, 1968, commenting on the Allis-Chalmers Technical Proposal.

(e) Allis-Chalmers letter of May 28, 1968, revising our Technical Proposal.

(f) Bureau of Reclamation letter of June 6, 1968, approving the Allis-Chalmers Technical Proposal.

We would like to point out that in accordance with paragraph A-9, Page 3, Special Conditions of Solicitation DS-6608, our priced quotation includes provisions for payment to the State of Washington the "Business and Occupation" tax in the amount of 0.44 percent on the gross proceeds of sale. No provision has been made for the payment of any other Washington State Tax.

Paragraph A-9 of the invitation special conditions cited in the last paragraph of the Allis-Chalmers letter provides:

A-9. Federal, State, and Local Taxes

a. Except as may be otherwise provided in this contract, the contract price includes all applicable Federal, State, and local taxes and duties.

b. Nevertheless, with respect to any Federal excise tax or duty on the transactions or property covered by this contract, if a statute, court decision, written ruling, or regulation takes effect after the contract date, and

(1) Results in the contractor being required to pay or bear the burden of any such Federal excise tax or duty or increase in the rate thereof which would not otherwise have been payable on such transactions or property, the contract price shall be increased by the amount of such tax or duty or rate increase: *Provided*, That the contractor if requested by the contracting officer, warrants in writing that no amount for such newly imposed Federal excise tax or duty or rate increase was included in the contract price as a contingency reserve or otherwise; or

(2) Results in the contractor not being required to pay or bear the burden of, or in his obtaining a refund or drawback of, any such Federal excise tax or duty which would otherwise have been payable on such transactions or property or which was the basis of an increase in the contract price, the contract price shall be decreased by the amount of the relief, refund, or drawback, or that amount shall be paid to Government, as directed by the contracting officer. The contract price shall be similarly decreased if the contractor, through his fault or negligence or his failure to follow instructions of the contracting officer, is required to pay or bear the burden of, or does not obtain a refund or drawback of, any such Federal excise tax or duty.

c. No adjustment pursuant to Paragraph *b.* above will be made under this contract unless the aggregate amount thereof is or may resasonably be expected to be over $100.

d. As used in Paragraph *b.* above, the term "contract date" means the date set for the bid opening, or if this is a negotiated contract, the date of this contract. As to additional supplies or services procured by modification to this contract, the term "contract date" means the date of such modification.

e. Unless there does not exist any reasonable basis to sustain an exemption, the Government, upon request of the contractor, without further liability, agrees,

except as otherwise provided in this contract, to furnish evidence appropriate to establish exemption from any tax which the contractor warrants in writing was excluded from the contract price. In addition, the contracting officer may furnish evidence to establish exemption from any tax that may, pursuant to this clause, give rise to either an increase or decrease in the contract price. Except as otherwise provided in this contract, evidence appropriate to establish exemption from duties will be furnished only at the discretion of the contracting officer.

f. The contractor shall promptly notify the contracting officer of matters which will result in either an increase or decrease in the contract price, and shall take action with respect thereto as directed by the contracting officer.

Westinghouse contends that the last paragraph of the Allis-Chalmers letter renders the Allis-Chalmers bid nonresponsive or, at least, makes it subject to an unlimited upward evaluation.

In response to the Westinghouse protest, you contend that the letter attached to the Allis-Chalmers bid was not part of the bid. You point out that the letter stated which submittals comprised the complete bid and that there was no counter-reference to the letter in the bid. Even if the letter is considered a part of the bid, you disagree with the contention that the last paragraph in the letter places the Government in a position where it cannot reasonably evaluate the Allis-Chalmers bid or that the intent is to impose upon the Government the burden of any other tax now or hereafter assessed by the State of Washington. You state the last paragraph in the Allis-Chalmers letter was purely informational, anticipating possible requests by Allis-Chalmers to the contracting officer for exemption evidence under paragraph "e" of the tax clause. You state that it seemed to be more appropriate to furnish the information with the bid rather than after award of a contract when it might be suspect as a selfserving declaration made to reduce costs of performance without benefit to the Government. You contend that the decision at 41 Comp. Gen. 289 relied upon by Westinghouse as a basis for rejection of the Allis-Chalmers bid is distinguishable on the facts and is not for application. You suggest that there is for consideration B–147073, February 6, 1962, which involved a situation where the bidder stated in the bid that the price did not include any State or city sales tax, but was considered responsive because the State and city sales taxes were not applicable to the contract. In that connection, you point out that the Washington State Sales and Use Taxes are not applicable to Government procurements as evidenced by rule 190 of the Washington State Tax Regulations.

In view of the fact that the Allis-Chalmers letter quoted above was attached to the company's bid; that it expressly referred to the tax clause; and that the last paragraph in the letter undertook to explain which taxes were and were not included in the "priced quotation," there would seem to be no doubt but that the letter should be considered a part of the bid. 37 Comp. Gen. 410; 38 *id.* 508.

It is stated that the last paragraph in the Allis-Chalmers letter was

included so that, if evidence of exemption from taxation is requested after award as provided in paragraph "e" of the tax clause, there would be no question as to the taxes excluded from the bid price. If this was the intended purpose of the statement in the letter it is not understood why similar precaution was not considered appropriate to protect against any subsequent question being raised concerning a contingency reserve for "newly imposed Federal excise tax or duty or rate increase" as referred to in the proviso of paragraph b(1) of the tax clause. In any event, the responsiveness of a bid must be determined on the basis of the bid as submitted. Any intention which was not communicated by the bid and the accompanying letter is not for consideration. It is therefore our view that the statement in the letter must be viewed as expressing the conditions and limitations the words themselves convey rather than an unexpressed intention not reasonably contemplated by the use of such language.

The tax clause provides that the contract price includes all applicable taxes and provides for an adjustment in the contract price only in the event of changes in the Federal excise tax or duty. The tax clause does not provide for any adjustment in the contract price to compensate for changes in State or local taxes. The statement that no provision has been made for the payment of any other Washington State tax is inconsistent with the responsibility imposed by the tax clause. While the tax clause requires the contractor to bear the risk of all State taxes, present and future, Allis-Chalmers has bid, in effect, on the basis that it has made provision only for the Business and Occupation Tax "in the amount of 0.44 percent on the gross proceeds of sale." Accordingly, irrespective of whether any other State taxes apply at the present time, Allis-Chalmers must be deemed to have bid on a tax-excluded basis so far as concerns any future increase in the Business and Occupation Tax over 0.44 percent and any future State taxes which might be imposed in connection with the performance of the contemplated contract.

Our office does not consider the differences in the particular facts between this case and 41 Comp. Gen. 289 as being so significant as to require a different result than that reached in the cited decision. For the reasons stated, it is our view that, as was the situation with respect to the bid questioned in that case, Allis-Chalmers bid was submitted on a tax-excluded basis. In that connection, at page 293 of the cited decision, it was stated:

> We must therefore conclude that where, as in the instant case, the invitation for bids includes the standard Federal, State and Local Taxes clause, and no provision is otherwise made in the invitation for the evaluation of tax-excluded bid prices and the award of a contract on that basis, a bid which is submitted on a tax-excluded basis, without specifically identifying the classes and amounts of taxes which have been excluded, must be considered nonresponsive to the invitation. * * *

In B–147073, February 6, 1962, the taxes excluded were identified in the bid as the "State or City sales tax" and therefore the bid met the requirement in 41 Comp. Gen. 289 that the excluded taxes be specifically identified. While it may be that the Washington State Sales and Use Taxes are not applicable to Government procurements, nowhere in the Allis-Chalmers bid are these taxes identified as the only taxes excluded from the contract price. Thus, B–147073 is not applicable here.

In view of the foregoing, we concluded that the Allis-Chalmers bid is nonresponsive to the invitation and should be rejected.

[B–158810]

Witnesses—Administrative Proceedings—Fees, Mileage, Etc.

Judicial precedent having established a basis for the payment of mileage and fees to witnesses appearing at administrative proceedings, persons summoned for testimony pursuant to 26 U.S.C. 7602 to enable the Internal Revenue Service to determine the tax liability of a taxpayer may be paid the fees and mileage provided by 5 U.S.C. 503(b), whether the witness is the person liable for the tax or is a person whose testimony is revelant or material to the inquiry involving the taxpayer. 45 Comp. Gen. 654, overruled.

To the Commissioner, Internal Revenue Service, August 22, 1968:

Letter dated August 8, 1968 (reference CC : GL–3532, 3533 & 3867/A : RCH), from the Assistant Commissioner (Compliance) refers to our decision of April 26, 1966, 45 Comp. Gen. 654, to you. The Assistant Commissioner notes that in our decision we stated that until such time as further judicial precedent requires a reconsideration of our position, that neither the provisions of 5 U.S.C. 95(a) (now 5 U.S.C. 503(b)) of themselves nor the decisions of the United States District Court for the Southern District of Florida in the cases of *United States* v. *Martin Lemlish, et al.*, No. 65–850–Civ–CF and *United States* v. *Wolff*, No. 66–99–Civ–EC, may be relied upon as authority for the payment of mileage and witness fees to persons summoned for testimony pursuant to the provisions of 26 U.S.C. 7602.

The Assistant Commissioner advises that on July 2, 1968, the United States Court of Appeals for the Fifth Circuit issued its opinion in the (consolidated) cases of *Lloyd Roberts* v. *United States*, No. 25152; *Eleanor Roberts* v. *United States*, No. 25153; *United States* v. *Greenman*, No. 25296; and *United States, et al.* v. *Saitow, et al.*, No. 25297, 68 USTC par. 9450. He states that each of these cases was on appeal from the United States District Court for the Southern District of Florida; and that Fifth Circuit affirmed the judgments of the District

Court which had ordered witness fees to be paid in the *Greenman* and *Saitow* cases and concurrently reversed the judgments of the District Court which had denied witness fees and mileage in the *Roberts* cases. The Assistant Commissioner points out that the Court of Appeals in its opinion stated:

> We think it plain that the congressional purpose in the enactment of Sec. 503 [5 U.S.C. 503(b)] was to provide for witness fees in all administrative proceedings of the character here involved. It seems eminently just that a person compelled to answer such a summons should be entitled to such fees and we decline to believe that Congress meant anything else.

In view of the opinion of the Fifth Circuit on the matter, the Assistant Commissioner requests that our position concerning the payment of witness fees and mileage, as set forth in 45 Comp. Gen. 654, be reconsidered.

As indicated by the Assistant Commissioner, we held in 45 Comp. Gen. 654 that—quoting the syllabus:

> Witnesses summoned pursuant to 26 U.S.C. 7602 to give testimony at proceedings to enable the Internal Revenue Service to determine the tax liability of a taxpayer may not be paid the fees and travel expenses authorized by 5 U.S.C. 95a—the Administrative Expenses Act of 1946—for witnesses subpoenaed to appear at departmental hearings, a section 7602 investigation not constituting a hearing within the meaning of 5 U.S.C. 95a, notwithstanding two district court cases to the contrary, and the section 7602 proceedings, informal and private and having no parties, but designed to obtain information to enable the Internal Revenue Service to reach conclusions concerning a taxpayer's liability that he is free to contest, not meeting the criteria of a hearing, which involves parties, tries issues of law and of fact, and takes action that may materially affect the rights of the parties, absent further judicial precedent, 5 U.S.C. 95a may not be relied upon as authority for the payment of mileage and witness fees to persons summoned for testimony pursuant to 26 U.S.C. 7602.

The United States Court of Appeals for the Fifth Circuit held in the consolidated cases cited above that persons summoned by the Internal Revenue Service pursuant to 26 U.S.C. 7602 to give testimony at proceedings authorized thereunder (to enable the Internal Revenue Service to determine the tax liability of a taxpayer) are entitled to be paid the fees and mileage provided by 5 U.S.C. 503(b), whether the witness summoned is the person liable for the tax (i.e., the taxpayer), or is a person whose presence is otherwise desired to give such testimony as may be revelant or material to the inquiry involving the taxpayer.

In view of the opinion of the Court of Appeals of the Fifth Circuit in the consolidated cases cited above, this Office will no longer object to persons (witnesses) summoned by the Internal Revenue Service to give testimony pursuant to 26 U.S.C. 7602 being paid the fees and mileage provided by 5 U.S.C. 503(b).

Accordingly, our decision of April 26, 1966, 45 Comp. Gen. 654, need no longer be followed.

[B-164431]

Pay—Retired—Disability—Retirement Pay as Member of Army of the United States—Subsequent Active Service

The termination of the "AUS status" of a member of the uniformed services who after serving as a commissioned officer in the Army of the United States from July 16, 1942, through October 4, 1946, was retired for physical disability under the act of April 3, 1939, subsequently electing to have his retired pay computed under section 402(d) of the Career Compensation Act of 1949, and serving on active duty as a Reserve officer from September 6, 1951 until appointed as a Regular officer on May 5, 1958, occurred March 31, 1953 pursuant to Public Law 86-197, and not May 5, 1958, by reason of his acceptance of an appointment in the Regular Army, where he is currently serving in the rank of lieutenant colonel under a temporary appointment pursuant to 10 U.S.C. 3442.

Pay—Retired—Re-Retirement—Recomputation of Retired Pay

An officer of the Army of the United States entitled to the disability retirement benefits of section 5, act of April 3, 1939—subsequently computed under section 402(d) of the Career Compensation Act of 1949—who entered on active duty September 6, 1951 in the Army Reserves and was appointed on May 5, 1958 to the Regular Army, where he currently is serving in the rank of lieutenant colonel under a temporary appointment pursuant to 10 U.S.C. 3442, upon retirement may be paid either the retired pay pertaining to his "new" retired status or the retired pay benefits to which entitled to by virtue of the act of April 3, 1939, as amended, whichever is greater.

Pay—Retired—Disability—Recomputation of Retired Pay

An officer of the uniformed services retired for physical disability pursuant to the act of April 3, 1939, who subsequently elected disability retirement pay computed under section 402(d) of the Career Compensation Act of 1949, and then served as an Army Reserve officer from September 6, 1951 to May 5, 1958, when he was appointed to the Regular Army, where he currently is serving in the rank of lieutenant colonel under a temporary appointment pursuant to 10 U.S.C. 3442, upon retirement would be entitled to retired pay recomputed under 10 U.S.C. 1402(d), if the conditions of clause (2) of section 1402(c) regarding additional physical disability are met; if not, the officer's retired pay status is for consideration under section 1402(a), subject to footnote 1, and to the provisions of 37 U.S.C. 205(a).

To the Secretary of the Army, August 22, 1968:

Further reference is made to letter of May 22, 1968, from the Assistant Secretary of the Army (Financial Management) requesting an advance decision (submission No. SS A-969) on certain questions involving the retired pay status of Lieutenant Colonel Robert W. Griffin (01 287 866, 080 810), United States Army.

It appears that Colonel Griffin served on active duty as an enlisted member of the Army from January 26, 1937 to July 15, 1942, inclusive. On July 16, 1942, he became a commissioned officer in the Army of the United States and he served on active duty in that capacity through October 4, 1946. He was certified as eligible, effective from October 5, 1946, for the disability retirement pay benefits authorized by section 5, act of April 3, 1939, ch. 35, 53 Stat. 557, as amended,

10 U.S.C. 456 (1946 ed.). Under authority of section 411 of the Career Compensation Act of 1949, ch. 681, 63 Stat. 823, 37 U.S.C. 281 (1952 ed.), he elected to qualify for and receive retirement pay benefits effective from October 1, 1949, computed as prescribed in section 402(d) of that act, 37 U.S.C. 272(d) (1952 ed.), based on a disability rating of 60 percent.

His appointments in the grade of second lieutenant effective July 16, 1942, and in the grade of captain effective February 17, 1945, in the Army of the United States appear to have been accomplished under authority of the Joint Resolution of September 22, 1941, ch. 414, 55 Stat. 728. The repeal of that Resolution by section 2a of the Joint Resolution of July 25, 1947, ch. 327, 61 Stat. 451, which repeal took effect on July 1, 1948, operated to terminate his status as a commissioned officer in the Army of the United States as of June 30, 1948. *LeRoy J. Abt* v. *United States*, 146 Ct. Cl. 205 (1959). However, section 2 of Public Law 86–197, August 25, 1959, 73 Stat. 426, 10 U.S.C. 3441 note, provided that all appointments made after December 6, 1941, in the Army of the United States without component under the joint resolution of September 22, 1941, that were not earlier terminated by administrative action or specific provision of law "* * * may be considered for all purposes to have continued in effect until the close of March 31, 1953." Thus, under Public Law 86–197, his status as a commissioned officer of the Army of the United States continued in force through March 31, 1953, unless such status was earlier terminated by administrative action or specific provision of law.

It is reported that Colonel Griffin was:

appointed CPT Inf USAR 1 August 1951; accepted USAR appointment 27 August 1951; entered on active duty 6 September 1951; appointed CPT Infantry, Regular Army 5 May 1958; D/R 7 January 1954 to MAJ 9 July 1961; to LTC AUS 12 April 1962.

It further appears that he has remained on active duty since September 6, 1951, and presently is serving in the rank of lieutenant colonel, a temporary appointment in the Army of the United States, as authorized in 10 U.S.C. 3442.

Although Colonel Griffin has not submitted an application for retirement you request information concerning his prospective retired pay status by reason of doubt whether:

a. The acceptance of the Regular Army appointment terminated or vacated the officer's AUS status.

b. The officer would acquire a "new" retired status, and in such a case the proper basis for the computation of the officer's "new" retired pay would be for determination solely under the applicable provisions of law which are in force and effect on the new retirement date, in the event active duty is terminated either as a result of an application for retirement or by action of an approved physical evaluation board.

c. Upon release from active duty, the officer would be reverted to his former disability retirement status with entitlement to retirement pay recomputed under authority of Title 10, U.S. Code 1402 (a) or (c).

In the first question doubt is expressed whether Colonel Griffin's acceptance on May 5, 1958, of an appointment as a commissioned officer in the Regular Army vacated his "AUS status." The "AUS status" referred to in this question appears to be his commissioned status in the Army of the United States which arose in 1942 when he was appointed a second lieutenant under authority of the joint resolution of September 22, 1941. As previously pointed out the officer's status as a commissioned officer in the Army of the United States terminated not later than March 31, 1953.

Possibly this question is directed to the matter of whether Colonel Griffin's basic entitlement to receive disability retirement pay (when not on active duty) under authority of the act of April 3, 1939, was terminated upon his acceptance on May 5, 1958, of an appointment as a commissioned officer in the Regular Army. The answer to that question is in the negative. See 23 Comp. Gen. 284, 286, and 40 Comp. Gen. 541. Question a is answered accordingly.

In the event Colonel Griffin is found to be qualified for retirement under the provisions of Title 10, U.S. Code, currently in effect, the second question raises two issues:

(1) whether, if otherwise qualified, he would be eligible to be retired pursuant to such provisions, and

(2) whether he would acquire a "new" retirement status and thereupon become entitled to receive retirement pay computed on the basis of the rates of active duty basic pay in force and effect on the date such "new" retirement status becomes effective.

The answer to both issues is in the affirmative subject, of course, to the rule that the law does not contemplate payment of two military retired pays for the same period. In other words, the officer could be paid retired pay pertaining to his "new" retired status or receive the retired pay benefits to which he is entitled by virtue of the act of April 3, 1939, whichever is greater. 36 Comp. Gen. 399, 401. Compare 9 Comp. Gen. 399, 403, and see *Robert E. Pate* v. *United States*, 78 Ct. Cl. 395 (1933). Question b is answered accordingly.

As previously stated, Colonel Griffin elected under section 411 of the Career Compensation Act of 1949 to receive disability retirement pay computed as prescribed in section 402(d) of that act. He entered an active duty status on September 6, 1951, under a new appointment in the military service and he has served on active duty since that date. Doubt is expressed in question c whether, upon his prospective release (retirement) from active duty, Colonel Griffin will revert "* * * to his former disability retirement status with entitlement to retirement

pay recomputed under authority of Title 10, U.S. Code 1402 (a) or (c)."

Colonel Griffin's disability retirement pay status under the provisions of the act of April 3, 1939, coupled with his section 411 election under the Career Compensation Act of 1949 to qualify for and receive disability retirement pay computed as prescribed in section 402(d) of the 1949 law, reasonably may be viewed as bringing him within the purview of clauses (1) and (3) in section 1402(c), Title 10, U.S. Code. However, under clause (2) eligibility to receive the benefits of section 1402(c) is contingent upon whether the member concerned:

> (2) incurs, while on active duty after retirement or after his name was placed on that list, a physical disability that is in addition to or that aggravates the physical disability for which he was retired * * *.

The information concerning Colonel Griffin set forth in the letter of May 22, 1968, does not indicate whether he meets the conditions specified in clause (2) of section 1402(c). If he should meet these conditions upon his prospective release from active duty he would be entitled to recompute his retired pay under the formula prescribed in subsection (d) as authorized in section 1402(c).

In the event that he does not meet the conditions of clause (2) of section 1402(c) then his retired pay status would appear to be for consideration under the provisions of 10 U.S.C. 1402(a), formerly section 516, Career Compensation Act of 1949, 63 Stat. 832, 833. In recomputing retired pay under section 1402(a), the specific provisions of footnote 1 apply as well as the provisions of 37 U.S.C. 205(a), which in pertinent part provide:

> Except for any period of active service described in clause (1) of this subsection and except as provided by section 1402 (b)–(d) of title 10, a period of service described in clauses (2)–(9) of this subsection that is performed while on a retired list, in a retired status, or in the Fleet Reserve or Fleet Marine Corps Reserve, may not be included to increase retired pay, retirement pay, or retainer pay. * * *

Question c is answered accordingly.

In summary, it may be stated that Colonel Griffin would be entitled to whichever one of the following three methods that results in the greater amount of retired pay:

(1) the disability retirement pay benefits authorized for him by the act of April 3, 1939, and his election under section 411 of the Career Compensation Act in the amount he was receiving on September 5, 1951, as increased by subsequent retired pay legislation, or

(2) if he acquires a new retired pay status he would be entitled to retired pay computed under the provisions of law in force and effect on the date of his release from active duty, or

(3) he may recompute his disability retirement pay under the provisions of 10 U.S.C. 1402 (a) or (c), as applicable.

[B-163828]

Bids—Multi-Year—Changed Conditions

Under a multi-year procurement for known quantities of generator sets, where the second-year increment of the solicitation was canceled as no longer being needed, an award on the basis of the low single-year alternate rather than canceling and reissuing the invitation was proper, in view of the fact fair and reasonable prices through adequate competition were obtained for the single-year alternate, and the low multi-year unit price was unavailable for award of the first-year increment. However, revision of paragraph 1-322 of the Armed Services Procurement Regulation is recommended for situations where the planned procurement for program years subsequent to the first year is canceled after bid opening but prior to award.

To the Dynamics Corporation of America, August 23, 1968:

Reference is made to your telegram of June 26, 1968, and subsequent communications, protesting the award of a single-year contract for generator sets to Onan Division of Studebaker Corporation (Onan) by the United States Army Mobility Equipment Command under Invitation for Bids No. DAAKO1-68-B-3303.

The subject invitation, a multi-year solicitation issued on February 10, 1968, was previously considered in our decision of June 18, 1968, B-163828, wherein Onan's protest was denied and award authorized to Fermont for the 2-year quantity of generator sets (12,435 5 KW 60-Hertz and 144 5 KW 400-Hertz) as had been proposed by the Department of the Army pursuant to the contracting officer's evaluation of the multi-year bids submitted under Alternate B of the invitation. Although it had been determined that Onan had submitted the low bid under Alternate A for the first-year requirements (9,129 5 KW 60-Hertz and 144 5 KW 400-Hertz) the possibility of an award for only the single-year quantity was neither an issue in Onan's protest nor considered in our decision of June 18.

The circumstances, and views of the administrative office, concerning the single-year award under Alternate A are set forth as follows in Army's report of July 12, 1968, which was made available to your counsel:

The bids as submitted were evaluated in accordance with these provisions [IFB paragraphs 29, 32, 33, and 34] and it was determined that Onan had submitted the low bid for the Alternate A, single year, at a total price of $7,761,620.62. For the single year Fermont's bid ranked number ten at a total price of $9,173,652.15. Fermont's bid on Alternate B, the multi-year, was low as compared to all other bids, including Alternate A or B. It was then contemplated that a multi-year award would be made to Fermont. However, before this action could be taken a protest was filed by Onan with your office, questioning certain evaluation criteria, and award was withheld pending a decision. While your office was considering the protest, by letter of 27 May 1968 (Incl 5), the Contracting Officer received notification that the fiscal year 1969 program requirement (which comprised the second year increment of 3,306 5KW 60 Cycle Generator Sets), was cancelled. Cancellation was necessitated when data purification prior to appointment review revealed an analytical error. Budget analysts working with preliminary data inserted substantial requirements figures in the

belief that they had been omitted from the preliminary data. In fact, the requirements were accounted for in the preliminary data and the analysts' insertion ultimately resulted in the initial statement of procurement requirements in excess of actual procurement needs. Fiscal year 1969 procurement requirements do not exist at this time. Accordingly, we were precluded from continuing with a multi-year procurement.

It is our view that, with the elimination of the 1969 fiscal year program requirements, the Contracting Officer had only two alternatives he could take—either to consider all bids as submitted for the single year Alternate A (in which case Onan was low), and to make an award on that basis, or to cancel the solicitation and readvertise. It was finally decided to make an award for the single year bids and not to resolicit. Resolicitation may or may not have resulted in lower prices. However, the number of bids received in a close competitive range for Alternate A, as shown by the abstract of bids (Incl 2) justified the conclusion that a fair and reasonable price had been obtained through adequate competition. Maintaining the integrity of the competitive bidding system was also considered. On this point, ASPR 2-404.1(a) states that "The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation."

The compelling reasons which might justify cancellation of bids after opening and disclosure of prices, are set forth in ASPR 2-404.1(b) (i) through (viii), and none of those reasons applied to the solicitation under protest. Moreover, awards on the single year basis appeared to be in line with the philosophy expressed in Comp. Gen. Decision B-155910, February 19, 1965, wherein you agreed that it was a better choice to make award on the lowest single year bid than to readvertise in a similar situation where the multi-year requirements had been cancelled prior to award.

Although you have expressed doubt as to the reliability of the basis advanced for cancellation of the second-year increment, in our view neither the arguments presented in your brief nor our review of the classified data and other pertinent material made available to this Office by the Department of the Army provide an adequate basis for rejecting the administrative position that the cancellation was occasioned by discovery of an analytical error, or for questioning the correctness of Army's revised forecast of its requirements for the sets, which no longer shows a need (with delivery during the period specified) for the increment which had been originally budgeted for the 1969 fiscal year.

Accordingly, since we could require cancellation of Onan's contract only upon a conclusion that the award was so clearly or plainly invalid that a court of competent jurisdiction would declare the contract a nullity, the basic question for resolution by this Office is whether under the provisions of the invitation and pertinent regulations the award to Onan is clearly illegal.

You contest the legality of the single-year award that was made to Onan under Alternate A on the principal bases (A) that the provisions of paragraph 1-322, Armed Services Procurement Regulation, and the terms of the invitation do not permit an award based on an evaluation of Alternate A bids alone, independently of the Alternate B bids; and (B) that award of the Alternate A quantity should have been made to Fermont at the lower unit prices set forth in its Alter-

nate B bid, which action you contend is consistent with our decision B–155910, February 19, 1965, and the provision of paragraph 10(c) of the Solicitation Instructions and Conditions (Standard Form 33A, July 1966) which provides:

* * * THE GOVERNMENT RESERVES THE RIGHT TO MAKE AN AWARD ON ANY ITEM FOR A QUANTITY LESS THAN THE QUANTITY OFFERED AT THE UNIT PRICES OFFERED UNLESS THE OFFEROR SPECIFIES OTHERWISE IN HIS OFFER.

At the outset we note that you have cited no court decision or other legal authority to support your contention that under the above provision of Standard Form 33A the Government may make an enforceable award to Fermont for the single-year quantity at its multi-year price. We consider such contention to be contrary to the most elementary principles of bidding which permit bidders to consider in their prices the quantities being procured and to restrict their prices to definite quantities. Where a bidder, as here, responds to an invitation that solicits bids on two alternate quantities by bidding a higher price on the smaller quantity and a lower price on the larger quantity, we are aware of no legal premise on which the bidder may be required to supply the smaller number at his lower price. While we have some doubt that paragraph 10(c) is entirely appropriate for inclusion in invitations requesting bids on alternate or different quantities, we believe that when a bidder states a higher price for the smaller of two quantities on which bids are requested he may be logically considered to have *specified otherwise* within the meaning of paragraph 10(c), so as to preclude any administrative attempt to secure such smaller quantity at the lower price bid on the larger quantity. In fact, by soliciting a separate bid on the smaller quantity the Government must be held to have estopped itself from attempting to hold the bidder to a different price for that quantity.

You also contend that once a multi-year procurement is initiated and bids exposed, cancellation of a subsequent program-year increment should be permitted only upon the strongest demonstration that under no circumstances will such requirements exist. We cannot accept that contention. Possible, although unlikely, situations or circumstances can always be envisioned which, if they actually occur, would increase the need for standard items such as the generator sets. However, we consider it to be a fundamental principle of good procurement practice that contracts should not be awarded for items in amounts that materially exceed an agency's needs or planned requirements as determined by the best judgment of the administrative officials concerned. We regard such principle as being applicable irrespective of whether bids have been disclosed, or whether such a contract would

contain clauses expressly providing for cancellation of portions of the items.

Multi-year procurement procedure is described in ASPR 1–322.1(a) as a method of competitive contracting for "known" requirements for military supplies, in quantities and total cost not in excess of planned requirements for 5 years, set forth in, or in support of, the Department of Defense Five Year Force Structure and Financial Program, even though the total funds ultimately to be obligated by the contract are not available to the contracting officer at the time of entering into the contract. Under this method, contract quantities are "budgeted for and financed in accordance with the program year for which each quantity is authorized." This procedure provides for solicitation of prices for supplies based either on award of the current 1-year program quantity only, or, in the alternative, on total quantities representing the first and one or more succeeding program year quantities (multi-year). Award is made on whichever of these two alternative bases reflects the lowest unit prices to the Government. If award is made on the multi-year basis, funds are obligated only for the first year's quantity, with succeeding years' contract quantities funded annually thereafter. In the event funds are not made available to support the quantities of one or more succeeding years, cancellation is effected.

ASPR 1–322.3(a) provides that evaluation of offers in a multi-year procurement involves not only the determination of the lowest overall evaluated cost to the Government for both alternatives, the multi-year procurement and the first program year procurement, but also involves comparison of the cost of buying the total requirement under a multi-year procurement with cost of buying the total requirement in successive independent procurements. Subparagraph (g) describes the method of comparing the lowest evaluated bid on the first program year alternative against the lowest evaluated bid on the multi-year alternative to determine the lowest evaluated unit price available. With certain exceptions not here concerned, paragraph 1–322.4(a) states that award shall be made on the basis of the lowest evaluated unit price determined in accordance with 1–322.3, whether that price is on a single-year basis or a multi-year basis.

It is evident that under the above provisions, which were included in the subject invitation, bids may be submitted and evaluated, and award made, on the basis of the first program year quantity, although only after a comparison of the lowest evaluated bid on the first program year alternative against the lowest evaluated bid on the multi-year alternative. Those provisions do not, however, apply to the situation where "known" multi-year requirements determined at the time the procurement was initiated ceased to exist prior to award of the

contract. Since contracts should not be awarded for quantities which materially exceed administrative needs or planned requirements, where, as here, the only "known" requirements covered by the invitation at time of award are those for the first program year the rationale for a comparison of such prices with the prices submitted for the multi-year quantity to determine which method of procurement offers the lowest evaluated unit price is no longer present. In our view award should not be made for the multi-year quantity which is no longer a part of the planned requirements for the subsequent program year, even though a bid submitted on that larger quantity may represent the lowest evaluated unit price for the item. As indicated above, we do not consider the low multi-year unit price to be available for award of the first year increment alone, and we have consistently held that award of less than all items bid upon should be based upon evaluation of only the items upon which award is to be made. See 33 Comp. Gen. 555.

Paragraph 10(a) of the Solicitation Instructions and Conditions states that the contract will be awarded to that responsible offeror whose offer conforming to the solicitation will be most advantageous to the Government, price and other factors considered. Paragraph 10(b) unqualifiedly reserves to the Government the right to reject any or all offers.

Paragraph 29 of the Additional Solicitation Instructions and Conditions provided:

29. BID EVALUATION. Bids will be evaluated on the basis of lowest over-all cost to the Government, *consistent with requirements*. When bids are submitted on an F.O.B. origin basis the most economical mode of commercial transportation consistent with military requirements and as determined by the Government, between the bidder's shipping point as set forth by the bidder herein and the designated destination as set forth in this invitation, will be considered in determining the lowest estimated cost to the Government. [Italic supplied.]

Requirements were stated under paragraph 32, as follows:

32. REQUIREMENTS

The Government has a *present* requirement for total of 12,435 each Generator Sets, 5 KW, 600 and 144 each Generator Sets, 5 KW, 400 Cycle as more fully described in the Schedule. *If* the requirement is to be fulfilled in whole for the 5 KW, 60 cycle, Generator Sets award will be made under ALTERNATE "B." *If* the first program year requirement only is fulfilled hereunder, award will be made under ALTERNATE "A." [Italic supplied.]

Paragraph 33 permitted offers to be "submitted for the total requirements of the first program year, Alternate 'A' or the total multi-year quantity, Alternate 'B,' or both."

Paragraph 34, which you stress in support of your position, implements those provisions of ASPR 1-322 providing for a comparison of the total evaluated prices of the lowest evaluated Alternate A and Alternate B offers to determine which method of procurement offers

the lowest overall cost to the Government. While that paragraph has a heading beginning with the words "EVALUATION OF OFFERS" the purpose of such paragraph is clearly shown by the further designation in the heading "(MULTI-YEAR VERSUS SINGLE YEAR ASPECT ONLY)." Provisions pertaining to the cost factors for evaluating the prices of individual bids are contained elsewhere in the invitation. Paragraph 34, rather than constituting a basic bid evaluation provision as you contend, merely states the procedure for comparing the costs of the two methods of procurement and does not even become operable unless bids on both alternates are received. The bids appear to have been evaluated in accordance with the cost factors specified in the invitation, and deletion of paragraph 34 would not change or affect the evaluated prices of the individual bids submitted under either alternate. The effect of the determination that requirements for quantities in excess of the first year Alternate A quantities no longer existed and that award would not be made therefor was, in our view, that bids on Alternate B should be rejected, and in view of the Government's expressly reserved right to reject any or all bids we see no legal basis for objection to that action.

As stated above in connection with the ASPR provisions which paragraph 34 implements, the purpose of a multi-year versus single-year comparison ceased when it was determined that there was no planned requirement for the quantity that had been budgeted for the 1969 fiscal year. Although the invitation was drafted on the premise that award would be made pursuant to a determination of which of the bids that were submitted under the competitive alternate methods of procurement afforded the lowest overall cost to the Government, and the invitation was issued on the basis of multi-year requirements that were considered "known" and were budgeted for at that time, we believe that upon rejection of the Alternate B bids the contracting officer was faced with the same situation as if no Alternate B bids had been submitted. In these circumstances, we conclude that award of Alternate A was proper under the terms of the invitation and was not contrary to any pertinent law or regulation.

Regarding your contention that an award of the Alternate A quantity to Fermont at the unit prices stated in its Alternate B bid would be consistent with our decision of February 19, 1965, B–155910, which the administrative office cited in support of its action, it appears that your contention is based on a mistaken interpretation of the facts. In that case we sanctioned Navy's award of the first program year (after the planned procurement for the subsequent program years was canceled) on the basis that it was the better choice to make award on the lowest single-year bid than to readvertise. You say that the bid ac-

cepted under Alternate A ($336.28 per unit) in that case represented the lowest unit price offered, taking into account both Alternate A and Alternate B; the fact was, however, that the lowest unit price was offered by General Electric Company, the protester, in the amount of $290 under its Alternate B bid.

In protesting the award and in its request for reconsideration of our decision thereon, General Electric's principal contention (similar to one presented by you) was that the invitation did not reserve the unrestricted right to make award on either a single-year or a multi-year basis, and the award was therefore contrary to the fundamental rule of competitive advertised bidding requiring evaluation of bids upon a common basis which is prescribed in the invitation. The invitation required bidders to submit a bid for the first program year, and provided that bidders could submit a price for the multi-year requirements. General Electric pointed out in its protest that the schedule provided underscored notice to bidders that "*THIS IS A MULTI-YEAR PROCUREMENT*" and that the criteria for evaluation of bids provided "If a multi-year price is low, award will be made on that basis; otherwise, award will be made on the basis of the first program year alternative." In our response of April 7, 1965, to General Electric's request for reconsideration of B–155910, we addressed its principal contention as follows:

> The rule that bids are to be evaluated on a common basis prescribed in the invitation is designed to insure fairness and equality to all bidders and to prevent unjust favoritism, collusion or fraud. While it would have been preferable for the Government to have expressly retained the unrestricted right to make award for the single-year requirement, since it appears unlikely that any prejudice resulted to any bidder in this case, we cannot say that this omission rendered the invitation so legally defective as to nullify the award. As indicated previously, bids were evaluated fairly and equally on a common basis with award going to the lowest one-year bidder. Under these circumstances we must again conclude that cancellation would not be in the Government's best interest.

Contrary to your position, we consider the award by Army in the present procurement to be consistent with our decision of February 19, 1965, B–155910, as well as with the views expressed in our subsequent letter to General Electric Company of April 7, 1965.

In view of the foregoing, your protest must be denied. However, we are bringing this matter to the attention of the Secretary of Defense by letter of today for further consideration of revising paragraph 1–322 of the Armed Services Procurement Regulation to cover situations where the planned procurements for program years subsequent to the first year are canceled after the opening of bids but prior to award. A similar recommendation was made by letter of February 19, 1965, to the Secretary of the Navy in connection with our decision B–155910 of that date.

[B-164455]

Witnesses—Administrative Proceedings—Fees, Mileage, Etc.

Payment of travel expenses, including lodging and subsistence, to non-Government employee witnesses who are invited rather than subpoenaed to appear at an administrative hearing in the interest of the Government is not precluded by section 10 of the Administrative Expenses Act of 1946 (5 U.S.C. 503(b)(2)), because a Federal agency authorized by law or regulation to hold hearings is not vested with the power to subpoena witnesses. Also payment of travel expenses may be made to witnesses on a commuted basis as well as on an actual expense basis, the term "persons serving without compensation" in section 5 of the act (5 U.S.C. 5703)—broad enough to include persons serving in other than an advisory capacity—constituting authority for the reimbursement of travel expenses on a commuted basis. Overrules 34 Comp. Gen. 438; B-123863, July 5, 1955.

To the Administrator, National Aeronautics and Space Administration, August 26, 1968:

Letter dated May 24, 1968, from the General Counsel of the National Aeronautics and Space Administration (NASA), requests our advice and decision on a question which has arisen within NASA affecting the expenditure of appropriated funds for the purpose of issuing invitational travel orders to "non-Government witnesses" (i.e., persons who are not Government employees) who have agreed to appear and to testify on behalf of the Government.

The question is whether or not certifying officers of NASA may approve payment of travel expenses, including a per diem allowance, on the basis of invitational travel orders issued by NASA to a "non-Government witness" who has agreed to testify as a witness for the Government in an administrative hearing under the following factual circumstances:

1. In an adverse action appeal to the United States Civil Service Commission, this agency requires the testimony and appearance of two non-Government witnesses before the Civil Service Commission Hearing Examiner to sustain the charges on which the adverse action (discharge of a Government employee) is based. The witnesses have agreed to appear on condition that they be reimbursed their travel expenses. Without the testimony of these witnesses, the Government would not be in a position to prove its charges and would be required to reinstate the employee with back pay.

2. Similarly, in a Board of Contract Appeals case, the Government requires the testimony of a former contracting officer who is no longer in the Government's employ. Without the testimony of this witness, the Government would not be in a position to defend against a contractor's substantial claim which the contractor alleges is due him as a result of changed conditions. The witness has agreed to appear on behalf of the Government if he can be compensated for his travel expenses and receive a per diem allowance. While the rules of the NASA Board of Contract Appeals provide for the taking of depositions, Government counsel believes that the witness's testimony would be more effective and persuasive if presented in person before the members of the Board rather than by deposition. In addition, the cost to the Government of sending Government counsel to take the witness's deposition and the cost of the services of a court reporter for attending and transcribing the deposition would exceed the cost of travel and per diem if the witness were to appear personally before the Board.

The General Counsel states that NASA has been unable to find any prior decisions of our Office which bear directly on these matters. He expresses the view that the general authority of NASA to carry out its personnel and procurement functions in a manner that will best protect the interest of the Government would be sufficient to authorize the payment of travel expenses, including a per diem allowance, in the situations described and refers to 42 U.S.C. 2473. He points out that the question submitted is not limited to the activities of NASA alone but could arise within any Government department or agency.

Although not so indicated in the General Counsel's letter, the doubt in the matter may arise from two of our decisions, namely, our decision of March 11, 1955, 34 Comp. Gen. 438, and our decision of July 5, 1955, B–123863. The decision of March 11, 1955, holds that the traveling expenses of witnesses (both Government witnesses and witnesses for the defendant) attending security hearings conducted in accordance with the act of August 26, 1950, 64 Stat. 476, 5 U.S.C. 22–1, would not be payable by the Government, and the decision of July 5, 1955, holds that travel and subsistence of witnesses testifying before the International Organizations Employee Loyalty Board would not be payable at Government expense.

The conclusion in each of these decisions was based largely upon the provisions of section 10 of the Administrative Expenses Act of 1946, 60 Stat. 808 (now in 5 U.S.C. 503(b)(2)), which read as follows:

> Whenever a department is authorized by law to hold hearings *and to subpena witnesses for appearance at said hearings*, witnesses summoned to and attending such hearings *shall be entitled* to the same fees and mileage, or expenses in the case of Government officers and employees, as provided by law for witnesses attending in the United States courts. [Italic supplied.]

There was a lack of statutory authority to subpoena witnesses in connection with the hearings considered in each of our decisions cited above.

Subsequent to those decisions, however, we held in 40 Comp. Gen. 226 that—quoting the syllabus:

> The payment of travel expenses of individuals who are requested by the Department of Defense to appear as witnesses to testify in personal appearance proceedings before Industrial Personnel Access Authorization Field Boards, as authorized by Executive Order No. 10865, is in the interest of the United States and section 10 of the Administrative Expenses Act of 1946, which limits payment of travel expenses of witnesses to proceedings to which they are called pursuant to a subpoena, need not be construed as precluding payment of such travel expenses, provided that the Executive order is amended to specifically authorize payment of travel expenses on an actual expense basis, limited to the maximum amount payable under the Standardized Government Travel Regulations.

In reaching the above conclusion we stated in the decision that it is clear that there is no requirement under section 10 to pay fees, mileage, or expenses in the case of a witness testifying at a proceeding held

under the authority of Executive Order No. 10865, because the witness' appearance at such proceeding would not be in response to a lawfully issued subpoena. Also, in the decision we noted that in our decision of July 5, 1955, we said that "section 10 must be considered as the only authority *under that act* [Administrative Expenses Act of 1946] for paying fees to and traveling expenses of witnesses." [Italic supplied.]

Here, as in that case, the basic question to be resolved is whether section 10 of the Administrative Expenses Act of 1946 must be construed as precluding the payment of traveling expenses of witnesses for the Government (who are not Government employees) attending hearings conducted pursuant to the Civil Service laws or attending agency proceedings conducted by contract appeals boards established by the agency head to adjudicate disputes arising under Government contracts, or whether independently of section 10, traveling expenses of witnesses for the Government may be paid when the attendance of the witness is determined necessary to protect the interests of the Government.

It is clear that section 10 of the Administrative Expenses Act of 1946, as amended, 5 U.S.C. 503(b), has the effect of "requiring" (as distinguished from "authorizing") Federal agencies which are authorized by law to hold hearing and subpoena witnesses to pay fees and mileage to the witnesses summoned to the hearing.

Also, a number of statutes that authorize Federal agencies to subpoena witnesses *require* that the witnesses be paid the same fees and mileage as provided by law for witnesses attending in the United States courts. Note for example 15 U.S.C. 49 relating to witnesses summoned to appear before the Federal Trade Commission; 19 U.S.C. 1333 relating to witnesses subpoenaed to appear before the United States Tariff Commission; 28 U.S.C. 1821 involving witnesses attending in courts of the United States or before United States Commissioners; 30 U.S.C. 475(i) relating to witnesses subpoenaed before the Federal Coal Mine Safety Board of Review; 45 U.S.C. 228j(b) relating to witnesses summoned before the Railroad Retirement Board; 18 U.S.C. 835 and 49 U.S.C. 18 relating to witnesses summoned to appear before the Interstate Commerce Commission; and 49 U.S.C. 1484(b) pertaining to witnesses summoned before the Civil Aeronautics Board.

The granting of specific statutory authority to various agencies of the Government to subpoena witnesses for attendance at agency hearings or investigations apparently resulted from congressional recognition of the fact that the various agencies of the Government have no inherent power to subpoena witnesses and that unless such power is expressly granted by the Congress to any given agency that agency

would be without authority to compel the attendance of witnesses. See decision of August 8, 1928, 8 Comp. Gen. 64. And, as indicated above, as an incident to the granting of power to subpoena to administrative agencies the Congress customarily in the same law provides for the payment of fees and mileage to witnesses who may be duly subpoenaed under such laws. In 8 Comp. Gen. 64, it was held as follows (quoting from the fourth paragraph of the syllabus) :

A subpoena or other compulsory process addressed to a civilian by a military court or board which has not express statutory authority to issue such process is void *ab initio* and civilian witnesses who appear before the board in response to such void process must be regarded as having done so voluntarily and are not entitled to witness fees, in the absence of a specific appropriation therefor.

The effect of that decision is to preclude the payment of a witness fee except where the attendance of such a witness is required by a legally issued subpoena. However, neither that decision nor the fact that the power of subpoena and incidental authority to pay fees to witnesses does not exist in Government departments and agencies except where granted by statute is necessarily controlling upon the question of the authority of an agency authorized by law or regulations to hold hearings—but not being vested with the power of subpoena—to pay travel expenses of individuals testifying at such hearings at the request of and for the Government.

It appears that the purpose of the payment provisions of section 10 and the other cited statutes was to insure that witnesses who are lawfully subpoenaed (and thus compelled to attend hearings) would receive the same witness fees and mileage payable to witnesses appearing before the United States courts. However, as indicated above, neither section 10 nor the other provisions of law necessarily need be viewed as precluding the payment of travel expenses—including costs of lodging and subsistence—necessarily incurred by an individual incident to travel performed at the request of a Government department for the purpose of attending hearings (as a witness) authorized by law or regulation to be held by a Federal agency, notwithstanding the lack of statutory authority for the subpoenaing of witnesses.

From a practicable viewpoint it cannot be disputed that the attendance of Government witnesses at agency hearings may be necessary to protect the interests of the Government. There also is recognized the difficulty of securing the attendance of Government witnesses at agency hearings unless the Government is authorized to pay the travel expenses incurred by them in being present at the place where the hearings are held. Also, if it were impossible to have essential Government witnesses travel at Government expense in order to present testimony before the hearing board, the members of the hearing

board could travel at Government expense in order to convene at a locality where witnesses could attend and be heard. However, in many instances such an approach not only would be impractical but would result in greater expense to the Government. Along that line it was held in decision of October 25, 1925, 5 Comp. Gen. 296, as follows (quoting from the syllabus):

> Witnesses not in the Government service and living outside the district of a collector of internal revenue may be engaged under contract to give testimony when their personal presence at a hearing is necessary and the cost of their hire, including reimbursement for transportation and subsistence charges, does not exceed the expense which would be necessary if the collector were to go to the district in which the witness resides to conduct the hearing by compulsory summons.

Therefore, while the law may not grant to agencies holding certain types of hearings the power of subpoena, nevertheless where the attendance of Government witnesses at such hearings is considered to be necessary to protect the interest of the Government it is our view the appropriations of the Federal agency involved reasonably may be regarded as available for the payment of expenses of travel—including expenses of lodging and subsistence—of witnesses attending such hearings.

In our decision of October 21, 1960, 40 Comp. Gen. 226, the syllabus of which is quoted above, we authorized reimbursement only upon an actual expense basis since in the absence of statutory authority reimbursement upon a commuted basis is not authorized. See 15 Comp. Gen. 206. *Cf.* the statutory provision, 5 U.S.C. 5706. Also, in unpublished decision of July 5, 1955, cited above, we concluded that non-Government employee witnesses who testified at hearings held before the International Organization Employee Loyalty Board, an organization under the Civil Service Commission, could not be paid traveling expenses, including a per diem allowance, as "persons serving without compensation" under the authority of section 5 of the Administrative Expenses Act of 1946—now 5 U.S.C. 5703—since such witnesses would not necessarily fall within the category of persons serving the Government in an advisory capacity such as experts and consultants.

Subsequent to the date of the decision, however, we have construed the language "persons serving without compensation" as including persons other than those serving the Government in a purely advisory capacity such as experts and consultants. See 37 Comp. Gen. 349. *Cf.* also 27 Comp. Gen. 183, discussing the purpose of enactment of section 5 of the Administrative Expenses Act of 1946.

Accordingly, we now are of the opinion that the better view is that the term "persons serving without compensation" is sufficiently broad

to cover all persons serving the Government without compensation despite the fact that they may be serving in other than an advisory capacity. When section 5 of the Administrative Expenses Act (now 5 U.S.C. 5703) is construed in such a manner it constitutes an express statutory authorization for reimbursement upon a commuted basis and reimbursement made upon such basis would not contravene the holding in 15 Comp. Gen. 206.

The question presented is answered accordingly.

Insofar as the conclusions reached in any of our prior decisions may be inconsistent with the views expressed above, they will no longer be followed.

[B–164707]

Officers and Employees—Transfers—Relocation Expenses—House Sale—Trailer and Lot Sale

The expenses incurred in the individual sale of an unimproved lot and of an unattached mobile home placed on the lot and used as living quarters are not reimbursable to an employee incident to an official change of duty station, section 9 of the Bureau of the Budget Circular No. A–56 and 5 U.S.C. 5724(b) contemplating reimbursement for the expenses of transporting and not the sale of a mobile dwelling, and section 4 of the Circular providing for the reimbursement of the expenses incurred in the disposition of a dwelling house affixed to land and not for the costs of selling unimproved real estate.

Officers and Employees—Transfers—Relocation Expenses—Transportation for House Hunting—Authorization

Although the Bureau of the Budget Circular No. A–56 provides for administrative discretion in authorizing reimbursement for the expenses of a house hunting trip prescribed in section 2.4 of the Circular when an employee's official duty is changed, absent evidence that a house hunting trip was authorized and performed, there is no authority to reimburse an employee for the cost of a house hunting trip and, therefore, under his travel orders he may only be allowed mileage for the one-way travel performed from the old to the new duty station.

Transportation—Household Effects—Commutation—Actual Expenses in Lieu of

An employee who incident to an official change-of-duty station is entitled to reimbursement on a commuted rate basis under 5 U.S.C. 5724(c) for the transportation of his household goods may not be paid on a mileage basis in lieu of the commuted rate basis. However, the employee having failed to obtain the actual weight of his goods at the time of transportation, to be paid at the commuted rate, he must show the space occupied by the household goods and that the goods were properly loaded by listing the items shipped and space occupied by each item. If unable to establish entitlement to a commuted payment, the employee may be reimbursed the actual expenses incurred for gas, oil, tolls, etc., to the extent the actual expenses do not exceed the amount which would have been payable to him on the basis of a reasonably approximated estimated weight at the applicable commuted rate.

To Luella S. Howard, Department of Housing and Urban Development, August 26, 1968:

We refer to your letter of June 25, 1968, forwarding for our advance decision the travel voucher of Mr. Woodrow E. Meeks, an employee of the Department of Housing and Urban Development, covering reimbursement of expenses incurred by him for mileage, the transportation of his household goods and effects, the sale of land, and the sale of his mobile home incident to the transfer of his official station from Dothan, Alabama, to Albany, Georgia.

The information of record shows that Mr. Meeks owned an unimproved lot on which was parked a trailer or mobile dwelling which he used as living quarters. The trailer and the lot were sold to the same person but in different transactions on different dates. Mr. Meeks paid a broker's commission of $150 for the sale of the lot which is said to be the minimum commission on *unimproved* property in Houston County, Alabama. Also he paid $30 to cover the cost of transferring the loan on the trailer and a recording fee, the legal title to the trailer being in the purchase financer under a conditional bill of sale. The claim for reimbursement of mileage ($57.50) consists of several trips made to transfer household effects and for a home hunting trip.

While 5 U.S.C. 5724(b) and section 9 of Bureau of the Budget Circular No. A-56, Revised October 12, 1966, contemplate reimbursement of the expenses of transporting a mobile dwelling upon transfer of an employee to a new official station neither the statute nor the regulations expressly authorize reimbursement of the expenses of the sale of a mobile dwelling incident to the transfer of station. In that regard, H. Rept. No. 1199, 89th Cong., on H.R. 10607, enacted as Public Law 89-516, in discussing the sale or purchase of a residence specifically refers to "real estate." (See pp. 6 and 13.)

If authorized by building regulations or construction codes in a given locality, our view is that a mobile dwelling or trailer might be so permanently affixed to the land by the construction of a foundation and permanent connections with utilities services as to convert a mobile dwelling into a house which could be considered as real property within the purview of 5 U.S.C. 5724a(a)(4). It could thus cease to be a "mobile" dwelling.

There is no evidence of record of such a conversion by Mr. Meeks. In fact the "transfer of equity" by Mr. Meeks of his equity in the mobile dwelling evidenced by the document of record dated October 21, 1967, establishes that he sold a mobile dwelling, the legal title to which was vested in the Capital City Mobile Homes. Further, Code of Ala., Tit. 51, section 692, includes house trailers among "Motor Vehicles"

and we must conclude, therefore, that the mobile dwelling in this case was personal property rather than real estate.

Consequently, we find no authority for reimbursement to Mr. Meeks for the expenses incurred in the sale of his mobile home.

Also, since there was no dwelling house affixed to the land of the lot sold at Dothan, Alabama, as contemplated by section 4 of Circular No. A–56, there is no authority to reimburse Mr. Meeks the costs of selling the unimproved real estate or a residence.

The Bureau of the Budget has provided for administrative discretion in authorizing reimbursement of certain expenses covered by Public Law 89–516, for example, the expenses of house hunting trips. As indicated in section 2.4 of Circular No. A–56, such discretion is to be exercised to avoid incurrence of unnecessary reimbursable expenses by transferred employees. Section 2.4 of Circular No. A–56 also provides that an appropriate official of the Department which will be responsible for payment of the travel and transportation allowances for the employee will make the decision as to whether such a trip will be authorized. There is nothing of record to show that the house hunting trip had been authorized. On the contrary, in section 6 of the travel authorization titled "Living Quarters Locating Trip," there is an X placed in the box marked "No." Therefore, there is no authority to reimburse the claimant for the cost of the house hunting trip. However, in accordance with the travel order, mileage may be allowed for one-way travel of the employee and his wife from the old to the new duty station.

5 U.S.C. 5724(c) provides, in pertinent part, as follows:

> Under such regulations as the President may prescribe, an employee who transfers between points inside the continental United States, instead of being paid for the actual expenses of transporting, packing, crating, temporarily storing, draying, and unpacking of household goods and personal effects, shall be reimbursed on a commuted basis at the rates per 100 pounds that are fixed by zones in the regulations. * * *

We have no authority to substitute payments on a mileage basis for payment on the commuted rate basis prescribed in the cited act. Therefore, the employee may not be reimbursed on a mileage basis for the transportation of his effects.

With respect to reimbursement under the commuted rate system, section 2.1g of Bureau of the Budget Circular No. A–56, applicable during the period here involved provides, in part, as follows:

> *Documentation required.* In support of claims for reimbursement under the commuted rate system employees shall submit * * * the original bills of lading or certified copies, or, if bills of lading are not available, other evidence showing point of origin, destination, and weight. If no adequate scale is available, at a point of origin, at any point en route, or at destination, a constructive weight, based on seven pounds per cubic foot of property loaded van space, may be used. * * *

Under that regulation the weight of household goods transported for the purpose of computing the commuted rate of payment allowable must be determined either by the actual scale weight of the goods or by the constructive weight of such goods determined on the basis of the space occupied when properly loaded for shipment in a van.

Since the employee failed to obtain the actual weight of his household goods at the time of transportation, he may be paid at the commuted rate only if he is able to show the amount of space occupied by his goods and that the goods were properly loaded in the space available. In establishing the amount of space which would have been occupied by his effects if properly loaded, the employee may submit a list of items transported together with the volume occupied by each based on actual measurement or a uniform table, preferably prepared by a commercial carrier.

If the employee is unable to establish his entitlement to a commuted payment by complying with the requirements listed above, he may be reimbursed the actual expenses incurred such as for gas, oil, tolls, etc., in transporting his household goods upon complying with the rule set forth in 38 Comp. Gen. 554, 555 as follows:

> When, however, as here, the evidence available affords a basis for concluding that the actual weight of the goods shipped reasonably approximates the estimated weight, the employee may be reimbursed for his actual expenses to the extent they do not exceed the amount which would have been payable for such estimated weight at the applicable commuted rates.

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

[B-164791]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Time Limitation

In computing the length of time allowed for temporary quarters at Government expense pursuant to subsections 2.5b(5) and (6) of the Bureau of the Budget Circular No. A-56, incident to an employee's permanent change of duty station, the allowable period begins to run from the first day for which claim for reimbursement is made regardless of the fact that the employee or a member of his immediate family may have occupied temporary quarters prior to the date of claim, provided the first day for which claim is made is within 30 days of the date the employee reported to duty at his new official station. Therefore, an employee who actually occupied temporary quarters from September 15, 1967, until November 11, 1967, who claims a temporary quarters allowance for 30 days commencing October 12, 1967, may be reimbursed for the period claimed.

To Nedra A. Blackwell, United States Department of the Interior, August 27, 1968:

We refer to your letter of July 5, 1968, reference 360, by which you forwarded for our advance decision the voucher for Mr. Larry M.

Macdonald covering reimbursement of expenses of subsistence while occupying temporary quarters.

The information of record shows that Mr. Macdonald transferred from Page, Arizona, to Coulee Dam, Washington, effective September 10, 1967. You say that Mr. Macdonald actually occupied temporary quarters from September 15 until November 11, 1967, at which time he and his family moved into a permanent residence. Mr. Macdonald is claiming temporary quarters allowance for the period October 12 through November 10, 1967.

Your doubt in the matter arises in view of subsections 2.5b(5) and (6) of Bureau of the Budget Circular No. A-56, Revised October 12, 1966. Those subsections state in part as follows:

(5) In computing the length of time allowed for temporary quarters at Government expense under the 30 or 60 day limitations specified herein, such time shall begin to run for the employee, spouse, and all members of the immediate family when either the employee, the spouse, or any member of the immediate family starts to occupy such quarters and the time shall run concurrently. * * *

(6) The use of temporary quarters for subsistence expense purposes under these provisions may begin as soon as the employee's transfer has been authorized and the written agreement required in subsection 1.3c has been signed. In order to be eligible for the temporary quarters allowance use of such quarters must begin not later than 30 days from the date the employee reported for duty at his new official station.

The cited regulation is not entirely clear as to whether it is intended to permit an employee to select any day within the 30-day period prescribed by subsection 2.5b(6) as the beginning date for the running of the 30 or 60-day period allowable under subsection 2.5b(5). In the circumstances the 30-day or 60-day maximum period, as applicable, shall be considered to run from the first day for which the claim for reimbursement is made regardless of the fact that the employee or a member of his immediate family may have occupied temporary quarters in connection with the transfer prior to such date, provided the first day for which a claim is made is within the 30 days of the date the employee reported for duty at his new official station.

Therefore, the voucher, which is returned herewith, may be certified for payment if otherwise correct.

[B-164940]

Officers and Employees—Transfers—Relocation Expenses—Temporary Quarters—Time Limitation

An employee who unable to locate permanent quarters incident to a change-of-duty station within the United States, occupies temporary quarters in excess of the 30 days allowable under section 2.5b(1) of the Bureau of the Budget Circular No. A-56 and incurs additional expenses for the subsequent unauthorized travel of his wife to the new station in a second privately owned automobile, may not be paid a temporary quarters and subsistence allowance for the 60-day period prescribed by section 2.5b(2) for transfers outside the United States, nor

paid more than the 8 cents per mile authorized for the travel of the employee and his wife in one automobile. Even if the additional amounts claimed were allowable, no mistake having been made in the preparation of the employee's travel orders, there would be no authority to amend the orders retroactively.

To M. J. Williams, Department of the Army, August 28, 1968:

This refers to your letter of July 26, 1968, reference NCBDC-F, requesting a decision as to the propriety for the payment of 60 days temporary subsistence and quarters allowance and of amending the travel authorization issued incident to the permanent change of station to accomplish such end. Also you request a decision concerning the propriety of and necessity for amending the employee's travel orders so as to specifically authorize reimbursement for the use of a second privately owned automobile incident to the change-of-station travel.

Travel authorization dated June 14, 1968, authorized the transfer of Mr. Warren Chowning from Fort Polk, Louisiana, to Buffalo, New York. As authorized in his orders, Mr. Chowning, unaccompanied by his wife, made a house hunting trip to Buffalo between June 16 and 23, 1968, but was unable to obtain suitable quarters. On June 26, 1968, Mr. Chowning, without dependent, transferred to Buffalo and entered into a temporary quarters and subsistence status as of 6 p.m. June 29, 1968. On July 13, 1968, Mr. Chowning entered into a contract to purchase a house but because of certain difficulties could not take possession until early September 1968.

The travel authorization contained the following notation under the heading 15. Remarks: "All other benefits as authorized in Vol #II of JTR, appendix A, Change 19 dated 12-01-66." The employee contends that under that authorization he would be entitled to 60 days temporary quarters and subsistence allowance plus reimbursement of mileage for the use of a second automobile by his wife in traveling to the new duty station incident to the transfer.

Subsections 2.5b(1) and (2) of Bureau of the Budget Circular No. A-56, Revised October 12, 1966, pertaining to subsistence expenses of the employee and his immediate family while occupying temporary quarters when an employee is transferred to a new official station, provide as follows:

(1) Subsistence expenses of the employee, for whom a permanent change of station is authorized or approved, and each member of his immediate family (defined in subsection 1.2d), for a period of not more than 30 days while necessarily occupying temporary quarters shall be allowed when the new official station is located in the 50 States, the District of Columbia, United States territories and possessions, the Commonwealth of Puerto Rico and the Canal Zone, provided a written agreement as required in subsection 1.3c is signed in connection with such transfer.

(2) Such expenses as provided in (1) above may be allowed for a period of not to exceed an additional 30 days while occupying temporary quarters when the employee is transferred either to or from Hawaii, Alaska, the territories and possessions, the Commonwealth of Puerto Rico, and the Canal Zone to the extent determined to be necessary.

Under the clear wording of the above-quoted regulations, an extension of the allowance for an additional period of up to 30 days occupancy of temporary quarters may be granted only when the old or new official station is located in Hawaii, Alaska, the territories and possessions, the Commonwealth of Puerto Rico or the Canal Zone. Since both the old and new official stations of Mr. Chowning were located within the 48 contiguous States, he could not lawfully be granted the allowance for any period in excess of 30 days.

Concerning reimbursement for the use of a second automobile, subsections 2.3 b and d provide as follows:

b. Use of no more than one privately owned automobile is authorized under this subsection as being advantageous to the Government in connection with permanent change of station travel except under the following special circumstances, when use of more than one privately owned automobile may be authorized:

(1) If there are more members of the immediate family than reasonably can be transported, together with luggage, in one vehicle,

(2) If because of age or physical condition special accommodations are necessary in transporting a member of the immediate family in one vehicle, and a second automobile is required for travel of other members of the immediate family,

(3) If an employee must report to a new official station in advance of travel by members of the immediate family who delay travel for acceptable reasons, such as completion of school term; sale of property; settlement of personal business affairs; disposal or shipment of household goods and personal effects; and temporary unavailability of adequate housing at the new official stations,

(4) If a member of immediate family performs unaccompanied travel between authorized points other than those for the employee's travel.

* * * * * * *

d. If the use of more than one privately owned automobile is not justified under the circumstances described in subsection 2.3b, only the allowances prescribed in subsection 2.3a shall be paid, as if all persons involved traveled in one automobile.

Nothing in the information transmitted here shows that the case of Mr. Chowning met any of the conditions set forth in section 2.3b, quoted above, justifying the use of a second automobile in performing the travel or that it was administratively intended that he be reimbursed mileage for such use. On the contrary, section 11 of the travel authorization provided for the use of a privately owned vehicle at the rate of 8 cents per mile. Section 2.3a(1) of Circular No. A–56 provides that when an employee and one member of his immediate family travel together on a permanent change of station the employee is entitled to reimbursement of 8 cents per mile. Moreover, subsection d of such section limits reimbursement to that which would be payable under subsection a as if the employe's wife had traveled with him in the one automobile.

In addition to the fact that the controlling regulations do not permit allowing the employee any greater amount for subsistence while occupying temporary quarters or any additional mileage reimbursement it also is well established that travel orders my not be modified retroactively so as to increase or decrease the rights which have become

fixed under the applicable statutes or regulations unless an error is apparent on the face of the order and all facts and circumstances clearly demonstrate that some provision previously determined and definitely intended has been omitted through error or inadvertence in preparing the orders. 23 Comp. Gen. 713; 24 *id.* 439. No such evidence of error is apparent.

Accordingly, there is no authority either to amend the travel authorization retroactively or to authorize payment of any part of the additional amounts claimed.

[B-164443]

Pay—Medical and Dental Officers—"Continuation Pay"—Active Duty Requirement

The entitlement to the "continuation pay" authorized by 37 U.S.C. 311 for medical and dental officers who by written agreement consent to extend their active service payment to be made in installments for each additional year of committed service, contingent upon the performance of active duty ceases upon the death, whether by misconduct or otherwise, of a medical specialist who had extended his service, and the installments of "continuation pay" due and payable to the officer had he lived may not be paid to any other person, section 311(b) permitting no exception to the requirement for the performance of active duty for entitlement to the special pay authorized for continued active service of medical specialists.

To the Secretary of Defense, August 29, 1969:

Further reference is made to letter of May 24, 1968, from the Assistant Secretary of Defense (Comptroller) requesting an advance decision concerning the propriety of making certain payments of "continuation pay" as authorized by 37 U.S.C. 311 in the circumstances set forth in Department of Defense Military Pay and Allowance Committee Action No. 415.

Section 311, Title 37, U.S. Code, as added by section 1(2)(A) of Public Law 90-207, December 16, 1967, 81 Stat. 651, provides in part as follows:

§ 311. Special pay: continuation pay for physicians and dentists who extend their service on active duty

(a) Under regulations to be prescribed by the Secretary of Defense or by the Secretary of Health, Education, and Welfare, as appropriate, an officer of the Army or Navy, in the Medical or Dental Corp, an officer of the Air Force who is designated as a medical officer or dental officer, or a medical or dental officer of the Public Health Service who -

(1) is serving on active duty in a critical specialty designated by the Secretary;

(2) has completed any other definitive active duty obligation that he has under law or regulation; and

(3) executes a written agreement to remain on active duty for at least one additional year;

may be paid not more than four months basic pay at the rate applicable to him when he executes that agreement for each additional year that he agrees to remain on active duty. Pay under this section shall be paid in equal annual or semiannual installments, as determined by the Secretary of Defense or the Sec-

retary of Health, Education, and Welfare, as appropriate, in each additional year covered by an agreement to remain on active duty. However, in meritorious cases, the pay may be paid in fewer installments if the Secretary determines it to be in the best interest of the officer.

(b) An officer who does not serve on active duty for the entire period for which he was paid under this section shall refund that percentage of the payment that the unserved part of the period is of the total period for which the payment was made.

The provisions of section 311 stem from a Department of Defense proposal and recommendation to the Congress relating to the serious problem of retaining competent medical officers in active military service. The proposal was to offer "continuation pay" to certain physicians in the uniformed services serving on active duty in critical medical categories who have no further obligation to remain on active duty.

It is apparent from the legislative history of section 311 that the reasons for authorizing "continuation pay" to certain medical specialists "to remain on active duty for at least one additional year" are not unlike the reasons which prompted the enactment of the provisions relating to variable reenlistment bonus as prescribed in section 308(g), Title 37, U.S. Code, for the purpose of inducing certain enlisted members having critical military skills to remain on active duty.

Committee Action No. 415 presents the following two questions:

1. In accordance with 37 U.S.C. 311 an eligible medical officer may be paid continuation pay in installments in each additional year covered by his agreement to remain on active duty. In the event of his decease, no misconduct involved, would all installments otherwise due and payable to him had he lived, be properly payable to any person or persons as provided under 10 U.S.C. 2771?
2. Would it make any difference if his death resulted from his own misconduct?

The discussion set forth in Committee Action No. 415 revolves entirely around subsection (b) of section 311 which provides that an officer who does not serve on active duty for the entire period for which he was paid "continuation pay" under section 311 shall refund that percentage of the payment that the unserved part of the period is of the total period for which the payment was made. It is sought, by analogy, to treat the matter of the unserved period for which "continuation pay" has accrued or been paid, in the same manner that refund of the variable reenlistment bonus prescribed in section 308(g) was treated in decision of January 4, 1966, 45 Comp. Gen. 379.

In the decision of January 4, 1966, it was held in answer to the first question therein presented:

* * * The reenlistment of a member accomplished pursuant to regulations to be prescribed as provided in subsection (g) constitutes an acceptance of the Government's offer and at that point the Government becomes obligated to pay the variable reenlistment bonus computed in accordance with the particular facts of the case. Hence, it is our view that the right to receive the variable reenlistment bonus vests in the enlisted member concerned upon completion of the reenlistment procedure. Therefore, in the case of a member who dies prior to receiving the full amount of the variable reenlistment bonus payable to him, the balance remaining unpaid would be payable (as a lump sum to be included in the settlement of the deceased member's final military pay account) in the manner prescribed in 10 U.S.C. 2771.

It is important to note that the conclusion so reached was based upon the specific language in subsection (e) of section 308, Title 37, U.S. Code, which provides as follows:

(e) Under regulations approved by the Secretary of Defense, or by the Secretary of the Treasury [Transportation] with respect to the Coast Guard, a member who voluntarily, or because of his misconduct, does not complete the term of enlistment for which a bonus was paid to him under this section shall refund that percentage of the bonus that the unexpired part of his enlistment is of the total enlistment period for which the bonus was paid.

Under subsection (e) refund is required only in a case where a member voluntarily, or because of his misconduct, does not complete the term of enlistment for which the bonus was paid. Inasmuch as subsection (e) of section 308 enumerates the specific conditions which Congress imposed as requiring refund of the unearned portion of a variable reenlistment bonus, it follows that refund of any unearned portion of such bonus is not required by the statute when a member fails for any other reason, including death, to complete the term of enlistment for which he received such bonus. Hence, in question 1, decision of January 4, 1966, death of a member did not affect the member's vested right to receive the variable reenlistment bonus. Consequently the unpaid amount thereof properly was held to be payable as a lump sum in the settlement of the deceased member's final military pay account as prescribed in 10 U.S.C. 2771.

In contrast to the provisions of section 308(e), subsection (b) of section 311 does not require a percentage refund only if the individual officer voluntarily, or because of his misconduct, does not complete the period of active service for which the payment of continuation pay was made to him. The clear and unambiguous language of section 311(b) permits no exceptions and becomes fully operative in any instance where an officer who has received continuation pay does not serve on active duty for the full period for which such continuation pay was paid, without regard to the reason or reasons why he fails or is unable to fulfill his written commitment for active duty service.

Accordingly, question 1 is answered in the negative and no reply is required to question 2.

[B-165056]

Travel Expenses—Military Personnel—Taxicabs—Between Residence and Headquarters—Unusual Circumstances

A member of the uniformed services dependent on public transportation whose performance of duty outside regular duty hours is during hours of infrequent transportation service or after dark may be reimbursed the expense of taxicab fare for travel between his permanent duty station and place of abode, even though the member is considered to be on duty at all times unless excused, in view of the fact a member experiences the same problems a civilian encounters in similar unusual travel circumstances where the travel of the civilian outside regular duty hours is considered travel on official business entitling him to reimbursement of travel costs. Therefore, the Joint Travel Regulations may

be amended to provide reimbursement to members of taxicab fares, subject to the same limitations applied to civilian employees under Bureau of the Budget regulations.

To the Secretary of the Navy, August 29, 1968:

Reference is made to letter of July 26, 1968, from the Assistant Secretary of the Navy requesting a decision whether the Joint Travel Regulations, Volume 1, may be amended to provide reimbursement for the use of a taxicab for travel between the member's permanent duty station and his place of abode under certain limited conditions. The request was assigned PDTATAC Control No. 68–31 by the Per Diem Travel and Transportation Allowance Committee.

The Assistant Secretary says that the current provisions of the Joint Travel Regulations authorizing reimbursement for use of a taxicab for travel within and adjacent to the permanent duty station of a member do not authorize reimbursement for travel between the station and place of abode other than in connection with a permanent change of station or while on temporary duty.

The Assistant Secretary says it is proposed to revise Chapter 4, Part K, of the regulations to provide that incident to the conduct of official business at a member's permanent duty station, reimbursement will be authorized or approved for the usual taxicab fare paid for travel between the member's permanent duty station and his place of abode. Such reimbursement would be limited to situations when (a) a member is officially ordered to perform duty outside of his regular duty hours, (b) the member is dependent on public transportation for such travel, and (c) the travel is during hours of infrequently scheduled public transportation or darkness.

The Assistant Secretary mentions that reimbursement as proposed above is now authorized for civilian employees, incident to the conduct of official business at an employee's designated post of duty, and expresses the view that the premise for such an allowance would be equally applicable to members of the uniformed services.

Paragraph 3.4a of Standardized Government Travel Regulations for civilian employees was amended by Bureau of the Budget Circular No. A–7 of May 31, 1968, to add the following provision:

Incident to the conduct of official business at an employee's designated post of duty, reimbursement for the usual taxicab fares paid by an employee for travel between his office and home may be authorized or approved when he is dependent on public transportation for such travel incident to officially ordered work outside his regular working hours, and his travel is during hours of infrequently scheduled public transportation or darkness.

Chapter 4, Part K, of the Joint Travel Regulations, Volume 1, authorizing reimbursement for travel within and adjacent to permanent duty stations, is based on 37 U.S.C. 408, which provides as follows:

A member of a uniformed service may be directed, by regulations of the head of the department or agency in which he is serving, to procure transportation

necessary for conducting official business of the United States within the limits of his station. Expenses so incurred by the member for train, bus, streetcar, taxicab, ferry, bridge, and similar fares and tolls, or for the use of privately owned vehicles at a fixed rate a mile, shall be defrayed by the department or agency under which he is serving, or the member is entitled to be reimbursed for the expense.

The provisions of 37 U.S.C. 408 originally were enacted as section 2(m) of the act of September 1, 1954, 68 Stat. 1129. The legislative history (page 8, S. Rept. No. 1941 on H.R. 8753, 83d Cong., 2d sess., which became the act of September 1, 1954) shows that the Senate Committee on Government Operations, referring to section 2(m), stated that it is the purpose of this subsection to allow payment to members of the uniformed services for those traveling expenses on the same basis as permitted for civilian employees. The provisions of the Standardized Government Travel Regulations quoted above are based on 5 U.S.C. 5701 to 5707.

While members of the uniformed services are regarded as on duty at all times except when excused, it is recognized that as a practical matter they normally are required to be at their posts of duty during specified hours and if permitted to live off the base, they, like civilian employees, must, in many instances, rely on public transportation to travel between their station and place of abode. Thus, if a member is officially ordered to perform duty outside his regular duty hours the problem of traveling by public transportation between his station and place of abode is no different than that encountered by the civilian employee in similar circumstances.

It long has been our view that generally travel by a member of the uniformed services in commuting between the location of his duty assignment and place of abode at his permanent station is a responsibility of the traveler. This is based on the rule that such travel is not in ordinary cases regarded as travel on official business. 42 Comp. Gen. 612; 45 *id.* 30. This likewise has been the view with respect to such travel by civilian employees of the Government. See 16 Comp. Gen. 64 and 27 Comp. Gen. 1, rendered prior to the Travel Expense Act of 1949, now codified in 5 U.S.C. 5701–5707. *Cf.* 36 Comp. Gen. 795.

The present provisions of law governing civilian and military travel, as they relate to official business travel at a permanent station, are quite similar. The regulations issued by the Director, Bureau of the Budget, on May 31, 1968, providing, within certain limitations, for reimbursement for the cost of the travel here concerned by civilian employees apparently is based on the premise that when the conduct of official business outside of regular hours results in an unusual travel situation of the type described, the travel may be considered to be travel on official business and the cost of the travel may be borne by the Government. That view of the matter does not appear to constitute an

unreasonable application of the present civilian statutory provisions and we have not objected to the regulations. In such circumstances and subject to the same limitations, we see no reason why reimbursement may not be authorized for similar travel by members of the uniformed services.

Accordingly, the Joint Travel Regulations, Volume 1, may be amended as proposed.

[B-164754]

Gratuities—Reenlistment Bonus—Extension of Enlistment—Army and Air Force Personnel

In determining entitlement to a reenlistment bonus for Army and Air Force personnel under the act of January 2, 1968, which authorizes the extension of enlistments not to exceed 4 years, not only for Navy and Marine Corps members but for the first time for Army and Air Force members who prior to the act were limited under 10 U.S.C. 3263 and 8263 to an enlistment extension "for a period of less than one year," the act does not operate to require the combination of enlistment extensions entered into before and on or after January 2, 1968, due to the fact that Army and Air Force members could not prior to January 2, 1968 qualify for the reenlistment bonus authorized by 37 U.S.C. 308 for reenlistments or voluntary extensions of enlistments for "at least 2 years."

Leaves of Absence—Military Personnel—Payments for Unused Leave on Discharge, Etc.—Enlistment Extension, Discharge, Reenlistment, Etc.

Under the act of January 2, 1968, which authorizes the extension and reextensions of a term of enlistment for not to exceed 4 years by members of all the services, and provides entitlement to the same pay and allowances as though the member had reenlisted, and considers that all extensions of an enlistment are one continuous extension, an accrued leave settlement is restricted to the first extension of an enlistment. In the absence in legislation prior to the 1968 act of any provision granting the same benefits upon the reextensions of an enlistment as is provided for an extension of an enlistment, the language of the 1968 act is construed as restricting an accrued leave settlement to the first extension of an enlistment.

To the Secretary of Defense, August 30, 1968:

Further reference is made to letter of June 28, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether the act of January 2, 1968, requires the combining of extensions of enlistments entered into after January 1, 1968, with extensions entered into prior to January 2, 1968, for the purpose of entitlement of Army and Air Force enlisted personnel to reenlistment bonus and settlement for unused accrued leave. The questions and a discussion relating to them are set forth in Department of Defense Military Pay and Allowance Committee Action No. 417.

The questions are stated in the Committee Action as follows:

1. For the purpose of determining entitlement to reenlistment bonus for Army and Air Force personnel, does 37 U.S.C. 906 operate to require the combination of extensions entered into under 10 U.S.C. 509 on or after 2 January 1968 with statutory extensions entered into before 2 January 1968?

2. Does 37 U.S.C. 906 restrict accrued leave settlement to the *first* extension of an enlistment?

Section 509 of Title 10, U.S. Code, as added by section 2(a)(1) of the act of January 2, 1968, Public Law 90-235, 81 Stat. 755, provides:

509. Voluntary extension of enlistments: periods and benefits

(a) Under such regulations as the Secretary concerned may prescribe, the term of enlistment of a member of an armed force may be extended or reextended with his written consent for any period. However, the total of all such extensions of an enlistment may not exceed four years.

(b) When a member is discharged from an enlistment that has been extended under this section, he has the same rights, privileges, and benefits that he would have if discharged at the same time from an enlistment not so extended.

Section 906 of Title 37, U.S. Code, as amended by section 2(c) of the act of January 2, 1968, 81 Stat. 757, provides as follows:

906 Extension of enlistment: effect on pay and allowances

A member of the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be, who extends his enlistment under section 509 of title 10 is entitled to the same pay and allowances as though he had reenlisted. For the purposes of determining entitlement to reenlistment bonus or to travel and transportation allowances upon discharge, all such extensions of an enlistment are considered one continuous extension.

Prior to January 2, 1968, the effective date of the above-quoted provisions of 10 U.S.C. 509, section 5539 of Title 10, U.S. Code, authorized enlisted members of the Navy and Marine Corps to extend or reextend their enlistments for less than 1 year or for a period of 1, 2, 3, or 4 full years, but the total of all such extensions of an enlistment could not exceed 4 years. Prior to August 10, 1956, only one extension of enlistment in the Navy or Marine Corps was expressly authorized by statute. A member of the Navy or Marine Corps who extended his enlistment under that section was entitled to the same pay and allowances as though he had been discharged and reenlisted.

For the purpose of determining entitlement to reenlistment bonus, all such extensions of an enlistment under 10 U.S.C. 5539 were considered one continuous extension. When a member was discharged from an enlistment that had been extended under that section, he had the same rights, privileges, and benefits that he would have had if discharged at the same time from an enlistment not so extended.

Prior to the act of January 2, 1968, the only statutory authority for extending enlistments in the Army or Air Force was that contained in 10 U.S.C. 3263 and 8263, which authorized an extension of an enlistment only for a period of less than 1 year from the date of the expiration of the existing enlistment. A member whose enlistment was so extended was entitled to the pay and allowances to which he would have been entitled if he had been discharged and reenlisted immediately after the expiration of his enlistment. Section 308 of Title 37, U.S. Code, authorizes the payment of a reenlistment bonus for an extension of an enlistment only where the member extends his enlistment "for at least two years." Consequently, prior to January 2, 1968,

members of the Army and Air Force could not qualify for the reenlistment bonus upon an extension of enlistment.

The act of August 10, 1956, effected a substantive change in the statutory law by expressly providing in 10 U.S.C. 5539 that a member of the Navy may "extend or re-extend his enlistment" and that for purposes of determining entitlement to reenlistment bonus "all such extensions of an enlistment are considered one continuous extension." In decision of April 18, 1960, 39 Comp. Gen. 711, we held that two 1-year extensions of an enlistment in the Navy constituted one reenlistment for the purposes of entitlement to reenlistment bonus. In the case of two 1-year extensions of enlistment where the first 1-year's extension had been entered into prior to August 10, 1956, we held in decision of July 18, 1960, 40 Comp. Gen. 14, that a second extension of enlistment effective after August 10, 1956, may be combined with an extension made prior to that date to aggregate an extension of 2 years so as to qualify for a reenlistment bonus under section 208 of the Career Compensation Act of 1949, now codified in 37 U.S.C. 308.

The Committee Action points out that the act of January 2, 1968, repealed the previous statutory authority for voluntary extension of enlistments and enacted uniform provisions in 10 U.S.C. 509 applicable to all the services. As indicated above, prior to that date the only statutory authority for extension of enlistments in the Army and Air Force was that contained in 10 U.S.C. 3263 and 8263, which limited such extensions to periods of less than 1 year.

Section 308 of Title 37, U.S. Code, provides that a member of the uniformed services who reenlists in a Regular component of the service concerned, or who voluntarily extends his enlistment for at least 2 years, is entitled to a reenlistment bonus computed as therein provided. Thus a member of the Army or Air Force who extended his enlistment prior to January 2, 1968, was not entitled to a reenlistment bonus under the provisions of 37 U.S.C. 308 for the reason that there was no statutory authority for extending an enlistment for 2 years. Since the act of January 2, 1968, is effective only from its date and there was no authority for payment of a reenlistment bonus to a member of the Army or Air Force who first extended his enlistment prior to that date, it appears extremely unlikely that in enacting a law which would give rise to a right to such bonus upon an extension of enlistment for 2 or more years entered into on or after January 2, 1968, the Congress intended that such extension should be combined with an earlier extension if the effect of such combination would adversely affect the right which accrued as a result of the extension for a period of 2 or more years.

Also, it would seem that a combination of an extension of more than 1 year on and after January 2, 1968, with an earlier extension

to obtain an aggregate of at least 2 years, could be accomplished only by giving retroactive effect to the act of January 2, 1968, since in combining the two the member's right to a reenlistment bonus would be determined as of a date prior to January 2, 1968.

Accordingly, the first question is answered in the negative.

Under the provisions of 37 U.S.C. 501(b) a member of the Armed Forces is entitled to a cash payment for the unused accrued leave to his credit at the time of his discharge. The act of July 12, 1955, ch. 334, 69 Stat. 299, authorized the extension of enlistments in the Army, Navy, Marine Corps, and Air Force for a period of less than 1 year from the date of expiration of the then existing term of enlistment. That act provided that upon such extension enlisted members of the Army and Air Force should be entitled to the same pay and allowances in all respects as though regularly discharged and reenlisted immediately upon expiration of their term of enlistment, similar to the provisions applicable to the Navy under 10 U.S.C. 5539, as indicated above.

In decision of September 14, 1950, 30 Comp. Gen. 103, and September 23, 1963, 43 Comp. Gen. 287, we held that enlisted members of the Navy who first voluntarily extend their enlistments at the expiration of such enlistments may be paid for unused leave to their credit as if regularly discharged and reenlisted. That result flowed from the statutory provisions cited above providing the same benefits for first extension of enlistment as were provided by law upon discharge and reenlistment. Insofar as the statutes are concerned, such rights existed with respect to members of the Army and Air Force upon extension of enlistment for a period of less than 1 year under the provisions of 10 U.S.C. 3263 and 8263. We know of no similar provision of law applicable upon a second extension of enlistment and there is nothing in the act of January 2, 1968, to suggest that the Congress intended that it should have such result.

The provisions of 37 U.S.C. 906 as added by the 1968 act provide that for certain benefits all extensions of an enlistment are considered one continuous extension. It will be noted that section 509 provides that an enlistment may be "extended or reextended," and that section 906 provides only that a member who "extends" his enlistment under section 509 is entitled to the same pay and allowances as though he had reenlisted. We think such language in the act of January 2, 1968, and the absence in prior legislation of any provision granting the same benefits upon reextensions of enlistment as were granted for an extension of enlistment warrants the conclusion that the provisions of 37 U.S.C. 906 restrict the accrued leave settlement to the first extension of an enlistment. Accordingly, the second question is answered in the affirmative.

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