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[B-165470]

Transportation—Dependents—Immediate Family—Under-Age Divorced Daughter

The 17-year-old divorced daughter of a civilian employee at an overseas duty post under a renewal contract who is unable to support herself and her infant daughter and temporarily resides with a sister in the United States may be considered a member of the employee's household for the purposes of section 1.2d of the Bureau of the Budget Circular No. A–56, even though she was not living under his roof at the time his employment contract was renewed or that he had not performed home leave travel incident to that contract. However, the grandchild is excluded from the term "immediate family" therefore limiting the employee's entitlement to payment of the one-way travel of his daughter, not to exceed the constructive payment of expenses from his United States place of residence to the overseas duty station.

To the Secretary of the Navy, January 6, 1969:

This is in reply to letter of September 23, 1968, reference SEEO/ICE, 00/sww, Ser: 766, from the Commander, Naval Electronic Systems Command, Central Atlantic Division, forwarded here by the Comptroller of the Navy, requesting our decision as to whether the 17-year-old divorced daughter of Mr. Eldred J. Daigre, an employee of your Department, and her infant daughter may be transported to the employee's overseas post at Government expense under the circumstances stated below.

On June 29, 1968, Mr. Daigre completed his 1-year contract with the Naval Communications Station, Keflavik, Iceland. On the following day he transferred to the Naval Electronic Systems Command at the same duty station pursuant to a renewal contract for 1 year. Mr. Daigre's wife and son had previously joined him and he retained his home in Keflavik. On June 7, 1968, Mr. Daigre's daughter was divorced and awarded custody of an infant daughter born April 1968. The daughter, who is to receive $20 per week for child support, is presently living with an older married sister in Idaho. However, since Mr. Daigre's daughter cannot continue to live with her sister indefinitely, she is incapable of providing the necessary support for herself and her child, and there is no one else who can provide a home and support, Mr. Daigre has proposed that she and her daughter return to live with her parents and grandparents in Iceland permanently. On July 17, 1968, Mr. Daigre requested in writing that the Government grant them entry and pay their transportation expenses.

Section 1.2d of Bureau of the Budget Circular No. A–56 (incorporated into Volume II of the Joint Travel Regulations) defines "*Immediate family*" as follows:

* * * any of the following named members of the employee's household at the time he reports for duty at his new permanent duty station or performs authorized or approved home leave or separation travel: spouse, children (including stepchildren and adopted children) unmarried and under twenty-one years of age or physically or mentally incapable of supporting themselves regardless of age, or *dependent* parents of the employee and of the employee's spouse.

For a person to be covered by this definition and consequently entitled to the transportation allowance in section 2.2 of the Circular it would be necessary for that person to be one of the named individuals and a member of the household.

Mr. Daigre's 17-year old daughter was divorced and is, therefore, unmarried and one of the individuals named in the definition. With respect to the term "household," there is no definition thereof in the Circular. It is one of uncertain meaning and people may be members of the same household even though they are not living under the same roof. However, in such a case the person who claims to be a member of a household has the burden of proof of establishing that he is a member. See *Crossfield* v. *Phoenix Insurance Company*, 187 A. 2d 20 (1962).

In the instant case the younger daughter's residence with her older sister was a temporary expedient. We assume that she and her child would have joined Mr. Daigre immediately after her divorce had he not resided overseas. In this connection the record indicates that within 3 days after Mr. Daigre was advised of the divorce on June 19, 1968, he requested his daughter to forward copies of the divorce decree and the baby's birth certificate so he might take steps to have his daughter and her baby join him. As soon as practicable after the receipt of the documents, Mr. Daigre requested their entry and payment of their transportation expenses. Under such circumstances, the daughter and her baby may be considered members of the employee's household on June 30, 1968. See B–161408, June 1, 1967.

The fact that Mr. Daigre did not perform home leave travel to which he was entitled under his renewal contract does not affect his entitlement to payment of the one-way travel expenses to the overseas station of persons who were members of his household as of the effective date of the renewal contract and who had not previously joined him overseas. See B–137605, March 17, 1961. Therefore, payment of the travel expenses of Mr. Daigre's daughter may be authorized to the extent they do not exceed the constructive payment of expenses from Mr. Daigre's United States place of residence to Iceland. However, the granddaughter may not be transported at Government expense since she is not embraced within the term "Immediate family" as defined in the Circular. See B–135091, March 4, 1958.

The papers submitted with the submission are returned herewith.

[B–165440]

Bids—Buy American Act—Evaluation—Components of Unknown Origin

Under an invitation for aluminum sulphate that contained the standard Buy American Act clause and a Buy American Certificate to the effect the end prod-

ucts offered were domestic and that components of unknown origin had been considered as mined, produced, or manufactured *outside* the United States, a bid that substituted the word "inside" for "outside," thus certifying the components of unknown origin had been considered domestic, properly was evaluated as a foreign end product and rejected because it was not the low bid. To permit the bidder to explain after bid opening the meaning of the certificate alteration would jeopardize the integrity of the competitive system, or to accept the altered certificate as a guarantee the components were produced in the United States would give the bidder the competitive advantage of supplying components of unknown origin.

To the Midland Chemical Corporation, January 8, 1969:

Further reference is made to your telegram dated October 15, 1968, and letter dated October 16, 1968, protesting the award of a contract to any other bidder under invitation for bids No. DSA–400–69–B–0698, issued by the Defense General Supply Center, Richmond, Virginia.

The invitation, for a requirements type contract, requested bids on an estimated quantity of 12,700 one hundred-pound bags of aluminum sulphate. Since the basic ingredients of aluminum sulphate are bauxite and sulphuric acid, materials which are mined, produced and manufactured both inside and outside the United States, the invitation and contract contained the standard provision entitled Buy American Certificate, which states:

> 7. Buy American certificate.
> The offeror hereby certifies that each end product, except the end products listed below, is a domestic source end product (as defined in the clause entitled "Buy American Act"); and that components of unknown origin have been considered to have been mined, produced, or manufactured outside the United States.
> Excluded End Products Country of Origin

Also, the invitation and contract included the Buy American Act clause required by Armed Services Procurement Regulation (ASPR) 6–104.5, which provides, in pertinent part, as follows:

> (a) In acquiring end products, the Buy American Act (41 U.S.C. 10a–d) provides that the Government give preference to domestic source end products. For the purpose of this clause:
> (i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;
> (ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and
> (iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred in (b)(ii) or (iii) of the clause shall be treated as components mined, produced, or manufactured in the United States.
> (b) The Contractor agrees that there will be delivered under this contract only domestic source end products * * *.

In your bid as submitted, you altered that part of the Buy American Certificate reading, "The offeror hereby certifies * * * that components of unknown origin have been considered to have been mined, produced and manufactured *outside* the United States," to "manu-

factured *inside* the United States." [Italic supplied.] The contracting officer states that the clear implication and only reasonable interpretation is that Midland is offering (1) an end product manufactured in the United States, and (2) that domestic components constitute 51 percent of the cost of all its components only if components of unknown origin are deemed domestic. Consequently, Midland could have insisted upon supplying components of unknown origin thus achieving a competitive advantage over other bidders. Therefore, Midland's bid was evaluated as one offering a foreign end product by adding 50 percent to its bid price less duty on bauxite. Midland's bid so evaluated is not low.

In your letter of protest dated October 16, 1968, you contend that the insertion of the word "inside" was not an error on your part but a restriction on your company to assure the Government that your end product would be acceptable under the "Buy American Act," 41 U.S.C. 10a–d, that to apply the 50 percent increase to your offered price is unjust and that you should be given an opportunity to verify the components which make up your end product. You also contend that if this is considered an error in your bid, an explanation or verification should be considered.

The question for determination in cases such as this is whether the acceptance of the bid as submitted will result in a contract binding on the bidder requiring performance in accordance with the terms and conditions of the contract.

In our decision, 36 Comp. Gen. 535, we considered the effect of certain typewritten provisions and printed conditions in a bid on the Government's rights upon acceptance. These provisions and conditions were similar to those incorporated in your bid. As you did in this instance, the bidder requested that such provisions and conditions be waived on the ground that his bid was intended to comply strictly with the advertised specifications. It was held that under the principles of law for application in such cases, the bidder's typewritten provisions and printed conditions would control the Government's rights in the matter and that the bid, conditioned as it was, must be rejected as not responsive to the invitation.

In the instant case, you appear to have interpreted the language of the second part of the Buy American Certificate as a guarantee or certification by you as to whether components of unknown origin would be produced inside or outside the United States. Unfortunately, this is not the meaning or purpose of that language. The first part of the certificate requires you to certify that each end product offered is of domestic origin, except those end products listed below. In the present case there is only one end product, aluminum sulphate.

The certificate refers to the definition of domestic source end product in the Buy American clause, and it is only in connection with that definition that the source of components of an end product becomes important. By definition, an end product may qualify as domestic if the cost of its domestic components exceeds 50 percent of the cost of all its components. The purpose of the second part of the certificate was to make sure that bidders, in determining whether their end product was domestic by comparing the costs of domestic and foreign components going into the end product, would include as domestic components only those they *knew* to be of domestic origin and would count as foreign components both those they *knew* to be of foreign origin and those whose origin was unknown.

By reason of the change you made in the language of the certificate, you certified only that all components you *knew* to be of foreign origin had been counted on the foreign side, and that you had included all components of unknown origin on the domestic side. If you had stated in your bid, that there were no components of unknown source, then the second part of the certificate would have been inapplicable and you would have been certifying that 50 percent or more of the components were known to be of domestic origin. However, your bid does not state whether there were or were not components of unknown origin in your end product and there obviously was no way for the contracting officer to determine this from your bid.

In other words, under the certificate you furnished you could supply an end product actually including 90 percent foreign component cost so long as you did not know the source of those components. As stated above, the purpose of the second part of the certificate was to prevent just this and to require bidders to *know* before they certify that over 50 percent of all component cost is domestic.

We have no doubt that your intentions were as you have stated them. We hope you will appreciate, however, that bids must be interpreted as submitted. To give bidders the opportunity to vary the apparent meaning of statements included in their bids by explanations or evidence submitted after bid opening would jeopardize the integrity of the competitive bid system.

Since the method of evaluation of your bid was proper under the applicable provisions of ASPR, no legal basis exists to question the administrative determination that your bid was not the lowest responsive bid.

365-520—69——2

[B-151204, B-157587]

Equipment—Automatic Data Processing Systems—What Constitutes Supplies

The exclusive authority prescribed by Public Law 89-306 to the General Services Administration to procure all general-purpose automatic data processing equipment and related supplies and equipment for use by other agencies includes the procurement of punch cards and tabulating paper, even if these items are considered the printing, binding, and blank-book work that 44 U.S.C. 111 provides "shall be done at the Government Printing Office," as the exclusive jurisdiction of GSA in the ADPE field supersedes any other authority and, therefore, the items may be added to the definition of supplies in section 101-32.402-4 of the Federal Property Management Regulations. However, to achieve economy and efficiency, the authority of GSA may be delegated if GPO can procure the items on more favorable terms.

To the Administrator, General Services Administration, January 10, 1969:

By letter of December 12, 1968, Commissioner H. A. Abersfeller requested our opinion regarding the applicability of Public Law 89-306, 79 Stat. 1127, 40 U.S.C. 759, to the procurement of automatic data processing equipment punch cards and tabulating paper.

Public Law 89-306 in adding a new section 111 to the Federal Property and Administrative Services Act of 1949, provided generally for a business-like Government-wide coordinated management effort directed toward maximizing the efficiency of Government ADPE operations. In construing the act with respect to defining the authority of the General Services Administration under its provisions, we concluded in a decision dated November 21, 1967, 47 Comp. Gen. 275, that Public Law 89-306 provides:

* * * exclusive authority to GSA to procure all general-purpose ADPE and related supplies and equipment for use by other Federal agencies.

The Commissioner points out that pursuant to this exclusive authority GSA is in the process of revising the Federal Property Management Regulations to cover the procurement of ADPE and related supplies. Section 101-32.402-4 of the proposed FPMR revision sets out the definition of "supplies" as meaning "consumable items designed specifically for use with ADPE, such as computer tape, ribbons, punch cards, and tabulating paper." Section 101-32.406, Procurement of Supplies, spells out that agencies shall acquire ADPE supplies, primarily through GSA sources and secondarily through Government Printing Office sources if the required supplies are not available through GSA.

In commenting upon the proposed FPMR revision the Public Printer has taken the position that as "printing and binding," punched cards and tabulating paper are not supplies within the meaning of our decision and are outside the scope of GSA's jurisdiction under Public

Law 89–306. The basis for the Public Printer's view lies essentially in the provision of section 111 of Title 44, United States Code, that:

> All Government printing, binding, and blank-book work * * * [with certain exceptions not pertinent here] * * * shall be done at the Government Printing Office * * *.

Assuming that punched cards and tabulating paper constitute "printing, binding, [or] blank-book work" within the meaning of the quoted statutory provision, question arises as to whether these items are within the stated jurisdiction of the Government Printing Office or within the exclusive jurisdiction of GSA with respect to procurement of ADPE and related supplies. We understand that the items in question are used virtually exclusively with ADPE. And we understand further that the GPO does not process them in any way but provides only for their procurement.

As we have construed Public Law 89–306, it provides for Government-wide coordination of ADPE operations. These operations necessarily include procurement and management not only of items of basic equipment but of related items of supply essential to the functioning of ADP installations. In this regard, we find no basis for distinguishing between punched cards or tabulating paper and, say, magnetic tape, despite the fact that the former come under a technical definition of "printing and binding" while the last item mentioned does not.

Any doubt concerning the paramount jurisdiction of GSA in terms of its exclusive authority over ADPE and the inapplicability of 44 U.S.C. 111 is dispelled by the provisions of subsection 111(e) of the Property Act as added by Public Law 89–306. Subsection 111(e), 40 U.S.C. 759(e), reads:

> The proviso following paragraph (4) in section 201(a) of this Act and the provisions of section 602(d) of this Act shall have no application in the administration of this section. No other provision of this Act or any other Act which is inconsistent with the provisions of this section shall be applicable in the administration of this section.

Section 602(d), 40 U.S.C. 474, referred to in the quoted subsection includes a number of exceptions to application of the Property Act, among them being one for the Joint Committee on Printing,-602(d)(18), 40 U.S.C. 474(18). By removing this exemption for the Joint Committee on Printing and specifically ruling out the applicability of legislation inconsistent with the new section 111 of the Property Act, subsection 111(e) clearly establishes the exclusive jurisdiction of GSA in the ADPE field as superseding any other general authority or requirement which might exist. The fact that such authority or requirement might cover items which would otherwise be classified as "printing, binding, or blank-book work" is of no consequence.

Accordingly, you are advised that punched cards and tabulating paper which are for use virtually exclusively with ADPE constitute related supplies within the meaning of our decision of November 21, 1967, and come under the exclusive jurisdiction of GSA to procure.

We would add, however, that the basic purpose of providing GSA exclusive jurisdiction in the ADPE field is, of course, to promote efficient Government ADP operations. And subsection 111(b)(2), 40 U.S.C. 759(b)(2), provides for delegations of GSA authority when such action is determined to be necessary for economy and efficiency of operations. We, therefore, would expect that if, in fact, the Government Printing Office for some reason is able to procure the items in question on more favorable terms than can GSA, that an appropriate delegation of procurement authority would issue.

A copy of this decision is being sent to the Public Printer.

[B-165575]

Bids—Evaluation—Determinable Factors Requirement

An administrative determination based on unadvertised standards that the elevating platforms offered by the low bidder were technically inadequate to serve the needs of the Government contravenes the established principles governing formal advertising that require a bid evaluation to be based on objectively determinable factors made known to bidders in advance; that do not permit the rejection of a bid for failure to specify a feature not required by the invitation; and that require the inclusion in the specifications of the requirement for the submission of technical or descriptive data if needed for evaluation purposes. Although the low bid should not have been rejected nor an award made on the basis of the nonresponsive second lowest bid, cancellation of the contract close to delivery date would serve no useful purpose; however, steps should be taken to preclude the recurrence of such a situation.

To the Postmaster General, January 10, 1969:

We refer to a letter dated November 12, 1968, from a contracting officer in the Memphis Regional Office, reporting upon the protest of Hydralifts, Inc., against the award of a contract to Southworth Machine Company under invitation for bids No. 33A-69-1, issued by the Engineering and Facilities Division of the Post Office Department, Memphis, Tennessee.

The procurement covered 22 electro-hydraulic, scissors type, elevating platforms manufactured, assembled and delivered to listed post offices in the Memphis region. The platforms were to be furnished in accordance with specification No. POD-P-255(RE), 6-15-65, amendment 1, 11-19-65, and as further amended by details listed in the invitation. Paragraph 3.1.2 of the specifications, as amended, entitled "Bid Data," provided:

Each bidder shall furnish complete descriptive literature covering the proposed equipment identifying the elevating platform by name and model number if a standard commercial unit is proposed. Lack of specific and complete informa-

tion will be sufficient cause for rejection of the bid. The following information must accompany each bid:

(a) Overall dimensions of platform—including width, length and height.

(b) Description of bridge plate—including weight and plan of attaching to platform.

(c) Platform capacity—including lift capacity, overload capacity and rollover capacity.

(d) Platform performance—including lowered height, raised height, lifting speed with full load and lowering speed unloaded.

(e) Description of power unit—including operating pressure; make, model and rating of motor; make, model and rating of pump; bore, stroke and rod size of hydraulic cylinder(s); and a hydraulic schematic of the system.

This information is required to facilitate the review of bids and to ensure the bidder understands and is able to comply with the requirements of the specification. Acceptance of the above data by the Contracting Officer shall not be construed by the bidder as waiving any of the requirements of this specification.

Bids were opened on September 9, 1968, and the abstract indicates that of the 10 bids received, Hydralifts submitted the low bid and Southworth submitted the second lowest bid.

The record contains a Statement and Certificate of Award dated October 16, 1968, which outlined the three reasons for rejection of the Hydralifts bid as nonresponsive. The contracting officer advised that company by letter dated October 21, 1968, that its bid was nonresponsive because:

(1) the one-and-a-half horsepower motor offered was considered inadequate;

(2) the schematic of the hydraulic circuit did not indicate a pressure relief valve;

(3) an overtravel device was not specified.

It is the Hydralifts' position that the Post Office Department was in error in rejecting the bid.

Paragraph 3.4.1 of the specifications, as amended, listed in the invitation, provided:

The motor shall be totally enclosed, rated for intermittent duty, and shall conform to Federal Specification CC–M–641. The motor shall be the Type II, designed for 3 phase, 60 cycle, 208–230/460 volt operation. The motor shall have overload and undervoltage protection and shall be of sufficient size to meet all performance requirements. A magnetic starter shall be furnished completely wired so that the only wiring required on installation shall be that of connecting to the power source.

Federal Specification CC–M–641, cited above, covers two types of motors, Type I, single-phase motors, and Type II, polyphase motors. Within Type II—called for in the specifications—there are three classes of motors, two of which permit horsepower ratings of ½ HP to 200 HP, the third permitting horsepower ratings of 20 to 200 HP. The invitation did not specify which horsepower rating was required, if indeed it was intended to restrict the solicitation to any particular horsepower rating.

Hydralifts offered a 207 series, 1½-HP motor, model No. MTE J207T–3154E, three-phase, 60 cycle, 208 volt supply. The contracting

officer has reported that a motor of that size is inadequate, relying upon descriptive data attached to Hydralifts' bid to support his conclusion. The descriptive data, however, did not refer to the exact motor number offered, but it did furnish general performance characteristics of other models in the 207 series. On the other hand, Hydralifts has informed us that the motor offered is made specifically for its vertical lifts and is adequate to operate the lift satisfactorily.

The contracting officer arrived at his determination that a motor larger than 1½ HP was required through analogy by comparing the J207T-3154E and the related models described in the Hydralifts literature. Hydralifts specified in its attached detailed drawing that its pump and motor would operate at 1,500 pounds per square inch (PSI) and would pump 2.25 gallons per minute (GPM). The contracting officer applied these figures to the charts and tables in the descriptive literature and concluded therefrom that a motor of about 2.1 HP would be necessary to pump 2.25 GPM at 1,500 PSI.

However, this analysis was made on the basis that the invitation required these motor characteristics. There is nothing in the invitation that requires the pump and motor to be capable of operating at 2.25 GPM or 1,500 PSI. It is reported by the procurement agency that its calculations showed that at least 2.25 GPM would be required for the pump, but such requirement was not included in the specifications. There is nothing in the record that 1,500 PSI is the minimum pressure under which the lift will operate properly.

The procurement agency concluded, in effect, that because the Hydralifts motor does not appear capable of pumping 2.25 GPM at 1,500 PSI, the motor is not "of sufficient size to meet all performance requirements." However, this assumes that for satisfactory performance it is necessary to pump the stated number of gallons per minute at the stated pressure. Therefore, the determination of the motor's inadequacy depended on a standard of evaluation not specified in the invitation or otherwise furnished to bidders.

Ordinarily we do not question a procurement agency's decision to reject an offer when it has found, as a factual matter, that the equipment offered does not meet the Government's advertised requirements. The simple reason for this policy is that we lack the technical competency to review such a determination. For this reason, we are unable to decide factually whether a 1½-HP motor is sufficient to meet the performance tests outlined in section 4 of the specifications.

However, we are of the opinion that the determination made by the procurement agency that the motor was inadequate was based on unadvertised standards and therefore was in contravention of the established principles governing formal advertising. See 44 Comp.

Gen. 392, 393, where a pertinent quotation from 36 Comp. Gen. 380, 385, held:

> 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.

It is a *non sequitur* to say that because a bidder's product apparently cannot do what he says it can do, the product therefore cannot do what the Government wants it to do, when there is no showing of a reasonable relationship between what the bidder has represented and what the procurement agency desires.

The second basis upon which the Hydralifts bid was determined to be nonresponsive was the failure to show on the hydraulic schematic drawing the pressure relief valve. The relevant portion of the specifications is as follows:

> 3.4.4 *Pressure-relief valve*—A pressure relief valve shall be provided to allow the hydraulic fluid to bypass the power units and be returned to the reservoir when the unit is overloaded. The relief pressure shall be as low as is practicable commensurate with requirements and not higher than 120 percent of the rated load in order to avoid damage to the motor and hydraulic system.

It is quite apparent from paragraph 3.1.2 that there is no specific requirement that the hydraulic schematic drawing show in detail each and every component. However, the Hydralifts drawing of the pump-and-motor combination, on which the hydraulic schematic also appears, clearly shows that a pressure relief valve is offered as part of the power system.

The foregoing is another illustration of a factual dispute with which we do not normally interfere. However, the disqualification of Hydralifts for failure to show the pressure relief valve on the hydraulic schematic represented again an evaluation not contemplated or provided for in the invitation. Furthermore, we do not perceive, nor are we informed, of any particular advantage which would accrue to the Government if Hydralifts had shown the pressure relief valve on its hydraulic schematic. Rather, it is quite evident that the pressure relief valve was an integral part of the pump-and-motor unit offered by Hydralifts. Under these circumstances, rejection for failure to show the pressure relief valve was unwarranted. 44 Comp. Gen. 392, 393, *supra.*

The third reason why the Hydralifts bid was rejected was failure to specify an overtravel device. It is further reported that Hydralifts intended to use a hydraulic pressure relief valve as an overtravel device and that this was unacceptable as not in accord with good engineering practice. The report also states that overtravel protection was intended to be obtained by electrical limit switches.

It is Hydralifts' position that the invitation did not require an overtravel device to be specified in the bid; that the bid data requirements of paragraph 3.1.2 did not require bidders to submit any information concerning overtravel devices, and that its product does in fact include an overtravel device. Hydralifts further claims that the statement that electrical limit switches were intended for overtravel protection is in conflict with paragraph 3.4.1 of the specifications.

We are not capable of considering the acceptability from an engineering standpoint of pressure relief valves functioning as overtravel devices. However, it does not appear to us that any overtravel device as such was required under the terms of the specifications. The only provision relative to overtravel in the invitation was that contained in paragraph 3.2.3 of the specifications. That provision read: "The platform shall be capable of meeting the sway, leveling, and overtravel tests outlined in Section 4." However, the relevant provision in section 4 of the specifications was deleted from the invitation. It is also to be noted that bid data provisions of paragraph 3.1.2 do not require the furnishing of any data on overtravel protection while they do require information on lift capacity, overload capacity, rollover capacity, and other aspects of platform performance. In short, there were no overtravel tests to be met nor was any information required as to overtravel protective measures. A bid may not be rejected for failure to specify some feature not required by the invitation. See B-161111, May 26, 1967. In that case we said, *inter alia:*

> * * * If technical or descriptive data was required for bid evaluation purposes, such requirement should have been included in the advertised specifications. See FPR 1-2.202-5(d); 38 Comp. Gen. 59, 64.

We therefore hold that the low bid of Hydralifts should not have been rejected for the reasons stated in the November 12 report.

In addition to the foregoing, we note that Southworth included as part of its bid a priced quotation form upon which it listed some of the salient features of its lift. At the bottom of this form appears the following language:

> All negotiations, agreements, and contracts are made contingent upon strikes, fires, accidents, transportation delays, government regulations and requirements beyond our control. We reserve the right to correct errors in quotations or any other pertinent matter. The prices stated herein are based upon seller's cost under existing laws. If such costs are increased by any Federal or State legislation, the amount of such increased costs shall be added to the prices stated.

It is well-established that "bids so qualified as to render indefinite the contract price to be paid are for rejection for uncertainty." 19 Comp. Gen. 614, 615 (1939). See, also, Federal Procurement Regulations, sec. 1-2.404-2(b)(1). The bid under such circumstances contravenes the requirement that firm bids be submitted. See B-164651, November 29, 1968. Therefore, Southworth's bid was clearly nonresponsive since it did not conform to the invitation for bids as required by 41 U.S.C. 253(b). Hence, the contract was improperly awarded to that company.

The delivery of the entire quantity of lifts was specified by Southworth as 75 days after date of award and the Certificate of Award was dated October 16, 1968. It is therefore apparent that cancellation of the contract at this date would not serve any useful purpose insofar as the rights of Hydralifts are concerned. However, we strongly recommend that the circumstances of this irregular award be reviewed so as to preclude a recurrence thereof.

The documents enclosed with the report are returned as requested.

[B-165740]

Officers and Employees—Transfers—Relocation Expenses—Lease Termination

An employee who in connection with the transfer of his official duty station terminates the lease on his apartment at the old duty station at the expiration of his lease and is required to pay for painting, cleaning, repair of blinds and stock transfer is not entitled to reimbursement for these expenses, 5 U.S.C. 5724a only authorizing reimbursement of those expenses that result from the termination of an unexpired lease and not the expenses chargeable at the expiration of a lease.

Officers and Employees—Transfers—Relocation Expenses—Attorney Fees

An employee who incident to the transfer of his official duty station purchases a residence at his new duty station and is reimbursed the attorney fees he paid for the preparation of notes and trusts, settlement fee, title examination, and preparation of an application for title insurance—services authorized by section 4.2c of the Bureau of the Budget Circular No. A-56—may not also be reimbursed the fees paid to a second attorney to prepare the contract and other instruments involved in the purchase, checking and examining various documents, and the travel expenses incurred by that attorney to be present at settlement, as the fee paid for legal representation and advice in connection with a purchase or sale of a residence is not reimbursable under section 4, Circular No. A-56.

To Luella S. Howard, Department of Housing and Urban Development, January 13, 1969:

We refer to your letter of December 2, 1968, by which you request our advance decision whether you may properly certify for payment two reclaim travel vouchers of Mr. Roy A. Cuneo to reimburse him the cleaning fee he paid in connection with moving out of his apartment in New York, New York, and the attorney fee he paid in connection with

the purchase of a residence in Reston, Virginia, incident to his transfer from New York to Washington, D.C., as an employee of the Department of Housing and Urban Development.

In connection with the termination of the lease of his apartment in New York, Mr. Cuneo was required to pay $237.40 for painting, cleaning, repair of blinds and stock transfer, plus additional charges for which reimbursement was not claimed. The charges for painting, repair of blinds, and transfer of stock were reimbursed to Mr. Cuneo but reimbursement of the cleaning charge of $40 was disallowed. The terms of the lease, a copy of which is attached to the voucher, do not make the payment of any of the charges mentioned contingent upon the lessee's termination of his lease prior to the date on which it expired. The lease provides that the lessee shall be liable for such charges even if the lease is terminated on the date it expires. Further, the lease provides that the lessee is liable for losses incurred by the lessor as a result of an early termination. There is no indication in the file that Mr. Cuneo was required to pay any amount as a result of the termination of this lease before it expired. Since 5 U.S.C. 5724a authorizes reimbursement of expenses resulting from the termination of an unexpired lease but not expenses chargeable at the expiration of a lease, Mr. Cuneo is not entitled to reimbursement of the $40 claimed for cleaning his New York apartment, and the $197.43 paid him for expenses incident to vacating that apartment should be recovered.

In connection with his purchase of a residence in the vicinity of his new official station, Mr. Cuneo paid and was reimbursed the charges of a firm of attorneys in Fairfax, Virginia, for preparation of notes and trusts, attorney's settlement fee, title examination and preparation of an application for title insurance. In addition to those legal fees, Mr. Cuneo paid a New York attorney $504 for various services in connection with the purchase transaction. Reimbursement of that fee was disallowed and is the subject of one of the reclaim vouchers presented.

The New York attorney advised Mr. Cuneo that his fee included charges for preparation of the contract and other instruments involved in the purchase, checking and examining various documents, and travel to the Washington area to be present at settlement. It appears that for the purpose of consummating the purchase the documentation prepared by the attorneys in Fairfax would have been sufficient and that the additional services rendered by the New York attorney were obtained by Mr. Cuneo as a matter of prudence. Legal services for which reimbursement is authorized are the types of services enumerated in section 4.2c of Bureau of the Budget Circular No. A–56 which are essential to the sale or purchase transaction. An attorney fee paid by

an employee for legal representation and advice in connection with the sale or purchase of a residence is not reimbursable under section 4, Circular No. A–56. See B–161891, August 21, 1967.

For the reasons stated the vouchers with attachments which are returned herewith may not properly be certified for payment.

[B–165013]

Bids—Two-step Procurement—Discontinued and Contract Negotiated—Propriety

The lowest bid submitted under the second-step of a two-step advertised procurement for an automatic hydraulic radio reporting system to aid in flood prediction exceeding allotted funds and no additional funds being obtainable, rejection of all bids by the contracting officer who had been delegated the 10 U.S.C. 2305(c) authority to cancel an invitation when in the public interest was proper, and the issuance of a 5-year lease purchase agreement under existing negotiated open end lease contracts was justified on the basis of compliance with the criteria prescribed in paragraph 1–317 of the Armed Services Procurement Regulation and price and technical considerations. Although the 5-year lease period violated sections 3732 and 3679, Revised Statutes, because available funds would not cover the total rental obligation, this basis of award having been assumed not to be legally objectionable, the contract term may be completed.

Bids—Preparation—Costs—Recovery

The claim of a low bidder for bid preparation expenses, as well as anticipatory profits, because all bids under a two-step advertised procurement had been rejected and a lease-purchase agreement negotiated for a desired automatic hydraulic radio reporting system may not be allowed as to the preparation costs absent proof that the procuring agency fraudulently induced bids with the deliberate intention before the bids were invited or received to disregard all bids except the one from the company to whom it was intended to award the contract, whether it was the lowest responsible bid or not, but even where preparation expenses are allowed, anticipatory profits are not recoverable by an unsuccessful bidder.

To Wismer and Becker Contracting Engineers, January 16, 1969:

Reference is made to your telegram of August 8, 1968, and subsequent correspondence in which you protested against the issuance of a purchase order for an automatic hydrologic radio reporting system to Motorola Communications and Electronics, Inc., Fairlawn, New Jersey, under negotiated Air Force lease-maintenance contract No. 34–601–23068. You maintain that this requirement should have been awarded to you under solicitation No. DACW33–68–B–0021 which was issued on July 21, 1967, by the Corps of Engineers, Department of the Army, as a two-step formally advertised procurement.

Under Step One of the above solicitation technical proposals were requested for an automatic hydrologic radio reporting system which was needed to obtain meteorological and hydrological data from remote reporting stations in New England to aid in flood prediction. Four technically acceptable proposals were received under Step One, including your proposal and Motorola's. The companies offering tech-

nically acceptable proposals submitted the following Step Two bids on February 13, 1968:

	Total (Items 1-6.1)	Spare Parts (Item 7) (Option of the Government)
Wismer & Becker	$586,707.00	$25,416.00
Motorola Communications & Electronics, Inc.	740,008.00	100.00
GCA Corporation	1,447,446.82	56,419.00

Since the lowest bid submitted exceeded the amount of funds allotted for the procurement by over $130,000, and no additional funds could be obtained, the Department rejected all bids. Because installation of the system prior to the 1969 flood season was considered urgent, the Department determined it would be in the Government's interest to obtain the system on a rental basis with purchase and recapture provisions. The rationale for making this determination and utilizing the Air Force contract, cited above, to consummate the lease was reported to our Office by the Department as follows:

3. Use of Existing Air Force Lease Contract

a. Installation of a hydrologic network prior to the 1969 flood season was still considered of utmost importance. Plans to obtain the system by formal advertising had been frustrated first by the delay caused by the freeze on all expenditures and then by the receipt of bids greatly in excess of available funds.

b. Other possible means of obtaining the needed system were explored and it became evident that a lease agreement with recapture provisions and option to purchase would present several advantages to the Government. A lease agreement, although more costly overall, would permit the Government to obtain and operate the system by the established target date, and thereby to improve flood protective efforts in the river basins of New England during the next and ensuing years. Available funds would cover the installation costs and rental for several years. Funds for subsequent yearly rental costs could be anticipated from later year appropriations. Further, a lease agreement would permit the Government protection against obsolescence of equipment and provide proper maintenance of complicated technical equipment; past experience by this office in the maintenance of electronic equipment emphasized the essentiality of proper skill and updated "know-how."

c. Formal advertising for rental of the system could not be accomplished in time to meet the established target date. Neither could a complete lease agreement be prepared and negotiated within the time remaining before the 1969 flood season. Sole source negotiation of a new contract with Wismer and Becker was not considered justified, and in any event there were serious doubts that this firm was prepared and equipped to furnish the system on a rental basis by the target date. This firm would have had to procure most of the equipment and materials, and replacement parts would be difficult to obtain.

d. This office was aware of the existence of already negotiated open-end lease contracts between certain manufacturers and the Government, through the Department of the Air Force, whereby the contractor furnishes rental and maintenance of commercial, nontactical two-way communications systems. Such contracts have been entered into with Motorola, RCA, and G.E. These contracts have been used extensively by the Air Force and by other Divisions of the

Corps of Engineers. Perusal of these contracts disclosed a ready tool and method through which the urgently needed hydrologic network could be obtained by the established target date.

e. Of the existing lease contracts with the Air Force, that with Motorola more nearly met the requirements of this office in that it included telemetering systems, whereas the others did not. Wismer and Becker, which firm submitted the low bid under the formal advertising procedure, was advised that we now felt compelled to enter into a lease agreement under one of the open-end lease contracts in order to have the system installed before the 1969 flood season. This firm then requested that it be permitted to join with RCA to submit a proposal under the RCA open-end lease contract. Such a proposal was entertained but for reasons discussed elsewhere the Motorola proposal was accepted as the lowest price and in the interests of the Government, all factors considered. Accordingly, on 29 May 1968 two delivery orders were placed against the Air Force lease contract with Motorola, as follows:

(1) D.O. No. DACW33-68-F-0338 covering design, installation and direct purchases in the amount of $161,073.75.

(2) D.O. No. DACW33-68-F-0339 providing for a monthly rental of $12,139.43 for a period of 60 months

Delivery of both orders will be made on or before 31 March 1969, thereby providing readiness for the 1969 flood season.

f. If no equipment is previously recaptured, the total cost in five years will be $895,899.75. (The monthly rental has been increased in a small amount by a modification to the rental delivery order.) As compared to the $586,707.00 price bid by Wismer and Becker, this is admittedly higher. However, the Wismer and Becker bid included maintenance for only one year. In addition, there was the obsolescence factor to consider. After completion and acceptance of the Wismer and Becker system, the Government would have been required to purchase and install any additional equipment deemed necessary as well as to enter into separate maintenance contracts. The following is a breakdown of the total cost under the Motorola lease agreement if purchased in five years:

First Cost (Direct purchase items, installation and system design)	$161,073.75
Agreed value (of rented system exclusive of First Cost defined above)	473,532.00
5 yr. Maintenance	115,260.00
Carrying Charge	146,034.00
Total	$895,899.75

You have raised several objections to this award which are summarized as follows: (1) award should have been made to your company as it submitted the lowest, responsive bid under the canceled invitation; (2) the decision to lease the requirement under the Air Force contract rather than purchase the system was improper; and (3) the Corps of Engineers advised you that no funds were available to obtain the requirement even on a lease-purchase basis. Additionally, you have requested our Office to authorize payment of expenses incurred in the preparation of your bid and the profit your company would have earned had you performed the contract, in the event we deny your protest.

Under the authority of 10 U.S.C. 2305(c), all bids may be rejected if the head of the agency determines that rejection is in the public interest, and under 10 U.S.C. 2311 the authority to make such a determination may be delegated to any other officer or official of that agency. Pursuant to the foregoing, the provisions of Armed Services Procurement Regulation (ASPR) 2-404.1(b)(viii) have delegated to

the contracting officer the authority to cancel an invitation where such action is determined to be in the best interest of the Government. In the instant case it would appear not only that the interest of the Government required cancellation of the subject IFB, but also that the contracting officer would have exceeded his authority if he had accepted your bid, since insufficient funds were available to purchase the system on the basis of your bid price. B-158991, July 12, 1966. It should be pointed out, moreover, that the courts have held that a request for bids by the Government does not import any obligation to accept any of the offers received, including the lowest responsive bid. *O'Brien* v. *Carney*, 6 F. Supp. 761. Under these circumstances we cannot consider the decision to cancel the subject IFB as improper.

Concerning the Department's subsequent decision to lease rather than purchase the system, we note that you also requested and were permitted to submit a lease purchase proposal for the system under a similar lease-maintenance contract which the Air Force had negotiated with the Radio Coporation of America, and made no complaint or charge of impropriety with respect to that method of procedure until an award was made to Motorola. Delay in submitting a protest under these circumstances raises doubt as to whether you considered you had a valid basis for protesting.

Be that as it may, ASPR 1-317 provides that this determination is to be made on a case-by-case basis, including consideration of the following criteria:

(i) the Government requirement is of short duration, and purchase would be costlier than rental (generally, long-term rentals should be avoided in the absence of compelling circumstances);
(ii) the probability that the equipment will become obsolete and that replacement within a short period will be necessary;
(iii) the equipment is special or technical, and the lessor will provide the equipment, as well as maintenance and repair services, at a lower cost than would otherwise be available to the Government.

Even though the rental period involved here constitutes a long term rental and has to be justified by a showing of compelling circumstances, the Department advised us in its report, quoted in part above, that it considered the installation of the system prior to the spring of 1969 to be of critical importance to the effectuation of flood-loss savings expected to accrue from the system's operation. The Department determined that only a lease arrangement would permit installation by the target date with the amount of funds then available. It has also stressed the need for owner-maintenance of the sophisticated electronic equipment involved in this system which is cited in ASPR 1-317(c), and protection against obsolescence of equipment stipulated in ASPR 1-317(b).

We cannot consider the Department's decision to rent rather than purchase the system as unjustified by the reasons set forth above. However, with regard to the 5-year period of the lease we are today advising the Secretary of the Army that we consider the agreement to be in violation of sections 3732 and 3679, Revised Statutes (41 U.S.C. 11; 31 *id.* 665(a)), since it does not appear that sufficient funds were available at the time the contract was consummated to cover the total rental obligation of the lease. Since award on this basis was made under the impression that it was not legally objectionable our Office will interpose no objection to completion of the contract term. 42 Comp. Gen. 81.

Concerning whether the award to Motorola will be more costly than an award to RCA on a comparable basis, the Department has furnished us with a cost comparison of the proposals received from the Motorola Corporation and RCA for the required system as follows:

	Motorola	RCA
First Cost	$161,074.00	$128,275.00*
Agreed Value	473,532.00	502,788.00*
5 Year Maintenance	115,260.00	168,000.00*
Carrying Charge	146,034.00	154,212.00 (recapture charge included)
60 Month Rental Cost (accumulated total)	895,900.00	953,275.00

*Price adjustment made to enable evaluation on technically equal basis.

Additional factors considered by the Department in evaluating the proposals are listed as follows:

As previously indicated, review of the existing lease agreements with the Air Force disclosed that the Motorola agreement met the needs of this office better than those of RCA or G.E. in that it included telemetering systems, whereas the others did not. However, Wismer and Becker was permitted to join with RCA in offering a proposal under the RCA lease agreement. Analysis of this proposal and that made by the Motorola firm resulted in the determination that the Motorola proposal was more advantageous to the Government. Extensive negotiations would be required with RCA to price the telemetering systems whereas such negotiation had already been accomplished by the Air Force under the Motorola open-end contract. The maintenance cost over the five-year period was the major item of high cost in the RCA proposal, probably due to the fact that RCA does not have as many distributing and repair agencies in the New England area as Motorola, thereby incurring more travel time and expense. RCA would also have to hire, train and sustain new people since it has performed no similar logic design and assembly before. Nor would it perform the logic work under the open-end lease contract if given the award. This work would be sublet to others. Motorola already has the local service organization that would be required to maintain the system for the five-year term of the contract. Other factors which influenced the decision to obtain the Motorola system are as follows:

a. Motorola demonstrated more experience in telemetry systems than Wismer & Becker and RCA, having completed several systems. It installed the Hydromet

system for the Water Resources Board in California about two years ago and is presently extending same to include several more remote stations. It also fabricated and installed a Hydromet system for the Corps of Engineers and the Weather Bureau in Fairbanks, Alaska. This system was completed in April 1968. It also has a contract for a system to be installed in Arizona for the Corps of Engineers. Our system would be a first for RCA, although Wismer & Becker have completed some smaller systems on their own.

b. Motorola will manufacture and assemble all components and be responsible for the entire system. The radio equipment for the remote station is a modified rigidized industrial type. The sets have been modified to provide low standby battery drain and constant level output required for telemetry. The logic equipment, comprising primarily integrated circuits, is a thoroughly developed product of Motorola which has been environmentally tested in the laboratory and in actual field installations. The integrated circuits produced by Motorola are manufactured under rigid military standards. While RCA has agreed to be responsible for their proposed system, there would in fact have been several individual responsibilities: RCA would manufacture the RF equipment; Moore Association would manufacture the logic equipment; Wismer and Becker would assemble the system. Coordination for the divided responsibilities would have been accomplished by RCA, but assurance of satisfactory results would have been diluted.

c. The Motorola proposal was much more complete and detailed and provided a far better basis for analysis.

d. Service and maintenance will be more rapid and more skilled with the Motorola organization, since it is a parent company operating and trained and, as previously indicated, it has many distributing and repair agencies in the New England area. RCA service is provided by a separate organization that would have to be trained by both RCA (manufacturing) and Wismer and Becker.

e. Parts and components will always be available from Motorola because of the continuing and diversified requirements being met under the Air Force contract, whereas RCA and Wismer and Becker would have difficulties in furnishing replacement parts due to the fact that the Corps of Engineers system would be a one-time contract for that combine.

Considering the price and technical considerations, related above, we cannot consider the selection of Motorola's proposal as lacking substantial justification.

Concerning your allegation that you were advised by representatives of the Corps of Engineers that no funds were available to construct this project even on a lease-purchase basis, the contracting officer has advised us that neither he nor members of his staff ever furnished such advice. In disputes of this nature, it is the long-established rule of our Office to accept the facts as established by the administrative records, unless there is sufficient clear and convincing evidence to refute the presumption of such records. 37 Comp. Gen. 568. We do not find such evidence in the present record.

You have also requested that we authorize the Corps of Engineers to reimburse your company for the expenses incurred in preparing your bid and the profit it would have earned, if it had secured the contract, apparently on the theory set forth by the Court of Claims in *Heyer Products Company* v. *United States*, 135 Ct. Cl. 63, 140 F. Supp. 409. In that case the court held that a company might recover the costs it expended in preparing its bid if it could show that the procuring agency fraudulently induced bids, with the deliberate intention, before the bids were invited or later received, to disregard them all except the one from

the company to whom it was intended to award the contract, whether it was the lowest responsible bidder or not. The Court expressly rejected the claim that an unsuccessful bidder could also recover its anticipated profits, even if such proof was adduced. Based on the present record we cannot find that you have sustained the burden of proof set forth by the court for the recovery of your bid preparation expenses.

For the reasons set forth above your protest must be denied.

[A-80185]

Social Security—Public Assistance—Federal Participation—Retroactive Payments by States, Etc.

The fact that a State or local welfare agency in the administration of the public assistance programs in which the Government participates under the authority of several titles of the Social Security Act, determines the eligibility of an applicant for assistance and certifies subsistence payments subsequent to the month of application for assistance, and the first assistance payment made to an eligible applicant includes the period beginning with the date of application does not preclude Federal financial participation for the period prior to the month in which the first payment was made to an eligible individual, entitlement upon certification of eligibility to public assistance beginning with the date of application and not when the responsible administrative agency makes its determination. 16 Comp. Gen. 314, modified.

To the Secretary of Health, Education, and Welfare, January 17, 1969:

In your letter of December 24, 1968, you outline a proposal, under State public assistance programs—Titles I, IV (part A), X, XIV, and XVI of the Social Security Act—for authorizing Federal financial participation in subsistence payments made to eligible individuals for periods beginning with the date of their applications. Basically, you propose that where an individual or family applies for financial assistance, and is eligible, and the State or local welfare agency makes its determination of eligibility and certifies the case for payment in a subsequent month but makes payment for the period beginning with the date of application, Federal matching would be available with respect to such payments.

In our decision of September 26, 1936, published at 16 Comp. Gen. 314, we considered the question of Federal participation in State payments of old age assistance where because of administrative necessities payments made in one month might have related to eligibility for another month. After reviewing the pertinent statutory language we concluded that it was appropriate to apply the statutory formula limitations and to calculate Federal participation on the basis of the months *for* which State payments were made as distinguished from the months *in* which such payments were made.

In stating this conclusion, however, we added the proviso:

> * * * that in no case shall payments by the State for any period prior to the month in which the first payment was made by the State to the individual be considered. 16 Comp. Gen. 314 316.

Because your proposal to provide Federal participation in State subsistence payments to individuals from date of their applications would obviously contravene the prohibition in the quoted proviso where the first payment is more than a month later than an application, you request that we concur in your view that whatever may have been the reason for adding the proviso in 1936 it is no longer appropriate to current circumstances.

You state that the 1936 decision was issued against a background of the beginning of the public assistance programs under the original Social Security Act of 1935 when States were in the process of developing the necessary administrative machinery and there were extended delays in some instances in acting on applications; that we then were being asked, in effect, whether Federal sharing would be available where a State proposed to make payments to its entire caseload for a back period of several months before the program was effectively operational; and that in context, the decision of September 26, 1936, applied to a much different situation than exists today.

In support of the proposition that the prohibition in question should be removed you present essentially four arguments:

1. The pertinent sections of the Social Security Act—3(a), 403(a), 1003(a), 1403(a), and 1603(a) (42 U.S.C. 303(a), 603(a), 1203(a), 1353(a), 1383(a))—provide for Federal payments to each State for each quarter on the basis of *expenditures during* such quarter, not counting so much of any expenditure *with respect to* any month as exceeds stated dollar ceilings multiplied by the number of recipients of aid *for* such month. Thus, under the statute, Federal sharing is available if payments are made *for* an earlier month.

2. Contrary to the situation which existed in 1936 when many State programs were in the process of initial development with large backlogs of applications, there now exist long established State programs under which individual applications are handled within a short time limit, as they come in. In line with the Social Security Amendments of 1950 which added a requirement in the several public assistance titles that State plans must provide that assistance shall be furnished with reasonable promptness to all eligible individuals, the Handbook of Public Assistance Administration IV–2200(b)(3), currently specifies that:

> Prompt action will be taken on each application, within reasonable State-established time standards (which, effective July 1, 1968, will not exceed 30 days in AFDC, OAA, and AB, and as to aged and blind in AABD, and 60 days in APTD and as to disabled in AABD).

See section 2(a)(8) of the Social Security Act, as amended, 42 U.S.C. 302(a)(8), and parallel provisions in other titles.

In this connection you assert that the existing rule operates to discourage States from meeting an applicant's need as of the time of his application, since if the first payment to him is not to be made until after the month in which he applied any payment for a period prior to the month of first payment would have to be made without Federal participation. Consequently, most States do not make such payments.

From this you conclude that:

> States which do not make retroactive payments have a financial disincentive to speed up the determination of eligibility; delay postpones payment and saves money. Given this disincentive, perhaps the only effective protection against delay would be a Federal requirement that States must pay assistance to eligible individuals for the period back to the date of application, or at least for the period back to 30 days after the date of application. Such a requirement is not realistically possible, however, under a Federal rule that denies Federal sharing for periods prior to the time of the first payment. This rule, then, works in practice to defeat the objective of the 1950 amendment requiring prompt action on applications.

3. Under principles of equity an eligible individual should have his needs met from the date of his application. It is not consistent with principles of equal protection underlying State public assistance programs, if two eligible individuals with equal need for assistance apply on the same date and receive different amounts because a determination is made with respect to one in the month his application was filed but with respect to the other in the next month. The speed of the administrative process does not appear to be a reasonable basis for distinguishing between the two.

4. In *Ewing* v. *Gardner*, 185 F. 2d 781 (1950), the court held that an individual is entitled to social security benefits when he meets the statutory conditions and has filed an application for benefits. Since, his entitlement begins when the specified conditions exist and not when the administrative agency makes its determination that they, in fact, exist, payments back to the date of application are required.

While there is no comparable decision dealing explicitly with the public assistance programs, you urge that it seems but a matter of time before there will be such a decision, and that there can be little doubt about the outcome. You further state that with the courts requiring the States to make payments for the period beginning with the date of application, it would be anomalous if Federal financial participation were not available.

In summarizing your views you state that:

> Federal recognition of initial State payments to eligible individuals covering the period to application is supported by the language of the Social Security Act, by program needs, by constitutional principles of due process and equal protection, and by elementary notions of fairness to the program beneficiaries.

Federal financial participation in such payments should be available without technical limitations. This policy will not affect Federal sharing in the large proportion of eligible cases which are paid in the month of application. Where the proposed policy is called into play, ordinarily only a month, or in disability cases perhaps two months, of retrospective payments will be involved. In the relatively few cases where there is a longer delay, it is all the more important that full Federal participation be available in payments back to the date of application. Only thus will the claimant's rights be vindicated, and only thus will the States be encouraged to comply with the mandate of the Social Security Act to make payments promptly to all eligible individuals.

The questioned proviso in our 1936 decision was added pursuant to a conception of old-age assistance under the Social Security Act as being generally to aid those States which make regular monthly grants to aged needy individuals, rather than to States which might delay payments for long periods. It hardly seemed consistent with the purposes of the act to allow Federal participation, particularly in the early start-up years of the various State programs, in payments to individuals for what might turn out to be long periods prior to the first State payment on their behalf.

However, we must concede that there is nothing in the statutory language considered by us in 1936 or in the language pertaining to the various other programs involved which precludes the approach you propose taking. While the wording in sections 3(a), 403(a), 1003(a), 1403(a), and 1603(a) of the act, contain slight variations, we concur in your view that no particular significance in terms of the issue herein considered attaches thereto.

Therefore, in light of the considerations set forth in your letter, especially those which relate to requirements for prompt determinations of eligibility thereby avoiding unduly long periods between receipt of an individual's application and first payment to him, we raise no objection to your proposal to authorize Federal financial participation in subsistence payments for periods beginning with the date applications are received from eligible individuals.

Our decision of September 26, 1936, published at 16 Comp. Gen. 314, is modified accordingly.

[B-154522]

Military Personnel—Dislocation Allowance—Members Without Dependents—Quarters Not Assigned

The dislocation allowance authorized by Public Law 90-207 (37 U.S.C. 407(a)) for members without dependents who upon permanent change of station are not assigned Government quarters is not payable to either of the two crews of a nuclear-powered submarine—the permanent station of both crews—as the on-duty crew is furnished quarters aboard the submarine and the off-crew ashore for training and rehabilitation is considered to be at a temporary duty station, whether or not the submarine is at home port. Therefore, members who incident to transfer aboard a submarine report to temporary station locations ashore where they do not perform basic duty assignments are not entitled to a dis-

location allowance, nor is the allowance payable to members reporting aboard the submarine when first relieved with the on-ship crew for training and rehabilitation.

Quarters—Failure to Furnish—Military Personnel Without Dependents—Dislocation Allowance

Although a member of the uniformed services without dependents who upon reporting to a submarine under permanent change-of-station orders is assigned quarters on board the submarine is not entitled to the dislocation allowance authorized in 37 U.S.C. 407(a) for members without dependents who upon permanent change of station are not assigned Government quarters, he would be entitled to the allowance if he reports to a nuclear-powered submarine that is undergoing overhaul or repair at its home port or home yard and quarters aboard the submarine are uninhabitable, the member is not assigned quarters ashore, and lodging accommodations pursuant to 10 U.S.C. 7572(a) are not furnished to the member.

To the Secretary of the Navy, January 17, 1969:

Reference is made to letter dated October 1, 1968, from the Assistant Secretary of the Navy, requesting a decision whether members without dependents are entitled to a dislocation allowance incident to a permanent change of station to a two-crew nuclear-powered submarine under the circumstances disclosed. The request for decision has been designated PDTATAC Control No. 68–36, by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary refers to Public Law 90–207, dated December 16, 1967, 81 Stat. 649, section 1(4) of which restated section 407(a) of Title 37, United States Code, effective October 1, 1967, to provide authority for payment of a dislocation allowance to members without dependents who are transferred to a permanent station where they are not assigned to quarters of the United States. He states that, generally, members without dependents assigned to ships, including submarines, are provided quarters on board ship and are therefore not entitled to a dislocation allowance. However, he says that in the case of nuclear-powered submarines there are two complete crews, one of which is one duty aboard the submarine and the other is ashore, usually, at the home port, for training and rehabilitation.

The Assistant Secretary states further that, since there are quarters aboard the submarine for only one crew at a time, a question arises as to whether a member without dependents is entitled to a dislocation allowance when he reports to the off-ship crew of a nuclear-powered submarine under permanent change-of-station orders, adequate Government quarters are not available for assignment to him at the home port and he occupies private off-station quarters. Likewise, he says there is a question whether, in the same circumstances, a member is entitled to a dislocation allowance when the home port of the submarine is changed and he is part of the off-ship crew on arrival at the new home port.

The Assistant Secretary expresses the view that members without dependents assigned to the off-ship crew should receive dislocation allowance in these circumstances, but recognizes that in our decisions of August 27, 1964, 44 Comp. Gen. 105, and April 4, 1968, 47 Comp. Gen. 527, involving entitlement to basic allowance for quarters, we considered the duty of such members ashore as duty at a temporary duty station.

The Assistant Secretary also says that it would appear proper that a member without dependents who reports to the on-ship crew incident to permanent change-of-station orders should also be entitled to a dislocation allowance when this crew is first relieved after his arrival and goes on training and rehabilitation ashore, if adequate Government quarters are not available for assignment to the member at that time and he occupies private off-station quarters.

In a related question, the Assistant Secretary indicates that an officer without dependents is entitled to reimbursement for private quarters personally procured on a not-to-exceed-his-rate-of-basic-allowance basis, under the provisions of 10 U.S.C. 7572, in instances when a nuclear-powered submarine is undergoing overhaul at its home yard or home port, where quarters aboard are uninhabitable, no adequate Government quarters are available ashore and the officer establishes private off-station quarters. He asks whether such officer is also entitled to a dislocation allowance when he reports to that submarine under permanent change-of-station orders.

If we determine that under the present provisions of the Joint Travel Regulations there is no entitlement to a dislocation allowance in the cases presented, the Assistant Secretary also asks whether an appropriate revision to those regulations to provide entitlement would be legally proper under the authority contained in 37 U.S.C. 411(d). He suggests a revision in paragraph M1150–10, Joint Travel Regulations, as a possibility.

Section 407(a), Title 37, United States Code, provides in pertinent part that under regulations prescribed by the Secretary concerned, a member of a uniformed service without dependents, who is transferred to a permanent station where he is not assigned to quarters of the United States, is entitled to a dislocation allowance equal to the basic allowance for quarters for one month as provided for a member of his pay grade and dependency status. It provides further that for the purposes of that subsection, a member whose dependents may not make an authorized move in connection with a change of permanent station is considered a member without dependents.

Section 411(d) of Title 37, United States Code, provides in pertinent part that for the administration of specified sections of that title, in-

cluding section 407, the Secretary concerned shall define the words "permanent station." The definition, it provides, shall include a shore station or the home yard or home port of a vessel to which a member of a uniformed service who is entitled to basic pay may be ordered. It provides further that an authorized change in the home yard or home port of such a vessel is a change of permanent station.

Section 7572(a), Title 10, United States Code, provides that for members listed therein who are on sea duty and are deprived of their quarters on board ship because of repairs or other conditions that make their quarters uninhabitable, if public quarters are not available, the Secretary of the Navy may provide lodging accommodations for such members. Such lodging accommodations may not be occupied by the member's dependents. Subsection (b) thereof provides that under regulations prescribed by the Secretary, any officer on sea duty who is deprived of his quarters on board ship for reasons stated in subsection (a), and who is not entitled to basic allowance for quarters, may be reimbursed for expenses incurred in obtaining quarters, in an amount not more than the basic allowance for quarters of an officer of his grade, if it is impractical to furnish accommodations under subsection (a).

Paragraph M1150–10, Joint Travel Regulations, promulgated pursuant to section 411(d) of Title 37, United States Code, defines a permanent station, in pertinent part, as the post of duty or official station (including a home port or home yard of a vessel or of a ship based staff insofar as transportation of dependents and household goods is concerned) to which a member is assigned or attached for duty other than "temporary duty" or "temporary additional duty."

Paragraph M9003 of the regulations provides that with certain exceptions not pertinent here, a dislocation allowance is payable to a member with dependents whenever dependents relocate their household in connection with a permanent change of station or whenever a member without dependents is transferred to a permanent duty station where he is not assigned to Government quarters.

The legislative history of section 1(4), Public Law 90–207, indicates that the intent in enacting that legislation was to authorize a dislocation allowance to a member without dependents because he incurs the same general type of additional expenses when he is not furnished Government quarters at the new station as does a member with dependents. While, however, section 407(a)(1) of Title 37, United States Code, provides for payment of dislocation allowance to a member with dependents when his dependents make an authorized move in connection with his change of station, whether Government quarters are or are not assigned to that member at his new station, section 407(a)(3) provides for payment of such allowance to a member without depend-

ents, upon *his* transfer to a permanent station and then only when he is not assigned to quarters of the United States.

With respect to a member assigned to a vessel, the definition of "permanent station" contained in paragraph M1150–10, Joint Travel Regulations, insofar as transportation of dependents and household goods is concerned, includes the home port or home yard of that vessel. But as far as the member himself is concerned, the vessel is the permanent station or post of duty and, in the case of a member without dependents, his entitlement to a dislocation allowance is for determination on that basis.

It long has been established that in instances where the vessel itself is the permanent station of a member assigned to duty aboard that vessel, which includes a submarine, a member without dependents assigned to duty aboard that vessel is not entitled to an allowance for quarters, since adequate quarters are available on board that vessel. 35 Comp. Gen. 10; 42 *id.* 65 and 44 *id.* 105. In the case of a nuclear-powered submarine, it has been held that the submarine itself is the duty station of both crews assigned to that submarine. 46 Comp. Gen. 161; 47 *id.* 527. Compare B–159688, September 15, 1966. During periods members of the off-ship crew of a nuclear-powered submarine are temporarily ashore for more than 15 days for training and rehabilitation, they are no longer at their permanent station, the submarine to which attached, but are on temporary assignment away from such station, whether at the home port or some other shore station.

A member without dependents, upon being transferred by permanent change-of-station orders to the off-ship crew of a nuclear-powered submarine, would be required to report at a temporary duty location ashore and not at his permanent station. Upon finally reporting on board the submarine, his permanent duty station, adequate quarters would normally be available for assignment to him.

Accordingly, the member would not be entitled to a dislocation allowance upon reporting to his temporary station, even though no adequate quarters were available for assignment to him at that temporary station. Nor would a member be entitled to such allowance upon reporting to the off-ship crew that has moved to a new port incident to a change of home port of that submarine, since his duty station is the submarine, not the home port. For the same reason, a member who reports for duty on board a nuclear-powered submarine as a member of the on-ship crew, having reported to his permanent duty station and been assigned to quarters, would not be entitled to a dislocation allowance when later relieved with that crew for training and rehabilitation at a temporary duty station ashore under conditions which require him to occupy private quarters.

As indicated above, normally an officer without dependents, upon reporting to a submarine under permanent change-of-station orders would not be entitled to a dislocation allowance, since he would be assigned to quarters on board that vessel. However, if that officer reports to a nuclear-powered submarine at the time it is undergoing overhaul or repair at its home port or home yard at which time the quarters aboard that vessel have been made uninhabitable for assignment to him, if there are no adequate quarters available for assignment to him ashore and no lodging accommodations are furnished him under the provisions of section 7572(a) of Title 10, United States Code, we are of the opinion that the officer would be entitled to a dislocation allowance. Compare 35 Comp. Gen. 10 and 44 Comp. Gen. 105–109, answer to question 2.

Section 411(d) of Title 37, United States Code, authorizes the Secretaries concerned to define the words "permanent station" in connection with the administration of the several sections listed in subsection (a) of that section, pertaining to travel and transportation allowances. Accordingly, except as may otherwise be authorized by statute, administrative regulations issued under that subsection must be applied within the limitations prescribed in the sections referred to in subsection (a). 44 Comp. Gen. 670–673. The words "permanent station" as defined in paragraph M1150–10, Joint Travel Regulations, pertaining to a member's entitlement in his own right as distinguished from his entitlement on account of transportation of dependents and household goods, is the place where his basic duty assignment is to be performed and the place to which he must proceed or return upon completion of temporary assignments or other absences from his normal duties. 38 Comp. Gen. 853; 41 *id.* 726; 44 *id.* 670.

The place where a member performs his basic duty when assigned to a nuclear-powered submarine, is the submarine itself. The shore assignments are for the purpose of training and rehabilitation. It is our view therefore that there is no legal basis for a change in the applicable regulations, including paragraph M1150–10, Joint Travel Regulations, so as to provide for payment of dislocation allowances to members without dependents upon reporting, incident to permanent change-of-station assignments to nuclear-powered submarines, to temporary locations ashore where they would not be performing their basic duty assignments.

Your questions are answered accordingly.

[B-165779]

Agriculture Department—Employees—Transfers—Leave Accruals

An emloyee transferring without a break in service whether between Federal service employment in the United States Department of Agriculture and Agricultural Stabilization and Conservation Service county committee employment or from county committee employment to the Department's Federal service may transfer his annual and sick leave accruals to the new position, Public Law 90-367, approved June 20, 1968, permitting the reciprocal transfer of leave between the county committee and departmental services.

Agriculture Department—Employees—County Committee Personnel—Transfers

An Agricultural Stabilization and Conservation Service county committee employee moving to a United States Department of Agriculture Federal service position, upon subsequent transfer to other Federal employment may transfer his annual and sick leave accruals, including the leave earned in a county committee office. The leave accruals transferred from the county committee service to the Department's Federal service under the authority of Public Law 90-367, approved June 29, 1968, may be treated as earned in Federal employment for transfer purposes to other Federal employment.

To the Secretary of Agriculture, January 21, 1969:

The letter of December 9, 1968, from your Assistant Secretary for Administration requests our decision on two questions concerning leave benefits of employees transferring between employment with ASC county committees and Federal employment with the Department of Agriculture and vice versa under the provisions of Public Law 90-367. The questions presented with the administrative discussion of the problems involved read as follows:

1. Does sick and annual leave transfer with a USDA Federal employee when he moves without a break in service to Agricultural Stabilization and Conservation Service county employment?

The legislative history of PL 90-367 clearly reflects congressional intent to correct inequities relating to the movement of ASCS county employees to USDA Federal positions. Even though this intent is directed towards movement in only one direction, there is nothing to indicate that Congress intended to bar the movement of leave for USDA employees moving to ASCS county positions. The law provides that transfer of leave between leave systems provided by section 6308 of Title 5, U.S.C. shall apply to the leave system established for these employees. Since the provisions of section 6308 permit transfer of leave in both directions, this would indicate that Congress intended a reciprocal system of transfers. Furthermore, to restrict leave transfer only from the ASCS county leave system would create hardships and inequities not intended by the Congress, for example: An ASCS county employee who moves without a break in service to a USDA leave-earning position would transfer his sick and annual leave. In some such cases the employee, because of personal or official reasons, finds it necessary after a short period of time to return to ASCS county employment. In such an event, the employee would suffer a severe penalty if he was unable to transfer his sick and annual leave balances back with him to his county employment.

2. If an ASCS county employee moves to a USDA Federal position and subsequently transfers to another department, may sick and annual leave be transferred as a result of the subsequent transfer?

It is our belief that the sick and annual leave transferred with an employee moving from an ASCS county office to a USDA Federal position becomes Federal employee leave for all purposes. Thus, upon subsequent transfer, the employee will transfer with him all leave accruals including leave which may have been earned in a county office. If the leave earned during county office employment cannot be transferred with the employee, it would create hardships and inequities

previously stated and place an unusual administrative problem upon this Department. It would be necessary to maintain dual leave accounts so long as the county leave earnings remained to the credit of the employee. In the case of sick leave, this situation could continue for many years. The confusion and additional work related to maintaining dual leave records was not, in our opinion, intended by Congress by the enactment of PL 90-367.

Section 2(a) of Public Law 90-367, approved June 29, 1968, amended subchapter I of chapter 63 of Title 5, United States Code, by adding the following new section:

§ 6312. Accrual and accumulation for former ASCS county office employees

Service rendered as an employee of a county committee established pursuant to section 8(b) of the Soil Conservation and Domestic Allotment Act (16 U.S.C. 590h(b)), or of a committee or an association of producers described in section 10(b) of the Agricultural Adjustment Act of May 12, 1933 (48 Stat. 37), shall be included in determining years of service for the purpose of section 6303(a) of this title in the case of any officer or employee in or under the Department of Agriculture. The provisions of section 6308 of this title for transfer of annual and sick leave between leave systems shall apply to the leave system established for such employees.

In the absence of any indication in the legislative history of the enactment to the contrary we agree that the language of 5 U.S.C. 6308, as amended by that enactment now authorizes the transfer of annual and sick leave to county committee employment from Department of Agriculture (Federal) employment as well as in going from county committee employment to Federal employment by the Department of Agriculture. Question 1 is answered in the affirmative.

With respect to question 2 we see no reason why the leave authorized to be transferred by the foregoing legislation upon Federal employment may not be treated as though earned in Federal employment for transfer purposes to other Federal employment. Question 2 is also answered in the affirmative.

[B-165293]

Buy American Act—Applicability—Waiver—Propriety

The determination by the Department of Housing and Urban Development prior to the solicitation of bids by the Guam Housing and Urban Renewal Authority for a low-rent housing project that certain foreign construction material could be procured at a considerable savings—at least 16 percent less than domestic items—and the waiver of Buy American requirements did not conform to the procedures established by Executive Order No. 10582 for determining whether domestic bid prices are unreasonable, the Executive order contemplating that a determination of unreasonable domestic cost would be made after the receipt of bids or offers on foreign materials and the comparison of prices. However, the difference between foreign and domestic prices exceeding the Executive order standards, the award made will not be disturbed, but future procurements should comply with prescribed procedures.

To the Secretary of Housing and Urban Development, January 23, 1969:

Reference is made to letter of October 24, 1968, from your General Counsel, reporting on the protests by the Ralston Manufacturing

Company and Raymond E. Holand Associates against the deletion of the Buy American Act provisions from Guam low-rent housing project 1–1.

Bidding documents for the construction of low-rent housing projects are issued by local housing authorities and the contracts for the construction of the projects are awarded by such authorities. In this case, the local authority is the Guam Housing and Urban Renewal Authority.

Financial assistance in the form of loans during the development period of the project and contributions during the operations period are provided to local housing authorities by the Department of Housing and Urban Development (HUD) under the United States Housing Act of 1937, as amended, 42 U.S.C. 1401, *et seq.* Section 6(c) of the act, 42 U.S.C. 1406(c), provides that the funds available for low-rent housing shall be subject to the Buy American Act provisions of 41 U.S.C. 10a and that every contract or agreement of any kind pursuant to the act shall contain a provision identical to that prescribed in 41 U.S.C. 10b. In view of this requirement, annual contributions contracts between the local housing authorities and HUD require the local authority to include in all its contracts for construction, alteration or repair of any project a provision requiring the use of domestic articles, materials and supplies, unless HUD determines that the use of domestic articles, materials or supplies is impracticable or their cost is unreasonable.

It is reported that the Buy American requirements were not deleted on Guam project 1–1, but that they were waived with respect to certain construction materials. In that connection, it appears that the Guam Housing and Urban Renewal Authority requested a waiver of the requirements as to listed materials and that the HUD Assistant Regional Administrator for Housing Assistance expanded the list and approved the waiver on the basis that purchase of the materials from foreign sources would result in considerable savings to the project and that the price of like materials of domestic origin was therefore unreasonable. In line with the waiver, the Assistant Regional Administrator advised the Guam Housing Authority to prepare the bidding documents to reflect the granted waiver. The waiver was based upon a sampling of foreign and domestic prices of 8 of the more than 30 materials waived. The foreign prices of the items sampled were determined to be 7, 10, 12, 12, 15, 24, 25 and 28 percent less than the domestic prices. The average savings on the sampling were computed at 16.6 percent. The report states that the Guam Housing Authority request was reviewed by officials in the HUD regional office in the light of Executive Order No. 10582, December 17, 1954, which prescribes uni-

form procedures for determinations to be made under the Buy American Act.

It is reported further that on September 1, 1968, the Guam Housing Authority advertised for bids with the exemptions to the Buy American Act requirements included in the bid documents and that the bids were opened on September 30, 1968. An award was made subsequently.

In B-153408, March 16, 1964, it was held that Executive Order No. 10582 is for application in connection with low-rent housing projects receiving financial assistance under the United States Housing Act of 1937, as amended. The Executive order provides that "the bid or offered price" of materials of domestic origin shall be deemed to be unreasonable if it exceeds the sum of "the bid or offered price" of like materials of foreign origin and a differential computed on the basis of one of the following formulas:

(1) The sum determined by computing six per centum of the bid or offered price of materials of foreign origin.
(2) The sum determined by computing ten per centum of the bid or offered price of materials of foreign origin exclusive of applicable duty and all costs incurred after arrival in the United States: provided that when the bid or offered price of materials of foreign origin amounts to less than $25,000, the sum shall be determined by computing ten per centum of such price exclusive only of applicable duty.

The Executive order thus contemplates that a determination of unreasonable domestic cost should be made after the receipt of bids or offers on the foreign materials. It was stated in 39 Comp. Gen. 309, at page 311, that "it is obvious from a review of the legislative history of the Buy American Act that the unreasonableness of domestic bid prices was to be determined by comparison with foreign bid prices." See, also, A-48328, April 28, 1933, which held, soon after enactment of the Buy American Act, that "the question whether there may be accepted and used foreign articles is one to be determined after the bids have been received and not before, as it cannot then be determined whether the difference in price be unreasonable."

The determination made here in advance of the solicitation of bids or offers that the cost of domestic material is unreasonable did not conform to the uniform procedures. However, our Office will not question the waiver inasmuch as award has been made and, in any event, the difference between foreign and domestic market prices in Guam appears to be in excess of the Executive order standards. We suggest that appropriate steps be taken to insure that the uniform procedures prescribed by the Executive order are followed in future cases.

[B-165165]

Quarters Allowance—Travel Status—Reservists

The basic allowance for quarters provided in 37 U.S.C. 403(f), as amended by Public Law 90-207, for a member of the uniformed services without dependents when he is not assigned adequate quarters while in a travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, may be paid to a Reserve member without dependents on the basis the travel of the reservist between home and first and last duty stations is permanent change-of-station travel. The amendment to section 403(f) does not require a change in the view that travel from home to a first duty station and from a last duty station to home is permanent change-of-station travel for purposes of the travel and transportation allowances prescribed by 37 U.S.C. 404(a).

Quarters Allowance—Entitlement—Training Duty Periods—Reporting From Home

The training station to which a Reserve member without dependents is ordered to active duty for less than 20 weeks in a temporary duty status is his permanent station and the member performing his basic assignment at his permanent duty station is entitled to the basic allowance for quarters prescribed by 37 U.S.C. 403(f), as amended by Public Law 90-207, while at the training station and the definition in paragraph M1150-10c of the Joint Travel Regulations that a home or place from which a member of a Reserve component is ordered to active duty for training is his permanent duty station is not for application. Therefore, paragraph 10242 and Table 1-2-4, Department of Defense Military Pay and Allowances Entitlements Manual remains applicable in computing allowable travel time for pay purposes for travel performed from home to a training station.

To the Secretary of Defense, January 27, 1969:

Reference is made to your letter of August 28, 1968, requesting a decision on two questions concerning the entitlement of a Reserve member without dependents to basic allowance for quarters in certain cases and on one question relating to allowable travel time for pay purposes for reservists called to active duty for less than 20 weeks. The questions are set out and discussed in Committee Action No. 419, of the Department of Defense Military Pay and Allowance Committee.

The questions are as follows:

1. May a member (without dependents) of a reserve component, when ordered to active duty, be paid a basic allowance for quarters for travel time from his home to his first duty station and from his last duty station to his home?
2. May a member (without dependents) of a reserve component, when ordered to active duty for less than twenty weeks in a temporary duty status, be paid a basic allowance for quarters for such tour of duty?
3. Since paragraph M1150-10c, Joint Travel Regulations, now includes a reservist's home as a permanent duty station for purposes of active duty tours of less than 20 weeks, and such tours are now performed in a temporary duty status, do the provisions of paragraph 10242 and Table 1-2-4, DODPM, still apply in computing allowable travel time for pay purposes in such cases?

Section 403(f) of Title 37 of the United States Code was amended by section 1(3) of Public Law 90-207, approved December 16, 1967, 81 Stat. 651, to provide that:

A member of a uniformed service without dependents who is in pay grade E-4 (four or more years of 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.

Prior to that amendment section 403(f) had prohibited credit of basic allowance for quarters to single members while in a travel or leave status between permanent duty stations.

Section 3 of the act of December 1, 1967, Public Law 90–168, 81 Stat. 521, amended section 404(a) of Title 37 of the Code by adding clause 4 to the section to provide for payment, under regulations prescribed by the Secretaries concerned, of travel allowances to a member of a uniformed service,

when away from home to perform duty, including duty by a member of the Army National Guard of the United States or the Air National Guard of the United States, as the case may be, in his status as a member of the National Guard.

Change 183 to the Joint Travel Regulations, implementing the added clause 4, changed the provisions of paragraph M1150–10c of the regulations to provide, for the purpose of paragraph M6001 of the regulations, that, "The home or place from which a member of the Reserve components is called (or ordered) to active duty (or active duty for training) is defined to be a permanent duty station."

With respect to question 1, the view is expressed in the Committee action that when the definition of permanent station contained in paragraph M1150–10, Joint Travel Regulations, did not include a reservist's home as a permanent station for any purpose, there was no question that 37 U.S.C. 403(f), referring only to travel between permanent duty stations, did not apply to a reservist's travel between his home and first and last duty stations.

Also, the Committee is of the opinion that the change in the definition of permanent station does not provide a basis for credit of basic allowance for quarters for travel time from home to first duty station and return.

Since, however, under the provisions of 37 U.S.C. 403, a service member entitled to basic pay is ordinarily entitled to a quarters allowance unless he is assigned to Government quarters and a reservist en route from home to first duty station and from last duty station to home is entitled to basic pay and is not assigned to Government quarters, the Committee says there would appear to be no reason why such a reservist, with or without dependents, should not be entitled to a quarters allowance for the authorized travel time in question.

We held in 43 Comp. Gen. 70, that under the provisions of 37 U.S.C. 320, then in effect (subsequently recodified as 37 U.S.C. 403(f)), an Air Force Reserve officer without dependents, who had been ordered to extended active duty with temporary duty en route to his permanent duty station was not entitled to a basic allowance for quarters from the day he departed from his home until his arrival at his permanent station because he was in a travel status during the entire period.

While the member's home is not a permanent duty station, travel allowances for travel from home to first duty station and from last duty station to home are authorized by clauses 2 and 3 of section 404(a) of Title 37 of the Code and the movements to and from home have been viewed as permanent changes of station for the purpose of those clauses. Paragraph M3003–1a of the Joint Travel Regulations. It was our opinion that in those circumstances such travel also should be regarded as permanent change-of-station travel for the purposes of 37 U.S.C. 403(f). The amendment to section 403(f) does not require any change in our opinion that travel from home to first duty station and from last duty station to home is permanent change-of-station travel for the purpose of travel and transportation allowances. See 47 Comp. Gen. 689.

Accordingly, under the present provisions of section 403(f) a member entitled to basic pay is entitled to a basic allowance for quarters when he is not assigned adequate quarters during periods of travel between home and first and last duty station, including periods of temporary duty en route, in any case, unless 37 U.S.C. 404(a)(4) and the implementing regulations require the conclusion that travel to which that statute and regulations apply is temporary duty travel.

Questions 2 and 3 appear to be predicated on a view that under the provisions of 37 U.S.C. 404(a)(4) as implemented by the permanent station definition contained in paragraph M1150-10c of the Joint Travel Regulations, the duty station in cases where those provisions are applicable is a temporary duty station and the travel to that station from home and return is travel for the purposes of performing temporary duty. If that view were correct section 403(f) of Title 37 would have no application to the travel.

The view that the duty here involved is performed in a temporary duty status appears to have followed as a matter of course from the fact that 37 U.S.C. 404(a)(4) authorizes the payment of per diem and under the provisions of 37 U.S.C. 404(a) prior to the addition of clause (4), a per diem was payable at a duty station only while a member was there in a temporary duty status.

A temporary duty status is essential to confer entitlement to per diem at a duty station under clause (1) of 37 U.S.C. 404(a), authorizing travel allowance when a member is "away from his designated post of duty." It may be noted, however, that clause (4) does not relate back to clause (1) but, like clauses (2) and (3), is applicable to travel from home without reference to absence from a designated post of duty. The term "permanent station" for the purpose of travel and transportation allowances has consistently been applied as having reference to the place where the member's basic duty assignment is

performed (38 Comp. Gen. 853; 41 *id.* 726; 44 *id.* 670), and his home, when he is not on duty and no duty is required of him, has never been viewed as such a permanent station. The benefits of clauses (2) and (3) accrue incident to travel from home to first duty station and from last duty station to home and the benefits of clause (4) accrue when "away from home to perform duty." Such provisions do not change the member's home to a designated post of duty nor require the existence of a temporary duty status as a condition for the payment of the travel allowances which they provide.

In decision of November 12, 1968, 48 Comp. Gen. 301, we considered the effect of section 404(a)(4) of Title 37 and the implementing provisions of paragraph M1150–10c of the Joint Travel Regulations on the entitlement of a reservist to basic allowance for quarters at his training duty station. On the basis that there was nothing to indicate that the provisions of section 404(a)(4) were intended to impair rights or entitlements under clauses (1), (2), and (3) of section 404(a) or other provisions of Title 37 relating to active duty pay and allowances, we said that, in our opinion, the training duty station continued to be a permanent station for pay and allowance purposes and that section 404(a)(4) simply provided authority for the payment of per diem at the permanent station in proper cases.

We concluded, therefore, that the permanent station definition contained in paragraph M1150–10c of the Joint Travel Regulations is neither authorized nor required by the provisions of 37 U.S.C. 404(a)(4) and is of no effect in determining the member's entitlement either to pay and allowances for the period of his training duty, or to reimbursement of the cost of travel to and from the training duty station. Since quarters were not assigned at the training duty station, we held that under the governing provisions of the law and regulations, the member was entitled to credit of the basic allowance for quarters and to such per diem as was authorized in the circumstances of his case.

Accordingly, question 1 is answered in the affirmative in all cases.

In answer to question 2, since the station to which a member is ordered incident to orders assigning him to active duty for less than 20 weeks is his permanent station, he is entitled to credit for basic allowance for quarters while at that station when Government quarters are not available for assignment to him.

With respect to question 3, since the station to which the member reports to perform his basic assignment is his permanent station, the provisions of paragraph 10242 and Table 1–2–4, Department of Defense Military Pay and Allowances Entitlements Manual are still applicable in computing allowable travel time for pay purposes for travel performed from home to that station.

We believe that the considerable confusion which exists as to the proper application of 37 U.S.C. 404(a)(4) would be greatly reduced if the permanent station definition added to the Joint Travel Regulations by Change 183 were removed from the regulations.

[B-164908(1)]

Equipment—Automatic Data Processing Systems—Lease-Purchase Agreements—Appropriation Availability

An installment purchase plan for a computer replacement project that provides for payment over a period of years is a proposal for a sale on credit that contemplates a contract extending beyond the current fiscal year, a contract that would continue unless affirmative action is taken by the Government to terminate it and, therefore, such a plan would be in conflict with sections 3732 and 3679, Revised Statutes, which prohibit a contract or purchase unless authorized by law and unless adequate funds are available for the fulfillment of the agreement. Notwithstanding the economic advantage of purchase over rental, the lack of sufficient funds to purchase the equipment outright cannot be used to frustrate the statutory prohibition against contracting for purchases in excess of available funds, absent congressional authority.

To the Secretary of the Air Force, January 31, 1969:

We refer to the letter dated October 1, 1968, from your Deputy General Counsel, requesting advice concerning a financial arrangement which has been offered by a prospective vendor to the Department of the Air Force in connection with the proposed computer replacement project for the Air Force Accounting and Financial Center (ESQ Project 42–67).

Proposals have been received from three vendors offering to furnish the required equipment and services for the project as requested in the request for proposals. Each of the proposals includes the usual option offering the equipment on the basis of a lease with an option to purchase or out-right purchase.

One vendor (vendor X) has offered an additional alternative which is described as an installment purchase plan. This plan has been offered by vendor X in connection with various other procurements of automatic data processing equipment (ADPE).

The basic features of the plan are set forth as follows:

1. The Government pays for the equipment installed by making a down payment of 10 percent of the purchase price and monthly payments of the remaining 90 percent of the purchase price over a period of years, plus interest on the unpaid balance at the rate of 6.5 percent. (You report the Government would actually make one annual payment each fiscal year.)

2. A deposit of 5 percent of the purchase price is required at installation to be applied against the unpaid balance in the form of credits at the end of the contract period. The deposit which is retained by the

vendor accumulates simple interest at a rate of 6.5 percent per annum in favor of the Government.

3. The Government may take title to the equipment either at the end of the series of payments or at the time of the initial payment, whichever it desires. (The present intention is to have title vest at the end of the series of payments.)

4. The Secretary of the Air Force may terminate the contract with respect to any or all equipment at the end of any fiscal year. However, the termination for convenience clause does not apply. Instead the contract provides that upon termination the vendor retains the 10 percent down payment and the 5 percent deposit in any case; and, in addition, if at the time of termination this amount, plus any accumulated maintenance charges due the Government under the contract and the periodic payments made, is less than what the cumulative rental charges would otherwise have been if the Government had leased from the beginning, the Government must pay the difference to the company. Also, the Government must pay the charges set forth in the contract to effect return of the equipment to the company.

In this connection, it is stated that the vendor would not allow the Government to apply any part of the amount paid under a contract to the purchase price of new equipment in the event the Government desires to upgrade or alter the components of the configuration during the term of the contract. Your Department estimates that the cost of configuration changes would amount to roughly 10 to 15 percent of the purchase price. If the Government could not redeploy the replaced equipment, it would have the option of continuing the installment purchase or defaulting and returning such replaced equipment to the vendor.

Based on evaluation of the three acceptable proposals received in connection with ESQ Project 42–67, it is reported that vendor X's proposal is lowest in cost on a purchase basis, and lower still if the installment purchase plan is used. But X's installment purchase plan is not lower than the other bids if the equipment is leased for three or more years and then purchased; nor is X the low bidder on a straight lease basis. It is noted, also, that under the installment plan the total amount paid for an item of equipment does not become lower than the rental cost under the straight lease plan until near the end of the third calendar year of payment.

We are advised that your Department does not have sufficient funds available to purchase X's systems at the outset; but that it is possible to make sufficient funds available to cover the initial funding of the installment purchase method of procurement. It is felt by your Department that the procurement could be accomplished either by the use of

funds that would ordinarily be available for rental of ADPE (i.e., the 1-year appropriation, "Operation and Maintenance, Air Force"), or by the use of funds that would ordinarily be available for a straight purchase of such equipment (i.e., the no-year appropriation, "Other Procurement, Air Force"). At this time it is contemplated that your Operation and Maintenance appropriation would be used.

Your counsel recognizes that there are certain areas of doubt as to the legality of the installment purchase plan offered by X and, in view of the pending award, has requested our decision on the matter. Specifically, he asks (1) whether the Air Force has the authority to enter into the installment purchase plan offered by vendor X, and (2) if so, whether funds available for the rental of ADPE could be used to accomplish the procurement.

The proposal to sell the equipment to the Government with payment therefor to be made over a period of years is a proposal for a sale on credit. It thus contemplates a contract extending beyond the current fiscal year and would continue as such unless affirmative action is taken by the Government to terminate. This ostensibly is the only way such equipment can be purchased at this time because of insufficient funds. A purchase of the equipment under these circumstances in the manner proposed would be in direct conflict with sections 3732 and 3679, Revised Statutes, as amended, codified as 41 U.S.C. 11 and 31 *id.* 665(a), respectively, which provide in pertinent part as follows:

> No contract or purchase on behalf of the United States shall be made, unless the same is authorized by law or is under an appropriation adequate to its fulfillment * * *
>
> * * * * * * *
>
> No officer or employee of the United States shall make or authorize an expenditure from or create or authorize an obligation under any appropriation or fund in excess of the amount available therein; nor shall any such officer or employee involve the Government in any contract or other obligation, for the payment of money for any purpose, unless such contract or obligation is authorized by law.

The economic advantages of a purchase over rental cannot be used to frustrate the statutory prohibition against the contracting for purchases in excess of available funds and any departure from such statutes must be authorized by Congress. The first question is therefore answered in the negative, and the second question is not answered, it being based upon an affirmative reply to the first.

In view of the disposal of your questions on other grounds it does not appear necessary to consider the propriety of payment of interest. In this connection, however, see 22 Comp. Gen. 772.

[B-164908(2)]

Contracts—Federal Supply Schedule—Multi-Year Procurement

Proposed multi-year contracting for Federal Supply Service requirements to effect savings in the repair and rehabilitation of business machines, typewriters, and furniture, the contracts to be financed by using the Federal Supply Fund and the Automatic Data Processing Fund and by reimbursing the funds from the fiscal year appropriations of the requisitioning agencies would violate the appropriation restrictions of 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and absent congressional approval, a contract term must be restricted to a 1-year period. Although A-60589, July 12, 1935, permitting requirements contracts under fiscal-year appropriations to cover 1-year periods extending beyond the end of the fiscal year is not technically correct, the practice having been followed for over 30 years in reliance upon the decision, there is no objection to its continuance.

Contracts—Requirements—Multi-Year Procurement

Although the General Supply Fund authorized by section 109 of the Federal Property and Administrative Services Act of 1949, as amended, is available without fiscal year limitation, requirements contracts for indefinite quantities of stock supplies that are charged to the fund should not be made for periods in excess of 2 years, even though funds are available for the total estimated quantities required, in the absence of specific legislative authority or prior determination by the United States General Accounting Office that the procurement will not be in derogation of the purposes of the advertising statutes.

Equipment—Automatic Data Processing Systems—Leases—Long Term

Long-term leases for automatic data processing equipment under fiscal year appropriations that would commit the Government to a minimum rental period of more than 1 year, and whose multi-year character would not change until the Government took effective cancellation action, are prohibited by 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and of three lease plans submitted only the one that does not obligate the Government to continue the rental period beyond the fiscal year in which made, and contains a renewal option, is not legally objectionable. However, revolving funds may be used to finance leases for reasonable periods of time in excess of 1 year, subject to the conditions that sufficient funds are available and are obligated to cover the costs under the entire contract.

To the Administrator, General Services Administration, January 31, 1969:

Reference is made to your letter of July 22, 1968, concerning the savings which may be realized through multi-year contracting.

The contracts you have in mind are those involving the Federal Supply Service. These contracts are financed through (a) direct charge to funds of requisitioning agencies and (b) the use of two revolving funds, namely (1) The General Supply Fund (GSF), authorized by section 109 of the Federal Property and Administrative Services Act of 1949, 63 Stat. 382, as amended (40 U.S.C. 756); and (2) The Automatic Data Processing Fund (ADPF), authorized by section 111 of the Federal Property and Administrative Services Act, 79 Stat. 1127, as amended (40 U.S.C. 759).

Where the revolving funds are used, agencies requiring supplies or services may place orders with GSA and their current appropria-

tions are then charged to reimburse the revolving fund. Also, certain contracts for stock supplies are made by GSA and charged directly to the General Supply Fund. You believe these revolving funds (GSF and ADPF) are not subject to fiscal year limitations, and therefore multi-year contracts are permissible.

The contracts charged directly to agency funds, on the other hand, usually do involve fiscal year appropriations. It is your belief that substantial price reductions could be obtained on certain types of these contracts if they were entered into on a multi-year rather than on a yearly basis.

As an example, you report that your repair and rehabilitation contracts, covering such equipment as business machines, typewriters and furniture, are generally of the requirements type and cover agency needs for the contract period, normally 1 year. Orders for the services are placed with the contractors directly by the using agencies, and the funds charged are those of the fiscal year in which the services are required. Your experience has indicated that price reductions as high as 10 percent might be realized if contracts of this type were made for a 2-year period instead of a 1-year period.

You report the same situation in the leasing of automatic data processing (ADP) equipment. Here again you believe that the restrictions on the duration of contracts are not in the best interests of the Government and that considerable savings may be realized from long-term leasing. You state that once a complex ADP system is installed, it is highly unlikely to be removed within 1 year in any case, because (1) the cost of installing new equipment is high and (2) commitments have been made to the existing configuration in terms of software, facilities, technical personnel, and so on. Thus, while there is technically only a 1-year commitment, you feel that in reality it is almost impossible to replace the equipment at the end of only 1 year, and that for all practical purposes the equipment originally installed becomes a sole source item for the particular installation for a considerable period of time. Accordingly you believe that the advantages of being able to contract for a long-term period to reflect the actual situation rather than on a 1-year basis are manifest.

Proposals have been received from various computer companies offering to lease ADP equipment for long-term periods at rental rates substantially below the rates offered by them to Government agencies on the regular annual basis under the Federal Supply Schedule. Enclosed with your letter are three such offers.

You would like to use multi-year contracting in situations, such as you have outlined, where it is clear that savings would result and the benefits which might be derived from annual advertising are highly speculative. However, there are certain provisions of law to be considered, and you have requested our views on the matter.

The legal impediments against the use of fiscal year funds for multi-year contracting are discussed in 42 Comp. Gen. 272. We stated therein that in applying certain statutes dealing with Government contracting, the decisions of the courts and contracting officers have consistently held that contracts executed and supported under authority of fiscal year appropriations can only be made within the period of their obligation availability and must concern a *bona fide* need arising within such fiscal year availability. Also, it was said that contracts entered into under fiscal year appropriations purporting to bind or obligate the Government beyond the fiscal year involved must be construed as binding the Government only to the end of the fiscal year unless otherwise authorized by law. In that case, the subject contract was a requirements contract which obligated the Government to order from the contractor such requirements as the Government might have during a 3-year period. This obligation alone, without considering an appropriation obligation, was viewed as a violation of sections 3732 and 3679, Revised Statutes, as amended, and section 1 of the act of July 6, 1949, derived from section 3690, Revised Statutes, codified as 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, respectively.

Since the requirements contract considered in the decision published at 42 Comp. Gen. 272 also required the contractor to keep certain equipment and personnel on a standby basis to perform only Government work over a 3-year period, we did not consider decision of July 12, 1935, A–60589, as supporting the propriety of the contract then being considered.

The contracts for 2-year periods now proposed by you, however, are requirements contracts similar to the one considered in the July 12, 1935, decision, which was awarded by the former Procurement Division of the Treasury Department for the Government's requirements for a certain gear oil during the period January 1, 1935, to March 31, 1936. The Procurement Division at that time, in order to stagger the award of contracts for the Government's requirements to provide as even a flow of work as possible, contracted for periods of time beyond the end of the current fiscal year and sometimes for periods in excess of 1 year. The then Comptroller General ruled that while such re-

quirements contracts could cover a period beyond the end of the current fiscal year, they were precluded from covering a period in excess of 1 year by section 3735, Revised Statutes, 41 U.S.C. 13.

For the reasons stated in 42 Comp. Gen. 272, we are not convinced that the decision of July 12, 1935, A- 60589, permitting requirements contracts under fiscal year appropriations to cover 1-year periods extending beyond the end of the fiscal year is technically correct. Since that practice, however, has been followed for over 30 years apparently in reliance upon the July 12, 1935, decision, no objection will be made to its continuance.

It is realized that your Administration and the Department of Defense have been exempted from the provisions of section 3735, Revised Statutes, 41 U.S.C. 13, prohibiting contracts for stationery or other supplies for a longer term than 1 year from the time the contract is made. But since there is nothing in the legislative histories of such exemptions indicating an intent to permit your Administration or the Department of Defense to enter into contracts in advance of appropriations, it is not believed that such exemptions can be viewed as authorizing requirements contracts under fiscal year appropriations for periods in excess of 1 year. It also is noted that the Department of Defense obtained statutory authority to enter into multi-year service contracts under fiscal year appropriations but the Congress authorized such practice only outside the forty-eight contiguous States and the District of Columbia and with various restrictions. See Public Law 90 378, approved July 5, 1968, 82 Stat. 289, 10 U.S.C. 2306(g), and the legislative history of that act.

Accordingly, we are of the opinion the proposed repair and rehabilitation requirements contracts under fiscal year appropriations must be restricted to 1-year periods unless legislative authority for contracts covering longer periods is obtained from the Congress. Also, requirements contracts for indefinite quantities of stock supplies chargeable to the General Supply Fund, even though such fund is available without fiscal year limitation, should not be made for periods in excess of 2 years even though funds are available for the total estimated quantities, in the absence of specific legislative authority therefor or prior determination by this Office that such procurement will not be in derogation of the purposes of the advertising statutes.

We consider next the three enclosed rental proposals. Company "A" offers minimum rental periods of either 3 or 5 years under which its equipment is made available at reduced rates (rates below its usual basic monthly rental rates), but with the condition that the rental

agreement may not be discontinued during the fiscal year in which made. Afterwards, it may be discontinued without retroactive adjustment of rental charges, but only at the end of the second or subsequent fiscal year except where discontinuance is required earlier due to extreme operational or economic necessity. It is readily apparent that this plan requires a minimum rental period of more than 1 year. Moreover, the provision of the agreement permitting cancellation does not change the multi-year term of the agreement until the Government takes effective cancellation action. Such an agreement under fiscal year appropriations would be in violation of the statutes mentioned above, even if it could be terminated at the end of the first fiscal year.

Company "B" offers a 15 percentage reduction in its normal GSA contract rental charge for its systems if it receives a 5-year use delivery order. However, if the Government should choose not to complete the full 5-year term the rental price will revert to the normal monthly rental charge set forth in the current or last current GSA contract and, in addition, the Government will be required to reimburse the company for the difference between the reduced 5-year monthly rental charge and the normal monthly rental charge for those periods the equipment was in rental under the 5-year agreement.

Under this proposal the Government would be committed to a 5-year contract for the use of the equipment. A contract for the furnishing of supplies or services for a period beyond the current year is contrary to sections 3679 and 3732 of the Revised Statutes even though the Government's liability is specifically made contingent upon the availability of appropriations for future fiscal years. *Leiter* v. *United States*, 271 U.S. 204. The only contractual arrangement which would satisfy the requirements of these statutes, in the absence of statutory authority otherwise, would be a contract for the first fiscal year's needs with an option for renewal for each succeeding year upon the giving of notice to the contractor. Company "B's" proposal does not meet this requirement.

The final plan submitted (Company "C") seems to avoid these legal difficulties. Company "C's" plan is similar to the prior plan in that the Government must complete the full rental period to qualify for the benefits offered. However, Company "C" makes its benefits available at the end of the full rental period and not during the period of the rental. Monthly rental credits are to be applied during the final months of a rental period (a 24 to 60-month period may be involved), if the plan is continued on a year by year basis throughout the entire rental period. Under this arrangement the Government would not be obligated

to continue the rental beyond the fiscal year in which made, or beyond any succeeding fiscal year, unless or until a purchase order is issued expressly continuing such rental during the following fiscal year. In effect, the company is proposing a 1-year rental contract with option to renew. Also, under this proposal rental for any contract year would not exceed the lowest rental otherwise obtainable from Company "C" for 1 fiscal year. We have no legal objection to this type of rental plan for ADP equipment.

Leases of automatic data processing equipment under fiscal year appropriations must be restricted to the period of availability of the appropriation involved. With respect to the revolving funds we have no legal objection to contracting for reasonable periods of time in excess of 1 year subject to the conditions that sufficient funds are available and are obligated to cover the costs under the entire contract. See 43 Comp. Gen. 657, 661. Nor, as stated above, would we have any objection under revolving funds to contracts for a basic period with renewal options, provided funds are obligated to cover the costs of the basic period, including any charges payable for failure to exercise the options.

[B-165571]

Compensation—Promotions—Effective Date—Regular *v.* Discrimination Action Promotions

The remedial action of retroactively promoting an employee alleging racial discrimination after the employee had been promoted from grade GS-9 to grade GS-11 without regard to the complaint does not entitle the employee to the higher grade salary for the period prior to the effective date of his regular promotion, neither 5 U.S.C. 7151 nor the implementing Civil Service Regulations providing for retroactive remedial action in the event of a finding of discrimination. Furthermore, the employee may not be paid additional compensation under the "Back Pay Statute" (5 U.S.C. 5596), or on the basis of a retroactive correction of an administrative error, the failure to timely promote the employee being neither the positive adverse administrative action required for payment under the statute nor an administrative error.

To the Secretary of Housing and Urban Development, January 31, 1969:

We refer to the letter of November 1, 1968, from the former Secretary of Housing and Urban Development requesting our decision concerning the implementation of a determination of the Equal Employment Opportunity Officer of the Department of Housing and Urban Development to the extent that it would involve the retroactive promotion of an employee.

The employee concerned filed a complaint on April 14, 1967, stating in effect that he had not been promoted from grade GS-9 to grade

GS–11 as the result of racial discrimination. On February 25, 1968, while the employee's complaint was pending in the Department under procedures prescribed in Subpart B, Part 713 of the Civil Service Regulations, he was promoted to grade GS–11 without regard to his complaint. A final decision that the complaint was justified was issued on August 29, 1968. That decision specified that remedial action should be taken in the form of a retroactive promotion for the employee effective March 1, 1967.

Initially, we believe it pertinent to point out that it is well-settled law that Federal Government employees are entitled only to the salaries of positions to which they are appointed regardless of the duties they actually perform. *Ganse* v. *United States*, 180 Ct. Cl. 183 (1967).

The Equal Employment Opportunity provisions of Subpart B, Part 713 of the Civil Service Regulations were issued pursuant to the provisions of 5 U.S.C. 7151 (as delegated by Executive Order No. 11246, September 24, 1965) which directs the President to use his existing authority to insure equal employment opportunity without regard to race, color, religion, sex or national origin. However, retroactive remedial action in the event of a finding of discrimination is not specified in such law or regulations. It was suggested that retroactive compensation in this case might be proper under the "Back Pay Statute," now codified in 5 U.S.C. 5596 or under our decisions which permit retroactive correction of administrative errors. 5 U.S.C. 5596 (b) provides:

(b) An employee of an agency who, on the basis of an administrative determination or a timely appeal, is found by appropriate authority under applicable law or regulation to have undergone an unjustified or unwarranted personnel action that has resulted in the withdrawal or deduction of all or a part of the pay, allowances, or differentials of the employee—

(1) is entitled, on correction of the personnel action, to receive for the period for which the personnel action was in effect an amount equal to all or any part of the pay, allowances, or differentials, as applicable, that the employee normally would have earned during that period if the personnel action had not occurred, less any amounts earned by him through other employment during that period; and

(2) for all purposes, is deemed to have performed service for the agency during that period, except that the employee may not be credited, under this section, leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount of the leave authorized for the employee by law or regulation.

The words of the above section indicate that a positive administrative action adverse to an employee must be the basis for back pay rather than an omission or failure to take action for an improper reason. In that connection the legislative history of that provision shows that the Congress intended to enact a uniform back pay provision appli-

cable to all Federal employees as a replacement for the limited provisions in force at that time. The new provision was to create a uniform method for computing back pay and to fill certain limited gaps in the personnel covered by the existing provisions of law. We find no indication of an intent to create a new basis—such as remedial action ordered in equal employment opportunity actions—for allowance of back pay. See S. Rept. No. 1062, 89th Cong., 2d sess.; H. Rept. No. 32, 89th Cong. 1st sess. We note that the Equal Employment Opportunity program was in effect at the time the Back Pay Act of 1966 was enacted. See generally 40 Comp. Gen. 207; B-164815, August 22, 1968.

We have not overlooked the decision of July 16, 1968, B-158925, in which we held that the back pay provisions of 5 U.S.C. 5596 could be applied in cases where reemployment rights provided by law are improperly withheld from an employee upon his return from military service. That case involved a reemployment right given by law, a request for reemployment, and an improper rejection of such request. The present case and other similar cases which might arise under the Equal Employment Opportunity provisions are predicated upon the failure of an agency to observe a Government policy which results in an employee's not being accorded benefits which he would have received had it not been for his race, color, religion, sex or national origin.

Regarding our decisions permitting the retroactive adjustment of an employee's compensation because of administrative error, it is our understanding that here no error was involved in the failure to timely promote the employee. Rather, such failure was found to have resulted from discrimination in that supervisory duties which were a part of the higher grade position were not assigned to him. Moreover, we do not regard other Office decisions cited in the letter of November 1 pertaining to retroactive salary increases as being applicable.

For the reasons stated the employee concerned may not be paid additional compensation on the basis of administrative action to fix retroactively the date of his promotion.

[B-165835]

Bids—Buy American Act—Evaluation—Erroneous

The cancellation of a contract for diesel fuel injection assemblies that had been awarded under an invitation subject to the Buy American Act on the basis the low bid had erroneously been evaluated as a domestic bid and was no longer low when properly evaluated was in accord with 10 U.S.C. 2305(c), which requires an award to be made to the responsible bidder whose bid conforms to the invita-

tion and will be most advantageous to the Government, price and other factors considered. However, as the item is needed and it is ready for shipment due to the delay in protesting the award occasioned by failure to notify unsuccessful bidders of the award, the cancellation may be rescinded if the contractor will meet the low bid price, if not, award should be made to the bidder found low upon the reevaluation of bids. Prompt notices of award will avoid future similar occurrences.

To the Director, Defense Supply Agency, January 31, 1969:

We refer to letter dated January 3, 1969, from your Assistant Counsel, forwarding a report and related papers on a protest filed with our Office by Diesel Injection Control (Diesel) against the cancellation of contract DSA–700–69–C–4631, which was awarded to Diesel by the Defense Construction Supply Center (DCSC) on November 1, 1968.

Invitation for Bids (IFB) DSA–700–69–B–0167, printed on Standard Form 33 (SOLICITATION, OFFER, AND AWARD), and dated August 1, 1968, solicited F.O.B. origin bids to furnish plunger and bushing assemblies for use in a diesel fuel injector identified as FSN 2910–363–5902 or GMC P/N 5227853. Under Item 1AA, 55 units were to be shipped to Ogden, Utah, and under Item 1AB, 1,266 units were to be shipped to Oakland, California. Delivery was required within 150 days after award.

Item 9 on the face sheet of the IFB stated that all offers were subject to certain additional provisions, including Standard Form 32, GENERAL PROVISIONS (Supply Contract). Of pertinence here is paragraph 14 of Standard Form 32, entitled "BUY AMERICAN ACT," reading as follows:

14. BUY AMERICAN ACT

(a) In acquiring end products, the Buy American Act (41 U.S. Code 10 a-d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and

(iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced or manufactured in the United States exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b) (ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954.)

The reverse side of the face sheet of the IFB, entitled "REPRESENTATIONS, CERTIFICATIONS, AND ACKNOWLEDGMENTS," included a Buy American Certificate to the effect that except as listed below the certificate each end product offered was a domestic source end product as defined in the Buy American Act clause. The space provided below the certificate for listing of excluded end items also provided for specification of the country of origin.

On pages 6 and 7 of the IFB schedule continuation sheet, bidders were required to furnish certain information pertaining to production facilities, including place of manufacturer, point of inspection, packaging and packing point, shipping point, and area(s) of performance. On page 8 of the continuation sheet, bidders were required to indicate the items on which ocean-going vessels would be employed and the amount of duty involved.

On September 3, 1968, bids were opened as scheduled. Korody-Colyer Corporation (Korody-Colyer) quoted a unit price of $8.74 and indicated in the space below the Buy American Certificate that all of its end products were excluded from the certificate and that the country of origin was Italy. Diesel, with a unit price of $12.24, indicated in the space below the Buy American Certificate that none of its end products was excluded from the certificate, and no notation was entered as to the country of origin. Western Truck Service, Inc. (Western) quoted a unit price of $12.72 and made no notation below the Buy American Certificate thereby indicating that only domestic end items were offered. All three low bids offered a prompt payment discount of 1 percent 20 days. As to time of delivery, both Korody-Colyer and Western offered to meet the 150-day requirement, but Diesel offered delivery within 60 days after award.

Under production facilities, Korody-Colyer listed a plant at Magenta, Italy, and a plant at Wilmington, California, as place of manufacturer, and included notations that all items would be semi-finished at the Magenta plant and finished and tested at the Wilmington plant. Korody-Colyer also indicated that the Wilmington plant was the point of inspection, the packaging and packing point, and the shipping point, but no information was furnished under the area(s) of performance item. The Diesel bid also listed two plants under place of manufacturer; i.e., a plant at Osaka, Japan, at which it was indicated the procurement item would be semi-finished, and a plant at San

Jose, California, which was also specified as the point of inspection, the packaging and packing point, and the shipping point. Under area(s) of performance, Diesel entered 30 percent of cost for performance at Osaka and 70 percent of cost for performance at San Jose. In addition, Diesel attached to its bid a statement on its letterhead reading as follows:

> Item 1 will be received from Yanmar Engine Co., Osaka, Japan (Yanmar has Mfg. Diesel fuel injection since 1912) in a Semi-Finished state, all necessary finishing operations to qualify under procurement description. FSN 2910-368-5904 dated 2 January 1968 & Diesel Equipment Division, General Motors Corp. Drawings No's 5227853, 5227854-C, 5227855-C & 5226450 (we have these drawings on file, furnished by Naval Supply Depot, Code 105, 5801 Tabor Avenue, Philadelphia, Pa. 19120)
>
> The following operations as necessary to qualify item #1 will be done in San Jose, California.
>
> Deburring, Grinding, Lapping, Dimensional measurements, (air gaging, Optical Flats) Dynamic Flowing in test fixture, ultrasonic cleaning, preserving, packing this will constitute 70% of the total cost.
>
> We successfully completed contract # DSA 700 67 C 0733 under Contracting Officer, Mr. Edward C. Hein, Date of award 26 July 1966.
>
> This contract was also for General Motors diesel fuel injector Plunger & Bushings Assy.
>
> The Semi-Finished plunger & bushings were supplied by Yanmar Engine Co., Osaka, Japan, and finished in San Jose, California.

On page 8 of the continuation sheet, Korody-Colyer specified that ocean-going vessels would be employed for all items and the duty would amount to $.32 [per unit]. Diesel supplied no information regarding the use of ocean-going vessels for the procurement item or the payment of any duty thereon.

On the basis of the percentages specified by Diesel under area(s) of performance, Diesel's bid was regarded as offering a domestic product, and its total bid after deduction of discount ($161.82) was $16,020.43. Korody-Colyer's bid of $11,545.54 was evaluated, as provided in Armed Services Procurement Regulation (ASPR) 6-104.4 (b), by excluding the total duty of $422.72, after deduction of discount ($115.46), and adding to the net price of $11,007.36 a 50-percent differential of $5,503.68, resulting in a net evaluated bid of $16,511.04. Western's bid of $16,803.12, after deduction of discount ($168.03), was $16,635.09.

On November 1, 1968, award was made to Diesel, but notice was not issued to the unsuccessful bidders until December 5. No explanation appears in the record as to why such notice was not dispatched with more promptness as required by ASPR 2-408.1.

On December 13, DCSC received a telegram from Korody-Colyer questioning the award to Diesel on the basis that evaluation of Diesel's bid as offering a domestic product was improper. Upon review of the

matter, Diesel's bid was evaluated as offering a foreign end item, and, pursuant to ASPR 6-104.4, after allowance of the discount and a reduction of 10 percent for import duty, a 50-percent differential was added making the net evaluated price $23,309.73 or third low. Accordingly, the contracting officer notified Diesel by telegram dated December 17 that its bid had been improperly evaluated as offering a domestic product and that when properly evaluated as offering a foreign product, as required by statute, it was not low; therefore, the award was canceled. At the time of cancellation, the contracting officer states, no deliveries had been made.

In its protest to our Office, Diesel states that it received the award notice on November 2, 1968, and immediately commenced ordering the material and preparing its facilities to fulfill the contract; that by early December, when the formal award notice was received, the contract was nearing completion; and that by December 18, the date the telegraphic notice of cancellation was received by Diesel the contract had already been completed. Further, Diesel states that cancellation of the contract at this stage would place Diesel in very serious financial jeopardy. Accordingly, and on the basis that since Diesel's bid disclosed the source of its material the mistake in evaluation, if any, was solely that of DCSC, for which Diesel should not be penalized, Diesel requests that the contract be reinstated.

It is the position of the contracting officer that since Diesel has substantially completed the contract, award to the lowest bidder would be detrimental to, and would work a hardship on, Diesel and would not be in the best interest of the United States. Accordingly, the contracting officer proposes to withdraw the cancellation and to accept delivery of the end item on condition that Diesel reduce its price to the price quoted by the lowest bidder (Korody-Colyer). In this connection, the contracting officer cites our unpublished decisions B-154356, July 22, 1964, and B-154501, August 11, 1964. In the event Diesel is not agreeable to the price reduction, the contracting officer recommends that award be made to Korody-Colyer, whose bid has been extended to February 16, 1969.

It is our understanding that subsequent to the issuance of the notice of cancellation of the award to Diesel, and the receipt of the contracting officer's statement on Diesel's protest, the supply of the procurement item at DCSC was exhausted; that currently a quarterly demand for 928 units exists, against which DCSC has already received purchase requests for 883 units; that DCSC contemplates procurement

in the near future of 3,902 units (which includes the 1,321 units on the canceled contract); and that failure to receive the units covered by the Diesel contract will require an emergency purchase under the public exigency authority in 10 U.S.C. 2304(a)(2) within the next 30 days.

The Buy American Act, 41 U.S.C. 10a, provides, in pertinent part, as follows:

> Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. * * *

Executive Order No. 10582, as amended, issued in implementation of the Buy American Act, provides that materials shall be considered to be of foreign origin if the cost of the foreign products used in such materials constitutes fifty percentum or more of the cost of all the products used in such materials. Further, while the order prescribes certain differentials for the purpose of determining whether a bid or offered price for materials of domestic origin is unreasonable by comparison with a bid or offered price for materials of foreign origin, it further provides that in any case in which the head of an executive agency proposing to purchase domestic materials determines that a greater differential is not unreasonable or that purchase of materials of domestic origin is not inconsistent with the public interest, the order shall not apply.

In implementation of the statute and the Executive order, ASPR 6–101 includes the following pertinent definitions:

> (a) *Domestic source end product* means an unmanufactured end product which has been mined or produced in the United States, or an end product manufactured in the United States if the cost of its components which are mined, produced, or manufactured in the United States exceeds 50 percent of the cost of all its components. The cost of components shall include transportation costs to the place of incorporation into the end product and, in the case of components of foreign origin, duty (whether or not a duty-free entry certificate may be issued). A component shall be considered to have been mined, produced, or manufactured in the United States (regardless of its source in fact) if the end product in which it is incorporated is manufactured in the United States and the component is of a class or kind (i) determined by the Government to be not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, or (ii) as to which the Secretary concerned has determined that it would be inconsistent with the public interest to apply the restrictions of the Act.
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> * * * * * * *
>
> (e) *Foreign end product* means an end product other than a domestic source end product.
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> * * * * * * *

(e) *Foreign bid* means a bid or offered price for a foreign end product, including transportation to destination and duty (whether or not a duty-free entry certificate may be issued).

Further, the current version of the Buy American Act clause prescribed by ASPR 6-104.5 includes in the parenthetical notation at the end of the clause as quoted above from Standard Form 32 two additional sentences reading as follows:

(So as to alleviate the impact of Department of Defense expenditures on the United States balance of international payments, bids offering domestic source end products normally will be evaluated against bids offering other end products by adding a factor of fifty percent (50%) to the latter, exclusive of import duties. Details of the evaluation procedure are set forth in Section VI of the Armed Services Procurement Regulation.)

In view of the above, Diesel's bid was required to be evaluated as offering an item of foreign origin, and when so evaluated it is third low. Accordingly, and there being no indication that either the lowest bid or the second low bid was not acceptable to the Government, it follows that the award to Diesel was not in accord with the requirement of 10 U.S.C. 2305(c) that award be made to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States, price and other factors considered. In the circumstances, the cancellation of the award, in our opinion, was a proper action.

Having in mind, however, that the Government's stock of the item has been totally depleted and that an immediate need exists for 883 units to fill existing orders, acceptance of the 1,321 units which Diesel has completed and stands ready to ship without delay would appear to be in the best interest of the Government. You are therefore authorized to rescind the notice of cancellation and accept such units from Diesel, if it will agree to amendment of the price to the amount quoted by the lowest bidder, Korody-Colyer. In the event Diesel refuses to furnish the items at the reduced price, we concur with the contracting officer's recommendation that award be made to Korody-Colyer for the procurement quantity at its low bid price.

We feel compelled to point out, however, that had notice of the award to Diesel been promptly issued to the other bidders, the matter might have been brought to light before Diesel had incurred any substantial expenses. We suggest, therefore, that action be initiated to avoid any similar occurrences in future procurements.

By letter of today, the contractor is being furnished a copy of this decision.

The file forwarded by your Assistant Counsel is returned.

[B-165916]

District of Columbia—Leases, Concessions, Rental Agreements, Etc.—Property Acquired by the District

An unused school facility which was transferred by the Board of Education to the District of Columbia Government to whom the restrictions of section 321 of the Economy Act of 1932, respecting properties of the United States, do not apply, may be leased by the District under the authority in 1 D.C. Code 244(c) to the Community Assistance, Inc., a local nonprofit organization whose activities are within the scope of community activities prescribed by 31 D.C. Code 801 and section 2 of Public Law 90-292, for the use of public school buildings, provided the repairs to the building the corporation proposes to make at its own expense do not change the character or nature of the building, and the plans for the work and the work performed are approved by the District.

To the Commissioner, District of Columbia, January 31, 1969:

Your letter of January 3, 1969, concerns the lease of the "B. B. French Manual Training School" (School) to a local nonprofit corporation known as Community Assistance, Incorporated (Community Assistance).

You advise that the School is not now required for any governmental purpose and that Community Assistance desires to lease the structure from the District for a nominal consideration in order to use the structure for the conduct of various community activities. You state that the program which that organization desires to achieve through the use of the School building is very desirable; and it is your view that the District should render every possible assistance.

You advise that in order to make use of the property, various repairs will have to be performed; that these repairs involve mechanical and electrical features as well as certain fireproofing and general work such as painting and patching walls; and that the cost of the work is presently estimated by your Department of Buildings and Grounds to be about $80,000. However, the Community Assistance organization would utilize voluntary help from the community and in so doing, feel that the repairs could be performed for approximately $40,000. In any event, the Community Assistance organization is willing to bear the cost of the repairs as part of its lease agreement. In view of certain problems mentioned in your letter—which are set forth below—our advice is requested as to whether or not a lease of the property involved to the Community Assistance organization is legally permissible.

You point out that section 321 of the Economy Act of 1932, 47 Stat. 382, 412, 40 U.S.C. 303b, provides, in effect, that leasing of buildings and property of the United States must be for a money consideration only and that there is not to be included in the lease any provision for

the alteration, repair or improvement as part of the consideration for rental. You advise that in 1949, the Corporation Counsel ruled that in light of a 1932 decision of the Comptroller General (A-43718, August 10, 1932), section 321 was for application to District buildings and properties. Although the 1932 opinion of the Comptroller General was concerned with section 320 of the Economy Act, 47 Stat. 412, you point out that the Comptroller General ruled that even though the District was not specifically mentioned in that section of the act, it nonetheless applied to the District. You note that section 320 relates to "appropriations hereinafter granted * * *" and state that it appears that the Comptroller General's 1932 ruling is premised on the fact that the Congress makes appropriations for the District, but you point out that section 321 specifically refers only to properties of the United States. You state that the Comptroller General has consistently ruled that where a statute specifically refers to the United States Government, it is generally not for application to the District of Columbia Government; and that specifically, this principle was applied in connection with a question considered in B-107612, dated February 8, 1952, wherein the Comptroller General ruled that section 601 of the Economy Act, 47 Stat. 417, 31 U.S. Code 686 (1964 ed.), was not for application to the District.

Your letter continues:

> I recognize that if it is determined that Section 321 of the Economy Act does not apply to the District, a decision rendered by your office on October 6, 1952 (32 Comp. Gen. 168) would also have a bearing on the question involved. That decision dealt with a proposed lease of District-owned property known as the Western Market. It was contemplated that the lessee would lease the site for a term not exceeding fifty years, remove the existing building and erect a modern parking facility on the site as well as provide accommodations for the market. In that decision, the Comptroller General pointed out that Congress specifically authorizes and appropriates funds for the construction of buildings for the District of Columbia and concluded that the construction of new buildings by and for the District of Columbia requires authority, either specifically expressed or necessarily implied, in some congressional enactment. I believe that the instant question involving as it does merely repairs to a structure - and not the construction of a new building--which is not being used by the District should be distinguished from the opinion dealing with the Western Market. Particularly, if it is determined that the provisions of Section 321 of the Economy Act are not applicable to the District, it would seem to follow that the District's authority to lease (Section 1-244(c), D.C. Code) would necessarily include by implication the authority to provide for incidentals normally associated with leasing, such as performance of repairs by tenants.

As indicated in your letter, section 321 of the Economy Act of 1932, as amended, 40 U.S.C. 303b specifically refers to "buildings and properties of the United States." The school building in question is the property of the District of Columbia, not the United States. We have held that statutes (including section 601 of the Economy Act of 1932)

referring specifically to the executive departments and establishments of the Federal Government are not applicable to the District of Columbia Municipal Government. See A–95478, June 13, 1938; 17 Comp. Gen. 296; B–37995, November 25, 1943; B–42887, July 18, 1944; 25 Comp. Gen. 579; and B–107612, February 8, 1952. *Cf.* B–34764, June 22, 1943. The rationale of those decisions would appear applicable in the instant case. That is to say, it is our view that a statute specifically referring to "buildings and properties of the United States" would not be applicable to buildings and properties of the District of Columbia Municipal Government.

As to our decision of October 6, 1952, 32 Comp. Gen. 168, in light of what is set forth below we do not feel it necessary to determine at this time whether the decision rendered in that case (or in 35 Comp. Gen. 214) is otherwise distinguishable from the instant case.

The act of December 20, 1944, as amended, 1 D.C. Code 244(c), provides, in pertinent part, as follows:

> The Commissioners of the District of Columbia are authorized and empowered within their discretion—
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> * * * * * * *
>
> (c) * * * To rent any building or land belonging to the District of Columbia or under the jurisdiction of the Commissioners, or any available space therein, whenever such building or land, or space therein, is not then required for the purpose for which it was acquired * * *.

With respect to the use of public school buildings in the District of Columbia by private citizens, 31 D.C. Code 801, provides that:

> The control of the public schools in the District of Columbia by the Board of Education shall extend to, include, and comprise the use of the public-school buildings and grounds by pupils of the public schools, *other children and adults, for supplementary educational purposes, civic meetings for the free discussion of public questions, social centers, centers of recreation, playgrounds. The privilege of using said buildings and grounds for any of said purposes may be granted by the Board upon such terms and conditions and under such rules and regulations as the Board may prescribe.* [Italic supplied.]

Note also in connection with the use of school buildings for community activities the following language used in section 2 of the District of Columbia Elected Board of Education Act, Public Law 90–292, 82 Stat. 101:

> SEC. 2. *The Congress hereby finds and declares that the school is a focal point of neighborhood and community activity;* that the merit of its schools and educational system is a primary index to the merit of the community; and that the education of their children is a municipal matter of primary and personal concern to the citizens of a community. It is therefore the purpose of this Act to give the citizens of the Nation's Capital a direct voice in the development and conduct of the public educational system of the District of Columbia; to provide organizational arrangements whereby educational pro-

grams may be improved and coordinated with other municipal programs; *and to make District schools centers of neighborhoods and community life.* [Italic supplied.]

We have been informally advised by a representative of the D.C. Government that the program (i.e., community activities) which will be conducted by Community Assistance, will fall generally within the scope of the activities or purposes set forth in 31 D.C. Code 801. In the instant case, as we understand it, the school building in question has been transferred from the jurisdiction of the Board of Education (Board) to the District Commissioner, apparently after a determination by the Board that the building was no longer needed for school purposes. As a result of such transfer the building is not now considered within the scope of the provisions of 31 D.C. Code 801, or section 2 of Public Law 90-292. Even so, these two provisions of law make it clear that the Congress apparently not only has no objection to nonprofit organizations using public school buildings for, in effect, community purposes and upon whatever terms and conditions and rules and regulations the Board of Education sees fit to prescribe, but, in effect, encourages such use.

Further, while the District Government has discretionary authority under 9 D.C. Code 301 to sell real estate it does not need (with the approval of NCPC), it apparently does not intend to either dispose of, or renovate, at this time the building involved here. Moreover, you have determined that the program (i.e., the community activities) intended to be carried out by Community Assistance in the building is very desirable insofar as the District is concerned and that the District should lend every possible assistance to that organization. Also, as indicated above, the use of the school building for community activities would not be inconsistent with congressional intent as evidenced by 31 D.C. Code 801 and section 2 of Public Law 90-292, even though such provisions of law may not be controlling in the instant case.

Considering all the foregoing facts and circumstances and assuming that the community activities involved will be similar to those set forth in 31 D. C. Code 801, we would not question the legality of the proposed lease in the instant case, provided any work on the building involved which Community Assistance must perform to enable it to use the building does not change the essential character or nature of the building, and the plans for the work and the work performed are approved by the District of Columbia Government.

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