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[B-148324]

Military Personnel—Reservists—Death or Injury—Inactive Duty Training, Etc.—Ability To Perform Limited Duty

Under 37 U.S.C. 204(i) a Reserve member of the naval service who is disabled by disease incurred in line of active duty or injured while in the performance of active duty or inactive duty training for any period of time is entitled to the same pay and allowances which would be payable in the same circumstances to a member of the Regular Navy of corresponding grade and length of service, but whether a disabled reservist who is physically qualified to perform duty of a limited or restricted nature is entitled to pay and allowances, and if so whether the entitlement would continue until he is qualified to perform his full and specialized duties, cannot be answered categorically, since the answer to each question would depend upon the facts of the particular case to which the question relates.

Pay—Active Duty—Reservists—Injured in Line of Duty—Ability To Perform Limited Duty Effect

A Reserve officer injured in line of duty who is not physically capable of performing his normal duties as an aviation pilot and who although able to perform is not placed in a limited or restricted Reserve duty status upon release from hospitalization is nevertheless entitled to pay and allowances until he is physically fit to perform his full and specialized naval duties, 37 U.S.C. 204(i) authorizing payment of pay and allowances to disabled Reserve officers in the same circumstances under which Regular officers would receive pay and allowances. When a disabled Reserve member is found physically fit to perform military or naval duties without qualification, the basis of entitlement to pay and allowances under 37 U.S.C. 204 (g), (h), or (i) is extinguished.

To the Secretary of the Navy, July 2, 1968:

Further reference is made to letter of March 30, 1968, from the Assistant Secretary of the Navy (Financial Management) requesting a decision on three questions relating to the provisions of section 204(i), Title 37, U.S. Code. The request was assigned control Number SS-N-989 by the Department of Defense Military Pay and Allowance Committee.

Section 204(i) provides as follows:

(i) A member of the Naval Reserve, Fleet Reserve, Marine Corps Reserve, Fleet Marine Corps Reserve, or Coast Guard Reserve is entitled to the pay and allowances provided by law or regulation for a member of the Regular Navy, Regular Marine Corps, or Regular Coast Guard, as the case may be, or corresponding grade and length of service, under the same conditions as those described in clauses (1) and (2) of subsection (g) of this section.

Clauses (1) and (2) of subsection (g) are as follows:

(1) he is called or ordered to active duty (other than for training under section 270(b) of title 10) for a period of more than 30 days, and is disabled in line of duty from disease while so employed; or

(2) he is called or ordered to active duty, or to perform inactive-duty training, for any period of time, and is disabled in line of duty from injury while so employed.

Thus, under authority of section 204(i) a Reserve member of the naval service who becomes disabled by reason of an injury incurred in line of duty while in the performance of active duty or inactive duty training for any period of time is entitled to receive the same pay and allowances which would be payable in the same circumstances to a member of the Regular Navy of corresponding grade and length of service.

The details of an actual case are outlined in the letter of March 30, 1968, for the purpose of stressing the nature of the administrative problems reflected in the three questions set forth below. A Naval Reserve officer (an aviation pilot engaged in Naval Air Reserve training) sustained a back injury when he ejected from his aircraft during a scheduled drill period on May 17 (no year shown). The injury was incurred in line of duty. He was hospitalized until May 21 and then released from the hospital with the recommendation that he not return to work for about 6 weeks. It appears that the recommendation that he not return to work for about 6 weeks had reference to his civilian employment.

It is stated that following release from the hospital the officer was examined periodically at the Naval Air Station Dispensary. It appears that although he was not considered as physically qualified to perform his usual and normal duties as an aviation pilot, including aerial flights, prior to July 6 he was, in the opinion of the naval medical authorities, considered as physically fit to perform naval duties of a limited or restricted nature. The information furnished indicates that the officer did not perform any inactive duty training drills during the period from May 22 to July 5, inclusive.

There is no question as to the officer's entitlement under authority of 37 U.S.C. 204(i) to receive pay and allowances for the period through May 21. The question as to his entitlement to pay and allowances arises with respect to the period from May 22 to July 5, inclusive, when he was not physically capable of performing the full duties of an aviation pilot but was considered as being physically capable of performing naval duties of a limited or restricted nature. In that connection the discussion contained in the letter of March 30, 1968, outlines the administrative difficulties and the practical aspects involved in endeavoring to extend to Reserve members of the naval service the same pay and allowances under authority of 37 U.S.C. 204(i) that a Regular member of the naval service would be entitled to receive in similar circumstances.

It is pointed out that whereas no particularly acute administrative problems ordinarily are encountered in assigning an injured Regular member to limited or restricted duties, such a course of action may

be completely impractical in certain situations involving Reserve members. For example, the Reserve officer mentioned above is an aviation pilot and it is stated that "In the area of Naval Air Reserve Training, there are practical impediments to placement of an aviation pilot on limited duty with his unit when the primary mission of that unit is training in the flight of aircraft."

In further reference to this same officer it is stated:

> Obviously, in the case of the officer portrayed * * * he was not physically qualified to fly from 17 May until 6 July because he was not found fit to perform full duties, including flying duties, until the later date. *But his entitlement to the continuance of pay authorized under 37 U.S.C. 204(i) was adversely affected from 21 May because he was considered physically fit to perform limited duties, regardless of the practicability of his placement to perform limited duties.* [Italic supplied.]

The conclusion reached in the sentence underscored above seems to be based on the statement contained in our decision of May 19, 1964, 43 Comp. Gen. 733, reading (at page 737) as follows:

> It seems reasonably clear that a right to active duty pay and allowances under the above-cited provisions of law while the member concerned is temporarily disabled by injury incurred in line of duty, is based upon physical disability to perform military duty, not his normal civilian pursuit, and that the determination as to how long the disability continues is left to the exercise of a sound administrative judgment. If, despite his injury, the service concerned should actually return him to a limited or restricted Reserve duty status where he would be subject to being called upon to perform such duty as his physical condition would permit, we would regard the continued payment of active duty pay and allowances in such circumstances as being too doubtful to warrant our approval of such payment. 37 Comp. Gen. 558. In each case, the service concerned should determine when the injured reservist recovers sufficiently to be fit to perform his normal military duties. In making that determination, the service should apply the same standards it would apply in the case of a member of the Regular service.

The following three questions are presented for resolution:

1. Should entitlement cease when a member is physically qualified to perform duty of a limited or restricted nature?;
2. Should entitlement continue until the member is physically qualified to perform his full and specialized duties such as flying, deepsea diving, or underwater demolition?; and
3. In addition to being found physically qualified for return to duty status, is it necessary that a member's return to duty status be actually accomplished administratively before entitlement can be terminated?

The first two questions are not open to an unqualified reply. They may not be answered categorically for the reason that the answer to each question depends upon the facts of the particular case to which that question relates. Therefore, the answers to these two questions will be based on the assumption that they relate to the facts which have been outlined above in the case of the Naval Reserve officer who was injured during a scheduled inactive duty training drill on May 17; who was released from hospitalization on May 21, physically fit to perform naval duties of a limited or restricted nature: but who was

not administratively considered to be physically fit to perform his full naval duties as an aviation pilot until July 6.

The officer in question appears to have been entitled on May 17 to receive compensation (basic pay) under the provisions and at the rate prescribed in 37 U.S.C. 206(a). In addition, under the provisions of 37 U.S.C. 301(f) he appears to have been entitled to receive incentive (hazardous duty) pay for duty involving aerial flights. Section 110, Executive Order No. 11157, June 22, 1964, 29 F.R. 7973, provides that any member of the uniformed services who is required by competent orders to perform hazardous duty and who becomes injured or otherwise incapacitated as a result of the performance of any such hazardous duty, by aviation accident or otherwise:

> * * * shall be deemed to have fulfilled all of the requirements for the performance of all hazardous duties which he is required by competent orders to perform, for a period not to exceed three months following the date as of which such incapacity is determined by the appropriate medical authority.

It seems apparent from the facts mentioned above that the Naval Reserve officer in question was not physically capable of performing his normal duties as an aviation pilot from the date of the accident on May 17 through July 5, inclusive. The record further indicates that he was not called to or placed in a limited or restricted Reserve duty status during the period from May 22 to July 5, inclusive.

Accordingly, question 1 as it relates to this Naval Reserve officer or other Reserve members in similar circumstances is answered in the negative.

As it relates to the same Naval Reserve officer or to other Reserve members in similar circumstances and subject to the observations made in the answer to the following question and to the limitations prescribed on the payment of incentive (hazardous duty) pay in Executive Order No. 11157, question 2 is answered in the affirmative.

The third question is broad enough to be of more general application. The administrative doubt reflected in this question may stem from the sentence which precedes the citation to 37 Comp. Gen. 558 contained in that part of the decision of May 19, 1964, previously quoted.

Also, in decision of March 4, 1958, 37 Comp. Gen. 558, it was stated (at page 559) that:

> The statute contains no provision indicating the exact time, during the period of convalescence from a disabling injury incurred in line of duty, when the right to active-duty pay and allowances should be considered to terminate. The determination as to how long a member continues to be "disabled" appears to have been left to the exercise of sound administrative discretion. Since there are varying degrees of "temporarily restricted duty" and "limited activities" which may be applicable in different cases of the type here involved, where a member is returned to a National Guard duty status, we believe that the matter of his right

to active-duty pay and allowances should be decided on the basis of whether or not he is returned to a duty status and without regard to the amount or degree of restricted or limited duty it is recommended that he perform after his return.

It is to be observed that in both decisions it was indicated that, where a Reserve member is capable of performing restricted or limited duty, the actual return of such a Reserve member to a Reserve duty status was to be considered as the determinative factor in establishing the cutoff date of the pay and allowances authorized by the provisions of law now codified in subsections (g), (h) and (i) of section 204, Title 37, U.S. Code. Under the rule so established the provisions of 37 U.S.C. 204 (g), (h) or (i) cease to be applicable when such a Reserve member is officially returned to a Reserve duty status.

On the other hand, when a Reserve member is found to be physically fit to perform his military or naval duties without qualification, it seems clear that the basis of entitlement to pay and allowances under authority of 37 U.S.C. 204 (g), (h) or (i) has been extinguished and no longer exists. Question 3 is answered accordingly.

[B-163543]

Veterans—Education—Dual Benefits—Prohibition

The provision in 38 U.S.C. 1781, which prohibits the granting of an educational assistance allowance or special training allowance to or on behalf of an eligible person or veteran under chapter 34 of Title 38, U.S. Code, for any period of enrollment in a program of education or course paid for by the United States under "any other provision of law," where the payment constitutes a "duplication of benefits paid from the Federal Treasury," having been uniformly and consistently interpreted by the Veterans Administration to mean payments for the same or similar benefits or purposes, even if the costs are not identical, the interpretation is entitled to great weight under the rule of statutory construction, particularly where the provision was reenacted, and it is immaterial whether a payment under other than chapter 34 is made to an educational institution.

Unemployment Retraining—Effect on Veterans Educational Benefits

To the extent that the Manpower Development Training Act program funds made available by agreement between the Labor Department and States, private and public agencies, and employers for on-the-job training to equip selected persons in appropriate skills are used to pay costs considered tuition costs, under the Veterans Administration contemporaneous and longstanding construction of 38 U.S.C. 1781, and prior similar provisions of law, the payment of an educational assistance allowance to a trainee under chapter 34 of Title 38, U.S. Code, would constitute a duplication of benefits paid from the Federal Treasury and, therefore, such a payment is barred.

Public Health Service—Educational Grants—Effect on Veterans Educational Benefits

When scholarships to students from Public Health Service grants to educational institutions under 42 U.S.C. 295g cover in part either tuition or living expenses,

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or both, the payment of an educational assistance allowance under chapter 34 of Title 38, U.S. Code, is barred under the longstanding construction by the Veterans Administration of section 1781 that such a payment would constitute a duplication of benefits paid from the Federal Treasury.

To the Administrator, Veterans Administration, July 2, 1968:

Your letter of February 9, 1968, concerns two questions which have been presented to the Veterans Administration (VA) for consideration relating to the legality of the payment of the educational assistance allowance authorized by chapter 34 of Title 38, United States Code, at the same time educationally orientated benefits are being provided under a program administered by a different agency of the Government (i.e., the Department of Labor and the Department of Health, Education, and Welfare). You state that although you have broad authority for administering the benefits authorized by Title 38, where the expenditure of appropriated funds administered by separate agencies is concerned, the matter presented cannot be finally resolved without obtaining our views thereon.

Specifically, you have received a request from the Department of Labor as to whether the veterans' educational assistance allowance authorized by 38 U.S.C. chapter 34, may be paid at the same time the individual is receiving on-the-job training under a Manpower Development Training Act program authorized by Title II of Public Law 87-415 (42 U.S.C. 2581-2602). You have also received a similar question in connection with a situation where a person is receiving scholarship aid under a Public Health Service scholarship grants program authorized by 42 U.S.C. 295g.

The questions you have been asked to consider arise as a result of the provisions of 38 U.S.C. 1781 which reads as follows:

No educational assistance allowance or special training allowance shall be paid on behalf of any eligible person or veteran under chapter 34 or 35 of this title for any period during which such person or veteran is enrolled in and pursuing a program of education or course paid for by the United States under any provision of law other than such chapters, where the payment of an allowance would constitute a duplication of benefits paid from the Federal Treasury to the eligible person or veteran or to his parent or guardian in his behalf.

You advise that this prohibition was carried forward from prior laws providing educational opportunities for veterans, and the VA regulations implementing the earlier laws interpreted the statutory provision as applying to any course paid for in whole or in part by the United States.

You state that the following is a brief résumé of your understanding of the two non-VA programs which are involved:

(a) Under the specific authority contained in 42 U.S.C. 2584, the Department of Labor can enter into agreements with States, private and public agencies, and employers, etc., whereby MDTA funds are paid for the cost of instruction, materials, spoilage, and other expenses relating to on-the-job training needed to equip selected persons with the appropriate skills. Trainees are paid by employers for

productive work. Employers, however, are not reimbursed for this expense. Under certain circumstances, the trainees will be paid a travel and subsistence allowance, paid directly to them by the Federal Government, when their training is away from home. With the exception of these special cases, no Federal funds would be paid directly to the individual trainee, other than the veterans benefits to which he would be entitled.

(b) Public Law 89-290 (42 U.S.C. 295g) authorized the Surgeon General to make scholarship grants to certain public or other non-profit schools of medicine, osteopathy, dentistry, optometry, podiatry and pharmacy for scholarships to be awarded annually by the school. Scholarships for individuals are awarded by the schools only to those from low-income families who, without such financial assistance, could not pursue a course at the school for that year. Grants to the schools may be paid in advance or by way of reimbursement. The lump sum grant is paid to the institution. The school selects the students to whom scholarships are granted. The amount of the individual scholarship is determined on the basis of the student's need for financial aid to meet expenses of tuition, books, supplies, housing and dependents. The schools are not required to deny scholarships to veterans who are receiving educational assistance from the VA. The amount received would, however, be a factor in determining the extent of his need for scholarship aid. At the end of the year the school reports to Public Health Service the number of students to whom scholarships have been awarded and the amount of each scholarship. If the total of the scholarships awarded exceeds the amount of the grant, reimbursement is authorized. If the full amount of the grant has not been expended, the surplus reverts to the Federal Treasury. In any event, however, Federal funds would not be paid directly to the individual student, other than the veterans benefits to which he would be entitled.

You state that the specific question which must be resolved is whether the two non-VA programs in question are in fact paid for in whole or in part by the United States to the extent that the payment of the veterans' educational allowance authorized by chapter 34 of Title 38 would constitute a duplication of benefits from the Federal Treasury so as to be barred by the provisions of the above-quoted 38 U.S.C. 1781. Our conclusions on this matter are requested.

The purpose of the educational assistance allowance authorized by chapter 34 of Title 38, is to enable the recipient to "meet, in part, the expenses of his subsistence, tuition, fees, supplies, books, equipment, and other educational costs." (38 U.S.C. 1681(a))

It is our view that it is immaterial in the case of a veteran whose education is being paid for—in whole or in part—by the United States under a provision of law other than chapter 34 of Title 38, United States Code, whether the payment involved is made directly to the veteran (or to his parent or guardian on his behalf) or directly to the entity or organization providing his education, insofar as determining whether the payment of an educational assistance allowance under chapter 34 would constitute a duplication of benefits paid from the Federal Treasury is concerned. In other words the fact that Federal funds used to pay for a veteran's education under provisions of law other than chapter 34 of Title 38 are paid to other than the veteran (or his parent or guardian on his behalf), would not be controlling in connection with determining whether the payment of an educational assistance allowance to such veteran (or his parent or guardian on his

behalf) under chapter 34 would constitute a duplication of benefits paid from the Federal Treasury.

To hold that 38 U.S.C. 1781 is not for application unless the Federal funds used to pay for a course of education being pursued by a veteran under a provision of law other than chapter 34 of Title 38 are paid directly to such veteran (or to his parent or guardian on his behalf) could have the effect of completely circumventing the provisions of 38 U.S.C. 1781 in that it would permit the receipt of duplicate benefits.

In any event, as indicated in your letter, the prohibition contained in 38 U.S.C. 1781 was carried forward from prior laws providing educational opportunities. One of the prior laws was the War Orphans' Educational Assistance Act of 1956, Public Law 634, 84th Congress, 70 Stat. 420, section 502 of which contained provisions almost identical with 38 U.S.C. 1781. The legislative history of section 502 discloses that the purpose of the provision is to prohibit the payment of allowances that will be paid under the act involved for periods during which the education of the eligible person is being paid for by the United States. See page 13, S. Rept. No. 2063, and page 24, H. Rept. No. 1974, of the 84th Cong., on the War Orphans' Educational Act of 1956, *supra*.

Although it is not completely clear from 38 U.S.C. 1781 or its legislative history or from the legislative history of section 502, what the Congress intended, we understand that the VA has always interpreted 38 U.S.C. 1781 and similar provisions in earlier laws as precluding the payment of an educational assistance allowance (or similar allowance) to an eligible person or eligible veteran pursuing a course of education paid for in whole or in part by the United States under any provision of law (other than the involved chapter of Title 38) if the payment involved (under such other law) covered in whole or in part either living expenses or tuition, or both, even though the payment under such other provision of law was not made directly to the eligible person or veteran or to his parent or guardian on his behalf.

The phrase "duplication of benefits" could be interpreted as pertaining only to payments covering identical costs. However, the VA has apparently interpreted "duplication of benefits" in its broadest sense and thus construed it to mean payments for the same (or similar) benefits or purposes, even though the payments do not cover identical costs. In other words, as indicated above, the VA has interpreted the phrase in question to preclude payment of an educational assistance allowance under chapter 34 to a veteran whose tuition or living expenses (or both), is being paid, in part, from Federal funds (under some other provision of law), even though the payment under the other Federal law and the educational assistance allowance payment would not cover the same identical portion of such expenses.

It is a well-established rule of statutory construction that the contemporaneous construction placed on an ambiguous statute by the officers or departments charged with its enforcement and administration is to be considered and given weight in construing the statute, especially if such construction has been uniform and consistent and has been observed and acted on and acquiesced in for a long time. According to the judicial authorities, such construction should not be disregarded or overturned except for the most cogent reasons and even where the executive construction is unsupported by law, it will be disturbed only when the issues presented require it. Also, executive construction is entitled to additional weight where it has been impliedly indorsed by the legislature, as by the reenactment of the statute, or the passage of a similar one in the same or substantially same terms (such as is true in the instant case). 82 C.J.S. Statutes 359.

Accordingly, we would not disagree with your Administration's contemporaneous and long standing interpretation of the provisions of law now appearing in 38 U.S.C. 1781.

Therefore, whether the two non-VA programs involved here are in fact paid for in whole or in part by the United States, to the extent that payment of the veterans' educational assistance allowance authorized by chapter 34 of Title 38 would constitute a duplication of benefits from the Federal Treasury so as to be barred by the provisions of 38 U.S.C. 1781, depends upon whether the Federal funds involved in the non-VA programs are to provide in whole or in part an allowance for living expenses or tuition, or both.

Concerning the MDTA program, your letter discloses that MDTA program agreements may provide that MDTA funds may be used to pay for the cost of instruction, materials, spoilage and other expenses related to on-the-job training needed to equip selected persons with the appropriate skills. Thus, under the MDTA program Federal funds may be used to pay costs that, in effect, are tuition costs. Hence, under the VA's contemporaneous and long standing administrative construction of 38 U.S.C. 1781 and prior similar provisions of law, it would appear that to the extent that MDTA funds are used to pay the costs enumerated above on account of a trainee, the payment of an educational assistance allowance to such trainee under chapter 34 of Title 38 would constitute a duplication of benefits paid from the Federal Treasury and hence be barred by 38 U.S.C. 1781.

As to the scholarships awarded by schools from grants made to such schools by the Surgeon General under 42 U.S.C. 295g, the scholarships are to cover such portion of the student's tuition, fees, books, equipment, and living expenses at the school, but not to exceed $2,500 for any year as the school may determine the student needs for such

year on the basis of his requirements and financial resources. (42 U.S.C. 295g(c)(2)). Thus, the Public Health Service scholarship grants may cover tuition and living expenses. Accordingly, to the extent that a scholarship awarded to a student under the PHS grants program authorized by 42 U.S.C. 295g covers in part either tuition or living expenses or both, the payment of an educational assistance allowance under chapter 34 would (in light of what is stated above) constitute a duplication of benefits paid from the Federal Treasury and hence be barred by 38 U.S.C. 1781.

The question presented is answered accordingly.

[B-163537]

Witnesses—Military Personnel—Courts of Foreign Forces

When the commanding officer of a military installation desires to honor a properly made request for the appearance of a member of his command as a witness before an authorized service court of a friendly foreign force, he may under the authority in 22 U.S.C. 703 issue orders to the member directing his attendance as a witness, and consider the member on official business in the nature of detached service while traveling and while in attendance at the proceedings of the foreign court. The member witness under 28 U.S.C. 1821 would be entitled to the fees and mileage, including subsistence when applicable, authorized for witnesses attending United States courts, payment to be made to the member from funds supplied by the foreign force, in advance if available, or after completion of the service upon availability of the funds.

To the Secretary of the Air Force, July 10, 1968:

Further reference is made to letter of January 30, 1968, with enclosures, from the Under Secretary of the Air Force, requesting decision concerning the payment of travel and transportation expenses for members of the Armed Forces appearing as witnesses before the service courts of friendly foreign forces in certain circumstances. The request for decision was assigned Control No. 68-6 by the Per Diem, Travel and Transportation Allowance Committee.

In the letter it is pointed out that the powers and privileges provided in 22 U.S.C. 701-706 in connection with the jurisdiction of courts martial or other military tribunals of friendly foreign forces within the United States and the attendance of persons subject to the jurisdiction of the United States as witnesses at such service courts may be implemented when deemed necessary for the maintenance of discipline, and after a finding and declaration by the President. Proclamation No. 3681, dated October 10, 1965, 79 Stat. 1512, 30 F.R. 13049, made such finding and declaration with respect to the military, naval and air forces of Australia.

The Under Secretary says that, while no specific guidance is provided for the payment of the expenses of military witnesses, it appears

that the statute contemplates that the procedure established therein for the payment of witnesses in general, should apply to military witnesses, and that they should be paid in advance with funds to be supplied by the friendly foreign forces. Also, he says it has been recommended that, for the purposes of establishing uniform procedures, the Joint Travel Regulations be amended to prescribe authorized travel and transportation allowances for members of the uniformed services appearing as witnesses before such service courts.

However, prior to amending the Joint Travel Regulations he requests our opinion concerning the following questions.

1. When a Commanding Officer desires to honor a properly made request for the appearance of a member of his command as a witness before an authorized service court of a friendly foreign force, should the witness be issued official travel orders and will he be considered to be on official business during the period of his travel to and from and while attending the service court?
2. Does the statute contemplate that the necessary expenses of military witnesses shall be paid or tendered directly to the individual witness by a friendly foreign force or may such witnesses be paid the standard travel and per diem allowances authorized in the Joint Travel Regulations for temporary duty, with reimbursement to the U.S. Government being obtained later from the friendly foreign force?
3. If the necessary expenses are to be paid or tendered directly to the individual witness by a friendly foreign force, will this be done on a standard fee schedule basis (*cf.* Rule 17(d) of the Federal Rules of Criminal Procedure), or will it involve payment of the actual expenses of travel, lodging, and subsistence incurred by the witness?

Section 703(a) of Title 22, United States Code, provides generally for obtaining the attendance of persons subject to the jurisdiction of the United States as witnesses at service courts of friendly foreign forces by means of judicial process and states specifically that "the fees of such witnesses and the mileage at the rate allowed to witnesses attending the courts of the United States should be duly paid or tendered in advance to such witnesses, with funds to be supplied by the friendly foreign force." Such language appears to contemplate that the witness fees and mileage will be paid or tendered by the designated official of the court issuing the process (28 U.S.C. 1825) from funds furnished by the friendly foreign force.

Section 703(b) of the statute provides specially that attendance of witnesses in the Armed Forces of the United States shall be obtained by request addressed to the discretion of the commanding officer of the person whose testimony is required. We are in agreement with the Under Secretary's view that this provision relates to obtaining the attendance of military witnesses and does not operate to exclude such witnesses from the payment provisions of section 703(a) that the fees and mileage of such witnesses shall be at the rate allowed to witnesses attending the courts of the United States and shall be paid or tendered in advance with funds to be supplied by the friendly foreign force. We believe the section should be applied as substituting the command-

ing officer for the court for the purpose of ordering the attendance of the military witness and paying or tendering the fees and mileage.

It is our view, therefore, that when the commanding officer desires to honor a properly made request for the appearance of a member of his command as a witness before a foreign service court, the member witness should be issued official orders by his military command directing his attendance and, that he should be considered as being on official business in the nature of detached service while traveling to and attending the proceedings of the foreign court.

In answer to question 2 concerning the payment of necessary expenses to military witnesses, as indicated above, we believe that, notwithstanding their official duty status, the special provisions of 22 U.S.C. 703(a) contemplate that military witnesses, like nonmilitary persons under United States jurisdiction appearing as witnesses before the foreign service courts, shall be paid the fees and mileage, including the additional allowance of $8 per day for subsistence if applicable, authorized generally for witnesses attending United States courts by 28 U.S.C. 1821. In line with the provisions of 22 U.S.C. 703(a) the necessary expenses of military witnesses should be paid in advance with funds supplied by the friendly foreign force. In case such funds may not then be available, the witness should be paid after the service is completed when funds for such payment have been supplied by the foreign force.

In view of the answers to questions 1 and 2, no answer to question 3 is required.

[B–138132]

Pay—Promotions—Temporary—Saved Pay—Items for Inclusion or Exclusion

Although enlisted members of the Navy or Marine Corps who at the time of appointment or promotion to commissioned officer grades under 10 U.S.C. 5586, 5589, 5596, 5597, 5784, or 5787, were receiving proficiency pay may not have the pay and allowances of their permanent status reduced because of the temporary appointment and entitlement under 37 U.S.C. 204 to the pay and allowances of the temporary grades, they are not entitled to saved proficiency pay unless they continue to meet the eligibility conditions prescribed by Navy Regulations. A member does not meet the prescribed conditions of eligibility for proficiency pay when as part of his duties as an officer he utilizes the skills of his military speciality for which the pay was authorized in the supervision of other personnel with similar skills.

To the Secretary of the Navy, July 16, 1968:

Further reference is made to letter dated May 1, 1968, from the Assistant Secretary of the Navy requesting decision on two questions concerning entitlement of members appointed or promoted to commissioned officer grades under the provisions of 10 U.S.C. 5586, 5589,

5596, 5597, 5784 or 5787 to proficiency pay as an item of saved pay. The request was assigned Control No. SS–N–994 by the Department of Defense Military Pay and Allowance Committee.

In his letter the Assistant Secretary says that it is provided in 37 U.S. Code 905(g) and (h), and 10 U.S. Code 5586(f), 5589(d), 5596(f), and 5784(e), that such persons may not suffer a reduction in the pay and allowances to which they were entitled because of their permanent status at the time of their appointment or promotion. Also, he says that proficiency pay is authorized by 37 U.S. Code 307 for enlisted members of the uniformed services and it also provides that the Secretary of Defense will prescribe regulations for the administration of the program.

Further, the Assistant Secretary states that the Secretary of Defense in DOD Directive 1340.2 issued general instructions implementing the program and delegated the responsibility of administering it to the Secretary of each military department. He refers to the regulations pertaining to the Navy which are currently set forth in paragraph 4, BUPERS Instruction 1430.12G dated December 20, 1967. Under subparagraph b it states the second requirement as:

b. Are considered qualified in an authorized Military Specialty and are assigned to and serving in an authorized military specialty billet reflected on the command's Manpower Authorization (OPNAV 1000/2) and utilizing the skills of the military specialty. * * *

The Assistant Secretary quotes from page 23 of our decision in 23 Comp. Gen. 21, as follows:

Moreover, while the previous pay and allowances of a person temporarily appointed to a higher grade are saved from reduction due to the temporary appointment, they are not saved from reduction due to other changes in the conditions affecting such pay and allowances.

Also, he quotes from page 489 of our decision in 38 Comp. Gen. 487 as follows:

It follows that under the terms of the saving provisions, proficiency pay is saved to the members concerned, in conjunction with the other pay and allowances of their enlisted grades, while they continue to meet all the conditions of eligibility for such pay after their appointments, and while the total pay and allowances to which they were entitled in their former enlisted status, including proficiency pay, is in excess of the pay and allowances of their officer grades, excluding proficiency pay. That is, the members concerned are entitled to receive at least the pay and allowances they were entitled to receive before their appointments as officers, to the extent they would have continued to receive such pay and allowances if they had not been appointed to officer status. If the members concerned do not continue to meet the prescribed conditions of eligibility for proficiency pay after their appointments, their proficiency pay is not saved to them as the reduction in that case is not due to the appointment but to the failure to otherwise qualify for proficiency pay.

The Assistant Secretary asks the following questions:

1. Some doubt arises as to whether proficiency pay may properly continue as an item of "saved pay" in the situation where the member (now an officer) is no longer actually assigned to and serving in a billet listed on the Manpower

Authorization (NAVPERS 576), such billet having been filled by an enlisted member who is now assigned thereto and serving therein. However, the duties of the member (now an officer) continue to include the utilization of the skill of the specialty.

2. Your further decision is requested as to whether a member who was receiving proficiency pay (P–3) at $100.00 per month as an Electronics Technician with an assigned NEC of 3332 at the time of his appointment or promotion would be entitled to include proficiency pay (P–2) at $75.00 per month as an item of saved pay, if he were on duty at a station where there was no requirement for a member with an assigned NEC of 3332 but there was a requirement for Electronics Technicians and his duties include the utilization of the skills of an Electronics Technician while supervising others who maintain the electronic equipment, even though he is not serving in a billet listed on the Manpower Authorization (NAVPERS 576).

Section 204 of Title 37, U.S. Code, provides that a member is entitled to the pay of the grade in which assigned or distributed in accordance with his years of service. Therefore, a member receiving a temporary appointment is entitled to the pay and allowances of his temporary grade.

However, as the Assistant Secretary points out in his letter, sections 905 (g) and (h) of Title 37, U.S. Code, and sections 5586(f), 5589(d), 5596(f) and 5784(e) of Title 10, U.S. Code, provide in effect that a person receiving a temporary appointment under any one of those sections may not suffer any reduction in the pay and allowances to which he was entitled because of his permanent status at the time of his temporary appointment. Also, as the Assistant Secretary says, we have held that a member's pay and allowances of his permanent grade are saved from reduction by reason of the temporary appointment, but are not saved from reduction by reason of subsequent changes in conditions affecting such pay and allowances.

With respect to this, in our decision of September 2, 1964, 44 Comp. Gen. 121, we explained that the saved pay provisions do not operate to save or continue items of pay and allowances such as increased pay for flying duty, proficiency pay and rental and subsistence allowances to which the member would not be entitled, either in his permanent status or in his temporary status, under the conditions of his actual subsequent service. See, also, 47 Comp. Gen. 491.

Therefore, enlisted members of the Navy or Marine Corps who are receiving proficiency pay at the time of temporary appointment to officer status under the sections cited are entitled to include proficiency pay as an item of saved pay only if they continue to meet the prescribed conditions of eligibility for proficiency pay after their appointments.

The proficiency pay regulations quoted above, relating to eligibility for proficiency pay, make it plain that generally the Navy member must be assigned to and serving in an authorized military billet requiring the skill on which the proficiency pay was based and if he is assigned to any billet not requiring that specialty the proficiency pay

must be terminated, regardless of the duties which he may be performing.

While paragraph 4b of BUPERS INSTRUCTION 1430.12G provides that the requirement of being assigned to and serving in a billet reflected on the command's Manpower Authorization (OPNAV 1000/2) may be waived in cases of certain specified assignments of limited duration, such provision has no application to the temporary appointments involved.

Therefore, if immediately prior to his temporary appointment as an officer, a member was serving in a billet and utilizing the skills of a military specialty for which he was receiving proficiency pay, and upon his appointment he was assigned to a billet which did not require the military specialty he would no longer be filling a billet which required the skill on which the proficiency pay was based. Consequently, he would no longer continue to qualify for proficiency pay and hence it could not be continued on a saved pay basis.

In answer to question 1, since the member is no longer assigned to and serving in a billet listed on the Manpower Authorization NAV PERS 576 (currently OPNAV 1000/2), he may not, under the Navy regulations as presently constituted properly continue to receive proficiency pay as an item of saved pay.

The second question appears to be predicated on an affirmative answer to the first question. However, since it is stated in the question that the member is not assigned to and serving in an authorized military specialty billet reflected on the command's Manpower Authorization NAVPERS 576 (currently OPNAV 1000/2) it appears such individual does not meet the prescribed conditions of eligibility for proficiency pay even though as a part of his duties as an officer he may utilize the skills of the military specialty for which such pay was authorized while supervising other personnel with similar skills. See our decision of this date, B–163657.

Accordingly, both questions are answered in the negative.

[B–162829]

Pay—Retired—Increases—Cost-of-Living Increases—Retroactive Authority

An Army sergeant who following retirement on July 1, 1964, under 10 U.S.C. 3914, serves on active duty from July 11, 1966, through March 23, 1967, retiring on physical disability with entitlement to retired pay computed under 10 U.S.C. 1402(d)(2), and who was held ineligible to receive the 3.7 Consumer Price Index percentage increase in retired pay effective December 1, 1966, may be paid a 3.7 per centum increase for the period May 1, 1967, to January 31, 1968, on the basis his retired pay is within the purview of section 2(b), Public Law 90–207, approved December 16, 1967, and effective October 1, 1967, which authorizes a cost-of-living increase, retroactively effective from date of retirement, to those

members who became entitled to retired pay on or after December 1, 1966, but before October 1, 1967, and who had not received any benefit from the December 1, 1966 percentage increase.

To Captain A. E. Velez, Department of the Army, July 16, 1968:

Further reference is made to your letter of February 27, 1968, requesting an advance decision concerning the payment proposed to be made on voucher (FCUSA Forms 20–41 and 20–43, enclosures 1 and 2 received with your letter), stated in favor of Staff Sergeant Woodrow W. Kitchens, RA 18 110 523, retired, in the amount of $77.40 representing a 3.7 per centum increase in his retired pay for the period May 1, 1967, to January 31, 1968, inclusive. Your request was forwarded here by the Office of the Comptroller of the Army with transmittal letter dated May 1, 1968, under D.O. No. 996, allocated by the Department of Defense Military Pay and Allowance Committee.

Sergeant Kitchens was retired effective July 1, 1964, upon his own application in accordance with the provisions of 10 U.S.C. 3914. He was recalled to active duty effective July 11, 1966, and he served on active duty through March 23, 1967. He reverted to an inactive status on the retired list on March 24, 1967, having been determined to be physically unfit for further military service. It appears that he elected under authority of 10 U.S.C. 1402(b) to receive retired pay effective from March 24, 1967, recomputed as prescribed in clause (2) of 10 U.S.C. 1402(d) on the basis of the percentage of his physical disability (60 per centum).

While serving on active duty during the period from July 11, 1966 to March 23, 1967, inclusive, Sergeant Kitchens received monthly basic pay in the amount ($387.60) prescribed in section 203(a), Title 37, U.S. Code (as amended effective July 1, 1966, by section 301, Public Law 89–501, July 13, 1966, 80 Stat. 278), for enlisted grade E–6 with over 22 years of service creditable for basic pay purposes. Thus he became entitled to receive retired pay effective March 24, 1967, computed under clause (2) of 10 U.S.C. 1402(d) in the amount of $232.56 per month (60 per centum of $387.60).

In decision of December 8, 1967, 47 Comp. Gen. 327, referred to in your letter it was held that Sergeant Kitchens was not entitled to the 3.7 Consumer Price Index percentage increase in retired pay that became effective on December 1, 1966, for the reason that under the specific terms of 10 U.S.C. 1401a(b) as amended by section 5(b) of Public Law 89–132, August 21, 1965, 79 Stat. 547, such Consumer Price Index percentage increase was applicable only to those "members or former members of the Armed Forces who became entitled to that pay" before December 1, 1966. Consequently it was concluded that:

* * * Inasmuch as Sergeant Kitchens did not become entitled to retired pay recomputed on the basis of the [July 1] 1966 rates of active duty pay at any time prior to December 1, 1966, no proper basis is presented to increase his present retired pay, $232.56 per month effective from March 24, 1967, by the 3.7 Consumer Price Index percentage increase that became effective on December 1, 1966.

The voucher you now submit for an advance decision proposes to allow Sergeant Kitchens a 3.7 percentage increase in his retired pay for the period May 1, 1967 to January 31, 1968, inclusive, by reason of the provisions of section 2(b), Public Law 90–207, December 16, 1967, 81 Stat. 653, 10 U.S.C. 1401a note. Section 2(b) became effective October 1, 1967 (see section 7 of that act, 37 U.S.C. 203 note) and provides as follows:

(b) Notwithstanding section 1401a(d) of title 10, United States Code, a person who is a member or former member of an armed force on the date of enactment of this Act and who *initially* became, or hereafter *initially* becomes, entitled to retired pay or retainer pay after November 30, 1966, but before the effective date of the next increase after July 1, 1966, in the rates of monthly basic pay prescribed by section 203 of title 37, United States Code, is entitled to have his retired pay or retainer pay increased by 3.7 percent, effective as of the date of his entitlement to that pay. [Italic supplied.]

After noting that under the provisions of section 2(b) those members of the uniformed services who "initially" became entitled to retired pay on or after December 1, 1966, but before October 1, 1967, were entitled to receive a 3.7 percentage increase in their retired pay, you point out that:

* * * As a consequence, it appears that all members who were retired before 30 September 1967 have now become entitled to that percentage increase with the seeming exception of those members who were receiving retired pay and who were recalled to active duty before 30 November 1966 and who reverted to a retired status during the period 1 December 1966 through 30 September 1967.

You add that:

* * * The inclusion of the word "initially" in connection with those who became or hereafter becomes entitled to retired pay after 30 November 1966, but before [October 1, 1967] the effective date of the next increase after 1 July 1966, in the rates of monthly basic pay, seems to continue to exclude such members.

The adverb "initially" was inserted before the word "became" and also before the word "becomes" in section 2(b) of H.R. 13510, 90th Cong. (now Public Law 90–207), by the Senate Committee on Armed Services. See the second item on page 2 in S. Rept. No. 808, November 28, 1967. It appears that this action was taken for the purpose of precluding the 3.7 percentage increase in retired pay therein authorized from accruing to personnel who had been transferred to the Fleet Reserve prior to December 1, 1966, and who later were further transferred from that list to the retired list between December 1, 1966 and September 30, 1967, inclusive. As explained in the third paragraph on page 12 of the Senate Report:

* * * Such a person would receive no increase under this bill since he would already have received the retired pay increase effective December 1, 1966, by virtue of his initial entitlement to retainer pay.

Irrespective of the particular reason above related for inserting the adverb "initially" in section 2(b) the primary purpose of that section was to extend to that group of military retirees who were retired on or after December 1, 1966, and before October 1, 1967, a 3.7 per centum increase in their retired pay retroactively effective from the date of their retirement. As stated in the Senate Report (second paragraph on page 12):

The rationale for this increase is to give them the same benefits as those who retired between July 1, 1966, and December 1, 1966, who were able to take advantage of both the statutory increases in pay [which became effective July 1, 1966] and CPI increases [which became effective December 1, 1966] for retirement purposes.

The Senate Committee commented on the favorable situation which permitted a member of the uniformed services who, after having received an increase in active duty basic pay effective July 1, 1966, retired prior to December 1, 1966, and then received effective as of December 1, 1966, the full 3.7 Consumer Price Index percentage increase in his retired pay. The Committee felt that the same situation operated inequitably in the case of those members of the uniformed services who were retired after December 1, 1966, and prior to October 1, 1967, since they did not receive any benefit from the December 1, 1966, Consumer Price Index percentage increase in retired pay. It was for the benefit of this latter group that section 2(b) was enacted into law.

As previously stated this Office held in the decision of December 8, 1967, that in recomputing his retired pay effective from March 24, 1967, under authority of clause (2) of 10 U.S.C. 1402(d), Sergeant Kitchens was not entitled to the 3.7 Consumer Price Index percentage increase in retired pay which became effective December 1, 1966, because the clear and specific language of 10 U.S.C. 1401a(b), as amended by Public Law 89–132, restricted such Consumer Price Index percentage increase in retired pay to those members or former members of the Armed Forces who had become entitled to retired pay before December 1, 1966. Inherent in that holding was the conclusion that if Sergeant Kitchens had become entitled prior to December 1, 1966, to recompute his retired pay on the basis of the highest monthly active duty basic pay ($387.60 effective July 1, 1966) which he received while serving on active duty, he would have been entitled to the 3.7 Consummer Index percentage increase in his retired pay effective from December 1, 1966.

Sergent Kitchens' situation with respect to his eligibility to receive the December 1, 1966, Consumer Price Index percentage increase in his retired pay seems to involve the very type of inequity which section

2(b) of Public Law 90–207 was intended to correct. Moreover, while the words "initially" as now contained in section 2(b) have special significance for those members of the naval service who were in receipt of retainer pay prior to December 1, 1966, it does not appear improper to conclude that effective as of March 24, 1967, Sergeant Kitchens' retired pay status fell within the purview of the cited statutory provisions since he did not "initially" become entitled to recompute his retired pay on the basis of the July 1, 1966, rates of active duty basic pay until after November 30, 1966, and before October 1, 1967.

Accordingly, and if otherwise correct, the voucher stated in favor of Sergeant Kitchens is proper for payment and is returned herewith together with enclosures 3 to 7, inclusive. A copy of this decision should be attached to the voucher in support of the payment made thereon.

[B–164522]

Bids—Acceptance Time Limitation—Bids Offering Different Acceptance Time

A low bid conditioned upon receipt of notice of award within 24 hours after the closing hour for receipt of bids under an invitation providing for a 4-day bid acceptance period having automatically expired before an award could be made, rejection of the bid was not contrary to the principles of the competitive bidding system. To permit the bidder to delete the acceptance time condition would provide an option to accept or reject an award subsequent to bid opening, an advantage unavailable to other bidders. The extension of the bid acceptance date prescribed by section 1–2.404–1 of the Federal Procurement Regulations designed for situations where a group of offers might expire before award action is completed, is not intended to grant a particular offeror limiting bid acceptance time, the right to extend the acceptance time.

To the Republic Metals Co., Inc., July 17, 1968:

Further reference is made to your letter of June 5, 1968, protesting the rejection of your low bid under purchase request No. 24937, issued by the Government Printing Office (GPO), Washington, D.C.

The purchase request dated May 8, 1968, requested bids for the delivery of 30,000 pounds of tin-antimony, f.o.b. Government Printing Office, 35 "G" Street, Washington, D.C., on or before June 19, 1968. Prospective bidders were advised in the invitation for bids that sealed bids would be received until 3:00 p.m., May 20, 1968. In regard to date of the award, the purchase request advised prospective bidders that "It is planned that the successful bidder will receive the Notice of Award by: May 24, 1968." In response to the purchase request, your firm submitted a bid dated May 16, 1968, offering to furnish the tin-antimony alloy at a price of $0.7347 per pound. On the face of your bid, you inserted the following note: "Subject to acceptance no later than 3:00 p.m. May 21, 1968." The next lowest bid was submitted by the

Federated Metals Division, American Smelting and Refining Company, in the amount of $0.7443 per pound.

The bid of your firm was rejected because it was conditioned upon the receipt of a notice of award on or before 3:00 p.m., May 21, 1968, 24 hours after the closing hour specified for receipt of bids, and because it was not feasible to follow GPO's regular procedures, including review and approval by the Congressional Joint Committee on Printing, and still make an award to your firm within the 24 hours allowed in your bid. Therefore, your bid, by its terms, automatically expired before an award could be made to your firm. See 14 Comp. Gen. 612; 16 *id.* 699; 35 *id.* 50. It is reported that the contracting officer is contemplating making an award of a contract to the Federated Metals Division, American Smelting and Refining Company, at a net amount of $22,329, subject to approval of the Congressional Joint Committee on Printing.

The president of your firm protested the rejection of your company's bid on May 22, 1968, and stated at that time his willingness to delete the conditional acceptance statement so that an award could be made to your firm. The president of your firm was advised that the contracting officer could not delete the acceptance time condition from your bid since this would give your company an advantage over other bidders, that is, the option of accepting or rejecting an award subsequent to the bid opening.

In your letter of June 5, 1968, you state that your firm was advised by GPO that its decision to award the contract to the second lowest bidder was based on the nonresponsiveness of your bid because of your conditional acceptance statement. You contend that the statement in the invitation for bids to the effect that "It is planned that the successful bidder will receive the Notice of Award by: May 24, 1968" is "not specific enough, nor strongly enough worded to automatically disqualify any bidder that may stipulate that the price submitted to the Government Printing Office was subject to acceptance by the Government on an earlier date." You state that the words "It is planned" used in the note on the purchase request can be so construed that under extenuating circumstances, such plans could or may be altered. You state that in other cases involving other Government agencies where your firm has specified in its bid a time for acceptance of your bid which is insufficient for the agency involved to evaluate your bid with the others received, the agency has requested an extension of time by telephone or telegraph from your firm. Further, you advise that had GPO requested an extension of your bid acceptance period, the time would have been extended for a limited number of days.

Although the note as to the contemplated date of award could have

been worded so as to leave no doubt that GPO required at least a 4-day bid acceptance period, we believe that the language employed placed all bidders on notice that an award would be effected by May 24, 1968. With that date in mind, a prudent bidder would have to allow a period of bid acceptance up to that date in order to assure that his bid would be open for acceptance at the time GPO would be in a position to make an award.

It is your contention that your firm is entitled to an award as the lowest bidder because, after your bid acceptance period had expired, you offered to extend such period for a "limited" number of days. As to such contention generally, it may be stated that statutes which require purchases to be made after advertising for bids were enacted for the benefit of the United States and not the bidders, and it consistently has been held by the accounting officers of the Government and by the courts that a request for bids does not import any obligation to accept any of the bids received, including the lowest correct bid. 17 Comp. Gen. 554; 26 *id.* 49; 41 *id.* 709, 711; *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113; *O'Brien* v. *Carney, et al.*, 6 F. Supp. 761.

It appears to be your position that GPO should have given your firm a timely opportunity to extend your acceptance date. In this regard, Federal Procurement Regulations (FPR), subparagraph (c) of paragraph 1–2.404–1, provides:

> (c) Should administrative difficulties be encountered after bid opening which may delay award beyond bidders' acceptance periods, the several lowest bidders should be requested, before expiration of their bids, to extend the bid acceptance period (with consent of sureties, if any) in order to avoid the need for readvertisement.

This subparagraph, to our knowledge, is the only regulation dealing with the subject of bid acceptance extensions initiated by the procurement activity. On its face, this provision of FPR is not applicable to the present situation because the regulation speaks of administrative delay beyond "bidders" acceptance periods, while your firm's offer was the only one which lapsed. We are of the opinion that the FPR provision in question was designed for situations when, due to unforeseen delay, a group of offers might expire before award action was completed, rather than granting a particular offeror who chose to limit its bid acceptance time a right to extend its acceptance time.

We are also of the opinion that failure of GPO to give consideration to your bid because of its inability to process an award to your firm within 1 day was not contrary to the general principles of the competitive bidding system. As we pointed out in 42 Comp. Gen. 604, 607, when an offeror limits its bid acceptance period, it has the legal right to refuse award after that time, so that it would be in a position of being able to reject an award in the event of unanticipated increases

in cost, or by extending its acceptance period, to accept an award if desired. Since the Government would not have been able to compel your firm to extend its acceptance period beyond 24 hours, it does not appear entirely inequitable that your firm cannot force the Government to do so.

In the circumstances, it is our view that the integrity of the competitive bidding system would best be served in the present procurement by making an award to American Smelting and Refining Company, the second lowest responsible bidder, as administratively proposed.

Accordingly, your protest is denied.

[B-164338]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, Etc., Determinations—Union Agreement Effect

The fact that a contractor may be obligated under a union agreement to pay higher or lower wage rates than those stipulated in a Government contract as minimum rates pursuant to a wage rate determination by the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor under the Service Contract Act of 1965, 41 U.S.C. 351–357 (Supp. II), does not affect either the validity of the rates established by the contract or the contractor's duty to comply with the wage rate determination in the performance of the contract. Although wage rate determinations are not reviewable by the United States General Accounting Office or the courts, information of prevailing locality rates should be submitted by the contractor to the Administrator for his consideration.

Post Office Department—Star Route Contracts—Wage Determinations *v.* Union Agreements

A star route carrier engaged in the transportation of United States mail pursuant to contracts with the Post Office Department, who is required to comply with a wage rate determination, issued by the Administrator, Wage and Hour and Public Contracts Divisions of the Department of Labor pursuant to the Service Contract Act of 1965, 41 U.S.C. 351–357 (Supp. II), that exceeds the rates payable under a union agreement is not entitled to review of the wage determination. The Service Contract Act does not provide for review by the United States General Accounting Office or the courts, and in the absence of a statute so providing, damage resulting from a wage determination made pursuant to a law, such as the Service Contract Act, which does not invade any recognized legal right, is irremediable.

To C. F. Waite, Inc., July 18, 1968:

Reference is made to your letter of May 13, 1968, protesting against Wage Rate Determination No. 68–233 issued April 11, 1968, by the Administrator, Wage and Hour and Public Contracts Divisions of the Department of Labor pursuant to the Service Contract Act of 1965, 41 U.S.C. 351 *et seq.* (Supp. II).

It appears that you are a Star Route carrier engaged in the trans-

portation of United States mail pursuant to contracts with the Post Office Department. Your attorney says that you have a collective bargaining agreement with Local No. 348 of the International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America; that this union has been certified as the exclusive bargaining agent by the National Labor Relations Board; that you have conducted negotiations and entered into contracts with the union since 1961; and that your union contract covers wages as well as fringe benefits included in the Administrator's determination.

Your attorney complains that the Administrator's determination, which sets forth hourly wages exceeding the rate required by the union agreement, is superimposed on the union contract and renders meaningless the considerable time, effort, and funds invested in negotiating the union contract. He further states that you are thus placed in an anomalous position in that if the wage requirements or fringe benefits are greater than the requirements of the union contract, you must comply with the Government's wage rate determination and that if the wage determination and fringe benefits are less, then you must comply with the union contract; and that it is your feeling that the Administrator's action under the act is discriminatory when it contravenes the terms of the union agreement negotiated in good faith by all parties.

Under the circumstances, you wish to register your protest to such wage determinations insofar as they pertain to employers with existing collective bargaining contracts covering identical subject matter.

The Service Contract Act provides that, with certain exceptions, every contract entered into by the United States in excess of $2,500, the principal purpose of which is to furnish services in the United States through the use of service employees, shall contain provisions specifying the minimum monetary wages and fringe benefits to be paid the various classes of service employees in the performance of the contract, as determined by the Secretary of Labor or his authorized representative, in accordance with prevailing rates for such employees in the locality. By Secretary's Order No. 36-65 the Secretary of Labor delegated to the Administrator of the Wage and Hour and Public Contracts Divisions the authority to determine minimum wages and fringe benefits thereunder.

The issuance of a wage rate determination constitutes a finding that the rates specified therein are the rates prevailing in the locality, and the inclusion thereof in an invitation for bids or a contract does not constitute a representation by the Government that labor can be obtained by the contractor at such rates. See *United States* v. *Binghamton Construction Co.*, 347 U.S. 171. The fact that a particular con-

tractor may be obligated by an independent agreement to pay higher or lower wage rates than those stipulated in a Government contract as minimum rates, pursuant to statute, does not affect either the validity of the rates established by the contract or the contractor's duty to comply therewith in the performance of the contract.

In any event, the Service Contract Act does not provide for review of wage rate determinations either by the General Accounting Office or the courts, and in the absence of a statute, damage resulting from a wage rate determination made pursuant to a law, such as the Service Contract Act, which does not invade any recognized legal right is irremediable. See *Perkins* v. *Lukens Steel Co.*, 310 U.S. 113.

Therefore, we are required to deny your protest. We suggest, however, if you have not already done so, that you present your views on the matter to the Administrator of the Wage and Hour and Public Contracts Divisions of the Department of Labor for his consideration, with such information as you may be able to offer with respect to the rates which you believe to be prevailing for work of the nature involved in your locality.

[B–164426]

Customs—Services in Foreign Ports—Recovery

Bureau of Customs costs other than overtime compensation for furnishing services to airline carriers at Canadian airports to tentatively clear air passengers and baggage bound for the United States is for recovery from the carriers under 31 U.S.C. 483a—the so-called "User Charges" statute—which authorizes Government agencies to charge for services not previously charged and to revise charges not fixed by law. The preclearance operation in Canada essentially of advantage to the airlines and not the Bureau, costs, including employees compensation, may be recovered to the extent they are in excess of costs that would be incurred if all the customs operations involved were performed in the United States, the costs to be fixed in accordance with 31 U.S.C. 483a.

Fees—Services to Public—Collection and Disposition

In view of the fact that the "User Charges" statute, 31 U.S.C. 483a, did not repeal or modify existing statutes, charges collected from airline carriers for preclearance of passengers and baggage at Canadian airports are for deposit to the appropriation from which the charges were paid in accordance with the requirement in 19 U.S.C. 1524 relating to deposit of customs charges.

Officers and Employees—Contributions from Sources Other than the United States—Prohibition

The fact that 18 U.S.C. 209, which prohibits Government officers and employees from receiving any salary from sources other than the United States, is a criminal statute enforceable by the Department of Justice and the courts, the Attorney General has the final determination of issues arising under the provision and, therefore, the Comptroller General does not have authority to make a binding determination as to the proper interpretation of the prohibition.

To the Secretary of the Treasury, July 22, 1968:

Letter dated May 21, 1968 (reference CC 191.8 G), from the Assistant Secretary of the Treasury, concerns the recovery of costs by the Bureau of Customs (Customs) for services furnished certain airlines at airports in Canada.

The facts and circumstances giving rise to the questions presented, as disclosed by the Assistant Secretary's letter, are set forth below.

At the request of certain airlines, customs officers have been stationed at major airports in Canada for some years past to provide tentative clearance for air passengers bound to the United States. Under this program Customs performs certain of its baggage examination, inspection and other functions in Canada, but residual functions remain to be performed after the aircraft reach the United States. Thus, each plane coming into the United States has to be entered and boarded and its cargo, other than baggage, has to be cleared. The preclearance operation is essentially of advantage to the airlines rather than to the Bureau of Customs and the airlines are desirous of seeing it expanded. Preclearance operations reduce a number of the administrative expenses which the airlines would otherwise incur and thus confers a financial benefit upon them. In addition, the airlines believe that this service attracts passengers and, accordingly, provides them with a competitive advantage over other means of transportation.

Although Customs costs within the United States are to some extent decreased by this program, the costs (including related costs) of stationing men and performing services in Canada are considerably greater than the total cost to Customs would be if all of the Customs operations were performed in the United States.

At the present time, the airlines reimburse the Government for extra compensation under the Customs overtime laws as they would for similar services performed within the United States but they pay no part of the other costs of the Customs operation. When these services were originally provided, the costs to the Customs appropriation were relatively small. The Assistant Secretary states, however, that with the increase in air travel, requests for additional manpower to provide these services continue to increase; and that with the present limits on your appropriation it therefore becomes necessary to consider whether the airlines may not be required to reimburse the Government if they want preclearance services.

The Assistant Secretary's letter continues:

> There is no statute which in terms expressly authorizes us to require (or specifically prohibits us from requiring) reimbursement for the tentative preclearance services, differing from overtime compensation authorized by 19 U.S.C. 267, and 1451. Before 1931 the salaries of Customs officers stationed in Canada were reimbursed by the transportation companies (principally rail) who were serviced. It would seem that the services performed then were similar in nature

to those now exercised at the airports. In objecting to the 1931 practice in 11 Comp. Gen. 153, your office quoted the Act of March 3, 1917 (now 18 U.S.C. 209), distinguished (1922) 33 Op. Atty. Gen. 273, and cited two other Comptroller General decisions (1923) 2 Comp. Gen. 775 and (1923) 3 Comp. Gen. 128. Each of those decisions took the view that reimbursement from private parties for special services of Customs officers was prohibited by the 1917 Act unless there is a statute authorizing reimbursement. The Department accepted your decision and discontinued the practice.

Since these decisions, however, the Congress has enacted as part of section 501 of the Independent Offices Appropriation Act the so-called "User Charges" statute, section 501 of the Independent Offices Appropriation Act of 1952 (31 U.S.C. 483a) which appears to be more than a mere expression of the "sense of Congress that any work, service, * * * benefit, privilege, authority, use, * * * or similar thing of value or utility performed, furnished, provided, granted * * * by any Federal agency * * * to any person * * * shall be self-sustaining to the full extent possible." The statute provides substantive authority for "the head of each Federal agency * * * by regulation * * * to prescribe therefor such fee, charge, or price, if any, as he shall determine, in case none exists, or redetermine, in the case of an existing one, to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served and other pertinent facts."

The Assistant Secretary expresses the view that in the language of 31 U.S.C. 483a, the services provided in Canada are embraced fairly within the terms "work," "service," "benefit," "privilege," and "use," "or similar thing of value," "performed," "furnished," "provided," or "granted." He states that the head of the Federal agency is authorized by regulation "to prescribe therefor such fee, charge, or fine, if any, as he shall determine, in case none exists * * *;" and that in doing so he shall make the charge "fair and equitable taking into consideration direct and indirect cost to the Government value to the recipient, public policy or interest served and other pertinent facts." This, he feels, indicates that the charge should cover the special benefit conferred; and he points out that although the authority contained in 31 U.S.C. 483a is subject to the proviso that its provisions do not "repeal or modify existing statutes prohibiting the collection * * * of any fee, charge, or price," there is no statute which in terms prohibits the collection of a charge for the services involved.

Accordingly, our decision is requested whether a charge for all or part of the expenses of Customs for providing the requested services to be performed in Canada in connection with the tentative preclearance of aircraft passengers and baggage bound for the United States would be authorized or required by 31 U.S.C. 483a, or otherwise.

In addition, if we determine that such charge is so authorized or required, our decision is also requested whether the provisions of 19 U.S.C. 1524, directing the deposit of the receipts for reimbursable charges as a reimbursement to the appropriation out of which they were paid, would authorize refund to the appropriation for collecting the revenue from Customs of the amounts collected. In this connection the Assistant Secretary points out that the proviso to 31 U.S.C. 483a saves from repeal or modification "existing statutes prohibiting the collecting, fixing the amount, or *directing the disposition of*

any fee, charge, or price," and would appear to allow such refund. [Italic supplied.]

In 37 Comp. Gen. 776 we stated that while in frequent instances prior to that decision we had discussed 18 U.S.C. 1914 (which was based on the act of March 3, 1917, and is now 18 U.S.C. 209), and on many occasions had cautioned against possible violations of its provisions, we had many times explained (subsequent to 11 Comp. Gen. 153) that since section 1914 was a criminal statute, its enforcement was primarily a function of the Department of Justice and the courts, and had expressly pointed that our opinions with respect thereto may or may not be shared by the Department. We further stated therein that we have no authority to make a binding determination as to the proper interpretation of 18 U.S.C. 1914, and, therefore, that any contrary construction of our role in this area is and should be regarded as incorrect. Accordingly, any determinations made in the decisions of this Office referred to in the Assistant Secretary's letter concerning the applicability of the act of March 3, 1917 (now 18 U.S.C. 209), would not be binding. Final determination on such an issue would be for the Attorney General.

Insofar as this Office is concerned, as indicated in the Assistant Secretary's letter, subsequent to our decisions cited in the letter, there was enacted into law section 501 of the Independent Offices Appropriation Act of 1952, 65 Stat. 290, 31 U.S.C. 483a, which reads as follows—quoting from the Code:

> It is the sense of the Congress that any *work, service, publication, report, document, benefit, privilege, authority, use, franchise, license, permit, certificate, registration, or similar thing of value or utility* performed, furnished, provided, granted, prepared, or issued by any Federal agency (including wholly owned Government corporations as defined in the Government Corporation Control Act of 1945) to or for any person (including groups, associations, organizations, partnerships, corporations, or businesses), except those engaged in the transaction of official business of the Government, *shall be self-sustaining to the full extent possible,* and the head of each Federal agency is authorized by regulation (which, in the case of agencies in the executive branch, shall be as uniform as practicable and subject to such policies as the President may prescribe) *to prescribe therefor such fee, charge, or price,* if any, as he shall determine, in case none exists, or redetermine, in case of an existing one, *to be fair and equitable taking into consideration direct and indirect cost to the Government, value to the recipient, public policy or interest served, and other pertinent facts, and any amount so determined or redetermined shall be collected and paid into the Treasury as miscellaneous receipts: Provided, That nothing contained in this section shall repeal or modify existing statutes prohibiting the collection, fixing the amount, or directing the disposition of any fee, charge or price: Provided further.* That nothing contained in this section shall repeal or modify existing statutes prescribing bases for calculation of any fee, charge or price, but this proviso shall not restrict the redetermination or recalculation in accordance with the prescribed bases of the amount of any such fee, charge or price. [Italic supplied.]

The legislative history of section 501 discloses that the purpose thereof is to provide authority for Government agencies to make charges for services in cases where no charge was made at the time of its enactment, and to revise charges where charges then in effect were too low, except in cases where the charge is specifically fixed by

law or the law specifically provides that no charge shall be made (page 3, H. Rept. No. 384, 82d Cong., 1st Sess.).

We agree with the Assistant Secretary that the language of 31 U.S.C. 483a is very broad, and that the section contemplates that those who receive the benefit of services rendered by the Government *especially for them* should pay the costs thereof, at least to the extent that it appears that a special benefit is conferred. In the instant case the Assistant Secretary's letter discloses that the costs (including related costs) of stationing men and performing services in Canada are considerably greater than total costs to Customs would be if all of the Customs operations were performed in the United States. Also, as indicated above, the preclearance operation in Canada is essentially of advantage to the airline rather than the Bureau of Customs. Accordingly, it is our view that to the extent the costs (including employees' compensation) of the requested preclearance services in Canada are in excess of the costs that Customs would incur if all of the Customs operations involved were performed in the United States, a charge covering such excess costs would be authorized by 31 U.S.C. 483a, if fixed in accordance with the provisions of such section.

Concerning the disposition of the charges proposed to be collected from the airlines, while 31 U.S.C. 483a provides that any fee, charge or price prescribed by an agency shall be collected and deposited into the Treasury as miscellaneous receipts, it further provides that nothing in section 483a shall repeal or modify existing statutes directing the disposition of any fee, charge or price. As indicated in the Assistant Secretary's letter, 19 U.S.C. 1524 provides that receipts for any reimbursable charges which have been paid out of any appropriation for collecting the revenue from Customs shall be deposited as a refund to such appropriation. Accordingly, the charges collected from the airlines by Customs for the services rendered in Canada may be deposited as a refund to the appropriation from which such charges were paid, with the understanding that the appropriation committees of the Congress will be advised of this fact.

The questions presented are answered accordingly.

[B-164549]

Quarters Allowance—Dependents—Quarters Occupancy Prevented by "Competent Authority"

The fact that an officer of the uniformed services supports his children residing with his former wife who had been awarded their custody in the divorce decree does not entitle him to a basic allowance for quarters on their behalf, the officer having remarried and having been assigned Government quarters at his overseas station, from which his dependents were not precluded by "competent orders." The divorce decree of the court having jurisdiction of the children is not the "competent authority" contemplated by 37 U.S.C. 403(d) in providing that a member assigned Government quarters may not be denied a basic

allowance for quarters if, because by orders of competent authority his dependents are prevented from occupying the assigned quarters.

To Lieutenant W. J. Sheehan, Department of the Navy, July 22, 1968:

Further reference is made to your letter dated March 18, 1968, forwarded here by first endorsement dated June 7, 1968, of the Comptroller of the Navy, requesting that a determination be made as to the entitlement of Commander Bill J. Bell, 582246, USN, to basic allowance for quarters on behalf of dependent children residing with his former wife. Your request has been assigned Submission No. DO–N–1001 by the Department of Defense Military Pay and Allowance Committee.

You report that Commander Bell was divorced from Lijean Bell on June 3, 1964; that the divorce decree awarded the children to the mother and required him to contribute to their support in the amount of $350 per month; and that his current pay record shows a dependency allotment of $175 payable to the Clerk of the Court of Escambia County, Florida, for the use of Mrs. Robert B. Waters (former Lijean Bell). You further state that Commander Bell has remarried; that on February 25, 1964, he reported to the Office of the Naval Attache, Monrovia, Liberia, for duty; that he was assigned Government quarters; and that basic allowance for quarters on behalf of his children was started since the "children could not reside with the member due to valid court order and he was required to contribute to their complete support."

By letter dated November 14, 1967, from the Comptroller of the Navy, you were advised that Commander Bell was not entitled to basic allowance for quarters while assigned adequate Government quarters and his dependents were not prevented from occupying such quarters by competent (military) authority. You say that his case concerns dependents who were prevented by "competent authority"—you appear to view the divorce decree of a court having jurisdiction of his children as constituting such authority—from occupying assigned Government quarters.

It is provided in 37 U.S.C. 403(b) that, except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters. However, subsection (d) provides that a member assigned Government quarters may not be denied the basic allowances for quarters if, because of orders of competent authority, his dependents are prevented from occupying those quarters.

It has long been established that quarters and rental allowances are

payable to a member of a military service as reasonable commutation in money when he is not furnished public quarters and he must provide his own. Also, it has been the policy of the uniformed services to preserve family units to the extent that exigencies of the service will allow. Thus, within certain limitations, the law authorizes transportation of an officer's dependents to his station to reside with him. Also, the law permits payment of basic allowance for quarters where, because of the member's military assignment, adequate quarters are not available or he is not permitted to have his dependents at his permanent post of duty, even though he is assigned quarters for himself.

Commander Bell's children were not prevented by competent military authority or the nature of his military assignment from occupying adequate quarters assigned him. Rather, they did not live with him (regardless of his place of military assignment) because of the court order awarding custody to their mother. Since his children did not reside with him for reasons which had nothing to do with his military assignment or an order issued by competent military authority, his situation does not come within the purview of 37 U.S.C. 403(d).

Accordingly, it is concluded that he was not entitled to a basic allowance for quarters in the circumstances described and appropriate action should be taken to collect the amounts of such allowance erroneously credited to his account.

[B-164842]

Pay—Retired—Effective Date—Voluntary *v.* Involuntary Retirement

An officer of the uniformed services subject to involuntary retirement on June 30, 1968, under section 1(i) of Public Law 86-155, "notwithstanding any other provision of law," whose application for voluntary retirement on July 1, 1968, pursuant to 10 U.S.C. 6323, is not accomplished by retirement orders stated to be effective July 1, 1968, because the officer had not been recommended for continuation on the active duty list as required by section 1(i) of the act, is considered to have been mandatorily retired on June 30, 1968. Therefore, the rule in 44 Comp. Gen. 584 does not govern to entitle the officer to computation of his retired pay at the higher active duty pay rate that became effective July 1, 1968, and the officer's retired pay is for computation on the basis of his active duty pay rate in effect June 30, 1968, the date of his retirement.

To Major G. W. Colburn, United States Marine Corps, July 23, 1968:

Reference is made to your letter of July 2, 1968, and enclosures, requesting decision whether Colonel Stanley D. Low, 08150, United States Marine Corps, retired, may be paid retired pay computed on the higher rates of active duty basic pay ($1,373.10 per month effective July 1, 1968, for a colonel with over 26 years of service creditable for pay purposes) prescribed in Executive Order No. 11414, June 11, 1968, 33 F.R. 8645, promulgated in accordance with the provisions of section 8, Public Law 90-207, December 16, 1967, 81 Stat. 654, 37

U.S.C. 203 note. Two additional questions relating to "retirements of the type and under the circumstances in question" are presented in the first endorsement of July 2, 1968, to your letter. Your request for decision was assigned control number DO–MC–1011 by the Department of Defense Military Pay and Allowance Committee.

The Register of Commissioned and Warrant Officers of the United States Navy and Marine Corps and Reserve Officers on Active Duty, January 1, 1967, shows (at page NC–4) that Colonel Low initially entered into service on September 8, 1941, and September 1, 1960, is shown as his date of rank in the grade of colonel.

The Commandant of the Marine Corps in orders dated May 3, 1968, notified Colonel Low that in accordance with the provisions of Public Law 86–155, August 11, 1959, 73 Stat. 333–338, 10 U.S.C. 5701 note, "* * * you are transferred to the Retired List effective 1 July 1968." In a letter dated May 10, 1968, addressed to the Secretary of the Navy, Colonel Low requested that he be "* * * voluntarily retired effective 1 July 1968" under the provisions of 10 U.S.C. 6323 and paragraph 13054.3, Marine Corps Personnel Manual, relating to applications for voluntary retirement after completing more than 20 years of active service.

Paragraph 13054, Marine Corps Personnel Manual, provides in subparagraph 1 that requests for voluntary retirement shall be submitted so as to arrive at Headquarters, U.S. Marine Corps, not more than 4 months and not less than 2 months prior to the requested effective date of retirement. It is further provided that the requested effective date of retirement must be the first day of a month. Subparagraph 2 provides that:

2. An officer who is subject to involuntary retirement may request voluntary retirement to be effective *on* or prior to the date of involuntary retirement, provided he is eligible for voluntary retirement. If such a request is submitted it will be processed and voluntary retirement effected in lieu of involuntary retirement. [Italic supplied.]

While the above-quoted provisions of the Marine Corps Personnel Manual appear to be applicable in a number of different situations where a Marine Corps officer is subject to involuntary retirement, for the reasons shown below it is our view that the word "on" in subparagraph 2 can have no application in a case involving a mandatory retirement situation under Public Law 86–155.

It is stated in the second paragraph of your letter that the orders of May 3, 1968, were canceled and new orders were issued transferring Colonel Low to the retired list "* * * effective 1 July 1968 under 10 U.S.C. 6323 and the act of August 11, 1959." The record shows that Colonel Low was advised by the Commandant of the Marine Corps in orders dated June 10, 1968, as follows:

1. The Secretary of the Navy has approved your request for retirement after the completion of more than twenty years active service. You are transferred to

the Retired List, pursuant to the provisions of references (a) and (b) effective 1 July 1968.

References (a) and (b) mentioned in the orders of June 10, 1968, are 10 U.S.C. 6323 and Public Law 86–155, respectively.

The importance to Colonel Low (numerous other officers are stated to be in the same situation) of being placed on the retired list effective July 1, 1968, under authority of 10 U.S.C. 6323 (voluntary retirement upon the application of a Naval or Marine Corps officer after completing more than 20 years of active service, in the discretion of the President and effective on the first day of any month designated by the President) is that his retired pay status then would be governed by the rule of decision of March 26, 1965, 44 Comp. Gen. 854. In that case it was held that all officers who were retired under that statutory provision effective September 1, 1964, were entitled to compute their retired pay on the basis of the higher rates of active duty basic pay which became effective September 1, 1964, as prescribed in Public Law 88–422, August 12, 1964, 78 Stat. 395, 37 U.S.C. 203.

Hence, if Colonel Low's retirement under authority of 10 U.S.C. 6323 became legally effective on July 1, 1968, he would be entitled to compute his retired pay on the rates of active duty basic pay which became effective on that date. On the other hand if, under the provisions of Public Law 86–155, he was required to be placed on the retired list on June 30, 1968, his retired pay would be required to be computed on the rate of active duty basic pay that he was receiving on June 30, 1968, $1,284.60 per month (37 U.S.C. 203(a), as amended by Public Law 90–207, effective October 1, 1967).

It appears that the 1968 fiscal year Continuation Board which was convened under authority of section 1(a) of Public Law 86–155, considered Colonel Low but did not recommend him for continuation on the active list. He thereupon became subject to the involuntary retirement provisions of section 1(i) of that law, 73 Stat. 335, which reads as follows:

(i) Unless sooner selected for promotion to the next higher grade, each officer who is considered for continuation on the active list by a board convened under this section and who is not recommended for continuation in the approved report of the board, *shall, notwithstanding any other provision of law* except subsection (j) or (k), be retired on June 30 of the fiscal year in which the report of the board is approved or in which he completes 20 years of total commissioned service, as computed under section 6387 or 6388 of title 10, United States Code, whichever is later. [Italic supplied.]

The word "notwithstanding" means "without prevention or obstruction from or by" and "in spite of." See 66 C.J.S. 679, note 53, and cases there cited. Thus, as used in section 1(i), the word "notwithstanding" means "without prevention or obstruction from or by" and "in spite of" any other provision of law.

The record does not indicate that the provisions of subsections (j) or (k) of section 1 of Public Law 86–155, 73 Stat. 335, 336, had any application in Colonel Low's case so as to affect the mandatory re-

quirement relating to his placement on the retired list on June 30, 1968, under section 1(i). Note the use of the imperative word "shall" coupled with the phrase "notwithstanding any other provision of law." In such circumstances, it would seem that the language contained in section 1(i) would preclude an officer—whom a continuation board, convened under authority of Public Law 86–155, did not recommend for continuation on the active list—from retiring under "any other provision of law," unless other language contained therein evidences a contrary intent. The provisions of sections 2(d) and 2(e) of Public Law 86–155 relate to this matter.

An officer within the scope of section 2(d) who is retired under that act "* * * shall be paid, in addition to his retired pay, a lump-sum payment of $2,000, effective on the date of his retirement."

Section 2(e) provides:

(e) An officer who has the qualifications specified in subsection (d) and who has been considered but not recommended for continuation on the active list pursuant to section 1 of this Act shall be considered for the purpose of subsection (d) as being retired under this Act *if the officer retires voluntarily prior to the date specified for his retirement under this Act.* [Italic supplied.]

It is axiomatic in statutory construction that words are not inserted into an act without some purpose. While sections 2(d) and 2(e) of Public Law 86–155 apparently sanction voluntary retirements under the circumstances there prescribed, it appears clear that the phrase "notwithstanding any other provision of law" was employed in section 1(i) for the purpose of precluding the operation of "any other provision of law" authorizing voluntary retirement, unless the voluntary retirement of the individual concerned under such "other provision of law" became effective before June 30 of the fiscal year prescribed in that section.

Section 6323, Title 10, U.S. Code, provides in subsection (a) that:

(a) An officer of the Navy or Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired on the first day of any month designated by the President.

As previously stated, the Commandant of the Marine Corps notified Colonel Low in orders dated June 10, 1968, that he was being transferred to the retired list pursuant to the provisions of 10 U.S.C. 6323 and Public Law 86–155 "effective 1 July 1968." It is apparent that to the extent that such orders contemplated a voluntary retirement under the provisions of 10 U.S.C. 6323, such retirement was not to become effective prior to June 30, 1968, the date prescribed in section 1(i) as the effective date of his mandatory retirement under Public Law 86–155. Since such ostensible retirement did not meet the requirements of the law, it is our view that he was mandatorily retired on June 30, 1968, and that the orders of June 10, 1968, were without effect to accomplish his retirement effective July 1, 1968. Therefore, it is concluded that his retired pay effective from July 1, 1968, is required to be

based on the rates of active duty basic pay which were in effect on June 30, 1968. Your basic question is answered accordingly.

The two additional questions presented in the first endorsement to your letter are as follows:

a. Should it be held in effect that an officer subject to involuntary retirement on 1 July 1968 under the provisions of the act of August 11, 1959, Public Law 86-155, may be retired on that date under 10 U.S.C. 6323, would he be entitled to otherwise proper payment of $2,000 under section 2(d) of the cited 1959 act. The reason for doubt in the matter is that section 2(e) of the 1959 act provides for payment of the $2,000 to an officer who "retires voluntarily prior to the date specified for his retirement under this Act."

b. Would the same officer be entitled to change or revoke his survivorship annuity election made under chapter 73 of title 10, U.S. Code, as provided for by section 3 of the act of August 11, 1959, Public Law 86-155, as amended by section 12 of the act of July 12, 1960, Public Law 86-616 [and as further amended by section 2, Public Law 88-393, August 1, 1964, 78 Stat. 375]. The reason for doubt is that clause (2) of section 3 provides for a change or revocation of a survivorship annuity election by an officer who "retires voluntarily before the date specified for his retirement under this Act."

In view of the above answer to the basic question you have presented, no response appears necessary to questions a and b.

[B-164518]

Public Buildings—Construction—Cost Limitations—Certification, Compliance, Etc.

The statutory cost limitation certificate required by paragraph 18-110(b) of the Armed Services Procurement Regulation in connection with construction contracts is regarded as being intended to prevent the deliberate understatement of estimated costs so as to stay within the statutory limitation, and is considered a requirement that is in accord with paragraph 2-201(c) of the regulation, which provides for the rejection of bids materially unbalanced "for the purpose of bringing affected items within cost limitations."

Bids—Evaluation—Cost Limitations

Whether the overstatement of costs on proposed construction contracts which are subject to statutory limitations and to the certification of the accuracy of cost apportionment statements prescribed by paragraph 18-110(b) of the Armed Services Procurement Regulation would in no case be grounds for finding a bid nonresponsive cannot be answered without qualification. However, such cases are not anticipated in view of the fact that problems involving paragraph 18-110 have concerned understatements of estimated costs by bidders attempting to stay within the statutory limitations, and because paragraph 2-201(c)(i) of the regulation provides for the rejection of bids materially unbalanced for the purpose of bringing affected items within cost limitations or bids which exceed cost limitations, unless the limitations had been waived prior to award.

Bids—Unbalanced—To Meet Cost Limitations

Where the Government estimate on construction contracts shows that costs will not exceed the statutory cost limitations prescribed in paragraph 18-110 of the Armed Services Procurement Regulation, and the bidder's certified cost apportionment is also within the limitation, the fact that the bid was unbalanced would not ordinarily justify rejection of the bid as nonresponsive.

Bids—Unsigned—Cost Certifications

Where a Government estimate on construction projects shows that costs subject to the statutory cost limitations of paragraph 18-110 of the Armed Services Procurement Regulation will not exceed the limitation, the failure to sign the cer-

tification required by subsection (b) is not grounds for finding a bid nonresponsive, and the usual principles regarding the acceptability of unsigned bids would govern in view of the fact that pursuant to paragraph 2-201(c)(i), a bidder by his signature certifies to the correctness of his estimated cost apportionment and to the entire bid and, therefore, the failure to certify the cost apportionment should not arise as a distinct issue.

Bids—Unbalanced—To Meet Cost Limitations

In connection with construction projects, the fact that the accuracy of a bidder's apportionment between statutorily limited costs and those not so limited can affect the responsiveness of a bid, paragraph 2-201(c)(i) of the Armed Services Procurement Regulation properly provides that "materially unbalanced" or grossly inaccurate cost apportionment can be cause for the rejection of a bid.

Contracts—Specifications—Deviations—Informal *v.* substantive—Cost information

The refusal to submit a certified cost apportionment that satisfies the statutory limits prescribed for construction contracts pursuant to paragraph 18-110 of the Armed Services Procurement Regulation, or the submission of grossly erroneous cost apportionment data to circumvent the statutory cost limitations is regarded as a material discrepancy which renders a bid nonresponsive, notwithstanding the apportionment certificate is considered only one tool in an array of aids, such as prior cost experience, Government engineering estimates, competing bidders' costs apportionment, and the like, which are available to determine whether the statutory cost limitations have been met by the bidder.

Bids—Evaluation—Cost Limitations

Although the evaluation of materially unbalanced bids on construction projects is a matter of bid responsiveness, the materiality would to a great extent be determined by whether the actual price offered by the bidder exceeded the statutory limitation imposed by paragraph 18-110 of the Armed Services Procurement Regulation, as there is no authorization for construction which exceeds the statutory limits. In the absence of an appropriate waiver pursuant to paragraph 2-201(c)(i) of the regulation, a bid that on the basis of full evaluation has been determined to have exceeded the statutory limitation is for rejection without regard to responsiveness, whether or not the problem of a materially unbalanced bid is involved.

To the Secretary of the Army, July 24, 1968:

Reference is made to the June 4, 1968, letter from the Director of Procurement Policy and Review, Office of the Assistant Secretary (I&L) (PP), Department of the Army, presenting a number of questions regarding the effect of a bidder's certification as required by paragraph 18-110, Armed Services Procurement Regulation (ASPR), of his cost apportionment between items subject to a statutory cost limitation and those items without such limitation.

As presently formulated, the subject regulation provides:

18-110 STATUTORY COST LIMITATIONS.

(a) Contracts for construction shall not be awarded at a price in excess of statutory cost limitations unless the limitations for the particular contract can be and have been waived and shall not be awarded at a price, which, with allowances for Government imposed contingencies and overhead, exceeds the statutory authorization for the project.

(b) Invitations for bids and requests for proposals containing one or more items subject to statutory cost limitations shall state in a separate schedule the applicable cost limitation for each item subject to a specific statutory cost limitation. Invitations for bids and requests for proposals shall state specifically that a bid or proposal which does not contain prices for the individual schedules will be considered nonresponsive. Bids or proposals shall contain a certification

that each such price includes an approximate apportionment of all estimated applicable costs, direct and indirect, as well as overhead and profit. The invitation for bids requiring such certification shall direct the attention of bidders to the following statement to be included in the invitation for bids.

BIDS MUST SET FORTH FULL, ACCURATE, AND COMPLETE INFORMATION AS REQUIRED BY THIS INVITATION FOR BIDS (INCLUDING ATTACHMENTS). THE PENALTY FOR MAKING FALSE STATEMENTS IN BIDS IS PRESCRIBED IN 18 U.S.C. 1001 (See 2-405 and 2-406.)

PROCUREMENT OF CONSTRUCTION AND CONTRACTING FOR ARCHITECT-ENGINEER SERVICES

(c) A bid or proposal containing prices within statutory cost limitations only because such bid or proposal is materially unbalanced shall be rejected. An unbalanced bid or proposal is one which is based on prices significantly less than cost for some work, and prices which are overstated for other work. A bid or proposal containing prices that exceed applicable statutory cost limitations shall be rejected, unless for construction of cold storage or regular (general purposes) warehousing, barracks for enlisted personnel or bachelor officer's quarters, and the determination of the Assistant Secretary of Defense (Installations and Logistics) has been obtained that the limitations on construction costs in the annual Military Construction Act shall not apply as impracticable. In addition, where appropriate provision is made in the invitation for bids or requests for proposals, separate award may be made on individual items whose price is within or not subject to any applicable cost limitation, and those items whose price is in excess of the limitations shall be rejected. Such a provision for separate award shall not be made unless determined to be in the best interest of the Government.

In addition ASPR 2-201(c)(i) provides for the insertion of a related clause in the following words:

(1) Except when the Assistant Secretary of Defense (Installations and Logistics) has granted a waiver (see 18-110) prior to solicitation, if the invitation contains one or more items subject to statutory cost limitation, a provision substantially as follows:

COST LIMITATION. A bid which does not contain separate bid prices for the items identified as subject to a cost limitation may be considered nonresponsive. A bidder by signing his bid certifies that each price bid on items subject to a cost limitation includes an appropriate apportionment of all applicable estimated costs, direct and indirect, as well as overhead and profit. Bids may be rejected which (i) have been materially unbalanced for the purpose of bringing affected items within cost limitations, or (ii) exceed the cost limitations unless such limitations have been waived by the Assistant Secretary of Defense (Installations and Logistics) prior to award.

Your letter expresses concern that the decisions of this Office, such as 46 Comp. Gen. 298 and B-158595, May 26, 1966, may be at variance with ASPR 18-110. In particular, you ask the questions which are quoted and discussed below in the order presented:

a. Does your Office regard the certification required by ASPR 18-110(b) as having the sole purpose of guarding against *understatement* of costs subject to a statutory limitation in order to come within that limitation?

We believe the certification required by ASPR 18-110(b) is intended to prevent deliberate understatement of estimated costs so as to stay within the statutory limitation, and we so stated on pages 8 and 9 of our decision B-159813, October 13, 1966, 46 Comp. Gen. 298, when we said:

While it could be that bidders might unbalance bids with a view toward overloading costs of other work so that the costs on the work governed by a given dollar limitation will come within the limitation, no useful purpose would appear

to be served for a bidder, who reasonably can be expected to be bidding with the view of being successful in obtaining an award of a contract, to deliberately overload the costs for that part of the work within the limitation and at the same time state a ridiculously low cost for other work. It is the kind of unbalancing first mentioned which Armed Services Procurement Regulation (ASPR) guards against in section 18–110(c).

It is our opinion that this statement accords with ASPR 2–201(c)(i), which provides for the rejection of bids of materially unbalanced "for the purpose of bringing affected items within cost limitations."

b. If the answer to a. is affirmative, does it follow that the overstatement of costs subject to a statutory limitation and certification of the accuracy of such statement would in no case be grounds for finding a bid nonresponsive?

Since every possible circumstance cannot be anticipated, we cannot unqualifiedly answer the question in the affirmative. Nevertheless, because the problems to date involving ASPR 18–110 have concerned the alleged understatement of estimated costs by bidders attempting to stay within the statutory limitations, and because of the present wording of ASPR 2–201(c)(i), we do not anticipate cases under ASPR 18–110 involving overstated estimates of costs subject to statutory limitations.

c. If an independent Government estimate shows that costs subject to statutory limitation will *not* exceed the limitation, is the fact that a bidder understated these costs and certified the accuracy of such statement grounds for finding the bid nonresponsive? Regardless of the bidder's intent?

Our conclusions regarding a bidder's understatement of estimated costs of statutorily limited items depend upon many factors, including, when known, the bidder's intention. See B–162173, September 29, 1967, to the Secretary of the Navy, where we questioned the propriety of allowing the rebalancing of an unbalanced bid, which was low in the overall, in order to come within the statutory limitations. On the other hand, where the Government's own estimates show that the costs subject thereto will not exceed the statutory limitation and the bidder's certified cost apportionment is also within the limitation, the fact that the bid was unbalanced would not ordinarily justify rejection of the bid as not responsive.

d. If an independent Government estimate shows that costs subject to statutory limitation will *not* exceed the limitation, is the failure of a bidder to sign the certification required by ASPR 18–110(b) grounds for finding the bid nonresponsive?

As we understand the present formulation of solicitations pursuant to ASPR 2–201(c)(i), a bidder certifies as to the correctness of his estimated cost apportionment by his signature to the entire bid. Where this is the case the failure to certify cost apportionment should not arise as a distinct issue. Accordingly, the usual principles regarding the acceptability of unsigned bids would govern.

e. Is the accuracy of a bidder's apportionment between statutorily limited costs and those not so limited a factor which cannot be made to affect the responsiveness of his bid, regardless of what the IFB states on this matter? Is the bidder's certification of his apportionment also a factor which cannot affect responsiveness?

It is our opinion that the accuracy of a bidder's apportionment between statutorily limited costs and those not so limited can affect the responsiveness of a bid. See B-162173, *supra*. ASPR 2-201(c)(i) provides that "materially unbalanced," or grossly inaccurate, cost apportionment can be cause for the rejection of a bid. We are in agreement with this provision of the regulation.

As discussed in response to question "d," it appears unlikely that the failure to certify a cost apportionment will become an issue for future procurements.

f. Can it be said that the *accuracy* of the certificate required by ASPR 18-110 has no effect on responsiveness and can only affect the acceptability of the bid from the standpoint of nonresponsibility due to lack of business integrity?

It is important to note that the statutes establishing cost limitations for military barracks and housing units are directed toward the appropriate governmental departments rather than to the private contractors who build the units. For this reason, the bidder's cost apportionment certification should be considered as one tool in an array of aids, such as prior cost experience, Government engineering estimates, competing bidders' cost apportionments and the like, available to determine whether the statutory cost limitations have been met. This is not to say that the submission of a cost apportionment certificate is a meaningless act, for despite the existence of a degree of latitude inherent in good faith cost apportionment, bidders are required to furnish the Government a reasonable guide to their estimated costs so that the Government will be able to ascertain whether the projected costs will stay within the limits prescribed by Congress. Therefore, the refusal to submit a certified cost apportionment satisfying the statutory limits, or the submission of grossly erroneous cost apportionment data for the apparent purpose of circumventing such limits, is to be regarded as a material discrepancy rendering the bid nonresponsive.

g. If a bid is rejected under ASPR 18-110(c) because it is "materially unbalanced," is it a proper interpretation of that section to say that such a bid is not nonresponsive, but is rejected because the bidder's actual cost could exceed the statutory limit?

As stated in our response to question "f," we believe that the evaluation of materially unbalanced bids is a matter of bid responsiveness. However, the materiality would to a great extent be determined by whether the actual price would exceed the statutory limit. There would, of course, be no authorization for construction which exceeds the statutory limits. In the absence of an appropriate waiver, if on the basis of a full evaluation it is determined that a bid will exceed the statutory cost limitation, then it must, for that reason, be rejected, without regard to its responsiveness otherwise. This is true whenever it is determined that the statutory limits will be exceeded, even though the problem of a materially unbalanced bid may not be present.

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