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[B-165915, B-166340, B-166751]

Bidders—Qualifications—Integrity, Etc.—Officials Lack of Integrity Imputed to Bidder

Although as a general proposition the lack of integrity on the part of individuals of a business concern who as officers, directors, or stockholders control the activities, policies, and management of the concern must not always be imputed to the concern, where the president of the low bidder corporation had been found guilty of wilful failure to pay income taxes and a key employee was convicted of fraud against the Government and sentenced, and also placed on a debarred bidders' list, imputing the lack of integrity to the corporation was a proper determination by the procuring agency, absent a showing the determination was not based on substantial evidence, 10 U.S.C. 2305(c) requiring award to a "responsible bidder," a term embracing the personal attributes of character or integrity as well as pecuniary ability and physical capability to perform a contract.

Bidders—Qualifications—Integrity, Etc.—Generally

The definition of the term "integrity" in connection with Government contracts does not differ from the generally accepted connotation of uprightness of character, moral soundness, honesty, probity, and freedom from corrupting influence or practice. As used in prescribing qualifications for public officers, trustees, etc., the term "integrity" means soundness of moral principle and character in the making and performance of contracts and fidelity and honesty in the discharge of trusts, and the term synonymous with probity, honesty, and uprightness, the lack of integrity on the part of the officials of a bidder may be imputed to the bidder by the procuring agency, unless the administrative determination is not based on substantial evidence demonstrating the bidder's lack of responsibility.

To the Domco Chemical Corporation, June 5, 1969:

Reference is made to your telegram and letter of January 3, 1969, protesting against award under invitation for bids (IFB) Nos. DSA-400-69-B-0592, DSA-400-69-B-1720 and DSA-400-69-B-2137, issued by the Defense General Supply Center, Richmond, Virginia. Reference is also made to your subsequent telegrams and letters of February 6, March 5 and April 23, 1969, protesting against award under IFB 400-69-B-2005, DSA-400-69-B-2871, and DSA-400-69-B-4405, respectively, also issued by the above command.

The first IFB, DSA-400-69-B-0592, was issued on September 23, 1968, solicitating offers for furnishing of photographic chemicals, and Domco submitted the low responsive bid for items 1 and 2. However, preaward survey No. DCRN 68-10-95 recommended that no award be made to Domco. IFB DSA-400-69-B-1720 was issued on September 16, 1968, also soliciting offers for the furnishing of photographic chemicals. Domco was the low responsive bidder for items 1 through 4. Preaward survey No. DCRN 68-10-122 recommended that no award be made to Domco. IFB DSA-400-69-B-2137 was issued on October 9, 1968, once again soliciting offers for the furnishing of photographic chemicals. Domco was the low bidder for items 1, 2, 6 and 7. Preaward survey No. DCRN 68-11-115 recommended that no award be made to Domco.

On December 12, 1968, separate determinations were made for all three of the above solicitations that Domco was nonresponsible due to lack of business integrity. Each of the determinations was based on information contained in the above-mentioned preaward surveys as supplemented by further inquiries. IFB DSA–400–69–B–2005 was issued on October 10, 1968, and solicited offers for the furnishing of the Defense General Supply Center's requirement for boiler compound. Domco was the low responsive bidder for items 1 and 2. Preaward survey No. DCRN 68–12–50 recommended that no award be made to Domco. On January 7, 1969, Domco was once again determined to be nonresponsible due to lack of business integrity. This determination was based upon the four preaward surveys as verified by further inquiries. IFB DSA–400–69–B–2871 was issued on November 8, 1968, soliciting bids on Corrosion Inhibitor in alternate quantities. Domco was the low responsive bidder for items 11–15, the alternate quantity for which award was made. Preaward survey No. DCRN 68–12–65 recommended that no award be made to Domco. On February 6, 1969, Domco was once again determined to be nonresponsible due to lack of business integrity. This determination was also based on the most current preaward survey plus the previous surveys as verified by further inquiries. Finally, IFB DSA–400–69–B–4405 was issued on January 27, 1969, and solicited bids on 26,920 six (6) ounce jars of calcium Hypochlorite. Bids were opened on February 18, 1969, and Domco was the low responsive bidder for all quantities. However, preaward survey No. 09193013A, dated March 20, 1969, conducted in connection with the latter procurement, unlike the previous preaward surveys recommended award. Nevertheless, on April 11, 1969, Domco was once again determined to be nonresponsible due to lack of business integrity. Apparently Domco's capacity and credit were not in question at this point and the procuring agency reports that the preaward survey should have been confined to ascertaining the status of certain proceedings against Mr. Wertheimer and Dr. Matthew, which will be discussed later, and their current association with the firm.

All of the determinations of nonresponsibility are substantially the same (except for the determination of April 11, 1969) basing Domco's lack of business integrity on the fact that, on March 20, 1968, a Criminal Information was filed in the Federal District Court, Southern District of New York, charging Dr. Thomas Matthew, President of Domco Chemical Corporation with wilful failure to pay income taxes on $106,003, allegedly earned over a 3-year period; 1961, 1962 and 1963. Additionally one of Domco's key employees, Mr. Jules Wertheimer, was recently convicted in the same court of offenses constituting criminal fraud against the U.S. Government as a result of his actions under

contracts DSA–4–08054 and DSA–4–08631 awarded by the Defense General Supply Center, and was sentenced to a total of 10 years imprisonment. Mr. Wertheimer was also placed on the Department of Defense (DOD) debarred bidders' list. The determination of April 11 differed from the other determinations in that prior to the time it was made Dr. Matthew was tried and found guilty on two counts and is now awaiting sentencing, and the determination included a reference thereto.

Contracts pursuant to formal advertising are required to be awarded, under 10 U.S.C. 2305(c), "to the responsible bidder whose bid conforms to the invitation and will be the most advantageous to the United States." The rule is settled that the phrase "responsible bidder" in this and similar statutes denotes something more than the ability or capacity of a bidder to perform the contract, and a contracting agency, therefore, may also consider a bidder's record of integrity in deciding whether he is, in fact, a responsible bidder. B–159242, July 26, 1966. Also see 39 Comp. Gen. 468, 470, and court cases and decisions of our Office therein cited. It was stated in *Best* v. *City of Omaha* (Neb.), 293 N.W. 116, "that responsibility as used in statutory enactments requiring award of public contracts to the lowest responsible bidder, embraces not merely pecuniary ability and physical capability to perform, but also more personal attributes of character or integrity." Also see *Arthur Venneri Company* v. *Paterson Housing Authority*, 149 A. 2d 228, 234.

In your letter of April 18, 1969, you state that you are unable to respond to the allegation that your firm lacks "integrity," since you have no knowledge of how this Office defines the term in connection with Government contracts. We are unaware of any definition for the term in connection with Government contracts which differs from its generally accepted connotation, and we have accepted the usual definitions given by the courts. "Integrity" has been defined as "uprightness of character and soundness of moral principle, honesty, probity" (*In re Gordon's Estate*, 75 P. 672, 674, 142 Cal. 125) and "moral soundness, freedom from corrupting influence or practice" (*Manasco* v. *Walley*, 63 So. 2d 91, 95, 216 Miss. 614). Black's Law Dictionary, Fourth Edition, states "As occasionally used in statutes prescribing the qualification of public officers, trustees, etc., this term means soundness of moral principle and character, as shown by one person dealing with others in the making and performance of contracts, and fidelity and honesty in the discharge of trusts. It is synonymous with 'probity,' 'honesty' and 'uprightness.' "

While the fact that a criminal information was filed against Dr. Matthew charging him with wilful failure to pay income taxes, in and

of itself, might not be sufficient to warrant an adverse responsibility determination, see 39 Comp. Gen. 468; B-105082, September 18, 1951, we are of the opinion that the criminal information, coupled with Mr. Wertheimer's conviction for criminal fraud and his subsequent placement on the DOD debarred list, is sufficient to support a determination of nonresponsibility. Of course Dr. Matthew's subsequent conviction would add even greater weight to the determination.

The next question to be resolved is whether the lack of integrity of Dr. Matthew and Mr. Wertheimer as indicated by their convictions, can be imputed to the corporation. We have held that while a corporation is generally viewed as separate and distinct from the stockholders, it can operate only through the individuals who, as officers, directors, or stockholders, control the activities, policies, and management of the corporation. It follows that the integrity of a corporation can be no greater than the integrity of the individuals who control its operation. 39 Comp. Gen. 468, 471. Certainly any lack of integrity on the part of Dr. Matthew could be imputed to the corporation, since as president of the corporation he could be expected to have a major voice in its management and operation.

However, in the case of Mr. Wertheimer we cannot be as certain. Dr. Matthew states that Mr. Wertheimer has a technical proficiency in connection with packaging trichloromelamine food disinfectant products which the corporation produces or will produce; about 15 years manufacturing experience; a master's degree in business administration; and a Bachelor of Science degree in chemical engineering. Dr. Matthew further states that Mr. Wertheimer was officially employed as a consulting product developer and his duties are limited to making recommendations and assisting in the instruction of employees in the implementation of approved recommendations. However, the record indicates that Mr. Wertheimer has been repeatedly named by Dr. Matthew during various preaward plant surveys as "Chief Consultant" for Domco Chemical Corporation and Domco Properties and also as "Plant or Production Manager" for Domco Chemical Corporation. In the latter position it is stated that he has been very active in the preparation of bids and proposals in response to solicitations issued by the Defense General Supply Center. Dr. Matthew has stated that Mr. Wertheimer's employment is vital to the operation of Domco Chemical Corporation, and we must assume he is still associated with the company since the preaward survey report of March 20, 1969, shows that Mr. Wertheimer was one of the persons who served as a contact for Domco during the survey. While this Office would be extremely reluctant to subscribe to the general proposition that lack of integrity on the part of an employee must always be imputed to the corporation, we

cannot conclude that in the present instance such an imputation is not justified.

Whether evidence of a bidder's lack of integrity is sufficient to warrant a finding in any particular case that the bidder is not responsible is a matter primarily for evaluation by the procuring agency, and because reasonable men may well disagree in such evaluation, this Office has adopted the rule that we will not substitute our judgment for that of the contracting agency unless it is shown that the agency's determination was not based on substantial evidence demonstrating the bidder's lack of responsibility. 39 Comp. Gen. 468, 472; 36 *id.* 42; 37 *id.* 798; 38 *id.* 131; *id.* 778.

Since on the basis of the record we are unable to say that the evidence was insufficient to support the contracting agency's determinations that Domco was nonresponsible, your protests must be denied.

[B-147332]

Storage—Household Effects—Military Personnel—Time Limitation—Extension

When the continued storage of the household effects of members of the uniformed services beyond the authorized (37 U.S.C. 406(b)) temporary storage period of 180 days is required by an unforeseen emergency or conditions beyond the control of a member, the use of appropriations to pay the storage company for a period in excess of 180 days to enable the member to enjoy the benefit of the Government rate incident to the additional temporary storage would violate section 3678, Revised Statutes, 31 U.S.C. 628, which limits expenditures to the objects for which made, even though the member would subsequently be billed for the storage cost of the extended period. Therefore, the practice of converting a storage account from the Government to a member upon the expiration of the 180 days temporary storage period should be continued.

To the Secretary of the Army, June 9, 1969:

Further reference is made to letter of March 17, 1969, from the Assistant Secretary of the Army (Manpower and Reserve Affairs), requesting a decision whether the Joint Travel Regulations, Volume 1, may be amended to authorize temporary storage of household effects of members of the uniformed services beyond the current maximum period of 180 days with provision for reimbursement of the Government by the member of the excess cost of such extended storage. The request was assigned PDTATAC Control No. 69-9 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says it has been the practice in the past that, after 180 days of temporary storage at Government expense, the storage account has been converted from Government to personal with all costs of storage thereafter billed by the storage firm directly to the member and that such conversion usually involves an upward adjustment in the storage rate over that charged on the Government account.

The Assistant Secretary also says that because the continued storage is required by unforeseen emergency or is due to conditions beyond the control of the member which would not have occurred except for the related change-of-station orders which required the move, it has been suggested that the goods be continued in storage on the Government account with the cost of storage over 180 days being charged to the member by the Government.

The Assistant Secretary further says, however, that in view of the position expressed in our decision of December 12, 1961, 41 Comp. Gen. 402, that storage beyond 180 days is not regarded as in consonance with the concept of "temporary" storage, question arises as to whether we would object to an amendment to the regulations which would continue to limit the Government's liability for temporary storage to 180 days but would enable the member to enjoy the benefit of the Government rate for any additional temporary storage that may be required.

In the decision of December 12, 1961, cited above, we expressed the view that storage in excess of 6 months or 180 days would go beyond the concept of temporary storage as authorized by section 303(c) of the Career Compensation Act of 1949 (now 37 U.S.C. 406(b)) and, therefore, we said we would not be justified in concluding that the regulations could be amended to authorize such storage for a longer period.

Since it is our view that the law does not authorize temporary storage for more than 6 months, we are also of the opinion that the use of appropriations to pay the storage company for a longer period would be in violation of section 3678, Revised Statutes, 31 U.S.C. 628, even though the member would subsequently be billed for the portion relating to the excess period.

Section 3678 provides that, except as otherwise provided by law, appropriations for expenditure in the public service shall be applied solely to the objects for which they are respectively made, and for no others. See 33 Comp. Gen. 423; 42 *id.* 226; *id.* 498; 43 *id.* 687.

It may be added that a different situation was involved in our decisions published at 21 Comp. Gen. 559 and 25 Comp. Gen. 360, since those decisions were based on specific statutes providing for shipment of excess baggage and payment to the carrier for shipments on Government bills of lading. In those circumstances we held that the carrier is entitled to payment, recovery to be made from the member for any excess weight. Such decisions, however, have no application to an unauthorized period of storage.

Accordingly, it is concluded that the Joint Travel Regulations, Volume 1, may not legally be amended in the manner proposed.

[B-166703]

Post Office Department—Leases—Building Construction—Specification Compliance

Under an invitation for bids to construct a building on Government land for lease to the Post Office Department, with reimbursement to the Department for the cost of the site by the date specified, an award to the low bidder after his withdrawal of a bid acceptance time extension and prior to the acceptance of the condition for the extension—an equal time extension for the site payment—was inconsistent with 39 U.S.C. 2103(a) and 2112(2) requiring the consummation of post office lease agreements in accordance with 41 U.S.C. 5—award to the lowest, responsible bidder whose bid conforms to the advertised specifications. The site payment, a material requirement that the contracting officer could not waive, either under the original bid or the bid extension, the award to the low bidder should be canceled and the bid deposit refunded.

To the Postmaster General, June 12, 1969:

Reference is made to the letter of May 1, 1969, from the Assistant General Counsel, Real Property and Procurement Division, reporting on the protest of Mr. Leonard D. Pearlman against the award to him of a contract for the construction and lease to the Post Office Department of the Fort Hamilton Station in Brooklyn, New York.

The advertisement for bids dated November 8, 1968, solicited bids pursuant to the leasing authority in 39 U.S.C. 2103 and the advertising requirements of 41 U.S.C. 5. Paragraph 3 of the advertisement for bids provided:

3. Any award of contract will be made to that responsible bidder whose bid, conforming to the advertisement for bids, offers the lowest annual rental for the basic lease term. In case of tie bids in the basic lease term rental, the low bid shall be the one quoting the lower renewal option rental in the ascending order of renewal option periods. The Post Office Department reserves the right to negotiate with the low bidder as to any or all rental rates or other terms and conditions of the Agreement to Lease without waiving its right to accept the bid as submitted. The Post Office Department may, when in its interest, reject any or all bids or waive any informality in bids received.

Paragraph 6 of the advertisement stated:

6. The Government has acquired title to the site upon which this postal facility will be located at a cost of $307,024.00 which amount the successful bidder must reimburse to the Government not later than June 13, 1969. * * *

The agreement to lease stated:

1. In compliance with the advertisement for Bids dated November 8, 1968, the undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished, he shall:

A. * * *

B. Not later than June 13, 1969, remit to Assistant Postmaster General, Bureau of Facilities, Post Office Department, Washington, D.C. 20260, by certified check or cashier's check made payable to "Bureau of Finance and Administration, Post Office Department," the sum of $307,024.00 as reimbursement to the Department for site cost. * * *

FAILURE TO COMPLY WITH THE TIME LIMITS STATED IN SUBPARAGRAPHS 1A AND 1B ABOVE WILL BE GROUNDS FOR CONSIDERATION OF DEFAULT ACTION.

Bids were opened on December 13, 1968. Of the four bids received, the bid from Mr. Pearlman was the lowest. Prior to the expiration of the 60-day period provided for the acceptance of the bid, a representative of the Post Office Department orally requested Mr. Pearlman to extend the acceptance period through March 28, 1969. It is reported that Mr. Pearlman stated it would be necessary that the time for paying the purchase price of the site be extended for the same number of days as the bid extension and that the Post Office official advised him that such an extension of time for making payment for the site would be acceptable.

Subsequently, on February 11, 1969, Mr. Pearlman sent a telegram to the Post Office Department as follows:

IN ACCORDANCE WITH YOUR REQUEST THIS WILL ADVISE YOU THAT I AGREE TO EXTEND MY BID TO MARCH 28 ON THE FORT HAMILTON POST OFFICE TOGETHER WITH ALL OPTIONS AS BID PROVIDING THIS EXTENSION DOES NOT CREATE ADDITIONAL COSTS NOT ANTICIPATED IN THE BIDDING DOCUMENTS VIZ THE DATE TO ACQUIRE THE LAND FROM THE FEDERAL GOVERNMENT WILL BE EXTENDED THE SAME NUMBER OF DAYS YOU HAVE REQUESTED AN EXTENSION FOR.

The Post Office responded to Mr. Pearlman by telegram of February 13, 1969, as follows:

REURTEL FEBRUARY 11 CONDITION FOR EXTENSION UNCLEAR. DO YOU MEAN ONLY CONDITION IS THAT PAYMENT FOR LAND WILL BE EXTENDED FORTY FIVE DAYS FROM JUNE 19, 1969 AS CONSIDERATION FOR EXTENSION OF BID TO MARCH 28, 1969 WITH ALL OTHER TERMS AND CONDITIONS OF BID UNCHANGED? IMMEDIATE ANSWER ESSENTIAL.

By telegram of February 17, 1969, Mr. Pearlman answered:

RE YOUR TELEGRAM FORT HAMILTON POST OFFICE ONLY CONDITION WOULD BE AN EQUIVALENT EXTENSION OF TIME TO PURCHASE LAND.

Then on March 18, 1969, Mr. Pearlman sent a telegram as follows:

* * * AS I HAVE NOT RECEIVED AN ACCEPTANCE OF MY "CONDITIONAL EXTENSION OF TIME" I MUST WITHDRAW "THE EXTENSION OF TIME" PREVIOUSLY GIVEN YOU.

By telegram of March 19, 1969, the Post Office Department advised Mr. Pearlman:

REURTEL OF MARCH 18, 1969. YOUR WITHDRAWAL IS NOT ACCEPTED. YOUR TELEGRAPHIC REPLY TO THE DEPARTMENT'S FEBRUARY 13, 1969 TELEGRAM REMOVED ALL CONDITIONS AND CONFIRMED A BINDING EXTENSION UNTIL MARCH 28, 1969.

By telegram of March 23, 1969, Mr. Pearlman responded:

MY TELEGRAPHIC REPLY TO THE DEPARTMENT'S FEBRUARY 13 TELEGRAM UNQUESTIONABLY HAD A CONDITION ATTACHED THAT

THE DEPARTMENT DID NOT ACCEPT PRIOR TO MY WITHDRAWAL. I HAVE NOT RECEIVED ANY CORRESPONDENCE OR AGREEMENT FROM THE DEPARTMENT ALLOWING THEM TO TAKE TITLE TO THE LAND IN ACCORDANCE WITH THE BIDDING DOCUMENTS, AND PAYING FOR SOME 45 DAYS THEREAFTER. AWARD OF THE BID TO ME AT THIS TIME WILL SUBJECT ME TO UNFAIR AND UNDUE HARDSHIP NOT ANTICIPATED BY THE BIDDING DOCUMENTS.

On March 28, 1969, the Post Office sent to Mr. Pearlman the following telegram:

REURTEL MARCH 23, 1969, NO PROPER BASIS FOR WITHDRAWAL OF FIRM BID SHOWN. YOUR BID TO CONSTRUCT AND LEASE QUARTERS TO US FOR THE FORT HAMILTON STATION OF THE BROOKLYN, NEW YORK POST OFFICE IS ACCEPTED, AS PER WIRES OF 2/11/69 AND 2/17/69 EXTENDING BID DATE TO MARCH 28, 1969, AT ANNUAL RENTAL OF $80,480 FOR THE BASIC TERM. TIME FOR REIMBURSEMENT OF SITE ACQUISITION COST OF $307,024 IS EXTENDED TO JULY 28, 1969 PER YOUR TEL OF FEBRUARY 11, 1969. PLEASE FURNISH THIS OFFICE WITHIN TWENTY DAYS PERFORMANCE BOND IN SUM OF $643,840 AND LABOR AND MATERIALS BOND IN SUM OF $321,920. EXECUTED PAPERS FOLLOW. PLEASE TREAT THIS AS CONFIDENTIAL INFORMATION UNTIL PUBLICLY ANNOUNCED.

Essentially, it is the position of Mr. Pearlman that the bid extension was so conditioned that it would not become effective unless and until the Post Office accepted the condition, and that a valid contract never came into existence because the Post Office accepted the condition after he had withdrawn the extension. Mr. Pearlman has indicated that the reason for withdrawing the bid was that the financing he had tentatively arranged while awaiting confirmation of the bid extension was no longer available because of an increase in interest rates and reduction of funds available for mortgages.

The Post Office Department takes the position that once the bidder extended the time for consideration of the bid, the bidder was precluded from withdrawing the bid under the "firm bid rule" and that the Department did not have to confirm the acceptance of the condition to make the extension effective. It is stated that the only change in the original offer was that the time for reimbursing the site acquisition costs was extended and that this was not a material change since it stemmed from a delay in award by the Government for which the bidder would have been entitled to a time extension under the "Termination for Default—Damages for Delay—Time Extensions" clause of the contract, citing *Anthony P. Miller, Inc.* v. *United States*, 161 Ct. Cl. 455.

The cited contract clause provides that the contractor's right to proceed shall not be terminated if the delay in the completion of the work arises from unforeseeable causes beyond the control and without the fault or negligence of the contractor, including, but not restricted to, acts of God, act of the public enemy, acts of the Government in either its sovereign or contractual capacity, acts of another contractor

in the performance of a contract with the Government, fires, floods, epidemics, quarantine restrictions, strikes, freight embargoes, unusually severe weather, or delays of subcontractors or suppliers arising from unforeseeable causes beyond the control and without the fault or negligence of both the contractor and such subcontractors or suppliers. The contract clause provides further that the contracting officer shall ascertain the facts and the extent of the delay and extend the time for completing the work when, in his judgment, the findings of facts justify such an extension.

In B–159239, August 2, 1966, and B–155281, October 29, 1964, we observed that projects advertised for acquisition pursuant to 39 U.S.C. 2103(a), as implemented by 39 U.S.C. 2112(2) requiring consummation of lease agreements in accordance with the advertising requirements of 41 U.S.C. 5, are to be awarded only to the responsible bidder submitting the lowest bid in accordance with the advertised specifications. Further, in B–163775, May 6, 1968, concerning a solicitation for bids pursuant to 39 U.S.C. 2103 and the advertising requirements in 41 U.S.C. 5, it was stated:

> The fact that the advertisement here involved was issued in accordance with the advertising requirements of 41 U.S.C. 5 (Section 3709, Revised Statutes, as amended), could not be considered as authorizing or justifying the acceptance of a bid not complying in substance with the advertised terms and conditions of the proposed contract. In that connection, see 17 Comp. Gen. 751, wherein it was stated that Section 3709, Revised Statutes, requires all contracts with the United States to be advertised and let to the lowest responsive bidder; and 17 *id.* 554, wherein it was indicated that to permit public officers to accept bids not complying in substance with the advertised specifications or to permit bidders to vary their proposals after the bids are opened would be contrary to the fundamental rules governing the award of public contracts on a competitive basis.

Moreover, in B–158182, March 4, 1966, and B–151791, September 25, 1963, our Office held that where bid extensions were different from the original bids in material respects, they could not be considered by the contracting officer. In B–158182, it was stated:

> * * * We have consistently held that the submission of a second bid after disclosure of all bid prices is contrary to the well established principle governing competitive bidding. See 34 Comp. Gen. 82; 35 *id.* 33; 41 *id.* 203. * * *

In B–151791, *supra*, it was stated:

> * * * We have repeatedly held that to permit bidders to vary their proposals after the bids are opened would soon reduce to a farce the whole procedure of letting public contracts on an open competitive basis. 35 Comp. Gen. 167, and cases cited therein. * * *

In 36 Comp. Gen. 181 we considered the case of a bidder who offered a delivery later than the time specified in the invitation for bids. In that connection, the decision stated:

> We have consistently held that where an invitation on its face requires delivery within a stated period, time must be regarded as "of the essence" of the contract to be entered into notwithstanding the invitation does not expressly so state.

The acceptance of a low bid offering delivery later than specified in the invitation has been held to be contrary to the spirit and purpose of the law governing procurements made pursuant to advertising. * * *

* * * * * * *

The contract awarded to the successful bidder must be the same offered in the invitation. 34 Comp. Gen. 119. While the contracting officer may waive informalities in bids, this authority does not extend to the waiver of material variations to the terms and conditions of the invitation. To award a contract to a low bidder without regard to the terms and conditions of delivery advertised would discriminate against other bidders who may well have included overtime pay and other additional costs in order to meet the deadline. A provision of an invitation which on its face establishes a definite requirement as to time of delivery is material. *Cf.* B–104418, August 23, 1951. The acceptance of a bid not complying with such material provision is unauthorized and does not bind the Government. 17 Comp. Gen. 554, 559. Accordingly, the award in this case was improperly made * * *.

See, also, 38 Comp. Gen. 98 and *id.* 876. In the latter decision it was stated:

* * * Where the invitation on its face requires delivery within a stated period, time must be regarded as of the essence of the contract even if the invitation does not expressly so state. 36 Comp. Gen. 181. Failure of a bid to conform to the required delivery schedule must be regarded as material deviation which cannot be waived and which requires rejection of such bid. 34 Comp. Gen. 24.

As indicated above, our Office has taken the position that where an invitation states a time for performance, it must be regarded as "of the essence" of the advertised contract even though not expressly stated. In this case, the advertisement for bids provided that the contractor shall reimburse the Government for the land not later than June 13, 1969. But, even more than that, the agreement to lease stated that failure to comply with such time limit will be grounds for consideration of default. Therefore, we believe that there can be no question but that the June 13 date was a material requirement and the contracting officer could not properly waive such requirement in the original bid or permit a deviation therefrom in the bid extension. See decisions, *supra.*

Where a change in a material requirement occurs before award, the only alternative is to reject all bids and to readvertise. Accordingly, whether the contracting officer would or would not extend the time for performance under the "Time Extensions" clause of the contract is of no significance.

The *Anthony P. Miller* case referred to above has no relevance to the immediate situation. In that case, the contractor was not granted additional time for closing a housing contract because the Government delayed in making an award to it. The added time was granted because of difficulties the contractor encountered in obtaining financing *after* the contract was awarded. The court did not pass on whether there were adequate grounds for allowing the contractor additional time for closing. That additional time was granted was stated as a matter of fact.

Further, the time extension in the cited case merely provided the Government with additional time to consummate the contract without the relinquishment of any contract requirements.

We recognize that the advertisement provided that the Post Office Department reserves the right to negotiate with the low bidder as to any or all rental rates or other terms and conditions of the agreement to lease; however, since the procurement was required to be consummated in accordance with advertising requirements, any negotiations that might occur could not properly be inconsistent with the rules pertaining to advertised procurements.

In view of the foregoing, we conclude that the award made to Mr. Pearlman was not consistent with the rules pertaining to formally advertised procurements and that it should therefore be canceled and the bid deposit refunded. We are not aware that Mr. Pearlman would be entitled to further relief under the reported circumstances.

[B-166949]

Pay—Retired—Annuity Elections for Dependents—Revocation, Etc.—Reduction in Annuity Determination

Although the reduction made pursuant to Public Law 90-485, August 13, 1968 (10 U.S.C. 1436(b)) in the annuity elected under the Retired Serviceman's Family Protection Plan by an Air Force officer retired under 10 U.S.C. 8911 from option 1 with 4 at ½ reduced retired pay to "the ¼ percentage factor" does not conflict with the prescribed minimum amounts allowed by the act for the reduction of an annuity, the request combining fractions and percentages without mentioning the principal amount to which the reduction should apply is too vague to determine the amount of the reduced annuity elected, but upon clarification of the exact amount of the new annuity elected, the irrevocable reduction may be made retroactively effective to the date of reduction approval by the Secretary of the Air Force and the cost of the reduced annuity computed at the dollar cost of the original annuity.

To N. R. Breningstall, Department of the Air Force, June 12, 1969:

Further reference is made to your letter dated April 25, 1969, which was forwarded here by letter dated May 13, 1969, of Headquarters United States Air Force, requesting an advance decision as to the propriety of payment of a voucher for $584.77 representing retired pay (exclusive of withholding tax and allotment deductions) to Lieutenant Colonel Rodney D. Gurley, FV 103 5275, for the month of May 1969. Your request was assigned Air Force Request No. DO-AF-1038 by the Department of Defense Military Pay and Allowance Committee.

You say that Colonel Gurley retired September 1, 1964, under 10 U.S.C. 8911 upon completing 23 years and 15 days of active service; that his gross retired pay at retirement was $521.64 per month; that he had made an election under the Retired Serviceman's Family Protection Plan (10 U.S.C. 1441-1446) for option 1 with 4 at ½ reduced

retired pay; and that the monthly cost to him for that election, $48.56 per month, has been deducted from his retired pay since retirement to provide a monthly annuity of $236.54 to Mrs. Gurley upon his death.

Under the authority of 10 U.S.C. 1436(b), as amended by section 1(6) of the act of August 13, 1968, Public Law 90-485, 82 Stat. 753, and as implemented by section 406, DOD Directive 1332.17 dated December 18, 1968, Colonel Gurley, in October 1968, requested that the amount of the annuity specified by him be "reduced to the ¼ percentage factor." This request was approved by the Secretary of the Air Force and under the terms of the law became effective May 1, 1969.

You state that under the terms and conditions of Colonel Gurley's first election a ¼ percentage factor would have cost him $25.46 per month and would have provided an annuity of $124.05 per month. However, a reduction allowed by 10 U.S.C. 1436(b) must be "to not less than the prescribed minimum" and since the minimum prescribed in connection with elections under 10 U.S.C. 1434(a) and 1434(b) applies to the elector's full retired pay, you raise the question whether the approved reduction in Colonel Gurley's case will provide an annuity of $124.05 (computed at ¼ reduced retired pay) or an annuity of $130.41 (computed at ¼ of full retired pay). You also ask, if the annuity is to be computed at the higher rate, whether the cost for the $130.41 annuity should be increased in proportion to the cost for a $124.05 annuity, or $26.76 as opposed to $25.46 per month.

It is now provided in 10 U.S.C. 1436(b) that, in accordance with regulations authorized to be prescribed to carry out the program, the Secretary concerned may, upon application by a retired member, allow such member, among other things, "to reduce the amount of the annuity specified by him under section 1434(a) and 1434(b) of this title but to not less than the prescribed minimum * * *." The annuity or annuities authorized may not be more than 50 per centum nor less than 12½ per centum of the elector's retired or retainer pay but in no case less than $25. It does not appear that Colonel Gurley's changed election conflicts with the prescribed minimum amounts.

Section 406 of the implementing regulations for the plan, effective December 18, 1968, provides that the new cost, after a reduction in survivor annuity, will be computed from the applicable cost table at the time of retirement.

At the time Colonel Gurley retired, the cost of the annuity he elected under the former provisions of 10 U.S.C. 1434(a) computed under the appropriate actuarial table was deducted from his pay before the elected fraction was applied to determine the amount of the annuity. Ordinarily, parts of a whole are expressed in terms of either fractions or percentages, rather than in a combination of the two. Thus,

some uncertainty exists as to the change desired by Colonel Gurley when he requested that his elected annuity "be reduced to the ¼ percentage factor" without mentioning the principal amount to which the reduction factor should be applied. We consider his request too vague to determine the amount of the annuity he is now electing.

Under the provisions of 10 U.S.C. 1436(b)(1) a retired member may apply for any annuity that is less than the original annuity he elected provided it is not less than the prescribed minimum. Since a request to reduce the amount of an annuity is irrevocable, it is necessary that the retired member be specific in stating the amount to which he desires the annuity to be reduced. Accordingly, Colonel Gurley should be requested to state the exact amount of the annuity he had in mind when he requested that the annuity be reduced. Since such statement would be merely a clarification of his original application for reduction, the reduced annuity may be made effective as of May 1, 1969.

As to the cost of the reduced annuity, the cost per dollar of the original annuity under the cost table in effect at the time of the member's retirement should be determined and that cost per dollar of annuity applied to the dollar amount of the reduced annuity he elects. Your letter indicates that the cost of Colonel Gurley's present annuity is $0.2053 per dollar and it would appear that that is the cost to be applied to the reduced annuity he specifies.

There being no basis for payment on the voucher forwarded with your letter, it will be retained here.

[B–166736]

Transportation — Dependents — Military Personnel — Dislocation Allowance—Members Without Dependents

An Army officer who upon completion of a tour of duty in a restricted overseas area is not assigned Government quarters incident to a permanent change of station but rejoins his dependents who had remained in the family residence in the United States is not entitled to the dislocation allowance prescribed by 37 U.S.C. 407(a) for a "member without dependents," as the term means a member that is not entitled to the transportation of his dependents, whereas the officer is entitled to the transportation of his dependents between the place at which they were located when he received his orders and his new duty station, regardless of the prohibition against their travel at Government expense to and from the United States, an entitlement that is not negated by the fact the place where his dependents were located and the place to which they were entitled to transportation are the same.

To Lieutenant Colonel R. D. Teasdale, Department of the Army, June 16, 1969:

Reference is made to your letter of March 10, 1969 (Ref: FINFA-3), and enclosures, forwarded here on April 17, 1969, by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Con-

trol No. 69–10), requesting a decision as to the entitlement of Lieutenant Colonel Jack W. Nielsen, 058534 (SSAN 273–18–5931), to dislocation allowance under the circumstances described.

You say that, while Colonel Nielsen served a tour of duty in the Republic of Vietnam, a restricted area, his dependents resided at 9256 Kristin Lane, Fairfax, Virginia. Upon completion of his tour of duty in that area, he was issued permanent change of station orders reassigning him to the Washington, D.C., area. Thereupon, he rejoined his dependents at 9256 Kristin Lane, Fairfax, Virginia, where he continues to reside with his dependents at this time. He has not been assigned Government quarters.

Your question in those circumstances is whether Colonel Nielsen is entitled to the dislocation allowance as a member without dependents under the provisions of paragraph M9003–1 of the Joint Travel Regulations.

Section 407(a) of Title 37, United States Code, provides in pertinent part as follows:

> (a) * * * under regulations prescribed by the Secretary concerned, a member of a uniformed service—
>
> * * * * * * *
>
> (3) without dependents, who is transferred to a permanent station where he is not assigned to quarters of the United States, is entitled to a dislocation allowance equal to his basic allowance for quarters for one month as provided for a member of his pay grade and dependency status in section 403 of this title. For the purposes of this subsection, a member whose dependents may not make an authorized move in connection with a change of permanent station is considered a member without dependents.

Paragraph M9003–1 of the Joint Travel Regulations, issued under the quoted statutory authority, provides that the dislocation allowance is payable whenever a member without dependents is transferred to a permanent duty station where he is not assigned to Government quarters. For such purpose, the term "member without dependents" is defined in paragraph M9001–2 of the Joint Travel Regulations to include a member who is not entitled to transportation of dependents under the provisions of paragraph M7000 in connection with a change of permanent station.

It appears to be your belief that Colonel Nielsen qualifies as a "member without dependents" as defined in paragraph M9001–2 incident to his reassignment to duty in the Washington, D.C., area by virtue of the provisions of paragraph M7000–14. Such provisions prohibit transportation of dependents for travel to and from the United States when the member is considered to be without dependents as defined in paragraph M4300–2, and item 4 of that paragraph includes in its definition of "members without dependents" members whose dependents are not authorized to be present in the vicinity of their overseas duty stations.

Paragraph M7000, with exceptions including that in subparagraph 14, cited above, provides that:

> Members of the Uniformed Services are entitled to transportation of dependents at Government expense upon a permanent change of station (see par. M3003–1) for travel performed from the old station to the new permanent station or between points *otherwise authorized in this volume*, * * * [Italic supplied.]

Subparagraph 4 of paragraph M7005 of the Joint Travel Regulations provides that when a member is—

> 1. transferred by permanent change of station orders from a restricted area to an unrestricted area;
>
> * * * * * * *
>
> he will be entitled to transportation of dependents from the place his dependents are located on receipt of permanent change-of-station orders * * * or from the place to which dependents were moved at Government expense [incident to his assignment to the restricted area] * * *, whichever results in the lesser entitlement, to the current duty station of the member, * * *.

Since Colonel Nielsen was transferred by permanent change-of-station orders from a restricted area to a station in the Washington, D.C., area, he was entitled under paragraph M7000 to transportation of his dependents between the place they were located upon his receipt of such orders and his current duty station as authorized by subparagraph 4 of paragraph M7005, regardless of the prohibition against their travel at Government expense to or from the United States as provided by paragraph M7000–14. The mere fact that the place the dependents were located and the place to which they were entitled to transportation were the same does not negate the basic entitlement's existence.

Inasmuch as Colonel Nielsen was entitled to the transportation of dependents under the provisions of paragraph M7000, as indicated, in connection with his permanent change-of-station from Vietnam to the Washington area, he must be considered a member with dependents under the provisions of paragraph M9001 of the Joint Travel Regulations. Accordingly, you are advised that he is not entitled to the dislocation allowance claimed. The supporting papers are retained.

[B–147109]

Payments—Advance—Subscriptions to Newspapers, Periodicals, Etc.—Lantern Slide Photographs

Lantern slide photographs of X-ray film, electrocardiograms, gross specimens, and photomicrographs that are illustrative of the materials presented in a Journal of Medicine and that are necessary for the effective use of the journal may be classified as "publications" as that term is used in 31 U.S.C. 530a, and, therefore, subscriptions for the slides may be paid for in advance. The fact

that the reproduced photographic material will be viewed or read from a screen does not preclude the slides from being considered publications.

To the Acting Administrator, Veterans Administration, June 19, 1969:

Reference is made to letter of May 19, 1969, from the former Administrator of Veterans Affairs presenting for our decision a question concerning the propriety of paying in advance for certain lantern slides described therein.

It is stated that the Veterans Administration is considering the procurement of 35 millimeter lantern slide photographs of X-ray film, electrocardiograms, gross specimens, and photomicrographs, which relate to, and are to be used in connection with case studies that appear in the New England Journal of Medicine. It is explained that the slides are illustrative of the materials presented in the journal and are necessary for effective use of the journal. The slides are produced by and are available only from the Department of Pathology of the Massachusetts General Hospital on a paid in advance subscription basis, while the New England Journal of Medicine must be procured from the publisher.

Question is asked, in effect, whether the slides may be considered to be "publications" as that term is used in 31 U.S.C. 530a and subscriptions therefor paid for in advance as authorized by such provision of law.

Section 530a of Title 31, United States Code, provides in pertinent part as follows:

> Subscriptions or other charges for newspapers, magazines, periodicals, and other publications for official use of any office under the Government * * * may be paid in advance from appropriations available therefor, notwithstanding the provisions of section 529 of this title.

As stated in the Administrator's letter, we held in our decision of September 26, 1961, 41 Comp. Gen. 211, that although microcards (sensitized cards on which printed matter is reproduced photographically in greatly reduced form) are distributed as separates, as distinguished from a pamphlet or periodical consisting of a number of pages, such factor need not be viewed as precluding them from being "publications." Also, we stated that the process under which the microcards were produced need not be considered as adversely affecting their classification as publications.

The items specified in 31 U.S.C. 530a—newspapers, magazines, and periodicals—are items which must be read as contrasted to phonograph records and tape recordings which are made to be heard. We have held that these latter items do not constitute publications. See 46 Comp. Gen. 394.

The fact that the reproduced photographic material will be viewed or read from a screen does not, in our opinion, preclude the slides from being considered publications, there being much similarity between the facts involved in this case and those in the microcard case referred to above.

Accordingly, and since the slides will be used in conjunction with printed matter and are said to be necessary for effective use thereof, we believe the slides properly may be classed as "publications" as that term is used in 31 U.S.C. 530a.

[B–149372, B–158195]

President—Former—Allowances—Staff, Office Space, Etc.

The "suitable" office space authorized by the so-called Former Presidents Act of 1958 "at such place within the United States as the former President shall specify" means space in one locality only, the act using the singular of the word "place," and whether space may be provided in more than one building in the same locality is for determination by the Administrator of General Services Administration who is authorized to provide the space. The Presidential Transition Act of 1963 prescribes space and office staff for the first 6 months after the expiration of a Presidential term to wind up the affairs of the Presidential office, and thereafter space and staff are to be furnished under the 1958 act. The 1970 fiscal year funds appropriated to carry out both acts may be used after July 20, 1969, but nonreimbursable services may not continue beyond the 6 months fixed by the 1963 act.

To the Administrator, General Services Administration, June 20, 1969:

Reference is made to your letter of May 19, 1969, requesting a decision concerning the furnishing of office space and office staff by the General Services Administration (GSA) to former Presidents of the United States under the so-called Former Presidents Act (act of August 25, 1958), Public Law 85–745, 72 Stat. 838, as amended, 3 U.S.C. 102 note.

Section 1(c) of the Former Presidents Act authorizes the Administrator of GSA to furnish for each former President suitable office space as determined by the Administrator, "at such place within the United States as the former President shall specify." You inquire as to whether under this authority the Administrator may provide office space (a) only in one building; (b) only in one locality but in more than one building; or (c) in more than one building in more than one locality.

Also, you refer to our letter of April 29, 1969, B–149372, B–158195, to the Chairman of the House Appropriations Committee, wherein you state that we held that the current appropriation for "Expenses, Presidential Transition," would be available for obligation through fiscal year 1970 for the purposes of the Presidential Transition Act of

1963 (see 3 U.S.C. 102 note). Under the Presidential Transition Act the Administrator of GSA is authorized to provide office space and compensation for office staff for a former President. You advise that funds are included in the fiscal year 1970 budget for provision of office space and staff to former Presidents under the Former Presidents Act. You request a decision as to whether after July 20, 1969, the funds available under both the Presidential Transition Act and the Former Presidents Act could be used to provide office space and office staff, subject to the other requirements of the acts.

A literal reading of section 1(c) of the Former Presidents Act would indicate that it was intended to authorize the Administrator of GSA to furnish a former President office space in only one locality in the United States, as distinguished from furnishing such space to a former President in more than one locality therein. The word "place" is singular and is used in juxtaposition with the words "within the United States." Had the Congress intended to authorize the furnishing of office space in more than one "place" in the United States, it would seem that either the plural of "place" (i.e., "places" would have been used, or language would have been used similar to that used in the Presidential Transition Act, where the furnishing of office space is authorized at "such place or places within the United States as the President-elect or Vice President-elect shall designate."

Also, insofar as the legislative history of section 1(c) is concerned, the House Hearings on the bill (S. 607) which became the Former Presidents Act discloses the following (Hearings before Committee on Post Office and Civil Service, House of Representatives, 85th Congress, 1st session, on H.R. 4401 and S. 607, page 8) :

Mr. LESINSKI. First of all, Mr. McCormack, I am honored to have you before the committee, and there are a few questions I would like to ask the gentleman, if it is proper.

On page 2, section (c), it says in a sense that he may have an office provided wherever he desires. President Hoover has served on the Hoover Commission and other commissions in this country and has served this country well. Would it not be appropriate for the language to state that an office shall be provided in the Capitol of the United States, or words to that effect, in Washington, D.C., *and any other place he may desire?*

Mr. MCCORMACK. I might suggest, Congressman, that I hope the language will be left the way it is because it says :

> The Administrator of General Services shall furnish for each former President suitable office space appropriately furnished and equipped, as determined by the Administrator, located in a Federal building at such place within the United States as the former President shall specify.

Of course "Federal building" is very broad. I should think that he has very wide discretion there and if this should become law of course we know in practical operation there would be no difficulties from that angle at all. I would imagine that President Truman if he were to take advantage of that part of the bill would probably want to have office space out in Independence or in close proximity to his home. I would assume under this if they wanted it and there was office space available in Washington—I do not mean the Capitol Building itself, but in Washington—the Administrator would have the authority and power under this language to designate such space. However, I do not think there would be any difficulty on that. [Italic supplied.]

While it appears from the quoted discussion that consideration was given to authorizing the furnishing of office space in more than one place within the United States, section 1(c) was not changed to so provide. Mr. McCormack's reply to Mr. Lesinski indicates that he imagined that a particular former President would probably want office space near his home, but that if a former President desired office space in Washington, D.C., the Administrator of GSA would have the authority under section 1(c) to designate such space. There is nothing specific in Mr. McCormack's reply, however, to indicate that it was intended that former Presidents could be furnished office space in more than one locality within the United States, and the language used in section 1(c) does not support such an intent.

It should be noted that the House amended S. 607 (insofar as pertinent here) so as to delete the provision (section 1(c)) authorizing the furnishing of office space, but the provision was restored in conference, except that the restriction in S. 607 requiring that such office space be located in a Federal building was eliminated.

In light of the foregoing it is our view that under section 1(c) of the Former Presidents Act the Administrator of GSA may provide office space to former Presidents in only one locality within the United States.

Insofar as providing space in more than one building in the same locality is concerned, section 1(c) authorizes the Administrator of GSA to furnish former Presidents "suitable office space * * * *as determined by the Administrator.*" Thus, what constitutes "suitable office space" is a matter primarily for determination by the Administrator of GSA. Hence, whether it would be necessary to provide space in more than on building in the same locality in order to furnish a former President "suitable office space" would be a matter for determination by the Administrator of GSA.

Insofar as "suitable office space" is concerned, we note from the above-cited House Hearings (page 29) that the Bureau of the Budget (apparently on the basis of information furnished by GSA) indicated to the Committee that the estimated cost of office furnishings for a former President and staff was based on furnishing a three-room suite aggregating approximately 1300 square feet of floor space. However, we do not consider this as controlling insofar as furnishing space in more than one building within a locality is concerned.

As to your second question, section 4 of the Presidential Transition Act of 1963, provides, in part, that the provisions of the act of August 25, 1958, 72 Stat. 838, 3 U.S.C. 102 note (the Former Presidents Act), other than subsections (a) and (e)—having to do with allowance and pension respectively—shall not become effective with respect to a

former President until 6 months after the expiration of his term of office as President. Thus, it would appear that the Congress did not intend, insofar as pertinent here, that a former President would be provided office space and office staff under both the Presidential Transition Act and the Former Presidents Act, since the period for which the Administrator is authorized to provide office space and office staff under the former act (Presidential Transition Act) is limited to a period not to exceed 6 months from the date of the expiration of the former President's term of office. See pages 7 and 8, H. Rept. No. 301, 88th Cong., 1st sess.

Section 4 of the Presidential Transition Act limited the period thereunder for which the Administrator of GSA is authorized to furnish office space and staff to a former President to not more than 6 months from the date of expiration of his term of office; however, funds appropriated in the Independent Offices and Department of Housing and Urban Development Appropriation Act, 1969, to carry out the Presidential Transition Act were made available until June 30, 1970. As previously stated, we held in our letter of April 29, 1969, that the funds contained in the above-cited appropriation act to carry out the Presidential Transition Act were available for obligation for the purposes of that act until June 30, 1970, notwithstanding the provisions of section 4 of such act.

Since funds to be appropriated for fiscal year 1970 to carry out the provisions of the Former Presidents Act and funds appropriated by the Independent Offices and Department of Housing and Urban Development Appropriation Act, 1969, Public Law 90-550, 82 Stat. 937, to carry out the provisions of the Presidential Transition Act of 1963 are available until June 30, 1970, both may be used after July 20, 1969, to provide office space and office staff for such former President, subject to the other requirements of both acts.

We would point out, however, that funds made available to carry out the Presidential Transition Act are to be used to provide office space and office staff for a former President and are to be used only for the purpose of winding up of the affairs of his office; and that funds made available to carry out the Former Presidents Act are to be used only to provide office space and office staff in connection with carrying out the provisions of that act.

Also, you are advised that neither our letter of April 29, 1969, nor this decision, authorizes the continuation of the nonreimbursable services—i.e., services for which appropriations are not required—provided for in the Presidential Transition Act beyond the 6-month period fixed in that act.

[B-166865]

Bids—Delivery Provisions—Failure to Meet

A telegraphic bid on additional gallons of turbine fuel, aviation JP-4, to be shipped on an f.o.b. origin basis that did not specify the point of origin, information that also was not furnished in a confirming letter, properly was rejected as nonresponsive where the f.o.b. shipping point could not be ascertained by a reading of the bid as a whole. Although the small business bidder has only one refinery and it was identified in both the telegram and confirming letter, the fuel being obtainable from a wide number of sources, and the bidder having listed in its basic bid three different origin points for four separate increments of JP-4 grade fuel, the Government could neither determine transportation costs for evaluation purposes, nor if it accepted the bid, legally bind the bidder to deliver at its refinery.

To Korth and Korth, June 20, 1969:

Further reference is made to your letter of May 5, 1969, protesting on behalf of the Okmulgee Refining Co., Inc., against the rejection of its bid under telegraphic invitation for bids No. DSA600-69-B 0161-0003, issued by the Defense Fuel Supply Center, Alexandria, Virginia.

The telegraphic invitation for bids, which was issued on March 24, 1969, requested letter bids or wire bids confirmed by letter for delivery of all or any part of 4,500,000 additional gallons of turbine fuel, aviation grade JP-4, on an f.o.b. origin or f.o.b. destination basis, Tinker Air Force Base, Oklahoma, during the period April 1, 1969, or date of award, through June 30, 1969. Prospective bidders were advised that the solicitation was issued subject to all terms, conditions, and specifications of the basic invitation for bids No. DSA600-69-B 0161, as amended, except as modified by the telegraphic invitation for bids itself. Of the 4,500,000 gallons requested, 3,825,000 gallons were set aside for small business firms.

One of the five telegraphic bids received by bid opening, which was held at 3:45 p.m., April 7, 1969, was a telegraphic bid from the Okmulgee Refining Co., Inc., stating:

REFERENCE DSA600-69-B-0161-0003 ATTN CODE DFSC PS. OKMULGEE BID .0985 ORIGIN. TERMS NET. WE ARE INTERESTED AND QUALIFY FOR SMALL BUSINESS SET ASIDE. WE HAVE READ AND AGREE TO CONDITIONS FIXED IN SOLICITATION WIRE OF MARCH 24, 1969 KA-325. CONFIRMING LETTER TO FOLLOW.

In a confirming letter dated April 2, 1969, Okmulgee stated:

Reference: DSA600-69-B-0161-0003, Attention Code DFSC-PS.
Okmulgee bid .0985 Origin.
Terms net.
We are interested and qualify for small business set-aside.
We have read and agree to conditions fixed in Solicitation wire of March 24, 1969 KA-325.
Bid by wire—April 2, 1969.

Two of the four other bidders quoted f.o.b. origin prices of $0.096 and $0.104 per gallon and the two other bidders quoted f.o.b. destination prices of $0.1043 and $0.1095 per gallon. The contracting officer

reports that since Okmulgee did not specify the point of origin in its bid, he determined that such bid was nonresponsive to the invitation and, therefore, should be rejected. On April 11, 1969, an award of 2,000,000 gallons was made to the Bell Oil & Gas Company under contract No. DSA600-69-D-1876, and an award of 2,500,000 gallons was made to the Tonkawa Refining Company under contract No. —1877.

You contend that Okmulgee's letter confirming its wire bid when read alone shows the point of origin of the fuel; that the phrase "Okmulgee bid .0985 Origin" clearly indicates the origin to be Okmulgee, Oklahoma; and that your position is further enhanced by the fact that Okmulgee is a small business firm with only one refinery, which situation, you state, is clearly analogous to the situation present in the Saratoga case reported in decision B-155429, November 23, 1964.

In the Saratoga case, B-155429, mentioned above, we held that if a bidder submitting a "letter bid" fails to explicitly designate an f.o.b. point of origin, the f.o.b. point may, in the proper circumstances, be ascertained by a reading of the bid as a whole. In that case our Office considered the responsiveness of such a bid submitted by a small business concern offering to furnish the advertised supplies at a price lower than other bidders. We held in that case, in pertinent part, that:

> The competitive bidding statute codified at 10 U.S.C. 2305 requires that award of a contract be made to that responsible bidder submitting the lowest responsive bid. 37 Comp. Gen. 550. Where bids are submitted on an f.o.b. origin basis, one of the factors for consideration is the Government's cost of transportation. See generally 42 Comp. Gen. 434. Essentially you appear to take the position that since Saratoga did not explicitly designate its intended f.o.b. point of origin, its bid cannot be evaluated fairly since the Government cannot compute the cost of transportation. The contracting officer on the other hand has taken the position that since Saratoga has only one plant, which is located at Saratoga Springs, New York, it is only fair to assume that Saratoga intended to designate Saratoga Springs as the f.o.b. point of origin for purposes of bid evaluation. It could well be argued that Saratoga's letter bid itself indicates Saratoga Springs, New York, as its intended f.o.b. origin point, since that letter shows Saratoga Springs as the company location, no other location is mentioned in the letter, and the letter states the company is a small business incorporated in the State of New York. Further, in view of the fact that Saratoga's bid is approximately $150,000 less than the next lowest bid (by Rodale Electronics), it is apparent that the cost of transportation from *any* point of origin (total weight is under 30,000 pounds) could not change Saratoga's standing as low bidder. * * *

The contracting officer contends that our decision in the Saratoga case does not apply to the situation in the present case because there are certain facts present in this case which were not present in the Saratoga case. He admits that many facts in the Saratoga case are similar to those at hand, such as a small business firm, one plant only in existence, and a letter bid containing the location of the sole plant in the letterhead (or in the signatory portion of the telegram). He states, however, there the analogy ceases. He points out that in the Saratoga case, the end items being procured were components for an "AN/ASA-

16 Indicator Group, together with change pages to technical manuals, revision drawings, design data, and provisioning data." It is his opinion that it was safe to believe that Saratoga would be producing and delivering the end items from its own plant since such end items and documents could not easily be obtained elsewhere. The contracting officer also contends that the facts here involved are materially different from those present in the Saratoga case in that the product (grade JP–4 turbine fuel) is easily obtainable from a wide number of sources; that there are numerous possible sources for the product within a reasonable area of the stated destination; that Okmulgee has recently bid from three points of origin including two in the area here involved; and that it is common practice in the industry to bid from another's refinery. It is the opinion of the contracting officer that the Defense Fuel Supply Center would not legally bind Okmulgee to deliver at Okmulgee, Oklahoma, if it had accepted its bid as submitted.

We do not agree with your contention that the phrase "Okmulgee bid .0985 Origin" appearing in Okmulgee's telegram and letter indicates the point of origin to be Okmulgee, Oklahoma. In our view, the word "Okmulgee" obviously was intended to identify the bidder. Further, we concur in the view of the contracting officer that the rationale of the Saratoga case may not be applied to the present case because Okmulgee's origin of Okmulgee, Oklahoma, cannot be supported upon a historical basis. The record indicates that in a bid submitted in response to basic invitation for bids No. DSA600–69–B–0161, Okmulgee listed three different origin points for four separate quantity increments of grade JP–4 aviation turbine fuel. We therefore are of the opinion that the Government could not legally bind Okmulgee to deliver at Okmulgee, Oklahoma, if it had accepted the bid as submitted.

Accordingly, your protest must be denied.

[B–166803]

Pay—Absence Without Leave—Civil Arrest—Unexcused, Etc.

A Marine Corps member who while in an unauthorized absence status is confined and later indicted by civilian authorities for violating 18 U.S.C. 2312 (transporting in interstate commerce a stolen motor vehicle or aircraft), and who on the basis of a court finding of mental incompetency is retained in a Medical Center for Federal Prisoners until discharge of the indictment and his return to military control, is not entitled to credit in his final military pay record with pay and allowances for the period of absence—October 5, 1962 to February 9, 1965—in view of the Commandant of the Corps determination under paragraph 044253, Navy Comptroller Manual, that the absence may not be excused as unavoidable, and that the member's absence in the hands of the civil authorities must be considered "time lost" for pay purposes.

To Major D. J. Thomas, United States Marine Corps, June 25, 1969:

Further reference is made to your letter of April 15, 1969, with enclosures, requesting an advance decision whether you are authorized to credit the final military pay record of a former private in the U.S. Marine Corps with pay and allowances for the period October 5, 1962, to February 8, 1965, under the circumstances disclosed. Your letter was forwarded here by Disbursing Branch, Fiscal Division, Headquarters United States Marine Corps, under date of April 28, 1969, and has been assigned control number DO–MC–1035 by the Department of Defense Military Pay and Allowance Committee.

You state that the private enlisted in the Marine Corps for 4 years on November 8, 1961; that he entered an unauthorized absence status on September 12, 1962; that on October 5, 1962, he was apprehended and confined by civil authorities in Memphis, Tennessee, on suspicion of violating 18 U.S.C. 2312 (transporting in interstate commerce a stolen motor vehicle or aircraft); and that on October 8, 1962, an indictment was entered against him in the U.S. District Court for the Western District of Tennessee.

You also state that the enlisted man entered a plea of not guilty to the indictment; that upon his motion to the court he was granted a private psychiatric examination; and that on the basis of the psychiatrist's report, the court, on March 5, 1963, committed him to the Medical Center for Federal Prisoners, Springfield, Missouri, for further examination and evaluation. You report that on July 29, 1963, the enlisted man was found by the court to be "presently insane or otherwise so mentally incompetent as to be unable to understand the proceedings against him or properly to assist in his own defense." He was committed to the custody of the Attorney General until he was mentally competent to stand trial or until the charges were disposed of. He continued to be retained in the Medical Center for Federal Prisoners.

You further state that on February 5, 1965, the indictment against the enlisted man was dismissed and on February 9, 1965, he was released by the civil authorities and returned to military control. No disciplinary action was taken by the Marine Corps against him. The Commandant of the Marine Corps decided not to excuse his absence as unavoidable. On July 8, 1965, he was discharged from the Marine Corps under honorable conditions for physical disability, because of "Schizophrenic reaction, paranoid type, with active psychotic manifestations of such (sic) to produce complete social and industrial inadaptability." His disability was determined to have existed prior to entrance on active service and not to have been aggravated by active service.

You say that the enlisted man was not paid pay and allowances for the period September 12, 1962, to February 8, 1965. You also say that he petitioned the Board for the Correction of Naval Records to change his military records to show that his period of unauthorized absence was excused as unavoidable. The Correction Board has taken the position that the absence of the member during the period October 5, 1962, to February 8, 1965, while he was in confinement in the hands of civil authorities, concerns a matter which is not properly within its purview.

The Board is of the opinion, however, as pointed out in your letter, that paragraph 044253, Navy Comptroller Manual, automatically excuses as unavoidable an absence while in confinement by the civil authorities under circumstances such as are here involved and that the claimant is entitled to pay and allowances for the period of confinement. It appears that the Correction Board views the action by the Commandant in not excusing the absence as unavoidable, as being in contravention of the regulations and therefore without lawful effect.

You express doubt as to whether paragraph 044253 of the Navy Comptroller Manual is the controlling regulation. You refer to paragraph 044254 of the same manual, and you say that while the Department of the Navy did not make a specific determination that the member was mentally incompetent, the court found that he was not mentally competent and the indictment was subsequently dismissed because of his mental disorder. If it is determined that paragraph 044253 is controlling, you express further doubt whether that regulation should be literally interpreted so as to remove from administrative officials the discretionary authority to find that an unauthorized absence should or should not be excused as unavoidable.

The right of a member to receive pay and allowances while absent without leave is governed by the provisions of 37 U.S.C. 503(a) derived from section 4(b) of the Armed Forces Leave Act of 1946 which reads as follows:

> (a) A member of the Army, Navy, Air Force, Marine Corps, Coast Guard, or Environmental Science Services Administration, who is absent without leave or over leave, forfeits all pay and allowances for the period of that absence, unless it is excused as unavoidable.

It has long been held that the phrase "unless it [the absence] is excused as unavoidable" used in the above statutory provision, must be construed as meaning that if the absence is excused as unavoidable, the member involved would not forfeit pay and allowances to which he is otherwise entitled for the period of his absence. Under the statute, the question whether there exists sufficient grounds for excusing a member's absence as unavoidable, is, at least in the first instance, a matter for administrative determination based on the facts in a particular case. See 36 Comp. Gen. 173; 39 *id.* 781 and the authorities there cited.

With respect to the question of confinement of a member by the civil authorities because of an alleged commission of a civilian offense while on unauthorized leave, we said in 36 Comp. Gen. 173, 175, that presumably, dismissal of the charges or acquital would constitute a sufficient basis for excusing such an unauthorized absence as unavoidable, but "Until so excused * * * the statute precludes payment of pay for the period of absence, regardless of the outcome of the civilian proceedings."

Unlike the provisions in paragraph 044253 of the Navy Comptroller Manual, discussed below, regulations promulgated by the Army (paragraph 12122*a*, Army regulation 37–104, February 15, 1965) and Air Force (paragraph 10351a, Air Force Manual 173–20, ch. 46, January 1, 1958) in implementing 37 U.S.C. 503(a) and the similar provision of the 1946 leave act, specifically required a determination by the member's commanding officer that the unauthorized absence in the hands of civil authorities was excused as unavoidable, before payment of pay and allowances could be made.

We understand that the decision which you believe to be applicable in this case and which covers a situation similar to this one is B–144660, April 3, 1961. In that decision we considered the case of an Air Force enlisted man who, for the period involved, was in the hands of the civil authorities and in confinement at St. Elizabeth's Hospital in consequence of the commission of a criminal act. In the light of the law and the implementing Air Force regulations which precluded payment of pay and allowances unless the absence is excused by the commanding officer as unavoidable, we concluded that in the absence of such a determination he was not entitled to the pay and allowances for the period of the absence.

Paragraph 044253, Navy Comptroller Manual, in effect during the period of the private's claim, provided in pertinent part, as follows:

> 044253 ABSENCE, IN CUSTODY OF CIVIL AUTHORITIES.
> 1. GENERAL. A member under arrest and held by civil authorities will receive no pay and allowances for the time of such unauthorized absence. If he is released without trial or after trial and acquittal, except upon his agreement to make restitution or reparation for the alleged offense for which he was taken into custody, the absence is considered as unavoidable, and pay and allowances for the period of such absence will be returned unless the member is subsequently convicted by a court-martial on the same facts * * *.

Apparently, no action has been taken by the Marine Corps under paragraph 044253. The Commandant of the Marine Corps, however, on the basis of the facts in this case, made a determination under paragraph 044254, of the same manual, that the member's absence may not be excused as unavoidable. This paragraph precluded payment of pay and allowances to a mentally incompetent member for a period of unauthorized absence, unless such absence is excused as unavoidable.

In a decision dated December 12, 1958, B–134538, we considered the effect of the above-quoted provisions of paragraph 044253 in the case of an enlisted man of the Navy whose authorized leave expired while he was being held by the civil authorities under charges against him which were subsequently dismissed. While we held in that case that in the light of paragraph 044253, the enlisted man was entitled to pay and allowances for the period he was absent in the hands of the civil authorities, there is for noting that such conclusion was based on the additional fact that since no entry was made in the man's service record charging him with "lost time" under the cited Sec Nav Instruction, his absence was considered as having been excused. The same situation is not present in this case, since the Commandant, in message dated March 30, 1965, copy of which you enclosed, expressly determined that the member's absence in the hands of the civil authorities must be considered as "time lost" for pay purposes. Moreover, paragraph 044254 was not involved, that is, it had no application, in the case considered in the decision of December 12, 1958.

While the enlisted man's situation seems to bring him within the scope of either paragraph 044253 or 044254 of the Navy Comptroller Manual, it is our view that in the absence of a determination by proper authorities that his absence during the period October 5, 1962, to February 8, 1965, a period of over 2⅓ years, while he was in the hands of the civil authorities, is excused as unavoidable, there is no basis for crediting his final pay account with pay and allowances for that period. *Cf.* 40 Comp. Gen. 366; 47 *id.* 214, and authorities there cited. See, also, the current regulations, applicable to all the services, under which pay and allowances of an enlisted man while absent in confinement by the civil authorities is forfeited unless a determination is made that the absence is excused as unavoidable. See paragraph 10314, chapter 3, section B, Department of Defense Military Pay and Allowances Entitlements Manual, Rules 5 and 6, Tables 1–3–2. Table 1–3–3 prescribes rules for determining whether absence is unavoidable and states that such absence *may* be excused as unavoidable.

[B–167018]

Guam—Junior Reserve Officers' Training Corps Programs—Establishment

The phrase "throughout the Nation" as used in 10 U.S.C. 2031(a) authorizing the establishment and maintenance of Junior Reserve Officers' Training Corps units may be considered to include the unincorporated territory of Guam, absent an indication in the legislative history that the phrase was used in a restrictive or limited sense and in view of the indication that expansion of the Junior ROTC programs was intended. Therefore, appropriated funds may be used to support a Junior ROTC unit if established at George Washington Senior High

School, Mangilao, Guam, an instrumentality of the unincorporated territory of the Government of Guam established, maintained, and operated pursuant to the authority in section 29(b) of the Organic Act of Guam.

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

The employment of retired members of the uniformed services by a secondary school that is an instrumentality of the unincorporated territory of the Government of Guam as administrators or instructors in a Junior Reserve Officers' Training Corps program is not prohibited under the dual pay and dual employment provisions of 5 U.S.C. 5531–5533, absent an indication in the Dual Compensation Act or its legislative history of the intent to expand the coverage of the act to offices or positions in territories which had not been included in the previously existing dual compensation laws that were repealed. In addition the Reserve Officers' Training Corps Vitalization Act of 1964 (10 U.S.C. 2031(d)) authorizes the employment of retired members in Junior ROTC programs and prescribes the basis for payment to the members.

To the Secretary of the Army, June 25, 1969:

Reference is made to the letter dated May 14, 1969, with enclosures from the Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs), presenting several questions arising out of the application for the establishment of a Junior Reserve Officers' Training Corps unit at George Washington Senior High School, Mangilao, Guam.

The first question presented is whether appropriated funds may be expended to support a Junior ROTC unit, if established on Guam. This question apparently arises because there is some doubt as to whether the territorial status of Guam permits it to be included within the words "throughout the Nation" as used in the sentence contained in 10 U.S.C. 2031(a) which provides that "The President shall promulgate regulations prescribing the standards and criteria to be followed by the military departments in selecting the institutions at which units are to be established and maintained and shall provide for the fair and equitable distribution of such units throughout the Nation."

Assuming a positive response to the first question the next question presented in the letter is whether George Washington Senior High School, Mangilao, Guam, is considered to be a part of the "legislative, executive or judicial branch of the Government of the United States" within the meaning of 5 U.S.C. 5531. Under the provisions of 5 U.S.C. 5531 the term "position" is defined for the purposes of 5 U.S.C. 5532 and 5533, dealing with dual pay and dual employment, as "a civilian office or position (including a temporary, part-time, or intermittent position), appointive or elective, in the legislative, executive, or judicial branch of the Government of the United States (including a Government corporation and a nonappropriated fund instrumentality under the jurisdiction of the armed forces) or in the government of the District of Columbia."

The last question presented in the letter is "Do the restrictions on the employment of retired Regular members apply to these members when employed to conduct Junior ROTC at schools considered to be part of the Government of the United States within the meaning of 5 U.S.C. 5531?"

The island of Guam was ceded to the United States from Spain at the end of the Spanish-American War by Article II of the Treaty of Peace between the United States of America and the Kingdom of Spain, signed at Paris on December 10, 1898, 30 Stat. 1754.

Section 3 of the Organic Act of Guam, approved August 1, 1950, 64 Stat. 384, 48 U.S.C. 1421a, declares Guam to be an "unincorporated territory of the United States and the capital and seat of government thereof shall be located at the city of Agana, Guam." Section 4 of the same act, 48 U.S.C. 1421*l*, amended Chapter II of the Nationality Act of 1940 so as to declare certain persons born in or inhabitants of the island of Guam to be citizens of the United States.

Section 3 of the act also provides that the government of Guam "shall consist of three branches, executive, legislative, and judicial, and its relations with the Federal Government shall be under the general administrative supervision of the head of such civilian department or agency of the Government of the United States as the President may direct." Effective August 1, 1950, administration of the island was transferred from the Secretary of the Navy to the Secretary of the Interior.

Section 29(b) of the Organic Act of Guam, 48 U.S.C. 1421g(b), provides that the Governor "shall provide an adequate public educational system of Guam, and to that end shall establish, maintain, and operate public schools at such places in Guam as may be necessary."

Neither the phrase "throughout the Nation" nor the word "Nation" is defined in the Reserve Officers' Training Corps Vitalization Act of 1964, Public Law 88-647, approved October 13, 1964, 78 Stat. 1063, which became 10 U.S.C. 2031 *et seq.* There is nothing in the legislative history of the act to specifically indicate the legislative intention in using those terms, and there are no generally accepted definitions of those terms which would be helpful. However, there is nothing to indicate that the terms were used in any restrictive or limited sense. It does appear that considerable expansion of the Junior ROTC program was intended. See, for example, page 4 of S. Rept. No. 1514 of August 20, 1964, in which it is stated:

> The committee intent is that the Junior ROTC program be expanded on an equitable geographic basis by establishing as many as 200 units each year from the best qualified institutions that apply for such units, up to the maximum of 1,200 units.

Enclosed with the Deputy Assistant Secretary's letter of May 14, 1969, was a copy of a letter dated January 8, 1969, to the Deputy Assistant Secretary, Reserve Affairs, Assistant Secretary of Defense, from the Director, Office of Territories, United States Department of the Interior, which concludes with the opinion that a Junior ROTC program can be established on Guam pursuant to the provisions of section 2031 of the Reserve Officers' Training Corps Vitalization Act of 1964.

It is our understanding that George Washington Senior High School, Mangilao, Guam, is an instrumentality of the unincorporated territory of the Government of Guam established, maintained, and operated pursuant to authority of section 29(b) of the Organic Act of Guam, *supra.*

In view of the above it is our conclusion that Guam may be included in the phrase "throughout the Nation" as contained in 10 U.S.C. 2031 (a). Therefore, appropriated funds may be used to support a Junior ROTC unit, if established at George Washington Senior High School, Mangilao, Guam. Compare our decision dated December 5, 1966, 46 Comp. Gen. 548, in which it was concluded that the island of Guam may be considered "outside * * * the United States" within the meaning of that phrase as used in the second paragraph of 36 U.S.C. 138b relating to certain authority of the American Battle Monuments Commission.

The following is applicable to the last two questions presented.

We have consistently recognized a distinction between employment by a territorial government and employment by the Government of the United States.

In our decision of June 28, 1946, 25 Comp. Gen. 912, we held that section 212 of the Economy Act of June 30, 1932, 47 Stat. 406 (then 5 U.S.C. 59a) did not prohibit the concurrent receipt of retired pay from the United States by a retired officer of the Army and salary as an Adjutant General of the then Territory of Hawaii, paid from territorial funds. Our decision of March 24, 1948, 27 Comp. Gen. 552, held that the Adjutant General of Puerto Rico whose compensation is paid from territorial funds as an officer of the territory may accept an appointment as State Director of Selective Service Records without resulting in the holding of more than one Federal office in violation of any of the Federal dual compensation statutes.

In our decision of December 22, 1955, 35 Comp. Gen. 369, we held that, employees of the government of Guam who received salaries in accordance with the provisions of section 26(d) of the Organic Act of Guam, 48 U.S.C. 1421d, are not employees of the United States within the purview of sections 5537 and 6322 of Title 5 of the United

States Code (formerly sections 30n and 30o) which concern fees for jury service and the granting of court leave to employees of the United States serving as jurors. A decision of September 4, 1963, 43 Comp. Gen. 227, concluded that quarters rented by the government of Guam to Federal employees traveling on official business were not furnished by a Federal Government agency within the purview of section 6.7 of the Standardized Government Travel Regulations.

In an unpublished decision of February 12, 1953, B–112015, to the Secretary of the Interior, we held that the provisions of section 212 of the Economy Act of June 30, 1932, *supra*, were not applicable to a retired commissioned officer of the Armed Forces employed in a department of the Government of Samoa.

The dual compensation statutes, including section 212 of the Economy Act of June 30, 1932, *supra*, which are referred to in some of the above decisions, were repealed by the provisions of the Dual Compensation Act, approved August 19, 1964, Public Law 88–448, 78 Stat. 484. That Dual Compensation Act formed the basis for the dual compensation provisions of 5 U.S.C. 5531 *et seq.* when the laws relating to the organization of the Government of the United States and to its civilian officers and employees, generally, were revised, codified, and enacted as Title 5 of the United States Code, entitled "Government Organization and Employees" by Public Law 89–554, approved September 6, 1966, 80 Stat. 378.

There is nothing in the Dual Compensation Act or in its legislative history to indicate an intention on the part of Congress to expand its coverage to offices or positions in the territories which had not been included within the provisions of the previously existing dual compensation laws which it repealed. Therefore it is our conclusion that the dual pay and dual employment provisions of 5 U.S.C. 5531 *et seq.* which are based upon the provisions of the Dual Compensation Act would not be applicable to persons employed by an institution of the government of Guam as administrators or instructors in a Junior ROTC program. Whatever doubt might arise, because persons so employed might be considered as engaged in the performance of Federal functions authorized by Federal statute and therefore by analogy come within the purview of our decision of August 6, 1956, 36 Comp. Gen. 84, appears to be resolved by the provisions of the Reserve Officers' Training Corps Vitalization Act of 1964 in 10 U.S.C. 2031(d) as follows:

§ 2031. Junior Reserve Officers' Training Corps

* * * * * * *

(d) Instead of, or in addition to, detailing noncommissioned and commissioned officers on active duty under subsection (c)(1), the Secretary of the military department concerned may authorize qualified institutions to employ, as administrators and instructors in the program, retired noncommissioned and commissioned officers, and members of the Fleet Reserve and Fleet Marine Corps Reserve, whose qualifications are approved by the Secretary and the institution concerned and who request such employment, subject to the following:

(1) retired members so employed are entitled to receive their retired or retainer pay and an additional amount of not more than the difference between their retired pay and the active duty pay and allowances which they would receive if ordered to active duty, and one-half of that additional amount shall be paid to the institution concerned by the Secretary of the military department concerned from funds appropriated for that purpose.

(2) notwithstanding any other provision of law, such a retired member is not, while so employed, considered to be on active duty or inactive duty training for any purpose.

We understand that the purpose of the provisions quoted above was to avoid the application of the dual compensation statutes and other restrictive statutes in existence at the time the legislation was being considered which might have affected the employment of retired members of the armed services by qualified secondary schools in the Junior Reserve Officers' Training Corps program. See our decision of October 28, 1963, to the then Secretary of the Army, 43 Comp. Gen. 421.

The limitations in 10 U.S.C. 2031(d) *supra* are, of course, applicable to persons employed in accordance with its authority.

It is believed that the above disposes of the last two questions presented in the letter.

[B–166601]

Bids—Unsigned—Only Bid Received

The rejection of the only bid received before bid opening because it was not signed was not required by paragraph 2–405 of the Armed Services Procurement Regulation, but the representative who had delivered the bid should have been permitted to sign it, not on the basis that his authority to bind the bidder was known or made obvious by his conduct, but because the bid was the only one received and neither the question of bidder option to elect after bid opening whether or not to be bound, nor the question of prejudice to other bidders were involved—the only other bid received being an acceptable late bid submitted at a higher price. Therefore, the unsigned bid must now be treated as if permission to sign it had been given and the bid may be considered for award.

To the Murdock, Inc., June 27, 1969:

Reference is made to your telegrams of April 3 and 9, 1969, and subsequent correspondence, protesting against failure of the U.S. Navy Purchasing Office, Washington, D.C., to award your company a contract under invitation for bids (IFB) No. N00600–69–B–0313.

The above invitation was issued on February 5, 1969, and called for the furnishing of one forming press. The specified bid opening time

was 10:30 a.m., February 27, 1969. Prior to bid opening, at approximately 9:30 a.m. February 27, a Mr. Bogumil, Director of Manufacturing of Chisholm-Ryder Company, Inc., visited the office of Mr. Emanual Wolf, the Navy Purchasing Office (NPO) buyer cognizant of the subject solicitation. Mr. Bogumil displayed two bid packages to Mr. Wolf and stated that his purpose in visiting the NPO Washington office was to deposit a bid on the present solicitation as well as a second solicitation. He also indicated to Mr. Wolf that since K. R. Wilson Division of Chishom-Ryder Company, Inc., was operating below capacity and was anxious to receive new contracts, he had bid low on the subject solicitation and was sure that K. R. Wilson would be the successful bidder. Mr. Bogumil departed at 10:15 a.m. indicating that he planned to deposit the bids and attend the bid opening. At bid opening time K. R. Wilson Division's bid of $45,750 was the only bid received and opened. However, it was discovered that, while the name "H. W. Schuyler, Comptroller," was typed in the block entitled "name and title of person authorized to sign offer," there was no signature nor was there a signature anywhere else on the bid.

Government representatives at the bid opening informed Mr. Bogumil, who was present, that since the bid was unsigned it could not be considered for award. Mr. Bogumil requested permission to sign the bid, but was told by bid opening officials that since the time for submission of bids had passed he could not be permitted to sign the bid. Mr. Bogumil then returned to the office of Mr. Wolf, explained to Mr. Wolf that the bid had not been signed and requested that the bid be considered in spite of the absence of a signature. Later in the day a second bid was received from Murdock in the amount of $55,579, however, we understand that the buyer was not advised until the following day that a late bid had been received. After an investigation it was determined that Murdock's bid had been sent by certified mail and that the lateness had been due solely to a delay in the mail. This determination appears to have been made on March 10, at which time the bid was forwarded to the buyer, was opened, and was entered on the abstract.

Mr. Wolf as well as Mr. William R. Cooper, another NPO buyer, stated that they had had previous dealings with Mr. Bogumil and were under the impression that he had the authority to bind the Chisholm-Ryder Corporation contractually, and that his commitments had always been confirmed by it. It does not appear from the record, however, that either Mr. Wolf or Mr. Cooper had any other notice, written or oral, of Mr. Bogumil's authority to bind the corporation in contract matters, or that he had in fact ever signed formal contractual documents on its behalf, all of the commitments which they referred

to as having been confirmed by the comptrollers of the respective divisions having been oral.

After bid opening K. R. Wilson Division submitted a copy of a letter of February 9, 1965, addressed to the New York Procurement District, Rochester Regional Office, by Chisholm-Ryder, which stated that Mr. Bogumil was authorized to sign for any and all divisions of Chisholm-Ryder. Also, by letter of April 25, 1969, addressed to NPO, the President of Chisholm-Ryder stated that Mr. Bogumil has the authority to sign quotations and to negotiate contracts for the Chisholm-Ryder Company, Inc., and its divisions. In their telegram of June 4, 1969, to this Office, K. R. Wilson Division reaffirmed this authority. Of course, the latter communications, having been written after bid opening, would have no probative value to establish that acceptance of the bid as submitted would have bound the corporation, since we have held that the responsiveness of a bid may not be established by material furnished by the bidder after bid opening. 38 Comp. Gen. 819. Neither does it appear that the contracting officials were on notice of the 1965 statement to the New York Procurement District.

It is the procuring activity's contention that Government representatives (the buyers mentioned above) were aware, prior to bid opening, that Mr. Bogumil was authorized to bind the bidder to a contract. Additionally, it is stated that Mr. Bogumil's expressions to Mr. Wolf, prior to opening, of his confidence of receiving the award on the present procurement constituted a clear expression of an intention to be bound by the unsigned bid. Consequently, it is contended that in view of the circumstances surrounding the bid submission, K. R. Wilson Division would be unable to disavow the bid and upset an award made to it on the ground that the bid lacked an authorized signature. Therefore, the activity considers the absence of a signature to be merely a minor informality which may be waived pursuant to Armed Services Procurement Regulation (ASPR) 2-405(iii)(B), and proposes to make award to K. R. Wilson Division.

According to ASPR 2-405 the contracting officer shall give the bidder an opportunity to correct the failure to sign a bid or waive such deficiency, but only if—

> (B) the unsigned bid is accompanied by other material indicating the bidder's intention to be bound by the unsigned bid document such as the submission of a bid guarantee with bid, or a letter signed by the bidder with the bid referring to and clearly identifying the bid itself.

The above cited regulation is in accord with the decisions of our Office in which we have held that unsigned bids may not be considered for award unless the bid is accompanied by documentary or other evidence showing a clear intent to submit a bid. 17 Comp. Gen. 497; 36 *id.* 523; B-158607, April 21, 1966. When, as in the present case,

the documentry evidence is not present and the bid merely contains the printed name and address of a company and a representative of the company, our Office has held that the bid should be rejected. The reason for this is that when a bid is not signed, and there is no other clear indication in the bid submission that the purported bidder intended to submit the bid, the contracting officer cannot be sure that the bid was submitted by someone with authority to bind the bidder, and the acceptance of such a bid may not automatically obligate the named bidder. 34 Comp. Gen. 439; B–151724, July 15, 1963. The actual test of whether failure to sign a bid may be waived is whether the bid as submitted will effect a binding contract upon its acceptance without resort to the bidder for confirmation of its intention. B–160125, November 25, 1966; and B–157637, October 27, 1965.

It is apparent, however, that both the regulation and the decisions cited above are directed to preventing a bidder from electing, after bids have been opened and prices have been revealed, whether he will acknowledge or deny the bid, since such an option would give the bidder an unfair advantage over other bidders whose bid prices were revealed at bid opening. B–157637, October 27, 1965; B–148235, March 23, 1962; B–144470, March 14, 1961.

Conversely, where only one bid is received, and that bid is found upon bid opening to be unsigned, we see no reason why the bid should be rejected. Clearly, since in that situation there are no other bidders, it would not be unfair to ask the bidder whether he intends to be bound by his bid, or to permit him to sign the bid after bid opening. Such was the position Chisholm-Ryder Company was in from the time its bid was opened until the time Murdock's late bid was received and opened. During that time, Mr. Bogumil repeatedly advised that the company intended to be bound by its bid, and he offered to sign the bid for the company. In so doing we must assume he also represented that he was authorized to sign the bid and that his signature would in fact bind the company. That such was, in fact the case would appear to be established by a letter dated February 9, 1965, from the president of Chisholm-Ryder Company to the Rochester Regional Office, New York Procurement District, which reads as follows:

> In response to your recent request, we advise that the following individuals, until further notice, are authorized to sign and commit the respective divisions of Chisholm-Ryder Company, Inc. to contact civilian and military:
>
> | | |
> |---|---|
> | Premax Division | M. A. Finley |
> | | John V. Maglio |
> | K. R. Wilson Division | H. W. Schuyler |
> | | Charles B. Atwell |
> | Punch Products Corporation | R. L. Stefano |
> | | Ralph Welsbeck |
>
> In addition to the above individuals, Mr. Walter A. Bogumil who is Works Manager of Chisholm-Ryder Company, Inc., is authorized to sign for any and all divisions or affiliates.

We do not, however, consider the question of whether Mr. Bogumil had the authority to sign the bid, or whether the Navy procurement officials were aware of such authority, as being dispositive of the question of whether Mr. Bogumil should have been permitted to sign the bid, or whether other action to confirm the company's intent to be bound should have been permitted. Obviously, if Mr. Bogumil had been permitted to sign the bid when he first asked to do so, no unfair advantage would have resulted to his company, or against Murdock, whose late bid had not yet been received. If the procuring officials considered assurance, other than Mr. Bogumil's signature, necessary to bind Chisholm-Ryder Company in the event its bid was accepted, they could, and should, have requested such additional assurance from the company either before or after Mr. Bogumil signed the bid.

Based upon the present record, there is no doubt that the company would have acknowledged Mr. Bogumil's authority to sign the bid and bind the company. However, even if the company had denied Mr. Bogumil's authority to sign and had refused to accept an award, we fail to see how the Government would have been in any worse position than when it declined to let Mr. Bogumil sign, or how Chisholm-Ryder Company's refusal to accept an award would be unfair to Murdock, since such refusal would place Murdock in an undisputed position to receive the award at its higher bid price.

In view of the foregoing, it is our opinion that Mr. Bogumil should have been permitted to sign the bid immediately after bid opening, and that the bid must now be treated in the same manner as it would if Mr. Bogumil had been permitted to sign it. Since it appears that such action would in fact have bound Chisholm-Ryder Company to accept an award, we are advising the Secretary of the Navy that we agree with the position of the Naval Supply Systems Command that such an award should now be made.

Accordingly, your protest must be denied.

[B-167005]

Compensation—Downgrading—Saved Compensation—Conversion of Positions Between Executive and General Schedules

Upon removal of the Level V position of Assistant Archivist for Presidential Libraries from the Executive Schedule and return of the position to its former GS-17 classification under the General Schedule, the higher compensation of the Level V position may not be saved to the incumbent, both actions being Presidential they are outside the scope of 5 U.S.C. 5334(d), authorizing salary retention for employees who together with their positions are brought under the Classification

Act from some other Federal pay system. Even if no change of position is considered to have occurred incident to the Presidential actions, the situation would be within the purview of section 539.203 of the Civil Service Regulations limiting the application of 5 U.S.C. 5334(d) to the case where "the employee and his position are initially brought under the General Schedule."

To the Chairman, United States Civil Service Commission, June 27, 1969:

Your letter of May 16, 1969, encloses a copy of a letter from the Director of Personnel, General Services Administration, showing that the position of Assistant Archivist for Presidential Libraries, was originally established and classified in grade GS–16 on March 9, 1964; as a result of substantial expansions in the Presidential library system that position was reclassified to grade GS–17 on June 28, 1968, and the present incumbent was appointed thereto August 11, 1968. Further, the record shows that by Executive Order No. 11441, December 23, 1968, the position was placed in Level V of the Executive Schedule; the position remained in the competitive service and the present incumbent continued to occupy it as a career employee. We understand that a proposal is pending to remove the position from the Executive Schedule by the issuance of an Executive order and have the position placed in its former classification by the Commission under the General Schedule, i.e., grade GS–17. The current Level V rate is shown to be $36,000 per annum.

The question presented is whether the pertinent provisions of 5 U.S.C. 5334(d) and section 539.203 of the Civil Service Regulations would be for application if the present incumbent and his position are again placed in grade GS–17, thus saving to him the $36,000 per annum salary.

5 U.S.C. 5334(d) reads as follows:

The Commission may prescribe regulations governing the retention of the rate of basic pay of an employee who together with his position is brought under this subchapter and chapter 51 of this title. If an employee so entitled to a retained rate under these regulations is later demoted to a position under this subchapter and chapter 51 of this title, his rate of basic pay is determined under section 5337 of this title. However, for the purpose of section 5337 of this title, service in the position which was brought under this subchapter and chapter 51 of this title is deemed service under this subchapter and chapter 51 of this title.

Section 539.203 issued pursuant to the foregoing provision reads, in pertinent part, as follows:

Sec. 539.203 *Rate of basic pay in conversion actions.* When an employee occupies a position not subject to the General Schedule and the employee and his position are initially brought under the General Schedule pursuant to a reorganization plan or other legislation, an Executive order, a decision of the Commission under section 5103 of title 5, United States Code, or an action by an agency

under authority of section 511.202 of this chapter, the agency shall determine the employee's rate of basic pay as follows:

* * * * * * *

(d) When the employee is receiving a rate of basic pay above the maximum rate of the grade in which his position is placed, he is entitled to retain his former rate as long as he remains continuously in the same position or in a position of higher grade in the same agency, or until he receives a higher rate of basic pay by operation of chapter 51 and subchapter III of chapter 53 of title 5, United States Code, and part 531 of this chapter. The employee may retain his former rate on subsequent reassignment as defined in section 531.202(m) of this chapter. If the employee is subsequently demoted to a position subject to the General Schedule, the agency shall determine his rate of basic pay in accordance with section 531.203(c) or subpart E of part 531 of this chapter, as appropriate.

The purpose of the legislation, i.e., section 604(b), Public Law 87–793, approved October 11, 1962, 76 Stat. 848 (now codified as 5 U.S.C. 5334(d)), quoted above, was to authorize salary retention for employees who, together with their positions, were brought under the General Schedule thus overcoming the difficulty previously encountered upon conversion of the employees with their positions to Classification Act coverage. The legislative history of the foregoing legislation reveals numerous statements similar to the one contained in H. Rept. No. 2532, 87th Cong., 2d sess. 61, reading as follows:

Section 604(b) adds a new subsection (d) to section 802 of the Classification Act of 1949. There is no present authority for saving the basic compensation of an employee who, together with his position, is brought under the Classification Act from some other Federal pay system (such as the wage board system), if his salary rate is in excess of the maximum rate of the classification grade in which his position is placed. * * *

Under 5 U.S.C. 5317 the President is authorized to place a limited number of positions in levels IV and V of the Executive Schedule "when he considers that action necessary to reflect changes in organization, management responsibilities or workload in an Executive agency." Our opinion is that in the exercise of the Presidential authority a determination of a change in the responsibilities or duties of a position which had been placed in grade GS–17 would necessarily be involved. A similar change would necessarily be present upon return of the employee from the Executive Schedule to the General Schedule, grade GS–17. Therefore, we view those Presidential actions as being outside the scope of 5 U.S.C. 5334(d).

Aside from the statutory restriction the regulation, quoted above, limits its application to the case where "the employee and his position are initially brought under the General Schedule." The employee and his position in this instance originally were subject to the General Schedule and now the proposal is to return the employee and his position from the Executive Schedule to the General Schedule. Therefore,

even if it could be concluded that no change of position occurred incident to the Presidential actions, we do not feel that the situation presented is within the purview of the regulation.

In the circumstances we find no proper basis to authorize retention to the employee of his existing salary rate ($36,000) under 5 U.S.C. 5334(d) and section 539.203 of the Civil Service Regulations upon the return of the employee to the position under the General Schedule which he occupied prior to his being placed in the position in the Executive Schedule.

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A postal supply clerk at wholesale stamp window whose shortage of funds in his fixed credit accountability is explained as being due to his busyness in exchanging "old rate" for "new rate" stocks of stamps is not considered to have exercised high degree of care that is expected from an accountable officer in performance of duty and, therefore, unexplained shortage raising presumption of negligence that record does not rebut, relief from liability for shortage may not be granted to employee under 39 U.S.C. 2401 or 31 U.S.C. 82a–1 566

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Promotions

Incumbent of reclassified position

Civil Service Commission having waived experience and training requirement of incumbent of position reclassified from grade GS–9 to grade GS–11, administrative determination to require employee to serve 1 year in reclassified position to obtain required experience prior to advancement to GS–11 level rather than placing incumbent in reclassified position, another position, or separating her was erroneous, and incumbent having been continued in reclassified position, correction action is required to promote her not later than beginning of second pay period following receipt of notice of approval by Civil Service Commission of waiver of qualifications of incumbent of reclassified position 258

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Low bid signed by unknown agent of corporation submitting bid and unaccompanied by evidence of agent's authority to bind principal—necessary requirement absent establishment of agent's authority prior to bid opening—is nonresponsive bid. Although evidence of agent's authority is acceptable after bid opening when apparent authority of agent

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would estop principal from denying agent's authority, to permit proof of unknown agent's authority after bid opening would give bidder option to elect to abide by bid or claim bid was submitted in error by person without authority to enter into contracts on its behalf—an option that is considered chance to second-guess other bidders after bid opening and, therefore, must be regarded as fatal to bid 369

A low unsigned bid evidencing in type name of corporation president as person authorized to sign bid, which was hand-delivered by president who signed sealed envelope to show delivery by him, envelope also reflecting time and date bid was received and by whom, is for consideration pursuant to par. 2-405(iii)(B) of Armed Services Procurement Reg. prescribing that unsigned bid may be considered for award if accompanied by documentary evidence showing clear intent to submit binding bid, and president's signature on bid envelope constitutes evidence of such intent. Identification of president as person authorized to sign bid, personal delivery of bid by him, together with his signature on bid envelope preclude possibility of bid repudiation or avoidance of liability on contract 648

AGRICULTURE DEPARTMENT
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An Agricultural Stabilization and Conservation Service county committee employee moving to U.S. Dept. of Agriculture Federal service position, upon subsequent transfer to other Federal employment may transfer his annual and sick leave accruals, including leave earned in county committee office. The leave accruals transferred from county committee service to Dept.'s Federal service under authority of Pub. L. 90-367, approved June 29, 1968, may be treated as earned in Federal employment for transfer purposes to other Federal employment 486

Transfers
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An employee transferring without break in service whether between Federal service employment in U.S. Dept. of Agriculture and Agricultural Stabilization and Conservation Service county committee employment or from county committee employment to Dept.'s Federal service may transfer his annual and sick leave accruals to new position, Pub. L. 90-367, approved June 20, 1968, permitting reciprocal transfer of leave between county committee and departmental services 486

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Dislocation allowance authorized by Pub. L. 90-207 (37 U.S.C. 407(a)) for members without dependents who upon permanent change of station are not assigned Govt. quarters is not payable to either of two crews of nuclear-powered submarine—permanent station of both crews—as on-duty crew is furnished quarters aboard submarine and off-crew ashore for training and rehabilitation is considered to be at temporary duty station, whether or not submarine is at home port. Therefore, members who incident to transfer aboard submarine report to temporary station locations ashore where they do not perform basic duty assignments are not entitled to dislocation allowance, nor is allowance payable to members reporting aboard submarine when first relieved with on-ship crew for training and rehabilitation ---------- 480

Although member of uniformed services without dependents who upon reporting to submarine under permanent change-of-station orders is assigned quarters on board submarine is not entitled to dislocation allowance authorized in 37 U.S.C. 407(a) for members without dependents who upon permanent change of station are not assigned Govt. quarters, he would be entitled to allowance if he reports to nuclear-powered submarine that is undergoing overhaul or repair at its home port or home yard and quarters aboard submarine are uninhabitable, member is not assigned quarters ashore, and lodging accommodations pursuant to 10 U.S.C. 7572(a) are not furnished to member ---------- 480

Army officer who upon completion of tour of duty in restricted overseas area is not assigned Govt. quarters incident to permanent change of station but rejoins his dependents who had remained in family residence in U.S. is not entitled to dislocation allowance prescribed by 37 U.S.C. 407(a) for "member without dependents," as term means member that is not entitled to transportation of his dependents, whereas officer is entitled to transportation of his dependents between place at which they were located when he received his orders and his new duty station, regardless of prohibition against their travel at Govt. expense to and from U.S., entitlement that is not negated by fact place where his dependents were located and place to which they were entitled to transportation are same ---------- 782

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Medically unfit

Member of uniformed services who after having performed active duty is found to have been medically unfit at time of entry into service is not deprived of right to military pay and allowances or of status of being entitled to basic pay because of administrative failure to discover his physical condition, absent affirmative statutory prohibition against induction of persons on basis of physical or mental disqualification, and in view of fact 50 U.S.C. App. 454(a) provides no person shall be inducted into armed services until his acceptability has been satisfactorily determined, and sec. 456(h) prescribes that physical or mental condition constitutes basis for deferment from induction rather than absolute disqualification ---------- 377

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only one that does not obligate Govt. to continue rental period beyond fiscal year in which made, and contains renewal option, is not legally objectionable. However, revolving funds may be used to finance leases for reasonable periods of time in excess of 1 year, subject to conditions that sufficient funds are available and are obligated to cover costs under entire contract ---------- 497
Limitations
Vessel construction
Foreign shipyards
Subcontracting with Canadian firm of welding and assembly services for submarine hull cylinders under prime fixed-price incentive contract that contains restriction on construction of major vessel components in foreign shipyard pursuant to Tollefson Amendment in Defense Dept. appropriation acts, as well as Byrnes Amendment barring complete construction of naval vessels in foreign shipyards, is not prohibited. The hull components constituting less than 10 percent of total value of submarine, and work to be performed in foreign shipyard but 39 percent of value of hull, welding and assembly services proposed are not considered vessel construction contemplated by appropriation act prohibitions and, therefore, Navy may consent to subcontracting of services to Canadian firm ---------- 709
Obligation
Contracts
Availability of funds requirement
Lowest bid submitted under second-step of two-step advertised procurement for automatic hydraulic radio reporting system to aid in flood prediction exceeding allotted funds and no additional funds being obtainable, rejection of all bids by contracting officer who had been delegated 10 U.S.C. 2305(c) authority to cancel invitation when in public interest was proper, and issuance of 5-year lease purchase agreement under existing negotiated open end lease contracts was justified on basis of compliance with criteria prescribed in par. 1-317 of Armed Services Procurement Reg. and price and technical considerations. Although 5-year lease period violated secs. 3732 and 3679, R.S., because available funds would not cover total rental obligation, this basis of award having been assumed not to be legally objectionable, contract term may be completed ---------- 471
Future needs
Proposed multi-year contracting for Federal Supply Service requirements to effect savings in repair and rehabilitation of business machines, typewriters, and furniture, contracts to be financed by using Federal Supply Fund and Automatic Data Processing Fund and by reimbursing funds from fiscal year appropriations of requisitioning agencies would violate appropriation restrictions of 41 U.S.C. 11; 31 *id.* 665 (a); *id.*

APPROPRIATIONS—Continued Page
Obligation—Continued
Contracts—Continued
Future needs—Continued
712a, and absent congressional approval, contract term must be restricted to 1-year period. Although A–60589, July 12, 1935, permitting requirement contracts under fiscal-year appropriations to cover 1-year periods extending beyond end of fiscal year is not technically correct, practice having been followed for over 30 years in reliance upon decision, there is no objection to its continuance ---------- 497
AUTOMATIC DATA PROCESSING SYSTEMS
(*See* Equipment, Automatic Data Processing Systems)
BIDDERS
Qualifications
Experience
Certification requirements
Failure to submit with low bid for construction of Govt. building required certificate of competency relating to experience of proposed installer of air-conditioning equipment is not fatal to consideration of bid under invitation that did not make furnishing of certificate material requirement or provide that failure to submit certificate with bid would require rejection of bid as nonresponsive. Certificate intended to facilitate Govt.'s determination of bidder responsibility and not intended for listing of subcontractors, submission of certificate of competency for subcontractor who will install air-conditioning equipment after bid opening but prior to award does not require rejection of low bid as nonresponsive ---------- 158
Responsibility *v.* responsiveness
Experience requirements clause in invitation for multi-year procurement of diesel-engine generator units for 13 power plants for Sentinel System that specified overall capabilities and reliability that must be attained by any unit offered by bidder is considered as going to responsiveness of bid and not responsibility of bidder in view of critical nature of procurement and express language of experience requirements coupled with cautionary notice that experience data must be submitted with bid. Therefore, rejection of low bid for failure to submit required operating experience of units offered before bid opening time was proper, for to accept such information after bids were opened would be prejudicial to other bidders ---------- 291
Subcontractors
Submission with bid for construction of Govt. building of certificate of competency certifying to required experience of subcontractor who will install air-conditioning equipment does not place prime contractor at competitive disadvantage because bids from subcontractors accompanied by certificate were priced higher than those that were not. Certificate relating to responsibility of subcontractor, bidder who puts together bid without knowing whether prospective subcontractor whose bid has been used in computation of bid has or has not required qualifications runs risk of discovering later he may have to utilize another subcontractor that can qualify but whose price is higher ---------- 158

BIDDERS—Continued Page

Qualifications—Continued

Integrity, etc.

Generally

Definition of term "integrity" in connection with Govt. contracts does not differ from generally accepted connotation of uprightness of character, moral soundness, honesty, probity, and freedom from corrupting influence or practice. As used in prescribing qualifications for public officers, trustees, etc., term "integrity" means soundness of moral principle and character in making and performance of contracts and fidelity and honesty in discharge of trusts, and term synonymous with probity, honesty, and uprightness, lack of integrity on part of officials of bidder may be imputed to bidder by procuring agency, unless administrative determination is not based on substantial evidence demonstrating bidder's lack of responsibility ---------- 769

Officials lack of integrity imputed to bidder

Although as general proposition lack of integrity on part of individuals of business concern who as officers, directors, or stockholders control activities, policies, and management of concern must not always be imputed to concern, where president of low bidder corporation had been found guilty of wilful failure to pay income taxes and key employee was convicted of fraud against Govt. and sentenced, and also placed on debarred bidders' list, imputing lack of integrity to corporation was proper determination by procuring agency, absent showing determination was not based on substantial evidence, 10 U.S.C. 2305(c) requiring award to "responsible bidder," term embracing personal attributes of character or integrity as well as pecuniary ability and physical capability to perform contract ---------- 769

Small business concerns. (*See* **Contracts, awards, small business concerns**)

BIDS

Acceptance time limitation

Bids offering different acceptance time

A low bid conditioned upon receipt of notice of award within 24 hours after closing hour for receipt of bids under invitation providing for 4-day bid acceptance period having automatically expired before award could be made, rejection of bid was not contrary to principles of competitive bidding system. To permit bidder to delete acceptance time condition would provide option to accept or reject award subsequent to bid opening, an advantage unavailable to other bidders. Extension of bid acceptance date prescribed by sec. 1-2.404-1 of Federal Procurement Regs. designed for situations where group of offers might expire before award action is completed is not intended to grant particular offeror limiting bid acceptance time the right to extend acceptance time ------- 19

Extension

Conditioned

Under invitation for bids to construct building on Govt. land for lease to Post Office Dept., with reimbursement to Dept. for cost of site by date specified, award to low bidder after his withdrawal of bid acceptance time extension and prior to acceptance of condition for extension—equal time extension for site payment—was inconsistent with 39 U.S.C. 2103 (a) and 2112(2) requiring consummation of post office lease agreements in accordance with 41 U.S.C. 5—award to lowest, responsible bidder whose bid conforms to advertised specifications. The site payment,

BIDS—Continued Page
Acceptance time limitation—Continued
Extension—Continued
Conditioned—Continued
material requirement that contracting officer could not waive, either under original bid or bid extension, award to low bidder should be canceled and bid deposit refunded---------- 775
Aggregate *v.* separable items, prices, etc.
Evaluation. (*See* Bids, evaluation, aggregate *v.* separable items, prices, etc.)
Low on one item is no basis for aggregate award
The fact that different language specified methods of award for two window cleaning service items of invitation—Item 1 reserving right to Govt. to make award on any or all of subitems and Item 2 providing for award of subitems in aggregate—does not entitle low bidder on one of Item 1 subitems to award of subitem where purpose of reservation in Item 1 was to determine individual prices on requested service in event of insufficient funds, and intent to award single contract on Item 1 is evidenced by use of singular—"award" in reservation and "the contractor" and "the successful bidder" in general specifications applicable to Item 1, as well as impracticability of having more than one contractor perform subitems at same time---------- 381
Alternative
Unsolicited
The failure before bids were invited on second step of two-step formally advertised procurement to furnish separate notice to bidder of technical unacceptability of low alternate proposal submitted not as separate package but incident to clarification of unacceptable original proposal does not constitute acceptance of low alternate proposal. Provision in sec. 1-2.503-1(b)(5) of Federal Procurement Regs., as well as in administrative regulation, for notice of technical unacceptability of proposal under two-step advertised method of procurement is procedural right that does not go to essence of award, and rejection of alternate proposal will not be questioned, absent evidence determination was arbitrary, capricious, or made in bad faith---------- 349
Auction technique bidding. (*See* Contracts, negotiation, auction technique prohibition)
Awards. (*See* Contracts, awards)
Bid forms
Unsigned. (*See* Bids, unsigned)
Block bidding
Block bidding on clothing and textile products, method of bidding that quotes several basic unit prices for various quantity increments of same material, having effect of making bid evaluation complicated and unnecessarily delaying award of contract, situation that is not within free and open competition contemplated by 10 U.S.C. 2305, use of invitation limiting each bidder to one offer in order to test feasibility of prohibiting complex offers brought about by techniques of block bids, alternate bids, tie-in bids, and other such combination of bids which delay awards, is not considered improper, nor does invitation preclude award of contract to firms submitting bid as group---------- 372
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)

BIDS—Continued Page

Buy American Act

Evaluation

Components of unknown origin

Under invitation for aluminum sulphate that contained standard Buy American Act clause and Buy American Certificate to effect end products offered were domestic and that components of unknown origin had been considered as mined, produced, or manufactured *outside* U.S., bid that substituted word "inside" for "outside," thus certifying components of unknown origin had been considered domestic, properly was evaluated as foreign end product and rejected because it was not low bid. To permit bidder to explain after bid opening meaning of certificate alteration would jeopardize integrity of competitive system, or to accept altered certificate as guarantee components were produced in U.S. would give bidder competitive advantage of supplying components of unknown origin 458

Erroneous

Cancellation of contract for diesel fuel injection assemblies that had been awarded under invitation subject to Buy American Act on basis low bid had erroneously been evaluated as domestic bid and was no longer low when properly evaluated was in accord with 10 U.S.C. 2305 (c), which requires award to be made to responsible bidder whose bid conforms to invitation and will be most advantageous to Govt., price and other factors considered. However, as item is needed and it is ready for shipment due to delay in protesting award occasioned by failure to notify unsuccessful bidders of award, cancellation may be rescinded if contractor will meet low bid price, if not, award should be made to bidder found low upon reevaluation of bids. Prompt notices of award will avoid future similar occurrences 504

General Agreement on Trades and Tariffs

Although classifying individual items to be furnished under single contract to Govt. construction contractor as separate end products for purpose of Buy American Act evaluation may be contrary to intent of General Agreement on Trades and Tariffs (GATT), conflict is not for consideration in determining lowest evaluated bid. Under competitive bidding procedures, bids are to be evaluated only on basis of factors made known to all bidders in advance and invitation did not warn bidders to prepare their bids in light of GATT and its possible impact on Buy American Act evaluation; also applicability of GATT is not matter of procurement responsibility but rather is for consideration by U.S. Tariff Commission 384

Foreign product determination

Comparison of foreign and domestic component costs

In determining whether cylinder liners to be manufactured in U.S. from basic liner forging purchased in Japan constitute foreign or domestic source end product under E. O. No. 10582, cost of U.S. operations may not include cost of testing, production qualification evaluation, and packaging as these processes are not considered "manufacturing" or components of end item within contemplation of Buy American Act. Domestic operations on forging—home boring, chrome plating, and machining—neither exceeding cost of foreign forging as required by par. 6-101(a)

BIDS—Continued Page
Buy American Act—Continued
Foreign product determination—Continued
Comparison of foreign and domestic component costs—Continued
of Armed Services Procurement Reg., nor creating different article or or effecting fundamental change in forging, cylinder liner end product is considered foreign source end product ---------- 727
Component *v.* end product
Classification of each item to be furnished Govt. construction contractor as separate end product for evaluation under Buy American Act and award of single contract is within contemplation of par. 6-001 of Armed Services Procurement Reg., and bid that would be low domestic bid if line items were considered components instead of end products is not responsive bid. There is no simple answer to question of what constitutes end product—award of single contract is not determinative, but purpose of procurement playing part, classifying items to be delivered to job and assembled by another contractor as end items is proper exercise of procurement judgment ---------- 384
Foreign product proposed
After bid opening
Under invitation permitting bidders to offer either domestic or foreign-end products, low bidder—an English concern—notwithstanding its failure to list in Buy American certificate that it would furnish foreign-end products has submitted bid which on its face complies in all material respects with invitation and, therefore, such bid must be regarded as responsive. Effect of acceptance of such bid is matter of evaluation rather than responsiveness. Accordingly, acceptance of low bid which was corrected to show that equipment was to be manufactured in Great Britain, fact known to the contracting personnel, and which remained low after evaluation under Buy American standards was not prejudicial to other bidders and resulted in contract as intended by parties ---------- 142
Price differential
Discretionary determinations
In evaluating bids for wrenches subject to Buy American Act (41 U.S.C. 10a-d), fact that Defense Department agencies may be predominant users of item does not require General Services Administration (GSA), responsible for procurement and application of act, to use 50 percent price differential prescribed by par. 6-104.4 of Armed Services Procurement Reg. under discretionary authority provided in sec. 5 of E. O. No. 10582, in lieu of 6 percent differential, minimum fixed by act for addition to cost of foreign products to determine whether domestic price is unreasonable, which adopted by GSA in sec. 1-6.104-4 of Federal Procurement Regs. governs procurement and, therefore, domestic price that exceeds foreign bid by more than 6 percent is unreasonable and must be rejected ---------- 403
Reasonableness
Application of different percentages specified by Armed Services Procurement Reg. (50 percent in par. 6-104.4) and Federal Procurement Regs. (6 percent in sec. 1-6.104-4) creating unrealistic results in determining whether price of domestic item is unreasonable, establishment of uniform policy for guidance of Federal agencies and contractors regarding use of price differentials under Buy American Act has been recommended ---------- 403

BIDS—Continued Page

Buy American Act—Continued

Price differential—Continued

Reasonableness—Continued

Determination by Dept. of Housing and Urban Development prior to solicitation of bids by Guam Housing and Urban Renewal Authority for low-rent housing project that certain foreign construction material could be procured at considerable savings—at least 16 percent less than domestic items—and waiver of Buy American requirements did not conform to procedures established by E.O. No. 10582 for determining whether domestic bid prices are unreasonable, Executive order contemplating that determination of unreasonable domestic cost should be made after receipt of bids or offers on foreign materials and comparison of prices. However, difference between foreign and domestic prices exceeding Executive order standards, award made will not be disturbed, but future procurements should comply with prescribed procedures---------- 487

Competitive system

Agents of Government

Conformability with Government bidding methods

As National Zoological Park (Zoo) is considered Govt. property, authority of Regents of Zoo is subject to limitations applicable generally to administrative officials of Govt., limitations that are not affected by act of Nov. 6, 1966, authorizing negotiation of concession operations at Zoo with nonprofit, scientific, educational, or historic organizations and, therefore, any arrangement for operation of food concessions at Zoo is subject to advertising procedures. However, as use of single contract to procure restaurant concessions at Smithsonian facilities, including Zoo, would be more economical and efficient, upon issuance of determination that it would not be feasible or practicable to use formal advertising procedures, combined contract may be negotiated under 41 U.S.C. 252(c)(10) and sec. 1-3.210 of Federal Procurement Regs---------- 193

Ambiguous bids

Allegation of ambiguity made after award of contract that bidding schedule created uncertainty as to whether Govt. desired prices on packaging or data items in furnishing of geodetic rods is not sustained where there is only one reasonable interpretation of meaning of schedule, for ambiguity exists only if two or more reasonable interpretations are possible. Appropriate time to allege ambiguity and seek clarification of uncertainty is prior to time for submission of bids, and protest after bid opening on matters one would reasonably expect to have clarified during period when bids are prepared, tends to cause doubt as to purpose and validity of protest---------- 757

Assumption of performance risk

Solicitation under 10 U.S.C. 2304(a)(10) for air conditioners to be furnished in accordance with military specifications and Govt. drawings that discloses possibility of error in technical data package and places assumption of risk of performance on successful contractor by holding him responsible for identifying and correcting deficiencies and providing for reimbursement for deficiences on predetermined basis and also pursuant to changes clause for designated changes violating no law or regulation, procedure is acceptable substitute for contractor's normal remedy under the changes clause. The fact that Govt. does not impliedly war-

BIDS—Continued Page
Competitive system—Continued
Assumption of performance risk—Continued
rant adequacy of drawings and specifications should not affect competition on common basis nor result in excessive contingency costs to Govt... 750

While all offerors under request for proposals issued pursuant to 10 U.S.C. 2304(a)(10) for air conditioners and providing for successful contractor to assume risk of performance by holding him responsible for determining, identifying, and correcting any discrepancy, error, or deficiency in design or technical data in lieu of Govt.'s implied warranty of adequacy of drawings and specifications may not have familiarity with drawings equal to that of firm previously producing equipment, same is true in any procurement involving prior producers, and such natural competitive advantage is one which procurement laws do not recognize as unlawful or even necessarily undesirable..... 750

Bid acceptance time

A low bid conditioned upon receipt of notice of award within 24 hours after closing hour for receipt of bids under invitation providing for 4-day bid acceptance period having automatically expired before award could be made, rejection of bid was not contrary to principles of competitive bidding system. To permit bidder to delete acceptance time condition would provide option to accept or reject award subsequent to bid opening, an advantage unavailable to other bidders. Extension of bid acceptance date prescribed by sec. 1-2.404-1 of Federal Procurement Regs. designed for situations where group of offers might expire before award action is completed is not intended to grant particular offeror limiting bid acceptance time the right to extend acceptance time..... 19

Bid mistake corrections

Because correction of mistakes in bid is always a vexing problem, correction after bid opening should be denied where there is any reasonable basis for argument that public confidence in integrity of competitive bidding system would be adversely affected. Therefore, where low bidder for construction of Post Office and Federal Building alleges omission from its bid of $21,000 bid by electrical subcontractor, and prices for item range from Govt.'s estimate of $31,000 to that of second low bid of $27,500, bid may not be corrected, even though position of low bidder would remain unchanged and evidence submitted supports conclusion error was made, as facts are not sufficiently clear to warrant bid correction that would result in making low overall bid less than $500 lower than second low bid, but erroneous bid may be withdrawn... 748

Bidder qualification information

Submission with bid for construction of Govt. building of certificate of competency certifying to required experience of subcontractor who will install air-conditioning equipment does not place prime contractor at competitive disadvantage because bids from subcontractors accompanied by certificate were priced higher than those that were not. Certificate relating to responsibility of subcontractor, bidder who puts together bid without knowing whether prospective subcontractor whose bid has been used in computation of bid has or has not required qualifications runs risk of discovering later he may have to utilize another subcontractor that can qualify but whose price is higher..... 158

BIDS—Continued Page

Competitive system—Continued

Broadening competition

An award to seventh highest bidder out of eight bidders submitting responsive bids to an invitation for desks that incorporated unessential, restrictive proprietary specifications, is based on desire, for superior product and not on minimum needs of Govt. and, therefore, requirements of par. 1–1201 of Armed Services Procurement Reg. (ASPR) that invitations state minimum needs, describe supplies and services so as to encourage competition, and eliminate restrictive features that might limit acceptability of product were disregarded. To assure full and free competition contemplated by par. 1–1206.1(a) of ASPR, future advertised specifications for desks should accurately reflect only actual minimum needs ---------- 345

"Buying-in" prices

Under revised request for quotations (RFQ) that exercised quantity option contained in original RFQ issued pursuant to public exigency negotiation authority in 10 U.S.C. 2304(a)(2), and which permitted submission of different designs for aircraft fuel flow system to cost less than $100,000, acceptance of price reduction, contemplating specification changes, without soliciting competition from only other offeror who had responded to initial RFQ did not create "buy-in" and sole-source procurement situation, nor require submission of cost or pricing data pursuant to "Truth in Negotiations" Act, "Buying-in" meaning offering price in competition that is under cost with expectation of making up losses, and "Truth in Negotiations" Act not applying to procurement that is less than $100,000---------- 337

Defective specifications

Omission of packaging sheets referred to on bid schedule as being "attached" is not fatal, incorporation by reference in invitation for bids of contracting agency's Contract Clause Book provisions concerning availability of specifications—term considered to include packaging sheets—satisfying requirement in 10 U.S.C. 2305(b) that if descriptive language and attachments necessary to full and free competition that are omitted from invitation are otherwise accessible to all competent and reliable bidders, invitation is not invalid---------- 757

Delayed awards

Block bidding on clothing and textile products, method of bidding that quotes several basic unit prices for various quantity increments of same material, having effect of making bid evaluation complicated and unnecessarily delaying award of contract, situation that is not within free and open competition contemplated by 10 U.S.C. 2305, use of invitation limiting each bidder to one offer in order to test feasibility of prohibiting complex offers brought about by techniques of block bids, alternate bids, tie-in bids, and other such combination of bids which delay awards, is not considered improper, nor does invitation preclude award of contract to firms submitting bid as group---------- 372

Determinable factors requirement

An administrative determination based on unadvertised standards that elevating platforms offered by low bidder were technically inadequate to serve needs of Govt. contravenes established principles governing formal advertising that require bid evaluation to be based on objec-

BIDS—Continued Page
Competitive system—Continued
Determinable factors requirement—Continued
tively determinable factors made known to bidders in advance; that do not permit rejection of bid for failure to specify feature not required by invitation; and that require inclusion in specifications of requirement for submission of technical or descriptive data if needed for evaluation purposes. Although low bid should not have been rejected nor award made on basis of nonresponsive second lowest bid, cancellation of contract close to delivery date would serve no useful purpose; however, steps should be taken to preclude recurrence of such situation 464
Effect of erroneous awards
While finding of responsiveness to invitation requesting bids for "Microwave System" in accordance with one of four configurations, bids to be evaluated in numerical order with award to lowest responsive bidder under schedule selected, regardless of cost, is factual determination to be made by contracting agency, manner of evaluation is subject to review by U.S. General Accounting Office, and where in evaluation of third low bid submitted on configuration I—first two bids having been rejected for failure to comply with technical and delivery requirements of specifications—information outside bid and required descriptive literature is considered, determination that bid was responsive was not in compliance with statutory and regulatory provisions governing procurement by formal advertising 420
Although contract awarded to bidder whose bid was not in compliance with "full and free" competition envisioned by statute and regulations governing procurement by formal advertising, cancellation of award made to bidder, month before completion of 7-month delivery schedule would serve no useful purpose where only two other bidders under invitation were nonresponsive. However, entire procurement should be carefully reviewed to preclude reoccurrence of situation 420
Evaluation factors determinability
Although classifying individual items to be furnished under single contract to Govt. construction contractor as separate end products for purpose of Buy American Act evaluation may be contrary to intent of General Agreement on Trades and Tariffs (GATT), conflict is not for consideration in determining lowest evaluated bid. Under competitive bidding procedures, bids are to be evaluated only on basis of factors made known to all bidders in advance and invitation did not warn bidders to prepare their bids in light of GATT and its possible impact on Buy American Act evaluation; also applicability of GATT is not matter of procurement responsibility but rather is for consideration by U.S. Tariff Commission 384
Federal aid, grants, etc.
Equal Employment Opportunity programs
The so-called "Philadelphia Pre-Award Plan" to implement compliance on federally assisted programs with equal employment opportunity conditions of E. O. No. 11246, which does not establish standards or criteria for judging compliance but instead provides for preaward conference to negotiate acceptable revision of low bidder's initially unacceptable action program is inconsistent with statutory requirements of competitive bidding. Federally assisted programs are required to be

BIDS—Continued Page

Competitive system—Continued

Federal aid, grants, etc.—Continued

Equal Employment Opportunity programs—Continued

awarded on basis of publicly advertised competitive bidding and, therefore, Plan for submission of affirmative action programs should inform prospective bidders of minimum requirements to be met by proposed compliance program, and standards and criteria established for judging programs ---------- 326

Impracticable to obtain competition

Negotiation of procurement. (*See* **Contracts, negotiation, competition, impracticable to obtain**)

Two-step procurement

Discarding all bids

Lowest bid submitted under second-step of two-step advertised procurement for automatic hydraulic radio reporting system to aid in flood prediction exceeding allotted funds and no additional funds being obtainable, rejection of all bids by contracting officer who had been delegated 10 U.S.C. 2305(c) authority to cancel invitation when in public interest was proper, and issuance of 5-year lease purchase agreement under existing negotiated open end lease contracts was justified on basis of compliance with criteria prescribed in par. 1-317 of Armed Services Procurement Reg. and price and technical considerations. Although 5-year lease period violated secs. 3732 and 3679, R.S., because available funds would not cover total rental obligation, this basis of award having been assumed not to be legally objectionable, contract term may be completed ---------- 471

First stage determinations

Use of two-step formal advertising method of procurement authorized by par. 2-501 of Armed Services Procurement Reg. for purchase of helicopters, where Request for Technical Proposals avoided unnecessary restrictive statements of Govt.'s requirements in order to promote competition, and recognized that potential bidders would have to modify FAA certified helicopters submitted in first-step in order to meet specifications was not improper, and acceptance of proposal based upon determination that necessary modifications to meet specifications introduced only minor technical risk and did not cast reasonable doubt on achievability of proposal will not be questioned absent fraud, abuse of authorized, or arbitrary action in evaluation of proposal---------- 49

The strict rule that all bids must respond fully to requirements of invitation so that contract awarded will be same contract offered to all bidders is not for application in evaluation of technical proposals submitted on complex items in first-step of two-step procurement since in order to accomplish objectives of two-step procurement procedure authority by par. 2-501 of Armed Services Procurement Reg. considerable element of flexibility is required and, therefore, regulation provides for discussion with any offeror of his proposal, which makes first-step evaluation procedure more in nature of negotiated procedure than of strict formal advertising---------- 49

BIDS—Continued Page

Contracts, generally. (*See* **Contracts**)

Delivery provisions

Evaluation. (*See* **Bids, evaluation, delivery provisions**)

Failure to meet

Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2-405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian Doctrine"—applicable only to initially responsive bids—par. 2-201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interests of Govt., contract will not be canceled, but quantity option should not be exercised 593

Cancellation in its entirety of contract erroneously awarded to nonresponsive bidder who had failed to furnish f.o.b. origin shipping point information is required rather than just cancellation of option directed in 48 Comp. Gen. 593, where cancellation will pose no problem respecting emergency need for procurement and contingent liability of Govt. under canceled contract, in view of fact next lowest bidder is willing to purchase inventory items involved in canceled contract and to hold Govt. harmless from any liability resulting from contract cancellation, and has demonstrated ability to meet delivery requirements that refutes contracting officer's contrary determination. Upon immediate cancellation of entire contract, prompt award should be made to lowest bidder 689

The mere insertion by Govt. of symbol "X" in particular box of invitation not automatically incorporating provision in resulting contract, identified bid term or condition requires some affirmative action on part of bidder to establish his agreement to comply with bid term or condition and, therefore, failure of bidder to respond to boxed "X" regarding f.o.b. origin shipping point information relating to responsiveness of his bid, failure must be treated as though bidder had taken deliberate exception to material provision of advertised invitation 689

Telegraphic bid on additional gallons of turbine fuel, aviation JP-4, to be shipped on f.o.b. origin basis that did not specify point of origin, information that also was not furnished in confirming letter, properly was rejected as nonresponsive where f.o.b. shipping point could not be ascertained by reading of bid as whole. Although small business bidder has only one refinery and it was identified in both telegram and confirming letter, fuel being obtainable from wide number of sources, and bidder having listed in its basic bid three different origin points for four separate increments of JP-4 grade fuel, Govt. could neither determine transportation costs for evaluation purposes, nor if it accepted bid, legally bind bidder to deliver at its refinery 790

BIDS—Continued Page

Deviations from advertised specifications. (*See* **Contracts, specifications, deviations**)

Discarding all bids

Appropriation availability

Lowest bid submitted under second-step of two-step advertised procurement for automatic hydraulic radio reporting system to aid in flood prediction exceeding allotted funds and no additional funds being obtainable, rejection of all bids by contracting officer who had been delegated 10 U.S.C. 2305(c) authority to cancel invitation when in public interest was proper, and issuance of 5-year lease purchase agreement under existing negotiated open end lease contracts was justified on basis of compliance with criteria prescribed in par. 1–317 of Armed Services Procurement Reg. and price and technical considerations. Although 5-year lease period violated secs. 3732 and 3679, R.S., because available funds would not cover total rental obligation, this basis of award having been assumed not to be legally objectionable, contract term may be completed 471

Readvertisement justification

Lacking

Cancellation of invitation for bids on light and heavy diesel electric locomotives under development loan to Pakistan and resolicitation of procurement is not justified where same locomotives would be offered and only price competition between two bidders would result and, therefore, award should be made under invitation. One bidder determined to be ineligible for award of light locomotives, award on heavy locomotives should be made on basis price clause in one of bids to cover eventuality of delivery delay does not affect bid responsiveness, certain technical deviations may be waived and post-opening specification changes considered, but not post-award offer to extend warranty terms, and as heavy locomotives tendered are acceptable as to experience and construction, there remains for administrative determination question of compliance with other specifications 731

Specifications defective

Descriptive literature requirement

Requirement for inclusion of drawings and descriptive data in bids on dehumidifiers without defining its purpose and effect and without stating noncompliance would preclude bid consideration, and which had as its purpose determining whether product offered will conceivably meet specifications and to generally establish what bidder proposed to furnish, is requirement directed toward determining responsibility of bidder rather than responsiveness of bid and there is no valid basis for rejecting low bid solely for failure to submit drawings and data. However, if acceptable product cannot be procured without descriptive literature indicating exactly what bidder proposes to furnish, invitation should be canceled and reissued in compliance with sec. 1–2.202–5 of Federal Procurement Regs. 659

BIDS—Continued Page

Estimates of Government

Failure to furnish on all items

Although it would have been preferable if estimated quantities had been furnished for all 323 janitorial services listed in invitation which provided blank spaces for unit prices and totals, and also for contract award on basis of cost of entire job, award to bidder who marked 6 of 12 items for which no estimates were stated "N.C." and furnished individual prices which were not extended for other 6, was proper and is considered award on "entire job." In addition even if total bid price had been increased to include 6 unextended items, relative standing of successful bidder would have remained unchanged. However, for guidance of bidders, and to provide more realistic bidding basis, future invitations should provide quantity estimates for all items solicited---------- 230

Evaluation

Aggregate *v.* separable items, prices, etc.

Item price omission

Award to low bidder on geodetic rods who had for data items to be furnished inserted in unit price and amount columns opposite word "Lot" a "——," only other bidder showing "no charge" for items, was proper as low bid is not considered nonresponsive *per se*, absent specific requirement that "no charge" be stated. Use of "——" indicates low bidder had not overlooked data items and in deciding not to insert prices for items intended to be obligated under invitation provision to effect that contractor agrees he is obligated to deliver all data listed on bidding schedule, and price he is to be paid therefor is included in total price specified in contract---------- 757

Subitems

Under invitation permitting bid to be submitted for any quantity less than specified, offer on portion of one of items solicited, providing for delivery on only several of dates specified, is considered responsive to invitation on basis partial quantity specified for delivery on each of several stated dates is separate subitem for award to lowest bidder. Therefore, low bid on six out of ten items which contained only partial bid on one item for delivery on eight out of ten specified dates, and "no bid" on first two required delivery dates—whether deliveries were offered at beginning, middle, or end of delivery schedule is immaterial—is bid that is not in variance with Govt.'s requirements and low bid is eligible for award---------- 267

The fact that different language specified methods of award for two window cleaning service items of invitation—Item 1 reserving right to Govt. to make award on any or all of subitems and Item 2 providing for award of subitems in aggregate—does not entitle low bidder on one of Item 1 subitems to award of subitem where purpose of reservation in Item 1 was to determine individual prices on requested service in event of insufficient funds, and intent to award single contract on Item 1 is evidenced by use of singular—"award" in reservation and "the contractor" and "the successful bidder" in general specifications applicable to Item 1, as well as impracticability of having more than one contractor perform subitems at same time---------- 381

BIDS—Continued Page

Evaluation—Continued

Alternate bases bidding

Fiscal *v.* multi-year procurement

Under multi-year procurement for known quantities of generator sets, where second-year increment of solicitation was canceled as no longer being needed, award on basis of low single-year alternate rather than canceling and reissuing invitation was proper, in view of fact fair and reasonable prices through adequate competition were obtained from single-year alternate, and low multi-year unit price was unavailable for award of first-year increment. However, revision of par. 1–322 of Armed Services Procurement Reg. is recommended for situations where planned procurement for program years subsequent to first year is canceled after bid opening but prior to award 103

Complex combination bids

Block bidding on clothing and textile products, method of bidding that quotes several basic unit prices for various quantity increments of same material, having effect of making bid evaluation complicated and unnecessarily delaying award of contract, situation that is not within free and open competition contemplated by 10 U.S.C. 2305, use of invitation limiting each bidder to one offer in order to test feasibility of prohibiting complex offers brought about by techniques of block bids, alternate bids, tie-in bids, and other such combination of bids which delay awards, is not considered improper, nor does invitation preclude award of contract to firms submitting bid as group 372

Cost limitations

Whether overstatement of costs on proposed construction contracts which are subject to statutory limitations and to certification of accuracy of cost apportionment statements prescribed by par. 18–110(b) of Armed Services Procurement Reg. would in no case be grounds for finding bid nonresponsive cannot be answered without qualification. However, such cases are not anticipated in view of fact that problems involving par. 18–110 have concerned understatements of estimated costs by bidders attempting to stay within statutory limitations, and because par. 2–201(c)(i) of regulation provides for rejection of bids materially unbalanced for purpose of bringing affected items within cost limitations or bids which exceed cost limitations, unless limitations had been waived prior to award 34

Where Govt. estimate on construction contracts shows that costs will not exceed statutory cost limitations prescribed in par. 18–110 of Armed Services Procurement Reg., and the bidder's certified cost apportionment is also within limitation, fact that bid was unbalanced would not ordinarily justify rejection of bid as nonresponsive 34

In connection with construction projects, fact that accuracy of bidder's apportionment between statutorily limited costs and those not so limited can affect responsiveness of bid, par. 2–201(c)(i) of Armed Services Procurement Reg. properly provides that "materially unbalanced" or grossly inaccurate cost apportionment can be cause for rejection of bid .. 34

Although evaluation of materially unbalanced bids on construction projects is matter of bid responsiveness, materiality would to great extent be determined by whether actual price offered by bidder exceeded statutory limitation imposed by par. 18–110 of Armed Services Procurement

BIDS—Continued Page

Evaluation—Continued

Cost limitations—Continued

Reg., as there is no authorization for construction which exceeds statutory limits. In absence of appropriate waiver pursuant to par. 2–201(c)(i) of regulation, bid that on basis of full evaluation has been determined to have exceeded statutory limitation is for rejection without regard to responsiveness, whether or not problem of materially unbalanced bid is involved 34

Delivery provisions

F.O.B. origin

Erroneous evaluation

Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2–405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian Doctrine"—applicable only to initially responsive bids—par. 2–201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interest of Govt., contract will not be canceled, but quantity option should not be exercised 593

Cancellation in its entirety of contract erroneously awarded to nonresponsive bidder who had failed to furnish f.o.b. origin shipping point information is required rather than just cancellation of option directed in 48 Comp. Gen. 593, where cancellation will pose no problem respecting emergency need for procurement and contingent liability of Govt. under canceled contract, in view of fact next lowest bidder is willing to purchase inventory items involved in canceled contract and to hold Govt. harmless from any liability resulting from contract cancellation, and has demonstrated ability to meet delivery requirements that refutes contracting officer's contrary determination. Upon immediate cancellation of entire contract, prompt award should be made to lowest bidder 689

Omitted from bid

Telegraphic bid on additional gallons of turbine fuel, aviation JP–4, to be shipped on f.o.b. origin basis that did not specify point of origin, information that also was not furnished in confirming letter, properly was rejected as nonresponsive where f.o.b. shipping point could not be ascertained by reading of bid as whole. Although small business bidder has only one refinery and it was identified in both telegram and confirming letter, fuel being obtainable from wide number of sources, and bidder having listed in its basic bid three different origin points for four separate increments of JP–4 grade fuel, Govt. could neither determine transportation costs for evaluation purposes, nor if it accepted bid, legally bind bidder to deliver at its refinery 790

Guaranteed shipping weight

The failure of low bidder to furnish guaranteed maximum weight and maximum dimensions for shipping containers required under second-step of two-step multi-year procurement for transceivers to be delivered f.o.b. origin is deviation that is distinguishable from type of bid irregularity covered by "triviality" or "*de minimus*" rule, and omission did

BIDS—Continued Page

Evaluation—Continued

Delivery provisions—Continued

Guaranteed shipping weight—Continued

not render bid nonresponsive where maximum shipping cost was ascertainable from other information contained in invitation—size and weight of transceiver—there is no question as to bidder's undertaking to meet all requirements of specifications, including delivery, and that on basis of possible transportation costs, low bidder had offered most advantageous bid to Govt 357

Requirements contracts

Establishment of weight factors to evaluate bids under invitation contemplating requirements contract subject to maximum order limitation for delivery to single destination on basis of previous procurement experience on 71 out of 249 items of shelving classified under Federal Supply Catalog system to be purchased, and assignment of token weight to remainder of 249 items is realistic method of evaluation which does not result in unbalanced bidding. Therefore, even though it would have been preferable to evaluate bids by using f.o.b. origin prices, there is no objection to award under solicitation, bids having been exposed and evaluated on common basis, and fact that in future procurements, most meaningful method of obtaining competitive prices will be used 62

Time schedule

Under invitation permitting bid to be submitted for any quantity less than specified, offer on portion of one of items solicited, providing for delivery on only several of dates specified, is considered responsive to invitation on basis partial quantity specified for delivery on each of several stated dates is separate subitem for award to lowest bidder. Therefore, low bid on six out of ten items which contained only partial bid on one item for delivery on eight out of ten specified dates, and "no bid" on first two required delivery dates—whether deliveries were offered at beginning, middle, or end of delivery schedule is immaterial—is bid that is not in variance with Govt.'s requirements and low bid is eligible for award 267

Determinable factors requirement

An administrative determination based on unadvertised standards that elevating platforms offered by low bidder were technically inadequate to serve needs of Govt. contravenes established principles governing formal advertising that require bid evaluation to be based on objectively determinable factors made known to bidders in advance; that do not permit rejection of bid for failure to specify feature not required by invitation; and that require inclusion in specifications of requirement for submission of technical or descriptive data if needed for evaluation purposes. Although low bid should not have been rejected nor award made on basis of nonresponsive second lowest bid, cancellation of contract close to delivery date would serve no useful purpose; however, steps should be taken to preclude recurrence of such situation 464

BIDS—Continued Page
Evaluation—Continued
Discount provisions
Absence of provision in invitation
Notwithstanding invitation requesting bids for requirements contract for repair, maintenance, and reconditioning of electric typewriters did not solicit quantity discount, consideration of quantity discount which made bid containing offer low was proper. Failure to make specific provision for every possible method of price quotation should not deprive Govt. of right to take advantage of benefit which does not contravene any stated requirement or prohibition, and results in award that is advantageous to Govt., price and other factors considered---------- 256
Deviation from terms of invitation
A bid specifying "All sales are payable Net 30 following date of invoice" in response to invitation providing for insertion of any desired discount in one or more of blanks preceding words "%10 calendar days," "%20 calendar days," "%30 calendar days," and "%____ calendar days" is responsive bid, term meaning that Govt. will not be allowed any discount and that payment is expected within 30 days following date of invoice—expectation which is not contrary to terms of payment included in standard terms of contract. Also insertion of word "Net" in "%30 calendar days" space of invitation neither varied language of bid nor imposed greater obligation on Govt. than terms of "Payments" provision of Standard Form 32---------- 306
Estimates
Individual items
Although it would have been preferable if estimated quantities had been furnished for all 323 janitorial services listed in invitation which provided blank spaces for unit prices and totals, and also for contract award on basis of cost of entire job, award to bidder who marked 6 of 12 items for which no estimates were stated "N.C." and furnished individual prices which were not extended for other 6, was proper and is considered award on "entire job." In addition even if total bid price had been increased to include 6 unextended items, relative standing of successful bidder would have remained unchanged. However, for guidance of bidders, and to provide more realistic bidding basis, future invitations should provide quantity estimates for all items solicited---- 230
Factors other than price
Best interest of Government
Cancellation of contract for diesel fuel injection assemblies that had been awarded under invitation subject to Buy American Act on basis low bid had erroneously been evaluated as domestic bid and was no longer low when properly evaluated was in accord with 10 U.S.C. 2305(c), which requires award to be made to responsible bidder whose bid conforms to invitation and will be most advantageous to Govt., price and other factors considered. However, as item is needed and it is ready for shipment due to delay in protesting award occasioned by failure to notify unsuccessful bidders of award, cancellation may be rescinded if contractor will meet low bid price, if not, award should be made to bidder found low upon reevaluation of bids. Prompt notices of award will avoid future similar occurrences---------- 504

BIDS—Continued Page

Evaluation—Continued

Factors other than price—Continued

Superior product

If low bid meets minimum requirements prescribed in invitation for bids, fact that product offered may be inferior to that offered by other bidders does not preclude consideration of low bid. Procurement agencies of Govt. are only required to prepare specifications describing their needs and not maximum quality obtainable as public advertising statutes do not authorize agency to pay higher price for article which may be superior to one that adequately meets its needs---------- 403

General Accounting Office authority

While finding of responsiveness to invitation requesting bids for "Microwave System" in accordance with one of four configurations, bids to be evaluated in numerical order with award to lowest responsive bidder under schedule selected, regardless of cost, is factual determination to be made by contracting agency, manner of evaluation is subject to review by U.S. General Accounting Office, and where in evaluation of third low bid submitted on configuration I—first two bids having been rejected for failure to comply with technical and delivery requirements of specifications—information outside bid and required descriptive literature is considered, determination that bid was responsive was not in compliance with statutory and regulatory provisions governing procurement by formal advertising---------- 420

Incorporation by reference

Affirmative action by bidder requirement

The mere insertion by Govt. of symbol "X" in particular box of invitation not automatically incorporating provision in resulting contract, identified bid term or condition requires some affirmative action on part of bidder to establish his agreement to comply with bid term or condition and, therefore, failure of bidder to respond to boxed "X" regarding f.o.b. origin shipping point information relating to responsiveness of his bid, failure must be treated as though bidder had taken deliberate exception to material provision of advertised invitation---------- 689

Incorporation of terms by reference

***Christian* doctrine**

Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantive provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F. 2d 418--doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award, and, therefore, "Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted---------- 171

Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2-405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian

BIDS—Continued Page
Evaluation—Continued
Incorporation of terms by reference—Continued
Christian doctrine—Continued
Doctrine"—applicable only to initially responsive bids—par. 2-201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interests of Govt., contract will not be canceled, but quantity option should not be exercised---------- 593
Multi-year *v.* single year procurement
Under multi-year procurement for known quantities of generator sets, where second-year increment of solicitation was canceled as no longer being needed, award on basis of low single-year alternate rather than canceling and reissuing invitation was proper, in view of fact fair and reasonable prices through adequate competition were obtained from single-year alternate, and low multi-year unit price was unavailable for award of first-year increment. However, revision of par. 1-322 of Armed Services Procurement Reg. is recommended for situations where planned procurement for program years subsequent to first year is canceled after bid opening but prior to award---------- 103
Negotiation. (*See* Contracts, negotiation, evaluation factors)
Propriety
Criteria of evaluation
Under invitation for maximum of 3,000 floodlight sets, obligating Govt. to purchase minimum quantity of 963 units and providing for bids to be evaluated on basis of prices offered for minimum quantity plus 50 percent of quantity of difference between minimum and maximum quantities—a total of 1981.5 units Govt. may require prospective contractor to furnish—and prescribing tentative delivery destination, bid prices offered bearing reasonable relationship to actual anticipated needs of Govt., evaluation formula established accurate means of evaluating bids and not unbalanced bidding situation---------- 555
Qualified bids. (*See* Bids, qualified)
Tax inclusion or exclusion
Attachment to low bid stating prices quoted included provisions for payment of the then current State of Washington business and occupation tax but that "no provision has been made for the payment of any other Washington tax" is considered part of bid, and bid submitted on tax-excluded basis regarding future increases in business tax or newly imposed State taxes in nonresponsive to invitation which contained tax clause requiring contract price to include all applicable taxes and provided for adjustment in contract price only in event of changes in Federal excise tax or duty and not for changes in State or local taxes---------- 93
Failure to furnish something required. (*See* Contracts, specifications, failure to furnish something required)
Late
Agency responsibility
Bid received day following scheduled bid opening addressed with both street address and zip code shown in invitation for bids and different zip code and post office box number contained in bid form may be opened

BIDS—Continued Page

Late—Continued

Agency responsibility—Continued

and considered for award, day lost in delivery being attributable to misleading and conflicting use of dual addresses reflected in bid documents prepared by Govt. Government obligated to ensure transmission of bids within reasonable time, late bid regulations are not for application, nor does failure of bidder to use registered or certified mail due to closing of post offices in official mourning for former President Eisenhower have any significance where delivery delay is fault of Govt 765

Mishandling determination

Under invitation that showed different street addresses for invitation issuing office and bid receiving office located in same city without distinguishing between them, bid erroneously forwarded by registered mail, which timely redirected was forwarded to office issuing invitation instead of bid opening office and not drawn to attention of appropriate procurement official before bid opening time may be opened and evaluated for award on basis two offices constitute "Government installation" within meaning of late bid provision exception in sec. 1-2.303.2(c) of Federal Procurement Regs. for purpose of determining that bid had been mishandled by Govt. However, this ruling should not be given general application in view of unique and special circumstances involved 271

Samples

Bid samples forwarded by commercial truck which were not timely delivered due to conditions of local unrest may not be considered under invitation which in soliciting bids for requirements contract provided for consideration of late samples only when sent by certified or registered mail and precluded reapplication of previously submitted samples. Bidders on notice that samples were integral part of bid for evaluation purposes, submission of samples is not considered mere technicality that may be waived. Therefore, bidder in using commercial trucking assumed risk of late delivery, and samples not having been forwarded as required for consideration under provisions governing late bids, rejection of low bid is proper under sec. 1-2.303-5 of Federal Procurement Regs 59

Mistakes

Correction

After opening

Rule

Because correction of mistakes in bid is always vexing problem, correction after bid opening should be denied where there is any reasonable basis for argument that public confidence in integrity of competitive bidding system would be adversely affected. Therefore, where low bidder for construction of Post Office and Federal Building alleges omission from its bid of $21,000 bid by electrical subcontractor, and prices for item range from Govt.'s estimte of $31,000 to that of second low bid of $27,500, bid may not be corrected, even though position of low bidder would remain unchanged and evidence submitted supports conclusion error was made, as facts are not sufficiently clear to warrant bid correction that would result in making low overall bid less than $500 lower than second low bid, but erroneous bid may be withdrawn 748

BIDS—Continued Page
Multi-year
Changed conditions
Under multi-year procurement for known quantities of generator sets, where second-year increment of solicitation was canceled as no longer being needed, award on basis of low single-year alternate rather than canceling and reissuing invitation was proper, in view of fact fair and reasonable prices through adequate competition were obtained from single-year alternate, and low multi-year unit price was unavailable for award of first-year increment. However, revision of par. 1–322 of Armed Services Procurement Reg. is recommended for situations where planned procurement for program years subsequent to first year is canceled after bid opening but prior to award---------- 103
Negotiated contracts. (*See* Contracts, negotiation)
Nonresponsive to invitation
Information after bid opening unauthorized
Experience requirements clause in invitation for multi-year procurement of diesel-engine generator units for 13 power plants for Sentinel System that specified overall capabilities and reliability that must be attained by any unit offered by bidder is considered as going to responsiveness of bid and not responsibility of bidder in view of critical nature of procurement and express language of experience requirements coupled with cautionary notice that experience data must be submitted with bid. Therefore, rejection of low bid for failure to submit required operating experience of units offered before bid opening time was proper, for to accept such information after bids were opened would be prejudicial to other bidders---------- 291
Opening
Public
Delayed openings
Although under requirement in 10 U.S.C. 2305(c) that "Bids shall be opened publicly at time and place stated in advertisement," delayed opening may be excusable in unusual circumstances, and reasonably short delays resulting from normal administrative routine would not ordinarily be objectionable, setting number of bid openings for same hour when it is obvious they cannot with available personnel and facilities be opened within reasonable time is not in conformity with statute and is practice that discourages free attendance of witnesses which public opening is intended to foster. When it is necessary to schedule numerous bids for opening on same day, to avoid delay, openings should be scheduled at intervals and held in rooms designated for purpose----- 413
"When practicable"
The term "when practicable" in par. 2–402.1(a) of Armed Services Procurement Reg. qualifying requirement for reading aloud of bids should be judged on basis of nature of bids—multiplicity of items, complexity or interrelationship of method of bidding, or evaluation prescribed rather than by amounts involved, or availability of personnel or space to conduct bid opening that is intended to protect both public and bidders against any form of fraud, favoritism, partiality, complicity, or even suspicion of irregularity. Therefore elimination of reading of bids below arbitrarily selected dollar amount is not recommended, but adequate space and personnel should be provided to handle normal volume of bid openings---------- 413

BIDS—Continued Page

Options

Exercise of option. (*See* **Contracts, options**)

Preparation

Costs

Recovery

Claim of low bidder for bid preparation expenses, as well as anticipatory profits, because all bids under two-step advertised procurement had been rejected and lease-purchase agreement negotiated for desired automatic hydraulic radio reporting system may not be allowed as to preparation costs absent proof that procuring agency fraudulently induced bids with deliberate intention before bids were invited or received to disregard all bids except one from company to whom it was intended to award contract, whether it was lowest responsible bid or not, but even where preparation expenses are allowed, anticipatory profits are not recoverable by unsuccessful bidder 471

Prices

Bid evaluation on basis other than price. (*See* **Bids, evaluation, factors other than price**)

Item omission

Award to low bidder on geodetic rods who had for data items to be furnished inserted in unit price and amount columns opposite word "Lot 55 a "——," only other bidder showing "no charge" for items, was proper as low bid is not considered nonresponsive per se, absent specific requirement that "no charge" be stated. Use of "——" indicates low bidder had not overlooked data items and in deciding not to insert prices for items intended to be obligated under invitation provision to effect that contractor agrees he is obligated to deliver all data listed on bidding schedule, and price he is to be paid therefor is included in total price specified in contract 757

Qualified

Acceptance time difference

A low bid conditioned upon receipt of notice of award within 24 hours after closing hour for receipt of bids under invitation providing for 4-day bid acceptance period having automatically expired before award could be made, rejection of bid was not contrary to principles of competitive bidding system. To permit bidder to delete acceptance time condition would provide option to accept or reject award subsequent to bid opening, an advantage unavailable to other bidders. Extension of bid acceptance date prescribed by sec. 1-2.404-1 of Federal Procurement Regs. designed for situations where group of offers might expire before award action is completed is not intended to grant particular offeror limiting bid acceptance time the right to extend acceptance time 19

Buy American Certificate

Under invitation for aluminum sulphate that contained standard Buy American Act clause and Buy American Certificate to effect end products offered were domestic and that components of unknown origin had been considered as mined, produced, or manufactured *outside* U.S., bid that substituted word "inside" for "outside," thus certifying components of unknown origin had been considered domestic, properly was evaluated as foreign end product and rejected because it was not low

BIDS—Continued Page

Qualified—Continued

Buy American Certificate—Continued

bid. To permit bidder to explain after bid opening meaning of certificate alteration would jeopardize integrity of competitive system, or to accept altered certificate as guarantee components were produced in U.S. would give bidder competitive advantage of supplying components of unknown origin ---------- 458

Descriptive literature

Volunteered

A bid on automotive infrared exhaust gas analysis systems which included unsolicited descriptive literature that did not conform to specifications, but accompanying letter considered part of bid offered to meet specifications, is responsive bid where unsolicited nonresponsive descriptive literature did not qualify bid or affect Govt.'s right to require conformity with specifications. Absent qualification in bid, compliance with specifications determinative on basis of product and not on speculative interpretations of unsolicited descriptive literature, acceptance of noise level in systems as minor deviation, correction of which would have negligible effect on price was within province of contracting agency---------- 306

Letter containing conditions not in invitation

Attachment to low bid stating prices quoted included provisions for payment of the then current State of Washington business and occupation tax but that "no provision has been made for the payment of any other Washington tax" is considered part of bid, and bid submitted on tax-excluded basis regarding future increases in business tax or newly imposed State taxes is nonresponsive to invitation which contained tax clause requiring contract price to include all applicable taxes and provided for adjustment in contract price only in event of changes in Federal excise tax or duty and not for changes in State or local taxes---------- 93

Price, quantity, delivery, etc., unaffected

Bid acceptance

Acceptance of low bid containing provision that "No withholding will be allowed without prior written consent of seller"—condition which not affecting price, quantity, quality, or delivery could have been deleted pursuant to sec. 1-2.404-2(b) of Federal Procurement Regs.—consummated a valid and enforceable contract that does not diminish Govt.'s right to withhold monies under "Default" provision of contract, Contract Work Hours Standards Act, Walsh-Healey Act, internal revenue laws, and Govt.'s common-law right as creditor. Should monies be withheld and contractor sue, Govt. could assert claim either as cross-claim or as separate action---------- 306

Rejection

Propriety

An administrative determination based on unadvertised standards that elevating platforms offered by low bidder were technically inadequate to serve needs of Govt. contravenes established principles governing formal advertising that require bid evaluation to be based on objectively determinable factors made known to bidders in advance; that do not permit rejection of bid for failure to specify feature not

BIDS—Continued Page

Rejection—Continued

Propriety—Continued

required by invitation; and that require inclusion in specifications of requirement for submission of technical or descriptive data if needed for evaluation purposes. Although low bid should not have been rejected nor award made on basis of nonresponsive second lowest bid, cancellation of contract close to delivery date would serve no useful purpose; however, steps should be taken to preclude recurrence of such situation ---------- 464

Samples. (*See* **Contracts, specifications, samples**)

Signatures

Agents

Authority. (*See* **Agents, of private parties, authority, contracts, signatures**)

Bid unsigned. (*See* **Bids, unsigned**)

Small business concerns. (*See* **Contracts, awards, small business concerns**)

Specifications. (*See* **Contracts, specifications**)

Taxes

Evaluation. (*See* **Bids, evaluation, tax inclusion or exclusion**)

Two-step procurement

Delivery provisions evaluation

The failure of low bidder to furnish guaranteed maximum weight and maximum dimensions for shipping containers required under second-step of two-step multi-year procurement for transceivers to be delivered f.o.b. origin is deviation that is distinguishable from type of bid irregularity covered by "triviality" or "*de minimus*" rule, and omission did not render bid nonresponsive where maximum shipping cost was ascertainable from other information contained in invitation—size and weight of transceiver—there is no question as to bidder's undertaking to meet all requirements of specifications, including delivery, and that on basis of possible transportation costs, low bidder had offered most advantageous bid to Govt ---------- 357

Discontinued and contract negotiated

Propriety

Lowest bid submitted under second-step of two-step advertised procurement for automatic hydraulic radio reporting system to aid in flood prediction exceeding allotted funds and no additional funds being obtainable, rejection of all bids by contracting officer who had been delegated 10 U.S.C. 2305(c) authority to cancel invitation when in public interest was proper, and issuance of 5-year lease purchase agreement under existing negotiated open end lease contracts was justified on basis of compliance with criteria prescribed in par. 1-317 of Armed Services Procurement Reg. and price and technical considerations. Although 5-year lease period violated secs. 3732 and 3679, R.S., because available funds would not cover total rental obligation, this basis of award having been assumed not to be legally objectionable, contract term may be completed ---------- 471

BIDS—Continued Page
Two-step procurement—Continued
Technical proposals
Deficiencies
Notice
The failure before bids were invited on second step of two-step formally advertised procurement to furnish separate notice to bidder of technical unacceptability of low alternate proposal submitted not as separate package but incident to clarification of unacceptable original proposal does not constitute acceptance of low alternate proposal. Provision in sec. 1-2.503-1(b)(5) of Federal Procurement Regs., as well as in administrative regulation, for notice of technical unacceptability of proposal under two-step advertised method of procurement is procedural right that does not go to essence of award, and rejection of alternate proposal will not be questioned, absent evidence determination was arbitrary, capricious, or made in bad faith 349
Modification
Use of two-step formal advertising method of procurement authorized by par. 2-501 of Armed Services Procurement Reg. for purchase of helicopters, where Request for Technical Proposals avoided unnecessary restrictive statements of Govt.'s requirements in order to promote competition, and recognized that potential bidders would have to modify FAA certified helicopters submitted in first-step in order to meet specifications was not improper, and acceptance of proposal based upon determination that necessary modifications to meet specifications introduced only minor technical risk and did not cast reasonable doubt on achievability of proposal will not be questioned absent fraud, abuse of authority, or arbitrary action in evaluation of proposal 49
Use basis
The strict rule that all bids must respond fully to requirements of invitation so that contract awarded will be same contract offered to all bidders is not for application in evaluation of technical proposals submitted on complex items in first-step of two-step procurement since in order to accomplish objectives of two-step procurement procedure authorized by par. 2-501 of Armed Services Procurement Reg. considerable element of flexibility is required and, therefore, regulation provides for discussion with any offeror of his proposal, which makes first-step evaluation procedure more in nature of negotiated procedure than of strict formal advertising 49
Unbalanced
Bid evaluation formula
Under invitation for maximum of 3,000 floodlight sets, obligating Govt. to purchase minimum quantity of 963 units and providing for bids to be evaluated on basis of prices offered for minimum quantity plus 50 percent of quantity of difference between minimum and maximum quantities--a total of 1981.5 units Govt. may require prospective contractor to furnish—and prescribing tentative delivery destination, bid prices offered bearing reasonable relationship to actual anticipated needs of Govt., evaluation formula established accurate means of evaluating bids and not unbalanced bidding situation 555

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Unbalanced—Continued

Evaluation

Establishment of weight factors to evaluate bids under invitation contemplating requirements contract subject to maximum order limitation for delivery to single destination on basis of previous procurement experience on 71 out of 249 items of shelving classified under Federal Supply Catalog system to be purchased, and assignment of token weight to remainder of 249 items is realistic method of evaluation which does not result in unbalanced bidding. Therefore, even though it would have been preferable to evaluate bids by using f.o.b. origin prices, there is no objection to award under solicitation, bids having been exposed and evaluated on common basis, and fact that in future procurements, most meaningful method of obtaining competitive prices will be used 62

To meet cost limitations

Statutory cost limitation certificate required by par. 18–110(b) of Armed Services Procurement Reg. in connection with construction contracts is regarded as being intended to prevent deliberate understatement of estimated costs so as to stay within statutory limitation, and is considered requirement that is in accord with par. 2–201(c) of regulation, which provides for rejection of bids materially unbalanced "for purpose of bringing affected items within cost limitations." 34

Whether overstatement of costs on proposed construction contracts which are subject to statutory limitations and to certification of accuracy of cost apportionment statements prescribed by par. 18–110(b) of Armed Services Procurement Reg. would in no case be grounds for finding bid nonresponsive cannot be answered without qualification. However, such cases are not anticipated in view of fact that problems involving par. 18–110 have concerned understatements of estimated costs by bidders attempting to stay within statutory limitations, and because par. 2–201(c)(i) of regulation provides for rejection of bids materially unbalanced for purpose of bringing affected items within cost limitations or bids which exceed cost limitations, unless limitations had been waived prior to award 34

Where Govt. estimate on construction contracts shows that costs will not exceed statutory cost limitations prescribed in par. 18–110 of Armed Services Procurement Reg., and the bidder's certified cost apportionment is also within limitation, fact that bid was unbalanced would not ordinarily justify rejection of bid as nonresponsive 34

In connection with construction projects, fact that accuracy of bidder's apportionment between statutorily limited costs and those not so limited can affect responsiveness of bid, par. 2–201(c)(i) of Armed Services Procurement Reg. properly provides that "materially unbalanced" or grossly inaccurate cost apportionment can be cause for rejection of bid 34

Although evaluation of materially unbalanced bids on construction projects is matter of bid responsiveness, materiality would to great extent be determined by whether actual price offered by bidder exceeded statutory limitation imposed by par. 18–110 of Armed Services Procurement Reg., as there is no authorization for construction which exceeds statutory limits. In absence of appropriate waiver pursuant to par. 2–201(c)(i) of regulation, bid that on basis of full evaluation has been determined to have exceeded statutory limitation is for rejection with-

BIDS—Continued Page
Unbalanced—Continued
To meet cost limitations—Continued
out regard to responsiveness, whether or not problem of materially unbalanced bid is involved ---------- 34
Unsigned
Agent's signature
Low bid signed by unknown agent of corporation submitting bid and unaccompanied by evidence of agent's authority to bind principal—necessary requirement absent establishment of agent's authority prior to bid opening—is nonresponsive bid. Although evidence of agent's authority is acceptable after bid opening when apparent authority of agent would estop principal from denying agent's authority, to permit proof of unknown agent's authority after bid opening would give bidder option to elect to abide by bid or claim bid was submitted in error by person without authority to enter into contracts on its behalf—an option that is considered chance to second-guess other bidders after bid opening and, therefore, must be regarded as fatal to bid ---------- 369
Cost certifications
Where Govt. estimate on construction projects shows that costs subject to statutory cost limitations of par. 18-110 of Armed Services Procurement Reg. will not exceed limitation, failure to sign certification required by subsec. (b) is not grounds for finding bid nonresponsive, and usual principles regarding acceptability of unsigned bids would govern in view of fact that pursuant to par. 2-201(c)(i), bidder by signature certifies to correctness of estimated cost apportionment and to entire bid and, therefore, failure to certify cost apportionment should not arise as distinct issue ---------- 34
Evidence of bidder's intent to be bound
A low unsigned bid evidencing in type name of corporation president as person authorized to sign bid, which was hand-delivered by president who signed sealed envelope to show delivery by him, envelope also reflecting time and date bid was received and by whom, is for consideration pursuant to par. 2-405(iii)(B) of Armed Services Procurement Reg. prescribing that unsigned bid may be considered for award if accompanied by documentary evidence showing clear intent to submit binding bid, and president's signature on bid envelope constitutes evidence of such intent. Identification of president as person authorized to sign bid, personal delivery of bid by him, together with his signature on bid envelope preclude possibility of bid repudiation or avoidance of liability on contract ---------- 648
Only bid received
Rejection of only bid received before bid opening because it was not signed was not required by par. 2-405 of Armed Services Procurement Reg., but representative who had delivered bid should have been permitted to sign it, not on basis that his authority to bind bidder was known or made obvious by his conduct, but because bid was only one received and neither question of bidder option to elect after bid opening whether or not to be bound, nor question of prejudice to other bidders was involved—only other bid received being acceptable late bid submitted at higher price. Therefore, unsigned bid must now be treated as if permission to sign it had been given and bid may be considered for award ---------- 801

BUILDINGS Page
Public. (*See* **Public Buildings**)
BUY AMERICAN ACT
Applicability
Contractors purchases from foreign sources
End product *v.* components
Classification of each item to be furnished Govt. construction contractor as separate end product for evaluation under Buy American Act and award of single contract is within contemplation of par. 6-001 of Armed Services Procurement Reg., and bid that would be low domestic bid if line items were considered components instead of end products is not responsive bid. There is no simple answer to question of what constitutes end product—award of single contract is not determinative, but purpose of procurement playing part, classifying items to be delivered to job and assembled by another contractor as end items is proper exercise of procurement judgment 384
Foreign component changes
In determining whether cylinder liners to be manufactured in U.S. from basic liner forging purchased in Japan constitute foreign or domestic source end product under E.O. No. 10582, cost of U.S. operations may not include cost of testing, production qualification evaluation, and packaging as these processes are not considered "manufacturing" or components of end item within contemplation of Buy American Act. Domestic operations on forging—hone boring, chrome plating, and machining—neither exceeding cost of foreign forging as required by par. 6-101(a) of Armed Services Procurement Reg., nor creating different article or effecting fundamental change in forging, cylinder liner end product is considered foreign source end product 727
Waiver
Propriety
Determination by Dept. of Housing and Urban Development prior to solicitation of bids by Guam Housing and Urban Renewal Authority for low-rent housing project that certain foreign construction material could be procured at considerable savings—at least 16 percent less than domestic items—and waiver of Buy American requirements did not conform to procedures established by E.O. No. 10582 for determining whether domestic bid prices are unreasonable, Executive order contemplating that determination of unreasonable domestic cost should be made after receipt of bids or offers on foreign materials and comparison of prices. However, difference between foreign and domestic prices exceeding Executive order standards, award made will not be disturbed, but future procurements should comply with prescribed procedures 487
Bids. (*See* **Bids, Buy American Act**)
CHECKS
Delivery
To other than payee
Banks
The authority in Pub. L. 90-365, approved June 29, 1968, to issue single Govt. salary check to bank for deposit to individual accounts of employees may not be construed to include members of uniformed services, words "salary" and "wages" in act denoting compensation of

CHECKS—Continued Page
Delivery—Continued
To other than payee—Continued
Banks—Continued
Federal employees, whereas when referring to compensation of military personnel, terms "pay" or "pay and allowance" are used. However, under allotment authority of chapter 13 of Title 37, U.S. Code, at request of members, single Govt. check may be issued to financial institution to cover "net pay"—total pay and allowances less authorized deductions—provided purpose of allotments is considered to be proper by Secretary concerned ---------- 138
CITIES, CORPORATE LIMITS
Transfers within corporate limits, etc.
Relocation expenses
Payment of relocation expenses provided in 5 U.S.C. 5724a to employees who are transferred between posts of duty 35 miles apart within corporate limits of same city—Houston, Texas—is precluded under sec. 1.3a of Bur. of Budget Cir. No. A–56, which authorizes travel and transportation expenses and applicable allowances only when transfer is between "official stations" as term is defined in sec. 1.5 of Standardized Govt. Travel Regs., and section prescribing that designated post of duty and official station are one and same, an area that is circumscribed by corporate limits of city, there is no authority for payment of relocation expenses to employees transferred within corporate limits of Houston-- 227
CLAIMS
Abatement pending court decision
The general rule that no action will be taken by U.S. GAO on claim involved in suit or controversy while judicial determination is pending has no application to Army officer seeking injunctive relief incident to correction of military records rather than money judgment. Therefore, request for decision on legality of payment of disability retired pay that is based on administrative action taken subsequent to date court action was filed will be considered and merits of officer's claim for disability determined ---------- 235
Assignments
Contracts
Business operation sold, etc.
Purchaser of manufacturing concern which completed shipment of five Govt. contracts assigned to it by seller—where two of contracts had been awarded prior to seller's change of firm name but no filing made of change as required by par. 1–1602 of Armed Services Procurement Reg., and two of remaining three contracts, with purchaser's consent, had been assigned to bank pursuant to 31 U.S.C. 203—may be recognized as successor in interest to contractor of record on all five contracts, no claim having been received from contractor of record or bank. However, consideration of claim for payment under 31 U.S.C. 71, requires two releases, one from contractor of record, identifying five contracts, other from bank relinquishing any claim against Govt ---------- 196

CLOTHING AND PERSONAL FURNISHINGS Page

Special clothing and equipment

Tuxedo, formal attire, etc.

Rental charges on formal dress attire required to be worn by U.S. Secret Service agents for security purposes and not merely to be attired in socially acceptable manner may be reimbursed to special agents whenever written determination is made by proper official of Service that utilization of formal attire is necessary for proper performance of duty to which assigned 48

COAST GUARD

Commissioned personnel

Service credits

Temporary service in a higher grade

When Coast Guard officer who is advanced in grade under temporary promotion system authorized in 14 U.S.C. 275 reverts to permanent promotion system grade, time in temporary service grade, absent specific legislation, may not be used as time in grade higher than permanent grade from which originally appointed for temporary service in view of fact that when read together, secs. 275(h) which prescribes that upon termination or expiration of temporary appointment "officer shall revert to his former grade," and 257(b) which provides that service in temporary grade is service "only in grade that officer concerned would have held had he not been so appointed," permit only counting of temporary service as time in officer's permanent grade held immediately preceding temporary service appointment 390

COLLEGES, SCHOOLS, ETC.

Tuition, etc., payments

Duplication of payments prohibition

When scholarships to students from Public Health Service grants to educational institutions under 42 U.S.C. 295g covers in part either tuition or living expenses, or both, payment of educational assistance allowance under chapter 34 of Title 38, U.S. Code, is barred under longstanding construction by Veterans Administration of sec. 1781 that such payment would constitute duplication of benefits paid from Federal Treasury 5

COMPENSATION

Double

Concurrent military retired and civilian service pay

Disability retirement

"Armed conflict" in Vietnam

As it is difficult to apply exemption to reduction in retired pay provision prescribed by sec. 201(b) of Dual Compensation Act to officer of Regular component of uniformed services retired for injury or disease as direct result of armed conflict in Vietnam who is employed in civilian position under U.S., due to nature of combat operations in Vietnam and difficulty of establishing that inception of disease occurred while officer was engaged in armed conflict, affirmative administrative finding that there was direct causal relationship between disability and engagement in armed conflict will be accepted unless unreasonable or insufficiently supported by record, or if determination is rendered dubious by further evidence or circumstances not considered, or unduly gives person benefit of reasonable doubt 219

COMPENSATION—Continued Page
Double—Continued
Concurrent military retired and civilian service pay—Continued
Exemptions
Reserve Officers' Training Corps programs
Employment of retired members of uniformed services by secondary school that is instrumentality of unincorporated territory of Govt. of Guam as administrators or instructors in Junior Reserve Officers' Training Corps program is not prohibited under dual pay and dual employment provisions of 5 U.S.C. 5531–5533, absent indication in Dual Compensation Act or its legislative history of intent to expand coverage of act to offices or positions in territories which had not been included in previously existing dual compensation laws that were repealed. In addition Reserve Officers' Training Corps Vitalization Act of 1964 (10 U.S.C. 2031(d)) authorizes employment of retired members in Junior ROTC programs and prescribes basis for payment to members_ 796
Leave without pay from civilian employment
Retired Regular Air Force officer employed as civilian with Federal Govt. and subject to retired pay reduction pursuant to 5 U.S.C. 5532, who is in leave-without-pay (LWOP) status for 12-day period—Monday, Aug. 7 through Friday, Aug. 18, 1967—is entitled to full military retired pay for Saturday and Sunday occurring within LWOP period during which officer is not entitled to civilian compensation. However, officer's retired pay is subject to reduction for Saturdays and Sundays, Aug. 5, 6, 19, and 20, 1967, occurring before and after LWOP period, days that stand alone and do not involve any loss of civilian compensation and which fall within "full calendar period" of permanent civilian employment prescribed by 5 U.S.C. 5532(b)_____ 152
Retired Regular Air Force officer employed as civilian for "full calendar period" May 7, 1966, to Apr. 14, 1967, during which time he is subject to reduction in retired pay pursuant to 5 U.S.C. 5532, who is in leave-without-pay (LWOP) status 1 hour on Friday, Oct. 28, and on following Monday, Oct. 31, is not entitled to full retired pay for intervening Saturday and Sunday, officer having received 7 hours civilian compensation for Friday is considered to have been in receipt of civilian compensation for day, thus subjecting him to reduction in retired pay pursuant to 5 U.S.C. 5532(b), and his LWOP status commencing following Monday, he is not entitled to full retired pay for Saturday and Sunday that do not fall within LWOP period_____ 152
A leave-without-pay (LWOP) status on 31st day of Oct. 1967 does not entitle retired Regular Air Force officer employed as civilian and subject to reduction in retired pay pursuant to 5 U.S.C. 5532, to additional amount of retired pay. Military retired pay accrues on monthly basis, computed as if each month had 30 days and no retired pay accrues on 31st day of any month. Therefore, officer accrued full month's retired pay for month of October, whether or not he was in LWOP status from his civilian Federal position on 31st of October_____ 152
Under rule that retired pay of retired Regular officer is not subject to reduction under 5 U.S.C. 5532 for absences from Federal civilian position on Saturdays and Sundays that occur within leave-without-pay (LWOP) period, no loss of compensation being involved, retired Regular Air Force officer who is absent in LWOP status on four separate

COMPENSATION—Continued Page

Double—Continued

Concurrent military retired and civilian service pay—Continued

Leave without pay from civilian employment—Continued

occasions from civilian position he occupied from May 7, 1966, through Apr. 13, 1967—considered "full calendar period" within phrase contained in 5 U.S.C. 5532(a)—is only entitled to full retired pay for Saturday and Sunday that occurred within one of LWOP periods, and no adjustment of retired pay is required for Saturdays and Sundays that occurred before and after other LWOP periods---------- 152

Territorial employment

Employment of retired members of uniformed services by secondary school that is instrumentality of unincorporated territory of Govt. of Guam as administrators or instructors in Junior Reserve Officers' Training Corps program is not prohibited under dual pay and dual employment provisions of 5 U.S.C. 5531–5533, absent indication in Dual Compensation Act or its legislative history of intent to expand coverage of act to offices or positions in territories which had not been included in previously existing dual compensation laws that were repealed. In addition Reserve Officers' Training Corps Vitalization Act of 1964 (10 U.S.C. 2031(d)) authorizes employment of retired members in Junior ROTC programs and prescribes basis for payment to members---------- 796

Concurrent military retired pay and disability compensation. (*See* **Officers and Employees, death or injury, disability compensation, etc., retainer pay**)

Exemptions

Dual Compensation Act

Disability "as a direct result of armed conflict"

As it is difficult to apply exemption to reduction in retired pay provision prescribed by sec. 201(b) of Dual Compensation Act to officer of Regular component of uniformed services retired for injury or disease as direct result of armed conflict in Vietnam who is employed in civilian position under U.S., due to nature of combat operations in Vietnam and difficulty of establishing that inception of disease occurred while officer was engaged in armed conflict, affirmative administrative finding that there was direct causal relationship between disability and engagement in armed conflict will be accepted unless unreasonable or insufficiently supported by record, or if determination is rendered dubious by further evidence or circumstances not considered, or unduly gives person benefit of reasonable doubt---------- 219

Downgrading

Saved compensation

Conversion of positions between Executive and General Schedules

Upon removal of Level V position of Assistant Archivist for Presidential Libraries from Executive Schedule and return of position to its former GS–17 classification under General Schedule, higher compensation of Level V position may not be saved to incumbent, both actions being Presidential they are outside scope of 5 U.S.C. 5334(d), authorizing salary retention for employees who together with their positions

COMPENSATION—Continued Page
Downgrading—Continued
Saved compensation—Continued
are brought under Classification Act from some other Federal pay system. Even if no change of position is considered to have occurred incident to Presidential actions, situation would be within purview of sec. 539.203 of Civil Service Regs. limiting application of 5 U.S.C. 5334(d) to case where "the employee and his position are initially brought under the General Schedule" ---------- 805
Increases
Quality increases
In accordance with Civil Service Commission instruction giving effect to 5 U.S.C. 5335(a), which prescribes waiting period of 156 weeks in step 7 before employee may be advanced to step 8 of his grade, and to sec. 5336(b), which provides that quality increase is not equivalent increase in pay within meaning of sec. 5335(a), employee advanced on Jan. 2, 1966 to step 6 of grade GS-13, upon receiving quality increase on July 3, 1966 to step 7, not having received equivalent increase does not start new waiting period to qualify for step 8. However, employee is required to serve, not 104 weeks waiting period prescribed for step 6, but 156 weeks prescribed for step 7, which period runs from Jan. 2, 1966, date of advancement to step 6 ---------- 150
International dateline crossings
An employee who "lost" a workday incident to permanent change-of-station transfer from Honolulu to Tokyo due to crossing international dateline is entitled to compensation for day under rule that in establishing entitlement to pay, time of place at which employee is located is controlling under 15 U.S.C. 262. In accordance with longstanding administrative practice, pay of employee should not be increased because of extra time gained when traveling across international dateline in eastward direction—crossings in opposite directions canceling each other out. However, any specific factual situations may be presented for consideration ---------- 233
Military personnel. (*See* Pay)
Overtime
Entitlement
Employees receiving premium pay
When employees who are receiving premium pay on annual basis under 5 U.S.C. 5545(c)(2) prescribed for irregular, unscheduled overtime, Sunday, holiday, and night duty, are detailed to perform 12-hour shifts of duty on Saturday, Sunday, and Monday, they may be regarded as performing regularly scheduled overtime work entitling them additionally to overtime compensation for services performed on detail in excess of 40 hours per week and 8 hours a day, special work satisfying term "regularly scheduled work" used in 5 U.S.C. 5545 with respect to night differential and defined as work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals. However, hours spent in traveling to site of special duty are not compensable as overtime ---------- 334

COMPENSATION—Continued Page
Overtime—Continued
Training courses
Outside regular tour of duty
Prohibition
Wage board employees at Army depot who attended welders' training program in nongovernmental facility after regular tours of duty are not, pursuant to 5 U.S.C. 4109, entitled to overtime for training periods, notwithstanding receipt of travel expenses incident to training. The fact that employees would have lost productive time had training not been held after regular hours does not bring them within exception to prohibition against payment of overtime while training prescribed in Federal Personnel Manual, Subchapter 6–2b, nor are employees entitled to overtime on basis of benefit to employing agency, work-related night courses giving employees qualification of substantial value that is transferable to other organizations---------- 620
Periodic step-increases
Quality increase effect
In accordance with Civil Service Commission instruction giving effect to 5 U.S.C. 5335(a), which prescribes waiting period of 156 weeks in step 7 before employee may be advanced to step 8 of his grade, and to sec. 5336(b), which provides that quality increase is not equivalent increase in pay within meaning of sec. 5335(a), employee advanced on Jan. 2, 1966 to step 6 of grade GS–13, upon receiving quality increase on July 3, 1966 to step 7, not having received equivalent increase does not start new waiting period to qualify for step 8. However, employee is required to serve, not 104 weeks waiting period prescribed for step 6, but 156 weeks prescribed for step 7, which period runs from Jan. 2, 1966, date of advancement to step 6---------- 150
Promotions
Effective date
Regular *v.* discrimination action promotions
The remedial action of retroactively promoting employee alleging racial discrimination after employee had been promoted from grade GS–9 to grade GS–11 without regard to complaint does not entitle employee to higher grade salary for period prior to effective date of his regular promotion, neither 5 U.S.C. 7151 nor implementing Civil Service Regs. providing for retroactive remedial action in event of finding of discrimination. Furthermore, employee may not be paid additional compensation under "Back Pay Statute" (5 U.S.C. 5596), or on basis of retroactive correction of administrative error, failure to timely promote employee being neither positive adverse administrative action required for payment under statute nor administrative error---------- 502
Rates
Special
To compete with private industry
Authority in 5 U.S.C. 5303(a) to raise minimum rate of grade in order to compete with private industry permits increase in any or all of additional steps of grade in view of permissive language of section, which provides that President or his designee "*may* make corresponding increases in all step rates of the salary range for each such grade" for purposes of recruitment or retention of well-qualified persons in posi-

COMPENSATION—Continued Page

Rates—Continued

Special—Continued

To compete with private industry—Continued

tions paid under sec. 5332. The "corresponding increase" authorized in sec. 5303(a) means each increase is limited to not more than amount of increase in first step rate, thus permitting different steps in grade may be increased by different amounts 190

Removals, supensions, etc.

Back pay

Involuntary leave

Recrediting

Under 5 U.S.C. 5596(b), employee who is entitled to back pay and other restoration benefits may not be credited with leave in amount that would cause amount of leave to his credit to exceed maximum authorized by law or regulation. Therefore, in reconstructing annual leave account of employee separated Feb. 20, 1968 after suspension period that was canceled, who at time of suspension May 1, 1967, had leave ceiling of 240 hours and 290 hours of leave to his credit, leave in excess of 240 hours ceiling is forfeited and, although employee accrued 32 hours of annual leave from Jan. 1 to Feb. 20, 1968, his lump-sum leave payment under 5 U.S.C. 5551(a) is limited to 240 hours, and forfeiture of leave may not be retroactively substituted for corresponding portion of suspension period 572

Deductions from back pay

Outside earnings

In excess of "back pay" due

In computing back pay due employee for improper suspension, 5 U.S.C. 5596(b), which requires deduction of any amounts earned through other employment during period of suspension, does not contemplate daily or weekly comparison of back pay with outside earnings, but rather total amount of outside earnings is for comparison with total amount of back pay due employee. Therefore, employee whose outside earnings exceeded amount he would have earned in Govt. had he not been suspended from duty is not entitled to back pay for period of suspension, notwithstanding that during suspension period, he did not have any earnings for 6 days 572

Severance pay

Discontinuance

Reemployment of separated employee

Upon employment of separated civil service employee by nonappropriated funds instrumentality described in 5 U.S.C. 2105(c), severance pay former employee is receiving is not required to be discontinued, provisions in 5 U.S.C. 5595(d) prescribing discontinuance of severance pay applying only when former employee is reemployed by Federal Govt. Even though nonappropriated funds instrumentalities are integral parts of Govt. of U.S., employees of instrumentalities are not considered employees of U.S. for purpose of laws administered by Civil Service Commission and, therefore, severance pay of former employee should not be discontinued as result of employment by nonappropriated funds instrumentality 192

COMPENSATION—Continued Page
Wage board employees
Fringe benefits
When upon wage survey in connection with pay of temporary Federal construction workers in a particular area under 5 U.S.C. 5341, it is found that prevailing wage rate for employees of private construction contractors engaged in similar non-Govt. work or for Davis-Bacon employees includes costs of certain fringe benefits and it is determined to be in public interest not to destroy area rate and also to remain competitive in labor market, fringe benefits may be included as wage increments along with basic hourly rate as part of overall prevailing rate ---------- 278
Overtime
Training courses outside regular tour of duty
Wage board employes at Army depot who attended welders' training program in nongovernmental facility after regular tours of duty are not, pursuant to 5 U.S.C. 4109, entitled to overtime for training periods, notwithstanding receipt of travel expenses incident to training. The fact that employees would have lost productive time had training not been held after regular hours does not bring them within exception to prohibition against payment of overtime while training prescribed in Federal Personnel Manual, Subchapter 6-2b, nor are employees entitled to overtime on basis of benefit to employing agency, work-related night courses giving employees qualification of substantial value that is transferable to other organizations ---------- 620
Work in excess of daily and weekly limitations
Intermittent and part-time employees
Intermittent and part-time wage board employees, regardless of whether 40-hour administrative workweek or 8-hour day has been established for them, are entitled to overtime compensation at not less than time an one-half for time worked in excess of 8 hours a day or 40 hours a week pursuant to sec. 201 of "Work Hours Act of 1962," amending sec. 23 of act of Mar. 28, 1934, language of sec. 23, as amended, regarding "establishment" of regular hours of labor at not more than 8 per day or 40 per week intending only to prescribe measure as to when regular and overtime rates of compensation are payable and not to require formal establishment of regular hours of work ---------- 439
CONTRACTORS
Conflicts of interest
Avoidance
Dept. of Defense Directive 5500.10 (Appendix G of Armed Services Procurement Reg.) promulgated to avoid conflicts of interest on part of contractors is not self-executing regulation but requires notice of its applicability in solicitation and in contract, and exercise of judgment or discretion by contracting officer, subject to review, and, therefore, doctrine of *G. L. Christian and Associates* v. *U.S.*, 312 F. 2d 418, may not be invoked to give Directive force and effect of law and to read into contract mandatory clauses of ASPR that were not included ---------- 702

CONTRACTORS—Continued Page
Conflicts of interest—Continued
Developmental or prototype items
The fact that low bidder under invitation for Terminal, Telegraph-Telephone system had in development of system furnished under contract productive drawings used in preparation of applicable military specifications does not require that bidder be barred under Rule 2—"Restrictions on Future Procurements"—of Dept. of Defense Directive 5500.10 governing conflicts of interest of contractors who furnish Govt. with engineering or technical services in connection with initiation of new systems, programs, or specifications. Bidder not only did not furnish "complete specifications" restricted by Rule 2, but drawings obtained under production contract awarded by competitive bidding, their use is within exception to Rule 2 of Directive relating to "contracts for developmental or prototype items." 702
Employees
Integrity
Although as general proposition lack of integrity on part of individuals of business concern who as officers, directors, or stockholders control activities, policies, and management of concern must not always be imputed to concern, where president of low bidder corporation had been found guilty of wilful failure to pay income taxes and key employee was convicted of fraud against Govt. and sentenced, and also placed on debarred bidders' list, imputing lack of integrity to corporation was proper determination by procuring agency, absent showing determination was not based on substantial evidence, 10 U.S.C. 2305(c) requiring award to "responsible bidder," term embracing personal attributes of character or integrity as well as pecuniary ability and physical capability to perform contract 769
Definition of term "integrity" in connection with Govt. contracts does not differ from generally accepted connotation of uprightness of character, moral soundness, honesty, probity, and freedom from corrupting influence or practice. As used in prescribing qualifications for public officers, trustees, etc., term "integrity" means soundness of moral principle and character in making and performance of contracts and fidelity and honesty in discharge of trusts, and term synonymous with probity, honesty, and uprightness, lack of integrity on part of officials of bidder may be imputed to bidder by procuring agency, unless administrative determination is not based on substantial evidence demonstrating bidder's lack of responsibility 769
CONTRACTS
Amounts
Award for lesser amount than solicited
Issuance of supplemental instructions to provisions of invitation permitting submission of offers for quantities less than specified and reserving to Govt. right to make award on any item for quantity less than offered at unit price offered that withdrew permission to offer less than quantities specified in invitation did not abrogate Govt.'s right to award contract for lesser amount at unit price offered and, therefore, award of contract for less than total number of items originally specified is not precluded by terms of invitation. However, to avoid submission of "all or none" bids and reduction of competition in future, language of Supplemental Solicitation Instruction should be modified 142

CONTRACTS—Continued Page

Amounts—Continued

Award for lesser amount than solicited—Continued

The right having been reserved in invitation to make award on any of ten items being solicited for quantity less than quantity offered at unit price offered, unless offeror specified otherwise, quantity cutback prior to award of contract to only bidder on first four of ten items solicited was proper where procurement agency responsible for determining needs of Govt. made award in good faith and in accordance with established procurement procedure---------- 267

Indefinite

Error correction

Authority granted in sec. 1-2.406-4(b)(2) of Federal Procurement Regs. to reform contract price either upward or downward in amount not to exceed $1,000, if as corrected amount will not exceed next lowest bid submitted under original invitation for bids, may be applied to indefinite quantity requirements contract and estimated quantity or quantities shown in solicitation for item or items in question used to determine whether correction would exceed limitation. Therefore, erroneous price on one item of bid on estimated quantities of drugs and pharmaceutical products upon which Federal Supply Schedule contract is based an obvious error even though only one bid was received may be corrected by using agency, for to exceed limitation it would be necessary for various Govt. agencies to order during contract period more than twice estimated quantity of item---------- 745

Propriety of evaluation

Under invitation for maximum of 3,000 floodlight sets, obligating Govt. to purchase minimum quantity of 963 units and providing for bids to be evaluated on basis of prices offered for minimum quantity plus 50 percent of quantity of difference between minimum and maximum quantities—a total of 1981.5 units Govt. may require prospective contractor to furnish—and prescribing tentative delivery destination, bid prices offered bearing reasonable relationship to actual anticipated needs of Govt., evaluation formula established accurate means of evaluating bids and not unbalanced bidding situation---------- 555

What constitutes

Invitation for floodlight sets requiring Govt. to purchase minimum of 963 units and obligating prospective contractor to supply up to 3,000 units and to offer separate prices on two different types of packing on minimum quantity and on difference between minimum and maximum quantities, or 2,037 units—bids to be evaluated on basis of 50 percent of each type packing—meets requirements prescribed by par. 3-409.3 of Armed Services Procurement Reg. for indefinite quantity procurement, notwithstanding failure to advertise exact number of each type packing to be procured under minimum quantity, regulation only requiring statement of minimum and maximum quantities of item to be purchased and not of collateral items such as packing---------- 563

Assignments. (*See* **Claims, assignments, contracts**)

Auction technique bidding. (*See* **Contracts, negotiation, auction technique prohibition**)

CONTRACTS—Continued Page

Awards

Advantage to Government

Award protested

When contracting officer determines under par. 2-407.9(b)(3)(iii) of Armed Services Procurement Reg. that prompt award would be advantageous to Govt., and award is properly authorized by higher authority, there is no requirement that award be held up pending decision by U.S. General Accounting Office in accordance with par. 2-407.9(b)(2) of regulation ---------- 702

Cancellation

Erroneous awards

Cancellation at no cost to Government

Cancellation in its entirety of contract erroneously awarded to nonresponsive bidder who had failed to furnish f.o.b. origin shipping point information is required rather than just cancellation of option directed in 48 Comp. Gen. 593, where cancellation will pose no problem respecting emergency need for procurement and contingent liability of Govt. under canceled contract, in view of fact next lowest bidder is willing to purchase inventory items involved in canceled contract and to hold Govt. harmless from any liability resulting from contract cancellation, and has demonstrated ability to meet delivery requirements that refutes contracting officer's contrary determination. Upon immediate cancellation of entire contract, prompt award should be made to lowest bidder ---------- 689

Cancellation not required

Although negotiation procedures conducted prior to award of contract for floating bridge sets to be delivered to Vietnam deviated from requirements of 10 U.S.C. 2304(g) respecting simultaneous notification of all prospective contractors of solicitation changes and advice to low offeror of common cutoff date for negotiations, award will not be disturbed due to urgent need for procurement, and on basis cancellation of award would subject Govt. to substantial termination costs. However, repetitions of such deviations must be avoided and future procurements will be scrutinized to determine compliance with par. 3-805.1(e)—changes notification—and par. 3-805.1(b)—common cutoff date—of Armed Services Procurement Reg., thus affording all offerors equal negotiation opportunity ---------- 582

Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2-405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian Doctrine"—applicable only to initially responsible bids—par. 2-201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interests of Govt., contract will not be canceled, but quantity option should not be exercised ---------- 593

The acceptance under authority of 10 U.S.C. 2304(g) of initial low proposals negotiated pursuant to sec. 2304(a)(10) without discussion

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Awards—Continued

Cancellation—Continued

Erroneous awards—Continued

Cancellation not required—Continued

with offeror from whom valve being solicited had been procured for many years as brand name item on sole-source basis, whose allegation of proprietary data violation was not substantiated, but whose offer was in competitive range and only offer complying with required delivery date, was contrary to adequate competition and accurate prior cost experience prescribed by 10 U.S.C. 2304(g) to insure fair and reasonable prices. However, although awards will not be disturbed in view of broad negotiation authorities under which they were made, improper negotiation procedure under concept of "acceptance of an initial procurement without discussion" should be brought to attention of procurement officials 605

Contract performance status

Although contract awarded to bidder whose bid was not in compliance with "full and free" competition envisioned by statute and regulations governing procurement by formal advertising, cancellation of award made to bidder, month before completion of 7-month delivery schedule would serve no useful purpose where only two other bidders under invitation were nonresponsive. However, entire procurement should be carefully reviewed to preclude reoccurrence of situation 420

Rescission of cancellation

Cancellation of contract for diesel fuel injection assemblies that had been awarded under invitation subject to Buy American Act on basis low bid had erroneously been evaluated as domestic bid and was no longer low when properly evaluated was in accord with 10 U.S.C. 2305 (c), which requires award to be made to responsible bidder whose bid conforms to invitation and will be most advantageous to Govt., price and other factors considered. However, as item is needed and it is ready for shipment due to delay in protesting award occasioned by failure to notify unsuccessful bidders of award, cancellation may be rescinded if contractor will meet low bid price, if not, award should be made to bidder found low upon reevaluation of bids. Prompt notices of award will avoid future similar occurrences 504

Delayed awards

Propriety

Block bidding on clothing and textile products, method of bidding that quotes several basic unit prices for various quantity increments of same material, having effect of making bid evaluation complicated and unnecessarily delaying award of contract, situation that is not within free and open competition contemplated by 10 U.S.C. 2305, use of invitation limiting each bidder to one offer in order to test feasibility of prohibiting complex offers brought about by techniques of block bids, alternate bids, tie-in bids, and other such combination of bids which delay awards, is not considered improper, nor does invitation preclude award of contract to firms submitting bid as group 372

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Awards—Continued
Protest pending
The fact that award of contract is made while protest is pending would not violate par. 2-407.9(b)(3) of Armed Services Procurement Reg. (ASPR), if administrative determination had been made that prompt award will be advantageous to Govt. Therefore, where contracting agency found that to postpone award would alter performance dates of contract with consequent effect on bid price, award made prior to resolution of protest is not invalid. However, contracting officer having failed to give written notice of award as required under ASPR, appropriate steps should be taken to assure future compliance with regulation ---------- 230
Small business concerns
Propriety
Cancellation of award to second low bidder under invitation for bids that contained small business set-aside for alteration of Veterans Administration hospital building and award to low bidder initially denied award for failing to acknowledge addenda that affected price increase in space provided on bid form for number and addenda date was proper where invitation prescribed that certified mail and telegraph company records would be considered acknowledgment of amendment and certified mail receipt for addenda had been signed by official of low bidder and received prior to bid opening. Therefore, receipt of addenda having been acknowledged by method specified in invitation, low bidder obligated to comply with its terms was entitled to award under 41 U.S.C. 253(b) and sec. 1-2.407.1 of Federal Procurement Regs. ---------- 738
Bids, generally. (*See* Bids)
Buy American Act
Noncompliance with requirements
Determination by Dept. of Housing and Urban Development prior to solicitation of bids by Guam Housing and Urban Renewal Authority for low-rent housing project that certain foreign construction material could be procured at considerable savings—at least 16 percent less than domestic items—and waiver of Buy American requirements did not conform to procedures established by E.O. No. 10582 for determining whether domestic bid prices are unreasonable, Executive order contemplating that determination of unreasonable domestic cost should be made after receipt of bids or offers on foreign materials and comparison of prices. However, difference between foreign and domestic prices exceeding Executive order standards, award made will not be disturbed, but future procurement should comply with prescribed procedures ---------- 487
Construction
Public buildings. (*See* Public Buildings)
Cost plus
Reimbursement
Unclaimed amounts
Unclaimed wages and other obligations arising out of cost-reimbursable type contracts with U.S. which contractor is required to report

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Cost plus—Continued

Reimbursement—Continued

Unclaimed amounts—Continued

and pay to State authorities under escheat laws are reimbursable to contractor, unclaimed amounts constituting part of cost of performing contract and meeting cost-principles of par. 15–201.2 of Armed Services Procurement Reg. Under criteria that wages or other obligations paid or accrued are reimbursable items of cost, reimbursement to contractor need not be postponed until unclaimed amounts are actually paid to State under its escheat laws. However, Govt. would be entitled to recover payments to contractor where claimants were not subsequently located and their last know addresses are in States which do not require accounting for unclaimed property after expiration of stated periods of time. Modifies B–48063, Mar. 21, 1945 179

Damages

Government liability

Contractor's property

Assumption by Selective Service System of liability for damages to motor vehicles by registrants who when ordered for physical examinations or for induction by local boards are transported in Charter Coach Service is not precluded because System lacks express authority to contract for liability, appropriations for operation and maintenance of System providing authority to contract for travel of selectees with no express limitation placed on such authority in appropriation acts or in Universal Military Training and Service Act. Nor does fact that service contracts do not expressly provide for liability preclude payment of damage claims, terms of charter certificates furnished when service is used incorporating into contract by reference indemnity provision of carriers' charter coach tariffs 361

Liquidated

Withholding from contract payments

Withholding from current contract of wage underpayments due under two contracts for prior years, together with liquidated damages assessed on account of violations—all contracts containing Contract Work Hours Standards Act provision authorizing set-off from "moneys payable on Account of work performed"—may not be retained as to wage underpayments, no mutuality of obligation existing between collection of underpayments by Govt. as trustee and its direct debt liability under current contract, but set-off to collect liquidated damages was proper, as there is mutuality of obligation between amount due for work performed under latest contract and liquidated damages due on account of wage underpayments under earlier contracts 387

Defense effort facilitation

Modification of conracts. (*See* **Contracts, modification, facilitation of defense effort**)

Equal employment opportunity requirements. (*See* **Contracts, labor stipulations, nondiscrimination**)

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Federal supply schedule

Multiple suppliers

Price reduction

Under Federal Supply Schedule contract for one-speed recorders awarded pursuant to invitation soliciting bids on four speed classes, approval as acceptable of two-speed recorder preproduction sample, delivery of superior two-speed equipment at no additional cost to Govt., and subsequent price reduction under terms of contract to match price of successful bidder on two-speed recorders is not legally objectionable. Even though two-speed equipment is superior to one-speed recorder, if bidder had indicated intent to supply two-speed equipment for one-speed equipment bid on, it would not have been entitled to award at bid price higher than that offered by two-speed equipment bidder, and it is by virtue of invitation and award that bidder may be considered contractor for two-speed equipment---------- 685

Multi-year procurement

Proposed multi-year contracting for Federal Supply Service requirements to effect savings in repair and rehabilitation of business machines, typewriters, and furniture, contracts to be financed by using Federal Supply Fund and Automatic Data Processing Fund and by reimbursing funds from fiscal year appropriations of requisitioning agencies would violate appropriation restrictions of 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and absent congressional approval, contract term must be restricted to 1-year period. Although A–60589, July 12, 1935, permitting requirement contracts under fiscal year appropriations to cover 1-year periods extending beyond end of fiscal year is not technically correct, practice having been followed for over 30 years in reliance upon decision, there is no objection to its continuance---------- 497

Term contract procurement

Evaluation of bids

Establishment of weight factors to evaluate bids under invitation contemplating requirements contract subject to maximum order limitation for delivery to single destination on basis of previous procurement experience on 71 out of 249 items of shelving classified under Federal Supply Catalog system to be purchased, and assignment of token weight to remainder of 249 items is realistic method of evaluation which does not result in unbalanced bidding. Therefore, even though it would have been preferable to evaluate bids by using f.o.b. origin prices, there is no objection to award under solicitation, bids having been exposed and evaluated on common basis, and fact that in future procurements, most meaningful method of obtaining competitive prices will be used---------- 62

Use propriety

Determination to use requirements contract to satisfy needs of Govt. for storage and display shelving classified under Federal Supply Catalog system—contract to be subject to maximum order limitation for delivery to single destination—is valid determination within ambit of sound administrative discretion where term contract conforms to criteria established in par. 101–25.101–4 of Federal Property Management Regs. and results in overall economy to Govt., and there is no reason to anticipate abuse of contract's maximum order limitations and year end purchases to avoid returning unexpired appropriations to Treasury---------- 62

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Incorporation of terms by reference

Christian **doctrine**

Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantive provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F. 2d 418—doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award and, therefore, "Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted..... 171

Dept. of Defense Directive 5500.10 (Appendix G of Armed Services Procurement Reg.) promulgated to avoid conflicts of interest on part of contractors is not self-executing regulation but requires notice of its applicability in solicitation and in contract, and exercise of judgment or discretion by contracting officer, subject to review, and, therefore, doctrine of *G. L. Christian and Associates* v. *U.S.*, 312 F. 2d 418, may not be invoked to give Directive force and effect of law and to read into contract mandatory clauses of ASPR that were not included..... 702

Joint ventures. (*See* **Joint Ventures**)

Labor stipulations

Nondiscrimination

"Affirmative action programs"

The so-called "Philadelphia Pre-Award Plan" to implement compliance on federally assisted programs with equal employment opportunity conditions of E.O. No. 11246, which does not establish standards or criteria for judging compliance but instead provides for preaward conference to negotiate acceptable revision of low bidder's initially unacceptable action program is inconsistent with statutory requirements of competitive bidding. Federally assisted programs are required to be awarded on basis of publicly advertised competitive bidding and, therefore, Plan for submission of affirmative action programs should inform prospective bidders of minimum requirements to be met by proposed compliance program, and standards and criteria established for judging programs 326

Service Contract Act of 1965

Contract modifications

Modification of star route service contract that is not subject to Service Contract Act of 1965, to extend delivery routes or provide for additional services pursuant to 37 U.S.C. 6424, or to adjust under authority in sec. 6423, compensation prescribed in contract, cannot be effected unilaterally but requiring consensual agreement of both parties to contract, modification creates new contract, and contract should, therefore, incorporate provisions of act, or wage rates in effect at time new contract is negotiated..... 719

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Labor stipulations—Continued

Service Contract Act of 1965—Continued

Contract term extended

When authority of Postmaster General prescribed in 39 U.S.C. 6407 (a) to "continue in force" for period not to exceed 6 months any contract for transportation of mail until "a new contract is made" is exercised to extend contracts for star route mail service that are not subject to Service Contract Act of 1965, new contracts are not created, exercise of authority merely operating to extend term of original agreement, and provisions of act are not required to be incorporated to cover extended period of contract, nor new wage rates promulgated under act imposed during limited period while new contract is being negotiated or advertised ---------- 719

Minimum wage, etc., determinations

Union agreement effect

The fact that contractor may be obligated under union agreement to pay higher or lower wage rates than those stipulated in Govt. contract as minimum rates pursuant to wage rate determination by Administrator of Wage and Hour and Public Contracts Divisions of Dept. of Labor under Service Contract Act of 1965, 41 U.S.C. 351–357 (Supp. II), does not affect either validity of rates established by contract or contractor's duty to comply with wage rate determination in performance of contract. Although wage rate determinations are not reviewable by U.S. General Accounting Office or courts, information of prevailing locality rates should be submitted by contractor to Administrator for his consideration_ 22

A star route carrier engaged in transportation of U.S. mail pursuant to contracts with Post Office Dept., who is required to comply with wage rate determination, issued by Administrator, Wage and Hour and Public Contracts Divisions of Dept. of Labor pursuant to Service Contract Act of 1965, 41 U.S.C. 351–357 (Supp. II), that exceeds rates payable under union agreement is not entitled to review of wage determination. The Service Contract Act does not provide for review by U.S. General Accounting Office or courts, and in absence of statute so providing, damage resulting from wage determination made pursuant to law, such as Service Contract Act, which does not invade any recognized legal right, is irremediable ---------- 22

Withholding unpaid wages, overtime, etc.

Mutuality of obligation requirement

Withholding from current contract of wage underpayments due under two contracts for prior years, together with liquidated damages assessed on account of violations—all contracts containing Contract Work Hours Standards Act provision authorizing set-off from "moneys payable on account of work performed"—may not be retained as to wage underpayments, no mutuality of obligation existing between collection of underpayments by Govt. as trustee and its direct debt liability under current contract, but set-off to collect liquidated damages was proper, as there is mutuality of obligation between amount due for work performed under latest contract and liquidated damages due on account of wage underpayments under earlier contracts ---------- 387

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Leases. (*See* Leases)

Modification

Facilitation of defense effort

Review jurisdiction of General Accounting Office

Although denial of relief under authority to amend or modify contracts to facilitate national defense (50 U.S.C. 1431-1435) is not subject to review, suspicion of mistake in only offer made under request for proposals in response to urging by procurement office that was more than 50 percent less than Govt.'s estimate and which contracting officer failed to verify in accordance with par. 2-406 of Armed Services Procurement Reg. but accepted on basis of conjectural manufacturing process guessed at by Govt. engineer is factual finding that it is not final in connection with any other form of relief, and contractor is entitled to price adjustment based on audit of actual contract costs, absent proof of what offer would have been but for error ---------- 672

Indefinite amounts

Authority granted in sec. 1-2.406-4(b)(2) of Federal Procurement Regs. to reform contract price either upward or downward in amount not to exceed $1,000, if as corrected amount will not exceed next lowest bid submitted under original invitation for bids, may be applied to indefinite quantity requirements contract and estimated quantity or quantities shown in solicitation for item or items in question used to determine whether correction would exceed limitation. Therefore, erroneous price on one item of bid on estimated quantities of drugs and pharmaceutical products upon which Federal Supply Schedule contract is based—an obvious error even though only one bid was received may be corrected by using agency, for to exceed limitation it would be necessary for various Govt. agencies to order during contract period more than twice estimated quantity of item ---------- 745

Multi-year procurements

Appropriation availability

Proposed multi-year contracting for Federal Supply Service requirements to effect savings in repair and rehabilitation of business machines, typewriters, and furniture, contracts to be financed by using Federal Supply Fund and Automatic Data Processing Fund and by reimbursing funds from fiscal year appropriations of requisitioning agencies would violate appropriation restrictions of 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and absent congressional approval, contract term must be restricted to 1-year period. Although A-60589, July 12, 1935, permitting requirement contracts under fiscal-year appropriations to cover 1-year periods extending beyond end of fiscal year is not technically correct, practice having been followed for over 30 years in reliance upon decision, there is no objection to its continuance ---------- 497

Although General Supply Fund authorized by sec. 109 of Federal Property and Administrative Services Act of 1949, as amended, is available without fiscal year limitation, requirements contracts for indefinite quantities of stock supplies that are charged to fund should not be made for periods in excess of 2 years, even though funds are available for total estimated quantities required, in absence of specific legislative authority or prior determination by U.S. General Accounting Office that procurement will not be in derogation of purposes of advertising statutes ---- 497

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Long-term leases for automatic data processing equipment under fiscal year appropriations that would commit Govt. to minimum rental period of more than 1 year, and whose multi-year character would not change until Govt. took effective cancellation action, are prohibited by 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and of three lease plans submitted only one that does not obligate Govt. to continue rental period beyond fiscal year in which made, and contains renewal option, is not legally objectionable. However, revolving funds may be used to finance leases for reasonable periods of time in excess of 1 year, subject to conditions that sufficient funds are available and are obligated to cover costs under entire contract 497
Negotiation
Auction technique prohibition
Cutoff notice of negotiations
Where common cutoff date for negotiations prescribed by par. 3-805.1 (b) of Armed Services Procurement Reg. was not established under request for proposals until after low offer had been made responsive and accepted during pendency of request for small business certificate of competency on offeror of responsive proposal who viewed cutoff notice as request for confirmation or extension of its offer and not as continuation of negotiations, cutoff notice although not constituting improper auction technique within meaning of par. 3-805.1(b) was insufficient to inform offerors that negotiations were still open and to invite their "best and final offer." Therefore, all offerors within competitive range should be afforded further opportunity for negotiations 536
Authority
Prenegotiation clearance
The authority to negotiate on basis of only responsive offer out of three initial proposals received to furnish a NATO procurement solicited under 10 U.S.C. 2304(a)(2) is a prenegotiation clearance to contract that grants no rights to prospective contractor, and the offer, not lowest submitted, exceeding available NATO funds and sufficient time remaining for negotiation before funds became available, contracting officer was obligated under 10 U.S.C. 2304(g) to continue negotiations. Therefore, award of contract on basis of negotiated revised proposal to offeror, submitting nonresponsive initial proposal that was within competitive range, price and other factors considered, was proper even though initial responsive offeror who had confirmed prices during negotiations was not notified of cutoff date for negotiations 449
Awards
Initial proposal basis
In request for proposals, reservation of unqualified option to contracting officer to consider original proposal as final without extending privilege of revising quotation or conducting any negotiations with any offeror was at variance with 10 U.S.C. 2304(g) and par. 3-805 of Armed Services Procurement Reg. and procedure of denying offeror opportunity to negotiate should be corrected 314

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Awards—Continued

Initial proposal basis—Continued

The acceptance under authority of 10 U.S.C. 2304(g) of initial low proposals negotiated pursuant to sec. 2304(a)(10) without discussion with offeror from whom valve being solicited had been procured for many years as brand name item on sole-source basis, whose allegation of proprietary data violation was not substantiated, but whose offer was in competitive range and only offer complying with required delivery date, was contrary to adequate competition and accurate prior cost experience prescribed by 10 U.S.C. 2304(g) to insure fair and reasonable prices. However, although awards will not be disturbed in view of broad negotiation authorities under which they were made, improper negotiation procedure under concept of "acceptance of an initial procurement without discussion" should be brought to attention of procurement officials..... 605

Legality

In negotiation of procurement for cylinder liners, shifting from exception to advertised bidding "when it is impossible to draft specifications" to public exigency exception, and award to only offeror whose product was immediately technically acceptable, and which had been used in solicitation to identify item, were not legally improper, even if delivery schedule was not most favorable offered, in view of fact that failure to obtain cost and pricing data prescribed by 10 U.S.C. 2306(f) falls within catalog sales exception, and that ambiguity in discount terms offered had been properly resolved under par. 3-804 of Armed Services Procurement Reg. However, "or equal" products which were not considered should have been forwarded without delay for technical evaluation and possible qualification for future procurements, and service claim should have been verified..... 612

Changes during negotiations

Notification

Procedures used under request for proposals issued pursuant to 10 U.S.C. 2304(a)(2) due to urgent need for procurement, where during 2 years between initial need and contract award repeated revisions occurred respecting quantity, dates for receipt and acceptance of proposals, price, delivery destination, and availability of Govt-owned equipment, were deficient and deviated from requirements of 10 U.S.C. 2304(g), contracting agency having failed to simultaneously notify all prospective contractors of changes as they occurred during negotiation in accordance with par. 3-805.1(e)(ii) of Armed Services Procurement Reg., and having failed to advise low offeror of final cutoff date for negotiations as required by par. 3-805.1(b), based on erroneous determination "late" amendment acknowledgment was not for consideration..... 582

Although negotiation procedures conducted prior to award of contract for floating bridge sets to be delivered to Vietnam deviated from requirements of 10 U.S.C. 2304(g) respecting simultaneous notification of all prospective contractors of solicitation changes and advice to low offeror of common cutoff date for negotiations, award will not be disturbed due to urgent need for procurement, and on basis cancellation of award would

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Notification—Continued
subject Govt. to substantial termination costs. However, repetitions of such deviations must be avoided and future procurements will be scrutinized to determine compliance with par. 3-805.1(e)—changes notification—and par. 3-805.1(b)—common cutoff date—of Armed Services Procurement Reg., thus affording all offerors equal negotiation opportunity ---------- 582
Competition
Award under initial proposals
The acceptance under authority of 10 U.S.C. 2304(g) of initial low proposals negotiated pursuant to sec. 2304(a)(10) without discussion with offeror from whom valve being solicited had been procured for many years as brand name item on sole-source basis, whose allegation of proprietary data violation was not substantiated, but whose offer was in competitive range and only offer complying with required delivery date, was contrary to adequate competition and accurate prior cost experience prescribed by 10 U.S.C. 2304(g) to insure fair and reasonable prices. However, although awards will not be disturbed in view of broad negotiation authorities under which they were made, improper negotiation procedure under concept of "acceptance of an initial procurement without discussion" should be brought to attention of procurement officials---- 605
Changes in price, specifications, etc.
Under revised request for quotations (FRQ) that exercised quantity option contained in original RFQ issued pursuant to public exigency negotiation authority in 10 U.S.C. 2304(a)(2), and which permitted submission of different designs for aircraft fuel flow system to cost less than $100,000, acceptance of price reduction, contemplating specification changes, without soliciting competition from only other offeror who had responded to initial RFQ did not create "buy-in" and sole-source procurement situation, nor require submission of cost or pricing data pursuant to "Truth in Negotiations" Act, "Buying-in" meaning offering price in competition that is under cost with expectation of making up losses, and "Truth in Negotiations" Act not applying to procurement that is less than $100,000---------- 337
Discussion with all offerors requirement
Action permitting reduction in price and waiver of first article testing on basis of previous product acceptability which made high offer low under amended request for proposals issued pursuant to public exigency authority of 10 U.S.C. 2304(a)(2) in order to evaluate two offers received on common basis of first article testing is not "clarification" of offer but negotiation that is not within exceptions to discussion with all offerors contemplated by par. 3-805.1(a)(v) of Armed Services Procurement Reg. and 10 U.S.C. 2304(g). Although further negotiation was required with low offeror under amended proposal, notwithstanding that because of satisfying first article testing requirement, offeror possibly would not meet price reduction and delivery schedule, cancellation of contract is not required due to advanced stage of production---- 663

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Negotiation—Continued
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Impracticable to obtain
Justification for negotiation
As National Zoological Park (Zoo) is considered Govt. property, authority of Regents of Zoo is subject to limitations applicable generally to administrative officials of Govt., limitations that are not affected by act of Nov. 6, 1966, authorizing negotiation of concession operations at Zoo with nonprofit, scientific, educational, or historic organizations and, therefore, any arrangement for operation of food concessions at Zoo is subject to advertising procedures. However, as use of single contract to procure restaurant concessions at Smithsonian facilities, including Zoo, would be more economical and efficient, upon issuance of determination that it would not be feasible or practicable to use formal advertising procedures, combined contract many be negotiated under 41 U.S.C. 252(c)(10) and sec. 1-3.210 of Federal Procurement Regs 193
Cost, etc., data
Sole offeror
In negotiation of procurement for cylinder liners, shifting from exception to advertised bidding "when it is impossible to draft specifications" to public exigency exception, and award to only offeror whose product was immediately technically acceptable, and which had been used in solicitation to identify item, were not legally improper, even if delivery schedule was not most favorable offered, in view of fact that failure to obtain cost and pricing data prescribed by 10 U.S.C. 2306(f) falls within catalog sales exception, and that ambiguity in discount terms offered had been properly resolved under par. 3-804 of Armed Services Procurement Reg. However, "or equal" products which were not considered should have been forwarded without delay for technical evaluation and possible qualification for future procurements, and service claim should have been verified 612
Cutoff date
Notice sufficiency
Where common cutoff date for negotiations prescribed by par. 3-805.1(b) of Armed Services Procurement Reg. was not established under request for proposals until after low offer had been made responsive and accepted during pendency of request for small business certificate of competency on offeror of responsive proposal who viewed cutoff notice as request for confirmation or extension of its offer and not as continuation of negotiations, cutoff notice although not constituting improper auction technique within meaning of par. 3-805.1(b) was insufficient to inform offerors that negotiations were still open and to invite their "best and final order." Therefore, all offerors within competitive range should be afforded further opportunity for negotiations 536
Procedures used under request for proposals issued pursuant to 10 U.S.C. 2304(a)(2) due to urgent need for procurement, where during 2 years between initial need and contract award repeated revisions occurred respecting quantity, dates for receipt and acceptance of proposals, price, delivery destination, and availability of Govt-owned equipment, were deficient and deviated from requirements of 10 U.S.C. 2304(g), contracting agency having failed to simultaneously notify all pros-

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Notice sufficiency—Continued
pective contractors of changes as they occurred during negotiation in accordance with par. 3-805.1(e)(ii) of Armed Service Procurement Reg., and having failed to advise low offeror of final cutoff date for negotiations as required by par. 3-805.1(b), based on erroneous determination "late" amendment acknowledgment was not for consideration---------- 582
Although negotiation procedures conducted prior to award of contract for floating bridge sets to be delivered to Vietnam deviated from requirements of 10 U.S.C. 2304(g) respecting simultaneous notification of all prospective contractors of solicitation changes and advice to low offeror of common cutoff date for negotiations, award will not be disturbed due to urgent need for procurement, and on basis cancellation of award would subject Govt. to substantial termination costs. However, repetitions of such deviations must be avoided and future procurements will be scrutinized to determine compliance with par. 3-805.1(e)—changes notification—and par. 3-805.1(b)—common cutoff date—of Armed Services Procurement Reg., thus affording all offerors equal negotiation opportunity ---------- 582
Determination and findings
Basis of negotiation
When procurement involves determination to negotiate under 10 U.S.C. 2304(a)(10) due to unavailability of data to describe required supplies, determination in accordance with 10 U.S.C. 2310(b) must be supported by written findings to show facts and circumstances that "clearly and convincingly establish that formal advertising would not have been feasible and practicable," and copy of such determination and findings (D&F) should accompany any administrative report to U.S. General Accounting Office on procurement. When supported by a D&F, administrative determination to negotiate is final pursuant to 10 U.S.C. 2310(a) ---------- 605
Evaluation factors
Criteria
The procedure of stating Govt.'s requirements in request for proposals for design, fabrication, and installation of weighing scales system for C-5A aircraft in broad general terms, emphasizing reliance on ingenuity of offerors to propose actual design of system, and then without further negotiation to reject 6 out of 7 proposals for technical reasons that reflect detailed and rigid requirements is procedure that is not in accord with information standards prescribed by par. 3-501(b) of Armed Services Procurement Reg. and by par. 4-105 of regulation specifically relating to research and development contracts. Therefore, procedure should be corrected to provide offerors be informed of all evaluation factors involved in procurement and of relative weights to be attached to each factor ---------- 314
Discount terms
In negotiation of procurement for cylinder liners, shifting from exception to advertised bidding "when it is impossible to draft specifications" to public exigency exception, and award to only offeror whose product

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was immediately technically acceptable, and which had been used in solicitation to identify item, were not legally improper, even if delivery schedule was not most favorable offered, in view of fact that failure to obtain cost and pricing data prescribed by 10 U.S.C. 2306(f) falls within catalog sales exception, and that ambiguity in discount terms offered had been properly resolved under par. 3–804 of Armed Service Procurement Reg. However, "or equal" products which were not considered should have been forwarded without delay for technical evaluation and possible qualification for future procurements, and service claim should have been verified 612
Late proposals and quotations
Modification of proposal
Price reduction
Negotiations for lower prices under request for proposals prompted by unsolicited price revision received subsequent to initiation of preaward survey of low offeror do not constitute auction technique prohibited by par. 3–805.1(b) of Armed Services Procurement Reg., where neither price nor competitive position of low offeror was exposed, precaution was taken in preaward survey request—which *per se* does not constitute auction technique—to protect information, and determination to continue price negotiations was made in good faith. However, whether or not unsolicited price reduction should be considered is problem for inclusion in study of procedures for handling late proposals and late modifications to proposals 323
Limitation on negotiation
Propriety
In request for proposals, reservation of unqualified option to contracting officer to consider original proposal as final without extending privilege of revising quotation or conducting any negotiations with any offeror was at variance with 10 U.S.C. 2304(g) and par. 3–805 of Armed Services Procurement Reg. and procedure of denying offeror opportunity to negotiate should be corrected 314
Even if time schedule in request for proposals (RFP) inadequately provides for computer manufacturers to contact peripheral manufacturers and test their equipment, legality of procurement is unaffected. 10 U.S.C. 2304(g) provides for solicitation of proposals from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and, therefore, award under RFP would not be illegal because some offerors were unable to submit proposals and qualify their products within time allowed, or that tests tend to restrict competition. In addition, products of peripheral manufacturers are known, their inventories no doubt would support tests, and computer-system procurement on component basis is subject of study 320
Procedures used under request for proposals issued pursuant to 10 U.S.C. 2304(a)(2) due to urgent need for procurement, where during 2 years between initial need and contract award repeated revisions

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Negotiation—Continued

Limitation on negotiation—Continued

Propriety—Continued

occurred respecting quantity, dates for receipt and acceptance of proposals, price, delivery destination, and availability of Govt-owned equipment, were deficient and deviated from requirements of 10 U.S.C. 2304(g), contracting agency having failed to simultaneously notify all prospective contractors of changes as they occurred during negotiation in accordance with par. 3-805.1(e)(ii) of Armed Services Procurement Reg., and having failed to advise low offeror of final cutoff date for negotiations as required by par. 3-805.1(b), based on erroneous determination "late" amendment acknowledgment was not for consideration ---------- 582

Although negotiation procedures conducted prior to award of contract for floating bridge sets to be delivered to Vietnam deviated from requirements of 10 U.S.C. 2304(g) respecting simultaneous notification of all prospective contractors of solicitation changes and advice to low offeror of common cutoff date for negotiations, award will not be disturbed due to urgent need for procurement, and on basis cancellation of award would subject Govt. to substantial termination costs. However, repetitions of such deviations must be avoided and future procurements will be scrutinized to determine compliance with par. 3-805.1(e)—changes notification—and par. 3-805.1(b)—common cutoff date—of Armed Services Procurement Reg., thus affording all offerors equal negotiation opportunity ---------- 582

The acceptance under authority of 10 U.S.C. 2304(g) of initial low proposals negotiated pursuant to sec. 2304(a)(10) without discussion with offeror from whom valve being solicited had been procured for many years as brand name item on sole-source basis, whose allegation of proprietary data violation was not substantiated, but whose offer was in competitive range and only offer complying with required delivery date, was contrary to adequate competition and accurate prior cost experience prescribed by 10 U.S.C. 2304(g) to insure fair and reasonable prices. However, although awards will not be disturbed in view of broad negotiation authorities under which they were made, improper negotiation procedure under concept of "acceptance of an initial procurement without discussion" should be brought to attention of procurement officials ------ 605

Mistakes

Correction

Although denial of relief under authority to amend or modify contracts to facilitate national defense (50 U.S.C. 1431-1435) is not subject to review, suspicion of mistake in only offer made under request for proposals in response to urging by procurement office that was more than 50 percent less than Govt.'s estimate and which contracting officer failed to verify in accordance with par. 2-406 of Armed Services Procurement Reg. but accepted on basis of conjectural manufacturing process guessed at by Govt. engineer is factual finding that is not final in connection with any other form of relief, and contractor is entitled to price adjustment based on audit of actual contract costs, absent proof of what offer would have been but for error ---------- 672

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Negotiation—Continued
National emergency authority
Ocean transportation
Program known as "RESPOND" proposing negotiation of peacetime berth-line services based on guarantee of availability of needed services in event of emergency, even though services could be bought for less without guarantee, is within purview of 10 U.S.C. 2304(a) (16), and negotiations need not be limited to contractors whose continued existence under competitive bidding is doubtful, use of sec. 2304(a) (16) authority assuring availability of critical transportation services in interest of national defense. However, for requisitioning phase of program, option should be retained to proceed under contract or authority of Merchant Marine Act of 1936, and Federal Maritime Commission should participate in program by fixing rates to bring them within exception to competition provided by 10 U.S.C. 2304(g), and by reviewing emergency augmentation commitments by berth-line operators 199
Propriety
The authority to negotiate on basis of only responsive offer out of three initial proposals received to furnish a NATO procurement solicited under 10 U.S.C. 2304(a) (2) is a prenegotiation clearance to contract that grants no rights to prospective contractor, and the offer, not lowest submitted, exceeding available NATO funds and sufficient time remaining for negotiation before funds became available, contracting officer was obligated under 10 U.S.C. 2304(g) to continue negotiations. Therefore, award of contract on basis of negotiated revised proposal to offeror, submitting nonresponsive initial proposal that was within competitive range, price and other factors considered, was proper even though initial responsive offeror who had confirmed prices during negotiations was not notified of cutoff date for negotiations 449
Procedures used under request for proposals issued pursuant to 10 U.S.C. 2304(a) (2) due to urgent need for procurement, where during 2 years between initial need and contract award repeated revisions occurred respecting quantity, dates for receipt and acceptance of proposals, price, delivery destination, and availability of Govt-owned equipment, were deficient and deviated from requirements of 10 U.S.C. 2304(g), contracting agency having failed to simultaneously notify all prospective contractors of changes as they occurred during negotiation in accordance with par. 3–805.1(e)(ii) of Armed Services Procurement Reg., and having failed to advise low offeror of final cutoff date for negotiations as required by par. 3–805.1(b), based on erroneous determination "late" amendment acknowledgment was not for consideration.. 582
Although negotiation procedures conducted prior to award of contract for floating bridge sets to be delivered to Vietnam deviated from requirements of 10 U.S.C. 2304(g) respecting simultaneous notification of all prospective contractors of solicitation changes and advice to low offeror of common cutoff date for negotiations, award will not be disturbed due to urgent need for procurement, and on basis cancellation of award would subject Govt. to substantial termination costs. However,

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Propriety—Continued
repetitions of such deviations must be avoided and future procurements will be scrutinized to determine compliance with par. 3-805.1(e)—changes notification—and par. 3-805.1(b)—common cutoff date—of Armed Services Procurement Reg., thus affording all offerors equal negotiation opportunity ---------- 582
Preaward plant survey effect
Negotiations for lower prices under request for proposals prompted by unsolicited price revision received subsequent to initiation of preaward survey of low offeror do not constitute auction technique prohibited by par. 3-805.1(b) of Armed Services Procurement Reg., where neither price nor competitive position of low offeror was exposed, precaution was taken in preaward survey request—which *per se* does not constitute auction technique—to protect information, and determination to continue price negotiations was made in good faith. However, whether or not unsolicited price reduction should be considered is problem for inclusion in study of procedures for handling late proposals and late modifications to proposals ---------- 323
Public exigency
Created subsequent to initial negotiation
In negotiation of procurement for cylinder liners, shifting from exception to advertised bidding "when it is impossible to draft specifications" to public exigency exception, and award to only offeror whose product was immediately technically acceptable, and which had been used in solicitation to identify item, were not legally improper, even if delivery schedule was not most favorable offered, in view of fact that failure to obtain cost and pricing data prescribed by 10 U.S.C. 2306(f) falls within catalog sales exception, and that ambiguity in discount terms offered had been properly resolved under par. 3-804 of Armed Services Procurement Reg. However, "or equal" products which were not considered should have been forwarded without delay for technical evaluation and possible qualification for future procurements, and service claim should have been verified ---------- 612
Justification for negotiation
Action permitting reduction in price and waiver of first article testing on basis of previous product acceptability which made high offer low under amended request for proposals issued pursuant to public exigency authority of 10 U.S.C. 2304(a)(2) in order to evaluate two offers received on common basis of first article testing is not "clarification" of offer but negotiation that is not within exceptions to discussion with all offerors contemplated by par. 3-805.1(a)(v) of Armed Services Procurement Reg. and 10 U.S.C. 2304(g). Although further negotiation was required with low offeror under amended proposal, notwithstanding that because of satisfying first article testing requirement, offeror possibly would not meet price reduction and delivery schedule, cancellation of contract is not required due to advanced stage of production ---------- 662

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Negotiation—Continued

Request for proposals

Submission date

Even if time schedule in request for proposals (RFP) inadequately provides for computer manufacturers to contact peripheral manufacturers and test their equipment, legality of procurement is unaffected. 10 U.S.C. 2304(g) provides for solicitation of proposals from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and, therefore, award under RFP would not be illegal because some offerors were unable to submit proposals and qualify their products within time allowed, or that tests tend to restrict competition. In addition, products of peripheral manufacturers are known, their inventories no doubt would support tests, and computer-system procurement on component basis is subject of study 320

Sole source basis

Additional procurement

The sole-source procurement and award of letter contract for additional requirements to contractor awarded initial procurement under public exigency authority of 10 U.S.C. 2304(a)(2) was not unreasonable exercise of contractor's discretionary authority to determine extent of negotiation in view of emergency status of procurement and fact only other offeror under initial request for proposals would need time to comply with first article testing requirement. However, in future in order to determine possibility of procurement by competitive negotiation, elements of anticipated delivery schedule should be formulated with more precision 663

Specifications unavailable

Assumption of risk of performance

Solicitation under 10 U.S.C. 2304(a)(10) for air conditioners to be furnished in accordance with military specifications and Govt. drawings that discloses possibility of error in technical data package and places assumption of risk of performance on successful contractor by holding him responsible for identifying and correcting deficiencies and providing for reimbursement for deficiencies on predetermined basis and also pursuant to changes clause for designated changes violating no law or regulation, procedure is acceptable substitute for contractor's normal remedy under the changes clause. The fact that Govt. does not impliedly warrant adequacy of drawings and specifications should not affect competition on common basis nor result in excessive contingency costs to Govt 750

Basis for exception to formal advertising

In negotiation of procurement for cylinder liners, shifting from exception to advertised bidding "when it is impossible to draft specifications" to public exigency exception, and award to only offeror whose product was immediately technically acceptable, and which had been used in solicitation to identify item, were not legally improper, even if delivery schedule was not most favorable offered, in view of fact that failure to obtain cost and pricing data prescribed by 10 U.S.C. 2306(f) falls within catalog sales exception, and that ambiguity in discount terms offered had been properly resolved under par. 3-804 of Armed Services Procurement Reg. However, "or equal" products which were not con-

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Basis for exception to formal advertising—Continued
sidered should have been forwarded without delay for technical evaluation and possible qualification for future procurements, and service claim should have been verified---------- 612
Offer and acceptance
Acceptance
Erroneous
Under invitation for bids to construct building on Govt. land for lease to Post Office Dept., with reimbursement to Dept. for cost of site by date specified, award to low bidder after his withdrawal of bid acceptance time extension and prior to acceptance of condition for extension—equal time extension for site payment—was inconsistent with 39 U.S.C. 2103(a) and 2112(2) requiring consummation of post office lease agreements in accordance with 41 U.S.C. 5—award to lowest, responsible bidder whose bid conforms to advertised specifications. The site payment, material requirement that contracting officer could not waive, either under original bid or bid extension, award to low bidder should be canceled and bid deposit refunded---------- 775
Options
Cancellation
Erroneous award
Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2-405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian Doctrine"—applicable only to initially responsive bids—par. 2-201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interests of Govt., contract will not be canceled, but quantity option should not be exercised---------- 593
Cancellation in its entirety of contract erroneously awarded to nonresponsive bidder who had failed to furnish f.o.b. origin shipping point information is required rather than just cancellation of option directed in 48 Comp. Gen. 593, where cancellation will pose no problem respecting emergency need for procurement and contingent liability of Govt. under canceled contract, in view of fact next lowest bidder is willing to purchase inventory items involved in canceled contract and to hold Govt. harmless from any liability resulting from contract cancellation, and has demonstrated ability to meet delivery requirements that refutes contracting officer's contrary determination. Upon immediate cancellation of entire contract, prompt award should be made to lowest bidder-- 689
Payments
Minimum billing charge
Issuance of two unpriced orders, one for items valued at 30¢, other for items worth $1.01, that stated "this is a firm order if price is $50 or less" to supplier whose policy of charging minimum order price of $50 is

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Payments—Continued

Minimum billing charge—Continued

shown in its quotation is acceptance of supplier's terms and purchase orders became binding contracts for minimum charge upon acceptance and performance of orders and, although minimum charge is questionable, vouchers including charge may be certified for payment. In addition to administrative action taken to consolidate future orders for small purchases, provisions should be included in future bid solicitations to require successful bidder to agree prices will not include minimum billing charge, but should they, that minimum billing charge will be no greater than amount stated in solicitation 168

Releases

Payment to other than contractor of record

Purchaser of manufacturing concern which completed shipment of five Govt. contracts assigned to it by seller—where two of contracts had been awarded prior to seller's change of firm name but no filing made of change as required by par. 1–1602 of Armed Services Procurement Reg., and two of remaining three contracts, with purchaser's consent, had been assigned to bank pursuant to 31 U.S.C. 203—may be recognized as successor in interest to contractor of record on all five contracts, no claim having been received from contractor of record or bank. However, consideration of claim for payment under 31 U.S.C. 71, requires two releases, one from contractor of record, identifying five contracts, other from bank relinquishing any claim against Govt 196

Withholding

Government's right restricted

Acceptance of low bid containing provision that "No withholding will be allowed without prior written consent of seller"—condition which not affecting price, quantity, quality, or delivery could have been deleted pursuant to sec. 1–2.404–2(b) of Federal Procurement Regs.—consummated a valid and enforceable contract that does not diminish Govt.'s right to withhold monies under "Default" provision of contract, Contract Work Hours Standards Act, Walsh-Healey Act, internal revenue laws, and Govt.'s common law right as creditor. Should monies be withheld and contractor sue, Govt. could assert claim either as cross-claim or as separate action 306

Laborers and mechanics claims

Withholding from current contract of wage underpayments due under two contracts for prior years, together with liquidated damages assessed on account of violations—all contracts containing Contract Work Hours Standards Act provision authorizing set-off from "moneys payable on account of work performed"—may not be retained as to wage underpayments, no mutuality of obligation existing between collection of underpayments by Govt. as trustee and its direct debt liability under current contract, but set-off to collect liquidated damages was proper, as there is mutuality of obligation between amount due for work performed under latest contract and liquidated damages due on account of wage underpayments under earlier contracts 387

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Performance

Compliance with specifications

Price adjustment for noncompliance

Under Federal Supply Schedule contract for one-speed recorders awarded pursuant to invitation soliciting bids on four speed classes, approval as acceptable of two-speed recorder preproduction sample, delivery of superior two-speed equipment at no additional cost to Govt., and subsequent price reduction under terms of contract to match price of successful bidder on two-speed recorders is not legally objectionable. Even though two-speed equipment is superior to one-speed recorder, if bidder had indicated intent to supply two-speed equipment for one-speed equipment bid on, it would not have been entitled to award at bid price higher than that offered by two-speed equipment bidder, and it is by virtue of invitation and award that bidder may be considered contractor for two-speed equipment 685

Price adjustment

Changes

Delivery, performance, etc., changes

Provisions in invitation for trash and garbage removal that suggested bidders inspect Veterans Administration Hospital where services were to be performed for full information concerning "the character and conditions under which the service is to be performed," and that required successful contractor shortly after award to submit list of containers, locations, and frequencies of pickup—which it failed to do—were calculated to discourage reliance on Govt.'s suggested schedule of pickup frequencies and container sizes and not to serve as warranty. Therefore, contractor is not entitled to additional compensation for 11 percent variation in quantum of work performed—a variation that is not specification "change" that is actionable for failure to issue change order 576

The word "warranty" is not simple to define—at a minimum, a warranty, whether an expressed or implied warranty, is something of an assurance by one party that the other may rely on the truth of a given representation. No such assurance is implied under requirements contract for trash and garbage removal where Govt. had "suggested" pickup schedule and container sizes and contractor after award was "required" to inspect work area and submit its own list of containers, locations, and frequencies of pickups and, therefore, contractor is not entitled to additional compensation on basis of 11 percent variation between work performed and Govt.'s suggestions—a variation that is not specification change 576

Profits

Recovery

Claim of low bidder for bid preparation expenses, as well as anticipatory profits, because all bids under two-step advertised procurement had been rejected and lease-purchase agreement negotiated for desired automatic hydraulic radio reporting system may not be allowed as to preparation costs absent proof that procuring agency fraudulently induced bids with deliberate intention before bids were invited or received to disregard all bids except one from company to whom it was intended to award contract, whether it was lowest responsible bid or not, but even where preparation expenses are allowed, anticipatory profits are not recoverable by unsuccessful bidder 471

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Protests

Award approved

Prior to resolution of protest

The fact that award of contract is made while protest is pending would not violate par. 2–407.9(b)(3) of Armed Services Procurement Reg. (ASPR), if administrative determination had been made that prompt award will be advantageous to Govt. Therefore, where contracting agency found that to postpone award would alter performance dates of contract with consequent effect on bid price, award made prior to resolution of protest is not invalid. However, contracting officer having failed to give written notice of award as required under ASPR, appropriate steps should be taken to assure future compliance with regulation 230

Award withheld pending General Accounting Office decision

Award advantageous to Government

When contracting officer determines under par. 2 407.9(b)(3)(iii) of Armed Services Procurement Reg. that prompt award would be advantageous to Govt., and award is properly authorized by higher authority, there is no requirement that award be held up pending decision by U.S. General Accounting Office in accordance with par. 2 407.9(b)(2) of regulation 702

Request for information *v.* protest

Failure to use procedure prescribed in Solicitation Instructions and Conditions of invitation to effect any explanation desired by bidder in regard to solicitation must be in writing and with sufficient time allowed for reply to reach bidders before submission of bids, and which provided for amendment of solicitation should requested information be prejudicial to other bidders, no doubt deprived Govt. of responsive bid from bidder whose allegation of restrictive specifications indicated misunderstanding of specifications. Therefore, to obtain broadest possible competition, questions relating to meaning of specifications raised before bid opening should be treated as requests for information rather than as protests, particularly when award must be made prior to resolution of questions by U.S. General Accounting Office under protest procedure. 415

Releases

Payments. (*See* **Contracts, payments, releases**)

Requirements

Estimated amounts not warranty

Provisions in invitation for trash and garbage removal that suggested bidders inspect Veterans Administration Hospital where services were to be performed for full information concerning "the character and conditions under which the service is to be performed," and that required successful contractor shortly after award to submit list of containers, locations, and frequencies of pickup—which it failed to do—were calculated to discourage reliance on Govt.'s suggested schedule of pickup frequencies and container sizes and not to serve as warranty. Therefore, contractor is not entitled to additional compensation for 11 percent variation in quantum of work performed—a variation that is not specification "change" that is actionable for failure to issue change order 576

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Requirements—Continued

Estimated amounts not warranty—Continued

The word "warranty" is not simple to define—at a minimum, a warranty, whether an expressed or implied warranty, is something of an assurance by one party that the other may rely on the truth of a given representation. No such assurance is implied under requirements contract for trash and garbage removal where Govt. had "suggested" pickup schedule and container sizes and contractor after award was "required" to inspect work area and submit its own list of containers, locations, and frequencies of pickups and, therefore, contractor is not entitled to additional compensation on basis of 11 percent variation between work performed and Govt.'s suggestions—a variation that is not specification change 576

Federal supply catalog system

Evaluation of bids

Establishment of weight factors to evaluate bids under invitation contemplating requirements contract subject to maximum order limitation for delivery to single destination on basis of previous procurement experience on 71 out of 249 items of shelving classified under Federal Supply Catalog system to be purchased, and assignment of token weight to remainder of 249 items is realistic method of evaluation which does not result in unbalanced bidding. Therefore, even though it would have been preferable to evaluate bids by using f.o.b. origin prices, there is no objection to award under solicitation, bids having been exposed and evaluated on common basis, and fact that in future procurements, most meaningful method of obtaining competitive prices will be used ... 62

Use propriety

Determination to use requirements contract to satisfy needs of Govt. for storage and display shelving classified under Federal Supply Catalog system—contract to be subject to maximum order limitation for delivery to single destination—is valid determination within ambit of sound administrative discretion where term contract conforms to criteria established in par. 101-25.101-4 of Federal Property Management Regs. and results in overall economy to Govt., and there is no reason to anticipate abuse of contract's maximum order limitations and year end purchases to avoid returning unexpired appropriations to Treasury 62

Future needs charged to current appropriations

Proposed multi-year contracting for Federal Supply Service requirements to effect savings in repair and rehabilitation of business machines, typewriters, and furniture, contracts to be financed by using Federal Supply Fund and Automatic Data Processing Fund and by reimbursing funds from fiscal year appropriations of requisitioning agencies would violate appropriation restrictions of 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and absent congressional approval, contract term must be restricted to 1-year period. Although A-60589, July 12, 1935, permitting requirement contracts under fiscal-year appropriations to cover 1-year periods extending beyond end of fiscal year is not technically correct, practice having been followed for over 30 years in reliance upon decision, there is no objection to its continuance 497

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Requirements—Continued

Multiyear procurement

Although General Supply Fund authorized by sec. 109 of Federal Property and Administrative Services Act of 1949, as amended, is available without fiscal year limitation, requirements contracts for indefinite quantities of stock supplies that are charged to fund should not be made for periods in excess of 2 years, even though funds are available for total estimated quantities required, in absence of specific legislative authority or prior determination by U.S. General Accounting Office that procurement will not be in derogation of purposes of advertising statutes 497

Overlapping awards

Award of requirements-type contract for delivery of uniforms during calendar year 1969 for part of requirements that arose during period of existing contract expiring Dec. 31, 1968, and providing for delivery early in 1969 was in derogation of terms and conditions of prior contract that could have resulted in legal liabilities had second contract not been awarded to contractor performing under first contract—low bidder having qualified his bid. Although no useful purpose would be served by cancellation of second contract as successful bidder is obligated to supply requirements for uniforms to be delivered early in 1969 under first contract, action should be taken to preclude reoccurrence of circumstances surrounding award of second contract 285

Research and development

Conflicts of interest prohibitions

The fact that low bidder under invitation for Terminal, Telegraph-Telephone system had in development of system furnished under contract productive drawings used in preparation of applicable military specifications does not require that bidder be barred under Rule 2—"Restrictions on Future Procurements"—of Dept. of Defense Directive 5500.10 governing conflicts of interest of contractors who furnish Govt. with engineering or technical services in connection with initiation of new systems, programs, or specifications. Bidder not only did not furnish "complete specifications" restricted by Rule 2, but drawings obtained under production contract awarded by competitive bidding, their use is within exception to Rule 2 of Directive relating to "contracts for developmental or prototype items." 702

Technical deficiencies of proposals

Evaluation propriety

The procedure of stating Govt.'s requirements in request for proposals for design, fabrication, and installation of weighing scales system for C–5A aircraft in broad general terms, emphasizing reliance on ingenuity of offerors to propose actual design of system, and then without further negotiation to reject 6 out of 7 proposals for technical reasons that reflect detailed and rigid requirements is procedure that is not in accord with information standards prescribed by par. 3–501(b) of Armed Services Procurement Reg. and by par. 4–105 of regulation specifically relating to research and development contracts. Therefore, procedure should be corrected to provide offerors be informed of all evaluation factors involved in procurement and of relative weights to be attached to each factor 314

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Service Contract Act of 1965. (*See* Contracts, labor stipulations, Service Contract Act of 1965)
Small Business concerns. (*See* Contracts, awards, small business concerns)
Specifications
Addenda acknowledgment. (*See* Contracts, specifications, failure to furnish something required, addenda acknowledgment)
Adequacy
Complex procurements
Inclusion of clause required by par. 7–602.45 of Armed Services Procurement Reg. in all military fixed-price construction contracts to provide that omissions from drawings or specifications, or misdescription of details of work necessary to carry out intent of drawings and specifications, or details which are customarily performed shall not relieve contractor from performing omitted or misdescribed details of work is not restrictive of full and free competition contemplated by 10 U.S.C. 2305 (a), as well as 41 U.S.C. 253(a). Therefore, in view of fact that contracting agency has primary responsibility for drafting specifications to meet requirements of Govt., and clause is reasonable and necessary in performance of complicated construction contracts, general usage of clause will not be questioned 90
Ambiguous
Clarification
Before bidding
Failure to use procedure prescribed in Solicitation Instructions and Conditions of invitation to effect any explanation desired by bidder in regard to solicitation must be in writing and with sufficient time allowed for reply to reach bidders before submission of bids, and which provided for amendment of solicitation should requested information be prejudicial to other bidders, no doubt deprived Govt. of responsive bid from bidder whose allegation of restrictive specifications indicated misunderstanding of specifications. Therefore, to obtain broadest possible competition, questions relating to meaning of specifications raised before bid opening should be treated as requests for information rather than as protests, particularly when award must be made prior to resolution of questions by U.S. General Accounting Office under protest procedure 415
What constitutes an ambiguity
Allegation of ambiguity made after award of contract that bidding schedule created uncertainty as to whether Govt. desired prices on packaging or data items in furnishing of geodetic rods is not sustained where there is only one reasonable interpretation of meaning of schedule, for ambiguity exists only if two or more reasonable interpretations are possible. Appropriate time to allege ambiguity and seek clarification of uncertainty is prior to time for submission of bids, and protest after bid opening on matters one would reasonably expect to have clarified during period when bids are prepared, tends to cause doubt as to purpose and validity of protest 757
Attachments
Omission
Omission of packaging sheets referred to on bid schedule as being "attached" is not fatal, incorporation by reference in invitation for bids of contracting agency's Contract Clause Book provisions concerning

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Specifications—Continued

Attachments—Continued

Omission—Continued

availability of specifications—term considered to include packaging sheets—satisfying requirement in 10 U.S.C. 2305(b) that if descriptive language and attachments necessary to full and free competition that are omitted from invitation are otherwise accessible to all competent and reliable bidders, invitation is not invalid 757

Brand name or equal (*See* **Contracts, specifications, restrictive, particular make**)

Changes, revisions, etc.

Increased cost liability

Provisions in invitation for trash and garbage removal that suggested bidders inspect Veterans Administration Hospital where services were to be performed for full information concerning "the character and conditions under which the service is to be performed," and that required successful contractor shortly after award to submit list of containers, locations, and frequencies of pickup—which it failed to do—were calculated to discourage reliance on Govt.'s suggested schedule of pickup frequencies and container sizes and not to serve as warranty. Therefore, contractor is not entitled to additional compensation for 11 percent variation in quantum of work performed—a variation that is not specification "change" that is actionable for failure to issue change order 576

The word "warranty" is not simple to define—at a minimum, a warranty, whether an expressed or implied warranty, is something of an assurance by one party that the other may rely on the truth of a given representation. No such assurance is implied under requirements contract for trash and garbage removal where Govt. had "suggested" pickup schedule and container sizes and contractor after award was "required" to inspect work area and submit its own list of containers, locations, and frequencies of pickups and, therefore, contractor is not entitled to additional compensation on basis of 11 percent variation between work performed and Govt.'s suggestions—a variation that is not specification change 576

Clarification. (*See* **Contracts, specifications, ambiguous, clarification**)

Conformability of equipment, etc., offered

Minimum responsive bid *v.* superior bid

If low bid meets minimum requirements prescribed in invitation for bids, fact that product offered may be inferior to that offered by other bidders does not preclude consideration of low bid. Procurement agencies of Govt. are only required to prepare specifications describing their needs and not maximum quality obtainable as public advertising statutes do not authorize agency to pay higher price for article which may be superior to one that adequately meets its needs 403

Samples, etc., deviating from specifications

Under Federal Supply Schedule contract for one-speed recorders awarded pursuant to invitation soliciting bids on four speed classes, approval as acceptable of two-speed recorder preproduction sample, delivery of superior two-speed equipment at no additional cost to Govt., and subsequent price reduction under terms of contract to match price of successful bidder on two-speed recorders is not legally objec-

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Conformability of equipment, etc., offered—Continued
Samples, etc., deviating from specifications—Continued
tionable. Even though two-speed equipment is superior to one-speed recorder, if bidder had indicated intent to supply two-speed equipment for one-speed equipment bid on, it would not have been entitled to award at bid price higher than that offered by two-speed equipment bidder, and it is by virtue of invitation and award that bidder may be considered contractor for two-speed equipment ---------- 685
Technical deficiencies
Evaluation standards unknown to bidders
An administrative determination based on unadvertised standards that elevating platforms offered by low bidder were technically inadequate to serve needs of Govt. contravenes established principles governing formal advertising that require bid evaluation to be based on objectively determinable factors made known to bidders in advance; that do not permit rejection of bid for failure to specify feature not required by invitation; and that require inclusion in specifications of requirement for submission of technical or descriptive data if needed for evaluation purposes. Although low bid should not have been rejected nor award made on basis of nonresponsive second lowest bid, cancellation of contract close to delivery date would serve no useful purpose; however, steps should be taken to preclude recurrence of such situation ---------- 464
Negotiated procurement
The procedure of stating Govt.'s requirements in request for proposals for design, fabrication, and installation of weighing scales system for C–5A aircraft in broad general terms, emphasizing reliance on ingenuity of offerors to propose actual design of system, and then without further negotiation to reject 6 out of 7 proposals for technical reasons that reflect detailed and rigid requirements is procedure that is not in accord with information standards prescribed by par. 3–501(b) of Armed Services Procurement Reg. and by par. 4–105 of regulation specifically relating to research and development contracts. Therefore, procedure should be corrected to provide offerors be informed of all evaluation factors involved in procurement and of relative weights to be attached to each factor ---------- 314
Notice
The failure before bids were invited on second step of two-step formally advertised procurement to furnish separate notice to bidder of technical unacceptability of low alternate proposal submitted not as separate package but incident to clarification of unacceptable original proposal does not constitute acceptance of low alternate proposal. Provision in sec. 1-2.503-1(b)(5) of Federal Procurement Regs., as well as in administrative regulation, for notice of technical unacceptability of proposal under two-step advertised method of procurement is procedural right that does not go to essence of award, and rejection of alternate proposal will not be questioned, absent evidence determination was arbitrary, capricious, or made in bad faith ---------- 349

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Defective
Contractor *v.* Government responsibility
Solicitation under 10 U.S.C. 2304(a)(10) for air conditioners to be furnished in accordance with military specifications and Govt. drawings that discloses possibility of error in technical data package and places assumption of risk of performance on successful contractor by holding him responsible for identifying and correcting deficiencies and providing for reimbursement for deficiencies on predetermined basis and also pursuant to changes clause for designated changes violating no law or regulation, procedure is acceptable substitute for contractor's normal remedy under the changes clause. The fact that Govt. does not impliedly warrant adequacy of drawings and specifications should not affect competition on common basis nor result in excessive contingency costs to Govt..... 750
While all offerors under request for proposals issued pursuant to 10 U.S.C. 2304(a)(10) for air conditioners and providing for successful contractor to assume risk of performance by holding him responsible for determining, identifying, and correcting any discrepancy, error, or deficiency in design or technical data in lieu of Govt.'s implied warranty of adequacy of drawings and specifications may not have familiarity with drawings equal to that of firm previously producing equipment, same is true in any procurement involving prior producers, and such natural competitive advance is one which procurement laws do not recognize as unlawful or even necessarily undesirable..... 750
Corrective action recommended
An invitation for Argon Laser with Ceramic Discharge Tube, Carson Model SP–300 or equal that failed to indicate whether all or some of specification details were salient features or characteristics essential to needs of Govt. is defective invitation that provided no basis for determination made under par. 1–1206.4 of Armed Services Procurement Reg. to effect that deviations in successful bid which failed to comply with important aspects of invitation were minor or inconsequential, and deterred brand name manufacturer from offering lower priced "or equal" item. In future procurements utilizing brand name or equal descriptions, actual needs should be determined in advance and only those needs set forth as salient characteristics in appropriate terms in invitation..... 441
Descriptive data
Inadequate
Award made nonetheless
While finding of responsiveness to invitation requesting bids for "Microwave System" in accordance with one of four configurations, bids to be evaluated in numerical order with award to lowest responsive bidder under schedule selected, regardless of cost, is factual determination to be made by contracting agency, manner of evaluation is subject to review by U.S. General Accounting Office, and where in evaluation of third low bid submitted on configuration I—first two bids having been rejected for failure to comply with technical and delivery requirements of specifications—information outside bid and required descriptive literature is considered, determination that bid was responsive was not in compliance with statutory and regulatory provisions governing procurement by formal advertising..... 420

CONTRACTS—Continued Page
Specifications—Continued
Descriptive data—Continued
Omission from invitation
Omission of packaging sheets referred to on bid schedule as being "attached" is not fatal, incorporation by reference in invitation for bids of contracting agency's Contract Clause Book provisions concerning availability of specifications—term considered to include packaging sheets—satisfying requirement in 10 U.S.C. 2305(b) that if descriptive language and attachments necessary to full and free competition that are omitted from invitation are otherwise accessible to all competent and reliable bidders, invitation is not invalid---------- 757
Purpose
Requirement for inclusion of drawings and descriptive data in bids on dehumidifiers without defining its purpose and effect and without stating noncompliance would preclude bid consideration, and which had as its purpose determining whether product offered will conceivably meet specifications and to generally establish what bidder proposed to furnish, is requirement directed toward determining responsibility of bidder rather than responsiveness of bid and there is no valid basis for rejecting low bid solely for failure to submit drawings and data. However, if acceptable product cannot be procured without descriptive literature indicating exactly what bidder proposes to furnish, invitation should be canceled and reissued in compliance with sec. 1-2.202-5 of Federal Procurement Regs---------- 659
"Requirements" clause in invitation
An administrative determination based on unadvertised standards that elevating platforms offered by low bidder were technically inadequate to serve needs of Govt. contravenes established principles governing formal advertising that require bid evaluation to be based on objectively determinable factors made known to bidders in advance; that do not permit rejection of bid for failure to specify feature not required by invitation; and that require inclusion in specifications of requirement for submission of technical or descriptive data if needed for evaluation purposes. Although low bid should not have been rejected nor award made on basis of nonresponsive second lowest bid, cancellation of contract close to delivery date would serve no useful purpose; however, steps should be taken to preclude recurrence of such situation---------- 464
Voluntary submission
Nonconformance to specifications
A bid on automotive infrared exhaust gas analysis systems which included unsolicited descriptive literature that did not conform to specifications, but accompany letter considered part of bid offered to meet specification, is responsive bid where unsolicited nonresponsive descriptive literature did not qualify bid or affect Govt.'s right to require conformity with specifications. Absent qualification in bid, compliance with specifications determinative on basis of product and not on speculative interpretations of unsolicited descriptive literature, acceptance of noise level in systems as minor deviation, correction of which would have negligible effect on price was within province of contracting agency---------- 306

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Specifications—Continued

Deviations

Delivery provisions

The failure of low bidder to furnish guaranteed maximum weight and maximum dimensions for shipping containers required under second-step of two-step multi-year procurement for transceivers to be delivered f.o.b. origin is deviation that is distinguishable from type of bid irregularity covered by "triviality" or "*de minimus*" rule, and omission did not render bid nonresponsive where maximum shipping cost was ascertainable from other information contained in invitation—size and weight of transceiver—there is no question as to bidder's undertaking to meet all requirements of specifications, including delivery, and that on basis of possible transportation costs, low bidder had offered most advantageous bid to Govt 357

Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2-405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian Doctrine"—applicable only to initially responsive bids—par. 2-201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interests of Govt., contract will not be canceled, but quantity option should not be exercised 593

Cancellation in its entirety of contract erroneously awarded to nonresponsive bidder who had failed to furnish f.o.b. origin shipping point information is required rather than just cancellation of option directed in 48 Comp. Gen. 593, where cancellation will pose no problem respecting emergency need for procurement and contingent liability of Govt. under canceled contract, in view of fact next lowest bidder is willing to purchase inventory items involved in canceled contract and to hold Govt. harmless from any liability resulting from contract cancellation, and has demonstrated ability to meet delivery requirements that refutes contracting officer's contrary determination. Upon immediate cancellation of entire contract, prompt award should be made to lowest bidder 689

The mere insertion by Govt. of symbol "X" in particular box of invitation not automatically incorporating provision in resulting contract, identified bid term or condition requires some affirmative action on part of bidder to establish his agreement to comply with bid term or condition and, therefore, failure of bidder to respond to boxed "X" regarding f.o.b. origin shipping point information relating to responsiveness of his bid, failure must be treated as though bidder had taken deliberate exception to material provision of advertised invitation 689

Informal *v.* substantive

Cost information

Refusal to submit certified cost apportionment that satisfies statutory limits prescribed for construction contracts pursuant to par. 18-110 of Armed Services Procurement Reg., or submission of grossly erroneous

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued
Cost information—Continued
cost apportionment data to circumvent statutory cost limitations is regarded as material discrepancy which renders bid nonresponsive, notwithstanding apportionment certificate is considered only one tool in array of aids, such as prior cost experience, Govt. engineering estimates, competing bidders' costs apportionment, and like, which are available to determine whether statutory cost limitations have been met by bidder ---------- 34
Invitation to bid provisions
Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantive provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F.2d 418—doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award and, therefore, "Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted---------- 171
Payment date for Government land
Under invitation for bids to construct building on Govt. land for lease to Post Office Dept., with reimbursement to Dept. for cost of site by date specified, award to low bidder after his withdrawal of bid acceptance time extension and prior to acceptance of condition for extension—equal time extension for site payment—was inconsistent with 39 U.S.C. 2103 (a) and 2112(2) requiring consummation of post office lease agreements in accordance with 41 U.S.C. 5—award to lowest, responsible bidder whose bid conforms to advertised specifications. The site payment, material requirement that contracting officer could not waive, either under original bid or bid extension, award to low bidder should be canceled and bid deposit refunded---------- 775
Drawings
Omissions and misdescriptions
Inclusion of clause required by Par. 7-602.45 of Armed Services Procurement Reg. in all military fixed-price construction contracts to provide that omissions from drawings or specifications, or misdescription of details of work necessary to carry out intent of drawings and specifications, or details which are customarily performed shall not relieve contractor from performing omitted or misdescribed details of work is not restrictive of full and free competition contemplated by 10 U.S.C. 2305 (a), as well as 41 U.S.C. 253(a). Therefore, in view of fact that contracting agency has primary responsibility for drafting specifications to meet requirements of Govt. and clause is reasonable and necessary in performance of complicated construction contracts, general usage of clause will not be questioned---------- 90

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Specifications—Continued
Failure to furnish something required
Addenda acknowledgment
Certified mail, etc., records in lieu
Cancellation of award to second low bidder under invitation for bids that contained small business set-aside for alteration of Veterans Administration hospital building and award to low bidder initially denied award for failing to acknowledge addenda that affected price increase in space provided on bid form for number and addenda date was proper where invitation prescribed that certified mail and telegraph company records would be considered acknowledgment of amendment and certified mail receipt for addenda had been signed by official of low bidder and received prior to bid opening. Therefore, receipt of addenda having been acknowledged by method specified in invitation, low bidder obligated to comply with its terms was entitled to award under 41 U.S.C. 253(b) and sec. 1-2-407.1 of Federal Procurement Regs 738
Waiver
When failure to acknowledge amendment to invitation prior to opening of bids does not affect price, quantity, or quality, rule for application is that if it can be shown that bidder, upon acceptance of bid, could be required to perform at bid price in accordance with all terms and conditions of amended invitation, bid rejection is not required. Therefore, failure of low bidder to acknowledge two amendments under invitation for indefinite quantity of floodlight sets, one merely repeating packing requirements of Navy specifications incorporated in invitation, other relaxing delivery from 90 to 120 days —even though as result Govt. could require delivery of more units—not affecting price, quality, or quantity, failure may be waived as bid informality 555
Bid signature
Rejection of only bid received before bid opening because it was not signed was not required by par. 2-405 of Armed Services Procurement Reg., but representative who had delivered bid should have been permitted to sign it, not on basis that his authority to bind bidder was known or made obvious by his conduct, but because bid was only one received and neither question of bidder option to elect after bid opening whether or not to be bound, nor question of prejudice to other bidders was involved —only other bid received being acceptable late bid submitted at higher price. Therefore, unsigned bid must now be treated as if permission to sign it had been given and bid may be considered for award 801
Cost data
Refusal to submit certified cost apportionment that satisfies statutory limits prescribed for construction contracts pursuant to par. 18-110 of Armed Services Procurement Reg., or submission of grossly erroneous cost apportionment data to circumvent statutory cost limitations is regarded as material discrepancy which renders bid nonresponsive, notwithstanding apportionment certificate is considered only one tool in array of aids, such as prior cost experience, Govt. engineering estimates, competing bidders' costs apportionment, and like, which are available to determine whether statutory cost limitations have been met by bidder 34

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

Information

Buy American Certificate

Under invitation permitting bidders to offer either domestic or foreign-end products, low bidder—an English concern—notwithstanding its failure to list in Buy American certificate that it would furnish foreign-end products has submitted bid which on its face complies in all material respects with invitation and, therefore, such bid must be regarded as responsive. Effect of acceptance of such bid is matter of evaluation rather than responsiveness. Accordingly, acceptance of low bid which was corrected to show that equipment was to be manufactured in Great Britain, fact known to the contracting personnel, and which remained low after evaluation under Buy American standards was not prejudicial to other bidders and resulted in contract as intended by parties---------- 142

Delivery, etc., information

Telegraphic bid on additional gallons of turbine fuel, aviation JP–4, to be shipped on f.o.b. origin basis that did not specify point of origin, information that also was not furnished in confirming letter, properly was rejected as nonresponsive where f.o.b. shipping point could not be ascertained by reading of bid as whole. Although small business bidder has only one refinery and it was identified in both telegram and confirming letter, fuel being obtainable from wide number of sources, and bidder having listed in its basic bid three different origin points for four separate increments of JP–4 grade fuel, Govt. could neither determine transportation costs for evaluation purposes, nor if it accepted bid, legally bind bidder to deliver at its refinery---------- 790

Descriptive data sufficiency

While finding of responsiveness to invitation requesting bids for "Microwave System" in accordance with one of four configurations, bids to be evaluated in numerical order with award to lowest responsive bidder under schedule selected, regardless of cost, is factual determination to be made by contracting agency, manner of evaluation is subject to review by U.S. General Accounting Office, and where in evaluation of third low bid submitted on configuration I—first two bids having been rejected for failure to comply with technical and delivery requirements of specifications—information outside bid and required descriptive literature is considered, determination that bid was responsive was not in compliance with statutory and regulatory provisions governing procurement by formal advertising---------- 420

Experience data of equipment offered

Experience requirements clause in invitation for multi-year procurement of diesel-engine generator units for 13 power plants for Sentinel System that specified overall capabilities and reliability that must be attained by any unit offered by bidder is considered as going to responsiveness of bid and not responsibility of bidder in view of critical nature of procurement and express language of experience requirements coupled with cautionary notice that experience data must be submitted with bid. Therefore, rejection of low bid for failure to submit required operating experience of units offered before bid opening time was proper, for to accept such information after bids were opened would be prejudicial to other bidders---------- 291

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required—Continued
Invitation to bid provisions
Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantive provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F. 2d 418—doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award and, therefore, "Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted 171
Furnishing more than contract requirements
Under Federal Supply Schedule contract for one-speed recorders awarded pursuant to invitation soliciting bids on four speed classes, approval as acceptable of two-speed recorder preproduction sample, delivery of superior two-speed equipment at no additional cost to Govt., and subsequent price reduction under terms of contract to match price of successful bidder on two-speed recorders is not legally objectionable. Even though two-speed equipment is superior to one-speed recorder, if bidder had indicated intent to supply two-speed equipment for one-speed equipment bid on, it would not have been entitled to award at bid price higher than that offered by two-speed equipment bidder, and it is by virtue of invitation and award that bidder may be considered contractor for two-speed equipment 685
Minimum needs requirement
Erroneously stated
An award to seventh highest bidder out of eight bidders submitting responsive bids to an invitation for desks that incorporated unessential, restrictive proprietary specifications, is based on desire, for superior product and not on minimum needs of Govt. and, therefore, requirements of par. 1–1201 of Armed Services Procurement Reg. (ASPR) that invitations state minimum needs, describe supplies and services so as to encourage competition, and eliminate restrictive features that might limit acceptability of product were disregarded. To assure full and free competition contemplated by par. 1–1206.1(a) of ASPR, future advertised specifications for desks should accurately reflect only actual minimum needs 345
Superior products
If low bid meets minimum requirements prescribed in invitation for bids, fact that product offered may be inferior to that offered by other bidders does not preclude consideration of low bid. Procurement agencies of Govt. are only required to prepare specifications describing their needs and not maximum quality obtainable as public advertising statutes do not authorize agency to pay higher price for article which may be superior to one that adequately meets its needs 403

CONTRACTS—Continued Page

Specifications—Continued

Misdescriptions, etc.

Construction contracts

Inclusion of clause required by par. 7-602.45 of Armed Services Procurement Reg. in all military fixed-price construction contracts to provide that omissions from drawings or specifications, or misdescription of details of work necessary to carry out intent of drawings and specifications, or details which are customarily performed shall not relieve contractor from performing omitted or misdescribed details of work is not restrictive of full and free competition contemplated by 10 U.S.C. 2305(a), as well as 41 U.S.C. 253(a). Therefore, in view of fact that contracting agency has primary responsibility for drafting specifications to meet requirements of Govt., and clause is reasonable and necessary in performance of complicated construction contracts, general usage of clause will not be questioned---------- 90

Propriety

Invitation for floodlight sets requiring Govt. to purchase minimum of 963 units and obligating prospective contractor to supply up to 3,000 units and to offer separate prices on two different types of packing on minimum quantity and on difference between minimum and maximum quantities, or 2,037 units—bids to be evaluated on basis of 50 percent of each type packing—meets requirements prescribed by par. 3-409.3 of Armed Services Procurement Reg. for indefinite quantity procurement, notwithstanding failure to advertise exact number of each type packing to be procured under minimum quantity, regulation only requiring statement of minimum and maximum quantities of item to be purchased and not of collateral items such as packing---------- 563

Restrictive

Particular make

"Or equal" product acceptability

In negotiation of procurement for cylinder liners, shifting from exception to advertised bidding "when it is impossible to draft specifications" to public exigency exception, and award to only offeror whose product was immediately technically acceptable, and which had been used in solicitation to identify item, were not legally improper, even if delivery schedule was not most favorable offered, in view of fact that failure to obtain cost and pricing data prescribed by 10 U.S.C. 2306(f) falls within catalog sales exception, and that ambiguity in discount terms offered had been properly resolved under par. 3-804 of Armed Services Procurement Reg. However, "or equal" products which were not considered should have been forwarded without delay for technical evaluation and possible qualification for future procurements, and service claim should have been verified---------- 612

Salient characteristics

An invitation for Argon Laser with Ceramic Discharge Tube, Carson Model SP-300 or equal that failed to indicate whether all or some of specification details were salient features or characteristics essential to needs of Govt. is defective invitation that provided no basis for determination made under par. 1-1206.4 of Armed Services Procurement Reg.

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Salient characteristics—Continued
to effect that deviations in successful bid which failed to comply with important aspects of invitation were minor or inconsequential, and deterred brand name manufacturer from offering lower priced "or equal" item. In future procurements utilizing brand name or equal descriptions, actual needs should be determined in advance and only those needs set forth as salient characteristics in appropriate terms in invitation------ 441
Proprietary item, process, etc.
An award to seventh highest bidder out of eight bidders submitting responsive bids to an invitation for desks that incorporated unessential, restrictive proprietary specifications, is based on desire, for superior product and not on minimum needs of Govt. and, therefore, requirements of par. 1-1201 of Armed Services Procurement Reg. (ASPR) that invitations state minimum needs, describe supplies and services so as to encourage competition, and eliminate restrictive features that might limit acceptability of product were disregarded. To assure full and free competition contemplated by par. 1-1206.1(a) of ASPR, future advertised specifications for desks should accurately reflect only actual minimum needs ---------- 345
Review of specifications
Failure to use procedure prescribed in Solicitation Instructions and Conditions of invitation to effect any explanation desired by bidder in regard to solicitation must be in writing and with sufficient time allowed for reply to reach bidders before submission of bids, and which provided for amendment of solicitation should requested information be prejudicial to other bidders, no doubt deprived Govt. of responsive bid from bidder whose allegation of restrictive specifications indicated misunderstanding of specifications. Therefore, to obtain broadest possible competition, questions relating to meaning of specifications raised before bid opening should be treated as requests for information rather than as protests, particularly when award must be made prior to resolution of questions by U.S. General Accounting Office under protest procedure---- 415
Samples
Preproduction sample requirement
Sample superior to contract
Under Federal Supply Schedule contract for one-speed recorders awarded pursuant to invitation soliciting bids on four speed classes, approval as acceptable of two-speed recorder preproduction sample, delivery of superior two-speed equipment at no additional cost to Govt., and subsequent price reduction under terms of contract to match price of successful bidder on two-speed recorders is not legally objectionable. Even though two-speed equipment is superior to one-speed recorder, if bidder had indicated intent to supply two-speed equipment for one-speed equipment bid on, it would not have been entitled to award at bid price higher than that offered by two-speed equipment bidder, and it is by virtue of invitation and award that bidder may be considered contractor for two-speed equipment---------- 685

CONTRACTS—Continued Page
Specifications—Continued
Samples—Continued
Preproduction sample requirement—Continued
Waiver

Action permitting reduction in price and waiver of first article testing on basis of previous product acceptability which made high offer low under amended request for proposals issued pursuant to public exigency authority of 10 U.S.C. 2304(a)(2) in order to evaluate two offers received on common basis of first article testing is not "clarification" of offer but negotiation that is not within exceptions to discussion with all offerors contemplated by par. 3-805.1(a)(v) of Armed Services Procurement Reg. and 10 U.S.C. 2304(g). Although further negotiation was required with low offeror under amended proposal, notwithstanding that because of satisfying first article testing requirement, offeror possibly would not meet price reduction and delivery schedule, cancellation of contract is not required due to advanced stage of production ---------- 663

The sole-source procurement and award of letter contract for additional requirements to contractor awarded initial procurement under public exigency authority of 10 U.S.C. 2304(a)(2) was not unreasonable exercise of contractor's discretionary authority to determine extent of negotiation in view of emergency status of procurement and fact only other offeror under initial request for proposals would need time to comply with first article testing requirement. However, in future in order to determine possibility of procurement by competitive negotiation, elements of anticipated delivery schedule should be formulated with more precision ---------- 663

Time for submission

Bid samples forwarded by commercial truck which were not timely delivered due to conditions of local unrest may not be considered under invitation which in soliciting bids for requirements contract provided for consideration of late samples only when sent by certified or registered mail and precluded reapplication of previously submitted samples. Bidders on notice that samples were integral part of bid for evaluation purposes, submission of samples is not considered mere technicality that may be waived. Therefore, bidder in using commercial trucking assumed risk of late delivery, and samples not having been forwarded as required for consideration under provisions governing late bids, rejection of low bid is proper under sec. 1-2.303-5 of Federal Procurement Regs ---------- 59

Subcontracts
Propriety
Foreign subcontractors

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

CONTRACTS—Continued Page
Subcontracts—Continued
Propriety—Continued
Foreign subcontractors—Continued
therefore, Navy may consent to subcontracting of services to Canadian firm ---- 709
Warranties
Deviation from specifications
Provisions in invitation for trash and garbage removal that suggested bidders inspect Veterans Administration Hospital where services were to be performed for full information concerning "the character and conditions under which the service is to be performed," and that required successful contractor shortly after award to submit list of containers, locations, and frequencies of pickup—which it failed to do—were calculated to discourage reliance on Govt.'s suggested schedule of pickup frequencies and container sizes and not to serve as warranty. Therefore, contractor is not entitled to additional compensation for 11 percent variation in quantum of work performed—a variation that is not specification "change" that is actionable for failure to issue change order ---- 576
The word "warranty" is not simple to define—at a minimum, a warranty, whether an expressed or implied warranty, is something of an assurance by one party that the other may rely on the truth of a given representation. No such assurance is implied under requirements contract for trash and garbage removal where Govt. had "suggested" pickup schedule and container sizes and contractor after award was "required" to inspect work area and submit its own list of containers, locations, and frequencies of pickups and, therefore, contractor is not entitled to additional compensation on basis of 11 percent variation between work performed and Govt.'s suggestions—a variation that is not specification change ---- 576
Implied
Assumption of risk by contractor in lieu
Solicitation under 10 U.S.C. 2304(a)(10) for air conditioners to be furnished in accordance with military specifications and Govt. drawings that discloses possibility of error in technical data package and places assumption of risk of performance on successful contractor by holding him responsible for identifying and correcting deficiencies and providing for reimbursement for deficiencies on predetermined basis and also pursuant to changes clause for designated changes violating no law or regulation, procedure is acceptable substitute for contractor's normal remedy under the changes clause. The fact that Govt. does not impliedly warrant adequacy of drawings and specifications should not affect competition on common basis nor result in excessive contingency costs to Govt ---- 750
While all offerors under request for proposals issued pursuant to 10 U.S.C. 2304(a)(10) for air conditioners and providing for successful contractor to assume risk of performance by holding him responsible for determining, identifying, and correcting any discrepancy, error, or deficiency in design or technical data in lieu of Govt.'s implied warranty of adequacy of drawings and specifications may not have familiarity with drawings equal to that of firm previously producing equipment, same is true in any procurement involving prior producers, and such natural competitive advantage is one which procurement laws do not recognize as unlawful or even necessarily undesirable ---- 750

COURTS Page

Costs

Transcripts

The Administrative Office of U.S. Courts authorized in view of *Tate* v. *U.S.*, 359 F. 2d 245 (1966), to furnish transcripts for defendants prosecuted and convicted in U.S. side of Court of General Sessions who are allowed to appeal to Dist. of Columbia Court of Appeals in *forma pauperis*, may charge transcript fees to appropriations made for costs incurred under 28 U.S.C. 753(f), and such costs are not limited to $300 imposed by Criminal Justice Act of 1964 (18 U.S.C. 3006A(a)), but payment for transcripts may be made in manner used to pay for transcripts for defendants prosecuted in U.S. District Courts in cases where cost of transcript exceeds $300 ---------- 569

Decisions

Merlyn E. Horn v. *United States*, **185 Ct. Cl. 795.** (*See* **Pay, retired, fleet reservists, retainer pay withholdings, disability compensation as civilian**)

District of Columbia

Court of General Sessions

Transcripts

Although indigent defendants prosecuted by U.S., whether in U.S. branch of Dist. of Columbia Court of General Sessions or in U.S. District Court for Dist. of Columbia, for petty offenses as defined in 18 U.S.C. 1 are not entitled on appeal to Dist. of Columbia Court of Appeals to transcript at expense of U.S. under Criminal Justice Act of 1964 (18 U.S.C. 3006A(a))—act expressly excluding defendants charged with petty offenses—in view of holding in *Tate* v. *U.S.*, 359 F. 2d 245 (1966), that 11 D.C. Code 935 makes 28 U.S.C. 753(f), authorizing payment of transcript fees in *forma pauperis* proceedings applicable to Court of General Sessions, defendants convicted of petty offenses in U.S. side of Court of General Sessions may be furnished transcripts without charge. B–153485, Mar. 17, 1964, modified ---------- 569

Judgments, decrees, etc.

Claims subsequent to judgment

Period not included in judgment

The court in *Lerner* v. *U.S.*, 168 Ct. Cl. 247, decided Dec. 11, 1964, having established right of plaintiff to disability retirement pay effective Dec. 23, 1943, correction of military records, approved Dec. 4, 1967, did not change disability retired status of plaintiff—Army officer—and, therefore, he is not entitled to disability retired pay for period Dec. 23, 1943, to July 31, 1953, period barred by reason that under 28 U.S.C. 2501, payment of judgment was restricted to period July 1, 1957, to Dec. 11, 1964, and under 31 U.S.C. 71a, payment of claim received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from date of judgment ---------- 235

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Jurors

Government employees

Granting of court leave

An employee who had served on jury duty both under his current 4-year term appointment made pursuant to sec. 316.301 of Civil Service Commission regulations and under prior 1-year temporary limited appointment authorized as prescribed by sec. 316.401 of regulations may be granted court leave for jury duty performed under both appointments, 5 U.S.C. 6322 authorizing that compensation of "any employee of the United States or the District of Columbia" shall not be diminished by reason of jury service in any State court or court of U.S., restriction on granting of leave of absence with pay to temporary employees for purpose of serving on jury duty is not required. 38 Comp. Gen. 307; 20 *id.* 133; *id.* 145; and B–127804, dated May 11, 1956, modified 630

Narcotics addicts proceedings

Court appointed physicians reimbursement

When a Federal court authorized to either appoint private physicians or use Office of Surgeon General of Public Health Service, Dept. of Health, Education, and Welfare (HEW) to examine persons who are voluntarily committed as narcotics addicts under title III of Narcotic Addict Rehabilitation Act of 1966 (42 U.S.C. 3411–3426), appoints and selects private physicians, compensation of court appointed private physicians is payable from appropriation appearing in annual Judiciary acts under heading "Travel and Miscellaneous Expenses," for although HEW bears cost of examinations performed by regular or contract physicians of Surgeon General's Office, their appropriations are not available for payment of court selected private physicians over whom they have no control 681

CRIMINAL LAW VIOLATIONS

Jurisdiction

General Accounting Office *v.* Attorney General

The fact that 18 U.S.C. 209, which prohibits Govt. officers and employees from receiving any salary from sources other than U.S., is criminal statute enforceable by Dept. of Justice and courts, Attorney General has final determination of issues arising under provision and, therefore, Comptroller General does not have authority to make binding determination as to proper interpretation of prohibition 24

CUSTOMS

Brokers fees

Government shipments

Although reimbursement of $12 brokerage fee paid by employee of U.S. Forest Service to clear through customs teledendrometer purchased from foreign source by Service may be made to employee on basis Treasury Dept., Bur. of Customs, procedure for clearing Govt. shipments from abroad through customs without incurring expense of hiring outside customs brokers was misunderstood and small amount of fee involved, in future procedure of filing customs Form 3461—"Application and Special Permit for Immediate Delivery"—either on individual or yearly basis, should be followed to clear Govt. shipments without expense of using brokers, and any duty payable billed to agency concerned 680

CUSTOMS—Continued Page
Employees
Overtime services
Travel expenses
The travel and subsistence expenses incurred by Bureau of Customs border clearance inspectors incident to nonregular overtime unlading assignment at McGuire Air Force Base, New Jersey, and billed to Department of Air Force in accordance with Bureau's regulations may be paid by Department, provisions of regulations conforming to authority in 19 U.S.C. 1447 prescribing reimbursement to Govt. by party in interest for expenses incurred by inspectors on nonregular assignments at place other than port of entry. The fact that travel and subsistence expenses may be incurred when employees are entitled to premium pay does not affect propriety of regulations ---------- 622
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 U.S. is for recovery from carriers under 31 U.S.C. 483a—so-called "User Charges" statute—which authorizes Govt. 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 airlines and not Bureau, costs, including employees compensation, may be recovered to extent they are in excess of costs that would be incurred if all customs operations involved were performed in U.S., the costs to be fixed in accordance with 31 U.S.C. 483a ---------- 24
In view of fact that "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 appropriation from which charges were paid in accordance with requirement in 19 U.S.C. 1524 relating to deposit of customs charges ---------- 24
Services outside regularly scheduled hours
Cost recovery
Additional costs, including compensation, incurred to extend hours of service at customs ports of entry and customs stations along Canadian and Mexican borders that do not maintain 24-hour service, and to provide service at rail transshipment point, are recoverable in accordance with 31 U.S.C. 483a, so-called "user charges" statute, from party requesting special service. However, under 19 U.S.C. 1451, Tariff Act of 1930, as amended, any costs resulting from assignment of additional personnel during regularly scheduled hours would not be recoverable. Costs collected for any special customs service may be deposited to appropriation from which costs were paid ---------- 262
DAMAGES
Contracts. (*See* Contracts, damages)
Flood control projects. (*See* Public Works, flood control projects, damage liability)
Property
Public. (*See* Property, public, damage, loss, etc.)

DEBT COLLECTIONS Page

Amount uncollectible

Writeoff does not preclude collection

The fact that debt has been written off by administrative agency as uncollectible does not preclude subsequent satisfaction of indebtedness, GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 4, sec. 56.7, entitled "Administrative Accounting for Uncollectible Debts," prescribing maintenance of administrative record as opposed to accounting record of debts written off as uncollectible with view that at some future time debt might become collectible through set-off of amounts due debtor from agency 365

DELEGATION OF AUTHORITY

Between agencies

Automatic data processing equipment

Exclusive authority prescribed by Pub. L. 89-306 to General Services Administration to procure all general-purpose automatic data processing equipment and related supplies and equipment for use by other agencies includes procurement of punch cards and tabulating paper, even if these items are considered printing, binding, and blank-book work that 44 U.S.C. 111 provides "shall be done at the Government Printing Office," as exclusive jurisdiction of GSA in ADPE field supersedes any other authority and, therefore, items may be added to definition of supplies in sec. 101-32.402-4 of Federal Property Management Regs. However, to achieve economy and efficiency, authority of GSA may be delegated if GPO can procure items on more favorable terms 462

DEPARTMENTS AND ESTABLISHMENTS

Status

Maritime subsidy board

The "actual tax" doctrine used by Maritime Subsidy Board in computing "net earnings" of American vessel operators subsidized under Merchant Marine Act, 1936, as amended, for purpose of applying revenue and recapture provisions of operating-differential subsidy contracts under which investment credit against Federal income tax established by 1962 Revenue Act is not considered applicable to subsidized operators, does not contravene sec. 203(e) of 1964 Revenue Act prescribing "Treatment of Investment Credit by Federal Regulatory Agencies," as Board in administering operating differential subsidy contracts is not regulatory agency within meaning of sec. 203(e), and, therefore, is without jurisdiction with respect to taxpayer that uses investment credit to reduce Federal income tax 250

Smithsonian Institution

National Zoological Park

As National Zoological Park (Zoo) is considered Govt. property, authority of Regents of Zoo is subject to limitations applicable generally to administrative officials of Govt., limitations that are not affected by act of Nov. 6, 1966, authorizing negotiation of concession operations at Zoo with nonprofit, scientific, educational, or historic organizations and, therefore, any arrangement for operation of food concessions at Zoo is subject to advertising procedures. However, as use of single contract to procure restaurant concessions at Smithsonian facilities, including Zoo, would be more economical and efficient, upon issuance of determination

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Status—Continued
Smithsonian Institution—Continued
National Zoological Park—Continued
that it would not be feasible or practicable to use formal advertising procedures, combined contract may be negotiated under 41 U.S.C. 252 (c)(10) and sec. 1-3.210 of Federal Procurement Regs 193
DISTRICT OF COLUMBIA
Courts. (*See* Courts, District of Columbia)
Leases, concessions, rental agreements, etc.
Property acquired by the District
An unused school facility which was transferred by Board of Education to District of Columbia Govt. to whom restrictions of sec. 321 of Economy Act of 1932, respecting properties of U.S., do not apply, may be leased by District under authority in 1 D.C. Code 244(c) to Community Assistance, Inc., local nonprofit organization whose activities are within scope of community activities prescribed by 31 D.C. Code 801 and sec. 2 of Pub. L. 90-292, for use of public school buildings, provided repairs to building corporation proposes to make at its own expense do not change character or nature of building, and plans for work and work performed are approved by District 511
DOCUMENTS
Incorporation by reference
Bid evaluation information. (*See* Bids, evaluation, incorporation by reference)
Christian doctrine
Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantative provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F. 2d 418—doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award and, therefore, "Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted 171
Failure to designate in bid f.o.b. point of origin as required by invitation was deviation that affected price and deviation was improperly waived under par. 2-405 of Armed Services Procurement Reg. on basis information was obtainable elsewhere in bid. Under so-called "Christian Doctrine"—applicable only to initially responsive bids—par. 2-201(b)(xxxii)B prescribing that bid will be evaluated on basis of delivery from plant at which contract will be performed was not incorporated in invitation by operation of law to make nonresponsive bid responsive, nor did contracting officer's knowledge of f.o.b. point of origin have this effect. However, in best interests of Govt., contract will not be canceled, but quantity option should not be exercised 593
Dept. of Defense Directive 5500.10 (Appendix G of Armed Services Procurement Reg.) promulgated to avoid conflicts of interest on part of contractors is not self-executing regulation but requires notice of its ap-

DOCUMENTS—Continued Page

Incorporation by reference—Continued

Christian **doctrine—Continued**

plicability in solicitation and in contract, and exercise of judgment or discretion by contracting officer, subject to review, and, therefore, doctrine of *G.L. Christian and Associates* v. *U.S.*, 312 F. 2d 418, may not be invoked to give Directive force and effect of law and to read into contract mandatory clauses of ASPR that were not included 702

EASEMENTS, RIGHTS-OF-WAY

Damage, loss, etc.

Government liability

Project agreements with local authorities

Incident to taking of easement for attachment of dikes to railroad embankment in connection with flood prevention project, which necessitates alteration of railroad bridge and its approaches, although it would be preferable to amend project agreement between Federal Govt. and local flood control district entered into under authority of Watershed Protection and Flood Prevention Act, which precludes Federal Govt. from assuming cost of land, easements, and rights-of-way, and to have district in turn enter into concomitant agreement with railroad company for alteration of bridge and its approaches and second agreement to acquire easement of attachment, there is no objection to paying damages, whether or not railroad company agrees to make needed alterations, in order to secure title to easement and protect Govt.'s investment 132

EDUCATION

Veterans. (*See* **Veterans, education**)

EQUAL EMPLOYMENT OPPORTUNITY

Contract provision. (*See* **Contracts, labor stipulations, nondiscrimination**)

Officers and employees

Discrimination

Remedial action

The remedial action of retroactively promoting employee alleging racial discrimination after employee had been promoted from grade GS-9 to grade GS-11 without regard to complaint does not entitle employee to higher grade salary for period prior to effective date of his regular promotion, neither 5 U.S.C. 7151 nor implementing Civil Service Regs. providing for retroactive remedial action in event of finding of discrimination. Furthermore, employee may not be paid additional compensation under "Back Pay Statute" (5 U.S.C. 5596), or on basis of retroactive correction of administrative error, failure to timely promote employee being neither positive adverse administrative action required for payment under statute nor administrative error 502

EQUIPMENT

Automatic Data Processing Systems

Lease-purchase agreements

Appropriation availability

An installment purchase plan for computer replacement project that provides for payment over period of years is proposal for sale on credit that contemplates contract extending beyond current fiscal year,

EQUIPMENT—Continued Page
Automatic Data Processing Systems—Continued
Lease-purchase agreements—Continued
Appropriation availability—Continued
contract that would continue unless affirmative action is taken by Govt. to terminate it and, therefore, such plan would be in conflict with secs. 3732 and 3679, R.S., which prohibit contract or purchase unless authorized by law and unless adequate funds are available for fulfillment of agreement. Notwithstanding economic advantage of purchase over rental, lack of sufficient funds to purchase equipment outright cannot be used to frustrate statutory prohibition against contracting for purchases in excess of available funds, absent congressional authority-- 494
Leases
Long term
Long-term leases for automatic data processing equipment under fiscal year appropriations that would commit Govt. to minimum rental period of more than 1 year, and whose multi-year character would not change until Govt. took effective cancellation action, are prohibited by 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and of three lease plans submitted only one that does not obligate Govt. to continue rental period beyond fiscal year in which made, and contains renewal option, is not legally objectionable. However, revolving funds may be used to finance leases for reasonable periods of time in excess of 1 year, subject to conditions that sufficient funds are available and are obligated to cover costs under entire contract---------- 497
Selection and purchase
Time for submission of offers
Even if time schedule in request for proposals (RFP) inadequately provides for computer manufacturers to contact peripheral manufacturers and test their equipment, legality of procurement is unaffected. 10 U.S.C. 2304(g) provides for solicitation of proposals from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and, therefore, award under RFP would not be illegal because some offerors were unable to submit proposals and qualify their products within time allowed, or that tests tend to restrict competition. In addition, products of peripheral manufacturers are known, their inventories no doubt would support tests, and computer-system procurement on component basis is subject of study---------- 320
What constitutes supplies
Exclusive authority prescribed by Pub. L. 89-306 to General Services Administration to procure all general-purpose automatic data processing equipment and related supplies and equipment for use by other agencies includes procurement of punch cards and tabulating paper, even if these items are considered printing, binding, and blank-book work that 44 U.S.C. 111 provides "shall be done at the Government Printing Office," as exclusive jurisdiction of GSA in ADFE field supersedes any other authority and, therefore, items may be added to definition of supplies in sec. 101-32.402-4 of Federal Property Management Regs. However, to achieve economy and efficiency, authority of GSA may be delegated if GPO can procure items on more favorable terms---------- 462

EVIDENCE Page

Preponderance *v.* substantial

Because proceedings by U.S. General Accounting Office are not comparable to judicial proceedings, Office does not settle claims and make determinations subject to "preponderance of the evidence," except as that term may be equated with clear and convincing evidence. Therefore, in absence of plain and convincing proof beyond reasonable controversy that records prepared by Army at port of origin in U.S. of shipment of rice to overseas destination was in error, *prima facie* case in favor of Govt. has not been overcome and ocean carrier is liable for shortage of rice at destination of shipment 638

Presumptions

Death

Retired pay checks of Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside continental U.S. by private firm are to be sent to bank in U.S., upon his alleged capture by enemy forces may not be issued to bank or any other person on his behalf for support of his family. The right of retired member of uniformed services terminates upon death and power of attorney executed by him is automatically revoked by his death, whether or not fact of death is known, and in absence of statutory authority providing otherwise, and because presumption of death after lapse of 7 years rule is not applicable, payment of retired pay on behalf of missing sergeant must be held in abeyance until it is established that he is not dead 706

Negligence

Loss, etc., of funds

A postal supply clerk at wholesale stamp window whose shortage of funds in his fixed credit accountability is explained as being due to his busyness in exchanging "old rate" for "new rate" stocks of stamps is not considered to have exercised high degree of care that is expected from an accountable officer in performance of duty and, therefore, unexplained shortage raising presumption of negligence that record does not rebut, relief from liability for shortage may not be granted to employee under 39 U.S.C. 2401 or 31 U.S.C. 82a–1 566

FAMILY ALLOWANCES

Separation

Type 2

Common residence

Management and control by member

Payment of monthly rental by member of uniformed services to wife's parents for accommodations furnished pregnant wife during his absence, and supplying of funds for operation of car and to provide clothing for wife and needed baby items do not entitle member to $30 monthly family separation allowance prescribed in 37 U.S.C. 427(b) to compensate member for additional household expenses occasioned by separation due to military assignment. The household of wife's parents is not subject to management and control of member—a prerequisite for payment of allowance—and fact that he pays rent, cost for which basic allowance for quarters provides, and supplies other funds affords no legal basis for crediting member with family separation allowance 525

FEES Page

Bank drafts, money orders, etc.

Use of collection proceeds

Use of collection proceeds to cover cost of fees for money orders or bank drafts prior to mailing balance of collection to depositories with appropriate accounting adjustment as optional method to employee paying fee from his personal funds and obtaining reimbursement from appropriation will not contravene requirements of 31 U.S.C. 484 that gross amount of moneys received on behalf of U.S. must be covered into Treasury as miscellaneous receipts. Proposed procedure under which cost of fees for money orders and bank drafts would be charged to proper appropriation without diminishing gross amounts ultimately deposited in Treasury may be adopted after detailed accounting procedures have been developed and approved for promptly effecting necessary accounting adjustments ---------- 670

Brokerage

Generally. (*See* Customs, brokers fees)

Physicians

Court appointed

Examine narcotics addicts

When a Federal court authorized to either appoint private physicians or use Office of Surgeon General of Public Health Service, Dept. of Health, Education, and Welfare (HEW) to examine persons who are voluntarily committed as narcotics addicts under title III of Narcotic Addict Rehabilitation Act of 1966 (42 U.S.C. 3411–3426), appoints and selects private physicians, compensation of court appointed private physicians is payable from appropriation appearing in annual Judiciary acts under heading "Travel and Miscellaneous Expenses," for although HEW bears cost of examinations performed by regular or contract physicians of Surgeon General's Office, their appropriations are not available for payment of court selected private physicians over whom they have no control ---------- 681

Services to public

Collection and disposition

In view of fact that "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 appropriation from which charges were paid in accordance with requirement in 19 U.S.C. 1524 relating to deposit of customs charges. 24

Inspectional services

Custom services in foreign ports

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 U.S. is for recovery from carriers under 31 U.S.C. 483a—so-called "User Charges" statute—which authorizes Govt. 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 airlines and not Bureau, costs, including employees compensation, may be recovered to extent they are in excess of costs that would be incurred if all customs operations involved were performed in U.S., the costs to be fixed in accordance with 31 U.S.C. 483a --- 24

FEES—Continued Page

Services to public—Continued

Inspectional services—Continued

Outside regularly scheduled hours

Additional costs, including compensation, incurred to extend hours of service at customs ports of entry and customs stations along Canadian and Mexican borders that do not maintain 24-hour service, and to provide service at rail transshipment point, are recoverable in accordance with 31 U.S.C. 483a, so-called "user charges" statute, from party requesting special service. However, under 19 U.S.C. 1451, Tariff Act of 1930, as amended, any costs resulting from assignment of additional personnel during regularly scheduled hours would not be recoverable. Costs collected for any special customs service may be deposited to appropriation from which costs were paid 262

Witnesses

Administrative proceedings

Judicial precedent having established basis for payment for mileage and fees to witnesses appearing at administrative proceedings, persons summoned for testimony pursuant to 26 U.S.C. 7602 to enable Internal Revenue Service to determine tax liability of taxpayer may be paid fees and mileage provided by 5 U.S.C. 503(b), whether witness is person liable for tax or is person whose testimony is revelant or material to inquiry involving taxpayer. 45 Comp. Gen. 654, overruled 97

Military personnel

Courts of foreign forces

When commanding officer of military installation desires to honor properly made request for appearance of member of his command as witness before an authorized service court of a friendly foreign force, he may under authority in 22 U.S.C. 703 issue orders to member directing his attendance as witness, and consider member on official business in nature of detached service while traveling and while in attendance at proceedings of foreign court. Member witness under 28 U.S.C. 1821 would be entitled to fees and mileage, including subsistence when applicable, authorized for witnesses attending U.S. courts, payment to be made to member from funds supplied by foreign force, in advance if available, or after completion of service upon availability of funds 10

FOREIGN GOVERNMENTS

Donations, grants, loans, etc.

Procurements

Bid evaluation

Cancellation of invitation for bids on light and heavy diesel electric locomotives under development loan to Pakistan and resolicitation of procurement is not justified where same locomotives would be offered and only price competition between two bidders would result and, therefore, award should be made under invitation. One bidder determined to be ineligible for award of light locomotives, award on heavy locomotives should be made on basis price clause in one of bids to cover eventuality of delivery delay does not affect bid responsiveness, certain technical deviations may be waived and post-opening specification changes considered, but not post-award offer to extend warranty terms, and as heavy locomotives tendered are acceptable as to experience and construction, there remains for administrative determination question of compliance with other specifications 731

FOREIGN SERVICE Page

Retirement

Military duty

Annuity effect

Annuity payments to retired foreign service officer who is recalled to active duty as officer in U.S. Naval Reserve are not affected by recall absent provision in 22 U.S.C. 1112 that limitation on concurrent receipt of annuity and civilian compensation by reemployed foreign service officer in Federal Govt. service is intended to apply when retired foreign officer is recalled to active military duty and, therefore, annuitant may continue to receive foreign service annuity while serving in Naval Reserve ---------- 131

FUNDS

Appropriated. (*See* **Appropriations**)

Collection proceeds

Mailing costs

Use of collection proceeds to cover cost of fees for money orders or bank drafts prior to mailing balance of collection to depositories with appropriate accounting adjustment as optional method to employee paying fee from his personal funds and obtaining reimbursement from appropriation will not contravene requirements of 31 U.S.C. 484 that gross amount of moneys received on behalf of U.S. must be covered into Treasury as miscellaneous receipts. Proposed procedure under which cost of fees for money orders and bank drafts would be charged to proper appropriation without diminishing gross amounts ultimately deposited in Treasury may be adopted after detailed accounting procedures have been developed and approved for promptly effecting necessary accounting adjustments ---------- 670

Federal grants, etc., to other than States

Provisional indirect cost rates

Adjustment

Supplemental payments to grantees under sec. 301 of Public Health Service Act, 42 U.S.C. 241(d), and implementing regulations after expiration of research project period to cover actual indirect costs in excess of estimated provisional amounts allocated as indirect costs in grant awards made prior to July 1, 1968, date of clarifying amendments to secs. 52.14 (a) and (b) of Public Health Service regulations permitting adjustment of grant awards, is not precluded, use of phrase "provisional indirect cost rate" in grant agreements recognizing tentative arrangement subject to adjustment—adjustment that would not create type obligation prohibited under sec. 52.14(b). Only appropriation originally obligated by grant is available for payment of upward adjustment of provisional indirect cost rate ---------- 186

Miscellaneous receipts. (*See* **Miscellaneous receipts**

Revolving

Supply funds

Availability

Although General Supply Fund authorized by sec. 109 of Federal Property and Administrative Services Act of 1949, as amended, is available without fiscal year limitation, requirements contracts for indefinite quantities of stock supplies that are charged to fund should not be made for periods in excess of 2 years, even though funds are available for total

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Supply funds—Continued
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Long-term leases for automatic data processing equipment under fiscal year appropriations that would commit Govt. to minimum rental period of more than 1 year, and whose multi-year character would not change until Govt. took effective cancellation action, are prohibited by 41 U.S.C. 11; 31 *id.* 665(a); *id.* 712a, and of three lease plans submitted only one that does not obligate Govt. to continue rental period beyond fiscal year in which made, and contains renewal option, is not legally objectionable. However, revolving funds may be used to finance leases for reasonable periods of time in excess of 1 year, subject to conditions that sufficient funds are available and are obligated to cover costs under entire contract 497
Trust
Prisoners. (*See* **Prisons and Prisoners, trust funds**)
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Claims
Abatement pending court decision. (*See* **Claims, abatement pending court decision**)
Jurisdiction
Attorney General *v.* General Accounting Office
The fact that 18 U.S.C. 209, which prohibits Govt. officers and employees from receiving any salary from sources other than U.S., is criminal statute enforceable by Dept. of Justice and courts, Attorney General has final determination of issues arising under provision and, therefore, Comptroller General does not have authority to make binding determination as to proper interpretation of prohibition..... 24
Procedure
Proceedings not judicial
Because proceedings by U.S. General Accounting Office are not comparable to judicial proceedings, Office does not settle claims and make determinations subject to "preponderance of the evidence," except as that term may be equated with clear and convincing evidence. Therefore, in absence of plain and convincing proof beyond reasonable controversy that records prepared by Army at port of origin in U.S. of shipment of rice to overseas destination was in error *prima facie* case in favor of Govt. has not been overcome and ocean carrier is liable for shortage of rice at destination of shipment..... 638
GENERAL AGREEMENT ON TRADES AND TARIFFS
Bid evaluation effect
Buy American Act
Although classifying individual items to be furnished under single contract to Govt. construction contractor as separate and products for purpose of Buy American Act evaluation may be contrary to intent of General Agreement on Trades and Tariffs (GATT), conflict is not for

GENERAL AGREEMENT ON TRADES AND TARIFFS—Continued Page
Bid evaluation effect—Continued
Buy American Act—Continued
consideration in determining lowest evaluated bid. Under competitive bidding procedures, bids are to be evaluated only on basis of factors made known to all bidders in advance and invitation did not warn bidders to prepare their bids in light of GATT and its possible impact on Buy American Act evaluation; also applicability of GATT is not matter of procurement responsibility but rather is for consideration by U.S. Tariff Commission 384
GRANTS
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To States. (*See* States, Federal aid, grants, etc.)
GRATUITIES
Reenlistment bonus
Critical military skills
Training leading to a commission
Reenlistment for the purpose of training
An enlisted member of Coast Guard who is discharged and reenlists while training under Officer Candidate School program is not entitled to variable reenlistment bonus provided in 37 U.S.C. 308(g) incident to reenlistment, member having reenlisted not for purpose of continuing to serve in his critical skill but to make him eligible to participate in officer training program, which upon successful completion qualifies him for appointment as commissioned officer in Coast Guard 624
Coast Guard member possessing skills in critical short supply who reenlists for purpose of participating in training leading to commission under Aviation Cadet or Officer Candidate School programs if he did not complete training and is returned to duty in his critical skill would not be entitled to receive variable reenlistment bonus prescribed in 37 U.S.C. 308(g) to induce reenlistment and avoid loss of critical skills to service. Entitlement to bonus vesting at time of reenlistment, member did not become entitled to bonus incident to reenlistment for purpose of participating in officer training program and any subsequent change in duty assignment would not create entitlement to variable reenlistment bonus 624
Reenlistment prior to approval of training
A member of Coast Guard with critical skill who when discharged upon expiration of enlistment reenlists before application for training leading to commission under Aviation Cadet or Officer Candidate School programs is approved is entitled to initial and subsequent installments of variable reenlistment bonus prescribed in 37 U.S.C. 308(g), member's reenlistment obligating him prior to selection for training to serve for period of reenlistment contract, his right to bonus which vested at time of *bona fide* reenlistment is not changed by subsequent selection for training. However, if member had been accepted for training prior to reenlistment, fact that he had not received orders to training site would not operate to entitle him to variable reenlistment bonus 624
The fact that enlisted member of Coast Guard who is being considered for officer training receives early discharge pursuant to 14 U.S.C. 370

GRATUITIES—Continued Page
Reenlistments bonus—Continued
Critical military skills—Continued
Training leading to a commission—Continued
Reenlistment prior to approval of training—Continued
does not defeat right upon reenlistment to variable reenlistment bonus provided in 37 U.S.C. 308(g) as inducement to first-term enlisted members possessing skills in critically short supply to reenlist so skills will not be lost to service, member's discharge having been without prejudice to "any right, privilege, or benefit" that he would have received—except pay and allowances for unexpired portion of reenlistment—or "to which he would thereafter become entitled" had he served his full term. The awareness of member shortly after reenlistment of acceptance for training would not preclude payment of bonus---------- 624

Entitlement to variable reenlistment bonus provided in 37 U.S.C. 308(g) to induce members possessing skills in critically short supply to reenlist so skills would not be lost to service vesting at time of reenlistment, members currently serving as officers in Coast Guard who had reenlisted prior to selection for officer training and under circumstances entitling them to bonus may continue to be paid yearly installments of bonus, subsequent appointment of member as officer not operating to curtail entitlement to further annual installment of bonus---------- 624

Extension of enlistment
Army and Air Force personnel

In determining entitlement to reenlistment bonus for Army and Air Force personnel under act of Jan. 2, 1968, which authorizes extension of enlistments not to exceed 4 years, not only for Navy and Marine Corps members but for first time for Army and Air Force members who prior to act were limited under 10 U.S.C. 3263 and 8263 to enlistment extension "for a period of less than one year," act does not operate to require combination of enlistment extensions entered into before and on or after Jan. 2, 1968, due to fact that Army and Air Force members could not prior to Jan. 2, 1968 qualify for reenlistment bonus authorized by 37 U.S.C. 308 for reenlistments or voluntary extensions of enlistments for "at least 2 years"---------- 127

Six months' death
Inactive duty training
Direct traveling requirement

The six months' death gratuity prescribed in 32 U.S.C. 321(a)(3) for payment to beneficiary of member of National Guard who dies from injury incurred while traveling directly to or from inactive training is not payable incident to death of member who when dismissed from regularly scheduled drill proceeded to truck stop in direction away from his residence where he stayed approximately 1 hour, and then while en route to his home was involved in accident that resulted in his death, as member is not considered to have been traveling directly from training place to his home, either in point of time or route, when accident occurred and, therefore, case does not fall within meaning of sec. 321(a)(3) and implementing regulations---------- 762

GUAM Page

Junior Reserve Officers' Training Corps Programs

Establishment

The phrase "throughout the Nation" as used in 10 U.S.C. 2031(a) authorizing establishment and maintenance of Junior Reserve Officers' Training Corps units may be considered to include unincorporated territory of Guam, absent indication in legislative history that phrase was used in restrictive or limited sense and in view of indication that expansion of Junior ROTC programs was intended. Therefore, appropriated funds may be used to support Junior ROTC unit if established at George Washington Senior High School, Mangilao, Guam, an instrumentality of unincorporated territory of Govt. of Guam established, maintained, and operated pursuant to authority in sec. 29(b) of Organic Act of Guam ---------- 796

Employment of retired members of uniformed services by secondary school that is instrumentality of unincorporated territory of Govt. of Guam as administrators or instructors in Junior Reserve Officers' Training Corps program is not prohibited under dual pay and dual employment provisions of 5 U.S.C. 5531–5533, absent indication in Dual Compensation Act or its legislative history of intent to expand coverage of act to offices or positions in territories which had not been included in previously existing dual compensation laws that were repealed. In addition Reserve Officers' Training Corps Vitalization Act of 1964 (10 U.S.C. 2031(d)) authorizes employment of retired members in Junior ROTC programs and prescribes basis for payment to members---------- 796

HUSBAND AND WIFE

Divorce

Children

Support

The fact that officer of uniformed services supports his children residing with former wife who had been awarded their custody in divorce decree does not entitle him to basic allowance for quarters on their behalf, officer having remarried and having been assigned Govt. quarters at overseas station, from which dependents were not precluded by "competent orders." Divorce decree of court having jurisdiction of children is not "competent authority" contemplated by 37 U.S.C. 403(d) in providing that member assigned Govt. quarters may not be denied basic allowance for quarters if, because by orders of competent authority dependents are prevented from occupying assigned quarters---------- 28

INSANE AND INCOMPETENTS

Military personnel

Absence without leave

Marine Corps member who while in unauthorized absence status is confined and later indicted by civilian authorities for violating 18 U.S.C. 2312 (transporting in interstate commerce stolen motor vehicle or aircraft), and who on basis of court finding of mental incompetency is retained in Medical Center for Federal Prisoners until discharge of indictment and return to military control, is not entitled to credit in final military pay record with pay and allowances for period of absence—Oct. 5, 1962 to Feb. 9, 1965—in view of Commandant of Corps determination under par. 044253, Navy Comptroller Manual, that absence may not be excused as unavoidable, and that member's absence in hands of civil authorities must be considered "time lost" for pay purposes---------- 792

INTERIOR DEPARTMENT Page

Wildlife projects

Reimbursement

Conveyance of land purchased by State of Kentucky from General Services Administration for recreational purposes pursuant to authority in 50 U.S.C. 1622(h), which provides for sale of land at 50 percent of its fair value and for its reversion to Govt. in event land is not used for purpose of conveyance is not grant of Federal funds precluding reimbursement to State of 75 percent of cost of project under terms of Federal Aid in Wildlife Restoration Act of 1937—project approved by Secretary of Interior—and fact that land was purchased for less than its "fair value" does not prohibit reimbursement, purchase price paid for land constituting cost of project 161

JOINT VENTURES

Independent debt of one coventurer

Although general rule is that funds due joint venture—form of limited partnership subject generally to laws of partnership—may not be set off to satisfy independent prior debt of one of coventurers, even if set-off is only against his interest in partnership claim, rule is negated when all parties to joint venture agree subsequent to contract performance that joint venturers will pursue and obtain payment from Govt. as individuals. Therefore, amount due under agreement to partner indebted to Govt. for damages assessed under his defaulted, individual contract with Govt. may be set off to partially liquidate that indebtedness, notwithstanding pursuant to accounting procedure, indebtedness had been written off as uncollectible 365

Set-off. (*See* Set-Off, mutuality of parties, etc., joint ventures)

LEASE-PURCHASE PROGRAM

Rent

Appropriation obligation for lease term

Lowest bid submitted under second-step of two-step advertised procurement for automatic hydraulic radio reporting system to aid in flood prediction exceeding allotted funds and no additional funds being obtainable, rejection of all bids by contracting officer who had been delegated 10 U.S.C. 2305(c) authority to cancel invitation when in public interest was proper, and issuance of 5-year lease purchase agreement under existing negotiated open end lease contracts was justified on basis of compliance with criteria prescribed in par. 1-317 of Armed Services Procurement Reg. and price and technical considerations. Although 5-year lease period violated secs. 3732 and 3679, R.S., because available funds would not cover total rental obligation, this basis of award having been assumed not to be legally objectionable, contract term may be completed 471

LEASES

Automatic Data Processing Systems. (*See* Equipment, Automatic Data Processing Systems, leases)

District of Columbia Government (*See* District of Columbia, leases, concessions, rental agreements, etc.)

Post Office Department. (*See* Post Office Department, leases)

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Rent
Limitation
Fair market value determination
Propriety of procurement procedure
Failure to furnish incumbent lessor with request for proposals and to provide opportunity to compete as required by sec. 1–3.101(c) and (d) of Federal Procurement Regs. because based on other than then current property appraisal previously proposed rental increase to cover completing air conditioning of building occupied by Veterans Administration would cause rental to exceed 15 percent of fair market value at date of lease limitation imposed by sec. 322 of Economy Act, 40 U.S.C. 278a, was not in accord with procurement procedure envisioned by regulations, for lessor should have been informed rent proposed due to air conditioning improvement would exceed statutory limitation and given opportunity to negotiate rental downward. Successful lessor having incurred substantial expenses, award will not be disturbed, but recurrence of similar situation should be precluded---------- 722
Repairs and improvements
Lessor's liability
The lessor of facilities occupied as post office obligated to repaint interior of building under "good repair" provision of lease, upon lessor's refusal to assume responsibility, Post Office Department properly proceeded to have painting performed under contract and under its common law right of set-off to withhold cost from rental payments due. The action of Department not having been based on finding that premises were "unfit for use," remedy to Govt. was not termination of lease---------- 289
LEAVES OF ABSENCE
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Return to duty requirement
Advancement of annual leave to employee missing at sea at least a month contravenes rule that employee may not be advanced annual or sick leave if it is known at time of advance that he will not return to duty. While it may not have been known for certainty at time of approving advance of annual leave to missing employee that he would return to duty, available information indicated his return was remote possibility, and court subsequently determining employee was lost at sea, presumption of life was conclusively rebutted and payment of salary for period of annual leave advanced may not be certified------- 676
Annual
Accrual
Employees "stationed" outside United States
Recruited overseas
A postal employee whose official duty station continues to be Ponce, Puerto Rico, while training in U.S. for duties of postal inspector and assignment to duty at New York, N.Y., upon transfer to San Juan, P.R., is not eligible to accrue 45 days of annual leave authorized by 5 U.S.C. 6304 for individuals recruited or transferred from U.S. or its territories or possessions for employment outside area of recruitment or from which transferred. Although employee was assigned to New York

LEAVES OF ABSENCE—Continued Page

Annual—Continued

Accrual—Continued

Employees "stationed" outside United States—Continued

Recruited overseas—Continued

he did not change his permanent residence from Puerto Rico to any point in U.S. where he would be expected to take home leave and, therefore, no basis exists for permitting employee to accumulate annual leave in excess of 30 days fixed by Annual and Sick Leave Act of 1951, as amended ---------- 437

Transfers

Different leave systems

When civilan employee transfers between positions under different leave systems without break in service, employee may transfer all accumulated and currently accrued annual leave to his credit as of date of transfer under authority of 5 U.S.C. 6308. The aggregate leave transferred that is not in excess of maximum limitation allowable under leave system from which employee transferred shall constitute his leave ceiling, ceiling that will remain to employee's credit until reduced under conditions prescribed in sec. 208(a) of Annual and Sick Leave Act of 1951. Therefore, nurses of Veterans Administration under Title 38 leave system will not be required to forfeit annual leave when reassigned to General Schedule positions. 33 Comp. Gen. 85; *id.* 209, modified..... 212

An employee transferring without break in service whether between Federal service employment in U.S. Dept. of Agriculture and Agricultural Stabilization and Conservation Service county committee employment or from county committee employment to Dept.'s Federal service may transfer his annual and sick leave accruals to new position, Pub. L. 90-367, approved June 20, 1968, permitting reciprocal transfer of leave between county committee and departmental services..... 486

An Agricultural Stabilization and Conservation Service county committee employee moving to U.S. Dept. of Agriculture Federal service position, upon subsequent transfer to other Federal employment may transfer his annual and sick leave accruals, including leave earned in county committee office. The leave accruals transferred from county committee service to Dept.'s Federal service under authority of Pub. L. 90-367, approved June 29, 1968, may be treated as earned in Federal employment for transfer purposes to other Federal employment..... 486

Court

Jury duty

Temporary employees

An employee who had served on jury duty both under his current 4-year term appointment made pursuant to sec. 316.301 of Civil Service Commission regulations and under prior 1-year temporary limited appointment authorized as prescribed by sec. 316.401 of regulations may be granted court leave for jury duty performed under both appointments, 5 U.S.C. 6322 authorizing that compensation of "any employee of the United States or the District of Columbia" shall not be diminished by reason of jury service in any State court or court of U.S., restriction on granting of leave of absence with pay to temporary employees for for purpose of serving on jury duty is not required. 38 Comp. Gen. 307; 20 *id.* 133; *id.* 145; and B-127804, dated May 11, 1956, modified..... 630

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Involuntary leave
Removals, suspensions, etc.
Recrediting of leave
Under 5 U.S.C. 5596(b), employee who is entitled to back pay and other restoration benefits may not be credited with leave in amount that would cause amount of leave to his credit to exceed maximum authorized by law or regulation. Therefore, in reconstructing annual leave account of employee separated Feb. 20, 1968, after suspension period that was canceled, who at time of suspension May 1, 1967, had leave ceiling of 240 hours and 290 hours of leave to his credit, leave in excess of 240 hours ceiling is forfeited and, although employee accrued 32 hours of annual leave from Jan. 1 to Feb. 20, 1968, his lump-sum leave payment under 5 U.S.C. 5551(a) is limited to 240 hours, and forfeiture of leave may not be retroactively substituted for corresponding portion of suspension period ---------- 572
Military personnel
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"Continuous period" interruptions
Absences
The hostile fire pay prescribed in 37 U.S.C. 310(a) for members on permanent duty in designated hostile fire area accruing on monthly basis, "continuous period" of at least 120 days for accruing excess leave authorized in 10 U.S.C. 701(f) in area in which member is entitled to hostile fire special pay continues through absences from designated area for periods of less than calendar month ---------- 546
Hospitalization
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Leave accounting
Where member of uniformed services has not served continuous period of 120 days in hostile fire area for entitlement to accumulate leave in excess of 60 days authorized in 10 U.S.C. 701(b), as provided by Pub. L. 90–245, approved Jan. 2, 1968 (10 U.S.C. 701(f)), and leave accounting period is occasioned by discharge, release, resignation, death, or day prior to date first extension of enlistment takes effect, tentative accrual of leave in excess of 60 days may be entered on member's leave account, and if he fails to meet 120 days qualifying period, appropriate adjustment would be required incident to deletion of excess leave accrual entry ---------- 546
Maximum accumulation
In administering accumulation of leave prescribed by Pub. L. 90–245, approved Jan. 2, 1968 (10 U.S.C. 701(f)), member of uniformed services may not at end of leave accrual period have credit or benefit from more

LEAVES OF ABSENCE—Continued Page

Military personnel—Continued

Excess leave accrual—Continued

Maximum accumulation—Continued

than 90 days leave and, therefore, when member is discharged and reenlists before end of fiscal year following fiscal year in which accrual of excess leave terminates, he may be paid for 60 days of leave and credited with excess leave accrued, and if excess leave is not used during period ending with end of fiscal year after fiscal year in which member's service entitling him to leave terminates, excess leave should be deleted from leave account of member 545

Qualifying period

In establishing excess leave accrual authorized by Pub. L. 90-245, approved Jan. 2, 1968 (10 U.S.C. 701(f)), for members of uniformed services on active duty for continuous period of at least 120 days in area in which they are entitled to hostile fire pay prescribed in 37 U.S.C. 310(a), leave earned prior to Jan. 2, 1968 may not be used, act by its specific terms "applies only to active duty performed after Jan. 1, 1968." Therefore, member with 60 days accrued leave on June 30, 1967, who arrives in hostile fire area on Jan. 1, 1968 and takes no leave through June 30, 1968, does not commence to accumulate excess leave until Jan. 1, 1968, and by June 30, 1968 he would have accumulated only 75 days leave—60 days ordinary leave, plus 15 days accrual for Jan. 1 to June 30, 1968 period 546

Use period determinations

In determining fiscal year in which member's service in hostile area terminates for purpose of using excess leave accumulation authorized in 10 U.S.C. 701(f), there is no significance to date member exited designated hostile fire area for hospitalization, but for consideration is date of release from hospital or end of third month after month in which member was injured or wounded—37 U.S.C. 310(a) prescribing 3-month limitation on payment of hostile fire pay during period of hospitalization. Therefore, member wounded June 15, 1968, and released from hospital on July 20, 1968, would have until June 30, 1970 to use accrued leave in excess of 60 days 546

Use requirement

The authority in Pub. L. 90-245, approved Jan. 2, 1968 (10 U.S.C. 701(f)), permitting member who serves on active duty for continuous period of at least 120 days in area in which he is entitled to hostile fire pay under 37 U.S.C. 310(a) to accumulate leave in excess of 60 days (10 U.S.C. 701(b))—not to exceed 90 days—does not provide for payment of excess leave but only for its use before end of fiscal year after fiscal year in which member's service is terminated. Therefore, leave account of member serving in Vietnam who on Aug. 1, 1969, upon expiration of enlistment is paid for 60 days leave, and reenlisting immediately is credited with 30 days excess leave, is for adjustment at time of his death on Sept. 1, 1969, on basis of 2½ days ordinary leave earned before member's death and adjustment may not include unused excess leave 546

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Under act of Jan. 2, 1968, which authorizes extension and reextensions of terms of enlistment for not to exceed 4 years by members of all services, and provides entitlement to same pay and allowances as though member had reenlisted, and considers that all extensions of enlistment are one continuous extension, accrued leave settlement is restricted to first extension of enlistment. In absence in legislation prior to 1968 act of any provision granting same benefits upon reextensions of enlistment as is provided for extension of enlistment, language of 1968 act is construed as restricting accrued leave settlement of first extension of enlistment---------- 127
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Pay claims. (*See* Pay, absence without leave)
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Advancement of annual leave to employee missing at sea at least a month contravenes rule that employee may not be advanced annual or sick leave if it is known at time of advance that he will not return to duty. While it may not have been known for certainty at time of approving advance of annual leave to missing employee that he would return to duty, available information indicated his return was a remote possibility, and court subsequently determining employee was lost at sea, presumption of life was conclusively rebutted and payment of salary for period of annual leave advanced may not be certified---------- 676
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Different leave systems
Same agency
An employee transferring without break in service whether between Federal service employment in U.S. Dept. of Agriculture and Agricultural Stabilization and Conservation Service county committee employment or from county committee employment to Dept.'s Federal service may transfer his annual and sick leave accruals to new position, Pub. L. 90–367, approved June 20, 1968, permitting reciprocal transfer of leave between county committee and departmental services---------- 486
An Agricultural Stabilization and Conservation Service county committee employee moving to U.S. Dept. of Agriculture Federal service position, upon subsequent transfer to other Federal employment may transfer his annual and sick leave accruals, including leave earned in county committee office. The leave accruals transferred from county committee service to Dept.'s Federal service under authority of Pub. L. 90–367, approved June 29, 1968, may be treated as earned in Federal employment for transfer purposes to other Federal employment---------- 486
Transfers
Different leave systems
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Without pay

Effect on dual compensation restriction

Retired Regular Air Force officer employed as civilian with Federal Govt. and subject to retired pay reduction pursuant to 5 U.S.C. 5532, who is in leave-without-pay (LWOP) status for 12-day period—Monday, Aug. 7 through Aug. 18, 1967—is entitled to full military retired pay for Saturday and Sunday occurring within LWOP period during which officer is not entitled to civilian compensation. However, officer's retired pay is subject to reduction for Saturdays and Sundays, Aug. 5, 6, 19, and 20, 1967, occurring before and after LWOP period, days that stand alone and do not involve any loss of civilian compensation and which fall within "full calendar period" of permanent civilian employment prescribed by 5 U.S.C. 5532(b)---------- 152

Retired Regular Air Force officer employed as civilian for "full calendar period" May 7, 1966, to Apr. 14, 1967, during which time he is subject to reduction in retired pay pursuant to 5 U.S.C. 5532, who is in leave-without-pay (LWOP) status 1 hour on Friday, Oct. 28, and on following Monday, Oct. 31, is not entitled to full retired pay for intervening Saturday and Sunday, officer having received 7 hours civilian compensation for Friday is considered to have been in receipt of civilian compensation for day, thus subjecting him to reduction in retired pay pursuant to 5 U.S.C. 5532(b), and his LWOP status commencing following Monday, he is not entitled to full retired pay for Saturday and Sunday that do not fall within LWOP period---------- 152

A leave-without-pay (LWOP) status on 31st day of Oct. 1967 does not entitle retired Regular Air Force officer employed as civilian and subject to reduction in retired pay pursuant to 5 U.S.C. 5532, to additional amount of retired pay. Military retired pay accrues on monthly basis, computed as if each month had 30 days and no retired pay accrues on 31st day of any month. Therefore, officer accrued full month's retired pay for month of October, whether or not he was in LWOP status from his civilian Federal position on 31st of October---------- 152

Under rule that retired pay of retired Regular officer is not subject to reduction under 5 U.S.C. 5532 for absences from Federal civilian position on Saturdays and Sundays that occur within leave-without-pay (LWOP) period, no loss of compensation being involved, retired Regular Air Force officer who is absent in LWOP status on four separate occasions from civilian position he occupied from May 7, 1966, through Apr. 13, 1967—considered "full calendar period" within phrase contained in 5 U.S.C. 5532(a)—is only entitled to full retired pay for Saturday and Sunday that occurred within one of LWOP periods, and no adjustment of retired pay is required for Saturdays and Sundays that occurred before and after other LWOP periods---------- 152

MANPOWER DEVELOPMENT AND TRAINING

(*See* **Unemployment Retraining**)

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Subsidies

Operating-differential

Recapture of earnings

The "actual tax" doctrine used by Maritime Subsidy Board in computing "net earnings" of American vessel operators subsidized under Merchant Marine Act, 1936, as amended, for purpose of applying revenue and recapture provisions of operating-differential subsidy contracts under which investment credit against Federal income tax established by 1962 Revenue Act is not considered applicable to subsidized operators, does not contravene sec. 203(e) of 1964 Revenue Act prescribing "Treatment of Investment Credit by Federal Regulatory Agencies," as Board in administering operating differential subsidy contracts is not regulatory agency within meaning of sec. 203(e), and, therefore, is without jurisdiction with respect to taxpayer that uses investment credit to reduce Federal income tax ---------- 250

Vessels

Construction

Prohibitions

Subcontracting with Canadian firm of welding and assembly services for submarine hull cylinders under prime fixed-price incentive contract that contains restriction on construction of major vessel components in foreign shipyard pursuant to Tollefson Amendment in Defense Dept. appropriation acts, as well as Byrnes Amendment barring complete construction of naval vessels in foreign shipyards, is not prohibited. The hull components constituting less than 10 percent of total value of submarine, and work to be performed in foreign shipyard but 39 percent of value of hull, welding and assembly services proposed are not considered vessel construction contemplated by appropriation act prohibitions and, therefore, Navy may consent to subcontracting of services to Canadian firm ---------- 709

MEALS

Training periods

Propriety

Civilian employee coordinator of seminar for purpose of training employees of International Agricultural Development Service who paid cost of meals for non-Govt. employee guest speakers and employees of Service attending seminar conducted at headquarters may be reimbursed for expense incurred upon determination by appropriate authority that cost of meals furnished non-Govt. employees is authorized under 5 U.S.C. 4109; that one Service employee participated as seminar speaker; and that business of seminar was conducted during mealtime requiring attendance of Service employees. Pursuant to sec. 6.7 of Standardized Govt. Travel Regs., any per diem payments authorized should be reduced ---------- 185

MEDICAL TREATMENT Page

Military personnel

Prolonged treatment

Dislocation allowance entitlement

"Permanent station" meaning place where member of uniformed services is assigned for duty, definition of permanent station in par. M1150 10 of Joint Travel Regs. may not be broadened to include hospital in U.S. to which member is transferred for prolonged hospitalization from either duty station or other hospital in U.S., and, therefore, chapter 9 of regulations may not be amended to permit payment when member is so hospitalized of dislocation allowance provided in 37 U.S.C. 407(a)(1) for members whose dependents make authorized move "in connection with his change of permanent station." However, chapter 9 may be amended to authorize allowance on same basis dependents and baggage are transported to hospital, that is "as for a permanent change of station" upon issuance of certificate of prolonged treatment 603

MILEAGE

Travel by privately owned automobile

Dependents

More than one automobile

An employee who unable to locate permanent quarters incident to change-of-duty station within U.S., occupies temporary quarters in excess of 30 days allowable under sec. 2.5b(1) of Bur. of Budget Circular No. A–56 and incurs additional expenses for subsequent unauthorized travel of wife to new station in second privately owned automobile, may not be paid temporary quarters and subsistence allowance for 60-day period prescribed by sec. 2.5b(2) for transfers outside U.S., nor paid more than 8 cents per mile authorized for travel of the employee and his wife in one automobile. Even if additional amounts claimed were allowable, no mistake having been made in preparation of employee's travel orders, there would be no authority to amend orders retroactively 119

Meter readings

Reimbursement basis

Secs. 2.1 and 2.2 of Bur. of Budget Circular No. A–56, authorizing reimbursement of transportation costs and other travel expenses incurred by employee and his family in accordance with Travel Expense Act of 1949, as amended, and Standardized Govt. Travel Regs. (SGTR), employee who incident to permanent change of station is authorized travel with his wife by privately owned automobile to new station and return to seek permanent residence quarters is entitled to mileage under sec. 3.5c(1) of SGTR for distance traveled as shown in standard highway mileage guides or by speedometer reading, and if there is no substantial deviation between the two, mileage claimed by employee may be allowed without explanation 276

Rates

Employee and one family member

An employee and his wife who traveled by privately owned automobile in performance of authorized round trip between old and new official station to seek permanent residence quarters is entitled to reimbursement under authority prescribed in sec. 2.3a of Bureau of Budget Circular No. A–56 at rate of 8 cents per mile, rate specified in sec. 2.3a(1) for employee traveling with one member of his family in privately owned automobile 276

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Allowances
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Quarters. (*See* **Quarters Allowance**)
Station allowances. (*See* **Station Allowances, military personnel**)
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Annuities. (*See* **Pay, retired, annuity elections for dependents**)
Dislocation allowance. (*See* **Transportation, dependents, military personnel, dislocation allowance**)
Proof of dependency for benefits
Children
An unmarried officer of uniformed services who although acknowledging paternity of illegitimate child and contributing to support of child has not established home in which child lives with him as member of his family may not be credited with increased quarters allowance on account of child, law of State of California, place of birth of child and residence of all parties requiring in addition to acknowledging illegitimate child that father receive child into his family and treat child as his legitimate offspring ---------- 311
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Transportation. (*See* **Transportation, dependents, military personnel**)
Disability retired pay. (*See* **Pay, retired, disability**)
Dislocation allowance
Members with dependents. (*See* **Transportation, dependents, military personnel, dislocation allowance**)
Members without dependents
Quarters not assigned
Dislocation allowance authorized by Pub. L. 90–207 (37 U.S.C. 407(a)) for members without dependents who upon permanent change of station are not assigned Govt. quarters is not payable to either of two crews of nuclear-powered submarine—permanent station of both crews—as on-duty crew is furnished quarters aboard submarine and off-crew ashore for training and rehabilitation is considered to be at temporary duty station, whether or not submarine is at home port. Therefore, members who incident to transfer aboard submarine report to temporary station locations ashore where they do not perform basic duty assignments are not entitled to dislocation allowance, nor is allowance payable to members reporting aboard submarine when first relieved with on-ship crew for training and rehabilitation---------- 480

MILITARY PERSONNEL—Continued Page
Dislocation allowance—Continued
Members without dependents—Continued
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Although member of uniformed services without dependents who upon reporting to submarine under permanent change-of-station orders is assigned quarters on board submarine is not entitled to dislocation allowance authorized in 37 U.S.C. 407(a) for members without dependents who upon permanent change of station are not assigned Govt. quarters, he would be entitled to allowance if he reports to nuclear-powered submarine that is undergoing overhaul or repair at its home port or home yard and quarters aboard submarine are uninhabitable, member is not assigned quarters ashore, and lodging accommodations pursuant to 10 U.S.C. 7572(a) are not furnished to member ---------- 480
Army officer who upon completion of tour of duty in restricted overseas area is not assigned Govt. quarters incident to permanent change of station but rejoins his dependents who had remained in family residence in U.S. is not entitled to dislocation allowance prescribed by 37 U.S.C. 407(a) for "member without dependents," as term means member that is not entitled to transportation of his dependents, whereas officer is entitled to transportation of his dependents between place at which they were located when he received his orders and his new duty station, regardless of prohibition against their travel at Govt. expense to and from U.S., entitlement that is not negated by fact place where his dependents were located and place to which they were entitled to transportation are same ---------- 782
Divorce. (*See* Husband and Wife, divorce)
Dual benefits
Retainer pay and civilian disability compensation
Limiting application of rule in *Mulholland* v. *U.S.*, 139 Ct. Cl. 507, that member of Fleet Reserve may receive retainer pay concurrently with civilian disability compensation to periods prior to 1952, will no longer be required in view of holding in *Merlyn E. Horn* v. *U.S.*, 185 Ct. Cl. 795, in which court recognized plaintiff's claim for retainer pay withheld after 1952 for period during which he received disability compensation for injury sustained in civilian position. Therefore, retainer pay withheld from member injured in 1966 and awarded 288 weeks of civilian disability compensation may be released to him and future monthly payments of retainer pay due in his and other similar cases may be paid concurrently with civilian disability compensation. ---------- 515
Dual payments
Military pay and foreign service annuity
Annuity payments to retired foreign service officer who is recalled to active duty as officer in U.S. Naval Reserve are not affected by recall absent provision in 22 U.S.C. 1112 that limitation on concurrent receipt of annuity and civilian compensation by reemployed foreign service officer in Federal Govt. service is intended to apply when retired foreign officer is recalled to active military duty and, therefore, annuitant may continue to receive foreign service annuity while serving in Naval Reserve ---------- 131
Family separation allowances. (*See* Family Allowances, separation)

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Foreign citizenship or service

Effect on retired pay

Retired pay benefits authorized for non-Regular service members of uniformed services in chapter 67 of Title 10, U.S. Code, viewed as pension, entitlement to retired pay under 10 U.S.C. 1331 is not dependent on continuation of military status. Therefore person eligible to retired pay at age 60 as provided in sec. 1331 who prior to attaining age 60 acquires foreign citizenship and/or status in foreign military service does not lose entitlement to retired pay at age 60, nor is person in receipt of retired pay pursuant to sec. 1331 required to forfeit such pay if he becomes citizen of foreign country and/or enters armed forces of foreign country, provided foreign country is not one that is engaged in hostile military operations against U.S---------- 699

Gratuities. (*See* Gratuities)

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Storage. (*See* Storage, household effects, military personnel)

Insane and incompetents. (*See* Insane and Incompetents, military personnel)

Leaves of absence. (*See* Leaves of Absence, military personnel)

Medical officers

Pay. (*See* Pay, medical and dental officers)

Medical treatment. (*See* Medical Treatment, military personnel)

Medically unfit

Status

Member of uniformed services who after having performed active duty is found to have been medically unfit at time of entry into service is not deprived of right to military pay and allowances or of status of being entitled to basic pay because of administrative failure to discover his physical condition, absent affirmative statutory prohibition against induction of persons on basis of physical or mental disqualification, and in view of fact 50 U.S.C. App. 454(a) provides no person shall be inducted into armed services until his acceptability has been satisfactorily determined, and sec. 456(h) prescribes that physical or mental condition constitutes basis for deferment from induction rather than absolute disqualification---------- 377

Medically unfit persons inducted into service who perform training and service, absent statutory prohibition are entitled to full pay and allowances from time of entry on active duty through date they are released from military control, and they may receive any unpaid pay and allowances which accrued prior to and including date of release from military control. In addition, member may be furnished transportation in kind or monetary allowance in lieu thereof to home of record upon release from military control---------- 377

Member of uniformed services who at time of induction into military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of preexisting medical condition during active service has not met requirement in 10 U.S.C. 1201 and 1203 that physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from service. However, entitlement to such benefits accrues to member experiencing aggravation of his physical condition by active

MILITARY PERSONNEL—Continued Page

Medically unfit—Continued

Status—Continued

service or acquiring new or additional unfitting condition, even if unfitting condition is incurred by member who did not meet procurement medical fitness standards at time of induction, but did then meet retention fitness standards---------- 377

Missing, interned, etc., persons

Retired members

Retired pay checks of Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside continental U.S. by private firm are to be sent to bank in U.S., upon his alleged capture by enemy forces may not be issued to bank or any other person on his behalf for support of his family. The right of retired member of uniformed services terminates upon death and power of attorney executed by him is automatically revoked by his death, whether or not fact of death is known, and in absence of statutory authority providing otherwise, and because presumption of death after lapse of 7 years rule is not applicable, payment of retired pay on behalf of missing sergeant must be held in abeyance until it is established that he is not dead---------- 706

National Guard. (*See* National Guard)

Pay. (*See* Pay)

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

Promotions

Pay. (*See* Pay, promotions)

Record correction

Payment basis

Interim civilian earnings

When military or naval records of members or former members of uniformed services are corrected pursuant to 10 U.S.C. 1552, deduction of interim earnings received from civilian employment should be made from back pay and allowances granted. Correction of records law is not intended to place members or former members whose records are corrected in a more advantageous position than members who remained in service and received like pay and allowances, but no additional civilian earnings. Issuance of regulations to require deduction of interim civilian earnings from payment of back pay and allowances will provide uniform treatment of military and civilian personnel in making adjustments for loss of compensation arising out of erroneous or illegal separation or suspension from service---------- 580

Retired pay

Disability

The court in *Lerner* v. *U.S.*, 168 Ct. Cl. 247, decided Dec. 11, 1964, having established right of plaintiff to disability retirement pay effective Dec. 23, 1943, correction of military records, approved Dec. 4, 1967, did not change disability retired status of plaintiff—Army officer—and, therefore, he is not entitled to disability retired pay for period Dec. 23, 1943, to July 31, 1953, period barred by reason that under 28 U.S.C. 2501, payment of judgment was restricted to period July 1, 1957, to Dec. 11, 1964, and under 31 U.S.C. 71a, payment of claim received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from day of judgment---------- 235

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Disability—Continued
The general rule that no action will be taken by U.S. GAO on claim involved in suit or controversy while judicial determination is pending has no application to Army officer seeking injunctive relief incident to correction of military records rather than money judgment. Therefore request for decision on legality of payment of disability retired pay that is based on administrative action taken subsequent to date court action was filed will be considered and merits of officer's claim for disability determined 235
Retired pay of Air Force officer retired effective Apr. 1, 1963, who by correction of military records is placed on temporary disability retired list as of Mar. 31, 1963, with entitlement to disability retired pay effective Apr. 1, 1963, from which list he is removed on Mar. 11, 1968, properly was for computation under sec. 5(a)(1) and not 5(a)(2) of Uniformed Services Pay Act of 1963, officer's entitlement to retired pay on Apr. 1, 1963 not having occured by force of Uniform Retirement Date Act, but by action of Secretary, and officer, therefore, was not overpaid retired pay commencing Oct. 1, 1963, computed at 75 percent of monthly basic pay of his grade fixed by 1963 pay act 329
Reenlistment bonus. (*See* Gratuities, reenlistment bonus)
Removals, suspensions, etc.
Back pay
Civilian employment earnings
When military or naval records of members or former members of uniformed services are corrected pursuant to 10 U.S.C. 1552, deduction of interim earnings received from civilian employment should be made from back pay and allowances granted. Correction of records law is not intended to place members or former members whose records are corrected in a more advantageous position than members who remained in service and received like pay and allowances, but no additional civilian earnings. Issuance of regulations to require deduction of interim civilian earnings from payment of back pay and allowances will provide uniform treatment of military and civilian personnel in making adjustments for loss of compensation arising out of erroneous or illegal separation or suspension from service 580
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The phase "throughout the Nation" as used in 10 U.S.C. 2031(a) authorizing establishment and maintenance of Junior Reserve Officers' Training Corps units may be considered to include unincorporated territory of Guam, absent indication in legislative history that phrase was used in restrictive or limited sense and in view of indication that expansion of Junior ROTC programs was intended. Therefore, appropriated funds may be used to support Junior ROTC unit if established at George Washington Senior High School, Mangilao, Guam, an instrumentality of unincorporated territory of Govt. of Gaum established, maintained, and operated pursuant to authority in sec. 29(b) of Organic Act of Guam 796

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Employment of retired members of uniformed services by secondary school that is instrumentality of unincorporated territory of Govt. of Guam as administrators or instructors in Junior Reserve Officers' Training Corps program is not prohibited under dual pay and dual employment provisions of 5 U.S.C. 5531–5533, absent indication in Dual Compensation Act or its legislative history of intent to expand coverage of act to offices or positions in territories which had not been included in previously existing dual compensation laws that were repealed. In addition Reserve Officers' Training Corps Vitalization Act of 1964 (10 U.S.C. 2031(d)) authorizes employment of retired members in Junior ROTC programs and prescribes basis for payment to members.... 796
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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 performance of active duty or inactive duty training for any period of time is entitled to same pay and allowances which would be payable in same circumstances to member of Regular Navy of corresponding grade and length of service, but whether a disabled reservist who is physically qualified to perform duty of limited or restricted nature is entitled to pay and allowances, and if so whether entitlement would continue until he is qualified to perform full and specialized duties, cannot be answered categorically, since answer to each question would depend upon facts of particular case to which question relates..... 1
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A naval reservist who travels from and to his home under orders providing for 63-day recruiting assignment at temporary duty station and then under subsequent orders after 1-day break in service returns to temporary duty station for 150-day similar assignment is considered to have had one continuous period of service for determining entitlement to temporary duty allowance—per diem and monetary allowance in lieu of transportation—and under 37 U.S.C. 404(a) permitting payment of travel and transportation allowances to reservists ordered from home for short periods of active duty—less than 20 weeks—where mess and quarters are not provided, member may not be paid on basis that two periods of duty were authorized by separate orders..... 655

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Active *v.* inactive duty

Effect on travel rights

Reserve member who performs inactive duty training at headquarters before and after active duty training period is not precluded from entitlement to travel and transportation allowances authorized in 37 U.S.C. 404(a) because of prohibition in par. M6002–2 of Joint Travel Regs. against payment of travel or transportation allowances for inactive duty training at headquarters of Reserve component, absent requirement for performance of travel immediately preceding or upon detachment from active duty. For consideration, however, is availability of reservist for inactive duty training, 37 U.S.C. 204(v), providing that active duty status of reservist ordered to duty for more than 30 days is expanded to include travel time ---------- 78

Per diem

Joint Travel Regs. issued to implement travel and transportation allowances authorized in 37 U.S.C. 404(a)(4) (Pub. L. 90–168, Dec. 1, 1967) for members of uniformed services performing duty away from home may not be amended to deny payment of per diem to member of Reserve component performing annual active duty for training at same location where he normally performs inactive duty training, unless member does not incur quarters and subsistence costs but commutes from home to duty station, whether or not duty station and home are both located within boundaries of same city or other specified geographical area, for then reservist would not be "away from home" within meaning of 37 U.S.C. 404(a)(4) to entitle him to per diem for period of annual active duty for training ---------- 517

Members of Reserve components who are called to active duty or active duty for training, as distinguished from annual active duty for training under orders which require return home upon completion of duty, are entitled to per diem if called to duty from their home for tours of less than 20 weeks duration, 37 U.S.C. 404(a)(4) permitting payment of per diem to reservists ordered from their homes for short periods of less than 20 weeks of duty, irrespective of type of duty performed, if they are not furnished quarters and mess at training duty station ---------- 517

Denial of per diem under 37 U.S.C. 404(a)(4) to member of Reserve component is required only while he is on annual active duty for training when Govt. quarters and Govt. mess are available and, therefore, per diem may be paid to member of Reserve component while on annual active duty for training, active duty for training, or active duty at duty station where Govt. quarters or Govt. mess, or both, are not available even though duty is performed at same place and under same conditions as apply to reservist's inactive duty training ---------- 517

When members of Reserve components are on annual active duty for training, active duty for training, or active duty at locations away from home under orders which require return home upon completion of duty, they may only be paid per diem under 37 U.S.C. 404(a)(4) if Govt. quarters and mess are unavailable to them. Members of Regular services under par. M4205–5 of Joint Travel Regs. are not entitled to per diem

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Per diem—Continued
when furnished subsistence and quarters while on temporary duty, and any per diem paid is subject to reduction, and sec. 404(a)(4) contemplating equalization of reservist's entitlement to per diem with that of Regular member, payment of per diem to reservist on any other basis would result in unequal treatment 517
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Restrictions on movement of dependents in cases of active duty for less than 6 months and training duty for less than 1 year that are contained in Joint Travel Regs. are unaffected by addition of clause (4) (Pub. L. 90–168, Dec. 1, 1967) to 37 U.S.C. 404(a), and amendment of Joint Travel Regs. to authorize permanent change-of-station allowances for members of Reserve components instead of per diem whenever such alternative is considered appropriate is matter for determination by Secretaries concerned under authority of 37 U.S.C. 406(a) and (c) 517
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Payment of travel and transportation allowances prescribed in 37 U.S.C. 404(a) to retired members of uniformed services ordered to short periods of duty at station where mess and quarters are not prescribed is not precluded by lack of specific reference to retirees in legislative history of Pub. L. 90–168, dated Dec. 1, 1967, adding clause 4 to sec. 404(a) to provide travel and transportation allowances for Reserve components, 1967 act having been designed to authorize same entitlements to "all military personnel" when circumstances are essentially same. In amending Joint Travel Regs. to provide for payment to retired members, fact that per diem authorized by act is permanent station allowance that is payable only during periods of duty at permanent station is for consideration 553
Employment by educational institutions
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The phrase "throughout the Nation" as used in 10 U.S.C. 2031(a) authorizing establishment and maintenance of Junior Reserve Officers' Training Corps units may be considered to include unincorporated territory of Guam, absent indication in legislative history that phrase was used in restrictive or limited sense and in view of indication that expansion of Junior ROTC programs was intended. Therefore, appropriated funds may be used to support Junior ROTC unit if established at George Washington Senior High School, Mangilao, Guam, an instrumentality of unincorporated territory of Govt. of Guam established, maintained, and operated pursuant to authority in sec. 29(b) of Organic Act of Guam 796

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Termination of "AUS status" of member of uniformed services who after serving as commissioned officer in Army of U.S. from July 16, 1942, through Oct. 4, 1946, was retired for physical disability under act of Apr. 3, 1939, subsequently electing to have retired pay computed under sec. 402(d) of Career Compensation Act of 1949, and serving on active duty as Reserve officer from Sept. 6, 1951 until appointed as Regular officer on May 5, 1958, occurred Mar. 31, 1953 pursuant to Pub. L. 86–197, and not May 5, 1958, by reason of acceptance of appointment in Regular Army, where he is currently serving in rank of lieutenant colonel under temporary appointment pursuant to 10 U.S.C. 3442_____ 99
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Survivorship benefits. (*See* **Pay, retired, annuity elections for dependents**)

Temporary lodging allowances. (*See* **Station Allowances, military personnel, temporary lodgings**)

Training duty station

Status for benefits entitlement

Pub. L. 90–168 (37 U.S.C. 404(a)(4)) having as its purpose payment of extra expenses incurred during training periods by members of uniformed services or National Guard members while away from home, definition in par. M1150–10c of Joint Travel Regs. implementing act to effect that home or place from which member of Reserve components is called or ordered to active duty or active duty for training is permanent duty station of member has no effect in determination of entitlement, either to pay and allowances for period of training duty or to reimbursement of cost of travel to and from training duty 301

Training station to which Reserve member without dependents is ordered to active duty for less than 20 weeks in temporary duty status is permanent station and member performing basic assignment at his permanent duty station is entitled to basic allowance for quarters prescribed by 37 U.S.C. 403(f), as amended by Pub. L. 90–207, while at training station and definition in par. M1150–10c of Joint Travel Regs. that home or place from which member of Reserve component is not for application. Therefore, par. 10242 and Table 1–2–4, Dept. of Defense Military Pay and Allowances Entitlements Manual, remains applicable in computing allowable travel time for pay purposes for travel performed from home to training station 490

Joint Travel Regs. issued to implement travel and transportation allowances authorized in 37 U.S.C. 404(a)(4) (Pub. L. 90–168, Dec. 1, 1967) for members of uniformed services performing duty away from home may not be amended to deny payment of per diem to member of Reserve component performing annual active duty for training at same location where he normally performs inactive duty training, unless member does not incur quarters and subsistence costs but commutes from home to duty station, whether or not duty station and home are both located within boundaries of same city or other specified geographical area, for then reservist would not be "away from home" within meaning of 37 U.S.C. 404(a)(4) to entitle him to per diem for period of annual active duty for training 517

Denial of per diem under 37 U.S.C. 404(a)(4) to member of Reserve component is required only while he is on annual active duty for training when Govt. quarters and Govt. mess are available and, therefore, per diem may be paid to member of Reserve component while on annual active duty for training, active duty for training, or active duty at duty station where Govt. quarters or Govt. mess, or both, are not available even though duty is performed at same place and under same conditions as apply to reservist's inactive duty training 517

Restrictions on movement of dependents in cases of active duty for less than 6 months and training duty for less than 1 year that are contained in Joint Travel Regs. are unaffected by addition of clause (4) (Pub. L. 90–168, Dec. 1, 1967) to 37 U.S.C. 404(a), and amendment of

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Member of Reserve component who commutes daily from home to training duty station is not "away from home" within meaning of 37 U.S.C. 404(a)(4) to entitle him to reimbursement for expense of commuting and, therefore, although reservist because active duty station is permanent duty station would be entitled to reimbursement under part K, ch. 4, of Joint Travel Regs. for travel expenses incurred in conducting official business within permanent duty station and adjacent areas, regulation may not be amended to authorize reimbursement to reservists for expense of commuting daily between home and duty station located within corporate limits of same city or town---------- 517
Elimination of permanent station definition in par. M1150–10c of Joint Travel Regs.—definition which is neither authorized nor required by 37 U.S.C. 404(a)(4) and has no effect in determining entitlement of member of Reserve component to either pay and allowances for period of training duty, or to reimbursement for travel to and from training station—although recommended would not alter fact that part K, ch. 4, of Joint Travel Regs., which authorizes reimbursement of travel expenses incurred in conducting official business within limits of permanent duty station and adjacent areas, may not be amended to provide reimbursement to reservist for expense of commuting daily from home to training station---------- 517
Transfers
Awaiting vessel
Temporary lodging allowances
A member of uniformed services who incident to permanent change-of-station orders assigning him to duty on board ship, occupies hotel or hotel-like accommodations with his family at home port or is temporarily assigned to off-ship crew of two-crew nuclear powered submarine, is not eligible to receive temporary lodging allowances prescribed by 37 U.S.C. 405 as permanent station allowance to partially reimburse member for more than normal expenses incurred upon arrival at permanent station outside U.S. Therefore, as member is not considered to be at permanent duty station for purposes of temporary lodging allowance until he reports aboard vessel to which assigned, Joint Travel Regs. may not be amended to authorize payment of allowance to member prior to reporting aboard ship---------- 716
Hospital transfer status
"Permanent station" meaning place where member of uniformed services is assigned for duty, definition of permanent station in par. M1150–10 of Joint Travel Regs. may not be broadened to include hospital in U.S. to which member is transferred for prolonged hospitalization from either duty station or other hospital in U.S., and, therefore, chapter 9 of regulations may not be amended to permit payment when member is so hospitalized of dislocation allowance provided in 37 U.S.C. 407(a)(1) for members whose dependents make authorized move "in connection with his change of permanent station." However, chapter 9

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When commanding officer of military installation desires to honor properly made request for appearance of member of his command as witness before an authorized service court of a friendly foreign force, he may under authority in 22 U.S.C. 703 issue orders to member directing his attendance as witness, and consider member on official business in nature of detached service while traveling and while in attendance at proceedings of foreign court. Member witness under 28 U.S.C. 1821 would be entitled to fees and mileage, including subsistence when applicable, authorized for witnesses attending U.S. courts, payment to be made to member from funds supplied by foreign force, in advance if available, or after completion of service upon availability of funds..... 10
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Use of collection proceeds to cover cost of fees for money orders or bank drafts prior to mailing balance of collection to depositories with appropriate accounting adjustment as optional method to employee paying fee from his personal funds and obtaining reimbursement from appropriation will not contravene requirements of 31 U.S.C. 484 that gross amount of moneys received on behalf of U.S. must be covered into Treasury as miscellaneous receipts. Proposed procedure under which costs of fees for money orders and bank drafts would be charged to proper appropriation without diminishing gross amounts ultimately deposited in Treasury may be adopted after detailed accounting procedures have been developed and approved for promptly effecting necessary accounting adjustments..... 670
Special account *v.* miscellaneous receipts
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In view of fact that "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 appropriation from which charges were paid in accordance with requirement in 19 U.S.C. 1524 relating to deposit of customs charges..... 24
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Compensation paid by insurance firm to cost-plus contractor operating and maintaining research vessel for National Science Foundation to cover damages sustained by vessel while being overhauled and repaired by subcontractor may not be used to augment Foundation's appropriations, absent specific statutory authority, and moneys, even if paid to prime contractor, are for deposit as miscellaneous receipts into Treasury of U.S. in consonance with sec. 3617, Revised Statutes, 31 U.S.C. 484..... 209

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Death or injury

While traveling to and from inactive duty

The six months' death gratuity prescribed in 32 U.S.C. 321(a)(3) for payment to beneficiary of member of National Guard who dies from injury incurred while traveling directly to or from inactive training is not payable incident to death of member who when dismissed from regularly scheduled drill proceeded to truck stop in direction away from his residence where he stayed approximately 1 hour, and then while en route to his home was involved in accident that resulted in his death, as member is not considered to have been traveling directly from training place to his home, either in point of time or route, when accident occurred and, therefore, case does not fall within meaning of sec. 321(a)(3) and implementing regulations ---------- 762

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Accountable officers. (*See* **Accountable Officers**)

Agriculture Department. (*See* **Agriculture Department, employees**)

Clothing and personal furnishings. (*See* **Clothing and Personal Furnishings**)

Compensation. (*See* **Compensation**)

Contributions from sources other than the United States

Prohibition

The fact that 18 U.S.C. 209, which prohibits Govt. officers and employees from receiving any salary from sources other than U.S., is criminal statute enforceable by Dept. of Justice and courts, Attorney General has final determination of issues arising under provision and, therefore, Comptroller General does not have authority to make binding determination as to proper interpretation of prohibition ---------- 24

Court leave. (*See* **Leaves of Absence, court**)

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Retainer pay

Limiting application of rule in *Mulholland* v. *U.S.*, 139 Ct. Cl. 507, that member of Fleet Reserve may receive retainer pay concurrently with civilian disability compensation to periods prior to 1952, will no longer be required in view of holding in *Merlyn E. Horn* v. *U.S.*, 185 Ct. Cl. 795, in which court recognized plaintiff's claim for retainer pay withheld after 1952 for period during which he received disability compensation for injury sustained in civilian position. Therefore, retainer pay withheld from member injured in 1966 and awarded 288 weeks of civilian disability compensation may be released to him and future monthly payments of retainer pay due in his and other similar cases may be paid concurrently with civilian disability compensation ---------- 515

Equal employment opportunity

Discrimination actions

The remedial action of retroactively promoting employee alleging racial discrimination after employee had been promoted from grade GS-9 to grade GS-11 without regard to complaint does not entitle employee to higher grade salary for period prior to effective date of his regular promotion, neither 5 U.S.C. 7151 nor implementing Civil Service Regs. providing for retroactive remedial action in event of finding of discrimination. Furthermore, employee may not be paid additional com-

OFFICERS AND EMPLOYEES—Continued Page

Equal employment opportunity—Continued

Discrimination actions—Continued

pensation under "Back Pay Statute" (5 U.S.C. 5596), or on basis of retroactive correction of administrative error, failure to timely promote employee being neither positive adverse administrative action required for payment under statute nor administrative error ---------- 502

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Establishment for overtime purposes

Intermittent, etc., wage board employees

Intermittent and part-time wage board employees, regardless of whether 40-hour administrative workweek or 8-hour day has been established for them, are entitled to overtime compensation at not less than time and one-half for time worked in excess of 8 hours a day or 40 hours a week pursuant to sec. 201 of "Work Hours Act of 1962," amending sec. 23 of act of Mar. 28, 1934, language of sec. 23, as amended, regarding "establishment" of regular hours of labor at not more than 8 per day or 40 per week intending only to prescribe measure as to when regular and overtime rates of compensation are payable and not to require formal establishment of regular hours of work ---------- 439

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

Mileage. (*See* **Mileage**)

Missing, interned, captured, etc.

Proximate result of civilian employment determination

When civilian employee stationed inside U.S. enters missing status outside U.S. while on leave sailing sloop from Newport, R.I. to St. Thomas, V.I., determination by agency head that missing status of employee was proximate result of his civilian employment is required before missing persons benefits provided by act of Aug. 29, 1957 (5 U.S.C. 5561) may be granted, even though act does not expressly refer to situation involved ---------- 527

Moving expenses

Public Law 89–516 authority. (*See* **Officers and Employees, transfers, relocation expenses**)

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

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Promotions

Compensation. (*See* **Compensation, promotions**)

Reclassified positions

Incumbent's status

Civil Service Commission having waived experience and training requirement of incumbent of position reclassified from grade GS–9 to grade GS–11, administrative determination to require employee to serve 1 year in reclassified position to obtain required experience prior to advancement to GS–11 level rather than placing incumbent in reclassified position, another position, or separating her was erroneous, and incumbent having been continued in reclassified position, correction action is required to promote her not later than beginning of second pay period following receipt of notice of approval by Civil Service Commission of waiver of qualifications of incumbent of reclassified position ---------- 258

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Transferred employees. (*See* Officers and Employees, transfers, relocation expenses)
Removals, suspensions, etc.
Compensation. (*See* Compensation, removals, suspensions, etc.)
Service agreements
Overseas employees. (*See* Officers and Employees, transfers, service agreements)
Severance pay. (*See* Compensation, severance pay)
Trailer allowances. (*See* Trailer Allowances, civilian personnel)
Training
Expenses
Meals and room at headquarters
Civilian employee coordinator of seminar for purpose of training employees of International Agricultural Development Service who paid cost of meals for non-Govt. employee guest speakers and employees of Service attending seminar conducted at headquarters may be reimbursed for expense incurred upon determination by appropriate authority that cost of meals furnished non-Govt. employees is authorized under 5 U.S.C. 4109; that one Service employee participated as seminar speaker; and that business of seminar was conducted during mealtime requiring attendance of Service employees. Pursuant to sec. 6.7 of Standardized Govt. Travel Regs., any per diem payments authorized should be reduced ---------- 185
Official duty away from training site
An employee who incident to moving family residence to training site under authority in 5 U.S.C. 4109(a)(2)(B) forfeits right to per diem is entitled to transportation costs and per diem when required to travel on official business away from training site, even while performing official duties at location which would otherwise be his official station. For purposes of sec. 6.8 of Standardized Govt. Travel Regs., which prohibits payment of per diem at permanent duty station, training site may be considered employee's permanent duty station, thus entitling him to per diem while temporarily assigned official duties away from training site---------- 313
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An employee who on July 9, 1966, contracts to purchase residence in anticipation of mass transfer incident to relocation of agency headquarters, although he is not informed until Nov. 22, 1966, that move, which had been anticipated for several years, tentatively was set for Apr. 1, 1968—delay in move occasioned by unavailability of funds for move and building construction—and who moves into new residence Apr. 22, 1967, completing settlement July 12, 1967, may be reimbursed

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under Pub. L. 89–516 for expenses incurred in purchase of new residence on basis employee acquired residence after he received definite information on Nov. 22, 1966, that his permanent station was being transferred... 395
Relocation expenses
Attorney fees
An employee who incident to transfer of official duty station purchases residence at new duty station and is reimbursed attorney fees he paid for preparation of notes and trusts, settlement fee, title examination, and preparation of application for title insurance—services authorized by sec. 4.2c of Bur. of Budget Cir. No. A–56—may not also be reimbursed fees paid to second attorney to prepare contract and other instruments involved in purchase, checking and examining various documents, and travel expenses incurred by that attorney to be present at settlement, as fee paid for legal representation and advice in connection with purchase or sale of residence is not reimbursable under sec. 4, Cir. No. A–56 469
House sale
Collateral transactions
Expenses, including real estate commission, incurred by transferred employee in sale of parcel of land he had accepted in partial payment for his residence at old duty station are not reimbursable under sec. 4, Bur. of Budget Cir. No. A–56, notwithstanding possible savings to Govt. by reason of real estate broker relinquishing commission on residence for opportunity to sell and receive commission on land, collateral transaction not having been connected with sale of employee's residence incident to permanent change of station 419
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A 90-day interest charge—prepayment penalty—assessed by lending institution in connection with sale of residence at old duty station of transferred employee is not reimbursable expense absent provision in original contract or mortgage instrument for reimbursement as prescribed by sec. 4.2d, Bur. of Budget Cir. No. A–56. Language of note covering loan secured by employee's residence reading "payable on the —— day of each month" is not express provision that imposes prepayment penalty and, therefore, employee may not be reimbursed interest charge payment he was required to make 407
Trailer and lot sale
Expenses incurred in individual sale of unimproved lot and of unattached mobile home placed on lot and used as living quarters are not reimbursable to employee incident to official change of duty station, sec. 9 of Bur. of Budget Circular No. A–56 and 5 U.S.C. 5724(b) contemplating reimbursement for expenses of transporting and not sale of mobile dwelling, and sec. 4 of Circular providing for reimbursement of expenses incurred in disposition of dwelling house affixed to land and not for costs of selling unimproved real estate 115
Lease termination
An employee who in connection with transfer of official duty station terminates lease on his apartment at old duty station at expiration of

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his lease and is required to pay for painting, cleaning, repair of blinds and stock transfer is not entitled to reimbursement for these expenses, 5 U.S.C. 5724a only authorizing reimbursement of those expenses that result from termination of unexpired lease and not expenses chargeable at expiration of lease ---------- 469
Mass transfer
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An employee who on July 9, 1966 contracts to purchase residence in anticipation of mass transfer incident to relocation of agency headquarters, although he is not informed until Nov. 22, 1966 that move, which had been anticipated for several years, tentatively was set for Apr. 1, 1968—delay in move occasioned by unavailability of funds for move and building construction—and who moves into new residence Apr. 22, 1967, completing settlement July 12, 1967, may be reimbursed under Pub. L. 89-516 for expenses incurred in purchase of new residence on basis employee acquired residence after he received definite information on Nov. 22, 1966, that his permanent station was being transferred ---------- 395
Miscellaneous expenses
House trailer preparation for movement
Cost to civilian employee to equip housetrailer transported incident to permanent change of station with an extra axle in compliance with State law is not reimbursable expense. The expenditure representing cost of structural change in trailer constitutes capital improvement that is not reimbursable as miscellaneous expense under sec. 3 of Bur. of Budget Cir. No. A-56, and structural change to trailer having been incurred to prepare trailer for movement, reimbursement for cost of axle is excluded under sec. 9.3a(3) of Circular ---------- 226
Overseas employees transferred between overseas duty stations
Requirement in sec. 3.2a of Bur. of Budget Circular No. A-56 that employee execute employment agreement prescribed by sec 1.3c of Circular in order to be eligible to receive payment of miscellaneous expense allowance authorized has no application to employees transferred within foreign countries or within territories or possessions of U.S. outside contiguous 48 States and District of Columbia. Therefore, employees transferred by their agency from one official station to another overseas prior to completing agreed 12 months of service, whether or not they are required to sign new employment agreement, are entitled to miscellaneous expense allowance authorized by sec. 3.2a, and possibly other benefits prescribed by Circular No. A-56 ---------- 39
"Settlement Date" limitations on property transactions
What constitutes litigation
Fact that ultimate sale of residence of transferred employee was delayed more than 1 year after date of entrance on duty at new official station, as limited by sec. 4.1d of Bur. of Budget Circular No. A-56 on real estate transactions, by reason of breach of escrow agreement tantamount to contract sales and continued possession of property by defaulter does not entitle employee under "litigation" exception provided

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"Settlement Date" limitations on property transactions—Continued
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in sec. 4.1d to 1-year settlement requirement, to reimbursement for expenses incurred in selling residence, delay in disposing of residence not stemming from suit at law within contemplation of Budget Circular..... 71
Temporary quarters
Time limitation
In computing length of time allowed for temporary quarters at Govt. expenses pursuant to subsecs. 2.5b(5) and (6) of Bur. of Budget Circular No. A–56, incident to employee's permanent change-of-duty station, allowable period begins to run from first day for which claim for reimbursement is made regardless of fact that employee or member of immediate family may have occupied temporary quarters prior to date of claim, provided first day for which claim is made within 30 days of date employee reported to duty at new official station. Therefore, employee who actually occupied temporary quarters from Sept. 15, 1967, until Nov. 11, 1967, who claims temporary quarters allowance for 30 days commencing Oct. 12, 1967, may be reimbursed for period claimed..... 118
An employee who is unable to locate permanent quarters incident to change-of-duty station within U.S., occupies temporary quarters in excess of 30 days allowable under sec. 2.5b(1) of Bur. of Budget Circular No. A–56 incurs additional expenses for subsequent unauthorized travel of wife to new station in second privately owned automobile, may not be paid temporary quarters and subsistence allowance for 60-day period prescribed by sec. 2.5b(2) for transfers outside U.S., nor paid more than 8 cents per mile authorized for travel of the employee and his wife in one automobile. Even if additional amounts claimed were allowable, no mistake having been made in preparation of employee's travel orders, there would be no authority to amend orders retroactively..... 119
Transfer within corporate limits of city
Payment of relocation expenses provided in 5 U.S.C. 5724a to employees who are transferred between posts of duty 35 miles apart within corporate limits of same city—Houston, Texas—is precluded under sec. 1.3a of Bur. of Budget Cir. No. A–56, which authorizes travel and transportation expenses and applicable allowances only when transfer is between "official stations" as term is defined in sec. 1.5 of Standardized Govt. Travel Regs., and section prescribing that designated post of duty and official station are one and same, an area that is circumscribed by corporate limits of city, there is no authority for payment of relocation expenses to employees transferred within corporate limits of Houston..... 227
Transportation for house hunting
Authorization
Although Bur. of Budget Circular No. A–56 provides for administrative discretion in authorizing reimbursement for expenses of house hunting trip prescribed in sec. 2.4 of Circular when employee's official duty is changed, absent evidence that house hunting trip was authorized and performed, there is no authority to reimburse employee for cost of house hunting trip and, therefore, under his travel orders he may only be allowed mileage for one-way travel performed from old to new duty station 115

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Mileage
An employee and his wife who traveled by privately owned automobile in performance of authorized round trip between old and new official station to seek permanent residence quarters, is entitled to reimbursement under authority prescribed in sec. 2.3a of Bureau of Budget Circular No. A–56 at rate of 8 cents per mile, rate specified in sec. 2.3a(1) for employee traveling with one member of his family in privately owned automobile ---------- 276
Secs. 2.1 and 2.2 of Bur. of Budget Circular No. A–56, authorizing reimbursement of transportation costs and other travel expenses incurred by employee and his family in accordance with Travel Expense Act of 1949, as amended, and Standardized Govt. Travel Regs. (SGTR), employee who incident to permanent change of station is authorized travel with his wife by privately owned automobile to new station and return to seek permanent residence quarters is entitled to mileage under sec. 3.5c(1) of SGTR for distance traveled as shown in standard highway mileage guides or by speedometer reading, and if there is no substantial deviation between the two, mileage claimed by employee may be allowed without explanation ---------- 276
Service agreements
Transfers between overseas duty stations
Employees who at time of transfer by their agencies between overseas duty stations located in different territories or countries outside continental U.S. had only completed part of agreed period of service and had less than 12 months of service to perform under employment agreement are required pursuant to 5 U.S.C. 5724(d) to execute new agreement for minimum of 12 months service—1 school year for overseas teachers—in order to be eligible for payment by Govt. of costs of transfer---------- 39
Although employees with less than 12 months of service to perform transportation agreement are not required under 5 U.S.C. 5724(d) to execute new employment agreement upon transfer by their agency or department between official stations located in same territory or country outside U.S., agency or department, by policy or regulation, nevertheless may require their employees to execute new employment agreement_ 39
Requirement in sec. 3.2a of Bur. of Budget Circular No. A–56 that employee execute employment agreement prescribed by sec. 1.3c of Circular in order to be eligible to receive payment of miscellaneous expense allowance authorized has no application to employees transferred within foreign countries or within territories or possessions of U.S. outside contiguous 48 States and Dist. of Columbia. Therefore, employees transferred by their agency from one official station to another overseas prior to completing agreed 12 months of service, whether or not they are required to sign new employment agreement, are entitled to miscellaneous expense allowance authorized by sec. 3.2a, and possibly other benefits prescribed by Circular No. A–56---------- 39
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Dependents. (*See* Transportation, dependents)
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Travel by privately owned automobile

Mileage. (*See* **Mileage, travel by privately owned automobile**)

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

Travel time

International dateline crossings

An employee who "lost" a workday incident to permanent change-of-station transfer from Honolulu to Tokyo due to crossing international dateline is entitled to compensation for day under rule that in establishing entitlement to pay, time of place at which employee is located is controlling under 15 U.S.C. 262. In accordance with longstanding administrative practice, pay of employee should not be increased because of extra time gained when traveling across international dateline in eastward direction—crossings in opposite directions canceling each other out. However, any specific factual situations may be presented for consideration. ---------- 233

Uniforms. (*See* **Uniforms, civilian personnel**)

Wage board

Compensation. (*See* **Compensation, wage board employees**)

Hours of work

Establishment for overtime purposes

Intermittent and part-time employees

Intermittent and partime wage board employees, regardless of whether 40-hour administrative workweek or 8-hour day has been established for them, are entitled to overtime compensation at not less than time and one-half for time worked in excess of 8 hours a day or 40 hours a week pursuant to sec. 201 of "Work Hours Act of 1962," amending sec. 23 of act of Mar. 28, 1934, language of sec. 23, as amended, regarding "establishment" of regular hours of labor at not more than 8 per day or 40 per week intending only to prescribe measure as to when regular and overtime rates of compensation are payable and not to require formal establishment of regular hours of work---------- 439

ORDERS

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Retroactive

Rule

An employee who unable to locate permanent quarters incident to change-of-duty station within U.S., occupies temporary quarters in excess of 30 days allowable under sec. 2.5b(1) of Bur. of Budget Circular No. A-56 and incurs additional expenses for subsequent unauthorized travel of wife to new station in second privately owned automobile, may not be paid temporary quarters and subsistence allowance for 60-day period prescribed by sec. 2.5b(2) for transfers outside U.S., nor paid more than 8 cents per mile authorized for travel of the employee and his wife in one automobile. Even if additional amounts claimed were allowable, no mistake having been made in preparation of employee's travel orders, there would be no authority to amend orders retroactively---------- 119

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Competent

What constitutes

The fact that officer of uniformed services supports his children residing with former wife who had been awarded their custody in divorce decree does not entitle him to basic allowance for quarters on their behalf, officer having remarried and having been assigned Govt. quarters at overseas station, from which dependents were not precluded by "competent orders." Divorce decree of court having jurisdiction of children is not "competent authority" contemplated by 37 U.S.C. 403(d) in providing that member assigned Govt. quarters may not be denied basic allowance for quarters if, because by orders of competent authority dependents are prevented from occupying assigned quarters---------- 28

PAY

Absence without leave

Civil arrest

Unexcused, etc.

Marine Corps member who while in unauthorized absence status is confined and later indicted by civilian authorities for violating 18 U.S.C. 2312 (transporting in interstate commerce stolen motor vehicle or aircraft), and who on basis of court finding of mental incompetency is retained in Medical Center for Federal Prisoners until discharge of indictment and return to military control, is not entitled to credit in final military pay record with pay and allowances for period of absence—Oct. 5, 1962 to Feb. 9, 1965—in view of Commandant of Corps determination under par. 044253, Navy Comptroller Manual, that absence may not be excused as unavoidable, and that member's absence in hands of civil authorities—must be considered "time lost" for pay purposes----- 792

Active duty

Grade or rank

Reduction propriety

Although reduction of petty officer from first class E–6 to second class E–5 for incompetency to perform duties of higher grade was based on two special evaluations rather than on required waiver of condition precedent to reduction—"evaluation of member for at least two consecutive marking periods," member is not entitled upon advancement to E–6 to rate of pay of that grade for period of reduction in absence of correction of records pursuant to 10 U.S.C. 1552. Reduction orders issued by competent authority are valid even though not issued in strict conformity with administrative regulations and, therefore, under 37 U.S.C. 204 (a) member is entitled only to pay and allowances of grade E–5 while serving in that grade, unless record warrants correction---------- 416

Medically unfit personnel

Member of uniformed services who after having performed active duty is found to have been medically unfit at time of entry into service is not deprived of right to military pay and allowances or of status of being entitled to basic pay because of administrative failure to discover his physical condition, absent affirmative statutory prohibition against induction of persons on basis of physical or mental disqualification, and

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Medically unfit personnel—Continued

in view of fact 50 U.S.C. App. 454(a) provides no person shall be inducted into armed services until his acceptability has been satisfactorily determined, and sec. 456(h) prescribes that physical or mental condition constitutes basis for deferment from induction rather than absolute disqualification. ---------- 377

Medically unfit persons inducted into service who perform training and service, absent statutory prohibition are entitled to full pay and allowances from time of entry on active duty through date they are released from military control, and they may receive any unpaid pay and allowances which accrued prior to and including date of release from military control. In addition, member may be furnished transportation in kind or monetary allowance in lieu thereof to home of record upon release from military control---------- 377

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 normal duties as aviation pilot and who although able to perform is not placed in limited or restricted Reserve duty status upon release from hospitalization is nevertheless entitled to pay and allowances until physically fit to perform full and specialized naval duties, 37 U.S.C. 204((i) authorizing payment of pay and allowances to disabled Reserve officers in same circumstances under which Regular officers would receive pay and allowances. When disabled Reserve member is found physically fit to perform military or naval duties without qualification, basis of entitlement to pay and allowances under 37 U.S.C. 204 (g), (h), or (i) is extinguished---------- 1

Additional

Aviation duty. (*See* **Pay, aviation duty**)

Hostile fire pay

Excess leave accrual. (*See* **Leaves of Absence, military personnel, excess leave accrual**)

Proficiency pay

Change from enlisted to officer status

Although enlisted members of Navy or Marine Corps who at 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 pay and allowances of their permanent status reduced because of temporary appointment and entitlement under 37 U.S.C. 204 to pay and allowances of temporary grades, they are not entitled to saved proficiency pay unless they continue to meet eligibility conditions prescribed by Navy Regs. Member does not meet prescribed conditions of eligibility for proficiency pay when as part of duties as officer he utilizes skills of his military specialty for which pay was authorized in supervision of other personnel with similar skills---------- 12

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Proficiency pay—Continued
"Special award" criteria
Proficiency pay provided by 37 U.S.C. 307 for enlisted members of uniformed services qualifying in occupation or skill may not be paid to members assigned to headquarters tour of duty as "Special Award," where commanding officer is authorized to assign and terminate awards at his discretion or upon transfer of member from assignment. Award of proficiency rating on basis of billet occupied, with no criteria established with respect to performance of duties of member's rating or assignment does not provide sufficient basis for payment of proficiency pay---------- 86
"Superior performance" awards
Under 37 U.S.C. 307, which provides that enlisted member of uniformed services entitled to basic pay and designated as specially proficient in military skill may be paid proficiency pay, regulations that do not conform to intended purpose of "superior performance" category of award established pursuant to sec. 307—incentive for achievement and maintenance of superior performance by member in his current pay grade—but prescribe eligibility for award on basis of qualifying for promotion to next higher pay grade are regulations that are not consistent with sec. 307, and, therefore, payments of proficiency pay in superior performance category that do not relate to member's current pay grade but on eligibility for promotion in grade may not be authorized---------- 86
Allotments
Banking facilities for deposit, etc.
The authority in Pub. L. 90-365, approved June 29, 1968, to issue single Govt. salary check to bank for deposit to individual accounts of employees may not be construed to include members of uniformed services, words "salary" and "wages" in act denoting compensation of Federal employees, whereas when referring to compensation of military personnel, terms "pay" or "pay and allowance" are used. However, under allotment authority of chapter 13 of Title 37, U.S. Code, at request of members, single Govt. check may be issued to financial institution to cover "net pay"—total pay and allowances less authorized deductions—provided purpose of allotments is considered to be proper by Secretary concerned.. 138
Aviation duty
Excess flying hours
Flying status of limited duration
Excess flying time accumulated by member of uniformed services while in flying status of limited duration may not be applied to subsequent flying status to qualify member for flying pay for later period, par. 20110c of Dept. of Defense Pay and Allowances Entitlements Manual requiring that member placed in flying status for limited period must meet flight requirements within specified period for entitlement to flying pay—regulation not necessarily inconsistent with sec. 104(a)(1) of E. O. No. 11292, which prescribes minimum flight requirements. However, restriction if not in best interest of uniformed services may be eliminated and excess flying time accumulated during limited period of service applied to qualify member for flying pay in subsequent flying status---------- 214

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Suspension from flying duty

Administration action required

Although Air Force officer failed to satisfy requirement for annual physical examination to qualify for flying pay, his flying orders remained in effect until terminated by base commander or air tactical unit and, therefore, suspension of flight pay absent orders directing suspension was ineffective and officer is entitled to flight pay received to date payment was unofficially suspended and to payment for period from date of pay suspension until date flying status was officially terminated..... 81

Civilian employees. (*See* **Compensation**)

Disability retired pay. (*See* **Pay, retired, disability**)

Medical and dental officers

"Continuation pay"

Active duty requirement

Entitlement to "continuation pay" authorized by 37 U.S.C. 311 for medical and dental officers who by written agreement consent to extend their active service—payment to be made in installments for each additional year of committed service, contingent upon performance of active duty—ceases upon death, whether by misconduct or otherwise, of medical specialist who had extended his service, and installments of "continuation pay" due and payable to officer had he lived may not be paid to any other person, sec. 311(b) permitting no exception to requirement for performance of active duty for entitlement to special pay authorized for continued active service of medical specialists..... 122

Missing, interned, etc., persons

Retired pay

Retired pay checks of Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside continental U.S. by private firm are to be sent to bank in U.S., upon his alleged capture by enemy forces may not be issued to bank or any other person on his behalf for support of his family. The right of retired member of uniformed services terminates upon death and power of attorney executed by him is automatically revoked by his death whether or not fact of death is known, and in absence of statutory authority providing otherwise, and because presumption of death after lapse of 7 years rule is not applicable, payment of retired pay on behalf of missing sergeant must be held in abeyance until it is established that he is not dead..... 706

Proficiency. (*See* **Pay, additional, proficiency pay**)

Promotions

Service credits

Temporary service in a higher grade

When Coast Guard officer who is advanced in grade under temporary promotion system authorized in 14 U.S.C. 275 reverts to permanent promotion system grade, time in temporary service grade, absent specific legislation, may not be used as time in grade higher than permanent grade from which originally appointed for temporary service in view of fact that when read together, secs. 275(h) which prescribes that upon termination or expiration of temporary appointment "officer shall revert to his former grade," and 257(b) which provides that service in temporary grade is service "only in grade that officer concerned would

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have held had he not been so appointed," permit only counting of temporary service as time in officer's permanent grade held immediately preceding temporary service appointment---------- 390
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Saved pay
Items for inclusion or exclusion
Although enlisted members of Navy or Marine Corps who at 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 pay and allowances of their permanent status reduced because of temporary appointment and entitlement under 37 U.S.C. 204 to pay and allowances of temporary grades, they are not entitled to saved proficiency pay unless they continue to meet eligibility conditions prescribed by Navy Regs. Member does not meet prescribed conditions of eligibility for proficency pay when as part of duties as officer he utilizes skills of his military specialty for which pay was authorized in supervision of other personnel with similar skills---------- 12
Reduction
Pay based on grade held
Although reduction of petty officer from first class E–6 to second class E–5 for incompetency to perform duties of higher grade was based on two special evaluations rather than on required waiver of condition precedent to reduction—"evaluation of member for at least two consecutive marking periods," member is not entitled upon advancement to E–6 to rate of pay of that grade for period of reduction in absence of correction of records pursuant to 10 U.S.C. 1552. Reduction orders issued by competent authority are valid even though not issued in strict conformity with administrative regulations and, therefore, under 37 U.S.C. 204(a) member is entitled only to pay and allowances of grade E–5 while serving in that grade, unless record warrants correction---------- 416
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Fleet reservists
Retired pay. (*See* Pay, retired, fleet reservists)
Injured in line of duty. (*See* Pay, active duty, reservists, injured in line of duty)
Retired pay. (*See* Pay, retired, reservists)
Retainer pay. (*See* Pay, retired, fleet reservists)
Retired
Active duty
After retirement
Higher grade service
Pub. L. 88–132, effective Oct. 1, 1963, amending 10 U.S.C. 1402(a) not changing conclusion in prior decisions that inclusion of inactive duty time on retired list is precluded in determining rate of monthly basic pay for purposes of computing retired pay, master sergeant upon reretirement may not be credited with 3 years and 4 months of inactive service between date of retirement, Jan. 1, 1960, under 10 U.S.C. 8914, and return to active duty in grade of technical sergeant on May 1, 1963.

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However, under sec. 1402(a) upon re-retirement Dec. 1, 1967, enlisted man who had served less than 2 years as master sergeant is pursuant to second sentence in footnote 1, sec. 1402(a) entitled to retired pay computed on basis of basic pay rate in effect at time of re-retirement and multiplier factor that reflects 4 years and 7 months of additional active service ---------- 398
Advancement on retired list
Highest grade satisfactorily held "at any time in the Armed Forces"
Air Force master sergeant retired effective Oct. 1, 1966, pursuant to 10 U.S.C. 1331 and 1401, in grade of major, equivalent grade in Air Force to that of lieutenant commander, highest grade he satisfactorily held in Naval Reserve where he served for 20 years, and who then on basis of retirement under sec. 1331 is placed on Air Force Reserve Retired list as major effective Aug. 9, 1967, is entitled to have retired pay computed on basis of lieutenant commander grade provided Secretary of Navy or his designee determines officer satisfactorily held that grade. Member having qualified for retired pay under 10 U.S.C. 1331 became entitled to retired pay computed under formula 3, sec. 1401, which prescribes computation of retired pay on basis of highest grade satisfactorily held "at any time in Armed Forces"---------- 532
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Rates applicable on retirement *v.* effect of May 20, 1958 act
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Annuity elections for dependents
Annuity determination
Upon retirement of any member of uniformed services after Nov. 1, 1968, effective date of Pub. L. 90–445, percentage of annuity elected prior to Nov. 1, 1968, for dependent under Retired Serviceman's Protection Plan (10 U.S.C. 1441–1446) is for determination, absent savings provision in act, on total retired pay of member, act having eliminated requirement that cost of annuity should be deducted from member's retired pay before applying elected percentage in determining annuity payable. Although members subject to act may within prescribed time limitations both before and after retirement reduce amount of elected annuity or withdraw from participation in Plan, increase in amount of annuity is only available to member not yet retired---------- 281

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Pub. L. 90-485, approved Aug. 13, 1968 (10 U.S.C. 1331(e)), intended only to exempt non-Regular retirees of uniformed services from provisions of Uniform Retirement Date Act (5 U.S.C. 8301) with respect to benefits of Retired Serviceman's Family Protection Plan (10 U.S.C. 1431–1446), enactment does not affect principle established in *Seagrave v. U.S.*, 131 Ct. Cl. 790, and accepted in 37 Comp. Gen. 653 to effect right of member retired under sec. 1331 accrues from first day of month following date member qualifies by reason of meeting age and service requirements of sec. 1331(a) without regard to date of application for retirement, or accrues from first day of any subsequent month stipulated by member, and principle applies even if member meets requirements of sec. 1331(a) prior to Aug. 13, 1968 but delays application for retired pay until after that date 652
Revocation, etc.
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Savings clause contained in Pub. L. 90–485, dated Aug. 13, 1968, exempting active duty member of uniformed services from application of provision to reduce from 3 to 2 years delay in effective date of elections, modifications, or revocations made under Retired Serviceman's Family Protection Plan by member after completing 19 years of service, and providing for continuation of provisions of sec. 1431 (b) or (c), is restricted by language of savings clause to those members who had made election or change or revocation prior to Aug. 13, 1968, and, therefore, savings clause may not be extended to include applications made between Aug. 13, 1968, effective date of 10 U.S.C. 1431(b), and Nov. 1, 1968, date sec. 1431(c) became effective 353
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Approval of retired member's application to withdraw from participation or reduce level of participation in Retired Serviceman's Family Protection Plan made pursuant to Pub. L. 90–485, dated Aug. 13, 1968 (10 U.S.C. 1436(b))—application which Secretary concerned is required to act upon with reasonable promptness, and which becomes effective on first day of seventh calendar month following receipt of application at appropriate Finance Center—may not be canceled before effective date of application, approval by Secretary being only matter of form. Nor may retired member cancel his application before or after its approval, but before effective date of application, as 6 months waiting period before application becomes effective is not period intended for reconsideration of application by retired member 353
Reduction in annuity determination
Although reduction made pursuant to Pub. L. 90–485, Aug. 13, 1968 (10 U.S.C. 1436(b)), in annuity elected under Retired Serviceman's Family Protection Plan by Air Force officer retired under 10 U.S.C. 8911 from option 1 with 4 at ½ reduced retired pay to "the ¼ percentage factor" does not conflict with prescribed minimum amounts allowed by act for reduction of annuity, request combining fractions and percentages without mentioning principal amount to which reduction should apply is too vague to determine amount of reduced annuity elected, but

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upon clarification of exact amount of new annuity elected, irrevocable reduction may be made retroactively effective to date of reduction approval by Secretary of Air Force and cost of reduced annuity computed at dollar cost of original annuity 780
Termination
Children for Other than Age
Upon marriage or death on Mar. 1, 1968 of daughter of deceased member of uniformed services who is entitled to annuity payments pursuant to 10 U.S.C. 1431–1436 until her eighteenth birthday on May 1, 1968, her entitlement to annuity payments ceased with occurrence of event and, therefore, entitlement to annuity payment for month of March did not accrue 167
Children Reaching Eighteen Years of Age
The right of designated beneficiary to annuity payments provided under 10 U.S.C. 1431–1436, continuing while "under 18 years of age" and ceasing first instant eighteenth anniversary of birth is reached, eligibility of daughter of deceased member of uniformed services to annuity payments provided for her ceased first instant she reached eighteenth anniversary of her birth on May 1, 1968 and she is entitled to retain annuity payment made for month of April but is not entitled to payment for month of May, 10 U.S.C. 1437 providing that "no annuity occurs for the month in which entitlement thereto ends 167
Concurrent military retired and civilian service pay. (*See* **Compensation, double, concurrent military retired and civilian service pay**)
Cost-of-living increases. (*See* **Pay, retired, increases, cost-of-living increases**)
Disability
Disability determination subsequent to release
Record correction action
Retired pay of Air Force officer retired effective Apr. 1, 1963, who by correction of military records is placed on temporary disability retired list as of Mar. 31, 1963, with entitlement to disability retired pay effective Apr. 1, 1963, from which list he is removed on Mar. 11, 1968, properly was for computation under sec. 5(a)(1) and not 5(a)(2) of Uniformed Services Pay Act of 1963, officer's entitlement to retired pay on Apr. 1, 1963 not having occurred by force of Uniform Retirement Date Act, but by action of Secretary, and officer, therefore, was not overpaid retired pay commencing Oct. 1, 1963, computed at 75 percent of monthly basic pay of his grade fixed by 1963 pay act 329
Statutes of limitation
The court in *Lerner* v. *U.S.*, 168 Ct. Cl. 247, decided Dec. 11, 1964, having established right of plaintiff to disability retirement pay effective Dec. 23, 1943, correction of military records, approved Dec. 4, 1967, did not change disability retired status of plaintiff—Army officer—and, therefore, he is not entitled to disability retired pay for period Dec. 23, 1943, to July 1953, period barred by reason that under 28 U.S.C. 2501, payment of judgment was restricted to period July 1, 1957, to Dec. 11,

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1964, and under 31 U.S.C. 71a, payment of claim received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from date of judgment---------- 235
Members who served in higher rank than at retirement
Permanent *v.* temporary rank
On basis of *Taylor* v. *U.S.*, 174 Ct. Cl. 1266, in which court citing *Friestedt* v. *U.S.*, 173 Ct. Cl. 447, held that permanent appointment of plaintiff to rank of major would have entitled him to advancement on retired list under 10 U.S.C. 3964 had he served required 6 months in higher grade, ruling of *Friestedt* case may be applied in situations involving advancement on retired list under 10 U.S.C. 3964. 46 Comp. Gen. 17, modified---------- 163
Recomputation of retired pay
An officer of uniformed services retired for physical disability pursuant to act of Apr. 3, 1939, who subsequently elected disability retirement pay computed under sec. 402(d) of Career Compensation Act of 1949, and then served as Army Reserve officer from Sept. 6, 1951 to May 5, 1958, when he was appointed to Regular Army, where he currently is serving in rank of lieutenant colonel under temporary appointment pursuant to 10 U.S.C. 3442, upon retirement would be entitled to retired pay recomputed under 10 U.S.C. 1402(d), if conditions of clause (2) of sec. 1402(c) regarding additional physical disability are met; if not, officer's retired pay status is for consideration under sec. 1402(a), subject to footnote 1, and to provisions of 37 U.S.C. 205(a)---------- 99
Upon removal from temporary disability retired list on Mar. 11, 1968, and permanently retired with 50 percent disability, Air Force officer whose original retirement effective Apr. 1, 1963, under 10 U.S.C. 8911 had been corrected to place him with 100 percent disability on temporary disability retired list became entitled to retired pay recomputed under third sentence of 10 U.S.C. 1401 as though he had retired in first instance under sec. 8911, and officer's retired pay greater when computed under Formula B at 72½ percent of monthly pay of his grade fixed by Uniformed Services Pay Act of 1963 than if computed at his disability rating of 50 percent, beginning Mar. 11, 1968, officer became entitled to retired pay computed under Formula B, as increased by subsequent legislation-- 329
Retirement pay as member of Army of the United States
Subsequent active service
Termination of "AUS status" of member of uniformed services who after serving as commissioned officer in Army of U.S. from July 16, 1942, through Oct. 4, 1946, was retired for physical disability under act of Apr. 3, 1939, subsequently electing to have retired pay computed under sec. 402(d) of Career Compensation Act of 1949, and serving on active duty as Reserve officer from Sept. 6, 1951 until appointed as Regular officer on May 5, 1958, occurred Mar. 31, 1953 pursuant to Pub. L. 86-197, and not May 5, 1958, by reason of acceptance of appointment in Regular Army, where he is currently serving in rank of lieutenant colonel under temporary appointment pursuant to 10 U.S.C. 3442------ 99

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Retirement pay as member of Army of the United States—Continued
Subsequent active service—Continued
An officer of Army of U.S. entitled to disability retirement benefits of sec. 5, act of Apr. 3, 1939--subsequently computed under sec. 402(d) of Career Compensation Act of 1949– who entered on active duty Sept. 6, 1951 in Army Reserves and was appointed on May 5, 1958 to Regular Army, where he currently is serving in rank of lieutenant colonel under temporary appointment pursuant to 10 U.S.C. 3442, upon retirement may be paid either retired pay pertaining to "new" retired status or retired pay benefits to which entitled to by virtue of act of April 3, 1939, as amended, whichever is greater ---------- 99
Severance pay. (*See* Pay, severance, disability retirement)
Effective date
Age and service requirements
Public Law 90–485
Pub. L. 90–485, approved Aug. 13, 1968 (10 U.S.C. 1331(e)), intended only to exempt non-Regular retirees of uniformed services from provisions of Uniform Retirement Date Act (5 U.S.C. 8301) with respect to benefits of Retired Serviceman's Family Protection Plan (10 U.S.C. 1431–1446), enactment does not affect principle established in *Seagrave* v. *U.S.*, 131 Ct. Cl. 790, and accepted in 37 Comp. Gen. 653 to effect right of member retired under sec. 1331 accrues from first day of month following date member qualifies by reason of meeting age and service requirements of sec. 1331(a) without regard to date of application for retirement, or accrues from first day of any subsequent month stipulated by member, and principle applies even if member meets requirements of sec. 1331(a) prior to Aug. 13, 1968 but delays application for retired pay until after that date ---------- 652
Voluntary *v.* involuntary retirement
An officer of the uniformed services subject to involuntary retirement on June 30, 1968, under sec. 1(i) of Pub. L. 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 officer had not been recommended for continuation on active duty list as required by sec. 1(i) of act, is considered to have been mandatorily retired on June 30, 1968. Therefore, rule in 44 Comp. Gen. 584 does not govern to entitle officer to computation of retired pay at higher active duty pay rate that became effective July 1, 1968, and officer's retired pay is for computation on basis of active duty pay rate in effect June 30, 1968, date of retirement ---------- 30
Retired members of Navy who if they had been involuntarily retired on July 1, 1968 would have been subject to Uniform Retirement Date Act, 5 U.S.C. 8301, but who were retired voluntarily effective that date under statutory provisions cited in decision are entitled, except for members retired under 10 U.S.C. 1293, to have their retired pay computed at higher rates of active duty basic pay prescribed in E.O. No. 11414, dated June 11, 1968, promulgated in accordance with sec. 8 of Pub. L. 90–207, and effective July 1, 1968 ---------- 239

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Retired—Continued
Fleet reservists
Retainer pay withholdings
Disability compensation as civilian
Limiting application of rule in *Mulholland* v. *U.S.*, 139 Ct. Cl. 507, that member of Fleet Reserve may receive retainer pay concurrently with civilian disability compensation to periods prior to 1952, will no longer be required in view of holding in *Merlyn E. Horn* v. *U.S.*, 185 Ct. Cl. 795, in which court recognized plaintiff's claim for retainer pay withheld after 1952 for period during which he received disability compensation for injury sustained in civilian position. Therefore, retainer pay withheld from member injured in 1966 and awarded 288 weeks of civilian disability compensation may be released to him and future monthly payments of retainer pay due in his and other similar cases may be paid concurrently with civilian disability compensation---------- 515
Foreign citizenship or service effect
Non-Regular service members
Retired pay benefits authorized for non-Regular service members of uniformed services in chapter 67 of Title 10, U.S. Code, viewed as pension, entitlement to retired pay under 10 U.S.C. 1331 is not dependent on continuation of military status. Therefore person eligible to retired pay at age 60 as provided in sec. 1331 who prior to attaining age 60 acquires foreign citizenship and/or status in foreign military service does not lose entitlement to retired pay at age 60, nor is person in receipt of retired pay pursuant to sec. 1331 required to forfeit such pay if he becomes citizen of foreign country and/or enters armed forces of foreign country, provided foreign country is not one that is engaged in hostile military operations against U.S---------- 699
Foreign employment
Missing, interned, etc., persons
Retired pay checks of Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside continental U.S. by private firm are to be sent to bank in U.S., upon his alleged capture by enemy forces may not be issued to bank or any other person on his behalf for support of his family. The right of retired member of uniformed services terminates upon death and power of attorney executed by him is automatically revoked by his death, whether or not fact of death is known, and in absence of statutory authority providing otherwise, and because presumption of death after lapse of 7 years rule is not applicable, payment of retired pay on behalf of missing sergeant must be held in abeyance until it is established that he is not dead---------- 706
Grade, rank, etc., at retirement
Service in higher rank than at retirement
Air Force master sergeant retired effective Oct. 1, 1966, pursuant to 10 U.S.C. 1331 and 1401, in grade of major, equivalent grade in Air Force to that of lieutenant commander, highest grade he satisfactorily held in Naval Reserve where he served for 20 years, and who then on basis of retirement under sec. 1331 is placed on Air Force Reserve Retired list as major effective Aug. 9, 1967, is entitled to have retired pay computed on basis of lieutenant commander grade provided Secretary of Navy or his designee determines officer satisfactorily held that grade. Member having

PAY—Continued Page
Retired—Continued
Grade, rank, etc., at retirement—Continued
Service in higher rank than at retirement—Continued
qualified for retired pay under 10 U.S.C. 1331 became entitled to retired pay computed under formula 3, sec. 1401, which prescribes computation of retired pay on basis of highest grade satisfactorily held "at any time in Armed Forces."---------- 532
Increases
Cost-of-living increases
Active duty recall
The retired pay status of Army sergeant disabled during period of service which commenced May 25, 1966, subsequent to retirement on July 1, 1962 under 10 U.S.C. 3914 for length of service, who upon reversion to inactive status on retired list effective Mar. 15, 1968, elected retired pay pursuant to 10 U.S.C. 1402(d), based on 60 percent disability computed at rates prescribed in 37 U.S.C. 203(a), as amended by Pub. L. 90-207 (10 U.S.C. 1401a) to provide cost-of-living increase effective Oct. 1, 1967, comes within purview of 10 U.S.C. 1401a(c) entitling member to increase in retired pay to reflect increase of 3.9 percent in Consumer Price Index effective Apr. 1, 1968, adjusted pursuant to subsec. (c) to nearest one-tenth of 1 percent of increase in Consumer Price Index for Jan. 1968 that exceeded Sept. 1967 Index, or 1.3 percent increase---- 204
Computation
Under 10 U.S.C. 1401a, as amended by Pub. L. 90-207 to provide cost-of-living increase effective Oct. 1, 1967, to be computed at different percentages prescribed, 10 U.S.C. 1401a(e) applies only when retirement of member of uniformed services becomes effective on or after Oct. 1, 1967. Therefore, member retired on July 1, 1962 and re-retired on Mar. 15, 1968 does not come within purview of subsec. (e). For members whose retired pay status comes within purview of subsecs. (b) and (c), subsec. (c) containing phrase "notwithstanding subsec. (b)" applies. If adjusted retired pay of members retired on or after Oct. 1, 1967 is greater when computed under subsec. (e) rather than under subsecs. (c) or (d), members are entitled to greater amount of retired pay---------- 204
Death of member
The one-time 3.7 percent cost-of-living increase authorized in sec. 2(b) of Military Pay Act of 1967 (Pub. L. 90-207, approved Dec. 16, 1967), effective Oct. 1, 1967, for "person"—member or former member of uniformed services—entitled to retired or retainer pay after Nov. 30, 1966, because such person did not receive benefit of Consumer Price Index percentage increase provided by Pub. L. 89-132 effective Dec. 1, 1966 for members entitled to retired or retainer pay before Dec. 1, 1966, does not apply to members retired between Nov. 30, 1966 and Sept. 29, 1967 who died before Dec. 16, 1967, date of approval of 1967 act, word "person" in sec. 2(b) referring to person living on Dec. 16, 1967---------- 164
Retroactive authority
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 3.7 Consumer Price Index percentage increase in retired

PAY—Continued Page
Retired—Continued
Increases—Continued
Cost-of-living increases—Continued
Retroactive authority—Continued
pay effective Dec. 1, 1966, may be paid a 3.7 per centum increase for period May 1, 1967, to Jan. 31, 1968, on basis retired pay is within purview of sec. 2(b), Pub. L. 90–207, approved Dec. 16, 1967, and effective Oct. 1, 1967, which authorizes cost-of-living increase, retroactively effective from date of retirement, to those members who became entitled to retired pay on or after Dec. 1, 1966, but before Oct. 1, 1967, and who had not received any benefit from Dec. 1, 1966 percentage increase---- 15
Death of member
Basic pay rates prescribed by Military Pay Act of 1967 (Pub. L. 90–207, approved Dec. 16, 1967) effective Oct. 1, 1967, apply in computation of retired pay of members retired on or after Sept. 30, 1967, but who died before Dec. 16, 1967, benefits of sec. 6 of act accruing to every member or former member of uniformed services who initially became entitled to receive retired or retainer pay on or after Oct. 1, 1967, right that is not affected by death prior to Dec. 16, 1967 and, therefore, new pay rates prescribed by act apply from Oct. 1, 1967, effective date of act, up to and including day of death of member---- 164
Under Public Law 90–207
Retired members of Navy who if they had been involuntarily retired on July 1, 1968 would have been subject to Uniform Retirement Date Act, 5 U.S.C. 8301, but who were retired voluntarily effective that date under statutory provisions cited in decision are entitled, except for members retired under 10 U.S.C. 1293, to have their retired pay computed at higher rates of active duty basic pay prescribed in E.O. No. 11414, dated June 11, 1968, promulgated in accordance with sec. 8 of Pub. L. 90–207, and effective July 1, 1968---- 239
Medically unfit personnel at time of induction
Member of uniformed services who at time of induction into military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of preexisting medical condition during active service has not met requirement in 10 U.S.C. 1201 and 1203 that physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from service. However, entitlement to such benefits accrues to member experiencing aggravation of his physical condition by active service or acquiring new or additional unfitting condition, even if unfitting condition is incurred by member who did not meet procurement medical fitness standards at time of induction, but did then meet retention fitness standards---- 377
Members who served in higher rank than at retirement
Friestedt case
On basis of *Taylor* v. *U.S.*, 174 Ct. Cl. 1266, in which court citing *Friestedt* v. *U.S.*, 173 Ct. Cl. 447, held that permanent appointment of plaintiff to rank of major would have entitled him to advancement on retired list under 10 U.S.C. 3964 had he served required 6 months in higher grade, ruling of *Friestedt* case may be applied in situations involving advancement on retired list under 10 U.S.C. 3964. 46 Comp. Gen. 17, modified---- 163

PAY—Continued Page

Retired—Continued

Non-Regular service

Effective date

Pub. L. 90–485, approved Aug. 13, 1968 (10 U.S.C. 1331(e)), intended only to exempt non-Regular retirees of uniformed services from provisions of Uniform Retirement Date Act (5 U.S.C. 8301) with respect to benefits of Retired Serviceman's Family Protection Plan (10 U.S.C. 1431–1446), enactment does not affect principle established in *Seagrave v. U.S.*, 131 Ct. Cl. 790, and accepted in 37 Comp. Gen. 653 to effect right of member retired under sec. 1331 accrues from first day of month following date member qualifies by reason of meeting age and service requirements of sec. 1331(a) without regard to date of application for retirement, or accrues from first day of any subsequent month stipulated by member, and principle applies even if member meets requirements of sec. 1331(a) prior to Aug. 13, 1968 but delays application for retired pay until after that date 652

Re-retirement

Inactive service credits

Pub. L. 88–132, effective Oct. 1, 1963, amending 10 U.S.C. 1402(a) not changing conclusion in prior decisions that inclusion of inactive duty time on retired list is precluded in determining rate of monthly basic pay for purposes of computing retired pay, master sergeant upon re-retirement may not be credited with 3 years and 4 months of inactive service between date of retirement, Jan. 1, 1960, under 10 U.S.C. 8914, and return to active duty in grade of technical sergeant on May 1, 1963. However, under sec. 1402(a) upon re-retirement Dec. 1, 1967, enlisted man who had served less than 2 years as master sergeant is pursuant to second sentence in footnote 1, sec. 1402(a) entitled to retired pay computed on basis of basic pay rate in effect at time of re-retirement and multiplier factor that reflects 4 years and 7 months of additional active service 398

Recomputation of retired pay

An officer of Army of U.S. entitled to disability retirement benefits of sec. 5, act of Apr. 3, 1939—subsequently computed under sec. 402(d) of Career Compensation Act of 1949—who entered on active duty Sept. 6, 1951 in Army Reserves and was appointed on May 5, 1958 to Regular Army, where he currently is serving in rank of lieutenant colonel under temporary appointment pursuant to 10 U.S.C. 3442, upon retirement may be paid either retired pay pertaining to "new" retired status or retired pay benefits to which entitled to by virtue of act of Apr. 3, 1939, as amended, whichever is greater 99

An officer of uniformed services retired for physical disability pursuant to act of Apr. 3, 1939, who subsequently elected disability retirement pay computed under sec. 402(d) of Career Compensation Act of 1949, and then served as Army Reserve officer from Sept. 6, 1951 to May 5, 1958, when he was appointed to Regular Army, where he currently is serving in rank of lieutenant colonel under temporary appointment pursuant to 10 U.S.C. 3442, upon retirement would be entitled to retired pay recomputed under 10 U.S.C. 1402(d), if conditions of clause (2) of sec. 1402(c) regarding additional physical disability are met; if not, officer's retired pay status is for consideration under sec. 1402(a), subject to footnote 1, and to provisions of 37 U.S.C. 205(a) 99

PAY—Continued Page
Retired—Continued
Reservists
Civilian disability compensation paid concurrently
Limiting application of rule in *Mulholland* v. *U.S.*, 139 Ct. Cl. 507, that member of Fleet Reserve may receive retainer pay concurrently with civilian disability compensation to periods prior to 1952, will no longer be required in view of holding in *Merlyn E. Horn* v. *U.S.*, 185 Ct. Cl. 795, in which court recognized plaintiff's claim for retainer pay withheld after 1952 for period during which he received disability compensation for injury sustained in civilian position. Therefore, retainer pay withheld from member injured in 1966 and awarded 288 weeks of civilian disability compensation may be released to him and future monthly payments of retainer pay due in his and other similar cases may be paid concurrently with civilian disability compensation 515
Non-Regular service
Foreign citizenship or service effect
Retired pay benefits authorized for non-Regular service members of uniformed services in chapter 67 of Title 10, U.S. Code, viewed as pension, entitlement to retired pay under 10 U.S.C. 1331 is not dependent on continuation of military status. Therefore person eligible to retired pay at age 60 as provided in sec. 1331 who prior to attaining age 60 acquires foreign citizenship and/or status in foreign military service does not lose entitlement to retired pay at age 60, nor is person in receipt of retired pay pursuant to sec. 1331 required to forfeit such pay if he becomes citizen of foreign country and/or enters armed forces of foreign country, provided foreign country is not one that is engaged in hostile military operations against U.S. 699
Retainer pay. (*See* Pay, retired, fleet reservists)
Service credits. (*See* Pay, service credits)
Status on retired list
Subsequent to judgment award
The court in *Lerner* v. *U.S.*, 168 Ct. Cl. 247, decided Dec. 11, 1964, having established right of plaintiff to disability retirement pay effective Dec. 23, 1943, correction of military records, approved Dec. 4, 1967, did not change disability retired status of plaintiff—Army officer—and, therefore, he is not entitled to disability retired pay for period Dec. 23, 1943, to July 31, 1953, period barred by reason that under 28 U.S.C. 2501, payment of judgment was restricted to period July 1, 1957, to Dec. 11, 1964, and under 31 U.S.C. 71a, payment of claim received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from date of judgment 235
Thirty-first day of the month
Leave-without-pay from civilian employment
A leave-without-pay (LWOP) status on 31st day of Oct. 1967 does not entitle retired Regular Air Force officer employed as civilian and subject to reduction in retired pay pursuant to 5 U.S.C. 5532, to additional amount of retired pay. Military retired pay accrues on monthly basis, computed as if each month had 30 days and no retired pay accrues on 31st day of any month. Therefore, officer accrued full month's retired pay for month of October, whether or not he was in LWOP status from his civilian Federal position on 31st of October 152

PAY—Continued Page

Retired—Continued

Waiver for veterans benefits

Reduction in retired pay effect

Employment of retiree

Waiver of retired pay under 38 U.S.C. 3105 by retired officer in favor of Veterans Administration disability compensation not operating to reduce his legally authorized retired pay, additional amount retired officer is entitled to for performing instructional and administrative duties in private high school that maintains Junior Reserve Officers' Training Corps program pursuant to 10 U.S.C. 2031(d), is difference between retired pay he would be entitled to but for waiver and active duty pay and allowances he would receive if ordered to active duty..... 73

Saved

Act of May 20, 1958

Advancement on the retired list

Army sergeant who at time of retirement on Jan. 1, 1960 under 10 U.S.C. 3914 was receiving active duty pay in grade E–4 subject to savings provisions of act of May 20, 1958, upon advancement on retired list to grade of sergeant E–5 on Aug. 7, 1968 pursuant to 10 U.S.C. 3964, is not entitled to recomputation of retired pay on basis of saved pay rate for grade E–5 as act provides only for saving of basic pay or retired pay to which member or former member of uniformed services was entitled on day before effective date of act, and sergeant entitled on May 20, 1958 to pay of grade E–4, recomputation of retired pay may not be based on saved pay rate of grade E–5 but on rate prescribed in 1958 act for grade E–5. B–156576, July 22, 1965, modified..... 618

Temporary promotions. (*See* **Pay, promotions, temporary, saved pay**)

Service credits

Inactive time

Public Health Service commissioned officers

The counting of inactive service in determining retired pay percentage multiple for Public Health Service commissioned officers is not authorized prior to June 1958 by virtue of enactment of 10 U.S.C. 1405, which in prohibiting credit for inactive service performed after May 1958 in computing retired pay percentage multiple of Army, Navy, Marine Corps, Air Force, Coast Guard, and Coast and Geodetic Survey officers, saved to those members only inactive years of service accumulated before June 1958. The Public Health Service Act authorizing credit only for active service in computation of retired pay of commissioned officers of Service, 10 U.S.C. 1405 has no application to them, and to credit officers with inactive service performed prior to June 1, 1958, therefore would require additional legislation..... 632

Severance

Disability retirement

Medically unfit personnel at time of induction

Member of uniformed services who at time of induction into military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of preexisting medical condition during active service has not met requirement in 10 U.S.C. 1201 and 1203 that physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on

PAY—Continued Page

Severance—Continued

Disability retirement—Continued

Medically unfit personnel at time of induction—Continued

separation from service. However, entitlement to such benefits accrues to member experiencing aggravation of his physical condition by active service or acquiring new or additional unfitting condition, even if unfitting condition is incurred by member who did not meet procurement medical fitness standards at time of induction, but did then meet retention fitness standards ---------- 377

Members who served in higher rank than at separation

On basis of *Taylor* v. *U.S.*, 174 Ct. Cl. 1266, in which court citing *Friestedt* v. *U.S.*, 173 Ct. Cl. 447, held that permanent appointment of plaintiff to rank of major would have entitled him to advancement on retired list under 10 U.S.C. 3964 had he served required 6 months in higher grade, ruling of *Friestedt* case may be applied in situations involving advancement on retired list under 10 U.S.C. 3964. 46 Comp. Gen. 17, modified ---------- 163

Status of kinds of pay

Retired pay

Missing, interned, etc., persons

Retired pay checks of Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside continental U.S. by private firm are to be sent to bank in U.S., upon his alleged capture by enemy forces may not be issued to bank or any other person on his behalf for support of his family. The right of retired member of uniformed services terminates upon death and power of attorney executed by him is automatically revoked by his death, whether or not fact of death is known, and in absence of statutory authority providing otherwise, and because presumption of death after lapse of 7 years rule is not applicable, payment of retired pay on behalf of missing sergeant must be held in abeyance until it is established that he is not dead ---------- 706

Thirty-first day of the month

Retired pay. (*See* **Pay, retired, thirty-first day of the month**)

PAYMENTS

Advance

Subscriptions to newspapers, periodicals, etc.

Lantern slide photographs

Lantern slide photographs of X-ray film, electrocardiograms, gross specimens, and photomicrographs that are illustrative of materials presented in Journal of Medicine and that are necessary for effective use of journal may be classified as "publications" as that term is used in 31 U.S.C. 530a, and, therefore, subscriptions for slides may be paid for in advance. The fact that reproduced photographic material will be viewed or read from screen does not preclude slides from being considered publications ---------- 784

Witnesses

Military for foreign forces

When commanding officer of military installation desires to honor properly made request for appearance of member of his command as witness before an authorized service court of a friendly foreign force,

PAYMENTS—Continued Page
Advance—Continued
Witnesses—Continued
Military for foreign forces—Continued
he may under authority in 22 U.S.C. 703 issue orders to member directing his attendance as witness, and consider member on official business in nature of detached service while traveling and while in attendance at proceedings of foreign court. Member witness under 28 U.S.C. 1821 would be entitled to fees and mileage, including subsistence when applicable, authorized for witnesses attending U.S. courts, payment to be made to member from funds supplied by foreign force, in advance if available, or after completion of service upon availability of funds..... 10
Contracts. (*See* Contracts, payments)
POST EXCHANGES, SHIP STORES, ETC.
Employees
Separated civil service employee
Severance pay status
Upon employment of separated civil service employee by nonappropriated funds instrumentality described in 5 U.S.C. 2105(c), severance pay former employee is receiving is not required to be discontinued, provisions in 5 U.S.C. 5595(d) prescribing discontinuance of severance pay applying only when former employee is reemployed by Federal Govt. Even though nonappropriated funds instrumentalities are integral parts of Govt. of U.S., employees of instrumentalities are not considered employees of U.S. for purpose of laws administered by Civil Service Commission and, therefore, severance pay of former employee should not be discontinued as result of employment by nonappropriated funds instrumentality..... 192
POST OFFICE DEPARTMENT
Contracts
Labor stipulations
Service Contract Act
When authority of Postmaster General prescribed in 39 U.S.C. 6407 (a) to "continue in force" for period not to exceed 6 months any contract for transportation of mail until "a new contract is made" is exercised to extend contracts for star route mail service that are not subject to Service Contract Act of 1965, new contracts are not created, exercise of authority merely operating to extend term of original agreement, and provisions of act are not required to be incorporated to cover extended period of contract, nor new wage rates promulgated under act imposed during limited period while new contract is being negotiated or advertised 719
Modification of star route service contract that is not subject to Service Contract Act of 1965, to extend delivery routes or provide for additional services pursuant to 37 U.S.C. 6424, or to adjust under authority in sec. 6423, compensation prescribed in contract, cannot be effected unilaterally but requiring consensual agreement of both parties to contract, modification creates new contract, and contract should, therefore, incorporate provisions of act, or wage rates in effect at time new contract is negotiated..... 719

POST OFFICE DEPARTMENT—Continued Page

Employees

Leaves of absence

Accrual

Recruited, etc., outside United States

A postal employee whose official duty station continues to be Ponce, Puerto Rico, while training in U.S. for duties of postal inspector and assignment to duty at New York, N.Y., upon transfer to San Juan, P.R., is not eligible to accrue 45 days of annual leave authorized by 5 U.S.C. 6304 for individuals recruited or transferred from U.S. or its territories or possessions for employment outside area of recruitment or from which transferred. Although employee was assigned to New York he did not change his permanent residence from Puerto Rico to any point in U.S. where he would be expected to take home leave and, therefore, no basis exists for permitting employee to accumulate annual leave in excess of 30 days fixed by Annual and Sick Leave Act of 1951, as amended ---------- 437

Liability relief

Fund shortages

A postal supply clerk at wholesale stamp window whose shortage of funds in his fixed credit accountability is explained as being due to his business in exchanging "old rate" for "new rate" stocks of stamps is not considered to have exercised high degree of care that is expected from an accountable officer in performance of duty and, therefore, unexplained shortage raising presumption of negligence that record does not rebut, relief from liability for shortage may not be granted to employee under 39 U.S.C. 2401 or 31 U.S.C. 82a–1---------- 566

Leases

Building construction

Specification compliance

Under invitation for bids to construct building on Govt. land for lease to Post Office Dept., with reimbursement to Dept. for cost of site by date specified, award to low bidder after his withdrawal of bid acceptance time extension and prior to acceptance of condition for extension—equal time extension for site payment—was inconsistent with 39 U.S.C. 2103(a) and 2112(2) requiring consummation of post office lease agreements in accordance with 41 U.S.C. 5—award to lowest, responsible bidder whose bid conforms to advertised specifications. The site payment, material requirement that contracting officer could not waive, either under original bid or bid extension, award to low bidder should be canceled and bid deposit refunded---------- 775

Mails

Theft, loss, damage, etc.

Insurance coverage

An indemnity payment for lost package valued at $7,448, which in addition to being fully insured under postal registry system is covered by commercial insurance policy containing $10,000 deductible clause may be made for full value of package under 39 U.S.C. 5001, authorizing indemnity payments for articles valued at $1,000 or less "for which no other compensation or reimbursement has been made" and for articles valued not in excess of $10,000 "when the article is not insured with

POST OFFICE DEPARTMENT—Continued Page

Mails—Continued

Theft, loss, damage, etc.—Continued

Insurance coverage—Continued

another insuring agency." To hold that indemnity payment is limited to $1,000 because package was insured by "another insuring agency," even though payment for loss is precluded under commercial insurance policy would be unrealistic, and reading both qualifying clauses in sec. 5001 together, permits reimbursement for actual value of loss 435

Star route contracts

Extension

Service Contract Act applicability

When authority of Postmaster General prescribed in 39 U.S.C. 6407 (a) to "continue in force" for period not to exceed 6 months any contract for transportation of mail until "a new contract is made" is exercised to extend contracts for star route mail service that are not subject to Service Contract Act of 1965, new contracts are not created, exercise of authority merely operating to extend term of original agreement, and provisions of act are not required to be incorporated to cover extended period of contract, nor new wage rates promulgated under act imposed during limited period while new contract is being negotiated or advertised 719

Modification

Service Contract Act applicability

Modification of star route service contract that is not subject to Service Contract Act of 1965, to extend delivery routes or provide for additional services pursuant to 37 U.S.C. 6424, or to adjust under authority in sec. 6423, compensation prescribed in contract, cannot be effected unilaterally but requiring consensual agreement of both parties to contract, modification creates new contract, and contract should, therefore, incorporate provisions of act, or wage rates in effect at time new contract is negotiated 719

Wage determinations *v.* union agreements

A star route carrier engaged in transportation of U.S. mail pursuant to contracts with Post Office Dept., who is required to comply with wage rate determination, issued by Administrator, Wage and Hour and Public Contracts Divisions of Dept. of Labor pursuant to Service Contract Act of 1965, 41 U.S.C. 351-357 (Supp. II), that exceeds rates payable under union agreement is not entitled to review of wage determination. The Service Contract Act does not provide for review by U.S. General Accounting Office or courts, and in absence of statute so providing, damage resulting from wage determination made pursuant to law, such as Service Contract Act, which does not invade any recognized legal right, is irremediable 22

POWERS OF ATTORNEY

Revocation

Retired pay checks of Army master sergeant retired under 10 U.S.C. 3914 that during his employment outside continental U.S. by private firm are to be sent to bank in U.S., upon his alleged capture by enemy forces may not be issued to bank or any other person on his behalf for support of his family. The right of retired member of uniformed services terminates upon death and power of attorney executed by him is automati-

POWERS OF ATTORNEY—Continued Page
Revocation—Continued
cally revoked by his death, whether or not fact of death is known, and in absence of statutory authority providing otherwise, and because presumption of death after lapse of 7 years rule is not applicable, payment of retired pay on behalf of missing sergeant must be held in abeyance until it is established that he is not dead ---------- 706
PRESIDENT
Executive Schedule employees
Conversion to General Schedule
Downgrading
Upon removal of Level V position of Assistant Archivist for Presidential Libraries from Executive Schedule and return of position to its former GS–17 classification under General Schedule, higher compensation of Level V position may not be saved to incumbent, both actions being Presidential they are outside scope of 5 U.S.C. 5334(d), authorizing salary retention for employees who together with their positions are brought under Classification Act from some other Federal pay system. Even if no change of position is considered to have occurred incident to Presidential actions, situation would be within purview of sec. 539.203 of Civil Service Regs. limiting application of 5 U.S.C. 5334(d) to case where "the employee and his position are initially brought under the General Schedule" ---------- 805
Former
Allowances
Staff, office space, etc.
The "suitable" office space authorized by so-called Former Presidents Act of 1958 "at such place within U.S. as former President shall specify" means space in one locality only, act using singular of word "place," and whether space may be provided in more than one building in same locality is for determination by Administrator of General Services Administration who is authorized to provide space. The Presidential Transition Act of 1963 prescribes space and office staff for first 6 months after expiration of Presidential term to wind up affairs of Presidential office, and thereafter space and staff are to be furnished under 1958 act. The 1970 fiscal year funds appropriated to carry out both acts may be used after July 20, 1969, but nonreimbursable services may not continue beyond 6 months fixed by 1963 act ---------- 786
PRESUMPTIONS
(*See* **Evidence, presumptions**)
PRISONS AND PRISONERS
Trust funds
Withdrawal
Since under trust contracts with prisoners, prison officials have no right to withdraw trust funds without inmates signed approval, even on court orders, attachments, liens or other legal process for satisfaction of claims, Commissary Management Manual of Bureau of Prisons may be revised to prevent disbursement of funds without prisoners' consent to satisfy claims of Govt. for willful destruction of its property. B–72468, Apr. 21, 1948, overruled ---------- 249

PROPERTY Page

Private

Deceased persons

Escheat

Unclaimed wages and other obligations arising out of cost-reimbursable type contracts with U.S. which contractor is required to report and pay to State authorities under escheat laws are reimbursable to contractor, unclaimed amounts constituting part of cost of performing contract and meeting cost-principles of par. 15–201.2 of Armed Services Procurement Reg. Under criteria that wages or other obligations paid or accrued are reimbursable items of cost, reimbursement to contractor need not be postponed until unclaimed amounts are actually paid to State under its escheat laws. However, Govt. would be entitled to recover payments to contractor where claimants were not subsequently located and their last known addresses are in States which do not require accounting for unclaimed property after expiration of stated periods of time. Modifies B–48063, Mar. 21, 1945 179

Public

Damage, loss, etc.

Disposition of funds recovered

Compensation paid by insurance firm to cost-plus contractor operating and maintaining research vessel for National Science Foundation to cover damages sustained by vessel while being overhauled and repaired by subcontractor may not be used to augment Foundation's appropriations, absent specific statutory authority, and moneys, even if paid to prime contractor, are for deposit as miscellaneous receipts into Treasury of U.S. in consonance with sec. 3617, Revised Statutes, 31 U.S.C. 484 209

Shortages

Evidence

Deduction made from amounts owing ocean carrier to reimburse Govt. for unexplained shortage in 1950 Army shipment of rice under Govt. bill of lading from Stockton, Calif., to Kobe, Japan, may not be refunded to carrier on basis loading records were only "shipper's count and weight" and were inaccurate, where bill of lading, Army manifest, and ship's log are in agreement as to number and weight of bags of rice loaded and record is not impeached by daily loading hatch reports nor by unloading tally slips. Presumption of correctness in record of number of bags loaded supporting setoff by Army almost 16 years ago to recover value of lost U.S. property, action to recover loss will not be disturbed 638

Because proceedings by U.S. General Accounting Office are not comparable to judicial proceedings, Office does not settle claims and make determinations subject to "preponderance of the evidence," except as that term may be equated with clear and convincing evidence. Therefore, in absence of plain and convincing proof beyond reasonable controversy that records prepared by Army at port of origin in U.S. of shipment of rice to overseas destination was in error, *prima facie* case in favor of Govt. has not been overcome and ocean carrier is liable for shortage of rice at destination of shipment 638

Easements, rights-of-way, etc. (*See* **Easements, rights-of-way, etc.**)

PUBLIC BUILDINGS Page

Construction

Cost limitations

Certification, compliance, etc.

Statutory cost limitation certificate required by par. 18-110(b) of Armed Services Procurement Reg. in connection with construction contracts is regarded as being intended to prevent deliberate understatement of estimated costs so as to stay within statutory limitation, and is considered requirement that is in accord with par. 2-201(c) of regulation, which provides for rejection of bids materially unbalanced "for purpose of bringing affected items within cost limitations."---------- 34

Whether overstatement of costs on proposed construction contracts which are subject to statutory limitations and to certification of accuracy of cost apportionment statements prescribed by par. 18-110(b) of Armed Services Procurement Reg. would in no case be grounds for finding bid nonresponsive cannot be answered without qualification. However, such cases are not anticipated in view of fact that problems involving par. 18-110 have concerned understatements of estimated costs by bidders attempting to stay within statutory limitations, and because par. 2-201(c)(i) of regulation provides for rejection of bids materially unbalanced for purpose of bringing affected items within cost limitations or bids which exceed cost limitations, unless limitations had been waived prior to award---------- 34

Where Govt. estimate on construction contracts shows that costs will not exceed statutory cost limitations prescribed in par. 18-110 of Armed Services Procurement Reg., and the bidder's certified cost apportionment is also within limitation, fact that bid was unbalanced would not ordinarily justify rejection of bid as nonresponsive---------- 34

Where Govt. estimate on construction projects shows that costs subject to statutory cost limitations of par. 18-110 of Armed Forces Procurement Reg. will not exceed limitation, failure to sign certification required by subsec. (b) is not grounds for finding bid nonresponsive, and usual principles regarding acceptability of unsigned bids would govern in view of fact that pursuant to par. 2-201(c)(i), bidder by signature certifies to correctness of estimated cost apportionment and to entire bid and, therefore, failure to certify cost apportionment should not arise as distinct issue---------- 34

In connection with construction projects, fact that accuracy of bidder's apportionment between statutorily limited costs and those not so limited can affect responsiveness of bid, par. 2-201(c)(i) of Armed Services Procurement Reg. properly provides that "materially unbalanced" or grossly inaccurate cost apportionment can be cause for rejection of bid--- 34

Refusal to submit certified cost apportionment that satisfies statutory limits prescribed for construction contracts pursuant to par. 18-110 of Armed Services Procurement Reg., or submission of grossly erroneous cost apportionment data to circumvent statutory cost limitations is regarded as material discrepancy which renders bid nonresponsive, notwithstanding apportionment certificate is considered only one tool in array of aids, such as prior cost experience, Govt. engineering estimates, competing bidders' costs apportionment, and like, which are available to determine whether statutory cost limitations have been met by bidder--- 34

PUBLIC BUILDINGS—Continued Page

Construction—Continued

Cost limitations—Continued

Certification, compliance, etc.—Continued

Although evaluation of materially unbalanced bids on construction projects is matter of bid responsiveness, materiality would to great extent be determined by whether actual price offered by bidder exceeded statutory limitation imposed by par. 18-110 of Armed Services Procurement Reg., as there is no authorization for construction which exceeds statutory limits. In absence of appropriate waiver pursuant to par. 2-201 (c) (i) of regulation, bid that on basis of full evaluation has been determined to have exceeded statutory limitation is for rejection without regard to responsiveness, whether or not problem of materially unbalanced bid is involved 34

Invitation requirements

Omissions and misdescriptions

Inclusion of clause required by par. 7-602.45 of Armed Services Procurement Reg. in all military fixed-price construction contracts to provide that omissions from drawings or specifications, or misdescription of details of work necessary to carry out intent of drawings and specifications, or details which are customarily performed shall not relieve contractor from performing omitted or misdescribed details of work is not restrictive of full and free competition contemplated by 10 U.S.C. 2305 (a), as well as 41 U.S.C. 253 (a). Therefore, in view of fact that contracting agency has primary responsibility for drafting specifications to meet requirements of Govt, and clause is reasonable and necessary in performance of complicated construction contracts, general usage of clause will not be questioned 90

PUBLIC HEALTH SERVICE

Commissioned personnel

Retired pay

Inactive service credit

The counting of inactive service in determining retired pay percentage multiple for Public Health Service commissioned officers is not authorized prior to June 1958 by virtue of enactment of 10 U.S.C. 1405, which in prohibiting credit for inactive service performed after May 1958 in computing retired pay percentage multiple of Army, Navy, Marine Corps, Air Force, Coast Guard, and Coast and Geodetic Survey officers, saved to those members only inactive years of service accumulated before June 1958. The Public Health Service Act authorizing credit only for active service in computation of retired pay of commissioned officers of Service, 10 U.S.C. 1405 has no application to them, and to credit officers with inactive service performed prior to June 1, 1958, therefore would require additional legislation 632

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 covers in part either tuition or living expenses, or both, payment of educational assistance allowance under chapter 34 of Title 38, U.S. Code, is barred under long-standing construction by Veterans Administration of sec. 1781 that such payment would constitute duplication of benefits paid from Federal Treasury 5

PUBLIC WORKS Page

Flood control projects

Damage liability

Incident to taking of easement for attachment of dikes to railroad embankment in connection with flood prevention project, which necessitates alteration of railroad bridge and its approaches, although it would be preferable to amend project agreement between Federal Govt. and local flood control district entered into under authority of Watershed Protection and Flood Prevention Act, which precludes Federal Govt. from assuming cost of land, easements, and rights-of-way, and to have district in turn enter into concomitant agreement with railroad company for alteration of bridge and its approaches and second agreement to acquire easement of attachment, there is no objection to paying damages, whether or not railroad company agrees to make needed alterations, in order to secure title to easement and protect Govt.'s investment---------- 132

PURCHASES

Purchase orders

Minimum billing charge

Issuance of two unpriced orders, one for items valued at 30¢, other for items worth $1.01, that stated "this is a firm order if price is $50 or less" to supplier whose policy of charging minimum order price of $50 is shown in its quotation is acceptance of supplier's terms and purchase orders became binding contracts for minimum charge upon acceptance and performance of orders and, although minimum charge is questionable, vouchers including charge may be certified for payment. In addition to administrative action taken to consolidate future orders for small purchases, provisions should be included in future bid solicitations to require successful bidder to agree prices will not include minimum billing charge, but should they, that minimum billing charge will be no greater than amount stated in solicitation---------- 168

QUARTERS

Failure to furnish

Military personnel without dependents

Dislocation allowance

Dislocation allowance authorized by Pub. L. 90-207 (37 U.S.C. 407(a)) for members without dependents who upon permanent change of station are not assigned Govt. quarters is not payable to either of two crews of nuclear-powered submarine—permanent station of both crews—as on-duty crew is furnished quarters aboard submarine and off-crew ashore for training and rehabilitation is considered to be at temporary duty station, whether or not submarine is at home port. Therefore, members who incident to transfer aboard submarine report to temporary station locations ashore where they do not perform basic duty assignments are not entitled to dislocation allowance, nor is allowance payable to members reporting aboard submarine when first relieved with on-ship crew for training and rehabilitation---------- 480

Although member of uniformed services without dependents who upon reporting to submarine under permanent change-of-station orders is assigned quarters on board submarine is not entitled to dislocation allowance authorized in 37 U.S.C. 407(a) for members without dependents who upon permanent change of station are not assigned Govt. quarters, he would be entitled to allowance if he reports to nuclear-powered submarine

QUARTERS—Continued Page
Failure to furnish—Continued
Military personnel without dependents—Continued
Dislocation allowance—Continued
that is undergoing overhaul or repair at its home port or home yard and quarters aboard submarine are uninhabitable, member is not assigned quarters ashore, and lodging accommodations pursuant to 10 U.S.C. 7572(a) are not furnished to member ---- 480
Army officer who upon completion of tour of duty in restricted overseas area is not assigned Govt. quarters incident to permanent change of station but rejoins his dependents who had remained in family residence in U.S. is not entitled to dislocation allowance prescribed by 37 U.S.C. 407 (a) for "member without dependents," as term means member that is not entitled to transportation of his dependents, whereas officer is entitled to transportation of his dependents between place at which they were located when he received his orders and his new duty station, regardless of prohibition against their travel at Govt. expense to and from U.S., entitlement that is not negated by fact place where his dependents were located and place to which they were entitled to transportation are same ---- 782
QUARTERS ALLOWANCE
Dependents
Children
Illegitimate
An unmarried officer of uniformed services who although acknowledging paternity of illegitimate child and contributing to support of child has not established home in which child lives with him as member of his family may not be credited with increased quarters allowance on account of child, law of State of California, place of birth of child and residence of all parties requiring in addition to acknowledging illegitimate child that father receive child into his family and treat child as his legitimate offspring ---- 311
Not at duty station
Assignment to grade E–4 Army sergeant with less than 2 years service of family type quarters notwithstanding ineligibility for quarters, as quarters were in excess of needs of command, on assumption member's family would join him later, properly was termination when family did not join member after he became eligible for assignment of family quarters upon promotion to grade E–5. Therefore, pursuant to 37 U.S.C. 403 (a) and (b), member is entitled to basic allowance for quarters as member with dependents from date family quarters assignment was terminated ---- 216
Quarters occupancy prevented by "competent authority"
The fact that officer of uniformed services supports his children residing with former wife who had been awarded their custody in divorce decree does not entitle him to basic allowance for quarters on their behalf, officer having remarried and having been assigned Govt. quarters at overseas station, from which dependents were not precluded by "competent orders." Divorce decree of court having jurisdiction of children is not "competent authority" contemplated by 37 U.S.C. 403(d) in providing that member assigned Govt. quarters may not be denied basic allowance for quarters if, because by orders of competent authority dependents are prevented from occupying assigned quarters ---- 28

QUARTERS ALLOWANCE—Continued Page
Entitlement
Training duty periods
Reporting from home
A member of Coast Guard Reserve who away from home to perform active duty training at installation where Govt. quarters and messing facilities are not available, in addition to entitlement to travel and transportation allowances provided by 37 U.S.C. 404(a)(2) and (3), may be credited under authority of 37 U.S.C. 404(a)(4) with basic allowance for quarters and per diem without reduction, restriction in 37 U.S.C. 403(b) to payment of quarters allowance when member is not entitled to basic pay having no application to sec. 404(a)(4) entitlement, and par. M6001 of Joint Travel Regs. not requiring reduction in per diem while reservist is entitled to quarters allowance. However, basic allowance for subsistence prescribed by 37 U.S.C. 402(b) is not payable to enlisted man receiving per diem and therefore subsisted at Govt. expense ---------- 301
Training station to which Reserve member without dependents is ordered to active duty for less than 20 weeks in temporary duty status is permanent station and member performing basic assignment at his permanent duty station is entitled to basic allowance for quarters prescribed by 37 U.S.C. 403(f), as amended by Pub. L. 90–207, while at training station and definition in par. M1150–10c of Joint Travel Regs. that home or place from which member of Reserve component is not for application. Therefore, par. 10242 and Table 1–2–4, Dept. of Defense Military Pay and Allowances Entitlements Manual, remains applicable in computing allowable travel time for pay purposes for travel performed from home to training station ---------- 490
Government quarters
Husband and wife service members
A husband and wife, members of uniformed services in pay grades E–5 and E–4, respectively, each member in receipt of basic allowance for quarters while occupying private quarters, when assigned inadequate Govt. quarters on rental basis may continue under 42 U.S.C. 1594j(a) to receive allowance as members without dependents. However, their combined allowances exceeding allowance received by usual military family—one member only in service—occupying inadequate quarters, reduction provided by sec. 1594j(a) when rental rate exceeds 75 per centum of quarters allowance may not be applied on basis of husband's allowance alone. The manner or from whom rental charges are collected is immaterial under landlord and tenant relationship ---------- 68
Nonoccupancy
Allowance continuance
Members without dependents duty station changes
Members of uniformed services without dependents who are not assigned or do not occupy Govt. quarters while in travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, are entitled to basic allowance for quarters during interim between detachment from old station and reporting at new station on same basis as members with dependents, Pub. L. 90–207, amending 37 U.S.C. 403(f) prescribing entitlement to allowance for period while in permanent change-of-station status without regard to dependency ---------- 40

QUARTERS ALLOWANCE—Continued Page

Leave or travel status

Between permanent duty stations

The fact that member of uniformed services occupies accommodations aboard ship as passenger en route to new permanent duty station does not affect his basic allowance entitlement under 37 U.S.C. 403(f), as amended, in view of rule that accommodations furnished members and their dependents while traveling incident to change of station are not considered equivalent of public quarters 40

Basic allowance for quarters provided in 37 U.S.C. 403(f), as amended by Pub. L. 90-207, for member of uniformed services without dependents when he is not assigned adequate quarters while in travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, may be paid to Reserve member without dependents on basis travel of reservist between home and first and last duty stations is permanent change-of-station travel. Amendment to sec. 403(f) does not require change in view that travel from home to first duty station and from last duty station to home is permanent change-of-station travel for purposes of travel and transportation allowances prescribed by 37 U.S.C. 404(a) 490

Members without dependents

While in a travel or leave status between duty stations

To extent that members of uniformed services without dependents are not assigned Govt. quarters while traveling, or during delays en route, they are entitled to basic allowances for quarters from date of departure from old station to date of arrival at new station overseas, including periods while in per diem or group travel status for overseas portion of travel, accommodations furnished during such travel not being regarded as assignment or occupancy of public quarters within meaning of quarters allowance authorized by 37 U.S.C. 403(f) 40

Nonoccupancy of quarters for personal reasons

Entitlement to allowance

Assignment to grade E-4 Army sergeant with less than 2 years service of family type quarters notwithstanding ineligibility for quarters, as quarters were in excess of needs of command, on assumption member's family would join him later, properly was terminated when family did not join member after he became eligible for assignment of family quarters upon promotion to grade E-5. Therefore, pursuant to 37 U.S.C. 403(a) and (b), member is entitled to basic allowance for quarters as member with dependents from date family quarters assignment was terminated 216

Transit type quarters

Basic allowance entitlement

On basis that 37 U.S.C. 403(f), as amended, authorizes payment of basic quarters allowance to members of uniformed services without dependents while in travel or leave status between permanent stations when not assigned Govt. quarters, sec. 403(i) of E.O. No. 11157, dated June 22, 1964, may be amended to apply to members without dependents as well as to members with dependents with respect to temporary occupancy of Govt. quarters while in duty or leave status incident to change of permanent station, thus permitting promulgation of adminis-

QUARTERS ALLOWANCE—Continued Page
Transit type quarters—Continued
Basic allowance entitlement—Continued
trative regulations to authorize basic allowance for quarters for not more than 30 days to member without dependents who occupies transient type quarters while in duty or leave status incident to permanent change of station---- 40
Absent administrative regulation to authorize occupancy of transient type Govt. quarters for not to exceed 30 days while between permanent duty stations without loss of entitlement to basic allowance for quarters, member without dependents who occupies Govt. quarters while assigned temporary duty at preembarkation overseas processing point in U.S. would not be entitled to basic allowance for quarters prescribed by 37 U.S.C. 403(f), as amended by Pub. L. 90–207, regardless of reduction in per diem because of occupancy, or direction to utilize Govt. quarters due to mission requirements of temporary duty to be performed en route to permanent duty station---- 40
The fact that member of uniformed services occupies accommodations aboard ship as passenger en route to new permanent duty station does not affect his basic allowance entitlement under 37 U.S.C. 403(f), as amended, in view of rule that accommodations furnished members and their dependents while traveling incident to change of station are not considered equivalent of public quarters---- 40
Occupancy of transient type Govt. quarters by member of uniformed services without dependents for 28 days while awaiting arrival at its home port of vessel to which assigned does not affect member's entitlement to basic allowance for quarters, sec. 401(d) of E.O. No. 11157, dated June 22, 1964, which implements 37 U.S.C. 403, defining term "permanent station" as including home yard or home port of ship in which member is required to perform duty---- 40
Member of uniformed services without dependents who while awaiting arrival at its home port of vessel to which ordered is assigned by his squadron to another squadron for performance of 29 days temporary duty is not entitled to basic allowance for quarters during period of temporary duty, in view of fact temporary quarters occupied aboard vessel while performing temporary duty are considered permanent quarters of U.S. within purview of 37 U.S.C. 403(b) and (f), and because temporary assignment does not come within exceptions contained in E.O. No. 11157, dated June 22, 1964---- 40
A transfer from one vessel to another where both vessels are homeported in same area not constituting permanent change of station within purview of sec. 401(d) of E.O. No. 11157, implementing 37 U.S.C. 403, and transfer not coming within exception contemplated by sec. 403(i) of Executive order, which permits occupancy of Govt. quarters without loss of basic allowance for quarters (BAQ) while member is in leave or duty status incident to change of permanent station, members of uniformed services without dependents who occupy transient quarters incident to transfer from one vessel to another in same home port are not entitled to BAQ for period of occupancy of transient quarters---- 40

QUARTERS ALLOWANCE—Continued Page

Travel status

Reservists

Basic allowance for quarters provided in 37 U.S.C. 403(f), as amended by Pub. L. 90–207, for member of uniformed services without dependents when he is not assigned adequate quarters while in travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, may be paid to Reserve member without dependents on basis travel of reservist between home and first and last duty stations is permanent change-of-station travel. Amendment to sec. 403(f) does not require change in view that travel from home to first duty station and from last duty station to home is permanent change-of-station travel for purposes of travel and transportation allowances prescribed by 37 U.S.C. 404(a) ---------- 490

REAL PROPERTY

Conveyances

Grant of Federal funds status

Conveyance of land purchased by State of Kentucky from General Services Administration for recreational purposes pursuant to authority in 50 U.S.C. 1622(h), which provides for sale of land at 50 percent of its fair value and for its reversion to Govt. in event land is not used for purpose of conveyance is not grant of Federal funds precluding reimbursement to State of 75 percent of cost of project under terms of Federal Aid in Wildlife Restoration Act of 1937 -project approved by Secretary of the Interior- -and fact that land was purchased for less than its "fair value" does not prohibit reimbursement, purchase price paid for land constituting cost of project ---------- 161

REGULATIONS

Self-executing

Dept of Defense Directive 5500.10 (Appendix G of Armed Services Procurement Reg.) promulgated to avoid conflicts of interest on part of contractors is not self-executing regulation but requires notice of its applicability in solicitation and in contract, and exercise of judgment or discretion by contracting officer, subject to review, and, therefore, doctrine of *G. L. Christian and Associates* v. *U.S.*, 312 F. 2d 418, may not be invoked to give Directive force and effect of law and to read into contract mandatory clauses of ASPR that were not included ---------- 702

RESERVE OFFICERS' TRAINING CORPS

(*See* Military Personnel, Reserve Officers' Training Corps)

SELECTIVE SERVICE SYSTEM

Charter Coach Service

Damage liability

Assumption by Selective Service System of liability for damages to motor vehicles by registrants who when ordered for physical examinations or for induction by local boards are transported in Charter Coach Service is not precluded because System lacks express authority to contract for liability, appropriations for operation and maintenance of System providing authority to contract for travel of selectees with no express limitation placed on such authority in appropriation acts or in Universal Military Training and Service Act. Nor does fact that service contracts do not expressly provide for liability preclude payment of damage claims, terms of charter certificates furnished when service is

SELECTIVE SERVICE SYSTEM—Continued Page
Charter Coach Service—Continued
Damage liability—Continued
used incorporating into contract by reference indemnity provision of carriers' charter coach tariffs 361
SET-OFF
Authority
Common law right
The lessor of facilities occupied as post office obligated to repaint interior of building under "good repair" provision of lease, upon lessor's refusal to assume responsibility, Post Office Department properly proceeded to have painting performed under contract and under its common law right of set-off to withhold cost from rental payments due. The action of Department not having been based on finding that premises were "unfit for use," remedy to Govt. was not termination of lease 289
Mutuality of parties, etc.
Joint ventures
Although general rule is that funds due joint venture—form of limited partnership subject generally to laws of partnership—may not be set off to satisfy independent prior debt of one of coventurers, even if set-off is only against his interest in partnership claim, rule is negated when all parties to joint venture agree subsequent to contract performance that joint venturers will pursue and obtain payment from Govt. as individuals. Therefore, amount due under agreement to partner indebted to Govt. for damages assessed under his defaulted, individual contract with Govt. may be set off to partially liquidate that indebtedness, notwithstanding pursuant to accounting procedure, indebtedness had been written off as uncollectible 365
Transportation
Property damage, etc.
Reclaim of set-off
Deduction made from amounts owing ocean carrier to reimburse Govt. for unexplained shortage in 1950 Army shipment of rice under Govt. bill of lading from Stockton, Calif. to Kobe, Japan, may not be refunded to carrier on basis loading records were only "shipper's count and weight" and were inaccurate, where bill of lading, Army manifest, and ship's log are in agreement as to number and weight of bags of rice loaded and record is not impeached by daily loading hatch reports nor by unloading tally slips. Presumption of correctness in record of number of bags loaded supporting setoff by Army almost 16 years ago to recover value of lost U.S. property, action to recover loss will not be disturbed 638
Unrelated transactions
Withholding from current contract of wage underpayments due under two contracts for prior years, together with liquidated damages assessed on account of violations—all contracts containing Contract Work Hours Standards Act provision authorizing set-off from "moneys payable on account of work performed"—may not be retained as to wage underpayments, no mutuality of obligation existing between collection of underpayments by Govt. as trustee and its direct debt liability under current contract, but set-off to collect liquidated damages was proper, as there is mutuality of obligation between amount due for work performed under latest contract and liquidated damages due on account of wage underpayments under earlier contracts 387

SMITHSONIAN INSTITUTION Page

Contracts

Advertising, etc., law compliance

As National Zoological Park (Zoo) is considered Govt. property, authority of Regents of Zoo is subject to limitations applicable generally to administrative officials of Govt., limitations that are not affected by act of Nov. 6, 1966, authorizing negotiation of concession operations at Zoo with nonprofit, scientific, educational, or historic organizations and, therefore, any arrangement for operation of food concessions at Zoo is subject to advertising procedures. However, as use of single contract to procure restaurant concessions at Smithsonian facilities, including Zoo, would be more economical and efficient, upon issuance of determination that it would not be feasible or practicable to use formal advertising procedures, combined contract may be negotiated under 41 U.S.C. 252(c)(10) and sec. 1-3.210 of Federal Procurement Regs..... 193

SOCIAL SECURITY

Public assistance

Federal participation

Retroactive payments by States, etc.

Fact that State or local welfare agency in administration of public assistance programs in which Govt. participates under authority of several titles of Social Security Act, determines eligibility of applicant for assistance and certifies subsistence payments subsequent to month of application for assistance, and first assistance payment made to eligible applicant includes period beginning with date of application does not preclude Federal financial participation for period prior to month in which first payment was made to eligible individual, entitlement upon certification of eligibility to public assistance beginning with date of application and not when responsible administrative agency makes its determination. 16 Comp. Gen. 314, modified..... 477

STATE LAWS

Escheat

Unclaimed amounts due from contractors

Unclaimed wages and other obligations arising out of cost-reimbursable type contracts with U.S. which contractor is required to report and pay to State authorities under escheat laws are reimbursable to contractor, unclaimed amounts constituting part of cost of performing contract and meeting cost-principles of par. 15-201.2 of Armed Services Procurement Reg. Under criteria that wages or other obligations paid or accrued are reimbursable items of cost, reimbursement to contractor need not be postponed until unclaimed amounts are actually paid to State under its escheat laws. However, Govt. would be entitled to recover payments to contractor where claimants were not subsequently located and their last known addresses are in States which do not require accounting for unclaimed property after expiration of stated periods of time. Modifies B-48063, Mar. 21, 1945..... 179

STATES Page

Federal aid, grants, etc.

Amendment, etc.

Provisional indirect cost rates

Supplemental payments to grantees under sec. 301 of Public Health Service Act, 42 U.S.C. 241(d), and implementing regulations after expiration of research project period to cover actual indirect costs in excess of estimated provisional amounts allocated as indirect costs in grant awards made prior to July 1, 1968, date of clarifying amendments to secs. 52.14 (a) and (b) of Public Health Service regulations permitting adjustment of grant awards, is not precluded, use of phrase "provisional indirect cost rate" in grant agreements recognizing tentative arrangement subject to adjustment—adjustment that would not create type obligation prohibited under sec. 52.14(b). Only appropriation originally obligated by grant is available for payment of upward adjustment of provisional indirect cost rate---------- 186

Municipalities

Flood prevention projects

Damage liability

Incident to taking of easement for attachment of dikes to railroad embankment in connection with flood prevention project, which necessitates alteration of railroad bridge and its approaches, although it would be preferable to amend project agreement between Federal Govt. and local flood control district entered into under authority of Watershed Protection and Flood Prevention Act, which precludes Federal Govt. from assuming cost of land, easements, and rights-of-way, and to have district in turn enter into concomitant agreement with railroad company for alteration of bridge and its approaches and second agreement to acquire easement of attachment, there is no objection to paying damages, whether or not railroad company agrees to make needed alterations, in order to secure title to easement and protect Govt.'s investment. ---------- 132

Recreational project

Purchase of land reimbursement

Conveyance of land purchased by State of Kentucky from General Services Administration for recreational purposes pursuant to authority in 50 U.S.C. 1622(h), which provides for sale of land at 50 percent of its fair value and for its reversion to Govt. in event land is not used for purpose of conveyance is not grant of Federal funds precluding reimbursement to State of 75 percent of cost of project under terms of Federal Aid in Wildlife Restoration Act of 1937—project approved by Secretary of Interior—and fact that land was purchased for less than its "fair value" does not prohibit reimbursement, purchase price paid for land constituting cost of project---------- 161

STATION ALLOWANCES

Military personnel

Temporary lodgings

Awaiting arrival of vessel

A member of uniformed services who incident to permanent change-of-station orders assigning him to duty on board ship, occupies hotel or hotel-like accommodations with his family at home port or is temporarily assigned to off-ship crew of two-crew nuclear powered submarine, is not

STATION ALLOWANCES—Continued Page

Military personnel—Continued

Temporary lodgings—Continued

Awaiting arrival of vessel—Continued

eligible to receive temporary lodging allowances prescribed by 37 U.S.C. 405 as permanent station allowance to partially reimburse member for more than normal expenses incurred upon arrival at permanent station outside U.S. Therefore, as member is not considered to be at permanent duty station for purposes of temporary lodging allowance until he reports aboard vessel to which assigned, Joint Travel Regs. may not be amended to authorize payment of allowance to member prior to reporting aboard ship 716

STATUTES OF LIMITATION

Claims

General Accounting Office

Military matters

Disability retired pay

The court in *Lerner* v. *U.S.*, 168 Ct. Cl. 247, decided Dec. 11, 1964, having established right of plaintiff to disability retirement pay effective Dec. 23, 1943, correction of military records, approved Dec. 4, 1967, did not change disability retired status of plaintiff—Army officer—and, therefore, he is not entitled to disability retired pay for period Dec. 23, 1943, to July 31, 1953, period barred by reason that under 28 U.S.C. 2501, payment of judgment was restricted to period July 1, 1957, to Dec. 11, 1964, and under 31 U.S.C. 71a, payment of claim received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from date of judgment 235

STATUTORY CONSTRUCTION

Administrative construction weight

Provision in 38 U.S.C. 1781, which prohibits granting of educational assistance allowance or special training allowance to or on behalf of eligible person or veteran under ch. 34 of Title 38, U.S.C., for any period of enrollment in program of education or course paid for by U.S. under "any other provision of law," where payment constitutes "duplication of benefits paid from Federal Treasury," having been uniformly and consistently interpreted by Veterans Administration to mean payments for same or similar benefits or purposes, even if costs are not identical, interpretation is entitled to great weight under rule of statutory construction, particularly where provision was reenacted, and it is immaterial whether payment under other than chapter 34 is made to an educational institution 5

STORAGE

Household effects

Military personnel

Time limitation

Extension

When continued storage of household effects of members of uniformed services beyond authorized (37 U.S.C. 406(b)) temporary storage period of 180 days is required by unforeseen emergency or conditions beyond control of member, use of appropriations to pay storage company for period in excess of 180 days to enable member to enjoy benefit of Govt.

STORAGE—Continued Page
Household effects—Continued
Military personnel—Continued
Time limitation—Continued
Extension—Continued
rate incident to additional temporary storage would violate sec. 3678, R.S., 31 U.S.C. 628, which limits expenditures to objects for which made, even though member would subsequently be billed for storage cost of extended period. Therefore, practice of converting storage account from Govt. to member upon expiration of 180 days temporary storage period should be continued 773
SUBSIDIES
Vessels. (*See* **Maritime Matters, subsidies**)
SUBSISTENCE
Per diem
Military personnel
At permanent post
Payment of travel and transportation allowances prescribed in 37 U.S.C. 404(a) to retired members of uniformed services ordered to short periods of duty at station where mess and quarters are not prescribed is not precluded by lack of specific reference to retirees in legislative history of Pub. L. 90-168, dated Dec. 1, 1967, adding clause 4 to sec. 404(a) to provide travel and transportation allowances for Reserve components, 1967 act having been designed to authorize same entitlements to "all military personnel" when circumstances are essentially same. In amending Joint Travel Regs. to provide for payment to retired members, fact that per diem authorized by act is permanent station allowance that is payable only during periods of duty at permanent station is for consideration 553
Incidental expenses
Tips given exclusively for handling Govt. property at hotels may be reimbursed to members of uniformed services, and Joint Travel Regs. amended accordingly, rule that tip is incidental expense item included in member's per diem applying only to personal baggage. However, reimbursement may not be authorized for tips or fees incurred in handling member's personal baggage as well as Govt. property at hotels except to extent separate charge or additional cost is experienced for handling Govt. property 84
Station per diem allowance. (*See* **Station Allowances, military personnel**)
Temporary duty
Two successive orders
A naval reservist who travels from and to his home under orders providing for 63-day recruiting assignment at temporary duty station and then under subsequent orders after 1-day break in service returns to temporary duty station for 150-day similar assignment is considered to have had one continuous period of service for determining entitlement to temporary duty allowance—per diem and monetary allowance in lieu of transportation—and under 37 U.S.C. 404(a) permitting payment of travel and transportation allowances to reservists ordered from home for short periods of active duty—less than 20 weeks—where mess and quarters are not provided, member may not be paid on basis that two periods of duty were authorized by separate orders 655

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Training duty periods
Reporting from home

Pub. L. 90-168 (37 U.S.C. 404(a)(4)) having as its purpose payment of extra expenses incurred during training periods by members of uniformed services or National Guard members while away from home, definition in par. M1150-10c of Joint Travel Regs. implementing act to effect that home or place from which member of Reserve components is called or ordered to active duty or active duty for training in permanent duty station of member has no effect in determination of entitlement, either to pay and allowances for period of training duty or to reimbursement of cost of travel to and from training duty 301

A member of Coast Guard Reserve who away from home to perform active duty training at installation where Govt. quarters and messing facilities are not available, in addition to entitlement to travel and transportation allowances provided by 37 U.S.C. 404(a)(2) and (3), may be credited under authority of 37 U.S.C. 404(a)(4) with basic allowance for quarters and per diem without reduction, restriction in 37 U.S.C. 403(b) to payment of quarters allowance when member is not entitled to basic pay having no application to sec. 404(a)(4) entitlement, and par. M6001 of Joint Travel Regs. not requiring reduction in per diem while reservist is entitled to quarters allowance. However, basic allowance for subsistence prescribed by 37 U.S.C. 402(b) is not payable to enlisted man receiving per diem and therefore subsisted at Govt. expense 301

Reservists

Joint Travel Regs. issued to implement travel and transportation allowances authorized in 37 U.S.C. 404(a)(4) (Pub. L. 90-168, Dec. 1, 1967) for members of uniformed services performing duty away from home may not be amended to deny payment of per diem to member of Reserve component performing annual active duty for training at same location where he normally performs inactive duty training, unless member does not incur quarters and subsistence costs but commutes from home to duty station, whether or not duty station and home are both located within boundaries of same city or other specified geographical area, for then reservist would not be "away from home" within meaning of 37 U.S.C. 404(a)(4) to entitle him to per diem for period of annual active duty for training 517

Members of Reserve components who are called to active duty or active duty for training, as distinguished from annual active duty for training under orders which require return home upon completion of duty, are entitled to per diem if called to duty from their home for tours of less than 20 weeks duration, 37 U.S.C. 404(a)(4) permitting payment of per diem to reservists ordered from their homes for short periods of less than 20 weeks of duty, irrespective of type of duty performed, if they are not furnished quarters and mess at training duty station 517

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Training duty period—Continued
Reservists—Continued
Denial of per diem under 37 U.S.C. 404(a)(4) to member of Reserve component is required only while he is on annual active duty for training when Govt. quarters and Govt. mess are available and, therefore, per diem may be paid to member of Reserve component while on annual active duty for training, active duty for training, or active duty at duty station where Govt. quarters or Govt. mess, or both, are not available even though duty is performed at same place and under same conditions as apply to reservist's inactive duty training---------- 517
When members of Reserve components are on annual active duty for training, active duty for training, or active duty at locations away from home under orders which require return home upon completion of duty, they may only be paid per diem under 37 U.S.C. 404(a)(4) if Govt. quarters and mess are unavailable to them. Members of Regular services under par. M4205-5 of Joint Travel Regs. are not entitled to per diem when furnished subsistence and quarters while on temporary duty, and any per diem paid is subject to reduction, and sec. 404(a)(4) contemplating equalization of reservist's entitlement to per diem with that of Regular member, payment of per diem to reservist on any other basis would result in unequal treatment---------- 517
When members of Reserve components are ordered to active duty or active duty for training for 20 weeks or more, rules and regulations relating to temporary duty travel do not apply and entitlement of reservists to per diem is for determination pursuant to 37 U.S.C. 404(a)(1) and not sec. 404(a)(4), which provides for equalization of reservists' benefits with that of Regular members---------- 517
Restrictions on movement of dependents in cases of active duty for less than 6 months and training duty for less than 1 year that are contained in Joint Travel Regs. are unaffected by addition of clause (4) (Pub. L. 90-168, Dec. 1, 1967) to 37 U.S.C. 404(a), and amendment of Joint Travel Regs. to authorize permanent change-of-station allowances for members of Reserve components instead of per diem whenever such alternative is considered appropriate is matter for determination by Secretaries concerned under authority of 37 U.S.C. 406 (a) and (c)---- 517
Reduction
Conference meals
Civilian employee coordinator of seminar for purpose of training employees of International Agricultural Development Service who paid cost of meals for non-Govt. employee guest speakers and employees of Service attending seminar conducted at headquarters may be reimbursed for expense incurred upon determination by appropriate authority that cost of meals furnished non-Govt. employees is authorized under 5 U.S.C. 4109; that one Service employee participated as seminar speaker; and that business of seminar was conducted during mealtime requiring attendance of Service employees. Pursuant to sec. 6.7 of Standardized Govt. Travel Regs., any per diem payments authorized should be reduced---------- 185

SUBSISTENCE—Continued Page

Per diem—Continued

Training periods

Training site status

An employee who incident to moving family residence to training site under authority in 5 U.S.C. 4109(a)(2)(B) forfeits right to per diem is entitled to transportation costs and per diem when required to travel on official business away from training site, even while performing official duties at location which would otherwise be his official station. For purposes of sec. 6.8 of Standardized Govt. Travel Regs., which prohibits payment of per diem at permanent duty station, training site may be considered employee's permanent duty station, thus entitling him to per diem while temporarily assigned official duties away from training site 313

Witnesses

Administrative proceedings

Individuals who are not members of uniformed services or Federal civilian employees may be called as witnesses in adverse administrative proceedings whether in behalf of Govt. or in behalf of member or employee and paid transportation and per diem allowances as "individuals serving without pay" within scope of 5 U.S.C. 5703, if presiding hearing officer determines that member or employee reasonably has shown that testimony of witness is substantial, material, and necessary, and that affidavit would not be adequate. Joint Travel Regulations may be amended accordingly, and any inconsistent prior decisions will no longer be followed 644

TIME

International dateline

Crossing effect on compensation

An employee who "lost" a workday incident to permanent change-of-station transfer from Honolulu to Toyko due to crossing international dateline is entitled to compensation for a day under rule that in establishing entitlement to pay, time of place at which employee is located is controlling under 15 U.S.C. 262. In accordance with longstanding administrative practice, pay of employee should not be increased because of extra time gained when traveling across international dateline in in eastward direction—crossings in opposite directions canceling each other out. However, any specific factual situations may be presented for consideration 233

Limitation effect

Household effects storage

When continued storage of household effects of members of uniformed services beyond authorized (37 U.S.C. 406(b)) temporary storage period of 180 days is required by unforeseen emergency or conditions beyond control of member, use of appropriations to pay storage company for period in excess of 180 days to enable member to enjoy benefit of Govt. rate incident to additional temporary storage would violate sec. 3678, R.S., 31 U.S.C. 628, which limits expenditures to objects for which made, even though member would subsequently be billed for storage cost of extended period. Therefore, practice of converting storage account from Govt. to member upon expiration of 180 days temporary storage period should be continued 773

TRAILER ALLOWANCES Page

Boats

Status of houseboat

The authority in 37 U.S.C. 409, prescribing mileage allowance for transporting housetrailer or mobile dwelling that is used as residence in lieu of shipping household goods and payment of authorized dislocation allowance contemplating overland travel, which is reimbursed at rates fixed on basis of tariffs filed with Interstate Commerce Commission, boat used as living quarters does not come within meaning and scope of term "mobile dwelling" to qualify for purpose of trailer allowance and, accordingly, Joint Travel Regs. may not be amended to authorize incident to permanent change of station payment of trailer allowance to member transporting a houseboat that is used as residence 147

Civilian personnel

Costs to prepare trailer for shipment, etc.

Cost to civilian employee to equip housetrailer transported incident to permanent change of station with an extra axle in compliance with State law is not reimbursable expense. The expenditure representing cost of structural change in trailer constitutes capital improvement that is not reimbursable as miscellaneous expense under sec. 3 of Bur. of Budget Cir. No. A–56, and structural change to trailer having been incurred to prepare trailer for movement, reimbursement for cost of axle is excluded under sec. 9.3a(3) of Circular 226

TRANSPORTATION

Bills of lading

Government

Released valuation condition

Condition 5 of Govt. bill of lading that "shipment is made at restricted or limited valuation specified in tariff or classification at or under which lowest rate is available" entitles Govt. on shipment subject to sec. 22 quotation that does not require notice of shipper's released valuation in specified form to lowest rate provided in quotation—released value rate. Even though quotation is not "tariff or classification" within strict meaning of Interstate Commerce Act, it is schedule of charges for services contemplated by definition of word "tariff"—a statement by carrier that it will furnish certain services under certain conditions for certain prices, a schedule of rates and charges 335

Dependents

Immediate family

Under-age divorced daughter

The 17-year old divorced daughter of civilian employee at overseas duty post under renewal contract who is unable to support herself and infant daughter and temporarily resides with sister in U.S. may be considered member of employee's household for purposes of sec. 1.2d of Bur. of Budget Cir. No. A–56, even though she was not living under his roof at time his employment contract was renewed or that he had not performed home leave travel incident to that contract. However, grandchild is excluded from term "immediate family" therefore limiting employee's entitlement to payment of one-way travel of his daughter, not to exceed constructive payment of expenses from his U.S. place of residence to overseas duty station 457

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel

Availability of Government transportation

Commercial means

When wife of Army enlisted man is afraid to travel by airplane and there is no justification for issuance of medical certificate, but member who in order to meet reporting date at new duty station in U.S. from overseas assignment is authorized to travel with dependent by commercial surface transportation as no Govt. surface transportation was available is entitled pursuant to par. M4159–4 of Joint Travel Regs. to reimbursement for cost of wife's travel by commercial surface transportation without reduction. Also payment of monetary allowance may be made to member to cover land travel of dependent from overseas station to port of embarkation and from port of debarkation to new duty station 408

Dislocation allowance

Actual movement of dependents requirement

Army officer who upon completion of tour of duty in restricted overseas area is not assigned Govt. quarters incident to permanent change of station but rejoins his dependents who had remained in family residence in U.S. is not entitled to dislocation allowance prescribed by 37 U.S.C. 407(a) for "member without dependents," as term means member that is not entitled to transportation of his dependents, whereas officer is entitled to transportation of his dependents between place at which they were located when he received his orders and his new duty station, regardless of prohibition against their travel at Govt. expense to and from U.S., entitlement that is not negated by fact place where his dependents were located and place to which they were entitled to transportation are same 782

Hospital transfers

"Permanent station" meaning place where member of uniformed services is assigned for duty, definition of permanent station in par. M1150–10 of Joint Travel Regs. may not be broadened to include hospital in U.S. to which member is transferred for prolonged hospitalization from either duty station or other hospital in U.S., and, therefore, chapter 9 of regulations may not be amended to permit payment when member is so hospitalized of dislocation allowance provided in 37 U.S.C. 407 (a)(1) for members whose dependents make authorized move "in connection with his change of permanent station." However, chapter 9 may be amended to authorize allowance on same basis dependents and baggage are transported to hospital, that is "as for a permanent change of station" upon issuance of certificate of prolonged treatment 603

Members without dependents. (*See* Military Personnel, dislocation allowance, members without dependents)

Transfers

Successive changes of employee

An employee who before his immediate family and household effects were transferred to new duty station was transferred second time to station located at greater distance from old duty station than first

TRANSPORTATION—Continued Page

Dependents—Continued

Transfers—Continued

Successive changes of employee—Continued

transfer point is entitled to mileage based on greater distance from old to ultimate duty station for movement of family and in determining commuted payment covering transportation of household effects under principle formerly applied to shipment of household effects, that is that "cost to the Government shall not exceed the cost of shipment in one lot by the most economical route from the last official station to the new"---------- 51

Household effects

Commutation

Actual expenses in lieu of

Employee who incident to official change-of-duty station is entitled to reimbursement on commuted rate basis under 5 U.S.C. 5724(c) for transportation of household goods may not be paid on mileage basis in lieu of commuted rate basis. However, employee having failed to obtain actual weight of goods at time of transportation, to be paid at commuted rate, must show space occupied by household goods and that goods were properly loaded by listing items shipped and space occupied by each item. If unable to establish entitlement to commuted payment, employee may be reimbursed actual expenses incurred for gas, oil, tools, etc., to extent actual expenses do not exceed amount which would have been payable to him on basis of reasonably approximated estimated weight at applicable commuted rate---------- 115

Distance determination

Cost of transporting household effects within continental U.S. is for reimbursement under sec. 6.4 of Bur. of Budget Circular No. A–56 in accordance with schedules of commuted rates compiled and distributed by General Services Administration, schedules which provide that distance is for determination pursuant to household goods mileage guides filed with Interstate Commerce Commission. Therefore, mileage transferred employee is entitled to for movement of household effects incident to permanent change of station is for computation in accordance with Household Goods Carriers' Bureau Mileage Guide No. 9 and Movers' & Warehousemen's Association of America, Inc., Mileage Guide No. 7, both effective Feb. 1, 1968---------- 276

Weight evidence

The documentation required by sec. 6.4d(3) of Bur. of Budget Cir. No. A–56 to support civilian employee's claim for reimbursement at commuted rate for transportation of household effects is original or certified copy of bill of lading, or if bill of lading is unavailable, other evidence showing point of origin, destination, and weight of shipment is acceptable. If no adequate scale is available, constructive weight based on 7 pounds per cubic foot of properly loaded van space may be used. Where evidence to support claim for shipping household effects does not establish cubic feet of properly loaded space, employee is entitled to reimbursement at commuted rate based on pounds shown on transportation invoice, notwithstanding actual costs may have been less---------- 574

TRANSPORTATION—Continued Page

Household effects—Continued

Transfers

Successive changes

An employee who before his immediate family and household effects were transferred to new duty station was transferred second time to station located at greater distance from old duty station than first transfer point is entitled to mileage based on greater distance from old to ultimate duty station for movement of family and in determining commuted payment covering transportation of household effects under principle formerly applied to shipment of household effects, that is that "cost to the Government shall not exceed the cost of shipment in one lot by the most economical route from the last official station to the new" ---------- 651

Military personnel

Commercial means

Reimbursement

Where only Govt. air transportation is available to enlisted man upon change of duty station from overseas to U.S. and because wife is afraid to travel by air he is authorized to travel at his own expense by commercial surface transportation, member may be reimbursed for transoceanic travel to extent it would have cost Govt. to provide air transportation he was entitled to under par. M4159-4a of Joint Travel Regs. Member also is entitled to monetary allowance incident to land travel performed by him from his overseas duty station to point where Govt. air travel would have been available and from aerial point of debarkation in U.S. to his new duty station---------- 408

Medically unfit

Release from active duty

Medically unfit persons inducted into service who perform training and service, absent statutory prohibition are entitled to full pay and allowances from time of entry on active duty through date they are released from military control, and they may receive any unpaid pay and allowances which accrued prior to and including date of release from military control. In addition, member may be furnished transportation in kind or monetary allowance in lieu thereof to home of record upon release from military control---------- 377

Ocean carriers

Liability

Damage, loss, etc., of cargo

Evidence

Deduction made from amounts owing ocean carrier to reimburse Govt. for unexplained shortage in 1950 Army shipment of rice under Govt. bill of lading from Stockton, Calif., to Kobe, Japan, may not be refunded to carrier on basis loading records were only "shipper's count and weight" and were inaccurate, where bill of lading, Army manifest, and ship's log are in agreement as to number and weight of bags of rice loaded and record is not impeached by daily loading hatch reports nor by unloading tally slips. Presumption of correctness in record of number of bags loaded supporting setoff by Army almost 16 years ago to recover value of lost U.S. property, action to recover loss will not be disturbed ---------- 638

TRANSPORTATION—Continued Page
Ocean carriers—Continued
Liability—Continued
Damage, loss, etc., of cargo—Continued
Evidence—Continued
Because proceedings by U.S. General Accounting Office are not comparable to judicial proceedings, Office does not settle claims and make determinations subject to "preponderance of the evidence," except as that term may be equated with clear and convincing evidence. Therefore, in absence of plain and convincing proof beyond reasonable controversy that records prepared by Army at port of origin in U.S. of shipment of rice to overseas destination was in error, *prima facie* case in favor of Govt. has not been overcome and ocean carrier is liable for shortage of rice at destination of shipment ---------- 638
"RESPOND" Program
Negotiation
Program known as "RESPOND" proposing negotiation of peacetime berth-line services based on guarantee of availability of needed services in event of emergency, even though services could be bought for less without guarantee, is within purview of 10 U.S.C. 2304(a) (16), and negotiations need not be limited to contractors whose continued existence under competitive bidding is doubtful, use of sec. 2304(a) (16) authority assuring availability of critical transportation services in interest of national defense. However, for requisitioning phase of program, option should be retained to proceed under contract or authority of Merchant Marine Act of 1936, and Federal Maritime Commission should participate in program by fixing rates to bring them within exception to competition provided by 10 U.S.C. 2304(g), and by reviewing emergency augmentation commitments by berth-line operators ---------- 199
Rates
Classification
Combination article rule
Airplane engine mounted on trailer
The wheeled carrier on which airplane engine is mounted for shipping purposes is not freight trailer requiring engine and trailer to be considered combination article subject to highest rated article in mixed package, the freight trailer. The wheeled carrier was not designed and is not used as general freight trailer but is shipping device designed solely to support airplane engine in transportation, therefore making shipment properly ratable at airplane engine rate for total weight of shipment ---------- 542
Value released *v.* unreleased
Bill of lading provision
Condition 5 of Govt. bill of lading that "shipment is made at restricted or limited valuation specified in tariff or classification at or under which lowest rate is available" entitles Govt. on shipment subject to sec. 22 quotation that does not require notice of shipper's released valuation in specified form to lowest rate provided in quotation—released value rate. Even through quotation is not "tariff or classification" within strict meaning of Interstate Commerce Act, it is schedule of charges for services contemplated by definition of word "tariff"—a statement by carrier that it will furnish certain services under certain conditions for certain prices, a schedule of rates and charges ---------- 335

TRANSPORTATION—Continued Page

Reservists in the military forces

Active *v.* inactive duty training

Reimbursement entitlement

Reserve member who performs inactive duty training at headquarters before and after active duty training period is not precluded from entitlement to travel and transportation allowances authorized in 37 U.S.C. 404(a) because of prohibition in par. M6002–2 of Joint Travel Regs. against payment of travel or transportation allowances for inactive duty training at headquarters of Reserve component, absent requirement for performance of travel immediately preceding or upon detachment from active duty. For consideration, however, is availability of reservist for inactive duty training, 37 U.S.C. 204(v), providing that active duty status of reservist ordered to duty for more than 30 days is expanded to include travel time 78

Vessels

American

Cargo preference

Routing

To use foreign vessels operating from Great Lakes ports to transport military troop support cargo overseas for those shipments that are more costly to route through tidewater ports utilizing U.S. flag shipping would violate 1904 cargo preference act, which enacted to protect American shipping from foreign competition does not permit use of cost, or time and distance considerations to avoid use of U.S. vessels, except where freight charged is excessive or otherwise unreasonable. However, use of Great Lakes ports is not prohibited when American vessels are available at costs that are competitive with tidewater port shipments, or if use of Military Sea Transportation Service vessels is more advantageous from cost standpoint 430

TRAVEL EXPENSES

Air travel

Refusal to use

Dependents of military personnel

When wife of Army enlisted man is afraid to travel by airplane and there is no justification for issuance of medical certificate, but member who in order to meet reporting date at new duty station in U.S. from overseas assignment is authorized to travel with dependent by commercial surface transportation as no Govt. surface transportation was available is entitled pursuant to par. M4159–4 of Joint Travel Regs. to reimbursement for cost of wife's travel by commercial surface transportation without reduction. Also payment of monetary allowance may be made to member to cover land travel of dependent from overseas station to port of embarkation and from port of debarkation to new duty station 408

Military personnel

Where only Govt. air transportation is available to enlisted man upon change of duty station from overseas to U.S. and because wife is afraid to travel by air he is authorized to travel at his own expense by commercial surface transportation, member may be reimbursed for transoceanic

TRAVEL EXPENSES—Continued Page
Air travel—Continued
Refusal to use—Continued
Military personnel—Continued
travel to extent it would have cost Govt. to provide air transportation he was entitled to under par. M4159–4a of Joint Travel Regs. Member also is entitled to monetary allowance incident to land travel performed by him from his overseas duty station to point where Govt. air travel would have been available and from aerial point of debarkation in U.S. to his new duty station 408
Boats
Houseboat used as residence
The authority in 37 U.S.C. 409, prescribing mileage allowance for transporting housetrailer or mobile dwelling that is used as residence in lieu of shipping household goods and payment of authorized dislocation allowance contemplating overland travel, which is reimbursed at rates fixed on basis of tariffs filed with Interstate Commerce Commission, boat used as living quarters does not come within meaning and scope of term "mobile dwelling" to qualify for purpose of trailer allowance and, accordingly, Joint Travel Regs. may not be amended to authorize incident to permanent change of station payment of trailer allowance to a member transporting houseboat used as residence 147
Customs employees overtime inspection duty
Party-in-interest liability
The travel and subsistence expenses incurred by Bureau of Customs border clearance inspectors incident to nonregular overtime unlading assignment at McGuire Air Force Base, New Jersey, and billed to Department of Air Force in accordance with Bureau's regulations may be paid by Department, provisions of regulations conforming to authority in 19 U.S.C. 1447 prescribing reimbursement to Govt. by party in interest for expenses incurred by inspectors on nonregular assignments at place other than port of entry. The fact that travel and subsistence expenses may be incurred when employees are entitled to premium pay does not affect propriety of regulations 622
Fares
Taxicabs
Between residence and headquarters
Military personnel
Member of uniformed services dependent on public transportation whose performance of duty outside regular duty hours is during hours of infrequent transportation service or after dark may be reimbursed expense of taxicab fare for travel between permanent duty station and place of abode, even though member is considered to be on duty at all times unless excused, in view of fact member experiences same problems civilian encounters in similar unusual travel circumstances where travel of civilian outside regular duty hours is considered travel on official business entitling him to reimbursement of travel costs. Therefore, Joint Travel Regs. may be amended to provide reimbursement to members of taxicab fares, subject to same limitations applied to civilian employees under Bur. of Budget regulations 124

TRAVEL EXPENSES—Continued Page

Fares—Continued

Taxicabs—Continued

Common carrier constructive cost

An employee at headquarters having limousine service available to and from airport terminal who, assigned temporary duty and authorized travel by plane or privately owned auto not to exceed common carrier cost, departs during office hours traveling by privately owned auto, properly was disallowed taxi fare for day of departure in computation under secs. 3.5*c*(2) (a) and 3.1*b* of Standardized Govt. Travel Regs. of constructive cost of travel by common carrier, for had employee traveled by plane, availability of office limousine would have restricted use of taxicab to airport. However, if applicable, constructive taxi fare authorized by sec. 3.1*b* from home to office on day of departure may be allowed..... 447

Mileage. (*See* **Mileage**)

Military personnel

Air travel

Refusal to use. (*See* **Travel Expenses, air travel, refusal to use**)

Miscellaneous expenses

Hotel, etc., rooms

Reservation cancellation

Civilian employees and members of uniformed services subject to Joint Travel Regs. who are prevented from using advance hotel room reservation due to cancellation of orders, change in travel itineraries, or weather conditions may be reimbursed forfeited advance deposit, expense being imputable to travel which required room reservation. Therefore, regulations may be amended to prescribe reimbursement for nonrefundable reservation charge on actual expense basis and item included in reimbursement authorized for subsistence expenses on actual expense basis in unusual circumstances of travel..... 75

Reservists

Training

Active *v.* inactive duty

Reserve member who performs inactive duty training at headquarters before and after active duty training period is not precluded from entitlement to travel and transportation allowances authorized in 37 U.S.C. 404(a) because of prohibition in par. M6002–2 of Joint Travel Regs. against payment of travel or transportation allowances for inactive duty training at headquarters of Reserve component, absent requirement for performance of travel immediately preceding or upon detachment from active duty. For consideration, however, is availability of reservist for inactive duty training, 37 U.S.C. 204(v), providing that active duty status of reservist ordered to duty for more than 30 days is expanded to include travel time..... 78

Travel between home and duty station

Member of Reserve component who commutes daily from home to training duty station is not "away from home" within meaning of 37 U.S.C. 404(a)(4) to entitle him to reimbursement for expense of commuting and, therefore, although reservist because active duty station is permanent duty station would be entitled to reimbursement under part

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
Reservists—Continued
Training—Continued
Travel between home and duty station—Continued
K, ch. 4, of Joint Travel Regs. for travel expenses incurred in conducting official business within permanent duty station and adjacent areas, regulation may not be amended to authorize reimbursement to reservists for expense of commuting daily between home and duty station located within corporate limits of same city or town---------- 517
Elimination of permanent station definition in par. M1150-10c of Joint Travel Regs.—definition which is neither authorized nor required by 37 U.S.C. 404(a)(4) and has no effect in determining entitlement of member of Reserve component to either pay and allowances for period of training duty, or to reimbursement for travel to and from training station—although recommended would not alter fact that part K, ch. 4, of Joint Travel Regs., which authorizes reimbursement of travel expenses incurred in conducting official business within limits of permanent duty station and adjacent areas, may not be amended to provide reimbursement to reservist for expense of commuting daily from home to training station---------- 517
Taxicabs
Between residence and headquarters
Unusual circumstances
Member of uniformed services dependent on public transportation whose performance of duty outside regular duty hours is during hours of infrequent transportation service or after dark may be reimbursed expense of taxicab fare for travel between permanent duty station and place of abode, even though member is considered to be on duty at all times unless excused, in view of fact member experiences same problems civilian encounters in similar unusual travel circumstances where travel of civilian outside regular duty hours is considered travel on official business entitling him to reimbursement of travel costs. Therefore, Joint Travel Regs. may be amended to provide reimbursement to members of taxicab fares, subject to same limitations applied to civilian employees under Bur. of Budget regulations---------- 124
Temporary duty
Two successive orders
A naval reservist who travels from and to his home under orders providing for 63-day recruiting assignment at temporary duty station and then under subsequent orders after 1-day break in service returns to temporary duty station for 150-day similar assignment is considered to have had one continuous period of service for determining entitlement to temporary duty allowance—per diem and monetary allowance in lieu of transportation—and under 37 U.S.C. 404(a) permitting payment of travel and transportation allowances to reservists ordered from home for short periods of active duty—less than 20 weeks—where mess and quarters are not provided, member may not be paid on basis that two periods of duty were authorized by separate orders---------- 655
Tips. (*See* **Travel Expenses, tips**)

TRAVEL EXPENSES—Continued Page

Military personnel—Continued

Travel status

Reservists

Basic allowance for quarters provided in 37 U.S.C. 403(f), as amended by Pub. L. 90–207, for member of uniformed services without dependents when he is not assigned adequate quarters while in travel or leave status between permanent duty stations, including time granted as delay en route or proceed time, may be paid to Reserve member without dependents on basis travel of reservist between home and first and last duty stations is permanent change-of-station travel. Amendment to sec. 403(f) does not require change in view that travel from home to first duty station and from last duty station to home is permanent change-of-station travel for purposes of travel and transportation allowances prescribed by 37 U.S.C. 404(a)---------- 490

Miscellaneous expenses

Hotel, etc., rooms

Cancellation of reservation

Deposit reimbursement

Civilian employees and members of uniformed services subject to Joint Travel Regs. who are prevented from using advance hotel room reservation due to cancellation of orders, change in travel itineraries, or weather conditions may be reimbursed forfeited advance deposit, expense being imputable to travel which required room reservation. Therefore, regulations may be amended to prescribe reimbursement for nonrefundable reservation charge on actual expense basis and item included in reimbursement authorized for subsistence expenses on actual expense basis in unusual circumstances of travel---------- 75

Tuxedo, etc., rental

Rental charges on formal dress attire required to be worn by U.S. Secret Service agents for security purposes and not merely to be attired in socially acceptable manner may be reimbursed to special agents whenever written determination is made by proper official of Service that utilization of formal attire is necessary for proper performance of duty to which assigned---------- 48

Overseas employees

Transfers

Between duty stations overseas

Employees who at time of transfer by their agencies between overseas duty stations located in different territories or countries outside continental U.S. had only completed part of agreed period of service and had less than 12 months of service to perform under employment agreement are required pursuant to 5 U.S.C. 5724(d) to execute new agreement for minimum of 12 months service—1 school year for overseas teachers—in order to be eligible for payment by Govt. of costs of transfer ---------- 39

Miscellaneous expenses

Requirement in sec. 3.2a of Bur. of Budget Circular No. A–56 that employee execute employment agreement prescribed by sec. 1.3c of Circular in order to be eligible to receive payment of miscellaneous expense allowance authorized has no application to employees transferred within

TRAVEL EXPENSES—Continued Page
Overseas employees—Continued
Transfers—Continued
Miscellaneous expenses—Continued
foreign countries or within territories or possessions of U.S. outside contiguous 48 States and Dist. of Columbia. Therefore, employees transferred by their agency from one official station to another overseas prior to completing agreed 12 months of service, whether or not they are required to sign new employment agreement, are entitled to miscellaneous expense allowance authorized by sec. 3.2a, and possibly other benefits prescribed by Circular No. A–56 39
Taxicabs
Fares. (*See* Travel Expenses, fares, taxicabs)
Tips
Baggage handling, etc.
Government-owned equipment
At hotels
Tips given exclusively for handling Govt. property at hotels may be reimbursed to members of uniformed services, and Joint Travel Regs. amended accordingly, rule that tip is incidental expense item included in member's per diem applying only to personal baggage. However, reimbursement may not be authorized for tips or fees incurred in handling member's personal baggage as well as Govt. property at hotels except to extent separate charge or additional cost is experienced for handling Govt. property 84
Witnesses
Administrative proceedings
Payment of travel expenses, including lodging and subsistence, to non-Govt. employee witnesses who are invited rather than subpoenaed to appear at administrative hearing in interest of Govt. is not precluded by sec. 10 of Administrative Expenses Act of 1946 (5 U.S.C. 503(b)(2)), because Federal agency authorized by law or regulation to hold hearings is not vested with power to subpoena witnesses. Also payment of travel expenses may be made to witnesses on commuted basis as well as on actual expense basis, term "persons serving without compensation" in sec. 5 of act (5 U.S.C. 5703)—broad enough to include persons serving in other than advisory capacity—constituting authority for reimbursement of travel expenses on commuted basis. Overrules 34 Comp. Gen. 438; B–123863, July 5, 1955 110
Judicial precedent having established basis for payment of mileage and fees to witnesses appearing at administrative proceedings, persons summoned for testimony pursuant to 26 U.S.C. 7602 to enable Internal Revenue Service to determine tax liability of taxpayer may be paid fees and mileage provided by 5 U.S.C. 503(b), whether witness is person liable for tax or is person whose testimony is revelant or material to inquiry involving taxpayer. 45 Comp. Gen. 654, overruled 97
Individuals who are not members of uniformed services or Federal civilian employees may be called as witnesses in adverse administrative proceedings whether in behalf of Govt. or in behalf of member or employee and paid transportation and per diem allowances as "individuals

TRAVEL EXPENSES—Continued Page
Witnesses—Continued
Administrative proceedings—Continued
serving without pay" within scope of 5 U.S.C. 5703, if presiding hearing officer determines that member or employee reasonably has shown that testimony of witness is substantial, material, and necessary, and that affidavit would not be adequate. Joint Travel Regulations may be amended accordingly, and any inconsistent prior decisions will no longer be followed---------- 644
Military personnel
Courts of foreign forces
When commanding officer of military installation desires to honor properly made request for appearance of member of his command as witness before an authorized service court of a friendly foreign force, he may under authority in 22 U.S.C. 703 issue orders to member directing his attendance as witness, and consider member on official business in nature of detached service while traveling and while in attendance at proceedings of foreign court. Member witness under 28 U.S.C. 1821 would be entitled to fees and mileage, including subsistence when applicable, authorized for witnesses attending U.S. courts, payment to be made to member from funds supplied by foreign force, in advance if available, or after completion of service upon availability of funds---------- 10
UNEMPLOYMENT RETRAINING
Effect on Veterans Educational Benefits
To extent that Manpower Development Training Act program funds made available by agreement between Labor Dept. 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 Veterans Administration contemporaneous and long-standing construction of 38 U.S.C. 1781, and prior similar provisions of law, payment of educational assistance allowance to trainee under chapter 34 of Title 38, U.S. Code, would constitute duplication of benefits paid from Federal Treasury, and, therefore, such payment is barred---------- 5
UNIFORMS
Civilian personnel
Allowances
Term
An employee of National Park Service who within 1 year after becoming eligible for and receiving full payment of initial $60 annual uniform allowance provided for male maintenance nonsupervisory employees of Service is promoted to supervisory position in which employee is allowed annual uniform allowance of $125, if he was required to purchase substantially different uniform he would be entitled to $125 allowance from date of promotion, notwithstanding year covered by payment received had not expired, in view of fact 5 U.S.C. 5901 and sec. 4c of Bur. of Budget Cir. No. A-30 prescribing $125 annual uniform allowance for supervisory employees contemplate that employee will remain subject to substantially same uniform requirements during annual period to which limitation applies---------- 678

UNIFORMS—Continued Page
Military personnel
Reserve Officers' Training Corps
Reserve duty prior to Regular appointment
A distinguished military graduate of Air Force Reserve Officers' Training Corps who incident to reporting for active duty on June 1, 1964 in his status as Reserve officer is not paid uniform allowance prescribed by act of Aug. 10, 1956, upon appointment on Oct. 9, 1964 as second lieutenant in Regular Air Force, with date of rank June 1, 1964, pursuant to 10 U.S.C. 8284, is entitled to initial and additional active duty uniform allowance provided by amendatory act of Oct. 13, 1964, which extended uniform allowance benefits to ROTC graduates appointed under 10 U.S.C. 2106 or 2107, and commissioned after Oct. 13, 1964. Absent statute providing otherwise, the effective date of officer's appointment to Regular Air Force was date of acceptance, Oct. 27, 1964, after new law was in effect 529

VEHICLES
Charter Coach Service
Damage liability of Government
Assumption by Selective Service System of liability for damages to motor vehicles by registrants who when ordered for physical examinations or for induction by local boards are transported in Charter Coach Service is not precluded because System lacks express authority to contract for liability, appropriations for operation and maintenance of System providing authority to contract for travel for selectees with no express limitation placed on such authority in appropriation acts or in Universal Military Training and Service Act. Nor does fact that service contracts do not expressly provide for liability preclude payment of damage claims, terms of charter certificates furnished when service is used incorporating into contract by reference indemnity provision of carriers' charter coach tariffs 361

VESSELS
Construction
Foreign shipyards
Prohibition
Subcontracting with Canadian firm of welding and assembly services for submarine hull cylinders under prime fixed-price incentive contract that contains restriction on construction of major vessel components in foreign shipyard pursuant to Tollefson Amendment in Defense Dept. appropriation acts, as well as Byrnes Amendment barring complete construction of naval vessels in foreign shipyards, is not prohibited. The hull components constituting less than 10 percent of total value of submarine, and work to be performed in foreign shipyard but 39 percent of value of hull, welding and assembly services proposed are not considered vessel construction contemplated by appropriation act prohibitions and, therefore; Navy may consent to subcontracting of services to Canadian firm 709

VESSELS—Continued Page

Crews

Two-crew nuclear-powered submarines

Dislocation allowance

Dislocation allowance authorized by Pub. L. 90–207 (37 U.S.C. 407(a)) for members without dependents who upon permanent change of station are not assigned Govt. quarters is not payable to either of two crews of nuclear-powered submarine—permanent station of both crews—as on-duty crew is furnished quarters aboard submarine and off-crew ashore for training and rehabilitation is considered to be at temporary duty station, whether or not submarine is at home port. Therefore, members who incident to transfer aboard submarine report to temporary station locations ashore where they do not perform basic duty assignments are not entitled to dislocation allowance, nor is allowance payable to members reporting aboard submarine when first relieved with on-ship crew for training and rehabilitation ---------- 480

Although member of uniformed services without dependents who upon reporting to submarine under permanent change-of-station orders is assigned quarters on board submarine is not entitled to dislocation allowance authorized in 37 U.S.C. 407(a) for members without dependents who upon permanent change of station are not assigned Govt. quarters, he would be entitled to allowance if he reports to nuclear-powered submarine that is undergoing overhaul or repair at its home port or home yard and quarters aboard submarine are uninhabitable, member is not assigned quarters ashore, and lodging accommodation pursuant to 10 U.S.C. 7572(a) are not furnished to member ---------- 480

Temporary lodging allowances

A member of uniformed services who incident to permanent change-of-station orders assigning him to duty on board ship, occupies hotel or hotel-like accommodations with his family at home port or is temporarily assigned to off-ship crew of two-crew nuclear powered submarine, is not eligible to receive temporary lodging allowances prescribed by 37 U.S.C. 405 as permanent station allowance to partially reimburse member for more than normal expenses incurred upon arrival at permanent station outside U.S. Therefore, as member is not considered to be at permanent duty station for purposes of temporary lodging allowance until he reports aboard vessel to which assigned, Joint Travel Regs. may not be amended to authorize payment of allowance to member prior to reporting aboard ship ---------- 716

Government-owned

Damages

Disposition of funds recovered

Compensation paid by insurance firm to cost-plus contractor operating and maintaining research vessel for National Science Foundation to cover damages sustained by vessel while being overhauled and repaired by subcontractor may not be used to augment Foundation's appropriations, absent specific statutory authority, and moneys, even if paid to prime contractor, are for deposit as miscellaneous receipts into Treasury of U.S. in consonance with sec. 3617, Revised Statutes, 31 U.S.C. 484 ---------- 209

Transportation matters. (*See* Transportation, vessels)

VETERANS Page

Education

Dual benefits

Prohibition

Provision in 38 U.S.C. 1781, which prohibits granting of educational assistance allowance or special training allowance to or on behalf of eligible person or veteran under ch. 34 of Title 38, U.S.C., for any period of enrollment in program of education or course paid for by U.S. under "any other provision of law," where payment constitutes "duplication of benefits paid from Federal Treasury," having been uniformly and consistently interpreted by Veterans Administration to mean payments for same or similar benefits or purposes, even if costs are not identical, interpretation is entitled to great weight under rule of statutory construction, particularly where provision was reenacted, and it is immaterial whether payment under other than chapter 34 is made to an educational institution ---------- 5

To extent that Manpower Development Training Act program funds made available by agreement between Labor Dept. 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 Veterans Administration contemporaneous and longstanding construction of 38 U.S.C. 1781, and prior similar provisions of law, payment of educational assistance allowance to trainee under chapter 34 of Title 38, U.S. Code, would constitute duplication of benefits paid from Federal Treasury, and, therefore, such payment is barred---- 5

When scholarships to students from Public Health Service grants to educational institutions under 42 U.S.C. 295g covers in part either tuition o rliving expenses, or oth, payment of educational assistance allowance under chapter 34 of Title 38, U.S. Code, is barred under longstanding construction by Veterans Administration of sec. 1781 that such payment would constitute duplication of benefits paid from Federal Treasury ---------- 5

VIETNAM

"Armed conflict"

Disability determinations

As it is difficult to apply exemption to reduction in retired pay provision prescribed by sec. 201(b) of Dual Compensation Act to officer of Regular component of uniformed services retired for injury or disease as direct result of armed conflict in Vietnam who is employed in civilian position under U.S., due to nature of combat operations in Vietnam and difficulty of establishing that inception of disease occurred while officer was engaged in armed conflict, affirmative administrative finding that there was direct causal relationship between disability and engagement in armed conflict will be accepted unless unreasonable or insufficiently supported by record, or if determination is rendered dubious by further evidence or circumstances not considered, or unduly gives person benefit of reasonable doubt---------- 219

VOUCHERS AND INVOICES Page

Expense of billing exceeds value of item furnished

Issuance of two unpriced orders, one for items valued at 30¢, other for items worth $1.01, that stated "this is a firm order if price is $50 or less" to supplier whose policy of charging minimum order price of $50 is shown in its quotation is acceptance of supplier's terms and purchase orders became binding contracts for minimum charge upon acceptance and performance of orders and, although minimum charge is questionable, vouchers including charge may be certified for payment. In addition to administrative action taken to consolidate future orders for small purchases, provisions should be included in future bid solicitations to require successful bidder to agree prices will not include minimum billing charge, but should they, that minimum billing charge will be no greater than amount stated in solicitation 168

WITNESSES

Administrative proceedings

Fees, mileage, etc.

Payment of travel expenses, including lodging and subsistence, to non-Govt. employee witnesses who are invited rather than subpoenaed to appear at administrative hearing in interest of Govt. is not precluded by sec. 10 of Administrative Expenses Act of 1946 (5 U.S.C. 503(b)(2)), because Federal agency authorized by law or regulation to hold hearings is not vested with power to subpoena witnesses. Also payment of travel expenses may be made to witnesses on commuted basis as well as on actual expense basis, term "persons serving without compensation" in sec. 5 of act (5 U.S.C. 5703)—broad enough to include persons serving in other than advisory capacity—constituting authority for reimbursement of travel expenses on commuted basis. Overrules 34 Comp. Gen. 438; B–123863, July 5, 1955 110

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Transportation and per diem allowances

Individuals who are not members of uniformed services or Federal civilian employees may be called as witnesses in adverse administrative proceedings whether in behalf of Govt. or in behalf of member or employee and paid transportation and per diem allowances as "individuals serving without pay" within scope of 5 U.S.C. 5703, if presiding hearing officer determines that member or employee reasonably has shown that testimony of witness is substantial, material, and necessary, and that affidavit would not be adequate. Joint Travel Regulations may be amended accordingly, and any inconsistent prior decisions will no longer be followed 644

WITNESSES—Continued Page
Military personnel
Courts of foreign forces
When commanding officer of military installation desires to honor properly made request for appearance of member of his command as witness before an authorized service court of a friendly foreign force, he may under authority in 22 U.S.C. 703 issue orders to member directing his attendance as witness, and consider member on official business in nature of detached service while traveling and while in attendance at proceedings of foreign court. Member witness under 28 U.S.C. 1821 would be entitled to fees and mileage, including subsistence when applicable, authorized for witnesses attending U.S. courts, payment to be made to member from funds supplied by foreign force, in advance if available, or after completion of service upon availability of funds------ 10
Subpoena *v.* summons
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WORDS AND PHRASES
"Integrity"
Definition of term "integrity" in connection with Govt. contracts does not differ from generally accepted connotation of uprightness of character, moral soundness, honesty, probity, and freedom from corrupting influence or practice. As used in prescribing qualifications for public officers, trustees, etc., term "integrity" means soundness of moral principle and character in making and performance of contracts and fidelity and honesty in discharge of trusts, and term synonymous with probity, honesty, and uprightness, lack of integrity on part of officials of bidder may be imputed to bidder by procuring agency, unless administrative determination is not based on substantial evidence demonstrating bidder's lack of responsibility---------- 769
"Publications"
Lantern slide photographs of X-ray film, electrocardiograms, gross specimens, and photomicrographs that are illustrative of materials presented in Journal of Medicine and that are necessary for effective use of journal may be classified as "publications" as that term is used in 31 U.S.C. 530a, and, therefore, subscriptions for slides may be paid for in advance. The fact that reproduced photographic material will be viewed or read from screen does not preclude slides from being considered publications---------- 784

WORDS AND PHRASES—Continued Page

"Tariff"

Condition 5 of Govt. bill of lading that "shipment is made at restricted or limited valuation specified in tariff or classification at or under which lowest rate is available" entitles Govt. on shipment subject to sec. 22 quotation that does not require notice of shipper's released valuation in specified form to lowest rate provided in quotation—released value rate. Even though quotation is not "tariff or classification" within strict meaning of Interstate Commerce Act, it is schedule of charges for services contemplated by definition of word "tariff"—a statement by carrier that it will furnish certain services under certain conditions for certain prices, a schedule of rates and charges..... 335

"Warranty"

The word "warranty" is not simple to define—at a minimum, a warranty, whether an expressed or implied warranty, is something of an assurance by one party that the other may rely on the truth of a given representation. No such assurance is implied under requirements contract for trash and garbage removal where Govt. had "suggested" pickup schedule and container sizes and contractor after award was "required" to inspect work area and submit its own list of containers, locations, and frequencies of pickups and, therefore, contractor is not entitled to additional compensation on basis of 11 percent variation between work performed and Govt.'s suggestions—a variation that is not specification change..... 576

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