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[B-156932]

Courts—District of Columbia—Court of General Sessions—Transcripts

Although indigent defendants prosecuted by the United States, whether in the United States branch of the District of Columbia Court of General Sessions or in the United States District Court for the District of Columbia, for petty offenses as defined in 18 U.S.C. 1 are not entitled on appeal to the District of Columbia Court of Appeals to a transcript at the expense of the United States under the Criminal Justice Act of 1964 (18 U.S.C. 3006A(a))—the act expressly excluding defendants charged with petty offenses—in view of the holding in *Tate* v. *United States*, 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 the Court of General Sessions, defendants convicted of petty offenses in the United States side of the Court of General Sessions may be furnished transcripts without charge. B-153485, March 17, 1964, modified.

Courts—Costs—Transcripts

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

To the Attorney General, March 3, 1969:

Letter dated October 10, 1968, from the Assistant Attorney General for Administration (Assistant Attorney General) presents for our decision two questions relating to payments for transcripts for indigent defendants.

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

In *Tate* v. *United States*, 123 U.S. App. D.C. 261, 359 F. 2d 245 (1966), it was held that an indigent defendant (one allowed to sue, defend or appeal *in forma pauperis*) prosecuted by the United States in the Court of General Sessions is entitled on appeal to the District of Columbia Court of Appeals to a transcript at the expense of the United States. Following that decision, the Court of General Sessions began ordering transcripts at Government expense and, in accordance with our decision in 46 Comp. Gen. 93, payment therefor is made from appropriations of the Administrative Office of the United States Courts.

Although the Criminal Justice Act is applicable to felony and misdemeanor cases in the Court of General Sessions, a question has arisen as to the interpretation of section 3006A(a), Title 18, United States

Code, which states that each United States district court shall place in operation a plan for furnishing representation for defendants charged with felonies or misdemeanors, *other than petty offenses*, as defined in 18 U.S.C. 1, who are financially unable to obtain an adequate defense. This latter code section states that a misdemeanor, the penalty for which does not exceed imprisonment for a period of 6 months or a fine of not more than $500, or both, is a petty offense.

A number of offenses prosecuted by the United States in the Court of General Sessions fall within the classification of petty offenses. In one of these cases, the indigent appellant has requested a transcript. The administrative Office of the United States Courts has indicated that its funds are not available for such payments since the Criminal Justice Act is inapplicable to petty offense cases. If the court orders a transcript, at Government expense, the reporter will not prepare the transcript without assurance it will be paid for.

In light of the foregoing, the Assistant Attorney General requests

> * * * instructions as to how payment for transcripts under these circumstances may be made. If it is your view that payments may be made from government funds, are funds available to the Department of Justice or the Administrative Office of the U.S. Courts to be used for this purpose?
>
> A second problem which may occur concerns cases where the cost of the transcript may exceed $300. Services other than counsel fees under the Criminal Justice Act are limited to this amount. In the event we have a case in which the transcript costs exceed the sum of $300, we would appreciate your instructions as to how such amounts are to be paid.

The Criminal Justice Act of 1964, 18 U.S.C. 3006A, reads, in pertinent parts, as follows:

> (a) Choice of plan.—Each United States district court, with the approval of the judicial council of the circuit, shall place in operation throughout the district a plan for furnishing representation for defendants charged with felonies or misdemeanors, *other than petty offenses as defined in section 1 of this title*, who are financially unable to obtain an adequate defense. *Representation under each plan shall include counsel and investigative, expert, and other services necessary to an adequate defense.* * * * [Italic supplied.]

There is specifically excluded from the "representation" authorized by section 3006A(a) for defendants who are financially unable to obtain an adequate defense, defendants charged with petty offenses as defined in 18 U.S.C. 1. Further, inasmuch as "representation" is defined in section 3006A(a) is including counsel, investigative, expert "and other services necessary to an adequate defense," it is obvious that "representation," as used therein, includes "transcripts" and the cost thereof.

It is clear from the foregoing that "petty offenses" as defined in 18 U.S.C. 1 do not come within the scope of the Criminal Justice Act of 1964, and that "transcripts" are included in the term "representation" as used in that act. Hence, defendants prosecuted by the United States for petty offenses—as defined in 18 U.S.C. 1—in the

District of Columbia Court of General Sessions are not entitled on appeal to the District of Columbia Court of Appeals to a transcript at the expense of the United States under the Criminal Justice Act of 1964. Accordingly, appropriations made to the Administrative Office of the United States Courts to enable it to carry out the provisions of the Criminal Justice Act of 1964 would not be available to pay for transcripts for indigent defendants charged with petty offenses, whether such defendants are prosecuted in the United States branch of the District of Columbia Court of General Sessions or in the United States District Court for the District of Columbia, nor are we aware of any appropriation of the Department of Justice which appears to be available for such purpose.

Insofar as payment for transcripts under authority other than the Criminal Justice Act of 1964 is concerned, 28 U.S.C. 753(f) reads in pertinent part as follows:

> (f) * * * Fees for transcripts furnished in criminal or habeas corpus proceedings to persons allowed to sue, defend, or appeal in forma pauperis shall be paid by the United States out of money appropriated for that purpose. * * *

In the *Tate* case mentioned above the United States Court of Appeals for the District of Columbia held, in effect, that 11 D.C. Code 935 makes 28 U.S.C. 753(f) applicable to the Court of General Sessions, and that, hence, a defendant prosecuted in the United States side of the Court of General Sessions who is allowed to appeal *in forma pauperis* to the District of Columbia Court of Appeals is entitled to a transcript at the expense of the United States. There is no distinction made in either 11 D.C. Code 935 or 28 U.S.C. 753(f) between defendants charged within felonies and misdemeanors other than petty offenses, and those charged with petty offenses. Accordingly, in view of the decision of the Court of Appeals in the *Tate* case, we would not object to the Administrative Office of the United States Courts using the appropriations available to it to pay costs incurred pursuant to the authority in 28 U.S.C. 753(f) to pay for transcripts for defendants prosecuted in the United States side of the Court of General Sessions who are allowed to appeal *in forma pauperis* to the District of Columbia Court of Appeals.

As to cases prosecuted in the Court of General Sessions where the cost of the transcript exceeds $300, as indicated in the Assistant Attorney General's letter, services other than counsel fees under the Criminal Justice Act of 1964 are limited to $300. However, since appropriations are made to the Administrative Office of the United States Courts for costs incurred under 28 U.S.C. 753(f), in view of the decision of the United States Court of Appeals in the *Tate* case, we would not object to the Administrative Office of the United States Courts paying for transcripts for defendants allowed to appeal *in*

forma pauperis—as distinguished from those financially unable to obtain an adequate defense—prosecuted in the United States side of the Court of General Sessions in the same manner it pays for transcripts for such defendants prosecuted in United States district courts in cases where the cost of the transcript exceeds $300.

The questions presented are answered accordingly.

To the extent our decision of March 17, 1964, B-153485, is contrary to the foregoing, it need no longer be followed.

We are sending a copy of this decision to the Director, Administrative Office of the United States Courts.

[B-165843]

Compensation—Removals, Suspensions, Etc.—Deductions From Back Pay—Outside Earnings—In Excess of "Back Pay" Due

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

Leaves of Absence—Involuntary Leave—Removals, Suspensions, Etc.—Recrediting of Leave

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

To James J. D'Angelillio, Defense Supply Agency, March 3, 1969:

We refer to your letter of November 29, 1968, reference DPSC-BE, requesting our advice concerning the granting of annual leave to an employee who was improperly suspended from his position with the Defense Supply Agency. Your letter reads, in part, as follows:

a. An employee was suspended from duty during an advance notice period of proposed removal from 1 May 1967 through 20 February 1968. He was removed from the Federal Service on 20 February 1968. At the time of his suspension he had 290 hours of annual leave. His maximum accrual was 240 hours for which he received a lump sum payment after his separation on 20 February 1968.

b. After appeal through the Defense Supply Agency's appeal procedure, the employee's suspension during the advance notice period was cancelled but the removal action was sustained. According to Civil Service Regulations Section 5596, Volume B, Title 5 of the U. S. Code, the employee is entitled to back pay during the period of suspension from 1 May 1967 through 20 February 1968 less any amounts earned by him through other employment during that period.

c. During the period of suspension the employee had been employed by private industry and his earnings exceeded the salary he would have earned had he remained employed by this Center. Although his total earnings during the entire suspension period exceed his federal salary, he did not have any earnings for six (6) days.

d. During 1967 the employee worked in private industry for 33 weeks and 4 days and earned $5,306.64. He continued working at the same rate during 1968. The earnings he would have received during the period 1 May 1967 through 31 December 1967 (35 weeks), would have been $4,302.00 and $911.68 for 7 weeks and 2 days in 1968.

The employee did not work or receive any pay for only six (6) days during his entire period of suspension 1 May 1967 through 20 February 1968. Therefore, he would be entitled to back pay of only $147.84 less approximately $25.00 for income tax and life insurance and Civil Service retirement.

* * * * * * *

f. This employee worked in our Directorate of Manufacturing which shut down and required employees to take annual leave for summer vacation from 24 July 1967 through 4 August 1967 and during the Christmas holiday period from 26 December 1967 through 29 December 1967, a total of 14 days annual leave. The suspended employee had 290 hours of annual leave to his credit as of 1 May 1967. He earns 8 hours for every two weeks, therefore, he would have earned 136 additional hours during 1967 and 32 hours during 1968.

Based upon the facts above, you present the following questions for our consideration:

(1) Would the employee be entitled to be on leave and paid for 186 hours, the amount of excess annual leave he would have earned in 1967?

(2) Would he also be entitled to be on leave and be paid for the 32 hours leave he earned in 1968?

(3) If not entitled to the excess annual leave, would the employee be entitled to be paid for 14 days annual leave he would have been required to take during the periods the Directorate of Manufacturing was shut down for summer vacation and Christmas vacation?

(4) If not, would the employee be entitled to be granted leave for the 50 hours excess annual leave that he had at the time of the unwarranted suspension action?

In computing the amount of back pay due an employee for a period of improper suspension, section 5596(b) of Title 5, United States Code, requires the deduction of "any amounts earned by him through other employment during such period." That statute does not require or contemplate that a daily or weekly division of the back pay be compared with the employee's outside earnings over an equivalent period of time as suggested in paragraphs c and d of your letter. Rather, the total amount of outside earnings is to be compared with the total amount of back pay otherwise due the employee for the period of suspension or removal.

In the present case no amount of back pay appears to be due the employee for the period of his suspension since his outside earnings exceeded the amount which he would have earned in the Government

had he not been suspended from duty. Accordingly, the statement in paragraph d of your letter that the employee is entitled to receive back pay for the 6 days for which he had no outside earnings is incorrect.

Section 5596(b) of Title 5, United States Code, provides that an employee who is entitled to back pay and other restoration benefits provided thereunder may not be credited with leave in an amount that would cause the amount of leave to his credit to exceed the maximum amount authorized by law or regulation. The employee here involved had an annual leave ceiling of 240 hours. Therefore, in the reconstruction of his leave account following the cancellation of the suspension action, the employee was prohibited by statute (5 U.S.C. 6304(a)) from receiving credit for more than 240 hours of annual leave at the beginning of the 1968 leave year. Consequently, he was required to forfeit 186 hours of annual leave. In that regard our Office consistently has held that the above-cited statutory provision requires the forfeiture of all annual leave credited to an employee at the close of a leave year which is in excess of the ceiling established therein regardless of the reason for the employee's failure to use such excess leave. 32 Comp. Gen. 162; 36 *id.* 596.

During the period January 1 through February 20, 1968, the employee accrued an additional 32 hours of annual leave and, thus, had a total of 272 hours of leave to his credit on the date of his separation from the service (February 20, 1968). However, in accordance with 5 U.S.C. 5551(a) his lump-sum payment for annual leave upon separation was limited to 240 hours.

Since the annual leave which was forfeited under the provisions of 5 U.S.C. 6304(a) and 5551(a), discussed above, may not now be recredited to the employee's account, there exists no basis upon which such leave may be retroactively substituted for a corresponding portion of the suspension period. Therefore, questions (1) through (4), above, are answered in the negative.

[B–166010]

Transportation—Household Effects—Commutation—Weight Evidence

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

To Major J. E. Ingles, National Security Agency, March 3, 1969:

We refer to your request of January 8, 1969, your Serial: D5/0024F, by which an advance decision is requested whether you may properly pay the attached travel voucher of Mr. Frank D. Brouse, an employee of the National Security Agency, to reimburse him at the commuted rate for transportation of his household effects incident to change in his official station under travel orders of May 8, 1968. Your request was forwarded to us by the Per Diem, Travel and Transportation Allowance Committee on January 22, 1969, under PDTATAC Control No. 69–4.

The only question presented relates to the entitlement of Mr. Brouse to reimbursement for moving his household effects at the commuted rate as prescribed under 5 U.S.C. 5724(c), instead of on an actual expense basis, in view of the fact that the weight of the effects transported was not obtained from weighing scales. Documentation required to support an employee's claim for reimbursement at the commuted rate is prescribed in section 6.4d(3) of Bureau of the Budget Circular No. A–56 which is in pertinent part as follows:

(3) *Documentation required.* Claims for reimbursement under the commuted rate system shall be supported by * * * the original bills of lading or certified copies, or, if bills of lading are not available, other evidence showing point of origin, destination and weight. If no adequate scale is available at point of origin, at any point en route, or at destination, a constructive weight, based on 7 pounds per cubic foot of properly loaded van space, may be used. * * *

In cases involving the local transportation of household effects in which there was no legal requirement that charges be based on weight and mileage and charges were based on hourly or job rates, we have held that the nonavailability of scales need not be further demonstrated. B–153134, January 22, 1964; B–150433, December 17, 1962. In such cases we have authorized payment at the commuted rate based on a showing of the amount of properly loaded van space occupied by the effects using the 7 pounds per cubic foot formula specified in the controlling regulation to determine the amount due. The evidence presented in this case does not clearly establish the volume of properly loaded van space occupied by the effects. A copy of what was apparently the original bill presented to Mr. Brouse for the transportation services involved indicates that 8,700 pounds of effects were transported, but a statement from the movers dated more than 2 months later indicates that the effects occupied 1,512 cubic feet of van space giving a weight of 10,584 pounds under the prescribed formula.

We do not believe that the evidence submitted establishes that Mr. Brouse's household effects occupied 1,512 cubic feet of properly loaded van space. It does appear, however, that the weight of those effects was at least the 8,700 pounds indicated on the original bill.

Therefore, we would not object to your allowing him payment for transportation of 8,700 pounds of household effects at the commuted rate less the amount already paid on an actual expense basis. In that connection, we note that payment of the amount due under the commuted rate system may not be withheld because the employee's costs for moving his effects were less than the commuted rate payment. 32 Comp. Gen. 321.

As to your other questions involving local moves when the carriers' charges are not required to be based on the weight of the effects, we do not believe it desirable to attempt to set forth a separate interpretation of the words "properly loaded van" as used in the regulations which would be applicable to local moves rather than long distance moves. However, in a given case we would not object to requiring a statement from the carrier indicating the volume of van space that would have been occupied by such effects had they been loaded with a view to the most efficient use of such space.

The voucher which is returned herewith may be paid in accordance with the above.

[B–166073]

Contracts—Requirements—Estimated Amounts Not Warranty

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

Contracts—Warranties—Deviation From Specifications

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 a requirements contract for trash and garbage removal where the Government had "suggested" a pickup schedule and container sizes and the contractor after award was "required" to inspect the work area and submit its own list of containers, locations, and frequencies of pickups and, therefore, the contractor is not entitled to additional compensation on the basis of an 11 percent variation between the work performed and the Government's suggestions—a variation that is not a specification change.

To the Administrator, Veterans Administration, March 3, 1969:

We refer to a letter (reference 134C) dated January 31, 1969, from the Director of the Supply Service, Department of Medicine and Surgery, forwarding documents relative to the request of Dispos-O-

Waste Company for additional compensation under contract No. V515P-1288.

The invitation for bids, issued on June 12, 1968, described the subject of the procurement in the following manner:

COMPLETE MISCELLANEOUS TRASH AND NONEDIBLE GARBAGE REMOVAL SERVICES for the period July 1, 1968 thru June 30, 1969, inclusive. Furnish necessary labor and material to render complete miscellaneous trash and nonedible garbage removal service for the Veterans Administration Hospital, Battle Creek (Fort Custer), Michigan, for above period, in accordance with all the terms and conditions and provisions of this proposal.

Page 5 of the invitation, entitled "Requirements," began with this preamble:

Services, labor, material and equipment necessary for the collection, transportation and disposal of all refuse specified in the contract, at the VA Hospital, Battle Creek, Michigan.

Paragraph 1 of the requirements stated, in part:

Specifications and accompanying drawing provide for collecting refuse and disposing of same in a complete and workmanlike manner for a period of 365 calendar days after award of contract. * * * The contractor will furnish all plant supervision, labor, material, and equipment necessary for the collecting, transporting, and disposal of all refuse specified in the contract.

The first sentence of paragraph 2 was as follows:

Specifications and accompanying plans state and show the work to be performed under the contract. * * *

However, the first sentence of paragraph 16 of the requirements permitted the contractor some freedom in determining the method of performance:

As soon as practical, but within 10 calendar days after award of contract, the contractor shall submit a complete listing of containers, locations, and proposed frequencies of pickup. * * *

Paragraph 17 of the requirements (page 7 of the invitation) contained a table showing "suggested" sizes of containers and frequencies of pickup. On pages 8 through 10 of the invitation certain "Special Conditions" were recited. Condition number 4 admonished bidders:

Bidders are required to visit the Hospital to fully inform themselves of the character and conditions under which the service is to be performed. Failure to do so will in no way relieve the successful bidder from the necessity of furnishing the services as specified in this proposal without additional cost to the Government. * * *

On June 28, 1968, the contract was awarded to Dispo-O-Waste at its bid price of $1,175 per month, or a total of $14,100 for the full contract period. Although Dispo-O-Waste was obligated under paragraph 16 of the requirements to submit within 10 days of award a complete list of containers, locations, and frequencies of pickup, there is no indication in the record that such a list was forthcoming.

The next event occurred on July 30, 1968, when Dispo-O-Waste wrote to the contracting officer at the VA Hospital and stated:

> Item 17 of the specifications, in the invitation, indicated the sizes of the containers and the frequency of pickups required at the various locations. We installed our containers in accordance with these specifications and have provided the frequency stipulated * * *

with two noted exceptions. The letter further related that "We have discovered that you have not provided for adequate service at 19 of the buildings involved." Thereupon Dispos-O-Waste disclosed that its purpose in writing the letter was "to request that the contract be modified to stipulate increased frequency of collection at the 19 locations involved and that our compensation be increased from $1,175.00 to $1,473.00 per month." Dispos-O-Waste enclosed a suggested revised schedule of pickup frequencies and container sizes, involving a total weekly increase of 78 cubic yards.

On August 17, 1968, Dispos-O-Waste again wrote to the chief of the hospital's supply division. The letter reveals that various containers had been moved to other buildings and that as a result the amount of overflow had been reduced. Dispos-O-Waste then stated, in part, "*Since most of the problems have now been solved* we will begin to perform in accordance with the contract * * *." [Italic supplied.]

Dispos-O-Waste sent a third letter, dated November 13, 1968, to the chief of the hospital's supply division. It is therein related that there remained overflow trash at certain locations. The excess over the amount "indicated in the specifications" was said to be 27 cubic yards per week. Dispos-O-Waste then stated as follows: "We request that our contract be amended to reflect this increase in the quantity which we have been hauling, almost from the beginning of the contract period." The letter continued:

> Our bid, $1,175.00 per month, was based on approximately $1.07 per cubic yard multiplied by the 1,105 cubic yards per month *stipulated* in the specifications. We propose to haul the additional 117 cubic yards per month at a charge of $1.07 per cubic yard or $125.19 per month additional. [Italic supplied.]

On December 10, 1968, the chief of the hospital's engineering division sent a memorandum to the chief of the hospital's supply division, in substance verifying the generation of about 27 additional cubic yards of trash a week.

The Director of the Supply Service has recommended adjustment of the contract price as requested. In support of this position, he has cited two decisions of our Office, B–159937, October 18, 1966, and B–164995, August 26, 1968. Both of these decisions cited the case of *Eastern Service Management Company* v. *United States*, 243 F. Supp. 302 (E.D.S.C. 1965).

In our earlier decision, we expressly recognized the limited applicability of the doctrine of reformation: "Where, by reason of mutual

mistake, a contract as reduced to writing does not reflect the actual agreement and intention of the parties, the written instrument may be reformed if it can be established what the agreement actually was." B–157899, November 1, 1965. However, in neither of the cited decisions was application of that doctrine possible; we similarly believe that the instant facts do not present a case where reformation is appropriate.

Nevertheless, payment of additional compensation was authorized in both decisions on the basis that the Government's "approximate" estimate of the quantum of work to be performed was so erroneous as to be misleading to the contractor. At this point in both decisions, we cited the *Eastern* case for authority. We believe our two previous decisions are factually distinguishable inasmuch as the actual work exceeded the estimates by 47 percent and 49 percent, whereas in this case the additional amount of work is only about 11 percent greater than that "suggested" in the invitation.

The *Eastern* case involved two principles which are relevant to the present contract claim: (1) the Government's approximated estimate of the square footage of floor to be serviced constituted a warranty or representation binding on the Government, and failure to include in the estimate lobby, corridor and restroom space was a breach which entitled the contractor to damages; and (2) discovery of the actual size of the space to be serviced was a "change" within the meaning of the "Changes" clause and the contracting officer's refusal to issue a change order was also a breach of contract.

We do not consider that the Government in the circumstances of the present case has made any express or implied warranty concerning the amount of work to be performed by Dispos-O-Waste. Of course, it is no simple matter to define what is meant by a "warranty." Consider the following excerpt from *Strika* v. *Netherlands Ministry of Traffic*, 185 F. 2d 555, 558 (2d Cir. 1950):

> * * * It is true that a warranty, whether express or implied, is treated as if it were an assurance by the warrantor to the warrantee that he may rely upon the truth of the fact warranted, and in the case of express warranties it would be difficult in principle to treat that assurance as other than itself a promise. However, implied warranties, although they are consensual in the sense that they presuppose that the parties have entered into some sort of contract, are not promises by the warrantor that the fact warranted is true; they are "obligations" imposed *in invitum* as a consequence of making the contract regardless of the warrantor's intent. Hence it is only by a fiction that we call them promises at all in the sense that express warranties are promises.

At the minimum, a warranty is something of an assurance by one party that the other may rely on the truth of a given representation. There is no such assurance intended or to be implied in this case.

It is true that the Government impliedly represented that the suggested schedule of pickup frequencies and container sizes were adequate to effect "complete" trash removal, but it was only "suggested."

Bidders were "required" to inspect the premises for full information concerning "the character and conditions under which the service is to be performed." Bidders also knew that the contractor would be "required" within a very short time after award to submit its own list of containers, locations, and frequencies of pickup. It seems to us that such provisions were calculated to discourage reliance on the Government's "suggestions." Indeed, the presence of the latter contractual requirement is a distinguishing factor which was not present in *Eastern*. Additionally, in *Eastern* the Government made a representation of a fact capable of rather exact measurement not subject to fluctuation, and one "which normally would be presumed to be within its specific knowledge." *Eastern*, page 305. The same is not true of the amount of trash generated at a large hospital complex. This would also militate against implying a warranty (or assurance of accuracy) in this case.

We similarly conclude that there has been no "change" in this instance so as to make actionable a failure to issue a change order. In *Eastern*, the Government had a right to the cleaning of "approximately" 129,300 square feet of office space. The court held that when it turned out that the Government would require cleaning of 138,300 square feet, there had been a "change" in the specifications. The variation there was about 7 percent. While the variation in the present case is about 11 percent, the subject matter of the contract is of variable quantity with a tendency in recent years to increase rather substantially due to more widespread use of prepackaged and disposable goods. In light of these considerations, we find no legal basis to authorize the payment of additional compensation under the contract.

[B-152421]

Military Personnel—Record Correction—Payment Basis—Interim Civilian Earnings

When the military or naval records of members or former members of the uniformed services are corrected pursuant to 10 U.S.C. 1552, deduction of the interim earnings received from civilian employment should be made from the back pay and allowances granted. The 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 the service and received like pay and allowances, but no additional civilian earnings. The issuance of regulations to require the deduction of interim civilian earnings from the 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 an erroneous or illegal separation or suspension from the service.

To the Secretary of Defense, March 10, 1969:

Reference is made to letter of February 18, 1969, from the Assistant Secretary of Defense (Comptroller), requesting an expression of our views on the propriety of deducting earnings received from civilian employment in effecting settlement of back pay and allowances found due a member or former member of the uniformed services by reason of the correction of his military or naval records in certain cases, pursuant to the provisions of 10 U.S.C. 1552.

The Assistant Secretary states that in a recent case before the Air Force Board for Correction of Military Records the Department of Defense practice of not deducting the member's or former member's interim net earnings received from civilian employment from back pay and allowances granted in correction board cases has been questioned. He further states that the basic problem stems from those cases in which the records are corrected to show that the discharged member was not in fact discharged but remained on extended active duty and that in such cases the applicant receives back pay and allowances with no deduction of interim net non-Governmental earnings.

According to the Assistant Secretary, an anomalous situation exists in this class of cases since, if the individual had sued in the Court of Claims and won, the interim net earnings would have been deducted in determining the amount of the judgment awarded to him.

With respect to this problem, the Assistant Secretary says that in decision B–152421, October 7, 1964, a former Comptroller General agreed with the views expressed in letter from the Department of Defense dated August 11, 1964, that the controlling statute, 10 U.S.C. 1552, does not require deduction of interim net earnings and, therefore, the administrative practice of not deducting interim earnings in making settlements in record correction cases is not so clearly erroneous as to require this Office to object to the payment of back pay and allowances to members and former members of the Armed Forces upon the correction of their military or naval records without a deduction of interim earnings.

The letter of August 11, 1964, was in reply to our letter of February 18, 1964, asking the then Secretary of Defense for an expression of his views on a proposal that the Department of Defense take appropriate steps in cases in which retroactive payments of active duty pay and allowances become due as a result of correction board action to deduct from the amount due the interim earnings received by the member or former member during the period covered by the military pay and allowances found payable to him.

Due to the Secretary's position in the matter, as stated in the letter of August 11, 1964, we recommended to Congress that the provisions

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of 10 U.S.C. 1552 be appropriately amended to provide specific statutory authority for such deductions so as to provide uniform treatment of military and civilian personnel in making adjustments for loss of compensation arising out of an erroneous or illegal separation or suspension from the service. This would have made such deductions mandatory. A bill to implement our recommendation was introduced in Congress. However, no action was taken on such bill.

The Assistant Secretary expresses the view that while the statute does not require such deductions, neither does it prohibit such deductions. He adds that since the primary purpose of the statute was to permit the Secretary concerned to correct any error "or remove an injustice," it might be argued that the statute is sufficiently broad to permit deductions of interim earnings when the Secretary concerned believes that failure to do so results in an unwarranted windfall which would not have resulted had the person actually served on active duty. While conceding that the matter is not free from doubt, he suggests that such doubt may be resolved by administratively adopting the practice followed by the Court of Claims in comparable cases. This suggestion is in line with the proposal made in the letter of February 18, 1964.

In the letter dated February 18, 1964, it was said, in support of the proposal made therein, that—

> The Congress enacted the correction of records law to authorize the departments "to correct an error or remove an injustice" and not to place members or former members in a more advantageous position when their military or naval records are corrected than members who remained in the service and received like pay and allowances, but no additional civilian earnings. To permit the successful member or former member in a record correction case to have retroactive payments from the Government and retain earnings from civilian employment for the retroactive period involved would in effect serve to unduly enrich him and thus would tend to defeat the true purpose of the law. Had such member not been discharged from the service or released from active duty, he generally would not have had an opportunity to engage in civilian employment and receive an income therefrom. It is clear that the purpose of a correction of records is to restore the member or former member to the same position that he would have had if he had not been separated from the military service.

Also, in support of the proposal submitted to the then Secretary of Defense, reference was made to the practice followed by the Court of Claims to require the deduction of the plaintiff's net earnings through interim civilian employment for the corresponding period from the amount of the military pay and allowances it awarded to him.

As the Assistant Secretary indicates, the statute is silent with respect to this matter and we do not view the failure of Congress to take any legislative action to make mandatory the deduction of interim civilian earnings as a limitation on the Secretary's authority to effect a proper settlement of amounts due incident to a correction of records. In consonance with the views expressed in the letter of February 18, 1964, we

believe that if the equitable purposes of the statute are to be maintained, interim civilian earnings properly should be taken into consideration by the military departments in effecting settlements of back pay and allowances found due as a consequence of the correction of military records.

Accordingly, should regulations be issued requiring a deduction of interim civilian earnings, where appropriate, in those cases, our Office would apply the regulations in the audit of disbursing officers' accounts and in the settlement of claims which may come before us in such cases.

[B-165988]

Contracts—Negotiation—Propriety

The procedures used under a request for proposals issued pursuant to 10 U.S.C. 2304(a)(2) due to the urgent need for the procurement, where during the 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 Government-owned equipment, were deficient and deviated from the requirements of 10 U.S.C. 2304(g), the contracting agency having failed to simultaneously notify all prospective contractors of changes as they occurred during negotiation in accordance with paragraph 3-805.1(e)(ii) of the Armed Services Procurement Regulation, and having failed to advise the low offeror of the final cutoff date for negotiations as required by paragraph 3-805.1(b), based on the erroneous determination a "late" amendment acknowledgment was not for consideration.

Contracts—Awards—Cancellation—Erroneous Awards—Cancellation Not Required

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

To the Director, Defense Supply Agency, March 11, 1969:

Reference is made to letters dated February 10 and 18, 1969, with enclosures, from the Assistant Counsel, and related correspondence, furnishing a report on the protest by the General Steel Tank Co. (GST) against the award of a contract to the Menominee Engineering Corporation (MEC) under request for proposals (RFP) No. DSA-700-68-R-7400, issued by the Defense Construction Supply Center (DCSC), Directorate of Procurement & Production, Columbus, Ohio.

The background of the present procurement shows that an initial purchase request for the purchase of floating bridge sets was received by DCSC from the Marine Corps in January 1967. Three sets were required at that time and the requirement was for Southeast Asia with an "FAD II Priority 02" (second highest priority) assigned. The solicitation under the initial request did not generate any responses, apparently because the prospective sources were not interested in submitting offers on the quantity tendered by DCSC. Thereupon, the Marine Corps increased the quantity to eight sets and the solicitation was continued on this basis and a series of amendments were issued clarifying the specification. However, at the closing date of February 8, 1968, only one offer was received. This offer exceeded the funds available for the purchase of the eight sets. Thereafter, the Marine Corps suspended action on February 29, 1968, and subsequently revised the specifications to call for a less complex bridge. The revision to the specification requirements was received March 26, 1968, and was the basis for a new solicitation, the subject RFP 700–68–R–7400 (issued pursuant to Marine Corps military interdepartmental procurement requests (MIPR's) Nos. M00027–6291–3412 and M00027–7243–3331).

The RFP was issued on April 24, 1968 (citing 10 U.S.C. 2304(a) (2) as the negotiation authority), and solicited offers for eight bridges (fixed, floating, 60-ton capacity) with related provisioning, interim stock repair parts and technical data sheets. Thereafter, amendment No. 0001, issued May 14, 1968, increased the quantity of bridges requested from eight to 11; amendment No. 0002, issued May 21, 1968, extended the closing date for receipt of proposals from May 24 to June 7, 1968; amendment No. 0003, issued May 31, 1968, corrected the shipping destination from Barlow, Florida, to Barstow, California; and amendment No. 0004 extended the closing date for the receipt of proposals to June 28, 1968. On this date, it is reported that seven proposals were received, all with a common acceptance date of August 26, 1968. At this stage, GST was the apparent low offeror and MEC was second lowest.

We note parenthetically that, while negotiation was authorized under 10 U.S.C. 2304(a) (2), because the public exigency will not permit the delay incident to advertising, 2 years elapsed between the expression of urgent need and the award of a contract. Indeed, we understand that an MIPR for three bridge sets was issued on October 31, 1966, in which the delivery date was specified as December 1, 1966. With the benefit of hindsight, it may be said that formal advertising might have satisfied the needs of the Marine Corps somewhat more rapidly.

By telegram dated July 10, 1968, the procurement office advised offerors as follows:

UNCLAS in reply refer to DCSC-DP/CPF-7-10 signed Wallace. This is to advise that a second round of negotiations is being conducted on entire quantity of 11 sets Bridge, Fixed Floating 60 Ton capacity FSN 5420-391-3208 to same description as DSA-700-68-R-7400. Requests proposals be on basis of Bid A and B as follows which is same as originally solicited:

BID A

Items 1AA—FOB Origin for shipment as listed in Bid B below—3 sets and/or FOB Origin with all transportation charges prepaid by contractor to destinations for shipment to:

Item 1AB—Barstow, California—3 sets.

Item 2AA--5 Sets same FOB as item 1AA above. Item 2AB same FOB as item 1AB above. Item 6AA—3 sets same FOB as Item 1AA above and item 6AB same FOB as item 1AB above. Items 3, 4, and 5 to be quoted as originally solicited.

Delivery Requirement: Item 1—3 Sets in 150 days ADA, Item 2—5 Sets in 210 days ADA and Item 6—3 Sets in 240 days ADA. Since this is an urgent procurement it is requested that you carefully review your proposal with respect to delivery and price and advise the Contracting Officer not later than 4:00 P.M. EDST 17 July 68 as to the best price and time of delivery that your firm can offer. This request is subject to all the terms and conditions of Request for Proposal DSA-700-68-R-7400. Any revision of your proposal received after above closing date will be treated as a late modification subject to Paragraph 8 Standard Form 33-A which formed a part of the Request for Proposal.

In response to such telegram, none of the offerors changed their initial proposal or price, except MEC which reduced its price by $7,941 per bridge set and its total offer to $3,423,850.65 f.o.b. destination and $3,314,352.25 f.o.b. origin. However, GST's offer in amount of $3,338,341 (submitted on an f.o.b. destination price) still remained the apparent low offer.

Subsequently, on August 9, 1968, the procurement office was advised by the Marine Corps that the MIPR's would have to be revised to allow shipment of separate components of the bridge set from subcontractors' plants to destination and to require an assembly test of one partial bridge set. Accordingly, in view of such expected change, all offerors were requested on August 22, 1968, to extend the acceptance period of their offers to September 26, 1968. In response to such request, MEC extended its acceptance period without any change in its price, and GST increased its price by $2,455 per bridge set in connection with such extension of its acceptance period.

Since the procurement office had not yet received the MIPR changes, offerors were requested on September 24, 1968, to extend their acceptance periods to November 1, 1968. GST extended its acceptance period only to October 4, 1968. On October 3, 1968, GST then extended its acceptance period to October 7, 1968 (with no increase in price), and to October 11 at an increase of $1,515 per bridge set for a total increase of $16,665. On October 11 GST again extended its acceptance period, this time to November 15; GST did not change its price and maintained its position as low offeror. MEC did not acknowledge receipt

of the request for extension until October 2, some 6 days after its previous extension had expired. In addition to acknowledging receipt, MEC granted the request by extending its offer to November 1.

The expected changes in the Marine Corps MIPR's were received by DCSC on September 30. On October 18, amendment No. 0005 was issued to permit the separate shipment of components by subcontractors and requiring first article (assembly) test. A closing date of October 25 was fixed by the amendment. It also included a request that offerors furnish further extensions of their acceptance periods to November 15. By telegram dated October 24, MEC signified receipt and acceptance of the amendment, granted the requested extension and decreased the unit price of the bridge sets by $2,287.25. GST wired DCSC on October 29, acknowledging receipt of the amendment, extending its acceptance period to November 15 and increasing its price $5,500 per bridge set. The administrative report indicates that after these changes were effected GST continued to be the low offeror.

It was thereupon determined that the Government would not be able to provide the gauges which the specifications required it to furnish because the gauges were being used under Army contracts for some of the components of the bridges. In view of the time required to resolve this new complication, DCSC on November 12 telegraphically requested all offerors to extend their acceptance periods to November 29. MEC by telegram of November 14 extended its offer as requested. In a telegram of the same date, GST extended to November 24, but on November 22 further extended to November 29. On the 29th, GST again extended its acceptance period to December 6 and reduced its price $1,800 per bridge set. It appears that all other offers were permitted to expire on November 29. GST had been advised in the interim (December 2) of the nonavailability of the gauges. It responded on December 3 with an offer to provide the gauges at no cost but on condition that such gauges would remain as GST property. However, since DCSC specified that title to the gauges would have to vest in the Government upon completion of the contract, GST on December 4 agreed to furnish the gauges with title vesting in the Government.

A preaward survey of GST was begun on December 5, 1968. On the same date, DCSC requested additional funds from the Marine Corps to permit an award presumably to GST. Four days later, on December 9, the Marine Corps reduced its requirements from 11 to eight bridge sets.

The prime issue raised by GST's protest to our Office involves the manner in which negotiations have been conducted, with particular emphasis on the period commencing December 9, 1968. As set out

above, on Deecmber 5, 1968, when DCSC initiated the preaward survey of GST and requested additional funds from the Marine Corps to permit an award, GST was the lowest offeror for the requested 11 bridge sets. Thereafter, on December 9, 1968, the Marine Corps telephonically advised DCSC that eight bridge sets, rather than 11, were required. This was a substantial change in the Government's requirements and, since offers had been solicited on the basis of 11 bridge sets, DCSC telephonically requested GST on December 9, 1968, to submit an offer on the revised requirement of eight bridge sets and required GST to submit its offer responsive to the reduced requirement that very same day, December 9, 1968. In response thereto, GST, by telegram of December 9, confirmed the telephonic request and responded to the lessened requirement of eight bridges in lieu of the 11 bridges with no increase in unit price. Thereafter, on December 11, DCSC requested that GST extend its acceptance time to December 18, which GST did with no increase in price.

It was at this point in time (after December 9) that a serious issue confronted DCSC. In contemplation of making award, DCSC determined that award should not be made until another round of negotiations had been conducted with other offerors in the zone of consideration ostensibly because:

(a) the offer of GST in response to amendment 0005 had been a "late offer" which should not have been accepted at the time;

(b) the action of December 9, 1968, constituted a new solicitation from GST alone on the reduced requirement; and

(c) other offerors which had been in the zone of consideration on the basis of 11 bridge sets must be given equal opportunity to submit prices on the reduced quantity.

The following sequence of events then occurred. On December 17, DCSC requested that GST extend its acceptance time to January 10, 1969, and on December 18 three other offerors in a competitive range were requested to extend their acceptance periods to January 18, 1969. GST complied with this request. Then, on December 19, 1968, DCSC reopened negotiations with the three other offerors (MEC, Consolidated Diesel Electric Company and Washington Aluminum Company) considered to have been within the competitive range as a result of their offers for the original 11 bridge sets. These firms were requested to submit offers on the reduced requirement of eight bridge sets by the close of business on December 20, 1968.

In response thereto, MEC replied by telegram of December 20, 1968, in which it reduced its unit price for eight sets by $10,785 per set, in addition to the $10,228.25 per set reduction previously submitted for 11 sets. This pricing was based on (1) an all-or-nothing basis for the

entire solicitation of eight sets, and (2) receipt of award prior to January 18, 1969.

It is reported that after evaluation on the basis of furnishing eight bridge sets, MEC was found to be the new lowest offeror at $2,307,412.50 for delivery on an f.o.b. origin basis plus freight of $79,152 for a total f.o.b. origin offer of $2,386,564.50, as compared to its total f.o.b. destination offer of $2,392,644.50. In comparison, GST's total f.o.b. destination offer was $2,450,608, or $64,043.50 higher than MEC's f.o.b. origin bid plus freight to destination. Thereupon, DCSC requested a preaward survey on MEC on December 31, 1968, the results of which survey were favorable to MEC and led to further negotiations solely with MEC which culminated in the contract award to MEC on January 17, 1969.

Essentially, the prime issue for consideration at this juncture is whether the position of GST was prejudiced by its not having been solicited on December 19, 1968, for its best and final offer, with the three other offerors in the zone of consideration. We think, under the circumstances of this case, that GST was not given an equal opportunity and its position was thereby prejudiced.

Paragraph 3-805.1(a) of the Armed Services Procurement Regulation (ASPR) requires that, after receipt of initial proposals, discussions be conducted with all offerors within a competitive range with certain exceptions not here pertinent. That regulation imposes an affirmative duty to negotiate and, in this case, DCSC did in fact negotiate with three other offerors during the crucial period of December 9 through 20, 1968. However, ASPR 3-805.1(b), in addition to prohibiting auction techniques, provides in part as follows:

> * * * Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations (see (a) above) *shall be offered an equitable opportunity to submit such price, technical, or other revisions in their proposals as may result from the negotiations. All such offerors shall be informed of the specified date (and time if desired) of the closing of negotiations and that any revisions to their proposals must be submitted by that date.* All such offerors shall be informed that any revision received after such date shall be treated as a late proposal in accordance with the "Late Proposals" provisions of the request for proposals. (In the exceptional circumstances where the Secretary concerned authorizes consideration of such a late proposal, resolicitation shall be limited to the selected offerors with whom negotiations have been conducted.) In addition, all such offerors shall also be informed that after the specified date for the closing of negotiation no information other than notice of unacceptability of proposal, if applicable (see 3-508), will be furnished to any offeror until award has been made. [Italic supplied.]

The emphasis here is directed at affording offerors a specified date, common to all, signifying the close of negotiations. In connection with the foregoing, GST contends (and the record supports such contention) that no specified common cutoff date for the close of negotiations

was established for competing offerors to the prejudice of GST's negotiation posture.

The late acknowledgment of amendment No. 0005 by GST has been advanced by DCSC as one reason for reopening negotiations with three offerors on December 19, 1968. However, contrary to that position, we note that ASPR 3-506 states:

(h) The normal revisions of proposals by selected offerors occurring during the usual conduct of negotiations with such offerors are not to be considered as late proposals or late modifications, but shall be handled in accordance with 3-805.1(b).

Here, GST was requested several times to extend the time for acceptance of its offer after submission of its so-called "late" acknowledgment of amendment No. 0005 and while it was still the low offeror, without advice that its late acknowledgment of the amendment rendered its revised offer on amendment No. 0005 ineligible for consideration. However, it should be emphasized that negotiation procedures, unlike those required for formal advertising, are designed to be flexible and informal. These procedures properly permit the contracting officer to do things in the awarding of a negotiated contract that would be contrary to the law if the procurement were being accomplished by formal advertising. See 47 Comp. Gen. 279, 284. Therefore, we see no justification for the administrative emphasis placed on a "late" acknowledgment of amendment No. 0005 by GST as being one of the reasons for not including GST in the final round of negotiations which commenced on December 19, 1968.

More serious is the fact that the contracting officer effectively established different cutoff dates for GST (December 9) and MEC (December 20) when the procurement requirements were reduced from 11 to eight bridge sets. Under the rules applicable to negotiated procurement, negotiations may be conducted at different times with different offerors. However, when this is done, the rules also require, in fairness to all, that a *common cutoff date* be set for all. In a situation, such as here involved, where a substantial change occurred in the number of bridges required, ASPR 3-805.1(c) requires:

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

companied, or immediately followed by a writen amendment to the request for proposal or request for quotations embodying such changes or modifications. [Italic supplied.]

While we can understand that the urgency of the situation may have precluded the issuance of a written amendment prior to December 9, 1968, the record submitted here fails to show compliance with the requirement in subparagraph (ii), quoted above, that all prospective contractors be notified *simultaneously* of the substantial change in the Government's requirements. In our opinion, this represented a significant deficiency in the negotiation process revealed by the chain of events leading to the award made to MEC. While DCSC attempts to justify its action in reopening negotiations with the three other offerors on December 19 without extending the same opportunity to GST on the basis that GST had already been solicited for the reduced requirements on December 9, the fact remains that GST was led to believe that no further negotiation action on its part was required or necessary after December 9. We see no reason why GST could not have been included in the December 19 solicitation and given the common cutoff date of December 20 that was afforded the other offerors.

We believe the effect of the negotiation procedures employed by DCSC in this case was to establish two separate cutoff dates (December 9 and 20) which, as the situation developed, definitely operated to the prejudice of the competitive position of GST. In this regard, we have previously stated that offerors should be advised (1) that negotiations are being conducted; (2) that offerors are being asked for their "best and final" offer, not merely to confirm or reconfirm prior offers; and, finally (3) that any revision must be submitted by the date specified. See 48 Comp. Gen. 536, February 13, 1969, and 48 *id.* 449, December 27, 1968.

The parties do not make an issue of the expiration of MEC's offer on September 26 and again on November 29, and no prejudice is claimed to have resulted from revival of the offers by extensions granted after expiration. For these reasons, and particularly since we have involved here a negotiated procurement, it would appear that prices could be revised concurrently with or following a tardy extension of the acceptance period without prejudice to any other offeror or to the system of negotiated procurement.

Although DCSC had concluded negotiations with GST on December 4 relative to the nonavailability of Government-owned gauges, no mention of such nonavailability was made in the December 19 communication to the three other offerors in which they were requested to submit prices on the reduced requirement of eight bridge sets. For all that appears, all three offerors continued to believe that the Govern-

ment would fulfill its obligation to furnish gauges and, on that assumption, submitted their revisions accordingly. Knowledge of the actual state of affairs concerning the gauges remained a private matter between DCSC and GST. A seemingly reliable estimate of the value of these gauges is about $21,000. We think that the developments concerning the gauges constituted a "substantial change" in the procurement within the meaning of ASPR 3-805.1(e) and that, therefore, the failure to notify the three other offerors on December 19 of the current facts regarding gauges was contrary to that section.

The administrative report indicates that, while the contracting officer was aware during the month of December (and even earlier) that the gauges could not be supplied by the Government, it was not until early January 1969 that he learned that MEC and its subcontractors had possession of some or all of the gauges. This information was provided by MEC itself in the following telegram, dated January 2, 1969:

1. Menco has or will have inspection gauges in house for the contracts for all balks, stiffeners and ramp rafts. Our suppliers for trestle and saddle assemblies also have gauges in house.
2. Should any or all of these gauges not be available for 7400, Menco will at the Government's request, furnish pricing and delivery schedule for supplying the necessary gauges. Menco at that time will also request a change in 7400 delivery schedule if necessary.

It is clear from the second paragraph that MEC was willing to supply any gauges which it might not possess, but only upon condition that the Government bear the costs thereof. Since GST had been persuaded to agree to supply all the gauges without additional cost to the Government and to consent to a stipulation that title thereto pass to the Government on completion of the contract, it is not clear that MEC could not have been induced to do the same. Conduct of negotiations in such respect could have been undertaken during that period in January when MEC was increasing its prices and negotiating with the agency to clarify contract terms and to incorporate a specific requirement for first article testing of components.

Representatives of GST have questioned the evaluation factor of $12,000 which was added to MEC's proposal to compensate for its competitive advantage in possessing some or all of the gauges. Technical personnel at Fort Belvoir submitted, after award, their estimate of $21,592 for the gauges; even at this higher figure the MEC offer is lower than GST's. The administrative report states that the evaluation factor represents the "total cost of the gages which General had offered to purchase and turn over to the Government." We are incapable of appraising the value of these gauges since we lack the special expertise necessary to make such an appraisal. Therefore, we have no alternative but to accept the statement of the contracting agency.

Item 3 of the RFP called for "Provisioning and technical documentation requirement to be in accordance with the requirements of DSAM 4100.1 and attachment 3, pages 1 thru 4, statement of provisioning policy for type I provisioning requirements, dated 31 Aug 67- applicable to items 1 and 2." Item 4 was "Interim stock repair parts" in accordance with MIL-I-82110(MC), as amended. The abstract of offers received in this case reveals that two of the seven offerors submitted no prices for items 3 and 4; that two submitted a price on item 3, but not on the other; and that three offerors submitted prices on both items. There are further disclosed by the abstract the following facts:

(1) The prices submitted on item 3 ranged from $25 to $75,000; and

(2) The prices submitted on item 4 ranged from $313.50 to $2,500.

A review of the attachment under item 3 and the MIL-I-82110 under item 4 indicates to us that the amounts and prices for repair parts and provisioning were to be negotiated by the Government and the contractor after award. It is therefore possible to conclude that no prices were required for these two items. This fact, taken together with the wide ranges of prices submitted and the fact that some offerors failed to submit any price on one or both of these items, indicates confusion on the part of the offerors. Since prices stated for items 3 and 4 were for the purpose of comparing the various offers, fruitful inquiry might well have been undertaken to clarify the offerors' apparent doubt on this matter and to permit evaluation on an equal basis. We have been informally advised by GST in this connection that its $1,200 price on item 4 represents the estimated cost of the interim repair parts themselves; on the other hand, MEC's $313.50 figure for this item, we are told, represents only the cost of a commercial parts list (which is provided for under paragraph 3.1.1 of MIL-I-82110). Failure to negotiate with offerors with respect to the varying responses to items 3 and 4 was contrary to that part of ASPR paragraph 3-804 which reads:

*** * * Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid. * * ***

The abstract of offers itself demonstrates that there was indeed uncertainty among the offerors as to both items 3 and 4.

Government procurement by negotiation, like procurement by formal advertising, requires that contracting officers observe elemental impartiality toward all offerors. While negotiation procedures are more flexible than advertised procedures, such flexibility demands a greater degree of care on the part of the contracting officer to insure that all competitive offerors are treated equally. The record of negotia-

tions with GST, as well as with the other offerors, points up serious deficiencies in the negotiation process employed which definitely were prejudicial to at least GST.

The procurement procedures utilized by DCSC in this case deviated from the requirements of 10 U.S.C. 2304(g) and regulations so materially as ordinarily would warrant cancellation of the award and the reopening of negotiations with all offerors in a competitive range. We would be disposed to hold that such action should be taken in this instance but for the deleterious effect on our military posture in Southeast Asia. The Marine Corps has stressed that there is a critical shortage of the procurement requirements and that any slippage in delivery of tactical bridging will have an undesirable impact on III Marine Amphibious Force tactical/logistical operations in Southeast Asia. The Commanding General, Fleet Marine Force, Pacific, has asked that every effort be made to prevent any slippage in delivery of tactical bridging.

A second reason militating against cancellation of award is the substantial termination costs which would now be incurred by the Government. In this connection, you have advised that an attempt has been made to obtain from MEC a mutual no-cost stopwork agreement in the event the Marine Corps could afford a delay in the delivery of the bridge sets. No such agreement could be obtained. The contract contains no suspension-of-work clause and, thus, even the issuance of a suspension-of-work order could subject the Government to a breach of contract claim.

In view of the foregoing administrative presentation by the Marine Corps and the Defense Supply Agency, we are constrained to take no action to disturb the award. However, this is not to be taken as sanctioning the procurement actions employed by DCSC. Repetitions of the foregoing deficiencies must be avoided, and you are advised that we will scrutinize future procurements to determine whether all substantial changes occurring during negotiations are treated in accordance with ASPR 3-805.1(e) and whether all offerors are notified of the specified common cutoff date for negotiations under ASPR 3-805.1 (b) and are afforded equal negotiation opportunity. The matter is brought to your attention with the expectation that it may serve as a guide to contracting officers to preclude recurrences of like cases in the future.

[B-165792]

Bids—Delivery Provisions—Failure to Meet

The failure to designate in a bid the f.o.b. point of origin as required by the invitation was a deviation that affected price and the deviaton was improperly

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

To the Secretary of the Navy, March 13, 1969:

Reference is made to letters SUP 0232A dated January 29 and 31 and February 25 and 27, 1969, from the Deputy Commander, Purchasing, and letter of January 31, 1969, from the Head, Protest and Claim Branch, Purchasing Operations Division, Naval Supply Systems Command, reporting on the protest by the Admiral Corporation of award of a contract to the Collins Radio Company under Aviation Supply Office invitation for bids N00383-69-B-0553.

The invitation, issued November 13, 1968, solicited bids for AN/ARC-51A/AX/BX radio sets and related data items. Section 422 of the invitation required bidders to offer prices f.o.b. origin. The invitation also requested bids on two different bases, i.e., with first article testing and waiver thereof in appropriate circumstances. The invitation provided that within 30 days after first article approval, or 120 days after date of contract if first article is waived, the Government could exercise a 100-percent option to purchase additional radio sets under the contract.

The facesheet of the invitation provided that the bidder agrees "to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s)." Section 422 of the invitation for bids provided as to f.o.b. origin:

422—Place of Delivery: Origin: (a) The articles to be furnished shall be delivered free of expense to the Government and, at the Government's option, (i) loaded, blocked, and braced on board carrier's equipment, (ii) at the freight station, or (iii) placed on wharf of water carrier (where material will originate within or adjacent to a port area and is adaptable to water movement), at or near Contractor's plant at:

(1) (Bidder insert city or town in which plant is located),

(2) (Bidder insert exact location of private siding or nearest rail terminal from which rail shipment will be made, together with the name of serving railroad(s)),

(3) (Bidder insert the exact location from which truck shipments will be made, including the name of the street or highway), and

(4) (Bidder insert the port, or the specific area within such port to which supplies will be delivered), for shipment at Government expense (normally on Government bill of lading) to destinations to be specified at a later date. Allocations for the material covered hereby should be requested from the Aviation Supply Office by the cognizant inspector at least four weeks prior to the anticipated delivery dates of such material. After receipt of such request, the Aviation Supply Office will furnish the inspector with allocations for such material.

* * * * * * *

(d) Bids submitted on a basis other than f.o.b. origin will be rejected as nonresponsive.

With further reference to the f.o.b. origin requirement, section 60.6 of the invitation incorporated by reference the following clause:

> Responsibility For Supplies.
> Except as otherwise provided in this contract, (i) *the Contractor shall be responsible for the supplies covered by this contract until they are delivered at the designated delivery point, regardless of the point of inspection;* (ii) *after delivery to the Government at the designated point* and prior to acceptance by the Government or rejection and giving notice thereof by the Government, the Government shall be responsible for the loss or destruction of or damage to the supplies only if such loss, destruction, or damage results from the negligence * * * of the Government * * * . [Italic supplied.]

Bids were received from Collins and Admiral on December 4, 1968, and, in accordance with paragraph 2 of the "*Notes to Bidders*," bids were evaluated on the basis of the quantities selected for award with the result that Collins' bid prices on both bases (first article testing and waiver thereof) were lower than Admiral's low bid price for waiver of first article testing. It was noted, however, that Collins' lowest bid price was predicated upon compliance with the first article testing requirement, whereas, its bid price based on waiver of the testing requirement was $23,620 higher.

Under the authority vested in the contracting officer by ASPR 2–406.2, Collins' bid was evaluated on the basis that the price offered for first article testing was actually intended as its bid for waiver of that requirement. The cited regulation provides, in part, that "Any clerical mistake apparent on the face of the bid may be corrected by the contracting officer prior to award, if the contracting officer has first obtained from the bidder * * * verification of the bid actually intended."

By letter dated December 11, 1968, addressed to the procurement activity, with copy to our Office, counsel for Admiral protested consideration of Collins' bid for award on the basis that Collins had submitted a bid that was not proper for acceptance under formal advertising procedures. Specifically, it is argued on behalf of Admiral that Collins' failure to designate in its bid the f.o.b. point of origin (city or town at or near plant) as required by section 422 of the invitation for bids, *supra*, for purposes of bid evaluation and contract performance prevented the Government from accurately evaluating Collins' bid to determine the total cost of the procurement, including transportation to destination.

Subsequent to receipt of Admiral's letter of December 11, the contracting officer by teletype message dated December 20, 1968, requested, in part, that Collins "confirm":

> A. That the information required by clause 442, entitled "Place of Delivery: Origin:" is as follows:
> 1. Cedar Rapids, Iowa.

2. 325 10th Ave., S.E., Cedar Rapids, Iowa—Rock Island & Chicago Northwestern.
3. 325 10th Ave., S.E., Cedar Rapids, Iowa.

In answer thereto, Collins, on January 2, 1969, responded as follows:

(A) In response to clause NBR 511 the bid indicates that the principal place of manufacture and the point of inspection and acceptance will be Cedar Rapids, Iowa. The data relating to clause NBR 422 entitled "Place of Delivery: Origin" is as follows:
1. Cedar Rapids, Iowa.
2. 325 10th Avenue S.E., Cedar Rapids, Iowa—Rock Island & Chicago Northwestern.
3. 325 10th Avenue S.E., Cedar Rapids, Iowa.

The contracting officer determined that Collins' failure to designate its f.o.b. point of origin as required by section 422 of the invitation for bids was a minor deviation which, under Armed Services Procurement Regulation (ASPR) 2-405 and applicable decisions of our Office, could be cured by reference to the information contained in the inspection and acceptance clause (section 511 of the invitation) and to the information contained on the facesheet of the invitation. At section 511, Collins affirmatively stated that the "Place of principal manufacture" was Cedar Rapids, Iowa. The facesheet of the invitation showed Collins' business address in Cedar Rapids, Iowa.

The January 29 administrative report concludes in this regard that "it is known by the contracting officer that shipment would be made from Cedar Rapids since all previous contracts with Collins for these articles and their spare parts were performed at, and shipment made from the Cedar Rapids plant." The contracting officer accordingly concluded that Collins was the lowest responsive, responsible bidder under the terms of the invitation. In view of the urgency of the procurement, the contracting officials determined to make immediate award to Collins for the maximum quantity available. In the latter part of January 1969, a contract was awarded to Collins in the total amount of $4,628,251.50 which included a portion of the option quantities.

In support of the award made, Collins contends that failure to designate in section 422 the "city or town in which plant is located" did not render Collins' bid defective since its actual f.o.b. shipping point was plainly stated elsewhere in its bid. Collins states further that bidders were required under article 422 to identify only the city or town at or near their plant and that no bidder had a free choice either before or after opening of bids to select an f.o.b. shipping point at a location different than the point near its plant. Collins argues that its f.o.b. point of origin had to be Cedar Rapids, Iowa, the city in which Collins' manufacturing plant is located. Restated, Collins' position is that the language of article 422 obligated a responding bidder to use the city where its plant is located as its shipping point. That is to say, "The reader had only to turn over two pages to Clause 511 to ascertain

the location of the point of manufacture, the place of inspection, and the place of delivery or shipping point." Collins concludes that because it was stated in section 511 that Collins is the principal manufacturer and that its place of principal manufacture is Cedar Rapids, there is no room for question that Cedar Rapids is Collins' f.o.b. point of origin and that that point could not be changed either before or after opening of bids.

In the alternative, Collins urges that the contracting officer had a clear duty to look to Collins' business address stated on the face of its bid "in order to verify the location of Collins' manufacturing plant/shipping point" pursuant to ASPR 19-212. That section provides that a mandatory clause prescribed by ASPR 2-201(b)(xxxii)B should be included in invitations calling for f.o.b. origin bids. The cited clause provides:

> If the bidder (or offeror), prior to bid opening (or the closing date specified for receipt of proposals), fails to indicate any shipping point or plant, the Government will evaluate the bid (or proposal) on the basis of delivery from the plant at which the contract will be performed, as indicated in the bid or proposal. If no such plant is indicated in the bid (or proposal), then the bid or proposal will be evaluated on the basis of delivery from the Contractor's business address indicated on Standard Form 33 or other bid (proposal) form.

Even though the above-quoted clause was not included in the invitation, Collins contends that under the doctrine enunciated in *G. L. Christian and Associates* v. *United States*, 160 Ct. Cl. 1; and *Condec Corporation* v. *United States*, 177 Ct. Cl. 958, such clause was included in the invitation by operation of law.

Briefly, the so-called "Christian Doctrine" is to the effect that contract clauses required by statutory regulations are incorporated by law in a contract. The decision in the *Condec* case went one step further by holding that a late telegraphic bid modification clause required by regulation to be in Government solicitations was incorporated into a solicitation by operation of law. The court held in the *Condec* case at page 966 that:

> The Procurement Regulations were issued under statutory authority and had the force and effect of law and their requirements were thus controlling on the contracting officer; for the contracting officer is an agent of the government and as such may bind the United States only in accordance with the authority granted him by statute or regulation. For this reason, the requirements of the regulations (including section 2.305(a)) must be deemed applicable to the invitation, at least if the latter is to be legally valid.

Both the procurement agency and Collins rely on our decision B-155429, November 23, 1964, wherein 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. * * *

It is also argued that the location of the Collins' plant in Cedar Rapids was well known to the Government because Collins has held 11 previous contracts for the identical procurement item and on each contract shipments have been made on an f.o.b. origin basis from Cedar Rapids.

After thorough consideration of this facet of the Admiral protest in the light of the various decisions of our Office, the briefs of opposing counsel, and several in-depth discussions and conferences with all interested parties, including representatives of the procurement agency, we are unable to conclude that the Collins' bid manifested a clear and firm offer to assume the obligation and responsibilities inherent in delivering the end items free of charge to the Government to an f.o.b. point where the supplies will be loaded, blocked and braced on board the carrier's equipment.

We have held on numerous occasions that in the selection of a low bid submitted on an f.o.b. origin basis one of the factors for consideration is the cost to the Government of transportation to destination. B-161287, June 28, 1967. The purpose of such evaluation is to fix the maximum cost of the item to the Government. 40 Comp. Gen. 160; B-147284, November 13, 1961. Deviations from advertised mandatory requirements may be waived as informalities provided the deviations do not go to the substance of the bid or prejudice other bidders. However, it has been consistently held that deviations which affect price, quantity, or quality go to the substance of a bid and waiver of such deviations is prejudicial to the other bidders and the competitive bidding system. See 30 Comp. Gen. 179; 17 *id.* 554.

We are of the opinion that the argument of Collins and the procurement agency that the rationale in the *Saratoga* case is dispositive of

the question presented here does not afford a sound basis for concluding that the bid of Collins unqualifiedly offered to comply with the mandatory f.o.b. origin requirements of the invitation. The facts and circumstances involved in the *Saratoga* case are significantly different from those involved here. In the *Saratoga* case, we held that because the bidder had only one plant at Saratoga Springs, New York, it was fair to assume that the small business bidder could only intend to designate that city as its f.o.b. point of origin for purposes of bid evaluation. Moreover, Saratoga affirmatively offered in its letter bid to be bound by the invitation f.o.b. origin terms including, by inference, the provisions of the responsibility for supplies clause. As an adjunct thereto, it is important to note that Saratoga's letter bid itself indicated no address other than Saratoga Springs as the location of its plant.

Nowhere in Collins' bid does there appear an offer to comply with the f.o.b. origin terms of the invitation. The only place provided in the invitation for bids for a bidder to affirmatively show its compliance with the f.o.b. origin requirements was the blanks provided in section 422. At most Collins designated a plant where a major portion of the manufacture of the supplies would take place, but has not specified a shipping point (city) for the purpose of affirmatively assuming all delivery obligations as required under the responsibility for supplies clause and the f.o.b. origin terms of the invitation. Moreover, Collins is a large business concern and, as we understand it, has several other manufacturing plants in the continental United States.

Contrary to the argument advanced, we do not think that the place of principal manufacture stated by Collins in section 511 of its bid can be properly used to supply the information called for in section 422 as to the place of f.o.b. delivery "at or near Contractor's plant." We take this view because ASPR 19–104.1(c) (1) states succinctly that "The place of Government procurement quality assurance actions and place of acceptance shall not control the transportation term." In this regard, Collins contends that all that the cited regulation does is to advise that "the f.o.b. point may be different from the place of inspection and acceptance." But this supports our view that there is no necessary correlation between the designated place of principal manufacture named in the inspection and acceptance clause and the town or city at or near the contractor's plant identified under section 422 as the f.o.b. origin point.

Significantly, in this respect the administrative report furnished to our Office on October 23, 1964, by the Aviation Supply Office in the *Saratoga* case (the same procuring activity as here) urged that Saratoga's failure to identify the principal manufacturer and place of principal manufacture, as requested in a clause substantially similar to section 511 in the present case, in no way affected the responsiveness

of Saratoga's bid, and that this kind of information "is certainly the kind of information that may be obtained after bid opening." On page 5 of the *Saratoga* decision, we stated that "In connection with [the protestant's] reference to the 'inspection and acceptance' information required at page 43, the Navy Aviation Office has taken the position, *with which we agree*, that this information is the type which may be furnished after bid opening." Information that may be supplied after opening of bids necessarily relates to a bidder's responsibility and it is axiomatic that such statements of information represent a free choice by the bidder which may be changed after opening of bids. See 42 Comp Gen. 434. [Italic supplied.]

In our decision B–161287, mentioned above, we held that a bidder's failure to designate its f.o.b. point of origin, despite the inclusion of descriptive literature showing a plant location at Eau Claire, Wisconsin, rendered the bid nonresponsive because the literature bore a legend reserving the right "to change specifications or design without notice." We are of the opinion that the import of that case is equally applicable here. In that case the bidder reserved the right after opening to change the information in its bid concerning its f.o.b. shipping point information. Here, the information given by Collins in section 511 as to its "place of principal manufacture" cannot serve to provide the requested f.o.b. point of origin information because the section 511 information is legally subject to free-choice changes after opening of bids.

As to the applicability of the "Christian Doctrine" to this case, it cannot be argued that any element of nonresponsiveness was involved in the consideration of the Christian bid. In 48 Comp. Gen. 171, October 3, 1968, discussing the "Christian Doctrine," we stated:

> * * * the solicitation failed to include a clause which was required by the Armed Services Procurement Regulation (ASPR) to be included in the solicitation and resulting contract. Since ASPR is a statutory regulation with the force and effect of law, the court held that the missing clause was incorporated in the contract as a matter of law. In the instant case the solicitation includes the clauses required by the Federal Procurement Regulations, but the pages incorporating several of those clauses and other substantive provisions of the solicitation are missing from the bid submitted. The issue, therefore, is one of responsiveness of the bid to the solicitation, a matter which is for determination prior to award. Accordingly, we do not believe that the "Christian doctrine," relating as it does to the construction of the contract actually executed by the bidder and the Government, may be invoked to insert conditions in a bid, after bid opening and before award, which the bidder, either by accident or design, may have failed to include. Rather, we believe that the matter is for resolution under the rule long followed by our Office that in the case of missing bid papers the intent of a bidder is to be determined from the bid as submitted. In line with such decisions, * * * it is our view that since the Benner bid does not evidence a specific and unequivocal intent on the part of Benner to be bound by all of the provisions which were set forth on the missing pages, the rejection of the bid was required * * *.

Similarly, in 47 Comp. Gen. 682, May 28, 1968, we stated that:

> * * * we believe that the court's decision [in *Christian*] must of necessity be limited to situations wherein mandatory contract provisions imposed by statutory procurement regulations are incorporated by operation of law in otherwise properly awarded Government contracts as to which such regulations clearly apply.

The *Condec* decision did not involve the responsiveness of a bid. Condec's bid was responsive, but it sought to prevent the Government from taking advantage of a late telegraphic modification lowering its already low bid price by claiming that the invitation did not provide for the favorable consideration of late telegraphic modifications. The court held that ASPR is controlling on the contracting officer and that even though the mandatory provision had been omitted from the invitation, ASPR required the consideration of late telegraphic bid modifications. In other words, the missing ASPR provision had no effect upon the responsiveness of Condec's bid, but merely constituted a procedural requirement concerning the consideration of late telegraphic bid modifications.

We therefore believe that the "Christian Doctrine" has been applied only in cases where the responsiveness of the bid in question has not been in issue. Collins' bid was not responsive to the f.o.b. delivery terms of the invitation; therefore, the "Christian Doctrine" was not applicable so as to have made Collins' nonresponsive bid responsive to a mandatory invitation requirement.

Concerning Collins' and the contracting officer's statements that the f.o.b. point of origin of the Collins' bid was clearly known to the contracting officials to be Cedar Rapids because of past dealings with that firm, we have held on numerous occasions that the responsiveness of a bid is to be determined by the intention of the bidder manifested within the "four-corners" of the bid documents. Acceptance of a bid by a contracting officer on the basis of independent knowledge outside of the bid itself would not operate to create a valid and binding contract. B-161287, *supra*. This would be tantamount to giving a bidder the option of accepting the award or alleging that its bid contemplated manufacture at a plant other than the one utilized in past contracts. Such option is contrary to the principle that no bidder has a right, after opening, to another opportunity to bid in derogation of the rights of other bidders. 34 Comp. Gen. 82; 35 *id.* 33; 36 *id.* 705.

Collins has advised further that reevaluation of the transportation costs to the Government under its bid on the basis of widely scattered f.o.b. origin points in the United States shows that Collins would remain the lowest evaluated bidder in any event. This is verified by the procurement agency.

On February 25, 1969, we informally requested that the procurement agency advise us of the estimated amount of termination charges that might be claimed by Collins in the event the present contract should be canceled at the direction of our Office. By supplemental report dated February 27, 1969, the Deputy Commander, Naval Supply Systems Command, supplied us with the requested information, already in his possession as of the close of Collins' business on February 21, as follows:

A. Collins advised that performance has been undertaken to the extent indicated below:

(1) Purchased Electrical Parts—All on order—Total Estimated Cost $1,675,000.00—Estimated Termination Charges—$150,000.00.

(2) Fabricated Purchase Parts—(Metal and Plastic Parts Bought Outside)—All on order—Total Estimated Cost $614,000.00—Estimated Termination Charges $185,000.00.

(3) Fabricated Make Parts—(Includes minor labor charges)—Total Estimated Cost $428,000.00—Estimated Termination Charges—$85,000.00.

(4) Total Estimated Termination Charge as of 21 February 1969 is $420,000.00 (Sum of A(1), (2) and (3) above).

B. Collins advised it was necessary to place all orders expeditiously, and to request expedited effort from its sub-contractors because (i) the contract requires delivery beginning 180 days after date of contract at high monthly rates, (ii) the contract requires time-consuming reliability tests that must be performed before delivery, and (iii) the contract contains liquidated damages provisions against late delivery.

C. The details of Collins Production Planning Schedule were stated by Collins to be as follows:

(1) Parts for the first 20 sets are required to be released to the plant by 14 April 1969; therefore, all parts for 20 sets must be "in-house" by 14 March 1969 to provide for 30 day in-house inspection and acceptance.

(2) Parts for the next 195 sets are required to be released to the plant by 12 May 1969; therefore, all parts for 195 sets must be in-house by 12 April 1969 to provide for 30 day in-house inspection and acceptance.

(3) Thereafter releases continue each month until final release to the plant which is scheduled for 14 August 1969.

D. All orders are in the form of written purchase orders or written internal shop orders.

While we conclude that the award made to Collins was improper and contrary to well-established principles of competitive bidding, in view of these representations, we are of the opinion that the best interests of the Government would not be served by cancellation of the contract at this date. However, since we do not think that the injury to the competitive bidding system should be compounded by exercising the contract quantity option, such option should not be exercised and, in the event that the option has already been exercised, we believe that portion of the contract should be canceled.

In view of the conclusion reached herein, it is unnecessary to consider the other contentions made by Admiral in support of its protest.

[B-166130]

Transportation — Dependents—Military Personnel—Dislocation Allowance—Hospital Transfers

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

To the Secretary of the Army, March 14, 1969:

Further reference is made to letter of January 21, 1969, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision whether the definition of "permanent station" in paragraph M1150-10 of the Joint Travel Regulations may be amended to include a hospital in the United States to which a member is transferred from either a duty station or hospital in the United States for observation and treatment when a statement of prolonged hospitalization has been issued by the commanding officer of the receiving hospital; and, whether chapter 9 of the regulations may be amended to permit payment of the dislocation allowance when such transfers are made. The request was assigned PDTATAC Control No. 69-5 by the Per Diem, Travel and Transportation Allowance Committee.

Section 407(a)(1) of Title 37, U.S. Code, provides that under regulations prescribed by the Secretaries concerned, a member of the uniformed services whose dependents make an authorized move "in connection with his change of permanent station" is entitled to a dislocation allowance.

When a member is transferred to a hospital in the United States from either a duty station or hospital in the United States for observation and treatment and a statement of prolonged hospitalization has been issued by the commanding officer of the receiving hospital, the Joint Travel Regulations (paragraphs M7004 and M8254) long have provided that his dependents and household effects may be moved to the hospital or the effects may be moved to nontemporary storage, "as for a permanent change of station." Payment of the dislocation allowance, however, has not been authorized.

The Assistant Secretary says that the dislocation allowance is for the purpose of partially reimbursing a member for the expenses in-

curred in relocating his household upon a change of station and when he is transferred from a hospital or duty station in the United States to a hospital in the United States for prolonged treatment, he incurs just as many expenses for moving his household as members moving under a normal change of permanent station.

The Assistant Secretary also says it is recognized that the language of 37 U.S.C. 407(a)(1) authorizes payment of a dislocation allowance only where a change of permanent station is involved although section 407(a)(2) authorizes it when the provisions of section 405a(a) (evacuation) are involved. On the ground that authority is vested by section 411(d) of Title 37, U.S. Code, in the Secretary concerned to define what constitutes a "permanent station," he suggests that the Secretaries jointly could, within their vested authority, amend the Joint Travel Regulations as proposed.

The Assistant Secretary expresses the belief that decisions of this Office which have held that such assignments are not a permanent change of station were based largely on the definition of "permanent station" in paragraph M1150–10a of the Joint Travel Regulations and that a different conclusion may have been reached had the term "permanent station" been defined as now proposed.

So far as we are aware the station of a member of the uniformed services has always been considered to be the place where he is assigned for duty. An assignment to a place where no duty is required of him does not change his station. *United States* v. *Phisterer*, 94 U.S. 219; *McGowan* v. *United States*, 48 Ct. Cl. 95; *Andrews* v. *United States*, 15 Ct. Cl. 264.

A station may be either permanent or temporary, the permanent station of a member of the uniformed services being regarded as the place where his basic duty assignment is performed. See 38 Comp. Gen. 853; 41 *id.* 726; 44 *id.* 670. And, past decisions of the accounting officers, rendered long prior to the first Joint Travel Regulations, holding that orders to a hospital for the purpose of observation and treatment do not effect a change of a permanent station are predicated on the duty concept of a station and not, as suggested in the Assistant Secretary's letter, upon the permanent station definition contained in the Joint Travel Regulations. See 6 Comp. Gen. 725; 17 *id.* 133; 20 *id.* 312; 29 *id.* 535. We see no legal basis for now concluding that orders which direct a member to proceed to a place where no duty is required of him effect a change of permanent station.

While the Secretaries of the uniformed services are authorized by the provisions of 37 U.S.C. 411(d) to define the words "permanent station" for purposes of travel and transportation allowances entitlement of members upon change of permanent station, while performing

ordered travel away from the permanent station, etc., in our opinion that authority does not vest in the Secretaries the power to constitute for a member a permanent station for such purposes at a place where no duty is required of him.

It is our view, therefore, that amending the definition of a permanent station in the Joint Travel Regulations to include a hospital in the United States to which a member is transferred solely for observation and treatment could not serve to make the hospital a permanent station for purposes of travel and transportation allowances. See 48 Comp. Gen. 517, February 7, 1969.

Accordingly, the question presented, as it relates to amending the definition of "permanent station" in the regulations as proposed, is answered in the negative.

However, section 3 of War Department Circular 167, June 26, 1947, authorized the transportation of dependents and baggage to the city or town in which the hospital is located "as for a permanent change of station" upon the issuance of a certificate of prolonged treatment. Similar regulations were incorporated in the Joint Travel Regulations and, while the validity of the regulations was not entirely free from doubt, we have not objected to them. Therefore, if the Secretaries desire to amend chapter 9 of the Joint Travel Regulations to authorize the payment of a dislocation allowance under the same circumstances and on the same basis we would not be required to object to such an amendment.

[B-165088]

Contracts—Negotiation—Competition—Award Under Initial Proposals

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

Contracts—Negotiation—Determination and Findings—Basis of Negotiation

When a procurement involves a determination to negotiate under 10 U.S.C. 2304(a)(10) due to the unavailability of data to describe the required supplies, the determination in accordance with 10 U.S.C. 2310(b) must be supported by

written findings to show the facts and circumstances that "clearly and convincingly establish that formal advertising would not have been feasible and practicable," and a copy of such a determination and findings (D&F) should accompany any administrative report to the United States General Accounting Office on the procurement. When supported by a D&F, the administrative determination to negotiate is final pursuant to 10 U.S.C. 2310(a).

To the Director, Defense Supply Agency, March 18, 1969:

We refer to letters dated September 30, November 13, 1968, and February 28, 1969, from Mr. Willard J. Hurley, Assistant Counsel, forwarding, respectively, a report and two supplemental reports on the protest of the Automatic Sprinkler Corporation against awards made to another company under requests for proposals (RFP) Nos. DSA 700-68-R-3713 and -6852, issued by the Defense Construction Supply Center, Directorate of Procurement and Production, on January 8 and April 12, 1968.

Both procurements were negotiated under 10 U.S.C. 2304(a)(10) and Armed Services Procurement Regulation (ASPR) 3-210.2(xiii) because of the asserted unavailability of data with which to describe the required supplies. The determinations and findings (D&F), which under 10 U.S.C. 2310(b) must support a decision to negotiate under 2304(a)(10), were executed on December 16, 1967, and April 1, 1968. That subparagraph provides that a decision to negotiate under 10 U.S.C. 2304(a)(10) must be based on a written finding by the person making the decision showing the facts and circumstances which "clearly and convincingly establish * * * that formal advertising would not have been feasible and practicable." We would comment, parenthetically, that copies of the D&Fs were not made available to us as part of either the original or the supplemental report, and were supplied only after a specific request for them. It would be appreciated if, in the future, reports concerning negotiated contracts involving D&Fs executed pursuant to section 2310 would include a copy of each D&F.

Automatic Sprinkler has protested that its alleged rights in proprietary data were infringed by the Government. It claims that the pilot valve which was the subject of these procurements was developed by it in 1948 for use in fire control systems in magazines aboard U.S. Navy ships. It is also claimed that, although Automatic has voluntarily given the Government courtesy copies of its drawing, it was never contractually obligated to do so and was never paid any consideration therefor. The fact that no restrictive legend appears on its drawing is countered by the argument that such was unnecessary at the time the drawing was furnished because this was prior to the promulgation of ASPR 9-202.3(c) which requires such a restrictive legend. Certain additional claims are made, but we do not believe

it necessary to recite them all since, even assuming the existence of proprietary rights in these drawings, we cannot conclude that there has been any violation of proprietary rights.

Lift Parts Mfg., Inc., the contractor under both of the solicitations, submitted drawings of the valve offered by it. The RFPs described the valve in the following manner:

> FSN 4210-399-2532.
> Valve.
> Manufactured or supplied under the following part number(s)—.
> Automatic Sprinkler Corp. of America—P/N 1241000.

The item offered by Lift Parts was described in its proposal as "P/N :CP-1241000," which Lift Parts said that it manufactured. On March 20, 1968, during the course of the earlier of these two procurements, the contracting officer wrote a letter to Lift Parts in which he said that the Quality Assurance Certification attached to the Lift Parts' offer was insufficient to describe the item clearly or to form a basis for evaluation, and that further information would therefore be required. Lift Parts was requested in this letter to furnish "complete drawings showing the degree of interchangeability between the item being offered and the Automatic Sprinkler Part Number 1241000."

The response of Lift Parts was dated April 10, 1968, and related the manner in which that company determined what the Government desired to buy. Lift Parts described a "reverse engineering" process in which samples of the Automatic Sprinkler part were purchased and were disassembled to reveal the various components and the way they fit together. The letter also contained assurances that the Lift Parts' valve was completely interchangeable with Automatic Sprinkler's for form, fit, and function. Attached to this letter were drawings bearing the Lift Parts' legend. We have compared these to a copy of the drawing previously submitted by Automatic Sprinkler but it is not apparent to us that Lift Parts copied the Automatic drawing.

The original report states flatly that "The Government did not knowingly or unknowingly use a proprietary drawing of 'Automatic's' to solicit proposals from other sources," making reference for substantiation to the Lift Parts' letter of April 10. The question whether the Government made Automatic Sprinkler's drawings available to Lift Parts is factual in nature. In disputes as to facts, we are obliged to accept as correct the agency's position. 40 Comp. Gen. 178 (1960). It is, moreover, our opinion that no violation of proprietary rights is apparent on this record. To the contrary, the evidence indicates a likelihood that Lift Parts gained its knowledge by means of the legitimate process of reverse engineering rather than by receipt from the Government of confidental drawings supplied by Automatic Sprinkler.

The second basis, and the most significant, for Automatic's protest is the failure to conduct discussions with that company after receipt of proposals and prior to award. The original report justifies the failure to conduct discussions with Automatic Sprinkler on the ground that offerors were advised that award might be made on the basis of initial offers received, without discussion, where acceptance in this manner would result in fair and reasonable prices. The statutory authorization for such action was based on 10 U.S.C. 2304(g), which provided as follows:

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

The Lifts Parts' proposal offered the valves at $32.85 each, while Automatic Sprinkler's price was $34.03 per valve.

There seems to be no question that Automatic Sprinkler's offer was within a competitive range, as contemplated by the above-quoted statute, and therefore discussions with that company would have been mandatory unless one of the enumerated statutory exceptions was applicable.

The report states that the Lift Parts' price was considered fair and reasonable based upon the prior cost experience with Automatic Sprinkler. The reliability of such cost experience is questionable since the prior history of the procurement was noncompetitive. Further doubt is cast upon the reasonableness of the price inasmuch as the two D&Fs stated that the estimated cost of the first procurement of 600 valves was $16,620, while that of the second was $51,688.20 for 1,866 valves. The estimated unit price for both procurements is therefore about $27.70. Considering also that the two offers differed by $1.18, we do not think it was "clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product, that acceptance of an initial proposal without discussion would result in fair and reasonable prices." We think that serious consideration should have been given to the possibility of negotiating with both offerors to bring their prices more in line with the Government estimate.

In addition, the first RFP stated a desired delivery time of 120 days.

Lift Parts offered 270-day delivery while Automatic Sprinkler offered to make delivery in 120 days. The second RFP stated that delivery was desired within 60 days. Again, Lift Parts offered 270-day delivery. Although we do not have the second proposal of Automatic Sprinkler, that company advised us in a letter dated December 13, 1968, that it offered to deliver within 90 days under the second RFP. The resulting contracts with Lift Parts both specified 270-day delivery. Neither RFP stated a maximum acceptable delivery period.

The acceptability of delivery periods which, in the earlier procurement, was more than twice as long as that stated as desirable and, in the later procurement, over four times longer indicates to us that the desire for 120 and 60-day delivery was not accorded any significant weight in the evaluation of proposals. Indeed, the fact that no attempt was made to negotiate such disproportionately long deliveries offered by Lift Parts, with a view to their reduction, would incline us to conclude that there was no real desire for delivery within 120 days or 60 days. Yet Automatic Sprinkler appears to have made an effort to meet the stated schedules while Lift Parts seemingly ignored them. In endeavoring to satisfy the requested delivery dates, Automatic Sprinkler acted reasonably, for by specifying desired delivery periods the Government was putting prospective offerors on notice that fairly urgent deliveries were required.

The contracting officials are, of course, the best judges of the delivery needs of the Government. A potential contractor does well to observe those needs, as stated in the solicitation, and to make a bona fide effort to satisfy them. When the solicitation indicates that delivery within 4 months or 2 months is desired, the Government has thereby given offerors some measure of the range of acceptable delivery dates. To agree to 9-month deliveries, without question or discussion, shows that the offeror who has acted reasonably in offering almost complete compliance to the stated delivery requirements has complied with a relatively meaningless request, without having had an opportunity to revise his proposal in light of actual acceptable delivery periods which exceeded those specified.

Considering both the disparity in the delivery schedules offered by the two offerors and the close pricing of both offers, we believe that the interests of the Government required resort to negotiation procedures. That is to say, since 270-day delivery was acceptable to the Government, discussions with Automatic Sprinkler on the basis of the substantially longer delivery period may have resulted in a reduction in Automatic Sprinkler's price proposal. Additionally, since the Government stated desired delivery schedules and since Lift Parts considerably exceeded them, discussions with Lift Parts may have

revealed whether that company was in a position to approximate more closely the stated delivery periods. If it developed that Lift Parts could have done so, further discussion could have disclosed whether a reduction in delivery schedules would have affected the prices of the offers.

There is an additional reason why we believe that negotiations should have been conducted. Both RFPs, as we have already noted, described the valve by reference to the Federal stock number and the Automatic Sprinkler part number. There was no expression in the RFPs to indicate that an equivalent product would be acceptable. Of course, the absence of such an expression does not preclude consideration of an offer of an "or equal" product and award to a company offering such a product may be properly made. B-164848, October 15, 1968. However, the absence of the "or equal" phrase in the item description may be relevant in considering the propriety of a failure to negotiate with the offeror which makes the name-brand item. See 47 Comp. Gen. 778, June 25, 1968.

Although we have no definitive information concerning the prior procurements of this valve, all the evidence indicates that it has been procured in the past on a "sole-source" basis. In a letter dated December 13, 1968, the attorneys for Automatic Sprinkler represented that for 20 years the procurements had been "sole source." This, together with the company's belief that it had proprietary rights in the mechanical drawings of its valve, would suggest that Automatic Sprinkler contemplated noncompetitive procurement under these RFPs.

The parallels between the present case and the above-cited decision 47 Comp. Gen. 778, June 25, 1968, are striking. In that case, the Naval Supply Systems Command issued a request for quotations on 71 digital voltmeters described as Cimron Division Part Number 7300A-631. A competitor of Cimron offered allegedly "equal" equipment manufactured by the competitor. No discussions were conducted with Cimron and a contract was awarded to the competitor after the procurement officials had satisfied themselves that the competitor's equipment was acceptable. The contracting officer justified his action under ASPR 3-805.1(a)(v) which is substantially a restatement of that part of 10 U.S.C. 2304(g) relating to acceptance on the basis of initial proposals where it can be clearly demonstrated through adequate competition or accurate prior cost experience that such action would result in fair and reasonable prices. In the above-cited decision, we made the following observations and holding:

From the foregoing it is apparent that the RFQ solicited a quotation from Cimron for an item manufactured only by Cimron, and it must therefore be assumed Cimron's quotation was submitted in the belief that only items manufactured by Cimron would be acceptable and that the procurement was therefore noncompetitive. It follows that the decision to consider quotations based upon items determined to be equal to those manufactured by Cimron operated not only

to relax the specification requirements but also to transform the procurement from a noncompetitive to a competitive one. In such circumstances, it is our opinion that the provisions of ASPR 3-805.1(b) and (e) require amendment of the RFQ, notice of the amendment to the supplier initially solicited, and an equitable opportunity for the supplier to amend his quotation to reflect such changes as he may consider appropriate in the light of the changes accomplished by the amendment to the RFQ. That the failure to permit Cimron to amend its quotation cannot be considered the "equitable opportunity to negotiate" contemplated by ASPR 3-805.1(b) appears to be established by the fact that Cimron, unlike its competitor, was not given an opportunity to submit a quotation on an item "equal to" Cimron Part Number 7300-A-631, or to submit a quotation based on supplying the named part number on a competitive basis.

We think that what we said in the foregoing case is equally applicable here. The contracting officer in his initial report distinguished that decision on the basis that the products there were "equal" while these are "identical." We think that this is a difference but not a distinction. The emphasis in 47 Comp. Gen. 778 was on the transformation of the procurement from noncompetitive to competitive with the necessary result that the named manufacturer's reasonable belief that only its product would be acceptable was erroneous. Whether the other manufacturer offered its product as "identical" or "equal" was not of crucial significance. Offers must be evaluated on an equal basis. Automatic Sprinkler's offer was submitted under a misapprehension that there was to be no competition while Lift Parts knew that its offer necessarily implied competition. The initial offers were not submitted on an equal basis and could not have been equally evaluated unless Automatic Sprinkler was notified of the competition and given an opportunity to respond to it. If that company, armed with the knowledge that it was in fact competing with another, would be willing to offer the Government a better bargain than that in its original proposal, it would be in the Government's interest to provide the company with that knowledge.

The most recent report on these procurements concerns discussions dating back to October 16, 1968, when the Commander of the Naval Ship Engineering Center wrote to the Chief of the Defense Construction Supply Center recommending termination of the Lift Parts' contracts for the convenience of the Government. Two reasons were given in support of such recommendation. First, Automatic Sprinkler had always supplied the valve and also had the annual maintenance contracts with the Navy for inspection and adjustment of the valves. Second, the Navy considered it possible that Lift Parts "might produce indiscernible deviations which would cause difficulty in operation and maintenance."

Subsequent contact between the Navy and the Defense Construction Supply Center led to the formulation of a 100-percent test to be incorporated into the Lift Parts' contracts by means of change orders. This apparently alleviated the apprehensions of the Navy. It is noteworthy that Automatic Sprinkler claimed that the instant RFPs were

misleading because that company had always tested each valve before delivery to the Navy and therefore assumed that reference to its part number indicated that such testing was expected under these procurements. It is clear that had negotiations been conducted with Automatic Sprinkler, the testing problem might have been brought to light early enough for truly equal evaluation of offers. As it is, a unit price of $32.85 for untested valves was matched against a tested unit price of $34.03. We do not know how much of the $34.03 represents testing costs or how much the change orders will cost the Government, but it is conceivable that the bargain price of $32.85 will turn out to be no "bargain" at all

Subsequent to its initial letter of protest, Automatic Sprinkler wrote another letter expanding upon some points and raising a new issue. The new question concerned the propriety of procuring these valves by negotiation rather than by formal advertising

Both procurements were initiated by written D&Fs to which we have already made reference. Under the provision in 10 U.S.C. 2310(a) an administrative decision to negotiate is final. We therefore are unable to consider the protestant's contentions concerning this question.

Although we think that Automatic Sprinkler and Lift Parts should have been given an opportunity to revise their initial proposals, in view of the broad negotiation authorities under which these awards were made, we do not consider that the Government's best interests would be served if the awards were disturbed at this time. We suggest, however, that this protest be brought to the attention of procurement officials as an example of improper negotiation procedures under the concept of "acceptance of an initial proposal without discussion."

[B-165240]

Contracts—Negotiation—Awards—Legality

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

To Milton C. Grace and William Blum, Jr., March 18, 1969:

We refer again to your letter of September 11, 1968, and subsequent correspondence in behalf of Hunt-Spiller Manufacturing Division,

Power Products, Incorporated (Hunt-Spiller), protesting a contract awarded to Electro-Motive Division, General Motors Corporation (GMC), to furnish cylinder liners under negotiated solicitation No. 700-68-R-8070, issued by the Defense Supply Agency, Defense Construction Supply Center, Directorate of Procurement and Production, Columbus, Ohio (DSA).

The solicitation was issued in a negotiated form pursuant to 10 U.S.C. 2304(a)(10), which permits negotiation in lieu of advertised bidding under circumstances where "it is impracticable to obtain competition." Under Armed Services Procurement Regulation (ASPR) 3-210.2(xiii) the exception may be invoked "when it is impossible to draft specifications." The solicitation described the desired cylinder liner by its Federal Stock Number, 2815-390-2127, and by the Electro-Motive part number, 3262144, but because no other specifications were available, the solicitation included no additional descriptive material or information concerning the article to be procured. Although the procuring activity failed to check the block for Clause 2.103 (Brand Name or Equal), alternate products were for consideration since they were not specifically excluded. B-149962, December 26, 1962; see also B-164848, October 15, 1968.

Due to the receipt of a purchase request for an additional 563 units before the time scheduled for the closing of offers, the solicitation's original requirement of 484 cylinder liners was increased on June 21, 1968, to 1047. On June 24, 1968, the contracting officer received a report stating that a public exigency existed for this item, because the stock was exhausted and back orders for 279 units had been received. It is indicated by the record that the exigency arose because of faulty inventory records necessitating a downward inventory adjustment.

Three responses were received by the amended closing date, July 3, 1968. The offer of Electro-Motive, with discount, was low. Without discount, it was second low, and the offer of Diesel Service was low. Hunt-Spiller's offer of a foreign end product was third low in either event.

However, both Diesel Service and Hunt-Spiller offered "or equal" products which were subject to technical evaluation by the Navy to determine whether they met the requirement of a 1000-hour test or proof of satisfactory service of 2000 hours under conditions comparable to Navy service. The contracting officer thus had before him one fully responsive offer, and two other offers within a competitive range, one higher and one possibly lower, from suppliers whose products had not been checked out for compliance with the test requirements for "or equal" products. The contracting officer states that this process of technical evaluation takes from 30 to 60 days. It must also be remem-

bered that by this time the contracting officer had been advised that the procurement had become urgent.

Electro-Motive's offer used the terms "net cash" and "net price" in its original offer on the 484 units and on the added 563 units. Its original offer also included a preprinted form offering discounts on "All prices listed in our current Replacement Parts Price Book, or any prices quoted." This discount amounted to 18 percent on cylinder liners. The contracting officer states that this preprinted discount form usually accompanied quotations by Electro-Motive under an existing requirements contract, and that the unit price for cylinder liners under that contract, with the 18 percent discount, would have been $505 instead of the $405 quoted by Electro-Motive. In view of Electro-Motive's use of the terms "net cash" and "net price" in its offer of July 3, 1968, the contracting officer, properly in our opinion, queried Electro-Motive by telephone on July 8, 1968, as to whether the 18 percent discount was intended to apply to its price of $405 per unit. Electro-Motive replied by telegram the same day that it was not. It should be borne in mind that no offeror's prices had been disclosed at this time.

It is our opinion that the facts recited above created an ambiguity in Electro-Motive's offer as to the price intended. ASPR 3-804 directs that oral discussions or written communications be conducted with offerors to the extent necessary to resolve uncertainties relating to the price to be paid in negotiated procurements. In our view this provision required the contracting officer to communicate with Electro-Motive to resolve the uncertainty as to whether the discount provision applied.

You argue that the contracting officer should have followed the procedures for the correction of mistakes in bid set out in ASPR 2-406.3. We do not agree. This provision of ASPR applies, on its face, only to advertised procurements, and we think ASPR 3-804 controls in the instant case.

On July 16, 1968, Hunt-Spiller protested to the contracting officer, alleging that because Diesel Service was offering a foreign end product, its offer was required to be evaluated in accordance with the Buy American Act, 41 U.S.C. 10a, and associated regulations. Officials of Diesel Service denied they were offering a foreign end product. No final decision was reached by the contracting officer on the question, presumably because Diesel Service's offer was subsequently rejected on the grounds that time considerations prevented its technical evaluation.

On July 29, 1968, the contracting officer contacted Electro-Motive in an attempt to obtain more favorable delivery terms. However, by telegram of the same date Electro-Motive advised that it could offer

no better schedule. Three days later, on August 1, 1968, which was 28 days after the amended closing date for submission of proposals, the contracting officer issued a new Determination and Finding changing the basis of the negotiation authority from that of unavailability of specifications under ASPR 3-210.2 (xiii) and 10 U.S.C. 2304(a)(10) to public exigency under ASPR 3-202.1 and 10 U.S.C. 2304(a)(2). Presumably the decision to shift to the public exigency exception was motivated by the report received by the contracting officer on June 24, 1968, and the further requirement of ASPR 3-210.3 that the authority to negotiate under ASPR 3-210 shall not be used when negotiation is authorized by ASPR 3-202 (public exigency). The contracting officer, on page 3 of his report to this Office, explained his decision not to negotiate with Hunt-Spiller as follows:

> Although it was felt that, given enough time, Hunt-Spiller would be able to prove to the Navy the technical acceptability of its alternate offer, since the offer was not low when evaluated under the requirements of Armed Services Procurement Regulation 6-104.4 (b) and since it was also considered that the public exigency dictated negotiations with the only offeror who was technically acceptable and thus within the competitive range, it was felt proper to limit negotiations to Electro-Motive only.

In view of anticipated future procurements of this liner, the contracting officer forwarded the offers of Hunt-Spiller and Diesel Service to the cognizant engineering support activity, the U. S. Navy Ships Parts Control Center, Mechanicsburg, Pennsylvania, for technical evaluation on August 7, 1968. On August 8, 1968, Hunt-Spiller attempted an oral reduction of its price. There is a difference of opinion between the two persons involved as to whether the dollar amount of the reduction was stated, but the Hunt-Spiller representative was advised that oral offers could not be considered. Award was made to Electro-Motive the next day, August 9, 1968, for 1047 liners at a unit price of $405. Some ten days after the award Hunt-Spiller sent a telegram in which it referred to its oral offer of August 8, 1968, as being a reduction to $282 per unit, which would be evaluated at just under $403 a unit as a foreign product. The oral offer, even if made in a specific dollar amount, could not be considered, and the later telegram sent after award was obviously too late for consideration. It must also be remembered that Hunt-Spiller's offer was not technically acceptable before award was made to Electro-Motive.

We believe that the contracting officer should not have waited for over a month before forwarding the offers of Hunt-Spiller and Diesel Services for technical evaluation and possible qualification for future procurements, especially since purchase requests for an additional 1600 liners had been issued on June 10 and 18, 1968. It appears further that when he finally did so on August 7, 1968, he failed to forward Hunt-Spiller's letter of June 27, 1968, in which Hunt-Spiller stated

32 of its cylinder liners were installed in the Navy submarine Bugara in early 1967, the best possible evidence of use under Navy conditions. On the other hand, when this letter was finally sent to Navy on September 5, 1968, the Naval Ship Engineering Center, inexcusably in our opinion, did not attempt to verify the service claimed (although admitting it would qualify the liners), but advised by letter of October 14, 1968, that DSA should find this out from the Bugara. This took DSA until late November. We cannot understand why the Naval Ship Engineering Center should not itself have verified service claimed in a Navy ship, and we have recommended to the Secretary of the Navy in a separate letter that in the future Navy engineering support activities furnish prompt and complete responses to DSA requests for technical information and advice.

You also contend that DSA did not have the authority to negotiate under ASPR 3-202.2, the "public exigency" exception to the general mandate to procure by advertising, for the entire quantity of 1047 cylinder liners. You point out that under the contract awarded to GMC, final delivery was scheduled for 270 days after award. While you agree that the 100 units GMC delivered within 30 days might satisfy the public exigency criterion, you argue that the later deliveries at the rate of 170 units a month from 120 days to 270 days after award should be viewed as a replenishment of stock, and not as an emergency buy. It must be remembered that the solicitation and the amendment thereto were both originally issued, not under the public exigency exception, but under the exception permitting negotiation because it was impossible to draft specifications.

Both the original solicitation and the amendment stated the desire of the Government that deliveries begin in 90 days and be completed in 150 days. Presumably this leadtime was established in consideration of the probable time needed by different manufacturers to produce this quantity of cylinder liners. It should also be mentioned that the procurement could hardly be considered a "normal" replenishment of stock, since the contracting officer received notice immediately after issuance of the amendment that stock on hand was zero, with back orders of 279 units, and an experienced average quarterly demand rate of 322 units, or about 107 per month. In any event, 10 U.S.C. 2310 makes the procuring activity's determination of urgency under 10 U.S.C. 2304(a)(2) final, and we do not feel it can be questioned in this case.

You further argue that the delivery schedule proposed by Hunt-Spiller was more favorable than the schedule offered by GMC. Hunt-Spiller offered to begin delivery in 90 days and to complete within 180 days, while GMC offered 100 units in 30 days and then 170 units a

month starting in 120 days and completing in 270 days. In your opinion, this faster completion of total deliveries made Hunt-Spiller's offer more favorable than GMC's, despite GMC's earlier delivery of the first 100 units. We agree that the delivery offered by Hunt-Spiller was probably preferable to that offered by GMC. However, the fact remains that Hunt-Spiller's offer was not considered acceptable for other reasons, and could not therefore have been accepted regardless of how much more favorable its delivery offer was.

You also contend that the award to GMC was improper because the contracting officer failed to obtain cost and pricing data in accordance with 10 U.S.C. 2306(f) when he determined that GMC was the sole responsive offerer. You recognize that the cylinder liners being purchased here are commonly used commercial items which would normally fall within the exception to the requirement for cost and pricing data where prices are based on established catalog or market prices of commercial items sold in substantial quantities to the general public, as provided in both 10 U.S.C. 2306(f) and ASPR 3-807(3)(c). However, you allege that the exception in inapplicable due to the large difference between GMC's price and its competitors' prices, and between GMC's price here and its catalog price. In support of this contention, you cite the portion of ASPR 3-807(3)(c) which provides that when the procuring official determines that the catalog price is not reasonable and "supports such finding by an enumeration of the facts upon which it is based" then "cost or pricing data *may* be requested" [Italic supplied.].

The price discrepancies you mention are capable of many explanations. GMC's production costs in this country may exceed its competitors' overseas production costs. GMC's spare parts pricing policy may take into account losses suffered in maintaining a full range of spare parts including infrequently ordered items not offered by its competitors. And the difference between GMC's bid price and its catalog price might be attributable to the lower cost of producing a single order of 1047 units as compared to the cost of maintaining and distributing an inventory of spare parts for purchase on an individual basis. In our opinion, this Office does not have sufficient reason to question the contracting officer's treatment of the procurement as coming within the catalog sales exception to the general requirement for cost and pricing data.

You have contended throughout your correspondence with this Office, that the procurement in question failed to satisfy the minimum level of effort to obtain competition. While we agree that some actions taken by the Defense Supply Agency and the Department of the

Navy, and the delay in taking other actions, did not meet the optimum standards for obtaining competition, we cannot conclude the contract award was legally improper. Accordingly, your protest is denied.

[B-165859]

Pay—Retired—Advancement on Retired List—Recomputation—Rates Applicable on Retirement *v.* Effect of May 20, 1958 Act

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

To Lieutenant Colonel J. E. Farr, Department of the Army, March 18, 1969:

Further reference is made to your letter of November 21, 1968 (file referene FINCS–E St. John, Gerald, RA 6965868 (Retired)), forwarded under Department of Defense Military Pay and Allowance Committee Number A–1027, requesting an advance decision as to the propriety of making payment on a voucher in the amount of $1.13 for the period October 1 to 31, 1968, in favor of Sergeant Gerald St. John, retired, representing the difference in retired pay of sergeant, E–5, based on a saved pay status computed under a rate of basic pay in effect on April 1, 1955, and the rate of pay in effect on June 1, 1958.

Sergeant St. John was retired on January 1, 1960, in the grade of Specialist 4 (E–4), under the provisions of 10 U.S.C. 3914. His actual active service totaled 21 years, 4 months and 24 days. At the time of retirement he was receiving active duty basic pay at the rate of $218.40 monthly by virture of the savings provisions prescribed in section 10(1) of the act of May 20, 1958, Public Law 85–422, 72 Stat. 130. Retired pay was established at $114.66 monthly computed at 52½ percent of this saved basic pay rate. Subsequent increases in retired pay under authority of the act of October 2, 1963, Public Law 88–132, 77 Stat. 210, the act of August 21, 1965, Public Law 89–132, 79 Stat. 545, and section 1401a of Title 10, U.S. Code, as amended, increased his monthly entitlement to $135.42, effective April 1, 1968.

On August 7, 1968, Sergeant St. John was advanced on the retired list to the grade of sergeant, E–5, pursuant to 10 U.S.C. 3964 and he then was entitled to recompute his retired pay as prescribed in 10

U.S.C. 3992. You indicate that the monthly entitlement recomputed under the saved pay rate would be $149.95; and that computed under the basic pay rate prescribed in the act of May 20, 1958, the monthly entitlement would be $148.82. The amounts so computed include the percentage increases authorized under subsequent legislation. You state the problem presented for an advance decision as follows:

> Doubt exists as to whether Sergeant St. John is entitled upon advancement to continue to have saved to him the 1955 basic pay rates as the greater amount applicable to both pay grades E–4 and E–5 with over 18 but less than 22 years of service or if this basic pay rate is no longer saved and he is required to come under the basic pay rates which became effective 1 June 1958.

Section 10 of the act of May 20, 1958, Public Law 85–422, 72 Stat. 130, provides, in part, as follows:

> The enactment of this Act shall not operate to reduce—
> (1) the basic pay or retired pay to which a member or former member of a uniformed service was entitled on the day before the effective date of this Act * * *.

In discussing the above provision we stated in 38 Comp. Gen. 281, 287, that:

> Such provisions by their own terms *go no further* than to save to the members concerned the basic pay or retired pay to which they were entitled *on the day before the effective date of the act of May 20, 1958.* The method of computing a member's retired pay is prescribed by other provisions of law. * * * [Italic supplied.]

The determination to be made, then, is whether "on the day before the effective date" of the act of May 20, 1958, Sergeant St. John was "entitled" to saved pay rates in the grade of E–5 for purposes of the August 7, 1968, recomputation.

The legislative history of the saved pay provision in the act of May 20, 1958, discloses that the purpose thereof was to insure that a member would not suffer, by reason of the enactment of that act, any reduction in basic or retired pay to which he was entitled on the day before its effective date. See S. Rept. No. 1472, on H.R. 11470, 85th Cong., 2nd sess., 24–25. The only pay to which Sergeant St. John was entitled on that date was pay in the grade of E–4. The savings provision insured that such rate would not be reduced. The decision quoted above (38 Comp. Gen. 281, 287) indicates that the savings provision goes no further than to continue existing entitlements, in this case pay in the grade of E–4. It does not justify using the saved pay rate of grade E–5 in the August 7, 1968, recomputation, since Sergeant St. John was not entitled to payment at that rate prior to the effective date of the 1958 act.

Section 3992 of Title 10, U.S. Code, provides that recomputation should be based on the rate applicable on the date of retirement. Since, for reasons stated above, only pay at the E–4 rate was saved to Sergeant St. John, the applicable rate of grade E–5 for purposes of the

computation here involved is the rate prescribed in the act of May 20, 1958. Thus the proper monthly entitlement is $148.82. Accordingly, payment of the voucher, which is retained here, is not authorized.

To the extent that anything said in our decision of July 22, 1965, B–156576, is in conflict with the views expressed herein, that decision no longer will be followed.

[B–166046]

Compensation—Overtime—Training Courses—Outside Regular Tour of Duty—Prohibition

Wage board employees at an Army depot who attended a welders' training program in a nongovernmental facility after regular tours of duty are not, pursuant to 5 U.S.C. 4109, entitled to overtime for the training periods, notwithstanding receipt of travel expenses incident to the training. The fact that the employees would have lost productive time had the training not been held after regular hours does not bring them within the exception to the prohibition against the payment of overtime while training prescribed in Federal Personnel Manual, Subchapter 6–2b, nor are the employees entitled to overtime on the basis of benefit to the employing agency, the work-related night courses giving the employees a qualification of substantial value that is transferable to other organizations.

To the Executive Vice President, National Association of Government Employees, March 18, 1969:

Reference is made to your letter of December 31, 1968, requesting us to direct payment of overtime to various welders employed at the Pueblo Army Depot, Pueblo, Colorado, who participated in a welders' training program at Southern Colorado State College in 1966 and 1967.

The overtime claimed consisted of three 2-hour sessions per week for various periods during the training program and the training was given after the 8-hour day or 40-hour week applicable to Wage Board employees. The Department of the Army disallowed the overtime claims on the ground that section 10 of the Government employees Training Act (now 5 U.S.C. 4109) precludes such payment. Our Claims Division also disallowed the claims with two exceptions not yet acted upon. However, you say the Department apparently gave no consideration to Civil Service Regulations promulgated in accordance with the provisions of the act and Executive Order No. 10800, January 15, 1959, 24 Fed. Reg. 447, and authorizing overtime for training in certain situations. You state the employees are entitled to payment of overtime since they were paid travel expenses incident to the training, and training of the employees after regular work hours resulted in lower costs to the Government if for no other reason than the training during regular work hours would mean interference and delays in regular work assignments.

Training for civilian employees is authorized by 5 U.S.C. 4101–4118. Section 4109, Expenses of training, reads in pertinent part as follows:

(a) The head of an agency, under the regulations prescribed under section 4118(a)(8) of this title and from appropriations or other funds available to the agency, may—

(1) pay all or a part of the pay (except overtime, holiday, or night differential pay) of an employee of the agency selected and assigned for training under this chapter, for the period of training * * *.

Under the statute the authorization for the payment of all or any part of the pay of an employee selected for training in non-Government facilities is for determination by the head of each department in accordance with Civil Service Regulations and is not dependent on whether the payment of the employee's travel is allowed incident to the training. The regulations issued by the Civil Service Commission authorizing overtime pay under certain conditions were promulgated subsequent to our decision 38 Comp. Gen. 363, dated November 17, 1958.

The following portions of the letter of October 31, 1958, from the Chairman, United States Civil Service Commission, were quoted in our decision:

We agree fully with what we understand to be the intent of the Congress that overtime pay * * * be prohibited (1) when an employee assigned to an educational institution for full-time training attends some classes at night or on non-work days, and (2) when an employee working a full eight-hour day attends a work-related night course, which, while it would benefit his agency, also gives the employee a qualification of substantial value and transferability to other organizations.

* * * Agencies have called to our attention such situations as the following where a prohibition against their paying overtime, holiday, or night differential would cause serious problems:

* * * * * * *

(d) When training is given on overtime or nonwork days because payment of overtime compensation is cheaper than spreading the training over a longer calendar period by confining it to regular work hours. An example is training for which field employees are brought in to headquarters in travel status, and the premium payment for Saturday time would cost less than keeping the employees in travel status over the weekend to complete the training on Monday.

Our decision also quotes the following excerpt from a letter of the Chairman, Committee on Post Office and Civil Service, House of Representatives, explaining the parenthetical limitation in section 10:

* * * This limitation was directed primarily to have a braking effect on excessive salary claims which it was felt, in the absence of such limitation, might otherwise be allowed in general under authority of such clause. The need for the limitation was based on certain cases that had been reported to individual Members as arising out of the administration of prior existing broad training authorizations. It was sought by the limitation to prevent recurrence of such excessive claims and salary payments based thereon.

One such case involved an employee of the Government department who had been assigned for training by a non-Government facility for a period of more than one week. The training curriculum included certain classes on Saturday—a non-work day in this employee's regular tour of duty with the Government,

Having attended the Saturday classes, the employee claimed overtime pay for this day. It was the intent, through use of the parenthetical limitation in clause (1) of Section 10 of the Act, to prohibit such payments.

Thereafter, the Commission issued an amendment to the training regulations which would permit an agency to pay overtime in certain cases. The provisions which you believe would permit overtime for the training here involved are set forth in Federal Personnel Manual, subchapter 6–2b, which reads in pertinent part as follows:

(2) Under certain conditions, employees are excepted from the prohibition of payment of overtime * * * and are eligible to receive overtime * * * in accordance with pay authorities applicable to their individual cases. The following are excepted from the prohibition on premium pay during training:

* * * * * * *

(c) An employee given training on overtime * * * because the costs of the training, premium pay included, are less than the costs of the same training confined to regular work hours. * * * Similarly, the department could schedule 48 hours of training during a 5-day period and pay employees overtime for the extra hours if the Government's out-of-pocket costs would be lower on this basis.

Our opinion is that the exemptions in subchapter 6–2b(2), above, are confined to situations such as referred to in example (d) of the Commission's letter of October 31, 1958, where a specific saving in travel costs results by scheduling training at night or on a nonworkday. Loss of productive time is not a factor under the exemptions. Rather, as stated in the Commission's letter of October 31 overtime is not considered to be payable when an employee works a full 8-hour day and attends a work-related night course which, while it would benefit his agency, also gives the employee a qualification of substantial value and transferability to other organizations.

In view of the above and since the training consisted of sessions in a non-Government facility after the employees' regular tours of duty, the prohibition in 5 U.S.C. 4109 against the payment of overtime during training applies to the present cases.

[A–3051]

Customs—Employees—Overtime Services—Travel Expenses

The travel and subsistence expenses incurred by Bureau of Customs border clearance inspectors incident to a nonregular overtime unlading assignment at McGuire Air Force Base, New Jersey, and billed to the Department of the Air Force in accordance with the Bureau's regulations may be paid by the Department, the provisions of the regulations conforming to the authority in 19 U.S.C. 1447 prescribing reimbursement to the Government by a party in interest for expenses incurred by inspectors on nonregular assignments at a place other than a port of entry. The fact that the travel and subsistence expenses may be incurred when employees are entitled to premium pay does not affect the propriety of the regulations.

To W. H. Thomas, Department of the Air Force, March 19, 1969:

This is in reply to your request of January 13, 1969, reference G438BAF (Com'l Svcs-4050), for a decision as to whether you may pay a voucher for $565.10, representing travel and subsistence items on billing documents from the Bureau of Customs for border clearance inspectors. The items were billed in connection with the overtime services of inspectors not regularly assigned to McGuire Air Force Base, New Jersey. Payment has not been made since it is believed the charges are improper in view of our decisions 3 Comp. Gen. 960 and 43 *id.* 101.

In 3 Comp. Gen. 960 and 43 *id.* 101, we held that the travel and subsistence expenses of customs employees incident to the unloading of a vessel or vehicle at night, on a Sunday or holiday are not chargeable to the master, owner or agent of the vessel or vehicle under section 451 of the Tariff Act of 1930, as amended, 19 U.S.C. 1451, relating to merchandise, baggage, or passengers (see 19 U.S.C. 1450), which requires reimbursement of the premium pay and expenses of customs employees during the times stated to be made in accordance with the provisions of 19 U.S.C. 267. Our decisions held only that the statutory provisions cited did not in and of themselves authorize reimbursement of the travel and subsistence expenses of customs employees incident to services performed during the times specified therein.

Section 447 of the Tariff Act of 1930, as amended, 19 U.S.C. 1447, provides that Commissioner of Customs may permit entry of a vessel at a place other than a port of entry and that when such permission is granted, and the vessel laden with merchandise in bulk proceeds to a place designated by the Secretary of the Treasury for the purpose of unlading under the supervision of customs officers, the compensation and expenses of such officers shall be reimbursed to the Government by the party in interest.

Bureau of Customs regulations, which appear in Title 19, Code of Federal Regulations, read in pertinent part as follows:

§ 24.17 Other services of officers: reimbursable.

(a) Amounts of compensation and expenses chargeable to parties-in-interest in connection with services rendered by customs officers or employees during regular hours of duty or on customs overtime assignments (19 U.S.C. 267, 1451), under one or more of the following circumstances shall be collected from such parties-in-interest and deposited by collectors of customs as repayments to the appropriation from which paid.

* * * * * * *

(5) When a customs officer or employee is assigned under authority of section 447, Tariff Act of 1930 [19 U.S.C. 1447], to make entry of a vessel at a place other than a port of entry or to supervise the unlading of cargo, the private

interest shall be charged the full compensation and authorized travel and subsistence expenses of such officer or employee from the time he leaves his official station until he returns thereto.

* * * * * * *

(c) The charge for any service enumerated in this section for which expenses are required to be reimbursed shall include actual transportation expenses of a customs employee within the port limits and any authorized travel expenses of a customs employee, including per diem, when the services are performed outside the port limits irrespective of whether the services are performed during a regular tour of duty or during a customs overtime assignment. No charge shall be made for transportation expenses when a customs employee is reporting to as a first daily assignment, or leaving from as a last last daily assignment, a place within or outside the port limits where he is assigned to a regular tour of duty. * * *

The Department of the Air Force believes the provisions in the above regulations relating to the reimbursement of travel and subsistence, as well as similar provisions in paragraph 10809, Air Force Manual 177-102, may be in conflict with our decisions since the same term "compensation and expenses" is used in 19 U.S.C. 267, 1447 and 1451. It is to be noted, however, that 19 U.S.C. 1451 covers unlading by special license on Sundays, holidays and at night and limits reimbursement by the party in interest in accordance with 19 U.S.C. 267, which latter section covers only compensation of inspectors for Sundays, holidays and at night. However, no reference to 19 U.S.C. 267 appears in 19 U.S.C. 1447. When permission is granted to unlade a vessel under the provisions of 19 U.S.C. 1447, travel and subsistence expenses are reimbursable by the party in interest. Therefore, the regulations cited above are proper inasmuch as they require reimbursement of travel and subsistence expenses only when they are incurred incident to an inspection authorized under the provisions of 19 U.S.C. 1447 by employees who are not regularly assigned to the inspection site. The fact that the travel and subsistence may be incurred when the employees are entitled to premium pay does not affect the propriety of the regulations.

In view of the above the voucher, which is returned herewith, may be paid if otherwise proper.

[B-160096]

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Reenlistment Prior to Approval of Training

A member of the Coast Guard with a critical skill who when discharged upon the expiration of his enlistment reenlists before his application for training leading to a commission under the Aviation Cadet or Officer Candidate School programs is approved is entitled to the initial and subsequent installments of the variable reenlistment bonus prescribed in 37 U.S.C. 308(g), the member's reenlistment obligating him prior to his selection for training to serve for the period of the

reenlistment contract, his right to the bonus which vested at the time of the *bona fide* reenlistment is not changed by his subsequent selection for training. However, if the member had been accepted for training prior to reenlistment, the fact that he had not received his orders to the training site would not operate to entitle him to the variable reenlistment bonus.

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Reenlistment Prior to Approval of Training

The fact that an enlisted member of the Coast Guard who is being considered for officer training receives an early discharge pursuant to 14 U.S.C. 370 does not defeat his right upon reenlistment to the variable reenlistment bonus provided in 37 U.S.C. 308(g) as an inducement to first-term enlisted members possessing skills in critically short supply to reenlist so the skills will not be lost to the service, the member's discharge having been without prejudice to "any right, privilege, or benefit" that he would have received—except pay and allowances for the unexpired portion of the reenlistment--or "to which he would thereafter become entitled" had he served his full term. The awareness of the member shortly after reenlistment of his acceptance for training would not preclude payment of the bonus.

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Reenlistment for the Purpose of Training

An enlisted member of the Coast Guard who is discharged and reenlists while training under the Officer Candidate School program is not entitled to the variable reenlistment bonus provided in 37 U.S.C. 308(g) incident to the reenlistment, the member having reenlisted not for the purpose of continuing to serve in his critical skill but to make him eligible to participate in the officer training program, which upon successful completion qualifies him for appointment as a commissioned officer in the Coast Guard.

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Reenlistment for the Purpose of Training

A Coast Guard member possessing skills in critically short supply who reenlists for the purpose of participating in training leading to a commission under the Aviation Cadet or Officer Candidate School programs, if he did not complete the training and is returned to duty in his critical skill would not be entitled to receive the variable reenlistment bonus prescribed in 37 U.S.C. 308(g) to induce reenlistment and avoid the loss of critical skills to the service. Entitlement to the bonus vesting at the time of reenlistment, the member did not become entitled to the bonus incident to reenlistment for the purpose of participating in an officer training program and any subsequent change in duty assignment would not create entitlement to the variable reenlistment bonus.

Gratuities—Reenlistment Bonus—Critical Military Skills—Training Leading to a Commission—Reenlistment Prior to Approval of Training

Entitlement to the variable reenlistment bonus provided in 37 U.S.C. 308(g) to induce members possessing skills in critically short supply to reenlist so the skills would not be lost to the service vesting at the time of reenlistment, members currently serving as officers in the Coast Guard who had reenlisted prior to selection for officer training and under circumstances entitling them to the bonus

may continue to be paid yearly installments of the bonus, the subsequent appointment of a member as an officer not operating to curtail entitlement to further annual installments of the bonus.

To the Secretary of Transportation, March 21, 1969:

Further reference is made to letter dated January 10, 1969, from the Commandant, United States Coast Guard, requesting a decision whether our decision of February 8, 1968, 47 Comp. Gen. 414, would preclude the payment of the variable reenlistment bonus to enlisted members of the Coast Guard who enter the Coast Guard Aviation Cadet program or the Coast Guard Officer Candidate School.

In the above decision we concluded that under 37 U.S.C. 308(g) and implementing regulations, as cited therein, no authority exists for the payment of a variable reenlistment bonus to enlisted members who have been selected for college training under the Navy Enlisted Scientific Education Program (NESEP) or other similar programs and who are reenlisted for the purpose of meeting obligated service requirements for such training. Included among the regulations cited was DOD Directive No. 1304.10, dated December 18, 1965, which provided that members shall be used in the specialty for which the variable reenlistment bonus is awarded unless the Secretary of the Military Department waives such use restriction based on the needs of the service, and which we said reflected the intent of the Congress in authorizing the variable reenlistment bonus.

In this connection, it was explained in the decision that the legislative history of section 308(g) shows that it was enacted to authorize the variable reenlistment bonus as an additional inducement to first-term enlisted members possessing skills in critically short supply to reenlist so that such skills could continue to be utilized and not lost to the service. It was further explained that one of the considerations in authorizing this substantial bonus was the high cost to the Government of training a replacement for such a member who does not reenlist, an expense that would be avoided if the member reenlists to continue serving in the critical rating.

The Commandant has advised that the Coast Guard has no NESEP or similar educational program but relies upon two programs in order to obtain qualified commissioned officers from the enlisted ranks, namely, the Coast Guard Aviation Cadet Program and the Officer Candidate School. He reports that members are selected for these programs under the following procedure. In order for selections to be made, applications are received from enlisted members, recommendations are made and boards held at various levels to determine their qualifications, and final selections are made by Coast Guard Headquarters.

If a member is not selected, he is so advised by letter from the Commandant. If he is found fully qualified, the only notification of selection tendered him is in the form of orders directing him to proceed to the officer training site. Enlisted personnel entering the Aviation Cadet Program, which requires approximately 18 months of flight training, are required to have at least 2 years of obligated service remaining on current enlistment upon entering the program and it is reported that such members usually extend their enlistments to meet this requirement. Upon entering this program they are assigned the special enlisted grade of aviation cadet (AVCAD) and upon completion they are commissioned ensigns in the Coast Guard Reserve.

Enlished personnel selected for or enrolled in the Officer Candidate School, which requires 17 weeks of training, are not required to extend their enlistments in order to have obligated service to attend such training. Members who are E–5 or above retain their enlisted grade until commissioned as ensigns in the Coast Guard and those who are E–4 or below are advanced to officer candidate undergoing instruction—2 (OCUI2) on entry and retain that grade until also commissioned as ensigns, or revert back to their permanent grade if they leave the program before being commissioned.

Also, the Commandant has quoted the following excerpt from our decision of February 8, 1968, and supplied italic as indicated—

* * * the legislative history shows that the only purpose in authorizing the bonus was as an inducement to first-term enlisted members possessing a critically needed military skill so that such skill would not be lost to the service and the training of a replacement required. In effect, the bonus is a form of additional compensation and, while payment of the bonus is not affected by subsequent duty changes, *the enlistment must be for that purpose.* * * *

He has stated that in view of the above-quoted portion of our decision considerable doubt exists as to whether yearly installments of the variable reenlistment bonus may be properly authorized to members currently serving as officers in the Coast Guard and whether payment of the variable reenlistment bonus is authorized in the following cases:

a. A member holding a critical skill submits his application for a commission under the OCS or AVCAD program. Prior to receipt of orders to the training site, he is discharged and reenlisted by reason of "convenience of the Government" at his own request (3 months prior to the date of expiration of enlistment as contained in 14 USC 370). Is the member entitled to the initial and subsequent installments of variable reenlistment bonus?

b. Would a. above require a different answer if the same conditions apply but the member is discharged and reenlisted by reason of "expiration of enlistment," i.e., his full enlistment has been completed?

c. Would a member, otherwise entitled, be authorized payment of variable reenlistment bonus if he is discharged and reenlisted while training under the Officer Candidate School Program?

d. If the answers to the questions above are in the negative, would the member be entitled to the variable reenlistment bonus should he not complete the training leading to commissioning and continue in the Coast Guard performing duty in the critical skill held upon reenlistment?

Authorization for the payment of the variable reenlistment bonus is contained in 37 U.S.C. 308(g) which provides in pertinent part as follows:

> g. Under regulations to be prescribed by the Secretary of Defense, or the Secretary of Transportation with respect to the Coast Guard when it is not operating as a service in the Navy, a member who is designated as having a critical military skill and who is entitled to a bonus computed under subsection (a) of this section upon his first enlistment may be paid an additional amount not more than four times the amount of that bonus. The additional amount shall be paid in equal yearly installments in each year of the reenlistment period. However, in meritorious cases the additional amount may be paid in fewer installments if the Secretary concerned determines it to be in the best interest of the members.

Implementing regulations pertaining to the payment of the variable reenlistment bonus are contained in Commandant Instruction 7220.13A, dated May 31, 1967.

Authority for early discharge of enlisted members of the Coast Guard is contained in 14 U.S.C. 370, which provides as follows:

> Under regulations prescribed by the Secretary, any enlisted man may be discharged at any time within three months before the expiration of his term of enlistment or extended enlistment without prejudice to any right, privilege, or benefit that he would have received, except pay and allowances for the unexpired period not served, or to which he would thereafter become entitled, had he served his full term of enlistment or extended enlistment.

As indicated in our decision of February 8, 1968, no authority exists for the payment of a variable reenlistment bonus to enlisted members who have been selected for college training under the Navy Enlisted Scientific Education Program or other similar programs and who are reenlisted for the purpose of meeting the obligated service requirements for such training. That decision, however, does not preclude a member from receiving a variable reenlistment bonus in an otherwise proper case if he reenlists before he has been selected for such training and his reenlistment is in fact for the purpose of serving in the specialty for which the bonus is authorized.

Therefore, if a member designated as holding a critical skill submits his application for training leading to a commission under the Officer Candidate School or AVCAD program and is discharged upon expiration of enlistment and reenlisted prior to his selection for such training, it cannot be said that his reenlistment was solely for the purpose of meeting the obligated service requirement or for training under the particular program. Upon reenlistment he is obligated to serve for the period of his reenlistment contract and, of course, at that time there is no assurance that he will be found qualified and selected for training under the program of his choice. Under such circumstances, his right to the variable reenlistment bonus vests at

the time of his *bona fide* reenlistment and his subsequent selection for such officer training would not change his entitlement.

If the member has been administratively accepted or selected for such officer training at the time of his reenlistment, however, the fact that he had not received orders to the training site would not operate to entitle him to a variable reenlistment bonus. In these circumstances it would be known by the administrative office that the reenlistment was not for the purpose of continued service in the member's critical skill.

The fact that a member receives an early discharge pursuant to 14 U.S.C. 370 would not defeat his right to the variable reenlistment bonus if he is otherwise entitled thereto. Under that law and the regulations issued pursuant thereto such a discharge is without prejudice to "any right, privilege, or benefit" that he would have received (except pay and allowances for the unexpired portion of the enlistment) or "to which he would thereafter become entitled" had he served his full term of enlistment. See 3 Comp. Gen. 330. Also, the fact that such member may be aware that shortly after his reenlistment he may be accepted for training for a commission would not preclude payment of the bonus. See 35 Comp. Gen. 664, and compare 25 Comp. Gen. 700 and B–150235, dated January 31, 1963. The Commandant's questions "a" and "b" are answered accordingly.

A member who is discharged while training under the Officer Candidate School program would not reenlist for the purpose of continuing to serve in his critical skill, but to continue his enlisted status as required for participation in that program. Upon his successful completion of the training course he would be appointed a commissioned officer in the Coast Guard. Therefore, since the member's reenlistment would not be for the purpose of continuing to serve in his critical skill, he would not be entitled to a variable reenlistment bonus incident to his reenlistment. The Commandant's question "c" is answered in the negative.

Question "d" concerns a member who was not entitled to a variable reenlistment bonus at the time of reenlistment since at that time he had been selected for or was undergoing training leading to appointment as a commissioned officer. The question asked is whether the member would be entitled to the bonus should he not complete the officer training and continue in the Coast Guard performing duty in the critical skill held upon reenlistment.

A similar question was considered in our decision of March 4, 1969, B–160096, concerning a member of the Marine Corps who reenlisted for 6 years to meet the obligated service requirement for participation in the Navy Enlisted Scientific Education Program (NESEP). He

was enrolled in the University of Colorado under NESEP but was subsequently disenrolled for unsatisfactory academic performance and was transferred to a Marine Corps installation for further service in the critical occupational specialty which he held at the time of reenlistment.

As pointed out in that decision, the variable reenlistment bonus vests, if at all, at the time of reenlistment (45 Comp. Gen. 379) and a subsequent change in the member's duty assignment does not operate to divest him of the bonus to which he was entitled incident to his reenlistment. Since the member reenlisted for the purpose of participating in the Navy officer training program he was not entitled to a variable reenlistment bonus incident to his reenlistment. Hence, we necessarily concluded that his subsequent disenrollment and return to duty in his critical skill did not entitle him to variable reenlistment bonus payments. Question "d" is answered in the negative.

With respect to the doubt expressed as to whether members currently serving as officers in the Coast Guard are entitled to yearly installments of variable reenlistment bonus, it may be stated that if the member reenlisted prior to selection for officer training under circumstances entitling him to a variable reenlistment bonus his subsequent appointment as an officer would not operate to curtail his entitlement to further annual installments of the bonus, his right having vested at the time of reenlistment. See 45 Comp. Gen. 379 and 46 Comp. Gen. 322.

It is believed that entitlement of the officers concerned can be determined by applying the rules set forth above but if doubt still exists in any case the matter may be submitted here for our decision.

[B–166056]

Leaves of Absence—Court—Jury Duty—Temporary Employees

An employee who had served on jury duty both under his current 4-year term appointment made pursuant to section 316.301 of the Civil Service Commission regulations and under a prior 1-year temporary limited appointment authorized as prescribed by section 316.401 of the regulations may be granted court leave for the jury duty performed under both appointments, 5 U.S.C. 6322 authorizing that the 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 the United States, the restriction on the granting of a leave of absence with pay to temporary employees for the 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.

To Wayne D. Sexton, Defense Supply Agency, March 21, 1969:

We refer to your letter of January 27, 1969, with enclosures, reference DDTC–R, requesting our decision whether an employee of the Defense Depot Tracy is entitled to be granted court leave for the purpose of performing jury duty under 5 U.S.C. 6322.

The employee in question is serving under a 4-year term appointment, effective April 7, 1968, which expires not later than April 6, 1972. Term appointments are authorized under section 316.301 of the Civil Service Commission's regulations, as follows:

> The Commission may authorize an agency to make a term appointment for a period of more than 1 year on request of the agency and after determination by the Commission that the needs of the service so require and that the employment need is for a limited period of 4 years or less.

We note, however, that prior to his conversion to the 4-year term appointment the employee was serving under a 1-year appointment (temporary limited) and that certain of the days for which court leave is requested were during the period of the 1-year appointment. Temporary limited appointments are authorized for a definite period of 1 year or less under section 316.401 of the Commission's regulations.

Section 1 of the act of June 29, 1940, 54 Stat. 689 (now 5 U.S.C. 6322) provides:

> * * * That the compensation of any employee of the United States or of the District of Columbia who may be called upon for jury service in any State court or court of the United States shall not be diminished during the term of such jury service by reason of such absence, except as provided in section 3, nor shall such period of service be deducted from the time allowed for any leave of absence authorized by law.

In decision of September 7, 1940, 20 Comp. Gen. 133, our Office ruled that temporary employees are not entitled to leave of absence with pay for jury duty under the above-quoted act. With the exception of temporary indefinite employees (see 27 Comp. Gen. 300) that rule has been followed in subsequent decisions. See 38 Comp. Gen. 307. However, since the statute, by its terms, applies to "any employee of the United States or of the District of Columbia" it appears that our original construction of the act was unnecessarily restrictive. Upon further consideration of the statutory language as well as the legislative purpose of the act, we now hold that temporary employees are entitled to court leave for jury duty under 5 U.S.C. 6322. Therefore, if otherwise proper, court leave may be granted to the employee here involved for the days on which he performed jury duty.

To the extent that our prior decisions are inconsistent with the views expressed herein, such decisions are hereby modified.

[B-166166]

Public Health Service—Commissioned Personnel—Retired Pay—Inactive Service Credit

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

To the Secretary of Health, Education, and Welfare, March 21, 1969:

Reference is made to your letter of February 10, 1969, requesting decision as to the service which may be credited to commissioned officers of the Public Health Service in the computation of their retired pay.

You say that section 211 of the Public Health Service Act, as amended, 42 U.S.C. 212, provides several formulae for computing retired pay of Public Health Service officers under varying circumstances; that subsection (a)(4) of section 220 [221] of that act, as amended, 42 U.S.C. 213a(a)(4), assimilates commissioned officers of the Public Health Service to commissioned officers of the Army for the purposes of the benefits provided under chapter 71 of Title 10, U.S. Code, Computation of Retired Pay; and that section 1405, included in chapter 71, "establishes a formula for computation of retired pay" which includes the use of years of service (including inactive service) for basic pay purposes to the credit of an officer on May 31, 1958. It is stated that the use of such inactive service is not included in the years of service authorized to be credited for computing retired pay under section 211 of the Public Health Service Act and that, for reasons not clearly ascertainable, section 211 of the Public Health Service Act has been used exclusively to compute the retired pay of commissioned officers of the Public Health Service.

You further state that an aggrieved officer requested review by his Congressman of his eligibility to use his basic pay credits (inactive service) in the multiplier factor in computing his retired pay which resulted in bills being introduced in prior Congresses to authorize credit of such inactive service in the computation of the retired pay of Public Health Service officers.

Your letter indicates that, prior to the reintroduction of such proposed legislation in the 91st Congress, Congressman Henry P.

Smith III requested the American Law Division, Legislative Reference Service, Library of Congress, to review the need for such legislation; that the American Law Division concluded that section 1405 of Title 10 is applicable to Public Health Service officers; that new legislation is therefore unnecessary; and that the General Counsel of the Department of Health, Education, and Welfare also has reached the same conclusion. The bill introduced in the 90th Congress, H.R. 912, was designed to allow full time for inactive service performed prior to June 1958 in determining the multiplier factor in computing retired pay.

Section 211(a)(4) of the Public Health Service Act, as amended, provides that the retired pay of commissioned officers of the Public Health Service should be computed on the basis of 2½ percent of the basic pay of the officer's grade multiplied by his years of active service plus, in the case of medical and dental officers, certain constructive service. Section 221(a)(4) of that act, as added by section 4 of the act of August 10, 1956, ch. 1041, 70A Stat. 619, provides that commissioned officers of the Service are entitled to all the rights and benefits now or hereafter provided for commissioned officers of the Army under chapter 71 of Title 10, U.S. Code, Computation of Retired Pay, except formula 3 of section 1401. When that act was enacted chapter 71 of Title 10, U.S. Code, did not contain a section 1405.

Section 1405 of Title 10, U.S. Code, was made a part of chapter 71 by the act of May 20, 1958, and insofar as that section relates to commissioned officers of the Army its effect is to authorize the inclusion in the multiplier factor, in computing the retired pay of such officers, of their years of inactive service prior to June 1, 1958, under formula 4 of section 1401, section 3888(1), section 3927(b)(1), and formula B of section 3991. Those sections refer to computation of retired pay of (1) warrant officers (formula 4 of section 1401); (2) certain officers of the Army mandatorily retired for age (section 3888(1)); (3) certain officers involuntarily retired because not recommended for promotion, excessive number in grade, etc. (section 3927(b)(1)); and (4) commissioned officers of the Army voluntarily retired for more than 20 years of service (formula B of section 3991).

It should be noted that formula 4 of section 1401, the only section mentioned in section 1405 that is a part of chapter 71, does not apply to commissioned officers of the Army (the specified sections of Title 10, U.S. Code, to which that formula applies relate to warrant officers) and hence that formula does not appear to be for consideration here.

Prior to the enactment of the Pay Readjustment Act of 1942, approved June 16, 1942, ch. 413, 56 Stat. 359, Regular commissioned officers of the uniformed services appointed on and after June 1, 1922, generally could count only active commissioned service in computing

their active duty pay. See section 1 of the uniformed services pay act of June 10, 1922, ch. 212, 42 Stat. 627, 37 U.S.C. 4 (1940 ed.). Thus, commissioned officers could not even count active service as enlisted men for longevity pay purposes. 5 Comp. Gen. 1035.

As long as those provisions remained in effect, retirement statutes that provided that the percentage multiple in the computation of the retired pay of commissioned officers should be based on the number of years of service to which they were entitled to credit in the computation of their pay on the active list precluded the counting of inactive commissioned service or even active enlisted service in determining their retired pay percentage multiple. See, for example, section 5 of the act of July 31, 1935, ch. 422, 49 Stat. 507, as amended, 10 U.S.C. 971*b* (1940 ed.); and section 12 of the act of June 23, 1938, ch. 598, 52 Stat. 949, 34 U.S.C. 404(b) (1940 ed.).

During World War II certain changes were made relating to the computation of active duty pay and, possibly without there being a general awareness of the full effect thereof, such changes concerning active duty pay indirectly permitted much more service to be used in the computation of retired pay. However, in the act of February 21, 1946, ch. 34, 60 Stat. 26, and the act of June 29, 1948, ch. 708, 62 Stat. 1081, 10 U.S.C. 6394, amending prior laws, the formula for computing the retired pay multiplier factor on the basis of service creditable for longevity pay purposes was retained with respect to officers of the Army, Navy, Marine Corps, Air Force and Coast Guard.

Under the Department of Defense proposals made pursuant to the recommendations of the Defense Advisory Committee on Professional and Technical Compensation (Cordiner Committee), the compensation system of the uniformed services would have practically eliminated the longevity (length of service) concept in military compensation and replaced it with a pay system based on years of service in grade, rather than cumulative years of service (longevity concept).

In a bill introduced in the Senate, S. 2014, 85th Congress, 1st session, to carry into effect those recommendations, section 202 of the Career Compensation Act, 37 U.S.C. 205, which set forth the service creditable for longevity pay purposes, would have been eliminated, making it necessary to provide elsewhere in the statutory law the service creditable for computing retired pay. Section 5(3) of that bill would have added a new section to Title 10, U.S. Code, section 1405, to list the service creditable in determining years of service for the computation of retired pay. In order to allow the computation of retired pay to continue to include service then creditable for that purpose without change, the new section 1405 would have restated the substance of the rules then contained in section 202 of the Career Compensation Act of 1949 for basic (longevity) pay purposes.

Section 12(a)(4) of that bill would have added a new subsection (h) to section 211 of the Public Health Service Act to permit certain retired Public Health Service officers to compute their retired pay on the basis of "years of service computed under section 1405 of Title 10, United States Code."

In view of the conclusion of the Senate Armed Services Committee that those commissioned officers of the armed services who had served at least 20 years on active duty and thereafter remained in or were appointed in the Reserve prior to being transferred to a retired list with pay under then existing law should not be eligible, when their active and inactive Reserve service totaled 30 years, to receive the same retired pay as officers who had served on active duty for 30 years, that Committee adopted an amendment to section 11, referred to as "SECTION AFFECTING RETIRED PAY MULTIPLIER," of H.R. 11470, which became the 1958 military pay act, "which will prevent the inclusion of nonactive duty Reserve service in the computation of the retired pay on the basis of a full active duty year." S. Rept. No. 1472, 85th Cong., 2d sess. 14.

The Committee explained its amendment relating to eliminating credit for inactive service in the multiplier factor as follows:

> Subsection (a): Clause (1) amends chapter 71 of title 10, United States Code, by adding a new section 1405 at the end thereof. The new section provides that, for the purposes of those enumerated sections of title 10 relating to *retirement from an armed force*, the years of service to be used as a multiplier in computing retired pay, but not eligibility for retirement, will be as follows:
>
> (1) All active service performed in the Armed Forces by the member concerned.
>
> (2) The years of service credited to him under section 202(a)(7) of the Career Compensation Act of 1949 for his professional education, if he is a medical or dental officer.
>
> (3) The years of service, not included in clause (1) or (2), with which he was entitled to be credited, on the day before the effective date of this section, in computing his retired pay.
>
> * * * * * * *
>
> The effect of this rule is to eliminate, with one exception, the future accumulation of years of nonactive service for use as a multiplier in the computation of retired pay. However, such years *accumulated before the effective date of this act will continue* to be credited. * * * [Italic supplied.]

See page 25 of that Senate Report. The Senate amendment is further explained in the Conference Report (H. Rept. No. 1701, 85th Cong., 2d sess. 16) as follows:

> 8. Another provision of the Senate amendment contained a provision which will prevent the inclusion of nonactive duty Reserve service in the computation of the retired pay on the basis of a full active duty year, and will provide that such service will be computed on the basis of the point computation system applicable to Reserve officers retired under the reserve retirement law at age 60. This section would affect those officers who had served at least 20 years on active duty and thereafter remain or are appointed in the Reserve prior to being transferred to a retired list with pay. As a result of the Senate amendment all future inactive reserve time will be computed on the same basis for retired pay purposes.

While the Congress in enacting the 1958 military pay bill did not eliminate the longevity concept of military pay and therefore did not delete section 202 governing service creditable for basic (longevity) pay purposes from the Career Compensation Act, it made conforming changes in the retirement laws with respect to service creditable for computing retired pay and added section 1405 to chapter 71 of Title 10, U.S. Code, to eliminate the crediting of full time for inactive service performed thereafter in determining the percentage multiple in retired pay formulae.

It may be noted that section 3 of S. 3082, a companion bill to S. 3081 (similar to H.R. 11470), which was designed to accomplish what section 11 of the 1958 military pay act did accomplish, would have amended the law authorizing the crediting of inactive service in the retired pay percentage multiple of commissioned officers of the Coast and Geodetic Survey (who, like Public Health Service officers, had been made eligible for the benefits of chapter 71 of Title 10, U.S. Code, by section 3 of the act of August 10, 1956, 70A Stat. 619) by striking out the words "for which entitled to credit in the computation of his pay while on active duty" in 33 U.S.C. 853*o* (1952 ed.) and inserting there the words, "that may be credited to him under section 1405 of title 10, United States Code."

In commenting on that section of the proposed bill, the Department of the Air Force as spokesman for the Department of Defense recommended that section 3 be clarified:

> It further appears that there may be some doubt that section 3 of the bill would make the new formula applicable to the Coast and Geodetic Survey. Therefore, it is suggested that there should be inserted on line 23 of page 4, after the word "Code," the phrase "as if his service were *service as a member of the Armed Forces.*" [Italic supplied.]

See letter of April 4, 1958, to the Chairman of the Senate Committee on Armed Services, S. Rept. No. 1472, 85th Cong., 2d sess. 32, 33. That language was included in section 11(c) of the 1958 military pay law as recommended by the Department of the Air Force. No similar provision was made with respect to the Public Health Service, for which there then existed no authority to count inactive service in the retired pay percentage multiple.

Section 221(a) of the Public Health Service Act was enacted by section 4 of the act of August 10, 1956, ch. 1041, 70A Stat. 619, which codified Titles 10 and 34 of the United States Code as Title 10 thereof. It is clear that at that time commissioned officers of the Public Health Service were not authorized to count inactive service in their retired pay percentage multiple.

Section 1405 was not a part of Title 10, U.S. Code, as codified by the 1956 act, but was added by section 11 of the 1958 military pay act, the express purpose of which was to prohibit full credit for inactive

service performed after May 1958 in computing the retired pay percentage multiple of Army, Navy, Marine Corps, Air Force, Coast Guard, and Coast and Geodetic Survey officers. In 1956 when section 221 of the Public Health Service Act was enacted, chapter 71 of Title 10 had nothing to do with counting inactive time in the retired pay percentage multiple of Army officers retired with over 20 years of active service. Army officers could count such inactive time not by virtue of 10 U.S.C. 1405 but by virtue of 10 U.S.C. 3911 and 3991 and their source statutes, the act of July 31, 1935, as amended by section 202 of the act of June 29, 1948, 62 Stat. 1084.

In 1956 Public Health Service officers did not have a similar right and could count only active service in their retired pay percentage multiple under section 211 of the Public Health Service Act. While section 4 of the 1956 act mentions rights "now or hereafter provided for Army officers," section 1405 of chapter 71 as added in 1958 by section 11 of the 1958 military pay act did not add to, but actually restricted, the right of Army officers to count inactive service performed after May 1958 for retired pay percentage multiple purposes.

Thus, section 1405 did not confer upon Army officers the right to full credit for inactive service prior to June 1958 in their retired pay percentage multiple, but restricted the right to such credit to service performed prior to June 1958, that is, to such service as was creditable for that purpose on May 31, 1958. We find nothing in the law which thus reduced the rights of other retired officers, which might be viewed as increasing the rights of retired officers of the Public Health Service.

In view of the foregoing considerations, the fact that the retired pay proposal in S. 2014 to authorize the Public Health Service officers to count inactive service in their retired pay percentage multiple was not enacted in the 1958 military pay law, and the fact that the purpose of section 11 of that law adding section 1405 to Title 10, U.S. Code, was to limit the authorization for other officers of the uniformed services to count inactive service in their retired pay percentage multiple to such service performed prior to June 1958, it is our opinion that Public Health Service officers are not authorized to count inactive service prior to June 1958 in their retired pay percentage multiple by virtue of the provisions of 10 U.S.C. 1405.

In this connection, it is noted that the above-mentioned Conference Report states that since the 1958 amendment is prospective in scope, it would "not affect the service presently creditable under existing law."

Since, in our view, Public Health Service officers are not authorized to count any of their inactive service in determining their retired pay percentage multiple under existing law, we believe that additional legislation would be necessary if credit for such service prior to

June 1, 1958, is to be authorized for them. Legislation such as that proposed in S. 912, 90th Congress, would seem to be appropriate for that purpose if the Congress should decide that Public Health Service officers should receive that benefit.

[B-147781]

Property—Public—Damage, Loss, Etc.—Shortages—Evidence

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

Evidence—Preponderance *v.* Substantial

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

To the States Marine Lines, Inc., March 24, 1969:

On November 29, 1967, Mr. Milton C. Grace, your attorney, requested reconsideration of our decision of September 21, 1967, B-147781, which declined to review on its merits, pursuant to your request of July 10, 1967, the settlement certificate dated April 26, 1962.

The certificate in question disallowed a claim filed with the Department of the Army on January 25, 1961, which was forwarded to the General Accounting Office for settlement on February 15, 1961. The claim was for $21,830.40 collected by the Department of the Army on October 5, 1953, from amounts otherwise due the States Marine Lines, Inc., because of a loss of 4,195 sacks of rice shipped under Government bill of lading No. WV-9698659. The rice was loaded aboard the SS. WESTPORT, which sailed from Stockton, California, on January 15, 1950. The basis for the claim is that the bill of lading, the bridge log book and the Army manifest show that 45,696 bags of rice were loaded aboard at the Port of Stockton, and 41,501 bags were off-loaded at Kobe, Japan.

Subsequent to the Army's deduction on October 5, 1953, a complete

investigation and survey was made of all available records pertaining to the loading and discharge of this cargo of rice. On August 12, 1955, the Army advised States Marine Lines in detail of the information on which reliance was placed in concluding the vessel was liable for the unexplained shortage of 4,195 bags of rice; it was emphasized that the records available at Stockton established that the amount of rice which the vessel acknowledged as having been loaded was actually put aboard.

No further action was taken in this matter until January 25, 1961, when States Marine Lines, through Mr. Grace, presented its claim for $21,830.40. Mr. Grace supported the claim with two propositions: (1) that no setoff should have been made against unrelated accounts of the States Marine Lines, and (2) that the loading records of Stockton were not reliable and did not accurately reflect that 45,696 bags of rice were loaded.

The settlement certificate of April 26, 1962, answers both propositions and, with regard to the loading records at Stockton, indicates that the Army manifest, the bill of lading and the hatch clerk reports show that 45,696 bags of rice, weighing 2,055.3 long tons were loaded; the vessel's log and the hatch clerk reports again verified that 2,056 long tons were loaded aboard the vessel. The disallowance in the settlement certificate is thus premised on the fact that the vessel has not rebutted the origin loading records which establish that 45,696 bags of rice were loaded.

Five years later, on July 10, 1967, Mr. Grace requested review of the settlement certificate. The presentation made in support of this request for review was an extended discussion of the facts and argument submitted in January 1961. As noted, the request for review was denied in our decision of September 21, 1967. On November 29, 1967, Mr. Grace requested reconsideration of that decision and again asked that review of the settlement certificate be undertaken.

Mr. Grace had several conferences with representatives of our Office in April, May, June, July, and October 1968, and in February 1969. He filed additional briefs to support his position. We are still of the opinion that the evidence in the case does not justify favorable consideration of your company's claim for refund of the money recovered by the Army in adjustment of the loss.

As before stated, the bill of lading, signed for the Master on January 16, 1950, recites that 45,696 bags of rice weighing 4,603,873 pounds (2,055.3 long tons) were delivered to the vessel. The Army ocean manifest shows that the same number of bags and weight were loaded by the Jones Stevedoring Company. The vessel's Bridge Log Book recites the loading activities in detail, showing also the weight in tons loaded (1) 365 long tons during the day on January 14, (2) 1,172 long tons

during the night of January 14–15 and (3) 519 long tons to noon on January 15, the vessel getting under way at 1:00 p.m. on that day.

Thus, the bill of lading, the Army manifest and the ship's log are in agreement as to number and weight of the bags of rice loaded. Mr. Grace advances the argument, as in a memorandum of April 17, 1968, that these weights are not accurate; that the vessel did not tally the cargo into the holds; and that no hatch tally was made, and that the count to the vessel was made from "piles" of bags on the wharf, said to consist of 1,000 bags each. In short, it is contended that the number of bags reported as loaded to the vessel is only a "shipper's count," and that the vessel did not make its own tally or count of the bags of rice loaded at Stockton. It is contended further that the entries in the log regarding the weight of the cargo are not competent evidence. It is noted, however, that in *The Georgian*, 76 F. 2d 550 (5 Cir. 1935), it was stated at page 551:

> A vessel's logbook is perhaps the most important document among her papers, and the owner is bound by entries made therein by the ship's officers.

Furthermore, assuming that the count of the number of bags and weight recited on the bill of lading and confirmed by the Master by virtue of his signature on the bill of lading, is the "shipper's count and weight," the presumption of correctness nevertheless arises, and the burden is on the vessel to bring itself within the bill of lading exceptions or otherwise prove that it did not receive the count and weight stated on the bill of lading—in this case coinciding with the figures entered in the ship's log. In *Spanish-American Skin Company* v. *The M.S. Ferngulf*, 143 F. Supp. 345 (1956), affirmed 242 F. 2d 551 (1957), the court stated, at page 350:

> A bill of lading may be a receipt for goods plus a contract for the carriage of goods and also a negotiable document of title. Knauth, Ocean Bills of Lading (1953) pp. 134, 384. One of the purposes of the Carriage of Goods by Sea Act is to provide a prima facie description of the goods not merely as between the shipper and the carrier, but also for the benefit of any third party relying upon the bill of lading. Thus, if the carrier puts descriptive data in the bill of lading as to the weight of the shipment, he may not disavow liability therefor by stating that it is the shipper's weight. If there is any doubt in the mind of the shipper as to the weight being accurate, he need not put the weight in the bill of lading.

The argument in this instance is that the clerk's daily hatch reports at origin, which, when totaled, show 45,696 bags, weighing 2,056 tons, may not be relied upon as supporting the bill of lading and ship's log weight and count. Mr. Grace states that these reports are not in fact hatch tallies, and that they are not based upon hatch tallies.

We understand that the hatch reports in the record are not the individual stroke tally reports similar to those submitted to show the number of bags unloaded at Kobe. However, to say that these reports are not based on hatch tallies is to overlook the fact that they account

for all of the time that the stevedores were working the vessel. For example, the daily hatch report on hatch No. 5 for January 14, 1950, from 8:00 a.m. to 6:00 p.m. shows that from 8:00 a.m. to 10:00 a.m. the gang (14 men) was rigging gear, laying dunnage and lining the hold. From 10:00 to 12 noon, rice was being loaded; from noon to 1:00 p.m. time was taken for lunch; from 1:00 p.m. to 6:00 p.m. rice was being loaded. The summary shows that for the 9 hours on board, 7 hours were spent loading 4,599 pieces (bags), 207 weight tons and 253 measurement tons.

The hatch reports for the night of the 14th and for the early hours of the 15th account for all the time the stevedores were working cargo until the lower hold was covered at 9:30 a.m. on the 15th, and 1,152 pieces (bags) were loaded in the upper tween-deck. The hatch was covered and secured at 12 noon, the vessel getting under way at 1:00 p.m.

These activities can be verified by entries in the log book. For example, the log book entries on January 14 show the following: 8:00 a.m., two gangs on board begin loading the No. 1 and No. 5 holds; 12 noon, knock off for lunch; 1:00 p.m., resume loading No. 5 hold and start loading No. 2 hold. On January 15 the log book shows: No. 5 lower hold completed loading at 9:15 and began loading No. 5, tween-deck; ceased loading No. 5 at 11:30 a.m.; all loading completed and sea watches set at 12 noon.

Thus, it is clear that these daily hatch reports were summaries of activities taken *on deck* and the number of pieces mentioned on each of these reports is a summary of tallies of slings as the rice came over the side. On Jauary 4, 1954, States Marine Lines, by letter to the Army Finance Office, indicated that the San Francisco Port of Embarkation advised to the effect that the tally was by sling load. This information was given to States Marine Lines by the San Francisco Port of Embarkation on July 18, 1952. The fact that a sling tally was made when the rice was loaded negates any agreement which contemplated a count derived from the number of piles of rice on the wharf and an agreed number of bags in each pile.

We therefore believe that the correctness of the daily hatch reports and the supercargo summaries of the number of bags and weight as shown in the bill of lading and the log book have not been impeached on this record. Incidentally, we note that on July 3, 1952, States Marine Lines reported that the only loading records it saw were the three supercargo reports. Your company apparently did not receive copies of the 15 daily hatch reports in the present record.

After sailing from Stockton, the vessel stopped at Oakland, California, Astoria, Oregon, and Seattle, Washington. Its first port of unloading in Japan was Yokohama. The vessel arrived at Kobe on

Sunday, February 19, 1950, at 10:45 p.m. Stevedores commenced discharging all holds at 8:30 a.m. on the 20th.

The manner and record of unloading this rice at Kobe, where the shortage of 4,195 bags of rice was discovered, are said to establish the probability that the missing rice was not loaded aboard the vessel at Stockton. As support for this contention reference is made to statements from the stevedoring companies that no rice was unloaded at Yokohama and that the lower holds were not even opened at Yokohama.

It is stated further that the rice was tallied by the Army and the vessel when off-loaded into barges, and again tallied on shore. The tally sheets of Senko Freight Clerk & Co., agents of the vessel, have been furnished by Mr. Grace and they do show a total of 41,501 bags of rice as being tallied into the barges. No stroke tally sheets prepared by the Nippon Tally Company, said to be acting for the Army, have been furnished. A summary Report of Rechecked on Shore (Final) by the Japan Cargo-Tally Corporation allegedly the tally clerk for the consignee, shows 41,501 bags as having been unloaded from barges. Again, no stroke tally was furnished in this case. It is maintained that these papers help establish that there were only 41,501 bags of rice on board, notwithstanding the clear showing that 45,696 bags of rice were loaded aboard at Stockton.

While the evidence concerning the off-loading at Kobe may be taken as showing the quantity of rice accounted for at that time, we do not believe such evidence rebuts the clear loading record. This is for the reason that (1) the tally slips purporting to be a tally of *all* the rice on board are inconclusive because of unexplained time gaps in the continuity of the unloading operation, and (2) the report of the recheck on shore bears no identifiable relationship to the 20 barges apparently used in transporting the cargo from the vessel to shore; the recheck report does not disclose the number of bags unloaded from each of the barges used.

As for the Senko tally slips, the ship's log shows that stevedores commenced discharging cargo from all holds at 8:30 a.m. However, none of the tally slips for any of the holds shows a tally beginning before 9:00 a.m., and the tally for No. 4 hold did not commence until 9:50 a.m. The log book shows that with the exception of lunch periods and minor winch or rigging repairs, the holds were worked continuously until 5:00 a.m. on the 21st of February, with all holds being unloaded again at 8:15 a.m. There is no tally for hold No. 1 for the period 4:00 p.m. to 10:10 p.m. on February 20 although there is no notation in the log book that this hold was not being worked during this period, with the exception of the 1 hour lunch period.

Furthermore, there is no indication on any of the tallies that any

rice was unloaded from holds 3 and 4 after 4:30 a.m. on the 21st; after 2:30 p.m. from hold No. 1; after 11:00 a.m. on the 21st from hold No. 2; and 11:30 p.m. on the 20th from hold No. 5. The log book first mentions discharging the lower holds containing phosphate at 1:00 a.m. February 22. In other words, there are few tallies covering rice for the daytime period of the 21st, although the log book shows that stevedores were at work on that day. There are periods when the stevedores were working for which no tallies are shown, and in this connection there are no tallies for the 7,575 bags of wheat unloaded. While the unloading of wheat may account for the remainder of the time for which no tallies are available, it is also possible that some unauthorized unloading was taking place during that period of time.

Reference to the tally sheets—33 in number—shows that the rice was loaded from the vessel into 20 barges on the 20th and 21st. The "Report of Rechecked on Shore" lumps into three figures the quantities of rice apparently unloaded from the 20 barges on February 21, 22 and 23. Since no rice was unloaded from the vessel after 2:30 p.m. on the 21st, the major portion having been unloaded on the 20th, question arises as to how the three figures—"21/2 21897, 22/2 18359, 23/2 1245"—were produced.

In reaching our conclusion that the settlement certificate of April 26, 1962, disallowing your claim is not in error, we have given careful consideration to your memorandum of April 17, 1968, and later briefs, in which you undertake a review of the applicable law regarding the degree of proof which is required in this case. You point out that the decision of our Office on this claim "must, under settled law, be based upon probabilities, not possibilities." You believe that the *prima facie* case which is established by the facts disclosed in the documentation at origin and the report of shortage at destination has been overcome by a "preponderance of the evidence" that all the rice which was loaded on the WESTPORT at Stockton was delivered to the consignee at Kobe, regardless of what was reported as the amount of rice delivered to the vessel at Stockton.

We do not question the propriety of establishing a legal position based on indirect as well as direct evidence and on inferences drawn from the established facts that might be of sufficient strength to support a conclusion that the delivery of *all* the cargo of rice placed on board for Kobe was "more likely or probable than its non-occurrence." However, we do not believe that a probability of failure to load at Stockton 4,195 bags of rice, found short at Kobe, Japan, may be inferred from the evidence upon which you rely. This evidence consisting principally of the details furnished by the Senko Freight Clerk & Co., and the location of the rice, as loaded in the several holds of the vessel, is not acceptable as compelling a conclusion contrary to that reached in

previous considerations of this matter, because of the deficiencies which we have described above.

It would seem that while the propriety of a claim such as the present one may be established by circumstantial evidence, we are of the opinion that the evidence which you furnish is insufficient to overcome the *prima facie* case in favor of the Government. But since our proceedings obviously are not comparable to judicial proceedings, we do not settle claims and make determinations subject to a "preponderance of the evidence," except as that term may be equated with clear and convincing proof. Such proof must be plain and convincing beyond reasonable controversy that the Army and the records prepared at the port of origin, Stockton, are in error.

The evidence you have submitted does not, in our opinion, remove all reasonable doubt as to the propriety of reversing the action taken by the Army to recover the value of United States property almost 16 years ago. Because of this doubt we decline now to substitute our judgment for that of the Army officials who were then in the best position to investigate and determine the rights and obligations of the parties. Our declination is predicated on a further review of the available record, which we feel supports the setoff made by the Army in 1953, and on the inadequacy of your theory of probabilities.

In this respect we find support in the case of *Hongkong & Shanghai Banking Corp.* v. *United States*, 133 Ct. Cl. 753, 137 F. Supp. 425, 427 (1956), where the United States Court of Claims said: "We cannot hold the Government liable on the theory of probabilities. We must have some proof either direct or circumstantial, to show not what the Army probably did, but what it actually did." And, as said in a later case involving the Hongkong & Shanghai Banking Corp., the "plaintiff has failed to remove this case from the realm of conjecture, and for such failure its case must fail." 135 Ct. Cl. 722, 145 F. Supp. 631 (1956).

Accordingly, the settlement certificate of April 26, 1962, disallowing your claim for $21,830.40, is sustained. The vessel's log books and the Senko tallies are returned herewith, as requested.

[B–164455]

Witnesses—Administrative Proceedings—Transportation and Per Diem Allowances

Individuals who are not members of the uniformed services or Federal civilian employees may be called as witnesses in adverse administrative proceedings whether in behalf of the Government or in behalf of a member or employee and paid transportation and per diem allowances as "individuals serving without pay" within the scope of 5 U.S.C. 5703, if the presiding hearing officer determines that the member or employee reasonably has shown that the testimony of the

witness is substantial, material, and necessary, and that an affidavit would not be adequate. The Joint Travel Regulations may be amended accordingly, and any inconsistent prior decisions will no longer be followed.

To the Secretary of the Army, March 24, 1969:

Reference is made to letter dated January 13, 1969, from the Assistant Secretary of the Army (Manpower & Reserve Affairs), requesting a decision as to whether the Joint Travel Regulations may be amended to provide for payment of transportation and per diem allowances to individuals, not members of the uniformed services (member) or civilian employees (employee) of the Federal Government, when called as witnesses in behalf of the Government or in behalf of a member or employee in administrative proceedings such as civilian employee grievance appeal hearings within a department and administrative discharge proceedings against military personnel. The request was assigned PDTATAC Control No. 69–1 by the Per Diem, Travel and Transportation Allowance Committee.

While the Assistant Secretary's letter does not specifically so state, we understand that the employee grievance appeal hearings referred to in such letter are confined to hearings held in adverse action type cases, such as discharges, suspensions, demotions, etc., since such letter refers to "a civilian employee against whom administrative proceedings are directed" and an "employe or member subject to an adverse action." Our decision, therefore, is predicated upon such understanding.

The Assistant Secretary points out that in our decision of August 26, 1968, 48 Comp. Gen. 110, we expressed the view that while the law may not grant to agencies holding certain types of hearings the power of subpoena, nevertheless where the attendance of Government witnesses at such hearings is considered to be necessary to protect the Government, the appropriations of the Federal agency involved reasonably may be regarded as available for the payment of expenses of travel—including expenses of lodging and subsistence—of witnesses attending such hearings. He states that it appears, however, that our decision would authorize payment of travel expenses only of witnesses for the Government, and not of witnesses who testify for the military member or civilian employee against whom the administrative proceedings are directed. He expresses the view that an employee or military member subject to an adverse action could claim that this is discriminatory, comparable to giving a court in a criminal proceeding the authority to subpoena witnesses to testify for the Government and denying the court the authority to subpoena witnesses required by the defendant in his defense. For one thing—according to the Assistant Secretary—the employee or military member could claim that the Government is in a favored position since it could bring in a host

of live witnesses to support its case, but in contrast, the employee or military member would have to bear the expense of bringing in live witnesses in his behalf. If he did so, the Assistant Secretary feels that their testimony might be challenged on the ground that he paid them to appear; on the other hand, according to the Assistant Secretary, if the employee or member could not afford the cost, he could claim that being forced to rely on the use of affidavits prejudices his presentation of the case because affidavits are not as persuasive as testimony in person.

The Assistant Secretary's letter continues:

It would seem to be in the interest of the Government, in many instances, to have authority to pay the travel and transportation expenses not only of witnesses who will testify for the Government but also of those witnesses who will testify in behalf of the military member or civilian employee against whom administrative action is being taken. However, the view expressed in the aforementioned decision appears to preclude application of the decision to non-Government individuals when called as witnesses to testify in behalf of the military member or civilian employee. Yet, the construction in the decision placed on the language "persons serving without compensation" (now reading "an individual serving without pay") in 5 U.S.C. 5703 could seemingly be applied to non-Government individuals who are called to testify in behalf of such member or employee.

Since an element of doubt exists as to the legality of the proposed revision set forth herein, your decision is requested as to whether such a revision would be within the intent and scope of 5 U.S.C. 5703.

As indicated in the Assistant Secretary's letter our decision of August 26, 1968, would authorize payment of travel expenses—including lodging and subsistence—only of (non-Government employee) witnesses for the Government and not of (non-Government employee) witnesses who testify for the civilian employees or military member against whom the administrative proceedings are directed or who are the moving parties therein. We would point out, however, that prior to our decision of August 26, 1968, 48 Comp. Gen. 110, we held in 40 Comp. Gen. 226 that—quoting the syllabus:

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

We pointed out in such decision that:

* * * The Government's concern in the matter is to reach sound and tenable decisions in these cases; and therefore it is equally in the Government's interest to grant clearance in proper cases to skilled employees working for Government contractors on national defense contracts as to deny clearance when it is established that their continued access to classified material would be contrary to our national security or interest. * * *

In administrative proceedings directed against a civilian employee or member of the uniformed service, in adverse action type cases, the Government has an interest similar to that which was present in the situation considered in 40 Comp. Gen. 226. Here, as in that case, the interest of the Government is more than just a desire to reach a fair and equitable decision. Adverse actions directed against competent employees or members of the uniformed services, if unfounded, could result in impairment of the work of the activity concerned, such as might be involved in recruiting and training of new personnel or detailing other personnel to unfamiliar work, and result in greater financial costs to the agency.

The last-mentioned decision (40 Comp. Gen. 226) included within its scope the payment of travel expenses to non-Government employee witnesses called by the Department of Defense (in connection with its industrial personnel security clearance program) to testify on behalf of the person involved in the hearing, as well as to those witnesses called to testify on behalf of the Government.

A reading of 40 Comp. Gen. 226 discloses that we were advised as follows concerning the calling of witnesses to testify on behalf of the person involved in the hearings:

> * * * While under paragraph IV.D.4 of the directive, the department counsel and the Chairman of the Field Board *would have discretionary power to call witnesses for an applicant, that paragraph limits the discretion to cases in which the applicant can show that he needs specific assistance and that the desired witness is necessary for a proper disposition of the case.* It is stated in the letter of September 29, 1960, that even when such assistance would be provided, it is expected that "with possibly very rare exception, expenses of producing the witness would be paid by the applicant." * * * [Italics supplied.]

We feel that—as in the case of hearings held in the industrial personnel security program—in hearings involving adverse action type cases the presiding hearing officer should be given the discretionary authority to call witnesses for an employee or member, but that his discretion should be limited to cases in which the member or employee reasonably can show that the testimony of the witness is substantial, material and necessary for a proper disposition of the case, and in which the presiding hearing officer determines that an affidavit from the desired witness will not adequately accomplish the same objective.

If in an agency administrative hearing of the type under discussion, the presiding hearing officer should determine that the testimony of a person not employed by the Government is necessary for a proper disposition of the case, and the witness is called by the presiding hearing officer, it is our view that the witness may be considered as an "individual serving without pay" within the scope of 5 U.S.C. 5703, even though the witness is, in effect, to testify on behalf of the employee or member involved.

Accordingly, we would not object to your Department amending the

Joint Travel Regulations in the manner proposed, provided, of course, that the proposed revision conforms to what is set forth herein.

The question presented is answered accordingly.

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

[B-166190]

Bids—Unsigned—Evidence of Bidder's Intent to be Bound

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

To the Interstate Manufacturing Company, March 25, 1969:

Reference is made to your telegram of February 14, 1969, and subsequent correspondence in which you protest against any award to Trenton Textile Engineering and Manufacturing Company, Inc., under invitation for bids (IFB) No. DSA-100-69-B-1145, issued on January 22, 1969, by the Defense Personnel Support Center, Philadelphia, Pennsylvania. Trenton Textile submitted the lowest bid of the nine companies responding to the invitation.

The lowest bid opened was one bearing the name "Trenton Textile Eng. & Mfg. Co., Inc." typed in box 17 of the first page of the bid form, headed "Offeror Name & Address," and the name "Mario R. D'Antonio, President" typed in box 18, headed "Name and Title of Person Authorized to Sign Offer." Block 19, "Signature," was blank and no written signature appeared elsewhere on the bid form. This bid, however, was removed at the bid opening from a sealed envelope (which has been preserved with the bid) addressed to the procuring activity, bearing in the upper left hand corner the name "Trenton Textile Engineering & Manufacturing Co., Inc." and its address, and in the lower left hand corner the words "Re: IFB DSA 100-69-B-1145 Opening Date: 11 February 1969 Closing Time: 2:00 p.m. EST."

Across the face of the envelope there appeared the following:

Time Rec'd	11:00
Date Rec'd	11 Feb—69
Rec'd By	Amy Solipaca
Delivered By	M. R. D'Antonio

The time, date, and names were handwritten on the lines included on what appears to have been a rubber stamp impression of the rest of the quoted inscription. The names are established as handwritten signatures by the statement of Mrs. Solipaca, who was a Procurement Services Representative at the Center, on duty at the time shown at the place designated in the solicitation for receipt of hand-carried bids—namely, "Receptionist's Desk, 2nd Floor, Bldg. 12." Her statement is that the sealed envelope was handed to her by Mr. D'Antonio as a bid, that she stamped it as quoted above, filled in the hour and date and her signature, had Mr. D'Antonio sign his name, and deposited the envelope in the bid box.

Solicitation Instructions and Conditions No. 2(b) provided as follows:

> Each offeror shall furnish the information required by the solicitation. The offeror shall sign the solicitation and print or type his name on the Schedule and each Continuation Sheet thereof on which he makes an entry. Erasures or other changes must be initialed by the person signing the offer. Offers signed by an agent are to be accompanied by evidence of his authority unless such evidence has been previously furnished to the issuing office.

You maintain that Mr. D'Antonio's failure to sign the offer should require rejection of the company's bid as a material deviation rendering the offer nonresponsive.

Trenton Textile maintains that the personal delivery of its bid by Mr. D'Antonio to the procuring activity and his signature on the bid envelope, as witnessed by the installation's Procurement Services Representative, constitutes sufficient evidence under Armed Services Procurement Regulation (ASPR) 2-405(iii)(B), quoted as follows, to allow the company to correct its failure to sign the bid:

> *Minor Informalities or Irregularities in Bids.* A minor informality or irregularity is one which is merely a matter of form or is some immaterial variation from the exact requirements of the invitation for bids, having no effect or merely a trivial or negligible effect on price, and no effect on quality, quantity, or delivery of the supplies or performance of the services being procured, and the correction or waiver of which would not affect the relative standing of, or be otherwise prejudicial to, bidder. The contracting officer shall either give to the bidder an opportunity to cure any deficiency resulting from a minor informality or irregularity in a bid, or, waive any such deficiency where it is to the advantage of the Government. Examples of minor informalities or irregularities include:
>
> * * * * * * *
>
> (iii) failure of a bidder to sign his bid, but only if—
>
> (A) the firm submitting the bid has formally adopted or authorized the execution of documents by typewritten, printed, or rubber stamped signature and submits evidence of such authorization and the bid carries such a signature, or
>
> (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;* * * *, [Italic supplied.]

The above cited administrative 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 accompanied by some documentary evidence showing a clear intent to submit a binding bid, so that a valid contract would be effected upon the Government's acceptance of the offer without resort to the bidder for confirmation of his intention. 17 Comp. Gen. 497; 36 *id.* 523. Additionally, we have implied that there may be circumstances where the act of the individual submitting the bid unaccompanied by documentary evidence would constitute an adequate indication of an intent to offer a firm bid. B–148235, March 23, 1962. In the subject case we believe Mr. D'Antonio's signature on the bid envelope constitutes sufficient documentary evidence under ASPR 2–405(iii)(B) to allow consideration of the company's bid. Since Mr. D'Antonio was identified in block 18 as the corporate official authorized to sign Trenton's bid, his personal delivery of the bid to the procuring activity, together with his signature on the envelope, would appear to be adequate evidence to preclude any possibility of the corporation being able to repudiate the bid or to avoid liability on the contract consummated by its acceptance.

With respect to the recent ruling of the Court of Appeals in *Superior Oil Company et al.* v. *Udall and Union Oil Company of California*, C.A. D.C. Nos. 22,192 and 22,194, concerning the effect of the Union Oil Company's failure to sign its bid, we believe this decision is inapposite to the circumstances of the instant case. In the Superior Oil case the court held that an Interior Department procurement regulation governing the sale in question and requiring the manual signing of all bids prevented consideration of the company's offer, notwithstanding the presence of other evidence indicating Union Oil's intention to submit a firm bid. The court rejected the Secretary of Interior's argument that certain decisions of the Federal courts and our Office permitted consideration of such evidence, on the ground that the departmental regulation did not contain a provision authorizing admission of such data, unlike the regulations governing the cases cited by the Secretary. Furthermore, the principal thesis of the court's decision appears to have been that the contracting officer's rejection of the unsigned bid was final and not subject to review by the Secretary, and the Government's deposit and retention of the next bidder's bid deposit committed the Government to award to that bidder. In the present case the contracting officer has not rejected the Trenton bid, but proposes to waive the defect and accept it.

Since in our view the facts fall within the terms of ASPR 2–405 (iii)(B), we find no basis to disapprove the contracting officer's proposed action, your protest must be denied.

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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 be made to bidder found low upon reevaluation of bids. Prompt notices of award will avoid future similar occurrences---------- 504

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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

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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

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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

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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

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),

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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

Propriety

Criteria of evaluation

Under invitation for maximum of 3,000 floodlights 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 if Govt., evaluation formula established accurate means of evaluating bids and not unbalanced bidding situation 555

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Qualified

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 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

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 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

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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

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Unsigned

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

BUY AMERICAN ACT

Applicability

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

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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

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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

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Erroneous awards

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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

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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

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To unsuccessful bidders

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 aviod future similar occurrences----- 504

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Buy American Act

Foreign products

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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

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Federal supply schedule

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

Multi-year procurements

Appropriation 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 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

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

Awards

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

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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

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

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 offer." Therefore, all offerors within competitive range should be afforded further opportunity for negotiations 536

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

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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

Propriety

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, 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

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

CONTRACTS—Cont. Page

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

Price adjustment

Changes

Delivery, performance, etc., changes

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

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 frequen-

CONTRACTS—Cont. Page

Requirements—Cont.

Estimated amounts not warranty—Cont.

cies 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

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

Multi-year 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

Specifications

Conformability of equipment, etc., offered

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

Deviations

Delivery provisions

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

CONTRACTS—Cont. Page
Specifications—Cont.
Deviations—Cont.
Delivery provisions—Cont.
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

Failure to furnish something required
Addenda acknowledgment
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

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

CONTRACTS—Cont. Page

Specifications—Cont.

Restrictive—Cont.

Particular make—Cont.

"Or equal" product acceptability—Cont.

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

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

COURTS

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)**

COURTS—Cont. Page

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

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

CUSTOMS

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

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

DELEGATION OF AUTHORITY—Cont. Page

Between agencies—Cont.

Automatic data processing equipment—Cont.

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

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

Christian doctrine

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

EQUAL EMPLOYMENT OPPORTUNITY

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 Page

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, 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

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 blankbook 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

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

EVIDENCE—Cont. Page

Presumptions

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

FEDERAL SUPPLY SCHEDULE

Contracts. (*See* Contracts, Federal supply schedule)

FUNDS

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 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

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

GENERAL ACCOUNTING OFFICE Page

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

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 critically 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 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

GRATUITIES—Cont. Page
Reenlistment bonus—Cont.
Critical military skills—Cont.
Training leading to a commission—Cont.
Reenlistment prior to approval of training—Cont.
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 installments of bonus 624

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

LEAVES OF ABSENCE
Annual
Transfers
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

LEAVES OF ABSENCE—Cont. Page

Annual—Cont.

Transfers—Cont.

Different leave systems—Cont.

Same agency—Cont.

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 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

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

Excess leave accrual

"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

LEAVES OF ABSENCE—Cont. Page
Military personnel—Cont.
Excess leave accrual—Cont.
"Continuous period" interruptions—Cont.
Hospitalization

The hostile fire pay authorized in 37 U.S.C. 310(a) for members of uniformed services who are hospitalized as result of wound or injury from hostile action continuing for as long as 3 months after month in which wound or injury occurred, period of hospitalization may be included as qualifying time towards "continuous period of at least 120 days" for accruing excess leave in area in which member is entitled to special pay 546

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 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 546

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

LEAVES OF ABSENCE—Cont. Page
Military personnel—Cont.
Excess leave accrual—Cont.
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

Hospitalization
During period of excess leave

The hostile fire pay authorized in 37 U.S.C. 310(a) for members of uniformed services who are hospitalized as result of wound or injury from hostile action continuing for as long as 3 months after month in which wound or injury occurred, period of hospitalization may be included as qualifying time towards "continuous period of at least 120 days" for accruing excess leave in area in which member is entitled to special pay 546

Payments for unused leave on discharge, etc.
Enlistment extension, discharge, reenlistment, etc.
Combination of excess leave

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 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 546

LEAVES OF ABSENCE—Cont. Page

Sick

Transfers

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

Annual leave. (*See* Leaves of Absence, annual, transfers, different leave systems)

MARITIME MATTERS

Vessels

Crews. (*See* Vessels, crews)

MEDICAL TREATMENT

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

MILITARY PERSONNEL Page

Dislocation allowance

Hospital transfer. (*See* Transportation, dependents, military personnel, dislocation allowance, hospital transfers)

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

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

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

Family separation allowances. (*See* Family Allowances, separation)

Gratuities

Reenlistment bonus. (*See* Gratuities, reenlistment bonus)

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

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

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

Quarters allowance. (*See* Quarters Allowance)

MILITARY PERSONNEL—Cont. Page

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

Reservists

Training duty

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.

MILITARY PERSONNEL—Cont. Page
Reservists—Cont.
Training duty—Cont.
Per diem—Cont.

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

Permanent change of station allowances

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

Retired
Active duty after retirement
Travel and transportation allowances

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

Retired pay. ☐ (*See* Pay, retired)
Training duty station
Status for benefits entitlement
Reservists

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

MILITARY PERSONNEL—Cont. Page

Training duty station—Cont.

Status for benefits entitlement—Cont.

Reservists—Cont.

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

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

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

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 may be

MILITARY PERSONNEL—Cont. Page

Transfers—Cont.

Hospital transfer status—Cont.

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

Travel expenses. (*See* **Travel Expenses, military personnel**)

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

OFFICERS AND EMPLOYEES

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

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

Death or injury

Disability compensation, etc.

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

Dependents

Transportation. (*See* **Transportation, dependents**)

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 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

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

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

OFFICERS AND EMPLOYEES—Cont. Page

Postal service. (*See* **Post Office Department, employees**)

Promotions

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

Removals, suspensions, etc.

Compensation. (*See* **Compensation, removals, suspensions, etc.**)

Training

Overtime. (*See* **Compensation, overtime, training courses**)

Transfers

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

Lease termination

An employee who in connection with transfer of official duty station terminates the lease on his apartment at old duty station at expiration of his lease and is required to pay for painting, cleaning, repair of blinds and stock transfer is not entitled to reimbursement for these expenses, 5 U.S.C. 5724a only authorizing reimbursement of those expenses that result from termination of unexpired lease and not expenses chargeable at expiration of lease 469

PAY

Retainer pay. (*See* **Pay, retired, fleet reservists**)

Retired

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

PAY—Cont. Page
Retired—Cont.
Advancement on retired list—Cont.
Recomputation
Rates applicable on retirement *v.* effect of May 20, 1958 act

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

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

POST OFFICE DEPARTMENT
Employees
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 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

PROPERTY
Public
Damage, loss, etc.
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

PROPERTY—Cont. Page
Public—Cont.
Damage, loss, etc.—Cont.
Shortages—Cont.
Evidence—Cont.

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

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

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

QUARTERS—Cont. Page
Failure to furnish—Cont.
Military personnel without dependents—Cont.
Dislocation allowance—Cont.

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

QUARTERS ALLOWANCE
Entitlement
Training duty periods
Reporting from home

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

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

REVOLVING, FUNDS
(*See* Funds, revolving)

SET-OFF
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

SET-OFF—Cont. Page
Transportation—Cont.
Property damage, etc.—Cont.
Reclaim of set-off—Cont.
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

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

SUBSISTENCE
Per diem
Military personnel
Retired members
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

Training duty periods
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

SUBSISTENCE—Cont. Page
Per diem—Cont.
Military personnel—Cont.
Training duty periods—Cont.
Reservists—Cont.
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 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

SUBSISTENCE—Cont. Page

Per diem—Cont.

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

TRANSPORTATION

Damage, loss, etc., of public property. (*See* **Property, public, damage, loss, etc.**)

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

Military personnel

Dislocation allowance

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

Household effects

Commutation

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

TRANSPORTATION—Cont. Page

Household effects—Cont.

Commutation—Cont.

Weight evidence—Cont.

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

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 landing 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

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

TRAVEL EXPENSES Page

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

Military personnel

Reservists

Training

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 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

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

TRAVEL EXPENSES—Cont. Page

Witnesses

Administrative proceedings

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UNIFORMS

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

VESSELS

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-

VESSELS—Cont. Page
Crews—Cont.
Two-crew nuclear-powered submarines—Cont.
Dislocation allowance—Cont.
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

WARRANTIES
Contracts. (*See* Contracts, warranties)

WITNESSES
Administrative proceedings
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

WORDS AND PHRASES
"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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