Decisions of The Comptroller General of the United States

VOLUME 48 Pages 377 to 456

DECEMBER 1968

WITH

INDEX DIGEST

OCTOBER, NOVEMBER, DECEMBER 1968

UNITED STATES

GENERAL ACCOUNTING OFFICE

PCN 45300093600

U.S. GOVERNMENT PRINTING OFFICE
WASHINGTON : 1969

For sale by the Superintendent of Documents, U.S. Government Printing Office, Washington, D.C. 20402.
Price 25 cents (single copy); subscription price; $2.25 a year: $1 additional for foreign mailing.

COMPTROLLER GENERAL OF THE UNITED STATES

Elmer B. Staats

ASSISTANT COMPTROLLER GENERAL OF THE UNITED STATES

Frank H. Weitzel

GENERAL COUNSEL

Robert F. Keller

DEPUTY GENERAL COUNSEL

J. Edward Welch

ASSOCIATE GENERAL COUNSELS

John T. Burns

Ralph E. Ramsey

TABLE OF DECISION NUMBERS

		Page
B–123227	Dec. 9	387
B–159950	Dec. 24	439
B–164581	Dec. 27	449
B–164830	Dec. 5	381
B–164893	Dec. 23	420
B–164960	Dec. 12	398
B–165073	Dec. 13	408
B–165276	Dec. 11	390
B–165321	Dec. 12	403
B–165409	Dec. 26	441
B–165411	Dec. 16	413
B–165418	Dec. 11	395
B–165421	Dec. 23	430
B–165435	Dec. 23	435
B–165451	Dec. 17	416
B–165484	Dec. 3	377
B–165532	Dec. 16	415
B–165538	Dec. 12	407
B–165564	Dec. 26	447
B–165611	Dec. 19	419
B–165634	Dec. 5	384
B–165742	Dec. 23	437

Cite Decisions as 48 Comp. Gen.—.

Uniform pagination. The page numbers in the pamphlet are identical to those in the permanent bound volume.

[B-165484]

Military Personnel—Medically Unfit—Status

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

Pay—Active Duty—Medically Unfit Personnel

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

Pay—Retired—Medically Unfit Personnel at Time of Induction

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

To the Secretary of Defense, December 3, 1968:

Reference is made to letter of October 17, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to the right to pay and allowances of persons inducted into the Armed Forces pursuant to the Universal Military Training and Service Act, 50 U.S.C. App. 451, who, after having performed active duty for some time, are found to have been medically unfit for induction. The questions (which do not relate to persons judicially determined to be mentally incompetent prior to induction), together with a discussion relating to them, are set forth in Department of Defense Military Pay and Allowance Committee Action No. 423.

The Committee Action states that the questions presented primarily affect the Army but would have equal application to all services, and that each case involves a determination by the proper military authorities that the person inducted should not have been inducted into the Armed Forces because he was medically unfit for

military service, such condition existing at the time of entry into the service. It is indicated that persons who do not meet the medical fitness standards of the Army, but are in fact inducted, are being released unless their induction was procured by fraud on their part or unless they meet the medical standards for retention and sign a statement acknowledging eligibility for release from military control but desire retention.

The Committee Action states that this action by the Army is based on the position that generally an induction in violation of statute or regulation is void, and the individual concerned does not acquire a military status thereby. It says that several situations have been found to exist: the member may have a dormant disease which is not discovered until some time after induction; the member may have in fact been rejected by medical authorities but through administrative error he was in fact inducted; or medical authorities may have overlooked the defect even though proper medical procedures were followed.

The Committee Action refers to the case of *United States* v. *Hall*, 37 CMR 352 (1967), in which it was held that Hall, who had refused to be inducted into the Army in November 1965, had never acquired a military status even though he had worn a military uniform and had drawn pay and allowances, and that therefore he could not be tried by court-martial for failure to obey an order. The court stated at page 355 that:

> The teaching of these cases and the decisions cited therein is that, in order to have military jurisdiction attach, there must be some sort of compliance with the induction ceremony required under the Act and regulations. A failure to comply with the formalities of this entry into service or other irregularities therein may well be cured by accused's subsequent conduct and tacit submission to military authority. *United States* v. *Schoenemann* (14 USCMA 479, 34 CMR 259); *United States* v. *Rodriguez* (2 USCMA 101, 6 CMR 101). But where an accused refuses to submit to induction; in fact does not participate in any ceremony at all; and continually thereafter protests the attempt nonetheless to subject him to military service, no jurisdiction over him can be held to have attached.

See *Billings* v. *Truesdell*, 321 U.S. 542 (1944).

The Committee Action states that the Army's policy in regard to the release of inductees, who were not medically fit at the time of induction, is based on the ruling of the United States Court of Military Appeals in the *Hall* case, noting, however, that the refusal to take an oath of allegiance at the time of induction was within Hall's control, whereas the induction of an individual not medically fit for induction is a matter beyond the control of the individual concerned in most instances.

Also noted was our decision of May 4, 1960, 39 Comp. Gen. 742, holding that when, after induction, an inductee is administratively

determined by service medical authorities to be mentally incompetent and a determination is also made that such defect existed at the time of induction, the inductee remains a *member* of the uniformed services until he is separated from military control.

In addition the Committee Action notes that sections 1201 and 1203 of Title 10, United States Code, in providing for the retirement or separation of members of the Armed Forces for physical disability, provide that a member must be *entitled to basic pay* before a determination by the Secretary concerned can be made that he is unfit to perform the duties of his office, rank or rating because of physical disability incurred while *entitled to basic pay*.

It should be noted that the *Hall* case involved a person who the court held was not lawfully inducted into the military service and who never cured that irregularity by subsequent conduct and submission to military authority. Hall refused to be inducted even though he "wore the uniform, received pay, obtained an allotment for his wife, and performed some duties." In the cases here involved the selectees submitted themselves for induction into the Armed Forces without protest and presumably perform military training and service without protest against the lawfulness of their induction.

While certain provisions of law prohibit the enlistment of deserters and persons who are underage, insane, intoxicated, or convicted of a felony, and restrict certain enlistments to persons qualified by service regulations therefor and authorize the enlistment of "able-bodied" persons in the Regular Army and Regular Air Force (see 10 U.S.C. 3253, 3254, 3256, 5532, 8253, 8254, 8256), we have found no statute—and none has been brought to our attention—which affirmatively prohibits the induction into the Armed Forces of persons not physically and mentally qualified in all respects for training and service therein.

No person is authorized to determine his physical and mental qualifications for induction into the Armed Forces for himself. On the contrary the Government has established facilities, personnel, and procedures for making such determinations, and the persons selected for induction are required in most cases to accept such determinations.

Section 454(a) of Title 50, Appendix, United States Code, provides that no person shall be inducted into the Armed Forces for training and service until his acceptability in all respects, including his physical and mental fitness, has been satisfactorily determined under standards prescribed by the Secretary of Defense, and section 456(h) authorizes the President, under such rules and regulations as he may prescribe, to provide for the deferment from training

and service in the Armed Forces "* * * (2) of any or all categories of those persons found to be physically, mentally, or morally deficient or defective."

There thus appears to be not only an absence of an affirmative statutory prohibition of the induction of persons on the basis of physical or mental qualifications generally, but an indication that physical or mental condition may constitute a basis for deferment from induction rather than an absolute disqualification.

As a general proposition a person directed to report for induction into the Armed Forces may not unilaterally determine that he is physically or mentally disqualified for induction so as to lawfully refuse to be inducted, nor may a person inducted discharge himself from the Armed Forces even though he may have strong reason to believe that he is not physically or mentally qualified for service in the Armed Forces. *In re Grimley*, 137 U.S. 147, 153 (1890); *In re Morrissey*, 137 U.S. 157 (1890). See also *United States* v. *Prue*, 240 F. Supp. 390 (1965); and *Mimmack* v. *United States*, 97 U.S. 426, 432 (1878).

Accordingly, it is our view that the administrative failure to discover that the mental or physical condition of a person inducted into the Armed Forces was such as would warrant rejection for military service, does not deprive him of the right to military pay and allowances or of the status of being *entitled to basic pay.*

The first question is whether the medically unfit persons inducted into the service are entitled to receive full pay and allowances from the time of entry on active duty through the date the determination regarding their physical fitness is made or through the date they are in fact released from military control. Since their induction is not prohibited by law and they are accepted for induction into an armed service and perform training and service therein, it is our view that they are entitled to military pay and allowances through the date they are released from military control.

The second question is whether they are entitled to be paid any unpaid pay and allowances which accrued prior to the date of determination of medical unfitness or release from military control, but not claimed until later. That question is answered by saying that they are entitled to receive the unpaid pay and allowances which accrued prior to and including the date of release from military control.

Questions 3 and 4 are dependent upon negative answers to questions 1 and 2 and therefore require no answer. Question 5 is whether transportation in kind or a monetary allowance in lieu thereof may be furnished to their homes of record upon release from military control. This question is answered in the affirmative.

Question 6 is whether an individual who, at the time of induction, neither met the procurement medical fitness standards nor the retention

medical fitness standards and whose condition has not been aggravated by active service may be entitled to disability severance or retired pay on separation from the service. Under the provisions of 10 U.S.C. 1201 and 1203, for the purposes of disability retirement pay and disability severance pay, the physical disability must be incurred while entitled to basic pay. Since the disability involved in the cases described in question 6 would not be incurred while entitled to basic pay, but would be incurred prior to entrance into the service, question 6 is answered in the negative.

Question 7 is whether an individual described in question 6 but whose condition has been aggravated by active service or who acquired a new or additional unfitting condition is entitled to disability severance or retired pay on separation from the service. It is our opinion that this question should be answered in the affirmative as to those individuals who otherwise meet the requirements of law, including the requisite degree or extent of aggravation of the preexisting disability.

Question 8 is whether an individual who did not meet procurement medical fitness standards at the time of induction, but did then meet the retention fitness standards and who acquired an unfitting medical condition after induction, would be entitled to disability severance or retired pay on separation from the service. This question is answered in the affirmative provided, of course, he meets all of the other qualifications therefor.

[B-164830]

Bids—Aggregate *v.* Separable Items, Prices, Etc.—Low on One Item is no Basis for Aggregate Award

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

To the Building Maintenance Corporation, December 5, 1968:

Reference is made to your letter of July 12, 1968, and subsequent correspondence, in which you protested against an award made to Cuyahoga Cleaning Contractors, Inc., Cleveland, Ohio, under Invitation for Bids (IFB) No. GS-05-BB-7715, issued by the General Services Administration (GSA), Public Buildings Service, Region 5, Chicago, Illinois, for window washing and wall cleaning services for two

Government buildings in Cleveland, Ohio, during the period July 1968, through June 1969.

Item 1 of the IFB covered the New Federal Office Building and was divided into three subitems. Item 1(a) called for a price per cleaning for all windows (except lobby windows) to be cleaned not oftener than each 60 days; Item 1(b) called for a price per cleaning for the stainless steel curtain wall, to be required only at the discretion of the Government; and Item 1(c) called for a price for cleaning lobby windows, as requested by the Buildings Manager. Following the enumeration of those items the following statement appeared:

Note: *The Government reserves the right to make award on any or all of the sub-items for Item 1 covering the New Federal Office Building, whichever is in its best interests.* [Italic supplied.]

Item 2 provided for bids on cleaning of windows of the Federal Building at Public Square and Superior Avenue, as follows:

Item 2 (a) All exterior windows, excluding smokestack windows, to be washed *every two months.* (Approximately 590 windows, contractor to verify count.)
Price Per Cleaning: $_____ _____*

Item 2 (b) Four outside windows in smokestack to be washed *only once,* approximately in December 1968, under this contract.
Price per Cleaning: $_____*

Note: *Award on Item 2 will be made in the aggregate for (a) and (b) to the low qualified bidder.* [Italic supplied.]

**Award shall be made in the aggregate for Items 1 and 2, to the low, qualified bidder or an individual item basis, whichever is in the best interests of the Government.* [Italic supplied.]

The bids of Cuyahoga Cleaning Contractors, Inc., and Building Maintenance Corporation on Item 1, as evaluated by GSA, were as follows:

	Cuyahoga			BMC		
Item	Price per Cleaning	Freq.	Total	Price per Cleaning	Freq.	Total
1(a)	$3,100	6	$18,600	$12,288	6	$73,728
1(b)	42,000	1	42,000	22,800	1	22,800
1(c)	95	1	95	333	1	333
			$60,695			$96,861

Award was made to Cuyahoga Cleaning Contractors, Inc., on all of Item 1. No award was made on Item 2.

You maintain that the note following Item 1 required evaluation and award of the subitems of Item 1 on an individual basis and since your bid on subitem 1(b) was nearly $20,000 lower than Cuyahoga's you contend that award on this requirement should have been made to your company. Your interpretation is based upon the differing lan-

guage utilized in specifying methods of award for Items 1 and 2. Since the note appended to Item 2 clearly stipulated that Item 2 would be awarded in the aggregate and as this same language was not incorporated into the note attached to Item 1 you maintain that individual awards were contemplated for the subitems of Item 1.

GSA maintains that it intended a single award for Item 1 and that the language employed in the note appended to the item was used to determine the individual prices of the requested services so that if a lack of sufficient funds became apparent, the Government could award a contract for only those subitems for which funds were available. GSA also maintains that the specifications applicable to Item 1 contemplate award to only one contractor, since no mention was made of any obligation to coordinate use of the Government-owned power-operated scaffold (use of which would be permitted for the contract work) for the differing work requirements contemplated by subitems 1(a) and 1(b). GSA also has advised us that it would be impractical to have more than one contractor performing window cleaning and the stainless steel cleaning, since the windows must be cleaned contemporaneously with the stainless steel cleaning in order to prevent re-soiling of the windows from the steel washing.

In determining whether an invitation provides for contracting on an aggregate or individual basis we have held that where the invitation stated that "award will be made on Items One (1) and Two (2), or Items Two (2) and Three (3)" that the use of the word "award" would justify a belief by bidders that an aggregate award was to be accomplished. B–143263, July 28, 1960; see also B–149085, August 28, 1962. If such an interpretation is inconsistent with other provisions of the invitation, this presumption is rebutted. B–144281, November 4, 1960. In B–145859, May 22, 1961, it was held that the use of "award," "the lowest bidder" and "the contract" in the bidding schedule required the conclusion that a single contract was intended, notwithstanding the inclusion of a standard award provision permitting acceptance or rejection of any or all items of any bid.

Under the general specifications applicable to Item 1 of the subject invitation, reference is made to "the contractor" and "the successful bidder." The use of this phraseology in conjunction with the stipulation contained in note 1 that "award" would be made, tends to indicate that a single contract was intended. In addition, we have been informally advised that a complete simultaneous cleaning of the walls and windows performed by the contractor under the contract awarded in this case required a total time of 80 days, from which it appears to be established that your suggestion that the walls could be cleaned between the bi-monthly window washings is not feasible.

In the circumstances, we find no basis for legal objection to the award made. We are advising GSA, however, that in future procurements prospective bidders should be more clearly advised as to the type and basis of award to be made, as well as of any fiscal limitations which may result in an award of less than the total number of items specified in the invitation.

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

[B-165634]

Bids—Buy American Act—Foreign Product Determination—Component *v.* End Product

The classification of each item to be furnished a Government construction contractor as a separate end product for evaluation under the Buy American Act and the award of a single contract is within the contemplation of paragraph 6-001 of the Armed Services Procurement Regulation, and a bid that would be a low domestic bid if the line items were considered components instead of end products is not a responsive bid. There is no simple answer to the question of what constitutes an end product—the award of a single contract is not determinative, but the purpose of the procurement playing a part, classifying items to be delivered to the job and assembled by another contractor as end items is a proper exercise of procurement judgment.

Bids—Buy American Act—Evaluation—General Agreement on Trades and Tariffs

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

To Johann J. Leppitsch, December 5, 1968:

The Office of the Chief of Engineers has forwarded, as you requested, your letters of October 14 and 29, 1968, protesting an award to Fairbanks Morse Inc., under invitation for bids DACW17-69-B-0010 covering equipment for a pumping station to be constructed at a site in Florida.

The bid schedule listed 10 items as follows:

1.	Vertical pump complete	3 ea.
2.	Diesel engine including auxiliaries	3 ea.
3.	Spare parts for diesel engines and auxiliaries	1 set
4.	Spare parts for vertical pumps	1 set
5.	Gear transmission unit	3 ea.
6.	First pump model test	1 Job
7.	Additional pump model test	1 ea.
8.	Backflow control gate	6 ea.
9.	Gate hoist	6 ea.
10.	Services of erection engineer	250 Man (Approx) Days

The schedule provided spaces for the bidders to quote unit and extended prices for each item and the total price of the extended unit prices. The above items are to be furnished for installation by another Government contractor constructing the pumping station.

The invitation provided that an evaluation factor would be added to or subtracted from each bid depending upon whether the pump efficiency proposed by the bidder was below or exceeded the base efficiency stated in the invitation. In addition, although the invitation provided that the award for the bid schedule would be made as a whole to one bidder, it further provided that each separate line item in the bid schedule would be considered a separate end product to be evaluated separately under the Buy American Act, 41 U.S.C. 10a–d. The invitation further described the end products and components as follows:

For Item 1—(Vertical pump complete).
A major component would be suction bell, propeller, propeller housing, discharge bowl (diffuser assembly), discharge elbow, or propeller shaft.
For Item 2—(Diesel engine including auxiliaries).
A major component would be cylinder block, crankshaft, piston, connecting rod assembly, turbocharger, scavenging blower, engine base plate, or injection system.
For Item 5—(Gear transmission unit).
A major component would be the housing, an individual gear and/or gear shaft assembly.
For Item 8—(Backflow control gate).
A major component would be a complete gate weldment or a flap weldment.
For Item 9—(Gate hoist).
A major component would be the electric motor, or complete hoist assembly excluding motor.

Also included in the invitation was a requirement for furnishing descriptive data including a print drawing showing the overall dimensions of major individual items and other dimensions necessary to show that the equipment to be furnished could be installed in the space provided. The descriptive data clause provided that if the information fails to show conformity to the specifications and other requirements of the invitation, the bid would be rejected.

Your company (TATT–KSB Co.) and Fairbanks Morse Inc. were the only bidders. The total bid from your company was $1,065,117. The total bid from Fairbanks Morse was $1,092,909. Based upon the pump efficiency evaluation factors, the total bids were evaluated at $1,046,917 and $1,079,609, respectively. The bid from your company stated that the three vertical pumps in item 1 would be of foreign origin completely. Thus, the contracting officer evaluated your price for item 1 in accordance with the Buy American evaluation procedures. Under such procedures, the total bid from your company was evaluated at $1,256,551.

You have protested against an award to Fairbanks Morse on two bases. First, you contend that the bid from Fairbanks Morse was nonresponsive to the invitation in that its drawing 16500948, accompany-

ing its bid as required, did not include all the dimensions required by the descriptive data clause. Second, you contend that the Buy American evaluation factor should not have been applied to the end product item designated as item 1 in the invitation since you believe that the complete schedule of items is the end product and that the individual items are merely components of the end product. In this latter respect, you refer to the fact that the invitation provides for an award in the entirety to a single bidder. You contend that this requirement and our decisions 46 Comp. Gen. 813 and 47 Comp. Gen. 21 require that the line items be considered as components rather than end products. The bid from your company is such that if the line items are considered as components, instead of end products, it would qualify as a domestic bid as to which no Buy American factor would apply and, as such, would be the low bid.

The contracting officer has advised that, although the Fairbanks Morse drawing cited by you does not show the overall width of the engine and gear reducer unit, information was provided in detail in Philadelphia Gear Corporation drawing 03–152–0022–4 and Fairbanks Morse drawing 50A8FB33 furnished by Fairbanks Morse with its bid. Accordingly, the information appears to have been furnished with the bid and the failure to include it in the cited drawing is, at the most, a deviation in form which is not a fatal defect in the bid. ASPR 2–405.

Paragraph 6–001 of the Armed Services Procurement Regulation (ASPR) defines "end products" as "articles, materials, and supplies, which are to be acquired for public use." The provision states further that "As to a given contract, the end products are the items to be delivered to the Government, as specified in the contract." Thus, ASPR contemplates the possibility that a single contract may cover more than one end product. Therefore, the fact that a single contract is to be awarded is not determinative of the question whether all items in the contract constitute the end product. The decisions cited by you involve situations where the items under consideration were completely assembled by the contractor prior to delivery to the Government. Hence, those cases are distinguishable from the immediate case since here the items are not to be assembled until after delivery at the jobsite and then by another contractor. The magnitude of the assembly after delivery at the site is demonstrated by the fact that the bid schedule estimates that approximately 250 man-days of erection engineer services will be required to supervise the installation.

There is no simple answer to the question of what constitutes an end product. The purpose of the procurement as demonstrated by the entire bid package has to play some part in arriving at an answer. Where, as here, a number of separate items are being procured which

eventually will be assembled and installed by another contractor who is responsible for constructing a pumping station using the equipment being procured under this invitation as Government-furnished items of property, we believe that it was a proper exercise of procurement judgment to classify each such item as an end product for purposes of the Buy American Act. This is unlike the situation considered in the cited decisions where the item being procured was to be delivered to the Government assembled, in which circumstances the total unit was held to be the end product acquired for public use.

We have also considered your letter of November 25, 1968, wherein you suggest that the proposed application of the Buy American Act to this procurement would be contrary to the intent of the General Agreement on Trades and Tariffs (GATT). Under competitive bidding procedures, bids are to be evaluated only on the basis of factors made known in advance to all bidders. Here, bidders were advised in the invitation that bids would be evaluated under the Buy American Act on a line item (end product) basis. Whether such evaluation conflicts with GATT is not for consideration in determining the lowest evaluated bid. We believe that such is true especially since bidders were not warned in the invitation to prepare their bids in the light of GATT and its possible impact on Buy American Act evaluation. The applicability of, or the alleged contravention of, GATT is not a matter of procurement responsibility, but rather is for consideration by the United States Tariff Commission under its statutory responsibilities.

In view of the foregoing, your protest is denied.

[B–123227]

Contracts—Labor Stipulations—Withholding Unpaid Wages, Overtime, Etc.—Mutuality of Obligation Requirement

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

To the Secretary of the Air Force, December 9, 1968:

Reference is made to the letter dated July 29, 1968, from your Deputy General Counsel transmitting a request for our decision on a matter involving the Contract Work Hours Standards Act, Public Law 87–581, 40 U.S.C. 327, *et seq.*

It appears that on August 19, 1964, the Air Force entered into contract No. AF08(602)3243 with the Bayshore Royal Hotel in Tampa, Florida, for the period September 1, 1964, through August 31, 1965; that on August 5, 1965, the Air Force entered into contract No. AF08-(602)3537 with the same hotel for the period September 1, 1965, through August 31, 1966; and that on August 9, 1966, the Air Force entered into contract No. AF08(602)0144 with the same hotel for the period September 1, 1966, through August 31, 1967. These contracts were for the billeting of active duty enlisted men stationed at MacDill Air Force Base and they all contained a clause requiring the contractor to comply with the Contract Work Hours Standards Act.

The Deputy General Counsel says that an Air Force investigation of this contractor in 1967 revealed that he had failed to comply with the Contract Work Hours Standards Act during the performance of the prior two contracts; that back wages due were calculated at $642.80 for the period of contract No. AF08(602)3243 and $1,345.56 for the period of contract No. AF08(602)3537; and that liquidated damages due the Government for these periods were calculated to be $1,930 and $4,600, respectively. On the basis of these findings, the contracting officer withheld the sum of $8,518.36 on the third contract, which is No. AF08(602)0144. The contractor questions the authority of the contracting officer to withhold on a current contract to collect sums due for Contract Work Hours Standards Act violations under contracts for prior years.

The Deputy General Counsel seeks our guidance as to the legality of this withholding.

Section 102 of the Contract Work Hours Standards Act, 40 U.S.C. 328, provides, in pertinent part, as follows:

(b) The following provisions shall be a condition of every contract of the character specified in section 103 and of any obligation of the United States, any territory, or the District of Columbia in connection therewith:

(1) No contractor or subcontractor contracting for any part of the contract work which may require or involve the employment of laborers or mechanics shall require or permit any laborer or mechanic, in any workweek in which he is employed on such work, to work in excess of eight hours in any calendar day or in excess of forty hours in such workweek except in accordance with the provisions of this Act; and

(2) In the event of violation of the provisions of paragraph (1), the contractor and any subcontractor responsible therefor shall be liable to such affected employee for his unpaid wages and shall, in addition, be liable to the United States (or, in the case of work done under contract for the District of Columbia or a territory, to such District or to such territory) for liquidated damages as provided therein. Such liquidated damages shall be computed, with respect to each individual employed as a laborer or mechanic in violation of any provision of this Act, in the sum of $10 for each calendar day on which such individual was required or permitted to work in excess of eight hours or in excess of the standard workweek of forty hours without payment of the overtime wages required by this Act. The governmental agency for which the contract work is done or by which financial assistance for the work is provided may withhold, or cause to be withheld, subject to the provisions of section 104, from any moneys payable on account

of work performed by a contractor or subcontractor, such sums as may administratively be determined to be necessary to satisfy any liabilities of such contractor or subcontractor for unpaid wages and liquidated damages as herein provided.

Also, section 104 of the act, 40 U.S.C. 330, provides, in pertinent part, as follows:

Sec. 104. (a) Any officer or person designated as inspector of the work to be performed under any contract of the character specified in section 103, or to aid in the enforcement or fulfillment thereof shall, upon observation or investigation, forthwith report to the proper officer of the United States, of any territory or possession, or of the District of Columbia, all violations of the provisions of this Act occurring in the performance of such work, together with the name of each laborer or mechanic who was required or permitted to work in violation of such provisions and the day or days of such violation. The amount of unpaid wages and liquidated damages owing under the provisions of this Act shall be administratively determined and the officer or person whose duty it is to approve the payment of moneys by the United States, the territory, or the District of Columbia in connection with the performance of the contract work shall direct the amount of such liquidated damages to be withheld for the use and benefit of the United States, said territory, or said District, and shall direct the amount of such unpaid wages to be withheld for the use and benefit of the laborers and mechanics who were not compensated as required under the provisions of this Act. The Comptroller General of the United States is hereby authorized and directed to pay directly to such laborers and mechanics, from the sums withheld on account of underpayments of wages, the respective amounts administratively determined to be due, if the funds withheld are adequate, and, if not, an equitable proportion of such amounts.

(b) If the accrued payments withheld under the terms of the contracts, as aforesaid, are insufficient to reimburse all the laborers and mechanics with respect to whom there has been a failure to pay the wages required pursuant to this Act, such laborers and mechanics shall, in the case of a department or agency of the Federal Government, have the rights of action and/or of intervention against the contractor and his sureties conferred by law upon persons furnishing labor or materials, and in such proceedings it shall be no defense that such laborers and mechanics accepted or agreed to accept less than the required rate of wages or voluntarily made refunds.

Under the foregoing statutory provisions, the contractor responsible for violations is liable to the employees for underpayments of wages and to the Government for the liquidated damages, with authority in the person "whose duty it is to approve the payment of moneys * * * in connection with the performance of the contract work" to direct the withholding of such amounts as are determined to be necessary to satisfy the debts to the aggrieved employees and to the Government.

Since the amount due for underpayment of wages under the prior contracts is collectible by the Government in the capacity of trustee for the aggrieved employees, and the amounts due the contractor under contract No. AF08(602)0144 represent a direct debt of the Government itself, the moneys are owed in different capacities. Therefore, there is no such mutuality of obligations as is necessary to authorize setoff. Furthermore, in our view the language "payable on account of work performed" has reference to payments earned but not yet paid and we believe that the statutory language conferring the withholding authority upon the person authorized to approve payments in connection with the contract work is indicative that such withholding

was intended to be made only from such payments. On the other hand, since there is mutuality of the obligations due the contractor for work performed under the latest contract and sums due the United States for liquidated damages for violations incurred under the earlier contracts, such debts properly may be set off against each other. See *Whitney Brothers Plumbing and Heating, Inc.* v. *United States*, 224 F. Supp. 860.

Accordingly, the amount representing underpayments to employees were improperly withheld from the current contract and should be returned to the contractor. The action taken with respect to withholding the sum representing liquidated damages appears to have been proper.

[B-165276]

Coast Guard—Commissioned Personnel—Service Credits—Temporary Service in a Higher Grade

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

To the Secretary of Transportation, December 11, 1968:

Further reference is made to letter dated September 16, 1968, from the Commandant, United States Coast Guard, suggesting certain changes in the officer promotion policy of the Coast Guard in the light of the statutory authority there cited and requesting our views on the proposed action.

It is stated that the Coast Guard desires to promote ensigns to lieutenants (junior grade) at the completion of 12 months' active service and to promote lieutenants (junior grade) to lieutenants at the completion of 3 years' active commissioned service. This is said to be in line with current practice in the Navy. The view is expressed that a possible basis to accomplish this result is the temporary service promotion authority contained in 14 U.S.C. 275, which it is said is similar to 10 U.S.C. 5787 pertaining to the Navy. It is stated that the Coast Guard is seeking a legal means which will cause the least possible disruption to the Coast Guard's existing permanent promotion system, particularly as it relates to grades above lieutenant.

The primary question which concerns the Coast Guard, as stated in the Commandant's letter, is as follows:

When reverting from a temporary promotion system to a permanent promotion system as contemplated in 14 USC 275(i), does the second sentence of subsection 14 USC 257(b) permit the use of time in temporary service grade as time in a grade higher than the permanent grade from which originally appointed to a higher grade for temporary service?

The Commandant expresses the view that the authority contained in 14 U.S.C. 275 (a) and (b) could be used to effectuate a temporary service promotion system but that a temporary system under section 275, unlike the similar 10 U.S.C. 5787, pertaining to the Navy, must supplant the statutory permanent system. It is further stated that it is conceivable that a temporary promotion system could continue for some time, and that officers could advance upward through several successive temporary grades. In the light of the authority in 14 U.S.C. 275(i), it is suggested that when reverting from a temporary grade to a permanent grade, vacancies at that time could be filled by permanent appointments to all grades regardless of the lower permanent grades of the officers which originally existed when the temporary system began.

In order for normal permanent promotion flow to continue from the time of reversion to a permanent system, however, it is stated that it would be necessary for officers appointed to the new permanent grades to have some varying time in grade eligibilities within the meaning of 14 U.S.C. 257(a). Otherwise, it is pointed out that if the temporary system had existed long enough for all officers to have advanced through several temporary service grades and at reversion to a permanent system many had received permanent appointments to grades two steps or more beyond the permanent grades that they had originally held at inception of the temporary system, no subsequent promotions could follow for several years while the eligibility requirements of 14 U.S.C. 257(a) were satisfied. The view is expressed that the law does not require this unreasonable result.

It is stated that the language in the second sentence of 14 U.S.C. 257(b) "* * * in the grade that the officer concerned would have held * * *," suggests more than the counting of temporary service time in a higher grade merely as time in the permanent grade from which appointed. It is the Coast Guard's view that if it could establish with some certainty that an officer would have advanced under the permanent promotion system on a particular date, then, from that date, time in the same or higher temporary service grade would be counted as time in the grade to which the officer would have advanced had the permanent system been in effect. The Coast Guard proposes to continue its current practice and procedures with respect to selecting officers

for promotion and related matters, but instead of permanent promotion appointments being made, personnel record entries will be made to show the dates upon which officers would have been appointed to a higher grade.

A second question is asked—concerning officers in grades of ensigns and lieutenants (junior grade)—whether the suspension authority in 14 U.S.C. 275 permits suspension of applicable sections, subsections, or provisions of chapter 11 of Title 14, "only as they pertain to certain ranks or grades so that a temporary promotion system could be utilized for those grades without affecting the legal applicability of those sections to other grades?"

Section 257 of Title 14, U.S. Code, as added by Public Law 88–130 approved September 24, 1963, 77 Stat. 179, prescribes the eligibility requirements of Coast Guard officers for consideration for promotion and provides, in pertinent part, as follows:

(a) An officer on the active duty promotion list becomes eligible for consideration for promotion to the next higher grade at the beginning of the fiscal year in which he completes the following amount of service computed from his date of rank in the grade in which he is serving:

* * * * * * *

(b) For the purpose of this section, service in a grade includes all qualifying service in that grade or a higher grade, under either a temporary or permanent appointment. However, service in a grade under a temporary service appointment under section 275 of this title is considered as service only in the grade that the officer concerned would have held had he not been so appointed.

The authority for promoting Coast Guard officers under the regular promotion system and the procedure to be followed is contained in section 271 of Title 14. In time of war or national emergency declared by the President, temporary service promotions are authorized as provided in section 275 in pertinent part, as follows:

(a) In time of war, or national emergency declared by the President or Congress, the President may suspend any section of this chapter relating to the selection, promotion, or involuntary separation of officers. Such a suspension may not continue beyond six months after the termination of the war or national emergency.

(b) When the preceding sections of this chapter relating to selection and promotion of officers are suspended in accordance with subsection (a), and the needs of the service require, the President may, under regulations prescribed by him, promote to a higher grade any officer serving on active duty in the grade of ensign or above in the Coast Guard.

* * * * * * *

(h) An appointment under this section does not terminate any appointments held by an officer concerned under any other provisions of this title. The President may terminate temporary appointments made under this section at any time. An appointment under this section is effective for such period as the President determines. However, an appointment may not be effective later than six months after the end of the war or national emergency. When his temporary appointment under this section is terminated or expires, the officer shall revert to his former grade.

(i) Not later than six months after the end of the war or national emergency the President shall, under such regulations as he may prescribe, reestablish the active duty promotion list with adjustments and additions appropriate to the conditions of original appointment and wartime service of all officers to be included thereon. The President may, by and with the advice and consent of the

Senate, appoint officers on the reestablished active duty promotion list to fill vacancies in the authorized active duty strength of each grade. Such appointments shall be considered to have been made under section 271 of this title.

It is noted that the temporary service promotion authority in section 275, which the Coast Guard proposes to use, can become operative only pursuant to Presidential action. It is indicated in the Commandant's letter that no such action has been taken to implement this provision but that appropriate action will be taken to carry out that section should it be determined appropriate.

Prior to the enactment of Public Law 88–130, the Coast Guard had authority to make temporary promotions in time of war or national emergency as determined by the President. See 14 U.S.C. 436 (1958 ed.). This authority was derived from section 11(b) of the act of July 24, 1941, 55 Stat. 603, as amended, 34 U.S.C. 350j(b) (1952 ed.), which gave the Coast Guard the same authority granted the Navy and Marine Corps with respect to making temporary appointments and promotions of Navy and Marine Corps officers. Section 436 was repealed by section 4 of Public Law 88–130. The temporary promotion authority of the Navy is currently contained in 10 U.S.C. 5787.

Subsection (h) of section 275, Title 14, U.S. Code, expressly provides that when a temporary appointment made under that section terminates or expires, "the officer shall revert to his former grade." The time in grade eligibility provisions of the permanent promotion system prescribed in section 257 provide in subsection (b) that service in a grade under a temporary service appointment under section 275 is considered as service "only in the grade that the officer concerned would have held had he not been so appointed." It would seem that those two sections (257 and 275) when read together, do nothing more than permit the counting of temporary service in the temporary higher grade as time in the officer's permanent grade that he held immediately preceding his temporary service appointment.

The language in the second sentence of subsection (b) of section 257 and subsection (h) of section 275 is substantially the same as that pertaining to the Navy and Marine Corps wartime temporary service promotions authority in subsection (j) of section 5787, Title 10, which provides that when a temporary appointment made under that section terminates or expires, the member concerned "shall have the grade he would hold if he had not received any such appointment."

An examination of the legislative history of Public Law 88–130—of which the above sections 257, 271 and 275 are a part—discloses that the purpose of the bill (H.R. 5623) was, among other things, to establish a "permanent promotion system" based on merit rather than solely on seniority and, in addition, to provide authority for temporary promotions in time of war "when the regular promotion system is sus-

pended." It is also disclosed that the Defense Department's report on the bill notes that the proposed legislation would be similar to the present Navy and Marine Corps officer personnel systems. See pages 3 and 12 of H. Rept. No. 583 dated July 25, 1963, and page 3 of S. Rept. No. 476 dated August 30, 1963. Both reports accompanied H.R. 5623 which became Public Law 88–130.

We find nothing in Public Law 88–130 or its legislative history which would indicate that, except for the specific authority mentioned in subsection (i) of section 275, Title 14, U.S. Code, Congress intended to enlarge the scope of the Coast Guard's wartime temporary promotion authority in section 275 beyond that previously authorized for the Coast Guard by the act of July 24, 1941. As indicated above, this authority (act of July 24, 1941) is currently available to the Navy and Marine Corps as provided in 10 U.S.C. 5787. However, unlike the Coast Guard, the Navy and Marine Corps have additional authority to promote Navy temporary officers serving on active duty in the grade of ensign to the grade of lieutenant (junior grade) and Marine Corps officers serving in the grade of second lieutenant to the grade of first lieutenant. See 10 U.S.C. 5784. This authority stems from section 302, Officer Personnel Act of August 7, 1947, ch. 512, 61 Stat. 829–831.

The Navy and Marine Corps do not regard the wartime temporary promotion provisions in 10 U.S.C. 5787 as furnishing authority for counting service under a temporary promotion, in meeting the time in grade requirements for career advancement in the naval service. In this connection see our decision of April 24, 1968, 47 Comp. Gen. 587, 596, and the SECNAV NOTICE 1412 there quoted. Also, accompanying the submission on which the decision of April 24, 1968, was rendered is a copy of a memorandum dated January 5, 1967, by the Deputy Director, Administrative Law Division, Navy Judge Advocate General, which states in pertinent part, as follows:

> It is also important to recognize that there was a second, *separate* temporary appointment and/or promotion system in the naval service outside of the temporary and permanent promotions which was retained, without material change, after the passage of the OPA in 1947. Commonly called "temporary war or national emergency" appointments or promotions, 10 USC 5597 & 5787 contain authorization for the temporary appointment and promotion up to O–8 of Navy and Marine Corps officers based on the act of 24 July 1941, c. 320, 55 Stat. 603, *et seq*, as amended. Temporary promotions under this law do not become permanent, as do temporary promotions under OPA, and time spent in a grade to which an officer has been advanced under 10 USC 5787 cannot be counted as the requisite time in grade for further promotion under the provisions of OPA which actually regulate the naval officer's normal career.

We doubt that the Congress intended to give the Coast Guard any greater right in the exercise of its wartime promotion authority under 14 U.S.C. 275 than that given the Navy under 10 U.S.C. 5787, for purposes of counting temporary service as the requisite time in grade for further promotion under the permanent promotion system. In the

light of the above, it is our view that in the absence of specific statutory authority—similar to 10 U.S.C. 5784—there appears to be no legal basis for the Coast Guard to carry out a promotion procedure such as suggested in the Commandant's letter. If the needs of the service require a revision in the promotion policy of the Coast Guard, specific legislation in this area should be requested.

Accordingly, the first question is answered in the negative and no answer to the second question is required.

[B-165418]

Officers and Employees—Transfers—Mass Transfer—Effective Date

An employee who on July 9, 1966 contracts to purchase a residence in anticipation of a mass transfer incident to the relocation of agency headquarters, although he is not informed until November 22, 1966 that the move, which had been anticipated for several years, tentatively was set for April 1, 1968—the delay in the move occasioned by the unavailability of funds for the move and building construction—and who moves into his new residence April 22, 1967, completing settlement July 12, 1967, may be reimbursed under Public Law 89-516 for the expenses incurred in the purchase of a new residence on the basis the employee acquired the residence after he received definite information on November 22, 1966 that his permanent station was being transferred.

To Major J. E. Ingles, National Security Agency, December 11, 1968:

This is in reply to your request of September 6, 1968, Serial: D5/1532F, for a decision on the travel claim of Mr. Ronald D. Storm, an employee of your agency, who was transferred from Washington, D.C., to Fort George G. Meade, Maryland, by orders dated May 8, 1968.

You say that the National Security Agency commenced relocation from Washington to Fort Meade in 1955. It was contemplated at that time that all employees would be located during 1955 and 1956. However, due to space limitations it was decided that the Communications Security Organization (CSO) would remain in Washington until such time as funds could be programmed, budgeted, appropriated and a new building constructed at Fort Meade for its employees.

In March 1965, after funds for the design of a building were appropriated, the CSO employees were informed that a contract for the building design had been awarded, but that no firm or tentative date for relocation had been announced and until an official announcement was made no move on a reimbursable basis should be contemplated. In June 1966 the employees were informed that plans and specifications were distributed to interested contractors and bids would be submitted for evaluation on or before June 22, 1966. The employees were also notified that neither a firm nor tentative date for the relocation had been officially determined.

On November 22, 1966, each employee of CSO was given a copy of a memorandum stating that the move to Fort Meade was tentatively set for April 1, 1968. The memorandum also stated that the employees could move their immediate families and household effects to a location closer to or more convenient to Fort Meade and that reimbursement for expenses incurred by the employees would be made when travel orders were issued and the organization's move was accomplished.

On July 9, 1966, Mr. Storm entered into an agreement for the purchase of a house to be constructed in Laurel, Maryland. He apparently moved into his new residence on April 22, 1967, although settlement was not made until July 12, 1967. You submitted for decision Mr. Storm's voucher for reimbursement of expenses incurred in the purchase of his home because the agreement to purchase was dated prior to the official announcement of the relocation. With regard to Mr. Storm's voucher you ask the following questions:

a. Although Mr. Storm obligated himself under contract dated 9 July 1966 to purchase a residence, *may* he be reimbursed under Public Law 89-516 for expenses incurred in the purchase of his residence in connection with his PCS, in view of the fact that the actual relocation of his residence and incurrence of the expenses of the purchase of his residence accrued after the effective date of PL 89-516 and after the official announced relocation of the Communications Security Organization dated 22 November 1966?

b. Is the date of the official announcement of the relocation of the Communications Security Organization dated 22 November 1966 the *earliest* date that can be considered as providing definite information to the employee (as contemplated by Section 4.1c and 4.1d of BOB Circular A-56) that they were to be transferred * * *.

You also draw our attention to various decisions, including 27 Comp. Gen. 97, wherein reimbursement was authorized for the cost of the transportation of household goods and dependents incurred in anticipation of, but prior to, transfer orders. You state that we may eliminate the submission of additional claims resulting from the move to Fort Meade if we advise you how far in advance of the permanent change of station orders an employee could incur expenses in anticipation of the move and be reimbursed.

Reimbursement of expenses incurred in anticipation of a transfer has been authorized when it was shown that the travel order subsequently issued to the employee included authorization for the expenses on the basis of a previously existing administrative intention, *clearly evident at the time the expenses were incurred by the employee*, to transfer the employee's headquarters. B-155465, November 18, 1964. What constitutes a clear intention to transfer an employee depends on the circumstances in each case and is not necessarily dependent on a time element. See 27 Comp. Gen. 97; 29 *id.* 232; *id.* 293. As indicated in your letter we have held that when an agency proposes a mass transfer to take place more than 1 year in the future and announces no tenta-

tive date, there does not appear to be any basis for reimbursement of expenses incurred in anticipation of the transfer. B–120435, July 8, 1954. We note that when a proposed mass transfer depends on an intervening event such as the passage of an appropriation act, there is no definite assurance that the transfer will take place, even though the agency makes an announcement within 6 months of the proposed transfer. See B–123066, April 19, 1955.

In the instant case the proposed transfer, which did not take place in 1955 or 1956 as originally planned, remained indefinite for several years. The announcements of March 1965 and June 1966 advised that building plans were to be prepared and bids were solicited, respectively. However, neither contained a tentative transfer date. Indeed, until a contract was awarded for the construction of a building with a definite completion date no tentative transfer date could be announced. Also, the March 1965 announcement specifically advised that until an official announcement was made, no move on a reimbursable basis should be contemplated. Therefore, reimbursement on the basis of the above announcements is not authorized.

The November 1966 memorandum officially announced a tentative transfer date and advised employees they could move thereafter and be reimbursed their expenses when the transfer was completed. We assume that the contractor had been notified to proceed with building construction by this time. Accordingly, moving expenses incurred after November 22, 1966, would appear to be reimbursable if otherwise proper.

With respect to the date when Mr. Storm acquired his residence, we stated in 47 Comp. Gen. 582 that the word "sale" as used in 5 U.S.C. 5724a and implementing regulations refers to the transfer of title which usually does not occur until time of settlement. The contract of July 9, 1966, states that completion of the sale (purchase) is contingent upon various factors such as completion of construction and a lender's approval. As previously indicated Mr. Storm apparently moved into his new residence in April 1967 and settlement in connection with the purchase was completed on July 12, 1967. Therefore, it reasonably may be concluded that Mr. Storm did not acquire his residence until after he received definite information on November 22, 1966, that his permanent duty station was being transferred to Fort Meade, Maryland.

In view of the above the voucher returned herewith may be paid, if otherwise correct.

[B-164960]

Pay—Retired—Re-Retirement—Inactive Service Credits

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

To Lieutenant Colonel J. R. Kelliher, Department of the Air Force, December 12, 1968:

Further reference is made to your undated letter (forwarded here with Headquarters, United States Air Force letter dated July 29, 1968), requesting an advance decision as to the propriety of payment of $77.71 as additional retired pay on a voucher (Standard Form 1034, attachment No. 1 with your letter) stated in favor of Master Sergeant Rudolph N. Zupancic, USAF, retired, AF 699 7360, covering the period March and April 1968. Your request for decision was approved by the Department of Defense Military Pay and Allowance Committee as Air Force Request No. DO-AF-1013.

It appears that Sergeant Zupancic was placed on the retired list effective January 1, 1960, in the grade of technical sergeant in accordance with the provisions of 10 U.S.C. 8914. It further appears that he subsequently attained the higher grade of master sergeant while serving on active duty during the period May 1, 1963, to November 30, 1967, inclusive.

In Headquarters Air Force Accounting and Finance Center letter dated August 28, 1968, it was reported that he was paid retired pay at the gross rate of $342.60 per month for the period December 1, 1967, to February 29, 1968, inclusive; $304.49 for the month of March 1968; and at the rate of $316.36 per month effective from April 1, 1968. These payments are explained as follows in paragraphs 2 and 3, letter of August 28, 1968:

2. For the period 1 Dec 1967 through 28 Feb 1968 Sgt Zupancic was paid as a Master Sergeant with over 26 years for basic pay and 24 years, 7 months active duty time. Under pay rates established by Public Law 89-501 (effective 1 Jul 1966 and increased 3.7 percent on 1 Dec 1966), he was paid 62.5 percent of $548.16 or $342.60 monthly gross retired pay.

3. However, on 1 Mar 1968 we reduced his retired pay to that of a Master Sergeant with over 22 years for basic pay and 24 years, 7 months active duty time—pending Comptroller General Decision on this case. Sgt Zupancic's pay was increased by 3.9 percent in accordance with Public Law 90-207, effective 1 Apr 1968.

A copy of DD Form 424 (attachment No. 4 received with the submission letter) indicates that when placed on the retired list (effective January 1, 1960), Sergeant Zupancic had 20 years and 25 days of service (all active service) creditable for purposes of active duty basic pay and retirement. Thus, he had completed 24 years, 7 months and 25 days of active service when he was released from active duty on November 30, 1967, and when added to 3 years and 4 months of inactive time on the retired list (January 1, 1960 to April 30, 1963, inclusive) he had a total of 27 years, 11 months and 25 days of service creditable to him on November 30, 1967, for active duty basic pay.

The service authorized to be credited in computing the active duty basic pay of a member of a uniformed service is set forth in clauses (1) to (9) in subsection (a) of section 205, Title 37, U.S. Code. The first sentence following clause (9) in subsection (a) provides as follows:

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

The basic issue raised in the submission letter is whether the inclusion of the period of inactive time on the retired list (3 years and 4 months) in establishing the rate of monthly active duty basic pay that was used in recomputing Sergeant Zupancic's monthly retired pay during the period December 1, 1967, to February 29, 1968, inclusive, was inconsistent with the provisions of 37 U.S.C. 205(a). In connection, reference is made in the submission letter to three decisions of this Office relating to the proper basis on which to recompute the retired pay of those members of the uniformed services whose retired pay status by reason of active duty performed after retirement comes within the purview of section 1402(a), Title 10, U.S. Code.

The first two decisions to which reference is made (September 29, 1959, 39 Comp. Gen. 241 and December 29, 1960, 40 Comp. Gen. 387), were rendered prior to enactment on October 2, 1963, of Public Law 88–132. Insofar as here pertinent section 5(*1*)(1) of that law, 77 Stat. 214, 215, amended section 1402(a), Title 10, U.S. Code, effective October 1, 1963, by changing footnote 1 to read as follows:

> 1. For a member who has been entitled, for a continuous period of at least two years, to basic pay under the rates of basic pay in effect upon that release from active duty, compute under those rates. For a member who has been entitled to basic pay for a continuous period of at least two years upon that release from active duty, but who is not covered by the preceding sentence, compute under the rates of basic pay replaced by those in effect upon that release from active duty. For any other member, compute under the rates of basic pay under which the member's retired pay or retainer pay was computed when he entered on that active duty.

Upon reversion to an inactive status on the retired list on December 1, 1967, Sergeant Zupancic became entitled under the provisions of subsection (a) of section 1402, Title 10, U.S. Code, to receive retired pay recomputed by multiplying the monthly basic pay (subject to the provisions of footnote 1, quoted above, governing the applicable rate of monthly basic pay) of the grade in which he would have been eligible to retire if he had been retiring upon that release from active duty, by the total of 2½ percent for each year of service creditable in computing his retired pay and each year of active service after becoming entitled to retired pay.

The first paragraph of the syllabus in the decision of September 29, 1959, 39 Comp. Gen. 241, reads as follows:

The provision in section 202(b) of the Career Compensation Act of 1949 that, except for active service, the service credit authorized therein for periods on the retired list shall not be included to increase retired pay relates to increases in the longevity pay factor in the computation of retired pay rather than to the multiplier factor and does not prohibit retired members from counting active service performed after retirement in the multiplier factor to increase retired pay, so that a retired member who performed 15 days' active duty after retirement on June 30, 1953, may have such duty credited to increase the multiplier factor in computation of retired pay.

The second paragraph of the syllabus in the decision of December 29, 1960, 40 Comp. Gen. 387, is as follows:

The exception prescribed in section 202(b) of the Career Compensation Act of 1949 to the prohibition against the inclusion of inactive time on the retired list to increase retired pay is applicable to title IV of the act and does not apply to the provisions of section 516 which were contained in title V of the 1949 law; therefore, since section 516 was superseded and replaced by 10 U.S.C. 1402(a) without substantive change, inactive time on the retired list may not be included in determining the rate of monthly basic pay for computation of retired pay under 10 U.S.C. 1402(a).

The third decision (October 19, 1966, 46 Comp. Gen. 334) is mentioned as follows in paragraph 6 of the submission letter:

6. Decision B–159848, 19 October 1966 (46 Comp. Gen. 334) has been noted. However, in that case the member's basic pay rate was not affected by adding the time spent on the retired list since it was already at the maximum rate for an E–6. In Master Sergeant Zupancic's case, the time on the retired list did in fact increase the basic pay rate while on active duty from that of an E–7 with over 22 years of service to E–7 with over 26 years of service.

In the next paragraph (paragraph 7) of the submission letter it is pointed out that since the first two decisions were rendered prior to the 1963 amendment of section 1402(a), Title 10, U.S. Code, doubt has arisen "as to whether inclusion of inactive duty time on the retired list is precluded in determining the rate of monthly basic pay for purposes of computing retired pay under the current 10 U.S. Code 1402(a)" and decision is requested "whether Master Sergeant Zupancic is entitled to have his retired pay computed based on 27 years of service for basic pay purposes, i.e., including the years spent on the USAF Retired List."

The legislative history of the act of October 2, 1963, Public Law 88–132, clearly discloses the congressional intent and purpose underlying the language employed in new footnote 1 that was added to section 1402(a), Title 10, U.S. Code. In S. Rept. No. 387, August 5, 1963, to accompany H.R. 5555, 88th Congress (which became Public Law 88–132), it was stated at page 36:

Required periods of active service following recall from a retired status to recompute retired pay under higher rates

Under existing law section 1402(a), title 10, United States Code, a member who has been retired and later recalled to active service may recompute his retired pay when he leaves active service under whatever rates of pay were in effect upon his re-retirement. There is no prescribed period of time which he must serve in a recalled status.

The bill as passed by the House contained a provision requiring 1 year of continuous active duty following recall in order to recompute under any higher rates which might be in effect at the time of his re-retirement. The House provision would not require any prescribed length of service under the higher rates which might be in effect at the time the officer re-retired.

The Senate committee adopted a provision requiring that in order to recompute at the time an officer retires for the second or later time he must have served at least 2 years continuously under the higher rates following recall in order to recompute under any higher rates which may be in effect.* * *

It should be noted that the 2- and 3-year rule does not affect existing law insofar as the use of additional time as a retirement multiplier is concerned. The House version would have required the additional 1 year in order to receive any advantage for the purpose of adding the recall period to prior service for purposes of a retirement multiplier.

We find nothing in the foregoing which indicates that the 1963 changes made in section 1402(a), Title 10, U.S. Code, were directed at the conclusions reached by this Office in the decisions of September 29, 1959, 39 Comp. Gen. 241, and December 29, 1960, 40 Comp. Gen. 387, or that it was intended to lessen in any way the restriction against the counting of inactive time on the retired list to increase retired pay after a period of active duty. Hence, the rule in the latter decision holding that "inactive time on the retired list may not be included in determining the rate of monthly basic pay for computation of retired pay under 10 U.S.C. 1402(a)" was not affected by the provisions of the 1963 law.

The question "whether inclusion of inactive duty time on the retired list is precluded in determining the rate of monthly basic pay for purposes of computing retired pay under the current [provisions of] 10 U.S.C. 1402(a)" is answered in the affirmative and the question "whether Master Sergeant Zupancic is entitled to have his retired pay computed based on 27 years of service for basic pay purposes, i.e., including the years spent on the USAF Retired List" is answered in the negative. Accordingly, the voucher stated in favor of Sergeant Zupancic for additional retired pay for the months of March and April 1968 based on the counting of inactive service on the retired list is not for payment and will be retained here.

It is noted that in addition to the overpayment of retired pay made to Sergeant Zupancic during the period December 1, 1967, to February 29, 1968, inclusive, the amount of $304.49 is stated to have been paid to him for the month of March 1968. Apparently, the amount of $304.49 represents an increase of 3.7 percent ($10.86) in the amount of retired pay ($293.63) administratively found to be due him under applicable provisions of law on the date (December 1, 1967) that he reverted to an inactive status on the retired list. The gross amount of $316.36 per month reported as having been paid to him effective from April 1, 1968, is stated to represent the Consumer Price Index increase of 3.9 percent which became effective April 1, 1968 ($11.87) in the amount of retired pay ($304.49) that was paid to him for the month of March 1968.

When Sergeant Zupancic reverted to an inactive status on the retired list on December 1, 1967, his retired pay status came squarely within the provisions of subsection (a) of section 1402, Title 10, U.S. Code. While he had been receiving pay at the appropriate rate prescribed in section 301 of the act of July 13, 1966, Public Law 89-501, 80 Stat. 276, he had received such pay for less than 2 years. Hence, under the second sentence in new footnote 1, section 1402(a) he became entitled to receive (recomputed) retired pay effective December 1, 1967, in the gross amount of $284.44 per month representing 62½ percent (his new multiplier factor reflecting the 4 years and 7 months of active service performed by him subsequent to his retirement) of $455.10, the rate of monthly active duty basic pay prescribed in section 1 of the act of August 21, 1965, Public Law 89-132, 79 Stat. 545, for a master sergeant (enlisted pay grade E-7) with over 22 but not over 26 years of creditable service. Since Sergeant Zupancic was not on active duty on the date of enactment of the act of December 16, 1967, Public Law 90-207, 81 Stat. 649, he did not become entitled to active duty pay at the rates prescribed in that act. See section 7 of the act, 81 Stat 654, 37 U.S.C. 203 note.

The gross amount of retired pay ($284.44 per month) to which he was entitled under the provisions of 10 U.S.C. 1402(a) during the period December 1, 1967, to March 31, 1968, inclusive, is required to be increased to $294.96 by the 3.7 percent Consumer Price Index increase in retired pay ($10.52) which became effective December 1, 1966. A Consumer Price Index increase of 3.9 percent in military retired pay became effective April 1, 1968, and under applicable provisions of law Sergeant Zupancic appears to have been entitled, effective as of April 1, 1968, to a corresponding increase (3.9 percent, $11.50) in the monthly gross amount ($294.96 per month) of retired pay that he was entitled to receive during the period December 1,

1967, to March 31, 1968, or a total of $306.46 per month effective April 1, 1968.

Accordingly, his retired pay account should be adjusted effective December 1, 1967, on the basis above set forth.

[B-165321]

Bids—Buy American Act—Price Differential—Discretionary Determinations

In evaluating bids for wrenches subject to the Buy American Act (41 U.S.C. 10a–d), the fact that Defense Department agencies may be the predominant users of the item does not require the General Services Administration (GSA), responsible for the procurement and the application of the act, to use the 50 percent price differential prescribed by paragraph 6–104.4 of the Armed Services Procurement Regulation under the discretionary authority provided in section 5 of Executive Order No. 10582, in lieu of a 6 percent differential, the minimum fixed by the act for addition to the cost of foreign products to determine whether a domestic price is unreasonable, which adopted by GSA in section 1–6.104–4 of the Federal Procurement Regulations governs the procurement and, therefore, a domestic price that exceeds a foreign bid by more than 6 percent is unreasonable and must be rejected.

Bids—Evaluation—Factors Other Than Price—Superior Product

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

Bids—Buy American Act—Price Differential—Reasonableness

The application of the different percentages specified by the Armed Services Procurement Regulation (50 percent in paragraph 6–104.4) and the Federal Procurement Regulations (6 percent in section 1–6.104–4) creating unrealistic results in determining whether the price of a domestic item is unreasonable, the establishment of a uniform policy for the guidance of Federal agencies and contractors regarding the use of price differentials under the Buy American Act has been recommended.

To Shaw, Pittman, Potts, Trowbridge & Madden, December 12, 1968:

Reference is made to your letters of September 25 and 27, 1968, protesting on behalf of The Ridge Tool Company, Elyria, Ohio, any award of a contract for pipe wrenches to R & O Tool Co., Inc., Pico Rivera, California, under items 3 through 7 of Invitation for Bids No. FPNTN-D1-70116-A-6-27-68 issued May 27, 1968, by the General Services Administration, Federal Supply Service.

The bid of R & O Tool Co., Inc., offering wrenches manufactured in Spain, was low on the subject items at a total price (aggregated on the basis of estimated quantities stated in the invitation) of $246,527, and remained low after evaluation and application of a 6 percent Buy American differential in accordance with the provisions of para-

graph 1-6.104-4 of the Federal Procurement Regulations (FPR). The bid of The Ridge Tool Company was second low on the items at $272,785 which was approximately 10 percent higher than the bid of R & O. The differences between the total prices are roughly proportionate to the differences on each individual item involved.

Essentially, your protest is on the grounds that (1) paragraph 6-104.4 of the Armed Services Procurement Regulation (ASPR) requires foreign bids to be adjusted for evaluation by adding 50 percent of the bid price, and since 80 to 90 percent of the wrenches are expected to be used and ultimately paid for by the Department of Defense, the 50 percent differential specified in ASPR should govern instead of the 6 percent differential set forth in FPR; (2) the Buy American Act, 41 U.S.C. 10a-d, requires award be made to a bidder supplying a domestic product unless the cost is unreasonable or the award is inconsistent with the public interest, and even though Ridge's bid exceeded that of the low bidder by approximately 10 percent, its price was not unreasonable nor would an award to Ridge for domestic goods be inconsistent with the national interest in view of the United States' balance of payments problem and Ridge's policy to actively recruit employees through minority group organizations; and (3) the Spanish wrenches offered by R & O are of inferior quality and infringe a patent held by Ridge. You further understand that the Spanish wrenches have been tested by GSA, and you request that GSA be required to produce the test results for analysis.

You cite our decision of July 14, 1967, 47 Comp. Gen. 29, in support of your contention that the provisions of ASPR should govern the procurement, from which decision you quote the statement:

> While GSA will execute the contract based on the Air Force source selection, selection of the source, under circumstances such as here involved, is in our opinion a part of the procurement process and subject to the requirements of 10 U.S.C. 2304(g) and the applicable provisions of ASPR.

It should be noted that such statement expresses the opinion that since the Air Force would make the source selection of the equipment, the *selection of the source* process was subject to the applicable provisions of ASPR. The procurement involved in that decision was of automatic data processing equipment and was subject to the specific provisions of the act of October 30, 1965, Public Law 89-306, 40 U.S.C. 759, which gave the Administrator of General Services special authority with respect to that type of equipment, but also restricted his authority to impair the determination by other agencies of their requirements or selection of equipment to meet them. We do not view the above quoted language as holding that provisions of ASPR not directly pertaining to the discharge of the Air Force's responsibilities in that particular procurement were for application, nor as implying

that procurements by GSA under its general authority are subject to the ASPR merely because the defense agencies may obtain supplies under them. The Department of Defense has no responsibilities in the conduct of the procurement process here involved. The contract to be entered into, which stipulates that it provides for the normal supply requirements of the GSA supply depots, will be a GSA contract and the necessary determinations for its formation will be made by GSA personnel. Procurements by GSA are governed by FPR, and we find no material significance in the fact that agencies of the Department of Defense, in accordance with the provisions of the ASPR (see section 5, parts 1, 2 and 12), may be predominant users of the wrenches. See in such connection ASPR 6–102.3 which provides generally that compliance with the Buy American Act and application of its exceptions are the responsibility of the agency which first acquires the item. Under such circumstances we perceive no authority at law, nor do we consider that you have cited any, on which GSA may be required to make the award on the basis of the provisions of ASPR instead of those applicable provisions contained in FPR.

As related to your protest, the Buy American Act requires that purchases of items for public use be of domestic production or manufacture unless the head of the Department or agency concerned determines it to be inconsistent with the public interest or the cost to be unreasonable. Executive Order No. 10582 issued December 17, 1954, provides for the addition of a 6 percent differential (which is specified in FPR) to the cost of foreign materials in determining whether the price of domestic products is unreasonable or the purchase of such products is inconsistent with the public interest. Section 5 of that order states:

> * * * In any case in which the head of an executive agency proposing to purchase domestic materials determines that a greater differential than that provided in this order between the cost of such materials of domestic origin and materials of foreign origin is not unreasonable or that the purchase of materials of domestic origin is not inconsistent with the public interest, this order shall not apply. * * *

Since the Buy American Act provides for the purchase of foreign products where the cost of domestic products is unreasonable, and Executive Order No. 10582 fixes a 6 percent differential as a criterion for determining unreasonable cost, the purchase of domestic products at a price which exceeds the cost of foreign products by more than 6 percent may not be made unless the agency head determines under section 5 of the order that a greater differential is not unreasonable or that the purchase of domestic supplies is not inconsistent with the public interest. The authority vested in the agency head by section 5 is discretionary, and although the Secretary of Defense has determined that the addition of a 50 percent differential is not unreasonable

362-575 O - 69 - 3

(ASPR 6-104.4), no determination that a differential greater than the 6 percent specified in Executive Order No. 10582 is not unreasonable has been made by the Administrator of GSA either generally or in connection with the subject procurement. Accordingly, under the criteria established by Executive Order No. 10582 and FPR 1-6.104-4 in the implementation of the Buy American Act, the price bid for your wrenches, which exceeds R & O's price on Spanish wrenches by more than 6 percent, must be regarded as unreasonable and therefore your bid may not be accepted. Compare 42 Comp. Gen. 608.

While the application of the different percentages specified by ASPR and FPR creates unrealistic results in determinations of whether the price of a domestic item is unreasonable, such a circumstance provides no basis at law for intervention by this Office in procurements made by the military and civilian agencies in accordance with their respective regulations. This situation, however, has been a matter of concern to the Congress for several years, and in an April 1968 report issued by the Subcommittee on Economy in Government of the Joint Economic Committee, the recommendation was made that "The Bureau of the Budget should issue a uniform policy for the guidance of Federal agencies and contractors regarding the use of price differentials under the Buy American Act." In making such recommendation the Subcommittee expressed the view that the economic implications of those separate and inconsistent policies were antagonistic, and stated:

> The 6-percent differential permits greater purchases of foreign goods and thus operates against a favorable balance of payments. The 50-percent differential protects domestic manufacturers but increases costs of procurements and therefore militates against a balanced budget.
> From the evidence it appears that the DOD's 50-percent differential raises a protective wall so high that American bidders may be encouraged to take advantage of it. It may also be self-defeating in the long run by pricing the protected items out of foreign markets and thus injuring our balance of payments. Further, the DOD's practice is placing a significant burden on the already extremely high level of defense procurement.

Regarding your contentions that the Spanish wrenches are inferior and infringe your client's patent, the public advertising statutes have consistently been held to require the procuring agencies of the Government to prepare specifications describing their needs in terms of actual or reasonable needs rather than of the maximum quality obtainable, and it is well settled that such statutes do not authorize an agency to pay a higher price for an article which may be superior than for one which is adequate for its needs. GSA has reported that sample wrenches furnished by each bidder were inspected only for the purpose of determining whether the workmanship complied with the specification requirements, and upon inspection it was determined that the Spanish wrenches met those requirements. Even if the Spanish wrenches are, in

fact, "inferior" to the wrenches offered by your client and other domestic manufacturers such factor would provide no basis for concluding that the foreign wrenches do not meet the Government's minimum requirements as set forth in the invitation for bids. Likewise, if the Spanish wrenches infringe Ridge's patent, as you contend, it does not affect R & O's entitlement to the award since it is well established that award is required to be made to the lowest bidder without regard to possible patent infringement. 38 Comp. Gen. 276.

In the event you wish to make a request for the results of GSA's inspection of the Spanish wrenches, it should be addressed to that Administration inasmuch as it is the policy of this Office to transfer requests for administrative records to the Federal agency having the primary interest in the record, 4 CFR 81.4(e).

In view of the foregoing, your protest against the proposed award to R & O Tool Company, Inc., is denied.

[B-165538]

Officers and Employees—Transfers—Relocation Expenses—House Sale—Mortgage Prepayment Charge

A 90-day interest charge—prepayment penalty—assessed by a lending institution in connection with the sale of a residence at the old duty station of a transferred employee is not a reimbursable expense absent a provision in the original contract or mortgage instrument for reimbursement as prescribed by section 4.2d, Bureau of the Budget Circular No. A-56. The language of the note covering the loan secured by the employee's residence reading "payable on the _____ day of each month" is not the express provision that imposes a prepayment penalty and, therefore, the employee may not be reimbursed the interest charge payment he was required to make.

To Rose M. Sperling, Federal Mediation and Conciliation Service, December 12, 1968:

Your letter of October 29, 1968, submits a reclaim voucher with attachments for $334.80 from Mr. Gerald A. Arnold, an employee, in connection with his permanent change of station and involving the sale of his residence at the old duty station. You ask whether the voucher may be certified for payment.

The papers attached to the voucher show the sum reclaimed is a 90-day interest charge—prepayment penalty—assessed by the institution making the loan. The original claim for such amount was suspended because the terms of the mortgage instrument and the note executed by Mr. Arnold and his wife did not provide for any additional costs for prepayment of the loan.

Mr. Arnold has now furnished a statement from the First Federal Savings and Loan Association, 312 Louisiana Street, Little Rock, Arkansas, the lending institution, to support his contention that the

$334.80 prepayment penalty charge was required by the terms of his note. That statement reads as follows:

> Following our conversation this morning, I am enclosing a copy of our note which you will see reads "payable on the _____ day of each month" and does not say "on or before" which is the clause which permits prepayment without penalty.
> The penalty regulation in the Federal Association Regulations reads as follows:
> "Prepayment penalty for a loan secured by a home, or combination home and business property, shall not be more than six months" advance interest on that part of the aggregate amount of all prepayments made on such loan in any twelve month period which exceeds twenty per cent of the original principal amount of the loan.
> We charged three month's interest on the unpaid balance of $20,597.06 which is considerably less than the six months' interest on $16,506 (the amount you owed January 1, less twenty per cent of your original $22,000 loan).

The regulation referred to therein is contained in 12 CFR 545.6-12 issued effective May 25, 1966, by the Home Loan Bank Board, Federal Savings and Loan System, and is applicable to Federal Savings and Loan Associations. The part thereof pertinent here reads:

> * * * Borrowers from Federal associations shall have the right to repay their loans without penalty unless the loan contract makes express provision for a prepayment penalty. The prepayment penalty for a loan secured by a home * * * shall not be more than 6 months' advance interest on that part of the aggregate amount of all prepayments made on such loan in any twelve month period which exceeds twenty per cent of the original principal amount of the loan.

Section 4.2d, Bureau of the Budget Circular No. A-56, Revised October 12, 1966, is in pertinent part as follows:

> Financing costs. A charge for repayment of a mortgage in connection with the sale of a residence at the old official station is reimbursable if the terms in the original contract or mortgage instrument provide for such cost, but not otherwise.
> * * *

We do not regard the language of the note referred to in the statement from the bank previously quoted as being an express provision imposing a penalty for prepayment of the claimant's loan in this case. Nor do we find any other language in the note or mortgage instruments to that effect. Consequently, we must conclude that reimbursement of the $334.80 charge (prepayment penalty) paid to the lending institution by Mr. Arnold is not authorized by the provisions of section 4.2d above.

In view of the foregoing the voucher with attachments, returned herewith, may not be certified for payment.

[B-165073]

Transportation—Military Personnel—Commercial Means—Reimbursement

Where only Government air transportation is available to an enlisted man upon change of duty station from overseas to the United States and because his wife is afraid to travel by air he is authorized to travel at his own expense by commercial surface transportation, the member may be reimbursed for his transoceanic travel to the extent it would have cost the Government to provide the

air transportation he was entitled to under paragraph M4159–4a of the Joint Travel Regulations. The member also is entitled to a monetary allowance incident to the land travel performed by him from his overseas duty station to the point where Government air travel would have been available and from the aerial point of debarkation in the United States to his new duty station.

Transportation—Dependents—Military Personnel—Availability of Government Transportation—Commercial Means

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

To Major C. J. Costello, Department of the Army, December 13, 1968:

Further reference is made to your letter of June 26, 1968, and enclosures, forwarded here by 1st Indorsement dated August 9, 1968, of the Per Diem, Travel and Transportation Allowance Committee, requesting an advance decision regarding the propriety of payment on a voucher submitted by SP 5 (E–5) Charles W. Brown, RA 33 633 980, for reimbursement for travel performed by him and dependent wife from Kaiserslautern, Germany, to Fort Devens, Massachusetts, during the period March 29 to April 26, 1967. Your request was assigned PDTATAC Control No. 68–32.

Insofar as here material, orders were issued on January 30, 1967, assigning Mr. Brown to Fort Bragg. Concurrent travel of his dependent wife was authorized. On February 10, 1967, these orders were amended to authorize travel by air and directing him to report to Rhein-Main Air Base, Frankfurt, Germany, on February 24, 1967, for a designated flight. The member informed his personnel officer that he could not return by air because his wife was afraid to fly, and he was advised to obtain a doctor's statement as required by regulations to support his request for surface transportation.

He submitted a "Medical Statement for Redeployment to CONUS" dated February 13, 1967, executed by a medical officer who certified that his wife "has a marked fear of heights and flying," and he advised the personnel officer of his command organization that he desired to bear the expense of commercial surface transportation to the United States if he could not obtain Government surface transportation. On the same date the medical statement along with a redeployment request was forwarded with a request for surface transportation. However, on February 17, 1967, advice was received that the member could not get Government transportation because space was unavailable and that the

reason shown in the medical statement was not sufficient to remove scheduled passengers to give passage for him and his wife.

On March 4, 1967, orders were issued reassigning the member to Fort Stewart, Georgia, with duty station at Hunter Air Force Base, and authorizing concurrent travel of his wife. On March 11, 1967, orders were issued revoking the latter orders and reassigning the member to Fort Devens, Massachusetts. He was directed by those orders, which also authorized travel by air and concurrent travel of his wife, to report to Frankfurt Flughafen Airport for a designated flight departing March 12, 1967.

It appears that the member again insisted on surface transportation and in this connection he was informed that dependents who refuse to travel by air for other than medical reasons may wait until surface travel via American flag vessels becomes available and further that concurrent travel for him and his wife would be approved in that circumstance provided he could meet the reporting date at the new duty station. Upon receiving this advice, the member on March 22, 1967, executed the following statement:

I desire to return to CONUS by commercial transportation at my own expense. I understand that I will not be entitled to reimbursement for this transportation by the Government to the CONUS port of debarkation.

On the basis of that statement, orders were issued on March 24, 1967, revoking the orders of March 11, 1967, and in again reassigning him to Fort Devens, incorporated the following special instruction:

Indiv has req & elect to tvl by comm trans at own exp & is auth to utilize comm trans at own exp W/O reimb for that portion of tvl fr this Cond to Port of Debarkation in CONUS. Govt trans would have been avail during the period of 23 thru 31 Mar 67.

The member and his wife traveled on March 29, 1967, by privately owned automobile from Kaiserslautern to Bremerhaven, Germany, and from Bremerhaven to New York, New York, by commercial surface vessel during the period March 30 to April 5, 1967. Travel from New York to Fort Devens on April 26, 1967, was performed by privately owned automobile.

The controlling statutory provisions, 37 U.S.C. 404 and 406, provide that, under regulations prescribed by the Secretaries concerned, a member of the uniformed services and his dependents are entitled to transportation at Government expense upon a change of permanent station.

Paragraph M4159–4a, Joint Travel Regulations, promulgated under that statutory authority, provides that when travel by Government transportation is authorized (as distinguished from directed) and the member performs transoceanic travel by another mode of transportation (other than foreign-flag) at personal expense, he is entitled to

reimbursement for the cost of the transportation utilized not to exceed the applicable tariff charge which the sponsoring service would have been required to pay for the available Government transportation. Also, paragraph M7002–1 of the regulations specifies that for transoceanic travel of dependents to, from or between areas outside the United States, Government aircraft or vessels will be utilized, and (item 5) that when dependents refuse to travel by Government aircraft, transportation will be furnished by Government vessel, if available, otherwise commercial vessel.

The above regulations have been implemented by regulations issued by the appropriate Army command in Europe. USAREUR Regulation No. 40–355, Change 1, Annex B, "Air Redeployment Medical Information," in pertinent part, reads as follows:

> The purpose of the information in this annex is to aid medical officers to determine whether or not individuals may fly in a passenger status. It concerns persons traveling on commercial flights as well as those traveling on MAC charter flights. The restrictions do not apply to MAC medical evacuation flights. "Medical Criteria for Passenger Flying," approved by the American Medical Association, may be used as guidance for evaluating passengers for air transportation.
>
> * * * * * * *
>
> b. *Neuropsychiatric.* Persons manifesting unpredictable behavior or those requiring restraint should not fly in a passenger status. Those with convulsive disorders subject to frequent seizures should be accompanied by a parent or responsible adult designated by parent or other competent authority. *Fear of flying cannot be justified to contraindicate air travel.* [Italic supplied.]

Paragraph 301–8, USAREUR Regulation No. 55–355, in pertinent part, reads as follows:

> *Commercial Transportation at Individual Expense.*
> a. Military and civilian personnel entitled to Government transportation for themselves and their dependents may be authorized, on their request, to return by commercial means at individual expense. Request for commercial transportation must be signed by both the adult dependent and the principal and must indicate:
> (1) That tentative arrangements for commercial transportation have been completed.
> (2) The approximate date of departure desired.
> (3) That travel to the port of debarkation in the United States will be performed at no expense to the Government *and that a claim for reimbursement will not be submitted.* [Italic supplied.]

Those regulations operate to preclude reimbursement of the cost of commercial transportation in such cases but they do not require a waiver of all travel and transportation allowances and in our opinion do not require the conclusion that the members concerned may not be reimbursed for their travel in the amount the Government would have been required to pay for their Government transportation.

Since the orders of March 24, 1967, did not direct or authorize the member to utilize Government transportation in proceeding to his new station—Government air transportation being available—but pursuant to his request and in accordance with the above-quoted paragraph

301–8, permitted him to travel by commercial transportation from Europe to a port of debarkation in the United States at his own expense without reimbursement of the cost of the commercial transportation, there appears to be no valid basis for reimbursing him for more than the applicable tariff charge the Army would have been required to pay for the available Government air transportation, to which he otherwise was entitled under paragraph M4159–4a of the Joint Travel Regulations. He may be reimbursed for his transoceanic travel on that basis only.

Concerning the utilization of commercial surface transportation by the member's dependent, there is included in the file a memorandum dated November 15, 1967, from the Deputy Chief of Staff for Logistics concerning the Department of the Army policy on the use of surface travel effective when Government vessels operated by the Military Sea Transportation Service were indefinitely suspended. It is stated therein, among other things, that under this policy—which was formulated with the concurrence of the Deputy Chief of Staff for Personnel and the Surgeon General who ruled that acrophobia (fear of flying) does not constitute justification for a medical certificate—the only mandatory requirements for surface transportation is for dependents with a bona fide doctor's certificate and that the remainder of the surface space procured by MSTS for the Army's use is then assigned to family groups pursuant to the provisions of Army Regulation No. 55–91. It is further stated in that memorandum that when dependents refuse to travel by air for other than medical resasons, they may be permitted to wait until surface travel via American flag surface carrier becomes available.

In view of that policy and the provisions of the above-quoted paragraph b. of USAREUR Regulation No. 40–355, the medical certificate dated February 13, 1967, appears to have been insufficient to qualify the member and his dependent for a priority assignment on Government-chartered commercial surface transportation.

However, paragraph M7002–2b of the Joint Travel Regulations provides that for transoceanic travel of dependents the member may be reimbursed in the same manner as for his own travel under paragraph M4159–4 of the regulations, "except that when transportation via Government vessel is not available and dependents refuse to travel by available Government aircraft, reimbursement for commercial transportation costs will not exceed the cost of passage by commercial vessel." In view of that express authority, and in the circumstances of travel shown, the dependent apparently not having signed the waiver of reimbursement of the cost of commercial transportation, it is concluded that the member is entitled to reimbursement for the cost of his wife's commercial surface transportation without reduction.

There is nothing in the record to show whether the member has been paid a monetary allowance incident to the land travel performed by him and his dependent. It appears that entitlement exists for (1) the land travel performed by him from his last duty station, Kaiserslautern, to Frankfurt, Germany, where Government air transportation would have been available, and from McGuire Air Force Base, New Jersey, the aerial point of debarkation in the United States to Fort Devens and (2) the land travel performed by his dependent from Kaiserslautern to Bremerhaven, port of embarkation, and from New York, New York, port of debarkation, to Fort Devens.

Accordingly, the voucher and supporting papers are returned for payment as indicated, including allowance for the land travel involved should it be ascertained that payment to the member for such land travel has not been made.

[B-165411]

Bids—Opening—Public—Delayed Openings

Although under the requirement in 10 U.S.C. 2305(c) that "Bids shall be opened publicly at the time and place stated in the advertisement," a delayed opening may be excusable in unusual circumstances, and reasonably short delays resulting from normal administrative routine would not ordinarily be objectionable, setting a number of bid openings for the same hour when it is obvious they cannot with available personnel and facilities be opened within a reasonable time is not in conformity with the statute and is a practice that discourages the free attendance of witnesses which the public opening is intended to foster. When it is necessary to schedule numerous bids for opening on the same day, to avoid delay, openings should be scheduled at intervals and held in the rooms designated for the purpose.

Bids—Opening—Public—"When Practicable"

The term "when practicable" in paragraph 2-402.1(a) of the Armed Services Procurement Regulation qualifying the requirement for the reading aloud of bids should be judged on the basis of the nature of the bids—the multiplicity of items, complexity or interrelationship of the method of bidding, or the evaluation prescribed rather than by the amounts involved, or the availability of personnel or space to conduct the bid opening that is intended to protect both the public and bidders against any form of fraud, favoritism, partiality, complicity, or even a suspicion of irregularity. Therefore, the elimination of the reading of bids below an arbitrarily selected dollar amount is not recommended, but adequate space and personnel should be provided to handle a normal volume of bid openings.

To the Director, Defense Supply Agency, December 16, 1968:

Enclosed is a copy of our decision of today to Barbed Tape Products, Inc., denying its protest concerning procurement of barbed concertina tape under Invitations for Bids DSA-700-69-B-0330 and DSA-700-67-B-4316, issued by the Defense Construction Supply Center (DCSC), Columbus, Ohio.

The protest was the subject of a report forwarded by letter dated November 5, 1968, from your Assistant Counsel. While it is stated in that letter that DCSC has informed your office that it has discontinued

the practice of opening bids in the smaller of the two rooms referred to in the report, and that bids on procurements of $50,000 or more will hereafter be read aloud, we are not satisfied that those steps will be sufficient to cure all the questionable features of the bid opening procedures disclosed by the report.

For consideration in connection with the review of those procedures reported to be in progress by your Headquarters, we submit the following observations.

The governing statute, 10 U.S.C. 2305(c), requires that "Bids shall be opened publicly at the time and place stated in the advertisement." Delayed opening may be excusable under certain unusual circumstances, and reasonably short delays resulting from normal administrative routine would not ordinarily be objectionable. However, we believe that a regular practice, such as is disclosed by the report in the present case, of setting all bid openings for the same hour where the number of openings is so large that it is obvious most of them cannot with available personnel and facilities be opened within a reasonable period of time after the hour set, is not in conformity with the statute. To require bidders or others interested in a particular procurement to spend several hours at the place of opening in order to witness the opening of bids thereon clearly tends to discourage the free attendance of witnesses which the public opening requirement is intended to foster. We therefore recommend that when it is necessary to schedule numerous bids for opening on the same day they should be scheduled at such intervals during the day as will avoid such delays, which not only inconvenience bidders but also tend to give rise to suspicion and charges of impropriety.

For the same reasons we recommend that when more than one room is to be used for bid opening each invitation for bids should designate a particular room and bids thereon should be opened in that room.

With respect to the reading aloud of bids, while it is true that Armed Services Procurement Regulation 2-402.1(a) qualifies the requirement that bids shall be read aloud by the phrase "when practicable," we are inclined to the view that the practicability of reading aloud should be judged on the basis of the nature of the bids themselves--the multiplicity of items involved, or the complexity or interrelationships of the method of bidding or evaluation prescribed—rather than by the amounts involved or by such purely administrative considerations as availability of personnel or space to conduct the bid opening. The purpose of public opening of bids for public contracts is to protect both the public interest and the bidders against any form of fraud or favoritism or partiality or complicity, and such openings should as far as possible be conducted so as to leave no ground even for suspicion of

any irregularity. For these reasons we question the propriety of eliminating the reading of bids on all procurements below an arbitrarily selected dollar amount, and we recommend that every effort be made to provide adequate space and personnel to handle the normal volume of bid openings without dispensing with such procedure.

The file forwarded with the November 5 report is returned.

[B-165532]

Contracts — Specifications — Ambiguous — Clarification — Before Bidding

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

To the Director, United States Information Agency, December 16, 1968:

Reference is made to a letter dated November 8, 1968, from your General Counsel furnishing us a report on the protest of Empire Generator Corporation (Empire) against the award of a contract to another bidder under Invitation for Bids No. 72–22–9, issued by your agency.

Enclosed is a copy of our decision of today to Empire Generator Corporation denying its protest. Your attention is invited, however, to section 3 of the Solicitation Instructions and Conditions in which it is stated that any explanation desired by a bidder in regard to the solicitation must be in writing and with sufficient time allowed for a reply to reach bidders before submission of their bids. It is further stated that any information given to a prospective bidder concerning the solicitation should be furnished all bidders as an amendment to the solicitation, provided such information is necessary to bidders submitting bids or lack of such information would be prejudicial to uninformed bidders. To the same effect, see Federal Procurement Regulations (FPR) section 1–2.207(d).

By its letter of October 25, 1968, Empire alleged that the specifications were restrictive because the purchase description for the generator's engine was written in such a way as to exclude all types except a pressure lubricated engine manufactured by only one company,

which would not sell the engine to Empire. This indicates to us that Empire did not understand Paragraph 4(c), Part I, of the specifications or it would have realized that a splash type lubricated engine would also satisfy USIA's needs. We are of the opinion that by use of the procedures outlined in section 3 of the Solicitation Instructions and Conditions and FPR 1-2.207(d), the above mentioned misunderstanding, as well as Empire's first objection relating to engine maintenance during the 500 hour operation period and its question relating to interference, could have been clarified. Since the procedures outlined in section 3 of the Solicitation Instructions and Conditions are designed to assure that all bidders will be interpreting the specifications in the same way, and thus assure the benefits of the broadest possible competition to the Government, it is our opinion that questions relative to the meaning of the Specifications which are raised before bid opening should be treated as requests for information under section 3 of the Solicitation Instructions and Conditions, rather than as protests. This would appear to be especially appropriate where, as in the instant case, there may be a necessity to make an award prior to resolution of the questions by this Office under the protest procedure, and the failure to advise a prospective bidder before bid opening that he is interpreting the specifications incorrectly is therefore likely to result in his failure to submit a responsive bid, and in failure of the Government to receive the full benefits of competitive bidding.

While our decision in this case has concluded that it would not be in the best interest of the Government to readvertise for bids, we recommend that appropriate steps be taken to insure that questions relative to the meaning of specifications which are raised before bid opening in future procurements be processed under the procedures prescribed in section 3 of the Solicitation Instructions and Conditions.

[B-165451]

Pay—Reduction—Pay Based on Grade Held

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

To the Secretary of the Navy, December 17, 1968:

Reference is made to letter of October 14, 1968, from the Assistant Secretary of the Navy (Financial Management) requesting a decision as to the entitlement of Claude E. Yocum, RMI, U.S. Navy, to the basic pay of grade E–6 during the period June 16, 1966, to February 29, 1968. The request was assigned No. SS–N–1021 by the Department of Defense Military Pay and Allowance Committee.

The Assistant Secretary says that on June 16, 1966, Petty Officer Yocum was administratively reduced in rate by his commanding officer from petty officer first class (pay grade E–6) to petty officer second class (pay grade E–5) under authority of article C–7211(3)(a), Bureau of Naval Personnel Manual, on the grounds that he was not qualified by reason of incompetency to perform the duties of his rate.

The Assistant Secretary points out that the cited article specifies as a condition precedent to such administrative reduction for incompetent performance of duty that the member concerned must be evaluated "for at least two consecutive marking periods," unless a waiver of that requirement has been granted by the Chief of Naval Personnel. For the purpose of that article, "two consecutive marking periods" is defined as "two regular annual or semiannual evaluation periods or one annual or semi-annual evaluation period and one special evaluation period of at least three months."

The Under Secretary says that the member received a special evaluation period November 16, 1965, to March 14, 1966; that his next evaluation, while termed a regular evaluation, actually covered the period March 15, 1966, to June 16, 1966; and that, although no waiver of the regulatory requirement was obtained from the Chief of Naval Personnel, the member was reduced in rate on June 16, 1966. On March 1, 1968, the Chief of Naval Personnel, noting the failure to comply with the regulation, authorized the member's advancement to petty officer first class (E–6), as of that date.

The Assistant Secretary says, however, that doubt exists as to whether the present record is such as to authorize the appropriate adjustment of Petty Officer Yocum's pay for the period June 16, 1966, to February 29, 1968, in the absence of any correction of his record by the Secretary of the Navy acting through the Board for Correction of Naval Records.

It long has been held that the mere fact that orders issued by competent authority reducing an enlisted man in grade are not issued in strict conformity with administrative regulations does not invalidate such orders. 15 Comp. Gen. 935. Also, it is well settled that an enlisted man is entitled only to the pay and allowances of the grade actually held by him. 15 Comp. Gen. 935; 36 *id.* 137; 41 *id.* 703.

Article C-7211(3)(b), Bureau of Naval Personnel Manual, provides that subject to the requirements in subparagraph (a) (mentioned above), commanding officers are authorized to effect reduction in grade (one grade only) of personnel in pay grade E-6 or below by making a service record entry showing the reason why the member is not qualified for the rate from which reduced. The reasons for reductions set forth in subparagraph (a) include incompetence.

While the commanding officer did not follow exactly the provisions of the regulation relating to the evaluation periods to be used in making his determination that the member was not qualified for the higher rate, that determination was based on consecutive marking periods and the entry in the member's pay record effecting the reduction was made by competent authority. Also, the member actually served in the lower rate for the period June 16, 1966, to February 29, 1968, and 37 U.S.C. 204(a) provides that members on active duty are entitled to the pay of grade to which assigned.

While the courts have awarded back pay in cases involving discharge of military members where prescribed procedures were not fully complied with, in those cases there was involved the stigma attached to the type of discharge and its adverse effect on the member returning to civilian life. See for example, *Clackum* v. *United States*, 148 Ct. Cl. 404 (1960), *id.* 161 Ct. Cl. 34 (1963). We are not aware of any court decision awarding back pay to an enlisted man reduced in grade by reason of inefficiency. Back pay for civilian employees of the Government who are reinstated or restored by corrective personnel action to a position from which their removal was unjustified or unwarranted is authorized by statute. See 5 U.S.C. 5591, *et seq.* No such statutory authorization has been enacted with respect to enlisted men who are determined to have been erroneously reduced in grade.

In the circumstances, we believe the matter is too doubtful for us to conclude, on the present record, that Yocum is entitled to the pay and allowances of the higher grade for the period involved. See B-70185, dated March 22, 1948.

Section 1552, Title 10, United States Code, provides that the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States and the member becomes

entitled to all the benefits due on the basis of the facts as shown in the correction. 42 Comp. Gen. 582.

If it is believed that the failure to comply with the regulations when the member's rate was reduced constitutes an error or injustice contemplated by 10 U.S.C. 1552, an appropriate correction of the records could afford a basis for the payment in question.

[B–165611]

Officers and Employees—Transfers—Relocation Expenses—House Sale—Collateral Transactions

The expenses, including a real estate commission, incurred by a transferred employee in the sale of a parcel of land he had accepted in partial payment for his residence at the old duty station are not reimbursable under section 4, Bureau of the Budget Circular No. A–56, notwithstanding a possible savings to the Government by reason of the real estate broker relinquishing the commission on the residence for the opportunity to sell and receive a commission on the land, the collateral transaction not having been connected with the sale of the employee's residence incident to the permanent change of station.

To Captain Bruce C. Starling, Department of the Army, December 19, 1968:

Your letter of November 6, 1968, 879–1110–4263/4215, enclosing papers showing certain expenses incurred by an employee in connection with a collateral real estate transaction resulting from an official change of duty station, asks whether such expenses may be reimbursed under the facts and circumstances hereinafter related based upon applicable provisions of the Bureau of the Budget Circular No. A–56, Revised October 12, 1966.

The employee advises that he personally sold his residence at the old duty station and accepted in partial payment a parcel of land which he had no intention of retaining. He points out that he was obligated to a real estate broker for the 6 percent commission on such sale—approximately $1,200—but that by agreement such commission was eliminated provided the broker was permitted to eventually sell the parcel of land involved and receive the commission thereon. The expenses claimed are all connected with the sale of the land only, i.e., recording deed, $6; Maryland stamps on deed, $2.20; real estate commission, $300; attorney fee for preparing deed, $20, a total of $328.20. We note that the employee is of the opinion that by such agreement he saved the Government approximately $900.

The provisions of section 4, Circular No. A–56, referred to above, cover allowances for expenses incurred in connection with real estate transactions upon permanent change of station and are for application here. Such provisions with respect to the matter presented only

apply to certain expenses incurred in the sale of the residence at the old official duty station and it appears from the record that the employee has been reimbursed therefor. The expenses claimed are not connected with the sale of that residence but rather to another entirely separate transaction, i.e., the subsequent sale of the parcel of land accepted in partial payment on the sale of the employee's residence. We cannot by decision extend such provisions to cover such a situation on the basis of possible savings to the Government resulting from a collateral transaction.

In view of the foregoing, reimbursement of the expenses claimed here is not authorized under the provisions of section 4, Bureau of the Budget Circular No. A-56, Revised October 12, 1966.

[B-164893]

Contracts—Specifications—Failure To Furnish Something Required—Information—Descriptive Data Sufficiency

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

Bids—Competitive Bidding—Effect of Erroneous Awards

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

To the Secretary of the Army, December 23, 1968:

Reference is made to a letter dated August 27, 1968, from the Acting Deputy Director of Procurement and Production, Headquarters United States Army Materiel Command, reporting on the protests of the Raytheon Company and the Collins Radio Company against the rejection of their bids and the award of a contract to Lenkurt Electric Co., Inc., under solicitation DAAG-08-68-B-2730.

The solicitation, issued May 27, 1968, by the Sacramento Army Depot, requested bids for a "MICROWAVE SYSTEM" in accordance with one of four configurations described therein for use by the Armed

Forces Korean Network. Prospective bidders were advised in a headnote to the description of the four configurations that:

THE GOVERNMENT WILL CONSIDER EACH SCHEDULE IN NUMERICAL ORDER, BEGINNING WITH SCHEDULE I, BUT RESERVES THE RIGHT TO AWARD A CONTRACT UNDER THE SCHEDULE WHICH IT DETERMINES TO BE IN ITS BEST INTEREST REGARDLESS OF DOLLAR VALUE BID ON OTHER SCHEDULES, ONLY ASSURING AWARD TO THE LOWEST RESPONSIVE BIDDER UNDER THE SCHEDULE SELECTED.

In addition to setting forth numerous technical requirements for the contemplated microwave system which will be discussed hereafter, as necessary, article 11 of the schedule provided that:

REQUIREMENT FOR DESCRIPTIVE LITERATURE (OCT. 1960) (ASPR 2-202.5)

(a) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the products the bidder proposes to furnish as to *descriptive literature of equipment to be supplied and a list of type and quantity of all equipment, and accessories.*

(b) Failure of descriptive literature to show that the product offered conforms to the specifications and other requirements of this Invitation for Bids will require rejection of the bid. Failure to furnish the descriptive literature by the time specified in the Invitation for Bids will require rejection of the bid, except that if the material is transmitted by mail and is received late, it may be considered under the provisions for considering late bids, as set forth elsewhere in this Invitation for Bids.

Bids were opened on June 12, 1968, with the following results:

	Configuration			
Bidder	I	II	III	IV
Lenkurt	$717, 576	$623, 401	$503, 129	$427, 567
Collins	656, 821	526, 207	457, 283	420, 476
Raytheon	594, 011	496, 844	453, 327	385, 682

Pursuant to the prescribed method of bid evaluation, the contracting officials elected to make award to the low responsive bidder under configuration I of the solicitation described as a "duplex frequency-diversity heterodyne system." The two low bidders, Raytheon and Collins, were determined to be nonresponsive to the terms and conditions of the solicitation. Accordingly, a contract for configuration I was awarded to Lenkurt as the low responsive, responsible bidder on June 29, 1968, in the total amount of $717,576.

Collins and Raytheon, by letter of July 18 and telegram of July 20, 1968, respectively, protested the rejection of their bids and the award to Lenkurt on the grounds that their bids were, in fact, fully responsive to the solicitation, and that the award to Lenkurt was improper because that bidder failed to submit sufficient data with its bid as required by

362-575 O - 69 - 4

the descriptive literature clause, *supra*, and did not specifically offer to comply with all of the technical requirements of configuration I.

Collins, in a letter attached to its bid, conditioned acceptance thereof upon delivery of the advertised microwave system "two-hundred and ten (210) days after receipt of the contract," whereas, the delivery clause of the solicitation called for delivery "210 calendar days *after date of award documents.*" Since Collins offered delivery of the contemplated system at other than the specified date, its bid was rejected by the contracting officer pursuant to Armed Services Procurement Regulation (ASPR) 2-404.2(c) which provides that "Any bid which fails to conform to the delivery schedule * * * shall be rejected as nonresponsive." B-158335, April 1, 1966, and cases cited therein. See, also, 36 Comp. Gen. 181, 183, where we stated that:

> The contract awarded to the successful bidder must be the same offered in the invitation. 34 Comp. Gen. 119. While the contracting officer may waive informalities in bids, this authority does not extend to the waiver of material variations to the terms and conditions of the invitation. * * * A provision of an invitation which on its face establishes a definite requirement as to time of delivery is material. *Cf.* B-104418, August 23, 1951. The acceptance of a bid not complying with such material provision is unauthorized and does not bind the Government. 17 Comp. Gen. 554, 555. * * *

See, 46 Comp. Gen. 368, for the proposition that a cover letter enclosed with, and referring to, a bid must be evaluated as a part of the bid and any qualification in the letter affecting the terms of the bid with reference to the invitation will, *a fortiori*, require rejection of the bid as nonresponsive.

Raytheon's bid was evaluated by the Government engineer assigned to assist the contracting officer and found to be nonconforming to two of the technical specifications of configuration I. It appears in this regard that Raytheon offered a mixture of remodulating and heterodyne equipment, whereas configuration I specified a complete heterodyne system. Also, Raytheon offered patching of *audio subcarriers* as opposed to patching of *audio* as specified. Raytheon contends that the solicitation permits and, in fact, requires the utilization of equipment of the nature offered in its bid. However, the contracting officer reaffirmed the rejection of Raytheon's bid for failure to comply with the two referenced technical specifications of configuration I for the same reasons heretofore stated.

The question as to whether the referenced technical performance requirements are necessary to meet the minimum needs of the procuring activity and the question as to the materiality of the differences between Raytheon's offered system and the one called for by the specifications are not for resolution by our Office. See B-149207, September 12,

1962. In this regard, we held in our decisions B–139830, August 19, 1959, and B–143389, August 26, 1960, respectively, as follows:

> This Office has neither an engineering staff nor a testing laboratory to evaluate the technical aspects of specifications. Moreover in disputes of fact between a protestant and a Government agency, we usually are required to accept the administrative report as correct. Whether a particular bid is responsive to the technical details of the specifications is not a matter, ordinarily, for our determination. * * *
>
> The question as to the action, if any, which our Office should take in cases involving the evaluation of technical requirements of specifications, etc., has been the subject of a number of decisions by our Office. Your protest is based upon such an evaluation. Of necessity our Office has established a rule governing such situations. In a decision dated January 8, 1938, to the President, Board of Commissioners, District of Columbia, published at 17 Comp. Gen. 554, 557, we set forth the following rule which we consider to be controlling in the instant matter:
>
> "It is in the province of the administrative officers to draft proper specifications necessary to submit for fair competitive bidding proposed contracts to supply Governmental needs and to determine factually whether articles offered meet these specifications. * * *" [Italic supplied.]

The record reasonably establishes that Raytheon's contemplated microwave system for configuration I differed in a demonstrative manner from the Government specifications which were set forth clearly in the solicitation. The contracting officer and the cognizant Government engineer in separate reports dated October 25, 1968, state that these differences would cause Raytheon's system to operate in a manner not contemplated by the specified performance requirements. Contracting officers have the right to insist upon strict compliance with the specifications and are not required to permit substitution of items which are not actually in accordance with the specifications, even if a deviating substitute may be equivalent to the items specified. In addition, 10 U.S.C. 2305(c) prescribes that "award shall be made * * * to the responsible bidder whose bid conforms to the invitation." See, also, ASPR 2–404.2(a) and article 10(a) of the solicitation instructions and conditions. In view thereof, and for the reasons set out in the above-cited cases, we must conclude that Raytheon's bid was properly rejected because it did not comply with the technical specifications of the solicitation.

In addition to the foregoing, Raytheon and Collins contend that Lenkurt failed to submit sufficient data with its bid as required by the descriptive literature clause, *supra*, to enable the contracting officials to fully evaluate the offered system and to determine positively that it complied with all of the technical equipment and performance requirements of the solicitation. The protesting bidders also argue that Lenkurt failed to bid a diversity switch and to offer to meet the required fade margin as specified, respectively, by articles 10 and 8 of the microwave system specifications. Also, Raytheon contends that Lenkurt failed to offer to meet the video signal-to-noise requirement

at article 8 and to bid an order wire as contemplated by article 10 of the specifications.

By supplemental report dated October 25, 1968, responding further to the Raytheon protest, but actually responsive to both protests in this respect, the contracting officer restated his determination that the data furnished by Lenkurt with its bid adequately fulfilled the requirement for descriptive literature as set forth in the solicitation. Specifically, that report concludes that:

> The Lenkurt Electric Co., Inc., literature does contain information clearly showing the characteristics and construction of the Lenkurt Electric Co., Inc., equipment to be furnished for the system. The characteristics are detailed on the Frequency Plan Sheets and the construction of the equipment is detailed in the technical description, * * *, together with illustrations of typical construction.

The report of October 25 also points out that "The requirement to furnish 'a list of type and quantity of all equipment, and accessories' was complied with by Lenkurt Electric Co., Inc., in their Detailed Material List for Schedule I, Configuration I, wherein the type of the equipment in the system is listed and the quantity for each site is set forth."

The protests by the two unsuccessful bidders with respect to the adequacy of the descriptive literature supplied by Lenkurt with its bid are predicated solely on the argument that the contracting officer's determination as to the adequacy of the literature supplied is patently erroneous.

As stated above, it is well recognized that the factual determination as to whether that which is offered by the bidder conforms to the specifications is to be decided primarily by the contracting agency. 17 Comp. Gen. 554, 557. We also stated at 43 Comp. Gen. 77, 80, that whereas the foregoing "rule has reference to the end product we see no reason why it is not also for application with respect to data submitted pursuant to the terms of the invitation." See, also, B-158299, April 19, 1966, where we said:

> The adequacy of descriptive data submitted with a bid and the significance of deviations therein often, as in this case, involve highly technical engineering and scientific issues. In this kind of situation we must rely on the findings of the contracting agency which, as indicated above, has utilized scientifically trained personnel who thoroughly analyzed the technical aspects of the bids. * * * See 35 Comp. Gen. 174 supporting award made upon an agency's technical evaluation of bids where no favoritism or arbitrary or capricious action had been shown.

Therefore, and since the sole dispute in this respect appears to be an honest difference of opinion between the protesting bidders and the contracting officer as to the adequacy of the Lenkurt descriptive literature for purposes of bid evaluation as to which we can ascribe no ulterior motives to the actions of the contracting officials in determin-

ing that the data submitted by Lenkurt was, in fact, adequate, our Office may not undertake to disturb that determination.

The protests against the other alleged inadequacies of Lenkurt's bid; i.e., failure to bid a diversity switch and order wire, and failure to meet the fade margin and video signal-to-noise requirements will be discussed below, *seriatim*.

Article 10 of the technical specifications, entitled "DIVERSITY SWITCH," provides that "A diversity switch for the frequency diversity channels to select one or the other microwave channels shall be provided." By letter dated July 18, 1968, Collins states that instead of offering a diversity switch as specified for configuration I, it is apparent that Lenkurt intends to utilize a "combiner" to perform the function of the diversity switch. In this regard Collins advises that "It is almost axiomatic that a combiner and a diversity switch are completely separate and distinct equipments with different operational characteristics." Collins therefore believes that Lenkurt's bid contained a material deviation to the specifications. By letter of September 16, 1968, Raytheon, in commenting on the above report of August 14, also protested the award for the same reasons. The supplemental administrative report of October 25 states in pertinent part that:

> The diversity switch is called out in the first paragraph entitled "Diversity Switch" on page III–10 of Lenkurt Electric Co. Inc.'s descriptive literature submitted with the IFB. Further, the diversity switch is contained on the Detailed Material List as an integral part of the 75 FD Radio Terminal. * * * The contracting officer agrees that a combiner is called out in the Lenkurt Electric Co. Inc.'s descriptive literature on page III–3, but the contracting officer does not agree that the combiner is for the same application as the diversity switch. In the Lenkurt Electric Co. Inc., Detailed Material List for Configuration I, Sheet 1 of 4 Sheets, there is no listing for a combiner or equipment in which a combiner is an integral part. Consequently, the combiner discussed on page III–3 under Path Protection does not form a part of Configuration I offered by Lenkurt Electric Co. Inc., * * *

Article 10 entitled "ORDER WIRE," provides that:

> An order wire shall be provided to interconnect all stations to provide for service channel and fault-alarm facilities. The order wire subcarrier shall be located above the video baseband on one of the subcarrier frequencies nominally utilized by a program channel subcarrier.

In its letter of July 9, 1968, Raytheon contends that Lenkurt's bid was nonresponsive to the second sentence of the above-quoted order wire requirement because the Lenkurt descriptive data indicates that the service channel does not operate within the specified range. The August 14 administrative report concludes, however, that a comprehensive analysis of the data in accordance with certain standards common to the industry shows clearly that Lenkurt properly bid an order wire within the specified range.

Raytheon further contends that an analysis of the Lenkurt path calculation data shows that the video signal-to-noise requirement of

the "*SYSTEM PERFORMANCE*" specifications was not met. Article 8 of the specifications provides in pertinent part that "The end to end signal-to-noise ratio for the outbound channel shall not be less than 62 db flat weighted (5MHz)." Raytheon states in its letter of July 9 (and Collins in its letter of July 18) that Lenkurt also failed to meet the fade margin requirement of the specification. Article 8 provides, in this respect, that:

> All microwave radio paths shall be designed with fade margins to a 33 db flat weighted minimum signal-to-noise ratio * * * . Fade margins shall be equal to or greater than the following for the outbound channel:
>
> | | |
> |---|---|
> | Paths less than 35 km | 30 db |
> | Paths 35–55 km | 40 db |
> | Paths over 55 km | 43 db |

Specifically, Collins states that Lenkurt erroneously discussed 33 decibels adjusted (dba) in its descriptive literature instead of a flat signal-to-noise ratio as required and that "when the signal-to-noise ratio of each receiver is weighted as specified by Lenkurt, * * * the resulting fade margin is below, and does not comply with, the specifications." In the alternative, Collins contends that if Lenkurt intended to bid an unweighted signal-to-noise ratio (db), the offered fade margin is theoretically impossible because of other contingencies.

It is stated in the August 14 administrative report that "33 dba" pertains only to telephone communications and is never applicable to television systems, such as being procured here. Therefore, by treatment of the offered ratio as flat weighted and by the application of recognized formulas, the figures furnished by Lenkurt for the video signal-to-noise and fade margin were responsive to the solicitation. In his report of October 25, addressed to the Raytheon protest, the contracting officer states that he did not rely on the application of recognized formulas to determine the responsiveness of Lenkurt's bid but only to verify the determination of responsiveness. In this respect, the contracting officer advises that the computations supplied in his report of August 14 were incorrect, as pointed out by Raytheon and Collins, but states that the calculations contained in the Government engineer's affidavit confirm Lenkurt's responsiveness to the performance requirements.

The manner of evaluation of Lenkurt's bid in order to determine compliance with the technical equipment and performance specifications must necessarily be governed by the language of the descriptive literature clause set forth in the solicitation. That clause provides that the failure of the data submitted to show that the offered microwave system conforms to the specifications will require rejection of the bid. The computations that were applied by the contracting officials to determine the responsiveness of Lenkurt's bid required the

utilization of certain figures and other data that were not included in Lenkurt's bid or descriptive literature. Specifically, the Government engineer, in his affidavit of October 25, reports that in evaluating Lenkurt's bid, his calculations revealed a 30.8 db video signal-to-noise ratio. The difference between 30.8 db and 33 db had to be adequately accounted for to prove Lenkurt's fade margins as being responsive to the performance specifications. The Government engineer reports that this was readily accomplished by increasing the power output of the transmitters to plus 40 dbm, which is possible, because "it is a known fact that Lenkurt 75B transmitters are rated for outputs of up to plus 40 dbm." It is noted in this regard that Lenkurt data specified power outputs of only up to plus 37 dbm on all paths except one where transmitter power is set at plus 38 dbm. Restated, in order to guarantee that the offered Lenkurt microwave system would fully meet the fade margin performance specification of the solicitation, it will be necessary to increase the power output of the transmitters to beyond that output specified by Lenkurt. The contracting officer states that the utilization of a higher power output in the fade margin calculations than that specified by Lankurt is permissible because it is known that the increased power output could, in fact, be reached. To verify this fact, the Government engineer checked a Lenkurt brochure which had previously been submitted to the purchasing activity under a prior planning request for quotations. Therefore, contrary to the intent of the descriptive literature clause, Lenkurt's bid was determined to be responsive only after consideration of information available to the Government engineer but not included in the data submitted with Lenkurt's bid.

While it is true, for the reasons stated above, that a finding of responsiveness is a factual determination to be made by the contracting agency, the manner of evaluation is subject to our review and, as such, must be in accordance with the statutory and regulatory provisions governing procurement by formal advertising.

The requirements for the standard descriptive literature clause, set forth at ASPR 2–202.5, provide in part that:

(d) *Requirements of Invitation for Bids.*

(1) When descriptive literature is required, the invitation for bids shall clearly state what descriptive literature is to be furnished, the purpose for which it is required, the extent to which it will be considered in the evaluation of bids, and the rules which will apply if a bidder fails to furnish it before bid opening or if the literature furnished does not comply with the requirements of the invitation for bids. Where descriptive literature is not considered necessary and a waiver of the literature requirements of a specification has been authorized, a statement shall be included in the invitation for bids that notwithstanding the requirements of the specifications, descriptive literature will not be required.

* * * * * * *

(e) *Waiver of Requirements for Descriptive Literature.*
(1) The provision prescribed in (d) (1) above may be modified to provide that the requirements for furnishing descriptive literature may be waived as to a particular bidder if (i) the bidder states in his bid that the product he is offering to furnish is the same as a product previously or currently being furnished to the purchasing activity and (ii) it is determined by the contracting officer that such product complies with the specification requirements of the current invitation for bids. * * *

In the present case, the contracting officer reports that since this was the initial procurement of the advertised microwave system, the standard waiver provision of the descriptive literature clause was intentionally omitted in the solicitation. The effect of the omission of the waiver provision therefore limits the evaluation of bids to the consideration only of descriptive information submitted by each bidder with its bid.

In justifying his consideration of data not submitted with Lenkurt's bid in evaluating the fade margin and video signal-to-noise ratio requirement, the contracting officer cites our decision 39 Comp. Gen. 595. In that case, we considered the legal effect of the failure of a bidder to supply the required *calculations* even though he otherwise supplied all of the necessary data. We held that the challenged bid in that case "should not be rejected for failure to furnish the mere mathematical computations included as a part of the descriptive data requirement" because the automatic rejection of a bid for a failure to conform to a purely technical or overliteral reading of the specifications may be as arbitrary as a waiver of nonresponsiveness to a material and substantial requirement. In so stating, we pointed out that:

* * * a distinction must be drawn between data which represent a relatively free choice by the bidder, and data which are bound by the application of information furnished in the invitation or the bid to the limitations of a recognized mathematical formula or rule of physics or chemistry. Strict application of the general principle in the latter case would appear to serve little purpose other than to determine the ability of the bid preparer to apply the formula or rule to the given information. * * * For example, a bid could hardly be rejected for the bidder's failure to provide a total figure in his descriptive literature, even though required by the terms of the invitation, if such total clearly represented nothing more than the sum of the several items listed. The reason for this is that the total figure is not subject to variance after bid submission at the option of the bidder but is fixed by the other information submitted and the application of a recognized mathematical principle. Rejection of a bid in that instance, notwithstanding the language of the descriptive literature requirement, would be unjustified.

We are of the opinion that the exception stated in the above-quoted decision to the general rule governing the evaluation of descriptive literature is not applicable in this instance. We have no argument with the application by the Government engineer of a recognized mathematical formula to the *actual* data supplied in the evaluation of Lenkurt's bid to determine the responsiveness thereof to the fade margin and video signal-to-noise ratio requirements. But, as we previously noted, in order to certify Lenkurt's offered system to be in

full compliance with the performance specifications, it was necessary to use data in excess of that contained in Lenkurt's descriptive literature. The increased power output figure supplied by the Government engineer does not obligate Lenkurt to furnish a transmitter having a power output up to plus 40 dbm because "a recognized mathematical formula or rule of physics or chemistry" was applied technically to its data. Rather, the output figure represents a relatively "free choice" by the bidder as proven by the fact that Lenkurt specifically limited the amount of transmitter output power to plus 37 and 38 dbm, instead of plus 40 dbm found necessary by the Government engineer to render Lenkurt's bid fully responsive.

As stated above, we have often observed that the drafting of proper specifications to meet the minimum requirements of the Government and the factual determination whether any product offered thereunder conforms to those specifications are matters primarily within the jurisdiction of the procurement activity. However, in the reported circumstances, it appears that Lenkurt's bid was not in compliance with the requirement for "full and free" competition as envisioned by the statute and regulations governing procurement by formal advertising. 46 Comp. Gen. 275, 277. However, since the contract was entered into on June 29, 1968, with delivery scheduled 210 days thereafter, and since the bids of the other responding bidders were technically nonresponsive for the reasons stated above, no useful purpose would be served by disturbing the award at this time. We suggest that the entire procurement be carefully reviewed to preclude a recurrence of the protests discussed here.

[B-165421]

Transportation—Vessels—American—Cargo Preference—Routing

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

To the Secretary of Defense, December 23, 1968:

We refer to letter of October 10, 1968, and enclosure, from the Honorable Thomas D. Morris, Assistant Secretary of Defense (Installations and Logistics). The letter concerns the authority of the Department of Defense under existing law to ship military troop support cargo on foreign vessels operating from Great Lakes ports.

We are asked to give our views on the propriety of changing existing Department of Defense policy and practices in order to permit the use of Great Lakes ports and foreign vessels for shipment overseas of military troop support cargo. A supporting memorandum of law, forwarded with the letter, concludes that where an initial analysis indicates routing of a shipment through a tidewater port utilizing U.S. flag shipping would result in greater total costs to the Government than routing the shipment through a Great Lakes port utilizing the lowest cost shipping obtainable, then a second analytical step, involving a comparison of total costs for each route, employing in this comparison the lowest cost ocean freight rates obtainable in each area under comparison would be permissible.

It is explained that this second step would be designed to identify those costs attributable to "seeking out" American flag shipping. Cargo would be routed through the Great Lakes ports when this second step indicated that a routing through a tidewater port would result in significantly greater costs. However, if the port selection computation showed that a routing through a port with available American shipping would result in lower costs, that routing would be used.

The memorandum of law refers to an opinion of October 3, 1907, by the Attorney General, 26 Op. Atty. Gen. 415, which expresses the view that where American shipping is not available the use of a foreign flag vessel does not violate the provisions of the cargo preference act relating to carriage of military supplies by sea, as enacted April 28, 1904, 33 Stat. 518. The Attorney General recognized the fact that the act did not expressly provide for such use in such a contingency but he concluded that the law must be given a reasonable construction and that a reasonable construction of the act would permit such use.

Also mentioned in the memorandum of law is a decision of April 16, 1912 (18 Comp. Dec. 796), by the Comptroller of the Treasury. It was there held that where no vessel of the United States could be procured to furnish transportation for supplies from New York, New York, to the U.S.S. Scorpion at Trieste, Austria, the employment of a foreign flag vessel did not violate the 1904 act. In two other decisions, 19 Comp. Dec. 537 (1913) and 22 Comp. Dec. 307 (1916), the Comptroller of the Treasury refused to allow the use of public funds for the ocean transportation of military supplies in foreign vessels, although American vessels would not have been available for about a month. Reference also is made in the memorandum to decisions by the Comptroller General, 31 Comp. Gen. 351, 36 Comp. Gen. 53 and 36 Comp. Gen. 207, which considered the provisions of section 901 of the Merchant Marine Act of 1936, 46 U.S.C. 1241(a).

It is pointed out that the general practice of the Military Traffic Management and Terminal Service (MTMTS) is to route most of the cargo originating in the Great Lakes area through tidewater ports, primarily those on the East Coast. It is said that frequently supplies manufactured in Toledo, Milwaukee or Detroit, each of which has suitable Great Lakes port facilities, are routed to other ports such as Philadelphia and Baltimore for ocean shipment.

This current practice, which requires considerable overland transportation in order to obtain transshipment to American flag carriers, often results in very high over all costs to the Government. The point is made that the 1904 act specifically covers the situation where the cost differential between American and foreign flag vessel use becomes excessive. An exception to the general requirement for use of American flag vessels is made where the President finds that rates charged by American vessels are excessive or otherwise unreasonable. The belief is expressed that to the extent costs represent the price for seeking out desired shipping at particular ports, such costs are for consideration in determining whether American flag vessels are available. The policy of seeking out American flag vessels is said to have the effect of giving American carriers port selection prerogatives for defense cargo.

The cargo preference act relating to the transportation of military supplies by sea, as enacted April 28, 1904, 33 Stat. 518, reads:

An Act To require the employment of vessels of the United States for public purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That vessels of the United States, or belonging to the United States, and no others, shall be employed in the transportation by sea of coal, provisions, fodder, or supplies of any description, purchased pursuant to law, for the use of the Army or Navy unless the President shall find that the rates of freight charges by said vessels are excessive and unreasonable, in which case contracts shall be made under the law as it now exists: *Provided,* That no greater charges be made by such vessels for transportation of articles for the use of said Army and Navy than are made by such vessels for transportation of like goods for private parties or companies.

By act of August 10, 1956, 70A Stat. 146, the law was codified as section 2631 of Title 10, United States Code, to read:

Supplies: preference to United States vessels

Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons.

Section 901 of the Merchant Marine Act of 1936, 46 U.S.C. 1241(a), requires that officers or employees of the United States traveling on official business overseas must travel on United States vessels. The Comptroller General decisions mentioned in the memorandum of law,

31 Comp. Gen. 351, 36 Comp. Gen. 53 and 36 Comp. Gen. 207, deal with situations where a traveler must wait an inordinate time to obtain an American sailing (the time factor) or must travel considerable distance overland at excessive cost in order to use an American vessel (the distance and cost factors). That provision of law states that an officer or employee of the United States shall travel and transport his personal effects on ships registered under the laws of the United States "where such ships are available," unless the necessity of his mission requires the use of a ship under a foreign flag or there is otherwise satisfactory proof (to be considered by the Comptroller General) of the necessity for the use of a foreign flag vessel.

While it may be proper to reach the conclusion that the use of a foreign flag vessel to transport military supplies when an American vessel is unavailable would not violate the 1904 preference act, it is questionable whether weight should be given to time, distance, and cost factors in resolving the question whether American flag vessels are available. The cases involving the passenger and personal effects preference act (46 U.S.C. 1241(a)) are inapposite because that statute expressly provides that a traveler may use a foreign flag vessel if the necessity of the traveler's mission requires such use. Obviously, in resolving the question whether the necessity of the mission requires use of foreign flag transportation, elements of time, distance and cost must be considered, but there is no comparable provision in the 1904 preference act. The mandatory language of that law clearly would seem to indicate that cost considerations cannot be used to avoid the statutory requirement that United States vessels be used except for cases where the freight charged by such vessels is excessive or otherwise unreasonable. Also to be considered is the fact that ordinarily the time factor is not as important in the case of cargo transportation as it is in the case of passenger transportation.

As we understand it, United States vessels usually are available at tidewater ports to carry military supplies. They may not be available at Great Lakes ports but this fact would not seem to justify, despite a cost differential in favor of the Great Lakes ports, a policy change which would result in the diversion of traffic from American shipping to foreign shipping unless American flag vessels are not available at tidewater ports. In our opinion, the shipment of military supplies to Great Lakes ports with the intention to transship by foreign vessels would violate the 1904 act if such vessels were used.

Congressional policy to promote and maintain a strong American Merchant Marine extends back to the first year of our Government when discounts were allowed on duties paid for goods imported in vessels owned by American citizens. The act of July 4, 1789, Ch. 2,

section 5, 1 Stat. 24, 27. This legislative policy has continued substantially unchanged to the present day. For example, the Jones Act was amended in 1960 to prohibit the coastwise operation of a rebuilt vessel unless the entire rebuilding was accomplished in the United States. Act of July 5, 1960, Public Law 86-583, 74 Stat. 321, 46 U.S.C. 883. For a compilation of the early preference statutes, see *Central Vermont Transportation Co.* v. *Durning*, 71 F. 2d 273, 276 (1934), affirmed 294 U.S. 33. In *Commodities—Pan-Atlantic Steamship Corp.*, 313 I.C.C. 23, 47-48 (1960), reversed 199 F. Supp. 635, modified 372 U.S. 744, appear excerpts from Government publications stressing the importance of an adequate domestic fleet in coastwise shipping for national defense purposes and also for the use of the general public as an integral part of the national transportation system.

At the time of the passage of the 1904 act, the Secretary of War was required by statute to award contracts for the purchase and transportation of supplies to the lowest bidder. The application of these laws resulted in the transportation of all coal to the Philippine Islands in foreign ships. S. Rept. No. 182, 58 Cong., 2d sess. 1. With an awareness of the difficulties encountered by the United States at the commencement of the Spanish-American War (the shortage of American supply vessels required the purchase of 51 foreign steamers, some at an excessive price and, as it turned out, of limited usefulness, whose foreign crews in many instances refused to serve under the American flag) Congress enacted legislation to reserve for American ships the transportation of defense supplies. Not only was this legislation intended to encourage a ready merchant fleet capability in times of national emergency, it also was intended to be beneficial in the establishment of general commerce, the employment of American seamen, and the stimulation of the American shipbuilding industry.

Since American ships were competing with cheaply built and operated foreign vessels, heavily subsidized by foreign nations, Congress felt that it should reserve Government traffic for American ships—in line with the policy of other countries which required the transportation of their national supplies in vessels under their own flag—even if the cost of such transportation were increased by as much as 300 percent. H. Rept. No. 1893, 58th Cong., 2d sess. 2-4 and 38 Cong. Rec. 5799. The broad scope of the 1904 act is indicated by the following passages excerpted from the Senate Debate occurring on February 27, 1904:

Mr. PERKINS. * * * My friend from Oregon [Mr. MITCHELL] seemed to think there was some local preference given by the provisions of this bill, and that the great State of Oregon, which he in part represents, would not have a fair chance. Mr. President, this is too broad a question to confine it to any particular port or State or even coast. It is a broad, patriotic question that the ships should be built in the United States, manned and officered by American

citizens, that are transporting the munitions of war and our sailors and the supplies of the Government from one port of the United States to another or from any port of the United States to a foreign port. 38 Cong. Rec. 2464.

Mr. PERKINS. * * * I believe in building up the merchant marine and the commerce of this country. I believe in carrying the freight and cargo and transporting the soldiers of our Army in vessels built in the United States * * *. 38 Cong. Rec. 2465.

Mr. PERKINS. Is there anything in this law that prevents the Government from buying Australian or Cardiff coal delivered in Manila or Honolulu or the United States?

Mr. BACON. I should think most undoubtedly there is. That would certainly be a violation of the spirit of the law. What benefit would that be to vessels of American registry, if the law can be evaded in that way? 38 Cong. Rec. 2473.

Thus, the intent of Congress is plainly manifested to insure that shipments of defense supplies move on American vessels and that any purchasing arrangements permitting the use of foreign bottoms in transporting such supplies would be in violation of the meaning and spirit of the law.

Our reading of the 1904 preference act and its legislative history convinces us that its primary purpose is to protect American shipping from foreign competition. To permit the carriage of defense supplies in foreign flag ships when United States flag ships are available, even though at other ports and at significantly higher costs, would deviate from the purpose of the 1904 act; it would not seem to remedy the disadvantages which the 1904 act was intended to remove. That act is something more than a privilege inuring to private concerns. Besides its obvious purpose to provide a ready merchant fleet capability in times of national emergency, the public interest is involved in the need for a strong merchant marine to bolster the commerce of the nation as a whole. Consequently, a liberal interpretation in favor of the public interest of the United States and the private business activities intended to be protected is required in the circumstances.

In view of the foregoing considerations, we are obliged to conclude that the present policy change proposal, which would result in the transfer of military shipments from American ships at tidewater ports to foreign ships at Great Lakes ports, would be illegal. There are some alternative changes, however, which might permit the use of Great Lakes ports and not result in violations of the 1904 act because foreign ships would not be used.

We understand that some American shipping on some trade routes is available at Great Lakes ports. There is no reason why this shipping could not be used where it is cost competitive, over all, with the total cost of overland transportation and ocean transportation by American vessels operating from tidewater ports. Also, if military supplies are being purchased in any great volume from plants located in the Great Lakes basin, it might be advantageous, from a cost standpoint, to arrange for the carriage of such supplies from Great Lakes ports in

vessels controlled by or owned by the Military Sea Transportation Service (MSTS). The use of such vessels would not seem to deprive privately owned American ships of cargo because, in effect, the MSTS vessels would be merely diverted from present cargo carrying operations to future operations, as needed, from Great Lakes ports.

[B-165435]

Post Office Department—Mails—Theft, Loss, Damage, Etc.—Insurance Coverage

An indemnity payment for a lost package valued at $7,448, which in addition to being fully insured under the postal registry system is covered by a commercial insurance policy containing a $10,000 deductible clause may be made for the full value of the package under 39 U.S.C. 5001, authorizing indemnity payments for articles valued at $1,000 or less "for which no other compensation or reimbursement has been made" and for articles valued not in excess of $10,000 "when the article is not insured with another insuring agency." To hold that the indemnity payment is limited to $1,000 because the package was insured by "another insuring agency," even though payment for the loss is precluded under the commercial insurance policy would be unrealistic, and reading both qualifying clauses in section 5001 together, permits reimbursement for the actual value of the loss.

To the Postmaster General, December 23, 1968:

This is in reply to your request of October 11, 1968, for our opinion concerning the indemnification of Shiman Brothers-Colonial, Inc., of New York City for the loss of a registered package.

On June 1, 1967, Shiman Brothers sent by registered mail a package of jewelry and precious stones having a declared value of $7,448. The administratively prescribed registry fee for that value, $3.75, and the necessary postage charges were paid. The package was not delivered to the addressee and Shiman Brothers filed a claim for the value of the lost items. On November 22, 1967, the claim was certified for payment, and on December 1, 1967, a check in the amount of $7,448 was issued.

Subsequently, on December 21, 1967, the New York Regional Office of the Post Office Department wrote Shiman Brothers that the payment of $7,448 was in error, in that the firm had commercial insurance covering its registered mail "though subject to a $10,000 deductible each and every loss." The Regional Office requested a refund of $6,448 with the explanation that under the provisions of subsection 5001(b), Title 39 of the United States Code, any registered article covered in whole or in part by commercial insurance is ineligible for more than $1,000 of postal insurance. Shiman Brothers refused to comply with the request stating the lost merchandise was not covered by commercial insurance and that they therefore fully insured the package under the postal registry system.

The maintenance of the postal registry system is authorized by section 5001, Title 39 of the United States Code. Subsection (a) of that

section provides that the Postmaster General, as a part of the registry system, "may indemnify the senders or owners of registered articles for their loss, rifling, or damage, in the mails." Subsection (b), the provisions of which prescribe the limits of indemnity and are of primary significance herein, is composed of two sentences:

[1] The maximum limit of indemnity payable for a registered article is $1,000, or the actual value when that is less than $1,000, and for which no other compensation or reimbursement has been made. [2] However, the Postmaster General may provide for the payment of indemnity for the actual value of a registered article, or insured article treated as a registered article, in excess of $1,000, but not in excess of $10,000 when the article is not insured with another insuring agency.

Subsection (c) of section 5001 authorizes the Postmaster General to have "underwritten or reinsured in whole or in part, with a commercial insurance company," a liability or risk assumed by the Department in connection with the mailing of a particular registered article. Also of some significance is section 5011, dealing with indemnity in the situation of co-insurance. That section states: "Claims for indemnity involving registered mail * * * which is also insured with another insuring agency shall be adjusted by the Postmaster General on a pro rata basis as a co-insurer with the other insuring agency."

Whether the indemnity payment herein of the total value of the lost package was precluded by statute turns upon the interpretation of the second sentence of subsection 5001(b), particularly the clause "when the article is not insured with another insuring agency." The view that an article is to be considered as insured, and thus indemnity limited to $1,000, even though reimbursement under the commercial insurance policy is precluded by the existence of a deductible clause, appears to us unrealistic and not in keeping with the otherwise practical tenor of the referred to statutory provisions dealing with indemnification for the loss, rifling, or damage of registered articles in the mail.

That the first sentence of subsection 5001(b), establishing an indemnity limit of $1,000 or the actual value when less, contains the clause, "for which no other compensation or reimbursement has been made," a clause not reiterated in the second sentence of the subsection permitting indemnity in excess of $1,000, does not warrant the conclusion that it is immaterial for the purposes of the second sentence whether the loss is the subject of actual reimbursement under the existing insurance policy. Moreover, we are of the view that the second sentence must be read in conjunction with the first and that the qualifying clause "for which no other compensation or reimbursement has been made," is also applicable to indemnity payments in excess of $1,000 under the second sentence of the subsection. The effect of the clause precluding the Postmaster General from providing for the payment of indemnity in excess of $1,000 when the article is insured with

another insuring agency is to prevent, or restrict, the Post Office from becoming a co-insurer, under section 5011, of articles having a value over $1,000. That situation does not exist in this case.

Nor do we find anything in the legislative history of the second sentence of subsection (b) of section 5001 to support an unrealistic interpretation of the clause "when the article is not insured with another insuring agency." The sentence stems from the administratively sponsored act of June 28, 1932, 47 Stat. 338, which, as disclosed by the debate on the floor of the House (75 Cong. Rec. 5571–5575), had for its primary purpose the increase of the revenues of the postal registry system to reduce the recurring deficit of the system. It would appear that an interpretation of the second sentence of subsection (b) of section 5001 to preclude indemnity coverage where the postal patron does not actually have insurance would not be in keeping with the historical legislative purpose of the second sentence.

In view of the foregoing, and as we find nothing in the postal registry regulations (39 CFR Part 161) precluding in this case the incurrence of postal insurance liability for the actual value of the lost package, we are of the opinion that the payment to Shiman Brothers of the sum of $7,448 was warranted and that a legal basis for the recovery of any part of that amount is not apparent.

[B–165742]

Leaves of Absence—Annual—Accrual—Employees "Stationed" Outside United States—Recruited Overseas

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

To the Postmaster General, December 23, 1968:

This is in reply to letter of December 2, 1968, from Chief Inspector H. R. Montague requesting our decision as to whether Inspector M. Cintron is eligible to accumulate 45 days of annual leave.

Inspector Cintron, a resident of Puerto Rico employed by the Ponce, Puerto Rico, Post Office, was recruited as a postal inspector on September 19, 1964. Ponce was considered his official duty station during the initial training he received in the United States. On completion of his training he was officially assigned on May 19, 1965, to duty at New

362-575 O - 69 - 5

York, New York, where he served until transferred to San Juan, Puerto Rico, effective September 9, 1967. Postal inspectors are subject to assignment wherever required and no promise or guarantee of assignment in Puerto Rico was given to Inspector Cintron when he was selected for training as an inspector. Our decision was requested inasmuch as the eligibility of the inspector to accumulate 45 days of annual leave was considered doubtful since he was originally a resident of Puerto Rico where he is now employed.

Section 6304 of Title 5, United States Code, provides in pertinent part as follows:

(b) Annual leave not used by an employee of the Government of the United States in one of the following classes of employees stationed outside the United States accumulates for use in succeeding years until it totals not more than 45 days at the beginning of the first full biweekly pay period, or corresponding period for an employee who is not paid on the basis of biweekly pay periods, occurring in a year:

(1) Individuals directly recruited or transferred by the Government of the United States from the United States or its territories or possessions including the Commonwealth of Puerto Rico for employment outside the area of recruitment or from which transferred.

This section was derived from section 203(d) of the act of October 30, 1951, 65 Stat. 680, as amended. S. Rept. No. 546, 82d Cong., to accompany S. 832, which was enacted as title II of S. 1046 (act of October 30, 1951), contains the following on page 6:

Paragraph (d) reduces and standardizes the maximum accumulation of annual leave for employees, except officers and employees in the Foreign Service of the Department of State, stationed outside the 48 States and the District of Columbia, at 90 days. The reason why such employees are permitted to accumulate annual leave in excess of that permitted employees in the United States is so that they will have ample leave for extended stays in the United States when they are able to return. Employees of the Foreign Service are not allowed the 90 days but are limited to an accumulation of 60 days because their home leave is provided for in a different manner. * * *

In the instant case Inspector Cintron was assigned to New York and transferred thereafter to Puerto Rico. However, there is no indication that he changed his permanent residence to any point in the United States where he would be expected to take home leave. Therefore, there is no basis for permitting him to accumulate the additional amount of leave.

Since any leave in excess of the 30-day limitation fixed by the Annual and Sick Leave Act of 1951, as amended, 5 U.S.C. 6304(a), is forfeited by operation of law, if not used by the close of the leave year (see 36 Comp. Gen. 596), we suggest that Mr. Cintron be promptly advised in order that he may have an opportunity to use any excess leave before the end of the leave year.

[B-159950]

Compensation—Wage Board Employees—Overtime—Work in Excess of Daily and Weekly Limitations—Intermittent and Part-Time Employees

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

To the Acting Administrator, Federal Aviation Administration, December 24, 1968:

We refer to your letter of October 17, 1968, requesting our decision whether intermittent and part-time wage board employees for whom a 40-hour administrative workweek has not been established are entitled to overtime compensation for time worked in excess of 40 hours in a workweek.

You point out the differences in the overtime and hours of work statutes applicable to wage board employees (5 U.S.C. 5544(a), 6102) and classification act employees (5 U.S.C. 5542(a), 6101(a)) and the separate derivations of the several provisions, the former from section 23 of the act of March 28, 1934, 48 Stat. 522, and the latter from the Federal Employees Pay Act of 1945, 59 Stat. 295. In view thereof you question whether the rule expressed in our decision 46 Comp. Gen. 667 is applicable to wage board employees.

In 46 Comp. Gen. 667 we affirmed the earlier decisions of our Office holding that part-time and intermittent employees who have no administratively established workweek of 40 hours are not covered by section 201 of the Federal Employees Pay Act of 1945, as amended, now 5 U.S.C. 5542(a), authorizing overtime compensation for hours worked in excess of 40 per week. See 27 Comp. Gen. 776; 28 *id.* 328; 34 *id.* 471. In explanation of those earlier decisions we pointed out that our action therein was predicated on section 604(a) of the Federal Employees Pay Act of 1945, 59 Stat. 303, now 5 U.S.C. 6101(a)(2), which provides as follows:

(2) The head of each Executive agency, military department, and of the government of the District of Columbia shall—

(A) establish a basic administrative workweek of 40 hours for each full-time employee in his organization; and

(B) require that the hours of work within that workweek be performed within a period of not more than 6 of any 7 consecutive days.

We went on to say that—

It was our view that the provision in section 201 of the Federal Employees Pay Act of 1945, above, which at that time only authorized payment of overtime compensation for hours of work in excess of 40 in an administrative workweek had reference to the administrative workweek of 40 hours required to be established for full-time officers and employees by section 604(a), quoted above, and thus overtime compensation for work in excess of 40 hours in a week was limited to full-time employees with an established administrative workweek of 40 hours. That rule has been in effect for many years and even though the subject of overtime and premium compensation has been before the Congress on several occasions there has been no change (or even a proposed change so far as we are aware) in the language of the law regarding overtime compensation for hours of work in excess of 40 in an administrative workweek. We point out that the amendment of July 18, 1966, to section 201 did not disturb the language therein pertaining to overtime compensation for hours in excess of 40 per week. Neither did such amendment affect the wording of section 604(a) of the 1945 act. Under such circumstances we must affirm our decision in 28 Comp. Gen. 328 and 34 *id.* 471.

The proviso of section 23 of the act of March 28, 1934 (prior to its amendment in 1962), concerning the hours of work and overtime compensation for wage board employees, read as follows:

* * * *Provided*, That the regular hours of labor shall not be more than forty per week; and all overtime shall be compensated for at the rate of not less than time and one-half.

As you point out in your letter our Office has stated in at least one decision (21 Comp. Gen. 965, 968) that under the above-quoted provision it was necessary for an administrative office to fix a regular tour of duty of 40 hours per week, during which the regular rate of compensation was payable, in order that overtime compensation at the overtime rate could be properly computed for work in excess of 40 hours per week. Compare 32 Comp. Gen. 399, 400; 20 *id.* 392 at page 397. While we concede that the statement in the decision in 21 Comp. Gen. 965 is susceptible of an interpretation (similar to 46 Comp. Gen. 667) to the effect that overtime compensation under section 23 of the 1934 act is payable only to full time employees for whom a regular tour of duty of 40 hours has been established it was not so intended. Rather, our intent was only to establish the rule that an employee must be in a pay status for 40 hours in a workweek during which his regular rate of compensation would be payable in order to be eligible for overtime compensation under the 1934 act.

Section 23 of the 1934 act was amended by section 201 of the "Work Hours Act of 1962," Public Law 87-581, 76 Stat. 357, as follows:

The proviso of section 23 of the Act of March 28, 1934 (48 Stat. 509, 522), as amended, is hereby amended to read as follows: "*Provided*, That the regular hours of labor are hereby established at not more than eight per day or forty per week, but work in excess of such hours shall be permitted when administratively determined to be in the public interest: *Provided further*, That overtime work in excess of eight hours per day or in excess of forty hours per week shall be compensated for at not less than time and one-half the basic rate of compensation, except that employees subject to this section who are regularly required to remain at or within the confines of their post of duty in excess of eight hours per day in a standby or on-call status shall be paid overtime rates only for hours of duty, exclusive of eating and sleeping time, in excess of forty per week."

As discussed above, our decisions concerning payment of overtime compensation to part-time and intermittent classification act employees were predicated on the specific statutory language of sections 201 and 604(a) of the Federal Employees Pay Act of 1945. The language of section 23, as amended, quoted above, does not, in our opinion, require a similar conclusion with respect to part-time and intermittent wage board employees. Although section 23, as amended, speaks of the establishment of regular hours of labor at not more than eight per day or forty per week, we believe that such language is to be construed as prescribing only a measure as to when regular rates and overtime rates of compensation are payable. Therefore, we hold that under the provisions of 5 U.S.C. 5544(a) part-time and intermittent wage board employees are entitled to overtime compensation for time worked in excess of 8 hours a day or 40 hours a week regardless of whether a 40-hour workweek or an 8-hour day has been administratively established.

[B–165409]

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics

An invitation for an Argon Laser with Ceramic Discharge Tube, Carson Model SP–300 or equal, that failed to indicate whether all or some of the specification details were salient features or characteristics essential to the needs of the Government is a defective invitation that provided no basis for the determination made under paragraph 1–1206.4 of the Armed Services Procurement Regulation to the effect that the deviations in the successful bid which failed to comply with important aspects of the invitation were minor or inconsequential, and deterred the brand name manufacturer from offering a lower priced "or equal" item. In future procurements utilizing brand name or equal descriptions, actual needs should be determined in advance and only those needs set forth as salient characteristics in appropriate terms in the invitation.

To the Secretary of the Air Force, December 26, 1968:

Reference is made to correspondence dated October 7, 1968, from the attorney for Carson Laboratories, Inc., requesting that our Office reconsider the denial by the Department of the Air Force of its protest against the award of a contract to Hughes Electron Dynamics Division, Hughes Aircraft Company, under invitation for bids No. F19617–68–B–0040, issued by the Base Procurement Division, Westover Air Force Base, Massachusetts. This protest was the subject of a report dated November 6, 1968, from the Deputy Chief, Procurement Operations Division, Directorate, Procurement Policy, Deputy Chief of Staff, Systems and Logistics.

The invitation dated April 18, 1968, requested bids for the furnishing of one Argon Laser with Ceramic Discharge Tube, Carson Model SP–300 or equal. In addition, the invitation listed certain technical

specifications which the laser had to meet to be "equal" to the brand name item. The invitation contained the clause required by Armed Services Procurement Regulation (ASPR) 1–1206.3 informing bidders that the "brand name or equal" description was intended to be descriptive but not restrictive, and was to indicate the quality and characteristics of products that would be satisfactory, and that bids offering "equal" products would be considered if it was determined that such products were equal in all "material" respects to the referenced brand name product.

Four bids were received and opened on May 28, 1968. The bids were in the following amounts:

Coherent Radiation Laboratories	$20,295
Hughes Electron Dynamics Division (Hughes)	21,750
Spectra-Physics, Inc.	25,050
Carson Laboratories, Inc. (Carson)	26,660

The record before us indicates that the low bid of Coherent Radiation Laboratories was offered on an "or equal" basis and was rejected since it failed to meet the size, weight and mounting requirements of the invitation. Hughes offered to furnish its model No. 3055H as equal to the Carson model SP–300 referenced in the invitation. Hughes furnished descriptive literature with its bid on its model No. 3055H. Air Force technical personnel and the contracting officer determined that the Hughes "or equal" bid was acceptable under the specifications and ASPR 1–1206.4. Subparagraph (a) of that section provides:

> (a) Bids offering products which differ from brand name products referenced in a "brand name or equal" purchase description shall be considered for award where the contracting officer determines in accordance with the terms of the clause in 1–1206.3(b) that the offered products are equal in all material respects to the products referenced. Bids shall not be rejected because of minor differences in design, construction, or features which do not affect the suitability of the products for their intended use.

However, before an award was made, Carson in its letter of June 19, 1968, to the contracting officer, protested the award of a contract to any bidder until such time as all the desired and allowable alternate specifications concerned in this invitation have been offered to all the bidders. Carson stated that the "low acceptable bid" was in fact an alternate or substitute bid which substantially deviated from the specifications in the invitation and should be rejected. Carson requested that the invitation be reissued with the technically acceptable alternate specifications in order that the Government may obtain the least expensive laser available that meets technical requirements.

By letter dated June 28, 1968, the contracting officer advised Carson that its reference to Hughes "alternate bid" was not applicable as the low responsive bid was not an alternate but an equivalent product without a substantial deviation; that is, the "minor variation is insignificant and does not alter the material respects of equality." The contracting officer stated that an evaluation was obtained which fully supported his determination that all essential characteristics of the invitation were met by Hughes. Accordingly, Carson was advised that its protest must be denied. On the same day, an award in the amount of $21,750 was made to Hughes.

The attorney for Carson filed a protest with the procuring activity by letter dated July 12, 1968, stating that the laser on which the Hughes bid was based failed to comply with the requirements of the specification in several important aspects. For example, the discharge tube of the Hughes laser is metallic rather than ceramic, and the length exceeds the maximum dimensions stated in the specification. The protest of Carson was submitted to the Air Force Logistics Command (AFLC) for its decision. That command denied the protest stating that the technical evaluation indicates that the metallic discharge tube and slight difference in dimension are such minor deviations as not to affect the suitability of the item for its intended use and that the metallic discharge tube and overall dimensions of the laser head are adequate to meet the requirements of the Government (citing ASPR 1-1206.4(a) and B-153499 of August 24, 1964). By letter of August 27, 1968, the contracting officer advised Carson of this denial. Approximately 2 months of the 3-month delivery schedule had elapsed at that time. Subsequently, Carson protested this matter to Headquarters United States Air Force, and by letter dated September 23, 1968, Carson was advised of the concurrence in the decision of AFLC denying the protest.

As of October 25, 1968, AFLC advised that delivery of the equipment was anticipated during the following week. Under the above circumstances, Headquarters United States Air Force reaffirmed its concurrence in the decision denying the protest of Carson.

Upon review of this procurement, we have concluded that the invitation was defective and that no award should have been made under the invitation. However, considering that delivery was to be made within 90 days and that the award was made on June 28, 1968, corrective action is not possible at this time. Our consideration of the protest is set out below for the future guidance of procurement officials.

ASPR 1-1206.2(b) provides that "Brand name or equal" purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government. ASPR 1-1206.2(c) provides that when necessary to describe adequately the item required, an applicable com-

mercial catalog description, or pertinent extracts therefrom, may be used if such description is identified in the invitation for bids as being that of the particular named manufacturer, producer, or distributor.

The invitation specifications provided, in pertinent part, as follows:

SPECIFICATIONS

Output Power—3 watts, CW, TEMoo, all wavelengths
Major Wavelengths—4800 Å at 1.2 watts,
5145 Å at 1.2 watts
Beam Polarization—Single transverse mode, linearly polarized
Beam Diameter—1.5 mm at half power points
Beam Divergency—Approx. 0.5 milliradians
Mirror Configuration—Long radius
Beam Ripple—.1% (360Hz)
Beam Noise—Less than 1% (10–100Hz)
Stability—1%
Cooling—Integral liquid to liquid heat—exchanger
Size—Maximum 41" long x 12" wide x 12" high (1m head)
Weight (Laser head)—Approx. 60 lbs.
Mounting—Vertical
Imput Power—3 phase/220V at 10 kw

* * * * * * *

NOTE:
Catalog cuts and/or specifications including deviations must accompany bids, and failure to furnish such catalog cuts and/or specifications may be cause for disqualification of the bid.

The invitation failed to indicate whether all or some of the specification details listed above were salient features or characteristics which were essential to the needs of the Government. However, the record before us indicates that complete detailed specifications of the Carson model were used which included characteristics which were found in the evaluation of bids to be not essential to the needs of the Government. In our decision B–157857, January 26, 1966, our Office considered a case where a brand name or equal purchase description did not include all the characteristics of the brand name item which were considered essential to the Government's needs. In that decision, it was stated:

* * * Bidders offering "equal" products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. An invitation which fails to list all the characteristics deemed essential, or lists characteristics which are not essential, is defective. 41 Comp. Gen. 242, 250–51: B–154611, August 28, 1964. See, also, 38 Comp. Gen. 345 and B–157081, October 18, 1965.

Carson protested the award of a contract to Hughes on the grounds that the bid failed to comply with the requirements of the specification in several important aspects. The invitation called for a laser with a ceramic discharge tube and provided that the laser head size would be a maximum of 41" long x 12" wide x 12" high. The record before us shows that the item Hughes is furnishing has a head length of 44", 3"

longer than the maximum size specified and additionally the Hughes laser is equipped with a metallic discharge tube rather than a ceramic tube as stated in the item description. The contracting officer has stated, in effect, that the fact that the Hughes model has a metallic discharge tube instead of the specified ceramic discharge tube and the fact that the Hughes model is slightly longer in size were not sufficient deviations to justify rejection of the Hughes bid as nonresponsive since these deviations are of a minor nature and do not affect the suitability of the Hughes model for its intended use. The Air Force found no objection to the technical evaluation which determined that despite these minor deviations, the Hughes model meets the requirements of the Government and is "equal" to the Carson model within the meaning of ASPR -1206.4(a).

The attorney for Carson by letter of July 12, 1968, to the Commander, 8th Air Force, Westover Air Force Base, Massachusetts, stated that in view of the manner in which the specification was developed, and in view of the impression clearly conveyed to Carson that the requirements of the specification were critical (especially where maximum dimensions were specified), it was led to believe that only its referenced brand name model would be suitable and thus was never given an opportunity to submit a bid based on its lower priced standard laser design. The attorney further states that Carson's standard laser design could have met the requirements of the specification to the same extent that the Hughes laser may be considered to have met the requirements of the specification, and that the Carson standard design is priced below the bid submitted by Hughes.

We have considered the applicability of B-153499, cited by AFLC, to support the award made to Hughes but we believe that such decision is distinguishable since it did not involve a brand name or equal purchase description or ASPR 1-1206.2(b).

We must, of course, accord significant weight to the technical finding by AFLC that the variances in the Hughes laser were minor and did not affect the suitability of the item for its intended use. At the same time, we also must recognize that the Hughes laser did not represent an equal product to the brand name referenced. While Hughes' failure to demonstrate complete equality of its product to the brand name item was not of major proportions, its failure to conform to the minimum size and to the discharge tube requirements rendered its bid nonresponsive. We hold this because the statement of specifications contained in the invitation must be viewed as representing the essential salient features or characteristics of the laser required by the Govern-

ment. We find no factual basis to identify certain of those listed features or characteristics as minor or inconsequential in determining equality under ASPR 1-1206.4.

We have construed the words "or equal," when used in conjunction with a brand name purchase description, to mean that an alternate item must be equal to the product specified, insofar as the needs of the procuring agency are concerned, but not necessarily an exact duplicate thereof in detail or performance. 38 Comp. Gen. 291, and decisions cited therein; 43 *id.* 761. Had the purchase description in this case contained, in addition to the brand name or equal description, only those salient characteristics which were essential to the needs of the Government in accordance with ASPR 1-1206.2(b), Hughes bid would clearly have been responsive to the invitation for bids. However, the fact remains that the bid of Hughes was not completely responsive to the terms of the invitation for bids in that it failed to offer the minimum size and type of discharge tube specified. Had this matter been brought to our attention prior to award of the contract, it seems clear that the best interests of the United States would have required cancellation of the invitation and a readvertisement of the Government's needs. However, the deviations in the bid were, concededly, deviations to requirements in the purchase description which were actually unnecessary to the Government's needs.

This procurement is an example of the difficulties all too frequently encountered in procurements utilizing brand name or equal purchase descriptions. In future procurements involving such purchase descriptions, the Government's actual needs should be determined in advance of the issuance of the invitation for bids and only such actual needs should be set forth as salient characteristics. See, in that connection, ASPR 1-1206.2(b) which specifies that " 'Brand name or equal' purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are *essential* to the needs of the Government." [Italic supplied.] Also, in the future, if reasonable tolerances respecting the physical or functional characteristics of equipment are generally acceptable to your department (as appears to be the case in the instant procurement), the salient characteristics in the purchase description should be stated in appropriate terms. See B-136574, August 14, 1958; 43 Comp. Gen. 761.

Alternatively, we suggest that the purchase description was written to specify only the Carson laser and should have precluded consideration of comparable lasers manufactured by other sources. While such was not intended, as evidenced by the award to Hughes, the circum-

stances indicate that the laser required by the Government was a commercial off-the-shelf item which could have been procured competitively under a purchase description setting forth the essential characteristics and functions of the laser. See ASPR 1-1206.1(a); *cf.* 41 Comp. Gen. 76.

[B-165564]

Travel Expenses—Fares—Taxicabs—Common Carrier Constructive Cost

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

To Edward Kneuper, Jr., Bureau of Reclamation, December 26, 1968:

Your letter of October 30, 1968, submitting a reclaim voucher from Mr. Morgan W. Pace in the amount of $1.85 representing the constructive cost of a taxi fare, asks whether the voucher may be certified for payment under the facts and circumstances hereinafter related.

You point out that Mr. Pace, by his travel authorization, was entitled to proceed on temporary duty by plane or privately owned auto not to exceed cost by common carrier and that he actually traveled by private auto. He included in the constructive common carrier cost on the original travel claim two taxi fares and two limousine fares in Amarillo. One of the taxi fares—now being reclaimed—was administratively suspended for the reasons set out below:

Subsection 3.5c(2)(a) of the Standardized Government Travel Regulations provides that "In determining the constructive common carrier cost there will also be included the usual transportation costs to and from the common carrier terminals." Limousine service is available at our office to and from the airport terminal. A review of our recent travel vouchers reveals that when an employee traveled by plane and departed or returned during office hours in most cases limousine fare only between office and airport was claimed. In most of the remaining cases round-trip mileage between office and airport plus parking fees were allowed. In addition, mileage between the office and the employee's residence was allowed under subsection 3.5c(1). On occasion an employee will return to his home before departure during working hours and will be reimbursed taxi and limousine fares to the airport terminal. Similar reimbursements have been made when an employee returns during office hours.

On this basis we considered a taxi fare on the constructive day of departure during office hours not to be allowable since the usual transportation cost to the airport terminal would have been limousine fare only or a mileage allowance between the airport and office. We also conclude that taxi fare could not be allowed for transportation to the office under the second paragraph of subsection 3.1b, since this transportation cost would not be to or from the common carrier terminal.

We note from the original voucher, covering the period September 30–October 4, 1968, that the comparative costs by common carrier were less than the costs claimed for the travel by privately owned auto. Such comparative costs are shown to be, one round trip plane fare $78; two taxi fares Amarillo ($1.60 plus tip $.25=$1.85) $3.70; two limousine fares Amarillo at $2 each, $4; two taxi fares Farmington ($.60 plus tip $.15=$.75) $1.50, totaling $87.20.

Section 3.5*c*(2)(a), Standardized Government Travel Regulations, provides, in pertinent part, that:

* * * In determining the constructive common carrier cost there will also be included the usual transportation costs to and from the common carrier terminals. * * *

Section 3.1*b*, SGTR, provides, in pertinent part, for:

b. Reimbursement will be allowed for the usual taxicab and airport limousine fares, when appropriate, plus tip, from common carrier or other terminal to either the employee's home or place of business, from the employee's home or place of business to common carrier or other terminal, or between an airport and airport limousine terminal. * * *

The foregoing provisions presuppose that a taxicab is required for use between the office and terminal. In view of the administrative explanation that limousine service is available at the office to and from the airport terminal it is evident that a taxicab upon departure during office hours would not have been utilized had the claimant traveled by airplane. In addition attention is invited to the amendment made to subsection *b* of section 3.1, SGTR, Transmittal Memorandum No. 7, April 7, 1967, to the effect that agencies should administratively restrict the use of taxicabs when suitable Government or common carrier transportation service, including airport limousine service, is available. Therefore, the constructive taxi fare of $1.85 may not be allowed. However, we direct your attention to the following provision which also appeared in the amendment of April 7, 1967, previously referred to:

In addition, reimbursement may be authorized or approved for the usual taxicab fares, plus tip, from the employee's home to his office on the day he departs from his office on an official trip requiring at least one night's lodging and from his office to his home on the day he returns to his office from the trip.

If such provisions are administratively determined applicable here a basis would exist for allowance of constructive taxi fare from the

employee's home to his office in lieu of the $1.85 reclaimed. See 36 Comp. Gen. 476. The voucher is returned herewith and may not be certified for payment on the basis of the present record.

[B-164581]

Contracts—Negotiation—Authority—Prenegotiation Clearance

The authority to negotiate on the basis of the only responsive offer out of three initial proposals received to furnish a NATO procurement solicited under 10 U.S.C. 2304(a)(2) is a prenegotiation clearance to contract that grants no rights to the prospective contractor, and the offer, not the lowest submitted, exceeding available NATO funds and sufficient time remaining for negotiation before funds became available, the contracting officer was obligated under 10 U.S.C. 2304(g) to continue negotiations. Therefore, the award of a contract on the basis of a negotiated revised proposal to an offeror submitting a nonresponsive initial proposal that was within a competitive range, price and other factors considered was proper, even though the initial responsive offeror who had confirmed prices during negotiations was not notified of the cutoff date for negotiations.

To Hart, Moss & Tavenner, December 27, 1968:

Reference is made to telegram dated June 14, 1968, from National Radio Company, Incorporated, and your letters dated June 20, June 26, August 16 and August 19, 1968, with enclosures, presenting the protest of the National Radio Company against the award of contract N00039-68-C-2563 to ITT Avionics under Request for Proposals RFP N00039-68-R-2011(S) issued by the Naval Electronic Systems Command, Washington, D.C.

The request for proposals was issued on February 16, 1968, for the supply of: Item 1—38 AN/GRN-9D radio sets; Item 2—one 3352/GRN-9D radio transmitter group; Item 3—37 repair parts kits; and Item 4AA—Data Requirements for Items 1 and 2, price to be included in the prices of Items 1 and 2. Delivery was required as follows: Item 1—first article in 330 days from date of contract; 2 each within 13 months; 5 each within 14 months and continuing at 5 each monthly thereafter until completion of contract; Item 2—within 14 months after effective date of contract; Item 3—concurrent with Item 1. The closing date for receipt of proposals was March 12, 1968. The solicitation was in response to an urgent NATO requirement for the radio sets and carried an "O2 priority" rating. Amendment No. 1 to the request for proposals, dated March 20, superseding telegraphic modification dated March 8, 1968, in addition to extending the closing date of April 1, 1968, and other modifications, revised the schedule of deliveries to provide for delivery as follows:

Item 1. 1 each within 10 months
2 each within 11 months
5 each month thereafter to completion of contract

This amendment also deleted all reference to first article testing requirements. Amendment No. 2, dated April 1, 1968, confirming and superseding Naval Electronic Systems Command message dated March 29, 1968, extended the closing date to April 5, 1968, in lieu of April 1, 1968.

Three proposals were received in response to the request, as follows:

Offeror	Amount
ITT Avionics	$1,695,038.77
National Radio Company	1,803,590.00
Keltec	1,909,203.00

It is reported that the offer of Keltec was premised on the use of a complete Government supplied data package which did not exist. Accordingly, Keltec's offer was considered nonresponsive and its proposal was rejected.

The proposal of the National Radio Company was fully responsive to the request. The ITT Avionics proposal of April 5, 1968, however, although proposing the lowest price, offered to produce the AN/GRN-9D that it had previously produced for NATO using its original drawings. ITT Avionics also proposed to omit certain testing and quality assurance procedures since it had performed these tests and procedures on its earlier contracts.

The solicitation contained the following instruction:

MOST FAVORABLE OFFER: THE GOVERNMENT RESERVES THE RIGHT TO ACCEPT, WITHIN THE TIME SPECIFIED HEREIN, ANY OFFER WITHOUT ANY DISCUSSIONS OR NEGOTIATIONS SUBSEQUENT TO ITS RECEIPT UNLESS THE OFFER IS WITHDRAWN IN WRITING PRIOR TO ACCEPTANCE. HENCE OFFERS SHOULD BE SUBMITTED INITIALLY ON THE MOST FAVORABLE TERMS FROM A PRICE AND TECHNICAL STANDPOINT WHICH THE OFFEROR CAN SUBMIT TO THE GOVERNMENT.

The contracting officer, exercising the right reserved in the above quotation, on April 30, 1968, requested clearance from the Chief of Naval Materiel and authority to contract with National Radio on the basis of the initial proposal and without negotiations with offerors, stating that:

In a normal situation consideration might be given to further negotiation with all bidders to *possibly clarify deficient offers* by again requesting strict conformance with the expressed requirements. This course of action is not feasible on this procurement since it is being negotiated under 10 U.S.C. Section 2304(a)(2), and award must be made immediately to satisfy U.S. Commitments to NATO Countries. Accordingly, since ITT [Avionics] and Keltec are not responsive, and since on a reconstructed basis National's proposal can be judged low, it is believed that an award to National Co., without delay, is justified. [Italic supplied.]

It should be noted here that Keltec's proposal was considered nonresponsive because it required something which could not be given, namely, the furnishing by the Government of a complete data package and that the ITT Avionics proposal, while not responsive on the basis of award without negotiation, was, however, capable of being made responsive through negotiation. See ASPR 3-805.1(b).

Several days later, on May 9, 1968, the contracting officer was advised through appropriate authority that National Radio's price exceeded available NATO funds, and that the Navy would not advance the money for the procurement pending efforts to obtain additional sums from the NATO countries concerned. Accordingly, it is stated in the administrative report, the request for clearance for award to National Radio was withdrawn and discussions of the proposals of ITT Avionics and National Radio were undertaken pursuant to 10 U.S.C. 2304(g). On May 22, 1968, National Radio and ITT Avionics were solicited by the contracting officer to submit final firm prices, with a closing date of May 29, 1968. At the Government's request representatives of National Radio met with Naval Electronic Systems Command negotiators on May 23, 1968.

The administrative office reports that at this meeting the specifications were discussed, that National Radio was advised of the difficulties concerning the insufficiency of NATO budgeted funds, and also, that it should confirm its price offer by May 29, 1968. On May 24, 1968, both offerors were requested to include in their final offers their prices for 39 units of the AN/GRN-9D radio sets (item 1) as well as for 38 units stated in the Request for Proposal. By letter dated May 28, 1968, National Radio confirmed its price for 38 units of item 1, and for items 2 and 3. National Radio also quoted its price for 39 units of item 1. The total price quoted for 39 units was slightly less per unit than the price per unit for 38 units. The contracting officer, not having received National Radio's final price proposals on May 29, 1968, telephoned National Radio and obtained the prices. Later the same day the prices were rechecked and confirmed by National Radio. Also on May 29, 1968, ITT Avionics hand delivered its final price proposals. In addition, on May 29, 1968, ITT Avionics telegraphed the Naval Electronic Systems Command its proposal devoid of exceptions which was responsive to the request for proposals and referred to its original proposal as "Alternate A," pointing out operational and economic advantages of "Alternate A." The final proposal was on the specifications stated in the request for proposals and was considered fully responsive.

The record shows that on May 31, 1968, NATO money for 38 units of

item 1 was obtained, and the procurement was financially authorized. Later the same day, procurement of the items from ITT Avionics was verbally approved. This approval and authority to contract with ITT Avionics was confirmed in writing on June 10, 1968. On June 8, 1968, ITT Avionics was notified in writing of the award to it of a contract for 38 units of item 1 and other items of the request for proposal. ITT Avionics accepted the award on June 12, 1968, and again acknowledged the 10-month delivery requirement of Amendment 1.

You contend that the contracting officer erred in permitting ITT Avionics to modify its proposal after April 5, 1968, final date for receipt of proposal; that the contracting officer erred in relaxing delivery requirements from 10 months to 13 months delivery for ITT Avionics without affording National Radio the same opportunity to adjust its price proposal on the basis of a relaxed delivery schedule; that while the necessary clearance to contract with National Radio had been obtained but not exercised ITT Avionics was permitted to revise its proposal; negotiations as such were not entered into with National Radio, although negotiations were conducted with ITT Avionics resulting in their "new" and revised proposal on which award was made.

We have examined the record before our Office carefully and minutely and have found no basis for concluding that ITT Avionics proposed or was tendered the opportunity to propose deliveries beginning 13 months following date of the contract. The ITT initial proposal was accompanied by an executed amendment No. 0001 which provided for a 10-month delivery. Its final proposal agreed to the same schedule. The apparent confusion arises from the telegraphic notice of award which incorrectly referred to deliveries beginning 13 months after date of contract. The error was immediately detected and ITT Avionics' acceptance of award correctly stated that deliveries would begin within 10 months following date of contract.

Essentially your other contentions come down to consideration of whether Kaltec's and ITT Avionics' initial proposals were nonresponsive to the degree of requiring outright rejection and whether, following the closing date for receipt of proposals, negotiations and/or discussions as contemplated by the law and regulations were in fact conducted with National Radio.

Armed Services Procurement Regulation 3-805.1 which prescribes the negotiation procedures to be applied in the selection of offerors for negotiation and award is in implementation of 10 U.S.C. 2304(g). That provision of law reads 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. [Italics supplied.]

The pertinent provisions of part 8—Price Negotiation Policies and Techniques—of section III, ASPR, which are particularly for consideration here are as follows:

3-804 Conduct of Negotiations. Evaluation of offerors' or contractors' proposals, including price revision proposals, by all personnel concerned, with the procurement, as well as subsequent negotiations with the offeror or contractor, shall be completed expeditiously. Complete agreement of the parties on all basic issues shall be the objective of the contract negotiations. 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. * * *

* * * * * * *

3-805.1 *General.*

(a) After receipt of initial proposals, written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price and other factors considered, except that this requirement need not necessarily be applied to:

* * * * * * *

(v) procurements in which it can be clearly demonstrated from the existence of adequate competition or accurate prior cost experience with the product or service that acceptance of the most favorable initial proposal without discussion would result in a fair and reasonable price. (*Provided, however,* that in such procurements, the request for proposals shall notify all offerors of the possibility that award may be made without discussion of proposals received and hence, that proposals should be submitted initially on the most favorable terms from a price and technical standpoint which the offeror can submit to the Government. In any case where there is uncertainty as to the pricing or technical aspects of any proposals, the contracting officer shall not make award without further exploration and discussion prior to award. * * *

It appears to us that the clear intent of the statute and ASPR 3-805.1 (a) (v) is to relax the mandatory requirement that negotiation is required to be conducted with *all* responsible offerors who submit competitive offers, only in those situations wherein it can be clearly demonstrated from the existence of adequate competition or accurate cost experience that acceptance of an initial offer without negotiation would result in fair and reasonable prices. In our view, the exception specified clearly was not applicable to the situation involved in this procurement.

If we assume, for the moment, that the initial proposals of Keltec and ITT Avionics were nonresponsive, without qualification, the result

would leave but one responsive offeror—National Radio Company. The Request for Authority to Contract with National Radio clearly states on its transmittal page that it was submitted as a "PRE-NEGOTIATION CLEARANCE." The approval of the request on the basis of exigency did not relieve the contracting officer of the obligation to negotiate with National Radio Company before making an award of a contract. The Navy Procurement Directive, Paragraph 1–403.50, provides as follows:

1–403.50 Business Clearance [authority to contract] is the required approval by the Chief of Naval Material of the business aspects of proposed contractual actions. Such clearance is required pursuant to statute (10 U.S.C. 5082) and authority derived from the Secretary of the Navy. Request for business clearance is submitted on a business clearance memorandum. (See NPD-1–403.52), and consists of two parts as follows:

(a) *Pre-Negotiation Business Clearance.* Upon receipt of the contractors' proposals and audit and inspection service reports, and upon completion of thorough evaluation of technical aspects and price and contract terms, a pre-negotiation business clearance memorandum will be prepared setting forth all of the significant details of the proposed contract negotiation and the course the procuring activity proposes to pursue in consummation of its procurement responsibility (See NPD–1–403.52). Any major change in the pre-negotiation business clearance memorandum proposed by the requisitioning or procuring activity or proposed by an offeror which the procuring activity desires to adopt shall be covered by a revised pre-negotiation business clearance memorandum.

(b) *Post-Negotiation Business Clearance.* Negotiation should be undertaken promptly after the Chief of Naval Material approval of the pre-negotiation business clearance memorandum, and the interval up to the post-negotiation business clearance minimized, with the objective of submission of the post-negotiation business clearance memorandum within 30 days from the date of approval of the pre-negotiation business clearance memorandum. In the event negotiations are not completed within 60 days after approval by the Chief of Naval Material of the pre-negotiation clearance, a supplemental pre-negotiation business clearance memorandum is required. Such clearance will include the reason for the delay and discussion of any pertinent changes that have occurred since submission of the pre-negotiation clearance memorandum. Upon completion of negotiation, the post-negotiation business clearance memorandum shall set forth in detail the negotiation results obtained, in accordance with NPD 1–403.52. NO COMMITMENT SHALL BE MADE TO A PROSPECTIVE CONTRACTOR PRIOR TO OBTAINING THE CHIEF OF NAVAL MATERIAL'S APPROVAL OF THE POST-NEGOTIATION BUSINESS CLEARANCE MEMORANDUM.

It is obvious from the above quotation that the approval by the Chief of Naval Material of the prenegotiation memorandum affords no rights to a proposed contractor. It merely serves as a clearance to the contracting officer to enter into negotiations. As a prelude to this negotiation certified costs and pricing data would be required of National Radio. See B–161448, February 7, 1968.

We must reiterate at this point, however, that the nonresponsiveness of both Keltec and ITT Avionics was with reference to consideration on an initial award basis and without negotiation. When it was discovered that the NATO funds available were insufficient, and the contracting officer decided there would be time for negotiation, pending

receipt of notice that additional NATO funds were acquired, he was obligated to negotiate with all responsible offerors whose proposals were within a competitive range, price and other factors considered.

It is our view that although the proposal of ITT Avionics, with its exceptions, may have been nonresponsive for the purpose of making an award on initial proposals only, it does not require a conclusion that the proposal was nonresponsive if negotiations were to be undertaken. The Keltec proposal, however, was nonresponsive in all aspects, requiring, as it did, the furnishing by the Government of a nonexisting complete data package. The ITT Avionics proposal offered the products sought, but stated exceptions and substitutions to reduce the price of the items. We consider that it was proper for ITT Avionics during negotiation, to revise its proposal by eliminating its exceptions, and of course, during negotiation it had the right to revise its price quotations.

The term "negotiation" generally implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by the parties. 10 U.S.C. 2304(g) implements and clarifies the definition of "negotiate" in 10 U.S.C. 2302(2) and it is our view that the term "negotiate" must be read in conjunction with 10 U.S.C. 2304(g) to include the solicitation of proposals and the conduct of written or oral discussions, when required, as well as the making and entering into a contract. See page 5 of H. Rept. No. 1638, on H.R. 5532, 87th Cong., which was enacted as Public Law 87–653, adding the new subsection (g) to 10 U.S.C. 2304.

Negotiation has been defined as "the deliberation which takes place between the parties touching a proposed agreement." Bouvier's Law Dictionary. It also has been defined as "the deliberation, discussion, or conference upon the terms of a proposed agreement; the act of settling or arranging the terms and conditions of a bargain, sale, or other business transaction." Black's Law Dictionary. We have held that:

> [It is] contend[ed] also that [offeror] was permitted to increase his price in the course of negotiations to include items originally excluded from the proposal. The contract was awarded pursuant to negotiation. The term "negotiation" implies a series of offers and counteroffers until a mutually satisfactory agreement is concluded by parties. The fact that [the offeror-contractor] may have been permitted to amend his proposal in the course of negotiations would not invalidate the resulting contract. B–151013, April 16, 1963.

You urge that no negotiations were conducted with National Radio, but you do acknowledge that a discussion took place with the Navy negotiators on May 23, 1968, for 30 to 40 minutes during which meeting discussion took place concerning a recommended change in specification, acceptable to the Navy. National Radio representatives also stated

at that time that the National Radio Company was satisfied with its proposal as submitted. It is stated that the Navy requested National Radio Company to reconfirm its proposal price in writing by May 29, 1968. The complaint that insufficient time was provided in the negotiation does not appear well taken to us. National Radio Company was satisfied with its proposal, and did not choose to revise its price quotation by May 29, 1968. We view the inquiry by the Navy as to the price for a 39th unit of item 1 as a legitimate inquiry, as long as all eligible offerors were solicited. We note that National Radio Company reduced the unit price of item 1 if 39 units were procured, but refused to adjust the unit price to the 39 unit rate, if only 38 units were procured. In this regard, ASPR paragraph 3–805.1(b) provides, in pertinent part, as follows:

(b) Whenever negotiations are conducted with more than one offeror, auction techniques are strictly prohibited; an example would be indicating to an offeror a price which must be met to obtain further consideration, or informing him that his price is not low in relation to that of another offeror. On the other hand, it is permissible to inform an offeror that his price is considered by the Government to be too high. After receipt of proposals, no information regarding the number or identity of the offerors participating in the negotiations shall be made available to the public or to any one whose official duties do not require such knowledge. Whenever negotiations are conducted with several offerors, while such negotiations may be conducted successively, all offerors selected to participate in such negotiations * * * shall be offered and 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. * * *

The regulations state that no information shall be made available, after the receipt of proposals, regarding the number of offerors participating in subsequent negotiations. It is possible the Navy negotiating team felt this precluded them from telling National Radio Company at the time it was requested to "reconfirm" its price by May 29, 1968, that competition had not ended. If so, we do not agree, and we have asked for comments on this point from the Secretary of the Navy.

Nevertheless, the fact remains that National was aware its original quotation exceeded the NATO funds then available, and it was given an opportunity to submit a revised price. While we think it would have been preferable to have given National more explicit notice that the competition would not end until May 29, 1968, we cannot say that the failure to do so amounted to a failure to conduct negotiations as required by the law and regulations.

We therefore cannot say that the award made was illegal, and we must deny your protest.

A copy of our letter to the Secretary of the Navy is enclosed.

INDEX

OCTOBER, NOVEMBER, AND DECEMBER 1968

LIST OF CLAIMANTS, ETC.

	Page
Abernathy, Buford D	239
Advance Building Maintenance Co	230
Alpine Geophysical Associates, Inc	209
American Steamship Lines, Committee	250
Anderson, Hubert M	301
Armstrong, James H	239
Arnold, Gerald A	407
Arnott, Joseph R	239
Attorney General	249, 334
Avien, Inc	337
Baldwin Brothers, Inc	289
Barbed Tape Products, Inc	413
Bellas, Mary C	239
Benner Box, Div. of Simkins Industries, Inc	171
Branchi, Titus	239
Brown, Charles W	408
Building Maintenance Corp	381
Burrell, William C	204
Business Services Corp	345
Capers, Ellison	239
Carroll, J	216
Carson Laboratories, Inc	441
Caveney, L. Richard	320
Chauvin, Edwin, Jr	334
Cintron, M	437
Collins Radio Co	420
ComTech Corp	349
Continental Business Enterprises, Inc	314
Continental Motors Corp	168
Cool-Rite Corp	369
Costello, C. J	408
Cramer, William C	326
Cross, Sally N	185
Crystal, Thomas L., Jr	329
Dedering, Kenneth C	239
Defense Supply Agency, Director	168, 196, 413
De Laval Turbine, Inc	291
District of Columbia, Commissioner	285
Douglas Aircraft Co	179
Electric Apparatus Co	196
Empire Generator Corp	415
Federal Aviation Administration, Acting Administrator	439
Feidelman, Joel R	230
Feldworth, Marjorie E	239
Fewell, Norwood I	239
Fulton, Robert B., II	239
General Services Administration, Administrator	271
Georgia Highway Express, Inc	335
Gilmore Industries, Inc	314
Gordy, Angela	167
Gordy, Demps	167
Groves, Leon E	276
Gubin, E. K	171
Hall, B. W	311
Hannebrink, Lila	365
Hart, Moss & Tavenner	449
Huffman, James D	226
Ingles, J. E	395
Interconnect Associates	369
International Minerals and Chemical Corp	262
Janet's Typewriter Service	256
Kelliher, J. R	329, 398
Kneuper, Edward, Jr	447
Kriesberg, Martin	185
Lavigne, Inc., Donald S	285
Leppitsch, Johann J	384
Lerner, David G	235
Magennis, Edward G	239
Morris, Robert D	239
National Radio Company, Inc	357, 449
National Science Foundation, Director	209
Noonan, Robert J	239
Obermeyer, Jack A	239
Ormond, Inc	314
Pace, Morgan W	447
Paulis Silk Co	267
Peugh, Everett R	239
Postmaster General	435, 437
Price, Joseph R	233
Propper Manufacturing Co., Inc	271
Prospect Manufacturing and Engineering Co	323
Qatron Corp	306
Raytheon Co	420
Ridge Tool Co., The	403
Risberg, T. W	365
Rolinitis, Darrell L	216
Rushing, Ethel P	258
Schullery, R. J	233
Schwag, Samuel F	372

LIST OF CLAIMANTS, ETC—Continued

	Page
Secretary of Agriculture	313
Secretary of the Air Force	314, 387, 441
Secretary of the Army	219, 420
Secretary of Commerce	250
Secretary of Defense	179, 199, 214, 281, 354, 377, 430
Secretary of Health, Education, and Welfare	186
Secretary of the Interior	278
Secretary of the Navy	258, 345, 416
Secretary of Transportation	227, 390
Secretary of the Treasury	262
Selective Service System, Director	361
Sellers, Conner & Cuneo	349
Shaw, Pittman, Potts, Trowbridge & Madden	403
Shiman Brothers-Colonial, Inc	435
Smithsonian Institution, Secretary	193
Sperling, Rose M	276, 407
Staley, Willis H	226
Starling, Bruce C	419
Storm, Ronald D	395
Strasser, Spiegelberg, Fried, Frank & Kampelman	306
Stupar, Branko	285
Sundberg, D. G	167, 230
Superfine, Irving J	239
TAIT-KSB Co	385
Tanenbaum Textile Co., Inc	372
United States Civil Service Commission, Chairman	190, 192, 212
United States Information Agency, Director	415
Van Brocklin, James R	301
Velez, A. E	204, 235
Vinn, John, Jr	239
Yocum, Claude E	416
Zupancic, Rudolph N	398

TABLES OF STATUTES, ETC., CITED IN DECISIONS OF THE COMPTROLLER GENERAL OF THE UNITED STATES

UNITED STATES STATUTES AT LARGE

For use only as supplement to U.S. Code citations

	Page		Page
1789, July 4, 1 Stat. 27	432	1965, Aug. 21, 79 Stat. 545	402
1846, Aug. 10, 9 Stat. 102	193	1966, July 13, 80 Stat. 275	240
1942, June 16, 56 Stat. 363	218	1966, July 13, 80 Stat. 276	402
1948, June 25, 62 Stat. 1035	363	1967, Nov. 3, 81 Stat. 350	211, 363
1963, Oct. 2, 77 Stat. 210	244	1967, Dec. 16, 81 Stat. 649	402
1964, Aug. 30, 78 Stat. 659	363		

UNITED STATES CODE

See, also, U.S. Statutes at Large

	Page		Page
5 U.S. Code Ch. 41	313	5 U.S. Code 6304(c)	214
5 U.S. Code 47a	331	5 U.S. Code 6308	212
5 U.S. Code Ch. 55	192	5 U.S. Code 8101(1)(A)	280
5 U.S. Code 59a	220	5 U.S. Code 8301	240, 332
5 U.S. Code 59a(a)	220	10 U.S. Code Ch. 61	205
5 U.S. Code 59a(b)	220	10 U.S. Code Ch. 73	282
5 U.S. Code 61d (1952 ed.)	213	10 U.S. Code 456 (1940 ed.)	236
5 U.S. Code 630g-2	321	10 U.S. Code 564(a)	242
5 U.S. Code 835 note	277	10 U.S. Code 1201	330, 379
5 U.S. Code 1132 note	191	10 U.S. Code 1202	330
5 U.S. Code 2105(c)	192	10 U.S. Code 1203	379
5 U.S. Code 3501	220	10 U.S. Code 1208	205
5 U.S. Code 4109	186	10 U.S. Code 1221	332
5 U.S. Code 4109(a)(2)(B)	313	10 U.S. Code 1293	242
5 U.S. Code 5102(7)	279	10 U.S. Code 1305(a)	246
5 U.S. Code 5303	190	10 U.S. Code 1305(c)	246
5 U.S. Code 5303(a)	190	10 U.S. Code 1315	243
5 U.S. Code 5303(b)	191	10 U.S. Code 1371	243
5 U.S. Code 5341	279	10 U.S. Code 1401	242, 333
5 U.S. Code 5532(b)	220	10 U.S. Code 1401a	206
5 U.S. Code 5532(c)	220	10 U.S. Code 1401a note	206
5 U.S. Code 5542(a)	439	10 U.S. Code 1401a(b)	209
5 U.S. Code 5544(a)	439	10 U.S. Code 1401a(c)	208
5 U.S. Code 5545	335	10 U.S. Code 1401a(d)	243
5 U.S. Code 5545(c)(2)	334	10 U.S. Code 1401a(e)	209, 243
5 U.S. Code 5591	418	10 U.S. Code 1402 note	330
5 U.S. Code 5595(d)	192	10 U.S. Code 1402(a)	399
5 U.S. Code 5724	228	10 U.S. Code 1402(b)	205
5 U.S. Code 5724a	229, 397	10 U.S. Code 1402(d)	205
5 U.S. Code 6101(a)	439	10 U.S. Code 1431	167, 354
5 U.S. Code 6101(a)(2)	439	10 U.S. Code 1431 note	283, 356
5 U.S. Code 6102	439	10 U.S. Code 1431(b)	356
5 U.S. Code 6301(2)(b)(iii)	280	10 U.S. Code 1431(c)	356
5 U.S. Code 6303	220	10 U.S. Code 1434(a)	282
5 U.S. Code 6304	438	10 U.S. Code 1434(c)	168
5 U.S. Code 6304(a)	438	10 U.S. Code 1435	168

UNITED STATES CODE—Continued

	Page
10 U.S. Code 1436(b)	354
10 U.S. Code 1436(b)(1)	355
10 U.S. Code 1436(b)(2)	355
10 U.S. Code 1437	168
10 U.S. Code 1441	282
10 U.S. Code 1446	282, 354
10 U.S. Code 1552	333, 418
10 U.S. Code 2302(2)	455
10 U.S. Code 2304(a)(2)	338
10 U.S. Code 2304(a)(16)	200
10 U.S. Code 2304(g)	202, 317, 322, 451
10 U.S. Code 2305	376
10 U.S. Code 2305(a)	348
10 U.S. Code 2305(c)	360, 414, 423
10 U.S. Code 2631	431
10 U.S. Code 3253	379
10 U.S. Code 3254	379
10 U.S. Code 3256	379
10 U.S. Code 3914	205
10 U.S. Code 5532	379
10 U.S. Code 5701 note	241
10 U.S. Code 5784	394
10 U.S. Code 5787	390
10 U.S. Code 5787(j)	393
10 U.S. Code 6322	244
10 U.S. Code 6323	240
10 U.S. Code 6323(a)	246, 332
10 U.S. Code 6372	244
10 U.S. Code 6372(a)	244
10 U.S. Code 6376	245
10 U.S. Code 6376(a)	245
10 U.S. Code 6377	245
10 U.S. Code 6377(a)	245
10 U.S. Code 6377(b)	245
10 U.S. Code 6379	240
10 U.S. Code 6380	247
10 U.S. Code 6383(a)	247
10 U.S. Code 6383(b)	248
10 U.S. Code 6383(c)	247
10 U.S. Code 6390(a)	247
10 U.S. Code 6390(b)	247
10 U.S. Code 6396(a)	248
10 U.S. Code 6396(c)	248
10 U.S. Code 6400	248
10 U.S. Code 8253	379
10 U.S. Code 8254	379
10 U.S. Code 8256	379
10 U.S. Code 8911	330
10 U.S. Code 8914	398
10 U.S. Code 8991	333
12 U.S. Code 1749	327
14 U.S. Code Ch. 11	392
14 U.S. Code 257	392
14 U.S. Code 257(a)	391
14 U.S. Code 257(b)	391
14 U.S. Code 271	392
14 U.S. Code 275	390
14 U.S. Code 275(a)	391
14 U.S. Code 275(b)	391
14 U.S. Code 275(h)	393
14 U.S. Code 275(i)	391
14 U.S. Code 436 (1958 ed.)	393
15 U.S. Code 262	234
19 U.S. Code 267	264
19 U.S. Code 1450	264
19 U.S. Code 1451	263
19 U.S. Code 1452	264
20 U.S. Code 52	194
20 U.S. Code 81	194
20 U.S. Code 85	194
20 U.S. Code 701	327
26 U.S. Code 38 note	252
26 U.S. Code 46(a)(1)	252
26 U.S. Code 48	253
28 U.S. Code 2501	236
29 U.S. Code 206(a)(1)	270
31 U.S. Code 71	199
31 U.S. Code 71a	236
31 U.S. Code 203	197
31 U.S. Code 483a	266
31 U.S. Code 484	211
31 U.S. Code 725s	249
37 U.S. Code 203	330
37 U.S. Code 203 note	206, 239, 402
37 U.S. Code 203(a)	267
37 U.S. Code 204(a)	418
37 U.S. Code 205(a)	339
37 U.S. Code 401(2)	312
37 U.S. Code 402(b)	396
37 U.S. Code 403	303, 311
37 U.S. Code 403(a)	217
37 U.S. Code 403(b)	218, 305
37 U.S. Code 404	410
37 U.S. Code 404(a)(1)	305
37 U.S. Code 404(a)(2)	304
37 U.S. Code 404(a)(3)	304
37 U.S. Code 404(a)(4)	302
37 U.S. Code 404(d)	305
37 U.S. Code 406	410
38 U.S. Code 101	220
39 U.S. Code 5001(a)	435
39 U.S. Code 5001(b)	435
39 U.S. Code 5001(c)	436
39 U.S. Code 5011	437
40 U.S. Code 276a	279
40 U.S. Code 327	310, 387
40 U.S. Code 328	388
40 U.S. Code 330	389
40 U.S. Code 332	310
40 U.S. Code 471 note	195
40 U.S. Code 759	404
41 U.S. Code 10a	385, 404
41 U.S. Code 10d	385, 404
41 U.S. Code 36	310
41 U.S. Code 252(c)(10)	195
41 U.S. Code 254a	187
42 U.S. Code 241(d)	187
42 U.S. Code 1870 (1958 ed.)	211
42 U.S. Code 1870(f) (1958 ed.)	211
42 U.S. Code 1873(h) (1958 ed.)	211
46 U.S. Code 801	254
46 U.S. Code 816	203
46 U.S. Code 817(b)(5) (1946 ed.)	203
46 U.S. Code 883	433
46 U.S. Code 1101 (1958 ed.)	250
46 U.S. Code 1111	254

UNITED STATES CODE—Continued

	Page
46 U.S. Code 1117	251
46 U.S. Code 1171	251
46 U.S. Code 1173(a)	251
46 U.S. Code 1175(a)	251
46 U.S. Code 1175(b)	251
46 U.S. Code 1176(5)	251
46 U.S. Code 1177(b)	251
46 U.S. Code 1177(c)	251
46 U.S. Code 1177(d)(1)	251
46 U.S. Code 1177(d)(2)	251
46 U.S. Code 1177(d)(3)	251
46 U.S. Code 1177(h)	251
46 U.S. Code 1211	252
46 U.S. Code 1212	201
46 U.S. Code 1241(a)	430
46 U.S. Code 1242	200
49 U.S. Code 1	337
49 U.S. Code 1376	254
50 U.S. Code App. 451	363, 377
50 U.S. Code App. 454(a)	379
50 U.S. Code App. 456(h)	379
50 U.S. Code App. 460(b)(1)	364

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL

	Page
4 Comp. Gen. 184	198
5 Comp. Gen. 928	211
7 Comp. Gen. 507	364
9 Comp. Gen. 72	198
9 Comp. Gen. 377	229
9 Comp. Gen. 512	240
10 Comp. Gen. 28	240
13 Comp. Gen. 210	229
15 Comp. Gen. 683	211
15 Comp. Gen. 935	417
15 Comp. Gen. 1064	291
16 Comp. Gen. 803	364
17 Comp. Gen. 554	308, 424
19 Comp. Gen. 785	310
20 Comp. Gen. 370	190
20 Comp. Gen. 392	440
21 Comp. Gen. 90	290
21 Comp. Gen. 965	440
22 Comp. Gen. 454	290
22 Comp. Gen. 1133	211
26 Comp. Gen. 952	229
27 Comp. Gen. 97	396
27 Comp. Gen. 363	229
27 Comp. Gen. 776	439
28 Comp. Gen. 328	439
29 Comp. Gen. 232	396
29 Comp. Gen. 293	396
31 Comp. Gen. 351	430
32 Comp. Gen. 227	199
32 Comp. Gen. 399	440
33 Comp. Gen. 51	234
33 Comp. Gen. 85	213
33 Comp. Gen. 209	213
33 Comp. Gen. 237	245
34 Comp. Gen. 72	226
34 Comp. Gen. 82	371
34 Comp. Gen. 439	371
34 Comp. Gen. 471	439
35 Comp. Gen. 174	347
35 Comp. Gen. 633	240
36 Comp. Gen. 53	430
36 Comp. Gen. 111	229
36 Comp. Gen. 137	417
36 Comp. Gen. 181	269, 422
36 Comp. Gen. 207	430
36 Comp. Gen. 251	308, 353
36 Comp. Gen. 476	449
36 Comp. Gen. 596	438
36 Comp. Gen. 809	322
37 Comp. Gen. 35	275
38 Comp. Gen. 71	309, 353
38 Comp. Gen. 131	232
38 Comp. Gen. 190	308, 347
38 Comp. Gen. 276	407
38 Comp. Gen. 291	446
38 Comp. Gen. 768	336
38 Comp. Gen. 819	358
39 Comp. Gen. 119	186
39 Comp. Gen. 140	314
39 Comp. Gen. 173	297
39 Comp. Gen. 178	238
39 Comp. Gen. 241	399
39 Comp. Gen. 282	257
39 Comp. Gen. 438	368
39 Comp. Gen. 561	219
39 Comp. Gen. 595	428
39 Comp. Gen. 742	378
40 Comp. Gen. 387	399
40 Comp. Gen. 397	335
40 Comp. Gen. 439	335
40 Comp. Gen. 514	361
40 Comp. Gen. 518	257
41 Comp. Gen. 76	447
41 Comp. Gen. 696	273
41 Comp. Gen. 703	417
41 Comp. Gen. 726	305
41 Comp. Gen. 737	297
42 Comp. Gen. 502	173
42 Comp. Gen. 582	419
42 Comp. Gen. 608	406
42 Comp. Gen. 650	194
42 Comp. Gen. 708	364
43 Comp. Gen. 77	424
43 Comp. Gen. 275	297
43 Comp. Gen. 425	330
43 Comp. Gen. 537	361
43 Comp. Gen. 761	446
43 Comp. Gen. 817	231
44 Comp. Gen. 276	168
44 Comp. Gen. 373	244
44 Comp. Gen. 439	318
44 Comp. Gen. 476	280
44 Comp. Gen. 584	246, 332
44 Comp. Gen. 607	193
44 Comp. Gen. 774	173

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL—Continued

	Page
45 Comp. Gen. 4	297
45 Comp. Gen. 389	237
45 Comp. Gen. 456	322
45 Comp. Gen. 484	310
45 Comp. Gen. 487	352
45 Comp. Gen. 685	195
46 Comp. Gen. 275	429
46 Comp. Gen. 334	400
46 Comp. Gen. 368	423
46 Comp. Gen. 606	326
46 Comp. Gen. 667	439
46 Comp. Gen. 776	215
46 Comp. Gen. 813	386
47 Comp. Gen. 21	386
47 Comp. Gen. 29	404
47 Comp. Gen. 70	211
47 Comp. Gen. 252	318
47 Comp. Gen. 279	324
47 Comp. Gen. 496	358
47 Comp. Gen. 582	397
47 Comp. Gen. 587	394
47 Comp. Gen. 666	326
47 Comp. Gen. 682	178
48 Comp. Gen. 15	208
48 Comp. Gen. 24	264
48 Comp. Gen. 30	240

DECISIONS OF THE COMPTROLLER OF THE TREASURY

	Page
18 Comp. Dec. 796	430
19 Comp. Dec. 537	430
22 Comp. Dec. 307	430

DECISIONS OVERRULED OR MODIFIED

	Page
33 Comp. Gen. 85	214
33 Comp. Gen. 209	214
B-48063, Mar. 21, 1945, unpublished decisions	185
B-72968, Apr. 21, 1948, unpublished decision	250

OPINIONS OF THE ATTORNEY GENERAL

	Page
26 Op. Atty. Gen. 415	430

DECISIONS OF THE COURTS

	Page
Adelhart Construction Co. *v.* United States, 123 Ct. Cl. 456	361
Baird's Estate, In re, 223 P. 974; 246 P. 324	312
Barnes *v.* United States, 163 Ct. Cl. 321	237
Bernard *v.* U.S. Aircoach, 117 F. Supp. 134	337
Billings *v.* Truesdell, 321 U.S. 542	378
Bridgman *v.* United States, 185 Ct. Cl. 133	239
Brown & Son Electrical Co. *v.* United States, 163 Ct. Cl. 465	361
Campbell *v.* United States, 132 Ct. Cl. 122	226
Central Vermont Transportation Co. *v.* Durning, 71 F. 2d 273	433
Chicago, Rock Island and Pacific RR Co., United States *v.*, 200 F. 2d 263	364
Christian, G. L., & Associates, *v.* United States, 160 Ct. Cl. 1, 58	174
Clackum *v.* United States, 148 Ct. Cl. 404; 161 Ct. Cl. 34	418
Commodities--Pan-Atlantic Steamship Corp., 313 I.C.C. 23	433
Darwin *v.* Ganger, 344 P. 2d 353	312
DeLavenga's Estate, In re, 75 P. 790	312
Delaware, L. & W. RR Co. *v.* United States, 123 F. Supp. 579	364
Douglas Aircraft Co. *v.* Cranston, 374 P. 2d 819	181
First Suburban Water Utility District *v.* United States, 129 Ct. Cl. 8	288
Flood's Estate, In re, 21 P. 2d 579	312
Grace Line *v.* United States, 144 F. Supp. 548	364
Great Northern Ry. Co. *v.* United States, 156 Ct. Cl. 332	337
Grimley, In re, 137 U.S. 147	380
Hadden *v.* United States, 125 Ct. Cl. 137	218
Haislip *v.* United States, 152 Ct. Cl. 339	238
Hall, United States *v.*, 37 CMR 352	378
Joint Industry Board *v.* United States, 391 U.S. 224	184
Jones' Estate, In re, 135 P. 288	312
Lake *v.* United States, 97 Ct. Cl. 447	218
Lerner *v.* United States, 168 Ct. Cl. 247	236
Lerner, David G. *v.* Stanley R. Resor, Sec. of Army & Elmer B. Staats, Comp. Gen. of U.S., Civ. Action No. 511-67	235
Lundblad *v.* United States, 98 Ct. Cl. 397	218
Mimmack *v.* United States, 97 U.S. 426	380
Morrissey, In re, 137 U.S. 157	380
Myers, Howard C., United States *v.*, 320 U.S. 561	263
North Central Airlines, Inc. *v.* Civil Aeronautics Board, 363 F. 2d 983	254

DECISIONS OF THE COURTS—Continued

	Page
Pacific SS. Co. *v.* Cackette, 8 F. 2d 259	337
Prue, United States *v.*, 240 F. Supp. 390	380
Remaley *v.* United States, 134 Ct. Cl. 874	237
Seaboard Air Line Ry. *v.* United States, 256 U.S. 655	198
Seaboard Air Line Ry. Co., United States *v.*, 22 F. 2d 113	364
South Star, The, United States *v.*, 115 F. Supp. 102	364
Strickland Transportation Co. *v.* United States, 334 F. 2d 172	337
Trans World Airlines, Inc. *v.* Civil Aeronautics Board, 385 F. 2d 648	254
Truschke *v.* La Rocca, 46 Cal. Rptr. 601	312
Turoff *v.* Eastern Airlines, 129 F. Supp. 319	337
Union Pacific R. Co. *v.* Higgins, 223 F. Supp. 396	337
United Post Offices Corp. *v.* United States, 80 Ct. Cl. 785	291
Whitney Brothers Plumbing & Heating, Inc. *v.* United States, 224 F. Supp. 860	390

INDEX DIGEST

OCTOBER, NOVEMBER, AND DECEMBER 1968

Page

ADMINISTRATIVE ERRORS

Correction

Promotions

Incumbent of reclassified position

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

AGENTS

Of private parties

Authority

Contracts

Signatures

Low bid signed by unknown agent of corporation submitting bid and unaccompanied by evidence of agent's authority to bind principal—necessary requirement absent establishment of agent's authority prior to bid opening—is nonresponsive bid. Although evidence of agent's authority is acceptable after bid opening when apparent authority of agent would estop principal from denying agent's authority, to permit proof of unknown agent's authority after bid opening would give bidder option to elect to abide by bid or claim bid was submitted in error by person without authority to enter into contracts on its behalf—an option that is considered chance to second-guess other bidders after bid opening and, therefore, must be regarded as fatal to bid 369

ALLOWANCES

Military personnel

Medically unfit

Member of uniformed services who, after having performed active duty, is found to have been medically unfit at time of entry into service is not deprived of right to military pay and allowances or of status of being entitled to basic pay because of administrative failure to discover

ALLOWANCES—Continued Page

Military personnel—Continued

Medically unfit—Continued

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

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

Quarters. (*See* **Quarters Allowances**)

Trailer allowances. (*See* **Trailer Allowances**)

ANNUAL LEAVE

(*See* **Leaves of Absence, annual**)

AUTOMATIC DATA PROCESSING SYSTEMS

(*See* **Equipment, automatic data processing systems**)

BIDDERS

Qualifications

Experience

Responsibility *v.* responsiveness

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

BIDS

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

Low on one item is no basis for aggregate award

The fact that different language specified methods of award for two window cleaning service items of invitation—Item 1 reserving right to Govt. to make award on any or all of subitems and Item 2 providing for award of subitems in aggregate—does not entitle low bidder on one of Item 1 subitems to award of subitem where purpose of reservation in

BIDS—Continued Page

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

Low on one item is no basis for aggregate award—Continued

Item 1 was to determine individual prices on requested service in event of insufficient funds, and intent to award single contract on Item 1 is evidenced by use of singular—"award" in reservation and "the contractor" and "the successful bidder" in general specifications applicable to Item 1, as well as impracticability of having more than one contractor perform subitems at same time 381

Alternative

Unsolicited

The failure before bids were invited on second step of two-step formally advertised procurement to furnish separate notice to bidder of technical unacceptability of low alternate proposal submitted not as separate package but incident to clarification of unacceptable original proposal does not constitute acceptance of low alternate proposal. Provision in sec. 1–2.503–1(b)(5) of Federal Procurement Regs., as well as in administrative regulation, for notice of technical unacceptability of proposal under two-step advertised method of procurement is procedural right that does not go to essence of award, and rejection of alternate proposal will not be questioned, absent evidence determination was arbitrary, capricious, or made in bad faith 349

Awards. (*See* **Contracts, awards**)

Block bidding

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

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

Buy American Act

Evaluation

General Agreement on Trades and Tariffs

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

BIDS—Continued Page

Buy American Act—Continued

Foreign product determination

Component *v.* end product

Classification of each item to be furnished Govt. construction contractor as separate end product for evaluation under Buy American Act and award of single contract is within contemplation of par. 6–001 of Armed Services Procurement Reg., and bid that would be low domestic bid if line items were considered components instead of end products is not responsive bid. There is no simple answer to question of what constitutes end product—award of single contract is not determinative, but purpose of procurement playing part, classifying items to be delivered to job and assembled by another contractor as end items is proper exercise of procurement judgment 384

Price differential

Discretionary determinations

In evaluating bids for wrenches subject to Buy American Act (41 U.S.C. 10a–d), fact that Defense Department agencies may be predominant users of item does not require General Services Administration (GSA), responsible for procurement and application of act, to use 50 percent price differential prescribed by par. 6–104.4 of Armed Services Procurement Reg. under discretionary authority provided in sec. 5 of E. O. No. 10582, in lieu of 6 percent differential, minimum fixed by act for addition to cost of foreign products to determine whether domestic price is unreasonable, which adopted by GSA in sec. 1–6.104–4 of Federal Procurement Regs. governs procurement and, therefore, domestic price that exceeds foreign bid by more than 6 percent is unreasonable and must be rejected 403

Reasonableness

Application of different percentages specified by Armed Services Procurement Reg. (50 percent in par. 6–104.4) and Federal Procurement Regs. (6 percent in sec. 1–6.104–4) creating unrealistic results in determining whether price of domestic item is unreasonable, establishment of uniform policy for guidance of Federal agencies and contractors regarding use of price differentials under Buy American Act has been recommended 403

Combination

Evaluation. (*See* **Bids, evaluation, complex combination bids**)

Competitive system

Agents of Government

Conformability with Government bidding methods

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

BIDS—Continued Page

Competitive system—Continued

Agents of Government—Continued

Conformability with Government bidding methods—Continued

Zoo, would be more economical and efficient, upon issuance of determination that it would not be feasible or practicable to use formal advertising procedures, combined contract may be negotiated under 41 U.S.C. 252(c)(10) and sec. 1-3.210 of Federal Procurement Regs..... 193

Broadening competition

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

"Buying-in" prices

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

Compliance requirement

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

BIDS—Continued Page

Competitive system—Continued

Delayed awards

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

Effect of erroneous awards

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

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

Evaluation factors determinability

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

Federal aid, grants, etc.

Equal Employment Opportunity Programs

The so-called "Philadelphia Pre-Award Plan" to implement compliance on federally assisted programs with equal employment opportunity conditions of E. O. No. 11246, which does not establish standards or

BIDS—Continued Page

Competitive system—Continued

Federal aid, grants, etc.—Continued

Equal Employment Opportunity Programs—Continued

criteria for judging compliance but instead provides for preaward conference to negotiate acceptable revision of low bidder's initially unaccceptable action program is inconsistent with statutory requirements of competitive bidding. Federally assisted programs are required to be awarded on basis of publicly advertised competitive bidding and, therefore, Plan for submission of affirmative action programs should inform prospective bidders of minimum requirements to be met by proposed compliance program, and standards and criteria established for judging programs---------- 326

Impracticable to obtain competition. (*See* **Contracts, negotiation, competition, impracticable to obtain**)

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

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

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

Estimates of Government

Failure to furnish on all items

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

Evaluation

Administrative determination conclusiveness

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

BIDS—Continued Page

Evaluation—Continued

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

Subitems

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

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

Complex combination bids

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

Delivery provisions

Guaranteed shipping weight

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

BIDS—Continued Page

Evaluation—Continued

Delivery provisions—Continued

Time schedule

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

Discount provisions

Absence of provision in invitation

Notwithstanding invitation requesting bids for requirements contract for repair, maintenance, and reconditioning of electric typewriters did not solicit quantity discount, consideration of quantity discount which made bid containing offer low was proper. Failure to make specific provision for every possible method of price quotation should not deprive Govt. of right to take advantage of benefit which does not contravene any stated requirement or prohibition, and results in award that is advantageous to Govt., price and other factors considered 256

Deviation from terms of invitation

A bid specifying "All sales are payable Net 30 following date of invoice" in response to invitation providing for insertion of any desired discount in one or more of blanks preceding words "%10 calendar days," "%20 calendar days," "%30 calendar days," and "%_____ calendar days" is responsive bid, term meaning that Govt. will not be allowed any discount and that payment is expected within 30 days following date of invoice—expectation which is not contrary to terms of payment included in standard terms of contract. Also insertion of word "Net" in "%30 calendar days" space of invitation neither varied language of bid nor imposed greater obligation on Govt. than terms of "Payments" provision of Standard Form 32 306

Estimates

Individual items

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

BIDS—Continued Page

Evaluation—Continued

Factors other than price

Superior product

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

Incorporation of terms by reference

Christian **doctrine**

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

Negotiation

Criteria establishment

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

On basis other than invitation

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

BIDS—Continued Page

Failure to furnish something required. (*See* **Contracts, specifications, failure to furnish something required**)

Late

Mishandling determination

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

Nonresponsive to invitation

Information after bid opening unauthorized

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

Opening

Public

Delayed openings

Although under requirement in 10 U.S.C. 2305(c) that "Bids shall be opened publicly at time and place stated in advertisement," delayed opening may be excusable in unusual circumstances, and reasonably short delays resulting from normal administrative routine would not ordinarily be objectionable, setting number of bid openings for same hour when it is obvious they cannot with available personnel and facilities be opened within reasonable time is not in conformity with statute and is practice that discourages free attendance of witnesses which public opening is intended to foster. When it is necessary to schedule numerous bids for opening on same day, to avoid delay, openings should be scheduled at intervals and held in rooms designated for purpose 413

"When practicable"

The term "when practicable" in par. 2–402.1(a) of armed Services Procurement Reg. qualifying requirement for reading aloud of bids should be judged on basis of nature of bids—multiplicity of items, complexity or interrelationship of method of bidding, or evaluation prescribed rather than by amounts involved, or availability of personnel or space to conduct bid opening that is intended to protect both public

BIDS—Continued Page

Opening—Continued

Public—Continued

"When practicable"

and bidders against any form of fraud, favoritism, partiality, complicity, or even suspicion of irregularity. Therefore elimination of reading of bids below arbitrarily selected dollar amount is not recommended, but adequate space and personnel should be provided to handle normal volume of bid openings 413

Prices

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

Qualified

Descriptive literature

Volunteered

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

Price, quantity, delivery, etc., unaffected

Bid acceptance

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

Signatures

Agents

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

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

Two-step procurement

Delivery provisions evaluation

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

BIDS—Continued Page

Two-step procurement—Continued

Delivery provisions evaluation—Continued

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

Technical proposals

Deficiencies

Notice

The failure before bids were invited on second step of two-step formally advertised procurement to furnish separate notice to bidder of technical unacceptability of low alternate proposal submitted not as separate package but incident to clarification of unacceptable original proposal does not constitute acceptance of low alternate proposal. Provision in sec. 1–2.503–1(b) (5) of Federal Procurement Regs., as well as in administrative regulation, for notice of technical unacceptability of proposal under two-step advertised method of procurement is procedural right that does not go to essence of award, and rejection of alternate proposal will not be questioned, absent evidence determination was arbitrary, capricious, or made in bad faith 349

Unsigned

Agent's signature

Low bid signed by unknown agent of corporation submitting bid and unaccompanied by evidence of agent's authority to bind principal—necessary requirement absent establishment of agent's authority prior to bid opening—is nonresponsive bid. Although evidence of agent's authority is acceptable after bid opening when apparent authority of agent would estop principal from denying agent's authority, to permit proof of unknown agent's authority after bid opening would give bidder option to elect to abide by bid or claim bid was submitted in error by person without authority to enter into contracts on its behalf—an option that is considered chance to second-guess other bidders after bid opening and, therefore, must be regarded as fatal to bid 369

BUY AMERICAN ACT

Applicability

Contractors purchases from foreign sources

End product *v.* components

Classification of each item to be furnished Govt. construction contractor as separate end product for evaluation under Buy American Act and award of single contract is within contemplation of par. 6–001 of Armed Services Procurement Reg., and bid that would be low domestic bid if line items were considered components instead of end products is not responsive bid. There is no simple answer to question of what constitutes end product—award of single contract is not determinative, but purpose of procurement playing part, classifying items to be delivered to job and assembled by another contractor as end items is proper exercise of procurement judgment 384

Bids. (*See* **Bids, Buy American**)

CITIES, CORPORATE LIMITS Page

Transfers within corporate limits, etc.

Relocation expenses

Payment of relocation expenses provided in 5 U.S.C. 5724a to employees who are transferred between posts of duty 35 miles apart within corporate limits of same city—Houston, Texas—is precluded under sec. 1.3a of Bur. of Budget Cir. No. A–56, which authorizes travel and transportation expenses and applicable allowances only when transfer is between "official stations" as term is defined in sec. 1.5 of Standardized Govt. Travel Regs., and section prescribing that designated post of duty and official station are one and same, an area that is circumscribed by corporate limits of city, there is no authority for payment of relocation expenses to employees transferred within corporate limits of Houston 227

CLAIMS

Abatement pending court decision

The general rule that no action will be taken by U.S. GAO on claim involved in suit or controversy while judicial determination is pending has no application to Army officer seeking injunctive relief incident to correction of military records rather than money judgment. Therefore request for decision on legality of payment of disability retired pay that is based on administrative action taken subsequent to date court action was filed will be considered and merits of officer's claim for disability determined 235

Assignments

Contracts

Business operation sold, etc.

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

Barred. (*See* Statutes of Limitation, claims)

COAST GUARD

Commissioned personnel

Service credits

Temporary service in a higher grade

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

COAST GUARD—Continued Page
Commissioned personnel—Continued
Service credits—Continued
Temporary service in a higher grade—Continued
had he not been so appointed," permit only counting of temporary service as time in officer's permanent grade held immediately preceding temporary service appointment 390
COMPENSATION
Double
Concurrent military retired and civilian service pay
Disability retirement
"Armed conflict" in Vietnam
As it is difficult to apply exemption to reduction in retired pay provision prescribed by sec. 201(b) of Dual Compensation Act to officer of Regular component of uniformed services retired for injury or disease as direct result of armed conflict in Vietnam who is employed in civilian position under U.S., due to nature of combat operations in Vietnam and difficulty of establishing that inception of disease occurred while officer was engaged in armed conflict, affirmative administrative finding that there was direct causal relationship between disability and engagement in armed conflict will be accepted unless unreasonable or insufficiently supported by record, or if determination is rendered dubious by further evidence or circumstances not considered, or unduly gives person benefit of reasonable doubt 219
International dateline crossings
An employee who "lost" a workday incident to permanent change-of-station transfer from Honolulu to Tokyo due to crossing international dateline is entitled to compensation for day under rule that in establishing entitlement to pay, time of place at which employee is located is controlling under 15 U.S.C. 262. In accordance with longstanding administrative practice, pay of employee should not be increased because of extra time gained when traveling across international dateline in eastward direction—crossings in opposite directions canceling each other out. However, any specific factual situations may be presented for consideration 233
Military personnel. (*See* **Pay**)
Overtime
Entitlement
Employees receiving premium pay
When employees who are receiving premium pay on annual basis under 5 U.S.C. 5545(c)(2) prescribed for irregular, unscheduled overtime, Sunday, holiday, and night duty, are detailed to perform 12-hour shifts of duty on Saturday, Sunday, and Monday, they may be regarded as performing regularly scheduled overtime work entitling them additionally to overtime compensation for services performed on detail in excess of 40 hours per week and 8 hours a day, special work satisfying term "regularly scheduled work" used in 5 U.S.C. 5545 with respect to night differential and defined as work which is duly authorized in advance and scheduled to recur on successive days or after specified intervals. However, hours spent in traveling to site of special duty are not compensable as overtime 334

COMPENSATION—Continued Page

Rates

Special

To compete with private industry

Authority in 5 U.S.C. 5303(a) to raise minimum rate of grade in order to compete with private industry permits increase in any or all of additional steps of grade in view of permissive language of section, which provides that President or his designee "*may* make corresponding increases in all step rates of the salary range for each such grade" for purposes of recruitment or retention of well-qualified persons in positions paid under sec. 5332. The "corresponding increase" authorized in sec. 5303(a) means each increase is limited to not more than amount of increase in first step rate, thus permitting different steps in grade may be increased by different amounts 190

Severance pay

Discontinuance

Reemployment of separated employee

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

Wage board employees

Fringe benefits

When upon wage survey in connection with pay of temporary Federal construction workers in a particular area under 5 U.S.C. 5341, it is found that prevailing wage rate for employees of private construction contractors engaged in similar non-Govt. work or for Davis-Bacon employees includes costs of certain fringe benefits and it is determined to be in public interest not to destroy area rate and also to remain competitive in labor market, fringe benefits may be included as wage increments along with basic hourly rate as part of overall prevailing rate 278

Overtime

Work in excess of daily and weekly limitations

Intermittent and part-time employees

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

CONTRACTS Page

Amounts

Award for lesser amount than solicited

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

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

Awards

Cancellation

Erroneous awards

Contract performance status

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

Delayed awards

Propriety

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

Protest pending

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

Bids, generally. (*See* **Bids**)

Cost plus

Reimbursement

Unclaimed amounts

Unclaimed wages and other obligations arising out of cost-reimbursable type contracts with U.S. which contractor is required to report and pay to State authorities under escheat laws are reimbursable to contractor,

CONTRACTS—Continued Page

Cost plus—Continued

Reimbursement—Continued

Unclaimed amounts—Continued

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

Damages

Government liability

Contractor's property

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

Incorporation of terms by reference

Christian **doctrine**

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

Labor stipulations

Nondiscrimination

"Affirmative action programs"

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

CONTRACTS—Continued Page

Labor stipulations—Continued

Nondiscrimination—Continued

"Affirmative action programs"—Continued

fore, Plan for submission of affirmative action programs should inform prospective bidders of minimum requirements to be met by proposed compliance program, and standards and criteria established for judging programs 326

Withholding unpaid wages, overtime, etc.

Mutuality of obligation requirement

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

Leases. (*See* **Leases**)

Negotiation

Authority

Prenegotiation clearance

The authority to negotiate on basis of only responsive offer out of three initial proposals received to furnish a NATO procurement solicited under 10 U.S.C. 2304(a) (2) is a prenegotiation clearance to contract that grants no rights to prospective contractor, and the offer, not lowest submitted, exceeding available NATO funds and sufficient time remaining for negotiation before funds became available, contracting officer was obligated under 10 U.S.C. 2304(g) to continue negotiations. Therefore, award of contract on basis of negotiated revised proposal to offeror, submitting nonresponsive initial proposal that was within competitive range, price and other factors considered, was proper even though initial responsive offeror who had confirmed prices during negotiations was not notified of cutoff date for negotiations 449

Awards

Initial proposal basis

In request for proposals, reservation of unqualified option to contracting officer to consider original proposal as final without extending privilege of revising quotation or conducting any negotiations with any offeror was at variance with 10 U.S.C. 2304(g) and par. 3-805 of Armed Services Procurement Reg. and procedure of denying offeror opportunity to negotiate should be corrected 314

Competition

Changes in price, specifications, etc.

Under revised request for quotations (RFQ) that exercised quantity option contained in original RFQ issued pursuant to public exigency negotiation authority in 10 U.S.C. 2304(a)(2), and which permitted submission of different designs for aircraft fuel flow system to cost less than $100,000, acceptance of price reduction, contemplating specification changes, without soliciting competition from only other offeror who had

CONTRACTS—Continued Page
Negotiation—Continued
Competition—Continued
Changes in price, specifications, etc.—Continued
responded to initial RFQ did not create "buy-in" and sole-source procurement situation, nor require submission of cost or pricing data pursuant to "Truth in Negotiations" Act, "Buying-in" meaning offering price in competition that is under cost with expectation of making up losses, and "Truth in Negotiations" Act not applying to procurement that is less than $100,000 337
Impracticable to obtain
Justification for negotiation
As National Zoological Park (Zoo) is considered Govt. property, authority of Regents of Zoo is subject to limitations applicable generally to administrative officials of Govt., limitations that are not affected by act of Nov. 6, 1966, authorizing negotiation of concession operations at Zoo with nonprofit, scientific, educational, or historic organizations and, therefore, any arrangement for operation of food concessions at Zoo is subject to advertising procedures. However, as use of single contract to procure restaurant concessions at Smithsonian facilities, including Zoo, would be more economical and efficient, upon issuance of determination that it would not be feasible or practicable to use formal advertising procedures, combined contract may be negotiated under 41 U.S.C. 252(c)(10) and sec. 1–3.210 of Federal Procurement Regs 193
Evaluation factors
Criteria
The procedure of stating Govt.'s requirements in request for proposals for design, fabrication, and installation of weighing scales system for C–5A aircraft in broad general terms, emphasizing reliance on ingenuity of offerors to propose actual design of system, and then without further negotiation to reject 6 out of 7 proposals for technical reasons that reflect detailed and rigid requirements is procedure that is not in accord with information standards prescribed by par. 3–501(b) of Armed Services Procurement Reg. and by par. 4–105 of regulation specifically relating to research and development contracts. Therefore, procedure should be corrected to provide offerors be informed of all evaluation factors involved in procurement and of relative weights to be attached to each factor 314
Late proposals and quotations
Modification of proposal
Price reduction
Negotiations for lower prices under request for proposals prompted by unsolicited price revision received subsequent to initiation of preaward survey of low offeror do not constitute auction technique prohibited by par. 3–805.1(b) of Armed Services Procurement Reg., where neither price nor competitive position of low offeror were exposed, precaution was taken in preaward survey request which *per se* does not constitute auction technique—to protect information, and determination to continue price negotiations was made in good faith. However, whether or not unsolicited price reduction should be considered is problem for inclusion in study of procedures for handling late proposals and late modifications to proposals 323

CONTRACTS—Continued Page
Negotiation—Continued
Limitation on negotiation
Propriety
In request for proposals, reservation of unqualified option to contracting officer to consider original proposal as final without extending privilege of revising quotation or conducting any negotiations with any offeror was at variance with 10 U.S.C. 2304(g) and par. 3-805 of Armed Services Procurement Reg. and procedure of denying offeror opportunity to negotiate should be corrected 314
Even if time schedule in request for proposals (RFP) inadequately provides for computer manufacturers to contact peripheral manufacturers and test their equipment, legality of procurement is unaffected. 10 U.S.C. 2304(g) provides for solicitation of proposals from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and, therefore, award under RFP would not be illegal because some offerors were unable to submit proposals and qualify their products within time allowed, or that tests tend to restrict competition. In addition, products of peripheral manufacturers are known, their inventories no doubt would support tests, and computer-system procurement on component basis is subject of study 320
National emergency authority
Ocean transportation
Program known as "Respond" proposing negotiation of peacetime berth-line services based on guarantee of availability of needed services in event of emergency, even though services could be bought for less without guarantee, is within purview of 10 U.S.C. 2304(a)(16), and negotiations need not be limited to contractors whose continued existence under competitive bidding is doubtful, use of sec. 2304(a)(16) authority assuring availability of critical transportation services in interest of national defense. However, for requisitioning phase of program, option should be retained to proceed under contract or authority of Merchant Marine Act of 1936, and Federal Maritime Commission should participate in program by fixing rates to bring them within exception to competition provided by 10 U.S.C. 2304(g), and by reviewing emergency augmentation commitments by berth-line operators. 199
Propriety
Preaward plant survey effect
Negotiations for lower prices under request for proposals prompted by unsolicited price revision received subsequent to initiation of preaward survey of low offeror do not constitute auction technique prohibited by par. 3-805.1(b) of Armed Services Procurement Reg., where neither price nor competitive position of low offeror was exposed, precaution was taken in preaward survey request—which *per se* does not constitute auction technique—to protect information, and determination to continue price negotiations was made in good faith. However, whether or not unsolicited price reduction should be considered is problem for inclusion in study of procedures for handling late proposals and late modifications to proposals 323

CONTRACTS—Continued Page

Negotiation—Continued

Propriety—Continued

Prenegotiation clearance

The authority to negotiate on basis of only responsive offer out of three initial proposals received to furnish a NATO procurement solicited under 10 U.S.C. 2304(a)(2) is a prenegotiation clearance to contract that grants no rights to prospective contractor, and the offer, not lowest submitted, exceeding available NATO funds and sufficient time remaining for negotiation before funds became available, contracting officer was obligated under 10 U.S.C. 2304(g) to continue negotiations. Therefore, award of contract on basis of negotiated revised proposal to offeror, submitting nonresponsive initial proposal that was within competitive range, price and other factors considered, was proper even though initial responsive offeror who had confirmed prices during negotiations was not notified of cutoff date for negotiations..... 449

Request for proposals

Submission date

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

Payments

Minimum billing charge

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

Releases

Payment to other than contractor of record

Purchaser of manufacturing concern which completed shipment of five Govt. contracts assigned to it by seller—where two of contracts had been awarded prior to seller's change of firm name but no filing made of change as required by par. 1-1602 of Armed Services Procurement Reg., and two of remaining three contracts, with purchaser's consent, had been assigned to bank pursuant to 31 U.S.C. 203—may be recognized as successor in interest to contractor of record on all

CONTRACTS—Continued Page
Payments—Continued
Releases—Continued
Payment to other than contractor of record—Continued
five contracts, no claim having been received from contractor of record or bank. However, consideration of claim for payment under 31 U.S.C. 71, requires two releases, one from contractor of record, identifying five contracts, other from bank relinquishing any claim against Govt.... 196
Withholding
Government's right restricted
Acceptance of low bid containing provision that "No withholding will be allowed without prior written consent of seller"—condition which not affecting price, quantity, quality, or delivery could have been deleted pursuant to sec. 1-2.404-2(b) of Federal Procurement Regs.—consummated a valid and enforceable contract that does not diminish Govt.'s right to withhold monies under "Default" provision of contract, Contract Work Hours Standards Act, Walsh-Healey Act, internal revenue laws, and Govt.'s commonlaw right as creditor. Should monies be withheld and contractor sue, Govt. could assert claim either as cross-claim or as separate action..... 306
Laborers and mechanics claims
Withholding from current contract of wage underpayments due under two contracts for prior years, together with liquidated damages assessed on account of violations—all contracts containing Contract Work Hours Standards Act provision authorizing set-off from "moneys payable on account of work performed"—may not be retained as to wage underpayments, no mutuality of obligation existing between collection of underpayments by Govt. as trustee and its direct debt liability under current contract, but set-off to collect liquidated damages was proper, as there is mutuality of obligation between amount due for work performed under latest contract and liquidated damages due on account of wage underpayments under earlier contracts..... 387
Protests
Award approved
Prior to resolution of protest
The fact that award of contract is made while protest is pending would not violate par. 2-407.9(b)(3) of Armed Services Procurement Reg. (ASPR), if administrative determination had been made that prompt award will be advantageous to Govt. Therefore, where contracting agency found that to postpone award would alter performance dates of contract with consequent effect on bid price, award made prior to resolution of protest is not invalid. However, contracting officer having failed to give written notice of award as required under ASPR, appropriate steps should be taken to assure future compliance with regulation..... 230
Requirements
Overlapping awards
Award of requirements-type contract for delivery of uniforms during calendar year 1969 for part of requirements that arose during period of existing contract expiring Dec. 31, 1968, and providing for delivery early in 1969 was in derogation of terms and conditions of prior contract that could have resulted in legal liabilities had second contract not been

CONTRACTS—Continued Page

Requirements—Continued

Overlapping awards—Continued

awarded to contractor performing under first contract- low bidder having qualified his bid. Although no useful purpose would be served by cancellation of second contract as successful bidder is obligated to supply requirements for uniforms to be delivered early in 1969 under first contract, action should be taken to preclude reoccurrence of circumstances surrounding award of second contract..... 285

Research and development

Technical deficiencies of proposals

Evaluation propriety

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

Specifications

Ambiguous

Clarification

Before bidding

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

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

Conformability of equipment, etc., offered

Minimum responsive bid *v.* superior bid

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

CONTRACTS—Continued Page
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies
Notice
The failure before bids were invited on second step of two-step formally advertised procurement to furnish separate notice to bidder of technical unacceptability of low alternate proposal submitted not as separate package but incident to clarification of unacceptable original proposal does not constitute acceptance of low alternate proposal. Provision in sec. 1–2.503–1(b)(5) of Federal Procurement Regs., as well as in administrative regulation, for notice of technical unacceptability of proposal under two-step advertised method of procurement is procedural right that does not go to essence of award, and rejection of alternate proposal will not be questioned, absent evidence determination was arbitrary, capricious, or made in bad faith 349
Defective
Corrective action recommended
An invitation for Argon Laser with Ceramic Discharge Tube, Carson Model SP–300 or equal that failed to indicate whether all or some of specification details were salient features or characteristics essential to needs of Govt. is defective invitation that provided no basis for determination made under par. 1–1206.4 of Armed Services Procurement Reg. to effect that deviations in successful bid which failed to comply with important aspects of invitation were minor or inconsequential, and deterred brand name manufacturer from offering lower priced "or equal" item. In future procurements utilizing brand name or equal descriptions, actual needs should be determined in advance and only those needs set forth as salient characteristics in appropriate terms in invitation 441
Descriptive data
Voluntary submission
Nonconformance to specifications
A bid on automotive infrared exhaust gas analysis systems which included unsolicited descriptive literature that did not conform to specifications, but accompanying letter considered part of bid offered to meet specifications, is responsive bid where unsolicited nonresponsive descriptive literature did not qualify bid or affect Govt.'s right to require conformity with specifications. Absent qualification in bid, compliance with specifications determinative on basis of product and not on speculative interpretations of unsolicited descriptive literature, acceptance of noise level in systems as minor deviation, correction of which would have negligible effect on price was within province of contracting agency 306
Deviations
Delivery provisions
Two-step procurement
The failure of low bidder to furnish guaranteed maximum weight and maximum dimensions for shipping containers required under second-step of two-step multi-year procurement for transceivers to be delivered f.o.b. origin is deviation that is distinguishable from type of bid irregularity covered by "triviality" or "*de minimus*" rule, and omission did

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Delivery provisions—Continued
Two-step procurement—Continued
not render bid nonresponsive where maximum shipping cost was ascertainable from other information contained in invitation— size and weight of transceiver—there is no question as to bidder's undertaking to meet all requirements of specifications, including delivery, and that on basis of possible transportation costs, low bidder had offered most advantageous bid to Govt 357
Failure to furnish something required
Information
Descriptive data sufficiency
While finding of responsiveness to invitation requesting bids for "Microwave System" in accordance with one of four configurations, bids to be evaluated in numerical order with award to lowest responsive bidder under schedule selected, regardless of cost, is factual determination to be made by contracting agency, manner of evaluation is subject to review by U.S. General Accounting Office, and where in evaluation of third low bid submitted on configuration I—first two bids having been rejected for failure to comply with technical and delivery requirements of specifications—information outside bid and required descriptive literature is considered, determination that bid was responsive was not in compliance with statutory and regulatory provisions governing procurement by formal advertising 420
Experience data of equipment offered
Experience requirements clause in invitation for multi-year procurement of diesel-engine generator units for 13 power plants for Sentinel System that specified overall capabilities and reliability that must be attained by any unit offered by bidder is considered as going to responsiveness of bid and not responsibility of bidder in view of critical nature of procurement and express language of experience requirements coupled with cautionary notice that experience data must be submitted with bid. Therefore, rejection of low bid for failure to submit required operating experience of units offered before bid opening time was proper, for to accept such information after bids were opened would be prejudicial to other bidders 291
Invitation to bid provisions
Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantive provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F.2d 418—doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award and, therefore, "Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted ... 171

CONTRACTS—Continued Page

Specifications—Continued

Minimum needs requirement

Erroneously stated

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

Superior products

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

Restrictive

Particular make

Salient characteristics

An invitation for Argon Laser with Ceramic Discharge Tube, Carson Model SP–300 or equal that failed to indicate whether all or some of specification details were salient features or characteristics essential to needs of Govt. is defective invitation that provided no basis for determination made under par. 1–1206.4 of Armed Services Procurement Reg. to effect that deviations in successful bid which failed to comply with important aspects of invitation were minor or inconsequential, and deterred brand name manufacturer from offering lower priced "or equal" item. In future procurements utilizing brand name or equal descriptions, actual needs should be determined in advance and only those needs set forth as salient characteristics in appropriate terms in invitation ---- 441

Proprietary item, process, etc.

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

CONTRACTS—Continued Page

Specifications—Continued

Restrictive—Continued

Review of specifications

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

COURTS

Judgments, decrees, etc.

Claims subsequent to judgment

Period not included in judgment

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

CUSTOMS

Services outside regularly scheduled hours

Cost recovery

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

DAMAGES

Contracts. (*See* **Contracts, damages**)

DEBT COLLECTIONS Page

Amount uncollectible

Writeoff does not preclude collection

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

DEPARTMENTS AND ESTABLISHMENTS

Status

Maritime subsidy board

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

Smithsonian Institution

National Zoological Park

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

DOCUMENTS

Incorporation by reference

Christian doctrine

Where low bid is properly held nonresponsive because bidder failed to return several pages of solicitation for bids which contained material and substantive provisions that affected rights and obligations of parties, so-called "Christian doctrine" enunciated in 312 F.2d 418—doctrine to effect that contract clauses required by statutory regulations are incorporated by law in contract—is not for application. Issue of bid responsiveness is for determination prior to award and, therefore,

DOCUMENTS—Continued Page
Incorporation by reference—Continued
Christian doctrine—Continued
"Christian doctrine" relating to construction of executed contract may not be invoked to insert conditions in bid after bid opening and before award, and matter is for resolution under rule that in case of missing papers intention of bidder is to be determined from bid as submitted..... 171
EQUAL EMPLOYMENT OPPORTUNITY
Contract provision. (*See* **Contracts, labor stipulations, nondiscrimination**)
EQUIPMENT
Automatic Data Processing Systems
Selection and purchase
Time for submission of offers
Even if time schedule in request for proposals (REP) inadequately provides for computer manufacturers to contact peripheral manufacturers and test their equipment, legality of procurement is unaffected. 10 U.S.C. 2304(g) provides for solicitation of proposals from maximum number of qualified sources consistent with nature and requirements of supplies to be procured and, therefore, award under RFP would not be illegal because some offerors were unable to submit proposals and qualify their products wlthin time allowed, or that tests tend to restrict competition. In addition, products of peripheral manufacturers are known, their inventories no doubt would support tests, and computer-system procurement on component basis is subject to study..... 320
FEDERAL GRANTS, ETC.
Bids
Competitive system applicability. (*See* **Bids, competitive system, Federal aid, grants, etc.**)
To States. (*See* **States, Federal aid, grants, etc.**)
FEES
Services to public
Inspectional services
Outside regularly scheduled hours
Additional costs, including compensation, incurred to extend hours of service at customs ports of entry and customs stations along Canadian and Mexican borders that do not maintain 24-hour service, and to provide service at rail transshipment point, are recoverable in accordance with 31 U.S.C. 483a, so-called "user charges" statute, from party requesting special service. However, under 19 U.S.C. 1451, Tariff Act of 1930, as amended, any costs resulting from assignment of additional personnel during regularly scheduled hours would not be recoverable. Costs collected for any special customs service may be deposited to appropriation from which costs were paid..... 262
FUNDS
Federal grants, etc., to other than States
Provisional indirect cost rates
Adjustment
Supplemental payments to grantees under sec. 301 of Public Health Service Act, 42 U.S.C. 241(d), and implementing regulations after expiration of research project period to cover actual indirect costs in excess of estimated provisional amounts allocated as indirect costs in grant awards made prior to July 1, 1968, date of clarifying amendments to secs. 52.14 (a) and (b) of Public Health Service regulations permitting

FUNDS—Continued Page

Federal grants etc., to other than States—Continued

Provisional indirect cost rates—Continued

Adjustment—Continued

adjustment of grant awards, is not precluded, use of phrase "provisional indirect cost rate" in grant agreements recognizing tentative arrangement subject to adjustment—adjustment that would not create type obligation prohibited under sec. 52.14(b). Only appropriation originally obligated by grant is available for payment of upward adjustment of provisional indirect cost rate 186

Trust

Prisoners. (*See* **Prisons and Prisoners, trust funds**)

GENERAL ACCOUNTING OFFICE

Claims

Abatement pending court decision. (*See* **Claims, abatement pending court decision**)

GENERAL AGREEMENT ON TRADES AND TARIFFS

Bid evaluation effect

Buy American Act

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

JOINT VENTURES

Independent debt of one conventurer

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

LEASES

Repairs and improvements

Lessor's liability

The lessor of facilities occupied as post office obligated to repaint interior of building under "good repair" provision of lease, upon lessor's refusal to assume responsibility, Post Office Department properly proceeded to have painting performed under contract and under its common law right of set-off to withhold cost from rental payments due. The action of Department not having been based on finding that premises were "unfit for use," remedy to Govt. was not termination of lease 289

LEAVES OF ABSENCE Page

Annual

Accrual

Employees "stationed" outside United States

Recruited overseas

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

Transfers

Different leave system

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

MARITIME MATTERS

Subsidies

Operating-differential

Recapture of earnings

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

MILEAGE Page

Travel by privately owned automobile

Meter readings

Reimbursement basis

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

Rates

Employee and one family member

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

MILITARY PERSONNEL

Annuity elections for dependents. (*See* Pay, retired, annuity elections for dependents)

Aviation duty

Pay. (*See* Pay, aviation duty)

Dependents

Proof of dependency for benefits

Children

An unmarried officer of uniformed services who although acknowledging paternity of illegitimate child and contributing to support of child has not established home in which child lives with him as member of his family may not be credited with increased quarters allowance on account of child, law of State of California, place of birth of child and residence of all parties requiring in addition to acknowledging illegitimate child that father receive child into his family and treat child as his legitimate offspring ---------- 311

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

Medically unfit

Status

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

MILITARY PERSONNEL—Continued Page

Medically unfit—Continued

Status—Continued

constitutes basis for deferment from induction rather than absolute disqualification 377

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

Member of uniformed services who at time of induction into military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of prexisting medical condition during active service has not met requirement in 10 U.S.C. 1201 and 1203 that physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from service. However, entitlement to such benefits accrues to member experiencing aggravation of his physical condition by active service or acquiring new or additional unfitting condition, even if unfitting condition is incurred by member who did not meet procurement medical fitness standards at time of induction, but did then meet retention fitness standards 377

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

Quarters allowance. (*See* **Quarters Allowance**)

Record Correction

Retired pay

Disability

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

The general rule that no action will be taken by U.S. GAO on claim involved in suit or controversy while judicial determination is pending has no application to Army officer seeking injunctive relief incident to correction of military records rather than money judgment. Therefore, request for decision on legality of payment of disability retired pay that is based on administrative action taken subsequent to date court action was filed will be considered and merits of officer's claim for disability determined 235

Retired pay of Air Force officer retired effective Apr. 1, 1963, who by correction of military records is placed on temporary disability retired list as of Mar. 31, 1963, with entitlement to disability retired

MILITARY PERSONNEL—Continued Page
Record Correction—Continued
Retired pay—Continued
Disability—Continued
pay effective Apr. 1, 1963, from which list he is removed on Mar. 11, 1968, properly was for computation under sec. 5(a)(1) and not 5(a)(2) of Uniformed Services Pay Act of 1963, officer's entitlement to retired pay on Apr. 1, 1963 not having occurred by force of Uniform Retirement Date Act, but by action of Secretary, and officer, therefore, was not overpaid retired pay commencing Oct. 1, 1963, computed at 75 percent of monthly basic pay of his grade fixed by 1963 pay act..... 329
Retired
Civilian service
Double compensation. (*See* **Compensation, double, concurrent military retired and civilian service pay**)
Pay. (*See* **Pay, retired**)
Severance pay. (*See* **Pay, severance**)
Training duty station
Status for benefits entitlement
Pub. L. 90–168 (37 U.S.C. 404(a)(4)) having as its purpose payment of extra expenses incurred during training periods by members of uniformed services or National Guard members while away from home, definition in par. M1150–10c of Joint Travel Regs. implementing act to effect that home or place from which member of Reserve components is called or ordered to active duty or active duty for training is permanent duty station of member has no effect in determination of entitlement, either to pay and allowances for period of training duty or to reimbursement of cost of travel to and from training duty..... 301
MISCELLANEOUS RECEIPTS
Special account *v.* miscellaneous receipts
Property damage collections
Compensation paid by insurance firm to cost-plus contractor operating and maintaining research vessel for National Science Foundation to cover damages sustained by vessel while being overhauled and repaired by subcontractor may not be used to augment Foundations' appropriations, absent specific statutory authority, and moneys, even if paid to prime contractor, are for deposit as miscellaneous receipts into Treasury of U.S. in consonance with sec. 3617, Revised Statutes, 31 U.S.C. 484.. 209
OFFICERS AND EMPLOYEES
Compensation (*See* **Compensation**)
Hours of work
Establishment for overtime purposes
Intermittent, etc., wage board employees
Intermittent and part-time wage board employees, regardless of whether 40-hour administrative workweek or 8-hour day has been established for them, are entitled to overtime compensation at not less than time and one-half for time worked in excess of 8 hours a day or 40 hours a week pursuant to sec. 201 of "Work Hours Act of 1962," amending sec. 23 of act of Mar. 28, 1934, language of sec. 23, as amended, regarding "establishment" of regular hours of labor at not more than 8 per day or 40 per week was intended only as prescribing a measure as to when regular and overtime rates of compensation are payable and does not require formal establishment of regular hours of work..... 439

OFFICERS AND EMPLOYEES—Continued Page

Household effects

Transportation. (*See* **Transportation, household effects**)

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

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

Moving expenses. (*See* **Officers and Employees, transfers, relocation expenses**)

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

Promotions

Reclassified positions

Incumbent's status

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

Severance pay

Compensation. (*See* **Compensation, severance pay**)

Training

Expenses

Meals and room at headquarters

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

Official duty away from training site

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

OFFICERS AND EMPLOYEES—Continued Page

Transfers

Mass transfer

Effective date

An employee who on July 9, 1966 contracts to purchase residence in anticipation of mass transfer incident to relocation of agency headquarters, although he is not informed until Nov. 22, 1966 that move, which had been anticipated for several years, tentatively was set for Apr. 1, 1968—delay in move occasioned by unavailability of funds for move and building construction—and who moves into new residence Apr. 22, 1967, completing settlement July 12, 1967, may be reimbursed under Pub. L. 89–516 for expenses incurred in purchase of new residence on basis employee acquired residence after he received definite information on Nov. 22, 1966 that his permanent station was being transferred 395

Relocation expenses

House sale

Collateral transactions

Expenses, including real estate commission, incurred by transferred employee in sale of parcel of land he had accepted in partial payment for his residence at old duty station are not reimbursable under sec. 4, Bur. of Budget Cir. No. A–56, notwithstanding possible savings to Govt. by reason of real estate broker relinquishing commission on residence for opportunity to sell and receive commission on land, collateral transaction not having been connected with sale of employee's residence incident to permanent change of station 419

Mortgage prepayment charge

A 90-day interest charge—prepayment penalty—assessed by lending institution in connection with sale of residence at old duty station of transferred employee is not reimbursable expense absent provision in original contract or mortgage instrument for reimbursement as prescribed by sec. 4.2d, Bur. of Budget Cir. No. A–56. Language of note covering loan secured by employee's residence reading "payable on the ____ day of each month" is not express provision that imposes prepayment penalty and, therefore, employee may not be reimbursed interest charge payment he was required to make 407

Mass transfer

Expenses prior to transfer orders

An employee who on July 9, 1966 contracts to purchase residence in anticipation of mass transfer incident to relocation of agency headquarters, although he is not informed until Nov. 22, 1966 that move, which had been anticipated for several years, tentatively was set for Apr. 1, 1968—delay in move occasioned by unavailability of funds for move and building construction—and who moves into new residence Apr. 22, 1967, completing settlement July 12, 1967, may be reimbursed under Pub. L. 89–516 for expenses incurred in purchase of new residence on basis employee acquired residence after he recieved definite information on Nov. 22, 1966 that his permanent station was being transferred. 395

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Nonreimbursable
House trailer preparation for movement
Cost to civilian employee to equip housetrailer transported incident to permanent change of station with an extra axle in compliance with State law is not reimbursable expense. The expenditure representing cost of structural change in trailer constitutes capital improvement that is not reimbursable as miscellaneous expense under sec. 3 of Bur. of Budget Cir. No. A–56, and structural change to trailer having been incurred to prepare trailer for movement, reimbursement for cost of axle is excluded under sec. 9.3a(3) of Circular 226
Transfer within corporate limits of city
Payment of relocation expenses provided in 5 U.S.C. 5724a to employees who are transferred between posts of duty 35 miles apart within corporate limits of same city—Houston, Texas—is precluded under sec. 1.3a of Bur. of Budget Cir. No. A–56, which authorizes travel and transportation expenses and applicable allowances only when transfer is between "official stations" as term is defined in sec. 1.5 of Standardized Govt. Travel Regs., and section prescribing that designated post of duty and official station are one and same, an area that is circumscribed by corporate limits of city, there is no authority for payment of relocation expenses to employees transferred within corporate limits of Houston.. 227
Transportation for house hunting
Mileage
An employee and his wife who traveled by privately owned automobile in performance of authorized round trip between old and new official station to seek permanent residence quarters is entitled to reimbursement under authority prescribed in sec. 2.3a of Bureau of Budget Circular No. A–56 at rate of 8 cents per mile, rate specified in sec. 2.3a(1) for employee traveling with one member of his family in privately owned automibile 276
Secs. 2.1 and 2.2 of Bur. of Budget Circular No A–56, authorizing reimbursement of transportation costs and other travel expenses incurred by employee and his family in accordance with Travel Expense Act of 1949, as amended, and Standardized Govt. Travel Regs. (SGTR), employee who incident to permanent change of station is authorized travel with his wife by privately owned automobile to new station and return to seek permanent residence quarters is entitled to mileage under sec. 3.5*c*(1) of SGTR for distance traveled as shown in standard highway mileage guides or by speedometer reading, and if there is no substantial deviation between the two, mileage claimed by employee may be allowed without explanation 276
Travel time
International dateline crossings
An employee who "lost" a workday incident to permanent change-of-station transfer from Honolulu to Tokyo due to crossing international dateline is entitled to compensation for day under rule that in establishing entitlement to pay, time of place at which employee is located is controlling under 15 U.S.C. 262. In accordance with longstanding administrative practice, pay of employee should not be increased because of

OFFICERS AND EMPLOYEES—Continued Page
Travel time—Continued
International dateline crossings—Continued
extra time gained when traveling across international dateline in eastward direction—crossings in opposite directions canceling each other out. However, any specific factual situations may be presented for consideration 233
Wage board
Compensation. (*See* **Compensation, wage board employees**)
Hours of work
Establishment for overtime purposes
Intermittent and part-time employees
Intermittent and part-time wage board employees, regardless of whether 40-hour administrative workweek or 8-hour day has been established for them, are entitled to overtime compensation at not less than time and one-half for time worked in excess of 8 hours a day or 40 hours a week pursuant to sec. 201 of "Work Hours Act of 1962," amending sec. 23 of act of Mar. 28, 1934, language of sec. 23, as amended, regarding "establishment" of regular hours of labor at not more than 8 per day or 40 per week was intended only as prescribing a measure as to when regular and overtme rates of compensation are payable and does not require formal establishment of regular hours of work 439
PAY
Active duty
Grade or rank
Reduction propriety
Although reduction of petty officer from first class E–6 to second class E–5 for incompetency to perform duties of higher grade was based on two special evalutions rather than on required waiver of condition precedent to reduction—"evaluation of member for at least two consecutive marking periods," member is not entitled upon advancement to E–6 to rate of pay of that grade for period of reduction in absence of correction of records pursuant to 10 U.S.C. 1552. Reduction orders issued by competent authority are valid even though not issued in strict community with administrative regulations and, therefore, under 37 U.S.C. 204(a) member is entitled only to pay and allowances of grade E–5 while serving in that grade, unless record warrants correction 416
Medically unfit personnel
Member of uniformed services who, after having performed active duty, is found to have been medically unfit at time of entry into service is not deprived of right to military pay and allowances or of status of being entitled to basic pay because of administrative failure to discover his physical condition, absent affirmative statutory prohibition against induction of persons on basis of physical or mental disqualification, and in view of fact 50 U.S.C. App. 454(a) provides that no person shall be inducted into armed services until his acceptability has been satisfactorily determined, and sec. 456(h) prescribes that physical or mental condition constitutes basis for deferment from induction rather than absolute disqualification 377
Medically unfit persons inducted into military service who perform training and service, absent statutory prohibition are entitled to full pay and allowances from time of entry on active duty through date they are released from military control, and they may receive any un-

PAY—Continued Page
Active duty—Continued
Medically unfit personnel—Continued
paid pay and allowances which accrued prior to and including date date release from military control. In addition, member may be furnished transportation in kind or monetary allowance in lieu thereof to home of record upon release from military control 377
Aviation duty
Excess flying hours
Flying status of limited duration
Excess flying time accumulated by member of uniformed services while in flying status of limited duration may not be applied to subsequent flying status to qualify member for flying pay for later period, par. 20110c of Dept. of Defense Pay and Allowances Entitlements Manual requiring that member placed in flying status for limited period must meet flight requirements within specified period for entitlement to flying pay--regulation not necessarily inconsistent with sec. 104(a)(1) of E.O. No. 11292, which prescribes minimum flight requirements. However, restriction if not in best interest of uniformed services may be eliminated and excess flying time accumulated during limited period of service applied to qualify member for flying pay in subsequent flying status.. 214
Civilian employees. (*See* **Compensation**)
Promotions
Temporary
Termination of temporary appointment
When Coast Guard officer who is advanced in grade under temporary promotion system authorized in 14 U.S.C. 275 reverts to permanent promotion system grade, time in temporary service grade, absent specific legislation, may not be used as time in grade higher than permanent grade from which originally appointed for temporary service in view of fact that when read together, secs. 275(h) which prescribes that upon termination or expiration of temporary appointment "officer shall revert to his former grade," and 257(b) which provides that service in temporary grade is service "only in grade that officer concerned would have held had he not been so appointed," permit only counting of temporary service as time in officer's permanent grade held immediately preceding temporary service appointment 390
Reduction
Pay based on grade held
Although reduction of petty officer from first class E–6 to second class E–5 for incompetency to perform duties of higher grade was based on two special evaluations rather than on required waiver of condition precedent to reduction—"evaluation of member for at least two consecutive marking periods," member is not entitled upon advancement to E–6 to rate of pay of that grade for period of reduction in absence of correction of records pursuant to 10 U.S.C. 1552. Reduction orders issued by competent authority are valid even though not issued in strict conformity with administrative regulations and, therefore, under 37 U.S.C. 204(a) member is entitled only to pay and allowances of grade E–5 while serving in that grade, unless record warrants correction. 416

PAY—Continued Page

Retired

Active duty

After retirement

Higher grade service

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

Annuity elections for dependents

Annuity determination

Upon retirement of any member of uniformed services after Nov. 1, 1968, effective date of Pub. L. 90–445, percentage of annuity elected prior to Nov. 1, 1968, for dependent under Retired Serviceman's Protection Plan (10 U.S.C. 1441–1446) is for determination, absent savings provision in act, on total retired pay of member, act having eliminated requirement that cost of annuity should be deducted from member's retired pay before applying elected percentage in determining annuity payable. Although members subject to act may within prescribed time limitations both before and after retirement reduce amount of elected annuity or withdraw from participation in Plan, increase in amount of annuity is only available to member not yet retired 281

Revocation, etc.

Delay in effective date

Savings clause contained in Pub. L. 90–485, dated Aug. 13, 1968, exempting active duty member of uniformed services from application of provision to reduce from 3 to 2 years delay in effective date of elections, modifications, or revocations made under Retired Serviceman's Family Protection Plan by member after completing 19 years of service, and providing for continuation of provisions of sec. 1431 (b) or (c), is restricted by language of savings clause to those members who had made election or change or revocation prior to Aug. 13, 1968, and, therefore, savings clause may not be extended to include applications made between Aug. 13, 1968, effective date of 10 U.S.C. 1431(b), and Nov. 1, 1968, date sec. 1431(c) became effective 353

Finality

Approval of retired member's application to withdraw from participation or reduce level of participation in Retired Serviceman's Family Protection Plan made pursuant to Pub. L. 90–485, dated Aug. 13, 1968 (10 U.S.C. 1436(b))—application which Secretary concerned is required to act upon with reasonable promptness, and which becomes effective on first day of seventh calendar month following receipt of application at appropriate Finance Center—may not be canceled before effective

PAY—Continued Page

Retired—Continued

Annuity elections for dependents—Continued

Revocation, etc.—Continued

Finality—Continued

date of application, approval by Secretary being only matter of form. Nor may retired member cancel his application before or after its approval, but before effective date of application, as 6 months waiting period before application becomes effective is not period intended for reconsideration of application by retired member 353

Termination

Children for other than age

Upon marriage or death on Mar. 1, 1968 of daughter of deceased member of uniformed services who is entitled to annuity payments pursuant to 10 U.S.C. 1431–1436 until her eighteenth birthday on May 1, 1968, her entitlement to annuity payments ceased with occurrence of event and, therefore, entitlement to annuity payment for month of March did not accrue 167

Children reaching eighteen years of age

The right of designated beneficiary to annuity payments provided under 10 U.S.C. 1431–1436, continuing while "under 18 years of age" and ceasing first instant eighteenth anniversary of birth is reached, eligibility of daughter of deceased member of uniformed services to annuity payments provided for her ceased first instant she reached eighteenth anniversary of her birth on May 1, 1968 and she is entitled to retain annuity payment made for month of April but is not entitled to payment for month of May, 10 U.S.C. 1437 providing that "no annuity occurs for the month in which entitlement thereto ends." 167

Cost-of-living increases. (*See* **Pay, retired, increases, cost-of-living increases**)

Disability

Disability determination subsequent to release

Record correction action

Retired pay of Air Force officer retired effective Apr. 1, 1963, who by correction of military records is placed on temporary disability retired list as of Mar. 31, 1963, with entitlement to disability retired pay effective Apr. 1, 1963, from which list he is removed on Mar. 11, 1968, properly was for computation under sec. 5(a)(1) and not 5(a)(2) of Uniformed Services Pay Act of 1963, officer's entitlement to retired pay on Apr. 1, 1963 not having occurred by force of Uniform Retirement Date Act, but by action of Secretary, and officer, therefore, was not overpaid retired pay commencing Oct. 1, 1963, computed at 75 percent of monthly basic pay of his grade fixed by 1963 pay act 329

Statutes of limitation

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

PAY—Continued Page
Retired—Continued
Disability—Continued
Disability determination subsequent to release—Continued
Statutes of limitation—Continued
received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from date of judgment 235
Recomputation of retired pay
Upon removal from temporary disability retired list on Mar. 11, 1968, and permanently retired with 50 percent disability, Air Force officer whose original retirement effective Apr. 1, 1963, under 10 U.S.C. 8911 had been corrected to place him with 100 percent disability on temporary disability retired list became entitled to retired pay recomputed under third sentence of 10 U.S.C. 1401 as though he had retired in first instance under sec. 8911, and officer's retired pay greater when computed under Formula B at 72½ percent of monthly pay of his grade fixed by Uniformed Services Pay Act of 1963 than if computed at his disability rating of 50 percent, beginning Mar. 11, 1968, officer became entitled to retired pay computed under Formula B, as increased by subsequent legislation 329
Effective date
Voluntary *v.* involuntary retirement
Retired members of Navy who if they had been involuntarily retired on July 1, 1968 would have been subject to Uniform Retirement Date Act, 5 U.S.C. 8301, but who were retired voluntarily effective that date under statutory provisions cited in decision are entitled, except for members retired under 10 U.S.C. 1293, to have their retired pay computed at higher rates of active duty basic pay prescribed in E.O. No. 11414, dated June 11, 1968, promulgated in accordance with sec. 8 of Pub. L. 90–207, and effective July 1, 1968 239
Increases
Cost-of-living increases
Active duty recall
The retired pay status of Army sergeant disabled during period of of service which commenced May 25, 1966, subsequent to retirement on July 1, 1962 under 10 U.S.C. 3914 for length of service, who upon reversion to inactive status on retired list effective Mar. 15, 1968, elected retired pay pursuant to 10 U.S.C. 1402(d), based on 60 percent disability computed at rates prescribed in 37 U.S.C. 203(a), as amended by Pub. L. 90–207 (10 U.S.C. 1401a) to provide cost-of-living increase effective Oct. 1, 1967, comes within purview of 10 U.S.C. 1401a(c) entitling member to increase in retired pay to reflect increase of 3.9 percent in Consumer Price Index effective Apr. 1, 1968, adjusted pursuant to subsec. (c) to nearest one-tenth of 1 percent of increase in Consumer Price Index for Jan. 1968 that exceeded Sept. 1967 Index, or 1.3 percent increase 204
Computation
Under 10 U.S.C. 1401a, as amended by Pub. L. 90–207 to provide cost-of-living increase effective Oct. 1, 1967, to be computed at different percentages prescribed, 10 U.S.C. 1401a(e) applies only when retirement of member of uniformed services becomes effective on or after Oct. 1,

PAY—Continued Page
Retired—Continued
Increases—Continued
Cost-of-living increases—Continued
Computation—Continued
1967. Therefore, member retired on July 1, 1962 and re-retired on Mar. 15, 1968 does not come within purview of subsec. (e). For members whose retired pay status comes within purview of subsecs. (b) and (c), subsec. (c) containing phrase "notwithstanding subsec. (b)" applies. If adjusted retired pay of members retired on or after Oct. 1, 1967 is greater when computed under subsec. (e) rather than under subsecs. (c) or (d), members are entitled to greater amount of retired pay..... 204
Medically unfit personnel at time of induction
Member of uniformed services who at time of induction into military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of preexisting medical condition during active service has not met requirement in 10 U.S.C. 1201 and 1203 that physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from service. However, entitlement to such benefits accrues to member experiencing aggravation of his physical condition by active service or acquiring new or additional unfitting condition, even if unfitting condition is incurred by member who did not meet procurement medical fitness standards at time of induction, but did then meet retention fitness standards..... 377
Re-retirement
Inactive service credits
Pub. L. 88–132, effective Oct. 1, 1963, amending 10 U.S.C. 1402(a) not changing conclusion in prior decisions that inclusion of inactive duty time on retired list is precluded in determining rate of monthly basic pay for purposes of computing retired pay, master sergeant upon re-retirement may not be credited with 3 years and 4 months of inactive service between date of retirement, Jan. 1, 1960, under 10 U.S.C. 8914, and return to active duty in grade of technical sergeant on May 1, 1963. However, under sec. 1402(a) upon re-retirement Dec. 1, 1967, enlisted man who had served less than 2 years as master sergeant is pursuant to second sentence in footnote 1, sec. 1402(a) entitled to retired pay computed on basis of basic pay rate in effect at time of re-retirement and multiplier factor that reflects 4 years and 7 months of additional active service..... 398
Status on retired list
Subsequent to judgment award
The Court in *Lerner* v. *U.S.*, 168 Ct. Cl. 247, decided Dec. 11, 1964, having established right of plaintiff to disability retirement pay effective Dec. 23, 1943, correction of military records, approved Dec. 4, 1967, did not change disability retired status of plaintiff—Army officer—and, therefore, he is not entitled to disability retired pay for period Dec. 23, 1943, to July 31, 1953, period barred by reason that under 28 U.S.C. 2501, Payment of judgment was restricted to period July 1, 1957, to Dec. 11, 1964, and under 31 U.S.C. 71a, payment of claim received Aug. 1, 1963, by U.S. GAO was limited to period Aug. 1, 1953, to June 30, 1957, but in view of recognition of uncorrected military records of officer, he is entitled to disability retired pay from date of judgment... 235

PAY—Continued Page
Severance
Disability retirement
Medically unfit personnel at time of induction
Member of uniformed services who at time of induction into military service did not meet procurement or retention medical fitness standards and who incurred no aggravation of preexisting medical condition during active service has not met requirement in 10 U.S.C. 1201 and 1203 that physical disability must be incurred while entitled to basic pay and he, therefore, is not entitled to disability severance or retired pay on separation from service. However, entitlement to such benefits accrues to member experiencing aggravation of his physical condition by active service or acquiring new or additional unfitting condition, even if unfitting condition is incurred by member who did not meet procurement medical fitness standards at time of induction, but did then meet retention fitness standards 377

PAYMENTS
Contracts. (*See* **Contracts, payments**)

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

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

POST OFFICE DEPARTMENT—Continued Page

Mails

Theft, loss, damage, etc.

Insurance coverage

An indemnity payment for lost package valued at $7,448, which in addition to being fully insured under postal registry system is covered by commercial insurance policy containing $10,000 deductible clause may be made for full value of package under 39 U.S.C. 5001, authorizing indemnity payments for articles valued at $1,000 or less "for which no other compensation or reimbursement has been made" and for articles valued not in excess of $10,000 "when the article is not insured with another insuring agency." To hold that indemnity payment is limited to $1,000 because package was insured by "another insuring agency," even though payment for loss is precluded under commercial insurance policy would be unrealistic, and reading both qualifying clauses in sec. 5001 together, permits reimbursement for actual value of loss..... 435

PRISONS AND PRISONERS

Trust funds

Withdrawal

Since under trust contracts with prisoners, prison officials have no right to withdraw trust funds without inmates signed approval, even on court orders, attachments, liens or other legal process for satisfaction of claims, Commissary Management Manual of Bureau of Prisons may be revised to prevent disbursement of funds without prisoners' consent to satisfy claims of Govt. for willful destruction of its property. B–72468, Apr. 21, 1948, overruled..... 249

PROPERTY

Private

Deceased persons

Escheat

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

Public

Damage, loss, etc.

Disposition of funds recovered

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

PURCHASES Page

Purchase orders

Minimum billing charge

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

QUARTERS ALLOWANCE

Dependents

Children

Illegitimate

An unmarried officer of uniformed services who although acknowledging paternity of illegitimate child and contributing to support of child has not established home in which child lives with him as member of his family may not be credited with increased quarters allowance on account of child, law of State of California, place of birth of child and residence of all parties requiring in addition to acknowledging illegitimate child that father receive child into his family and treat child as his legitimate offspring ---------- 311

Entitlement

Training duty periods

Reporting from home

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

Nonoccupancy of quarters for personal reasons

Entitlement to allowance

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

Page

SELECTIVE SERVICE SYSTEM

Charter Coach Service

Damage liability

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

SET-OFF

Authority

Common law right

The lessor of facilities occupied as post office obligated to repaint interior of building under "good repair" provision of lease, upon lessor's refusal to assume responsibility, Post Office Department properly proceeded to have painting performed under contract and under its common-law right of set-off to withhold cost from rental payments due. The action of Department not having been based on finding that premises were "unfit for use," remedy to Govt. was not termination of lease 289

Mutuality of parties, etc.

Joint ventures

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

Unrelated transactions

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

SMITHSONIAN INSTITUTION Page

Contracts

Advertising, etc., law compliance

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

STATE LAWS

Escheat

Unclaimed amounts due from contractors

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

STATES

Federal aid, grants, etc.

Amendment, etc.

Provisional indirect cost rates

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

Page

STATUTES OF LIMITATION

Claims

General Accounting Office

Military matters

Disability retired pay

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

SUBSIDIES

Vessels. (*See* **Maritime Matters, subsidies**)

SUBSISTENCE

Per diem

Military personnel

Training duty periods

Reporting from home

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

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

Reduction

Conference meals

Civilian employee coordinator of seminar for purpose of training employees of International Agricultural Development Service who paid cost of meals for non-Govt. employee guest speakers and employees of Service attending seminar conducted at headquarters may be reimbursed for expense incurred upon determination by appropriate authority that cost of meals furnished non-Govt. employees is authorized under 5 U.S.C.

SUBSISTENCE—Continued Page
Per diem—Continued
Reduction—Continued
Conference meals—Continued
4109; that one Service employee participated as seminar speaker; and that business of seminar was conducted during mealtime requiring attendance of Service employees. Pursuant to sec. 6.7 of Standardized Govt. Travel Regs., any per diem payments authorized should be reduced---- 185
Training periods
Training site status
An employee who incident to moving family residence to training site under authority in 5 U.S.C. 4109(a)(2)(B) forfeits right to per diem is entitled to transportation costs and per diem when required to travel on official business away from training site, even while performing official duties at location which would otherwise be his official station. For purposes of sec. 6.8 of Standardized Govt. Travel Regs., which prohibits payment of per diem at permanent duty station, training site may be considered employee's permanent duty station, thus entitling him to per diem while temporarily assigned official duties away from training site---- 313
TIME
International dateline
Crossing effect on compensation
An employee who "lost" a workday incident to permanent change-of-station transfer from Honolulu to Tokyo due to crossing international dateline is entitled to compensation for day under rule that in establishing entitlement to pay, time of place at which employee is located is controlling under 15 U.S.C. 262. In accordance with longstanding administrative practice, pay of employee should not be increased because of extra time gained when traveling across international dateline in eastward direction—crossings in opposite directions canceling each other out. However, any specific factual situations may be presented for consideration---- 233
TRAILER ALLOWANCES
Civilian personnel
Costs to prepare trailer for shipment, etc.
Cost to civilian employee to equip housetrailer transported incident to permanent change of station with an extra axle in compliance with State law is not reimbursable expense. The expenditure representing cost of structural change in trailer constitutes capital improvement that is not reimbursable as miscellaneous expense under sec. 3 of Bur. of Budget Cir. No. A–56, and structural change to trailer having been incurred to prepare trailer for movement, reimbursement for cost of axle is excluded under sec. 9.3a(3) of Circular---- 226
TRANSPORTATION
Bills of lading
Government
Released valuation condition
Condition 5 of Govt. bill of lading that "shipment is made at restricted or limited valuation specified in tariff or classification at or under which lowest rate is available" entitles Govt. on shipment subject to sec. 22 quotation that does not require notice of shipper's released valuation in specified form to lowest rate provided in quotation—re-

TRANSPORTATION—Continued Page
Bills of lading—Continued
Government—Continued
Released valuation condition—Continued
leased value rate. Even though quotation is not "tariff or classification" within strict meaning of Interstate Commerce Act, it is schedule of charges for services contemplated by definition of word "tariff"—a statement by carrier that it will furnish certain services under certain conditions for certain prices, a schedule of rates and charges 335
Damage, loss, etc., of public property. (*See* **Property, public, damage, loss, etc.**)
Dependents
Military personnel
Availability of Government transportation
Commercial means
When wife of Army enlisted man is afraid to travel by airplane and there is no justification for issuance of medical certificate, but member who in order to meet reporting date at new duty station in U.S. from overseas assignment is authorized to travel with dependent by commercial surface transportation as no Govt. surface transportation was available is entitled pursuant to par. M4159–4 of Joint Travel Regs. to reimbursement for cost of wife's travel by commercial surface transportation without reduction. Also payment of monetary allowance may be made to member to cover land travel of dependent from overseas station to port of embarkation and from port of debarkation to new duty station 408
Household effects
Commutation
Distance determination
Cost of transporting household effects within continental U.S. is for reimbursement under sec. 6.4 of Bur. of Budget Circular No. A–56 in accordance with schedules of commuted rates compiled and distributed by General Services Administration, schedules which provide that distance is for determination pursuant to household goods mileage guides filed with Interstate Commerce Commission. Therefore, mileage transferred employee is entitled to for movement of household effects incident to permanent change of station is for computation in accordance with Household Goods Carriers' Bureau Mileage Guide No. 9 and Movers' & Warehousemen's Association of America, Inc., Mileage Guide No. 7, both effective Feb. 1, 1968 276
Military personnel
Commercial means
Reimbursement
Where only Govt. air transportation is available to enlisted man upon change of duty station from overseas to U.S. and because wife is afraid to travel by air he is authorized to travel at his own expense by commercial surface transportation, member may be reimbursed for transoceanic travel to extent it would have cost Govt. to provide air transportation he was entitled to under par. M4159–4a of Joint Travel Regs. Member also is entitled to monetary allowance incident to land travel performed by him from his overseas-duty station to point where Govt. air travel would have been available and from aerial point of debarkation in U.S. to his new duty station 408

Transportation—Continued Page

Military personnel—Continued

Medically unfit

Release from active duty

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

Ocean carriers

"Respond" program

Negotiation

Program known as "Respond" proposing negotiation of peacetime berth-line services based on guarantee of availability of needed services in event of emergency, even though services could be bought for less without guarantee, is within purview of 10 U.S.C. 2304(a)(16), and negotiations need not be limited to contractors whose continued existence under competitive bidding is doubtful, use of sec. 2304(a)(16) authority assuring availability of critical transportation services in interest of national defense. However, for requisitioning phase of program, option should be retained to proceed under contract or authority of Merchant Marine Act of 1936, and Federal Maritime Commission should participate in program by fixing rates to bring them within exception to competition provided by 10 U.S.C. 2304(g), and by reviewing emergency augmentation commitments by berth-line operators..... 199

Rates

Value released *v.* unreleased

Bill of lading provision

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

Vessels

American

Cargo preference

Routing

To use foreign vessels operating from Great Lakes ports to transport military troop support cargo overseas for those shipments that are more costly to route through tidewater ports utilizing U.S. flag shipping would violate 1904 cargo preference act, which was enacted to protect American shipping from foreign competition does not permit use of cost, or time and distance considerations to avoid use of U.S. vessels, except where freight charged is excessive or otherwise unreasonable. However,

362-575 O - 69 - 10

Transportation—Continued Page
Vessels—Continued
American—Continued
Cargo preference—Continued
Routing—Continued
use of Great Lakes ports is not prohibited when American vessels are available at costs that are competitive with tidewater port shipments, or if use of Military Sea Transportation Service vessels is more advantageous from cost standpoint 430
TRAVEL EXPENSES
Air travel
Refusal to use
Dependents of military personnel
When wife of Army enlisted man is afraid to travel by airplane and there is no justification for issuance of medical certificate, but member who in order to meet reporting date at new duty station in U.S. from overseas assignment is authorized to travel with dependent by commercial surface transportation as no Govt. surface transportation was available is entitled pursuant to par. M4159–4 of Joint Travel Regs. to reimbursement for cost of wife's travel by commercial surface transportation without reduction. Also payment of monetary allowance may be made to member to cover land travel of dependent from overseas station to port of embarkation and from port of debarkation to new duty station 408
Military personnel
Where only Govt. air transportation is available to enlisted man upon change of duty station from overseas to U.S. and because wife is afraid to travel by air he is authorized to travel at his own expense by commercial surface transportation, member may be reimbursed for transoceanic travel to extent it would have cost Govt. to provide air transportation he was entitled to under par. M4159–4a of Joint Travel Regs. Member also is entitled to monetary allowance incident to land travel performed by him from his overseas duty station to point where Govt. air travel would have been available and from aerial point of debarkation in U.S. to his new duty station 408
Fares
Taxicabs
Common carrier constructive cost
An employee who, when authorized to travel by plane or by privately owned auto to temporary duty, at cost not to exceed common carrier, departs during office hours by privately owned auto from headquarters where a Government auto would have been available to take employee to airport terminal if he had traveled by plane may not be allowed constructive cost of taxicab fare between office and terminal under 3.1*b*, Standardized Government Travel Regulations, which presuppose that a taxicab is required for use between office and terminal, however, taxi fare from home to office on day of departure may be included in determination of constructive common carrier cost 447

VEHICLES Page

Charter Coach Service

Damage liability of Government

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

VESSELS

Government-owned

Damages

Disposition of funds recovered

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

Transportation matters. (*See* **Transportation, vessels**)

VIETNAM

"Armed conflict"

Disability determinations

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

VOUCHERS AND INVOICES

Expense of billing exceeds value of item furnished

Issuance of two unpriced orders, one for items valued at 30¢, other for items worth $1.01, that stated "this is a firm order if price is $50 or less" to supplier whose policy of charging minimum order price of $50 is shown in its quotation is acceptance of supplier's terms and purchase orders became binding contracts for minimum charge upon acceptance and performance of orders and, although minimum charge is questionable, vouchers including charge may be certified for payment. In addition to administrative action taken to consolidate future orders for small

VOUCHERS AND INVOICES—Continued Page

Expense of billing exceeds value of item furnished—Continued

purchases, provisions should be included in future bid solicitations to require successful bidder to agree prices will not include minimum billing charge, but should they, that minimum billing charge will be no greater than amount stated in solicitation 168

WORDS AND PHRASES

"Quotation"

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