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[B-165095]

Pay—Retired—Annuity Elections for Dependents—Termination—Children Reaching Eighteen Years of Age

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

Pay—Retired—Annuity Elections for Dependents—Termination—Children for Other than Age

Upon the marriage or death on March 1, 1968 of the daughter of a deceased member of the 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 the occurrence of the event and, therefore, entitlement to the annuity payment for the month of March did not accrue.

To Commander D. G. Sundberg, Department of the Navy, October 1, 1968:

Further reference is made to your letter dated July 26, 1968 (XO:HWM:mlo 7220/274 04 46), requesting an advance decision in the case of the late Chief Quartermaster Demps Gordy, USNFR, 274 04 46, concerning the question as to when his child, Angela Gordy, ceased to be entitled to receive annuity payments under the Uniform Services Contingency Option Act of 1953, ch. 393, 67 Stat. 501 (now the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431), in the circumstances set forth in your letter. Your letter was forwarded to this Office by second endorsement of the Comptroller of the Navy, dated August 20, 1968, and has been assigned Submission Number DO-N-1016 by the Department of Defense Military Pay and Allowance Committee.

It is shown that Mr. Gordy was transferred to the Fleet Reserve in August 1947, and that on November 10, 1953, he made a valid election of option 2 at one-half of his reduced retired pay under section 4 of the Contingency Option Act. You report that he died on January 17, 1956, and was survived by a daughter, Angela Gordy, born May 1, 1950, in whose name annuity payments were established effective January 1, 1956. It is indicated that such annuity payments have been made for each month following that date to and including May 1968.

It appears that since Angela's eighteenth birthday was on May 1, 1968, the annuity check for May 1968 was erroneously issued and the refund of that payment has been requested from her guardian. The primary question presented is whether a refund of the annuity pay-

ment for April 1968 should also be requested, on the basis that she may have become ineligible to receive annuity payments during the month of April rather than in May, 44 Comp. Gen. 276, being cited as having possible application. Additionally you request a decision as to the month in which Miss Gordy's entitlement would have terminated had she married or died on March 1, 1968.

Among the eligible beneficiaries designated in 10 U.S.C. 1435 are children of the member who are "unmarried" and "under 18 years of age." Section 1437 provides in pertinent part that "no annuity accrues for the month in which entitlement thereto ends."

The question considered in 44 Comp. Gen. 276 was similar to that here involved in that both are for determination on the basis of when the member's child ceased to be "under 18 years of age." We there said that the statute established a definite instant in time when eligibility to receive the annuity would terminate in the absence of a showing of incapability of self-support existing prior to the dependent's eighteenth birthday. While it was concluded that such time was the instant before the commencement of the child's eighteenth birthday, there was no intention of intimating anything more than that at no time on the child's eighteenth birthday was he an eligible beneficiary. The rule applied in that case was that, upon the occurrence of the specified event, a deduction from retired pay under 10 U.S.C. 1434(c) would not be made for the month in which such event occurred, that event being the eighteenth anniversary of the dependent's birthday, June 1, 1964.

In the present case, the right of the annuitant under 10 U.S.C. 1435 continued so long as she was "under 18 years of age" and ceased the first instant she reached the eighteenth anniversary of her birth. Since her birthday occurred during the month of May, that became the month in which entitlement ended and your first question is answered in the negative.

Insofar as the second question is concerned, the specific event of marriage or death of an otherwise eligible annuitant also occurs on a certain date. Consequently, until the event occurs, an annuitant's right to the annuity would continue. Therefore if the event of marriage or death had occurred on the first day of March, entitlement to the annuity would not have accrued for that month.

[B-164929]

Contracts—Payments—Minimum Billing Charge

The issuance of two unpriced orders, one for items valued at 30¢, the other for items worth $1.01, that stated "this is a firm order if price is $50 or less" to a supplier whose policy of charging a minimum order price of $50 is shown in its

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

To the Director, Defense Supply Agency, October 2, 1968:

Reference is made to the letters of July 24 and August 23, 1968, with enclosures, from the Chief, Accounting and Finance Division, Office of the Comptroller, requesting our decision as to the validity of the payment of two vouchers to the Continental Motors Corporation (Continental) in amounts of $48.99 and $49.70.

The gravamen of the problem is outlined by the disbursing officer in his letter of July 16, 1968, to our Office (one of the enclosures with the letter of July 24, 1968), where he said:

> The basis for my dilemma is the corporate policy of the Continental Motors Corporation, Muskegon, Michigan, to charge a minimum order price of fifty dollars ($50) per order irrespective of the fact that the value of the material ordered may be less than one dollar. * * *
>
> * * * * * * * * * *
>
> * * * Continental Motors Corporation invoices reflect a unit price and amount for each item ordered and delivered. But such invoices add to the item amount billed, a differential identified as "minimum billing" or "service charge" to increase the total amount billed to fifty dollars ($50). * * * the validity and reasonableness of such charges are questioned. Accordingly, we have honored and paid only the item, or material price billed. This procedure will be followed until your reply and decision is received.

According to the record, unpriced purchase order No. N–SB–N35-6–G6836 was issued on September 29, 1966, to Continental calling for 5 Spring-Poppets, Model 4–D277, to be delivered to the Chief, Navy Advisory Group, Military Assistance Command, Vietnam. Said purchase order was issued on DD Form 1155, where at paragraph 5.1 entitled "Monetary Limitation," it was stated, "THIS IS A FIRM ORDER IF PRICE IS $15.00 OR LESS." However, on April 18, 1967, this purchase order was amended so as to increase the monetary limitation to $50. Thereafter on October 9, 1967, Continental submitted its invoice on DD Form 250 billing an amount of $.30 for the 5 springs ordered and a "min billing" of $49.70 for a total amount of $50. The invoice was signed and the springs were received by an authorized Government representative on the same date.

Unpriced purchase order No. N00104–67–M–T594, issued on February 20, 1967, specified a $50 limitation for the two line items ordered. Two invoices were submitted by Continental and accepted by the Government. Invoice No. 15999 billed $.98 for line item number 1 and invoice No. 22077 billed $.03 for line item number 2 and added $48.99

as a "minimum billing" for a total sum of $49.02; the aggregate amount of both invoices being $50.

The record also reflects that Continental issues a quotation form on requests for quotations which clearly indicates that one of the terms of the quotation is a minimum charge of $50 per order. There seems to be little doubt that the Government had notice of Continental's practice, for the raising of the dollar limitation on the first invoice from $15 to $50 indicates that this practice had been in some way communicated to the Government's agent. The Disbursing Officer in his letter of July 16, 1968, stated:

> * * * Continental Motors Corporation quotation form indicates that many, if not all, purchasing or ordering activities affected are aware of Continental's minimum line item or destination charge, minimum charge per order, and minimum charge per diversion.

Also, the Chief, Accounting and Finance Division, in his letter of August 23, 1968, stated:

> * * * Therefore, the buying activity will issue an order knowing that the actual price of the particular item is far less than the total of the contract.

From the foregoing facts, we have to conclude that both unpriced purchase orders stating "THIS IS A FIRM ORDER IF PRICE IS $50 OR LESS" became binding contracts for the minimum charge by Continental once they were accepted by Continental and performance was perfected by delivery of the items sought, which were accepted by an authorized Government agent. While we question the reasonableness of the minimum charges, since they were agreed to by the Government we can find no legal basis to question their validity. Therefore the differential amounts designated as "minimum billing" may be certified for payment.

We feel strongly, however, that appropriate action should be taken to avoid additional small purchases such as those made in this instance and we are pleased to note from the record that your office has directed all DSA buying activities to make a concerted effort to consolidate their future orders. In this connection, if it is your opinion that the problem is of sufficient magnitude, you may wish to consider the advisability of including appropriate provisions in future bid solicitations under which the successful bidder will be required to agree to sell spare parts, for items of the class and type being procured, at prices which either do not include any charge for minimum billing, or which are subject to minimum billing charges no greater than an amount stated in the solicitation.

We would appreciate your advice relative to any corrective measures your agency may institute.

One set of the enclosures referred to is returned.

[B-164797]

Contracts—Specifications—Failure to Furnish Something Required—Invitation to Bid Provisions

Where a low bid is properly held nonresponsive because the bidder failed to return several pages of the solicitation for bids which contained material and substantive provisions that affected the rights and obligations of the parties, the so-called "Christian doctrine" enunciated in 160 Ct. Cl. 58, 312 F. 2d 418—a doctrine to the effect that contract clauses required by statutory regulations are incorporated by law in a contract—is not for application. The issue of bid responsiveness is for determination prior to award and, therefore, the "Christian doctrine" relating to the construction of an executed contract may not be invoked to insert conditions in the bid after bid opening and before award, and the matter is for resolution under the rule that in the case of missing papers the intention of the bidder is to be determined from the bid as submitted.

To E. K. Gubin, October 3, 1968:

We refer to your protest by letter of July 8, 1968, as supplemented by subsequent correspondence, on behalf of Benner Box Division of Simkins Industries, Inc. (Benner), against the rejection of Benner's low bid under Solicitation No. FPNSP-F1-10147-A, issued March 25, 1968, by the General Services Administration (GSA), Federal Supply Service, Office Supplies and Paper Products Branch, New York, New York.

The solicitation requested bids to furnish the normal supply requirements of several designated GSA supply depots for folding paperboard boxes, FSC Class 8115, for the period August 1, 1968, through July 31, 1969. The face sheet of the solicitation bore a notation that all offers would be subject to the following:

1. The attached Solicitation Instructions and Conditions, SF 33A.
2. The General Provisions, SF 32 *JUNE 1964* edition, which is attached or incorporated herein by reference.
3. The Schedule included below and/or attached hereto.
4. Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in the Schedule.)

Pages 3 and 4 of the solicitation constituted the two pages of Standard Form 33A, July 1966, entitled "SOLICITATION INSTRUCTIONS AND CONDITIONS."

Page 5 incorporated by reference into the solicitation GSA Form 1126, Supply Depots and Consignment Instructions, January 1968 Edition; GSA Form 1424, Supplemental Provisions (Supply Contract), September 1964 Edition; GSA Form 1790, Subcontracting Programs, November 1964 Edition, with a revision to paragraph (b); and GSA Form 2313, Termination for Convenience of the Government, March 1967 Edition (applicable to all contracts $100,000 or over), with a special clause for all contracts less than $100,000. In addition, page 5 included notation as to certain amendments to the quality

assurance agreement provisions and the marking provisions of GSA Form 1424.

Page 6 included revisions to the provisions of Standard Form 32 relating to equal opportunity and to utilization of concerns in labor surplus areas.

Page 7 substituted for Article 27 of GSA Form 1424 the "All or None" bid clause prescribed in 41 CFR 5A–2.201–73 for Federal Supply Schedule contracts; set forth under "Scope of Contract" the contract period specified on the face sheet of the solicitation, the obligations of GSA to make certain purchases under the contract, and the obligations of the contractor to deliver the quantities ordered in accordance with the contract terms; and included a minimum order limitation whereby the contractor could elect not to fill orders for 50 cartons or less.

Page 8 included provisions for a maximum order limitation prohibiting placement (by the Government) of orders with a total dollar value in excess of $10,000 and stating the contractor's agreement not to accept or fulfill such orders; instructions regarding priority orders and the fulfillment of orders not priority rated; and provisions relating to delivery prices reading as follows:

DELIVERY PRICES—F.O.B. DESTINATION

Prices are requested F.O.B. Destination to the GSA Depots and Annexes specified herein. Consignment Instructions for these destinations are indicated on GSA Form 1126, "General Services Administration Supply Depots and Consignment Instructions," dated January 1968 and as provided below:

a. Delivery to the door of the specified Government activity by freight or express common carriers on articles for which store door delivery is provided pursuant to regularly published tariffs or schedules duly filed with the Federal and/or state regulatory bodies governing such carriers or, at the option of the contractor, by parcel post on mailable articles; by contract carrier; or by contractor's vehicle.

b. Delivery to siding at destination when specified by the ordering office if not recovered under Paragraph a, above.

c. Delivery to the freight station nearest destination when delivery is not covered under Paragraphs a or b above.

Page 15 listed 13 different destinations for the shipments and specified estimated monthly peak requirements and estimated quantities for 12 months for each destination as well as total monthly peak requirements and total estimated quantity for 12 months for all 13 destinations. In addition, space was provided on page 15 for the bidder to indicate the pound weight per shipping container.

On April 15, 1968, bids were opened. Benner, who had submitted a bid in duplicate, was low on all 13 line items. However, both copies of Benner's bid did not include pages 3 through 8 of the solicitation. Accordingly, the contracting officer, in a findings and determination issued on June 4, 1968, ruled that the bid should be rejected pursuant to Federal Procurement Regulations (FPR) 1–2.404–2(b)(5) on the

basis that it was nonresponsive because various provisions incorporated in the solicitation only on the missing pages were material and substantive parts of the solicitation. On June 28, contracts were awarded to three other bidders, and by letter dated July 1, the contracting officer notified Benner of the rejection of its bid setting forth substantially the same information as was reflected in the findings and determination of June 4.

In your letter of July 8, you protested against award to any bidder other than Benner. You stated that Benner, after extending its bid acceptance period to June 28 at the request of the Government, had been verbally advised by GSA on July 2 that in accordance with 42 Comp. Gen. 502, March 21, 1963, the deficiency in its bid was a fatal defect. You asserted, however, that the matter is governed by 44 Comp. Gen. 774, June 2, 1965, in which we held that the absence of certain pages from a bid did not render it nonresponsive where the pages which were returned with the bid incorporated some of the provisions on the missing pages and where the remaining provisions related solely to bid preparation, the bases for acceptance, and other directory information not affecting the rights and liabilities of the parties.

In a report dated August 7, 1968, which has been made available to you, GSA concedes that the absence of pages 3 and 4, which contain only solicitation instructions and conditions would probably not render the bid nonresponsive since such provisions, as was the case with a similar form considered in 44 Comp. Gen. 774, relate solely to the manner in which bids are to be prepared and submitted, the bases of acceptance, and other directory information. With respect to the remaining pages, GSA makes the following statements:

> However, the omitted pages 5 through 8 contain several clauses of a substantive nature clearly affecting the rights and obligations of the parties. Page 5 incorporates by reference, *inter alia*, GSA Form 1126, Supply Depots and Consignment Instructions, January 1968 edition (Enclosure 5); GSA Form 1424, Supplemental Provisions (Supply Contract), September 1964 edition (Enclosure 6); and GSA Form 2313, Termination for Convenience of the Government, March 1967, edition (Enclosure 7). GSA Form 1424 modifies Standard Form 32 in several respects and contains clauses dealing with changes, variation in quantity, inspection, responsibility for supplies, assignment of claims, examination of records, notice of shipment, packing, packaging, and marking provisions, deliveries beyond the contractual period, price reductions, Federal, state and local taxes, gratuities, patent indemnity, and renegotiation. Since the bid is by its terms subject only to provisions attached or incorporated by reference, it is difficult to perceive how a bidder could be obligated to comply with any of the provisions of GSA Form 1424 when the only page of the Solicitation incorporating that form by reference (page 5) was not attached to the bid actually submitted. 42 Comp. Gen. 502.
>
> In addition to the above, the missing pages 6 through 8 of Benner's bid contain modifications to substantive provisions of Standard Form 32 and GSA Form 1424 as well as clauses dealing with minimum and maximum order limitations, scope of the contract, and delivery prices.
>
> You have consistently held that a bid from which pages of the solicitation containing substantive conditions and provisions concerning contractor obligations are missing is nonresponsive and should be rejected, since the bidder otherwise could elect to be bound only by the provisions attached to his bid. B-163647,

May 15, 1968; B–159360, June 14, 1966; B–154802, August 14, 1964; B–154626, July 17, 1964; 42 Comp. Gen. 502. Moreover, the intention of the bidder is not material if it is not apparent from the bid as submitted. B–160479, April 5, 1967; 45 Comp. Gen. 221; 42 Comp. Gen. 502.

Benner's bid was submitted in duplicate and the same pages were missing in both copies. In his letter of July 8, 1968, counsel for Benner states that employees of that company are ". . . presently preparing affidavits to prove that all forms were properly filled out and mailed to GSA, and that no pages were omitted from the mailing." In dealing with a similar contention you have stated:

"Mr. Gasparik's affidavit states that to the best of his knowledge the bid was complete when submitted by General Electronics. However, the General Services Administration reports that three copies of the bid were submitted by General Electronics and that as to each copy, pages 3, 4, 7, 8 and 9 were missing when the bid was received. Since there would be no reason to remove parts of a bid after receipt and since it is highly unlikely that the same pages could become separated inadvertently from three different copies, the conclusion seems justified that these pages were, in fact, missing." 42 Comp. Gen. 502 at 503.

The case cited by counsel for Benner, B–156700, June 2, 1965, is clearly distinguishable and not for application to the facts obtaining here. In that case, the omitted portions of the solicitation were either incorporated by reference in the pages contained in the bid as submitted (General Provisions, Standard Form 32), or did not relate to matters of substance affecting the contractual obligations of the bidder (Contract Terms and Conditions, Standard Form 30). Such is clearly not the case here.

GSA further reports that the June 28, 1968, awards under the solicitation were made prior to the receipt of your protest.

In a rebuttal dated September 4, 1968, to the GSA report, you make three basic contentions to support your position that the contracts should be canceled or terminated for the convenience of the Government and award made to Benner. First, you contend that the missing pages were lost after receipt of Benner's bid by GSA. Second, you maintain that such pages contain no matters of material substance which are not referenced elsewhere in the solicitation. Third, you assert that the absence of any particular clause or clauses in the bid is cured by the so-called "Christian doctrine" enunciated in *G. L. Christian & Associates* v. *United States*, 160 Ct. Cl. 1, 58, 312 F. 2d 418; motion for rehearing and reargument denied 320 F. 2d 325 (1963); certiorari denied 375 U.S. 954 (1963); petition for rehearing denied 376 U.S. 929 (1964). Briefly, the doctrine is to the effect that contract clauses required by statutory regulations are incorporated by law in a contract.

With respect to the first issue, you present affidavits from one official and two employees of Benner, the substance of which is that after Benner disassembled the bid sets to insert the required bid information, the papers were subsequently reassembled and complete sets were mailed to GSA; that none of the missing pages was found in Benner's files whereas Benner's own copy of the bid includes all of the solicitation sheets; that although Benner representatives contacted GSA by telephone several times during the bid evaluation period to ascertain whether any additional information was required by the Government, no mention was made of the missing pages; and that Benner first learned of the bid defect in a telephone conversation of July 2 with the

procuring activity. Two of the affidavits also make mention of telephone calls to the procuring activity during the latter part of June 1968, in which it is stated that a GSA representative advised Benner representatives that the procuring activity was in the process of moving and administrative procedures were chaotic. Further, you urge that the fact that GSA had possession of Benner's bid for 75 days after bid opening without advising Benner of the missing pages raises a strong presumption that if the pages were detached from the bid, such detachment occurred after the bid was in the hands of GSA.

In addition to the foregoing, you claim that the absence of six pages from Benner's bid would have affected its weight and therefore should have been noted when the bids were opened. Citing a notation on an abstract of bids prepared by a commercial bidders service regarding information missing from one other bid, you state that since that particular bid was obviously carefully examined, the Benner bid must also have been so examined at the bid opening; therefore, you deduce that the best answer to the absence of any mention of pages missing from the Benner bid is that possibly the pages were not missing at that time. Further, you suggest that the pages were lost during the moving of the procurement activity offices and that the request by GSA for extension by Benner of the bid acceptance time had as its purpose providing GSA additional time to search for the papers in its own offices. Moreover, you ask why, if the contracting officer had already determined on June 4 that the Benner bid was to be rejected, did the procuring activity issue a request to Benner on June 5 to extend its bid acceptance period.

GSA has advised our Office that the contracting officer's findings and determination of June 4 was subject to review by higher authority and that approval thereof was not issued until June 20. In the circumstances, the issuance on June 5 of the request for extension of the bid acceptance period in Benner's bid must be viewed as a proper procurement action under the provisions of the GSA regulations pertaining to Federal Supply Service contracts. 41 CFR 5A–2.407–72.

As to the weight of the missing pages, it should be noted that since the sheets in question bore printing on both sides only three of the ten sheets which comprised each bid set were involved. Further, there is for consideration the fact that none of the missing sheets required the furnishing of any information by the bidders. In the light of such factors, it is reasonable to assume that the absence of the three sheets could easily have gone unnoticed both at the time the bid papers were assembled by Benner prior to mailing and at the time the bids were opened, checking for price and other information required to be furnished by the bidders being possible without the missing pages.

As for your suggestion that the pages were lost during the moving of the procuring activity offices, in our view the statements in the affidavits of the Benner representatives to the effect that such move took place in the latter part of June 1968, which was at least several days after the contracting officer had considered the matter prior to rendering his adverse findings and determination of June 4 and after the June 5 request for extension of the bid acceptance period, effectively refute such argument.

With respect to the failure of GSA to notify Benner of the bid deficiency for a period of 75 days after bid opening, your attention is directed to the fact that FPR 1–2.408, relating to the furnishing of information to unsuccessful low bidders, contemplates notice of bid rejection in conjunction with the award. Accordingly, and since the contracting officer's decision of June 4 regarding the effect of the missing pages on the responsiveness of Benner's bid was not determinative of the matter until it was approved by higher authority on June 20, we are unable to conclude that the withholding of notice of bid rejection to Benner until July 1, 1968, was not in accord with the regulation. It is our view, therefore, that no significance should be attached to such factor. At this point it may be stated that in the case considered in 42 Comp. Gen. 502 there was a lapse of 5 months between bid opening and notice of bid rejection to the low bidder. Since there was no indication of any irregularity in the conduct of the procurement, however, that factor, which is not reflected in our decision, was not regarded as justification for consideration of the nonresponsive bid.

In the light of the foregoing, it is our view that the record does not substantiate your contention that the missing bid pages were lost after receipt of the bid by GSA. Accordingly, and in line with the excerpt from 42 Comp. Gen. 502 which is quoted in the GSA report, we must accept GSA's statement that the pages in question were missing from both copies of the Benner bid at the time it was received by GSA.

With respect to the issue of the materiality of the matter contained in the missing pages, we concur with your view that the bidding instructions and conditions, Standard Form 33A, which comprise pages 3 and 4 of the solicitation, are concerned with procedural information and under the reasoning applied in 44 Comp. Gen. 774 with respect to a similar standard bid form the absence of such pages from Benner's bid does not constitute a fatal defect.

As for pages 5 through 8, however, we are unable to accept your theory that there are no matters of substance on such pages which are not mentioned elsewhere in the solicitation; that the incorporation by reference on the face sheet of the solicitation of Standard Form 32, GENERAL PROVISIONS (Supply Contract), automatically

incorporates the provisions of GSA Form 1424 amending and supplementing Standard Form 32; and that various references to method of shipment, point of acceptance, and the listing of different prices for the several destination points shown on page 15 of the solicitation indicating that transportation charges are included in the bid prices cover the same matters as the delivery provisions on page 8.

The scope of the contract, as reflected on the face sheet of the solicitation, identifies the procurement as a requirements contract, describes the procurement item, and specifies the contract period. On page 7, however, the scope of contract provisions set forth, among other things, the clear obligation of the contractor to deliver items from time to time as ordered in accordance with the contract terms. Certainly, this must be regarded as a substantive provision; otherwise, the contractor could control the quantities to be delivered without regard to the needs of the ordering activity.

While the maximum order provision on page 8 is a limitation on the Government, as you point out, it also binds the contractor to an agreement not to accept or fulfill any orders in excess of the limitation and authorizes termination for default in the event of any such violation. Accordingly, the reference to the maximum order limitation on page 13 of the solicitation, which concerns only the Government's liability, does not cure the absence of the language governing the contractor's obligations, and barring any similar language elsewhere in the Benner bid papers the bidder could elect not to be bound by such provision. To such extent, therefore, the provision must be regarded as substantive.

Although the paragraphs which you cite concerning method of shipment and point of acceptance and the fact that Benner's bid shows different prices for the same item for each of several destinations listed on page 15 of the solicitation may be indicative of the inclusion of shipping costs in such prices, only in the language quoted above from page 8 of the solicitation is the bidder specifically bound to include in its bid prices the cost of transportation to destination. Absent such requirement in the pages which were included in Benner's bid, we question whether Benner could be held to pay the transportation charges.

Regarding your assertion that the incorporation by reference of Standard Form 32 on the face sheet of the solicitation covers the supplemental paragraphs and modifications reflected in GSA Form 1424, an examination of the file on 44 Comp. Gen. 774 (B–156700), which you cite as support for this point, shows that incorporation of supplemental clauses to the general provisions in Standard Form 32 in that case was specifically noted on one of the bid sheets returned to the contracting agency by the low bidder. Such notation, which

made reference to clauses 1 through 69 of the general provisions, was in addition to a notation on the face of the invitation for bid, incorporating the general provisions in Standard Form 32, which at that time included 44 clauses. In this case, the Standard Form 32 referenced on the face sheet of the solicitation includes only 22 clauses, and the GSA Form 1424, which modifies several of those clauses and adds 19 other clauses covering substantive matters such as taxes that were not covered by the Standard Form 32 provisions, is not mentioned on any of the pages included in Benner's bid, nor are the additional clauses referenced therein. Accordingly, it is our view that the incorporation of Standard Form 32 covers only the provisions printed therein and that in the absence of a notation in the papers Benner submitted, such as appeared in the bid papers involved in 44 Comp. Gen. 774, Benner could elect not to be bound by the modified and additional clauses set forth in GSA Form 1424.

As to the applicability of the "Christian doctrine" to this case, we direct your attention to the fact that there was no element of nonresponsiveness of the contractor's bid to the solicitation in the *Christian* case; rather, the solicitation failed to include a clause which was required by the Armed Services Procurement Regulation (ASPR) to be included in the solicitation and resulting contract. Since ASPR is a statutory regulation with the force and effect of law, the court held that the missing clause was incorporated in the contract as a matter of law. In the instant case the solicitation includes the clauses required by the Federal Procurement Regulations, but the pages incorporating several of those clauses and other substantive provisions of the solicitation are missing from the bid submitted. The issue, therefore, is one of responsiveness of the bid to the solicitation, a matter which is for determination prior to award. Accordingly, we do not believe that the "Christian doctrine," relating as it does to the construction of the contract actually executed by the bidder and the Government, may be invoked to insert conditions in a bid, after bid opening and before award, which the bidder, either by accident or design, may have failed to include. Rather, we believe that the matter is for resolution under the rule long followed by our Office that in the case of missing bid papers the intent of a bidder is to be determined from the bid as submitted. In line with such decisions, which include our decisions cited in the GSA report quoted above, it is our view that since the Benner bid does not evidence a specific and unequivocal intent on the part of Benner to be bound by all of the provisions which were set forth on the missing pages, the rejection of the bid was required by FPR 1–2.404–2(b).

Finally, we do not view this case as a proper vehicle for the review which you request of our decision of May 28, 1968, 47 Comp. Gen. 682.

That decision concerned a solicitation in which GSA inadvertently failed to include an "all or none bid" clause required by the Federal Procurement Regulations after specifically deleting the "all or none bid" clause which was already incorporated in the solicitation on GSA Form 1424, and the issue was whether the "Christian doctrine" could be invoked to read the missing clause into the solicitation. In this case, there is no defect in the solicitation; rather, the issue, as noted above, is the responsiveness of one particular bid. Our ruling in 47 Comp Gen. 682 is therefore not decisive of this case. Similarly, our decision in this case does not encompass the facts of that case.

For the reasons stated, we see no legal basis to object to the rejection of Benner's bid and to the awards which GSA has made under the solicitation. Your protest is therefore denied.

[B-48063]

Contracts—Cost Plus—Reimbursement—Unclaimed Amounts

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

To the Secretary of Defense, October 4, 1968:

Reference is made to our letter to you of February 26, 1968, and a letter dated April 15, 1968, from the Assistant Secretary, Comptroller, concerning the request of the Douglas Aircraft Company, Santa Monica, California, that we reconsider our decision, B-48063, March 21, 1945, in which it was held that contractors are not entitled to reimbursement for costs under cost-plus-a-fixed-fee contracts except to the extent of their *actual expenditures* and that, notwithstanding State escheat laws, unclaimed amounts included in payments to the contractors as costs of performance should be recovered by the Government and deposited in a prescribed trust fund receipt account or in proper appropriation accounts, and retained except to the extent necessary for the payment of claims later submitted by persons or firms for the previously unclaimed amounts due them from the contractors.

The decision of March 21, 1945, was used as a precedent for the

issuance by the Defense Contract Audit Agency of a notice of contract costs suspended and/or disallowed in connection with the audit of payments made under certain Air Force cost-reimbursable type contracts which were entered into with the Douglas Aircraft Company before it was operating as a division of the McDonnell Douglas Corporation. The Douglas Aircraft Company contended that no adjustment was due the Government since the Government had received the benefit of the work performed by its former employees and the supplies or services furnished by other creditors, and the unclaimed amounts due such employees and other creditors represent valid obligations of either the Douglas Aircraft Company or the McDonnell Douglas Corporation, regardless of whether the parties entitled thereto eventually request payment.

The Douglas Aircraft Company indicated that, under the Uniform Disposition of Unclaimed Property Act, adopted by the State of California in 1959, California Code of Civil procedure, section 1500 through section 1527, and the laws of various other States, the Douglas Aircraft Company or the McDonnell Douglas Corporation is required to report and pay to the States any unclaimed wages due their former employees and any unclaimed amounts due other creditors within certain periods of time after the obligations to make payments of such amounts first accrued. The company also indicated that, during and prior to the year 1959, it had allowed proportionate overhead cost credits for unclaimed wages and other unclaimed amounts in connection with the settlement of its reimbursement claims under Government cost-reimbursable type contracts, but that this practice was discontinued in 1959 because of the adoption in that year of the Uniform Disposition of Unclaimed Property Act by the State of California, and because the vast majority of the company's employees lived and worked in California.

In our preliminary review of the facts and circumstances of the case, as set forth in our letter of February 26, 1968, it was considered that there may be a substantial basis for concluding that our 1945 decision should no longer be applied, but that the Government was clearly entitled to recover portions of unclaimed amounts in the accounts of a cost-reimbursable type contractor to the extent that such amounts represented sums due persons or firms whose last known addresses were in States which did not require an accounting for unclaimed property. We referred to the apparent difference between the payment provisions of cost-reimbursable type contracts entered into during or prior to the year 1945 and the methods of payment provided for in the cost principles of paragraph 15, part 2, Armed Services Procurement Regulation (ASPR). However, we suggested that,

in any event, the Government's obligation to make cost reimbursements under a cost-reimbursable type contract apparently could not be held to have been completely discharged if the Government refused to reimburse the contractor for those portions of costs representing amounts paid to States under applicable escheat laws or paid to the contractor's employees or other creditors before the amounts involved were required to be paid to the States.

We noted but did not cite in our letter of February 26, 1968, the October 2, 1962 decision of the Supreme Court of California, Traynor, J., in the case of *Douglas Aircraft Company* v. *Cranston*, 374 P. 2d 819, to the effect that a State employer could not be required to pay to the State Controller unclaimed wages for nongovernmental work done in the State of California on which the State statute of limitations had run before the effective date of the 1959 California law concerning the disposition of unclaimed property. Although that case involved solely the question whether the law should be given a retroactive effect with respect to unpaid wages on which the statute of limitations had run, the court stated that the Douglas Aircraft Company had in the past credited to the United States unclaimed wages arising out of its contracts with the United States, and that the State Controller "makes no claim that such wages should be reported or paid to him."

The letter dated April 15, 1968, from your Department, sets forth that, while current contract cost principles do not necessarily require proof of prior payment in order to permit the approval and payment of vouchers on a day to day basis, payments under a cost-reimbursable type contract are nevertheless subject to a subsequent audit in depth for the purpose of determining the final allowable costs. It is stated that the cost principles of paragraph 15, part 2, ASPR, need not be interpreted to authorize or require reimbursement for unclaimed wages and that, since the Government has not, in effect, reimbursed the contractor in this case for unclaimed wages, it might be argued that the contractor has no unclaimed wages in its possession which could escheat to the State of California or to other States. The latter statement appears to be based in part upon information furnished by the Douglas Aircraft Company, and confirmed by your Department, that the sum of $40,004, representing costs suspended and/or disallowed by the Defense Contract Audit Agency, was deducted on a voucher covering payment of an amount otherwise due the McDonnell Douglas Corporation under Air Force contract No. AF 04(695)-C-0012.

The departmental letter suggests the possibility that, by discretionary action on the part of the Controller of the State of California, an exemption from the requirement of reporting and paying unclaimed

wages may be available to an employer so far as such unclaimed wages may relate to the performance of Defense contracts on a cost-reimbursable basis. In that connection, the letter refers to the case of *Douglas Aircraft Company* v. *Cranston*, *supra*, as indicating that, in addition to determining that no claim should be made against the company for unclaimed wages arising out of its contracts with the United States, the State Controller apparently also considered that the company was not even required to *report* such unclaimed wages. The letter otherwise sets forth that your Department is not aware of any California court decision rendered subsequent to October 2, 1962, or of any formal statement made by the Controller of the State of California, to the effect that unclaimed wages arising out of cost-reimbursable type contracts with the United States should be reported and paid to the State Controller.

In the particular circumstances, it is stated in the concluding paragraph of the April 15, 1968, letter that your Department is inclined to the view as expressed in our 1945 decision that reimbursement for unclaimed wages and other unclaimed amounts should continue to be disallowed in the absence of an authoritative judicial determination to the contrary.

A copy of the departmental letter was furnished to the Douglas Aircraft Company and there was subsequently submitted on the company's behalf a letter dated August 22, 1968, from The Honorable John F. Hassler, Judge of the Municipal Court of the State of California, Pasadena, California, who was the Deputy Attorney General for the State of California at the time the case of *Douglas* v. *Cranston* was heard. Judge Hassler's letter indicates that the State of California originally asserted entitlement to unclaimed wages arising out of contracts between Douglas and the United States; that Justice Traynor's remarks, as quoted in the letter of April 15, 1968, related only to stipulated facts; that the Office of the State Attorney General had been advised that unclaimed wages were the subject of offset credits under contracts between Douglas and the United States and that, while it was considered that the California law did not relate to those funds, the State of California did maintain full entitlement to all unclaimed wages which were not affected by the credits allowed by Douglas under its contracts with the United States before the adoption in the year 1959 of the Uniform Disposition of Unclaimed Property Act by the State of California.

The 1959 California law concerning the disposition of unclaimed property does not specifically exempt transactions between a California contractor and the United States, and the fact that the California Legislature did not intend that any such exemption would be available

seems to be fairly evident from the concurrent statute cited by Judge Hassler (section 1600 through section 1615, California Code of Civil Procedure), which was enacted with a view toward facilitating the discovery and transfer to the State of California from the United States of unclaimed property in the custody of its officers, departments and agencies. It would therefore appear that the State Controller would not have been authorized, as a discretionary matter, to exempt an employer from the requirements of reporting and paying unclaimed wages to the State of California so far as such unclaimed wages related to work performed under cost-reimbursable type contracts with the United States.

Judge Hassler referred to proposed Federal legislation during recent years designed for the purpose of enabling the States to discover and obtain the transfer of unclaimed property in the custody of the officers, departments and agencies of the United States. It appears that the latest proposed Federal legislation on that subject was included in Senate Bill No. S 3503, 89th Cong., 2d sess., introduced on June 15, 1966. Judge Hassler stated as his opinion that the State of California has a valid claim against the United States for the credits given by the Douglas Aircraft Company during and prior to the year 1959 for unclaimed wages arising out of the company's cost-reimbursable type contracts with the United States. We express no opinion on that question but the record before us discloses no indication that the Douglas Aircraft Company or the McDonnell Douglas Corporation has questioned the authority of the Controller of the State of California to require reports and payments within certain periods of time with respect to unclaimed wages accrued since the year 1959 which had been earned by employees whose last known addresses are in the State of California, regardless of whether the employees worked on Government cost-reimbursable type contracts.

We agree that partial payments made under a cost-reimbursable type contract are subject to a subsequent audit in depth to determine the final allowable costs. We doubt, however, that it could reasonably be held that the cost principles of paragraph 15, part 2, ASPR, need not be interpreted to authorize or require reimbursement for unclaimed wages, the amounts of which have been and were legally required to be paid to State authorities under applicable escheat laws. In our opinion, such payments would clearly constitute a part of the total cost of performing the contract and they would also meet the cost allowability standards of reasonableness, allocability and application, as set forth in ASPR 15-201.2.

In ASPR 15-201.3, it is stated that a cost is reasonable if, in its nature and amount, it does not exceed that which would be incurred

by an ordinarily prudent person in the conduct of competitive business, and it would not seem reasonable to deny reimbursement to a contractor for payments made to State authorities as required under escheat laws. A contractor might question the application of a particular escheat law but there appears to have been in this case no compelling reason why the contractor should have taken the position that the 1959 California law does not require payments to be made to the State Controller for unclaimed wages due for work performed under governmental and nongovernmental contracts except to the extent that such unclaimed wages involved prior credits given to other parties and possible claims on which the State statute of limitations had run before the effective date of the 1959 law.

Although the Douglas Aircraft Company was not required to pay amounts which it had previously credited to the United States, there appears to have been no basis upon which the company could have successfully maintained that it was not obligated to pay to the State Controller unclaimed wages arising out of the performance of contracts with the United States during periods subsequent to the year 1959 when the practice of allowing overhead cost credits for unclaimed wages earned in the performance of such contracts was discontinued because of the reporting and payment requirements of the 1959 law.

It is also our opinion that there is no reasonable basis for any contention that, if a contractor has not been reimbursed by the Government for unclaimed wages, it has no unclaimed wages in its possession which could escheat to the States. Regardless of the status of an account between a contractor and the Government, the contractor would remain liable to its employees for unclaimed wages until such time as the employees' rights passed to the States and the contractor would then be required to report and pay the amounts involved to the States. So long as the contractor is not insolvent, there would appear to be no substantial basis for considering that the unclaimed wages are not in the contractor's possession. With respect, generally, to the disposition of claims for amounts due employees of a bankrupt concern, see *Joint Industry Board* v. *United States*, 391 U.S. 224.

As was noted in our letter of February 26, 1968 (B–48063), there has been a change in the criteria for reimbursement of labor costs. Our original decision of March 21, 1945, involved a contract which limited reimbursement to *actual expenditures* by the contractor, while current cost criteria permit reimbursement for wages "paid currently or accrued * * * whether paid immediately or deferred." Even under the former cost criteria we believe the Government is obligated to make reimbursements for previously unclaimed amounts due employees and other creditors of the contractor after the contractor has either lo-

cated and paid the employees or other creditors, or has paid the unclaimed amounts to State authorities as unclaimed property subject to escheat laws. To the extent our 1945 decision would preclude such reimbursements in the absence of an authoritative judicial determination to the contrary, it is overruled.

Under the existing criteria of reimbursability for wages paid or accrued there would appear to be no justification for postponing reimbursement until the contractor has actually paid unclaimed wages over to the State under its escheat laws. However, as indicated in our letter of February 26, 1968, it is clear that the Government would be entitled to recover and retain the amounts of unclaimed wages or other unclaimed obligations of a contractor in situations where the prospective claimants have not been subsequently located and paid and their last known addresses are in States which do not require an accounting for unclaimed property after the expiration of stated periods of time.

[B–165235]

Officers and Employees—Training—Expenses—Meals and Room at Headquarters

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

To Sally N. Cross, Department of Agriculture, October 4, 1968:

We refer to your letter of September 10, 1968, requesting our decision concerning the propriety of certifying for payment a travel voucher transmitted therewith in favor of Mr. Martin Kriesberg for $110.50.

Mr. Kriesberg apparently had been designated to coordinate and conduct a Seminar on International Agricultural Development to be held at the University of Maryland, Adult Education Center, during the period March 18 to 22, 1968. The amounts claimed on the voucher represent the cost of meals paid by him on behalf of guest speakers (non-Government employees) at the Seminar and certain employees of the International Agricultural Development Service attending such Seminar. The voucher in question has been approved by the Administrator of the International Agricultural Development Service and

will be charged to a working fund made up of monies advanced by the Agency for International Development for expenses for the International Agricultural Development Service. We understand from an informal discussion of the matter that the Seminar is conducted for the sole purpose of training employees of the International Agricultural Development Service.

Under the circumstances it seems clear that the expenses of furnishing the meals to the non-Government employee speakers would be authorized under 5 U.S.C. 4109 as an expense of conducting the training. Moreover, it appears from the information presented that one of the Government employees addressed a dinner and evening session so that his participation in the meal was a necessary incident to providing the training. Further, it appears that a portion of the business of the Seminar was conducted during the meal sessions and that in order to obtain the full benefit of the Seminar training attendance of the other employees at the meal sessions may have been necessary. If an administrative determination to this effect is made by an appropriate authority in the International Agricultural Development Service then Mr. Kriesberg also may be reimbursed the cost of the meals furnished to all of the employees in question. *Cf.* 39 Comp. Gen. 119. If any of the employees involved were in a per diem status, an appropriate reduction in per diem should be made under section 6.7 of the Standardized Government Travel Regulations.

The voucher which is returned herewith may be certified for payment subject to the foregoing conditions.

[B–14386]

Funds—Federal Grants, Etc., to Other Than States—Provisional Indirect Cost Rates—Adjustment

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

To the Secretary of Health, Education, and Welfare, October 8, 1968:

Letter dated September 6, 1968, from the Assistant Secretary, Comptroller (Assistant Secretary), concerns the authority of your Depart-

ment under section 301 of the Public Health Service Act, as amended, 42 U.S.C. 241(d) and implementing regulations (42 CFR, Part 52) to make supplemental payments to grantees after the expiration of a research project period to cover actual indirect costs in excess of the estimated provisional amounts allocated as indirect costs in the grant award. The question arises because of the provisions of section 52.14(d) of the regulations which, in effect, prohibit the making of supplemental awards after the conclusion of the project period. In order to clarify the situation, sections 52.14 (a) and (b) were amended effective July 1, 1968 (33 F.R. 9821, July 9, 1968) to provide expressly for such upward as well as downward adjustment "to actual costs when the amount properly expended by the grantee for provisional items has been determined by the Secretary"; but this action does not affect those projects for which the project period expired prior to July 1, 1968.

The Assistant Secretary states that in connection with research project grants awarded pursuant to the authority contained in the Public Health Service Act, it has traditionally been Public Health Service policy to pay actual direct and indirect costs in carrying out a research project in accordance with the regulations and other applicable legal limitations. He further states that with regard to indirect costs, it has generally been Public Health Service practice to utilize provisional indirect cost rates in determining amounts to be awarded, except in those limited instances in which it can be determined in advance that the rate negotiated is likely to closely approximate the grant recipient's actual indirect cost rate, in which event the authority provided under public Law 87–638, 41 U.S.C. 254a, to negotiate fixed predetermined rates is utilized, where available. He advises that where provisional rates have been used as a basis for including an amount for indirect costs in the grant award, these rates have been recognized by both parties to be subject to adjustment, based on a subsequent determination of actual indirect cost rates. We are also advised that such determinations generally occur some time after the completion of the grantee's fiscal year and in the case of a terminating project will necessarily occur after the close of the project period.

The pros and cons of the matter, as set forth in the Assistant Secretary's letter, are as follows:

As noted above Sections 52.14 (a) and (b) of the Public Health Service regulations were amended effective July 1, 1968 to expressly authorize the awarding of provisional amounts for indirect costs, which provisional amounts may be adjusted upward after the expiration of the project period in the event that allowable indirect costs incurred exceed those provisionally allowed. It could be argued that, prior to this amendment the sense of the regulations, particularly as reflected in the provisions of Sections 52.14 (b) and (d) was that once the activity or approved project is completed (if not sooner) the Government's

interest of assisting the nongovernmental activities is satisfied, and that no obligation exists to pay more than was actually awarded.

However, it may also be argued that the amended regulations merely clarified the intent of the regulations as previously written to pay full indirect costs. It may be further argued that additional amounts awarded to provide such full payment represent nothing more than the ascertainment of the amount of the original obligation and hence do not constitute an additional or supplemental grant award. This interpretation is reinforced by the Public Health Service Policy Statements (revised July 1, 1967) with respect to research grants which amplified the statement of the discretionary authority in Section 52.10 of the Regulations that "a research project grant is the award . . . of funds . . . to meet in whole or in part the costs of conducting . . . the project" by providing (on page 28) that "with certain restrictions and prohibitions . . . the Public Health Service supports the policy of full reimbursement for applicable indirect costs" and further that ". . . If the final actual rate is higher than the provisional rate, the awarding Institute or Division shall provide the difference from funds available for this purpose."

* * * * * * *

It may nevertheless be contended that although additional payments may be made to meet an obligation established at the commencement of the grant year but not fully ascertained until after completion of the grant year, such payments are confined by Section 52.14(d) of the regulations to the time span encompassed within the project period. However, the provisions of Sections 52.32 and 52.41 would appear to support the view that such payments may be made even after completion of the project period. In this connection, the language of Section 52.14(e) which provides that "the Secretary shall . . . make payments to a grantee . . . for expenses *to be incurred* or *incurred* in the project period. . . ." [Italic supplied.] clearly contemplates that supplemental payments may be made after the completion of the project period when such payments are to compensate grantees for expenses actually incurred *during* the project period, with only the calculation of such expenses coming after the project has been terminated.

We are advised that within the context of this background, your Department is currently confronted with a circumstance in which a number of grantee institutions have requested payment for indirect costs incurred in years prior to fiscal year July 1, 1968 (the effective date of the amendment to sections 52.14 (a) and (b) of the regulations), which were in excess of the amounts provisionally awarded. These institutions contend that their research was undertaken under Public Health Service Awards with the understanding, as derived from regulations and policy statements, that awards for indirect costs were provisional in nature and hence subject to upward as well as downward adjustment upon determination of actual indirect costs. They contend further that the failure to make payments for actual indirect costs has created an unexpected financial burden.

The Assistant Secretary states that it is proposed to make adjustments to grants awarded to these institutions, in those instances in which actual indirect costs exceed amounts provisionally awarded both in those cases in which the project period has expired as well as to those in which the grant year, but not the project period, has expired.

Our advice is requested as to whether or not we would be required to object to such upward adjustments.

If the answer to the above question is in the negative, our advice is also requested as to whether we would be required to object to your

Department's proposal to pay such amounts from the appropriation for the fiscal year in which the obligation was incurred to the extent that funds are available.

Although there is nothing in the implementing regulations (42 CFR, Part 52) concerning "provisional indirect cost rates," the statement on page 31 of the Public Health "Policy Statement" as "Revised July 1, 1967," supports the conclusion that "provisional indirect cost rates" contained in grant awards were intended to be subject to upward as well as downward adjustment upon determination of actual indirect cost rates. We found, however, nothing in the "Policy Statement" in effect immediately prior to July 1, 1967, specifically providing for a "provisional indirect cost rate" in a grant; but neither did we find anything therein prohibiting the inclusion of such a provision in a grant award.

It would be reasonable to assume that in agreeing to a rate in a grant specifically denominated therein as a "provisional indirect cost rate," both the grantor and the grantee recognized that the rate would be subject to adjustment, based on a subsequent determination of actual indirect cost rates. To hold otherwise would appear to make meaningless the term "provisional," which is defined in Webster's Third New International Dictionary to mean, among other things, "suitable or acceptable in the existing situation but subject to change or nullification: Tentative: Conditional * * * contrasted with definitive."

Further, we do not feel that sections 52.14(b) or (d) of the implementing regulation require a different conclusion. Insofar as pertinent here section 52.14(d) of the governing regulations authorizes the making of additional or supplemental grant awards (within the project period). Section 52.14(b) of the regulations provides that neither the approval of a project nor a grant award shall commit or obligate the United States in any way "to make any additional, supplemental, continuation or other *award* with respect to any approved project or portion thereof." However, adjusting a "provisional indirect cost rate" contained in a grant on the basis of a subsequently determined actual indirect cost rate, does not, in our opinion, constitute the making of an "additional, supplemental, continuation or other award" or grant. Rather, as indicated above, such action constitutes an adjustment of the "provisional rate" contained in the original grant as presumably contemplated by the grantor and the grantee, otherwise the rate would not have been designated in the grant as provisional. In other words we agree with the view expressed in the Assistant Secretary's letter to the effect that such an adjustment represents nothing more than the ascertainment of the amount of the original obligation, and hence does not constitute an additional or supplemental grant award.

Accordingly, we would not be required to object to the upward adjustment of an indirect cost rate expressly designated as a "provisional rate" in the "grant award," to the rate subsequently determined to be the actual indirect cost rate, if otherwise proper, subject to any statutory or otherwise applicable limitation on indirect costs in effect when the grant involved was made.

As to the second question, a grant containing a "provisional indirect cost rate"—which rate was intended by the grantor and grantee to be subject to adjustment (upward or downward) on the basis of a subsequent determination of the actual indirect cost rate—would obligate or encumber the applicable appropriation current at the time the grant was made to the extent necessary to satisfy any payments due the grantee resulting from any required upward adjustment of the provisional indirect cost rate. Therefore the appropriation originally obligated by the grant involved would be the only appropriation legally available to pay amounts due the grantee as a result of any required upward adjustment of the provisional indirect cost rate set forth in the grant. *Cf.* 20 Comp. Gen. 370.

The questions presented are answered accordingly.

[B-165112]

Compensation—Rates—Special—To Compete With Private Industry

The authority in 5 U.S.C. 5303(a) to raise the minimum rate of a grade in order to compete with private industry permits an increase in any or all of the additional steps of a grade in view of the permissive language of the section, which provides that the 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 section 5332. The "corresponding increase" authorized in section 5303(a) means each increase is limited to not more than the amount of the increase in the first step rate, thus permitting that the different steps in a grade may be increased by different amounts.

To the Chairman, United States Civil Service Commission, October 8, 1968:

Your letter of August 21, 1968, requests our decision whether, when a special minimum rate in a grade is established under 5 U.S.C. 5303, as amended by section 207 of Public Law 90-206, Federal Salary Act of 1967, (1) more than one of the steps in the grade may be increased without increasing all of them, and (2) different steps in the grade may be increased by different amounts.

So far as here pertinent, 5 U.S.C. 5303(a) reads:

(a) When the President finds that the pay rates in private enterprise for one or more occupations in one or more areas or locations are so substantially above the pay rates of statutory pay schedules as to handicap significantly the

Government's recruitment or retention of well-qualified individuals in positions paid under——

(1) section 5332 of this title;

* * * * * * *

he may establish for the areas or locations higher minimum rates of basic pay for one or more grades or levels, occupational groups, series, classes, or subdivisions thereof, and may make corresponding increases in all step rates of the pay range for each such grade or level. However, a minimum rate so established may not exceed the maximum pay rate prescribed by statute for the grade or level. The President may authorize the exercise of the authority conferred on him by this section by the Civil Service Commission or, in the case of individuals not subject to the provisions of this title governing appointment in the competitive service, by such other agency as he may designate.

Subsection (b) of 5 U.S.C. 5303 provides that:

(b) Within the limitations of subsection (a) of this section, rates of basic pay established under that subsection may be revised from time to time by the President or by such agency as he may designate. The actions and revisions have the force and effect of statute.

The above-quoted authority to advance salary scales is a modification of the former authority in section 803 of the Classification Act, 5 U.S.C. 1132 note, which permitted the Civil Service Commission to raise the minimum rate of the grade—or hiring rate—for positions in shortage occupations paid under that act. Under the former authority, the minimum rate could be increased as high as the maximum rate but no increases were permitted for other step rates. Thus, when it became necessary to advance the minimum rate at a given grade of an occupation to the top rate of the grade, only a single salary rate could be paid to those in the class of position concerned. New employees could enter at the same salary that was being paid to experienced, better performing employees.

While the above suggests that undesirable results might flow from an action increasing some of the step rates of a grade without increasing all of them, nevertheless, section 504 as ultimately enacted in Public Law 87-793, 76 Stat. 842 (now 5 U.S.C. 5303), provided, in permissive language, that the President or his designee "*may* make corresponding increases in all step rates of the salary range for each such grade." [Italic supplied.] You express the view that the statutory language clearly permits an increase in the first rate only and that it would seem reasonable to interpret the permissive language covering other step rates as permitting that any or all of the additional steps may be increased.

In view of the permissive language now embodied in 5 U.S.C. 5303, we concur in your interpretation. Question (1) is answered in the affirmative.

Similarly, we construe the language as authorizing but not directing the President or his designee to make corresponding (equivalent, proportionate, matching or comparable) increases in all step rates of the pay range for each such grade. We agree with your view that the

reasonable meaning of the phrase "corresponding increases" is that each increase is limited to not more than the amount of the increase in the first step rate. Thus question (2), likewise, is answered in the affirmative.

[B-135115]

Compensation—Severance Pay—Discontinuance—Reemployment of Separated Employee

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

To the Chairman, United States Civil Service Commission, October 10, 1968:

We refer to your letter of September 19, 1968, by which you request our decision whether severance pay being allowed a separated civil service employee under the provisions of subchapter IX of chapter 55, Title 5, United States Code, must be discontinued at the time such former employee is employed by a nonappropriated funds instrumentality described in 5 U.S.C. 2105(c).

The provisions of 5 U.S.C. 5595(d) require the discontinuance of severance pay when the former employee concerned is reemployed by the Government. Although it has been determined that nonappropriated funds instrumentalities are integral parts of the Government of the United States, the employees of such instrumentalities are not considered to be employees of the United States for the purposes of laws administered by the Civil Service Commission under the provisions of 5 U.S.C. 2105(c). That provision of the codified Title 5 was derived from section 1 of the act of June 19, 1952, Ch. 444, 66 Stat. 138, 5 U.S.C. 150k, which was enacted for the purpose of excluding employees of the nonappropriated funds instrumentalities concerned from the restrictions and requirements applicable to civil service employees to enable such instrumentalities to be operated in accordance with methods of private commercial enterprise. See S. Rept. No. 1341, 82d Cong., 2d sess., page 1. The severance pay provisions are a part of the law governing the rights and benefits of civil service employees and are administered by the Civil Service Commission.

Accordingly, employees of nonappropriated funds instrumental-

ities are not employees of the Government for the purpose of subchapter IX, chapter 55 of Title 5, United States Code, and are not entitled to severance pay under that subchapter. Since such individuals are not considered employees of the Government for severance pay purposes, a separated Government employee receiving severance pay is not considered to be reemployed by the Government when employed by a nonappropriated funds instrumentality. Therefore, his severance pay should not be discontinued as a result of such employment.

Your submission is answered accordingly.

[B-164788]

Smithsonian Institution—Contracts—Advertising, Etc., Law Compliance

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

To the Secretary, Smithsonian Institution, October 10, 1968:

We refer to your letter of July 5, 1968, supplemented by letter of August 5 from Mr. James Bradley, requesting advice as to the propriety of negotiating contractual arrangements for the operation of cafeteria services in the National Zoological Park (otherwise referred to as the Zoo) in Washington, D.C.

In support of your proposal to negotiate such contractual arrangements reference is made to decisions in which we held that contracts or concession agreements might be negotiated without public advertising for similar services in the Museum of History and Technology (B-145878, September 1, 1961) and in the John F. Kennedy Center for the Performing Arts (44 Comp. Gen. 607, October 30, 1964) and you point out that those buildings were constructed primarily through the use of Government appropriations, as were also the building and improvements at the Zoo.

As you state, our Office has recognized the unique nature of the Smithsonian Institution and of the property appropriated for its uses and purposes. In fact, the decisions to which you refer were grounded squarely upon our conclusion that the act of August 10, 1846 (9 Stat.

102), which created the Institution to administer the Smithson trust, conferred upon the Board of Regents plenary authority to manage the trust property and affairs of the Institution without regard to the laws requiring advertising of Government contracts. In each of those cases, however, it was held that the particular building involved had by congressional action been, in effect, appropriated to the Smithsonian Institution and dedicated to the trust purposes to the same extent as the buildings originally authorized and constructed from the funds of the trust.

With respect to the National Zoological Park, however, we have held that this is the property of the United States, and not a part of the lands appropriated to the Smithsonian Institution by the act of April 30, 1846, 9 Stat. 104 (20 U.S.C. 52). See 42 Comp. Gen. 650, May 27, 1963, in which it was held that the authority of the Regents of the Smithsonian Institution over the Zoo, which was conferred by the act of April 30, 1890, 26 Stat. 78 (20 U.S.C. 81), was to be exercised subject to all limitations and restrictions applicable generally to administrative officials of the Government.

By Public Law 89–772 of November 6, 1966, 20 U.S.C. 85, the Congress specifically authorized the Regents "in furtherance of the mission of the National Zoological Park * * * to negotiate agreements granting concessions at the National Zoological Park to *nonprofit scientific, educational, or historic organizations.*" [Italic supplied.]

In the light of our decisions running back at least to April 4, 1929, A–23158, in which the restaurant concession at the Zoo has been regarded as subject to formal advertising procedure, we believe that the restriction imposed upon the above negotiating authority by the underscored enumeration of the classes of organizations with which concessions could be negotiated negates any possible interpretation of the cited act as affecting the limitations on the authority of the Regents with respect to the Zoo concession in any other respect.

Our belief is supported by the legislative history of Public Law 89–772, which includes a letter dated June 3, 1966, from you to the Chairman of the Senate Committee on Rules and Administration in which the following statement appears:

> It is not the intent of section 1 of this legislation to change the procedures whereby the restaurant concession at the National Zoological Park is let through competitive bidding.
>
> The Bureau of the Budget advises that from the standpoint of the President's program there is no objection to the enactment of section 1 of S. 3230.
>
> The Bureau of the Budget, however, has recommended that reconsideration be given section 2, which would allow the Smithsonian Institution to negotiate its cafeteria concession at the National Zoological Park, rather than to award it on the basis of competitive bidding, and to retain the Government portion of the receipts from the negotiated agreement to be used for research and educational

purposes for the benefit of the National Zoological Park. The Smithsonian Institution has reconsidered section 2 and respectfully requests that it be deleted from S. 3230. (S. Rept. No. 1580, 89th Cong., 2d sess.)

Section 2 was accordingly deleted, and the bill as enacted consisted only of what had originally been designated section 1.

We therefore feel that we must adhere to our longstanding and frequently asserted position that the concession to operate the restaurant and related activities in the National Zoological Park may not be granted except in accordance with the law applicable to the use of Government property generally.

In your letter of July 5 to us you stated as follows:

The primary purpose of these cafeteria services is convenience to the visiting public and staff members. However, long experience has shown that bidding for this privilege is not compatible with the selection of experienced operators with demonstrated dedication to public service. We believe that by combining all of the Smithsonian restaurant concessions into one master agreement, a contractual arrangement more advantageous to both the visiting public and the Smithsonian Institution could be negotiated.

This statement was amplified by the following language in Mr. Bradley's letter of August 5:

If it is possible to operate all present and future dining facilities of the Institution under a single negotiated contract, several important benefits will accrue. The single contract for a group of facilities will make possible much greater economies of operation than are available in each unit independently, because of the greater volume of sales and reduced overhead and supervisory expense, and these economies will be passed on to the public in the form of greatly improved food and service without an increase in prices; and, dealing with a single organization will make our limited supervisory personnel much more effective in ensuring that high standards are maintained.

In the light of the above statements, your attention is directed to our decision of May 12, 1966, 45 Comp. Gen. 685, to the Chairman of the Board of Trustees of the John F. Kennedy Center for the Performing Arts. We there held that the contract for the construction of the Center should be made in accordance with the Federal Property and Administrative Services Act of 1949, 40 U.S.C. 471 note, but stated that in view of the representations made by the General Counsel of the Board of Trustees, with the concurrence of the General Services Administration, as to the peculiar features and requirements of the Center, we would have no objection to the negotiation of a contract under exception 10 of section 302(c) of that act (41 U.S.C. 252(c)(10)) and section 1-3.210 of the Federal Procurement Regulations, upon the issuance of a determination setting forth facts and circumstances clearly and convincingly establishing that the use of formal advertising was neither feasible nor practicable.

It is therefore suggested that if you believe the special factors to which you refer would justify the conclusion that the use of formal

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advertising for negotiating a combined contract for the restaurant operations at the three facilities in question, including the Zoo, would not be feasible or practicable and issue a determination and finding to that effect, our Office would not question the negotiation of such a contract under the exception referred to in our decision of May 12, 1966.

[B-165031]

Claims—Assignments—Contracts—Business Operation Sold, Etc.

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

To the Director, Defense Supply Agency, October 10, 1968:

We refer to a letter dated August 7, 1968, from the Chief, Accounting and Finance Division, Office of the Comptroller, Defense Supply Agency, forwarding for advance decision by our Office a claim by Electric Apparatus Company (Electric Apparatus), Howell, Michigan, for payment for electrical equipment furnished to the Defense Construction Supply Center (DCSC), Columbus, Ohio, under five contracts awarded to Howell Electric Motors Company (Howell Electric Motors). The submission of the matter is on behalf of the Accounting and Finance Officer, DCSC.

The claim file shows that during the period October 5, 1966, to June 6, 1967, DCSC issued to Howell Electric Motors the five contracts cited in the Electric Apparatus claim, Nos. DSA 700-67-C-4227, 700-67-M-RY32, 700-67-M-TY18, 700-67-C-3993 and 700-67-M-ZG64. On November 1, 1966, Howell Electric Motors filed with the Treasurer of the State of Michigan a certificate of amendment to its articles of incorporation stating that pursuant to a majority vote of its shareholders at a meeting held on August 25, 1966, the corporate name had been changed to Howell International, Inc. (Howell International). The certification bore the signatures of Paul S. Dopp, president, and John T. Anderson, secretary, of Howell Electric Motors, and under the laws of Michigan the change of name was effective as of the date of said filing.

On June 22 and 23, 1967, Howell International, represented by Paul S. Dopp, president, and John T. Anderson, secretary, joined in an

agreement with Electric Apparatus, a company which had been incorporated under the laws of Michigan effective June 13, 1967, whereby Electric Apparatus purchased from Howell International the Howell manufacturing facility and other property originally held by Howell Electric Motors. The agreement was signed for Electric Apparatus by W. C. McConnell, Jr., president, and Paul H. Duback, secretary. As part of the transaction, Howell International executed an assignment to Electric Apparatus which included eight DSA contracts, among which were contracts Nos. 700-67-C-4227, 700-67-M-RY32, 700-67-MTY18 and 700-67-C-3993. (Contract No. 700-67-M-ZG64, which is also covered by the claim of Electric Apparatus, was not listed in the sales documents.)

By letter of November 28, 1967, Electric Apparatus notified the Director of Procurement and Production, DCSC, that Electric Apparatus had purchased for cash, on June 23, 1967, all of the assets of Howell International, including certain contracts with DSA; that from the assets so acquired Electric Apparatus had produced and shipped items under contracts Nos. 700-67-M-ZG64, 700-67-M-TY18, and 700-67-C-3993; and that invoices had not been prepared by Electric Apparatus for the items in question for the reason that Howell International had not yet signed a novation agreement [a prerequisite under Armed Services Procurement Regulation (ASPR) 1-1602 to recognition by DCSC of Electric Apparatus as successor in interest to Howell Electric Motors]. Accordingly, Electric Apparatus requested the DCSC not honor any invoices by Howell International under the three contracts.

On December 26, 1967, G. Willard Dopp, as vice president, and John T. Anderson, as secretary, for Howell International, executed assignments of the proceeds of contracts Nos. 700-67-C-4227 and 700-67-M-RY32, pursuant to 31 U.S.C. 203 in favor of the McPherson State Bank, Howell, Michigan. The assignments were filed with DCSC.

A letter dated March 28, 1968, from Electric Apparatus to DCSC includes information to the effect that the Howell Electric Motors facility in Howell, Michigan, was one of three companies owned by the corporation which changed its name to Howell International, Inc.; that Howell International has carried on a variety of business activities including the manufacturing at the Howell plant; and that the assignment to the McPherson State Bank by Howell International was executed pursuant to agreement of Electric Apparatus and Howell International with the bank being authorized by letter [presumably from Howell International] to remit the proceeds of the two contracts to Electric Apparatus upon receipt by the bank.

Copies of bills of lading and other shipping records for the five

contracts indicate that shipments under contracts Nos. 700-67-M-ZG64, 700-67-M-TY18 and 700-67-C-3993 were made on various dates from June 27, 1967, to August 25, 1967, but shipments under contracts Nos. 700-67-M-RY32 and 700-67-C-4227 were not made until January 2, 1968, and February 29, 1968, respectively, or subsequent to the December 26, 1967, assignment of such contracts to the bank. All of the shipments originated at 409 North Roosevelt Street, Howell, Michigan, the address shown for Howell Electric Motors on all five contracts and for Electric Apparatus in its articles of incorporation filed with the Treasurer of the State of Michigan on June 13, 1967; in the sales agreement of June 22, 1967, signed by both Howell International and Electric Apparatus; and on all of the invoices presented by Electric Apparatus with its claim.

In connection with contracts Nos. 700-67-C-4227 and 700-67-C-3993, which had been awarded to Howell Electric Motors prior to the change of name on November 1, 1966, the disbursing officer takes the position that Electric Apparatus may not be recognized as successor in interest to the contractor of record due to the failure of Howell International to file a change of name agreement in accordance with ASPR 1-1602, an action which the disbursing officer views as essential to creating any legal or equitable right on the part of Howell International in these two contracts. However, on the basis that the available evidence indicates that Electric Apparatus performed both contracts, that the Government has received the benefits thereof, and that the claim is fair and reasonable, the disbursing officer recommends that payment be authorized thereunder on a *quantum valebant* basis.

As to contracts Nos. 700-67-M-RY32 and 700-67-M-TY18, which were awarded in the name of Howell Electric Motors after the corporate name had been changed to Howell International, the disbursing officer urges that Electric Apparatus should be recognized as the legal assignee in view of the transfer of the business to Electric Apparatus which included assignment of the contracts. In this connection, reference is made to *Seaboard Air Line Railway* v. *United States*, 256 U.S. 655; 4 Comp. Gen. 184; and 9 Comp. Gen. 72, which stand for the proposition that the transfer of rights and obligations incident to a sale or merger of a contracting corporation or individual does not constitute an assignment in violation of the anti-assignment statutes. In line with these decisions, it is recommended that the provisions of 31 U.S.C. 203 be waived by the Government.

As to the assignments which were executed by Howell International on December 16, 1967, in favor of the McPherson State Bank under contracts Nos. 700-67-C-4227 and 700-67-C-3993, the disbursing officer asserts that such action was obviously intended ot avoid the novation

agreement requirement; that Howell International had no right or expectancy in the contracts [apparently because it failed to file with DCSC the change of name agreement required by ASPR 1-1602]; and that the doctrine of estoppel is not for application because it applies only when recovery is sought of sums which have already been paid. Accordingly, the disbursing officer contends that neither assignment is entitled to recognition either at law or in equity.

With respect to contract No. 700-67-M-ZG64, the disbursing officer recommends that since this order was not shipped until after the effective date of the transfer of the Howell, Michigan, manufacturing facility and since it was not specifically included in the list of contracts or customers in the transfer agreement from Howell International, to Electric Apparatus, payment not be made thereon.

There appears to be no question but that Electric Apparatus completed shipment under all five contracts after it assumed ownership of the facility formerly owned and operated, first by Howell Electric Motors and then by Howell International. Further, there is no record of the filing of any claim by Howell International, in either its own name or the name of Howell Electric Motors, under any of the contracts, or of the receipt of any claim by the McPherson State Bank as assignee of contracts Nos. 700-67-C-4227 and 700-67-M-RY32.

In the circumstances, it is our view that in line with the decisions cited by the disbursing officer Electric Apparatus may be recognized as the successor in interest to the contractor of record on all five contracts. See, also, 32 Comp. Gen. 227 and court cases therein cited. We therefore will consider the claim under our claims settlement authority (31 U.S.C. 71). In order to do so, however, it will be necessary that Electric Apparatus furnish to our Office from Howell International, Inc., a release of any claim in either its own name or the name of Howell Electric Motors Company against the Government under each of the five contracts, which should be specifically identified in the release, and from the McPherson State Bank a release signed by duly authorized officials of the bank relinquishing any claim against the Government under the assignments of December 26, 1967. We have so advised Electric Apparatus by letter of today.

[B-163964]

Transportation—Ocean Carriers—"RESPOND" Program—Negotiation

A program known as "RESPOND" proposing the negotiation of peacetime berth-line services based on a guarantee of the availability of needed services in the event of an emergency, even though the services could be bought for less without the guarantee, is within the 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, the use of section 2304(a)(16) authority assuring the availability of critical transportation services in the interest of national defense. However, for the requisitioning phase of the program, an option should be retained to proceed under the contract or the authority of the Merchant Marine Act of 1936, and the Federal Maritime Commission should participate in the program by fixing rates to bring them within the exception to competition provided by 10 U.S.C. 2304(g), and by reviewing emergency augmentation commitments by berth-line operators.

To the Secretary of Defense, October 11, 1968:

By letter of April 1, 1968, as supplemented by letters of June 19 and August 29, 1968, the Assistant Secretary of Defense (Installations and Logistics) requests our opinion as to whether 10 U.S.C. 2304(a)(16) authorizes the expenditure of appropriated fiscal year funds for the procurement of ocean transportation under a proposed program known as "RESPOND."

The salient feature of RESPOND is the provision that carriers seeking to obtain peacetime liner business from the Department of Defense will be requested to agree to provide prearranged ocean lift to meet possible future defense needs. This commercial sealift augmentation is divided into three stages. Stage I, which at the maximum would about double normal peacetime needs, could be invoked by the Secretary of Defense; Stage II, with a maximum of about three times the peacetime base, could be invoked by the President; and Stage III, with a maximum of about three and one-half times the peacetime base, could be invoked when a Presidential Proclamation sufficient to authorize the requisitioning of ships under section 902 of the Merchant Marine Act of 1936, 46 U.S.C. 1242, has been issued.

So far as here pertinent, 10 U.S.C. 2304(a)(16) authorizes procurement by negotiation rather than by formal advertising if the agency head determines it to be in the interest of the national defense that any supplier be made or kept available for furnishing services in the event of a national emergency. Stated another way, 10 U.S.C. 2304(a)(16) authorizes the negotiation of contracts for services currently needed in such manner as to assure that the contractor's services will be available for future national emergency use.

A somewhat similar program has been in effect for some time in the procurement of current airlift needs of the Department of Defense. We considered that program in our decision, B–143985, dated December 27, 1960. The question presented in that case was whether 10 U.S.C. 2304(a)(16) authorized the award of a contract under which an airline operator was required to guarantee the availability of needed services in the event of an emergency, and under which that guarantee was coupled with the furnishing of current services, even though the current services could be bought for less without the guarantee. We

stated in our decision that the legislative history of 10 U.S.C. 2304(a)(16) showed it might be expected that the Government would be required to pay more for services obtained in furtherance of the objective of the statute. We therefore gave our approval to the payment of the higher price to obtain the emergency augmentation guarantee.

It is contended by the unsubsidized liner operators that 10 U.S.C. 2304(a)(16) is intended to permit the negotiation of contracts only with particular contractors whose continued existence under competitive bidding is doubtful but who will be needed in the event of an emergency. Reference is made, in support thereof, to paragraph 306 of Armed Services Procurement Regulation, Appendix J, which speaks in terms of a showing of the need to negotiate with a particular contractor or contractors and why it is necessary to keep the proposed contractors available.

We agree that the usual case justifying negotiation under 10 U.S.C. 2304(a)(16) may well require contracting with a predetermined contractor or contractors. However, we do not agree that the authority granted by the section is limited to such a situation. It permits negotiation when it is determined to be in the interest of national defense to have a supplier available for furnishing services in case of a national emergency but not necessarily a particular supplier.

We think the primary purpose of the section is to assure the availability of critical supplies or services when they are needed. For example, it seems to us that 10 U.S.C. 2304(a)(16) well might be used to assure the availability of two or three geographically dispersed sources for the production of certain supplies without predetermination of the particular sources. Under the RESPOND program the services involved are sealift capability, adequate in terms of quantity, quality and timeliness to meet national emergency needs. What is needed are ships and crews, and because of the nature of the maritime industry it is impossible to designate certain ships in advance and contract for their availability within specified periods of time after an emergency arises. One feasible way to secure the sealift needed is to contract for the availability of a number of ships sufficient to give reasonable assurance that whenever an emergency arises the quantity and quality of committed ships then in port or quickly available will be adequate to meet the need. We believe 10 U.S.C. 2304(a)(16) provides the authority to negotiate contracts to accomplish this.

It can be argued that statutory authority already exists in sections 802 and 902 of the Merchant Marine Act of 1936, 46 U.S.C. 1212 and 1242, to requisition whatever ships may be needed. We recognize this, and the further fact that ships could be requisitioned today in view of the national emergency proclaimed by the President in 1950. Stages I

and II of RESPOND are contractual methods of obtaining emergency sealift augmentation without the necessity of resort to the ultimate power of the Government to requisition ships. In our opinion the fact that the Government has the power to requisition any needed ships does not preclude the use of an alternative procurement method to satisfy national defense needs if it is decided that such a course of action is the more desirable from the Government's standpoint.

Stage III of RESPOND is in a somewhat different category. The record before us characterizes it as requisitioning, although the differences between invocation of Stage III and requisitioning under the Merchant Marine Act are not stated. We would suggest that consideration be given to providing an option to the Government if Stage III is invoked to either proceed under the contract or to requisition under the authority of the Merchant Marine Act of 1936. At that point the Government could make its decision as to which course of action to follow after consideration of cost to the Government and other pertinent factors.

Under the plan proposed in the letter of April 1, 1968, each operator would submit general financial data, plus detailed cost and utilization data for vessels to be used on the trade routes involved. These data would have been used by the Military Sea Transportation Service (MSTS) to develop a weighted average cost per measurement ton for each trade route which, together with an industry-wide allowance for profit, would constitute a "uniform rate" payable for all berth liner services on that trade route. The plan contemplated use of the cost data furnished by operators to determine the "cost effectiveness" of each operator. As a result of informal discussions between representatives of our Office and the Department of Defense concerning the requirement in 10 U.S.C. 2304(g) that competition be obtained where feasible even in the case of negotiated procurements, certain modifications in this aspect of the program were proposed by the letter of June 19, 1968, which would have permitted a limited degree of competition. An operator's cost effectiveness and his bid prices would then have been included as factors in the allocation of peacetime cargo.

Objection to this aspect of the program was made by the unsubsidized lines, principally on the basis that subsidized lines would be able to bid lower regardless of operating costs because of their receipt of operating differential subsidy. In the letter of August 29, 1968, responding to this contention it is stated that elimination of this feature of the program would not adversely affect the objectives of RESPOND.

One of the concerns we have had with the RESPOND program was the nonparticipation of the Federal Maritime Commission in the fixing

of rates. While the Commission does not exercise the same control over foreign rates that it does over domestic rates, nevertheless it has substantial responsibilities with respect to the foreign maritime commerce of the United States. It is our present understanding that the Commission may be willing to undertake the establishment of criteria for the formulation of fair and reasonable rates on MSTS routes and to act as arbiter of rate disagreements which might arise between MSTS and either subsidized or unsubsidized carriers.

It should be noted that 10 U.S.C. 2304(g) does not require competition in those negotiated procurements in which rates or prices are fixed by law or regulation. Foreign maritime rates are not "fixed" by regulation to the extent that domestic rates are. The Shipping Act of 1916, as amended, nevertheless does give the Federal Maritime Commission authority under section 18(b)(5), 46 U.S.C. 817(b)(5) (1946 ed.), to disapprove any rate in foreign commerce found to be so unreasonably high or low as to be detrimental to the commerce of the United States. Section 17 of the act, 46 U.S.C. 816, forbids carriers in foreign commerce to charge discriminatory rates, and gives the Commission authority to enforce this provision. The act also permits restriction on competition by the establishment of conference rates under agreements approved by the Commission. Considering the regulatory authority vested in the Commission over foreign maritime rates, it seems to us that if such rates were to be established in accordance with criteria fixed by the Commission, they could fairly be said to come within the exception to competition permitted by 10 U.S.C. 2304(g).

In view of the above, we would have no objection to elimination of that part of the RESPOND program which would have based cargo allocation in part on competitive bids and individual carrier cost effectiveness, if the Federal Maritime Commission will undertake to participate in the fixing of MSTS rates.

As so modified, the RESPOND program would allocate peacetime cargo solely on the basis of the services and mobilization commitment offered by each carrier. We see no objection to cargo allocation on this basis, assuming that it will give reasonable assurance of the continued availability of whatever capacity is necessary to meet emergency sealift needs, whether the ships involved are subsidized or unsubsidized.

In answer to the specific question asked, it is our opinion that 10 U.S.C. 2304(a)(16) does permit, under the circumstances outlined above, the negotiation of contracts for berth-liner services under which contractors would commit sealift capacity for emergency use, even though current services might be obtained for less without the emergency commitment.

The letter of April 1, 1968, states that the RESPOND program would have an appreciable influence on the total berth operator market, which it is hoped would promote greater stability and long run efficiency within the industry. The concluding pages of the November 1967 DOD RESPOND proposal mention some of the problems to be solved in the further development and definition of the program. We express no opinion on these problems.

One other aspect of the program requires comment. Contractual commitments by berth line operators, particularly by subsidized operators, to furnish vessels to the Department of Defense in the event of national emergency have a potential effect on commercial sealift. We believe the overall national interest in U.S. flag shipping requires that any such emergency augmentation commitments be reviewed by the Maritime Administration.

There is enclosed for your information a copy of our letter of today to the American Unsubsidized Lines.

[B–164762]

Pay—Retired—Increases—Cost-of-Living Increases—Active Duty Recall

The retired pay status of an Army sergeant disabled during a period of service which commenced May 25, 1966, subsequent to retirement on July 1, 1962 under 10 U.S.C. 3914 for length of service, who upon reversion to inactive status on the retired list effective March 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 Public Law 90-207 (10 U.S.C. 1401a) to provide a cost-of-living increase effective October 1, 1967, comes within the purview of 10 U.S.C. 1401a(c) entitling the member to an increase in retired pay to reflect the increase of 3.9 percent in the Consumer Price Index effective April 1, 1968, adjusted pursuant to subsection (c) to the nearest one-tenth of 1 percent of the increase in the Consumer Price Index for January 1968 that exceeded the September 1967 Index, or a 1.3 percent increase.

Pay—Retired—Increases—Cost-of-Living Increases—Computation

Under 10 U.S.C. 1401a, as amended, by Public Law 90–207 to provide a cost-of-living increase effective October 1, 1967, to be computed at the different percentages prescribed, 10 U.S.C. 1401a(e) applies only when the retirement of a member of the uniformed services becomes effective on or after October 1, 1967. Therefore, a member retired on July 1, 1962 and re-retired on March 15, 1968 does not come within the purview of subsection (e). For members whose retired pay status comes within the purview of subsections (b) and (c), subsection (c) containing the phrase "notwithstanding subsection (b)" applies. If the adjusted retired pay of members retired on or after October 1, 1967 is greater when computed under subsection (e) rather than under subsections (c) or (d), the members are entitled to the greater amount of retired pay.

To Captain A. E. Velez, Department of the Army, October 17, 1968:

Further reference is made to your letter of June 13, 1968, and enclosures, requesting a decision whether payment of additional retired

pay is proper in the case of Sergeant First Class William C. Burrell, RA 7 083 770, United States Army, retired, for the months of April and May 1968. Your request was forwarded here on July 1, 1968, under D.O. Number A1009 allocated by the Department of Defense Military Pay and Allowance Committee.

It appears that William C. Burrell was placed on the retired list effective July 1, 1962, under the provisions of 10 U.S.C. 3914 (length of service) in the grade of sergeant first class (E–6). It is stated that he was credited with 20 years, 2 months and 3 days of active service for basic pay purposes. He was recalled to active duty in the grade of sergeant first class (E–7) on May 25, 1966, and he served on active duty in that grade through March 14, 1968, reverting to inactive status on the retired list on March 15, 1968. While serving on active duty during the period May 25, 1966, through March 14, 1968, he incurred a disability rated at 60 percent.

As a member of an armed force who had been retired other than for physical disability and who, while serving on active duty after such retirement, incurred a physical disability of at least 30 percent for which he would otherwise be eligible for disability retired pay under chapter 61 of Title 10, U.S. Code, Sergeant Burrell was entitled under section 1402(b), Title 10, U.S. Code, upon his release from active duty March 14, 1968, to recompute his retired pay as prescribed in section 1402(d), Title 10, U.S. Code.

Section 2(a)(2)(A) of Public Law 90–207, December 16, 1967, 81 Stat. 653, amended subsection (d) of section 1402, Title 10, U.S. Code, to read in part as follows:

> (d) A member of an armed force covered by subsection (b) or (c) may elect to receive either (1) the retired pay to which he became entitled when he retired *increased by any applicable adjustments in that pay under section 1401a of this title after he initially became entitled to that pay*, or (2) retired pay computed as follows:
>
> * * * * * * *
>
> If, while on active duty after retirement or after his name was placed on the temporary disability retired list, a member covered by this subsection was promoted to a higher grade in which he served satisfactorily, as determined by the Secretary concerned, he is entitled to retired pay based on the monthly basic pay to which he would be entitled if he were on active duty in that higher grade. [Italicized language was added by Public Law 90–207.]

It is stated that Sergeant Burrell "elected retired pay based on 60 percent for disability." Pursuant to his election to receive retired pay under the provisions of 10 U.S.C. 1402(d) his retired pay was recomputed effective from March 15, 1968, in accordance with the formula therein set forth which provides that the highest monthly basic pay that the member received while on active duty after retirement shall be multiplied as the member elects (1) by 2½ percent for each of the years of service creditable under 10 U.S.C. 1208 or (2) by the highest

percentage of disability attained while on active duty after retirement.

Computed on the basis indicated above Sergeant Burrell became entitled to receive retired pay effective March 15, 1968, at the rate of $297.72 per month (60 percent of $496.20). The basic issue raised in your submission is whether his retired pay of $297.72 per month properly may be increased by 3.9 percent to $309.33 per month effective April 1, 1968, representing the percentage increase in the Consumer Price Index determined as provided in 10 U.S.C. 1401a.

Section 1401a of Title 10, U.S. Code, was amended by section 2(a)(1) of the act of December 16, 1967, Public Law 90–207 (made effective October 1, 1967, by section 7 of that act, 37 U.S.C. 203 note), to provide as follows:

(a) Unless otherwise specifically provided by law, the retired pay or retainer pay of a member or former member of an armed force may not be recomputed to reflect any increase in the rates of basic pay for members of the armed forces. In this section "Index" means the Consumer Price Index (all items, United States city average) published by the Bureau of Labor Statistics.

(b) The Secretary of Defense shall determine monthly the percent by which the index has increased over that used as the basis (base index) for the most recent adjustment of retired pay and retainer pay under this subsection. If the Secretary determines that, for three consecutive months, the amount of the increase is at least 3 percent over the base index, the retired pay and retainer pay of members and former members of the armed forces who became entitled to that pay before the first day of the third calendar month beginning after the end of those three months shall, except as provided in subsection (c), be increased, effective on that day, by the highest percent of increase in the index during those months, adjusted to the nearest one-tenth of 1 percent.

(c) Notwithstanding subsection (b), if a member or former member of an armed force becomes entitled to retired pay or retainer pay based on rates of monthly basic pay prescribed by section 203 of title 37 that became effective after the last day of the month of the base index, his retired pay or retainer pay shall be increased on the effective date of the next adjustment of retired pay and retainer pay under subsection (b) only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(d) If a member or former member of an armed force becomes entitled to retired pay or retainer pay on or after the effective date of an adjustment of retired pay and retainer pay under subsection (b) but before the effective date of the next increase in the rates of monthly basic pay prescribed by section 203 of title 37, his retired pay or retainer pay shall be increased, effective on the date he becomes entitled to that pay, by the percent (adjusted to the nearest one-tenth of 1 percent) that the base index exceeds the index for the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay or retainer pay is based became effective.

(e) Notwithstanding subsections (c) and (d), the adjusted retired pay or retainer pay of a member or former member of an armed force retired on or after October 1, 1967, may not be less than it would have been had he become entitled to retired pay or retainer pay based on the same pay grade, years of service for pay, years of service for retired or retainer pay purposes, and percent of disability, if any, on the day before the effective date of the rates of monthly basic pay on which his retired pay or retainer pay is based.

Section 2(b) of Public Law 90–207, 10 U.S.C. 1401a note, provides:

(b) Notwithstanding section 1401a(d) of title 10, United States Code, a person who is a member or former member of an armed force on the date of enactment of this Act and who initially became, or hereafter initially becomes, entitled to retired pay or retainer pay after November 30, 1966, but before the effective date

of the next increase after July 1, 1966, in the rates of monthly basic pay prescribed by section 203 of title 37, United States Code, is entitled to have his retired pay or retainer pay increased by 3.7 percent effective as of the date of his entitlement to that pay.

Since Sergeant Burrell's retirement on July 1, 1962, several increases in the monthly basic rates of military active duty pay have become effective, including those of October 1, 1967 (section 1(1) of Public Law 90–207, 81 Stat. 649); and July 1, 1968 (under authority of section 8 of Public Law 90–207, 81 Stat. 654). A cost of living 3.7 percent Consumer Price Index increase in Military retired pay became effective on December 1, 1966, and a further Consumer Price Index increase of 3.9 percent in such military retired pay became effective on April 1, 1968.

The provisions of 10 U.S.C. 1401a currently in effect (as amended effective October 1, 1967, by Public Law 90–207) require that retired pay and retainer pay be adjusted when the Consumer Price Index has shown for three consecutive months an increase of at least 3 percent over the base index (that used as the basis for the most recent adjustment). To assure equity in the future, subsection (c) of section 1401a of Title 10, U.S. Code (as amended by Public Law 90–207) provides that members or former members of the Armed Forces who become entitled to retired pay or retainer pay based on rates of active duty pay prescribed in 37 U.S.C. 203(a) that became effective after the last day of the month of the base index shall, when the next Consumer Price Index adjustment in retired pay is made, receive only that part of the Consumer Price Index percentage increase which has occurred since the month immediately preceding the month in which the basic active duty pay rates on which his retired or retainer pay is based became effective.

This is illustrated as follows, at pages 11 and 12, H.Rept. No. 787, October 17, 1967, to accompany H.R. 13510, 90th Cong., now Public Law 90–207:

Assume a basic pay increase on October 1, 1967. Men retiring immediately thereafter will receive an annuity based on this base pay table. [Section 6, Public Law 90–207.]

Assume that the CPI increases 3 percent over the current base attained in September 1966 by May 31, 1968 (having remained at the new higher level for 3 consecutive months).

Men who had retired prior to October 1 [1967] would receive the full 3-percent CPI adjustment. However, those who had retired after October 1 [1967] would receive only the amount by which the CPI had increased between the [effective date of the] basic pay increase and May 31, 1968. [10 U.S.C. 1401a(c) as amended by Public Law 90–207.] In other words, they would get only that part of the CPI increase which has occurred since their last active duty basic pay change.

Also, it was stated:

This will tie the annuities of all retired personnel to the same base date for all future CPI adjustments, and thus assure equitable treatment of all retirees with respect to CPI movements, regardless of when they retire.

As indicated above, upon his reversion to inactive status on the retired list effective March 15, 1968, Sergeant Burrell became entitled to recompute his retired pay under the provisions of 10 U.S.C. 1402(d) on the basis of the rates of monthly active duty basic pay prescribed in 37 U.S.C. 203(a), as amended effective October 1, 1967, by section 1(1) of Public Law 90-207. In such circumstances his retired pay status reasonably may be viewed as coming within the purview of subsection (c) of 10 U.S.C. 1401a. *Cf.* 48 Comp. Gen. 15, July 16, 1968. Consequently, his retired pay properly may be increased effective as of April 1, 1968:

> * * * only by the percent (adjusted to the nearest one-tenth of 1 percent) that the new base index [for January 1968] exceeds the index for [September 1967] the calendar month immediately before that in which the rates of monthly basic pay on which his retired pay * * * is based became effective.

The Consumer Price Index increase of 3.9 percent in military retired pay which became effective April 1, 1968, is based on the Consumer Price Index of 118.6 for the 3-month period ending with the month of January 1968. The Consumer Price Index figure for the month of September 1967 was 117.1. Therefore the Consumer Price Index for January 1968 reflects an increase of 1.28 percent or (adjusted to the nearest one-tenth of 1 percent) an increase of 1.3 percent over the Consumer Price Index for September 1967. Hence, the rate of Sergeant Burrell's retired pay ($297.72 per month) to which he became entitled on March 15, 1968, properly may be increased effective April 1, 1968, by 1.3 percent to $301.59 per month (not $301.79 per month as indicated in your letter).

The last paragraph on page 2 of your letter is as follows:

> Doubt exists as to whether three different percentage increase computations for retired pay may be possible or are contemplated under subsections (b), (c), and (e) of the amended section 1401a of Title 10, U.S. Code on and after the effective date of any Consumer Price Index percentage increase and in this respect, the correct method of adjusting Sergeant Burrell's retired pay beginning 1 April 1968.

Inasmuch as Sergeant Burrell retired effective July 1, 1962, his retired pay status does not come within the purview of subsection (e) of section 1401a, Title 10, U.S. Code, as amended, which is applicable only when retirement becomes effective on or after October 1, 1967. Hence, the computation of his retired pay effective from April 1, 1968, is governed by the provisions of subsection (c) of section 1401a, as shown above ($301.59 per month).

The other question presented in the paragraph above quoted is based on the assumption that the retired pay status of the individual concerned comes within the purview of more than one of the subsections of 10 U.S.C. 1401a cited by you. Thus, if an individual's military retired pay status is within the scope of subsection (c) as well as

subsection (b) of section 1401a, Title 10, U.S. Code, as amended, you inquire, in effect, whether such individual would be entitled to the greater amount of retired pay or retainer pay computed under subsection (b) or subsection (c), as the case may be. This must be answered in the negative, since the phrase "Notwithstanding subsection (b)" contained in subsection (c) requires that the retired or retainer pay of an individual whose retired or retainer pay status lies within the scope and purview of both subsections (b) and (c) must be computed as specifically provided in subsection (c).

If the adjusted retired pay of a member or former member of an armed force retired on or after October 1, 1967, is greater when computed under subsection (e) of section 1401a than the amount of monthly retired pay to which he otherwise would be entitled computed under subsections (c) or (d), such individual is entitled to the greater amount of retired pay computed under subsection (e).

Since payment on the voucher (FCUSA Forms 20–41 and 20–43, enclosures 1 and 2, respectively, received with your letter) stated in favor of Sergeant William C. Burrell is not proper the voucher forms will be retained here.

[B–164952]

Vessels—Government-owned—Damages—Disposition of Funds Recovered

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

To the Director, National Science Foundation, October 17, 1968:

We refer to your letter of July 26, 1968, concerning the use of funds received by the Alpine Geophysical Associates, Inc., as compensation for damages to the Research Vessel *Anton Bruun*, a Government-owned vessel under the control of the National Science Foundation. The Alpine Geophysical Associates, Inc., is a cost-plus contractor of the National Science Foundation for the operation and maintenance of the *Anton Bruun*.

The operation and maintenance by Alpine of the *Anton Bruun* as a research support facility of the National Science Foundation began in 1963. The vessel, with crew and supplies furnished by Alpine, participated in the International Indian Ocean Expedition and the Southwestern Pacific Biological Oceanographic Program of the United States.

With the conclusion of the Southwestern Pacific Biological Oceanographic Program in 1966 the *Anton Bruun* was inactivated. Custody of the ship was retained by Alpine under its current contract, NSF–C–443, effective September 1, 1965. In April 1967 the Foundation decided to rehabilitate and modify the *Anton Bruun* in order to transfer her to the Government of India for oceanographic research. Pursuant to amendments of the contract for that purpose, Alpine entered into a fixed price subcontract, in the amount of $159,636 with Ira S. Bushey & Sons, Inc., for the overhaul and repair of the *Anton Bruun.*

The damaging of the *Anton Bruun* and the subsequent activities of Alpine are set forth in your letter as follows:

> On June 28, 1967, the ship was delivered into the custody of Bushey. Bushey towed the vessel to its yard, placed it in drydock, and commenced work under the subcontract. On the night of June 30, 1967, the drydock capsized and sank doing minor structural damage to ANTON BRUUN but entailing a great deal of damage as a result of flooding. ANTON BRUUN was raised on July 15, 1967, and steps were taken to clean and preserve the ship. Negotiations were immediately entered into concerning the restoration of the ship to her previous condition and also for the completion of the original overhaul and repair work. Bushey denied liability but eventually the Hartford Fire Insurance Company, insurer of the Bushey yard, agreed with Alpine and ourselves to settle the claim. Accordingly, on March 5, 1968, Hartford paid to Alpine $500,000.00 and assumed all charges by Bushey applicable to the cleaning and maintenance of the ship following the casualty. It was contemplated that Alpine would use the funds to rectify the damage to ANTON BRUUN in accordance with Article 15(f) of contract NSF–C–443.
>
> From July 1, 1967, until March 22, 1968, ANTON BRUUN remained at Bushey's yard. During most of this period Alpine maintained a twenty-four hour watch and incurred other expenses in connection with surveying the damage and in preparation of specifications for repair. In addition Alpine incurred and is still incurring costs in connection with management and operation of the vessel such as the services of senior officials of Alpine, travel, telephone and legal fees, all of which together with overhead are reimbursable under the terms of contract C–443 which will, unless further amended, expire October 31, 1968. * * *

Your letter goes on to state that the Foundation is now concerned with the disposition of the *Anton Bruun* and the proceeds resulting from the casualty. Although the Government of India has informed the United States that it no longer wishes the *Anton Bruun*, it is currently reconsidering its decision. In addition, several alternatives are being considered by the Foundation, including the sale or gift of the vessel in her present condition.

Assuming the Foundation decides not to restore the *Anton Bruun*, you request our opinion on the expressed belief that it would be appropriate to have Alpine reimburse itself from the money paid by Hartford for its expenses under contract C–443 from July 1, 1967, to the expiration of the contract whenever that may occur. In that connection you invite our attention to Article 15(f)(4) of contract NSF–C–443, which as pointed out is substantially the same as section (g)(4) of the clause set out in paragraph 13.703, Armed Services

Procurement Regulation. Also, the Foundation contemplates the deposit in the Treasury as miscellaneous receipts of the casualty moneys remaining on completion of contract NSF–443.

The referred to Article 15(f)(4) of the contract provides: "In the event the Contractor is indemnified, reimbursed, or otherwise compensated for any loss or destruction or damage to the Government Property, he shall use the proceeds to repair, renovate or replace the Government Property involved, or shall credit such proceeds against the cost of the work covered by the contract, or shall otherwise reimburse the Government, as directed by the Contracting Officer. * * *" Under that provision, read in the light of the entire Article 15, Government Property, the disposition of the proceeds is a matter for determination by the contracting officer, who in the exercise of that responsibility must necessarily give due consideration to statutory guides.

While the National Science Foundation has been empowered "to do all things necessary" to carry out the provisions of the National Science Foundation Act of 1950, that authority is qualified by the phrase "within the limits of available appropriations," 42 U.S.C. 1870. And in situations in which the appropriations of the National Science Foundation may be augmented, or implemented, we find the existence of specific statutory provisions. Thus the National Science Foundation Act grants the Foundation the authority "to receive and use funds donated by others" (section 1870(f)). See, also, section 1873(h). And recent appropriations for the Foundation carry the provision: "That receipts for scientific support services and materials furnished by the National Research Centers may be credited to this appropriation," Public Law 90–121, approved November 3, 1967, 81 Stat. 341, 350.

You are advised we perceive no valid basis for the use of the moneys received because of the physical damage to the *Anton Bruun* for what are essentially administrative or management expenses of the Foundation. Specifically, we are of the view the Foundation, assuming the *Anton Bruun* is not to be restored, would not be justified in substituting the use of the casualty receipts for its appropriated funds. Rather, we are of the opinion that the sum collected from the Hartford Insurance Company should be deposited into the Treasury of the United States in consonance with section 3617, Revised Statutes, 31 U.S.C. 484, generally requiring the gross amount of all moneys received from whatever source for the use of the United States to be deposited and covered into the Treasury as miscellaneous receipts. See 5 Comp. Gen. 928; 15 *id.* 683; 22 *id.* 1133; 47 *id.* 70). That the moneys

received from Hartford, even though paid to Alpine, were for the use of the United States appears of little doubt under the terms of the contract and the situation presented.

[B–116314, B–117272]

Leaves of Absence—Annual—Transfers—Different Leave System

When a civilian employee transfers between positions under different leave systems without a break in service, the employee may transfer all the accumulated and currently accrued annual leave to his credit as of the date of transfer under the authority of 5 U.S.C. 6308. The aggregate leave transferred that is not in excess of the maximum limitation allowable under the leave system from which the employee transferred shall constitute his leave ceiling, a ceiling that will remain to the employee's credit until reduced under the conditions prescribed in section 208(a) of the Annual and Sick Leave Act of 1951. Therefore, nurses of the 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.

To the Chairman, United States Civil Service Commission, October 18, 1968:

This refers to your letter of August 8, 1968, with enclosure, requesting our decision on several questions involving the disposition of annual leave which cannot be transferred to the employee's credit upon his transfer to a different leave system. The questions presented for our consideration were first raised by the Veterans Administration in letter of April 30, 1968, addressed to your office. That letter reads in part as follows:

> Our major problem stems from the relocation of central service activities from the Nursing Service to the Supply Division. Nurses in these units with as much as 120 days of accumulated annual leave under Title 38 Leave system have been reassigned to General Schedule positions in the Supply Division. As we interpret the Commission's instructions and Comptroller General decisions, a nurse in this situation can transfer 30 days of annual leave plus the current annual leave which an employee subject to the Title 5 system could have accrued to the date of transfer. However, there is a question concerning the employee's entitlement to untransferred leave.
>
> The regulation (630.501) which would permit recredit of untransferred leave, if they should return to the Title 38 leave system, probably would be of no help to these nurses because many of them are near retirement age or have physical handicaps which would prevent them from functioning as ward nurses. Therefore, it would seem that they should be entitled to a lump-sum payment for the untransferred leave, either at the time of transfer or upon later separation from the service. If the Commission determines that a lump-sum payment for the untransferred leave would be appropriate at the time of a later separation, some additional instructions on maintenance of records on the untransferred leave would appear to be appropriate.

Section 6308 of Title 5, United States Code, provides in pertinent part as follows:

> The annual and sick leave to the credit of an employee who transfers between positions under different leave systems without a break in service shall be transferred to his credit in the employing agency on an adjusted basis under regulations prescribed by the Civil Service Commission, unless the individual is excepted from this subchapter by section 6301(2) (ii), (iii), (vi), or (vii) of this title. * * *

The above-quoted provision was added to section 205 of the Annual and Sick Leave Act of 1951 by section 4(b) of Public Law 83–102, approved July 2, 1953. Prior to that amendment employees who transferred to different leave systems were paid a lump sum for all of the accumulated and currently accrued annual leave to their credit at the time of transfer (5 U.S.C. 61d (1952 ed.)). Following the enactment of Public Law 83–102, the Civil Service Commission, on two occasions, requested our decision as to the amount of annual leave that could be transferred under the above-quoted provision. In decision of November 9, 1953, 33 Comp. Gen. 209, we ruled as follows:

> In answer to question 1, the amount of leave permitted to be transferred may equal the leave which employees in the agency to which transferred could have accumulated and currently accured at the date of transfer * * *. Thus, in the example cited in your question, if the employee transferred prior to the beginning of the first complete biweekly pay period in 1954 (January 3, 1954), he could transfer 60 days plus the current leave which an employee in the agency to which the employee transferred could have accrued as of the date of transfer. Any leave in excess of 60 days not used by January 3, 1954, would be forfeited. * * *

We had reached a similar conclusion in 33 Comp. Gen. 85, answer to question 4(b).

In your letter of August 8, you point out that 5 U.S.C. 6308, quoted above, contains no limitation on the amount of annual leave that can be transferred thereunder. Further, you express the view that the Congress did not intend to cause any forfeiture of leave when it substituted the transfer of leave provision for the former lump-sum payment provision (5 U.S.C. 61d (1952 ed.)).

We have reexamined the legislative history of Public Law 83–102 and have analyzed the numerous cases that have arisen thereunder. We now believe that our original construction of section 4(b) of Public Law 83–102 (5 U.S.C. 6308) may have been unnecessarily restrictive.

As you have correctly pointed out, a forfeiture of annual leave under 5 U.S.C. 6308, as construed in our decisions cited above, may currently be avoided in most cases by the employee's subsequent retransfer to the former leave system or by a one-day break in service following the employee's separation (with lump-sum leave payment) from his position under the former leave system. Thus, a forfeiture of leave in other cases where neither a retransfer to the former leave system or a break in service occurs appears to be a result which should be avoided if a forfeiture is not specifically required by law.

Since as previously indicated the language of the law as well as the legislative history thereof is silent in the matter, we now hold that under the provisions of 5 U.S.C. 6308 an employee may transfer all of the accumulated and currently accrued annual leave to his credit as of the date of transfer. The aggregate amount of such leave, but not in

excess of the maximum limitation allowable under the leave system from which transferred, shall constitute the employee's annual leave ceiling and shall remain to his credit until reduced under the condition prescribed in section 208(a) of the Annual and Sick Leave Act of 1951, 65 Stat. 682 (5 U.S.C. 6304(c)).

To the extent that our prior decisions at 33 Comp. Gen. 85, *id.* 209, are inconsistent with the views expressed herein, such prior decisions are hereby modified. We assume the Commission's regulations will be amended accordingly.

[B-125037]

Pay—Aviation Duty—Excess Flying Hours—Flying Status of Limited Duration

The excess flying time accumulated by a member of the uniformed services while in a flying status of limited duration may not be applied to a subsequent flying status to qualify the member for flying pay for the later period, paragraph 20110c of the Department of Defense Pay and Allowances Entitlements Manual requiring that a member placed in a flying status for a limited period must meet flight requirements within the specified period for entitlement to flying pay—a regulation not necessarily inconsistent with section 104(a)(1) of the Executive Order No. 11292, which prescribes minimum flight requirements. However, the restriction if not in the best interest of the uniformed services may be eliminated and the excess flying time accumulated during a limited period of service applied to qualify a member for flying pay in a subsequent flying status.

To the Secretary of Defense, October 18, 1968:

Further reference is made to letter of August 28, 1968, from the Assistant Secretary of Defense (Comptroller) requesting a decision whether excess flying time accumulated by a member while on flying status for a specified period of time may be applied during a subsequent period of flight status to qualify for flying pay for the later period. The question, together with a discussion pertaining thereto, is set forth in Department of Defense Military Pay and Allowance Committee Action No. 420.

Section 104(a) of Executive Order No. 11157, June 22, 1964, as amended by Executive Order No. 11292, August 1, 1966, provides that, under such regulations as the Secretary concerned may prescribe, members of the uniformed services who are required by competent orders to participate frequently and regularly in aerial flights, other than glider flights, shall be required to meet certain minimum requirements, except as otherwise provided in section 110, in order to receive monthly incentive (flying) pay for the performance of hazardous duty. The prescribed minimum flight requirements for members on active duty are as follows:

(1) During one calendar month: 4 hours of aerial flight; however, hours of aerial flight performed during the immediately preceding five calendar months

and not already used to qualify for incentive pay may be applied to satisfy the aerial flight requirement for that month.

(2) During any two consecutive calendar months when the requirements of clause (1) above have not been met: 8 hours of aerial flight.

(3) During any three consecutive calendar months when the requirements of clause (2) above have not been met: 12 hours of aerial flight.

The Committee Action discussion refers to paragraph 4–9, Air Force Manual 35–13, which requires that flying status orders be issued with termination dates; that such orders be limited to the period of time needed to perform the duty; and that such period of time cannot be extended beyond the end of the fiscal year for which the order is written. Department of Defense Pay and Allowances Entitlements Manual provides in paragraph 20110c that flight requirements be met within a specified detail where a member is placed on flying status for a limited time. This requirement, the Committee Action states, is based on our decision dated April 6, 1926, A–13594.

In the decision of April 6, 1926, there were considered the provisions of Executive Order No. 3705–B, dated July 1, 1922, relating to increased pay for duty involving flying. Paragraph 9 of that Executive order provided, in part, that members detailed to duty involving flying "shall be required to make at least ten flights or be in the air a total of four hours during each calendar month." Flight requirements not met during any such calendar month could be made up in two succeeding months as there prescribed.

In that decision there was involved a detail to flying for a limited duration (December 11 to 31, 1925). No flights were made under that detail, but under a detail (January 1 to 31, 1926), immediately following the lapsed detail excess flights (as distinguished from excess hours) were made in the month of January 1926 to make up the deficiency in the preceding month, December 1925.

The decision held that the detail for a limited period expired with the date fixed for its termination; that if flights were not performed under that detail, there was no right to increased pay for flying duty; and that a right to flying pay under the lapsed detail is not created by flights made under the subsequent separate detail even though continuous with the lapsed detail. It was concluded that the provision in paragraph 9 of the Executive order dated July 1, 1922, was applicable only to a continuing detail to duty involving flying.

Unlike section 104(a)(1) of Executive Order No. 11292, there was no authority in the Executive order of July 1, 1922, to carry forward flights in excess of those required for a particular month to a subsequent calendar month. See 46 Comp. Gen. 776. Since there is nothing in section 104(a)(1) of the current Executive order which specifically states that those provisions either are, or are not, applicable to a member in a flying status for a limited period of time, it is necessary

to examine the implementing regulations issued under the authority of section 407 of the Executive order—such regulations may not be inconsistent with the terms of the Executive order—to determine whether a member in this category is in any way restricted in meeting flight requirements during a specified period for flying pay purposes.

Chapter 4 of Air Force Manual 35–13, cited above, is limited in scope and covers only the matter of flying status of nonrated officers and warrant officers. Paragraph 4–9 of that chapter provides, among other things, that flying status orders for members in this category must be limited to the period of time needed to perform the duty and that such period of time cannot be extended beyond the end of the fiscal year for which the order is written. Under the provisions of paragraph 20110c of the Entitlements Manual, cited above, a member placed on flying status for a limited period must meet the requirements within the specified period for entitlement to flying pay.

While the flight requirements restriction imposed in paragraph 20110c of the Entitlements Manual is based on our decision rendered in 1926, there would be no basis for questioning this provision unless it is inconsistent with the provisions of Executive Order No. 11292, see section 407. The restriction imposed in paragraph 20110c of the Entitlements Manual, as we understand it, would preclude the carrying forward of excess hours earned but not used by a member during a period while in a flying status of limited duration to a subsequent flying status period in order to qualify for flying pay. This restriction in the regulation is not necessarily inconsistent with the provisions of section 104(a)(1) of Executive Order No. 11292, since the latter are not addressed to the problem of carrying forward excess hours earned in situations involving a flying status for periods of limited duration.

Accordingly, in the light of the restrictive provision of paragraph 20110c of the Entitlements Manual, the question presented is answered in the negative.

Should the Secretaries concerned determine that the restrictive provision imposed in paragraph 20110c of the Entitlements Manual is not in the best interest of the services, we know of no reason why that provision could not be eliminated so as to authorize flying pay on the basis of excess hours under the circumstances disclosed.

[B–164860]

Quarters Allowance—Nonoccupancy of Quarters for Personal Reasons—Entitlement to Allowance

The assignment to a grade E–4 Army sergeant with less than 2 years service of family type quarters notwithstanding his ineligibility for quarters, as the quar-

ters were in excess of the needs of the command, on the assumption the member's family would join him later, properly was terminated when the family did not join the member after he became eligible for the assignment of family quarters upon promotion to grade E–5. Therefore, pursuant to 37 U.S.C. 403(a) and (b), the member is entitled to a basic allowance for quarters as a member with dependents from the date the family quarters assignment was terminated.

To Lieutenant Colonel J. Carroll, Department of the Army, October 18, 1968:

Reference is made to your letter of May 7, 1968, requesting a decision as to whether basic allowance for quarters for the period from January 18 to April 30, 1968, is payable to Darrell L. Rolinitis, E–5, RA, in the circumstances presented. Your request was assigned Number D.O.–A–1010, by the Department of Defense Military Pay and Allowance Committee.

In October 1967, while he was serving in grade E–4 with less than 2 years' service, Sergeant Rolinitis applied for and was assigned family quarters at White Sands Missile Range, New Mexico. While he was not entitled to assignment to Government quarters adequate for himself and his dependents by virtue of his grade and years of service, the assignment was made because there were a number of family quarters in excess of the needs of the command. On December 26, 1967, he was promoted to grade E–5 and became entitled to quarters for his dependents. However, his dependents did not join him at his duty station and his assignment to such quarters was terminated under the provisions of paragraph 15a(4), Army Regulations 210–14, effective January 18, 1968. The Housing Management Officer advised that adequate public quarters were available at the White Sands Missile Range and that he had not and would not issue a certificate of nonavailability of quarters.

In a letter dated March 19, 1968, Sergeant Rolinitis explained that he was assigned family quarters upon arrival at his station, pending the arrival of his family. He stated that his dependents were unable to come to his station due to financial reasons, inasmuch as it would require that his wife liquidate her business at his permanent home location and suffer substantial financial loss. He therefore requested the termination of his quarters and a duty assignment to a location closer to his family.

Section 403(a) of Title 37, U.S. Code, provides that, except as otherwise provided by law, a member of a uniformed service entitled to receive basic pay is entitled to a basic allowance for quarters. Subsection (b) provides in pertinent part that except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States or a housing facility under the jurisdiction of a uniformed service, appropriate to his grade, rank, or rating

and adequate for himself, and his dependents, if with dependents, is not entitled to a basic allowance for quarters.

Paragraph 8f, Army Regulations 210–14, pertaining to assignment of public quarters to eligible military personnel and their dependents, provides that a member reporting at a permanent station will not be assigned quarters considered adequate for a member with dependents unless such member is accompanied by dependents, or dependents are en route to join him. Paragraph 8h provides that generally, maximum practicable occupancy of family housing units will be maintained at all times. It provides further that where necessary for maintaining such occupancy, the commanding officer may make involuntary assignments to public quarters for military personnel reporting to duty stations in his command. However, it is also provided that such involuntary assignments will not be made in cases where extreme hardship would result from such assignment. Paragraph 15a(4) of that regulation provides that assignment of quarters to military personnel at their permanent station will be terminated automatically by the installation commander, when dependents no longer reside permanently with the member occupant.

Paragraph 30221(a), Military Pay and Allowances Entitlements Manual, provides in pertinent part that a member with dependents who is entitled to basic pay is entitled to basic allowance for quarters at rates prescribed for members with dependents when adequate Government quarters are not furnished for him and his dependents without payment of rental charges, and are not available for his dependents.

The wording in section 403(b) of Title 37, U.S. Code, "Except as otherwise provided by law, a member of a uniformed service who is assigned to quarters of the United States * * * is not entitled to a basic allowance for quarters" is somewhat similar to the language contained in section 6 of the Pay Readjustment Act of 1942, 56 Stat. 361, as well as section 6 of the act of June 10, 1922, as amended by section 2 of the act of May 31, 1924, 43 Stat. 250.

In the consideration of entitlement of officers to rental allowance under the former provisions, the Court of Claims held that the mere availability of quarters to an officer with or without dependents which could have been assigned to him does not defeat the right of that officer not assigned to such quarters to rental allowance. Such quarters must actually be assigned to him. *Lake* v. *United States*, 97 Ct. Cl. 447; and *Lundblad* v. *United States*, 98 Ct. Cl. 397. In *Hadden* v. *United States*, 125 Ct. Cl. 137, this rule was considered to apply to the right of enlisted members to quarters allowance under section 10 of the 1942 act, 56 Stat. 363, which stated in effect that an enlisted member not furnished quarters in kind was entitled to a monetary allowance for

quarters. The court held in that case that quarters are not "furnished" to a man merely because there are quarters available for assignment. They must be assigned to him.

The assignment of public quarters for members and their dependents is primarily an administrative matter. 39 Comp. Gen. 561; B–155403, November 23, 1964. To accomplish the maximum practicable occupancy of family housing units required by the cited regulations, the base commander or other responsible official has the obligation and duty to promptly assign available and suitable units for the use of members with dependents, but only to provide for their local housing requirements. Such regulations do not require that assignments be made on the basis of existing dependents wherever they might reside, but expressly prohibit assignment of family units to members whose dependents do not either accompany them to the duty station or are en route there upon their arrival. They also require a termination of assigned quarters if the dependents leave the member's duty station to live elsewhere.

While on the date of his promotion to grade E–5 Mr. Rolinitis in fact occupied family type quarters apparently assigned to him on the assumption that his dependents were later to join him at his duty station, it seems clear from the record that his situation following his promotion was not of the nature requiring or permitting the assignment to him of family type quarters at his duty station since his dependents were not at his station or en route thereto. In the circumstances, the termination of his family quarters assignment was proper. Therefore, he became eligible for basic allowance for quarters as a member with dependents effective January 18, 1968, under the provisions of section 403 (a) and (b), Title 37, U.S. Code.

Accordingly, the submitted voucher is returned herewith authorized for payment, if otherwise correct.

[B–165237]

Compensation—Double—Concurrent Military Retired and Civilian Service Pay—Disability Retirement—"Armed conflict" in Vietnam

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

To the Secretary of the Army, October 18, 1968:

Reference is made to letter of September 7, 1968, from the Deputy Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision concerning findings that a service member's disability resulted from injury or disease received as a direct result of armed conflict or was caused by an instrumentality of war during a period of war.

Section 201(a) of the Dual Compensation Act, Public Law 88-448, approved August 19, 1964, now codified in 5 U.S.C. 5532(b), provides that a retired officer of any Regular component of a uniformed service who holds a civilian position under the United States is entitled to receive the full pay of that position, but during the period for which he receives such pay his military service retired pay will be reduced as there provided.

Section 201(b) of that act (see 5 U.S.C. 5532(c) for similar provisions currently in effect) provides that such reduction in retired pay does not apply to a retired officer—

> * * * whose retirement was based on disability (1) resulting from injury or disease received in line of duty as a direct result of armed conflict or (2) caused by an instrumentality of war and incurred in line of duty during a period of war * * *.

Such period of war is defined in 38 U.S.C. 101 as including the "Vietnam era" beginning August 5, 1964, and ending on such date as shall hereafter be determined by Presidential proclamation or concurrent resolution of the Congress.

Section 202 of the Dual Compensation Act, now 5 U.S.C. 3501, includes among preference eligible employees a retired member of the uniformed service retired for disability for the reasons stated above, and section 203 of that act, now 5 U.S.C. 6303, allows credit to such a member for active military service for the purposes of annual leave as a civilian employee.

Section 212(b) of the Economy Act of 1932, ch. 314, 47 Stat. 406, 5 U.S.C. 59a(b) (1952 ed.), provided that the dual compensation provisions of section 212(a) of that act, 5 U.S.C. 59a(a) (1952 ed.), did not apply to officers "retired for disability incurred in combat with an enemy of the United States." Section 3 of the act of July 15, 1940, ch. 626, 54 Stat. 761, 5 U.S.C. 59a (1952 ed.), added an exemption for officers retired—

> * * * for disabilities resulting from an explosion of an instrumentality of war in line of duty during an enlistment or employment as provided in Veterans Regulation Numbered 1(a), Part I, Paragraph I.

The act of February 20, 1954, ch. 13, 68 Stat. 18, 5 U.S.C. 59a(b) (1958 ed.), substituted the language "caused by an instrumentality of war"

for that added by the 1940 law, eliminating the limitation to disabilities resulting from an "explosion" of an instrumentality of war.

The purpose of the 1954 act was to "eliminate the unjustified preferential treatment accorded by a 1932 'dual compensation' statute to one group of commissioned officers who are retired for disability over other such officers." See H. Rept. No. 884, 83d Cong., 1st sess. 1. The committee reports pointed out that under the 1932 law as amended by the 1940 law an officer disabled from an aircraft explosion following an airplane crash could draw both his disability retired pay and salary as a Federal employee regardless of the combined amount, but an officer retired for an identical disability incurred when his aircraft crashed but did not explode was subject to the monetary limitations of the 1932 dual compensation law. See H. Rept. No. 884 and S. Rept. No. 885, 83d Cong., 2d sess.

As pointed out in the Deputy Assistant Secretary's letter, the 1964 Dual Compensation Act substituted the phrase "as a direct result of armed conflict" for the phrase "in combat with an enemy of the United States," contained in section 212(b) of the Economy Act of 1932. The committee reports on the 1964 law point out that the exemption for members whose retirement was based on disability "incurred in combat with an enemy of the United States" was changed in order—

> * * * to include those retired members whose disability results "from an injury or disease received in line of duty as a direct result of armed conflict." This change would extend the exemption to those disabled in the kind of cold war conflicts in which American military personnel are now engaged.

See H. Rept. No. 890, 88th Cong., 1st sess. 16 and S. Rept. No. 935, 88th Cong., 2d sess. 12. Thus the exemption in the 1964 law includes members disabled incident to armed conflict during a "cold war" conflict.

The Deputy Assistant Secretary says that, in applying section 212(b) of the Economy Act of 1932, The Judge Advocate General of the Army has consistently stated that a disability may be incurred "in combat" if (a) it was incurred while the member was enaged in combat with the enemy or an operation or incident involving combat or the likelihood of combat and (b) a direct causal relationship exists between the combat or the incident or operation and the disability. If the above criteria are met, a disability has been characterized as incurred in combat even if it did not result from direct hostile action. This Office does not question such views.

The Deputy Assistant Secretary further states that the phrase "disease received in line of duty as a direct result of armed conflict" in the Dual Compensation Act has resulted in difficulties of application under conditions peculiar to and prevalent in Vietnam except with respect to diseases which are secondary to or residuals of injuries

received under the required circumstances, since such diseases would be considered as having been acquired under the same conditions as the original injury.

Combat operations in Vietnam are said to consist of intense but sporadic contacts with an elusive enemy, and are unlike those experienced during World Wars I and II and the Korean conflict. One type of "armed conflict" occurs as a result of our tactics where we seek out the hidden enemy in his jungle strongholds, temporary encampments, and while he is on the move, such "search and destroy" missions usually covering considerable ground while lasting only a few days. Our soldiers are also subjected to sudden and unexpected attacks by the enemy. Such hit and run engagements initiated by the enemy usually last only a short time and may be periodically renewed without notice. Consequently it is indicated that almost every member of the Army in Vietnam may at some time be directly involved in "armed conflict."

The Deputy Assistant Secretary then states the administrative problem associated with combat-incurred disabilities as follows:

> * * * Because of the fluctuating nature of these operations and because of the rapid medical evacuation of many patients from Vietnam, it is almost impossible to obtain sufficient evidence to establish that the inception of a disease occurred while the evacuee was actually engaged in one of the foregoing types of armed conflicts. The problem of trying to determine the date of the inception of a disease is further aggravated in the instance of some diseases because of their incubation period and because of the use of prophylactic drugs. Specifically included among the diseases under discussion are those mental conditions (psychoneuroses) having their origin in or aggravated by some traumatic occurrence during "armed conflict." Excluded from any consideration are functional psychoses, character and behavior disorders, and venereal diseases of all kinds and associated residuals.

The questions presented are as follows:

> Because of the foregoing difficulties, and because of the lack of legislative history clearly indicating the intent of Congress, would it be permissible for Army adjudicative agencies to determine that any unfitting *disease*, or the residual(s) thereof, excluding pyschoses, character and behavior disorders and venereal diseases, acquired by Army personnel in any area of combat operations, is within the definition of "direct result of armed conflict," provided it is definitely established that:
>
> a. The onset or aggravation of the disease commenced while the individual was a member of the Army in an area of combat operations, or during any period of detainment by hostile forces, to include conditions where manifestations first occur outside the area of combat operations but which, on the basis of accepted medical principles, had their onset while in this area,
>
> b. The likelihood of having developed such a disease, or aggravation of existing disease, in other than the combat zone environment is remote,
>
> c. The line of duty is determined to be yes, and,
>
> d. The disease is not the natural progression of an underlying condition which had its origin or inception prior to entry into the combat zone environment?

There is nothing in the legislative history of the Dual Compensation Act of 1964 to suggest that the Congress intended that the change in phraseology from "in combat with an enemy of the United States" to "as a direct result of armed conflict" should change the basic require-

ment that the disability should directly result from armed conflict. It seems doubtful that the Congress intended that the mere incurring of a disease in a general area where combat operations might occur should in itself be regarded as "a direct result" of armed conflict. In other words, we think that the law contemplates that an officer is within the exemption only if the disability for which retired is "a direct result of armed conflict" in which the retired officer himself was personally engaged rather than merely incurred in the general area in which the United States is involved in an armed conflict. The Judge Advocate General of the Army has held that in order to be regarded as

"retired for disability incurred in combat with the enemy," it must affirmatively appear that the disability resulted from actual contact with the enemy, and the mere fact that the United States was at war when an officer incurred the disability for which he was retired, does not bring him within the exception.

Digest of Opinions of The Judge Advocate General of the Army, 1912–1940, page 118. In a later opinion The Judge Advocate General of the Army held that the determination of whether disability was incurred in combat must depend upon a showing of (1) engagement in combat with the enemy and (2) a direct causal relationship between the combat and the disability, which is primarily a matter for determination by the medical authority. II Bull. JAGA 301, August 1943. The Judge Advocate General later held that a service member who developed severe migraine headaches as a result of long hours, lack of rest and proper diet while serving in combat in Korea, was not entitled to exemption for combat-incurred disability in the absence of a showing of a direct casual relationship between the combat and the disability. 2 Dig. Ops. JAGAF 721. Disability from frostbite suffered while attempting to return to friendly territory after the officer's plane was shot down over France by enemy action was held to be combat-incurred (VI Bull. JAGA 54, March-April 1947), as was a disability arising out of a vehicular collision in a combat area under "buzz-bomb" attack (VI Bull. JAGA 4, January-February 1947).

In our opinion such views are supported by the legislative history of the combat disability provision. As approved by the House of Representatives the bill which became the 1932 law exempted from the dual compensation law officers on the Emergency Officers' Retired List created by the act of May 24, 1928, and any person retired for disability incurred in line of duty. The Senate Committee recommended that such exemption provision be stricken from the bill. S. Rept. No. 756, 72d Cong., 1st sess. 9.

However, Senator Fletcher offered an amendment on the floor of the Senate to limit the exemption to "any person retired for injuries received in battle" on the basis that "an officer who has been actually wounded in battle ought not to be deprived of his retired pay." Sena-

tor Reed then stated that such an officer "is not entitled to one particle more sympathy than a fellow officer or fellow soldier right beside him who gets pneumonia from living in the trenches" and suggested that the exemption be broadened to include "injuries received or disability suffered in line of duty," to which suggestion Senator Fletcher agreed, but no action was then taken on the proposed amendment. See 75 Cong. Rec. 12146–7. Later an amendment was suggested that would have exempted "any person retired for injuries received in battle or disability incurred in line of duty." 75 Cong. Rec. 12177.

Subsequently Senator Bingham suggested that the exemption apply to "emergency officers retired for disability incurred in combat with an enemy of the United States." Senator Reed expressed the opinion that an officer who was disabled by frozen feet, for example, in the trenches is as much deserving of sympathy as an officer wounded by an enemy bullet. 75 Cong. Rec. 12349. The Senate adopted Senator Bingham's amendment. The House conferees accepted the Senate amendment but suggested including "regular officers retired for combat disability" in the exemption. H. Rept. No. 1657, 72d Cong., 1st sess. 10. As enacted into law the bill included Senator Bingham's amendment with the further amendment suggested by the House conferees to exempt *regular* and emergency officers "retired for disability incurred in combat with an enemy of the United States," that is, with such limited exemptions and without broader exemption suggested in the Senate for "disability incurred in line of duty."

While it is doubtful that there was a major substantive change in the legislative intent in adopting the 1964 language requiring that the disability be "a direct result of armed conflict" in place of "disability incurred in combat with an enemy of the United States," the difference in the nature of military operations in the present Vietnam conflict and combat conditions existing in World War I (which formed the basis for the combat disability provision in the prior law) must be recognized. The new language was adopted while the Vietnam conflict was in progress and the Congress was well aware of the differences in the military operations and the hit and run tactics practiced there and conventional warfare.

In many of the "search and destroy" missions there necessarily are involved instances where the enemy is not encountered in a suspected location even though intelligence information indicated his probable presence there. In a situation where the enemy is actually located in the suspected area there should be no question that a disabling injury or disease suffered incident to such a mission should be regarded as having been "incurred as a direct result of armed conflict" even though it was incurred while "moving up" toward the enemy and the

member was evacuated shortly prior to the time actual contact with the enemy was effected.

Similarly the failure to make a contact with the enemy in such a "search and destroy" mission should not of itself be regarded as precluding a finding that a disability caused by an injury incurred while "moving up" was "a direct result of armed conflict."

This Office has held that an officer who sustained an injury in attempting to escape from the enemy while a prisoner of war incurred disability in combat with an enemy of the United States. A–84384, May 20, 1937. Hence, it is our opinion that the fact that an injury or disease is incurred during a period of detainment by hostile forces in itself does not preclude a finding that the disability was incurred as a direct result of armed conflict. Under the conditions stated in the question it is reasonable to view a disability incurred during a prisoner-of-war status as a direct result of armed conflict, and hence this Office is not required to object to such a finding.

The term "area of combat operations" is not defined or explained in the discussion in the letter of September 7, 1968. In a broad sense practically the whole of South Vietnam might be considered to be in an area of combat operations. In view of the legislative history of the law, however, we doubt that it would be proper to regard administrative, supply, and other support personnel disabled in rear station areas as having a combat-incurred disability unless the injury is actually incurred during an enemy attack in the immediate area and as a direct result thereof. However, in our opinion, personnel disabled in the immediate area of actual hostilities during a period of hostilities or while on a "search and destroy" mission properly may be regarded as meeting the condition that the disability was incurred as a direct result of armed conflict, if it is administratively so determined.

It is impossible to give a definite unqualified affirmative answer to the question presented, in the absence of clear definitions of the terms employed and a clear understanding of the limitations with respect to time and geographical areas which would be observed in making the determinations that the disability was incurred as a direct result of armed conflict. The nature of the question of combat connection makes it one primarily for administrative determination. While an administrative finding in that respect does not preclude an independent determination thereof by this Office, it has been the practice of this Office not to disregard the administrative finding unless a clear case can be made out that the administrative conclusion is unreasonable, or is not sufficiently supported by the record, or is rendered dubious by further evidence or circumstances not administratively considered, or unduly gives a person the benefit of a reasonable doubt.

34 Comp. Gen. 72, 74. It should be understood, of course, that the statute requires that there be an affirmative finding that there was a direct causal relationship between the disability and engagement in armed conflict. *Cf. Campbell* v. *United States*, 132 Ct. Cl. 122 (1955).

Your question is answered accordingly.

[B–165340]

Trailer Allowances—Civilian Personnel—Costs to Prepare Trailer for Shipment, Etc.

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

To Willis H. Staley, Department of the Interior, October 21, 1968:

This refers to your letter of September 23, 1968, reference 300, by which you forwarded for our advance decision the reclaim voucher of James D. Huffman, an employee of the Bureau of Reclamation, covering an expense of $324.71 incident to the transportation of a housetrailer upon a permanent change of station.

By travel authorization dated April 22, 1968, Mr. Huffman was authorized to travel from Phoenix, Arizona, to O'Neill, Nebraska. A housetrailer to be used as a residence was authorized to be transported at Government expense.

Nebraska law requires that all housetrailers over 55 feet in length be equipped with three (3) axles before a permit to travel over Nebraska highways can be issued. It cost Mr. Huffman $324.71 to have a third axle put onto his 12′ x 60′ housetrailer prior to the move.

The computation of allowances when a housetrailer is transported by a commercial carrier is contained in section 9.3a of Bureau of the Budget Circular No. A–56 which provides as follows:

a. When a house trailer is transported by a commercial carrier,

(1) The allowance shall include the carrier's charges for actual transportation of the trailer in an amount not exceeding the applicable tariff as approved by the Interstate Commerce Commission (or appropriate State regulatory body for intrastate movements) for transportation of a trailer of the size and type involved for the distance involved, computed as provided in section 9.2.

(2) The allowance also shall include ferry fares and bridge, road, and tunnel tolls, taxes, charges or fees fixed by a State or municipal authority for permits to transport house trailers in or through its jurisdiction, similar charges imposed by a Canadian Jurisdiction for a trailer being transported between Alaska and the continental United States, and carriers' service charges for obtaining necessary permits.

(3) Allowances shall not include costs of preparing trailers for movement, maintenance, repairs, storage, insurance for valuation of trailers above carriers'

maximum responsibility, nor charges designated in the tariffs as "Special Service."

The expenditure for which reimbursement is claimed represents the cost of a structural change made in the trailer which, aside from being required to allow transporting over Nebraska roads, constituted a capital improvement to the trailer. An examination of the nature of the expenses for allowances under sections 9.3a (1) and (2), above, reveals that none of the items include the cost of a major modification of a housetrailer such as here involved in order to comply with a State law. The cost of such modification more reasonably may be regarded as being excluded by section 9.3a(3) as a cost of preparing the trailer for movement. Therefore, we do not believe that the allowances for the transportation of housetrailers were intended to cover such costs. Moreover, because the cost was incurred for a structural modification of the trailer, no part thereof would be reimbursable as a miscellaneous expense under section 3 of Bureau of the Budget Circular No. A–56. In view thereof, we hold that the cost of modifying a housetrailer—irrespective of whether it is required to permit its transportation over the highways of a particular State—does not fall within the purview of the statutory regulations pertaining to allowances payable incident to a permanent change of station.

Accordingly, the voucher which is returned herewith may not be certified for payment.

[B–165342]

Officers and Employees—Transfers—Relocation Expenses—Transfer Within Corporate Limits of City

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

To the Secretary of Transportation, October 22, 1968:

This is in reply to your letter of September 26, 1968, in which you request advice as to the applicability of the requirements contained in section 1.3a of Bureau of the Budget Circular No. A–56, Revised October 12, 1966, to 45 employees of the Department of Transportation who were transferred from Houston International Airport to

Houston Intercontinental Airport 35 miles away, both within the corporate limits of Houston, Texas.

In this regard section 1.3a of Bureau of the Budget Circular No. A–56, Transmittal Memorandum No. 1, dated April 7, 1967, provides in pertinent part as follows:

> The travel and transportation expenses and applicable allowances may be authorized in connection with a transfer of an employee from one official station to another only when the transfer is between official stations, as the term is defined in section 1.5 of the Standardized Government Travel Regulations. Thus, these expenses and allowances may not be authorized when the old and new posts of duty are located within the corporate limits of the same city or town or are both within another area described in said section 1.5.
>
> When the old and new posts of duty are within different official stations but are only a short distance apart and within the same general local or metropolitan area, the travel and transportation expenses and applicable allowances in connection with the employee's relocation of his residence may be authorized only when the agency determines that the relocation was incident to the transfer of official station. Such determination should take into consideration such factors as commuting time and distance between the employee's residence at the time of notification of transfer and his old and new posts of duty as well as the commuting time and distance between a proposed new residence and the new post of duty. Ordinarily, a relocation of residence should not be considered as incident to a transfer of official station unless the one-way commuting distance from the old residence to the new post of duty is at least 10 miles greater than from the old residence to the old post of duty. Even then, circumstances surrounding a particular case, e.g., relative commuting time, may suggest that the move of residence was not incident to the change of official station.

Attached to your letter is a memorandum from your General Counsel setting forth the view that section 1.3a, above, is not fair and just in that the employees concerned who have been transferred from Houston International Airport to a new post of duty 35 miles distant at Houston Intercontinental Airport but all within the corporate limits of Houston are denied the statutorily authorized relocation allowances. He considers that they are, in effect, victims of the expansion of the city of Houston's corporate limits to include the new airport. He further expresses the view that the definition of "official station" as set forth in section 1.3a, above, and which was incorporated by reference from section 1.5 of Bureau of the Budget Circular No. A–7, Standardized Government Travel Regulations, has no logical relation to relocation allowances. In his opinion the general rule in section 1.3a, above, that the allowances are payable if the posts are at least 10 miles distant where they are within different official stations but the same metropolitan area should be applied to all cases.

Payment of the travel and transportation expenses of transferred Government employees are provided in 5 U.S.C. 5724 as follows:

> (a) Under such regulations as the President may prescribe and when the head of the agency concerned or his designee authorizes or approves, the agency shall pay from Government funds—
>
> (1) the travel expenses of an employee transferred in the interest of the Government from one official station or agency to another for permanent duty, and the transportation expenses of his immediate family, or a commutation thereof under section 5704 of this title; and

(2) the expenses of transporting, packing, crating, temporarily storing, draying, and unpacking his household goods and personal effects not in excess of 11,000 pounds net weight.

Provision for payment of the new relocation allowances are prescribed in 5 U.S.C. 5724a as follows:

(a) *Under such regulations as the President may prescribe and to the extent considered necessary and appropriate, as provided therein,* appropriations or other funds available to an agency for administrative expenses are available for the reimbursement of all or part of the following expenses of an employee for whom the Government pays expenses of travel and transportation under section 5724(a) of this title * * *. [Italic supplied.]

The authority of the President to prescribe the above regulations was delegated to the Director, Bureau of the Budget by Executive Order No. 11230, June 28, 1965, as amended by Executive Order No. 11290, July 21, 1966.

The benefits granted under the controlling statutory provisions are conditioned upon the promulgation of appropriate regulations and are payable only to the extent authorized and in accordance with the terms of such regulations. Pursuant to the foregoing authority, Bureau of the Budget Circular No. A-56, and Transmittal Memorandum No. 1, dated April 7, 1967, amending section 1.3 were issued. Under section 1.3 travel and transportation expenses and applicable allowances may be authorized only when the transfer is between "official stations" as the term is defined in section 1.5 of Standardized Government Travel Regulations which provides as follows:

Official station—post of duty.—Designated post of duty and official station mean one and the same, the limits of which will be the corporate limits of the city or town in which the officer or employee is stationed, but if not stationed in an incorporated city or town, the official station is the reservation, station, or established area, or, in the case of large reservations, the established subdivision thereof having definite boundaries within which the designated post of duty is located.

The application of the foregoing regulation to the transportation of household effects is not a recent innovation as has been urged. It has been the established rule for years that the movement of household effects from one place to another within the same city, including movement from storage to place of residence, does not constitute the shipment of household effects such as contemplated by law and regulations but is a personal expense not payable from appropriated funds. See 9 Comp. Gen. 377; 13 *id.* 210; 26 *id.* 952; 27 *id.* 363.

The decision in 36 Comp. Gen 111 holding that a regulation requiring an employee to make an election between alternative statutory benefits before he reasonably could ascertain which alternative benefit would be to his advantage was tantamount to a denial of the election specifically conferred by statute is not pertinent to the instant case which does not involve an election or the denial of any other right unconditionally granted by Congress. Moreover, in the cited case

the agency stated that its intent had not been to deprive the employee of the election and that the later regulation conferring the election reflected its true intent.

In view of the broad grant of regulatory authority under the statutory provisions in question and the specific wording of the controlling regulations, there is no basis upon which this Office may authorize the payment of the relocation allowances to the employees in question.

[B-164984]

Bids—Estimates of Government—Failure to Furnish on all Items

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

Contracts—Awards—Protest Pending

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

To Joel R. Feidelman, October 24, 1968:

Reference is made to your letter of August 28, 1968, and previous correspondence, protesting, on behalf of the Advance Building Maintenance Company, certain administrative actions with respect to invitation for bids N62477-68-C-0664 for multibuilding janitorial services at the Naval Station, Washington, D.C.

The invitation schedule listed 323 items of work. With respect to 311 items, bidders were advised of the estimated number of times the services would be required to be performed during the 1-year term of the contract. Also, as to these 311 items bidders were to insert their unit prices and total extended prices. No estimated quantities or unit identifications were stated as to the other 12 items, but blank spaces were provided for unit prices and totals. In the column where the estimated quantity was shown for the other 311 items, these 12 items stated either "As Required" or "As Directed." The front sheet of the invitation

solicited prices for "Bid Item No. 1," "Bid Item No. 2" and "Bid Item No. 3." General paragraph 5.1 of the invitation provided that bids should be broken down on a per item basis as shown on the invitation schedule sheets and that award would be made on the total bid price. General paragraph 5.1.1 stated:

> Total bids shall be as follows:
> Bid Item 1—Cost of entire job.
> Bid Item 2—Cost of entire job less cost of civilian cafeterias in Buildings 21, 73, and 169; and Snack Bars in Buildings 200–G and 76, Washington Navy Yard.
> Bid Item 3—Cost of entire job less bid item 2 less Navy Exchange cafeteria in Building 184, WNY; T–50, Anacostia Annex; and Snack Bar in Building T–50.

You protested against an award to the low bidder, U.S. Building Maintenance Co., on the basis that its bid was nonresponsive because it failed to furnish a bid bond and to acknowledge two amendments of the invitation. The contracting office rejected the bid in view of the deficiencies cited by you.

Orbiting Enterprises, Inc., was the next low bidder. Orbiting Enterprises bid on bid items Nos. 1, 2 and 3. Orbiting also bid units and extended prices on the 311 items in the schedule which listed estimated quantities. Of the other 12 items which merely provided "As Directed" or "As Required," Orbiting bid "N.C." for 6 items and unit prices for the other 6 items. The contracting agency considered the bid as responsive and awarded the contract to Orbiting.

You contend that the total bid submitted by Orbiting did not include the prices for the several items upon which it bid unit prices without extended prices and that it was therefore ambiguous and should have been rejected as nonresponsive in view of our decisions 43 Comp. Gen. 817 and B–156145, March 8, 1965.

General section 5 of the invitation provided that bid items Nos. 1, 2 and 3 were to be total bids for the work covered by those bid items. Accordingly, the total bid prices for those bid items could be construed as including all of the 323 work items. On the other hand, since the total bid prices may represent only the sum of the extended items, the total bids might also be construed as including only those items. In that connection, the contracting agency has advised that as to the 6 items which Orbiting bid unit prices only, your client estimated in its bid that the cost of these items would be about $1,940. The contracting agency states that is a reasonable figure and that by no conceivable stretch of the imagination could the amount expended for these services come anywhere near the $60,867.68 difference between the Orbiting bid and the next low bid of your client. Therefore, even if the Orbiting total bid prices were construed as not including the six items involved, it does not appear that its total price would anywhere approach the total bid of your client if an additional amount were added for the items upon which Orbiting bid only a unit price.

The decisions you cited involved situations where the bid susceptible of two different interpretations was low on one basis and not low on the other interpretation. That is not the situation here, since, even if the six items are treated as extra work, the amount of work that might be required would not change the relative standing of the bidders.

The absence of an estimate for these 12 items probably was responsible for the unit basis upon which Orbiting furnished prices on 6 of those items. We believe that it would have been preferable had the invitation included estimates for the 12 items to provide more realistic bidding. We are therefore recommending to the Department of the Navy that, in future invitations of this nature, estimates of quantities for all the items be set forth for the guidance of bidders.

You contend also that the bid of Orbiting is ambiguous and nonresponsive because, although the work schedule in the invitation lists services to be performed in buildings 94 and 150, the schedule did not provide for a price for the work required in those buildings. However, general paragraph 1.2 provides that the work includes services in those buildings; general paragraph 3.5 provides that the bid shall be based on the work schedules which are a part of the contract; the work schedules require certain services to be performed in those buildings and specify the frequency; and general paragraph 5.1.1 provides that bid item 1, the basis upon which the contract was awarded, includes the cost of the entire job. Therefore, even though separate prices may not have been invited for work in those buildings, Orbiting's bid price included these additional requirements.

You contend that Orbiting is not a responsible bidder for a procurement of the size involved and you state that it does not have the financial or administrative capacity to undertake such a commitment. However, the contracting agency has advised that it had determined that Orbiting regularly performs the services required by the contract and that it has satisfactorily performed similar services at Fort Meade and it indicated that it is satisfied that Orbiting is a responsible contractor. The determination of responsibility does not appear arbitrary and we are therefore required to accept the determination that the bidder is capable of performing the contract. 38 Comp. Gen. 131.

You have also protested that the contracting agency violated Armed Services Procurement Regulation 2-407.9(b)(3) in making an award while the protest was pending in our Office and without providing notice to Advance that such action would be taken. Although ASPR 2-407.9(b)(3) provides, as a general proposition, that, where a protest is made before award, an award shall not be made until the matter is resolved, it also provides that an award may be made while a protest is pending under certain circumstances. In this case, the con-

tracting agency has reported it relied upon ASPR 2–407.9(b)(3)(iii), providing for an award when it is determined that a prompt award will otherwise be advantageous to the Government, in making an award to Orbiting as the lowest conforming bidder. The contracting agency further found that to have postponed the award would have altered the performance dates of the contract with a consequent effect on the bid price. However, under the ASPR the contracting officer was required to give written notice of the award determination to Advance and there was an administrative failure in this respect. We are bringing this aspect of the matter to the attention of the Department of the Navy with a recommendation that appropriate steps be taken to assure future compliance with the ASPR. However, we have held that the failure to comply with ASPR 2–407.9(b)(3) does not render invalid an otherwise proper award. See B–150014, November 20, 1962.

Accordingly, in view of the foregoing, the award to Orbiting Enterprises does not appear to have been improper. The protest is therefore denied.

[B–165110]

Compensation—International Dateline Crossings

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

To R. J. Schullery, Department of Transportation, October 24, 1968:

We make reference to your letter dated August 21, 1968, requesting our decision as to the compensation due an employee of the Federal Aviation Administration incident to his transfer (permanent change of station) from Honolulu, Hawaii, to Tokyo, Japan, in view of the fact that he "lost" a workday because the travel incident to the transfer involved crossing the international dateline.

The particulars concerning the transfer are as follows: Mr. Joseph R. Price whose workweek is Monday through Friday, 8 a.m. to 4:30 p.m., departed Honolulu at noon on Thursday, August 27, 1964, and after approximately 8 hours elapsed time he arrived in Tokyo at 3:25 p.m. on Friday, August 28, 1964 (7:55 p.m., August 27, Honolulu time). You indicate that under such circumstances Mr. Price was paid

for 8 hours on Thursday, August 27 (including travel time), but was not paid for Friday, August 28, which was the day "lost" during travel. He has now made a claim for payment of compensation for that day.

You refer to the case 33 Comp. Gen. 51 (1953) in which we held that the effective date of separation of an employee permanently assigned to Washington, D.C., who was killed in an aircraft accident while on temporary duty in Japan was the calendar date at the place where death occurred rather than the date at the location of his permanent duty station. Accordingly, the employee in that case was credited with compensation for the day lost crossing the international dateline en route to Japan. In view of that decision you question whether your agency may properly deny employees pay for days lost crossing the international dateline.

The facts presented show that Mr. Price was in a work status for travel on Thursday, August 27 in Honolulu and that he was in a work status for completion of his travel on Friday, August 28 in Tokyo. The lengthening or shortening of workdays due to travel between places located in different time zones is not taken into account for the purpose of determining an employee's entitlement to the basic pay. Further, in establishing an employee's entitlement to pay the time of the place at which he is located is controlling under the provisions of section 2 of the act of March 19, 1918, ch. 24, 40 Stat. 451, as amended, 15 U.S.C. 262. Although that section is applicable to the United States a similar rule has been applied outside the United States in the cited case 33 Comp. Gen. 51. In view of the above we believe that employees crossing the international dateline in a westward direction should not have their pay reduced because of the change in the date or time. Therefore, Mr. Price should be allowed the day's pay which was withheld incident to his travel from Honolulu to Tokyo.

Regarding the matter of eastward travel across the international dateline, we are not in a position to determine at this time the amount of pay which should be allowed in all cases involving such travel. However, in accordance with what we understand to be a long standing practice in many Government departments and agencies, the pay of an employee performing such travel should not be increased merely because of the extra day or part of a day which results from travel across the international dateline in an eastward direction. In other words, the crossing in one direction is usually canceled out by the crossing in the opposite direction. Any specific factual situations which may be involved in a voucher before you may be presented for our consideration.

[B-152310]

Pay—Retired—Disability—Disability Determination Subsequent to Release—Statutes of Limitation

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

Claims—Abatement Pending Court Decision

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

To Captain A. E. Velez, Department of the Army, October 29, 1968:

Reference is made to your undated letter (file reference FINCS-E Lerner, David G. 0 322 054, retired), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $16,772.27 in favor of Captain David G. Lerner, retired, representing disability retirement pay for the period December 23, 1943, to July 31, 1953, under the circumstances disclosed. You say that the amount of the voucher excludes retired pay during a period of active duty from January 13, 1944, to January 11, 1946, and Veterans Administration compensation received by the retired officer during the period involved. Your request was forwarded here on August 2, 1968, by the Office of the Comptroller of the Army and has been assigned DO-A number 1015 by the Department of Defense Military Pay and Allowance Committee.

As a general rule where a suit or controversy pending before a court involves a matter before us for payment, no action is taken by our Office until the matter has been judicially determined. In this connection, there is now pending in the United States District Court for the District of Columbia a complaint filed in March 1967 in the case of *David G. Lerner* v. *Stanley R. Resor*, Secretary of the Army, and *Elmer B. Staats*, Comptroller General of the United States, Civil Action No. 511-67, asking the court to issue certain orders there speci-

fied for permanent injunctive relief pertaining to the correction of Lerner's military record and his retired pay status.

In the pending case, however, the plaintiff seeks injunctive relief rather than a money judgment, and since your request for decision on the legality of payment of disability retired pay is based on action taken by the Under Secretary of the Army on December 4, 1967, which action is subsequent to the date the court action was filed—the merits of Lerner's claim will be considered.

Captain Lerner's claim for disability retired pay commencing December 23, 1943, was the subject of Court of Claims decision in the case of *Lerner* v. *United States*, 168 Ct. Cl. 247, decided December 11, 1964. Since the facts reported in that decision are identical with those related in your submission, only those pertinent facts giving rise to the question presented will be stated here.

The court in its decision of December 11, 1964, noted that on December 31, 1943, the Secretary of War approved the finding of an Army Retiring Board that Captain Lerner was permanently incapacitated as a result of a service-connected disability for which he was relieved from active duty on December 22, 1943, and placed on inactive status. Since the findings approved by the Secretary, however, included a recommendation that Lerner, a medical officer, be retained on active duty in a limited service capacity, he was ordered to active duty effective January 13, 1944, and continued in that capacity until January 11, 1946, when he was again relieved from active duty because of physical disability.

Pursuant to the judgment entered by the Court of Claims in Captain Lerner's case, the plaintiff was paid disability retired pay in the amount of $18,717.84 for the period July 1, 1957, to December 11, 1964, payment being restricted to the 6-year limitation period prescribed in 28 U.S.C. 2501. Subsequently, plaintiff's claim for retired pay, received in this Office on August 1, 1963, was allowed for the period August 1, 1953, to June 30, 1957. The 10-year limitation period fixed by the act of October 9, 1940, ch. 788, 54 Stat. 1061, 31 U.S.C. 71a, barred consideration of that part of the claim covering the period December 23, 1943, to July 31, 1953.

You say that in view of the action taken by the Court of Claims and the Comptroller General, the officer was placed on the Army of the United States Retired List on July 15, 1965, in the grade of captain as of December 23, 1943, with entitlement to disability retired pay from December 12, 1964, under the provisions of the act of April 3, 1939, ch. 35, 53 Stat. 557, as amended, 10 U.S.C. 456 (1940 ed.). Disability retirement pay has been paid to Lerner for the period December 12, 1964, through May 31, 1968, in the total amount of $10,064.55.

You express the view that since Captain Lerner was first denied the correction of his records but was paid a money judgment which could not, and did not, bestow on him the status of retirement or entitlement to disability retirement pay, and since he was not actually certified for retirement until after judgment by the court, it appears that establishment and payment of retired pay from date of judgment based solely on such judgment may be erroneous and may have resulted in an overpayment of retired pay for the period on and after December 12, 1964. If the action of the Correction Board on December 4, 1967, is determined to be legal and proper, you say that there is due the officer the sum of $16,772.27 for the period December 23, 1943, to July 31, 1953, as shown on the voucher.

Concerning your views of a possible overpayment of disability retired pay from the date of judgment, we invite your attention to the fact, as stated above, that both the Court of Claims and this Office have recognized that Captain Lerner's uncorrected record permits payment of disability retired pay under the law. See B–152310, April 16, 1965. The Court of Claims has recognized on a number of occasions that where it is established that a determination was administratively made while the member was entitled to receive basic pay that he was unfit to perform the duties of his office by reason of physical disability, further administrative action is unnecessary to authorize payment of retired pay. See, for example, *Barnes* v. *United States*, 163 Ct. Cl. 321 (1963), and *Remaley* v. *United States*, 134 Ct. Cl. 874 (1956). The effect of the latter decision was fully considered by us in 45 Comp. Gen. 389. Consequently, there is no legal basis to conclude that Lerner was not entitled to disability retirement pay subsequent to the date of the judgment (December 11, 1964).

You state that on April 5, 1965, after the judgment by the Court of Claims, Captain Lerner's attorney requested the Army Board for Correction of Military Records to reconsider the officer's application (which was previously denied on June 14, 1962) to change his records to show entitlement to disability retirement pay for all periods after December 22, 1943, except while serving on active duty. Subsequent to the filing of that request and while the above-mentioned complaint in the United States District Court for the District of Columbia was pending, the Under Secretary of the Army in a memorandum dated December 4, 1967, to The Adjutant General directed that:

> Having approved the additional findings, conclusions and the substituted recommendation of the Army Board for Correction of Military Records in the case of DAVID LERNER, the action of the Under Secretary of the Army on 14 June 1962 is withdrawn, and under the provisions of 10 U.S.C. 1552, it is directed:

That all of the Department of the Army records of DAVID LERNER be corrected to show:

a. that he was certified as eligible for disability retirement pay benefits in the grade of captain, effective 23 December 1943, under the provisions of the Act of 3 April 1939 (Public Law 18, 76th Congress);

b. that he was recalled to active duty in the grade of captain, effective 13 January 1944; and

c. that he was relieved from active duty in the grade of captain, effective 11 January 1946, at which time he regained eligibility to receive disability retirement pay.

While the action taken by the Under Secretary of the Army is in the form of a correction of Lerner's military record, it did not change any basic fact concerning his military disability retired status or give him any new right to retired pay. The certification as to his eligibility for disability retirement pay effective December 23, 1943, did not have any legal effect on his right, already judicially established by the court's decision of December 11, 1964, to disability retirement pay effective December 23, 1943. See 39 Comp. Gen. 178. Speaking of the Secretary's approval of the finding of Lerner's physical incapacity, the court said that (168 Ct. Cl. 247 at page 254) "Since the Secretary gave his approval to the finding of permanent incapacity, recovery is not prevented by the fact that plaintiff was never certified to the Veterans Administration as being eligible for disability retirement pay."

In the case of *Haislip* v. *United States*, 152 Ct. Cl. 339, decided January 18, 1961, it was stated "* * * defendant [Government] filed a cross-motion on the ground that the claim was barred by the statute of limitations [28 U.S.C. 2501]." The majority of the court held:

We are unable to see how the "decision" of the Correction Board gave plaintiff any right he had not had all along. No fact appearing in plaintiff's record was changed. The facts remained as they had been. On the basis of those facts, plaintiff was entitled to bring suit immediately after he was returned to the retired list and the denial by the Navy of the claim he now makes. That was in 1946, which was 13 years before his petition was filed in this case. In that 13 years the facts and the law governing his rights have not changed. All that the "decision" of the [Correction] Board amounted to was a decision that on the basis of those facts plaintiff was entitled to the rights he now claims. The Board's decision was merely a legal conclusion based on the law and the facts of record, no one of which was changed by the Board.

The rule in the *Haislip* case is applicable here. Under that rule Lerner acquired no right to disability retirement pay as a result of the Correction Board's action approved December 4, 1967. The facts concerning his disability retired status remain as they had been, that is, his disability retired status and the law governing the entitlement to disability retirement pay were the same after the action of December 4, 1967, as they had been ever since December 1943. On the basis of the facts found by the court in the decision of December 11, 1964, he

could have brought suit at any time after December 22, 1943, the date of his initial release from active duty, and by failing to do so until he filed his petition in the Court of Claims on July 31, 1963, he was subject to the period of limitation prescribed in 28 U.S.C. 2501 on his Court of Claims action and to the 10-year period stated in 37 U.S.C. 71a on his claim received in this Office on August 1, 1963.

As matter of interest, we invite your attention to a recent decision of the Court of Claims wherein the court recognized that Correction Board action which is favorable to an individual but which is based on unsupported findings or grounded in an erroneous interpretation of the statute is not binding for the purpose of supporting a claim for a money judgment. See the case of *Bridgman* v. *United States*, Ct. Cl. No. 378–66 decided July 17, 1968, and the authorities cited therein.

Accordingly, on the basis of the record before us, the approved Correction Board action of December 4, 1967, furnishes no legal basis for the payment to Captain Lerner of disability retired pay for any part of the period barred by the provisions of 31 U.S.C. 71a. The voucher and supporting papers will be retained here.

[B–164842]

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

Retired members of the Navy who if they had been involuntarily retired on July 1, 1968 would have been subject to the Uniform Retirement Date Act, 5 U.S.C. 8301, but who were retired voluntarily effective that date under the statutory provisions cited in the decision are entitled, except for the members retired under 10 U.S.C. 1293, to have their retired pay computed at the higher rates of active duty basic pay prescribed in Executive Order No. 11414, dated June 11, 1968, promulgated in accordance with section 8 of Public Law 90–207, and effective July 1, 1968.

To Commander D. G. Sundberg, Department of the Navy, October 29, 1968:

Further reference is made to your letter of August 22, 1968, with enclosures (reference XO:HA:mlo 7220), requesting an advance decision whether the retired members of the Navy listed on enclosure (1), received with your letter, are entitled to retired pay computed on the higher rates of active duty basic pay prescribed in Executive Order No. 11414 dated June 11, 1968, promulgated in accordance with the provisions of section 8 of Public Law 90–207, 37 U.S.C. 203 note, in the circumstances related therein. The request has been assigned Submission Number DO–N–1017 by the Department of Defense Military Pay and Allowance Committee and was forwarded to this Office by

second endorsement dated September 6, 1968, of the Comptroller of the Navy.

You state that the cases of the members listed on enclosure (1) are representative of approximately 435 other members who were subject to involuntary retirement on July 1, 1968, but who retired voluntarily effective that date. You say that such members would be entitled to retired pay based on the July 1, 1968, basic pay rates under the voluntary retirement laws but not under the involuntary laws. In view of the holdings in 35 Comp. Gen. 633 and 48 Comp. Gen. 30, which you cite, you express doubt concerning the rates of active duty basic pay to be used in computing their retired pay. In this connection, you say that pending receipt of our decision, the retired pay of the members listed on enclosure (1) and members whose cases are similar, has been based on the basic pay rates established by Public Law 89-501, approved July 13, 1966, 80 Stat. 275, effective July 1, 1966, increased by 3.7 percent and 3.9 percent.

The Uniform Retirement Date Act of April 23, 1930, now codified in 5 U.S.C. 8301 (formerly 5 U.S.C. 47a) provides as follows:

(a) Except as otherwise specifically provided by this title or other statute, retirement authorized by statute is effective on the first day of the month following the month in which retirement would otherwise be effective.

(b) Notwithstanding subsection (a) of this section, the rate of active or retired pay or allowance is computed as of the date retirement would have occurred but for subsection (a) of this section.

In decision of May 7, 1956, 35 Comp. Gen. 633, there was considered, among other things, the application of the Uniform Retirement Date Act as it pertained to the mandatory retirement provisions of section 312(c) of the Officer Personnel Act of 1947, 34 U.S.C. 410j(c)—now 10 U.S.C. 6379—in conjunction with the voluntary retirement provisions of 34 U.S.C. 410(b)—now 10 U.S.C. 6323.

In concluding that the Uniform Retirement Date Act was applicable to the mandatory retirement provisions of 34 US.C. 410j(c), the decision merely followed the long-established rule that where a member is retired for reasons other than disability and such retirement would otherwise be issued immediately upon becoming eligible therefor, the retirement is governed by the provisions of and subject to the restrictive provisions of the Uniform Retirement Date Act. 9 Comp. Gen. 512, 10 Comp. Gen. 28. That decision, however, in the light of the language in 34 U.S.C. 410j(c), also concluded that an officer who is scheduled for involuntary retirement may, if he is otherwise qualified, be voluntarily retired provided his application for voluntary retirement is approved prior to the date his name would otherwise be placed on the retired list.

In decision of July 23, 1968, 48 Comp. Gen. 30, there was involved a Marine Corps officer who by orders dated May 3, 1968, was scheduled for involuntary retirement on June 30, 1968, stated to be "effective 1 July 1968," under the provisions of Public Law 86–155, approved August 11, 1959, 73 Stat. 333–338, 10 U.S.C. 5701 note (commonly known as the Navy and Marine Corps "Hump Act" of 1959). Thereafter, pursuant to the officer's request that he be voluntarily retired effective July 1, 1968, under 10 U.S.C. 6323 (retirement of Navy and Marine Corps officers after completing more than 20 years of active service), orders were issued dated June 10, 1968, placing the officer on the retired list effective July 1, 1968, pursuant to 10 U.S.C. 6323 and Public Law 86–155.

In arriving at the conclusion reached in the decision of July 23, 1968, we considered that part of the language in section 1(i) of Public Law 86–155, stating "shall, notwithstanding any other provision of law," and we said that it would seem that such language would preclude an officer—whom a continuation board convened under authority of Public Law 86–155, did not recommend for continuation on the active list—from retiring under "any other provision of law," unless other language contained therein evidences a contrary intent. In concluding that the officer's retired pay effective from July 1, 1968, is required to be based on the rates of active duty basic pay which were in effect on June 30, 1968, we said:

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

It will be seen that the conclusion reached in the above decision was based primarily on the express language in section 1(i) of Public Law 86–155.

The 17 members whose retirement status is for consideration are listed below together with a citation to the involuntary retirement law which each member was scheduled to be retired under and the voluntary retirement law under which he was actually retired.

NAME OF RETIRED REGULAR MEMBER	FILE NO.	VOLUNTARY RETIREMENT LAW 10 U.S.C.	INVOLUNTARY RETIREMENT LAW 10 U.S.C.
1. CHMACH Robert J. Noonan	611 920	1293	564(a)
2. RAIM Robert B. Fulton, II	716 06	6322	6372
3. CAPT James H. Armstrong	777 21	6322	6376
4. CAPT John Vinn, Jr.	799 25	6322	6377
5. CDR Titus Branchi	146 842	6322	6379
6. CHSURORDTECH Norwood I. Fewell	244 237	6323	1305(a)(c)
7. CAPT Irving J. Superfine	810 37	6323	6376
8. CAPT Edward C. Magennis	138 865	6323	6390
9. CAPT Jack A. Obermeyer	787 88	6323	6377
10. CDR Buford D. Abernathy	123 600	6323	6379
11. CDR Everett R. Peugh	452 383	6323	6383(a)
12. LCDR Ellison Capers	538 449	6323	6380
13. LCDR Mary C. Bellas	417 469W	6323	6400
14. LCDR Robert D. Morris	542 318	6323	6383(b)
15. LCDR Marjorie E. Feldworth	225 650	6323	6396(a)
16. CHELCTECH Kenneth C. Dedering	597 088	6323	1305(a)
17. CHELCTECH Joseph R. Arnott	616 263	6323	564(a)

Each retired member will be considered in the order presented except that, for the reasons stated below, CHELCTECH Joseph R. Arnott, USN, retired, and CHMACH Robert J. Noonan, USN, retired, will be considered together.

Section 564(a) of Title 10, U.S. Code, provides, in part that:

> Unless retired or separated under some other provision of law, a permanent regular warrant officer who has twice failed of selection for promotion to the next higher permanent regular warrant officer grade shall—
> (1) if he has more than 20 years of active service * * * be retired 60 days after that date [there specified], except as provided by section 8301 of title 5, with retired pay computed under section 1401 of this title [title 10].

Under 10 U.S.C. 1293 the Secretary concerned may, upon a warrant officer's request, retire the member if he has completed at least 20 years of active service.

Formula 4 of 10 U.S.C. 1401 provides that the retired pay of a person retired under section 1293 shall be computed on the basis of the "Monthly basic pay to which the member would have been entitled if

he had served on active duty in his retired grade on day before retirement * * *." Section 1401 further provides, however, that "if a person would otherwise be entitled to retired pay computed under more than one pay formula of this table or of any other provision of law, he is entitled to be paid under the formula that is most favorable to him." Section 1315 of Title 10 requires that retired pay—under chapter 65, of which section 1293 is a part—be computed under chapter 71, which includes section 1401.

In the Noonan case, the first case for consideration, the record indicates that on June 30, 1968, he had 28 years, 4 months and 4 days of active service. He was scheduled for involuntary retirement effective July 1, 1968, under 10 U.S.C. 564(a) but prior to that date and at his request his voluntary retirement was approved effective July 1, 1968, under 10 U.S.C. 1293, 1315 and 1371.

Since under Formula 4 of 10 U.S.C. 1401, the formula applicable in the case of retirement under 10 U.S.C. 1293, the officer's retired pay was required to be computed on the basis of the "Monthly basic pay * * * on day before retirement * * *," and since we are not aware of any other formula or other provisions of law under which he would be entitled to compute his retired pay that would be more favorable to him, it is our view that he is not entitled to have his retired pay computed on the rates of active duty pay in effect on July 1, 1968. He is entitled, however, to have his retired pay computed under either subsection (d) or (e) of 10 U.S.C. 1401a, as added by section 2(a)(1) of the act of December 16, 1967, Public Law 90–207, 81 Stat. 649, 652, whichever gives him the greater amount of retired pay.

In the Arnott case, the record indicates that on June 30, 1968, the officer had 27 years, 8 months and 28 days of active service and 8 years, 5 months and 16 days' active commissioned service. He was scheduled for involuntary retirement effective July 1, 1968, under 10 U.S.C. 564(a) but prior to that date and at his request his voluntary retirement was approved effective July 1, 1968, under 10 U.S.C. 6323. However, since retirement under section 6323 requires that the officer have at least 10 years' active service as a commissioned officer, and since Arnott had less than 10 years of such service, we informally called this matter to the attention of the Bureau of Naval Personnel.

We are now in receipt of a copy of orders dated October 3, 1968, correcting the orders of June 21, 1968, to show, in substance, that the officer was retired July 1, 1968, under 10 U.S.C. 1293, 1315 and 1371. Since the retirement laws applicable in Arnott's case are the same as those in the Noonan case, his retired pay should be computed on the same basis.

350–220 O—69——6

Under 10 U.S.C. 6322 an officer of the Navy or Marine Corps holding a permanent appointment in the grade of warrant officer, W-1, or above, who applies for retirement after completing 30 or more years of active service may, in the discretion of the Secretary of the Navy, be retired with retired pay at the rate of 75 percent of the highest basic pay of the grade in which retired. There is no other specific provision governing the computation of the officer's retired pay and that section does not state whether the retired pay is to be based on the basic pay applicable on the last day of active duty before retirement or on the effective date of retirement.

In applying the 1930 act to retirement under 10 U.S.C. 6322, it was recognized in 44 Comp. Gen. 373, 383, that if a member completed 30 years of service on August 15, 1964, and applied for retirement on that date, the effective date of retirement would have been fixed as September 1, 1964, under the 1930 act even though he requested retirement effective September 1, 1964, and hence, the retired pay would be for computation on the basis of the rates prescribed in the 1963 pay act, 77 Stat. 210. However, if he completed the required service prior to August 1964 and requested retirement effective September 1, 1964, the date of retirement would have been fixed at the election of the retired officer and, therefore, the computation of his retired pay would not be governed by the 1930 act but would be computed at the rates prescribed in the 1964 pay act effective September 1, 1964.

The following four officers were voluntarily retired under 10 U.S.C. 6322:

Rear Admiral Robert B. Fulton, II, USN, retired, had 36 years and 29 days' total active and commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6372 effective July 1, 1968, but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6322 effective July 1, 1968. Under 10 U.S.C. 6372(a), a rear admiral restricted in the performance of duty shall be retired on June 30 of the fiscal year in which he first completes (1) at least 7 years of service in the grade of rear admiral and (2) has at least 35 years of total commissioned service as there indicated. Since the officer had completed more than 30 years' service for purposes of 10 U.S.C. 6322 prior to June 1968 and absent any restriction in the involuntary law (10 U.S.C. 6372(a)), it is our view that he became entitled to retired pay on July 1, 1968, not by virtue of 5 U.S.C. 8301 and hence he is entitled to retired pay computed on the basis of the rates of active duty pay in effect on July 1, 1968.

Captain James H. Armstrong, USN, retired, had 31 years, 8 months and 12 days' active service and training duty and 28 years, 11 months and 12 days' total active commissioned service on June 30, 1968. It is

understood that with certain constructive service creditable to him (see 33 Comp. Gen. 237) he had over 30 years' total commissioned service. He was scheduled for involuntary retirement effective July 1, 1968, under 10 U.S.C. 6376 but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6322 effective July 1, 1968. 10 U.S.C. 6376(a) provides, in substance, that a Navy line captain not restricted in the performance of duty shall be retired on June 30 of the fiscal year in which he completes 30 years of total commissioned service if he is not on a promotion list and twice failed for promotion to rear admiral. Since the officer completed more than 30 years of active service prior to June 1968 and, absent any restriction in the involuntary retirement law (10 U.S.C. 6376), he is not subject to 5 U.S.C. 8301 and his retired pay may be computed on the rates of active duty pay in effect on July 1, 1968.

Captain John Vinn, Jr., SC, USN, retired, had 30 years, 9 months and 9 days' total active and commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6377 effective July 1, 1968, but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6322 effective July 1, 1968. 10 U.S.C. 6377(a) provides, in substance, that a Regular Navy line captain restricted in the performance of duty who is not on a promotion list and who is not continued on the active list shall be retired on June 30 of the fiscal year in which he completes 31 years of total commissioned service. It is further provided in section 6377(b) that a Regular Navy staff corps captain shall be retired on June 30 of the fiscal year in which he completes (1) 30 years of total commissioned service and is considered as having twice failed of selection for promotion to rear admiral, or (2) 31 years of total commissioned service. Since the officer completed more than 30 years' active service prior to June 1968 and, absent any restriction in the involuntary retirement law, he is not subject to 5 U.S.C. 8301 and his retired pay may be computed on the rates of active duty pay in effect on July 1, 1968.

Commander Titus Branchi, USN, retired, had 36 years, 4 months and 29 days' active service and 25 years, 10 months and 16 days' total active commissioned service. As in the case of Captain Armstrong, it is understood that Commander Branchi was credited with sufficient constructive service to accumulate more than 26 years of total commissioned service. He was scheduled for involuntary retirement under 10 U.S.C. 6379 effective July 1, 1968, but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6322 effective July 1, 1968. 10 U.S.C. 6379 provides, in substance, that a Regular Navy commander shall be retired on June 30 of the fiscal

year in which (1) he is not on a promotion list; (2) he is considered as having twice failed of selection for promotion to captain; and (3) he has completed at least 26 years of total commissioned service. Since the officer completed more than 30 years' active service prior to June 1968 and since the involuntary retirement law does not otherwise preclude his retirement under another provision of law, he is not subject to 5 U.S.C. 8301 and his retired pay may be computed on the active duty rates in effect on July 1, 1968.

Under 10 U.S.C. 6323 an officer of the Navy or Marine Corps who applies for retirement after completing more than 20 years of active service, of which at least 10 years was service as a commissioned officer, may, in the discretion of the President, be retired "on the first day of any month designated by the President." In the light of that quoted provision, and applying the 1930 act to that section, we held in 44 Comp. Gen. 584, in answer to questions 1 and 2, that all officers retired under the provisions of 10 U.S.C. 6323(a) effective April 1, 1963, were entitled to compute their retired pay on the basis of the rates prescribed in the 1963 pay act and all officers retired under that section effective September 1, 1964, were entitled to compute their retired pay on the basis of the rates prescribed in the 1964 pay act regardless of the date they completed the minimum eligibility requirements for retirement.

The remaining 11 members listed above were voluntarily retired under 10 U.S.C. 6323. Details as to the facts and statutory provisions applicable in their cases are set forth below.

CHSURORDTECH Norwood I. Fewell, USN, retired, had 31 years and 14 days' active service and 23 years, 5 months' active commissioned service. He was scheduled for involuntary retirement under 10 U.S.C. 1305(a), (c) effective July 1, 1968, but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 1305(a) provides, in substance, that a permanent Regular warrant officer who has at least 30 years' active service shall be retired 60 days after he completes that service, except as provided in 5 U.S.C. 8301. Section 1305(c) provides that the Secretary concerned, may, upon recommendation of a board of officers and with the consent of the warrant officer, defer such retirement but not later than 60 days after he becomes 62 years of age.

Captain Irving J. Superfine, USN, retired, had 30 years and 29 days' total active and commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6376 effective July 1, 1968, but at his request and prior to that date his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. The involuntary retirement law (10 U.S.C. 6376) is the same as that in the Armstrong case noted above.

Captain Edward G. Magennis, USN, retired, had 26 years, 1 month and 14 days' active and commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6390 effective July 1, 1968, but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 6390(a) provides, in substance, that each officer on the active list of the Navy or Marine Corps serving in a grade below fleet admiral shall be retired by the President when he becomes 62 years of age unless the President defers his retirement. Section 6390(b) prescribes the formula for computing his retired pay.

Captain Jack A. Obermeyer, USN, retired, had 31 years and 28 days' total active and commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6377 effective July 1, 1968, but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. The involuntary retirement law (10 U.S.C. 6377) is the same as that in the Vinn case noted above.

Commander Buford D. Abernathy, USN, retired, had 26 years, 6 months and 12 days' total active and commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6379 but prior to that date and at his request his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. The involuntary retirement law (10 U.S.C. 6379) is the same as that in the Branchi case noted above.

Commander Everett R. Peugh, USN, retired, had 30 years, 1 month and 18 days' active naval service and 17 years, 4 months and 11 days' active commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6383(a) effective July 1, 1968, but at his request and prior to that date his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 6383(a) provides, in part, that each officer of the Regular Navy designated for limited duty shall be retired on the last day of the month following the month in which he completes 30 years of active naval service. Section 6383(c) prescribes the formula for computing his retired pay.

Lieutenant Commander Ellison Capers, USN, retired, had 23 years, 8 months and 16 days active service and 17 years, 7months and 18 days' total active commissioned service on June 30, 1968. Like Captain Armstrong and Commander Branchi, it is understood that Lt. Commander Capers was credited with sufficient constructive service to accumulate a total of more than 20 years of commissioned service. He was scheduled for involuntary retirement under 10 U.S.C. 6380 but at his request and prior to that date, his voluntary retirement was ap-

proved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 6380 provides, in substance, that each officer on the active list of the Navy serving in the grade of lieutenant commander shall be retired on June 30 of the fiscal year in which (1) he is not on a promotion list; (2) he is considered as having twice failed of selection for promotion to the grade of commander; and (3) he has completed 20 years of total commissioned service

Lieutenant Commander Mary C. Bellas, USN, retired, had 20 years, 6 months and 3 days' active commissioned service on June 30, 1968. She was scheduled for involuntary retirement under 10 U.S.C. 6400 effective July 1, 1968, but at her request and prior to that date, her voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 6400 provides, in part, that each woman officer on the active list of the Navy who holds a permanent appointment in the grade of lieutenant commander shall be retired on June 30 of the fiscal year in which (1) she is not on a promotion list; and (2) she has completed 20 years of active commissioned service in the Navy.

Lieutenant Commander Robert D. Morris, USN, retired, had 29 years, 2 months and 20 days' active service and 14 years, 7 months and 11 days' active commissioned service on June 30, 1968. He was scheduled for involuntary retirement under 10 U.S.C. 6383(b) effective July 1, 1968, but prior to that date and at his request, his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 6383(b) provides, in part, that each officer designated for limited duty on the active list of the Navy serving in the grade of lieutenant commander shall be retired on June 30 of the fiscal year in which he is considered as having failed of selection for promotion to the grade of commander. Section 6383(c) prescribes the formula for computing his retired pay.

Lieutenant Commander Marjorie E. Feldworth, NC, USN, retired, had 24 years, 11 months and 25 days' active and commissioned service on June 30, 1968. She was scheduled for involuntary retirement under 10 U.S.C. 6396(a) effective July 1, 1968, but prior to that date and at her request her voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. 10 U.S.C. 6396(a) provides, in part, that an officer on the active list of the Navy serving in the grade of lieutenant commander in the Nurse Corps shall be retired on June 30 of the fiscal year in which she becomes 55 years of age or completes 30 years of service whichever is earlier. Section 6396(c) prescribes the formula for computing her retired pay under that section.

CHELCTECH Kenneth C. Dedering, USN, retired, had 30 years, 2 months and 25 days' active service and 10 years' active commissioned

service. He was scheduled for involuntary retirement under 10 U.S.C. 1305(a) effective July 1, 1968, but at his request and prior to that date his voluntary retirement was approved under 10 U.S.C. 6323 effective July 1, 1968. The involuntary retirement law (10 U.S.C. 1305(a)) is the same as that in the Fewell case noted above.

Since each of these 11 members was qualified prior to June 1968 for retirement under the voluntary law indicated and since the involuntary retirement law applicable in each case imposes no restriction on such retirement, they are entitled to have their retired pay computed on the basis of the rates of active duty pay in effect on July 1, 1968.

The question presented is answered accordingly.

[B-165138]

Prisons and Prisoners—Trust Funds—Withdrawal

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

To the Attorney General, October 29, 1968:

By letter of August 23, 1968, the Assistant Attorney General, Office of Legal Counsel, requested our decision as to whether the Federal Government is denied the right of setoff against Federal prisoners' trust funds without the prisoners' consent. The Government is trustee of the funds as provided in 31 U.S.C. 725s.

A specific case now before the warden of the United States Penitentiary, Leavenworth, Kansas, concerns the responsibility of the warden to withdraw from an inmate's trust fund account without the inmate's consent an amount of money ordered by a writ of execution in satisfaction of a court judgment against the inmate. The Assistant Attorney General questions the Government's right of setoff against prisoners' trust funds in any case, inasmuch as 31 U.S.C. 725s provides that the funds are to be disbursed in compliance with the terms of the trust and one of the terms requires the prisoner's consent to any disbursement. The Department of Justice has ruled on several occasions that under the terms of the trust contract with prisoners the prison officials have no right to withdraw the funds without the inmate's signed approval, even on court orders, attachments, liens or apparently any other legal process for the satisfaction of claims.

The Assistant Attorney General states that one exception to this general rule is the allowance of setoff to satisfy claims of the United States arising from willful destruction of Government property by in-

mates while incarcerated. The exception is based on a decision of our Office, B–72968, April 21, 1948, and is now incorporated in Chapter II, paragraph 23c of the Commissary Management Manual, Bureau of Prisons. The Bureau of Prisons now considers the exception inconsistent with the general rule which denies setoff.

In B–72968, we held that the Government's right of setoff was applicable to prisoners' funds. However, in so ruling we were not aware of the fact that withdrawal of the funds without the consent of the prisoner was contrary to the terms of the trust.

We believe that the Department of Justice has a sound legal basis for denying setoff against prisoners' trust funds established under 31 U.S.C. 725s when setoff would be contrary to the terms of the trust. We have no objection to a revision of the Commissary Management Manual which would prevent the disbursement of funds without the prisoners' consent to satisfy the claims of the Government for willful destruction of its property. Accordingly, B–72968 should no longer be considered applicable to these cases unless specific provisions are included in the terms of the trust to permit withdrawal of the funds without the consent of the prisoner.

[B–146819]

Maritime Matters—Subsidies—Operating-Differential—Recapture of Earnings

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

To the Secretary of Commerce, October 30, 1968:

Reference is made to your request for a decision concerning a question presented in a petition by the Committee of American Steamship Lines (CASL), on behalf of its member lines, for Secretarial review of a Maritime Subsidy Board (MSB) decision relating to the investment credit provisions of the Revenue Acts of 1962 and 1964 in computing excess earnings of subsidized carriers for recapture purposes.

The Merchant Marine Act, 1936, as amended (hereinafter called "the act"), 46 U.S.C. 1101 *et seq.*, provides a program to assist in the development and maintenance of an adequate and well-balanced

American merchant marine to promote the commerce of the United States and to aid in the national defense. Title VI of the act, 46 U.S.C. 1117, authorizes the MSB to enter into a long term contract with an approved applicant for the payment of an operating-differential subsidy (ODS), determined in accordance with the provisions of the act for the operation of American-flag vessels in regular service on essential routes between American ports and certain foreign ports. The ODS is for the purpose of placing the operations of such vessels on a parity with the costs of their foreign-flag competitors and is computed upon the difference in cost of certain categories of expenses common to both American and competing foreign vessel operators.

The terms and conditions of the ODS contracts are required to reflect and to be consistent with the scheme of the act (section 603(a), 46 U.S.C. 1173(a)). The contracts must provide, among other things, (1) for the replacement of the contractor's existing vessels in United States shipyards in accordance with an established schedule (section 601, 46 U.S.C. 1171); (2) for the exclusion of domestic service and the operation of over-aged vessels from subsidy (sections 605 (a) and (b), 46 U.S.C. 1175 (a) and (b)); (3) for the repayment to the United States for application against the subsidy paid and not in excess thereof, one-half of the net profits of contractor in excess of 10 per centum upon the capital investment necessarily employed, computed on a 10-year cumulative basis, after taxes, excluding capital gains and losses, and after deduction of depreciation charges based upon the statutory life expectancy of the subsidized vessels (section 606(5), 46 U.S.C. 1176(5)); (4) for the establishment out of gross earnings of a capital reserve fund into which certain specified moneys, including depreciation, are to be deposited (section 607(b), 46 U.S.C. 1177(b)); (5) for the establishment of a special reserve fund into which the contractor is to deposit profits in excess of 10 per centum (section 607(c), 46 U.S.C. 1177(c)); (6) for the power of the MSB to prescribe rules and regulations for the administration of the reserve fund, including the definitions of the terms "net earnings" and "capital necessarily employed" (section 607(d)(1), 46 U.S.C. 1177(d)(1)); (7) that with MSB approval the contractors may make voluntary deposits of earnings into the reserve funds which are then exempt from all taxes except that if such earnings are subsequently withdrawn for general purposes they are taxable as if earned during the year of withdrawal (section 607(h), 46 U.S.C. 1177(h)); (8) that the funds in the reserve funds may be invested in certain securities and the earnings on these tax deferred funds are also exempt from tax (sections 607(d) (2) and (3), 46 U.S.C. 1177(d) (2) and (3)); and (9) that the contractor keep its

books, records and accounts in such form and under such regulations as may be prescribed (section 801, 46 U.S.C. 1211).

The Maritime Administrator's General Order 31, 2d Revision, 25 F.R. 3714, April 28, 1960, contains the current rules and regulations covering the establishment and maintenance of the statutory capital and special reserve funds and the determination of "capital necessarily employed in the business" and "net earnings" for the purposes of applying the reserve and recapture provisions of the Operating Differential Subsidy Agreements entered into under the provisions of the act. Section 286.5(b) limits the deduction for Federal income tax in determining net earnings to the total of such tax reported or assessed upon the total taxable income of the operator for the year or other accounting period. The Federal income tax to be taken into account in determining the net earning under subsidy agreements entered into since the inception of the act have been thus limited to those taxes paid or payable as determined by the Internal Revenue Service.

On April 27, 1965, the Maritime Administration Comptroller issued Accounting Instruction No. 37, the concluding paragraph of which provides as follows:

> The provision for Federal Income tax deducted in the determination of net earnings for subsidized operations will continue to be computed as prescribed in General Order 31, 2d revision, *i.e.*, the tax provision shall not exceed the amount paid or payable for the year or other accounting period involved.

CASL alleges that the quoted provision of Accounting Instruction No. 37 is invalid in that it requires the investment credit provided by the Revenue Act of 1962, 76 Stat. 960, to be considered a reduction in the subsidized operators' cost of service which is in contravention of section 203(e) of the Revenue Act of 1964, 78 Stat. 33, 26 U.S.C. 38 note.

Accounting Instruction No. 37 appears to have been intended to be, and in our opinion is, merely a reiteration of the prior regulations in effect for the accounting for Federal income taxes by subsidized operators. However, this is not material to the issue involved.

The Revenue Act of 1962 generally provided a credit against Federal income tax equal to 7 percent of the qualified investment in section 38, 26 U.S.C. 46(a)(1), property acquired after December 31, 1961. The law also required that the basis of such property be reduced by the tax credit for the purpose of computing depreciation. Subsequently, certain of the Federal regulatory agencies adopted the "flow through" concept. Under this concept the investment credit is considered as a reduction in the regulated industry's cost of service and the benefit of the investment credit is passed through to the industry's customers in the form of lower rates.

In 1963 there was introduced in the 88th Congress H.R. 8363 which proposed, among other things, to repeal entirely the reduction-in-basis provision of the 1962 act and to prevent Federal regulatory agencies in certain cases from requiring the "flow through" of the benefits of the investment credit to the customers of regulated industries. (H. Rept. No. 749, September 13, 1963, and S. Rept. No. 830, January 28, 1964.) Said bill became the Revenue Act of 1964, Public Law 82–272, February 26, 1964, 78 Stat. 19. Section 203(a), 26 U.S.C. 48, repealed the reduction-in-basis provision of 1962 act outright. With respect to the "flow through" concept section 203(e) provided as follows:

(e) Treatment of Investment Credit by Federal Regulatory Agencies.—It was the intent of the Congress in providing an investment credit under section 38 of the Internal Revenue Code of 1954, and it is the intent of the Congress in repealing the reduction in basis required by section 48(g) of such Code, to provide an incentive for modernization and growth of private industry (including that portion thereof which is regulated). Accordingly, Congress does not intend that any agency or instrumentality of the United States having jurisdiction with respect to a taxpayer shall, without the consent of the taxpayer, use—

(1) in the case of public utility property (as defined in section 46(c)(3)(B) of the Internal Revenue Code of 1954), more than a proportionate part (determined with reference to the average useful life of the property with respect to which the credit was allowed) of the credit against tax allowed for any taxable year by section 38 of such Code, or

(2) in the case of any other property, any credit against tax allowed by section 38 of such Code,

to reduce such taxpayer's Federal income taxes for the purpose of establishing the cost of service of the taxpayer or to accomplish a similar result by any other method.

The MSB in decision of September 29, 1967, and in memorandum opinion of November 13, 1967, held that section 203(e) of the 1964 Revenue Act is not applicable to the MSB in subsidy matters under the 1936 act. While question was raised in the decision of September 29, 1967, whether the shipping property of subsidized operators is "other property" within the meaning of section 203(e)(2) of the 1964 Revenue Act, we believe as stated in the later memorandum opinion that such question is not essential to the basic question here involved. The Federal income tax for consideration in MSB's determination of net earnings is the amount of the tax as finally determined by the Internal Revenue Service under both General Order 31, 2d revision, and Accounting Instruction No. 37.

CASL alleges that section 203(e) of the 1964 act is not limited to "regulatory" agencies of the United States or to agencies having jurisdiction over the reasonableness of rates as maintained by MSB. Furthermore, CASL urges that MSB is in fact a regulatory agency and performs many of the functions which are analogous to those performed by admittedly regulatory agencies, such as the Civil Aeronautics Board (CAB), the Interstate Commerce Commission (ICC),

the Federal Power Commission (FPC), and the Federal Maritime Commission (FMC).

As pointed out by MSB, all of CASL's cited "regulatory" activities of the MSB (except sections 9 and 37 of the Shipping Act, 1916, as amended, 46 U.S.C. 801, which have no bearing on the problem involved), are merely the terms of ODS contracts, for which the subsidized operators applied and into which they entered freely and willingly. That MSB is not considered as a "regulatory" agency, or at least not a regulatory agency in the same category as the ICC, FPC, CAB, and FMC, is borne out by Reorganization Plan No. 7 of 1961, 75 Stat. 840, set forth in note under 46 U.S.C. 1111. The very purpose of the Reorganization Plan was to separate the functions theretofore included in the Maritime Administration's Federal Maritime Board, transferring the "regulatory" functions to the newly created Federal Maritime Commission, and leaving the "promotional" activities (including ODS) in the Secretary of Commerce, who then delegated such activities to the Maritime Administration and MSB.

In any event, however, and regardless of what type agency the MSB may properly be called, when the relationship here involved between MSB and the subsidized operators is created solely by contract freely entered into, we do not believe that such relationship constitutes, within the meaning of section 203(e) of the 1964 Revenue Act, the MSB as a "regulatory" agency or an "agency or instrumentality of the United States having jurisdiction with respect to a taxpayer" which is using the tax investment credit to reduce a subsidized operator's Federal income taxes for the purpose of establishing the cost of service of such operator or to accomplish a similar result by any other method.

CASL refers to the decision in *North Central Airlines, Inc.* v. *Civil Aeronautics Board*, 363 F. 2d 983 (D.C. Cir. 1966), as being determinative of the issue. However, we agree with the MSB that such case is not controlling in the determination of net earnings on capital necessarily employed under the ODS contracts.

The subsidy involved in the *North Central Airlines* case is provided for by section 406, Federal Aviation Act of 1958, as amended, 49 U.S.C. 1376. The basis and purpose of such subsidy is described in the case *Trans World Airlines, Incorporated* v. *Civil Aeronautics Board*, 385 F. 2d 648 (D.C. Cir. 1967) at page 653, as follows:

> The terms "service" and "subsidy" do not appear in the Act but are widely used to describe the different forms of mail pay provided in Section 406. The "service" mail rate, paid by the Postmaster General, compensates carriers for transportation of mail, and is based on the cost of performing mail service including cost of equipment used and a fair return on the capital allocable to the mail service. In addition the Board makes "subsidy" payments to mail-certificated carriers whose operations are not self-sustaining on the basis of commercial revenues and service mail pay. Section 406(b) provides that the "subsidy" is based on: the need of each such air carrier [other than a supplemental air carrier] for

compensation for the transportation of mail sufficient to insure the performance of such service, and, together with all other revenue of the air carrier, to enable such air carrier under honest, economical, and efficient management, to maintain and continue the development of air transportation to the extent and of the character and quality required for the commerce of the United States, the Postal Service, and the national defense.

The subsidy comprehends what the carrier "needs" for "development," as well as for current operations, and for non-mail service as required for our commerce and national defense. A service rate applies only to mail carried, while the subsidy is based on miles flown. During the period involved service rates were based on costs of all carriers in the group, while the subsidy mail rate was based on the financial needs of each carrier. The amount of service mail pay, established at a group rate of 85 cents per ton mile for mail carried, is not contested in this case.

In the determination of the "need" of an air carrier for section 406 subsidy, the overall financial condition of the carrier is taken into consideration. In such circumstances and since the actual tax paid (after deduction of investment credit), was used in the subsidy computation, the carrier was denied the benefit of the investment credit. This was held in the *North Central Airlines* case to be in violation of section 203(e) of the 1964 Revenue Act.

Under the ODS contracts the subsidy is for the purpose of enabling United States-flag operators to compete with their foreign-flag competitors. The subsidy is computed upon the difference in cost of certain categories of expenses common to both the United States and competing foreign vessel operators. No consideration is given to the financial need of the contractor for the subsidy. The contractor is not guaranteed a profit nor is his profit limited by the subsidy. As a part of the program, however, the ODS contracts provide for repayment to the United States of one-half of the net profits, but not in excess of the subsidy paid, in excess of 10 per centum upon the capital investment necessarily employed, computed on a 10-year cumulative basis. Thus, unless a contractor has profits on capital employed in the subsidized operations which exceed 10 percent over a 10-year period, he keeps all profits including any investment tax credit to which he may be entitled. The contractor's profits from other than the subsidized operations are not touched.

The whole scheme of the subsidy for American-flag vessel operators under the ODS contracts, particularly when consideration is given to the tax free reserve funds which are for the purpose of enabling a contractor to accumulate capital for the modernization of his equipment, is vastly different from the subsidy provided for air carriers on a "need" basis under section 406 of the Federal Aviation Act. In view thereof, it would take emphatic language from the Congress to make us conclude that section 203(e) of the Revenue Act of 1964 was intended to repeal the "actual tax" doctrine consistently used in the computation of net earnings of subsidized vessel operators under

the ODS contracts entered into pursuant to the Merchant Marine Act of 1936.

Accordingly, you are advised that, in our opinion, the Maritime Administration/Maritime Subsidy Board in the administering of the provisions of ODS contracts, is not an "agency or instrumentality of the United States having jurisdiction with respect to a taxpayer" within the meaning of section 203(e) of the 1964 Revenue Act, and that, therefore, the provisions of section 286.5(b) of General Order 31, 2d revision, and Accounting Instruction No. 37 providing for the use of "actual tax" in the determination of net earnings under ODS contracts are not invalid.

[B-164795]

Bids—Evaluation—Discount Provisions—Absence of Provision in Invitation

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

To Janet's Typewriter Service, October 30, 1968:

Further reference is made to your letter of July 5, 1968, protesting against an award to another bidder under Invitation for Bids. No. WA-ND-1864-5-23-68.

The invitation was issued on May 8, 1968, by the General Services Administration requesting bids for a requirements contract for repair, maintenance and reconditioning of electric typewriters for the period July 1, 1968, through June 30, 1969.

The bids were opened as scheduled on May 23, 1968, and the two lowest bids were those submitted by Royal Office Typewriter (Royal), a Division of Litton Business Systems, Inc., and by your company (Janet's).

Janet's bid was in the sum of $30 with a 1 percent 20-day prompt payment discount resulting in a net price of $29.70. Royal submitted a bid price of $29.75 and inserted a 5 percent quantity discount for 5–19 machines, which would result in a net price of $28.26 if a sufficient number of machines were placed under maintenance. Further quantity discounts were offered by Royal of 10 percent for 20–49 machines; 15 percent for 50–149 machines; and 20 percent for 150 or more machines. Award was made to Royal on June 14, 1968, as the low responsive, responsible bidder.

Your company's protest is based on the contention that since the solicitation contained no provisions for, or any mention of, a quantity discount, and since the bid of Royal did not explain whether the quantity discounts would apply for the number of machines in a particular area or to the number of machines on each purchase order, the discount provision of Royal's bid should not have been considered.

Since there is no evidence to show that the consideration of the discount offer was contrary to bid instructions, a failure to consider for bid evaluation and award purposes a quantity discount offer, whether or not solicited in an invitation for bids, would appear to be contrary to advertising statutes, unless the contracting agency determines that the terms of the discount offer cannot reasonably be complied with. In this connection, we have held that bidders should be apprised as to the basis on which their bids will be evaluated when there are special factors which the Government intends to consider in making bid evaluations, 39 Comp. Gen. 282. However, we do not believe that, as a general rule, the Government's failure to make specific provision for every possible method of price quotation should deprive it of the right to take advantage of a clearly offered benefit which did not contravene any stated requirement or prohibition.

Under the Government's competitive bidding system, we think that a bidder may properly quote its best terms, including provisions, if they so desire, for allowance of discounts and other price reductions which might be based on the amount of work or supplies included in awards. It has long been an established policy of the Government to consider discount offers in evaluating bids on contracts to be awarded under formal advertisements, and in our opinion the consideration of discount offers is a proper method of evaluating the price which the Government will have to pay, if it reasonably appears that the condition on which the discount is based will be complied with. See 40 Comp. Gen. 518.

Concerning your contention that the bid did not explain whether the quantity discount would apply for the number of machines in the particular area or to the number of machines on each purchase order, the exact language of the offer was as follows:

> The following discounts from total Maintenance Agreement prices are offered to Federal Government installations having 5 or more electric typewriters on maintenance agreement with Royal Office Typewriters which are installed in buildings on the same or adjacent blocks, or all buildings on a continuous tract of land, such as a military post.
>
> A Federal Government installation may consist of several separate agencies or departments located in an area within the scope of a discount application. All electric typewriters belonging to agencies or departments of the Federal Government on Maintenance Agreement with Royal Office Typewriters will be considered as one installation when determining the customer's discount qualifications.

It is our opinion that the foregoing language clearly based the

quantity discount on the number of machines at each installation, rather than the number of machines on each purchase order.

With respect to the availability of the discount, the administrative report to our Office stated:

> Based on past experience and the fact that there were 330 IBM electric typewriters in the service area involved, 284 of which were located in the Norfolk Naval Shipyard, it was obvious that the discount offered by Royal in its bid would have a direct effect upon the cost to the Government of the maintenance services required. For example, since the offered discount would not take effect unless at least five machines in one installation were placed under maintenance, rejection of the bid on the basis that there was any possibility that less than the required number in one installation would be placed under maintenance would have required that we assume certain facts which contradict all of the available evidence and logic.
>
> During the past contract period 148 IBM typewriters were placed under maintenance. Because only 46 machines in the service area are located outside the Norfolk Naval Shipyard, at least 102 of those placed under maintenance were within the Shipyard. In addition, if only five machines were placed under maintenance at the discount rate, the Government could put an additional 144 machines under maintenance with Royal without a discount before the total cost would equal the price bid by Janet's Typewriter Service. There is, of course, no possibility that 144 machines located outside the Naval Shipyard will be placed under maintenance, since there are only 46 typewriters located outside the Shipyard. Equally, it is just as improbable that fewer than 5 machines would be placed under maintenance at the Shipyard, in view of the fact that 148 of the 284 machines at the Shipyard were under maintenance in the last contract period. Thus it would have been completely unrealistic to have ignored the offered quantity discount on the premise that there was any possibility that it would not have been realized. * * *

It therefore seems clear that to conclude that the offered quantity discount would not be applicable would be wholly unreasonable, and would require the assumption of the occurrence of events, the likelihood of which would be so remote as to be negligible. In this regard, we have been advised that since the award of the contract, 73 typewriters, all located within the Norfolk Naval Shipyard, have been placed under maintenance. Thus the 15 percent discount offered by Royal, rather than the 5 percent used in evaluation, is being realized.

It is our opinion that the action taken by the contracting officer in the present case was fully in accordance with the requirements of the procurement regulations and statutes, as well as with the terms for the invitation for bids, that an award shall be made to the responsible bidder whose bid conforms to the invitation and "will be most advantageous to the Government, price and other factors considered."

In view of the foregoing, our Office finds no proper basis for objecting to the award of the contract to Royal and your protest is therefore denied.

[B–165345]

Officers and Employees—Promotions—Reclassified Positions—Incumbent's Status

The Civil Service Commission having waived the experience and training requirement of the incumbent of a position reclassified from grade GS-9 to grade

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

To the Secretary of the Navy, October 30, 1968:

This is in reply to a letter from your office dated September 25, 1968, concerning the claim for back pay of Mrs. Ethel P. Rushing, an employee of the Department of the Navy at the Headquarters, Eleventh Naval District, San Diego, California.

The letter sets out the Department's view that there is no authority to promote Mrs. Rushing retroactively to July 16, 1967, on the ground that the additional administrative steps necessary to effect promotion were withheld by direction of the appointing authority citing our decision of August 22, 1968, B–164815.

The record indicates that in June 1967 Mrs. Rushing was serving as a Budget Analyst, GS–9, in the Budget Branch, Comptroller Division, Administration Department at the Headquarters and on June 28, 1967, the reclassification of her position from grade GS–9 to grade GS–11 was approved.

However, it was administratively determined that Mrs. Rushing did not meet the qualifications required for a GS–11 position and on June 29, 1967, a request for a waiver of qualifications was submitted to the Civil Service Commission's San Francisco Regional Office which waiver was approved by that office on July 11, 1967.

On July 12, 1967, the appointing authority noted on the SF 52 approval of Mrs. Rushing's employment qualifications referencing the SF 59 containing the Civil Service Commission's approval. It was also noted on the SF 52 that the former position description #9249 was canceled.

The only step in the promotion chain left incomplete at this point was the preparation and completion by the Consolidated Industrial Relations Office (CIRO) of a SF 50. We have been advised that this was ordinarily a routine administrative act. However, before such a step was taken the Commandant, Eleventh Naval District, apparently informally as there are no papers to this effect in the record, decided to delay the promotion until Mrs. Rushing had served in the position for a year.

In October 1967 following a refusal by the Headquarters to promote her to grade GS–11 Mrs. Rushing appealed to the Civil Service Commission's San Francisco Regional Office. Her supervisor indicated

at this time that she was performing the duties of the GS–11 position in an outstanding manner. Correspondence from the Headquarters to the regional office in connection with the appeal stated that the reclassification of the position in question from GS–9 to GS–11 had not been completed.

In a decision on the appeal dated March 27, 1968, the regional office stated:

JOB INFORMATION AND EVALUATION

The appellant is functioning as the Head, Budget Branch, Comptroller Division, Administration Department, Hq ND. We find no reason to disagree with the June 28, 1967 evaluation of this position as documented by PD #1839 by the 11th ND classifier, a copy of which has previously been furnished to the appellant. Although this classification decision was never placed in effect, there is no evidence that the appellant was ever relieved of any duties and responsibilities nor instructed not to perform any of the duties and responsibilities of PD #1839.

DECISION

Accordingly, it is our decision that the appellant's position is properly classified as Budget Analyst GS–560–11.

Following this appeal Mrs. Rushing was promoted to the GS–11 position on April 7, 1968. In June 1968 Mrs. Rushing protested the delay in promoting her to grade GS–11 upon reclassification of the position in June 1967. The Director, Employee Management Relations Division, Office of Civilian Manpower Management, Department of the Navy, in commenting on July 12, 1968, upon her contention that there was a failure to comply with NCPI 510.7–2b(1)(b) stated:

* * * The regulation you cite provides that when classification action has been taken on an occupied position, personnel action to put the person doing the work into the newly classified position, to put him into some other position, or to separate him, must be taken by the activity not later than the beginning of the second pay period following the date of classification action, except as provided in NCPI 510.7–3. This latter section refers to permissible delays. One of those permissible delays is delay to permit the individual to become qualified, since a personnel action to put a person in a position cannot be completed until and unless he qualifies for that position as it is classified.

The record shows that a waiver of experience and training requirement had been requested from and approved by the Civil Service Commission. However, it was determined that you should serve one year in the Budget Analyst work to obtain the required experience prior to advancement to the GS–11 level and the waiver was not used. This was a proper exercise of management prerogative.

On August 1, 1968, the San Francisco Regional Office (following consultation with Civil Service Commission's Central Office) in examining NCPI 510.7–2b(1)(b) in light of the Commission's regulation 511.701 stated:

We agree that the evidence of record shows that your position was officially classified as Budget Analyst GS–560–11 on June 28, 1967. In accordance with the regulations cited and 30 Comp. Gen. 156 and 37 Comp. Gen. 492, this action obligated your activity either to promote you or to remove you from the position. Since they did not do the latter, failure to process your promotion in timely fashion was an administrative error. Correction by your agency of this administrative error will entitle you to back pay since the effective date of your promotion would be based on the date your position was reclassified, that is June 28, 1967, in accordance with the regulations cited.

An examination of the foregoing facts leads to the conclusion that the position description #9249, grade GS–9, was canceled as of June 28, 1967, and the new position description #1839 and new job classification as a grade GS–11 were approved by proper authorities and became effective that date. While the District Headquarters asserted that the reclassification had not been completed Mrs. Rushing was actually the incumbent of a position the description and classification of which had been changed from grade GS–9 to grade GS–11. Her supervisor, the District Comptroller, asserted she was performing the duties of the GS–11 position and the Office of Civilian Manpower Management in its letter to her of July 12, 1968, in effect admitted that the change in classification had taken place. Moreover, SF 59 dated June 29, 1967, asking for a waiver of qualifications stated that the position's classification had been changed to the GS–11 level and the executed NAVEXOS–4543 indicated the GS–9 position had been replaced by the GS–11 position. Under the circumstances it clearly appears that the GS–9 position was replaced by the GS–11 position and that Mrs. Rushing at all times following the reclassification action was the incumbent of the GS–11 position in question. The Civil Service Commission in its letter of August 1, 1968, to Mrs. Rushing likewise takes the view that change of classification of the position in question to GS–11 was completed on June 28, 1967.

With respect to effecting personnel actions following a change in classification NCPI 510.7 provides in part as follows:

7–2. EFFECTIVE DATES.

* * * * * * *

b. *Occupied positions.*

When classification action has been taken on an occupied position, personnel action to put the person doing the work into the newly classified position, to put him into some other position, or to separate him, must be taken within the time limits stated below, even though an appeal has been or is about to be filed.

(1) Navy classification actions.

* * * * * * *

7–3. PERMISSIBLE DELAY.

The following are exceptions to the time limits stated above.

a. *Where CSC prior approval of a proposed promotion or reassignment is required.* (See NCPI 340.3–6.)

In this case the employee may be detailed under NCPI 340 to the newly-classified position until the Commission approves or disapproves the proposed promotion or reassignment. The request for GSC approval must be submitted to the Commission not later than the beginning of the second pay period following the date of classification action.

* * * * * * *

7–4. CORRECTION OF FAILURE TO PUT CLASSIFICATION ACTIONS INTO EFFECT.

a. *When it is discovered that classification action on an occupied position was not put into effect within the required time limits, the head of the command shall initiate action to correct the error.* If the employee has been overpaid, the activ-

ity shall take steps to recover the overpayment unless the salary retention provisions of NCPI 552.4 obtain. *If the employee has been underpaid, the activity shall make a supplemental payment to him.* [Italic supplied.]

We understand that the waiver by the Civil Service Commission of Mrs. Rushing's failure to meet the qualification requirements for the position was a condition precedent to her promotion thereto and to her entitlement to the pay thereof. However, that condition was satisfied on July 11, 1967. The record does not indicate whether Mrs. Rushing actually was detailed to the GS–11 position pending the Commission's approval of her qualifications but even if she had been so detailed under the regulation the detail would have continued only until the Civil Service Commission's approval was received. We note also that the regulations do not specify the time limit within which an employee performing the duties of a reclassified position must be promoted to such position following waiver by the Civil Service Commission of the position qualification requirements. It is reasonable, however, and within the spirit of the regulation to apply the same time limitations specified in NCPI 510.7–2b, quoted above, that is, not later than the beginning of the second pay period following receipt of notice of approval by the Civil Service Commission of the waiver of qualifications. Accordingly, corrective action should be taken in accordance with the foregoing.

We have not overlooked our decision B–164815, August 22, 1968, cited in the letter of September 25, 1968. However, that decision is not for application here since in that case the new position had not been established and consequently the employee was never appointed to it.

[B–164426]

Customs—Services Outside Regularly Scheduled Hours—Cost Recovery

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

To the Secretary of the Treasury, October 31, 1968:

Reference is made to letter dated October 24, 1968, from the Assistant Secretary of the Treasury concerning the authority of the Bureau of Customs (Customs) to furnish additional customs services at sta-

tions on the Canadian and Mexican borders and recover the cost of such services from the party requesting the services.

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

Customs services are provided at customs ports of entry and certain customs stations along the Canadian and Mexican borders during such hours on weekdays and on Sundays and holidays as the Bureau of Customs determines to be in the public interest and necessary to service the normal flow of traffic at those points. At Northgate, North Dakota, the regular hours of service for 7 days a week are 8 a.m. to 12 midnight in June, July and August and 9 a.m. to 10 p.m., during other months of the year. Present budgetary and manpower ceiling restrictions do not allow and, in your Department's opinion, the public interest does not require, the assignment of additional personnel to these ports during those hours or additional hours when the port is closed.

From time to time requests have been made to assign additional personnel and to extend the hours of service to cover up to 24 hours a day, 7 days a week at some of these ports and stations to serve the convenience and economic interests of private parties who have commercial operations on both sides of the border and would benefit from additional services to meet their particular needs. For example, the International Minerals and Chemical Corporation (International) proposes to truck potash from Esterhazy, Saskatchewan (approximately 100 miles north of the United States-Canadian frontier at Northgate, North Dakota) on a 24-hour per day basis to a facility 2½ miles south of Northgate where it will be transhipped via the Great Northern Railroad. This imported merchandise is free of duty under the Tariff Schedules of the United States, and its processing by the Bureau of Customs produces no revenue. The request is for the assignment of additional employees solely to process these shipments without delay 24 hours a day, 7 days a week, which would be in addition to the normal service to the general public when the port is open.

While section 451 of the Tariff Act of 1930, as amended, 19 U.S.C. 1451, authorizes the assignment of tours of duty at nights or on Sundays and holidays, the 1944 amendment to that section provides, as your Department understands it, that employees assigned to duty during overtime hours at night, or on Sundays and holidays, at such border facilities shall be paid compensation in accordance with existing law as interpreted by the United States Supreme Court in the case of *United States* v. *Howard C. Myers*, 320 U.S. 561, without reimbursement.

The Assistant Secretary states that the Senate Committee Report

(S. Rept. No. 858, 78th Cong., 2d sess., p. 2) accompanying the act of June 3, 1944, 58 Stat. 269, emphasizes the obligation of the United States to provide customs services without charge at international highways, bridges, tunnels and ferries "whenever the public interest requires" such services.

He advises that the 1944 act was considered at a time when border crossing points were being closed because payment for the overtime was not being reimbursed (see H. Rept. No. 1446, 78th Cong., 2d sess., p. 2); and that the Congress wanted these ports to remain open without reimbursement of costs when the public interest required it. He states that it thus provided for assignments as needed to serve the general public as determined by the Secretary without the requirement of reimbursement, and for payment at the established rates to be made by the Government; but that it made no specific provision with respect to services beyond those required to meet the needs of the general public.

The Assistant Secretary's letter continues:

> Since the passage of the Act of June 3, 1944, however, the Congress has enacted as part of section 501 of the Independent Offices Appropriation Act (31 U.S.C. 483a), the so-called "user charges" statute which, in your recent decision No. V-164426 [B-164426] of July 22, 1968, you have indicated is intended to provide authority for Government agencies to make charges for services except in cases where the charge is specifically fixed by law or the law specifically provides that no charge shall be made. You agreed that the language of section 31 U.S.C. 483a is very broad and the section contemplates that those who receive the benefit of services rendered by the Government especially for them should pay the added cost thereof at least to the extent that it appears a special benefit is conferred. In the case of the preclearance operations covered by your July 22 decision, you also agreed that the charges collected by Customs for such special services may be deposited as a refund to the appropriation from which payment for the services was made.

Our decision is requested whether additional services, such as those for International Minerals and Chemical Corporation at Northgate, North Dakota, requiring added tours of duty and personnel to perform them as requested by the party-in-interest for its sole convenience and benefit may be provided and the cost collected from the party for whom those services are performed. The Assistant Secretary states that it is assumed that following our above-cited decision of July 22, 1968 (48 Comp. Gen. 24), any reimbursement collected may be deposited as a refund to the appropriation from which such charges are paid.

The doubt in the matter arises, at least in part, because of the proviso in 19 U.S.C. 1451. Certain other provisions of law (contained in 19 U.S.C. 267, 1450, 1451 and 1452) require parties requesting customs services on Sundays, holidays and nights to obtain a special license and post bond (covering extra compensation, etc.) and also have the effect of requiring that the extra compensation required by law to be paid customs personnel for night overtime duty and duty on

Sundays and holidays shall be reimbursed the Government by the party requesting customs services during these hours. The proviso in 19 U.S.C. 1451—as far as pertinent here—makes inapplicable to owners, operators and agents of highway vehicles between the United States and Canada the aforementioned license, bond and reimbursement provisions and also provides that at ports of entry and border stations on the Canadian border where merchandise arrives or departs by highway vehicle the collector (of Customs) shall assign customs personnel to duty at such times during the 24 hours of each day including Sundays and holidays *as the Secretary of the Treasury in his discretion, may determine necessary to facilitate the inspection and passage of merchandise*, baggage or persons. The section further provides that all compensation (including overtime compensation) payable to such employees shall be paid by the United States without requiring any payment by the owner, operator, or agent of any such highway vehicle.

Thus, under 19 U.S.C. 1451, it appears that where the Secretary determines it necessary to assign customs personnel to duty at a customs facility on the Canadian border during certain hours and days in order to facilitate the inspection and passage of merchandise being transported by highway vehicle, the compensation (including overtime compensation) payable to the personnel for such hours and days must be paid by the United States without reimbursement from the owner, operator or agent of the highway vehicle.

Insofar as the example in the instant case is concerned, at a conference with representatives of the Bureau of Customs we were advised that there is a customs facility at Portal, North Dakota, which provides customs services 24 hours a day, 7 days a week. From a document furnished us at the conference it appears that the Portal customs facility is approximately 28 miles by highway from the Northgate customs facility. We were advised that International could, but does not wish to, route the trucks involved through Portal to the rail transhipment facility 2½ miles from Northgate because of economic reasons. We were informed that the distance via highway from Esterhazy to Northgate, direct, is 134 miles, while the highway distance from Esterhazy to Northgate via Portal is 186 miles, a difference of 52 miles one way. We understand that because of the additional transportation costs that would be incurred if the trucks used the Portal customs facilities, International has requested that it be furnished customs services on a reimbursable basis at either Northgate or the rail transhipment point 2½ miles south of Northgate.

We do not think we are required to hold that the proviso in 19 U.S.C. 1451 prohibits in all cases the recovery of costs incurred by

Customs incident to the furnishing of customs services to highway vehicles at customs facilities on the Canadian border. In the instant case it is clear that the necessary customs services are available to International 24 hours a day, 7 days a week at Portal, although to reach Northgate from Esterhazy by way of Portal would require the trucks to travel an additional 52 miles each way. In any event for reasons of its own International desires the trucks to use the Northgate customs facility rather than the one at Portal. Hence, under these facts and circumstances, extending the hours of service to cover 24 hours a day, 7 days a week at Northgate would result in a cost to Customs which apparently it would not otherwise incur, in view of the availability of services at the Portal customs facility at all times. In any event, it appears that the Secretary has not determined it necessary to provide services at Northgate 24 hours a day, 7 days a week in order to facilitate the passage and inspection of merchandise at that facility. Thus, under such circumstances, extending the hours of service at Northgate from those set forth in the Assistant Secretary's letter, to 24 hours per day, 7 days a week would apparently be solely for the benefit of International. Accordingly, in the instant case any costs (including compensation) incurred by Customs as a result of extending the hours of service at Northgate in the manner indicated above may be recovered from International in accordance with 31 U.S.C. 483a. However, considering the provisions of 19 U.S.C. 1451, we are of the view that any costs resulting from the assignment of additional personnel to Northgate during the regular hours of service at that facility may not be recovered from International.

Also, furnishing to International, at its request, customs services at the rail transhipment point rather than at the Northgate customs facility would be a service rendered solely for the benefit of International. Accordingly, to the extent the cost of customs services furnished at the rail transhipment point exceed the costs Customs would incur at the Northgate facility during the regular hours of service (i.e., the hours in effect prior to the extension proposed here), such excess costs (including compensation) may be recovered from International under the authority of 31 U.S.C. 483a.

Further, as indicated in the Assistant Secretary's letter, consistent with the position taken in our decision of July 22, 1968, any costs recovered or collected for customs services in accordance with the foregoing may be deposited to the appropriation from which such costs were paid.

The questions presented are answered accordingly.

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