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[B-168761]

Bids—Acceptance Time Limitation—Failure to Comply

The nonresponsiveness of the low bid of a Canadian firm offering a 60-day bid acceptance period under an invitation specifying a period of "at least 90 days" is not overcome by the fact that the bid submitted to the Canadian Commercial Corporation (CCC), the quasi-governmental agency that handles the bids of Canadian firms with the Department of Defense (DOD), was accompanied by a CCC form offering to keep the bid firm for an additional 10 days, or a total of 100 days, as the bidder's intent to be bound by the specified bid acceptance period was not submitted to DOD before bid opening. CCC is considered the prime contractor and, therefore, subject to the ordinary requirements regarding bid responsiveness, and the offer to meet the bid acceptance terms of the invitation not coming within the exceptions that permit late bid modifications, the low bid is not for consideration, even though the Government is deprived of lower prices.

Contracts—Specifications—Failure to Furnish Something Required—Blanket Offer to Conform to Specifications

The language of a covering letter accompanying a bid that failed to meet the "at least 90 days" acceptance period specified in the invitation, which stated the bid is "in response to Solicitation No. * * *" is not sufficient to offset the failure of the bidder to meet the bid acceptance terms of the invitation. The covering letter failed to cure the nonresponsiveness of the bid as it did not expressly or impliedly indicate that the bidder was offering the required bid acceptance period of at least 90 days.

Bids—Discarding All Bids—Compelling Reasons Only

The question whether the difference between a nonresponsive bid and the lowest acceptable bid is sufficiently substantial to justify rejection of all bids and to readvertise the procurement is for determination by the contracting officer. Paragraph 2-404.1(b)(vi) of the Armed Services Procurement Regulation permits cancellation of invitations for bids after opening but prior to award where the action is consistent with paragraph 2-404.1(a), which restricts rejection of all bids to situations where the reason for the cancellation of the invitation is compelling, and the contracting officer determines in writing that all otherwise acceptable bids received are at unreasonable prices.

To the Secretary of the Navy, April 1, 1970:

We refer to a report dated February 9, 1970 (reference AIR-OOC:CJM/jt), and letter dated March 20, 1970 (reference AIR-OOC:CJM/skr), from Counsel, Naval Air Systems Command (NAVAIR), reporting on the protest of the Canadian Commercial Corporation (Bristol Aerospace (1968) Limited, Winnipeg, Manitoba, Canada) against award to any other company under invitation for bids (IFB) No. N00019-70-B-0014, issued on September 17, 1969, by the Naval Air Systems Command, Washington, D.C. Two other firms, Hercules, Inc., and Thiokol Chemical Corporation, have submitted protests regarding the subject procurement.

The invitation requested bids for the manufacture and supply of MK36 Mod 5 and MK 50 Mod 0 Rocket Motors and data applicable thereto. Bids were opened on December 3, 1969, and the six bids received, as evaluated (including rental factors), were as follows:

Bidder	Total Price
Canadian Commercial Corp. (Bristol Aerospace (1968) Limited)	$4,393,688.00
Hercules, Inc.	4,503,420.14
Thiokol Chemical Corporation	4,601,443.00
Bermite Division, Whitaker Corp.	4,915,616.00
North American Rockwell	5,360,280.00
United Aircraft Corp.	5,450,564.00

The invitation contained Standard Form 33A (July 1966) entitled "Solicitation Instructions and Conditions" and Standard Form 33 (July 1966) entitled "Solicitation, Offer and Award." Of relevance to our consideration here, the "Offer" portion of the latter form provides as follows:

In compliance with the above, the undersigned offers and agrees, if this offer is accepted within ———— calendar days (60 calendar days unless a different period is inserted by the offeror) from the date for receipt of offers specified above, to furnish any or all items upon which prices are offered, at the price set opposite each item, delivered at the designated point(s), within the time specified in the Schedule.

Immediately following Standard Form 33, a page of "Additional Information" is provided wherein bidders are cautioned: "See 'Bid Acceptance Period' provision in the Additional Solicitation Instructions and Conditions attached hereto." Paragraph 45 of the Additional Solicitation Instructions states:

(45) Bid Acceptance Period (Apr. 1969) Bids offering less than ninety (90) days for acceptance by the Government from the date set for opening of bids will be considered nonresponsive and will be rejected (ASPR 2-201(a)(xv)). Bidders are cautioned that the period specified above must be entered in the appropriate space under Offer on the solicitation form (Standard Form 33).

The two lowest bidders (Bristol Aerospace and Hercules, Inc.) did not enter in the appropriate space on Standard Form 33 a bid acceptance period of at least 90 days and, in view of such deficiency, the contracting officer determined that the two lowest bids were nonresponsive. Both bidders have asserted that such a failure should not make their bids nonresponsive. The attorneys for Bristol, in briefs filed with our Office, contend that the Bristol bid, together with the accompanying documentation which was transmitted to the Canadian Commercial Corporation (CCC), indicates a bid acceptance period of at least 90 days and therefore is responsive.

Hercules, Inc., argues that its failure to comply with the 90-day acceptance period may be considered as a minor deviation which can be waived and the bid considered responsive. Hercules states that such a result would be consistent with the definition of a minor irregularity appearing in Armed Services Procurement Regulation (ASPR)

2–405. Further, in a letter to our Office dated February 16, 1970, Hercules contends that its bid is responsive since its cover letter which accompanied the Hercules bid stated, unequivocally and without exception, that the bid is "in response to Solicitation No. N00019–70–B–0014." Our Office has also received a protest from Thiokol Chemical Corporation protesting any award to CCC, Hercules, or any company other than Thiokol. Thiokol contends that the bid of Bristol as submitted by CCC to NAVAIR and the bid of Hercules are nonresponsive and that Thiokol is the lowest responsive, responsible bidder and therefore is entitled to the award.

The record indicates that a bid prepared by Bristol, a Canadian firm, and submitted to NAVAIR by CCC—a corporation owned and operated by the Canadian Government—was the lowest bid received by NAVAIR under the solicitation. As above indicated, the Bristol bid which was received by NAVAIR did not contain a bid acceptance period of at least 90 days and the contracting officer determined the bid to be nonresponsive.

The attorneys for Bristol state that on January 27, 1970, they met with Counsel, NAVAIR, and exhibited to Counsel, NAVAIR, "conclusive evidence," from an unimpeachable source, that the bid submitted by Bristol contained a provision which required Bristol to keep its bid firm for a period 10 days in excess of the bid acceptance requirements of the subject NAVAIR invitation, i.e., an acceptance period of 100 days. We are advised that at the conclusion of that conference Counsel, NAVAIR, indicated that this matter involved some unique aspects, and that it should, in his opinion, be decided by our Office.

When an invitation provision requires a bid to remain open for acceptance for a specified period to be considered for award, our Office has held that such provision is material and noncompliance therewith renders the bid nonresponsive. We are advised by NAVAIR that, while the rule of law which is generally applicable to this type of situation has been established (citing B–165690, February 3, 1969; B–164851, October 17, 1968; 47 Comp. Gen. 769 (1968); B–161628, July 20, 1967; and 46 Comp. Gen. 418 (1966)), it is its position that the facts involved in CCC's submission of Bristol's bid present a unique situation as to which a different rule of law may be applicable.

The record indicates that the bid as submitted by Bristol to CCC was accompanied by a cover letter dated November 28, 1969, addressed to NAVAIR. This letter stated that the solicitation, offer, and solicitation amendments were attached. It also requested progress payments and stated that "[n]o exceptions are taken to the bid." In processing Bristol's bid, CCC detached this letter before forwarding the bid to

NAVAIR. The attorneys for Bristol contend that the standard bid form of CCC (CCC Form 3B) which was submitted by Bristol to CCC provides that the bid of Bristol to CCC is "valid for ten days beyond the period cited in the U.S. Invitation for Bid." It is the opinion of CCC, based on its standard form and the letter addressed to NAVAIR, that Bristol has made a firm offer to CCC with an acceptance period of 100 days. Assuming that Bristol has made an offer to CCC which has an acceptance period of at least 90 days, the issue for our consideration is the legal effect of this firm offer which was made to CCC but not contained in Bristol's bid as timely submitted to NAVAIR by CCC.

Our Office has consistently held that the bid acceptance period is a material term and that the offer of a shorter bid acceptance period than that required by the solicitation renders the bid materially nonresponsive. Further, such nonresponsiveness may not be waived as a minor informality as requested by Hercules. See B-165690, February 3, 1969, and cases cited therein. Our Office has also stated that a bid which is nonresponsive on its face may not be considered for correction regardless of the circumstances. 38 Comp. Gen. 819 (1959); 40 *id.* 132 (1960).

Under the rules set forth above, the bid of Bristol must be considered to be nonresponsive unless the Bristol "cover letter" and/or the CCC Form 3B can be considered as curing the defect in the bid itself. The attorneys for Bristol, in a brief dated February 5, 1970, contend that the Bristol bid, submitted in response to the CCC invitation for bids, incorporated a bid acceptance period 10 days in excess of the 90-day period required by the NAVAIR invitation for bids. It is further contended that the contracting officer can properly consider the evidence which establishes that fact without doing violence to the principles of the competitive bidding system.

The attorneys for Thiokol contend that the Bristol cover letter dated November 28, 1969, cannot be considered under the mistake in bid procedures or as a late bid modification. Further, the attorneys for Thiokol contend that even if the Bristol letter be considered as part of its bid, it would not be effective to remedy the nonresponsiveness of the bid. It is contended that the language of the letter, "no exceptions are taken to the bid," is too vague and uncertain to express an intention to offer a bid acceptance period different than the express 60-day acceptance period provided for in the invitation "unless a different period is inserted by the offeror." Thiokol's attorneys state that the Navy's reliance on CCC Form 3B as effectively offering a bid acceptance period of 90 or 100 days is totally misplaced, quite apart from the fact that the Form 3B was not submitted to NAVAIR prior to bid opening.

In support of the Navy's position that the facts involved in the submission of CCC's bid present a unique situation, we are advised as follows:

As stated in the annual report for CCC, "[t]he principal purpose of the Corporation is to act on behalf of the Canadian government as the contracting agency when other countries and international agencies wish to purchase defense and other supplies and services from Canada on a government-to-government basis."

In the submission of a bid, CCC is characterized as the prime contractor, but it is a governmental agency of Canada and receives no monetary gain from any contracts of this nature.

Bristol Aerospace (1968) Limited is the Canadian firm which prepared and submitted the bid to CCC and, if the contract were awarded to CCC, would do 100% of the work.

For many purposes, CCC can be characterized as an agent for the Department of Defense. CCC provides many services without cost to the Department of Defense, which would otherwise be performed by DOD.

Some of these services are set forth in the Letter of Agreement appearing as ASPR 6-506, and include: assurance that all first-tier subcontracts will be placed in accordance with the practices, policies and procedures of the Government of Canada, determine and return "excess profits" to the appropriate Military Departments, provide for the audit of costs and profits where applicable, and provide inspection personnel and facilities. In addition, ASPR 6-504.2 and 6-504.3 provide that such contracts will be administered through CCC.

ASPR 1-904.4 provides that any firm proposed by CCC as its subcontractor will be presumed to be "responsible" under the provisions of ASPR 1-906.

Pursuant to ASPR 8-216, CCC has the authority to settle all Canadian subcontracts which are terminated, without limitation as to dollar amount and without the approval or ratification of the TCO.

Pursuant to an agreement between the Department of Defense and the Department of Defense Production (Canada), ASPR 6-504.2(a) provides that "[i]ndividual contracts covering purchases from suppliers located in Canada * * * shall be made with the Canadian Commercial Corporation * * *." This agreement and restriction are meant to advance the mutual Canadian-American interests as set forth in ASPR 6-501.

Thus, CCC is interposed between the U.S. Military Department and any Canadian firm that wishes to bid on an IFB due to ASPR 6-504.2(a). The character which CCC takes on due to this interposition is unique.

The characterization of CCC as the prime contractor does not fully describe the true relationships between CCC and Bristol and between CCC and NAVAIR.

CCC's position is one of administration. Its offer to NAVAIR is limited to the offer made to it by Bristol.

In the solicitation process CCC can best be described as a procedural avenue. It is the conduit through which a Canadian firm's bid must pass in order to compete for a NAVAIR contract.

It would seem that the principle which underlies the decision in 41 Comp. Gen. 165, 28 Aug 1961, would be proper for application in the present case. This case stated that where the "* * * error was made by an independent agency over which the bidder exercised no supervisory control" and the intended bid, but for the error, can be conclusively shown, then the reason for the rule precluding correction of a mistake does not exist and, therefore, the rule is inapplicable.

In our opinion, the terms and conditions of the NAVAIR invitation for bids are controlling in deciding whether the bids of Bristol and Hercules are responsive. The attorneys for Bristol contend that the "cover letter" and the CCC Form 3B are part of Bristol's bid. Since neither the cover letter nor the CCC Form 3B were submitted to NAVAIR with Bristol's bid, they must be considered, if at all, as late bid modifications. The general rule followed by our Office is that the bidder has the responsibility for the delivery of his bid to the proper

place at the proper time, and that exceptions to the rule requiring rejection of late bid modifications may be permitted only in the exact circumstances provided for in the invitation. 37 Comp. Gen. 35 (1957); B–144842, March 10, 1961.

Paragraph 22 of the Additional Solicitation Instructions and Conditions provides, in pertinent part, as follows:

(a) Offers and modifications of offers (or withdrawals thereof, if this solicitation is advertised) received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: (1) they are received before award is made; and either (2) they are sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained and it is determined by the Government that the late receipt was due solely to delay in the mails, for which the offeror was not responsible; or (3) if submitted by mail (or by telegram if authorized) it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; provided, that timely receipt at such installation is established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt (if readily available) within the control of such installation or of the post office serving it. However, a modification of an offer which makes the terms of an otherwise successful offer more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

In signing its bid, Bristol agreed to be bound by the above-cited terms. We note that the CCC Form 3B, which the attorneys for Bristol contend indicates Bristol's intention to keep its bid open for at least 90 days, was not submitted by CCC to NAVAIR with Bristol's bid and apparently it was not intended to be submitted to NAVAIR with Bristol's bid. Even if the Form 3B was intended to be submitted to NAVAIR, it could not now be considered since the circumstances involved in its late submission do not come within any of the exceptions specified in the invitation for considering late bid modifications. Also, Bristol's "cover letter" which was not submitted by CCC to NAVAIR prior to bid opening may not be considered as a late bid modification under the invitation provisions. See ASPR 2–303.2.

No authority has been cited to support the proposition that CCC is exempt from the ordinary requirements regarding bid responsiveness. Neither are we aware that CCC may be accorded any special consideration, whether as a quasi-governmental agency or otherwise. As regards the contention that CCC acts as an agent of the Department of Defense in the handling of bids from Canadian firms, ASPR 6–504.1(b)(1) provides that "the Canadian Commercial Corporation should normally be the prime contractor" and it appears to us that CCC was acting in that capacity in this case.

We cannot apply the rationale of our decision reported in 41 Comp. Gen. 165 (1961) to the facts in this case. In that decision, it was held, quoting from the syllabus as follows:

An error made by a telegraph company in failing to transmit to a contracting agency the correct amount of a bid reduction offer which would have made the

offeror the low bidder is an error made by an independent agent over which the bidder does not have any supervisory control so that in such cases where the evidence conclusively establishes the correct modification and that the message was timely made, the rule against correction of errors when the result is the displacement of another bidder is not for application and, therefore, correction of the bid is permitted.

In that case, our Office permitted correction, after bid opening, of an erroneously transmitted telegraphic modification on the basis that the error had been made by an independent agency over which the bidder had no supervisory control. That decision does not apply here because the modification considered there only reduced the bid price and so, unlike the present case, the bid as modified could be considered since there was not involved a correction of a nonresponsive bid.

While application of the invitation provisions relating to the handling of "late" bid modifications may result in the failure of the Government to receive the benefit of lower prices, such provisions preserve and maintain the integrity of the formal competitive bidding procedures. Therefore, the bid of Bristol which we conclude provided only for a 60-day bid acceptance period must, on the record before us, be considered as nonresponsive to the 90-day bid acceptance period specified in the invitation.

We also believe that the bid of Hercules is nonresponsive. The language contained in Hercules' cover letter that the bid is "in response to Solicitation No. N00019–70–B–0014" is not sufficient to offset its failure to meet the bid acceptance terms of the invitation. In our decision B–150019, December 5, 1962, we held that a letter accompanying a bid qualified the bid and rendered it nonresponsive even though the letter started with the words, in all caps: "THIS LETTER DOES IN NO WAY QUALIFY MY BID." Similarly, in B–166284, April 14, 1969, we held that an overall offer to conform to the specifications can cure a bid deviation only if the offer makes it patently clear on the face of the bid that the bidder did in fact intend so to conform. In our view, the Hercules cover letter failed to cure the nonresponsiveness of its bid since it did not expressly or impliedly indicate that the bidder was offering the required bid acceptance period of at least 90 days.

Bristol's attorneys contend that if neither its bid nor that of Hercules is considered responsive and award may not be made to either of the two lowest bidders, then the proper procedure would be to cancel the invitation and readvertise the procurement. The basis for Bristol's position is its contention that the bid of the third lowest bidder is almost a quarter of a million dollars higher than its bid. Bristol's attorneys state that, while our Office has frequently said that an invitation should not be canceled after opening of bids without

a cogent reason, we have held that "a substantial prospective saving to the Government is sufficient justification for the cancellation of an invitation after bid opening." B–143263, December 22, 1960; B–151910, August 20, 1963; and B–154324, August 28, 1964.

ASPR 2–404.1(a) provides in part as follows:

> The preservation of the integrity of the competitive bid system dictates that after bids have been opened, award must be made to that responsible bidder who submitted the lowest responsive bid, unless there is a compelling reason to reject all bids and cancel the invitation. * * *

ASPR 2–404.1(b)(vi) permits the cancellation of invitations for bids after opening but prior to award where such action is consistent with (a) above and the contracting officer determines in writing that all otherwise acceptable bids received are at unreasonable prices.

We are advised that the bid of Thiokol includes a rental factor which we understand amounts to $158,962. The record before us indicates that this figure is an evaluation factor which is added to equalize the competitive advantage of a bidder utilizing Government property on a rent-free basis and does not represent an actual expenditure by the Government on this procurement.

However, as provided by the regulation referred to above, the question whether the difference between Bristol's bid and the lowest acceptable bid is sufficiently substantial to justify rejection of all bids and readvertisement is for determination by the contracting officer.

[B–160808]

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

Naval officers whose retirement on July 1, 1965, was found to be illegal in a judgment awarded June 14, 1968, are on the basis of a record correction on September 17, 1969, making their retirement effective August 1, 1969, with the grade of captain under 10 U.S.C. 6323, entitled to pay and allowances for the period subsequent to judgment, June 15, 1968, to July 31, 1969, reduced first by any retired pay received and then by the interim civilian compensation earned, the method used in computing the amount due under the Court of Claims judgment, which method is in accord with a Department of Defense directive and implementing naval regulations.

Military Personnel—Record Correction—Payment Basis—Leave Accrual

Pursuant to a "Stipulation of Settlement" agreement, the naval officers who were considered to have been illegally retired on July 1, 1965, having been awarded in 188 Ct. Cl. 1169, specific amounts to finalize the lump-sum leave payments received by them upon release from active duty on June 30, 1965, and to cover the period July 1, 1965, to June 14, 1968, the date of the judgment in which the officers were awarded active duty pay and allowances, the leave accrual for consideration in determining the pay and allowances due the officers upon correction under 10 U.S.C. 1552, of their retirement date from July 1, 1965, to August 1, 1969, is the leave that had accrued from June 14, 1968, to July 31, 1969, as the officers' leave balance in accordance with the settlement agreement had been reduced on date of judgment award to zero.

To Lieutenant (jg) H. F. Beerman, Department of the Navy, April 2, 1970:

Further reference is made to your letter dated December 29, 1969, file reference CCA:MW:gp, 7220 PL 220, and enclosures, forwarded here by first endorsement dated January 28, 1970, of the Director, Navy Military Pay System, requesting a decision whether offset of interim civilian earnings is required in connection with proposed payments of active duty pay and allowances to be made to Captain Richard W. Ricker, CHC, USN, retired, 151 350, and Captain Oswald B. Salyer, CHC, USN, retired, 170 593, incident to the correction of their naval records. Your request was assigned No. DO–N–1067 by the Department of Defense Military Pay and Allowance Committee.

The record shows that subsequent to an unfavorable board recommendation for active service continuation, the subject officers were released from active duty on June 30, 1965, and were retired effective July 1, 1965, with the grade of captain. Based on a contention that their retirement was not legally effected because the continuation board was illegally constituted, the officers contested the action of the Department of the Navy by a combined suit in the Court of Claims. The court upheld the officers' contention and on June 14, 1968, it awarded judgment to the officers for active duty pay and allowances less appropriate offsets. The determination of the amount of recovery was reserved pending further proceedings under Court Rule 47(c).

Pursuant to a stipulation of the parties, judgment was entered by the court on July 7, 1969 (188 Ct. Cl. 1169 (1969)), in the amounts of $1,000 for plaintiff Ricker and $5,000 for plaintiff Salyer. In determining the amount due under the judgment, the active duty pay and allowances that accrued to each officer was reduced by the retired pay he had received and also by the amount of his civilian earnings for the period covered by the judgment.

The papers forwarded with your request show that under date of September 8, 1969, the Board for Correction of Naval Records, acting upon applications submitted by the subject officers and after having considered the holding of the Court of Claims and its judgment in accordance with the stipulation between the parties, rendered a decision which, among other things, directed that the naval records of the officers be corrected to show that they were not retired on July 1, 1965, but were continued on active duty until July 31, 1969, and retired on August 1, 1969, with the grade of captain pursuant to 10 U.S.C. 6323.

The Board recommended that the Department of the Navy pay to each officer or other party or parties all monies lawfully found to be due from June 15, 1968, to July 31, 1969 (including payment for annual leave accrued for such period), less retired pay received by them for

such period. On September 17, 1969, the Assistant Secretary of the Navy approved the Board's decision and recommendation.

In your letter you say that in line with memorandum dated March 18, [12], 1969, in which the Department of Defense advised that net civilian earnings should be offset in cases where a decision of the Board for Correction of Naval Records restored members to active duty, each of the officers was requested on December 4, 1969, to furnish information as to the net monthly wages earned by him from July 1, 1965, to July 31, 1969.

In this connection, you refer to a letter dated December 11, 1969, from the officers' attorney. He stated in that letter that the correction action in the cases was taken on or before September 24, 1969, and that, as he was informed, a regulation was signed on October 28, 1969, by the Secretary of Defense requiring that "earnings received" be deducted from active duty pay found due as a result of a correction board action. Also he said that the corrections were made in these cases with the definite understanding that no deduction of earnings would be made and he contended that such corrections are final and conclusive on all officers of the United States. He expressed the view that the October 28, 1969, change to the regulation could not be retroactively applied and therefore advised that no useful purpose would be served by furnishing the requested information.

You say further that the regulations providing for deduction of civilian earnings in the settlement of such claims were approved by the Secretary of the Navy on September 30, 1969, and by the Department of Defense on October 28, 1969, and were published in the Federal Register on December 4, 1969. You express doubt concerning the effective date of those regulations particularly since the instant cases were decided prior to the date the regulations were approved, but subsequent to the Department of Defense memorandum dated March 18, [12], 1969. Accordingly, you request our decision whether the interim civilian earnings should be offset against the amount determined to be due each officer as shown on the separate claim vouchers.

In transmitting the papers here the Director, Navy Military Pay System, has added a copy of letter dated June 24, 1969, from the officers' attorney, and letter dated December 10, 1969, from the Executive Secretary, Navy Board for Correction of Military Records. It is shown in that correspondence that the officers' applications for the correction of their naval records were submitted on an understanding with representatives of the Department of the Navy that the officers' retirement, effective as of August 1, 1969, would be dependent on a finding of entitlement to active duty pay and allowances for the period June 15, 1968, to July 31, 1969, "without deduction for civilian earnings," plus payment for unused leave.

Also, the Director presented questions as follows:

In the event the decision in this case requires that both "retired pay" and civilian earnings be offset against the amount of active duty pay to which subject officers are entitled, a decision is requested as to which should be first setoff against active duty pay.

It is noted that credit has been included for 60 days unused leave on the date of retirement as changed by the Board for Correction of Naval Records with offset made for the 60 days credit previously paid. Your decision is further requested as to whether this offset is correct inasmuch as the original payment was made during a period for which settlement was made in accordance with a Judgment of the Court of Claims, full information on which is already available in your files.

Section 1552 of Title 10, U.S. Code, authorizes the Secretary of a military department, under procedures established by him and approved by the Secretary of Defense and acting through a board of civilian employees, to correct any military record of that Department when he considers it necessary to correct an error or remove an injustice. Subparagraph (c) thereof provides in pertinent part that the department concerned may pay from applicable current appropriations a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits if, as a result of correcting a record the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be.

The propriety of deducting earnings received from civilian employment in effecting settlement of back pay and allowances found due a member or former member of the uniformed services by reason of the correction of his military or naval records pursuant to the provisions of 10 U.S.C. 1552 was considered in our decision of March 10, 1969, 48 Comp. Gen. 580, to the Secretary of Defense. We advised him that should regulations be issued requiring the deduction of civilian earnings where appropriate in such cases, our Office would give effect to the regulations.

In accordance with that decision, the Assistant Secretary of Defense (Comptroller) advised the Assistant Secretaries of the military departments (financial management) by memorandum of March 12, 1969, that appropriate action should be taken to require deduction of interim civilian earnings in effecting settlement of back pay and allowances due by reason of the correction of military or naval records in certain cases pursuant to 10 U.S.C. 1552.

Department of the Navy regulations with respect to settlement of claims under section 1552 are contained in 32 C.F.R. 723.10. Subparagraph 723.10(c) thereof, as revised to reflect the directive of March 12, 1969, and published in 34 F.R. 19196, December 4, 1969, reads as follows:

(c) *Settlement.* (1) Settlement of claims shall be upon the basis of the decision and recommendations of the Board, as approved by the Secretary of the

Navy. Computation of the amounts due shall be made by the appropriate disbursing activity. In no case will the amount found due exceed the amount which would otherwise have been paid or have become due under applicable laws had no error or injustice occurred. Earnings received from civilian employment during any period for which active duty pay and allowances are payable will be deducted from the settlement. To the extent authorized by law and regulations, amounts found due may be reduced by the amount of any existing indebtedness to the Government arising from military service.

In decision of July 7, 1954, 34 Comp. Gen. 7, we held that the Secretaries of the Army, Navy, Air Force and Treasury are not vested with any discretionary power to make determinations of the specific amounts to be paid as a result of the correction of military or naval records pursuant to section 207 of the Legislative Reorganization Act of 1946, as amended (now codified in 10 U.S.C. 1552) and therefore the amounts authorized to be paid under section 207(b) of the act depend solely upon a proper application of the statutes to the facts as shown by the corrected record in each particular case. We have uniformly adhered to that decision since that date. See 40 Comp. Gen. 502 (1961); 42 *id.* 582 (1963); 44 *id.* 144 (1964); 45 *id.* 47 (1965).

The legislative history of the act of October 25, 1951, ch. 588, 65 Stat. 655, from which 10 U.S.C. 1552 is derived, makes it clear that the correction functions to be performed through record correction boards of civilian employees and the payment functions to be performed by regular military and naval disbursing officers to allow amounts due on the basis of corrected records were intended to be separate and distinct functions governed by different considerations and provisions of law and regulation. Such legislative history (97 Cong. Rec. 7588) shows that certain Committee amendments were offered to H.R. 1181, 82nd Congress, which were incorporated into that bill as it was finally enacted and became the act of October 25, 1951.

Three of such amendments (Nos. 1, 3 and 4) were suggested to the Chairman, Committee on Armed Services, House of Representatives, by our Office in a letter dated May 25, 1951. As indicated in that letter, the obvious purpose of these three amendments was to remove any tenable basis for a construction which would (1) give the Secretary concerned any discretionary authority to make a final (unreviewable) settlement based on a record correction, and (2) give a departmental settlement or payment (as distinguished from a correction of fact in a military record) any finality.

Consequently, any stipulation by the officers as to the payment they were to receive by reason of the correction of their records, or any determination by the correction board as to the basis on which their money claims would be settled, is without effect, the amounts due being for determination upon a proper application of the statutes and regulations to the facts as shown by the corrected records.

While one purpose of the corrections made in the records of Captains Ricker and Salyer may have been to establish a record of their retirement, such corrections also were made to extend the benefits of the Court of Claims judgment by providing a clear basis for the Department of the Navy to pay the officers active duty pay and allowances for a period subsequent to the period covered by such judgment. Their rights to be so paid arose on September 17, 1969, when the correction of certain facts in their records was approved by the Assistant Secretary of the Navy.

The payment of their claims for money based on their corrected records and the determination of the net amounts due on such claims, however, was in no way subject to the jurisdiction of the correction board but depended, in the first instance, upon the determination of the departmental paying authorities and the application by such authorities of the laws, regulations, directives, practices and policies applicable at the time of the consideration of the claims for payment.

One of such directives was the memorandum of the Assistant Secretary of Defense, dated March 12, 1969, which plainly instructed the highest financial officials of the military services that they should take appropriate action "to require deduction of interim civilian earnings in such correction board cases." The terms of this directive indicate that it was to be effective immediately and it is our view that it was intended to apply to all claims of the type here involved which were not paid prior to its date.

In addition, however, the Navy regulations implementing that directive were approved by the Secretary of the Navy on September 30, 1969, at about the time the officers' claims "for monetary benefits due by reason of Correction of Naval Record" were submitted. Also, as indicated above, such Navy regulations were approved by the Department of Defense on October 28, 1969, while such claims were under consideration in the Navy Finance Center.

Under these circumstances, and since the civilian earnings of Captains Ricker and Salyer during the period covered by the Court of Claims judgment were deducted in determining the amounts due for that period, we have very serious doubt that these officers should be considered as having a legal right to pay and allowances for the subsequent period here involved without deduction of their civilian earnings for such subsequent period, particularly since the Court of Claims has consistently required deduction of civilian earnings during a specified period from active-duty military pay and allowances found due for the same period because of illegal separation from the service. See, for example, *Egan* v. *United States*, 141 Ct. Cl. 1 (1958); *Clackum* v. *United States*, 161 Ct. Cl. 34 (1963); *Garner* v. *United States*, 161 Ct. Cl. 73 (1963).

It has long been the rule that the Government accounting and administrative officers should reject or disallow all claims as to which they believe there may be a substantial defense in law or as to the validity of which they are in doubt. See *Longwill* v. *United States*, 17 Ct. Cl. 288, 291 (1882); *Charles* v. *United States*, 19 Ct. Cl. 316, 319 (1884). We, therefore, must conclude, in answer to the primary question presented, that Captains Ricker and Salyer are not entitled to active-duty pay and allowances for the period June 15, 1968, to July 31, 1969, without deducting from the amount otherwise due each of them on that account his earnings from civilian employment during that period.

The claim vouchers included in the file forwarded here show that in computing the amounts due there was set-off against the gross pay and allowances determined to be due each of the officers the retired pay which he had received for the period June 15, 1968, to July 31, 1969. The departmental regulations do not prescribe whether, in a case such as this, the retired pay or civilian earnings should first be set off from the active duty pay due by reason of the correction of the records. The correction of records is authorized, however, to correct an error or remove an injustice. In the absence of administrative regulations or any showing of intent to the contrary, we believe that the purpose of the statute will best be served by first setting off the pay required to be recovered by reason of the correction of records and then deducting civilian earnings from the balance due.

If civilian earnings should be first deducted, the balance available for setoff might be less than the pay required to be recovered because of the correction of records, leaving the member or former member indebted to the Government for the balance. We doubt that such a result was intended under the administrative regulations. Accordingly, the retired pay in this case should first be set off.

The second question presented by the Director, Navy Military Pay System, concerns the propriety of the inclusion of 60 days of annual leave on the date of each officer's retirement as changed by the Board and the corresponding offset of the lump-sum leave payment for 60 days of annual leave on June 30, 1965, in view of the payments ($1,000 and $5,000, respectively) made to them under the judgment of the Court of Claims. The "Stipulation of Settlement" on which the Court granted judgment to the officers on July 7, 1969, provided, among other things, that—

> c. As a further condition of the compromise reached, and to settle all controversy concerning the question of compensation relating to leave accrued up to June 14, 1968, the parties agree that defendant will not, as a part of the instant proceeding, take a credit for the $2,486.16 lump sum leave payments paid to each plaintiff as set forth in paragraph 2 above. Plaintiffs, in turn, each agree that (in proceedings before the Board for Correction of Naval Records or otherwise) they will not ever claim a lump-sum leave payment for the accrued leave (or its equivalent) represented by the said $2,486.16 payment, and that they will

promptly refund to the Government any additional payment for said leave which might be made even though not claimed by them. Plaintiffs further agree that under no circumstances will they seek to have their Navy leave accounts reflect an accrual (or re-accrual) of the leave (or its equivalent) for which the $2,486.16 payments have been made; but it is agreed that this settlement does not concern, and shall in no way affect plaintiffs' right to seek compensation in any appropriate forum for leave which is accrued to their credit subsequent to June 14, 1968.

The effect of the above-quoted provision in the stipulation is to eliminate from consideration the payment made by the Navy for the 60 days of leave which the officers had accrued prior to their release from active duty on June 30, 1965, and at the same time reduce their leave balance to zero as of June 14, 1968, in determining their right to pay for any leave that might accrue after that date.

Inasmuch as it was stipulated that the officers would have the right to claim for any leave which might accrue to their credit subsequent to June 14, 1968, the amount due as shown on each of the vouchers should be recomputed to eliminate the lump-sum payment proposed for 60 days of leave and the deduction of the amount paid on June 30, 1965, for such period of leave and to substitute in lieu thereof only the amount due for leave accruing for the period June 15, 1968, to July 31, 1969.

Accordingly, the vouchers are returned for recomputation and payment of any amount due on the basis as indicated above after obtaining the necessary information as to the officers' civilian earnings during the period involved.

[B–169095]

Travel Expenses—Official Business—Interruption Due to Illness or Death in Family—Military Personnel

An enlisted member of the uniformed services who upon arrival at a temporary duty station learns of the death of his father-in-law and is orally informed that his temporary duty orders will be canceled, that he may depart on leave, at the end of which period he should return to his permanent duty station, is not entitled to reimbursement for the travel expenses incurred, even though subsequently he is returned to the temporary duty station, or that formal orders issued to support the oral directions. The travel expenses did not relate to the activities or functions of the member's service and, therefore, were not incurred on public business, and having been induced by the personal needs of the member, reimbursement of the travel expenses may not be authorized.

Travel Expenses—Military Personnel—Official Business Requirement

The entitlement of a member of the uniformed services to travel at Government expense is for determination on the basis of whether the travel is performed on public business—that is that the travel relates to the activities or functions of the member's service—or is performed solely for personal reasons. If before completing a temporary assignment, a member's assignment is changed by competent orders, as defined in paragraph M3001 of the Joint Travel Regulations, because of the bona fide needs of the service, the fact that the change might also be beneficial to, or in accordance with the needs of the member, would not defeat his entitlement to the travel authorized incident to the change in assignment.

To R. K. O'Malley, Department of the Air Force, April 2, 1970:

Reference is made to your letter dated December 30, 1969, and enclosures, forwarded here by the Per Diem, Travel and Transportation Allowance Committee (PDTATAC Control No. 70–7), requesting a decision as to the propriety of payment of the claim of Staff Sergeant James F. Bush, FR 063 32 3232, USAF, for reimbursement of travel expense incurred while traveling from his temporary duty station, Holloman Air Force Base, New Mexico.

By Special Order No. TA 4285, dated June 24, 1969, Sergeant Bush was directed to proceed effective July 5, 1969, from Lawrence G. Hanscom Field, Bedford, Massachusetts, to Holloman Air Force Base, New Mexico, and to White Sands Missile Base, New Mexico, on a temporary duty assignment of approximately 27 days to participate in the cloud physics research program under the Cloud Puff series, and upon completion thereof he was to return to his duty station.

You say that upon arrival by Government aircraft at Holloman Air Force Base on July 5, 1969, the member was advised by telephone that his father-in-law had just died. Thereupon, the Project Director terminated Sergeant Bush's temporary duty and instructed him to return home to take whatever leave was necessary and, upon completion of such leave, he was to return to his permanent duty assignment at Hanscom Field. No written orders terminating the temporary duty or authorizing emergency leave were submitted with the transmitted file.

You also say that Sergeant Bush was unable to obtain a transportation request for his return travel and he traveled at his own expense by commercial air to Boston, Massachusetts, at a cost of $124.95, including tax. He signed in at his duty station on July 6, 1969. However, it appears that he returned to a duty status at his permanent duty station on July 9, 1969, since he was in a leave status on July 7 and 8, 1969.

Special Order TA–4554, dated July 8, 1969, directed the member to return to Holloman Air Force Base and White Sands Missile Range on or about July 13, 1969, to resume his temporary duty assignment, upon completion of which he was to return to his duty station. You state that Sergeant Bush reported at his temporary duty station on July 13 and upon completion of his temporary duty assignment, July 30, 1969, he returned to his permanent duty station.

Sergeant Bush submitted a travel voucher requesting reimbursement for the cost of the commercial airline ticket plus tax, from Alamogordo, New Mexico, to Boston, Massachusetts, for travel performed July 5–6, 1969. You express doubt as to the propriety of payment because the basis for terminating his temporary duty assignment was

the death of his father-in-law. You refer to a somewhat similar case pertaining to a civilian employee on temporary duty as discussed in 47 Comp. Gen. 59 (1967).

You point out that the member's temporary duty assignment was not completed at the time of his departure from his temporary duty station on July 5, 1969, and that his presence there was subsequently required to effect completion of that assignment. You therefore present the following questions for decision:

a. May a member of the uniformed services be authorized return transportation expenses when he has been directed by competent authority to abandon his official assignment for personal reasons, and even though he was subsequently required to return to the temporary duty point to complete a portion of the assignment?

b. If the answer to question a is No, and in a similar situation where the assignment has been partially but not fully completed and the member is not required to return to the temporary duty point, would return transportation of [at] Government expense be allowable?

c. If the answer to question b is No, and in a similar situation if the major portion of the TDY assignment had been completed, and the member's presence for all practical purposes was no longer required because his duties could have been absorbed by another member of the TDY party, would his mission be considered to have been completed as directed, and transportation to home station authorized at Government expense?

The travel of members of the uniformed services at Government expense is governed by the Joint Travel Regulations, promulgated pursuant to provisions in section 404 and other sections of Title 37, U.S. Code. Paragraph M3050–1 of the regulations provides that members of the uniformed services are entitled to travel and transportation allowances as authorized in accordance with existing regulations, only while actually in a "travel status" and that they shall be deemed to be in a travel status while performing travel away from their permanent duty station, *upon public business*, *pursuant to competent travel orders*, including necessary delays en route incident to mode of travel and periods of necessary temporary or temporary additional duty.

Paragraph M3000–1, Joint Travel Regulations, provides that no reimbursement for travel is authorized unless orders by competent authority have been issued therefor. Paragraph M3001 defines a competent travel order as a *written* instrument issued or approved by the Secretary of the department concerned, or such person or persons to whom authority has been delegated or redelegated to issue travel orders, directing a member or group of members to travel between designated points.

Paragraph M6454 of the regulations provides that expenses incurred during periods of travel under orders which do not involve public business are not payable by the Government. The words "public business" as used in the regulations relate to the activities or functions of the service to which the traveler is attached, and the travel and tem-

porary duty contemplated is that which reasonably may be considered as having been performed in the accomplishment of the purposes and requirements of such activities or functions.

It has been consistently held that the travel allowances authorized for members of the uniformed services are for the purpose of reimbursing them for the expenses incurred in complying with the travel requirements imposed upon them by the needs of the services over which they have no control, not for expenses of travel induced by personal reasons. Such allowances are not payable for travel performed solely for leave purposes, the travel being considered as made for personal reasons and not having been performed on public business. *Perrimond* v. *United States*, 19 Ct. Cl. 509; *Day* v. *United States*, 123 Ct. Cl. 10, 18; 30 Comp. Gen. 226 (1950); B–150518, February 11, 1963; and B–156903, June 22, 1965. *Cf.* 42 Comp. Gen. 27 (1962). The decision cited in your letter, 47 Comp. Gen. 59 (1967), also applies this principle, it being there stated that where the sole basis for terminating an employee's assignment is personal, there is no entitlement to travel or subsistence at Government expense.

No competent orders have been furnished as authority for the return travel performed July 5–6, 1969. However, even if such orders had been issued, Sergeant Bush performed such travel from the temporary duty station for personal reasons and not on public business. Accordingly, there is no authority for the payment of the member's claim and the submitted voucher will be retained here.

The questions you have presented, except as they relate to the claim of Sergeant Bush, are not properly before this Office for consideration and no specific answer can be given to the questions. As a general proposition, entitlement to travel at Government expense in the circumstances shown would be for determination on the basis of whether such travel is performed on public business or solely for personal reasons. If, before completing his temporary duty assignment, a member's assignment is changed by competent orders because of the *bona fide* needs of the service, the fact that such change might also be beneficial to, or in accordance with the needs of, the member would not defeat his entitlement to travel allowances otherwise authorized incident to such change in assignment.

[B–169138]

Witnesses—Administrative Proceedings—Corporation, Etc., Summoned

The word "person" as used in 26 U.S.C. 7602, which authorizes the issuance of a summons incident to an inquiry into the "liability of any person for any internal revenue tax," means, as defined in section 7701(a)(1), "an individual, a trust, estate, partnership, association, company or corporation" and, therefore, when

a summons is directed to a corporation or an unincorporated association to compel attendance as a witness at a hearing before an internal revenue officer, the witness fees and allowances authorized in 5 U.S.C. 503(b) for appearances at agency hearings and prescribed in 28 U.S.C. 1821, to compensate persons appearing as witnesses, are payable directly to the business organization and not to the individual appearing on its behalf, as the organization incurs the same costs to comply with a summons as does a natural person.

To the Secretary of the Treasury, April 2, 1970:

Reference is made to the letter of February 18, 1970, from the Assistant Secretary for Administration requesting a decision as to whether witness fees and allowances provided for by 5 U.S.C. 503(b) may be paid to other than a natural person to whom a summons has been directed. We understand informally from a member of your staff that you are specifically concerned with whether such fees may be paid to banks and other unincorporated associations and corporations which are summoned in regard to tax audits and, if so, to whom such fees are payable.

Section 503(b) provides that a witness, not further defined, is entitled to the fees and allowances allowed by statute for witnesses in the courts of the United States when he is subpoenaed to, and appears at, an agency hearing. Section 1821 of Title 28 regulates the amount of such fees.

The Fifth Circuit Court of Appeals, in *Roberts* v. *United States*, 397 F. 2d 968 (1968), has held that both taxpayers, whose tax liability is under investigation, and witnesses, who have knowledge of the affairs of these taxpayers, who are summoned to, and appear at, proceedings before an internal revenue officer, are attending a "hearing" within the meaning of that word in 5 U.S.C. 503(b) and are entitled to the payment of witness fees as provided by that section for their appearance. This Office reached a similar conclusion in 48 Comp. Gen. 97 (1968). Based upon these decisions, you ask for a decision as to whether witness fees are payable to other than a natural person, such as a corporation or an unincorporated association, to whom a summons has been directed.

We understand that in a tax audit a summons is directed to a corporation or unincorporated association in order to require the production of books and records and to take testimony validating the books and explaining the entries therein. The business organization itself can then select the employee who can best testify concerning the books and records. We further understand that when the testimony of a particular officer or employee is desired, he is summoned separately.

Under section 7602 of Title 26, United States Code, the Secretary of the Treasury, or his delegate, relevant to an inquiry into the liability of any person for any internal revenue tax, is authorized to summon "* * * the person liable for tax or required to perform the act, or any

officer or employee of such person, or any person having possession, custody, or care of books of account containing entries relating to the business of the person liable for the tax or required to perform the act, or any other person the Secretary or his delegate may deem proper, to appear before the Secretary or his delegate at the time and place named in the summons and to produce such books, papers, records, or other data, and to give such testimony under oath as may be relevant or material to such inquiry * * *."

A "person" under 26 U.S.C. 7701(a)(1) is defined as "an individual, a trust, estate, partnership, association, company or corporation." Therefore, a summons issued under section 7602 may lawfully be directed to a corporation or unincorporated association to compel its attendance as a witness at a hearing before an internal revenue officer.

One of the principal purposes of the Code provisions providing for the payment of witness fees is to compensate persons to whom a summons is directed for the expenses incurred for complying therewith. A business organization which is summoned as a witness incurs the same costs of compliance as does a natural person. Since nothing in the wording of the statutes here involved (5 U.S.C. 503(b) and 28 U.S.C. 1821) or anything in the legislative histories of these statutes indicates a congressional intent to distinguish between natural persons and business organizations, we believe that corporations and unincorporated associations which are summoned under 26 U.S.C. 7602 are entited to the payment of the same witness fees as are natural persons. Such fees are payable directly to the business organization and not to the individual who appeared on its behalf.

[B-166532]

Contracts—Subcontracts—Administrative Approval—Review by the United States General Accounting Office

Although generally the contracting practices and procedures employed by prime contractors in the award of subcontracts are not subject to the statutory and regulatory requirements which govern contract procurement by the United States, in view of the clause in a contract for the operation of an ammunition plant that provided for Government approval prior to award of a subcontract, the United States General Accounting Office reviewed the cancellation of two requests for quotations (RFQ) and the issuance of a third solicitation by the prime contractor, and even though criticizing the failure to notify the protesting subcontractor of the rejection of its bid under the first RFQ because of a negative Government preaward survey and its erroneous use to exclude the subcontractor from participating in the second RFQ, concluded the negotiations under the third solicitation based on required revised specifications were not prejudicial to the protestant.

To the Secretary of the Army, April 7, 1970:

By letters, with enclosures, dated May 27, 1969, and January 21, 1970, the Deputy Director of Procurement & Production and the

Deputy Director for Procurement, Directorate of Requirements and Procurement, Headquarters United States Army Materiel Command (AMC), Washington, D.C., respectively, furnished our Office with administrative reports relative to the protest of Lombard Corporation against award to any other offeror under projects 2709 and 2710, issued by Chamberlain Manufacturing Corporation in its capacity as contractor-operator of the Scranton Army Ammunition Plant under cost-reimbursable facilities contract No. DA-36-034-AMC-0163(A), as amended, with the United States Army Ammunition Procurement and Supply Agency (APSA), Joliet, Illinois.

Projects 2709 and 2710 were generated by modification No. 27 to the contract. By the terms of this amendment, Chamberlain agreed to procure and install at Scranton two press lines, with associated parts, for the present purpose of forging 155-mm. projectiles. Steps to fulfill this requirement were initiated by request for quotations (RFQ) MP-X-2709 & 2710 dated October 1, 1968. This solicitation was canceled and followed by RFQ MP-X-2709/10 dated January 24, 1969. During the evaluation of proposals received in response to this second solicitation, Lombard by telegram of March 26, 1969, and letter of April 4, 1969, requested our review of the procurement. Lombard's request was supplemented by letters dated June 16 and 20, 1969, from its counsel, Sellers, Conner & Cuneo.

Generally, counsel for Lombard maintained that the cancellation of the first solicitation was erroneous and further alleged that Lombard was unfairly excluded from competition on the second solicitation. It was urged that we should direct reinstatement of the first solicitation for the purpose of making award to Lombard thereunder, or, at the very least, that the requirement be resolicited and Lombard afforded an equal opportunity to participate.

On March 31, 1969, Chamberlain was requested by the Army to suspend action under the second solicitation. On July 9, 1969, a conference was held in our Office to discuss Lombard's objections. Representatives of Chamberlain Scranton Army Ammunition Plant, APSA, Headquarters AMC and counsel for Lombard were in attendance. At this conference, representatives of our Office raised certain objections (which will be discussed *infra*) relative to the exclusion of Lombard and the adequacy of the first and second solicitations. Subsequently, we were advised by letter dated September 22, 1969, from the Director of Procurement and Production, AMC, that the second solicitation had been canceled and all sources, including Lombard, had been resolicited. This was accomplished by RFQ MP-X-2709/10-C dated August 20, 1969.

Although Lombard participated in the third solicitation, its proposal was determined to be nonresponsive and was rejected. By letter

of December 10, 1969, counsel for Lombard formally renewed its protest against award to any other offeror and further action under the third solicitation has been suspended by the Army pending our decision. Counsel continues to maintain that award should be made to Lombard under the first solicitation, or, with respect to the third solicitation, that Lombard should, as stated in its letter of March 17, 1970, be given a "conditonal award" and that further negotiations be conducted with Lombard by Chamberlain.

From our review of the record before us, we must deny Lombard's protests; however, we believe the circumstances of this procurement as discussed below warrant your review and possible corrective action insofar as subcontract procurements by prime contractors are concerned.

With respect to the scope of our review, it must be acknowledged at the outset that, as the administrative reports have emphasized, by the terms of its contract with APSA, Chamberlain is an independent contractor and not a purchasing agent of the United States. In view of this status, we have recognized that the contracting practices and procedures employed by prime contractors of the United States in the award of subcontracts are generally not subject to the statutory and regulatory requirements which would govern direct procurement by the United States. 41 Comp. Gen. 424 (1961); 47 *id.* 223 (1967). Chamberlain's status must, of course, be considered in light of the provisions of the contract. In accordance with paragraphs 23-201.2 and 7-702.33 of the Armed Services Procurement Regulation (ASPR), Chamberlain's contract with APSA contains the clause entitled "Subcontracts (1967 APR)," prescribed in ASPR 7-203.8(a). This clause requires Government approval prior to Chamberlain's award of a subcontract of the magnitude involved in this procurement.

We have expressed the view that approval should not be granted if the award would be prejudicial to the interests of the United States, particularly since the cost of the procurement will ultimately be borne by the United States. 37 Comp. Gen. 315 (1957); 36 *id.* 311 (1956). Such determination will not be questioned by our Office in the absence of illegality or a showing that a proposed award is definitely against the interests of the United States. 37 Comp. Gen. 315, *supra*, at page 318.

The question of whether subcontract approval would be prejudicial to the interests of the United States is one that must be resolved by the responsible contracting officials of the Government after a *thorough* consideration of the particular facts and circumstances of each procurement. 46 Comp. Gen. 142 (1966). Generally, we believe that the frame of reference guiding such determination should be the Fed-

eral norm that is embodied in the procurement statutes and implementing regulations. *Cf.* ASPR 23-202. Nevertheless, it is evident from the existence of permissible variations in prime contracting practices and procedures that every detail of the Federal norm is not for application. (This is not to say, however, that where, as a result of Government intervention, the prime contractor's procurement practices and procedures mirror Federal procurement procedures, the Federal norm should not be applied (*Cf.* 36 Comp. Gen. 311, *supra*), or, for that matter, that this norm should not be adopted and applied wherever feasible and practicable under the circumstances and conditions of the prime contract.)

For the purposes of our inquiry here, the initial administrative report contains the following statement by the contracting officer's representative, which indicates generally Chamberlain's subcontracting procedures:

> Chamberlain Manufacturing Corporation effects procurement by the Sealed Bid Method, whereby a specification and request for quotas is issued to industry, and seal bid opening times are specified. Bids are opened in accordance with provisions of ASPR, by seal bid committee, technical evaluation made by Chamberlain Manufacturing Corporation, and a recommendation made to the Government for award of contract. After Government evaluation and concurrence, award is then made by Chamberlain Manufacturing Corporation.

Although the foregoing would suggest that formal advertising procedures are in effect, we were informally advised that Chamberlain does not disclose prices and reserves the right to discuss all aspects of responses received from offerors. In view of this advice, a decision by contracting officials to approve an award recommendation by Chamberlain should be guided by the general principles pertaining to contracts negotiated directly by the Government. In this connection, the touchstone of federally negotiated procurements is articulated in 10 U.S.C. 2304(g), as follows:

> * * * proposals, including price, shall be solicited from the maximum number of qualified sources consistent with the nature and requirements of the supplies or services to be procured, and written or oral discussions shall be conducted with all responsible offerors who submit proposals within a competitive range, price, and other factors considered * * *

At this point, we must note that insofar as the first and second solicitations are concerned, the record suggests a reluctance to utilize the negotiation right reserved by Chamberlain, particularly when contrasted with the conduct of negotiations under the third solicitation.

Turning now to the merits of the protest, the record contains a statement prepared by Chamberlain which outlines its view of the events leading up to Lombard's protest, the pertinent portions of which are as follows:

> 2. Selection of prospective sources was accomplished by Chamberlain through the use of Thomas Register, Mac Rae's Blue Book, and the Conover Mast

Directories, coupled with Chamberlain's experience in the forging field. * * * concerns were invited to submit sealed proposals by the close of business October 25, 1968, with opening set for October 28, 1968.

* * * * * * *

3. Proposals were received from Lombard Corporation of Youngstown, Ohio and Verson Allsteel Press Company of Chicago, Illinois. Both proposals were preceded by telegram bids dated October 25, 1969. Formal proposals dated October 25, 1969 from Lombard and October 29, 1969 from Verson were received by Chamberlain.

* * * * * * *

5. The Lombard bid price was viewed by Chamberlain Manufacturing Corporation as being extraordinarily low. In response to Chamberlain Manufacturing Corporation's telephone request, Lombard provided by letter dated November 6, 1968 and received November 11, 1968, its background of past performances. In the interim, considering that the Government's own cost estimate for the system was [substantially higher than Lombard's price], together with experience in recent press procurements, Chamberlain Manufacturing Corporation believed there was cause to investigate further. As a result a Dun and Bradstreet report was requested and received by Chamberlain Manufacturing Corporation on November 4, 1968. The report only amplified Chamberlain's doubts of financial responsibility.

6. Chamberlain Manufacturing Corporation, realizing the importance of the presses to its own production needs and, more important, to the future needs of the Government, was not willing to commit a contract of the size contemplated until there was sufficient assurance of responsibility. Consequently, on November 14, 1968, in a letter to the [contracting officer's representative] at Scranton Army Ammunition Plant Government guidance was requested. In response, the Government requested the [Defense Contract Administration Services Office (DCASO)] in Akron to perform a pre-award survey of the Lombard Corporation. The survey dated December 17, 1968 recommended no award.

7. Chamberlain Manufacturing Corporation was advised on December 17, 1968 of the pre-award survey results, which advice was formalized in a letter dated December 26, 1968 from the Contracting Officer's Representative to Chamberlain. The letter requested further that no award be made to Lombard and that resolicitation be effected.

8. On December 18, a notice of rejection was mailed to Verson. A search of the Chamberlain files does not reveal that a rejection notice was dispatched to Lombard, although there is little doubt that such was the intent. Chamberlain must, therefore, conclude that through its own inadvertence, Lombard was not notified of the bid rejection.

9. On December 19, 1968 a letter notice of intent to resolicit bids was sent to eight (8) sources. Lombard was not included in the list of solicitees. On January 23, 1969, formal bid packages were submitted to eight (8) sources. The return date for bids was established as February 28, 1969. Lombard was precluded from bidding in this second solicitation because of the pre-award findings of DCASO. Chamberlain Manufacturing Corporation, exercising its judgment as an independent contractor, felt that to solicit Lombard again would be an imprudent act, particularly after the Government pre-award survey recommended no award and, too, after the Government requested specifically that no award to Lombard be made.

10. The second solicitation resulted in the following responses:

* * * * * * *

Of the five (5) bids received, two (2) were not to specification, two (2) were closest to specification and one (1) was in accordance with the specification.

The record supports the conclusion to be drawn from Chamberlain's chronology: the Government directly participated in the decision to reject Lombard's proposal and to exclude it from participation in the resolicitation. In this connection, the actions taken by the contracting officer's representative, and the reasons therefor, are outlined in his statement as follows:

4. Upon receipt of request for assistance from Chamberlain Manufacturing Corporation, I requested a preaward survey be conducted by DCASO in Akron, Ohio. Upon notification from DCASO that the survey was unsatisfactory, a decision was made by me to advise Chamberlain Manufacturing Corporation to make no award. This decision was based on three factors.

a. Severe difference in quotes received from two vendors.

b. The unsatisfactory preaward survey.

c. The opinion that two quotes did not offer sufficient competitive bidding in a procurement of this magnitude.

5. I, therefore, requested Chamberlain Manufacturing Corporation, to prepare new specifications, with slight modifications and resubmit to industry. These modifications pertain to the elimination of a fire retardant oil requirement and an increase in the structural requirements of one press. To obtain adequate bids, Government assistance was offered, and utilized, in soliciting new quotes.

Key, of course, to Lombard's exclusion is the negative preaward survey. While Chamberlain suggests that it was "exercising its judgment as an independent contractor" in not soliciting Lombard, it was guided by the negative DCASO preaward survey and the specific request that no award be made to Lombard. Moreover, it is not maintained that Chamberlain's decision not to resolicit Lombard was without the approval of the responsible Government officials, for, as the contracting officer's representative states, "Government assistance was offered, and utilized, in soliciting new quotes." Thus, we believe that the exclusion of Lombard cannot be justified by attributing it solely to an exercise of discretion by Chamberlain.

We further believe that exclusion on the basis of the preaward survey was improper. This view was expressed by representatives of our Office during the conference on July 9, 1969. In this connection, the import of the survey is, in our opinion, correctly summarized by Lombard's counsel in a letter of June 16, 1969:

The report of the Industrial Specialist * * * found that Lombard is technically capable, has a satisfactory performance record, and is current on two other Government contracts. Nevertheless, [the] over-all recommendation was for no award because at the time of the survey Lombard had no firm quotes from vendors and could not state which subcontractors would be utilized. Similarly, the engineering evaluation * * * found that Lombard's proposed system met the requirements of the specification, that Lombard is technically capable of providing engineering for the proposed system, but that the producing subcontractor was not known at that time. Finally, the Pre-Award Monitor * * * found that Lombard has an adequate technical and design staff and that Lombard's subcontractors currently being utilized for present Government procurement are satisfactory, but that since Lombard proposed no subcontractors for production and since no firm quotes were available for materials or parts, no award was recommended.

The survey, then, evidences the lack of a firm price and the failure to make firm commitments with Lombard's proposed subcontractors. The record further suggests to us that Lombard's quote was the result of a business judgment, the validity of which was protected to some extent by the price escalation provision covering labor and materials contained in its proposal. Further, counsel's letter of June 16 alleges that the price differential between the Lombard and Verson quotes results from:

* * * Lombard's having employed a much less expensive accumulator pump system approach. Verson utilized a direct pumping approach. Lombard's approach required the use of *twelve* pumps for a total output of 1,416 gallons per minute and *three* 400 hp motors and starters for a total of 1,200 hp. In his pre-award evaluation report, the Government engineer specifically noted that Lombard chose the central pump-accumulator configuration *"in order to eliminate the need for many pumps and motors."* * * * To accomplish the same work, Verson's approach required *eighty-eight* pumps for a total output of 9,504 gallons per minute and *forty-four* 300 hp motors and starters for a total of 13,200 hp. * * *

This would appear to offer a partial explanation for Lombard's low price, as is apparently recognized by Chamberlain in its letter of December 18, 1968, to Verson, when it stated that the rejection of Verson's proposal was "influenced * * * by the fact that [its] pricing was based on direct pumping and far out of line with accumulator press prices."

We do not question Chamberlain's judgment that Lombard's price was unreasonably low, and, certainly, the preaward survey confirms the lack of price definition. Nevertheless, the defects revealed by the survey suggest negotiation to remove the doubt, rather than exclusion from the subsequent resolicitation.

Moreover, the propriety of Lombard's exclusion is even more questionable since, as Chamberlain acknowledged in its letter of November 14, 1969, requesting Government assistance, Lombard's proposal "seem[ed] to be technically competent." Further, the merit of its approach is recognized by the fact that the second solicitation expressly drew attention to the accumulator pump approach proposed by Lombard as an acceptable method of meeting the intended requirement. Here, we note that Lombard has quite understandably viewed this specification modification as a further indication of the unfairness of its exclusion.

Our objections to the exclusion of Lombard were voiced at the conference of July 9, 1969. In addition, we questioned the adequacy of the solicitations, particularly from the standpoint of eliciting sufficient informational responses from proposed sources to permit evaluation. In view of our doubts in this regard, we could interpose no objection to the suggestion by Chamberlain and Army representatives that cancellation and resolicitation would be the most appropriate way of correcting the specifications, permitting Lombard's participation, and recognizing the changed circumstances since the filing of Lombard's protest.

By letter dated February 27, 1970, Chamberlain, at our request, formally indicated the reasons, suggested by the record, for requiring, in its judgment, resolicitation, as follows:

First: The requirement grew from two (2) press lines (6 presses) to three (3) press lines (9 presses). This increase of 50% in the requirement led Chamberlain to believe that the best interests of the government would be best subserved by again reviewing the procurement and obtaining the widest of competition.

Secondly: During the period of resolicitation under RFQ–MP–X–2709/10 dated January 24, 1969, Industry response indicated that the fullest of competition had not been effected. At that time the specification was limited to presses of a hydraulic type. Two companies submitted alternate bids to provide a mechanical type press to perform a dual operation (cabbage and pierce). Such a system would reduce the press line configuration from three (3) presses per line to two (2) presses per line. Also, the suggested mechanical press system appeared to offer a break-through in the hot forging process, particularly in the area of speed of operations and minimization of ancillary equipment with their attendant maintenance problems. Again, Chamberlain viewed this development as an opportunity to widen the total competitive base by including that part of industry most knowledgeable in mechanical press construction.* * *

Thirdly: As a result of the first and second solicitations on October 1, 1968, and January 24, 1969, respectively, it became evident to Chamberlain that the specifications as written were inadequate to assure such technical response from industry as to permit a total and objective evaluation prior to award. Although the specifications provided basic functional and other technical requirements, it lacked totally specific guideline requirements for technical proposal submission so as to permit necessary objective evaluation.

The systems being procured are not an off-the-shelf type of equipment. Each system is, generally, specially designed for the task to be accomplished. Engineering wise design and technical approach may vary greatly. Only through a detailed technical proposal such as envisioned in the ultimate and last specification, may the government, through Chamberlain, be assured that a procurement of this magnitude will provide the desired result, namely, mass production of forgings at specified production rate.

The third solicitation was designed to require the detail which Chamberlain determined to be necessary to permit objective evaluation. The requirements of the solicitation are summarized in a letter dated January 23, 1970, from Chamberlain, as follows:

The specification and the request for proposal is so structured as to permit industry to submit proposals on various alternatives as follows:

1. A three (3) press system consisting of three (3) separate *hydraulic* presses to perform cabbage, pierce, and draw operations.
2. A two (2) press system consisting of one (1) *mechanical press* to perform the cabbage and pierce operations and one (1) *hydraulic press* to perform the draw operation.
3. A two (2) press system consisting of (1) *hydraulic press* to perform the cabbage and pierce operations and one (1) *hydraulic press* to perform the draw operation.

The specification set forth specifically certain physical, dimensional and functional requirements. In addition, the specification set forth a series of technical and pricing data requirements to be submitted by each offeror. In summary, and identified to each paragraph, the specification required that each proposal contain technical descriptions, information and affirmations as relate to the areas in the various sections, as follows:

PARAGRAPH 1

The physical, dimensional and functional requirements for hydraulic presses.

PARAGRAPH 2

The physical, dimensional and functional requirements of a mechanical press to perform the cabbage/pierce operations.

PARAGRAPH 3

Parameters related to tooling requirements for each press system proposed.

PARAGRAPH 4

Parameters related to handling and transfer equipment for each press system proposed.

NOTE: The specification further required that each offeror separately price various items and sub-items under Paragraphs 3 and 4 above.

PARAGRAPH 5

Complete descriptions related to press construction, proposed shuttle design, hydraulic equipment, motors, electricals and other controls including such items as dimensional, functional and weight data.

In addition to the foregoing, the specifications, under a general heading "General Prospectus," provides:

1. That the offeror submit eleven (11) separate items of price and delivery data on a pricing summary format furnished with the solicitation. These eleven (11) items, with the related subitems total 89 lines of pricing data.

2. Approximately twenty-five (25) separate items related to general requirements, informational data and instructions.

As we have indicated, Lombard's proposal in response to this solicitation was determined by Chamberlain to be nonresponsive for failure to provide the detailed technical and pricing responses. Such determination has been concurred in by responsible Army officials.

Counsel for Lombard in its letter of February 11, 1970, maintains that "from a recognized standard of good practice in the design of such industrial systems, the minute detail insisted upon by Chamberlain [in the third solicitation] is overreaching and a well-laid trap to eliminate Lombard as a responsive bidder on the third solicitation," and suggests in its letter of March 17, 1970, that "The kind of detail demanded * * * is that which is customarily resolved after award." In support of its contention, counsel refers to the brevity of the first two solicitations which, as counsel emphasizes, are eight pages long. Also, counsel has included in the record two recent solicitations for the same general type of equipment, one issued by the Department of the Air Force and the other by a commercial source, which are equally brief in content.

As you know, our Office is not in a position to render the technical judgment required to resolve the issues raised by Lombard. This is a matter appropriately within the purview of the responsible procurement officials. It may be that industry practice is marked by the informality suggested by counsel for Lombard; nevertheless, such practice does not restrict the prime contractor from requiring sufficient information in responses to its solicitations so that the prime contractor may determine whether the equipment proposed offers a reasonable expectation of meeting the intended requirement *prior* to award. Indeed, this is the policy governing direct Federal procurement. *Cf.* 42 Comp. Gen. 17 (1962); ASPR 3-804. Chamberlain has maintained that the technical detail required by the third solicitation was necessary to make the foregoing determination. We view the concurrence of the responsible procurement officials in the rejection of Lombard's proposal as affirmation that the required detail which Lombard failed to provide was a material requirement. In such circumstances, we have recognized, generally, that if reasonable efforts to obtain the detailed technical information required have proven to be unsuccessful, a refusal to consider the proposal further is not

objectionable. *Cf.* 39 Comp. Gen. 490 (1959); B-154848, September 11, 1964; B-160330, May 8, 1967.

With this in mind, we turn now to a consideration of negotiation procedures employed by Chamberlain in the third solicitation, and particularly the opportunity afforded Lombard to comply with the solicitation requirements. The record indicates that under Chamberlain's procurement plan each offeror was extended the right of site visit prior to proposal submission. After opening and review of proposals, each offeror was scheduled to visit the plant on separate days to negotiate the technical aspects of the proposals. Such discussions included clarifications of technical deficiencies and omissions. Thereafter, each offeror was given 1 week for formal response to confirm its answers or revise its technical data to meet the specification prerequisites. Chamberlain in its letter of February 27, 1970, advises that, with the exception of Lombard, "all other proposals received, as finally negotiated, did comply with the detailed requirements for submission of technical information."

With respect to Lombard's response to the third solicitation, a memorandum dated December 11, 1969, from Chamberlain's Manager of Plant Modernization, which was made available to counsel for Lombard, relates the consideration accorded the Lombard proposal, and the negotiation procedures employed with greater specificity. From this account, it appears that on September 9, 1969, Chamberlain made a routine telephone call to each participant to determine if the proposal package was received, to inquire if there were any summary questions, to offer any assistance in any areas of inquiry, and to remind each of the September 19, 1969, closing date. This date was subsequently extended to September 26, 1969. On October 3, 1969, a form letter scheduling the negotiation conferences was sent to each participant. Lombard was originally scheduled on October 15, 1969, for one full day of negotiation. Lombard confirmed this date by telephone on October 6, 1969. Then, on October 9, Lombard requested that its appointment be canceled and rescheduled, preferably October 24, 1969. Chamberlain agreed to modify its schedule to accommodate Lombard to the extent that the conference was rescheduled to October 17.

Prior to this conference Chamberlain's only other contact with Lombard was on September 29, 1969, to clarify Lombard's pricing structure. On September 30, 1969, a representative of Lombard responded and provided a pricing formula to determine the cost of the systems proposed by Lombard. Chamberlain advises that the formula failed to yield the required information. In addition to failing to provide the required pricing breakdown, Lombard failed to provide the required technical information; instead, it advised that it intended to

meet the specifications and to this end made a blanket offer to comply with the specifications. In our view, the blanket offer of compliance need not be regarded as curing the informational deficiencies in the Lombard offer. 39 Comp. Gen. 490 (1959).

During the negotiation conference with Lombard, the deficiencies in its proposal were discussed, and verbal responses were given by Lombard to questions prepared by Chamberlain. At the conclusion of the conference, a copy of the conference quesionnaire was given Lombard's representatives, together with several copies of the third solicitation's 2-page pricing summary. Lombard was advised to execute written confirmation of all verbal information given during the conference, to provide any other information requested by the specifications and to duly execute the required pricing summary. Significantly, Lombard was further advised that in order to qualify for further consideration, its response letter must be received within 1 week from the date of the conference.

In response, counsel in its letter of March 25, 1970, maintains that: "Lombard's clear understanding at the conclusion of that meeting was that it had satisfied Chamberlain as to the detail required for the specifications except for certain specific replies which were subsequently forwarded in writing to Chamberlain on October 23, 1969." But Lombard's subsequent response letter of October 23 was apparently not received until after the October 24 deadline. Nevertheless, the letter was considered and, after evaluation, it did not, in Chamberlain's view, provide the information promised. Thereafter, Chamberlain in a telephone conversation on October 28 advised Lombard of the deficiencies in its proposal. This resulted in Lombard's submission of a further revision by letter dated November 14, 1969, which submission, counsel suggests, was authorized by Chamberlain's representative. Chamberlain, however, considered the submission to be untimely and without technical support.

In the absence of sufficient evidence to the contrary, we are not in a position to adopt Lombard's understanding of the conference of October 17 or the telephone conversation of October 28. Moreover, as we have indicated, we may not determine the technical adequacy of Lombard's response letter of October 23. We can conclude, however, that Lombard was afforded a complete opportunity to compete, and that it was not prejudiced by Chamberlain's conduct of negotiations.

Accordingly, if responsible procurement officials are satisfied that the informational defects in the Lombard proposal, as negotiated, are of such substance that no reasonable assurance exists that Lombard would furnish equipment meeting the solicitation requirements, Chamberlain's rejection of Lombard's proposal would not be improper.

We would appreciate advice as to ultimate disposition of this matter. A copy of this decision is being furnished to Lombard's counsel of record.

[B-168880]

Appropriations—Restrictions—Legal Education

The tuition charges for the legal education of ROTC cadets enrolled during the academic year 1968–1969 under 10 U.S.C. 2107, fall within the prohibition in section 517 of the Department of Defense Appropriation Act for 1969 and, therefore, payment of the charges is precluded, even though the prohibition and its implementing regulation, paragraph 22-900 of the Armed Services Procurement Regulation, were approved after the cadets were enrolled. The restriction against the payment of tuition fees for legal training first appeared in the Department of Defense Appropriation Act for fiscal year 1953, and the exclusion in that act of students in ROTC units was removed in the 1954 act, and the authority in 10 U.S.C. 2107(c) to pay the expenses of ROTC cadets eligible to participate in educational assistance programs does not exempt the cadets from the legal training restriction contained in the annual Department of Defense appropriation acts, including the 1969 act.

To Captain Paul E. Hughes, Department of the Air Force, April 8, 1970:

Further reference is made to your letter of January 7, 1970 (file reference BCAF), with attachments, requesting an advance decision as to the propriety of making payment on several vouchers covering tuition charges for legal education of ROTC cadets enrolled during the academic year 1968–1969 (September-June) under section 2107 of Title 10, U.S. Code. Payment of such charges is questioned because of the prohibition in section 517 of the act of October 17, 1968, Public Law 90–580, 82 Stat. 1132. Your request was forwarded here under date of January 22, 1970, by Chief, Contractual, Accountability, and Administration Systems Branch, Directorate of Accounting Operations, Headquarters Air Force Accounting and Finance Center, Denver, Colorado.

The restriction against the use of appropriated funds for payment of tuition for legal training, which you cite, is contained in section 517 of the Department of Defense Appropriation Act for the fiscal year ending June 30, 1969, Public Law 90–580, 82 Stat. 1132, approved October 17, 1968, which provides as follows:

> None of the funds provided in this Act shall be available for training in any legal profession nor for the payment of tuition for training in such profession: *Provided*, That this limitation shall not apply to the off-duty training of military personnel as prescribed by section 521 of this Act.

Section 521 referred to in section 517 provides that:

> No appropriation contained in this Act shall be available for the payment of more than 75 per centum of charges of educational institutions for tuition or expenses for off-duty training of military personnel, nor for the payment of any part of tuition or expenses for such training for commissioned personnel who do not agree to remain on active duty for two years after completion of such training.

If we hold that the restriction in section 517 is applicable to tuition charges for legal education of ROTC cadets enrolled during the academic year 1968–1969 (September-June), you ask whether we would "object to payment of these claims due to a misunderstanding and delay in publishing appropriate directives to effect congressional limitations imposed in appropriation acts."

You say that the invoices (received with your letter) are from six civilian institutions representing claims for legal education tuition charges of seven cadets who were accepted and enrolled in the advanced ROTC program as authorized in 10 U.S.C. 2107. You further state that while section 517 of the Department of Defense Appropriation Act for the fiscal year 1969 implies prohibition of legal training for ROTC cadets, that act was not approved until October 17, 1968, or 1½ months after the students were enrolled in the ROTC program. You refer to paragraph 22–900, Armed Services Procurement Regulation, which you say first prohibited payment of funds for legal training effective September 1968, and that similar restrictions are contained in the January 1969 regulations.

Concerning the provision in the Standard Educational Services Contract that "No change to or termination of this contract shall affect any students enrolled prior to the effective date of such action," you say that claims are for the academic year 1968–1969, and that students were accepted and enrolled by official orders during September 1968.

As a possible basis for justifying payment of the claims, you point out (a) that the students were enrolled under a valid contract prior to knowledge and effective date of Armed Services Procurement Regulation changes; (b) that historically, students have been permitted to continue training if enrolled prior to the changes in policy; (c) that Congress did not intend to deny tuition for legal training for ROTC students enrolled under the ROTC Vitalization Act; and (d) that if the 1969 fiscal year Appropriation Act is construed to prohibit the payment of tuition for legal training for ROTC members, such act would have been retroactive to July 1, 1968, and would deny students the precedent for continuing or completing training.

As pointed out by you, the restriction against payment of tuition fees for legal training was first incorporated in the Department of Defense Appropriation Act for the fiscal year ending June 30, 1953. Section 636 of that act, 66 Stat. 537, restricted payment of appropriated funds for training in any legal profession or for the payment of tuition for training in such profession in excess of 20 persons per year, "exclusive of students in ROTC units." Section 636 further provided that nothing contained in that act should prohibit persons then attending law courses from completing same.

A review of the legislative history of the 1953 Appropriation Act discloses that the restriction against the use of appropriated funds for "training in any legal profession" and the payment of tuition for training in such profession was intended to prohibit the training of individuals for the purpose of qualifying them as lawyers. See enclosed copy of our decision of July 29, 1959, 39 Comp. Gen. 58, for a discussion of the legislative history of section 636 (originally designated as section 637 in the House bill, H.R. 7391, 82nd Congress).

The Department of Defense Appropriation Act for the fiscal year 1954, 67 Stat. 336, not only continued the legal training restriction as provided in section 633, but deleted the exemption of students in ROTC units. That section further provided that "nothing contained in this Act shall prohibit persons now attending law courses from completing same." We have been unable to determine from the legislative history of the 1954 Appropriation Act why it was concluded that students in ROTC units should no longer be exempt from the legal training restriction. It is noted that the Senate Committee on Appropriations recommended the change in the language of section 633, as passed by the House, which deleted the exemption relating to students in ROTC units. See page 10 of S. Rept. No. 601 to accompany H.R. 5969 which became the Department of Defense Appropriation Act of 1954.

The legal training provision in section 724 of the Department of Defense Appropriation Act, 1955, 68 Stat. 355, removed the restriction against the use of appropriated funds for training in any legal profession so far as concerns "off-duty training" of military personnel as prescribed by section 730 of that act.

Similar provisions in sections 517 and 521 of the Department of Defense Appropriation Act, 1961, 74 Stat. 352, 353, were construed in a case involving a proposal to pay a portion of the law school tuition for selected graduates in the ROTC program who would be appointed officers in the Regular Army, be granted excess leave without pay and allowances and be permitted to attend law school at their own expense and we said in our decision of March 10, 1961, 40 Comp. Gen. 505, 507, that the term "off-duty training" contemplates a member being in an active military status, performing regular duty attendant to such status and contemporaneously furthering his education on his own time while not engaged in military duties. We concluded that the off-duty training exemption to the prohibition against using appropriated funds for training in any legal profession was not applicable in the situation there stated. This decision would seem to be equally applicable to the ROTC students described in your submission.

The savings clause in section 636 of the 1953 Appropriation Act, which provided for the continuation of legal training for those per-

sons then attending law courses and paid for from appropriated funds terminated with the fiscal year ending June 30, 1957 (section 619, 70 Stat. 471).

Under section 2107(c) of Title 10, U.S. Code, which was added by section 201 of the Reserve Officers' Training Corps Vitalization Act of 1964, 78 Stat. 1063, the Secretary concerned is authorized to pay all expenses for ROTC cadets who are eligible to participate in the financial assistance program, including tuition, fees, books, and laboratory expenses. You state that this provision of law "does not exclude candidates because of any degree program."

We find nothing in the law or the legislative history of the Reserve Officers' Training Corps Vitalization Act of 1964 which would warrant a conclusion that Congress intended to exempt ROTC students from the legal training restriction contained in the annual appropriation acts for the Department of Defense, including section 517 of the 1969 act. Had Congress so intended, we believe appropriate language would have been used to express such intention.

The fact that Public Law 90–580 was enacted into law (October 17, 1968) 1½ months after the students were enrolled in the ROTC program affords no basis for concluding that the legal training restriction provision was not in existence when the students enrolled. In this connection, see section 101(b) of the Joint Resolution, Public Law 90–366, dated June 29, 1968, 82 Stat. 275, making continuing appropriations for the fiscal year 1969, and for other purposes. The legal training restriction applicable on June 30, 1968, continued to be in effect and was carried forward into the 1969 fiscal year Appropriation Act upon the enactment of Public Law 90–580. As indicated above, the precedent, if it be that, for continuing or completing legal training for those persons then attending law courses terminated with the fiscal year ending June 30, 1957.

The fact that it was not until September 1, 1968, that the Armed Services Procurement Regulation, paragraph 22–900 (added by Revision No. 30), included a provision prohibiting payment of appropriated funds for training in any legal profession affords no basis for authorizing payment contrary to an express provision in the law which had been reenacted annually for a number of years.

Since, in 1954, Congress saw fit to remove the exemption afforded students in ROTC units from the legal training restriction and has continued substantially the same language in subsequent Department of Defense appropriation acts enacted to date, it is our view that in the absence of some other specific statutory authority, ROTC students pursuing degrees in law, as indicated in your submission and enclosures, fall within the prohibition in section 517 of the Department of De-

fense Appropriation Act, 1969, so as to preclude payment of their tuition fees from appropriated funds.

Accordingly, payment on the vouchers is not authorized and the vouchers and supporting papers will be retained here.

[B–169372]

Sales—Bids—Discarding All Bids—After-Discovered Need for Property

The fact that the Government determined the inventory on hand upon termination of a contract was surplus to its needs and authorized the contractor to dispose of the inventory, does not preclude the Government, the real party in interest, from asserting an after-discovered need for the property and withdrawing it from sale for use under another contract. The rule that a contracting officer not only has the right to reject all bids when a procurement is no longer needed or wanted but would be derelict in his duty if he failed to do so, should be followed when a need arises for surplus property advertised for sale, as a determination to dispose of surplus property does not constitute a representation that no need exists or may not subsequently arise for the property.

To Firestone Equipment, Inc., April 8, 1970:

Pursuant to the request made in your letter dated February 20, 1970, to Batesville Manufacturing Company (BMC), your protest against the withdrawal of items 25, 26, 29, and 33 from BMC sale No. BMC 69–002 has been forwarded to our Office for review and decision. The property covered by the sale is reportedly owned by the United States, having been generated under a cost-plus-fixed-fee production contract with the Government. Accordingly, this contractor-conducted sale is a tripartite matter. However, as the Government is the real party in interest, we will consider the sale as if it were conducted directly by the Government.

It appears that an Air Force contract with BMC was terminated in mid-1969. Part of the termination inventory was submitted to the Dallas regional office of the Defense Contract Administration Services (DCAS); this portion of the inventory was special tooling. On August 1, 1969, DCAS initiated 30-day first phase utilization screening. There was no indication of a requirement for this property. Therefore, DCAS commenced 60-day second phase screening on September 2, 1969. This phase of utilization screening was also completed without discovery of a governmental requirement for any of the subject property.

In view of these negative responses, the DCAS property disposal officer (PDO) on November 21, 1969, authorized BMC to dispose of the property in a contractor-conducted sale. Pursuant to this authorization, BMC issued invitation for bids No. BMC 69–002 on December 8, 1969, with opening of bids scheduled for 10 a.m., January 8, 1970. When bids were opened at the appointed time, Firestone's was revealed

to be the highest received with respect to items 25, 26, 29, and 33, as well as a number of other items. The prices bid on items 25 and 26 (each described as a "Blow Mold System & Details") were $8,368 for each system. Firestone bid $18 on item 29, "Spare Parts & Tooling for Blow Mold System, Items 25 & 26." On item 33, a water softener, your bid price was $138.

The abstract of bids was forwarded to the PDO, and it was received in his office late in the afternoon of January 12, 1970. The PDO has reported that on January 13 and 14, 1970, he and other DCAS plant clearance personnel were away from the office attending a plant clearance seminar. It is further reported that during these 2 days, officials of Picatinny Arsenal attempted to contact the PDO. The statement by the PDO discloses these additional facts:

Mr. D. G. Ellington, Picatinny Arsenal, Dover, New Jersey contacted the Property Disposal Officer by telephone 15 January 1970 to advise that the Arsenal had a requirement for some of the automated assembly machines at Batesville Mfg. Co. if they were still available. He also asked if APSA [Ammunition Procurement and Supply Agency], Joliet had screened the items as he knew that they also had requirements for this type equipment. Mr. Ellington was advised that the property had already been through screening, including APSA, who had notified this office they had no requirements for the equipment. Mr. Ellington was further advised that the property was in a sale on which the Property Disposal Officer's approval of awards to successful bidders was pending at the time. He requested time to review their requirements against the items pending award. He was then advised that this involved termination inventory that must be removed as soon as possible to preclude accrual of storage charges. The Property Disposal Officer suggested to Mr. Ellington, however, that approval of awards would be delayed until 21 January 1970, if he would send a Picatinny Arsenal tooling engineer to physically sight the equipment not later than 19 January 1970 in order to be able to furnish us their firm requirements by 21 January 1970. Mr. Ellington coordinated this suggestion with management and called back later in the day to advise that their representative would arrive at the contractor's plant Monday, 19 January 1970 to sight the equipment.

Mr. Paul Packard, DCASR, Dallas Deputy Director, was contacted via telephone 21 January 1970, by Mr. F. C. June, Jr., Deputy Chief, Control Division, APSA, Joliet, Illinois who requested that APSA be given an opportunity to rescreen the equipment against their requirements before awards were approved to the successful bidders. Mr. Packard then discussed the subject with the DCASR Dallas, Deputy Director of Contracts, Chief of the Industrial Material Support Division, and the assigned Property Disposal Officer. Following a briefing by the Property Disposal Officer on the current status of the sale, and the importance of removing the property from the contractor's premises as soon as possible, Mr. Packard stated that even though APSA had already screened the equipment with negative results, they should be given another opportunity if they now had requirements. Accordingly, he directed that approval of awards be delayed pending rescreening by APSA and that we (personnel indicated above) contact Mr. June by telephone conference to arrange a realistic time cycle for accomplishment of this action. The designated personnel (Messrs. G. E. Carlson, C. E. Hamilton and M. D. Lewis respectively) plus Mr. John Lyga, Termination Officer, contacted Mr. June by telephone conference 21 January 1970 and agreed to a 31 January 1970 date for APSA to rescreen the property and furnish their requirements to this office. Additional copies of all applicable inventory schedules were air mailed to Mr. June, at his request, immediately following our telephone conference. The Property Disposal Officer received a telephone call from Mr. June 29 January 1970 requesting an extension until noon 4 February 1970 to complete screening of the property for requirements. He stated that the additional time was needed to permit a visit to the contractor's plant for physical inspection of

the equipment by Government Arsenal and Defense Contractor personnel. He was advised by the PDO that due to the extreme urgency of removing the property from the contractor's plant, no extension could be granted unless agreed to by the Termination Contracting Officer. Mr. Lyga was asked to join the conversation and it was agreed the extension would be approved based on the condition that APSA would furnish the PDO advance telephone information of their firm requirements not later than noon 4 February 1970. Mr. Clyde Miller, APSA Representative, and Team Captain of the DOD and Defense Contractor personnel visiting the contractor's plant to inspect the property, called me from Batesville Mfg. Co. plant 4 February 1970 and furnished the firm requirements, including the various destinations for the shipments.

The Property Disposal Officer furnished Batesville Mfg. Co. verbal approval of awards via telephone the afternoon of 4 February 1970 for Sale BMC 69-002, Item Nos. 3, 4, 21, 22 and 32. Contractor was also notified that the high bids on all other Sale Item Nos. were rejected since the property had been selected for transfer to other Department of Defense programs. This verbal notification was confirmed by letter 5 February 1970. * * *

The essence of your protests, as detailed in your letter of February 20, seems to be that upon completion of the screening process conducted by DCAS, which uncovered no governmental needs for items 25, 26, 29, and 33, and after the receipt of bids from private concerns on the property, the Government in this contractor-conducted sale was precluded from thereafter asserting a need for the property, withdrawing it from the sale, and devoting it to use under another Government contract.

We cannot assent to such a proposition. It is to be noted initially that invitation BMC 69-002 specifically provided that "The right is reserved to reject any or all bids." Moreover, it is well established that an invitation for bids does not import an obligation to accept any of the bids received, including that one which is most advantageous to the Government and which therefore is appropriate for acceptance under the applicable procurement statute (10 U.S.C. 2305). See, e.g., B-168557, January 23, 1970. Subsection (c) of the cited statutory provision explicitly states that all bids may be rejected if such action is determined to be "in the public interest." In our decision 17 Comp. Gen. 554 (1938), to which we have frequently adverted in subsequent decisions of our Office, we remarked at pages 559 and 560:

* * * and certainly it cannot be conceded that a public officer, acting for the general welfare, is bounded to accept a bid, where he determines that the public interest would be served by a rejection of all bids * * *

The authority of Government contracting officers to reject all bids is clearly conditioned upon a determination that the public interest would be served thereby. However, our review of such determinations is restricted to ascertaining whether the administrative officials acted in an arbitrary manner. In B-165463, March 13, 1969, we stated our position as follows:

* * * it is clear that the question of whether to make an award or reject all bids is primarily a matter of administrative discretion. In the absence of clear proof of the abuse of such discretionary power, this Office will not object to such action. * * *

In B–162914, January 30, 1968, we based our holding, that there was no abuse of discretion, on the well-established principle that "the Government should not be compelled to make an award for an item or for quantities of an item which it no longer needs or wants." We also observed in that decision that our Office had previously held that in such circumstances a contracting officer not only has the right to reject all bids, but would be derelict in his duty if he failed to do so.

While the cited case involved a situation where the Government discovered that it did not have a need for the item for which it had invited and received bids, we see no necessary reason why our approach should be different in the converse setting where the Government rejects bids on its property which has been advertised for sale as surplus or excess on the basis of a subsequently discovered governmental need for such property. In B–144756, March 28, 1961, the General Services Administration (GSA) received bids on an Air Force plant which was intended for sale as surplus. None of the bids received came up to the appraised fair market value of the plant. In addition, shortly after opening, the Department of Defense advised GSA of a need for certain equipment available at the plant. Based on these two considerations, GSA rejected all bids. We denied the protest of the highest bidder because we found that the administrative determination had been made in good faith. Although the above decision is factually distinguishable from the instant matter in that there has been no representation that your bid price is inadequate, the decision does stand for the proposition that it is appropriate to take into account newly discovered governmental needs in deciding whether to reject all bids received pursuant to an advertised sale of property theretofore considered surplus.

You rely on the fact that the administrative screening procedure did not bring to light any existing governmental need for this property. We believe that such reliance is misplaced and that an after-discovered need may be the basis for a rejection of your bid. To reach the result you have urged would require us to elevate a procedure adopted as an administratively convenient method of ascertaining such needs to the level of a representation that, in fact, no such needs exist. There is no evidence that such a representation was intended, and we will not presume such an intent. Furthermore, even if such a representation were intended, it could not extend to any needs arising subsequent to the date of completion of the screening, and your justifiable reliance thereon would be correspondingly limited. Finally, your argument in any event amounts to an assertion of an estoppel; it is clearly established that estoppel does not apply against the Government. *Utah Power and Light Co.* v. *United States*, 243 U.S. 389 (1917).

Since we find no abuse of discretion in this record, your protest must be denied.

[B–148324]

Military Personnel—Reservists—Death or Injury—Inactive Duty Training, Etc.—Disability Determination

An Army reservist who while on weekend training left his post of duty for lunch and was involved in an automobile accident that seriously injured him, and he was found by a medical board to be mentally incompetent because of a brain injury, and by a physical evaluation board as unfit for military duty, may be considered eligible for disability retirement if the Secretary of the Army determines the member's disability is the proximate result of performing active or inactive-duty training within the meaning of 10 U.S.C. 1204(2). The broad authority granted to the Secretaries in 10 U.S.C. 1204 was not involved in the decisions of the Comptroller General concerned with 10 U.S.C. 6148(a)—the *Meister* case, 162 Ct. Cl. 667—and other similar statutes and, therefore, such decisions are not controlling in reaching determinations under 10 U.S.C. 1204, as well as 10 U.S.C. 1216, although they may be considered.

To the Secretary of the Army, April 9, 1970:

Reference is made to letter dated February 19, 1970, from the Acting Deputy for Reserve Affairs and Personnel Practices, requesting a decision whether, in the circumstances shown below, the disability of Private First Class Anthony J. Cerino, SSAN 182–40–0807, USAR, may be considered as the proximate result of performing active duty or inactive-duty training within the meaning of 10 U.S.C. 1204(2) so as to entitle him to be retired for disability.

It is reported that Private Cerino was on weekend training at Valley Forge General Hospital, Phoenixville, Pennsylvania, scheduled from 7:30 a.m. September 6, 1969, to 4:00 p.m. September 7, 1969; that he left the hospital at about 11:30 a.m. September 7, 1969, in the company of two other enlisted men to get a sandwich; and that approximately 15 minutes later the car in which he was a passenger skidded on a curve, the right side hit a utility pole and he sustained serious injuries, including brain damage. Although the men were not on pass, there was no established policy against leaving the post during lunch break in weekend training.

It is further reported that an investigation has established that the injuries received by Private Cerino were incurred in line of duty; that a medical board determined that he is mentally incompetent because of brain trauma; and that a physical evaluation board has found him unfit for military duty because of physical disability. He thus appears to meet the requisites for retirement for disability pursuant to 10 U.S.C. 1204, except that doubt is expressed as to whether his disability was the proximate result of performing active duty or inactive-duty training since he was absent from the military reservation for his own purposes at the time his injuries were sustained.

Accordingly, the matter has been referred to this Office for decision in accordance with 43 Comp. Gen. 412 (1963).

It is provided in 10 U.S.C. 1204 in pertinent part that:

> Upon a determination by the Secretary concerned that a member of the armed forces not covered by section 1201, 1202, or 1203 of this title is unfit to perform the duties of his office, grade, rank, or rating because of physical disability resulting from an injury, the Secretary may retire the member with retired pay computed under section 1401 of this title, if the Secretary also determines that--
>
> (1) based upon accepted medical principles, the disability is of a permanent nature;
>
> (2) the disability is the proximate result of performing active duty or inactive-duty training * * *

Our decision 43 Comp. Gen. 412 (1963) concerned several questions as to the effect of the decision of the Court of Claims in the case of *Meister* v. *United States*, 162 Ct. Cl. 667 (1963), involving the right of a naval reservist to benefits under the provisions of 10 U.S.C. 6148 (a) as the result of an injury sustained prior to entering on inactive-duty training, that is, whether the member was injured "while so employed" within the meaning of that statute. Provisions of law similar to those considered in that case are contained in 10 U.S.C. 3687 and 3721 with respect to members of the Army Reserve. See also, 37 U.S.C. 204 (g), (h) and (i). Under the particular facts in the *Meister* case the court allowed the plaintiff's claim but did not attempt to lay down a general rule. Accordingly, we concluded that that case should not be used as a precedent in any similar cases and said that any claim involving facts which might be viewed as coming within the purview of the *Meister* case should be forwarded to this Office for direct settlement.

While what we have said in connection with cases arising under the law involved in the *Meister* case and other similar statutes may be given some consideration in reaching a determination under the provisions of 10 U.S.C. 1204(2), our decisions are not controlling in the matter since under that section, as well as 10 U.S.C. 1216, the Secretary concerned has been granted broad authority to make determinations with respect to retirement or separation of a military member for physical disability. Such broad authority was not granted in the law applicable to the *Meister* case. The following comments on the matter, however, may be helpful in making a determination in this case.

In situations involving facts similar to those in the case of Private Cerino, relating to State Workman's Compensation laws, it has been held that generally if an employee is injured while absent from employment for lunch, the injury does not arise out of or in the course of employment. See *Johannsen* v. *Acton Construction Company*, 119 N.W. 2d 826 (1963); *Oline* v. *Nebraska Natural Gas Company*, 131 N.W. 2d 410 (1964); and *Mills* v. *Standard Parts Service Company*,

131 N.W. 2d 546 (1964). Also, it is the ordinary rule that accidents occurring on public highways away from the place of employment and outside regular working hours, do not arise out of and in the course of employment. See *Patti* v. *Republic Aviation Corp.*, 248 N.Y.S. 2d 978 (1964) and *Shelton* v. *Standard Insurance Company*, 381 S.W. 2d 356 (1964).

The law involved in this case, 10 U.S.C. 1204, was derived from subsection 402(c) of the Career Compensation Act of 1949, approved October 12, 1949, chapter 681, 63 Stat. 817. When that provision was under consideration in the congressional committees, there was some discussion as to the intent of the requirement that the injury be determined to be the proximate result of the performance of active duty, etc. That intent seems to have been clearly expressed in the following excerpts from pages 23 and 24 of S. Rept. No. 733, 81st Cong., 1st sess., to accompany H.R. 5007, which became the 1949 act:

* * * As the bill passed the House of Representatives it had the word "direct" preceding the words "performance of active duty." After an examination of all aspects of the problem the committee liberalized the bill by deleting the word "direct." By this amendment, it is intended that an individual shall not be ruled ineligible for retirement pay simply because he might have been in a leave or liberty status or temporarily absent from his immediate job. This position on the part of the committee represents a compromise between the very stringent regulations issued by the Veterans' Administration to implement certain features of the Economy Act relating to the Emergency Officers Retired List of World War I, and the so-called line-of-duty concept which presently governs physical disability retirement cases. * * * By amending this title through the deletion of the word "direct," the committee avoided a strict "employees' compensation" approach to the problem. This is felt to be necessary because in time of war the bulk of the members of the Regular service, and practically all of the reserves, will have had less than 8 years of service, and care must be taken to avoid establishing unreasonable standards against which disability is to be judged. The very nature of their military duties denies service personnel any freedom of choice as to the job they perform. For this reason the normal "employees' compensation" concept is too restrictive to permit its rigid application to the uniformed services.

In view of the foregoing, it seems clear that if the Secretary concerned should find that Private Cerino's disability is the proximate result of performing active duty or inactive duty training within the meaning of 10 U.S.C. 1204(2), such determination would be within the authority vested in him by the statute.

[B–169450]

Compensation—Postal Service—Overtime—Work Stoppage Effect

Annual rate regular postal employees who incident to participating in a work stoppage during which period they were considered to have been AWOL, worked on regularly scheduled days off without completing a regular tour of duty are not entitled to overtime compensation under 39 U.S.C. 3573(a) for the services performed on their regularly scheduled days off, unless they worked in excess of 8 hours a day. The concept in *United Federation of Postal Clerks* v. *Watson*, 409 F. 2d 462, that all hours of work outside of regular work schedules, whether or not in excess of 8 hours in a day or 40 hours in a week, is compensable

as overtime, because the employees were temporarily required to shift their workweek for the needs of the service, has no application to a situation where the employees were responsible for the failure to complete a regularly scheduled tour of duty.

To the Postmaster General, April 9, 1970:

We refer to letter of April 1, 1970, from Mr. J. R. Thomason, Deputy Assistant Postmaster General and Controller, reading in part as follows:

* * * advice is requested concerning the Department's obligation, if any, to pay overtime to annual rate regular employees who participated in the recent work stoppage. It has been suggested that as interpreted by the Court of Appeals for the District of Columbia Circuit in *United Federation of Postal Clerks and Douglas E. Grocttum* v. *Watson*, 409 F (2d) 462. sections 3751 [3571] and 3573 of the 39 U.S. Code, require the payment of overtime for all work performed outside the regularly scheduled work days even though the employee was not in a pay status on one or more of his regularly scheduled work days. During the period of the work stoppage, an appeal was made for these employees to return to work which resulted in some employees returning to work on their scheduled day off. The Department has considered those employees who participated in the work stoppage as being AWOL. Because of the need to handle the backlogged mail, it was necessary to require some of those employees to work on their permanently scheduled off days. In other cases the employees worked on their permanently scheduled off days before the beginning of their regular work schedule.

The situations are illustrated as follows: Employee A, annual rate regular, has a permanent work schedule of Saturday through Wednesday with Thursday and Friday as his permanently scheduled offdays. He was AWOL Saturday, Sunday and Monday. He worked 8 hours on Tuesday, 10 hours each day on Wednesday and Thursday, and 8 hours on Friday.

Employee B, annual rate regular, has a permanent work schedule of Monday through Friday with Saturday and Sunday as his permanently scheduled off days. He worked 8 hours each day on Saturday through Tuesday. He was AWOL on Wednesday through Friday.

As to Employee A, your advice is requested. Is he entitled to overtime for work performed on his permanently scheduled offdays; i.e., Thursday and Friday and (2) is he entitled to any overtime for the 2 hours in excess of the 8 hours worked on Wednesday, a permanently scheduled work day? Employee A actually worked 36 hours during the service week.

As to Employee B, your advice is requested. Is he entitled to overtime for work he performed on Saturday and Sunday, his permanently scheduled offdays? Employee B worked 32 hours during the service week.

Subsection 3571(b) of Title 39, United States Code, provides that:

The Postmaster General shall establish work schedules in advance for annual rate regular employees consisting of five eight-hour days in each week.

Subsection 3573(a) provides that overtime work for an annual rate regular employee is any work officially ordered or approved which is in excess of his regular work schedule.

The case of *United Federation of Postal Clerks* v. *Watson*, 409 F. 2d 462, decided February 27, 1969, cited in the Assistant Postmaster General's letter, involved an annual rate regular employee whose regular work schedule of Monday through Friday (8 hours each day) was temporarily changed by administrative action apparently for the needs of the service to Saturday, Sunday, Tuesday, Wednesday and Thursday. Although the employee had received the proper advance notice of the change in his work schedule, the court

held that he was entitled to overtime pay for the 8 hours of work performed each day on Saturday and Sunday which were his regularly scheduled off days. In arriving at that conclusion the court construed subsections 3571(b) and 3573(a) of Title 39, United States Code, quoted above, to mean that in the circumstances before it an annual rate regular employee is entitled to overtime compensation for any work performed outside of the hours and days of his regular work schedule regardless of whether such work is in excess of 8 hours in a day or 40 hours in a week.

While we are in agreement with the ruling in that case we do not believe that the court's decision reasonably can be held to be applicable to the two situations presented. The court was concerned with a situation in which postal employees were being required to work on their regularly scheduled off days under temporary shifts in their scheduled workweeks. As we read the case, the court concluded that the Post Office Department may not, in such fashion, force an employee to forego overtime pay for work outside of his regular work schedule. Where such an attempt was made, it was held to be of no consequence that the employee in total worked only his regular number of hours (40) in a given week. Central to the court's conclusion was the underlying premise, albeit not specifically stated, that it was the Post Office Department and not the employees that caused the hours of work involved to be performed outside of regular work schedules.

In the circumstances of the examples presented, however, the failure of the employees to complete their regular work schedules was not due to actions of the Department. We do not believe that the concept enunciated by the court—of constituting as overtime, hours of work outside of regular work schedules—can reasonably be stretched to include such circumstances. Therefore, we hold in the above examples that employee "A" is not entitled to be paid at the overtime rate for the first 8 hours of work performed on Thursday or for the 8 hours performed on Friday and that employee "B" is not entitled to overtime compensation for the 8 hours of work performed on both Saturday and Sunday. See 45 Comp. Gen. 257 (1965); 25 *id.* 102 (1945); *id.* 121 (1945); B–165465, December 24, 1968.

However, in recognition of the intent of Congress to grant overtime compensation for any work performed in excess of 8 hours in a day (compare 5 U.S.C. 5542(a) and 5544(a)), we hold that employee "A" is entitled to overtime pay for the 2 hours of work in excess of 8 hours performed on both Wednesday and Thursday. See 45 Comp. Gen. 257, answer to question 6.

[B-169170]

Subsistence—Per Diem—Military Personnel—Group Travel

Although the payment of per diem to Army members traveling together as a group by Government conveyance from the same point of origin to the same destination under orders dated May 28, 1969, that failed to designate the travel as group travel was contrary to paragraph M4100 of the Joint Travel Regulations, the payment having been based on the erroneous instructions contained in paragraph 2-2, Army Regulation 310-10, no exception will be taken to payments under the involved orders, or similar orders, but if Government meals were furnished and no deduction made from the per diem authorized, the value of the meals should be recovered. However, the Army instructions should be changed to agree with the Navy and Air Force regulations implementing paragraph M4100 to require group travel to be so designated in orders, and until so changed, the travel of 3 or more Army members will be viewed as group travel, whether or not so designated. B-135534, June 5, 1958, modified.

To the Secretary of the Army, April 10, 1970:

It has come to our attention that per diem payments are being made to Army members for travel when three or more members are traveling together in a group by Government conveyance from the same point of origin to the same destination under one order.

The Joint Travel Regulations, promulgated pursuant to 37 U.S.C. 404, do not authorize per diem for group travel. Paragraph M4100 of the regulations defines "group travel" as a movement of three or more members traveling in a group for which transportation will be furnished by Government conveyance or transportation request under one order which is specifically designated by the order-issuing authority as a "group travel order."

As an example of the cases being encountered, Letter Order No. 50, Headquarters 35th Signal Group, Fort Bragg, North Carolina, dated May 28, 1969, directed 44 members to proceed from Fort Bragg to Fort Stewart, Georgia, for temporary duty of approximately 19 days. The travel data in the order specified "Military Convoy" and the special instructions directed the members "to proceed by military convoy," and stated that quarters would be furnished at Fort Stewart.

The travel directed by the orders—three or more members traveling by Government conveyance (military convoy) from the same point of origin to the same destination under the same order—falls squarely within the definition of group travel contained in paragraph M4100 of the Joint Travel Regulations except for the designation of the orders as group travel orders.

Voucher 425438 in the June 1969 accounts of the disbursing officer at Fort Bragg, Symbol No. I5072, covers payment of per diem for the days of travel to three of the members named in the order. The voucher shows that the travel to Fort Stewart and return was by Government vehicle and that the travel in each direction was completed in one day. The record also indicates that Government meals

were furnished in connection with some or all of the travel involved. Lodging en route was neither anticipated nor required.

In reply to an inquiry by our Army Audit Staff as to the basis for payment of per diem for the days of travel, the Finance Center, U.S. Army, referred to a per diem payment under a similar Fort Bragg order (LO No. 377, July 15, 1969). The reply stated that, although that order directed the movement of three or more members traveling in a group by military convoy from the same point of origin to the same destination, the travel was not group travel for the reason the the order lacked specific designation that it was a "group travel order" as required by the Joint Travel Regulations. Decision B-135534 of June 5, 1958, was cited as authority for that statement.

On the basis of the facts as set out in the decision of June 5, 1958, that decision involved orders which directed an officer and two enlisted men to escort three prisoners from Fort Sill, Oklahoma, to Fort Leavenworth, Kansas, and to return to their station. The orders stated that the transportation officer should determine and furnish necessary transportation and meal tickets for all travelers. Transportation requests and meal tickets were furnished to the officer for travel of six persons to Fort Leavenworth and the return travel of three members. The officer returned to Fort Sill alone at personal expense and turned in unused transportation and five meal tickets. The finance and accounting officer, who submitted the officer's claim for travel allowances for the round trip, questioned whether group travel was involved.

We held that the travel in that case appears to have involved precisely the group situation contemplated by the regulations, but that since the order lacked the specific designation that it was a "group travel order," as apparently required by the regulations to constitute group travel for per diem purposes, the officer was entitled to per diem for travel. At the time the travel was performed paragraph 16, Army Regulations 310-25, January 18, 1955, provided that group travel orders may be issued at the discretion of the commander and that when such orders are issued the orders should be identified as group travel orders.

The current instructions to Army order-issuing authorities are contained in paragraph 2-2, Army Regulation 310-10, as follows:

> Group Travel. Group travel orders may be used at the discretion of the commander to direct group travel. Such group travel orders may be used when three or more persons are departing from the same station, at the same time and are proceeding to the same destination on either permanent change of station or temporary duty, with no delay en route involved and are to arrive at the same time. Personnel who are authorized or permitted to travel separately from the group will be shown in separate orders.

The quoted provisions apparently are intended to implement paragraph M4100 of the Joint Travel Regulations. The Joint Travel

Regulations, however, do not constitute instructions to order-writing authorities. Since the Army's order-writing regulation does not require that orders directing travel in a group travel status be specifically designated as group travel orders it does not properly implement paragraph M4100. In this respect the Army regulation is not uniform with the group travel order-writing regulations of the other military departments.

Air Force Manual 10–3, page 2–58, Item 18, provides "(Group travel) If travel falls within the purview of paragraph M4100, JTR, include: 'This is a group travel order.'" Bureau of Naval Personnel Enlisted Transfer Manual (NAVPERS 15909B), Article 23.21c, likewise provides that when group travel is directed the orders "must be specifically designated as a 'group travel order.'" Thus, both the Navy and the Air Force have fully implemented paragraph M4100 of the Joint Travel Regulations by administrative regulations.

The provisions of the Joint Travel Regulations are intended to apply uniformly to like travel in each of the military services and we do not believe the intent of the regulations may be defeated by deficiencies in the order-writing regulations of a particular service.

Accordingly, unless and until the order-writing regulations of the Army are changed to require that group travel orders be specifically designated group travel orders, we will, for audit purposes, view any Army travel order directing the movement of three or more members in a group for which transportation will be furnished by Government conveyance or a transportation request from the same point of origin to the same destination, as a group travel order for purposes of paragraph M4100 of the Joint Travel Regulations, regardless of whether the order is specifically so designated.

To the extent that the decision of June 5, 1958, may be viewed as holding otherwise, it will no longer be followed.

In view of the conclusion in the decision of June 5, 1958, in situations of this type, exceptions will not be taken to the per diem payments made for travel under the orders of May 28, 1969, or similar orders heretofore issued. See B–129408 of June 3, 1957, to the Secretary of the Navy. However, where the record shows that Government meals were furnished the members who were paid per diem in such group travel situations, the value of such meals, if not deducted from the payment, should be recovered. See paragraph M4205–5 (footnote W) and M4451–2 of the Joint Travel Regulations.

[B-169098]

Transportation—Household Effects—Military Personnel—Reshipment of Effects Without a Station Change

When a member of the uniformed services incident to his transfer overseas is authorized the movement of dependents and household effects, but after shipment of the effects, his dependents are unable to join him because of illness or other personal reasons, and his tour is changed to an unaccompanied tour, the return of the member's household effects at Government expense from the overseas duty station to a designated place in the United States, Alaska, Hawaii, Puerto Rico, or a territory or possession of the U.S. may not be authorized. The transportation of the household effects of a member at Government expense may be authorized pursuant to 37 U.S.C. 406(b) only in connection with a duty station change, except in unusual or emergency circumstances (subsection 406 (e)) or if in the best interests of the member, his dependents, or the United States (subsection 406(h)).

To the Secretary of the Navy, April 14, 1970:

By letter of January 14, 1970, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requested a decision whether the Joint Travel Regulations, Volume 1, Chapter 8, may be amended to provide for return of household goods at Government expense from an overseas station to a designated place in the United States, Alaska, Hawaii, Puerto Rico, or a territory or possession of the United States when the dependents for personal reasons do not join the member at his overseas station. The request was assigned Control No. 70–75 by the Per Diem, Travel and Transportation Allowance Committee.

The proposed regulation, a copy of which was enclosed with the Assistant Secretary's letter, also would provide for subsequent return transportation of the household goods to the overseas station when entry approval for dependents is again granted, provided that at least 12 months remain in the member's tour of duty on the scheduled date of arrival of the household goods.

The Assistant Secretary says that it is a common practice for members of the uniformed services ordered to overseas duty to initiate shipment of their household goods immediately upon receipt of approval of their dependents' entry into the area of the member's overseas duty station. The dependents, however, do not commence travel until some time later in order to coordinate their arrival with the arrival of the household goods. Because of this practice, it is said that situations frequently arise where, prior to commencement of travel by the dependents, but subsequent to shipment of the household goods, dependents become ill or for some other reason are not able to join the member at his overseas duty station.

The Assistant Secretary says that when this happens the dependents' entry approval is canceled, and the member's tour is changed to "All others" (unaccompanied tour). He says the view has been expressed that this situation is similar to that where a member's overseas duty

station is changed from "unrestricted" to "restricted" and the member is entitled to have his dependents and household goods transported to a designated place.

In the situation discussed in the Assistant Secretary's letter there is no restriction on the movement of dependents to the member's station and the reasons why the dependents are not at his station are purely personal. The conversion of his tour from a with-dependents tour to an all-others tour—a conversion which we understand ordinarily is based on the election of the member and which, within prescribed time limitations, may be reconverted to a with-dependents tour—does not in our opinion place the member in a situation similar to that of a member whose overseas station is changed from unrestricted to restricted requiring the involuntary evacuation of dependents.

Except as authorized by sections 406(e) and 406(h) of Title 37, U.S. Code, the transportation of household effects of a member of the uniformed services at Government expense may be authorized only in connection with a change of the member's station. 37 U.S.C. 406(b).

Sections 406(e) and 406(h) of Title 37 of the Code provide that when permanent change-of-station orders have not been issued, or when orders have been issued but cannot be used as authority for the transportation of dependents, baggage and household effects, the Secretaries of the uniformed services may authorize the movement of dependents, baggage and household effects under certain prescribed conditions. The authority provided by section 406(e) may be used only under unusual or emergency circumstances. The authority provided by section 406(h) may be used only in the case of a member on duty outside the United States or in Hawaii or Alaska when it is determined to be in the best interest of the member or his dependents and the United States to move the member's dependents, baggage and household effects "at that station" to an appropriate location in the United States or its possessions.

The need to change a member's station from unrestricted to restricted, thereby requiring the removal of his dependents from the station, would ordinarily appear to result from circumstances of an unusual or emergency nature requiring the evacuation of dependents from the station. Consequently, section 406(e) has been considered as providing authority for the provisions contained in Chapter 7 of the Joint Travel Regulations authorizing the transportation of dependents at Government expense in such cases. In cases coming under section 406(e), however, the movement of household effects has been viewed as being contingent on an authorization for the transportation of

dependents. See paragraphs M8301, M8302 and M8303 of the Joint Travel Regulations. The transportation of household effects only has not been authorized.

In decision of March 22, 1965, 44 Comp. Gen. 574, concerning the scope of the provisions of section 406(h) we agreed with the view reflected by the regulations that section 406(e) did not provide authority for the transportation of household effects independently of the movement of dependents. And, on the basis of the legislative history of section 406(h), we concluded that under those provisions the advance movement of household effects independently of the movement of dependents likewise was not authorized.

In our opinion, therefore, there is no legal authority for the proposed change to the Joint Travel Regulations and the question presented is answered in the negative.

[B–169265]

Sales—Bids—Late—Agency Handling

The failure to establish procedures to pick up timber sale bids addressed in accordance with the invitation for bids to a post office box and the Forest Supervisor designated to receive bids, whose office was but a short distance from the post office, resulted in the late delivery of a bid that had been timely received at the post office, and the bid constructively delivered to the Forest Service facility when deposited at the post office is for consideration pursuant to section 1–2.303–2 of the Federal Procurement Regulations on the basis the mishandling is chargeable to the Government. Consideration of the bid may not be avoided by discarding the bids received and readvertising the timber sale as no cogent or compelling reason exists for such action.

To the Secretary of Agriculture, April 15, 1970:

By letter 2430 of March 6, 1970, the Deputy Chief, Forest Service, advised that the Meridian Pine Company brought a suit in the United States District Court in Idaho to enjoin an award to another bidder under timber sale 001 on the grounds that the bid of Meridian Pine Company should have been considered a timely bid. The attorney for the Meridian Pine Company and the United States Attorney have stipulated that the suit will be held in abeyance until the Forest Service has obtained a decision of our Office as to the timeliness of the Meridian Pine Company bid.

By letter 2450 of March 13, 1970, from the Acting Deputy Chief, Forest Service, additional information relative to the matter was furnished to our Office.

The subject timber sale was advertised in the Weiser Signal-American on December 25, 1969. The advertisement for bids, insofar as pertinent, provided:

* * * SEALED BIDS will be received by the Forest Supervisor or his authorized representative in the office of the Forest Supervisor, McCall, Idaho, at *2:00 p.m., January 26, 1970,* * * *.

The "BID FOR ADVERTISED TIMBER" form prepared by the Forest Service for the immediate sale stated near the top of the first page:

(*Title and address of Forest officer receiving bids*)
Forest Supervisor
Box 1026
McCall, Idaho 83638.

"INSTRUCTIONS TO BIDDERS" are provided beginning at the bottom of the first page of the form. Paragraph 4 of the instructions, insofar as pertinent, provides:

SUBMISSION OF SEALED BIDS. Sealed bids must be submitted to the Forest Officer, designated by the advertisement as the receiving officer, at or prior to the time established by the advertisement. * * *

Paragraph 5 of the instructions states:

PUBLIC OPENING OF SEALED BIDS. Sealed bids will be publicly opened and posted at the time set for opening in the advertisement.

The only bid opened at 2 p.m. on January 26, 1970, was submitted by Timber Products. No provision was made in the advertisement for bids or in the instructions to bidders for the consideration of late bids. However, paragraph 6 of Forest Service Manual title 2431.74 states, "If a bid is received after the time set for the opening of bids, the rules in FPR 1-2.303 will govern consideration or return." FPR sec. 1-2.303 is that part of the Federal Procurement Regulations which provides for the consideration of a late bid when it is received before award and the lateness is due solely to a delay in the mails or mishandling by the Government installation. The Forest Service Manual provides that the late bid provisions in the procurement regulations will be applied to timber sales.

The Forest Service picks up the mail from its box at the McCall, Idaho, Post Office twice a day. The first pickup is between 8:30 and 8:45 in the morning. The second pickup is between 2:30 and 2:45 in the afternoon. The bid from Meridian Pine Company was in the afternoon pickup. It was delivered to the Forest Supervisor's office at 2:55 p.m. The Forest Service determined the bid was a late bid and would not consider it. At the request of the bidder, the Forest Service reconsidered the matter and sustained the determination.

The bidder thereafter filed suit. Essentially, the position of the bidder in its formal complaint is that the bid was deposited in the Forest Service post office box more than 2½ hours before the bid opening and that such deposit amounted to constructive delivery and that the failure to pick up the bid at the post office prior to the bid opening time was attributable to mishandling by the Forest Service. In view thereof, the bidder suggests that its bid should be considered or, in the alternative, that all bids should be rejected and the sale readvertised.

As noted above, the late bid provisions in FPR sec. 1-2.303-2 provide for the consideration of late bids when the delay is due to mishandling by the Government installation. Where bids are received at one place by the Government for delivery by it to another place specified in the invitation, our Office has held that the Government has a duty to establish procedures calculated to insure that the physical transmission of bids is accomplished within a reasonable time after receipt. Hence, mishandling may be charged to the Government where the delay in the transmission of bids is due to the failure of a facility to use a transmittal procedure that would have permitted the bid to be delivered to the contracting officer within a reasonable time before bid opening. 42 Comp. Gen. 508 (1963); 43 *id.* 317 (1963); and B-152545, October 18, 1963.

The post office at McCall, Idaho, has indicated that the bid was delivered to the Forest Service post office box no later than 11:30 a.m. on January 26. Further, it appears that the post office box is only about ¼ mile from the Forest Service Supervisor's office and that it takes only about 10 minutes for a bid to be picked up at the post office and delivered to the Forest Supervisor. In the circumstances, it appears that the bid of the Meridian Pine Company was allowed to remain in the Forest Service post office box for 3 hours before it was picked up by the Forest Service shortly after bid opening. In view of the close proximity of the post office to the supervisor's office, we believe that the Forest Service had a responsibility to provide a procedure whereunder its post office box would be checked for bid envelopes which had been received by the post office subsequent to the usual morning mail pickup. Considering that it is the duty of the Government contracting installations to use reasonable procedures designed to permit timely receipt of bids, we conclude that the bid of the Meridian Pine Company was mishandled since its timely receipt could have been assured by a check of the post office box sometime prior to 2 p.m. on January 26. Of course, the whole situation could have been avoided by providing in the advertisement for bids a bid opening time within a reasonable time after the usual 2:30 p.m. mail pickup.

In the circumstances, it is our opinion that the bid of Meridian Pine Company should be considered as having been timely received.

The Forest Service has advised that if our Office holds, as it does, that the bid in question should be considered, it proposes to reject all bids and readvertise. Our Office has stated that it recognizes that administrative offices have authority to reject all bids and readvertise and that such authority is extremely broad and ordinarily will not be questioned, 40 Comp. Gen. 671, 674 (1961). However, in *Massman Construction Company* v. *United States*, 102 Ct. Cl. 699, 719 (1945), it was indicated that bids should not be rejected and readvertised where there

are no cogent reasons for doing so. In circumstances where no cogent or compelling reasons existed to reject all bids and readvertise, our Office has held such rejection to be improper and has directed cancellation of awards made after readvertising. 40 Comp. Gen. 671 (1961), and decisions cited therein.

The Forest Service has indicated that it would only readvertise the sale if the late bid is determined to be acceptable for consideration; otherwise, it would make award to the other bidder. However, the bid in question has continuously been in the possession of the Forest Service and it appears that the reason for rejecting bids and readvertising would be to avoid consideration of that bid. The proposed rejection of bids and readvertisement under such circumstances would be improper and contrary to the principles stated above.

[B–162621]

District of Columbia—Reorganization Plan No. 3 of 1967—Implementation

The language in Reorganization Plan No. 3 of 1967 concerning the District of Columbia to the effect that "There are hereby established in the Corporation so many agencies and offices * * * as the Commissioner shall from time to time determine" indicates no specific time limits apply to the Commissioner's implementation of the Plan.

Appropriations—Transfers—Limitations—Original Purpose of Appropriation

Pursuant to 5 U.S.C. 904(4), any District of Columbia reorganization plan proposed under Reorganization Plan No. 3 of 1967, when submitted to Congress for approval must provide for the transfer of unexpended balances, and upon transfer the funds may only be used for the purposes for which the appropriation was originally made. The strict application of the restriction to both partially and completely transferred functions, will avoid any augmentation of an appropriation account, or violation of section 3 of the District of Columbia Appropriation Act, 1970. The section 904(4) requirements also apply to funds appropriated in the 1970 act for the General Operating Expenses Account, notwithstanding the funds appropriated derived from designated sources, for upon appropriation the segregation of the special funds no longer was maintained.

To the Mayor-Commissioner, District of Columbia Government, April 17, 1970:

The Deputy Commissioner's letter of March 16, 1970, poses four questions concerning the authority vested in the Commissioner of the District of Columbia under Reorganization Plan No. 3 of 1967, 81 Stat. 948, 5 U.S.C. App. page 323 (Supp. IV). Specifically it was asked:

1. Does the Commissioner have an unlimited time in which to implement reorganization changes? If the answer is negative, when does the time expire?

2. Does this allow changes and transfer of funds between appropriations as passed by the Congress?

3. If the answer to question number two is affirmative, would this authority apply to partial changes of functions and mergers into other Departments and Agencies between various appropriations?

4. If the answer to question number two is in the affirmative, it is assumed that a Department or Agency transferred from the General Operating Appropriation to the Public Safety Appropriation would also be permissible. In such case, may the financial components of the structure that make up an appropriation such as the General Operating Expense be changed accordingly?

If a department whose operating expense consisting of several million dollars were transferred out of the General Operating Appropriation to another appropriation, should a proportionate share of the amounts receivable from the various funds be included in the transfer?

In answer to the first question submitted, nothing has been found in the Reorganization Plan which restricts the time during which the Commissioner may act thereunder. Moreover, the language of section 303 of the Reorganization Plan which reads: "There are hereby established in the Corporation so many agencies and offices * * * as the Commissioner shall from time to time determine" indicates that no specific time limits apply to the Commissioner's implementation of the Plan.

In considering questions two and three, it is essential to recognize that the authority in section 304 of the Plan to transfer personnel, property, records and funds must meet the requirement of 5 U.S.C. 904(4) that Reorganization Plans transmitted by the President for congressional approval must provide for such transfers. The last sentence of 5 U.S.C. 904(4) provides that unexpended balances transferred may only be used for the purposes for which the appropriation was originally made. Accordingly so long as the funds of an activity follow the transferred activity and finance only the purposes for which the appropriation was originally made any transfers or partial transfers contemplated by questions two and three are permissible. Strict application of this rule will avoid any augmentation of an appropriation account and thus would avoid any possible increase over maximum amounts stated in the appropriation act or any violation of section 3 of the District of Columbia Appropriation Act, 1970, Public Law 91–155, approved December 24, 1969, 83 Stat. 428, 432.

With regard to the fourth question, the General Operating Expenses in the District of Columbia Appropriation Act, 1970, is in part made up of what can be characterized as statutory contributions from the highway, water and sanitary sewage works funds. These funds are all special funds for which the Congress has specifically

designated the source from which derived and the purpose for which they may be used. As such they are separately accounted for and, until appropriated, are kept segregated. In this regard, it is our understanding that no attempt is made to maintain segregation of these funds once they are transferred to the General Operating Expenses Account. The portion of the appropriation relating to the functions transferred should likewise be transferred as indicated above in answer to questions two and three. See also the answer to question 3 in 32 Comp. Gen. 47, 50, July 23, 1952. While transfers of appropriated funds are authorized, there is no authority to change the sources from which the appropriations are derived.

We assume that you will notify both the House and Senate Committees on Appropriations of all transfers and reorganizations as requested in H. Rept. No. 91-680, 6 and S. Rept. No. 91-564, 9.

[B-167665]

Contracts—Awards—Small Business Concerns—Size—Classification Propriety

The Small Business Size Appeals Board in classifying the collection and disposal of refuse as a service falling within the $1 million small business size standard, to be applied in the future as the appeal had not been timely taken, rather than as a transportation activity within the contemplation of the $3 million size standard used by the procuring agency, disregarded Small Business Administration Regulation 121.3-1(b)(1) making consideration of the Standard Industrial Classification (SIC) mandatory in defining industries for the purpose of establishing small business size standards—a regulation that has the force and effect of law. The result in the size appeal, therefore, was inconsistent with the SIC definition of the involved refuse services as transportation and pursuant to section 121.3-8(f) of the SBA regulation, the $3 million small business size standard should apply to the services.

To Sadur, Pelland & Braude, April 20, 1970:

Further reference is made to your letters dated August 6, August 19, October 10, and October 23, 1969, protesting on behalf of Johnson & Speake, Incorporated, against the award of a contract to Square Deal Trucking Company, Incorporated, pursuant to invitation for bids No. F49604-69-B-0259, for refuse and garbage collection and disposal services at Bolling Air Force Base for the fiscal year 1970.

The invitation, issued on March 24, 1969, stated that the procurement was 100 percent set-aside for small business concerns. The scheduled bid opening date was April 22, 1969. On April 14, 1969, the contracting officer issued an amendment providing in part as follows:

1. The following subparagraph (c) is added to Paragraph 25 of the Additional Solicitation Instructions and Conditions, "Notice of Total Small Business Set-Aside": (c) Any concern bidding on a contract for transportation, collecting and transporting of refuse, is classified as a small business if its average annual sales or receipts for its preceding three fiscal years do not exceed $3 million.

Prior to the above amendment the invitation failed to set forth the size criteria as required by Armed Services Procurement Regulation (ASPR) 1–703(c)(1). It made reference to a small business concern only under paragraph 14 of the Solicitation Instructions and Conditions (SF–33A), which defines a small business as one meeting the criteria prescribed by the Small Business Administration (SBA), Code of Federal Regulations (CFR), Title 13, Part 121, as amended.

Three bids were received as follows:

Square Deal Trucking Company	$66,240
Shayne Brothers	$69,264
Johnson & Speake	$95,244

The Government estimate for the services was $79,300. Award was made to Square Deal Trucking Company on July 1, 1969, as the low responsive and responsible bidder.

You contend in your protest letter dated August 6, 1969, that the award should be canceled as violating (1) the Small Business Set-Aside Program; (2) the Armed Services Procurement Regulation; and (3) the integrity of the competitive bidding system. You state that the amendment sent by mail was not received by Johnson & Speake until 2 days before bid opening, thus precluding a timely protest under ASPR 1–703(c)(2)(ii) requiring submission not less than 5 working days before bid opening. In addition you question the good faith of Square Deal Trucking Company in certifying itself as small business inasmuch as it knew that under the allegedly proper size criterion of $1,000,000, it did not qualify.

Although no justification is given in the contracting officer's report as to why the invitation as issued did not contain a prescribed dollar limitation in accordance with ASPR 1–703(c)(1), it was clearly proper to amend the invitation to provide for the required size classification. See ASPR 2–208(a). The amendment, issued on April 14, 1969, based the $3,000,000 size standard on information submitted by the Deputy for Small Business Directorate of Procurement Policy, Hq USAF, by letter of April 11, 1969, advising that refuse collection could be placed in either of two categories, as follows:

> (a) If the contract merely requires that the trash be collected, the SIC [Standard Industrial Classification] is 4212 "Trucking" and the size standard is $3 Million. (b) If the contract provides that the trash be collected and disposed of in a particular manner, the SIC Code is 4953 and the size standard is $1 Million.

In evaluating the requirements of the invitation, the contracting officer determined that since a particular method for collection and disposal was not specified, the size standard of $3,000,000 should apply to the subject procurement.

By letter of April 24, 1969, you protested the size classification. In a determination of June 26, 1969, by the SBA Middle Atlantic Area Office, the size classification was not disturbed. Johnson and Speake then filed a notice of appeal with the SBA Size Appeals Board which, in a decision of July 24, 1969, decided that the $1,000,000 size standard should have been applied. However, the Board also decided that the appeal was not timely for purposes of the instant procurement.

Concerning your contention that the size classification amendment could not have been timely appealed to the Size Appeals Board as prescribed by ASPR 1-703(c)(2)(ii), which states that appeal must be taken "not less than five working days before the bid opening * * * where this date * * * is 30 or less days after the issuance of the invitation for bids * * * ", our Office has held that the controlling factor in like circumstances, is the time of receipt of the Size Appeals Board's decision by the contracting officer, notwithstanding that a timely appeal could not have been filed 5 days before bid opening. We note that although the amendment was received by your firm in time to acknowledge it before bid opening, your appeal was not filed until 2 days after bid opening. The Size Appeals Board's decision was dated 24 days after the date of award. In a similar case, B-167282, March 10, 1970, our Office stated:

> We think the question to be determined here is whether the contracting officer was authorized, in the circumstances, to make a valid award to Square Deal Trucking Company, notwithstanding a timely appeal from the size standard used.
>
> ASPR 1-703(c)(3) provides that: "* * * the SBA decision, if received prior to the opening date, shall be considered final, and solicitations will be modified to reflect such decision, if necessary. Where appropriate, opening dates may be extended. SBA rulings received after the opening date shall not apply to the current procurement but shall apply in future procurements of the product."
>
> There is nothing in the above regulation that is contrary to the SBA regulations, and the regulation states that where the decision of the SBA is received after the opening date, its ruling will not apply to the current procurement. There is no provision in ASPR or in the SBA regulations requiring a stay of award pending the outcome of an appeal to the Size Appeals Board. Absent such requirements, it is our view that the contracting officer consummated a binding and valid award to the low bidder, Square Deal Trucking Company, and the validity of such an award is not affected by the ruling of the Size Appeals Board in this case.

Therefore, your protest is denied. We think that the Size Appeals Board's decision, *Size Appeal of Johnson and Speake*, No. 370, July 24, 1969, may be subject to some question. SBA regulations establish the procedure by which small business size standards are to be determined. The first step in this process is to define each industry and its elements. In this regard 13 CFR 121.3-1(b)(1) provides as follows:

> The Standard Industrial Classification Manual, as amended, prepared and published by the Bureau of the Budget, Executive Office of the President, *shall be used by SBA in defining industries.* [Italic supplied.]

The single exception to the above quoted regulation, 13 CFR § 121.3-1(b)(1)(i), applies only to a specified class of manufactured prod-

ucts, and is not applicable to the services involved in the instant case.

Section 1–01(a) of the subject specifications provided: "The work shall consist of furnishing all transportation, equipment, supplies, management and labor necessary to collect refuse on Bolling Air Force Base * * * and remove it to a disposal point off the Base."

The Standard Industrial Classification (SIC) Manual designated "Motor Freight Transportation and Warehousing" as Major Group 42. Within this group the Manual classified "Local Trucking and Draying, Without Storage" as Industry No. 4212 defining it as follows:

> Companies primarily engaged in furnishing trucking, transfer, and draying services without storage, in a single municipality, contiguous municipalities, or a municipality and its suburban areas. Companies primarily engaged in collecting and disposing of refuse by processing or destruction of materials are classified in Industry 4953.

Included in this industry classification (No. 4212) are "Collecting and transporting refuse, without disposal"; and "Debris removal, carting only". The Manual also has a classification "Major Group 49-Electric, Gas and Sanitary Services". Industry No. 4953, "Refuse Systems" is defined as "Systems primarily engaged in the collection and disposal of refuse by processing or destruction. Companies primarily engaged on collecting and transporting refuse without disposal are classified in Industry 4212".

It is apparent that the services required by the subject solicitation are covered by the SIC Manual definition of the Local Trucking and Draying Industry No. 4212. No services are required beyond the collection of refuse and its transportation to any appropriate disposal site. It is obvious that the firms involved are not primarily engaged in collecting and disposing of refuse by processing or destruction.

SBA Regulations, 13 CFR 121.3–8(f) establish size standards for the transportation industry as follows:

> *Transportation.* Any concern bidding on a contract for passenger or freight transportation, not elsewhere defined in this section, is classified * * * (3) as small if it is bidding on a contract for either trucking (local and long-distance), warehousing, packing and crating, and/or freight forwarding, and its annual receipts do not exceed $3 million.

Section 121.3–8(e) of the SBA Regulations provides:

> *Services.* Any concern bidding on a contract for services, not elsewhere defined in this section, is classified as small if its average annual sales or receipts for its preceding three (3) fiscal years do not exceed $1 million.

Thus, according to the SIC definitions, the services of the subject procurement fall within section 121.3–8(f) of the SBA Regulations establishing the small business size standard for the transportation industry or annual receipts not to exceed $3 million.

However, in the *Size Appeal of Johnson and Speake*, *supra*, it is stated: "SBA is guided by and generally follows the Standard Industrial Classification (SIC) Manual * * * However, it is not bound by the Manual." Accordingly, it held that the size standard applicable to the subject procurement was $1 million pursuant to 13 CFR 121.3–8(e) quoted above, for services not elsewhere defined.

In a letter to this Office dated December 3, 1969, with regard to a similar procurement SBA stated:

> Regulations implementing these statutory provisions have been duly promulgated and appear as Part 121 of the SBA Rules and Regulations, 13 CFR 121, *et. seq.* Section 121.3–1(b) of such regulations provides that the Standard Industrial Classification Manual shall be used by the Small Business Administration in defining industries. However, subsection (3) thereof provides:
>
> "Product classification. For size standards purposes, a product shall be classified into only one industry, even though, for other purposes, it could be classified into more than one industry. In determining the SIC industry into which particular products shall be classified for size standard purposes, consideration shall be given to all appropriate factors including: (i) Alphabetic indices published by the Bureau of the Budget, Bureau of the Census, and the Business and Defense Services Administration; (ii) Description of the product under consideration; (iii) Previous Government procurements for the same or similar products; and (iv) Published information concerning the nature of companies which manufacture such product."
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> * * * * * * *
>
> The alphabetical Index of Occupations and Industries, published by the Bureau of the Census, 1960, and its companion volume, the Classified Index of Occupations and Industries, classify under Code 578, Sanitary Services, the following:
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> | | |
> |---|---|
> | Trash Collection | Trash Hauling |
> | Trash Disposal | Garbage Collecting |
> | Garbage Disposal | Garbage Trucking Co. |
> | Refuse Collection | Rubbish Collection |
>
> The classification of Trucking Service, under Code 509, does not include either collection or hauling of trash, garbage, refuse or rubbish. Copies of extracts of these classifications are enclosed.
>
> In determining the SIC industry into which particular products (including services) are classified for size standard purposes, SBA has given consideration to the foregoing publications, as well as the other factors enumerated in Section 121.3–1(b)(3) of the SBA Rules and Regulations.

It is a well established principle of administrative law that valid statutory regulations have the force and effect of law, are general in their application, and may not be waived. 37 Comp. Gen. 820, 821 (1958), and cases cited therein. SBA Regulation 121.3–1(b) establishes the mandatory requirement that the SIC Manual *shall* be used in defining industries. While it may be conceded that the term "product" used in section 121.3–1(b)(3) quoted above includes "services" so as to permit the use of publications of the Bureau of the Census mentioned above, by its very language it requires classification within a *SIC* industry. It should be noted also that the 1960 Census Bureau index of industries which is mentioned in SBA's letter of December 3, 1969, as support for the position that collecting and transporting refuse is not included in the Trucking Service classification, has been

superseded by the 1970 index. The 1970 index places Trucking Service under Code 417 and refers specifically to the SIC Manual classification which includes No. 4212, quoted above. Classification No. 4212, of course, includes collecting and transporting refuse, without disposal.

As already discussed, the services involved were for transportation within SIC definitions and therefore, a $3 million small business size standard applies pursuant to 13 CFR 121.3–8(f).

Accordingly, we believe that the result in *Size Appeal of Johnson and Speake*, *supra*, is inconsistent with the mandatory requirements of the SBA regulations. It is within SBA's authority to establish size standards; but the administrative process which establishes such standards must conform to the SBA regulations.

A copy of this decision is being sent to SBA today.

[B–168591]

Bidders—Invitation Right—Failure to Solicit Bids—Automated Bidders' List

Where a request for proposals issued under 10 U.S.C. 2304(a)(2) had been synopsized in the Commerce Business Daily and had been solicited from many sources, securing adequate competition and reasonable prices, the failure to solicit a firm on the automated bidders list need not be questioned as paragraph 2–205.4 of the Armed Services Procurement Regulation authorizes contracting officers to rotate the use of long mailing lists to avoid excessive administrative costs when justified by the size of the transaction, and the record evidences no intent or purpose to exclude the bidder.

To Fred Israel, April 21, 1970:

Reference is made to your letters dated January 5, and March 9, 1970, protesting on behalf of Stencel Aero Engineering Corporation any award of contract under request for proposals (RFP) No. DAAA25–70–R–0287, issued by the Department of the Army, Frankford Arsenal, Philadelphia, Pennsylvania.

The request for proposals for 542 Parachute Ejector XM 233 Assemblies was issued on November 7, 1969, with the closing time for receipt of proposals set for 5:00 p.m., EST, November 24, 1969. The purchase request contained an 02 Issue Priority Designator with mandatory delivery required on or before April 30, 1970, in order to meet scheduled temperate climate phase of the Check Test and the Arctic Winter Climate Tests. In view of the urgent circumstances, the contracting officer determined that the proposed contract could be negotiated without formal advertising pursuant to the public exigency exception to formal advertising provided at 10 U.S.C. 2304(a)(2) and Armed Services Procurement Regulation (ASPR) 3–202.2(vi). We are advised that the procurement was synopsized in the Commerce Business Daily on November 7, 1969.

It is reported that the negotiator originally solicited five sources known to him to be producers of propellant actuated devices and that he was unaware that Stencel was a potential source of supply. In addition, he requested and received the names of twenty other sources from the automated bidders' list. We are informed that this list for the item solicited contains the names of sixty-seven potential sources, and that Stencel Aero Engineering Corporation is included in the list as a potential source of supply. In addition to the twenty-five sources originally solicited, twenty-seven other sources requested copies of the RFP as a result of the synopsis in the Commerce Business Daily. A total of fifty-two sources were therefore directly and indirectly solicited for the procurement.

In response to the solicitation, three proposals were received as follows:

	Each
Canadian Commercial Corporation (Canadian Flight Equipment, Ltd.)	$110.99
Arnolt Corporation	317.40
I. D. Precision Components Corporation	117.83

The evaluated low offer was received from Canadian Commercial Corporation which would subcontract 100 percent with Canadian Flight Equipment Company, Ltd. On December 2, 1969, contract No. DAAA25-70-C-0304 was awarded to Canadian Commercial Corporation for 542 Parachute Ejector XM 233 Assemblies at $110.99 each for a total award of $60,156.58.

Stencel Aero Engineering Corporation (Stencel) contends that the RFP was not in conformance with ASPR since it had been assured in writing by the Department of the Army that it would be solicited, and it was not solicited with regard to the subject procurement. In this regard, a letter dated October 25, 1966, from the Frankford Arsenal to Stencel stated "* * * when procurement activity is instituted on this item, your company will be included as a source to be solicited." It is stated in the administrative report that the foregoing statement indicates the Army's intention to add Stencel to the bidders' list. We believe Stencel's letter of November 19, 1969, to the Frankford Arsenal demonstrates this understanding since it states "We asked back in 1966 to be placed on your bidders' list for this device * * *."

As mentioned above, Stencel was placed on the automated bidders' list which contains sixty-seven potential sources. In view of the size of the list and the value of the procurement, the negotiator decided not to solicit the entire list. The failure to solicit all firms on a long bidders' list is expressly permitted by ASPR to avoid excessive administrative costs. However, in order to assure that all firms on the list will eventually be solicited, the list is rotated, also in accordance with ASPR.

The pertinent provisions of ASPR are as follows:

2-205.4 EXCESSIVELY LONG BIDDERS MAILING LISTS.

(a) GENERAL. To prevent excessive administrative costs of a procurement, mailing lists should be used in a way which will promote competition commensurate with the dollar value of the purchase to be made. As much of the mailing list will be used as is compatible with efficiency and economy in securing adequate competition as required by law. Where the number of bidders on a mailing list is considered excessive in relation to a specific procurement, the numbers of firms to be solicited may be reduced by any method consistent with the foregoing, including those described in (b) below and 2-205.6. The fact that less than an entire mailing list is used shall not in itself preclude furnishing of bids sets upon request made by concerns not invited to bid.

(b) ROTATION OF LISTS. Mailing lists may be rotated, but to do so will require considerable judgment as to whether the size of the transaction justifies rotation. * * *

Based on the foregoing, we are of the opinion that use of the automated bidders' list in the subject procurement was in accordance with applicable regulations.

In B-164047, June 10, 1968, we stated as follows:

We have held that the propriety of a particular procurement must be determined from the Government's point of view upon the basis of whether adequate competition and reasonable prices were obtained, not upon whether every possible prospective bidder was afforded an opportunity to bid. B-147515, January 12, 1962.

Although it is regrettable that your firm did not receive a bid set in sufficient time to prepare and submit a bid pursuant to the terms and conditions of the invitation, there is no indication in the record that there was any conscious or deliberate intention to exclude you or any other interested firm from participating in the procurement. *In the absence of such intent or purpose, an inadvertent failure to furnish timely a copy of an invitation to a particular supplier does not constitute, in our opinion, a sufficient basis to cancel the invitation or to question an otherwise proper award under the invitation. Cf.* 34 Comp. Gen. 684; B-161241, May 8, 1967. [Italic supplied.]

It is reported that the contract price is substantially lower than the Government estimate and is considered reasonable. Since it is apparent there was no intent or purpose to preclude Stencel from participating in this procurement, we find no basis to question the award.

Accordingly, your protest is denied.

[B-169099]

Subsistence—Per Diem—Military Personnel—Temporary Duty—Near Permanent Duty Station

An officer occupying quarters on post at Quantico who is ordered to perform temporary duty at Marine Corps Headquarters, Washington, D.C., and to travel daily by privately owned car between the two points, a distance of 70 miles, is subject to paragraph M4201-14 of the Joint Travel Regulations (JTR), which precludes the payment of per diem to a member traveling daily from his residence to a temporary duty station on the basis the member incurs no change in living conditions or additional subsistence expenses, and the restriction is for application even though the Marine officer is absent from his permanent duty station in excess of 10 hours and would but for paragraph M4201-14 receive a partial per diem under Chapter 4, Part E, of the JTR. However, pursuant to paragraph M4203-3, the officer is entitled to the rate per mile prescribed for the required travel.

To Major F. R. Hasler, United States Marine Corps, April 21, 1970:

Further reference is made to your letter of November 26, 1969, file reference FRH/sdn, and enclosures, forwarded here by the Per Diem, Travel and Transportation Allowance Committee, requesting a decision as to the entitlement of Colonel T. T. Gentry, 023 926, to per diem under the circumstances described. Your request for decision was assigned Control No. 70–8 by the Per Diem, Travel and Transportation Allowance Committee.

Orders dated August 26, 1969, Headquarters, Marine Corps Development and Education Command, Quantico, Virginia, directed Colonel Gentry to proceed and report on September 8 or 9, 1969, to the Commandant of the Marine Corps, Headquarters Marine Corps, Washington, D.C., for temporary additional duty for a period of about 2 weeks in connection with being a member of the Major Selection Board. Travel by privately owned conveyance was authorized as being more advantageous to the Government. The orders also provided that "In accordance with Par M4201, Item 14 JTR you are directed to commute daily between your place of temporary additional duty and your permanent duty station/quarters and you are hereby notified that you will incur no additional subsistence expenses under these orders." Colonel Gentry occupied quarters on post at Quantico.

In your letter of November 26, 1969, you say that the claim of Colonel Gentry for per diem was disapproved on the basis of paragraph M4201–14 of the Joint Travel Regulations. You further say that his orders for temporary duty required him to report to Headquarters, Marine Corps, located in Arlington, Virginia, an area not adjacent to the Marine Corps Base, Quantico, Virginia, nor serviced by local common carrier. He commuted daily between his quarters at Quantico and his place of temporary additional duty. On 18 of the 22 days involved, you continue, Colonel Gentry was absent from his permanent duty station in excess of 10 hours and would normally have been authorized a partial per diem allowance for such days under the provisions of Chapter 4, Part E, of the Joint Travel Regulations.

In view of these facts, you ask the following questions:

a. Does the restriction contained in paragraph M4500–2 apply when the provisions of paragraph M4201–14 of the Joint Travel Regulations are applied as they are in the claim of Colonel Gentry, and should reimbursement be limited to the appropriate rate per mile for the required travel?

b. If the restriction does apply, is it permissible to deny per diem through the use of paragraph M4201–14 in cases similar to the claim of Colonel Gentry when the member would otherwise be authorized per diem under the provisions of Chapter 4, Part E of the regulations

on those days he was required to be absent from his permanent duty station for more than 10 hours?

The Per Diem, Travel and Transportation Allowance Committee in transmitting your letter of November 26, 1969, and enclosures, to our Office, commented that the purpose of paragraph M4201–14 of the Joint Travel Regulations is to preclude payment of per diem in those cases where the member proceeds from his residence to the temporary duty station and returns to his resident daily with no change occurring in his living conditions. The Committee says that this paragraph was specifically designed to cover the case of a member stationed at Quantico, Virginia, who lives somewhere between Quantico and Arlington or Washington and performs travel daily between his residence and the temporary duty station at the Pentagon or Navy Annex, a distance which is approximately the same as or less than the distance between his residence and Quantico.

The Committee also says that since Colonel Gentry occupied quarters on post at Quantico, his orders should not have cited paragraph M4201–14 of the Joint Travel Regulations as a change in his living conditions (travel) did occur because of the requirement for travel between Quantico and Headquarters, Marine Corps.

The Committee expresses the view that the provisions of Chapter 4, Part K, of the Joint Travel Regulations are not for application in Colonel Gentry's case since the location of his temporary duty station in relation to his permanent duty station and quarters is not within the area described therein for which transportation expenses may be authorized and, therefore, he is entitled to per diem as provided in paragraph M4205–5 and to a monetary allowance in lieu of transportation as provided in paragraph M4203–3 of the regulations.

Section 404 of Title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances for travel performed under orders away from his designated post of duty regardless of the length of time he is away from that post.

Section 408 of Title 37, U.S. Code, provides that a member of the uniformed services may be directed, by regulations of the Department in which he is serving, to procure transportation necessary in conducting official business within the limits of his station and be reimbursed for the expenses incurred or paid a mileage allowance for the use of a privately owned vehicle. This section stems from section 211(m) of the act of June 30, 1949, 63 Stat. 378, as added by section 2 of the act of September 1, 1954, ch. 1211, 68 Stat. 1129. In view of the legislative history of the section, it has been construed, where the duty station is located in a metropolitan area, as extending to travel within the

general area surrounding the official station that is served by local carriers. 35 Comp. Gen. 677 (1956); 41 Comp. Gen. 588 (1962).

Paragraph M4201–14 of the Joint Travel Regulations, promulgated pursuant to sections 404 and 408, provides that per diem allowances are not payable for periods of temporary duty away from the member's permanent duty station at a location near his permanent duty station and his permanent quarters from which he may commute daily to the temporary duty station and his commanding officer finds, and specifically states in the orders, that the member will incur no additional subsistence expenses. It is further provided in paragraph M4201–14 that transportation expenses incident to this type of temporary duty assignment may be considered under the provisions of Part K of the regulations.

Part K, chapter 4 of the regulations, issued under authority of section 408, relates to reimbursement for travel within and adjacent to permanent and temporary duty stations.

Paragraph M4500–2 included in Part K of the regulations provides that the area in which transportation expenses may be authorized or approved under that part for conducting official business will be within the limits of permanent and temporary duty stations, and the metropolitan areas surrounding those stations which are ordinarily serviced by local common carriers of the cities or towns in which such stations are located, or in the comparable surrounding areas if the posts of duty are not located within recognized metropolitan areas. Paragraph M4502 of the regulations provides that when authorized or approved under the conditions of Part K, members who travel by privately owned conveyance are entitled to reimbursement at a rate of 10 cents per mile for the use of a privately owned conveyance.

There is nothing in paragraph M4201–14 of the regulations which restricts its application to members residing between their permanent and temporary duty stations even though, as stated by the Per Diem, Travel and Transportation Allowance Committee, it may have been specifically designed for such cases. And we are not aware of any administrative directive which purports to limit its application to such cases. Paragraph M4201–14 provides that it is applicable when the commanding officer finds that the member will incur no additional subsistence expenses in connection with his temporary duty, which is to be performed at a location near his permanent station and his permanent quarters from which he may commute daily.

Colonel Gentry's travel voucher shows that he traveled a round-trip distance of 70 miles on the days he performed temporary duty, indicating that his temporary duty station was approximately 35 miles from his permanent station where he resided. That does not appear

to have been an unreasonable distance to commute daily and, in the circumstances, we find no basis for questioning the determination in effect made by the order-issuing authority that the place of temporary duty was near the member's permanent station and quarters within the contemplation of item 14, paragraph M4201 of the regulations, and that no additional subsistence expenses would be incurred.

As stated by the Per Diem, Travel and Transportation Allowance Committee, Colonel Gentry's travel from Quantico to his temporary duty station and return was not limited to the area surrounding such temporary duty station as defined in paragraph M4500–2 of the regulations, but constituted inter-station travel and payment of a travel allowance is governed by 37 U.S.C. 404 and the regulations issued pursuant thereto. 45 Comp. Gen. 30 (1965).

Thus, the two questions included in question *a* stated in your letter are both answered in the affirmative, and Colonel Gentry is entitled to reimbursement for travel at the rate of 7 cents per mile under the provisions of paragraph M4203–3 of the regulations (which it appears he has been paid) but he is not entitled to per diem for his temporary duty. Question *b* is also answered in the affirmative.

Colonel Gentry's travel vouchers and supporting documents will be retained by our Office.

[B–169368]

Bids—Discarding All Bids—Specifications Defective—Performance Time

When an invitation for bids provides for liquidated damages but omits to state the number of days in which the work of converting elevators to automatic controls must be completed, the question for resolution is not the responsiveness of the low bid that did not indicate performance time or the entitlement to a contract award of the only other bidder who had indicated performance time in its bid, but whether the invitation was defective. The invitation in omitting performance time did not comply with the requirement in Section 1–18.203–1(b) of the Federal Procurement Regulations, and in failing to indicate what time, if any, would be acceptable, did not permit bidders to compete on an equal basis and, therefore, the defective invitation should be canceled and the procurement readvertised.

To the Administrator, Veterans Administration, April 21, 1970:

Reference is made to letter 134G of March 19, 1970, from the Director, Supply Service, Department of Medicine and Surgery, requesting a decision with respect to the bids received on project 17–5084 for the conversion of four elevators to automatic control at the Veterans Administration Hospital at New Orleans, Louisiana.

Paragraph 5 of the general requirements in the invitation for bids provided that if there is a failure to complete the work in the time stated there will be a deduction in the amount of $50 for each calendar day of delay beyond the days specified for completion of the work.

Paragraph 5 does not specify any number of days for completion of the work. As a matter of fact, the invitation for bids neglected to state the number of calendar days required for completion of the work. The invitation contained a paragraph (h) for providing that information, but the number of days was omitted from the paragraph. The paragraph merely stated:

> Work is to be completed within calendar days.

Further, the bid form provided for the submission of bids, standard form 21, bid form for construction contracts, included a paragraph in which the number of days for completion of the work was also left blank. As included in the bid form, the paragraph read:

> The undersigned agrees, if awarded the contract, to commence the work within 10 calendar days after the date of receipt of notice to proceed, and to complete the work within calendar days after the date of receipt of notice to proceed.

Bids were opened January 20, 1970. Two bids were received. Haughton Elevator Company and Otis Elevator Company submitted bids in the amounts of $195,319 and $196,162, respectively. Otis Elevator Company completed the bid form to show completion of the work within 635 calendar days. Haughton Elevator Company did not provide any time for completion of the work in its bid. By letter of January 21, 1970, to the contracting agency, Haughton Elevator Company stated that, since there was no direct instructions requiring a completion time to be stated in the bid, it inadvertently omitted the completion time, but that the bid was based upon a completion time of 825 calendar days after the receipt of a notice to proceed. The letter stated further that barring unforeseen delays, the completion time should actually be less than 825 days.

By letter of February 4, 1970, to the contracting officer, Otis Elevator Company protested an award to Haughton Elevator Company on the ground that the bid received from the latter bidder was nonresponsive. The basis for the contention was that paragraph 5 of the general requirements provided liquidated damages for delay, standard contract form 23–A made completion time an important part of the contract, the bid form required the bidder to indicate the time for completion, and standard form 19–B contained an admonition to bidders to set forth full, accurate and complete information as required by the invitation for bids.

The contracting officer has indicated that he considers the additional 190 days offered by Haughton to be excessive and that the cost of salaries to the Government in continuing the elevators on manual operation for the additional 190 days would be in excess of $18,000 which would far exceed the $843 difference between the two bids. For

these reasons, the contracting officer has recommended that the award be made to Otis Elevator Company.

The March 19, 1970, letter from the Director of the Supply Service expresses the view that the Haughton bid is substantively nonresponsive for having failed to specify a time for performance, particularly because of the liquidated damage provision, and indicates an inclination to make an award to Otis, but raises a question as to whether the invitation is so defective as to preclude such an award.

Section 1–18.203–1(b) of the Federal Procurement Regulations (FPR) provides that—

> * * * invitations for bids shall contain the following to the extent applicable:
>
> * * * * * * *
>
> (4) Time for performance;

Further, FPR sec. 1–18.105 stipulates factors that the contracting officer should give consideration to in establishing the time for completion of the contract. Thus, FPR contemplates the inclusion of the time for performance in the invitation for bids and the contracting officer, rather than the bidders, fixing the amount of such time.

In this case, the invitation for bids was prepared to provide for the time of completion, but the number of days was omitted from the paragraph that was to contain the information. Although liquidated damages were specifically provided for and standard form 23–A provides the steps the Government may follow in the event the work is not completed within the time specified in the contract, there was nothing in the invitation requiring the bidders to state in their bids the time for completion. As indicated by the FPR, this is information required to be furnished by the invitation for bids. Further, the paragraph in the bid form pertaining to the time for completion only contemplated completion of the blank where the Government had specified a time for completion since at the outset it uses the terms "The undersigned agrees." Use of the word "agrees" indicates a response to some previous requirement and since, as indicated, no requirement as to time of completion was stated in the invitation, no response in that regard was necessarily called for in the bid.

However, it is indicated by the contracting officer that time is an important consideration. The bid of Otis indicates that it was based upon completing the work in 635 days and it has stated in the February 4 letter that its price was based upon the early performance. On the other hand, the information furnished by Haughton the day after bid opening indicated that its bid was based upon 825 days. Otis has stated that because of the liquidated damages provision, it assumed that time for completion was to be an important consideration and that if a longer completion time were permitted its bid would be lower. In view of the slight difference ($843) between the two bids, it may be

that Haughton would not have been the low bidder if Otis had based its bid upon a longer completion time.

We recognize that although Haughton stated in its January 21 letter that it based its bid upon completion in 825 days, it further indicated that it might complete the work earlier. We have no way of knowing from its bid whether it would have bid the same price and would have been the low bidder if it was required to bid to a 635-day completion time. Neither do we know whether Otis would have been the low bidder if it had not bid on the basis of completion within 635 days. It would not be consistent with formal advertising procedures to go outside the bids to ascertain what the bidders would have bid if the invitation for bids had not been defective.

In our view the question as to the responsiveness of Haughton's bid is not relevant to the matter. As indicated above, the FPR required the contracting officer to fix the time for completion of the work and include it in the invitation for bids. While a paragraph was included in the invitation in which the time for completion was to be inserted by the contracting agency, it failed to do so. Thus, the invitation did not specify what time, if any, would be acceptable for completion of the work and the bid form was not specific that the bidder was to enter any time for completion. If Haughton was nonresponsive for failing to specify any number of days for completion in the bid, it can be attributed to the defective invitation. If it had specified 825 days for completion in the bid, there would be no question as to its responsiveness, since the invitation did not specify any time for completion. However, the contracting officer has indicated that the time for completion is important, so that if it were responsive on that point, the contracting officer would have no choice but to cancel all bids and readvertise on an invitation specifying time for completion. In that regard, it has been held that bidders cannot compete on an equal basis as required by law unless they know in advance the basis on which bids will be evaluated. B–120741, March 17, 1955. Further, in 37 Comp. Gen. 251 (1957), it was held that the award of a construction contract to other than the low bidder, on the basis of an earlier completion date under an invitation which did not include any statement regarding completion time or that time would be considered as an evaluation factor, was improper, and the fact that the specifications required bidders to furnish a completion date was not sufficient to justify an evaluation on any basis other than price. In addition, our Office has held that free and unrestricted competition cannot be obtained unless all bids are made on the same basis and that there was no choice but to reject all bids and readvertise when time was an important consideration and the invitation did not specify any acceptable time limit. B–140071, September 29, 1959; 41 Comp. Gen. 599 (1962); and 46 *id.* 745 (1967).

In 41 Comp. Gen. 599, at page 602, it was stated:

> We have held that time of delivery properly may be considered in making an award, price alone not being controlling, when early delivery is required in the Government's interest and when the invitation so provides, all bidders thus being placed on notice and given an equal opportunity to compete for the Government's business. B–128405, August 3, 1956. We have, also, held in our numerous decisions on this subject that, in fairness to bidders, in the interest of the maintenance of the integrity of the competitive bidding system, and in compliance with the statutory requirements, invitations for bids should be as clear, precise and exact as possible in advising bidders of the basis on which their bids will be evaluated. 36 Comp. Gen. 380. Further, in this connection, in our decision of November 8, 1956, B–129678, to the then Secretary of the Navy, we stated, concerning the time of delivery provision there involved, in part, that—
>
> "We have consistently held that bidders cannot compete on an equal basis, as required by law, unless they know in advance the basis on which their bids will be evaluated. For this reason it is our view that a contracting agency cannot properly reserve the right to determine after the bids are submitted whether time of delivery will be a factor in evaluating bids."
>
> In our decision of September 15, 1956, B–128405, citing in support thereof the holding of the court in *United States* v. *Brookridge Farm*, 111 F. 2d 461, affirming 27 F. Supp. 909, we held that contracts awarded under invitations which are not so drawn as to permit competition on an equal basis, by failing to set forth the basis for evaluation as between price and time of delivery, are voidable. Finally, concerning the position that savings could be realized by the Government if the basis for evaluation as between price and time of delivery were left open, we have stated many times that in our opinion the preservation of the competitive bidding system is more beneficial to the Government from a long-range standpoint than the pecuniary saving which might be realized in an individual case.

It may be that Haughton was responsive on the basis of the bid as submitted, since the invitation did not provide a time for completion and did not provide for time as an evaluation factor. But, as stated above, the question of responsiveness is not the issue.

The invitation was defective in that it did not supply a time for completion as the FPR requires and there was nothing in the invitation indicating what time, if any, would be acceptable. Price, not time for performance, would therefore be the consideration in determining the acceptable bid. Thus a bidder could have specified any time for completion, without limitation, and it would have been required to be accepted if it was the low bid. As indicated above, any consideration of time after the opening of bids would require the readvertisement of the procurement, since that would be a new factor added after the bid opening.

As we have indicated, the invitation was defective for failing to follow FPR and was uncertain as to the time for performance by reason of this defect. In B–164749, August 26, 1968, our Office upheld the cancellation of an invitation for bids which contained uncertain and ambiguous performance terms without considering the responsiveness of some bids which were alleged to be nonresponsive to the delivery requirements of the invitation. See, also, B–143220, June 30, 1960, upholding the cancellation and readvertisement of an invitation

which was ambiguous as to whether time or price was to be the consideration for award.

In view of the foregoing, we are of the view that the circumstances of the immediate case likewise require the cancellation of the invitation and readvertisement of the procurement.

[B–167868]

Bids—Evaluation—Delivery Provisions—Guaranteed Shipping Weight, Etc.

An error in the cubic displacement of a shipment of cement to an overseas destination entitles the Government in accordance with the Maximum Guaranteed Shipping Weights and Dimensions clause contained in the invitation for bids to a contract price reduction between the actual transportation costs and the costs used to evaluate the bid. The contractor's allegation of mistake in the calculation of the guaranteed cubic displacement in bid preparation is not sustained, even though the displacement figure was below the Government's estimate, in view of the fact that generally bidders deliberately underestimate guaranteed shipping weights and dimensions, and that the additional transportation cost, taking into consideration the bid price for the cement, did not place the contracting officer on constructive notice of the possibility of error.

Contracts—Disputes—Administrative Determinations—Exhaustion of Remedies

Where a dispute is pending before a contracting officer on the propriety of a unilateral price reduction by the Government of the difference between the actual transportation costs and costs used in the evaluation of a bid on cement for shipment overseas, made pursuant to the Maximum Guaranteed Shipping Weights and Dimensions clause in the invitation for bids, the matter is properly not for consideration by the United States General Accounting Office as both the contractor and the Government are bound to follow the procedures set out in the contract for administrative settlement of disputes arising out of the contract, and the contractor must exhaust its remedies under the disputes clause before resorting either to General Accounting Office or the courts.

To Edward E. Whalen, April 22, 1970:

We further refer to your letters of September 3 and December 15, 1969, on behalf of Kaiser Cement & Gypsum Corporation (Kaiser), requesting relief from an allegedly erroneous computation of the maximum guaranteed shipping dimensions in Kaiser's bid, which bid is the basis of Naval Facilities Engineering Command, San Bruno, California, contract No. N62864–68–C–7019.

The facts of record indicate that invitation for bids No. N62864–68–C–7019, as amended, was issued to fulfill a requirement for 115,020 bags of type 3 Portland cement. The specifications required the cement to be packaged in 94-pound bags and palletized (3,834 pallets, each containing 30 bags of cement). Insofar as is relevant here, item 2 requested bidders to quote on an f.o.b. origin basis, and bidders were further requested to indicate the point at which the supplies would be delivered to the Government. The invitation also contained a Maxi-

mum Guaranteed Shipping Weights and Dimensions clause, which provides as follows:

Each offer will be evaluated to the overseas destination specified above by adding to the f.o.b. point price, or to the West Coast Port to which transportation charges will be prepaid, all transportation costs to the overseas destination. The guaranteed maximum for both shipping weight and cubic displacement, including packing, are required for determination of transportation costs. *Offeror must include this in the space provided below.* If delivered items exceed the guaranteed maximum shipping weights or cubic displacements the offeror agrees that the contract price shall be reduced by an amount equal to the difference between the transportation costs computed for evaluation purposes based on offeror's guaranteed maximum shipping weights or cubic displacements and the transportation costs that should have been used for evaluation purposes based on correct shipping data.

(MAY 1961)

TOTAL GUARANTEED MAXIMUM SHIPPING

(i) Weight_____

(ii) Cubic Displacement_____

Four bids were received and recorded on November 13, 1967, the scheduled bid opening date. The firms responding, the bid prices submitted for item 2, the cubic foot displacement guaranteed, and the Government's estimates are as follows:

Kaiser	$149,526.00	142,817 cubic feet
Southwestern Portland Cement Co.	155,495.54	167,162 cubic feet
American Cement Corporation	177,933.45	158,728 cubic feet
Oregon Portland Cement Co.	No Bid	172,530 cubic feet
Government Estimate	154,126.00	153,360 cubic feet

Upon evaluation, award was made to Kaiser on November 14, 1967, as the lowest responsive, responsible bidder, price and other factors considered. Thereafter, you advise, in your letter of September 3, 1969, that on November 17, 1967, a Government inspector approved Kaiser's proposed packaging. Packaging of the cement actually commenced on Sunday, November 26, 1967, the first day packaging materials were made available to Kaiser by its suppliers. During the next 10 days, the cement was packaged, palletized and loaded on Government-furnished trucks for transport to the South Military Ocean Terminal, Bay Area, United States Army, Redwood City, California. From December 4 through December 6, 1967, the cement was loaded on the S.S. *Frontenac Victory* (chartered by MSTS on a voyage charter with Atlas Steamship Company) by a stevedoring company under Government contract. During loading operations the stevedoring company questioned the accuracy of Kaiser's guaranteed cubic displacement. A measurement was taken and it was determined that the cubic displacement was 163,715 feet, as opposed to the 142,817 cubic feet guaranteed in Kaiser's bid. You advise that the overage is attributable to the alleged mistake and to the cubic displacement of additional

cement voluntarily furnished to the Government at no cost. As a result of this measurement, the Naval Facilities Engineering Command issued change order P001, effective May 28, 1968, which unilaterally reduced the price of the contract by $18,364.12 to cover the overage of 20,898 cubic feet.

Kaiser objected to the adjustment and in accordance with departmental procedures, the matter was forwarded to the Naval Facilities Engineering Command, Washington, D.C., for a final decision under the disputes clause of the contract. Prior to the issuance of a final decision, Kaiser discovered the alleged mistake in the calculation of its guaranteed cubic displacement. By letter dated May 21, 1969, Kaiser requested, and the Command agreed, that further consideration of the dispute be suspended pending referral of the mistake issue to our Office for resolution.

Turning now to a consideration of the alleged mistake, your letter of September 3, 1969, advises that:

> * * * In making its calculations, Kaiser had utilized a figure of 1.0 cubic feet per 94 pound bag of cement. Accordingly, its calculation was made as follows:
>
> | | |
> |---|---|
> | Pallet | 6.75 cubic feet |
> | Top | .50 cubic feet |
> | 30 sacks of cement | 30.00 cubic feet |
> | | 37.25 cubic feet per pallet |
>
> 37.25 cu. ft. × 3,834 pallets=142,817 cubic feet
>
> The actual cube of a 94 pound bag of cement is 1.063 cubic feet, but this figure is normally rounded to 1.1 cubic feet for purposes of bid calculations. If Kaiser had used this figure, its guaranteed cube measurement would have been calculated as follows:
>
> | | |
> |---|---|
> | Pallet | 6.75 cubic feet |
> | Top | .50 cubic feet |
> | 30 sacks of cement | 33.00 cubic feet |
> | | 40.25 cubic feet per pallet |
>
> 40.25 cu. ft. × 3,834 pallets=154,318 cubic feet
>
> Accordingly, due to an honest error by Kaiser, its guaranteed cube measurement was off by 11,501 cubic feet.

You further state that Kaiser had assumed the cubic measurement to be 1.0 cubic foot per 94-pound bag "since this is clearly stated on the cement bags utilized." Use of the 1.0 cubic foot per 94-pound bag measurement resulted in an excess of 11,501 cubic feet (approximately 385.7 measurement tons), which accounts for $13,557.36 of the $18,364.12 price adjustment.

Although you contend that the use of the 1.0 cubic-foot measure should be viewed as an honest mistake, we do not believe that this view may be sustained in the present circumstances. Here, we must emphasize your advice that the actual cube is *normally* rounded off to 1.1 cubic feet. That this is not the invariable practice is, of course, further evidenced by the 1.0 cubic-foot rate stated on the packaging

material used by Kaiser. We do recognize that overestimating the cubic displacement by use of the 1.1 cubic-foot rate might be desirable to Kaiser in the light of the potential liability for additional transportation costs under the Guaranteed Shipping Weights and Dimensions clause. Nevertheless, a conclusion that the failure to use the 1.1 cubic-foot rate establishes a mistake is, in our view, negated by the fact that a bidder may deliberately underestimate actual weights (38 Comp. Gen. 819, 821 (1959)) or dimensions (49 *id.* 558 (1970)).

Moreover, even assuming the mistake to be satisfactorily proven, the position taken by the Naval Facilities Engineering Command, Washington, D.C., in its report of November 19, 1969, to our Office is that the mistake should be considered unilateral and should not be imputed to the Government. In this connection, it is noted that Kaiser's cubic displacement figure was only about 7 percent below the Government's estimate. You maintain that this difference is significant since the Government's estimate closely approximates the actual cubic displacement and further note that all other bidders exceeded this estimate. However, as we have indicated, since a bidder may deliberately underestimate its guaranteed shipping weights and dimensions, we do not consider the percentage difference between Kaiser's guaranteed displacement and the Government estimate to be critical. *Cf.* B-154291, October 6, 1964. Thus, we cannot conclude that the additional transportation costs represented by Kaiser's underestimate of the actual cubic displacement, taking into consideration also its bid price for the cement, would be sufficient to place the contracting officer on constructive notice of the possibility of error.

In your correspondence you have also questioned the propriety of the unilateral price adjustment effected by change order P001 on other grounds. As you were advised in a meeting on March 24, 1970, with a representative of our Office, these matters are presently pending before the contracting officer under the disputes clause and are therefore not properly for consideration by our Office at this time. Both the contractor and the Government are bound to follow the procedures set out in the contract for the administrative settlement of disputes arising out of the contract and the contractor must exhaust its remedies under the disputes clause before resorting either to our Office or the courts. See *United States* v. *Hammer Contracting Corporation*, 331 F. 2d 173 (1964); *Beacon Construction Company of Mass.* v. *United States*, 314 F. 2d 501 (1963); *United States* v. *Peter Kiewit Sons' Co.*, 345 F. 2d 879 (1965); 37 Comp. Gen. 568 (1958), and authorities cited therein.

For the foregoing reasons, your request for relief is denied.

[B-169262]

Public Health Service—Commissioned Personnel—Pay, Etc.—Assimilation to Armed Services

The provision in section 206(a) of the Public Health Service Act (1944) that the Surgeon General of the Public Health Service (PHS) "during the period of his appointment as such, shall be of the same grade, with the same pay and allowances, as the Surgeon General of the Army" does not require the promotion of the PHS Surgeon General to pay grade 0-9 (lieutenant general) on the basis the Army Surgeon General was advanced by Public Law 89-288 (1965) to the grade of lieutenant general and assigned to pay grade 0-9, as the assimilation requirement of the 1944 act was impliedly repealed by the assignment of the PHS officer to pay grade 0-8 by section 201(b) of the Career Compensation Act of 1949. The codification of the 1949 act then eliminated the phrase "with the same pay and allowances" from section 206(a) of the 1944 act and the term "grade" no longer relating to "pay grade," there is no basis for promoting the PHS officer to pay grade 0-9.

To the Secretary of Health, Education, and Welfare, April 22, 1970:

Reference is made to your letter of March 6, 1970, requesting a decision whether section 206(a) of the Public Health Service Act, ch. 373, 58 Stat. 684, approved July 1, 1944, 42 U.S.C. 207(a), requires the promotion of the Surgeon General of the Public Health Service to pay grade 0–9 (lieutenant general).

Section 206(a) of the 1944 act provided that the Surgeon General of the Public Health Service, "during the period of his appointment as such, shall be of the same grade, with the same pay and allowances, as the Surgeon General of the Army." Prior to October 22, 1965, section 3036(b) of Title 10, U.S. Code, provided that the Surgeon General of the Army, if he holds a lower regular grade, shall be appointed in the regular grade of major general. The act of October 22, 1965, Public Law 89–288, 79 Stat. 1050, amended 10 U.S.C. 3036(b) to provide that the Surgeon General of the Army, "while so serving, has the grade of lieutenant general," which rank is assigned to pay grade 0–9 by 37 U.S.C. 201(a).

You say that it appears that the clear intent of section 206(a) of the Public Health Service Act in relation to 10 U.S.C. 3036(b) requires the promotion of the Surgeon General of the Public Health Service to pay grade 0–9, but that you have some hesitancy to take such action in view of the provisions of section 201(b) of the Career Compensation Act of 1949, 63 Stat. 307, now codified in 37 U.S.C. 201(a), which provide that the commissioned officer serving in the grade or rank of Surgeon General of the Public Health Service shall be in pay grade 0–8, to which grade major generals and rear admirals (upper half) are there assigned.

You state that section 201(b) of the Career Compensation Act of 1949 assigned the rank or grade of general, lieutenant general, and major general in the Army, as well as the Surgeon General of the

Public Health Service, to pay grade 0–8, the highest pay grade then authorized by law, thereby merely maintaining the previous equivalency between the ranks and pay grades of the Surgeon General of the Army and the Surgeon General of the Public Health Service.

You suggest that section 201(b) of the Career Compensation Act was not intended to restrict the operation of section 206(a) of the Public Health Service Act, but rather to effectuate such provision by placing the Surgeon General of the Public Health Service in the same pay grade as the Surgeon General of the Army, who by virtue of the provisions of 10 U.S.C. 81 (1946 ed.) held the rank of major general.

The act of May 20, 1958, Public Law 85–422, 72 Stat. 124, amending section 201(b) of the Career Compensation Act, created two additional pay grades for commissioned officers, 0–9 for lieutenant generals and vice admirals, and 0–10 for generals and admirals. No change was there made in the pay grade structure relating to commissioned officers of the Public Health Service, the pay grade of the Surgeon General being listed as 0–8 as it is in the current provisions of 37 U.S.C. 201(a). You say that at that time the statutory rank of the Surgeon General of the Army continued to be major general and hence there was no occasion for changing the pay grade for the Surgeon General of the Public Health Service, inasmuch as under section 206(a) of the Public Health Service Act the statutory grade of the Surgeon General of the Public Health Service was the same rank (major general) as that provided in section 201(b) of the 1949 act, as amended by the 1958 act.

You state that under the provisions of 10 U.S.C. 3066 the President promoted Major General Heaton, Surgeon General of the Army, to the grade of lieutenant general (0–9) in 1959, and that in the belief that section 206(a) of the Public Health Service Act related to the statutory grade of the Surgeon General of the Army, no action was taken to promote the Surgeon General of the Public Health Service to pay grade 0–9. You say, however, that since the statutory grade of the Surgeon General of the Army was changed to lieutenant general, pay grade 0–9, by Public Law 89–288 in 1965, it is your opinion that the Surgeon General of the Public Health Service should likewise have been promoted to pay grade 0–9 as required by section 206(a) of the Public Health Service Act.

Section 10 of the National Defense Act of June 3, 1916, 39 Stat. 171, 10 U.S.C. 81 (1940 ed.), provided that the Surgeon General of the Army shall have the rank of major general. Section 8 of the uniformed services pay readjustment act of June 10, 1922, 42 Stat. 629, 37 U.S.C. 12 (1940 ed.), provided that the annual base pay of the Surgeon General of the Public Health Service shall be $6,000 and that of a major general of the Army $8,000.

Section 10(b) of the act of April 9, 1930, ch. 125, 46 Stat. 152, 42 U.S.C. 11a (1940 ed.), an act to provide for the coordination of the public-health activities of the Government, provided that "Hereafter the Surgeon General of the Public Health Service shall be entitled to the same pay and allowances as the Surgeon General of the Army."

Section 7 of the Pay Readjustment Act of 1942, 56 Stat. 362, 37 U.S.C. 107 (1940 ed., Supp. II), provided that the annual base pay of a major general of the Army and of the Surgeon General of the Public Health Service shall be $8,000. As stated above, section 206(a) of the Public Health Service Act of 1944 (an act to consolidate and revise the laws relating to the Public Health Service) provided that the Surgeon General of the Public Health Service "shall be of the same grade, with the same pay and allowances, as the Surgeon General of the Army" (who under the provisions of the National Defense Act, 10 U.S.C. 81 (1940 ed.), was a major general).

The bill which became the Public Health Service Act of 1944 was considered in part a "codification of the public health laws." House Hearings on H.R. 3379, which became the 1944 act, at page 29. The committee reports of both the House of Representatives and the Senate state that "The bill for the most part is merely a restatement of the laws relating to the Public Health Service." H. Rept. No. 1364, 78th Cong., 2d sess. 1 and S. Rept. No. 1027, 78th Cong., 2d sess. 1. Its purposes were there stated to be "to bring together, in a compact and orderly arrangement, substantially all the existing law on the subject except obsolete provisions."

Inasmuch as both the 1930 public health law and the Pay Readjustment Act of 1942 were in agreement with respect to the pay and allowances of the Surgeon General, there was no occasion to then change the provisions of the Public Health Service laws. There is no indication in the legislative history of the 1944 law that the provisions of section 206(a) of the Public Health Service Act of 1944 were to supersede the provisions of section 7 of the Pay Readjustment Act of 1942, which was amended by section 3 of the act of June 29, 1946, ch. 523, 60 Stat. 344, to provide that the annual base pay of a major general of the Army and of the Surgeon General of the Public Health Service shall be $8,800.

The pay system then in effect was materially changed by the Career Compensation Act of 1949 which eliminated the base and longevity pay and pay period systems in effect for a number of years and substituted therefor a pay grade system together with basic pay which includes, in a single sum, the amount to which each member of a uniformed service is entitled in accordance with his *pay grade* and cumulative years of service.

Section 201(b) of the Career Compensation Act of 1949 assigned, for basic pay purposes, the rank or grade of general, lieutenant general, and major general of the Army as well as the grade of Surgeon General of the Public Health Service to pay grade 0–8, then the highest pay grade provided for commissioned officers of the uniformed services. That section, therefore, effectively established the basic pay grade of the Surgeon General of the Public Health Service as pay grade 0–8.

It would thus seem that section 201(b), being the later and the specific pay statute directly prescribing the pay grade and basic pay of the Surgeon General of the Public Health Service superseded that part of section 206(a) of the Public Health Service Act of 1944 relating to pay and allowances. See decision of April 15, 1941, 20 Comp. Gen. 645, holding that a statute assimilating the pay and allowances of Marine Corps personnel to those of the Army is inapplicable to cases where the Marine Corps personnel are otherwise specifically provided for. See, also, decisions of September 2, 1942, 22 Comp. Gen. 171, and July 4, 1944, 24 Comp. Gen. 4, holding that subsequent statutes specifically setting forth the pay and allowances of Marine Corps personnel make prior statutory assimilation provisions inoperative with respect to such pay and allowances. Compare 32 Comp. Gen. 35 (1952) and 44 Comp. Gen. 708 (1965).

In the case of *Beasley* v. *United States*, 176 Ct. Cl. 491 (1966), involving the pay rights of the Administrative Assistant Secretary of the Interior, the court considered the effect of several statutory provisions similar to those applicable to the Surgeon General of the Public Health Service.

Section 205 of the Public Works Appropriation Act, 1958, 71 Stat. 423, provided that after August 1957 the salary of the Administrative Assistant Secretary of the Interior shall be the same as the Solicitor of the Department of the Interior. Section 3(b) of the act of September 23, 1959, 73 Stat. 651, amended section 106(b) of the Federal Executive Pay Act of 1956 to provide that the annual rate of basic compensation of the Administrative Assistant Secretary of the Interior shall be $19,000. Section 106(a) of the Federal Executive Pay Act of 1956 was amended effective July 10, 1960, to increase the salary of the Solicitor of the Department of the Interior from $19,000 to $20,000. Effective July 4, 1964, new salary rates were established for both positions.

Based on the 1958 assimilation law the Administrative Assistant Secretary sued for the difference in salary between $19,000 and $20,000 for the period from July 10, 1960, to July 4, 1964. The Commissioner's opinion, as modified and adopted by the Court of Claims (with respect to the 1958 and 1959 laws relating to the salary of the Administrative Assistant Secretary) said:

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The two statutory provisions referred to in the preceding paragraph—the earlier of which would entitle the Administrative Assistant Secretary of the Interior to a salary of $20,000 per annum for the period in question and the later of which expressly fixed the salary of the position at $19,000 per annum for the same period—are clearly inconsistent with each other. Both of them cannot possibly be given effect with respect to the period of time that is involved in the present case. In such a situation, the rule is that the later of the two irreconcilable declarations of the legislature must prevail, as it is regarded as an implied repeal of the earlier provision. *United States* v. *Yuginovich*, 256 U.S. 450, 463 (1921); 1 SUTHERLAND, STATUTORY CONSTRUCTION §§ 1922, 2012 (3rd ed. 1943).

In the present case, Section 106(b) of the Federal Executive Pay Act of 1956, as amended by section 3(b) of the Act of September 23, 1959, was the later of the two clearly inconsistent statutory provisions that related to the compensation of the Administrative Assistant Secretary of the Interior; and it must be regarded as having impliedly repealed the repugnant portion of section 205 of the Public Works Appropriation Act of 1958. Therefore, the plaintiff, as the Administrative Assistant Secretary of the Interior, was properly paid a salary of $19,000 per annum during the period July 10, 1960–July 4, 1964 in accordance with Section 106(b) of the Federal Executive Pay Act of 1956, as amended by Section 3(b) of the Act of September 23, 1959.

While the intent of the Congress became less clear when the assimilating language "with the same pay and allowances," was included in section 206(a) of the 1944 act when that section was amended by the act of October 31, 1951, ch. 653, 65 Stat. 700, it should be noted that when section 1(2) of the act of May 20, 1958, Public Law 85–422, 72 Stat. 124, amended section 201(b) of the Career Compensation Act of 1949 to create two new pay grades, 0–10 and 0–9, major generals of the Army and the Surgeon General of the Public Health Service were again assigned to pay grade 0–8.

Whatever doubt as to the intent of the Congress which may have resulted from the 1951 amendment to section 206(a) of the Public Health Service Act of 1944, that doubt was removed by the act of September 7, 1962, Public Law 87–649, 76 Stat. 451, which codified the Career Compensation Act of 1949 in Title 37, U.S. Code. Section 201(a) of Title 37, as there codified, assigns major generals of the Army and the Surgeon General of the Public Health Service to pay grade 0–8. Section 11 of that act amended section 206(a) of the Public Health Service Act "by striking out the words, 'with the same pay and allowances,'" with respect to the Surgeon General of the Public Health Service, so that the said section now reads that "The Surgeon General, during the period of his appointment as such, shall be of the same grade as the Surgeon General of the Army."

Inasmuch as the term "grade" is not limited to pay grade, but is defined in both Title 10 and Title 37, U.S. Code, to mean a step or degree, in a graduated scale of office or rank, that is established and designated as a grade by law or regulation, and inasmuch as the same law that codified Title 37, U.S. Code, and retained the term "grade" in section 206(a) of the Public Health Service Act also assigned the Surgeon General of the Public Health Service to *pay grade 0–8*, it is our

opinion that the term "grade" in the said section 206(a) does not relate to "pay grade."

The obvious effect of the 1962 amendment was to completely eliminate from section 206(a) of the Public Health Service Act the provision of law assimilating the pay and allowances of the Surgeon General of the Public Health Service to the pay and allowances of the Surgeon General of the Army. We must conclude therefore, that section 1 of the act of October 22, 1965, Public Law 89-288, amending 10 U.S.C. 3036(b) to provide that the Surgeon General of the Army "has the grade of lieutenant general" did not have the effect of authorizing the payment to the Surgeon General of the Public Health Service of the same pay and allowances to which the Surgeon General of the Army, a lieutenant general in pay grade 0-9, is entitled.

On the contrary, the Career Compensation Act of 1949 having impliedly repealed the assimilation provision in section 206(a) of the Public Health Service Act and section 11 of the act of September 2, 1962, Public Law 87-649, having expressly eliminated the pay and allowance assimilation provision therefrom, there is no basis, under the present law, for paying the Surgeon General of the Public Health Service the basic pay prescribed for pay grade 0-9.

[B-168968]

Contracts—Specifications—Minimum Needs Requirement—Reference Materials

The input of substantial intellectual effort into the preparation of specifications for dictionaries, atlases, encyclopedias, and other reference materials does not justify an exception to the general rule that funds appropriated for purchases by Government agencies are available for purchase only of such articles as will meet the actual minimum needs of the agencies, and that payment of any greater amount for the purchase of articles which may be superior, or may for one reason or another be preferred by any individual officer, is not authorized. Therefore, the adoption of a single award procedure for various types of standard dictionaries in lieu of multiple awards is the proper exercise of administrative discretion where the specifications adequately meet the needs of the Government with no detrimental effect on the quality of the items being procured and at a savings to the Government.

To the Vice President and General Counsel, Encyclopaedia Britannica, April 24, 1970:

We refer to your letter dated January 28, 1970, concerning the objections of your subsidiary, G. & C. Merriam Company (Merriam), to the making of single awards in lieu of multiple awards by the Federal Supply Service (FSS), General Services Administration (GSA), for various types of dictionaries based on an interim Federal specification.

The first contract for the Government's needs for the types of dictionaries in question under single award procedures covered the period February 1, 1969, through January 31, 1970. The specification on

which the invitation for bids was based was Interim Federal Specification G-D-00331B (GSA-FSS), dated December 20, 1967, as amended August 21, 1968, which GSA reports was prepared after consideration of the comments and recommendations of industry.

In its amended form, the specification covered four types of dictionaries, three abridged and one unabridged, and read, in part, as follows:

3. REQUIREMENTS

3.1 Standard product: Each type dictionary shall be the publisher's standard product which is sold commercially and shall be of the latest copyrighted edition.

* * * * * * *

3.3 Content (all types). The dictionaries shall list alphabetically vocabulary terms (entries) of the English language complete with the following: (a) definitions, (b) pronunciations of the main terms by respelling using a defined system of phonetic representation, (c) part or parts of speech of each term with part-of-speech heading, (d) derived and inflected forms of main terms (may be either under the main term or in proper alphabetical sequence), and (e) synonyms and pictorial illustrations for selected entries. Commonly used slang and colloquial terms, technical and scientific words, and abbreviations shall be included in the lists of vocabulary terms or in accompanying appendices of the dictionaries. Each dictionary shall include a general guide for its proper usage. All printing shall be clearly legible and only black ink shall be used for printing entries and definitions.

3.3.1 Type I. The dictionary shall contain not less than 18,000 of the most common vocabulary terms, encountered by students of elementary school age, when tested in accordance with 4.2.3.2.1. Proper nouns shall be included in the dictionary and keys to pronunciation shall be on every two page spread. Size of type used for entries and definitions shall be not less than eight point.

3.3.2 Types II, III and IV. In addition to the general content requirements (see 3.3) the alphabetical listings of vocabulary terms for types II, III and IV dictionaries shall be complete with: (a) clear and informative etymologies of the main terms, (b) usage labels for terms, where applicable (e.g., slang, colloquial, informal, obsolete, British), and (c) variant spellings of terms. Commonly used foreign words and phrases shall be included in the lists of vocabulary terms.

3.3.2.1 Type II. In addition, the contents of the type II dictionary shall include proper nouns in the vocabulary listing or in an appendix; shall include keys to pronunciation on every two page spread; and shall contain not less than 130,000 entries when tested in accordance with 4.2.3.2.1.

3.3.2.2 Type III. Type III dictionary shall contain not less than 400,000 entries when checked in accordance with 4.2.3.2.1.

Quality assurance provisions in section 4 of the specification prescribed various tests including the following:

4.2.3.2.2 Content, type I. Check the dictionary for inclusion of at least eighteen of the following twenty terms, each complete with, or making reference to (a) definition, (b) pronunciation (except in the case of abbreviations), and (c) part-of-speech heading (except in the case of abbreviations):

albatross
cablegram
chromosome
circumnavigate
eclipse
equinox
etc.
fallout
galleon
German
H-Bomb
herbivorous
latitude
Mesozoic
nuclear energy
partridge
plutonium
RSVP
rural
SOS

4.2.3.2.3 Content, types II and III. Check the dictionary for inclusion of at least eighteen of the following twenty terms, each complete with, or making reference to (a) definition, (b) pronunciation (except in the case of abbreviations), (c) part-of-speech heading (except in the case of abbreviations), and (d) etymology (except in the case of foreign words and abbreviations) :

alluvial	ICBM
alveolus	jaywalk
Autobahn	laser
bathysphere	paranoia
colour	permutation
corker	petrol
electron microscope	rock and roll (or rock 'n' roll)
ESP	solarium
gene	U-boat
honky-tonk	xylem

Following a specification development conference on July 31, 1969, which was attended by representatives of the industry, the interim specification was revised after consideration of the views and comments of the industry. The revised specification, which was designated as Interim Federal Specification G–D–00331C (GSA–FSS), dated September 29, 1969, incorporated those views and comments of the industry which were considered by FSS to be advantageous in connection with the competitive procurement of dictionaries.

The revised specification was cited for single-contract procurement of the various types of dictionaries involved for the period February 1, 1970 (or date of award) through January 31, 1971, which was advertised under Invitation for Bids (IFB) FPNSO–EP–0605–A, issued October 17, 1969. On page 9 of the IFB, bidders were informed that award would be made on an item by item basis and that individual item quantities would not be subdivided for award purposes.

The record shows that Merriam participated in both of the procurements and as low bidder received award of one item under the first solicitation and of all three items on which it bid under the second solicitation.

The substance of your complaint is that good dictionaries, like good educational textbooks, should not be procured singly or with cost as the major consideration. In this regard, you question how specifications can be written to cover the literary and educational aspects of books, films and audio-visual aids, and so forth, particularly by the Government, without causing serious implications to freedom of thought and innovation.

GSA advised Merriam by letter of January 20, 1970, that the Federal Procurement Regulations (FPR) provide that purchases and contracts shall be made on a competitive basis to the maximum practicable extent [FPR 1–1.301–1] and that our Office has stressed that GSA should discontinue multiple awards whenever competitive procurement can be accomplished satisfactorily. On the premise, therefore, that the interim Federal specification is adequate, GSA states

that there is no basis to continue the previously used multiple-award procedure for procurement of the dictionaries in question. Further, GSA asserts, since it is essential, in GSA's opinion, that industry determine the literary and intellectual content of the dictionaries, GSA procures only standard products. (See paragraph 3.1. of the interim specification.)

In a letter dated January 28, 1970, to GSA, you express your opinion that our Office does not contemplate discontinuance of multiple awards for procurement of intellectual materials. In your letter of the same date to our Office you make the following pertinent statements:

> The question is: Does the GAO emphasis, referred to by Mr. Chapman, that GSA should discontinue multiple awards whenever procurement can be accomplished satisfactorily, intend to reach a judgment of whether materials with substantial intellectual input, such as dictionaries, atlases, encyclopedias and other reference materials can or should be reduced to full specifications? Certainly there can be and should be specifications on the physical properties of dictionaries—size of type, quality of paper and bindings, number of entries, etc.—but we argue there cannot be specifications on the intellectual input which constitutes a substantial part of the value of the product and that, therefore, the multiple award approach is proper.
>
> As I read the GAO position, it is one of urging the use of single awards wherever appropriate, but the decision of appropriateness within reason lies with the procuring agency, in this instance GSA.

By letter dated March 3, GSA has advised our Office that no objections were made by the industry to the 1967 interim specification or to the solicitation covering the period February 1, 1969, through January 31, 1970, in which the 1967 specification was cited, until after the bid opening, when Merriam interposed various objections. It is further stated that purchases of Government needs for dictionaries during the period of the contract at the low bid prices resulted in an estimated saving of $195,000 by the Government, when compared with the best prices available under the last previous supply schedule multiple award contracts. Under the current contract, GSA states, the expected annual saving to the Government, also by comparison with the same multiple award Federal Supply Schedule, is estimated as $245,533.

In light of the savings in both procurements, and for the other reasons stated above, GSA considers that the single-award competitive procedure is justified.

For your information there is enclosed a copy of Office letter of February 7, 1956, B–121926, B–122682, to the Administrator of General Services, in which our views as to the use of multiple awards for Federal Supply Schedule items are developed at some length, and which indicates the basis for our recommendations that such awards be limited so far as possible to certain specific situations.

While there is nothing in that letter with respect to "materials with substantial intellectual input," your question is whether our emphasis upon discontinuance of multiple awards is intended to reach a judgment as to whether such materials "can or should be reduced to full specifications."

With respect to dictionaries as a subject of procurement for Government use, we believe that the question raised by you can be resolved on the same basis as would apply to any other commercial article of common use: Can the needs of the Government for the article be adequately stated in such a way that any article conforming to the stated criteria would satisfactorily serve the Government's purposes?

In this instance the General Services Administration, which is charged with the authority and duty of making such determinations and drafting appropriate specifications, has, after consulting and advising with publishers, promulgated specifications which it considers appropriate for use in purchasing dictionaries.

While we cannot question your position that dictionaries represent substantial intellectual input, we do not feel that we could on that basis alone question GSA's conclusion that the Government's needs for dictionaries can be satisfactorily met by any dictionary conforming to the requirements of the specifications which it has prepared. Assuming that the purpose for which the Government purchases dictionaries for use by its employees is to facilitate the process of communication by use of language, the dictionary is simply a tool, and its suitability for such use appears to be as capable of being judged as is the fitness of any other tool for its intended use.

With respect to multiple awards generally, it is to be noted that agencies making purchases of articles for which more than one source is available are required, when purchasing other than the lowest priced item, to be prepared to furnish substantial justification for such action. Applying the intent of that rule to the estimated requirements for dictionaries stated in the invitation on which the current contract was awarded, the question arises whether there could be shown sufficient differences, in suitability for Government use, between several standard dictionaries for which multiple awards might be made, to justify the expenditure of the amounts which GSA estimates to be the savings realized by the making of single awards. In other words, can it be demonstrated that any one of such dictionaries is so superior to another, in its usefulness for the Government's purposes, as would justify the payment of a premium of approximately 50 percent, amounting to some $200,000 to $250,000 per year, to obtain *it*?

The general rule uniformly adhered to by this Office and its predecessor authorities in the Government is that funds appropriated by

the Congress for purchases by Government agencies are available for purchase only of such articles as will meet their actual minimum needs, and that payment of any greater amount for the purchase of articles which may be superior, or may for one reason or another be preferred by any individual agency or officer, is not authorized. We do not feel that an exception can be justified by the fact that the article purchased embodies the results of substantial intellectual input, where the article itself is one of a number of similar commercial items of widespread general use, freely available to the public in the common market place, any one of which is found to be adequate for the Government's needs.

In 38 Comp. Gen. 235 (1958), we had occasion to consider a somewhat similar procurement situation. In that case, GSA invited offers to supply, under separate awards, each of three types of coated steel addressing plates. While the procurement was pending, GSA ascertained, from information obtained during an investigation of difficulties encountered with one type of coating, that the coating was not at fault; rather, the investigation indicated that when cut to proper dimensions, each of the three types of coated plates performed satisfactorily. GSA therefore prepared an interim Federal specification providing for use of any one of the three types of coating at the option of the bidder, canceled the outstanding solicitation, and readvertised the procurement under single-award procedures using the interim specification. In upholding the actions taken by GSA, which one supplier protested for the reason, among others, that the coated plates were all different and should be procured separately, we stated that in light of the information furnished by GSA no proper basis existed for the making of separate awards for three different types of plates. With specific reference to the use of multiple awards, we further stated:

> The General Services Administration has, for some time, in accordance with recommendations made by our Office, endeavored to curtail the use of multiple awards wherever possible because of the probability that in most instances the resulting contracts would be legally unenforceable except to the extent performed. We have considered that a multiplicity of awards covering identical or substantially similar supplies to be furnished to meet the needs of the Government would ordinarily be wholly inconsistent with any obligation of the Government to any individual contractor. With respect to the subject of mutuality and enforceability of contracts to furnish the needs, desires, wants, and the like, of another, see 26 A. L. R. 2d 1139, 1141, 1142; *Willard, Sutherland & Co.* v. *United States*, 262 U.S. 489; and *Atwater & Company* v. *United States*, 262 U.S. 495.

For all the reasons discussed, we do not feel that we could properly hold that the specification in question is not justified and adequate for procurement of the dictionaries in question, or that there has been any detrimental effect on the quality of the items supplied to the Government. We therefore conclude that GSA's determination that the Gov-

ernment's advantage lies not in multiple awards but in single awards for each type of dictionary is a proper exercise of administrative discretion which is in keeping with the provisions of the applicable regulations and the rules of competitive bidding as reflected in the decisions of our Office.

[B–169473]

Bids—Late—Postal Strike Effect

A bid, forwarded by regular mail in sufficient time to have been delivered prior to the time set for the opening of bids but for the unprecedented postal strike that commenced in New York City on bid opening day, may not be considered for award by waiving the late bid regulations on the theory the strike was in the same realm as an act of God, defined as "some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes * * *." But even assuming the strike was an act of God, the bidder in not forwarding its bid by registered or certified mail, assumed the risk of delivery, a risk which was not overcome by bid handling instructions to procuring agencies necessitated by the strike, as the instructions did not suspend the late bid rules contained in Armed Services Procurement Regulation 2–303 and the invitation.

To Guimond Farms, April 24, 1970:

Reference is made to your telegram of April 2, 1970, and subsequent letters dated April 7, April 9, and April 18, 1970, protesting the decision of the Subsistence Regional Headquarters, Defense Personnel Support Center, New York City, not to consider your late bid on Invitation for Bids (IFB) No. DSA 136–70–B–0181.

The subject IFB was issued February 17, 1970, for the milk and dairy products requirements of Hanscom Field, Bedford, Massachusetts, for the period May 1, 1970, through October 31, 1970. Bids were scheduled for opening at 2:00 p.m. on March 18, 1970. It is administratively reported that your bid was mailed on March 17 via Special Delivery, and was received and time stamped at the Church Street postal substation, New York City, at 4:30 a.m. on March 18, 1970, in sufficient time to have been delivered to the Subsistence Regional Headquarters prior to the 2:00 p.m. deadline. However, because of a mail strike which commenced in New York City at 12:01 a.m. on March 18, 1970, your bid was not delivered until March 26, 1970.

You contend that your company should not be penalized and deprived of consideration of its bid because of delay in delivery caused by the unprecedented postal strike, which you argue could be considered in the same manner as an act of God. You therefore ask that the regulations be waived and your bid be opened and considered for award.

This case is unique in that the postal strike, which was unprecedented, was the sole factor for the delay in the delivery of your bid. At 5:00 p.m. on March 18, 1970, the Defense Personnel Support Center, Phila-

delphia, reacting to the postal strike, dispatched the following teletype message to the Subsistence Regional Headquarters in New York City:

Postal Strike in New York City

There is a postal strike in New York City which will effect the ability of bidders to mail bids from that City or its suburbs. Subsistence bids opening in this Headquarters this week are being extended one week with telegraphic bids authorized whenever bids from the New York area are anticipated. Subsistence Regional Headquarters in New York City will take similar action with its bids opening this week. If your amendments are in mail and cannot be delivered, it will be necessary to assume that bidders will have received the press release issued from here and/or to notify potential bidders by phone or wire. Other regional commanders should prepare to take similar action in the event the strike should spread outside the New York area and effect your sources.

On March 20, 1970, the Department of Defense sent out a message approved by the Armed Services Procurement Regulation (ASPR) Committee as follows:

The current mail stoppage in certain areas of the U.S. has created serious problems with regard to the scheduled opening of bids and receipt of proposals. As a direct result of the postal strike, telegraphic communications media have become severely overloaded. The following is therefore furnished for guidance of all DOD procurement offices:

1. If the requirement will permit, scheduled bid and proposal openings should be delayed until mail delivery problems have been substantially solved. Notwithstanding ASPR 2-208 and 3-505, notice of delay may be limited to display in the bid room. When mail service is restored, all prospective offerors should be notified of a new bid or proposal opening date by formal IFB or RFP amendment in accordance with 2-208 and 3-505.

2. If the requirement will not permit delay, available bids or proposals should be opened and award made thereon if it is determined that there was adequate competition or, in the case of proposals, negotiation undertaken when required. If it appears before bid opening that an insufficient number of bids has been received to indicate adequate competition, consideration should be given to canceling the IFB prior to opening and conducting negotiations, by telephone if such action is necessary.

However, it is important to note that both of these messages were dispatched after bid opening in the instant procurement, and that neither of these messages provides for a suspension of the late bid rules, as set forth in ASPR 2-303 and paragraph 8 of the Instructions and Conditions to the invitation.

The invitation cautioned all bidders to take notice of paragraph 8 of the Instructions and Conditions (Standard Form 33A, July 1966) providing in pertinent part that:

(a) Offers * * * received at the office designated in the solicitation after the exact hour and date specified for receipt will not be considered unless: (1) they are received before award is made; and either (2) *they are sent by registered mail, or by certified mail* for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained * * *, and it is determined by the Government that the late receipt was due solely to delay in the mails, * * * for which the offeror was not responsible; or (3) if submitted by mail * * * it is determined by the Government that the late receipt was due solely to mishandling by the Government after receipt at the Government installation; * * *. [Italic supplied.]

The conditions set forth in paragraph 8 of the Instructions and Conditions follow literally the provisions of paragraph 2-303.3 of

the ASPR. This Office has consistently held that the ASPR language concerning late bids is mandatory and any deviation from the requirements, particularly from the failure to use registered or certified mail in the case of a bid delayed in the mail and received after the time set in the solicitation, renders the bid late and therefore precludes its consideration. 46 Comp. Gen. 42, 45 (1966); 42 Comp. Gen. 255 (1962). As indicated in our decision of December 1, 1964, B–155119, "The Armed Services Procurement Regulation is a statutory regulation promulgated pursuant to 10 U.S.C. 2202. It has the force and effect of law, and there is no authority for our office to waive its requirements even when such action may be to the advantage of the Government."

You contend in your letter of April 18, 1970, that "the postal strike could be considered in the same realm as an act of God." An act of God has been defined as "some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes, such as lightning, tempest, floods, and inundations." *Duble* v. *Canadian Pacific S. S. Co., Limited*, 49 F. 2d 291 (1930). Thus it would appear that an act of God is not a thing or state in continued or persistent existence, but is a singular, unexpected and irregular visitation of a force of nature. A postal strike would not meet the requirements necessary to be considered an act of God. But even assuming, *arguendo*, that a postal strike could be considered an act of God, it has been stated that a failure to exercise reasonable diligence to guard against an act of God, which can be guarded against, is negligent behavior. *Davis* v. *Ivey*, 112 So. 264 (1927). In the present procurement, the only requirement for total protection against late delivery was to send your bid by registered or certified mail. Since you did neither, you assumed the risk of late delivery even if caused by an act of God.

Although we are sympathetic to a situation such as this, this Office is authorized to act only in accordance with applicable legal principles. We are without authority to substitute equitable consideration for the law in cases of this kind. 48 Comp. Gen. 59 (1968). In previously discussing the need to adhere to the late bid rule, as written, even under unusual conditions evoking sympathy for the bidders, we stated at 48 Comp. Gen. 59 at 62, *supra*:

> While these provisions of the regulations and of the invitation for bids may result in the failure of the Government to receive the benefit of lower bids and may seem unduly harsh by bidders affected adversely thereby, the adoption of the principles set forth therein have been determined to be necessary not only to the orderly and timely procurement of supplies and services by the Government, but to the integrity of the competitive bid system as well.

In view of the clear provisions of paragraph 8 of the invitation's Instructions and Conditions and ASPR 2–303.3, and the lack of authority to waive these provisions, we must conclude that you assumed

the risk of late delivery when you failed to register or certify your bid. Accordingly, we must conclude that the rejection of your bid was proper, and such action will not be disturbed by this Office.

[B-169026]

Contracts—Awards—Erroneous—Mistake in Fact

An award for dictating equipment to the apparent low bidder made on the basis of a mistake in fact that the bidder's offered price was the lowest price received, an understanding induced by the erroneous factual statements inadvertently made by the contractor's representative that the equipment would not require the leasing of dictating trunk lines at a monthly rental charge, was an erroneous award to other than the low, responsive, responsible bidder, and although made in good faith the award should be canceled and the procurement resolicited, as it is not enough that an award be made in good faith. The fact that the contractor's representative was unaware that his statements were erroneous is also of no effect as there is no difference between a contract entered into under a mutual mistake of fact and one in which one party contracts in reliance upon a deliberate misrepresentation by the other.

Contracts—Awards—Erroneous—Effect of Contract Protests

An unsuccessful offeror's failure to repeat the questions raised at the time proposals were opened concerning its competitor's ability to fulfill its representations is not considered a waiver of any rights to object to the award, nor does it preclude the offeror from renewing the complaints when the erroneous basis of the contract award is disclosed.

To the Administrator, Veterans Administration, April 27, 1970:

Reference is made to a letter dated February 4, 1970, with enclosures, from the Director of Supply Service, Department of Medicine and Surgery, requesting a decision as to whether a contract erroneously awarded to Dunshaw of Puerto Rico, Inc. (Dunshaw), an authorized sales agent of North American Phillips Corporation, a Federal Supply Schedule (FSS) contractor for Norelco dictating equipment, should be canceled and placed with the low bidder, Dictaphone Corporation (Dictaphone), whose equipment is also covered by a FSS contract.

Requests for proposals were sent to both Dictaphone and Dunshaw under date of October 8, 1969, for remote control dictating equipment to be installed at the Veterans Administration (VA) Hospital, San Juan, Puerto Rico. Bidders were requested to quote prices for the equipment as listed under the respective Federal Supply Schedule contracts, and to quote trade-in allowances for dictating and transcribing machines owned by the hospital.

Proposals were submitted on October 20, 1969. Dictaphone's net total after trade-in allowance was $25,192.11. However, directly after sub-item 2 (telephone links for each machine) of both Items I and II, Dictaphone inserted "* * * See note." The "note" referred to stated: "This item is quoted as requested. However, if the telephone company

dictation trunk is used in lieu of the quoted links, the net equipment cost would be reduced to $30,142.61, thereby providing a net total cost of $21,142.61." Dunshaw's net total bid offering Norelco equipment was $21,574.08, with "0" for sub-item 2 under Items I and II.

The contracting officer, assuming, apparently on the basis of statements by a representative of Dunshaw, that the Norelco system did not require any linkage through the telephone company, evaluated the Dictaphone proposal of $25,192.11, including the telephone links, as being on the same basis as Dunshaw's bid at $21,574.08. Consequently, the contract was awarded to Dunshaw on November 18, 1969, and a purchase order was issued to that firm.

However, it was subsequently discovered that Dunshaw's equipment will require the leasing of dictation trunk links from the Puerto Rico Telephone Company at a monthly rental charge. In light of this fact it became apparent that, if bids were to have been evaluated on an equal basis, Dictaphone's bid should have been evaluated at the price quoted in the note in its proposal for equipment without telephone links, which was lower than the price quoted by Dunshaw.

The record indicates that representatives of Dunshaw advised the contracting officer, both before and after the receipt of the proposals, that the Norelco equipment had built-in telephone links, and that the contracting officer understood from their statements that there would be no necessity for obtaining any additional equipment or service from the telephone company. The file contains a report dated September 2, 1969, by a special committee of hospital personnel who inspected the service capabilities of Dunshaw and Dictaphone in Puerto Rico, which includes findings that Dictaphone equipment would require installation and rental of links from the telephone company, and that the Norelco system would not.

In this case it is clear that the award to Dunshaw resulted from a mistake of fact and that Dictaphone's offered price was lower than Dunshaw's. In deciding whether a contract awarded erroneously but in good faith to other than the low responsive responsible bidder should be canceled, we must consider all of the relevant and material factors surrounding the award and base our decision on the best interests of the United States. It is not enough that the award be made in good faith. B–164826, August 29, 1968.

We are satisfied from the record that the award resulted from erroneous factual statements by Dunshaw's representative, and that the contract awarded did not accord with the contracting officer's understanding or intention. While we are inclined to believe, since it appears that no Norelco central dictating system had been installed in Puerto Rico, that Dunshaw's representative himself was unaware

that his statements were erroneous, we see no difference in effect between a contract entered into under a mutual mistake of fact and one in which one party contracts in reliance upon a deliberate misrepresentation by the other.

In opposition to the Dictaphone protest, Norelco's Government representative, Mid-Atlantic Industries, Inc., urges that the contract award should be allowed to stand. In support of its contentions it points out that the Veterans Administration specification X-708a, referenced in the solicitation of proposals, included a paragraph 3.2.1 describing a Dial Telephone Dictating System the statement, "telephone dictation trunk (link) is supplied by the Telephone Company on a rental basis as part of regular telephone service, one link being required for each recorder." Therefore it is contended that the items listed in the solicitation as "Telephone links" can properly be understood as applying to the interface equipment by which the impulses received through the telephone line are interpreted and made to produce the proper connections between the dictating and recording equipment. Since this interface equipment, referred to by Norelco as "links," is built into the Norelco units, it is argued that the Dunshaw proposal and the contract consummated by its acceptance must be considered as fully responsive to and in complete conformity with the solicitation.

Were we faced with a question merely of an ambiguity in the solicitation, the bidder's interpretation, if reasonable, might be regarded as controlling the interpretation of the contract. However, in the light of our conclusions stated above as to the misleading effect upon the contracting officer of the statements by Dunshaw, we regard the question as one of misrepresentation or mutual mistake, going to the formation of the contract, rather than one of ambiguity affecting only its interpretation.

It is also contended that the Dictaphone protest came too late, and that by its delay Dictaphone permitted the performance of the contract to proceed so far that its cancellation would be inequitable.

The record shows that in a letter dated September 29, 1969, just before the issuance of the solicitation for proposals, from Mr. Canellas, Manager of Dictaphone's Puerto Rico office, to Mr. Baraga of the Veterans Administration Center in San Juan, reference was made to a previous statement "by the competitors, that with their equipment no monthly rental rates would have to be paid to the Puerto Rico Telephone Company." In commenting on that statement Mr. Canellas pointed out that "with or without a built-in dictation link a monthly rental rate must be paid to the Puerto Rico Telephone Company for connection to their telephone lines."

Both Mr. Canellas, in a report to his office, and the contracting officer in his narrative statement of the facts, state that at the opening

of the proposals, when the asterisked note in the Dictaphone proposal was read, the Dunshaw representative stated that there would be no need for a telephone link and no recurring charge with the Norelco equipment.

Since the contracting officer accepted this representation and awarded the contract to Dunshaw with that understanding, Dictaphone felt that it was not in a position to protest further until the necessity for telephone connections on a rental basis was disclosed. The contracting officer was not advised as to this until about December 20, and did not receive Norelco's explanation until January 26. Dictaphone learned about the middle of January that the telephone company had been asked to quote rates for the necessary service, and its formal protest was made within two weeks thereafter.

In the circumstances, we do not feel that Dictaphone's failure to repeat the questions which it had already raised concerning Dunshaw's ability to fulfill its representations should be considered a waiver of any rights it might have had to object to the award, or to preclude it from renewing its complaints when the erroneous basis of the contract award had been disclosed.

The VA was advised by letter of January 27, 1970, from Mid Atlantic Industries that 9 of the 11 items involved had been shipped to Puerto Rico prior to that date. However, no material or wiring has been installed or received at the VA hospital. While the situation, as it affects Dunshaw, is most unfortunate, we think that the primary consideration is upholding the integrity of the competitive bid system. We do not find here a sufficient basis to deviate from the general rule that contracts are to be awarded to the low responsive bidder. Accordingly, the purchase order issued to Dunshaw should be canceled, and in view of the apparent misunderstanding by both the contracting officer and Dunshaw's representative concerning the use of the telephone company's dictation trunk links, as well as some uncertainty as what telephone services would be involved under Dictaphone's proposal, we are of the opinion that the procurement should be resolicited with appropriate clarification as to the use of such links and a statement of the method of evaluation to be employed if proposals received require different services from the telephone company.

In regard to the question raised by Dictaphone as to whether the Norelco equipment complies with the "Buy American Act", 41 U.S.C. 10, we have been furnished a certification that the Norelco model 2000 Central Dictation System as shown and described on pages 10 and 11 of General Services Schedule GS-00S-76538 complies with the Buy American Act and as such is considered to be a domestic end product. However, since the Norelco Federal Supply Schedule price list lists

"Phillips Lamp—Holland" as the manufacturer, it is suggested that further clarification of this aspect of the procurement be obtained upon resolicitation.

Copies of this decision are being furnished to both Dunshaw and Dictaphone.

[B–169083]

Contracts—Awards—Small Business Concerns—Price Reasonableness

The cancellation of an invitation for bids that contained a total set-aside for small business concerns due to the disparity in bid prices evidenced by the bid of a large business concern who had acquired a small business that had been solicited to submit a bid having satisfactorily performed under prior contracts, because the contracting officer was unaware of the concern's changed size status, and the readvertisement of the procurement on an unrestricted basis, was in accord with paragraphs 1–706.5(a)(1) and 1–706.3(a) of the Armed Services Procurement Regulation, and the withdrawal determination properly considered the "courtesy" bid of the large business concern submitted at a price that was less than half of the lowest small business price, even though no formal inquiry was made to establish the correctness of the large business concern's price as the firm was ineligible for award under the set-aside.

To West Point Research, April 28, 1970:

Further reference is made to your letter dated February 12, 1970, and subsequent correspondence, protesting the cancellation of Invitation for Bids (IFB) No. DAAF07–70–B–0145 ("IFB 0145") for 1856 firing pin assemblies, and the readvertising of the same item by IFB No. DAAF07–70–B–0191 ("IFB 0191"), issued by Watervliet Arsenal, Watervliet, New York.

IFB 0145 was issued as a total set-aside for small business on December 11, 1969, and was opened on December 26, 1969. Bids were solicited from 12 prospective bidders including a prior contractor, Argo Development Corporation. Six bids were received, as follows:

Bidder	Unit Price
Henry Products Co., Inc.	$ 5.08
West Point Research, Inc.	10.90
Fiedler Machine Co., Inc.	11.73
Santa Fe Mfg. Corp.	11.95
Acaron Division, Standard Helicopters	13.79
Suburban Tool & Mfg. Co.	23.50

In the course of planning the procurement, the contracting officer had determined that the entire procurement should be set aside for exclusive small business participation, and this determination was concurred in by the procuring activity's small business adviser.

The bid of Henry Products Co., Inc., a large business not on the bidders' list, included a cover sheet which stated:

THIS IS TO ADVISE THAT ARGO DEVELOPMENT CORP. HAS CONSOLIDATED ITS OPERATIONS WITH HENRY PRODUCTS CO., INC. AND ALL ADMINISTRATION AND SALES WILL BE PERFORMED AT THE ABOVE ADDRESS.

This bid also contained the explanation that the firing pin assemblies were "previously manufactured by Argo Development Corp. under contract No. DAAG25-68-C-1238." Argo Development Corporation was one of the small businesses on the bidders' list for this procurement and, at the time of the determination to set this procurement aside for small business concerns, the contracting officer was unaware of the change in Argo's small business status.

Award to your firm as the lowest small business bidder would have resulted in a contract price of $20,230.40. Although Henry Products was not eligible for award under IFB 0145, its bid price indicated the firing pin assemblies could be purchased for $9,428.48, a savings of $10,801.92. Henry Products was contacted and a representative of that firm orally confirmed its unit price of $5.08. A review of contract DAAG25-68-C-1238 established that in 1968, Argo Development Corporation had made timely delivery of 4816 firing pin assemblies at a unit price of $6.47. These considerations led the contracting officer to determine, on February 4, 1970, that the firing pin assemblies could not be obtained at reasonable prices from small business concerns as required by Armed Services Procurement Regulation (ASPR) 1-706.5. Therefore, it was decided to withdraw the set-aside, cancel IFB 0145, and readvertise for unrestricted competition. The procuring activity's small business adviser concurred in this decision.

On February 6, 1970, IFB No. DAAF07-70-B-0191 was issued, soliciting bids on an unrestricted basis. The following bids were recorded at the bid opening on February 16, 1970:

Bidder	Unit Price
Henry Products Co., Inc.	$ 5.95
Santa Fe Mfg. Co.	10.85
West Point Research	10.90
Fiedler Machine Co., Inc.	11.49
Acaron Division, Standard Helicopters	13.31
Suburban Tool & Mfg. Co.	18.75

An award based upon these bids has been withheld pending our consideration of your protest.

You protest the cancellation of IFB 0145, the withdrawal of the set-aside, and the resolicitation on an unrestricted basis on the ground that the procuring activity should not have considered the "impossibly low price submission" of Henry Products in determining the reasonableness of the bids received from small businesses. You state that your unit price of $10.90 is in line with the Government estimate for this procurement and reflects a "reasonable and properly competitive" price. You further state that Henry Products submitted a contrived low bid, which it knew could not be accepted, for the purpose of opening the procurement to big business and exposing the bids of its future competitors, and that consideration of the Henry Products bid in canceling IFB 0145 without verifying its accuracy and reasonableness does not afford the protection to small businesses contemplated by the small business set-aside program.

With respect to the propriety of the decision of the contracting officer to reject all bids under IFB 0145, ASPR 1-706.5(a)(1) provides that a procurement may be totally set aside for exclusive small business participation:

> * * * if the contracting officer determines that there is reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists. * * *

In addition, ASPR 1-706.3(a) authorizes withdrawal of small business set-asides as follows:

> (a) * * * If, prior to award of a contract involving an individual or class set-aside, the contracting officer considers that procurement of the set-aside from a small business concern would be detrimental to the public interest (e.g., because of unreasonable price), he may withdraw a unilateral or joint set-aside determination by giving written notice to the small business specialist, and the SBA representative if available, stating the reasons for the withdrawal. In a similar manner, a unilateral or joint class set-aside may be modified to withdraw one or more individual procurements.

There can be no doubt that the provisions of the Small Business Act authorize the award of contracts to small business concerns at prices which may be higher than those obtainable by unrestricted competition. However, we are aware of no valid basis upon which it may be concluded that this act was intended to require the award of contracts to small business concerns at prices considered unreasonable by the procuring activity, or that the procuring activity would be prohibited from withdrawing a set-aside determination where the bids

submitted by small business concerns were considered unreasonable. The regulations quoted above, permitting set-aside action only where there is a reasonable expectation of sufficient competition to produce reasonable prices and providing for withdrawal of the set-aside where that expectation is not realized, properly permit the withdrawal of a set-aside, based upon a valid determination that bid prices received from small business concerns are unreasonable. B–149889, November 2, 1962.

Under the terms of IFB 0145 (page 16), bids from large business concerns were to be considered as nonresponsive and were to be rejected. Such bids, while nonresponsive, are regarded as courtesy bids and our Office has not objected to the consideration of a courtesy bid in determining whether small business bids submitted in the same procurement were unreasonable. In our reconsideration, dated August 11, 1961, affirming our decision B–145376, June 21, 1961, we stated:

> We are not aware of any restriction on a procuring agency as to the factors to be considered in determining whether prices quoted under a small business set-aside are fair and reasonable and whether the small business set-aside should be withdrawn and the procurement readvertised. A "courtesy bid" would appear to be a factor proper for consideration.

See also B–169008, April 8, 1970; B–164523, August 28, 1968; B–158789, May 19, 1966, affirmed on reconsideration, August 5, 1966; 45 Comp. Gen. 613 (to American Electronic Laboratories, Inc.); B–153264, April 13, 1964; B–151741, July 30, 1963.

You have cited our decision B–168534, January 16, 1970, in support of your contention that the contracting officer in the instant case improperly considered the large business bid in determining the reasonableness of small business bids. Under the circumstances of that case involving a big business bid of $237,110.30 and a low small business bid of $247,501.88, we stated that the receipt of a lower bid from a large business is insufficient to require a conclusion that the small business prices are unreasonable. It should be noted, however, that such statement does not address the matter of disparity between the large and small business bids, and cannot reasonably be construed as expressing the view that the amount of the difference in such bids may not properly be considered as a factor in determining the reasonableness of small business bids.

In regard to the reasonableness of the small business bids, you contend that your unit price of $10.90 verified the accuracy and rea-

sonableness of the Government estimate for the procurement, which you understand was $10 per unit. You also maintain that Henry Products' unit price of $5.08 was either in error or unreasonable and a deliberate attempt to open up the procurement and expose the small business bids. Although Watervliet Arsenal personnel were of the opinion that the estimated unit cost of the assemblies was $13, the price of $6.47 is the official Government estimate set by the Army Weapons Command upon which the funding of the procurement was based. However, there is support in the present record for your contention that Henry Products' unit price of $5.08 was in error. As stated above, that firm orally confirmed its price and thus it appeared correct to the contracting officer at the time he decided to cancel IFB 0145 and withdraw the set-aside. After Henry Products bid a unit price of $5.95 in response to IFB 0191, the procuring activity requested an explanation for the increase of 87 cents per unit, whereupon Henry Products replied that it had previously omitted the cost of an item from its bill of materials.

No formal inquiry was made to establish the correctness of Henry Products' bid of $5.08 per unit, since that firm was ineligible for award under IFB 0145. However, we believe that the contracting officer's comparison of that bid with the small business bids was not improper action in view of Henry Products' oral confirmation of its price and the official estimated unit price of $6.47. Under the circumstances as outlined above, we find no legal basis to object to the contracting officer's decision to cancel IFB 0145, withdraw the set-aside, and readvertise on an unrestricted basis.

You have also stated that you were not notified of the cancellation of IFB 0145. The record shows that such notice was mailed to all bidders, including your firm, on February 4, 1970. While it is regrettable that you did not receive this notice, its nonreceipt can have no bearing on the validity of the cancellation.

Accordingly, your protest must be denied.

[B–169106]

Travel Expenses—Military Personnel—Use of Other Than Government Facilities—Reimbursement Basis

An Army officer returning to his new permanent duty station in Hawaii from a temporary duty assignment in the United States who is erroneously furnished transportation by commercial vessel to accompany his dependents authorized

this mode of transportation to travel to the new station prior to issuance of the temporary duty orders, is indebted for the cost of the commercial vessel transportation, less the cost of transportation by military air. The transportation officer, limited under the member's orders to authorizing transportation by commercial air if military aircraft was not available, exceeded his authority and did not exercise sound traffic judgment in furnishing transportation by commercial vessel, and the member returning to his station under temporary duty orders, his travel is not within the scope of paragraph M4159–4 of the Joint Travel Regulations authorizing commercial vessel travel concurrently with dependents under permanent change of station orders.

To Lieutenant Colonel R. D. Briercheck, Department of the Army, April 28, 1970:

Your letter of September 8, 1969, HCFA–F, with two endorsements, requests a decision as to the entitlement of Lieutenant Colonel Steven S. Crowell to travel allowances for his travel from Oakland Army Base, California, to Honolulu, Hawaii, during the period June 10 to 16, 1969. The request was assigned Control No. 70–4 by the Per Diem, Travel and Transportation Allowance Committee.

Colonel Crowell was transferred from Vietnam to Headquarters United States Army, Pacific, Hawaii, as a permanent change of station by orders dated January 30, 1969, as amended by orders dated February 23, 1969. By Letter Orders 5–124, dated May 20, 1969, as amended by Letter Orders No. 5–133, dated May 22, 1969, he was directed to proceed from Hawaii to Washington, D.C., for temporary duty of approximately three days upon completion of which he was to return to his station. Item 11 of the orders authorized transportation "as determined by transportation officer." Item 13 of the orders (remarks) provided that "If mil acft is not available, coml air trans auth." The orders also authorized a delay of 27 days chargeable to leave in returning, and the use of a privately owned vehicle in traveling from the east coast to port of departure.

Colonel Crowell arrived in Washington, D.C., by air on May 23, 1969, and upon completion of the temporary duty he proceeded to Anniston, Alabama, in a leave status to join his dependents. Prior to the issuance of the temporary duty orders of May 20, 1969, Colonel Crowell's dependents had been authorized by a dependents' travel authorization letter (DTAL–512 of May 14, 1969), to travel to his new duty station in Hawaii. The authorization stated that transportation by commercial vessel was desired for their ocean travel. The member traveled with his dependents to Oakland Army Base, California, by privately owned vehicle and was furnished transportation with them aboard a commercial vessel to Honolulu.

By letter of July 29, 1969, you advised the member that he is indebted to the United States in the amount of $270 representing the cost of transportation furnished him by commercial vessel ($315) less the cost of transportation by military air ($45) which would have been expended for his travel by that means. Also, it appears that he was charged with leave for the additional days of travel. The member contends, however, that he did not request surface transportation with his family. He says that on May 26, 1969, he phoned the Transportation Office at Oakland Army Base and requested a port call for military air on or about June 11, 1969, for his own travel. He further says that upon his arrival at Oakland Army Base he was informed by personnel in the Transportation Office that there was no record of an aerial port call for him and that since he was traveling with his family he was entitled to surface transportation to accompany them.

The record shows that you were advised by the Judge Advocate General's Office, U.S. Army Pacific, that the member was entitled to transportation by commercial vessel for the reason that under item 11 of the orders of May 20, 1969, the transportation officer at Oakland Army Base could have furnished transportation by any mode considered appropriate. Paragraph 304002, P.304-1, Change 304, Army Regulation 55-355, was cited in support of that view. Also, you were advised by that office that paragraph 26, Army Regulation 55-28, allows application to be made to the transportation officer for port call requests for surface transportation in connection with temporary duty.

The record further shows that the Office of the Comptroller of the Army shares the view that the member was entitled to transportation by commercial vessel and therefore appears to be entitled to additional per diem for the time required for ocean travel and an adjustment in his leave account. You question the correctness of the advice furnished you by the Army, however.

The pertinent statute, 37 U.S.C. 404, provides for the payment of travel and transportation allowances to a member of the uniformed services traveling under competent orders away from his post of duty under regulations prescribed by the Secretaries concerned. The Joint Travel Regulations, promulgated pursuant to that statutory authority and other sections of Title 37, U.S. Code, are supplemented by regulations of the various services. Part F of the Joint Travel Regulations provides travel allowances for temporary duty travel outside the

United States and paragraphs M4253–4c and M4253–5 provide for per diem for travel aboard commercial vessels in proper cases.

With respect to the Army regulations cited above, paragraph 3–4, Army Regulation 55–28, provides that port call requests for temporary duty travel will be submitted in the format shown in Appendix A. Field No. 26 of Appendix A provides that for unaccompanied military personnel the desired or required mode of transportation should be entered on the request by code number and lists various coded modes including "Air required" and "Commercial surface desired." While that instruction indicates that the mode of transportation desired by the traveler may be entered on the port call request, Paragraph 1–3e of the same regulation specifically provides that the Military Traffic Management and Terminal Service (MTMTS) is responsible for—

(1) Determining the modes of transportation to be used based on DA and DOD policies.

Paragraph 304002, Army Regulation 55–355, provides that when travel orders do not direct a specific mode of commercial transportation, the person arranging for transportation, in arriving at a decision regarding the mode of commercial transportation to be used will be required to use passenger transportation which provides satisfactory service and meets the military requirements, taking into consideration overall economy, and sound traffic judgment.

Since the latter regulation is also published as paragraph 304002 of Defense Supply Agency Regulation 4500.3 (Military Traffic Management Regulation), it apparently establishes Department of Defense policy as well as Department of the Army policy for furnishing transportation by the least expensive means meeting military requirements.

While the orders of May 20, 1969, authorized transportation as determined by the transportation officer, this clearly was limited by the further provision that transportation by "commercial air" was authorized only if military air was not available. Thus, we believe the orders must be considered as contemplating travel by Government air if available. The determination by the transportation officer was limited to Government air or commercial air.

Paragraph M4159–4 of the Joint Travel Regulations provides that when more than one type of Government transportation is available for ocean travel of members on permanent change of station the lowest priced one will be the maximum entitlement, except when the member, accompanied by dependents who have refused Government air

transportation, performs travel by surface transportation, the measure of entitlement will be Government surface transportation if available. If such transportation is not available then the member and his dependents are entitled to travel by commercial vessel.

Apparently, when the member arrived at the Transportation Office at Oakland Army Base with his dependents it was concluded that he was entitled to accompany them and travel by surface transportation under that provision.

That provision, however, applies only when a member is traveling to or from his overseas station under permanent change-of-station orders and concurrent travel of dependents (Paragraph 9-42, Army Regulation 37-106) has been authorized. Such was not the case here. The member was returning to his station under the temporary duty orders of May 20, 1969, and the fact that his dependents were traveling with him did not entitle him to travel by commercial vessel in order to accompany them.

Military requirements for the member's travel would have been met by military air and furnishing transportation by that mode would have resulted in "overall economy and sound traffic judgment." Since you propose to allow credit for the cost of transportation by military air, it evidently was available and would have been furnished. It long has been the view that the Government's liability for travel of members is limited to the least expensive means meeting the needs of the service. 40 Comp. Gen. 482 (1961) and 41 Comp. Gen. 100 (1961).

Since there was no authority for the member to be furnished transportation by commercial vessel in order to accompany his dependents, he received the benefit of transportation to which he was not entitled. While it appears that the transportation was furnished as a result of erroneous advice by personnel at the Oakland Army Base, such advice does not afford a basis for increasing the member's entitlement.

Accordingly, Colonel Crowell is indebted to the Government in the amount of $270 representing the excess cost of the transportation furnished for his travel which amount should be collected. It follows that he is not entitled to additional per diem for ocean travel nor an adjustment in leave charged to him. The voucher will be retained here.

[B-167585]

Contracts—Specifications—Deviations—Priority Status for Negotiating Set-Asides

The information required by paragraphs 1-706 and 1-804 of the Armed Services Procurement Regulation to establish bidder priority for negotiation of the small business set-aside and labor surplus area set-aside portions of an invitation serves not only to establish bidder responsibility to perform as a certified eligible concern, but also is involved in bid responsiveness. Therefore, a bidder who mistakenly furnished the name of a noncertified eligible supplier, which he was not permitted to correct after bid opening, and was declared disqualified from Group 1 priority for set-aside purposes, properly alleged the bidder who deliberately listed its certified eligible supplier as furnishing "nylon webbing" in lieu of the "polyester webbing" solicited was nonresponsive, even though the material deviation does not appear as a substitute elsewhere in the bid and, therefore, ineligible to negotiate for the set-asides.

To the Secretary of the Army, April 29, 1970:

We refer to a letter dated February 18, 1970, from the Assistant General Counsel, Headquarters, United States Army Materiel Command, and prior correspondence, reporting on the protest of Lite Industries, Inc., against the award to any other bidder of the set-aside portions of invitation for bids (IFB) No. DAAJ01-69-B-0352(1J), issued by the United States Army Aviation Systems Command, St. Louis, Missouri.

The invitation, issued on June 2, 1969, solicited bids for 75,828 each FSN 1670-937-0271 Cargo, Tiedown Assembly. Because of the large quantity required, the invitation was issued on the following basis:

25,275 each—non-set-aside
25,278 each—partial small business set-aside
25,275 each—labor surplus area set-aside

Bids were opened on June 17, 1969, and of the eighty-nine sources solicited, 17 submitted responses. Award of contract No. DAAJ01-70-C-0022(1J) for the non-set-aside portion of the invitation was made on July 16, 1969, to Lite Industries, Inc., who was determined to be the low responsive, responsible bidder.

We are advised that evaluation of the partial small business set-aside and the labor surplus area set-aside was made in accordance with information required to be submitted with bids pursuant to Armed Services Procurement Regulation (ASPR) 1-706 and 1-804. Bidders within the 120-percent bid price range were determined to be in the following priority groups:

	Partial small business set aside group	Labor surplus area set aside group
1. Lite Industries, Inc.	4	7
2. Jamco Manufacturing Co.	4	7
3. M. Steinthal & Co., Inc.	1	1
4. Aerial Machine & Tool Corp.	4	7
5. Irvin Industries, Inc. (large)	None	None
6. A & Z Engineering Co.	4	7
7. Kentucky Appalachian Ind.	4	7

Lite Industries relies on two bases in support of its protest. The first basis for its protest is the contention that it made an error involving the presentation in its bid of information necessary to support its entitlement to first priority as a certified eligible small business concern. Lite contends that the mistake in question consisted of including in its bid the name of a supplier of dacron webbing, the Southern Weaving Company, Greenville, South Carolina, rather than the Murdock Webbing Co., Central Falls, Rhode Island, which is a certified eligible concern. The information furnished by Lite with its bid, allegedly by mistake, disqualified the company from Group I priority for set-aside purposes. It is the position of the procurement activity that Lite's failure to list a Group I subcontractor in its bid as well as its failure to timely furnish certificates of its eligibility and of its subcontractor as certified eligible concerns made it ineligible for first priority consideration as a certified-eligible concern. Lite contends that it should be permitted to correct its bid in order to qualify itself and its subcontractor as certified-eligible firms entitled to first priority on the set-aside portions of the invitation.

The invitation sets forth the information to be furnished with the bid to determine the order of priority for first negotiation of the set-aside portions. The contracting officer contends that, after bid opening, Lite may not submit evidence of its eligibility and that of its subcontractor to establish its priority to first negotiation opportunity for award of the set-aside portions.

The second basis of Lite's protest is its contention that the Steinthal bid should be considered nonresponsive for purposes of award of the set-aside portions of the invitation because it took exception to the specification requirement for polyester webbing material to be used

in the manufacture of the end-items. Lite states that if its position concerning the Steinthal bid is sustained, the effect would be to render academic its protest regarding the mistake in bid since Lite would be entitled to priority for negotiation of the set-aside portion of the invitation. Therefore, Lite requests that a determination be made with respect to the validity of the Steinthal bid concerning the set-aside portions prior to considering Lite's mistake in bid.

Pages 32 and 38 of the invitation required bidders to furnish certain information with their bid to determine whether the bidder is entitled to priority for negotiation of the set-asides. This information is related to the quantity, material, source and location, manufacturer or distributor and cost. Although Steinthal is a small business concern, it is not a certified eligible concern. However, under the set-aside provisions of the invitation it would be entitled to preference for award of the set-aside portions if it demonstrated in its bid that a substantial part of the contract would be performed by certified eligible concerns. Steinthal showed in its bid that Narricot Industries, Inc., a certified eligible concern, would furnish "nylon web" and that AAI Manufacturing Company, a certified eligible concern, would furnish "hardware." We understand that these two items represent a substantial part of the cost of the contract if awarded to Steinthal.

Lite, in a letter dated October 31, 1969, to the contracting officer, contends that Steinthal has, in effect, taken an exception to the specification requirement of the bid by setting forth on pages 32 and 38 its intent to use nylon webbing in lieu of the specified polyester webbing. Lite states that if either set-aside award is made to Steinthal, it could claim the privilege of using nonspecification nylon webbing as specified in its bid.

Steinthal, in a letter dated December 2, 1969, to the contracting officer, sets forth its position in response to the Lite letter of October 31, 1969. Steinthal contends that it did not take an exception to the specifications and that no option is available to it to furnish anything other than polyester webbing called for by the specifications. The contracting officer's position is that information furnished by a bidder to establish its first priority eligibility under Group I of the set-aside portions serves only to establish its responsibility to perform as a certified-eligible concern, and does not involve responsiveness. The contracting officer does not consider that Steinthal qualified its bid so as to render it nonresponsive by reason of having listed nylon material under the information required to establish its eligibility under the set-asides, since Steinthal did not offer elsewhere in its bid to substitute material for that called for by the specifications. The contracting officer further states that even if that portion of the qualifying information were eliminated, the hardware Steinthal proposes to obtain

from the other certified eligible concern would meet the 25-percent requirement prescribed by the set-aside clauses of the invitation.

A review of the entire record leads us to the conclusion that Steinthal submitted a nonresponsive bid. Pages 32 and 38 of Steinthal's bid clearly show that it intended to purchase nonspecification nylon webbing from Narricott Industries. We do not agree with the contracting officer's position that information furnished by a bidder to establish eligibility under the set-aside portion serves only to establish the bidder's responsibility to perform as a certified eligible concern and does not involve responsiveness. Since the information in question was submitted with Steinthal's bid, it must be considered as a part of its offer under the invitation as issued. The listing of "nylon webbing" was a specific deviation from the specifications which called for polyester webbing. The fact that Steinthal did not elsewhere in its bid offer to substitute nylon webbing for that called for in the specification does not cure the specific deviation. The crux of the matter is the intent of the offeror and anything short of a clear intention to conform on the face of the bid requires rejection. Any clarification or explanation of the bidder's intention by extraneous information after bid opening would violate the rule that responsiveness must be ascertained from the bid itself. See B–166284, April 14, 1969, and the cases cited therein. In 47 Comp. Gen. 496, 499 (1968), we stated the principle that, "No exception deliberately taken * * * can be construed as trivial or minimal."

In addition, our Office has held that where deviations or exceptions from the requirements of the invitation are material, as here, the bid must be considered nonresponsive. We are of the view that Steinthal's deliberate listing of "nylon webbing" on pages 32 and 38 of its bid constituted a material deviation from the invitation terms in that it went to the substance of its bid affecting the quality and the cost of the article to be furnished, and, therefore, the acceptance of its bid would be prejudicial to the rights of other bidders not having such advantage. See 30 Comp. Gen. 179 (1950).

Even if the insertion of the phrase "nylon webbing" was the result of an inadvertent error by Steinthal, a nonresponsive bid does not constitute an offer which may properly be accepted, and to permit a bidder to make its bid responsive by changing, adding to, or deleting a material part of the bid on the basis of alleged error after opening would be tantamount to permitting a bidder to submit a new bid. An allegation of error is proper for consideration only in cases where a bid is responsive to the invitation and is otherwise proper for acceptance. 38 Comp. Gen. 819 (1959); 45 *id.* 800 (1966).

Therefore, we conclude that Steinthal submitted a nonresponsive bid and, hence, is ineligible to negotiate for the set-aside portions.

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