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[B–167759]

Debt Collections—Waiver—Known *v.* After Determined Overpayments

The advance collection of the excess costs to ship the household goods of separated members of the uniformed services, excess costs that arise when shipments consist of more than one lot, and the authorized distance and/or weight allowance prescribed by paragraph M8003 of the Joint Travel Regulations are exceeded, may not be waived for excess costs of $10 or less, for in the absence of statutory authority, the waiver would authorize a known overpayment. The waiver authority in Title 4 of the General Accounting Office Policy and Procedures Manual, section 55.3, and section 3(b) of the Federal Claims Collection Act of 1966, that recognizes the diminishing returns beyond which further collection efforts are not justified, relates to after determined overpayments. However, uniform regulations may issue to discontinue the collection of small excess cost amounts discovered after shipment, where the cost of collection would exceed the debt.

To the Secretary of Defense, December 1, 1969:

Reference is made to letter of August 1, 1969, AFSTPL, from the Office of the Directorate of Transportation, DCS/S&L, Department of the Air Force, requesting our comments on a proposed change in paragraph 5703f, Air Force Manual 75–4, to waive in advance of payment collection of excess costs of $10 or less in connection with shipment of household goods of members who are being separated from the service.

Section 406(b) of Title 37, United States Code, provides that in connection with a change of temporary or permanent station, a member is entitled to transportation (including packing, crating, drayage, temporary storage, and unpacking) of baggage and household effects within weight allowances prescribed by the Secretaries. Under a continuing fund limitation expenditure provision included in the Department of Defense Appropriation Acts, however, the maximum weight allowance which may be transported in any case is 13,500 pounds. Section 509 of Public Law 90–580, approved October 17, 1968, 82 Stat. 1132. Section 411 of Title 37 provides that the Secretaries concerned shall prescribe regulations that are, as far as practicable, uniform for all of the uniformed services.

Uniform regulations for transportation of household effects of the uniformed services are prescribed in Chapter 8, Volume 1, of the Joint Travel Regulations. Paragraph M8007 of those regulations provides that the Government's maximum transportation obligation is the cost of a through household goods movement of the member's prescribed weight allowance (paragraph M8003) in one lot between authorized places. It further provides that the member will bear all transportation costs arising from shipment in more than one lot, for distance in excess of that between authorized places and for weights in excess of the maximum allowance prescribed in paragraph M8003.

Paragraph M8010 of the Joint Travel Regulations provides that upon discharge, resignation, or separation of members from active duty who will not thereafter be in a pay status of the uniformed service concerned, shipments which will involve excess costs may be made "provided such excess costs are collected in cash from the member * * * in advance of the shipment." No exception to this requirement is stated in the Joint Travel Regulations.

Paragraph 10–1b, Army Regulations 55–71 (Change 6, January 27, 1969), repeats the provisions of paragraph M8010 of the Joint Travel Regulations for advance collection of excess costs with the further provision that transportation officers are responsible for effecting these collections, but that "Collection action is waived for amounts of $10 and less due to administrative and operational costs involved." The Air Force proposal is to amend Air Force Manual 75–4 to correspond with that provision in Army Regulations 55–71.

The Department of the Navy, by Change 14, April 24, 1969, amended Volume V, Navy Supply Systems Command Manual, by adding paragraph 58022–3c to authorize commanding officers of designated household goods shipping activities to waive collection of excess costs prior to shipment of the goods when the excess cost is $5 or less and the expense to collect it is expected to be greater. Thus, the regulations in this respect are not uniform and are not in conformity with the Joint Travel Regulations.

Committee Action No. 266 of the Department of Defense Military Pay and Allowance Committee provides that when discovery of error of a noncontinuing nature is made in the audit of military pay records of members no longer on active duty collection action will be waived for overpayments in amounts of $10 or less when a notice of exception has not been issued.

For many years the General Accounting Office Policy and Procedures Manual for Guidance of Federal Agencies has contained a provision requiring the establishment of "realistic points of diminishing returns * * * beyond which further collection efforts by the agency are not justified." 4 GAO 55.3. Also, section 3(b) of the Federal Claims Collection Act of 1966, approved July 19, 1966, Public Law 89–508, 80 Stat. 309, 31 U.S.C. 952(b), authorizes the heads of agencies, in conformity with standards promulgated jointly by the Attorney General and the Comptroller General, to terminate or suspend collection action on a debt where it appears that the "cost of collecting the claim is likely to exceed the amount of recovery." These provisions and the provisions of Committee Action No. 266, relate, of course, to after determined overpayments and have no application in cases where it is known prior to payment that an overpayment will be made.

The standards promulgated under that act provide "Collection action may be terminated on a claim when it is likely that the cost of further collection action will exceed the amount recoverable thereby." 4 CFR 104.3(c). Neither these standards, the Federal Claims Collection Act of 1966, nor 4 GAO 55.3 contemplate that no action at all will be taken to collect since they relate to further collection action. Moreover, in view of the many ways available to enforce collection of small debts owed by service members and Government employees, their application to such personnel may be doubtful in any event.

We have no objection to uniform regulations authorizing the discontinuance of collection action with respect to small amounts of excess costs in those cases where the excess costs were determined or discovered after shipment had been made, could not have been readily determined prior to shipment, and the cost of further collection proceeding will exceed the amount of the debt. This would be in conformity with Committee Action No. 266, the Federal Claims Collection Act of 1966, and 4 GAO 55.3, mentioned above. The waiver of collection action as to excess costs in connection with the shipment of a member's household effects where the excess cost is known or can be readily determined prior to the shipment, however, is a completely different matter. Regulations authorizing the waiver of excess costs in these circumstances would have the effect of authorizing disbursing officers to make a known overpayment, conceivably in some instances in excess of the fund expenditure limitation contained in the appropriation acts. We are not aware of any statutory authority which, even by implication, may be viewed as a basis for such action.

Accordingly, the proposed change to the Air Force regulation must be disapproved and similar existing regulations of the Army and Navy should be rescinded.

[B–168236]

Medical Treatment—Dependents of Military Personnel—Private Treatment—Retired Personnel

The wife of a retired member of the uniformed services having been paid insurance benefits under a commercial plan for the medical care received as an inpatient under 10 U.S.C. 1086, which provides health benefits at Government expense pursuant to contract, unless as implemented by the Civilian Health and Medical Program of the Uniformed Services, the benefits are payable under another insurance plan, the payment by the Government to the source of the medical care that exceeded its limited liability under section 1086(d), although an erroneous payment, may not be collected by a withholding from the member's retired pay without his consent. No indebtedness against the retiree was created within the purview of 5 U.S.C. 5514, nor does the fact the payment was made pursuant to the Military Medical Benefits Amendments of 1966, for and on account of the retired member, provide the basis for an involuntary collection.

To the Secretary of Defense, December 1, 1969:

Reference is made to letter of October 25, 1969, from the Assistant Secretary of Defense (Comptroller), requesting a decision as to whether the retired pay of a member of the armed services may be withheld without his consent to recover a payment made by the Government in an amount greater than its limited liability under 10 U.S.C. 1086(d). The matter is discussed in Department of Defense Military Pay and Allowance Committee Action No. 436.

The question presented is stated in the Committee Action as follows:

> Where the wife of a retiree (enlisted or officer) receives medical care as an in-patient under 10 USC 1086 and payment is made by the Government to the source of care before it is discovered that the wife was enrolled in another insurance plan provided by law or related to employment, and thereafter the commercial plan paid benefits directly to her, with the result that the Government paid the source of care an amount greater than its limited liability under 10 USC 1086(d), can the retired pay of the retired member be withheld without his consent to recover the erroneous payment made by the Government?

By long custom and practice military medical facilities have provided hospitalization for dependents of personnel of the armed services on active duty on a space-available basis. The Dependents' Medical Care Act of June 7, 1956, 70 Stat. 250, 37 U.S.C. 401 note (1952 ed.), authorized the use of military medical facilities or civilian insurance plans for hospitalization of certain dependents of active-duty military personnel. No similar program was provided for retired military personnel or their dependents, who were limited to military medical facilities on a space-available basis prior to 1967.

The Military Medical Benefits Amendments of 1966, approved September 30, 1966, Public Law 89–614, 80 Stat. 862, 10 U.S.C. 1071 note, authorized a new and expanded hospitalization and outpatient program in civilian facilities for retired military members and their spouses and children as well as an expansion of the types of care authorized in military medical facilities for them, that is, generally all types of care except nursing or convalescent home-type care, on a cost-sharing basis.

In order to prevent double payment and coverage of persons who might be enrolled in other plans by virtue of employment subsequent to retirement, subsection (d) of section 1086, Title 10, United States Code, was enacted as follows:

> (d) No benefits shall be payable under any plan covered by this section in the case of a person enrolled in any other insurance, medical service, or health plan provided by law or through employment unless that person certifies that the particular benefit he is claiming is not payable under the other plan.

Regulations implementing 10 U.S.C. 1086 provide that when benefits have been provided in good faith by the source of civilian care and it is subsequently determined that the persons concerned were not

in fact entitled to health benefits at Government expense under the Civilian Health and Medical Program of the Uniformed Services (CHAMPUS), collection and other legal action will be taken only against the sponsor, guardian, or individual who was not entitled to the benefits (see paragraph 34, AR 40–121). Such regulation, however, does not prescribe the manner or means of recovery.

It is stated in the Committee Action that the scope of the cited regulation is intended to cover situations not only where the person receiving care was not entitled to any benefits, but also where, as here, benefits paid by the Government exceeded those to which she was entitled under 10 U.S.C. 1086(d), and that the issue presented is whether any statutory authority exists for the recovery of such general indebtedness due the Government in the circumstances so as to permit the withholding of retired pay of the retired service member (sponsor) without his consent.

Section 5514 of Title 5, United States Code, provides that when the head of the Government agency concerned determines that an employee or member of the armed services is indebted to the United States because of an erroneous payment made to or on behalf of the individual, the amount of the indebtedness may be collected by deduction from the current pay account (including the retired pay account) of the individual. Subsection 1007(c) of Title 37, United States Code, provides that, under regulations prescribed by the Secretaries concerned, an amount that an enlisted member of the Army or the Air Force is administratively determined to owe the United States may be deducted from his pay.

The Committee Action points out that the applicable rule set forth in the Department of Defense Military Pay and Allowances Entitlements Manual—Table 7–7–4, Rule 2, Column C–provides in effect that an indebtedness for medical services furnished a dependent (for unpaid hospital bills) may be collected from the current pay of military personnel only with the member's consent, thereby suggesting that the above-cited statutory provisions are not for application, particularly in view of our holding in 39 Comp. Gen. 415 (1959) that the statute from which 37 U.S.C. 1007(c) was derived was not intended to apply to a member in a retired status.

In *Smith* v. *Jackson*, 241 F. 747 (1917), affirmed by the Supreme Court in 246 U.S. 388 (1918), it was held that the current compensation of an officer or employee of the United States may not be withheld under the Government's general right of set-off of debts due the United States from the debtor. As a general rule retired or retainer pay is not subject to administrative set-off without the debtor's consent. *Baker* v. *McCarl*, 24 F. 2d 897 (1928).

In *Melvile* v. *United States*, 23 Ct. Cl. 74 (1888), the Secretary of the Navy, during the absence of the naval officer on an Arctic Exploring Expedition, increased an allotment of his pay to his wife without his knowledge or consent by the total sum of $650. Notwithstanding the Government's contention that the payment was made by the Secretary of the Navy for the support of the officer's wife on the theory that he was liable for debts incurred for his wife's support and she was therefore his agent to receive the additional allotment payments, the Court of Claims held that the Government was without power to pay the extra allotment and that the money withheld from his pay should be restored to him.

In 33 Comp. Gen. 309 (1954), we held that the mere erroneous payment or overpayment of allotment or family allowance to the wife of a service member does not in itself provide a basis for collection from the service member. It should be noted that the payment of family allowances authorized for dependents of enlisted members of the armed services during World War II, like the payments for medical and hospital care here concerned, were made for the benefit and for the account of the members of the armed services. Even so, in the absence of participation in the benefits conferred by the erroneous payments or overpayments or some fault on his part, this Office regarded the right of the Government to collect from the service member as too doubtful to warrant retention of moneys collected from the member or former member.

We do not view the erroneous payment here involved as creating an indebtedness due from the retired member within the purview of 5 U.S.C. 5514. Also, the fact that payments for medical and hospital care for dependents of retired members of the armed services under the Military Medical Benefits Amendments of 1966 are made for and on account of the retired military member does not, in itself, in our opinion provide any basis for involuntary collection from the retired pay of the military member. Your question, therefore, is answered in the negative except where the member consents to such collection.

[B–167984]

Bids—Evaluation—Discount Provisions—Trade and Prompt Payment Discounts

A bid offering a 2 percent–20 days prompt payment discount and an unidentified discount of 2.1 percent–10 days under the non-set-aside portion of a labor surplus area invitation which provided that a discount in excess of 2 percent automatically would be considered a trade discount was properly evaluated as offering both a 2 percent prompt payment discount and a 2.1 percent trade discount for consideration as a price reduction to make the bid low and eligible for contract award. The Discount Limitation clause of the invitation intended for the purpose of precluding bidders from offering a prompt payment discount in excess of normal trade practices in the hope the Government would not earn it,

is not within the purview of paragraph 2-407.3(a) of the Armed Services Procurement Regulation establishing a 20-day prompt payment discount minimum and, therefore, the 2.1 percent 10-day discount offered properly was converted to a trade discount.

To Stassen, Kephart, Sarkis & Kostos, December 3, 1969:

Further reference is made to your letters of October 7, 29, 31, and November 18, 1969, with enclosures, supplementing the telegram of September 25, 1969, from Propper International, Inc., protesting the award to Metz of California of a part of the non-set-aside portion or any portion of the set-aside for labor surplus area under invitation for bids No. DSA100-69-B-2190.

The invitation was issued on June 30, 1969, as a partial labor surplus area set-aside and requested bids for the delivery of hot weather field caps. Of the four destinations specified in the non-set-aside portion, two destinations involve the following quantities set aside for labor surplus area concerns: Defense Depot, Memphis, Tennessee—141,660; Defense Depot, Ogden, Utah—168,240. Other destinations are Defense Depot, Mechanicsburg, Pennsylvania, and Atlanta Army Depot, Atlanta, Georgia. Offers were received from eight bidders on all the destinations in response to the invitation.

Metz received a non-set-aside award of 260,960 each on September 23, 1969, under contract No. DSA100-70-C-0583. Propper received a non-set-aside award of 250,000 each on the same date under contract No. DSA100-70-C-0584. Propper contends that it was entitled to receive the award made to Metz as well as the portion set aside for labor surplus area. No award of the set-aside portion has yet been made. The offers submitted by Metz and Propper on the non-set-aside portion were evaluated as follows:

OFFEROR	DESTINATION AND QUANTITY	UNIT PRICE	PROMPT PAYMENT DISCOUNT
Metz of California	Ogden—168,240 ea.	$1.005000	
	Less 2.1%-10 days (treated as a trade discount)	.021105	2%-20 days
		$ .983895	
	Mechanicsburg—92,720 ea.	$1.01000	2%-20 days
	Less 2.1%-10 days (treated as a trade discount)	.02121	
		$ .98879	
Propper International, Inc.	Memphis—141,660 ea.	$ .99	2%-20 days
	Atlantic—35,940 ea.	.99	2%-20 days
	Mechanicsburg—72,400 ea.	.99	2%-20 days

It will be noted from the above that the 2.1-percent, 10-day discount offered by Metz was evaluated as a trade discount which resulted in a reduction of its bid price. This evaluation was made pursuant to the discount limitation clause (clause 114.9) contained in the invitation. That clause provides as follows:

114.9 DISCOUNT LIMITATION

It is understood and agreed that, for the purpose of payments under this contract, an offer of prompt payment discount in excess of two percent shall be considered as a trade or special discount which shall be available to the Government as a reduction from the prices quoted, without regard to whether invoices are actually paid within the designated discount period. Offerors who desire to do so may quote customary terms of discount (not in excess of two percent), for prompt payment in addition to any trade or special discount available to the Government, provided such discounts are stated separately in their offers. Unless such trade or special discounts are separately stated, the offeror agrees that, when the discount offered exceeds two percent, the entire discount will be considered as a trade or special discount and will not be treated as a discount for prompt payment.

You protest on behalf of Propper that the 2.1-percent, 10-day discount offer tendered by Metz should not have been evaluated since the invitation provides (clause 400.1.17, page 45) that only 20 days origin and 30 days destination will be considered in the evaluation of prompt payment discounts. In your letter of October 6, 1969, to our Office, you state that the issue involved is: "Can the Government combine two discount periods (treating one as a trade discount and the other as a prompt payment discount) in effecting a reduction in price which is thereby prejudicial to another bidder?" You state further that it is unknown in the garment industry dealing with the Defense Personnel Support Center for bidders to offer trade discounts; that when a bidder offers a discount for payment in varying periods, it does not intend this to be a cumulative offer but rather independent offers for each period; and that the procurement agency gave effect to Metz offers of discounts by treating the 10-day period as a trade discount and the 20-day period as a prompt payment discount which is in contradiction of clause 114.9 because Metz did not "separately state" it was offering a trade discount and also a prompt payment discount.

You maintain that an interpretation of tendered discount should be limited to just one discount period; that a 10-day discount period was never a problem to the Government since such discount is not included in bid evaluation; and that the Government is not entitled to both trade discount and prompt payment discount unless separately stated by the bidder. You concede that there are no significant factual disputes or inconsistencies when comparison is made between your comments and the administrative report, a copy of which has been furnished to you, but that the only issue involved in your protest is fundamentally one regarding the proper and reasonable interpretation of the pertinent discount provisions.

With regard to your view that the 2.1-percent, 10-day discount offer should not have been evaluated since clause 400.1.17 provides that only 20 days origin and 30 days destination will be considered in the evaluation of prompt payment discounts, the contracting office acknowledges that 20 days is the minimum period established by the invitation for evaluation of prompt payment discounts. It is pointed out, however, that by reason of the terms of the discount limitation clause quoted above, the 2.1-percent, 10-day discount offered by Metz was considered to be a trade discount under which the bid price is reduced by 2.1 percent regardless of the time period involved. Consequently, a trade discount is considered in bid evaluation as a tendered price reduction and is not affected by paragraph 2–407.3(a) of the Armed Services Procurement Regulation (ASPR), since this provision has reference only to prompt payment discounts. Specifically, ASPR 2–407.3(a) provides that the discount clause of the type contained on page 3, paragraph 9 of the "Solicitation Instructions and Conditions" (standard form 33A) establishes a 20-calendar day minimum period for prompt payment discount, unless otherwise specified in the invitation. No other minimum period for evaluation of prompt payment discount is specified in the invitation. Under ASPR 2–407.3 (a), the 2-percent, 20-day discount offered by Metz qualifies as a prompt payment discount and properly is a factor in bid evaluation. Thus, we conclude that there was no accumulation of prompt payment discounts considered in the evaluation of bids.

With reference to the applicability of the discount limitation clause to this procurement, the record shows that the clause was first authorized for use by letter dated August 26, 1966, from Headquarters Defense Supply Agency to all of its six supply centers. Paragraphs 1 and 2 of this letter stated as follows:

> 1. A problem has been encountered by DSA wherein prompt payment discounts in excess of normal trade practices are being offered with the knowledge that favorable bid evaluation of the discount may result and that any subsequent failure by the Government to earn the discount will produce a "windfall profit."
>
> 2. This Headquarters requested and received approval from the ASPR Committee to utilize a Discounts Limitations Clause in addition to the one prescribed in ASPR. The approved clause will provide that excessive prompt payment discounts (in excess of 2% of contract price) will be considered as a trade or special discount not subject to time limitations for evaluation and payment purposes.

By press release dated December 5, 1968, the Commander, Defense Personnel Support Center, announced to industry that effective December 18, 1968, a discount limitation clause would be included in applicable solicitations. In addition, an appropriate cautionary notice was placed in those solicitations, as here, where the discount limitation clause was included.

Respecting your contention that when a bidder offers prompt payment discounts for varying periods, the bidder does not intend its offer to be cumulative but rather as independent offers, we must observe that the subjective intent of the bidder is immaterial and only its manifested intent is controlling. See 3 Corbin on Contracts § 538, page 57 (1960). In the instant case, the intent to be derived is restricted to the bidder's written response to the invitation terms and conditions including the discount limitation clause.

While a bidder may offer a discount for payment in varying periods, the discount limitation clause is quite specific that if any of these discounts exceed 2 percent and a trade discount is not separately stated, such discount so offered shall be considered a trade or special discount. A bidder who submits an offer subject to the invitation discount limitation clause may not thereafter contend successfully that it subjectively intended a result contrary to the express wording of the clause.

Your contention that a bidder can quote both a trade discount and a prompt payment only if the trade discount is separately stated is not tenable since it fails to give effect to the plain language of the discount limitation clause. The clause provides, in pertinent part, "Unless such trade or special discounts are separately stated, the offeror agrees that, when the discount offered exceeds two percent, the entire discount will be considered as a trade or special discount and will not be treated as a discount for prompt payment."

Under this provision, Metz offer met the criteria concerning trade discounts when it did not separately state a trade discount, and when it offered a prompt payment discount in excess of 2 percent. There is no obligation on the part of the Government to recognize a 10-day prompt payment discount only as a prompt payment discount in the presence of the clear wording of the clause which converts such prompt payment discounts to a trade discount when it is in excess of 2 percent.

It has long been an established policy of the Government to consider discounts in evaluating bids for contracts to be awarded under formal advertisements and we have frequently held that consideration of discount offers is an essential legal requirement in evaluating bids. Such has been our holding even where the invitation did not include any provisions for the particular type of discount which was offered. See 40 Comp. Gen. 518 (1961). The reason for such a policy is that an award of a Government contract shall be made to the responsible bidder whose bid conforms to the invitation and will be the one "most advantageous to the Government, price and other factors considered." Bidders are expected to quote their best prices and use their own judg-

ment in qualifying such prices in any matter where the prices are susceptible to adjustment, as in the case of allowances for discounts.

There is no evidence to show that consideration of the discounts offered by Metz was contrary to the invitation provisions and it must be concluded, therefore, that the action taken by the contracting officer is not subject to legal objection by our Office.

In view of the foregoing, your protest is denied.

[B-167353]

Contracts—Awards—Small Business Concerns—Award Prior to Resolution of Size Protest

The award of a refuse collection contract under a small business set-aside for urgently needed services prior to the resolution of a size protest by the Small Business Administration (SBA) within the 10 working days after receipt of the protest that is prescribed by paragraph 1-703(b)(1) of the Armed Services Procurement Regulation does not affect the validity of the contract. The contracting officer under the regulation upon expiration of the 10 working days was authorized to presume the questioned bidder to be a small business concern, eligible for a contract award, having complied with the requirements to ascertain when to expect a size decision from SBA, and to determine that a further delay in awarding the contract would be disadvantageous to the Government. Even though ultimately it is determined the contractor is not a small business concern, the contract awarded in good faith is not void *ab initio* but voidable at the Government's option.

Contracts—Awards—Small Business Concerns—Erroneous Award—*Ab Initio v.* Voidable

A contract awarded on the basis of a bidder's good faith self-certification that it is a small business concern, which status is subsequently determined erroneous, is not void *ab initio,* but is voidable at the option of the Government.

To Sadur, Pelland & Braude, December 4, 1969:

Further reference is made to your protest on behalf of Johnson & Speake, Incorporated, against the award of a contract to Capitol Trash Removing Company, Incorporated, for collection and disposal of refuse at Andrews Air Force Base for the period of 1 year commencing on July 1, 1969. The contract was awarded pursuant to solicitation No. F49642-69-B-0781, a total small business set-aside. Your primary contention is that Capitol was not a small business concern at the time of bidding and award and, therefore, the contract should be canceled.

The solicitation was issued on May 9, 1969, after the Small Business Administration (SBA) had advised the procuring activity that there was a sufficient number of small business concerns in the area to generate competition. SBA furnished a list of seven small business firms,

including your client and Capitol. The following five bids were received and opened on June 3, 1969:

Capitol	$150,596
Shipshape	235,074
Johnson & Speake	273,554
Baldwin	289,427
S & M	319,686

Since Capitol was the apparent low bidder, the contracting officer requested a preaward survey with "Special emphasis * * * on * * * where Company is incorporated and whether the Company has a parent company affiliation 'Ascertain whether Company is Small Business.'" The survey was conducted by the Baltimore Defense Contract Administration Services District and its report dated June 19, 1969, recommended award to Capitol. The report stated that Capitol had no affiliates and that based on a Dun & Bradstreet report dated March 28, 1969, annual sales were well below $1 million during the preceding 3-year period, the small business limitation for service industries.

On June 9, 1969, the contracting officer received the Johnson & Speake protest as to Capitol's small business status and forwarded it to SBA on the same day. A copy of Johnson & Speake's letter was also sent to and received by SBA, apparently on June 9, 1969. After consultations with SBA, the contracting officer concluded that immediate award would be necessary in order for the contractor to commence performance on July 1 as called for in the solicitation. Therefore, award was made to Capitol on June 23, 1969. The appropriate SBA regional office ruled on July 11, 1969, that Capitol was not small business. This decision was appealed and on October 28, 1969, the SBA Size Appeals Board denied the appeal.

In addition to your contentions with respect to Capitol's eligibility as a small business concern, you assert that the contracting officer violated the following provisions of the Armed Services Procurement Regulation (ASPR) concerning suspension of the procurement action where a firm's status has been questioned within 5 working days after bid opening in accordance with ASPR 1-703(b)(1) and, therefore, the award is void *ab initio:*

ASPR 1-703(b)(3)(i):

> (i) If the SBA Regional Director's determination is not received by the contracting officer 10 working days after SBA's initial receipt of a protest or notice questioning the Small Business status of a bidder or offeror, it shall be presumed that the questioned bidder or offerer is a small business concern. This presumption will not be used as a basis for making an award to the questioned bidder or offeror without first ascertaining when a size determination can be expected from SBA, and where practicable, waiting for such determination, unless further delay in award would be disadvantageous to the Government.

* * * * * * *

(iv) Until receipt of the SBA determination of the size status, or expiration of the ten day period (30 days in case of an appeal to the Chairman, Size Appeals Board), whichever occurs first, procurement action shall be suspended; however, this suspension shall not apply to any urgent procurement action which the contracting officer determines in writing must be awarded without delay to protect the public interest. The contracting officer's determination shall be placed in the contract file.

First, you contend that award was made before the SBA size determination and before the expiration of 10 working days without a proper finding that it was an "urgent procurement" and award had to be made without delay to protect the "public interest," contrary to subparagraph (iv). You contend that the 10 days expired on June 25, 1969. In the alternative, you contend that if award is considered to have been made after the expiration of 10 working days, it was contrary to subparagraph (i) above because the contracting officer did not first ascertain when SBA could be expected to make its determination and there was no proper finding that further delay would be "disadvantageous" to the Government. You contend that award was not justified as an "urgent procurement" or because further delay would have been "disadvantageous" to the Government because the contracting officer should have negotiated a month's extension of Johnson & Speake's current contract. In addition, you take the position that preservation of the integrity of the bidding system and the principles and policies of the Small Business Act outweigh any savings in money that would have been lost by a 1-month extension of Johnson & Speake's contract.

The record shows that the contracting officer contacted SBA on June 10 by telephone and learned that his letter has been received on that day. His letter to SBA included a statement to the effect that unless award was made by June 16 "the potential hazard to the mission of Andrews AFB will be materially increased," and requested immediate attention to the matter. He again discussed the protest with SBA on June 18 and 19 and learned that June 26, 1969, was the earliest date he could expect their decision. He calculated the 10-day period as expiring on June 24. On June 20 he received the affirmative preaward survey report, which included no information indicating Capitol was other than small business. On the same date the contracting officer issued a determination and findings, pursuant to ASPR 2-407.9(b)(3), that award should be made prior to resolution of Johnson & Speake's protest. This decision was coordinated with and approved by higher authority. His decision was based upon the fact that the current contract expired on June 30, 1969, and continuity of service was "urgently required to prevent and preclude possible danger to the health and welfare" of personnel and the public; that further delay would prevent the contractor from having the large number of disposal containers

in place on time and thereby delay performance; that award to Capitol would be monetarily advantageous because an extension of the current contract would cost more; and the Capitol had certified itself to be small business and had received a favorable preaward survey recommendation.

It is our view that although there appears to have been a technical violation of the "10-day period" as you contend, we do not believe this affects the validity of the contract. Assuming, arguendo, that award was made before expiration of 10 days, it is clear that waiting the full 10 days would have served no useful purpose since SBA's decision was not made until July 11, 1969, at least 22 working days after it was notified of the protest. It should also be noted that the contracting officer knew at the time he made the award that he could not expect a decision within the specified time. Under the provisions of ASPR 1-703(b)(3)(i) the contracting officer is authorized to presume the small business status of a self-certified bidder after expiration of 10 days once he has ascertained when a determination can be expected from SBA and where further delay will be "disadvantageous" to the Government. As noted above, the contracting officer did ascertain when SBA's determination could be expected and determined that delay in award would be to the Government's disadvantage. With regard to the latter point, the contracting officer has stated several reasons which appear to support his determination that further delay would be "disadvantageous." In these circumstances, it is our opinion that award was proper under the cited regulation. See *Mid-West Construction, Ltd.* v. *United States*, 181 Ct. Cl. 774 (1967). Since we have concluded that award was proper under ASPR 1-703(b)(3)(i), there is no need to determine whether award would have been authorized under ASPR 1-703(b)(3)(iv) as an "urgent procurement."

You also contend that the award was made contrary to the requirements of ASPR 2-407.9(b)(3); that award shall be withheld until the protest is resolved unless the contracting officer determines the items are urgently required, performance will be unduly delayed, or a prompt award will be disadvantageous to the Government; and that notice of intention to proceed with award be given to the protestor and others concerned. As noted above, the contracting officer made a determination that performance would be unduly delayed unless award was made promptly and that award would be monetarily advantageous. This determination was approved by the Director of Procurement, Headquarters, and Air Force legal counsel. Although there was a failure to comply with the notice requirement, we do not view this as invalidating the award.

Your contention that Capitol was not a small business concern at the time of bidding and award is based on the two-fold argument that Capitol (1) is an affiliate of the "empire" of three brothers, William, Charles and Robert Cohen, and (2) is affiliated with Shayne Brothers, a large business, for the purpose of securing the contract for the latter's benefit. Since these contentions were considered and determined by the Size Appeals Board of the Small Business Administration, which is vested by law (15 U.S.C. 637(b)(6)) with the authority to make such determinations, we quote from its decision of October 28, 1969:

B. A concern is small for the purpose of this procurement if, together with its affiliates, its average annual receipts for the past three fiscal years do not exceed $1 million.

C. Section 121.3-2(a) of the Small Business Size Standards Regulation states:

"Concerns are affiliates of each other when either directly or indirectly (1) one concern . . . controls or has the power to control the other or (2) a third party or parties . . . control or has the power to control both. In determining whether concerns are independently owned and operated and whether or not affiliation exists, consideration shall be given all appropriate factors, including common ownership, common management and contractual relationships . . ."

D. The record discloses that the appellant is subcontracting part of the work to Dixie Trash Company and is renting equipment from Shayne Bros., Inc. There is no evidence that Shayne Bros., Inc., is controlling, or has the power to control the appellant by renting its equipment. Therefore, the Board finds that the appellant is not affiliated with Shayne Bros., Inc.

E. The record further discloses that, at the time of bid opening and award, all of the stock of appellant was owned by Isadore Katzen and Robert Cohen, the Assistant Treasurer and Assistant Secretary of the Corporation respectively. Charles Cohen was President, Secretary and Treasurer, and William Cohen, Vice-President. Under the By-Laws, Charles Cohen, as President, had the duty and authority to manage the corporate affairs. The only offices mentioned in the By-Laws are those of President, Vice-President, Secretary and Treasurer, positions which were held by Charles Cohen and William Cohen, through election by the Board of Directors. The Board finds, therefore, that Charles Cohen had the power to control the appellant both at the time of bid opening and award. Charles Cohen also controlled or had the power to control certain other concerns which are considered to be affiliated with the appellant. Since all of the concerns controlled by Charles Cohen had combined average annual receipts for the past three fiscal years in excess of $1 million, the appellant, Capitol Trash Removal Company, Inc., is not a small business concern for this procurement.

In addition to the above finding confirming your position as to Capitol's size status, you contend that its small business self-certification was not in good faith and, therefore, the contract is void *ab initio*. In support of your contention that other than a good faith self-certification renders the contract void *ab initio*, you cite several decisions of our Office, including 34 Comp. Gen. 115 (1954); 41 *id.* 47 (1961); *id.* 252 (1961); B-157700 and B-157292, both decided November 15, 1965; B-157921, November 29, 1965. You contend that the certification was in bad faith because Capitol knew, or in the exercise of reasonable diligence should have known, that its affiliation with

other Cohen controlled enterprises and its "arrangement," whether express or implied, with Shayne Brothers precluded it from qualifying as a small business concern. You point out that the self-certification provision of the invitation instructed bidders to refer to paragraph 14 of standard form 33A, which makes it clear that affiliation must be considered in determining whether a firm is small business and refers to the SBA regulations concerning affiliates and, as noted above, SBA has determined that Capitol was affiliated with other Cohen interests within the meaning of such term as used in its regulations.

In view of these provisions, you argue that Capitol must be held to have been on notice that it had to consider its relationship to the Charles Cohen enterprises and its joint venture arrangement with Shayne Brothers. In these circumstances, you contend that a reasonable and prudent bidder would have been suspicious of its status and requested a certificate from SBA prior to submitting a bid. The willful or negligent failure of Capitol to inquire of SBA as to its status constitutes, in your opinion, a failure to exercise good faith. In support of the "rule urged here, that a good faith certification requires a freedom of knowledge of circumstances which ought to put a prudent bidder upon inquiry to ascertain its true status from the Small Business Administration, and a willful or negligent failure to make such inquiry constitutes a lack of good faith," you have cited numerous court cases and several decisions of our Office. In addition, you point to the fact that Capitol made a change in its officers on July 1, 1969, as indicating knowledge at the time of certification that it did not qualify as small business.

Capitol's attorney has submitted his views on your contentions concerning his client's small business certification. He argues that the certification was made in good faith by Isadore Katzen, Assistant Treasurer and 50-percent stockholder, in the honest belief that the corporation was a small business. It is his position that although the Size Appeals Board found Capitol affiliated with other interests of Charles Cohen within the meaning of its regulations, the facts of the situation support the conclusion that the certification was in good faith. In support of this argument he points to the evidence before the Size Appeals Board that on January 21, 1964, Charles Cohen was elected President and Secretary-Treasurer; William Cohen, Vice President; Isadore Katzen, Assistant Treasurer, and Robert Cohen, Assistant Secretary; that in 1965 Robert Cohen and Isadore Katzen became sole shareholders; that the officers remained the same because Charles and William Cohen were founders of Capitol and the new co-owners wanted the benefit of their reputation in the trade; that during the ensuing 4 years Robert Cohen and Isadore Katzen had

full control in running the business; that Charles and William Cohen did not act as officers of the corporation or visit the corporate offices more than once or twice during the period; that the only other business interests of Robert Cohen and Isadore Katzen are small real estate investments with annual gross income of less than $10,000; and that Capitol's annual sales during the most recent 3-year period averaged $431,110. Your contention concerning an arrangement with Shayne Brothers is denied and it is pointed out that neither SBA nor the preaward survey team found any evidence of such an agreement. In addition, it is pointed out that after making the allegation that Shayne Brothers would "perform all of the work necessary and furnish all labor, material, trucks and equipment required," Johnson & Speake seemingly refuted it by protesting to the contracting officer that it had learned from Capitol that it planned to purchase Canadian-made equipment. It is argued that in these circumstances there was no reason for the co-owners of Capitol to suspect that its size status would be questionable and, therefore, the certification was in good faith.

It has long been the position of our Office that a contract awarded in good faith on the basis of a bidder's certification that it is a small business concern, which status is subsequently determined erroneous, is not void *ab initio* but is voidable only at the option of the Government. 41 Comp. Gen. 252 (1961); B–137689, January 21, 1959. See, also, *Otis Steel Products Corporation* v. *United States*, 161 Ct. Cl. 694, 316 F. 2d 937 (1963). However, you contend that here the certification was in bad faith and that under the decisions of our Office the contract is therefore void *ab initio*. Although there is insufficient evidence to support a finding of bad faith, we believe a word should be said concerning the position of our Office where we have found there was a bad faith certification. Our review of the decisions you have cited in support of this proposition fails to reveal any decision where we have held a contract void *ab initio* as opposed to voidable at the Government's option, with the possible exception of 34 Comp. Gen. 115 (1954), where the language used may be construed as having such meaning. However, in B–137689, May 15, 1961, we clarified our position with respect to the use of that language as follows:

> While the language employed in reaching the conclusions indicated in the above decisions may differ, we think the legal result is the same, for as pointed out by the Supreme Court in *United States* v. *N. Y. Porto Rico S.S. Co.*, 239 U.S. 88, 93, even where a statute specifically declares a transaction void, "the party for whose protection the requirement is made often may waive it, *void being held to mean only voidable at the party's choice.*" See also *Adelhardt Construction Co.* v. *United States*, 107 F. Supp. 845.

As was stated in a more recent decision, B–166445, August 25, 1969—

* * * it has been and remains our position that, if a contract has been awarded on a small business set-aside procurement to a concern which, subsequent to award, has been determined by the Small Business Administration as one not qualifying as an eligible small business contractor on the contract award date, the contract is not void *ab initio* but is voidable, depending upon the particular circumstances of the case, only at the option of the Government. See 41 Comp. Gen. 252 and our decision B–164100, July 8, 1968. See, also, *Otis Steel Products Corporation* v. *United States*, 316 F. 2d 937, wherein the Court of Claims held that the plaintiff could not be relieved from its obligations under the contract involved by pleading that it was not a small business concern at the time the contract was awarded.

See, also, B–163128, April 24, 1968; B–166065, April 14, 1969; and B–167613, October 22, 1969.

As stated above, we do not believe there is sufficient evidence to support your contention that the certification was made either in bad faith or imprudently. With regard to your contention that Capitol had an "arrangement" with Shayne Brothers, the only substantive evidence indicates that Shayne Brothers only interest in the contract is in the rental of some of its equipment to Capitol for performance of the work. While our Office has held a certification lacking in good faith where the bidder was affiliated with another concern, the facts of those cases readily distinguish them from the instant case. In the case reported at 41 Comp. Gen. 47, Standard Steel Works had certified itself as small business even though it was aware that SBA had questioned its status and had taken an informal position that it did not qualify because of certain affiliations. In another case where the bidder, a small business concern at the time its bid was submitted, merged prior to bid opening with another firm and became large, we held that the bidder could not properly certify itself as small business at the time of bid opening. B–161693, July 21, 1967. In the instant case, the uncontroverted evidence is that although Charles Cohen held the office of president of Capitol at the time of bidding and award he had not held any stock in the corporation or performed any management functions for more than 4 years; Capitol's average annual receipts were well below the applicable limit; and Capitol had certified itself as a small business concern on other procurements without any size challenge. In these circumstances, we see no basis for imputing bad faith or a lack of prudence to Capitol in making its certification. Although the principals of Capitol changed the officers on July 1, 1969, we do not interpret this as an act indicating bad faith in its earlier certification but, rather, a realization after its size was challenged that this would be necessary to its future eligibility. For a similiar case, where affiliation and power to control was found, but no bad faith was imputed, see B–153780, June 4, 1964.

Finally, you state that regardless of whether there is good faith in a small business certification, the contract *may* be canceled at the Gov-

ernment's option, citing B–164932(1) and (2). In that case the successful bidder had certified that the item being purchased would be manufactured by a small business concern. Whether the bidder's small business certification was in good faith was not the issue involved. As stated in our letter to the Postmaster General—

> That statement unlike the small business certification does not involve a "good faith" representation or statement as to a belief concerning size status. Rather, it is an unqualified promise that a small business *will in fact* perform the contract.

In view thereof, and since it would not be in the Government's interest to cancel the contract, your protest is denied.

[B–167380]

Contracts—Specifications—Conformability of Equipment, Etc., Offered—Administrative Determination Conclusiveness—Bid Reevaluation Recommended

A decision by a contracting agency to reject a bid that as a factual matter is determined not to have met the specifications, particularly if the determination involves highly technical or scientific factors which the United States General Accounting Office is not equipped to judge, although generally accepted without question, where the rejection of the low bid submitted under an invitation for a completely integrated closed-loop loading system is based on the fact the descriptive literature failed to identify with bid items, the rejection appears to be an erroneous interpretation or application of the standards required by the invitation and it is suggested, without undertaking to decide bid responsiveness, that the bid should be reevaluated, with consideration given to all available information concerning the conformance of the several items of equipment offered to the intent of the specifications.

To the Secretary of the Army, December 5, 1969:

We refer to a letter of August 14, 1969, with enclosures, from the General Counsel, Office of the Chief of Engineers, reporting on the protest of CGS Scientific Corporation (CGS) against the award of a contract to any other bidder under invitation for bids No. DACA 55–69–B–0017, issued by the U.S. Army Engineer Division, Cincinnati, Ohio.

The invitation issued on May 29, 1969, sought the procurement of a completely integrated automatic closed-loop loading system, in accordance with the Technical Specifications set forth on pages 9 through 9.6 thereof. The specifications pertinent to this protest are as follows:

> 3.1.1 A solid state function generator shall be furnished to create an electrical analog of the form of loading output desired, including sine, haversine, triangle, square and ramp functions, each developed at frequencies not less than .005 Hz to 500 Hz. Frequency ranges shall be selectable by a decade multiplier. The ramp shall have the feature of a manual dwell possible at random, which may be subsequently either continued or reset to zero. Cyclic functions may be exercised for a single pulse. This unit may be programmed for a given number of cycles by a counter panel. The function generator shall have the following characteristics: Frequency stability of selected frequency, + 0.1%; Amplitude sta-

bility, ± 1%; Distortion, ± 0.5%; Output voltage (Approx.) ± 10 volts. Frequency accuracy not less than 1% of full scale of the selcted scale.

3.1.2 A counter panel shall be furnished complete with an electromechanical 6-digit counter, which may be preset to the desired number of cycles, a totalizing counter, X10 and X100 decade counter circuit for high frequency counting, and equipped with a selector switch to choose the repetitive function driving the counters. A manual reset total counter shall be provided. The maximum counting rate in 25 Hz or better which is increased to 250 and 2500 Hz with the X10 and X100 decade multipliers.

3.1.3 A phase shifting capability shall be furnished to operate in conjunction with the function generator. Output signals to the fourteen controllers shall be provided so that one channel may be selected as the reference and each of the remaining fourteen channels may be phase shifted from 0° to 360°. Frequencies shall be selectable to an accuracy of ±2° over the entire range.

* * * * * * *

3.2.5 Synchronized program run/stop button which synchronizes the function generator and provides for synchronization of an external function source such as magnetic tape or analog computer.

* * * * * * *

4.4 The load end of each actuator body shall be provided with a rectangular mounting flange with four holes suitable for attaching the actuator to a load reaction fixture. The other end shall be provided with a removable double clevis mount.

* * * * * * *

6.1.8 Low pressure bypass switch to allow low pressure turn-on.

In addition, the invitation included the following requirement for descriptive literature (Article 5 of the Special Conditions):

5. REQUIREMENT FOR DESCRIPTIVE LITERATURE (1960 OCT).

(a) Descriptive literature as specified in this Invitation for Bids must be furnished as a part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purpose of bid evaluation and award, details of the products the bidder proposes to furnish as specified in paragraph (c) below.

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

(c) In accordance with subparagraph (a) above, the following information and descriptive data shall be furnished:

One set of drawings showing specified dimensions or schematics shall be supplied for the following items:

Console layout
System block diagram
Hydraulic schematic
Hydraulic actuators

One set of descriptive literature or outline specifications as necessary to describe completely the nature and capabilities and to indicate clearly their conformance with the technical specifications shall be supplied for the following items:

Function generator
Counter panel
Load cells
Transducer conditions
Servo valves
Servo amplifier
Actuators
Actuator function curves
Hydraulic power unit

Bids were opened on June 24, 1969. Of the five bids received, CGS Scientific Corporation's was the lowest at $179,450, and MTS Systems Corporation's (MTS) was the second lowest at $198,875. However, on the basis of the descriptive literature furnished, CGS was determined to be nonresponsive to the invitation and was informed of this finding by a letter dated June 27, 1969, which outlined the reasons for rejection of its bid according to the first technical review of June 26, 1969. CGS protested this determination of nonresponsiveness to the U.S. Army Engineer Division. A second technical review, dated July 3, 1969, reaffirmed the original finding for substantially the same reasons. These reasons may be summarized as follows:

(1) Frequency stability of the Hewlett-Packard 203A function generator does not meet the frequency stability of 0.1 percent stated in Technical Specification 3.1.1.

(2) The CGS descriptive literature does not indicate that the run/stop feature is used to synchronize an external function source such as magnetic tape or analog computer as required by Technical Specification 3.2.5.

(3) Information is not provided by CGS that the "off" switch on the Model 835 panel can also be used for low pressure turn-on, as specified in Technical Specification 6.1.8.

(4) Load cells are not identified among the 16 models described and they are inconsistently sized.

It is CGS's position that the Corps of Engineers was in error in rejecting its bid. The bidder maintains that its interpretation of the specifications as reflected in its descriptive literature was reasonable and that award should be made to it.

The first basis upon which CGS was determined to be nonresponsive was the failure of its proposed system to comply with the frequency stability requirement of $\pm$ 0.1 percent. The agency considers this the major area of the CGS bid's nonresponsiveness. The second technical review, dated July 3, 1969, states that although Exact Model 330 function generator included in its system meets the required frequency stability, the Hewlett-Packard Model 203A function generator, which was also included, fails to do so. The CGS descriptive literature on the Hewlett-Packard Model 203A disclosed that the frequency stability, including warmup drift and line voltage variations of 10 percent, is $\pm$ 1 percent.

Technical Specification 3.1.1. calls for a solid state function generator, with a frequency stability of 0.1 percent. Specification 3.1.3. requires that a phase shifting capability be furnished to operate in conjunction with the function generator. The CGS proposal, on page 10, specified "Exact Model 330 Function Generator (see attached data

sheet). This unit fulfills all the requirements of paragraph 3.1.1 of the specifications." The next sentence of the proposal listed the Hewlett-Packard Model 203A Function Generator, with the statement "This unit provides the sine and cosine waveforms for the variable phase programmer."

It is our understanding that a function generator such as described in paragraph 3.1.1 does not in itself contain the phase shifting capability called for by paragraph 3.1.3, and we find that every proposal submitted calls for a separate device to meet this requirement, which appears to be in accord with the specification provision that the phase shifting capability operate "in conjunction with the function generator." Paragraph 3.1.3. contains no stability or accuracy requirement, except that frequencies shall be "selectable to an accuracy of ± 2° over the entire range"—a requirement apparently met by the Hewlett-Packard instrument. We therefore are unable to find in the record any basis for rejection of the CGS proposal, which we understand is to use the Hewlett-Packard device to supply the required phase-shifting capability "in conjunction with" the Exact Model 330 function generator.

Even if the frequency stability requirement of paragraph 3.1.1 is considered applicable to the Hewlett-Packard instrument offered to meet the requirement of paragraph 3.1.3, we note that the basis for the determination that the Hewlett-Packard item did not meet that requirement was the statement in the Hewlett-Packard literature which reads: "Frequency stability: within ± 1% including warmup drift and line voltage variations of ± 10%." The Exact Model 330 literature states frequency stability as: "Short term (10 min.): 0.05% Long term (24 hrs): 0.1%." The specification requirement does not describe the conditions under which the required stability is to be obtained, and it is clear that the stability of the two generators is not stated on the same basis. In view of the fact that we have been furnished with a statement from the manufacturers of the Exact generator that a one hour warmup period is required to stabilize the instrument under consideration, and a statement from Hewlett-Packard that its variable phase generator will give frequency stability of 0.05 percent after a 30-minute warmup time, we believe that a conclusion that the Exact generator offers a higher degree of frequency stability than the Hewlett-Packard model would be highly questionable, in the absence of further information or of a more exactly defined specification requirement.

The remaining three reasons for which CGS' bid was determined to be nonresponsive appear also to involve the adequacy of its descriptive literature. In the letter of June 27, 1969, which refers to the second

basis upon which the CGS bid was found nonresponsive, the contracting officer stated that the method for the synchronization of an external function source was not provided in the descriptive literature as required by Technical Specification 3.2.5. However, the second technical evaluation of July 3, 1969, stated that the information concerning the "run/stop" feature to meet Technical Specification 3.2.5, was submitted by CGS in a letter subsequent to the bid opening. The CGS letter referred to is that of June 28, 1969, addressed to the U.S. Army Engineering Division. Such letter, among other things, stated that the "run/stop" feature was met on the Model 878A panel. The record disclosed that page 10 of the CGS descriptive literature, supplied with the invitation, stated:

> The requirements of paragraph 3.2.5 are met on the Model 878A Panel.

Therefore, we must conclude that the letter of June 28, 1969, merely directed the contracting officer's attention to the "run/stop" feature previously included in CGS descriptive literature (p. 10) and was properly for consideration.

The third reason that the CGS bid was rejected was its failure to specify how the pressure "Off" switch on the Model 835 panel met Technical Specifications 6.1.8 requiring "low pressure turn-on." The second technical review, dated July 3, 1969, recognized that this requirement was apparently met by CGS. However, it is further stated that the phrase "for rapid reduction of hydraulic pressure" contained in Feature 5 of CGS' Technical Bulletin 201A, together with the CGS bulletin describing Model 835 Control and Indicator Panel (which has a switch labeled "Press" (pressure) "On" and "Off"), led to the interpretation that "Off" on the switch meant pressure off, i.e. zero pressure.

CGS presents the argument that the circuit described in Technical Bulletin 201A should have been identified as a low pressure circuit. While Model 835 Control and Indicator Panel only designates the switch positions as "On" and "Off," CGS states that the circuit pressure is 30 to 150 p.s.i. in the "Off" position, which is low compared to the normal pressure of 3,000 p.s.i., and therefore it is considered pressure off.

We recognize that the label "Off" on the switch may be confusing and that a more suitable designation of "on-low" might have been more accurate. However, since the question presented is principally one of interpretation we believe the bidder's explanation, and the actual characteristics and capabilities of the equipment described, should be given effect.

The fourth reason for rejecting the CGS bid was inconsistent sizing and inadequate identification of the Load Cells offered in its descrip-

tive literature. By letter of June 27, 1969, the contracting officer advised CGS that its sizing of load cells was inconsistent in stating that "20 kip load cell is used with the 10 kip actuator and a 10 kip load cell is used with the 5 kip actuator." However, the second technical review, dated July 3, 1969, concluded that the comment that "* * * load cell ratings were not consistent" was offered as an observation, and that the inconsistency was not considered a major deviation from the specifications. In our view it does not appear to be a deviation at all, since the rating of each cell proposed was within the specification requirement. Concerning the inadequate identification of the load cells, the CGS descriptive literature described three types of Load Cells: General Purpose, Precision, and Calibration, listing 7, 7, and 2 models, respectively. The second technical review, dated July 3, 1969, stated that the evaluator "* * * could not identify which of the 16 models in the submitted literature were proposed. Some models meet the specifications, others did not. The undersigned could not suppose that the bidder [CGS] had selected the correct load cells."

It is CGS' position that reasonable engineering evaluation would have easily identified the suitable cells, because only the general purpose types would be considered for the intended use, and only two of these (models U3G1 50–10K 3MV/V and U3G2 50–250 3MV/V) are suitable for accurate dynamic loading in accordance with the specifications.

We are not capable of determining from an engineering standpoint the correctness of the CGS contention. However, the record discloses that certain of the models listed in the descriptive literature do in fact meet the applicable Technical Specifications and if choice of the proper units would involve only the application of normal engineering practice we do not believe that the failure to designate the particular units would justify the assumption that the bidder would not use those which would conform to the specifications. See 39 Comp. Gen. 595 (1960).

Generally, we do not question an agency's decision to reject an offer when it has found, as a factual matter, that the equipment offered does not meet the Government's advertised specifications, particularly where the determination involves highly technical or scientific factors which we are not equipped to judge. However, we believe that the determination of the CGS bid's nonresponsiveness was based on an erroneous interpretation or application of the standards properly required by the invitation.

We do not undertake in this instance to decide that the CGS bid is responsive, but we believe it should be reevaluated in the light of the views here expressed, with consideration of all information available

concerning the conformance of the several items of equipment proposed by CGS to the intent of the specifications.

In other words, under the circumstances, we must conclude that the reasons stated in the August 14 report are not adequate to justify rejection of the low bid of CGS, and we therefore suggest that the CGS bid be further evaluated in accordance with the foregoing.

We are transmitting a copy of this decision to the protestant, and the file forwarded with the report of August 14 is returned.

[B-167975]

National Guard—Civilian Employees—Conversion to Federal Positions—Leave Status

A National Guard technician who on January 1, 1969, became a Federal employee as authorized by Public Law 90-486, is entitled to have all the annual and sick leave to his credit prior to the conversion of the position to Federal status credited to him in his Federal position, as the leave earned as a technician, became subject to the provisions of 5 U.S.C. 6301 *et seq.*, effective January 1, 1969, pursuant to section 3(d) of the act. However, the annual leave to the employee's credit in excess of the 240 hours limitation prescribed by 5 U.S.C. 6304, that he did not use between January 1, 1969, and the close of the 1968 leave act—January 11, 1969—was forfeited by operation of law.

National Guard—Civilian Employees—Conversion to Federal Positions—Effect on Part-time, Etc., Federal Employment

A National Guard technician who when his technician position was converted to Federal status under Public Law 90-486, resigned from a part-time postal position effective December 31, 1968, as required by 5 U.S.C. 5533, which prohibits an employee from receiving compensation from more than one position for more than an aggregate 40 hours of work in one calendar week, is regarded as separated from the postal service and under 5 U.S.C. 5551, he is entitled to a lump-sum leave payment. The sick leave to the employee's credit at the time of separation from the postal service may be recredited to him in his new Federal position, as provided by section 630.502(b)(1) of the leave regulations issued by the Civil Service Commission.

Leaves of Absence—Sick Leave—Recredit of Prior Leave—Break in Service

The sick leave earned by an employee in a Federal position which could not be credited to him when he accepted a position as technician in a State National Guard unit may be recredited to the employee upon conversion of the technician position to Federal status effective January 1, 1969, pursuant to Public Law 90-486, as section 630.502(b)(1) of the Civil Service Leave Regulations, provides that an employee separated from the Federal service is entitled to a recredit of sick leave when reemployed in the Federal service without a break in service of more than 3 years.

To Major General W. P. Wilson, Department of the Army, December 8, 1969:

Your letter of September 24, 1969, reference NGNGBTC, submits correspondence concerning a National Guard technician who was employed by the United States Post Office Department at night and on weekends and by the Army National Guard on weekdays prior to

January 1, 1969, upon which date such technicians were made Federal employees by the National Guard Technicians Act of 1968, Public Law 90–486, 82 Stat. 755, 32 U.S.C. 709 note. You ask whether the annual and sick leave earned by the technician during his employment in the local post office can be paid for in a lump sum or transferred under the facts and circumstances hereinafter related.

We are informally advised that the technician before the effective date of Public Law 90–486 had earned 256 hours of annual leave and 1,362 hours of sick leave. Such leave was authorized under the provisions of National Guard Regulations 51, sections II and III. A limitation of 240 hours annual leave was authorized to be carried forward to a subsequent leave year. Section II, paragraph 4–12. Such regulations authorized unlimited accrual of sick leave. Section III, paragraph 4–17.

As an employee in the local post office working evenings and weekends the technician earned annual and sick leave under the provisions of 5 U.S.C. 6301 *et seq.* The record of leave earned therein shows balances of 118 hours annual leave and 90 hours sick leave as of December 27, 1968. He resigned from his position in the post office December 31, 1968.

Effective January 1, 1969, the technician here involved became a Federal employee as authorized by the above-cited act. Under section 3(d) thereof, 82 Stat. 757, the annual and sick leave previously earned under the regulations referred to above was required to be credited to him in his new position. That section reads, in pertinent part, as follows:

> (d) Annual leave and sick leave to which a technician was entitled on the day before the conversion of his position * * * shall be credited to him in his new position.

Thus, the leave earned as a technician prior to January 1, 1969, also became subject to the provisions of 5 U.S.C. 6301 *et seq.*, effective January 1, 1969, including the 240 hours (30 days) annual leave accumulation limitation, 5 U.S.C. 6304. Therefore, since the technician apparently did not use the 16 hours annual leave, carried over from his position covered by the regulatory leave provisions, in excess of the applicable 240 hours limitation, by the close of the 1968 leave year, such leave was forfeited. Such forfeiture in this care, would have occurred under either 5 U.S.C. 6304, or the regulatory provisions referred to above since there was time before and after January 1, 1969, for the technician to use the leave.

However, with respect to the 118 hours annual leave earned in the position with the local post office the record shows that the technician resigned therefrom December 31, 1968. Apparently, such resignation was necessary in view of the provisions of 5 U.S.C. 5533, which

prohibit an employee from receiving compensation from more than one position for more than an aggregate of 40 hours of work in one calendar week with certain exceptions not here material. Therefore, so far as his postal service is concerned he may be regarded as having been separated from the service and under the provisions of 5 U.S.C. 5551 entitled to a lump-sum payment from the Postal Service for the 118 hours of annual leave. The New York Postal Data Center which forwarded certification of the leave earned in the Postal Service should be furnished a copy of this decision. An extra copy is enclosed for that purpose.

The sick leave earned while employed in the Postal Service is for recrediting under section 630.502(b) (1) of the leave regulations issued by the Civil Service Commission, 5 CFR 630.502.

We understand informally that the granting of Federal status by the foregoing act has created situations where technicians who were employed prior to January 1, 1969, and who had other Federal employment in which they earned sick leave that could not be transferred when they were employed as technicians are now seeking recredit of such leave under the provisions of section 630.502(b) (1), referred to in the preceding paragraph, which reads, in pertinent part, as follows:

> * * * an employee who is separated from the Federal Government or the government of the District of Columbia is entitled to a recredit of his sick leave if he is reemployed in the Federal Government * * * without a break in service of more than three years.

In such circumstances the provisions above quoted would be for application in those cases where there has not been a break in service of more than 3 years.

[B-167433]

Post Office Department—Star Route Contracts—Bidder Qualifications

Notwithstanding the absence of adequate documentation to support that a corporate bidder awarded three star route contracts was "actually engaged in business within the county in which part of the route lies or in an adjoining county" as required by 39 U.S.C. 6420, in view of the complex problems encountered in qualifying a corporate bidder, the contracts may be completed. The award of one contract was not without foundation as the contractor established a business that subjected it to state laws and jurisdiction within the rule stated in 35 Comp. Gen. 411. However, the other contracts having been awarded on the basis of postmaster certification and undocumented evidence, criteria for meeting the "actually engaged in business" requirement should be established, and contracting officers informed personal certifications do not qualify a corporation to bid on star route contracts.

To the Postmaster General, December 9, 1969:

This letter is addressed to you in connection with a recent review by our Office of three star route contracts in the State of Mississippi,

awarded by your Department to Wayland Distributing Company (Wayland). The star routes as indicated on the contract documents are route No. 390–40 between Jackson and Natchez; route No. 27136 between Jackson and Biloxi, and route No. 390–15 between Jackson, Mississippi, and New Orleans, Louisiana. The contracts were in the amounts of $23,900, $28,915, and $37,700, respectively.

The facts surrounding the awards of these contracts were ascertained by an independent field investigation by our Office and a review of your Department's documents concerning this matter.

Section 6420 of Title 39 of the United States Code provides in part that:

> (a) The Postmaster General may not consider the bid of an individual for a star route contract unless the bidder is a legal resident of the county in which part of the route lies or of an adjoining county. He may not consider the bid of a firm, company, or corporation for such a contract unless it is actually engaged in business within the county in which part of the route lies or in an adjoining county.

Substantially the same provision appears in 39 Code of Federal Regulations 521.3(c)(2)(a) and Part 521.332(a)(2) of the Postal Manual except that the further qualification is added that the business engaged in must be other than the transportation of mail.

Wayland is a corporation; consequently, it must qualify under the actually engaged in business requirement of the above statute. Since this requirement is a prerequisite to bidding, it follows that Wayland must have fulfilled the actually engaged in business requirement as of the time of bid opening for each of the three star route contracts in question.

The solicitation for the Jackson-Natchez star route was issued on March 10, 1969, with a closing date of April 14, 1969, and an opening date of April 15, 1969. The primary basis for the determination that Wayland was "actually engaged in business" and thus qualified to bid on the Jackson-Natchez route was a service station located on Highway 80 in Rankin County on the outskirts of the city limits of Jackson, Mississippi. The lease for the service station on Highway 80 was entered into on November 27, 1968, between Wayland as lessee and Standard Oil Company, (Incorporated in Kentucky) as lessor. The rental under the lease was one dollar through February 28, 1969, and effective March 1, 1969, the rental was to be 1 cent per gallon on all motor fuel purchased and received by the lessee and stored in underground tanks at the leased premises with a minimum of $175 per month. The term of the lease was from November 27, 1968, to November 27, 1969. Additional facts regarding the service station which were ascertained by our Office in its field investigation will be discussed below. The contract for the Jackson-Natchez star route which was awarded to Wayland was signed by the contracting officer on July 16,

1969, and the contract term was from July 5, 1969, to June 30, 1970.

Prior to the signing of the above contract, POD conducted an investigation into whether Wayland was "actually engaged in business" in a qualifying county and a report prepared by a Postal Inspector dated April 24, 1969, questioned Wayland's qualification to bid. As a result of the Postal Inspector's report a request was made through channels that the General Counsel for Transportation review the matter. The opinion of the Assistant General Counsel for Transportation expressed in a memorandum dated May 2, 1969, was that the evidence presented did not establish that Wayland had met the requirements of 39 U.S.C. 6420 and that this concern could not be awarded a contract on the basis of the evidence available.

Pursuant to the Assistant General Counsel's opinion Wayland was requested to submit further evidence to show that it was engaged in business in a qualifying county. Certain additional information with regard to Wayland's qualifications was obtained in the nature of reproductions of employees' time cards; a copy of the lease between the Standard Oil Company and Wayland Distributing Company; and recapitulations of the daily sales reports of the service station. Information was also provided that Wayland operates a total of 349,828 miles of star route service in the State of Mississippi; that Wayland uses five diesel tractors and one standby tractor and that the only gasoline burning vehicle operated by Wayland in Mississippi is a small van-type truck which carries various items that might be needed in the maintenance of Wayland's tractors and trailers.

Based on the additional information furnished by the Chief, Highway Transportation Branch, the General Counsel's office reconsidered its decision of May 2, 1969, and in a memorandum dated May 27, 1969, the Assistant General Counsel, Transportation, concluded that the daily sales report indicated that Wayland's service station made sales to the public; therefore, this concern was a qualified bidder.

The solicitation for the Jackson-Biloxi star route was issued on September 20, 1967, with a closing date of October 23, 1967. Bids were opened on October 24, 1967, five bids were received and the bid from Wayland was low at $28,915. The bid from D. B. Harrigill & Harold French at $36,873 was second low.

The background for this award is summarized in a memorandum dated May 13, 1969, prepared by the Chief, Highway Transportation Branch, Memphis Region. Basically the memorandum states that on account of difficulties which were being encountered with the contract in effect in 1967, both Harrigill and Wayland were solicited for a temporary contract even though it was known that neither of these concerns would meet the technical statutory qualifications for bidding

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on star route contracts. Award of the temporary contract was made to Wayland since this concern submitted the lower offer, and the memorandum states that it was made clear to Wayland that it would have to qualify to bid on the regular contract. With respect to Wayland's qualifications for the regular contract, a memorandum dated May 15, 1969, from the Chief, Highway Transportation Branch, states as follows:

> We requested Wayland Distributing Company to furnish us with documentation of the fact that they were operating a business in Jackson, Mississippi, prior to the time they began regular star route service between Jackson and Biloxi on December 1, 1967. We are attaching the documentation which they submitted. It is as follows:
>
> Exhibit No. 1. A statement from a motel that Frank Nix, Wayland's local representative, rented a room from them from August 1967 through January 1968. After that time Mr. Nix purchased a home in Jackson.
>
> Exhibit No. 2. Invoices from the Phillips Petroleum Company showing sales of sizeable quantities of gasoline to Wayland Distributing Company located on Highway 49 in Jackson, Mississippi. Please note that these invoices indicate that the distributor collected the State and Federal Tax, and also the Sales Tax for the purchase price of the gasoline.
>
> Exhibit No. 3 is a copy of the lease agreement executed by Frank Nix for Wayland Distributing Company with a D. Sherman, for the filling station.
>
> Exhibit No. 4 is a statement from the Deaton Truck Line that Wayland had four trucks leased to them and that Mr. Nix was Wayland's representative.

The contract for this star route was signed by the contracting officer on February 9, 1968. The term of this contract is from December 1, 1967, to June 30, 1970.

The advertisement for the Jackson-New Orleans star route was issued on November 1, 1968, with a closing date of November 21, 1968. Bids were opened on November 22, 1968, four bids were received and the bid from Wayland at $37,700 was low. The bid from D. B. Harrigill at $59,490 was third low.

With respect to Wayland's qualifications to bid on this procurement, a memorandum dated May 12, 1969, from the Chief, Highway Transportation Branch, states as follows:

> Your letter of May 5 requested proof of the residence requirements of Wayland Distributing Company to provide star route service between Jackson, Mississippi, and New Orleans, Louisiana.
>
> We are attaching copy of the Rankin County Privilege Tax License for Wayland to conduct a business, also copy of the Certificate of Authority from the State of Mississippi authorizing the company to transact business in that State, a copy of the Application for Permit as Distributor of Gasoline, Diesel Fuel, Kerosene or Oil, and a copy of the Permit to operate as a Non-Stop Dealer for motor vehicles from the Motor Vehicle Comptroller.
>
> We felt that these documents were sufficient proof that Wayland Distributing Company was operating a business which fulfilled the residence requirements.

The contract for the Jackson-New Orleans star route was signed by the contracting officer on January 20, 1969. The term of this contract was to be from December 7, 1968, to June 30, 1970.

Our office conducted its own investigation to ascertain the facts with regard to this matter. On August 26, 1969, representatives of our Office

visited the service station on Highway 80 in Rankin County. At the time of this visit the service station was found to be open and the attendant on duty advised that he had been employed at the station since August 7, 1969. The present attendant did not know the prior attendant or anything about what the inventory of the service station might have been prior to April 15, 1969, the bid opening date for the Jackson-Natchez star route and there were no records available to establish the inventory prior to April 15, 1969. As of August 26, 1969, the station was open from 9:00 a.m. to 5:30 p.m. 5 days a week with one attendant on duty. While our representatives were at the service station one car drove up and made a purchase. The inventory on August 26, 1969, consisted of various office equipment and vending machines and various quantities of grease and oil supplies. The service station had three gasoline pumps, one diesel pump and one pump was not used.

Our Office prepared comprehensive summary schedules for February, March and April and August 1969 based on the service station's daily reports. These daily reports were not available for the months of November and December 1968 and January, June and July of 1969.

The total sales based on the daily reports for the months for which these reports were available were as follows:

February 1969	$888.84
March 1969	489.01
April 1969	288.00
May 1969	666.26
August 1969	700.47

The total gallons of gasoline sold were as follows:

February 1969	2191.4
March 1969	1183.0
April 1969	679.0
May 1969	1592.9
August 1969	1194.2

The total gallons purchased from Standard Oil were as follows:

November 1968	None
December 1968	5,169
January 1969	None
February 1969	2,000
March 1969	1,475
April 1969	None
May 1969	1,000
June 1969	3,000
July 1969	2,000

The above figures regarding gasoline sales from Standard Oil to Wayland were confirmed by Standard Oil.

Our review indicated that Wayland's trucks which are used in its mail transportation contracts are fueled by a tanker truck owned by Wayland parked near the Post Office in Jackson. These trucks use diesel fuel except for a small gasoline driven pick-up truck which is used to service Wayland's diesel trucks. Occasionally this pick-up truck obtains gas from Wayland's service station. It does not seem that the pick-up truck would have used all of the gasoline fuel purchased by Wayland's service station; therefore, it seems reasonable to conclude as did POD that at least some of the gasoline which was sold during February, March and April 1969, as indicated above, was sold to the public.

On August 26, 1969, representatives of our Office interviewed certain other business people located in the vicinity of Wayland's service station. The people interviewed could not verify to what extent the service station was engaged in business as of April 15, 1969; however, the general consensus of the people interviewed was that there was little activity at the service station for the past few months. One of the people interviewed did say that activity at the service station had increased during the past two weeks.

Our Office interviewed personnel of Deaton Truck Line in both Jackson, Mississippi, and in Birmingham, Alabama. The rental agreement between Wayland and Deaton was for the rental by Wayland to Deaton of five tractors and the agreement began in June of 1967. Deaton's statement of May 12, 1969, stated that the leasing agreement was in effect until January 1968. Under the agreement executed in Birmingham, Wayland was to act as a contractor hauling less than truck lots (LTL) freight as directed by local Deaton terminal dispatchers. Wayland supplied and paid the drivers of the tractors, repaired the tractors, provided insurance and carried the LTL freight. Wayland's LTL activities involved three States and most of the activities were dispatched from Birmingham. Our representatives have not ascertained the specific routes travelled by Wayland's trucks under the leasing arrangement; however, our representatives were advised that pursuant to these agreements Wayland worked both out of Atlanta, Georgia, and Jackson, Mississippi.

Our Office interviewed representatives of Vassar Truck Leasing, Incorporated, to ascertain the extent of Wayland's flat fixing service to that concern. Our representatives were advised that the owner of Vassar and an employee of Wayland, located in Jackson had an informal agreement whereby Wayland's employee agreed to fix flats and make minor repairs to Vassar's trucks in Jackson. The repairs were performed at the Post Office in Jackson on Vassar's trucks carry-

ing United States mail to and from Jackson. Wayland's employee billed Vassar directly for the services and the checks for the services were sent from Vassar's central office directly to Wayland's employee in Jackson. The agreement was in effect from about June 1968 to about February 1969.

Our Office interviewed the Chief, Highway Transportation Branch, Memphis Region, POD. This official advised that whether prospective contractors qualify for star route contracts is determined primarily by a signed statement by a postal official certifying that the bidder is engaged in a business in a qualifying county. Another means for a contracting officer to determine a bidder's qualifications is by personal knowledge. This official further advised that since the postal regulations did not require documentation as to the bidder's qualifications and since this official had personal knowledge of most of the contractors in the Memphis region, documentation usually was not required in prior solicitations.

With respect to the Jackson-Biloxi star route award, the Chief, Highway Transportation Branch advised our representatives that he was furnished with a certification from a Postmaster from Rome, Georgia, that Wayland Distributing Company was engaged in business in Jackson. Mr. Wayland verbally informed the Chief, Highway Transportation Branch of the lease agreement with the Deaton Truck Line and that Wayland Distributing Company had taken over the operation of a service station on Highway 49 in Jackson, Mississippi. No further documentation was required and award was made to Wayland Distributing Company for the Jackson-Biloxi route. When questions were raised in May 1969 with respect to the award of star route contracts to Wayland Distributing Company, Mr. Wayland was requested to furnish additional documentation to establish that Wayland Distributing Company was a qualified bidder for the Jackson-Biloxi route. The documentation furnished by Mr. Wayland was set forth above in the excerpt from the Chief, Highway Transportation Branch's memorandum dated May 15, 1969.

With regard to the Jackson-New Orleans route, the Chief, Highway Transportation Branch stated to our representatives that the postmaster in Birmingham, Alabama, certified that Wayland Distributing Company was engaged in a business that met the bidder's qualifications for this star route. Mr. Wayland showed the contracting officer a Certificate of Authority granting permission to operate a business in the State of Mississippi, a Rankin County Privilege Tax License (State of Mississippi), an application for a Permit as a Distributor of Gasoline, Diesel Fuel, Kerosene or Oil (State of Mississippi) and a Truck Stop Dealer Permit (State of Mississippi). Based on the postmaster's certification and Mr. Wayland's evidence, and the personal knowledge

of the Chief, Highway Transportation Branch regarding Wayland's qualifications for the Jackson-Biloxi star route, no further documentation was required and award of the Jackson-New Orleans star route was made to Wayland.

Regarding the Jackson-Natchez route, the Chief, Highway Transportation Branch advised our representatives that he determined that Wayland was a qualified bidder pursuant to a certification from the Assistant Postmaster of Birmingham, Alabama and his personal knowledge of the basis for the award of the previous star routes to that concern. Also, as indicated, POD made an investigation regarding Wayland's qualifications for this route.

Our Office interviewed the Assistant Postmaster in Birmingham, Alabama, to ascertain the basis for the certification by him that Wayland was actually engaged in business in Jackson. The Assistant Postmaster advised our representatives that since it has been quite some time since he made this certification, he does not remember the specific situation; therefore, he does not remember what documentation was provided to substantiate that Wayland was engaged in a business in Rankin County. The Assistant Postmaster of Birmingham advised further that normally when making certifications of this nature, the bidder is required to furnish such information as (1) bank statements; (2) correspondence; (3) billing statements; (4) tax statements and (5) state licenses, permission and authority to operate a business.

Representatives of our office also interviewed Mr. Wayland; however, Mr. Wayland advised that he considered the matter closed and Mr. Wayland did not appear interested in contributing further to the investigation by our Office.

Our Office was advised that all star route contracts are awarded for a period of not more than 4 years and the expiration dates of all contracts within a post office region are the same. Within the Memphis region, the next star route expiration date is June 30, 1970, and at that time all star route contracts will be renewed or readvertised.

The question with regard to each of the above star routes is whether Wayland was engaged in business as contemplated by 39 U.S.C. 6420 so as to qualify as a corporate bidder for these contracts.

The question what constitutes "actually engaged in business" under the statute was considered by our Office in 35 Comp. Gen. 411 (1956) and in this respect it was stated as follows:

> As to the test to be applied in determining whether or not a corporation is "engaged" in such business, we are inclined to the view that the business should be of such nature and extent as would subject it to the jurisdiction of courts of the State in which the business was conducted. This interpretation would make the question one as to which the decisions of the United States Supreme Court are final and binding, being referable ultimately to the constitutional requirements of due process, without regard to local law or statutory construction (28 Am. Jur. 341).

The Supreme Court has not undertaken to lay down any all-embracing rule which would serve as a yardstick by which any given situation may be measured; rather it has decided every case on the basis of the particular facts involved. See *St. Louis S. W. R. Co.* v. *Alexander*, 227 U.S. 218; *Green* v. *C. B. & Q. R. Co.*, 205 U.S. 530; *Consolidated Textile Corp.* v. *Gregory*, 289 U.S. 85; *People's Tobacco Co.* v. *American Tobacco Co.*, 246 U.S. 79.

The service station on Highway 80 apparently was open to the public at least some of the time prior to the bid opening for the Jackson-Natchez star route. The lease for this service station was signed on behalf of Wayland by an agent of this company. Applying the test from 35 Comp. Gen. 411 (1956), it would seem that the business conducted by the service station in Mississippi was such as to reasonably warrant the inference that Wayland had subjected itself to the jurisdiction and laws of the State of Mississippi. It was indicated in 35 Comp. Gen. 411 (1956), that the motive behind establishing a business is not controlling with respect to whether fraud or bad faith are involved. We therefore find that the POD's determination that Wayland was a qualified bidder for the Jackson-Natchez star route was not without factual foundation. Our Office has been advised that upon expiration of the present contract there will be a new advertised solicitation for this route.

With respect to the Jackson-Biloxi and Jackson-New Orleans star routes, more difficult questions are presented. The Chief of Highway Transportation Branch, Memphis Region, has readily admitted that the determinations of Wayland's qualifications to bid on these routes were based primarily on the certifications furnished by postmasters located outside the Jackson vicinity.

With respect to whether a star route contract should be canceled in a situation where our Office might disagree with a determination by POD that a corporation was "actually engaged in business", it was stated in 35 Comp. Gen. 411 (1956):

We must, however, give due consideration to the fact that the duty and responsibility of determining the qualification of bidders in the first instance is legally in the Post Office Department. The award made by that department necessarily constitutes a determination that the corporation was "engaged in business," and we do not feel that we should refuse to allow credit for payments made to the contractor under the contract awarded, or direct cancellation of the contract, except for reasons so clear that they would reasonably be expected to constitute a valid defense to an action by the contractor for damages for breach of contract.

It does not seem that the facts surrounding the award of the Jackson-Biloxi star route present a case which requires cancellation of the award. The documentation supporting POD's determination that Wayland was qualified to bid on the Jackson-Biloxi star route apparently was not requested until sometime in 1969 when questions began to be raised with respect to that concern's qualifications to bid on star route contracts in Mississippi. In view of the undocumented

nature of your Department's determination regarding Wayland's qualifications for the Jackson-Biloxi star route we recommend that upon expiration of the present contract, there be a new advertised solicitation for this star route.

The determination that Wayland was a qualified bidder for the Jackson-New Orleans star route was made on the basis of a certificate by a postmaster located outside of the Jackson vicinity, and applications for various permits and licenses, a certificate of authority to do business and the Chief of Highway Transportation Branch's personal knowledge of Wayland's business activities. These certificates, permits, licenses and applications would not establish that Wayland was actually engaged in business. We have serious questions whether the flat fixing agreement with Vassar would be sufficient to qualify Wayland as a bidder for the Jackson-New Orleans route. Wayland's employee entered into this agreement in his own name and payment was made directly to this employee in his own name. It could be argued that this employee was providing the services to Vassar in order to obtain some additional income for himself. Moreover, even assuming that it could be shown that Wayland was a party to the agreement with Vassar since Vassar's trucks were engaged in the transportation of mail there would be a question whether the rendering of services under such an agreement could be considered as being engaged in a business other than the transportation of mail. *Cf* B–167738, December 1, 1969.

In view of what was said in 35 Comp. Gen. 411 (1956), cancellation of the Jackson-New Orleans contract would not be justified in the circumstances of this case. However, considering the doubtful aspects concerning the award of this contract we recommend that there be a new advertised solicitation for this star route upon expiration of the present contract.

The above review indicates the complex problems that can be encountered in situations where a corporation attempts to qualify itself as bidder on a star route contract. Only with respect to the Jackson-Natchez star route was adequate documentation regarding the qualifications of the prospective contractor obtained by your Department prior to award. We have reviewed your Department's regulations as published in the Code of Federal Regulations and the Postal Manual and we have found nothing therein which would give guidance to contracting officers regarding the nature and extent of the documentation that should be required to establish that a concern has qualified as a bidder for a star route contract.

It is our view that contracting officers should be given some specific criteria as to the documentation which must be furnished by a prospective corporate contractor to establish that it meets the actually engaged

in business requirement. With regard to the use of certifications of postmasters to establish that a concern is actually engaged in business in a qualifying county, those certifications should be supported by adequate documentation and in this regard we recommend that contracting officers be advised that such certifications by themselves do not establish that a corporation is qualified to bid on a star route contract.

[B–168025]

Bids—Acceptance Time Limitation—Reasonableness

The requirement for the presence of bidder principals to accept an award, sign the contract, execute bonds and agree to furnish performance and payment bonds within four hours of bid opening under an invitation for demolition work that provides for contract award within four hours of bid opening, does not mean presence at bid opening, but merely to be present within four hours of bid opening. Therefore, the low bidder who although not present at bid opening complied with the requirement was entitled to the award, for should he have failed to execute the contract or furnish performance and payment bonds, the bid bond would have become operative under the "firm-bid rule" to the effect that except for an honest mistake, a bid is irrevocable for a reasonable time after bid opening.

Contracts—Specifications—Deviations—Bidder's Presence at Bid Opening

The failure of a bidder to be present at bid opening if required by the invitation is not a deviation that affects price, quantity, or quality of the work to be performed, and, therefore, the requirement would be one for the benefit of the Government and not the bidder.

To Smith, Currie and Hancock, December 15, 1969:

Reference is made to your telegram of October 1, 1969, and subsequent correspondence protesting, on behalf of the Bartlett Construction Company (Bartlett), the award of a contract to the low bidder under invitation for bids (IFB) No. DC4–090029, issued by the General Services Administration (GSA), Atlanta, Georgia, for demolition work on the third floor of the United States Post Office, Courthouse and Customhouse in Miami, Florida.

The subject IFB was issued on September 11, 1969, under a 100 percent small business set aside. The scheduled bid opening was for 10.30 a.m. e.d.t., October 1, 1969, in Room No. 1623, Federal Building, Miami, Florida. The Standard Form 20 of the invitation contained the following requirement:

* * * THE CONTRACT AWARD AND NOTICE TO PROCEED WILL BE COMPLETED WITHIN FOUR (4) HOURS AFTER BID OPENING OR BEFORE C.O.B. OCTOBER 1. PRINCIPALS OF BIDDERS MUST, THEREFORE, BE PRESENT TO ACCEPT THE AWARD, SIGN THE CONTRACT, AND EXECUTE ACCEPTABLE BONDS.

In addition, Standard Form 21 provided that all bidders would be subject to the following commitment:

The undersigned agrees that, upon written acceptance of this bid, mailed or otherwise furnished within Four (4) hours after the of bids (sic), he will within

Four (4) hours after opening of bids of the prescribed forms (sic) execute Standard Form 23, Construction Contract, and give performance and payment bonds on Government standard forms with good and sufficient surety.

The requirement to furnish bonds appears in paragraph 2-5 of section 2, Special Conditions, as follows:

2-5 BONDS

2-5-1 Bid guarantee in the amount of 20 percent of the amount of the bid. Performance bond will be required in an amount equal to 100 percent of the bid four (4) hours after Bid Opening on October 1, 1969. Payment bond will be required four (4) hours after Bid Opening on October 1, 1969 in the amount as follows:

Contracts over $2,000 and not over $1,000,000; 50 percent of contract.

On October 1, 1969, bids were opened as scheduled. The bid of George E. Jensen, Contractors, Inc. (Jensen), in the amount of $27,031, which included Base Bid and Alternates 1 and 2, was the lowest of the four bids received. Bartlett submitted the second low bid. Although a representative of the low bidder was not present at bid opening, GSA reports that he did appear within four hours thereafter and accepted the award, signed the contract, and furnished performance and payment bonds. The Notice to Proceed was issued at the same time and the time for completion of the demolition work was 45 calendar days beginning on October 2, 1969. The demolition work was in connection with a recent fire in the Courthouse and Customhouse and it was necessary that this phase of the work be completed at the earliest possible date in order to schedule the building of urgently required courtroom facilities which would be performed under another phase of construction.

Your protest is based on the contention that the presence of the bidders at bid opening was part of the bid itself and that appearance of the low bidder's representative after bid opening rendered the bid late which gave the low bidder an option to choose between rejecting or executing the contract without incurring legal liability. You argue that the surety on the bid bond could likewise escape liability if the low bidder should elect not to execute the contract. You assert that the physical presence of the bidder at bid opening was required by the applicable clauses of the invitation, by a mimeographed letter, and by a telephone call from Bartlett to the contracting officer concerning the necessity of having someone physically there instead of being on short-notice call. Your letter also quotes extensively from 40 Comp. Gen. 321 (1960) to support your position.

The rule of Government contract law that a bid is irrevocable for a reasonable time after bid opening is known as the "firm-bid rule." See *W. A. Scott* v. *United States*, 44 Ct. Cl. 524 (1909); *Refining Associates, Inc.* v. *United States*, 124 Ct. Cl. 115 (1953); ASPR 10-101.4. After the bids have been opened a bidder cannot withdraw his bid, unless he can prove that the desire to withdraw is due solely to an

honest mistake and that no fraud is involved. See *United States* v. *Lipman*, 122 F. Supp. 284, 287 (1954). See, also, section 1-2.304(a) and (b) of the Federal Procurement Regulations, which provides, among other things, that bids may be modified or withdrawn by written or telegraphic notice or in person, but only if the withdrawal is prior to the exact time set for bid opening. In this case, the Jensen bid could not have been withdrawn after 10:30 a.m. e.d.t., October 1, 1969, without incurring liability on the bid bond submitted to the Government, regardless of a Jensen representative's presence or absence in Room No. 1623. The record discloses that the bid bond was properly executed by the United States Fidelity and Guaranty Co. of Baltimore, Maryland, as surety on behalf of Jensen. Liability on such a bid guarantee becomes operative when the sucessful bidder withdraws his bid within the time fixed for acceptance or if after acceptance he fails to enter into a contract or furnish the required bonds within the time specified. See *United States* v. *Conti*, 119 F. 2d 652 (1941); *Carol D. Heers, et al.* v. *United States*, 165 Ct. Cl. 294 (1964); 31 Comp. Gen. 477 (1952); 27 Comp. Gen. 436 (1948).

None of the provisions of Standard Form 20 and 21 called for the bidder's presence at bid opening. All the applicable provisions required that the successful bidder "be present to accept the award, sign the contract and execute acceptable bonds" *within 4 hours after opening of bids.* You also refer to a mimeographed letter which allegedly required bidders to be present at bid opening. We assume that you refer to a letter dated September 12, 1969, which was sent to all solicited bidders with the bid documents. However, that letter did not require the physical presence of the bidders at the bid opening, but only that the "low responsive bidder furnish the usual performance and payment bonds and execute a contract within four hours after bid opening."

A memorandum in the GSA report discloses that Mr. John Bartlett of the Bartlett Construction Company called an official of the GSA Building Management Aid at approximately 10:10 a.m. on the bid opening date and inquired if it was necessary for him to be present at the opening of bids since he could come into the GSA Office within a short time. According to this memorandum, Mr. Bartlett was advised that it was not absolutely necessary to be present at the opening of bids, but that his presence would be preferred.

In referring to 40 Comp. Gen. 321 (1960), you quote a part of our decision, contained on page 324, to support your proposition that the failure of Jensen to be present at bid opening was prejudicial to other bidders and should not have been waived. Assuming, arguendo, that the invitation required bidders to be physically present at 10:30 a.m., e.d.t., on October 1, 1969, in Room 1623, Federal Building,

Miami, Florida, we note that such requirement would have been solely for the benefit of the Government, because deviation from it does not affect bid price, quantity or quality of the demolition work to be performed. In this regard, our decision cited by you held that the rejection of the low bid as nonresponsive due to a minor deviation was improper. Similarly, failure to be present at bid opening would be a minor deviation. In the decision we said, immediately following your quotation:

> * * * However, the concept of formally advertised procurement, insofar as it relates to the submission and evaluation of bids, goes no further than to guarantee equal opportunity to compete and equal treatment in the evaluation of bids. *It does not confer upon bidders any right to insist upon the enforcement of provisions in an invitation, the waiver of which would not result in an unfair competitive advantage to other bidders by permitting a method of contract performance different from that contemplated by the invitation or by permitting the bid price to be evaluated upon a basis not common to all bids. Such provisions must therefore be construed to be solely for the protection of the interests of the Government and their enforcement or waiver can have no effect upon the rights of bidders* to which the rules and principles applicable to formal advertising are directed. To this end, the decisions of this Office have consistently held that where deviations from, or failures to comply with, the provisions of an invitation do not affect the bid price upon which a contract would be based or the quantity or quality of the work required of the bidder in the event he is awarded a contract, a failure to enforce such provision will not infringe upon the rights of other bidders and the failure of a bidder to comply with the provision may be considered as a minor deviation which can be waived and the bid considered responsive. [Italic supplied.]

For these reasons your protest is denied.

[B-167936]

Contracts—Specifications—Descriptive Data—Unnecessary

Bids under an invitation for a packaged air compressor plant and air dryer that failed to furnish sufficient descriptive literature information for bid evaluation purposes, or to submit the literature, should not have been rejected where the descriptive literature clause was included without the justification required by section 1-2.202-5(c) of the Federal Procurement Regulations for bid evaluation purposes only, and where there appears no need for the literature as the specifications were sufficiently detailed, leaving no performance characteristics for a bidder to describe, and furnished no standards for the evaluation of design, materials, or components. Future invitations that include a descriptive literature clause should advise bidders with particularity both as to the extent of detail required and the purpose the literature is expected to serve.

To the Secretary of Health, Education, and Welfare, December 19, 1969:

Reference is made to a letter dated November 5, 1969, with enclosures, from the Director of General Services, furnishing a report on the protest of PREMAC Corporation against the rejection of its bid under formally advertised solicitation No. 2-70, issued by the U.S. Public Health Service, Atlanta, Georgia.

The invitation, issued July 14, 1969, solicited bids for furnishing a packaged air compressor plant and an air dryer in accordance with

the Government's specifications. Prospective bidders were advised on the facesheet of the invitation for bids that bidders shall "Furnish an assembled, packaged air compressor plant, to provide 142 CFM of free air at 60 PSIG discharge pressure." It is reported that the invitation contained the clause as set forth in section 1-2.202-5(d) of the Federal Procurement Regulations (FPR) for the submission of descriptive literature. The clause reads as follows:

BIDDERS SHALL FURNISH WITH THEIR BIDS descriptive material (such as cuts, illustrations, drawings, or other information) which will clearly indicate exactly what they propose to furnish.

(a) Descriptive literature, as specified above, must be furnished as part of the bid and must be received before the time set for opening bids. The literature furnished must be identified to show the item in the bid to which it pertains. The descriptive literature is required to establish, for the purposes of bid evaluation and award, details of the product the bidder proposes to furnish as to design and performance characteristics.

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

Seven bids were received and opened on August 1, 1969, with PREMAC being the lowest bidder at $7,336.31. The second lowest bid in the amount of $7,709 was submitted by the E. D. Green Company and the third lowest bid in the amount of $7,991 was submitted by the Gardner-Denver Company. The bid of PREMAC was determined to be nonresponsive to the invitation inasmuch as the descriptive literature accompanying its bid failed to show that the equipment it was offering would meet the most critical requirement for the compressor; that it provide a minimum of 142 CFM of free air at 60 p.s.i.g. discharge pressure. The record also indicates that in a letter accompanying its bid, PREMAC took exception to the specifications in two instances which, of course, rendered its bid nonresponsive and ineligible for award. The second lowest bid was also rejected as being nonresponsive to the invitation because it was not accompanied by the required descriptive literature. The third lowest bid in the amount of $7,991 submitted by the Gardner-Denver Company was accepted on August 15, 1969.

Thereafter, by letter dated September 16, 1969, PREMAC protested to our Office the award of a contract under the invitation to any bidder other than itself. The corporation contends in its letter that during the evaluation of the bids received on the equipment, a representative of the U.S. Public Health Service visited its supplier, the Joy Manufacturing Company, for the purpose of discussing the firm's bid; that since the corporation was the prime bidder, the Government representative should have contacted it rather than its supplier; and that the Government representative's conversation with the supplier's repre-

sentative indicates that the Public Health Service representative was seeking an excuse to disqualify the firm rather than trying to determine whether the firm could meet the specifications. The corporation alleges that it can meet all the requirements of the specifications and that the contract should have been awarded to the corporation since it submitted the lowest bid on the equipment.

With regard to the corporation's complaint concerning the contact with its supplier, the contracting officer states in his report that an investigation has disclosed that an employee from the National Communicable Disease Center's organizational unit requisitioning the equipment, and who was present at the bid opening, did, in fact, without the consent or knowledge of the contracting officer or personnel from the contracting office, contact the local Joy Manufacturing Company office for the purpose of obtaining data on the equipment PREMAC proposed to furnish; that this employee has been informed in detail that his action was improper and that he has been cautioned against future similar conduct; and that this happening had no influence on and did not affect the decision of the contracting officer in rejecting the corporation's bid.

We have recognized that in the procurement of highly specialized equipment an administrative agency properly may require bidders to supply descriptive data in order to enable it to intelligently conclude precisely what the bidder proposes to furnish and what the Government would be binding itself to purchase by the making of an award. 36 Comp. Gen. 415, 416–17 (1956). Also, we have held that where descriptive data is required for determining the responsiveness of the bid, the invitation must clearly establish the nature and extent of the descriptive material asked for, the purpose intended to be served by such data, and particularly whether all details of such data will be considered an integral part of the awarded contract. 38 Comp. Gen. 59, 64 (1958). The foregoing is consistent with the principle that requirements of an invitation should be set forth clearly and accurately in order to permit bidders to compete on an equal footing. 17 Comp. Gen. 789 (1938).

The record furnished our Office does not contain any justification for the inclusion of the descriptive literature clause as required by FPR sec. 1–2.202–5(c). It appears from the contracting officer's report that descriptive literature was required for the purpose of bid evaluation. We believe that such reason, alone, does not justify the requirement for descriptive literature. Moreover, it is difficult to understand why descriptive literature was considered necessary since the specifications of the equipment being procured are stated in such detail that they leave nothing for the bidder to describe in the way of performance characteristics, and furnish no standards for evaluation of design,

materials, or components except to the extent that such elements are specifically prescribed in the specifications. Furthermore, even if an acceptable product could not have been procured without descriptive literature, the invitation fails to identify those items or specification features as to which descriptive literature was required. We have held that the requirement for such literature should advise bidders with particularity both as to the extent of detail required and the purpose it is expected to serve so that bidders might be on an equal basis in meeting the descriptive literature requirement. 38 Comp. Gen. 59 (1958); 42 *id.* 598 (1963); 46 *id.* 315 (1966).

Also, of relevance here is the following excerpt from 46 Comp. Gen. 315, 318 (1966):

> Furthermore, while it is not clear what was expected of bidders with respect to describing performance characteristics, the comments of the agency regarding the deficiencies in your bid with respect to certain paragraphs of the Purchase Description indicate it expected bidders to render their bids responsive merely by affirming that their equipment would indeed meet the requirements of the Purchase Description which they would have been required to have met without such a superfluous affirmation. If the requirement for descriptive literature can be met by parroting back the Government specifications, the legitimacy of that requirement is questionable. B–150622, dated June 6, 1963. The legitimacy of the requirement certainly is not here established, as it should be, by the "Justification for Descriptive Literature," which does little more than state a conclusion that descriptive literature is required, and furnishes no standards for or identification of performance characteristics which might be described, except to the extent such elements are already specifically prescribed by the Purchase Description requirements.

For the foregoing reasons, it is our opinion that the descriptive literature requirement was improperly included in the invitation. And, even if its inclusion could be justified, it is our opinion that the invitation was defective because the extent of descriptive detail required and the purpose to be served were not set out, 46 Comp. Gen. 1, 5 (1966).

Although the inclusion of a defective provision in an invitation may be disregarded and an award made thereunder where competition has not been affected, where the agency by award would enter into a binding contract for what it wanted, and where no bidder obtained an option or other undue advantage because of the defect in the invitation, B–157297, September 17, 1965, we do not believe that it is the case here. Two bids were rejected as nonresponsive to the invitation. These two bids were lower than the bid of Gardner-Denver Company and, while the record shows that the bid of the second lowest bidder was rejected because he failed to submit any descriptive literature, the bid of the lowest bidder, PREMAC, was rejected because it did not contain sufficient information to evaluate its conformity to the specifications, and not because the descriptive literature showed noncompliance with the specifications. Since nowhere in the invitation was there a statement as to what descriptive data was required for complete technical

evaluation, it was prejudicial to the bidders to reject their bids for failure to supply descriptive information to show compliance to the detailed specifications.

We have been informally advised that Gardner-Denver delivered the equipment on November 7, 1969. It is therefore apparent that corrective action at this late date would be impracticable. We recommend, however, that appropriate measures be taken to preclude any recurrence of the circumstances involved in the immediate protest.

By copy of this decision, we are advising the PREMAC Corporation of our decision with respect to its protest.

[B-167386]

Contracts—Negotiation—Changes, Etc.—Written Amendment Requirement

The failure to issue the written amendment required by sections 2-3.507(a) and 1-3.805-1(d) of the Federal Procurement Regulations for the changes in the delivery schedule of a negotiated procurement and the time for the submission of final proposals that were instead telephoned to offerors, and the continued negotiation after cut-off date with the low offeror under the original request for proposals that led to an award of a multi-year contract which was not contemplated under the original solicitation—the funding problem having subsequently developed—are procedural errors that oblige the Government to reopen negotiations. If the errors cannot be rectified by agreement with the successful contractor and the offeror within a competitive range whose price reduction was considered to have been submitted late, the United States General Accounting Office should be furnished with an estimate of costs chargeable to the Government in the event of contract cancellation.

To the Administrator, Federal Aviation Administration, December 22, 1969:

Reference is made to your letter of August 15, 1969, with enclosures, concerning the protest by Wilcox Division of American Standard, Incorporated, against the award of a contract to Cutler-Hammer, Airborne Instruments Laboratories (AIL) Division, under request for proposals (RFP) No. WA5M-9-0316 issued by your agency.

The RFP was issued on January 15, 1969, and, as amended, called for proposals on a quantity of 99 full and partial Mark I Instrument Landing Systems (ILS). Proposals were received on March 14, 1969, from AIL, Wilcox and Standard Telephone and Cable, Limited (STC). Technical and price negotiations were conducted with these 3 offerors, and were completed by May 26, 1969. Each of the offerors, as requested, confirmed the results of the negotiations held with it, and on June 2, 1969, the contracting officer forwarded a telegram to all 3 offerors requesting submission of final prices by June 5, 1969.

The RFP called for the initial system to be delivered within 240 days (8 months) after award. However, on June 4, the day before the final prices were due, the contracting officer was advised by his

technical staff that, in their opinion, none of the offerors could realistically be expected to deliver the initial system in 8 months even though none of the firms had objected to the delivery schedule. This technical conclusion was reached on the basis of an in-house evaluation developed from information obtained during the preceding negotiations. A 15-month initial delivery period was considered to be more realistic.

Based on this advice, the contracting officer on June 5, 1969, decided to extend the delivery period for the initial system from 8 months or less to 15 months or less. In view of the short time remaining before final prices were due, each offeror was called and read the following message:

The delivery schedule for the initial system under subject RFP is 240 calendar days (8 months) from date of contract award. Please include in your final submission on or before 6 June 1969 reflecting cost impact, if any, of an alternate delivery date for the initial system of 450 calendar days (15 months) from date of contract award, plus adjusting the delivery schedule for the balance of the deliverable items accordingly.

On June 6, the following proposals were received:

Company	Final Offer	Evaluation Price
AIL	$6, 328, 730	$6, 395, 743
Wilcox	$6, 731, 402	$6, 802, 811
STC	$5, 995, 564	$6, 947, 301

In evaluating these final prices, the provisions of the Buy American Act (41 U.S. Code 10a) and the Tariff Act (19 U.S. Code 1202) were applied to STC's proposal. Also, certain factors such as reliability, maintainability, and growth potential were given a dollar value and added on as a cost factor to each of the final prices.

Wilcox's final proposal stated the following with regard to the telephone calls of June 5:

Confirming telephone call of 5 June 1969 between Mr. Golrick of FAA and Mr. McInteer of Wilcox, Wilcox further states as follows:

Wilcox reaffirms that it can meet the delivery specified in the RFP and that our quoted prices are based upon the RFP delivery schedule.

Further, if the Government so desires, Wilcox would be willing to accept a contract requiring delivery of the initial equipment—as quoted or up to 15 months ARO, with further provision that the Government will accept earlier delivery, provided the equipment meets the governing specifications.

On June 12th the following letter dated June 9, 1969, was received from Wilcox:

Subsequent to our referenced June 4, 1969 submission in response to subject RFP, we have continued a review of our prices as submitted. This review has disclosed certain reductions in our bid computations that should be made available to the Government. We are accordingly prepared to reduce our last quoted price in referenced letter covering all line items (but excluding options) by $450,000.00.

Because of our intense interest in this program and recognizing your pressing need for ILS systems, Wilcox is prepared to guarantee delivery in accordance

with the contract delivery schedule cited in subject RFP and in this respect is prepared to offer the FAA a "Failure to Deliver" liquidated damages penalty in the sum of $20,000.00 for each full ILS system not delivered in accordance with contract schedule, up to a maximum sum equal to our bid profit in this proposal.

We will be pleased to discuss this matter in more detail.

The June 12 price reduction offered by Wilcox was deemed to be a late proposal modification. Under paragraph 2–3.508 of the Federal Aviation Administration Procurement Regulations, a late proposal or modification may not be considered for award except where such modification is "of extreme importance to the Government." It is reported that if the June 12 price reduction were considered in the award selection, it would have made Wilcox $47,325 lower in actual price and $42,932 lower in evaluated price than AIL. The contracting officer considered that these differences did not make the late modification of extreme importance to the Government, and the June 12 price reduction was not considered for the award.

On June 30, 1969, the contract was awarded to AIL, and Wilcox was so advised. The contract which was awarded to AIL was written as a multi-year contract for the total amount of $6,328,730, with $3,685,716 as the first year obligation and the balance of $2,643,014 to be funded by October 1, 1970, or if not the contract will terminate subject to a cancellation ceiling of 9 percent of the total contract amount, or $569,575. It is reported by your agency that the multi-year contract was utilized because of funding problems which FAA became aware of on June 10, 1969, and that, in the interest of saving the favorable price for 99 units it proceeded to obtain AIL's agreement to accept, without change in price, delivery, or rate of delivery, a contract using the multi-year technique. The cancellation ceiling of $569,575 was then established after negotiations with AIL during which AIL's request for a higher cancellation ceiling was rejected. The resulting contract contains the clauses appropriate to the multi-year technique, but conforms in the matter of price, delivery and delivery rate to the AIL proposal of June 6, 1969.

Wilcox has protested this award contending that the treatment of the Wilcox price reduction delivered on June 12, 1969, "was patently erroneous in light of FAA's oral request of June 5 for proposals or expression of interest from the offerors on a contract which would allow a 15-month delivery start, the absence of written confirmation of same and in the light of the negotiations conducted with AIL after June 6 on price and terms."

Wilcox's position has merit. We believe that a written amendment to the RFP should have been issued to cover the change in delivery and that offerors should have had a reasonable amount of time to consider the effect of the change in delivery before being required to confirm or modify their prices. FAA Procurement Regulation

2–3.507(a) calls for such a procedure whenever the quantities, specifications, or delivery schedules are significantly changed; and we note in FPR 1–3.805–1(d) that changes which *relax* the statement of requirements, as well as those which increase the requirements, should be made by formal amendment. If a written amendment had been issued and the time reasonably extended, we believe that the present controversy could have been avoided. As we stated in a recent decision dated September 3, 1969, 49 Comp. Gen. 156:

> The benefits to be derived from issuance of a written amendment are evident. The procurement officials of the agency are assured that notice of the complete change is in fact communicated to the proper officials of all competitive offerors and that all the aspects of the change referenced to the applicable RFP provisions are included in the notice. The possibility of charges of fraud or favoritism is thereby eliminated or reduced. Also, the written amendment and acknowledgment of its receipt provide a firm basis for reviewing and justifying a challenged procurement action. Moreover, the Government is assured that the resulting contract, as a legal document, will embody the new changed terms rather than the old terms.

More significantly, we believe that the substantial extension of the delivery schedule, particularly where as here a considerable amount of engineering had to be undertaken by the contractor, called for more than merely asking the offerors to submit by the next day a final price incorporating any impact in cost. The circumstances appear to call for the Government to take the initiative in encouraging a price reduction to reflect the delivery extension. We also believe that considerably more time should have been granted the offerors to compute such change. While there may have been significant reasons to award the contract as quickly as possible, the single day granted seems totally inconsistent with the magnitude of the recomputation or of the 7-month extension in the delivery schedule.

Admittedly, so far as concerns the equal treatment of proposers, we note the absence of any indication in the record that your agency was advised on June 5 or June 6 of a desire on the part of Wilcox or any other proposer to negotiate a revised price based on a 15-month delivery period. The record shows rather that the FAA was advised by all proposers that a 15-month delivery would have no cost impact. It is further reported that, at the time, neither Wilcox nor any other proposer indicated any desire or need for an extension of time beyond June 6 to compute the cost effect of the delivery extension. However, as indicated above, we do not believe that any proposers could make a meaningful decision within 24 hours as to the cost impact of the 7-month extension in delivery.

The last point raised by Wilcox is the alleged negotiation with AIL exclusively after the June 6 cut-off date. It appears that the multi-year contract entered into with AIL resulted from actions taken after Wilcox had submitted its price reduction offer on June 12. The administrative report states that AIL

* * * was approached on June 12, 1969 and asked if it would accept, without change in price, delivery, or delivery rate, a contract using the multiyear funding technique. On receipt of an affirmative answer, the cancellation ceilings were then established as well as agreement reached to include in any resulting contract the necessary clauses relative to the multiyear technique.

The administrative justification for considering that this did not constitute a reopening of negotiations is as follows:

The multiyear method of procurement was used because of a shortage of funds which developed late in the procurement process. * * * There was no prejudice to any other offeror since the change was entirely for the Government's benefit (to permit extended funding), there was no advantage conferred on AIL, and the substantive terms of AIL's final proposal remained firm. As indicated by Wilcox in its protest, it is true that two clauses were added to the contract, however, these related only to the establishment of a limitation in price and cancellation ceilings for a multi-year contract. It is to be noted that under FAA procurement regulations, cancellation ceilings cannot be considered as an evaluating factor in determining the recipient of an award.

We cannot agree with the administrative position on this point. There can be no disputing the fact that the contract entered into with AIL is different from its proposal of June 6, 1969. From a legal standpoint, AIL now has a firm contract for only 53 units, not 99 units. There has been added to the price for these units a contingency factor which could increase the cost of the 53 units by as much as $569,575. The statement that cancellation ceilings are not to be considered as an evaluating factor in determining the recipient of a multi-year award may be a valid observation in the situation to which it applies, mainly, the evaluation of a single-year versus multi-year proposals submitted under a multi-year procurement. The cancellation ceiling under a regular multi-year procurement is fixed in advance of solicitation and obviously would have no application in the evaluation of multi-year proposals only, since it would not affect the relative standing of such proposals. However, this has no relevance to the present situation, where only one multi-year proposal is being considered as an alternative to other proposals submitted on a different basis.

The basic question, in our opinion, is whether the changes in AIL's proposal of June 6 which were negotiated thereafter between AIL and FAA were substantial enough to be considered a reopening of negotiations with AIL. It is clear that there is a substantial difference between a multi-year contract for 99 units with a firm commitment for only 53 units, and a firm contract for all 99 units. The Government's potential liabilities are substantially different in each case.

The administrative position appears to rest principally on the fact, which may be conceded, that the changes made were solely for the benefit of the Government, from which it is argued that such changes gave no advantage to AIL and did not prejudice any other offeror. This argument ignores the fact that as long as negotiations are open every proposer has a right to change his price for any reason whatever, whether it be a consequence of the changes in the terms of the solici-

tation or not. In this connection the record shows that Wilcox was willing to offer a general price reduction. In our opinion, the dealings with AIL after June 6 constituted a reopening of negotiations. Having thus reopened negotiations with AIL, your agency was under an obligation to reopen negotiations with other proposers within a competitive range, which included Wilcox in view of the $450,000 price reduction submitted on June 12th. See Federal Procurement Regulation 1-3.805.

We are not unmindful of the urgency of the need for the systems now under contract with AIL. Nor can we ignore the possible financial consequences of a cancellation of the AIL contract. But for these considerations it is our view that the contract with AIL should be canceled, and further negotiations conducted with both Wilcox and AIL. We believe an effort should be made by your agency, under your authority to negotiate this procurement, to rectify the procedural errors made, and to reach some agreement between yourselves, AIL, and Wilcox which will best serve the interests of the Government in securing the most expeditious and economical delivery of the systems needed.

If such agreement cannot be reached, we request that you furnish us an estimate of costs chargeable to the Government in the event of cancellation of the AIL contract both in whole and as to the 46 units covered by the second year of the contract.

[B-168177]

Military Personnel—Cadets, Midshipmen, Etc.—Disenrolled From Service Academy—Status

A disenrolled service academy cadet or midshipman who returns home to await reassignment to active duty as an enlisted man is entitled to active duty pay and allowances from the date his separation is approved and his reassignment orders are issued to the date he receives notification of the action, the cadet or midshipman pursuant to 10 U.S.C. 516(b) "resumes his enlisted status" when separated for any reason other than appointment as a commissioned officer or for disability, and he is required to complete the period of service for which he enlisted or for which he is obligated, unless sooner discharged. As the member while at home awaiting orders will not be subsisted at Government expense, he is entitled pursuant to 37 U.S.C. 402(d) to a basic allowance for subsistence.

Pay—Active Duty—Effective Date—Cadets and Midshipmen Transferred to Reserve Component

A disenrolled service academy cadet or midshipman who while awaiting transfer by the Secretary concerned under 10 U.S.C. 4348(b), 6959(b), and 9348(b) to a Reserve component returns home is not entitled to pay and allowances until he is required to comply with new active duty orders, as the transfer has the effect of discharging the cadet or midshipman from his enlisted contract and, therefore, the member is not in an active duty status for pay and allowances purposes until he complies with his new orders.

Pay—Active Duty—At Home Awaiting Orders—Disenrolled Cadets and Midshipmen

The fact that several days elapsed between the time a Regular enlisted man of the uniformed services reverted to that status pursuant to 10 U.S.C. 516(b) upon termination from the Air Force Academy and the date he received his active duty orders at his home in Los Angeles does not affect the member's entitlement to pay and allowances as of the date of resuming Regular enlisted status. If the member should, however, be transferred to active duty as a reservist and ordered to Andrews Air Force Base in Maryland, his enlisted status having terminated when disenrolled from the Academy, his right to pay and allowances would commence on the day he departed from home by the means of transportation authorized, and should the member's orders reach him while visiting in the vicinity of the Base, pay and allowances would commence on the ordered reporting date.

To the Secretary of Defense, December 29, 1969:

Reference is made to letter dated October 18, 1969, from the Assistant Secretary of Defense (Comptroller) requesting a decision on certain questions which have arisen in connection with pay and allowance entitlements of cadets and midshipmen who are disenrolled from a service academy and who are sent home awaiting reassignment orders. There was enclosed copy of Committee Action No. 435 of the Department of Defense Military Pay and Allowance Committee, setting forth and discussing the several questions presented as follows:

Is a disenrolled service academy cadet or midshipman, who resumes a former regular enlisted status while at home awaiting reassignment orders, entitled to full pay and allowances effective the date following the date he is disenrolled? If not, at what date would entitlement commence? Assuming entitlement to basic pay what BAS rate, if any would apply?

Would the answer be the same if, instead of resuming a prior regular enlisted grade, he was transferred to a reserve component and ordered to active duty?

It is stated in the Committee Action discussion that service academy cadets and midshipmen appointed from the enlisted ranks are not relieved from their service obligation and that if disenrolled for any reason other than appointment as a commissioned officer or because of physical disability, the individual resumes his enlisted status and completes the period of obligated service, unless sooner discharged. 10 U.S.C. 516.

It is pointed out that these cadets and midshipmen appointed directly from civilian life assume a 6-year military obligation (10 U.S.C. 651) and that if disenrolled prior to completing the course of instruction the cadet is subject to being transferred to the Reserve component of his armed force and ordered to active duty for a period not to exceed 4 years. The statutory authority for taking such action is contained in sections 4348(b) (Army), 6959(b) (Navy) and 9348(b) (Air Force) of Title 10, United States Code. In implementing these statutory provisions with respect to their applicability to cadets and midshipmen appointed from a Regular or Reserve enlisted status, paragraph V. A. 2 of Department of Defense Directive No. 1332.23 dated May 9, 1968, provides in part that the "completion or partial

completion of service obligation required by prior enlistment in no way exempts a separated cadet or midshipman from being transferred to a Reserve component and ordered to active duty * * *."

The Committee Action states that it is the Air Force policy to send a cadet home while he is awaiting final approval of disenrollment, and reassignment orders on active duty as an enlisted man. It is also stated that the cadet must assent to and agree to going on leave without pay and that the individual continues in his cadet status while at home until his separation is finally approved. The leave without pay status seems to be in line with our decision reported at 46 Comp. Gen. 261 (1966) wherein it was held that a midshipman may, under proper regulations and with his consent, be placed in a leave without pay status pending approval of his resignation or discharge.

It is stated that generally several days elapse from the date separation is approved and reassignment orders issued, and the date he receives notification of the action. During this period, it is stated, he is no longer a cadet and neither can he report to or undertake the necessary travel to his new unit of assignment. The Committee Action states that some doubt exists concerning his entitlement to pay and allowances during the period from date of separation to the date he begins compliance with the reassignment orders.

Under the provisions of 10 U.S.C. 516(b), a cadet or midshipman, who holds a Regular enlisted status and who is separated from the service academy for any reason other than his appointment as a commissioned officer of a Regular or Reserve component of an armed force or because of disability, "resumes his enlisted status," and is required to complete the period of service for which he was enlisted or for which he has an obligation, unless sooner discharged.

Hence, when a former Regular enlisted man is notified of the approval of his separation as a cadet, he resumes his Regular enlisted status and may be considered as again being on continuous active duty (10 U.S.C. 3075 and 8075) so as to be entitled to active duty pay and allowances beginning with the date following the date of notification of his separation as a cadet (see Rule 3, Table 1–2–1, Department of Defense Military Pay and Allowances Entitlements Manual). Since a Regular member at home while awaiting reassignment orders generally is not being subsisted at Government expense, he is entitled to a basic allowance for subsistence under 37 U.S.C. 402(d) at the rate of $2.57 a day. The first question is answered accordingly.

With respect to the second question, unlike the situation contemplated by 10 U.S.C. 516(b), a cadet or midshipman who does not fulfill his agreement may be transferred by the Secretary concerned under sections 4348(b) (Army), 6959(b) (Navy), and 9348(b) (Air Force), of Title 10, to a Reserve component and ordered to active duty

in that capacity. Since this would have the effect of discharging him from his prior enlisted contract, the member would not be in an active duty status for pay and allowances purposes until he is required to comply with the new active duty orders. See 37 U.S.C. 204(b) and Rule 7, Table 1–2–1, Department of Defense Military Pay and Allowances Entitlements Manual. For this reason question 2 is answered in the negative.

In addition, the Committee Action describes situations that can exist in connection with the following questions:

A regular Air Force enlisted member stationed at Brooke Air Force Base, San Antonio, Texas is appointed a cadet and assigned to the Air Force Academy, Colorado Springs, Colorado. On 2 September this cadet goes to his home, Los Angeles, California, in a leave without pay status, to await final approval of disenrollment and reassignment orders to active duty as an enlisted man. His separation as a cadet is approved on 10 September and on 15 September he receives the orders, dated 15 September, assigning him to Andrews Air Force Base, Maryland on PCS TPA with a reporting date of 0800 hours 22 September. Would his pay and allowances be based on the allowable travel time from Los Angeles to Andrews Air Force Base, or from Los Angeles to Andrews Air Force Base not to exceed the allowable travel time from Colorado Springs to Andrews Air Force Base. What would be the basis if he received the orders on 18 September while visiting in Baltimore, Maryland? What if the reporting date were 0800 hours 19 September and the situations remained the same?

Would the answer change if, instead of resuming a prior regular enlisted grade, the individual was transferred to a reserve component and ordered to active duty? In this case he would have proceeded from his home, Los Angeles, to the Air Force Academy as a cadet, but the other circumstances would have been the same.

It appears that the person whose appointment as a cadet at the Air Force Academy was terminated on September 10, resumed his Regular enlisted status on September 11 and his entitlement to pay and allowances commenced on that day. See the answer to the first question. The time and place of receipt of the orders of September 15 would not affect his right to pay and allowances in any way. It is assumed that the questions asked did not relate to travel allowances.

If, instead of reverting to his Regular enlisted status, the person concerned were transferred to a Reserve component and were ordered to active duty at Andrews Air Force Base, his right to pay and allowances would commence on the day he commenced travel from Los Angeles by the means of transportation authorized in his orders, assuming that the travel time involved would not exceed that contemplated by Rule 3, Table 1–2–4, Department of Defense Military Pay and Allowances Entitlements Manual.

If the orders of September 15 were received by the Reserve member concerned on September 18 while he was visiting in Baltimore and he traveled from that place and reported for active duty at Andrews Air Force Base on September 19 or September 22 as directed in such orders, his right to pay and allowances would commence on the ordered reporting date.

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BIDS

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Procurement principles applying equally to surplus sales, contracting officer has broad authority to reject all bids and readvertise sale and, therefore, cancellation of sales invitation for disposal of surplus aircraft carcasses to be reduced to scrap aluminum, demilitarization and sweating of aircraft to be accomplished before removal from Air Force Base, and readvertisement of aircraft to give purchaser option of either on-base sweating or on-base demilitarization with off-base processing to alleviate critical pollution problem—held secondary issue—was proper on basis that to restrict bidder from computing bid price on using own facilities to reduce carcasses to scrap when procedure was not necessary in Govt.'s interest would be inimical to full and free competition contemplated by 40 U.S.C. 484, and that restriction was cogent and compelling reason to justify rejection of all bids 244

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Bidder operations restricted—Continued

In drafting specifications or invitations for bids that restrict application of techniques, methods, or operations to single, or administratively preferred process under which prospective contractors are required to perform work, criteria for inclusion of restrictions is whether valid justification has been established for prohibiting bidders from basing their bids on use of any customary methods of operation which in their considered judgment provide most economical means available to them, thus resulting in highest return to Govt. Therefore, to restrict bidders in disposal of surplus aircraft to on-base sweating in reduction of aircraft to scrap when this procedure was not necessary to Govt.'s interest, deprived bidders of full and free competition intended by 40 U.S.C. 484, and cancellation and readvertising of sale was justified 244

Brand name or equal procurement

Although experience certificate requirement in brand name or equal solicitation for complete electric generating plant was required to be executed "by official of firm manufacturing equipment," certificate signed by official of successful bidder whose letterhead indicated that it is distributor for one of two named brands specified in invitation is acceptable in view of fact that standard package of both brand named manufacturers required "slight" modification to meet specifications, and even though language used respecting modification accorded contracting officer too much interpretive leeway for formally advertised procurement, absence of appropriate standard did not inhibit full and free competition required by 10 U.S.C. 2305(b). However, vagueness of language should be eliminated in future procurements 274

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Procurement principles applying equally to surplus sales, contracting officer has broad authority to reject all bids and readvertise sale and, therefore, cancellation of sales invitation for disposal of surplus aircraft carcasses to be reduced to scrap aluminum, demilitarization and sweating of aircraft to be accomplished before removal from Air Force Base, and readvertisement of aircraft to give purchaser option of either on-base sweating or on-base demilitarization with off-base processing to alleviate critical pollution problem—held secondary issue—was proper on basis that to restrict bidder from computing bid price on using own facilities to reduce carcasses to scrap when procedure was not necessary in Govt.'s interest would be inimical to full and free competition contemplated by 40 U.S.C. 484, and that restriction was cogent and compelling reason to justify rejection of all bids---------- 244

Discounts

Unbalanced

Low bid to furnish motor vehicle repair parts that offered 20 percent discount on "common parts" available from several sources and 50 percent on "captive parts" procured from manufacturers or franchised dealers, is not unbalanced bid *per se* automatically precluding award to bidder in absence of evidence discounts offered constituted irregularity

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Notwithstanding Air Force should have issued formal amendment required by par. 2–208 of Armed Services Procurement Reg. for rack chart referenced but omitted from invitation soliciting bids and separate prices on first-year and multi-year requirements for multiplex equipment used in complicated communications systems, and failed to mail copy of chart calling for additional equipment for multi-year procurement to low bidder on both aspects of procurement, Govt.'s best interests requiring that award be made on basis of its multi-year requirements, nonresponsive bid must be rejected, even though inadvertently copy of chart was not sent to low bidder, and, therefore, there is no need to consider responsiveness of first-program year bid, which did not comply with requirement for two sets of prices..... 257

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Negotiation

Factors other than price

Where request for proposals (RFP) contained "Standards for Evaluation of Offers" provision and adequate competition had been obtained, contracting officer was not required to evaluate procurement on basis of cost analysis provisions of 10 U.S.C. 2306(f) and par. 3–807.3 of Armed Services Procurement Reg. which require consideration of factors other than price. Under criteria established by statute and implementing regulation, submission of cost or pricing data and certification thereof arises only in connection with changes or modification to initial contract that exceed $100,000, and it is unreasonable to equate RFP provision to ASPR definition of "cost analysis" to impose on contracting officer duty not contemplated, and award to low offeror, determined to be responsible offeror, is held to be in best interest of Govt.... 295

Samples

Fact that samples of fabric submitted with low bid on one of several classes of furniture solicited met color, pattern, finish, and/or appearance characteristics listed in invitation, but not composition requirements of fabric to be furnished and otherwise referenced in invitation, does not require rejection of bid, where samples served purpose for which they were intended—evaluation to determine compliance with listed characteristics—and were not required to meet or be tested for material conformity, and where record evidences that acceptable color and other characteristics of submitted samples are available in fabric to be furnished in performance of contract..... 311

BIDS—Continued Page

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

Mistakes

Actual or constructive knowledge

In absence of actual or constructive knowledge of alleged error, contracting officer is not required to assume burden of examining every bid or proposal for possible error and, therefore, contractor alleging mistake after award in his proposal on ballistic nylon canopies that was not apparent on its face, and where contracting officer had no constructive notice of error because there was only 14 percent difference between proposals, and because he could have procured vinyl set of blankets at lower price, is not entitled to price adjustment on basis contracting officer could have discovered mistake by examining prior procurements. It is unreasonable to hold contracting officer responsible to determine that prices offered are improvident on factors that are not ascertainable from bid or offer itself ---------- 272

Multi-year

Amendment

Propriety

Notwithstanding Air Force should have issued formal amendment required by par. 2–208 of Armed Services Procurement Reg. for rack chart referenced but omitted from invitation soliciting bids and separate prices on first-year and multi-year requirements for multiplex equipment used in complicated communications systems, and failed to mail copy of chart calling for additional equipment for multi-year procurement to low bidder on both aspects of procurement, Govt.'s best interests requiring that award be made on basis of its multi-year requirements, nonresponsive bid must be rejected, even though inadvertently copy of chart was not sent to low bidder, and, therefore, there is no need to consider responsiveness of first-program year bid, which did not comply with requirement for two sets of prices ---------- 257

Procedural deviations

Fact that invitation for bids on first-year and multi-year requirements for multiplex equipment used in complicated communications systems did not call for uniform unit prices for each year of multi-year program and did not contain criteria for comparison of first-year versus multi-year requirements does not violate par. 1–322 of Armed Services Procurement Reg. (ASPR), where because no two systems to be procured during multi-year period would have same unit price, Air Force was authorized to deviate from ASPR multi-year procurement policy on basis deviation would result in lower cost per unit and facilitate standardization of equipment, and because it would not be feasible to provide for one-year versus multi-year evaluation ---------- 257

Negotiated contracts. (*See* **Contracts, negotiation**)

Omissions

Invitation attachments

When bidder fails to return with bid all documents attached to invitation, bid if submitted in form that acceptance of it creates valid and binding contract will require bidder to perform in accordance with all material terms and conditions of invitation. Therefore, notwithstanding

BIDS—Continued Page

Omissions—Continued

Invitation attachments—Continued

failure of low bidder to return some of documents attached to invitation for janitorial services that concerned where, when, and in what manner services were to be performed, low bid may be considered responsive. Standard Form 33 on which bid was submitted contained in "offer" provision, phrase "in compliance with the above," a phrase that operated to incorporate by reference all invitation documents and, therefore, award to low bidder will bind him to perform in full accord with conditions of referenced documents. Overrules any prior inconsistent decisions 289

Prices

Anticipated loss

Where bid price is competitive and bidder is assumed to know costs involved and intended prices bid, there is no basis for conclusion that performance of contract would be at loss. Anticipated loss in performance of contract does not justify rejection of otherwise acceptable bid 311

Reduction propriety

Discount evaluation

Bid offering 2 percent—20 days prompt payment discount and unidentified discount of 2.1 percent—10 days under non-set-aside portion of labor surplus area invitation which provided that discount in excess of 2 percent automatically would be considered trade discount was properly evaluated as offering both 2 percent prompt payment discount and 2.1 percent trade discount for consideration as price reduction to make bid low and eligible for contract award. Discount Limitation clause of invitation intended for purpose of precluding bidders from offering prompt payment discount in excess of normal trade practices in hope Govt. would not earn it, is not within purview of par. 2-407.3(a) of Armed Services Procurement Reg. establishing 20-day prompt payment discount minimum and, therefore, 2.1 percent 10-day discount offered properly was converted to trade discount 364

Qualified

All or none

Definite quantities

Low bid submitted on all or none basis under invitation reserving to Govt. option to increase by 50 percent number of air conditioning units solicited, and option to purchase both interim and long leadtime repair parts for units was not qualified bid that eliminated Govt.'s option reservations and award to bidder is valid. "All or none" condition only indicated bidder's unwillingness to accept award for less than definite quantity stated in invitation and by this effort to protect itself from possibility of award for lesser initial quantity pursuant to standard form 33A, and bidder did not intend to include option items on which Govt. reserved right to make award at later time 324

BIDS—Continued Page

Rejection

Questionable

Reevaluation of bid recommended

Decision by contracting agency to reject bid that as factual matter is determined not to have met specifications, particularly if determination involves highly technical or scientific factors which U.S. GAO is not equipped to judge, although generally accepted without question, where rejection of low bid submitted under invitation for completely integrated closed-loop loading system is based on fact descriptive literature failed to identify with bid items, rejection appears to be erroneous interpretation or application of standards required by invitation and it is suggested, without undertaking to decide bid responsiveness, that bid should be reevaluated, with consideration given to all available information concerning conformance of several items of equipment offered to intent of specifications---------- 377

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

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

Unbalanced

Evidence

Low bid to furnish motor vehicle repair parts that offered 20 percent discount on "common parts" available from several sources and 50 percent on "captive parts" procured from manufacturers or franchised dealers, is not unbalanced bid *per se* automatically precluding award to bidder in absence of evidence discounts offered constituted irregularity that affected fair and competitive bidding and, therefore, low bid may be considered for award. It is in best interest of Govt. through appropriate invitation safeguards to discourage submission of unbalanced bids based on speculation as to which items are purchased in greater quantities, and contracting agency to eliminate problem in future will require bidders to cite only one discount on both common and captive parts--- 330

Upon unequivocal confirmation of apparent unbalanced low bid on motor vehicle parts and accessories that offered discounts of 36 percent on "common parts" and 60 percent on "captive parts," acceptance of bid was proper, for unbalanced bid is not automatically precluded from consideration in absence of evidence of irregularity, and contracting officer properly held that bidders who had failed to identify price lists were bound by lists included in invitation, and that low bid was responsive, notwithstanding bidder did not have on hand at time of award, all price lists to which committed under contract. Correction of mislabeled parts will be advantageous to Govt., without subverting contract, and Govt. in keeping with spirit of contract, will not request part by brand name to obtain higher discount---------- 335

Not automatically precluded

Cancellation of invitation for bids that contemplated 1-year requirements type contract for motor vehicle repair parts and asked bidders to quote discount from price lists included in invitation, or as alternative to quote separate discounts on "common parts" and "captive parts" was not justified on basis that bids received could not be evaluated as bidders were not required to commit themselves to any price lists prior to bid opening, and that low bid offering 20 percent and 50 percent

BIDS—Continued Page

Unbalanced—Continued

Not automatically precluded—Continued

discounts was unbalanced. Absent affirmative showing Govt.'s needs could not be satisfied, there was no "compelling reason" within contemplation of par. 2–404.1 of Armed Services Procurement Reg. for discarding bids, and as bid unbalancing *per se* does not automatically preclude award, low bid should be considered for award 330

Withdrawal

After opening

"Form-bid rule"

Requirement for presence of bidder principals to accept award, sign contract, execute bonds and agree to furnish performance and payment bonds within four hours of bid opening under invitation for demolition work that provides for contract award within four hours of bid opening, does not mean presence at bid opening, but merely to be present within four hours of bid opening. Therefore, low bidder who although not present at bid opening complied with requirement was entitled to award, for should he have failed to execute contract or furnish performance and payment bonds, bid bond would have become operative under "firm-bid rule" to effect that except for honest mistake, bid is irrevocable for reasonable time after bid opening 395

BOARDS, COMMITTEES AND COMMISSIONS

Interagency participation

Training institutes

Financing of contract by Veterans Admin. (VA) for hospital administrators interagency institute with nongovernmental facility in Dist. of Columbia, cost to be shared by other Federal agency members of Interagency Committee, is precluded by sec. 307 of Pub. L. 90–550, which prohibits use of monies appropriated in act to finance Interdepartmental Boards, Commissions, Councils, Committees, or similar group activities that otherwise would be financed under 31 U.S.C. 691, nor any authority in sec. 601 of Economy Act be used to provide training, as some of agencies of Committee are not enumerated in act. However, interagency arrangement under training act (5 U.S.C. 4101–4118) that would provide more effective or economical training would warrant VA contracting for nongovernmental training facilities 305

COMPENSATION

Adjustment

Military duty to enforce the law

In implementing 5 U.S.C. 5519, providing for crediting amounts received by Federal employee for service in aid of law enforcement as member of Reserve component of Armed Forces or National Guard under 5 U.S.C. 6323(c), gross amount of military pay received for day on which employee is excused from civilian duty under sec. 6323(c) should be deducted from civilian compensation for excused period, but military pay received for days on which employee does not receive civilian compensation need not be credited against civilian compensation received during period of military service. Civilian service retirement contributions should be computed on basis of civilian compensation due employee after military leave has been credited, and any tax questions are for determination by Internal Revenue Service 233

COMPENSATION—Continued Page

Adjustment—Continued

Military duty to enforce the law—Continued

When Federal employee who as member of Reserve component of Armed Forces or National Guard performs law enforcement duty pursuant to 5 U.S.C. 6323(c) is unable to furnish documented information of military pay received for purpose of determining civilian compensation entitlement, military pay information should be obtained from military organization. If employee's civilian compensation cannot be adjusted to account for military pay credit before payment is made to him, collection of gross amount of military pay may be made by offset against subsequent civilian compensation he receives, or in cash---- 233

Where military pay of Federal employee who as member of Reserve component of Armed Forces or National Guard performs law enforcement services pursuant to 5 U.S.C. 6323(c) exceeds his civilian compensation entitlement, employee may retain his daily military pay to extent it exceeds civilian compensation for any day or part of day on which he is excused from civilian duty, absent requirement for forfeiture of military pay in 5 U.S.C. 5519, which provides for crediting amounts received for Reserve or National Guard duty. Retirement and taxes are for deduction to extent of reduced civilian compensation, if any, due employee, health and life insurance deductions should be made to extent required by Civil Service Regs. when civilian compensation due is not sufficient to cover all deductions---------- 233

Double

Holding two positions

Prohibition

National Guard technician who when his technician position was converted to Federal status under Pub. L. 90–486, resigned from part-time postal position effective Dec. 31, 1968, as required by 5 U.S.C. 5533, which prohibits an employee from receiving compensation from more than one position for more than aggregate 40 hours work in one calendar week, is regarded as separated from postal service and under 5 U.S.C. 5551, he is entitled to lump-sum leave payment. Sick leave to employee's credit at time of separation from postal service may be recredited to him in his new Federal position, as provided by sec. 630.502(b)(1) of leave regulations issued by Civil Service Commission---------- 383

International dateline crossings

Under rule that generally employee's pay may not be increased or decreased because of crossing international dateline, employee stationed in Hawaii—3 time zones and 22 hours travel time difference away from 2-week temporary duty assignment in Wake Island, who departed Honolulu Monday at 10:20 a.m. and arrived in Wake Island at 1:15 p.m. on Tuesday properly was paid for 40 hours at regular pay, plus overtime, for first week of his temporary assignment, but incident to second week of assignment when he left Wake Island at 8:45 a.m. on Friday arriving in Honolulu at 3:30 p.m. on Thursday, he should not have been excused from work on Friday, and if he had been directed to work he would not have been entitled to additional pay for that day---------- 329

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Military personnel. (*See* **Pay**)

Overtime

Employees performing law enforcement services

Overtime compensation employee would have earned had he not been required to perform law enforcement services as member of Reserve component of Armed Forces or National Guard is for payment to employee. 5 U.S.C. 6323(c) in authorizing 22 workdays of additional leave in calendar year provides that compensation of employee granted sec. 6323(c) leave shall not be reduced by reason of absence ---------- 233

CONTRACTS

Awards

Propriety

Upheld

Where award of new contract would cost Govt. substantially less than continuing to procure motor vehicle parts and accessories under existing contract by exercising contract option, determination by contracting officer not to exercise option and to award new contract to other than incumbent contractor prior to resolution of its protest filed with U.S. GAO was within authority granted under par. 2-407.9(b) (2) and (3) of Armed Services Procurement Reg., prescribing criteria for making award prior to determination on preaward protest, and par. 1-1505(c) of regulation, providing criteria for exercise of options ---------- 335

Small business concerns

Award prior to resolution of size protest

Award of refuse collection contract under small business set-aside for urgently needed services prior to resolution of size protest by Small Business Administration (SBA) within 10 working days after receipt of protest that is prescribed by par. 1-703(b)(1) of Armed Services Procurement Reg. does not affect validity of contract. Contracting officer under regulation upon expiration of 10 working days was authorized to presume questioned bidder to be small business concern, eligible for contract award, having complied with requirements to ascertain when to expect size decision from SBA, and determine that further delay in awarding contract would be disadvantageous to Govt. Even though ultimately it is determined contractor is not small business concern, contract awarded in good faith is not void *ab initio* but voidable at at Govt's. option ---------- 369

Construction contracts

Authority of Small Business Administration pursuant to sec. 8(a) of Small Business Act (15 U.S.C. 637(a)) to enter into contracts with Govt. agencies and officers having procurement powers to furnish articles, equipment, supplies, or materials, and to subcontract prime contracts to small business concerns, as well as authority in sec. 15 to make direct contract awards, may be extended to construction contracts under expanded interpretation of parenthetical phrase "including but not limited to contracts for maintenance, repair, and construction" appearing in sec. 2(a), providing for placement of fair proportion of total purchases and contracts for property and services for Govt. with small business enterprises, thus carrying out intent of Congress that small business concerns obtain fair proportion of all types of Govt. contracts --- 219

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Erroneous award
Ab initio v. voidable

Contract awarded on basis of bidder's good faith self-certification that it is small business concern, which status subsequently determined erroneous, is not void *ab initio*, but is voidable at option of Govt---------- 369

Subcontracting authority

Where expanded interpretation of statute will accomplish beneficial results, serve purpose for which statute was enacted, is necessary incidental to power or right, or is established custom, usage or practice, maxim forming basis for inference that all omissions were intended will be refuted. Therefore, it is necessary to give expanded statutory construction to parenthetical phrase "including but not limited to contracts for maintenance, repair, and construction" appearing in sec. 2(a) of Small Business Act to include construction contracts in administration of subtracting authority in sec. 8(a) and direct contract authority in sec. 15, in order to carry out congressional intent that small business concerns obtain fair proportion of all types of Govt. contracts---------- 219

Bids. (*See* Bids)

Incorporation of terms by reference

When bidder fails to return with bid all documents attached to invitation, bid if submitted in form that acceptance of it creates valid and binding contract will require bidder to perform in accordance with all material terms and conditions of invitation. Therefore, notwithstanding failure of low bidder to return some of documents attached to invitation for janitorial services that concerned where, when, and in what manner services were to be performed, low bid may be considered responsive. Standard Form 33 on which bid was submitted contained in "offer" provision, phrase "in compliance with the above," a phrase that operated to incorporate by reference all invitation documents and, therefore, award to low bidder will bind him to perform in full accord with conditions of referenced documents. Overrules any prior inconsistent decisions------ 289

Mistakes

Actual or constructive notice

In absence of actual or constructive knowledge of alleged error, contracting officer is not required to assume burden of examining every bid or proposal for possible error and, therefore, contractor alleging mistake after award in his proposal on ballistic nylon canopies that was not apparent on its face, and where contracting officer had no constructive notice of error because there was only 14 percent difference between proposals, and because he could have procured vinyl set of blankets at lower price, is not entitled to price adjustment on basis contracting officer could have discovered mistake by examining prior procurements. It is unreasonable to hold contracting officer responsible to determine that prices offered are improvident on factors that are not ascertainable from bid or offer itself---------- 272

CONTRACTS—Continued Page

Negotiation

Changes, etc.

Written amendment required

Failure to issue written amendment required by secs. 2–3.507(a) and 1–3.805–1(d) of Federal Procurement Regs. for changes in delivery schedule of negotiated procurement and time for submission of final proposals that were instead telephoned to offerors, and continued negotiation after cut-off date with low offeror under original request for proposals that led to award of multi-year contract which was not contemplated under original solicitation—funding problem having subsequently developed—are procedural errors that oblige Govt. to reopen negotiations. If errors cannot be rectified by agreement with successful contractor and offeror within competitive range whose price reduction was considered to have been submitted late, U.S. GAO should be furnished with estimate of costs chargeable to Govt. in event of contract cancellation 402

Competition

Competitive range formula

To categorize 13 technically acceptable proposals to study development of fire detention system for manned spacecraft by declining degrees of acceptability—"significantly superior," and only group considered to be within competitive range for discussion required by 10 U.S.C. 2304(g), even though discussions seem to have been in order for next group classified as "technically acceptable," and last two groups classified "not apparently adequate for operational spacecraft use," and "marginally acceptable"—diluted usual meaning of word "acceptable" to point of meaningless, and further complicated and made uncertain extent of "competitive range." Use of misleading classifications should be avoided, and written or oral discussions contemplated by 10 U.S.C. 2304(g) conducted with all offerors submitting proposals within competitive range 309

Evaluation factors

Propriety of evaluation

Evaluating proposal on mathematical basis applying detailed and rigid requirements where solicitation for study of feasibility of automating Air Force operation was stated in broad, general terms and offerors were not sufficiently informed of evaluation factors to be used and relative weight to be attached to each, was not in accordance with par. 3–501(b) of Armed Services Procurement Reg. that "Solicitations shall contain information necessary to enable prospective offeror to prepare proposal or quotation properly." Appropriate action should be taken in future procurements to assure that when mathematical formula evaluation is to be used, offerors will be informed of major factors to be considered and broad scheme of scoring to be employed, and whether or not numerical ratings are used, information should be furnished of minimum evaluation standards and degree of importance to be accorded to particular factors in relation to each other 229

Where request for proposals (RFP) contained "Standards for Evaluation of Offers" provision and adequate competition had been obtained, contracting officer was not required to evaluate procurement on basis of

CONTRACTS—Continued Page

Negotiation—Continued

Evaluation factors—Continued

Propriety of evaluation—Continued

cost analysis provisions of 10 U.S.C. 2306(f) and par. 3–807.3 of Armed Services Procurement Reg. which require consideration of factors other than price. Under criteria established by statute and implementing regulation, submission of cost or pricing data and certification thereof arises only in connection with changes or modification to initial contract that exceed $100,000, and it is unreasonable to equate RFP provision to ASPR definition of "cost analysis" to impose on contracting officer duty not contemplated, and award to low offeror, determined to be responsible offeror, is held to be in best interest of Govt---------- 295

Protests

Award approved

Prior to resolution of protest

Where award of new contract would cost Govt. substantially less than continuing to procure motor vehicle parts and accessories under existing contract by exercising contract option, determination by contracting officer not to exercise option and to award new contract to other than incumbent contractor prior to resolution of its protest filed with U.S. GAO was within authority granted under par. 2–407.9(b)(2) and (3) of Armed Services Procurement Reg., prescribing criteria for making award prior to determination on preaward protest, and par. 1–1505(c) of regulation, providing criteria for exercise of options---------- 335

Qualified products. (*See* Contracts, specifications, qualified products)

Sales. (*See* Sales)

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

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

Specifications

Adequacy

Vagueness of language

Although experience certificate requirement in brand name or equal solicitation for complete electric generating plant was required to be executed "by official of firm manufacturing equipment," certificate signed by official of successful bidder whose letterhead indicated that it is distributor for one of two named brands specified in invitation is acceptable in view of fact that standard package of both brand named manufacturers required "slight" modification to meet specifications, and even though language used respecting modification accorded contracting officer too much interpretive leeway for formally advertised procurement, absence of appropriate standard did not inhibit full and free competition required by 10 U.S.C. 2305(b). However, vagueness of language should be eliminated in future procurements---------- 274

Bidder's presence requirement

Requirement for presence of bidder principals to accept award, sign contract, execute bonds and agree to furnish performance and payment bonds within four hours of bid opening under invitation for demolition work that provides for contract award within four hours of bid opening, does not mean presence at bid opening, but merely to be present within four hours of bid opening. Therefore, low bidder who although not

CONTRACTS—Continued Page
Specifications—Continued
Bidder's presence requirement—Continued
present at bid opening complied with requirement was entitled to award, for should he have failed to execute contract or furnish performance and payment bonds, bid bond would have become operative under "firm-bid rule" to effect that except for honest mistake, bid is irrevocable for reasonable time after bid opening 395
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make).
Changes, revisions, etc.
Amendment requirement
Notwithstanding Air Force should have issued formal amendment required by par. 2–208 of Armed Services Procurement Reg. for rack chart referenced but omitted from invitation soliciting bids and separate prices on first-year and multi-year requirements for multiplex equipment used in complicated communications systems, and failed to mail copy of chart calling for additional equipment for multi-year procurement to low bidder on both aspects of procurement, Govt.'s best interests requiring that award be made on basis of its multi-year requirements, nonresponsive bid must be rejected, even though inadvertently copy of chart was not sent to low bidder, and, therefore, there is no need to consider responsiveness of first-program year bid, which did not comply with requirement for two sets of prices 257
Conformability of equipment, etc., offered
Administrative determination conclusiveness
Bid reevaluation recommended
Decision by contracting agency to reject bid that as factual matter is determined not to have met specifications, particularly if determination involves highly technical or scientific factors which U.S. GAO is not equipped to judge, although generally accepted without question, where rejection of low bid submitted under invitation for completely integrated closed-loop loading system is based on fact descriptive literature failed to identify with bid items, rejection appears to be erroneous interpretation or application of standards required by invitation and it is suggested, without undertaking to decide bid responsiveness, that bid should be reevaluated, with consideration given to all available information concerning conformance of several items of equipment offered to intent of specifications 377
Defective
Corrective action recommended
Use of brand name or equal method of solicitation to permit possible suppliers to understand concept of completely packaged power plant as currently supplied by two named brands where technical requirements of Govt. were described in detail cannot be justified under par. 1–1206.1(a) of Armed Services Procurement Reg., which provides that "this technique should be used only when adequate specification or more detailed description cannot feasibly be made available by means other than reverse engineering in time for procurement under consideration," and specification used in solicitation should be carefully reviewed to determine its technical adequacy insofar as brand name or equal procurement is concerned 274

CONTRACTS—Continued Page

Specifications—Continued

Descriptive data

Unnecessary

Although failure to comply with descriptive information requirement when it is needed for bid evaluation is basis for bid rejection, low bid that did not furnish required furniture dimensions that are not essential to evaluation process is responsive bid and may be considered for award, for notwithstanding omission, contractor will be required to meet minimum specifications. Even if bid exceeded minimum dimensional requirements there would be no basis for rejecting bid, unless variations offered changed general description of item. However, invitations should not solicit unnecessary information in absence of legitimate justification 311

Bids under invitation for packaged air compressor plant and air dryer that failed to furnish sufficient descriptive literature information for bid evaluation purposes, or to submit literature, should not have been rejected where descriptive literature clause was included without justification required by sec. 1-2.202-5(c) of the Federal Procurement Regs. for bid evaluation purposes only, and where there appears no need for literature as specifications were sufficiently detailed, leaving no performance characteristics for bidder to describe, and furnished no standards for evaluation of design, materials, or components. Future invitations that include descriptive literature clause should advise bidders with particularity both as to extent of detail required and purpose literature is expected to serve 398

Deviations

Bidder's presence at bid opening

Failure of bidder to be present at bid opening if required by invitation is not deviation that affects price, quantity, or quality of work to be performed, and, therefore, requirement would be one for benefit of Govt. and not bidder 395

Failure to furnish something required

Information

Invitation to bid attachments

When bidder fails to return with bid all documents attached to invitation, bid if submitted in form that acceptance of it creates valid and binding contract will require bidder to perform in accordance with all material terms and conditions of invitation. Therefore, notwithstanding failure of low bidder to return some of documents attached to invitation for janitorial services that concerned where, when, and in what manner services were to be performed, low bid may be considered responsive. Standard Form 33 on which bid was submitted contained in "offer" provision, phrase "in compliance with the above," a phrase that operated to incorporate by reference all invitation documents and, therefore, award to low bidder will bind him to perform in full accord with conditions of referenced documents. Overrules any prior inconsistent decisions. 289

Multi-year procurements

Procedural deviations

Fact that invitation for bids on first-year and multi-year requirements for multiplex equipment used in complicated communications systems did not call for uniform unit prices for each year of multi-year program

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Multi-year procurements—Continued
Procedural deviations—Continued
and did not contain criteria for comparison of first-year versus multi-year requirements does not violate par. 1–322 of Armed Services Procurement Reg. (ASPR), where because no two systems to be procured during multi-year period would have same unit price, Air Force was authorized to deviate from ASPR multi-year procurement policy on basis deviation would result in lower cost per unit and facilitate standardization of equipment, and because it would not be feasible to provide for one-year versus multi-year evaluation---------- 257
Qualified products
Changes in machinery, product, etc.
Placement of manufacturer's name on Qualified Products List indicates ability to manufacture particular product according to certain specifications, even though qualification of product is not relied on or used as substitute for strict compliance with specifications of particular contract, notwithstanding contract specifications are same as those used in qualification tests, and entitles manufacturer to submit bids or proposals until its name is removed from list or requalification of product is required. Therefore, fact qualification of tow target honeycombs, critical components of aerial gunnery tow targets being procured, and production item were dissimilar did not disqualify low offeror from submitting proposal and receiving award. However, should qualification product be misrepresented, corrective administrative action could result in manufacturer being removed from Qualified Products List or placed on Debarred Bidders List---------- 224
Restrictive
Particular make
Invitation sufficiency
Invitation for bids that in soliciting brand name or equal sewer rodding machine listed as essential characteristics nonoperational features of machine that did not suggest machine's primary function or its required level of performance is restrictive invitation, for bidders could only determine equality of their products from listed characteristics of brand name, whereas "or equal" means to be acceptable, product need only be capable of meeting same standard of performance as brand name. It is not enough that invitation furnish essential characteristics of brand name—now provided in sec. 1–1206.1(a) of Armed Services Procurement Reg. in revision No. 3, June 30, 1969—and future invitations should contain sufficient information for intelligent preparation of bids so as to obtain maximum competition contemplated by 10 U.S.C. 2305(b)---------- 347
Modification of brand name
Although experience certificate requirement in brand name or equal solicitation for complete electric generating plant was required to be executed "by official of firm manufacturing equipment," certificate signed by official of successful bidder whose letterhead indicated that it is distributor for one of two named brands specified in invitation is acceptable in view of fact that standard package of both brand named manufacturers required "slight" modification to meet specifications, and even though language used respecting modification accorded contracting

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Modification of brand name—Continued
officer too much interpretive leeway for formally advertised procurement, absence of appropriate standard did not inhibit full and free competition required by 10 U.S.C. 2305(b). However, vagueness of language should be eliminated in future procurements---------- 274

Salient characteristics

Criteria established for experience certificate under invitation for complete electric generating plant that contained brand name or equal clause to permit bidders to understand concept of completely packaged plants of two named brands, but which did not indicate relationship between brand names and acceptable equivalent, failed to satisfy salient characteristics requirement of par. 1–1206.2(b) of Armed Services Procurement Reg., and notwithstanding industry may have understood Govt.'s needs, procurement would be canceled had performance not reached advanced stage. Brand name or equal description should be used only where needs of Govt. cannot be adequately described, and when used salient characteristics should be identified with clarity and precision---------- 274

Use limited to unavailability of adequate specifications

Use of brand name or equal method of solicitation to permit possible suppliers to understand concept of completely packaged power plant as currently supplied by two named brands where technical requirements of Govt. were described in detail cannot be justified under par. 1–1206.1(a) of Armed Services Procurement Reg., which provides that "this technique should be used only when adequate specification or more detailed description cannot feasibly be made available by means other than reverse engineering in time for procurement under consideration," and specification used in solicitation should be carefully reviewed to determine its technical adequacy insofar as brand name or equal procurement is concerned---------- 274

Techniques, methods, or operations restricted

In drafting specifications or invitations for bids that restrict application of techniques, methods, or operations to single, or administratively preferred process under which prospective contractors are required to perform work, criteria for inclusion of restrictions is whether valid justification has been established for prohibiting bidders from basing their bids on use of any customary methods of operation which in their considered judgment provide most economical means available to them, thus resulting in highest return to Govt. Therefore, to restrict bidders in disposal of surplus aircraft to on-base sweating in reduction of aircraft to scrap when this procedure was not necessary to Govt.'s interest, deprived bidders of full and free competition intended by 40 U.S.C. 484, and cancellation and readvertising of sale was justified---------- 244

Samples.
Adequacy

Fact that samples of fabric submitted with low bid on one of several classes of furniture solicited met color, pattern, finish, and/or appearance characteristics listed in invitation, but not composition requirements

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Specifications—Continued
Samples—Continued
Adequacy—Continued
of fabric to be furnished and otherwise referenced in invitation, does not require rejection of bid, where samples served purpose for which they were intended—evaluation to determine compliance with listed characteristics—and were not required to meet or be tested for material conformity, and where record evidences that acceptable color and other characteristics of submitted samples are available in fabric to be furnished in performance of contract 311

Training
Interagency participation
Authority
Financing of contract by Veterans Admin. (VA) for hospital administrators interagency institute with nongovernmental facility in Dist. of Columbia, cost to be share by other Federal agency members of Interagency Committee, is precluded by sec. 307 of Pub. L. 90–550, which prohibits use of monies appropriated in act to finance Interdepartmental Boards, Commissions, Councils, Committees, or similar group activities that otherwise would be financed under 31 U.S.C. 691, nor may authority in sec. 601 of Economy Act be used to provide training, as some of agencies of Committee are not enumerated in act. However, interagency arrangement under training act (5 U.S.C. 4101–4118) that would provide more effective or economical training would warrant VA contracting for nongovernmental training facilities 305

COURTS
Judgments, decrees, etc.
Acceptance as precedent by General Accounting Office
Berkey *v.* United States
Temporary suspension of determination in 47 Comp. Gen. 25 to follow *Berkey* v. *U.S.*, 176 Ct. Cl. 1, holding that retired pay withheld under 38 U.S.C. 3203(a)(1) from incompetent veteran who died while receiving care in Veterans Admin. Hospital is payable to "immediate family" of deceased veteran, to await outcome of similar legal issue in *Lorimer* case, USDC CA No. 206–67, respecting persons considered eligible to receive payment, is removed, court in *Lorimer* case viewing *Berkey* case as not applicable to relatives more remotely related to decedent than wife, children, or dependent parents, and distribution of withheld retired pay may now be made on basis of *Berkey* case to persons referenced in *Lorimer* case. 40 Comp. Gen. 666; 43 *id.* 39; 47 *id.* 25, modified 315

Jurors
Government employees
Granting of court leave
Substitute employees of postal service, whether career or temporary, who are compensated at hourly rate and have no established work schedules, hold appointments that are viewed as being similar to appointments on intermittent "when-actually-employed" basis, even though some substitutes may work average of 40 or more hours per week and, therefore, granting of court leave for performance of jury duty

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Jurors—Continued

Government employees—Continued

Granting of court leave—Continued

authorized under 5 U.S.C. 6322 may not be extended to substitute employees of postal service without specific statutory authority extending benefits of sec. 6322 to them 287

DEBT COLLECTIONS

Waiver

Known *v.* after determined overpayments

Advance collection of excess costs to ship household goods of separated members of uniformed services, excess costs that arise when shipments consist of more than one lot, and authorized distance and/or weight allowance prescribed by par. M8003 of Joint Travel Regs. are exceeded, may not be waived for excess costs of $10 or less, for in absence of statutory authority, waiver would authorize known overpayment. Waiver authority in Title 4 of GAO Policy and Procedures Manual, sec. 55.3, and sec. 3(b) of Federal Claims Collection Act of 1966, that recognizes diminishing returns beyond which further collection efforts are not justified, relates to after determined overpayments. However, uniform regulations may issue to discontinue collection of small excess cost amounts discovered after shipment, where cost of collection would exceed debt ... 359

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Pay, etc., due military personnel

Amounts withheld from hospitalized veterans

Retired pay *v.* pensions, etc.

Insane and incompetent members

Retired pay waived under 38 U.S.C. 3105 in favor of disability compensation by incompetent veteran although no longer considered forfeited pursuant to 38 U.S.C. 3203(b)(1) upon veteran's death while receiving care in Veterans Admin. Hospital in view of *Berkey* v. *U.S.*, 176 Ct. Cl. 1, is not payable to brother, half brother and half sister of decedent who had been domiciled in Illinois, as *Berkey* case is not considered applicable to relatives more remotely related to decedent veteran than wife, children, or dependent parents. However, retired pay that was not subject to withholding pursuant to 10 U.S.C. 2771 may be paid to claimants, rules of descent and distribution in State of Illinois making no distinction between whole and half blood brothers and sisters 315

DEPARTMENTS AND ESTABLISHMENTS

Administrative determinations. (*See* Administrative Determinations)

Interagency participation

Boards, committees, and commissions. (*See* Boards, Committees and Commissions, interagency participation)

Services between

Educational programs

Financing of contract by Veterans Admin. (VA) for hospital administrators interagency institute with nongovernmental facility in Dist. of Columbia, cost to be shared by other Federal agency members of Interagency Committee, is precluded by sec. 307 of Pub. L. 90–550, which

DEPARTMENTS AND ESTABLISHMENTS—Continued Page
Services between—Continued
Educational programs—Continued
prohibits use of monies appropriated in act to finance Interdepartmental Boards, Commissions, Councils, Committees, or similar group activities that otherwise would be financed under 31 U.S.C. 691, nor may authority in sec. 601 of Economy Act be used to provide training, as some of agencies of Committee are not enumerated in act. However, interagency arrangement under training act (5 U.S.C. 4101–4118) that would provide more effective or economical training would warrant VA contracting for nongovernmental training facilities 305

DISTRICT OF COLUMBIA
Leases, concessions, rental agreements, etc.
Prior appropriation necessity
Veterans Admin. (VA) in contracting for Hospital Administrators Institutes in nongovernmental facilities located in Dist. of Columbia (D.C.) may not have contractor procure room accommodations in D.C. for live-in-participants attending Institutes, 40 U.S.C. 34 restricting rental of space in D.C. for purposes of Govt., in absence of express appropriation. VA appropriations do not provide for rental of space in D.C. and VA may not avoid leasing restriction by inclusion of cost reimbursement type provision in contract. However, hotel services and facilities outside D.C. may be procured as necessary training expenses and furnished in kind to trainees in travel status, and appropriate reduction made in per diem payable 305
Incident to Veterans Admin. contract for Interagency Hospital Administrators Institutes in nongovernmental facilities in Dist. of Columbia, room accommodations other than in District may be procured and furnished on reimbursable basis to officers of military departments whose official duty station is Washington metropolitan area, as appropriations chargeable with expenditures provide funds for training expenses of members of military services and commissioned officers of Public Health Service 305

DOCUMENTS
Incorporation by reference
Contracts. (*See* Contracts, incorporation of terms by reference)

EVIDENCE
Sufficiency
Unsupported statements
Notwithstanding absence of adequate documentation to support that corporate bidder awarded three star route contracts was "actually engaged in business within the county in which part of the route lies or in an adjoining county" as required by 39 U.S.C. 6420, in view of complex problems encountered in qualifying corporate bidder, contracts may be completed. Award of one contract was not without foundation as contractor established business that subjected it to state laws and jurisdiction within rule stated in 35 Comp. Gen. 411. However, other contracts having been awarded on basis of postmaster certification and undocumented evidence, criteria for meeting "actually engaged in business" requirement should be established, and contracting officers informed personal certifications do not qualify corporation to bid on star route contracts 385

FORMS Page

Standard forms

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"In compliance with above" effect

When bidder fails to return with bid all documents attached to invitation, bid if submitted in form that acceptance of it creates valid and binding contract will require bidder to perform in accordance with all material terms and conditions of invitation. Therefore, notwithstanding failure of low bidder to return some of documents attached to invitation for janitorial services that concerned where, when, and in what manner services were to be performed, low bid may be considered responsive. Standard Form 33 on which bid was submitted contained in "offer" provision, phrase "in compliance with the above," a phrase that operated to incorporate by reference all invitation documents and, therefore, award to low bidder will bind him to perform in full accord with conditions of reference documents. Overrules any prior inconsistent decisions 289

INSANE AND INCOMPETENTS

Military personnel

Hospitalization, etc., in veterans facilities

Retired pay disposition

Temporary suspension of determination in 47 Comp. Gen. 25 to follow *Berkey* v. *U.S.*, 176 Ct. Cl. 1, holding that retired pay withheld under 38 U.S.C. 3203(a)(1) from incompetent veteran who died while receiving care in Veterans Admin. Hospital is payable to "immediate family" of deceased veteran, to await outcome of similar legal issue in *Lorimer* case, USDC CA No. 206–67, respecting persons considered eligible to receive payment, is removed, court in *Lorimer* case viewing *Berkey* case as not applicable to relatives more remotely related to decedent than wife, children, or dependent parents, and distribution of withheld retired pay may now be made on basis of *Berkey* case to persons referenced in *Lorimer* case. 40 Comp. Gen. 666; 43 *id.* 39; 47 *id.* 25, modified 315

Retired pay waived under 38 U.S.C. 3105 in favor of disability compensation by incompetent veteran although no longer considered forfeited pursuant to 38 U.S.C. 3203(b)(1) upon veteran's death while receiving care in Veterans Admin. Hospital in view of *Berkey* v. *U.S.*, 176 Ct. Cl. 1, is not payable to brother, half brother and half sister of decedent who had been domiciled in Illinois, as *Berkey* case is not considered applicable to relatives more remotely related to decedent veteran than wife, children, or dependent parents. However, retired pay that was not subject to withholding pursuant to 10 U.S.C. 2771 may be paid to claimants, rules of descent and distribution in State of Illinois making no distinction between whole and half blood brothers and sisters 315

LEASES

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

LEAVES OF ABSENCE Page

Administrative leave

Activity in the public interest

When Federal employee who as member of Reserve component of Armed Forces or National Guard performs law enforcement services for State or Dist. of Columbia exhausts 22 days of additional leave provided under sec. 5 U.S.C. 6323(c), he may not be granted administrative leave. Discretionary authority of agency heads to excuse employees when absent without charge to leave may not be used to increase number of days employee is excused to participate in Reserve and National Guard duty. Therefore, employee who has exhausted sec. 6323(c) leave may not be further excused from duty without loss of pay or charge to leave for performing military duty 233

Where National Guard is used to alleviate results of disaster, maintenance of law and order is prime function of military duties assigned and duties are within contemplation of term "military aid to enforce the law." Acceptable evidence of performance of such duty by Federal employees as members of Reserve component of Armed Forces or National Guard under 5 U.S.C. 6323(c) would be military orders issued by competent authority, or statement by commanding officer showing authority, extent, and nature of service. Administrative leave may not be granted should additional 22 days of military leave provided by 5 U.S.C. 6323(c) become exhausted, or to avoid applying pay adjustment provisions of 5 U.S.C. 5519 233

Annual

Accrual

Maximum limitation

Forefeiture by operation of law

National Guard technician who on Jan. 1, 1969, became Federal employee as authorized by Pub. L. 90–486, is entitled to have all annual and sick leave to his credit prior to conversion of position to Federal status credited to him in his Federal position, as leave earned as technician, became subject to provisions of 5 U.S.C. 6301 *et seq.*, effective Jan. 1, 1969, pursuant to sec. 3(d) of act. However, annual leave to employee's credit in excess of 240 hours limitation prescribed by 5. U.S.C. 6304, that he did not use between Jan. 1, 1969, and close of 1968 leave act—Jan. 11, 1969—was forfeited by operation of law 383

Civilians on military duty

Charging

Law enforcement services

To avoid disparity in benefits for employees who work five 8-hour day tours of duty and those who work uncommon tours of duty, leave benefits provided in 5 U.S.C. 6323(c), prescribing 22 additional days of military leave for civilian employees who as members of Reserve component of Armed Forces or National Guard perform law enforcement services, should be converted into hours and charged in units of hours on same basis as annual and sick leave is charged under chapter 63 of 5 U.S. Code 233

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Civilians on military duty—Continued
Civil disorders
Adjustments of civilian compensation, retirement, tax and insurance

In implementing 5 U.S.C. 5519, providing for crediting amounts received by Federal employee for service in aid of law enforcement as member of Reserve component of Armed Forces or National Guard under 5 U.S.C. 6323(c), gross amount of military pay received for day on which employee is excused from civilian duty under sec. 6323(c) should be deducted from civilian compensation for excused period, but military pay received for days on which employee does not receive civilian compensation need not be credited against civilian compensation received during period of military service. Civilian service retirement contributions should be computed on basis of civilian compensation due employee after military leave has been credited, and any tax questions are for determination by Internal Revenue Service---------- 233

When Federal employee who as member of Reserve component of Armed Forces or National Guard performs law enforcement duty pursuant to 5 U.S.C. 6323(c) is unable to furnish documented information of military pay received for purpose of determining civilian compensation entitlement, military pay information should be obtained from military organization. If employee's civilian compensation cannot be adjusted to account for military pay credit before payment is made to him, collection of gross amount of military pay may be made by offset against subsesequent civilian compensation he receives, or in cash---------- 233

Where military pay of Federal employee who as member of Reserve component of Armed Forces or National Guard performs law enforcement services pursuant to 5 U.S.C. 6323(c) exceeds his civilian conpensation entitlement, employee may retain his daily military pay to extent it exceeds civilian compensation for any day or part of day on which he is excused from civilian duty, absent requirement for forfeiture of military pay in 5 U.S.C. 5519, which provides for crediting amounts received for Reserve or National Guard duty. Retirement and taxes are for deduction to extent of reduced civilian compensation if any, due employee, health and life insurance deductions should be made to extent required by Civil Service Regs. when civilian compensation due is not sufficient to cover all deductions---------- 233

Provision in 5 U.S.C. 5519, for crediting to civilian compensation of Federal employee military pay received for performance of law enforcement services as member of Reserve component of Armed Forces or National Guard pursuant to 5 U.S.C. 6323(c), does not affect employee's entitlement to military pay and, therefore, military organization concerned has no authority to withhold military pay due employee for purpose of crediting his civilian compensation without his consent, and also Internal Revenue Service rules might require withholding of appropriate taxes on basis of employee's entitlement to military pay without regard to amount withheld for credit to civilian compensation of employee---------- 233

LEAVES OF ABSENCE—Continued Page
Civilians on military duty—Continued
Civil disorders—Continued
Administrative leave

When Federal employee who as member of Reserve component of Armed Forces or National Guard performs law enforcement services for State or Dist. of Columbia exhausts 22 days of additional leave provided under sec. 5 U.S.C. 6323(c), he may not be granted administrative leave, Discretionary authority of agency heads to excuse employees when absent without charge to leave may not be used to increase number of days employee is excused to participate in Reserve and National Guard duty. Therefore, employee who has exhausted sec. 6323(c) leave may not be further excused from duty without loss of pay or charge to leave for performing military duty---------- 233

Where National Guard is used to alleviate results of disaster, maintenance of law and order is prime function of military duties assigned and duties are within contemplation of term "military aid to enforce the law." Acceptable evidence of performance of such duty by Federal employees as members of Reserve component of Armed Forces or National Guard under 5 U.S.C. 6323(c) would be military orders issued by competent authority, or statement by commanding officer showing authority, extent, and nature of service. Administrative leave may not be granted should additional 22 days of military leave provided by 5 U.S.C. 6323(c) become exhausted, or to avoid applying pay adjustment provisions of 5 U.S.C. 5519---------- 233

Appropriation effect

Military pay credited to civilian compensation of Federal employee performing law enforcement service as member of Reserve component of Armed Forces or National Guard pursuant to 6323(c) may remain in agency appropriation and amounts collected in cash may be deposited in appropriation from which employee's civilian compensation was paid---------- 233

Charging leave in units of hours

To avoid disparity in benefits for employees who work five 8-hour day tours of duty and those who work uncommon tours of duty, leave benefits provided in 5 U.S.C. 6323(c), prescribing 22 additional days of military leave for civilian employees who as members of Reserve component of Armed Forces or National Guard perform law enforcement services, should be converted into hours and charged in units of hours on same basis as annual and sick leave is charged under chapter 63 of 5 U.S. Code---------- 233

Civilian and military duties on same day

Federal employee who having performed all duties of his civilian position on day he reported for law enforcement duty with National Guard unit as provided in 5 U.S.C. 6323(c) for members of National Guard, as well as Reserve components of Armed Forces, is entitled to receive both civilian compensation and military pay for day. Rule that civilian compensation and military pay may not be paid for same day because performance of civilian duties is incompatible with requirements of active military service has no application to day involved, and neither

LEAVES OF ABSENCE—Continued Page
Civilians on military duty—Continued
Civil disorders—Continued
Civilian and military duties on same day—Continued
does 5 U.S.C. 5519 which authorizes crediting military pay to civilian compensation entitlement of individual who performs law enforcement services 233
"Full time military service" defined
Term "full-time military service for his State" contained in 5 U.S.C. 6323(c) and used in connection with the 22 additional workdays of leave in calendar year provided under sec. 6323(c) for Federal employees performing active service in aid of law enforcement as members of Reserve component of Armed Forces or National Guard, includes time from reporting when ordered by competent authority to serve in active military service of State until relieved by proper orders, which time embraces standby status necessitated by need to take over or perform when active service or skill is needed as well as actual engagement in law enforcement duties 233
Leave in lieu of Public Law 90–588 leave
Federal employee who as member of Reserve component of Armed Forces as described in 10 U.S.C. 261, or National Guard as described in 32 U.S.C. 101 is entitled to 22 workdays of leave in calendar year pursuant to 5 U.S.C. 6323(c) for additional periods of active Federal service in aid of law enforcement may be granted annual leave or unused military leave under 5 U.S.C. 6323(a) when his sec. 6323(c) is exhausted, but only if leave is exhausted. Under sec. 6323(c), employee entitled "to leave without loss of or reduction in * * * leave" may not elect to use, nor may he voluntarily be charged annual leave, or any other type of leave for periods of service in aid of law enforcement if he has sec. 6323(c) leave available for use, even to avoid a forfeiture of leave 233
Overtime earned in civilian position
Overtime compensation employee would have earned had he not been required to perform law enforcement services as member of Reserve component of Armed Forces or National Guard is for payment to employee. 5 U.S.C. 6323(c) in authorizing 22 workdays of additional leave in calendar year provides that compensation of employee granted sec. 6323(c) leave shall not be reduced by reason of absence 233
Services due to natural disaster
Where National Guard is used to alleviate results of disaster, maintenance of law and order is prime function of military duties assigned and duties are within contemplation of term "military aid to enforce the law." Acceptable evidence of performance of such duty by Federal employees as members of Reserve component of Armed Forces or National Guard under 5 U.S.C. 6323(c) would be military orders issued by competent authority, or statement by commanding officer showing authority, extent, and nature of service. Administrative leave may not be granted should additional 22 days of military leave provided by 5 U.S.C. 6323(c) become exhausted, or avoid applying pay adjustment provisions of 5 U.S.C. 5519 233

LEAVES OF ABSENCE—Continued

Court Page

Jury duty

Substitute employees

Substitute employees of postal service, whether career or temporary, who are compensated at hourly rate and have no established work schedules, hold appointments that are viewed as being similar to appointments on intermittent "when-actually-employed" basis, even though some substitutes may work average of 40 or more hours per week and, therefore, granting of court leave for performance of jury duty authorized under 5 U.S.C. 6322 may not be extended to substitute employees of postal service without specific statutory authority extending benefits of sec. 6322 to them 287

Lump-sum payment

Entitlement

Separation required

National Guard technician who when his technician position was converted to Federal status under Pub. L. 90–486, resigned from part-time postal position effective Dec. 31, 1968, as required by 5 U.S.C. 5533, which prohibits an employee from receiving compensation from more than one position for more than aggregate 40 hours work in one calendar week, is regarded as separated from postal service and under 5 U.S.C. 5551, he is entitled to lump-sum leave payment. Sick leave to employee's credit at time of separation from postal service may be recredited to him in his new Federal position, as provided by sec. 630.502(b)(1) of leave regulations issued by Civil Service Commission.. 383

Sick

Recredit of prior leave

Break in service

Sick leave earned by employee in Federal position which could not be credited to him when he accepted position as technician in State National Guard unit may be recredited to employee upon conversion to technician position to Federal status effective Jan. 1, 1969, pursuant to Pub. L. 90–486, as sec. 630.502(b)(1) of Civil Service Leave Regs., provides that employee separated from Federal service is entitled to recredit of sick leave when reemployed in Federal service without break in service of more than three years 383

MEDICAL TREATMENT

Dependents of military personnel

Private treatment

Retired personnel

Wife of retired member of uniformed services having been paid insurance benefits under commercial plan for medical care received as in-patient under 10 U.S.C. 1086, which provides health benefits at Government expense pursuant to contract, unless as implemented by Civilian Health and Medical Program of Uniformed Services, benefits are payable under another insurance plan, payment by Govt. to source of medical care that exceeded its limited liability under sec. 1086(d), although erroneous payment, may not be collected by withholding from member's retired pay without his consent. No indebtedness against retiree was created within purview of 5 U.S.C. 5514, nor does fact

MEDICAL TREATMENT—Continued
Dependents of military personnel—Continued
Private treatment—Continued
Retired personnel—Continued Page
payment was made pursuant to Military Medical Benefits Amendments of 1966, for and on account of retired member, provide basis for involuntary collection 361

MILITARY PERSONNEL
Annuity elections for dependents. (*See* **Pay, retired, annuity elections for dependents**)
Cadets, midshipmen, etc.
Disenrolled from service academy
Status

Disenrolled service academy cadet or midshipman who returns home to await reassignment to active duty as enlisted man is entitled to active duty pay and allowances from date his separation is approved and his reassignment orders are issued to date he receives notification of action, cadet or midshipman pursuant to 10 U.S.C. 516(b) "resumes his enlisted status" when separated for any reason other than appointment as commissioned officer or for disability, he is required to complete period of service for which he enlisted or for which he is obligated, unless sooner discharged. As member while at home awaiting orders will not be subsisted at Govt. expense, he is entitled pursuant to 37 U.S.C. 402(d) to basic allowance for subsistence 407

Disenrolled service academy cadet or midshipman who while awaiting transfer by the Secretary concerned under 10 U.S.C. 4348(b), 6959(b), and 9348(b) to Reserve component returns home is not entitled to pay and allowances until he is required to comply with new active duty orders, transfer has effect of discharging cadet or midshipman from his enlisted contract and, therefore, member is not in active duty status for pay and allowances purposes until he complies with his new orders .. 407

Fact that several days elapsed between time Regular enlisted man of uniformed services reverted to that status pursuant to 10 U.S.C. 516(b) upon termination from Air Force Academy and date he received his active duty orders at his home in Los Angeles does not affect member's entitlement to pay and allowances as of date of resuming Regular enlisted status. If member should, however, be transferred to active duty as reservist and ordered to Andrews Air Force Base in Maryland, his enlisted status having terminated when disenrolled from Academy, his right to pay and allowances would commence on day he departed from home by the means of transportation authorized, should member's orders reach him while visiting in vicinity of Base, pay and allowance would commence on ordered reporting date 407

Service credits. (*See* **Pay, service credits, cadet, midshipman, etc.**)
Death or injury
Transportation of dependents and household effects

Entitlement of injured member of uniformed services when prolonged hospitalization or treatment is anticipated to transportation of dependents and household effects is no basis to authorize payment of temporary lodging allowance incident to evacuation of dependents occasioned by his injured status, unless movement of dependents and household effects is in connection with ordered permanent change of station for member .. 299

MILITARY PERSONNEL—Continued Page

Dependents

Dislocation allowance. (*See* **Transportation, dependents, military personnel, dislocation allowance**)

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

Indebtedness

Pay withholding. (*See* **Pay, withholding**)

Insane and incompetents. (*See* **Insane and Incompetents**)

Medical treatment. (*See* **Medical Treatment**)

Missing, interned, etc., persons

Evacuation of dependents

Temporary lodging allowance

Payment of temporary lodging allowance incident to evacuation of dependents of member of uniformed services missing in action may not be authorized, as allowance accrues only in connection with permanent change of station to partially reimburse member for more than normal expenses temporarily incurred at hotel or hotel-like accommodations and public restaurants immediately preceding departure from overseas station on permanent change of station. Under Missing Persons Act, which designates items of pay and allowances that may be continued while member is in missing status, although housing and cost-of-living station allowance may be paid, temporary lodging allowance incident to evacuation of dependents may not, because member in missing status cannot meet permanent change-of-station requirement---------- 299

Transportation entitlement

When it is necessary to evacuate dependents of member on active duty who is officially reported as dead, injured, or absent for period of more than 29 days in missing status, pursuant to 37 U.S.C. 554(b), irrespective of member's pay grade, transportation may be provided for dependents, personal effects, and household effects—including packing, crating, drayage, temporary storage, and unpacking of household effects—to member's official residence, to residence of dependents, or as otherwise provided, but no other allowances are payable incident to evacuation-- 299

National Guard. (*See* **National Guard**)

Orders. (*See* **Orders**)

Pay. (*See* **Pay**)

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

Service credits. (*See* **Pay, service credits**)

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

Training duty station

Status for benefits entitlement

Incident to Veterans Admin. contract for Interagency Hospital Administrators Institutes in nongovernmental facilities in Dist. of Columbia, room accommodations other than in District may be procured and furnished on reimbursable basis to officers of military departments whose official duty station is Washington metropolitan area, as appropriations chargeable with expenditures provide funds for training expenses of members of military services and commissioned officers of Public Health Service---------- 305

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

NATIONAL GUARD Page

Allowances

Per diem

Training periods

Members of Army National Guard who incident to rotary wing aviation active duty training that will require more than 20 weeks to complete are issued separate orders for less than 20 weeks each for two phases of training to be conducted at different locations may be paid per diem for entire training period under separate orders, whether or not second period of duty immediately follows completion of first phase of training. Revised par. M6001–1c(1) of Joint Travel Regs. authorizes per diem for members of Reserve components ordered to active duty from home while they are at permanent station for less than 20 weeks when Govt. quarters or mess, or both, are not available, and regulation implements Pub. L. 90–168, that in its legislative history does not indicate its provisions are not for application to separate periods of training 320

Fact that orders directing officer of Army National Guard to report for three phases of continuous rotary wing aviation training to be held at two different locations for period in excess of 20 weeks were revoked to substitute two separate orders of 18 weeks each for training at different locations, with service break in-between, does not operate to deny officer entitlement to per diem for entire period of training. Pub. L. 90–168, which is implemented by revised par. M6001–1c(1) of Joint Travel Regs. to provide per diem for members of Reserve components ordered to active duty from home while at permanent duty station for less than 20 weeks, where Govt. quarters or mess, or both, are not available, containing no indication in its legislative history that it is not applicable to separate periods of training 320

Civilian employees

Conversion to Federal positions

Effect on part-time, etc., Federal employment

National Guard technician who when his technician position was converted to Federal status under Pub. L. 90–486, resigned from part-time postal position effective Dec. 31, 1968, as required by 5 U.S.C. 5533, which prohibits an employee from receiving compensation from more than one position for more than aggregate 40 hours work in one calendar week, is regarded as separated from postal service and under 5 U.S.C. 5551, he is entitled to lump-sum leave payment. Sick leave to employee's credit at time of separation from postal service may be recredited to him in his new Federal position, as provided by sec. 630.502(b)(1) of leave regulations issued by Civil Service Commission .. 383

Leave status

National Guard technician who on Jan. 1, 1969, became Federal employee as authorized by Pub. L. 90–486, is entitled to have all annual and sick leave to his credit prior to conversion of position to Federal status credited to him in his Federal position, as leave earned as technician, became subject to provisions of 5 U.S.C. 6301 *et seq.*, effective Jan. 1, 1969, pursuant to sec. 3(d) of act. However, annual leave to employee's credit in excess of 240 hours limitation prescribed by 5 U.S.C. 6304, that he did not use between Jan. 1, 1969, and close of 1968 leave act—Jan. 11, 1969—was forfeited by operation of law 383

NATIONAL GUARD—Continued Page
Civilian employees—Continued
Conversion to Federal positions—Continued
Leave status—Continued

Sick leave earned by employee in Federal position which could not be credited to him when he accepted position as technician in State National Guard unit may be recredited to employee upon conversion to technician position to Federal status effective Jan. 1, 1969, pursuant to Pub. L. 90–486, as sec. 630.502(b)(1) of Civil Service Leave Regs., provides that employee separated from Federal service is entitled to recredit of sick leave when reemployed in Federal service without break in service of more than three years 383

OFFICERS AND EMPLOYEES
Compensation. (*See* **Compensation**)
Court leave. (*See* **Leaves of Absence, court**)
Ethics
Abuse

Disclosure by employee of contracting agency to prospective bidder under invitation for stevedore and related services of information relating to performance and cost data of incumbent contractor violated par. 1–329.3(c)(4)(a) of Armed Services Procurement Reg., which exempts certain information from public disclosure, and disclosure was prejudicial to incumbent contractor's competitive position in bidding on new contract, and suspicion of favoritism having been created by dismissal of employee, invitation should be canceled and readvertised to avoid jeopardizing integrity of competitive system. Allegation information could have been obtained or constructed from other sources is negated by fact it was furnished by unauthorized source to prejudice of other bidders, and resolicitation should include information considered essential to intelligent bidding 251

Leaves of absence. (*See* **Leaves of Absence**)
Post office employees. (**Post Office Department, employees**)
Travel time
International dateline crossings

Under rule that generally employee's pay may not be increased or decreased because of crossing international dateline, employee stationed in Hawaii—3 time zones and 22 hours travel time difference away from 2-week temporary duty assignment in Wake Island, who departed Honolulu Monday at 10:20 a.m. and arrived in Wake Island at 1:15 p.m. on Tuesday properly was paid for 40 hours at regular pay, plus overtime, for first week of his temporary assignment, but incident to second week of assignment when he left Wake Island at 8:45 a.m. on Friday arriving in Honolulu at 3:30 p.m. on Thursday, he should not have been excused from work on Friday, and if he had been directed to work he would not have been entitled to additional pay for that day .. 329

ORDERS Page

Canceled, revoked, or modified

Dislocation allowance

Military personnel

Army officer who incident to overseas transfer orders amended to reassign him within U.S. moves his dependents during fiscal year to selected permanent residence and then to new duty station, for which move he was paid dislocation allowance prescribed by par. M9000 of Joint Travel Regs. to partially reimburse member for expenses incurred in relocating household upon permanent change of station, may not be paid second dislocation allowance. 37 U.S.C. 407, and par. M9002 of JTR limit payment in connection with permanent change of station to one dislocation allowance in fiscal year, unless exigencies of service require more than one change, and 37 U.S.C. 406a, providing additional travel and transportation allowances when orders are amended has no application to dislocation allowance---------- 231

Expenses prior to change

Excess weight of household goods

Member of uniformed services whose change-of-station orders are rescinded subsequent to shipment of household goods in excess of permanent change-of-station weight allowance, and reassignment necessitated reshipment of goods, notwithstanding Govt.'s action was beyond his control is nevertheless liable for additional cost incurred for shipment of excess weight over circuitous route. Authority in 37 U.S.C. 406a to reimburse member for expenses incurred prior to effective date of change-of-station orders that are later canceled, revoked, or modified is limited to travel and transportation expenses prescribed in 37 U.S.C. 404, 406, and 409, and, therefore, member may not be relieved of liability imposed by par. M8003 of Joint Travel Regs. to pay cost of shipping excess weight over circuitous route---------- 255

PAY

Active duty

At home awaiting orders

Disenrolled cadets and midshipmen

Disenrolled service academy cadet or midshipman who returns home to await reassignment to active duty as enlisted man is entitled to active duty pay and allowances from date his separation is approved and his reassignment orders are issued to date he receives notification of action, cadet or midshipman pursuant to 10 U.S.C. 516(b) "resumes his enlisted status" when separated for any reason other than appointment as commissioned officer or for disability, he is required to complete period of service for which he enlisted or for which he is obligated, unless sooner discharged. As member while at home awaiting orders will not be subsisted at Govt. expense, he is entitled pursuant to 37 U.S.C. 402(d) to basic allowance for subsistence---------- 407

Fact that several days elapsed between time Regular enlisted man of uniformed services reverted to that status pursuant to 10 U.S.C. 516(b) upon termination from Air Force Academy and date he received his active duty orders at his home in Los Angeles does not affect member's entitlement to pay and allowances as of date of resuming Regular enlisted status. If member should, however, be transferred to active

PAY—Continued Page

Active duty—Continued

At home awaiting orders—Continued

Disenrolled cadets and midshipmen—Continued

duty as reservist and ordered to Andrews Air Force Base in Maryland, his enlisted status having terminated when disenrolled from Academy, his right to pay and allowances would commence on day he departed from home by the means of transportation authorized, should member's orders reach him while visiting in vicinity of Base, pay and allowance would commence on ordered reporting date 407

Effective date

Cadets and midshipmen transferred to Reserve component

Disenrolled service academy cadet or midshipman who while awaiting transfer by the Secretary concerned under 10 U.S.C. 4348(b), 6959(b), and 9348(b) to Reserve component returns home is not entitled to pay and allowances until he is required to comply with new active duty orders, transfer has effect of discharging cadet or midshipman from his enlisted contract and, therefore, member is not in active duty status for pay and allowances purposes until he complies with his new orders 407

Civilian compensation. (*See* **Compensation**)

Retired

Annuity elections for dependents

Automatic pay restoration feature

Savings clause

Air Force officer retired Sept. 7, 1968, who in 1958 had elected option 3 under Retired Serviceman's Family Protection Plan (10 U.S.C. 1434(a)(3)) to provide annuity of one-half reduced retired pay for his survivors, but who had not elected option 4, pay restoration feature of Plan, is not subject to automatic pay restoration feature of Pub. L 90–485, approved Aug. 13, 1968, for personnel retiring on or after that date, when eligible beneficiary no longer exists. To hold otherwise and increase officer's monthly annuity cost by imposing pay restoration provision not only would be contrary to his election, but contrary to savings clause in 1968 act, which permits members not yet retired who had made election prior to its enactment to remain under law in effect prior to 1968 act 263

Withholding

Veterans Administration care and treatment

Disposition of pay upon incompetent's death

Temporary suspension of determination in 47 Comp. Gen. 25 to follow *Berkey* v. *U.S.*, 176 Ct. Cl. 1, holding that retired pay withheld under 38 U.S.C. 3203(a)(1) from incompetent veteran who died while receiving care in Veterans Admin. Hospital is payable to "immediate family" of deceased veteran, to await outcome of similar legal issue in *Lorimer* case, USDC CA No. 206–67, respecting persons considered eligible to receive payment, is removed, court in *Lorimer* case viewing *Berkey* case as not applicable to relatives more remotely related to decedent than wife, children, or dependent parents, and distribution of withheld retired pay may now be made on basis of *Berkey* case to persons referenced in *Lorimer* case. 40 Comp. Gen. 666; 43 *id.* 39; 47 *id.* 25, modified 315

PAY—Continued Page
Retired—Continued
Withholding—Continued
Veterans Administration care and treatment—Continued
Disposition of pay upon incompetent's death—Continued

Retired pay waived under 38 U.S.C. 3105 in favor of disability compensation by incompetent veteran although no longer considered forfeited pursuant to 38 U.S.C. 3203(b)(1) upon veteran's death while receiving care in Veterans Admin. Hospital in view of *Berkey* v. *U.S.*, 176 Ct. Cl. 1, is not payable to brother, half brother and half sister of decedent who had been domiciled in Illinois, as *Berkey* case is not considered applicable to relatives more remotely related to decedent veteran than wife, children, or dependent parents. However, retired pay that was not subject to withholding pursuant to 10 U.S.C. 2771 may be paid to claimants, rules of descent and distribution in State of Illinois making no distinction between whole and half blood brothers and sisters------ 315

Service credits
Cadet, midshipman, etc.
Service schools

Although U.S. Merchant Marine Cadet School at San Mateo, Calif., is not "service school" within meaning of 10 U.S.C. 1333(2) and, therefore, attendance at school as cadet-midshipman, MMR, USNR, from Aug. 1943 until Apr. 1945 may not be credited in computing years of service upon retirement under 10 U.S.C. Ch. 67, relating to retired pay for non-Regular service, period is allowable as "service, other than active service, in a reserve component" under 10 U.S.C. 1333(4), and is also creditable service for multiplier purposes for officers retiring with 20 years' service pursuant to 10 U.S.C. 6323, or for any of purposes of any formula or other law enumerated in 10 U.S.C. 1405, which section groups laws in one category and specifically includes in clause 4, service creditable under 10 U.S.C. 1333---------- 356

Withholding
Member's consent requirement
Law enforcement services

Provision in 5 U.S.C. 5519, for crediting to civilian compensation of Federal employee military pay received for performance of law enforcement services as member of Reserve component of Armed Forces or National Guard pursuant to 5 U.S.C. 6323(c), does not affect employee's entitlement to military pay and, therefore, military organization concerned has no authority to withhold military pay due employee for purpose of crediting his civilian compensation without his consent, and also Internal Revenue Service rules might require withholding of appropriate taxes on basis of employee's entitlement to military pay without regard to amount withheld for credit to civilian compensation of employee---- 233

Medical benefits

Wife of retired member of uniformed services having been paid insurance benefits under commercial plan for medical care received as in-patient under 10 U.S.C. 1086, which provides health benefits at Government expense pursuant to contract, unless as implemented by Civilian Health and Medical Program of Uniformed Services, benefits are payable under another insurance plan, payment by Govt. to source of

PAY—Continued Page
Withholding—Continued
Member's consent requirement—Continued
Medical benefits—Continued
medical care that exceeded its limited liability under sec. 1086(d), although erroneous payment, may not be collected by withholding from member's retired pay without his consent. No indebtedness against retiree was created within purview of 5 U.S.C. 5514, nor does fact payment was made pursuant to Military Medical Benefits Amendments of 1966, for and on account of retired member, provide basis for involuntary collection ---- 361

PAYMENTS
Erroneous
Debt status
Advance collection of excess costs to ship household goods of separated members of uniformed services, excess costs that arise when shipments consist of more than one lot, and authorized distance and/or weight allowance prescribed by par. M8003 of Joint Travel Regs. are exceeded, may not be waived for excess costs of $10 or less, for in absence of statutory authority, waiver would authorize known overpayment. Waiver authority in Title 4 of GAO Policy and Procedures Manual, sec. 55.3, and sec. 3(b) of Federal Claims Collection Act of 1966, that recognizes diminishing returns beyond which further collection efforts are not justified, relates to after determined overpayments. However, uniform regulations may issue to discontinue collection of small excess cost amounts discovered after shipment, where cost of collection would exceed debt ---- 359

Restitution by Government
Payment to Govt. by insurance company to cover damages to Govt. property by car insured by company where date of accident was erroneously shown as falling within period of policy coverage may be reimbursed to company. Rule that insurance company may recover payments made under mistake of fact, which was due to its own negligence or forgetfulness, unless payee has so changed his position that it would be inequitable to require restitution is applicable to Govt., as persons receiving erroneous payments from Govt. acquire no rights to payments, and it is only fair and equitable that when Govt. is recipient of erroneous payment that money be returned. Govt. was not prejudiced in matter and may still recover cost of damage repair from tortfeasor ---- 222

POST OFFICE DEPARTMENT
Employees
Leaves of absence
Jury duty
Substitute employees of postal service, whether career or temporary, who are compensated at hourly rate and have no established work schedules, hold appointments that are viewed as being similar to appointments on intermittent "when-actually-employed" basis, even though some substitutes may work average of 40 or more hours per week and, therefore, granting of court leave for performance of jury duty authorized under 5 U.S.C. 6322 may not be extended to substitute employees of postal service without specific statutory authority extending benefits of sec. 6322 to them ---- 287

POST OFFICE DEPARTMENT—Continued

Star route contracts Page

Bidder qualifications

Notwithstanding absence of adequate documentation to support that corporate bidder awarded three star route contracts was "actually engaged in business within the county in which part of the route lies or in an adjoining county" as required by 39 U.S.C. 6420, in view of complex problems encountered in qualifying corporate bidder, contracts may be completed. Award of one contract was not without foundation as contractor established business that subjected it to state laws and jurisdiction within rule stated in 35 Comp. Gen. 411. However, other contracts having been awarded on basis of postmaster certification and undocumented evidence, criteria for meeting "actually engaged in business" requirement should be established, and contracting officers informed personal certifications do not qualify corporation to bid on star route contracts 385

PROPERTY

Public

Fire fighting services

City ordinance that establishes charges on tax exempt properties for sewer services, refuse incineration and disposal services, and police, fire and emergency ambulance services, charges that are included in real estate taxes and not directly assessed on taxable property, levies tax however labeled, and U.S. exempt from local taxation unless Congress affirmatively provides otherwise, has no legal obligation to pay for protective services municipality has duty to provide. Therefore, Coast Guard Academy, located within city limits of New London, Conn., and entitled to protective services of municipality, may not use appropriated funds to pay for service charges imposed by city ordinance unless extra protection is provided for special events such as football games 284

SALES

Bids

Discarding all bids

Full and free competition restricted

Procurement principles applying equally to surplus sales, contracting officer has broad authority to reject all bids and readvertise sale and, therefore, cancellation of sales invitation for disposal of surplus aircraft carcasses to be reduced to scrap aluminum, demilitarization and sweating of aircraft to be accomplished before removal from Air Force Base, and readvertisement of aircraft to give purchaser option of either on-base sweating or on-base demilitarization with off-base processing to alleviate critical pollution problem—held secondary issue—was proper on basis that to restrict bidder from computing bid price on using own facilities to reduce carcasses to scrap when procedure was not necessary in Govt.'s interest would be inimical to full and free competition contemplated by 40 U.S.C. 484, and that restriction was cogent and compelling reason to justify rejection of all bids 244

In drafting specifications or invitations for bids that restrict application of techniques, methods, or operations to single, or administratively preferred process under which prospective contractors are required to perform work, criteria for inclusion of restrictions is whether valid justification has been established for prohibiting bidders from basing their bids on

SALES—Continued Page
Bids—Continued
Discarding all bids—Continued
Full and free competition restricted—Continued
use of any customary methods of operation which in their considered judgment provide most economical means available to them, thus resulting in highest return to Govt. Therefore, to restrict bidders in disposal of surplus aircraft to on-base sweating in reduction of aircraft to scrap when this procedure was not necessary to Govt.'s interest, deprived bidders of full and free competition intended by 40 U.S.C. 484, and cancellation and readvertising of sale was justified ---------- 244
Military uniforms
Removal of military insignia
Item described in surplus sale as "Jumpers, men's: undress, cotton uniform twill white, enlisted men, navy * * *" is considered a distinctive military uniform within contemplation of 10 U.S.C. 771, and, therefore, sale of item is subject to administratively imposed condition requiring mutilation or modification of article by removing military insignia to make uniform nondistinctive. While condition is not based on specific statutory authority, its purpose is to preserve integrity of Navy uniform purpose that is consistent with 10 U.S.C. 771, which restricts wearing of military uniforms to military personnel ---------- 303
SICK LEAVE
(*See* **Leaves of Absence, sick**)
STATES
Municipalities
Services to Federal Government
Service charge *v.* tax
City ordinance that establishes charges on tax exempt properties for sewer services, refuse incineration and disposal services, and police, fire and emergency ambulance services, charges that are included in real estate taxes and not directly assessed on taxable property, levies tax however labeled, and U.S. exempt from local taxation unless Congress affirmatively provides otherwise, has no legal obligation to pay for protective services municipality has duty to provide. Therefore, Coast Guard Academy, located within city limits of London, Conn., and entitled to protective services of municipality, may not use appropriated funds to pay for service charges imposed by city ordinance unless extra protection is provided for special events such as football games ---- 284
STATION ALLOWANCES
Military personnel
Temporary lodgings
Conditions of entitlement
Permanent change of station
Payment of temporary lodging allowance incident to evacuation of dependents of member of uniformed services missing in action may not be authorized, as allowance accrues only in connection with permanent change of station to partially reimburse member for more than normal expenses temporarily incurred at hotel or hotel-like accommodations and public restaurants immediately preceding departure from overseas station on permanent change of station. Under Missing Persons Act, which

STATION ALLOWANCES—Continued Page
Military personnel—Continued
Temporary lodgings—Continued
Conditions of entitlement—Continued
Permanent change of station—Continued
designates items of pay and allowances that may be continued while member is in missing status, although housing and cost-of-living station allowance may be paid, temporary lodging allowance incident to evacuation of dependents may not, because member in missing status cannot meet permanent change-of-station requirement 299
Injured member
Entitlement of injured member of uniformed services when prolonged hospitalization or treatment is anticipated to transportation of dependents and household effects is no basis to authorize payment of temporary lodging allowance incident to evacuation of dependents occasioned by his injured status, unless movement of dependents and household effects is in connection with ordered permanent change of station for member 299
Missing status of member
When it is necessary to evacuate dependents of member on active duty who is officially reported as dead, injured, or absent for period of more than 29 days in missing status, pursuant to 37 U.S.C. 554(b), irrespective of member's pay grade, transportation may be provided for dependents, personal effects, and household effects—including packing, crating, drayage, temporary storage, and unpacking of household effects—to member's official residence, to residence of dependents, or as otherwise provided, but no other allowances are payable incident to evacuation 299
STATUTORY CONSTRUCTION
Omission of express language
Where expanded interpretation of statute will accomplish beneficial results, serve purpose for which statute was enacted, is necessary incidental to power or right, or is established custom, usage or practice, maxim forming basis for inference that all omissions were intended will be refuted. Therefore, it is necessary to give expanded statutory construction to parenthetical phrase "including but not limited to contracts for maintenance, repair, and construction" appearing in sec. 2(a) of Small Business Act to include construction contracts in administration of subcontracting authority in sec. 8(a) and direct contract authority in sec. 15, in order to carry out congressional intent that small business concerns obtain fair proportion of all types of Govt. contracts 219
SUBSISTENCE
Per diem
Military personnel
Training duty periods
More than one
Members of Army National Guard who incident to rotary wing aviation active duty training that will require more than 20 weeks to complete are issued separate orders for less than 20 weeks each for two phases of training to be conducted at different locations may be paid per diem for entire training period under separate orders, whether or not second period of duty immediately follows completion of first phase of training. Revised par. M6001-1c(1) of Joint Travel Regs. authorizes per diem for

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Training duty periods—Continued
More than one—Continued
members of Reserve components ordered to active duty from home while they are at permanent station for less than 20 weeks when Govt. quarters or mess, or both, are not available, and regulation implements Pub. L. 90–168, that in its legislative history does not indicate its provisions are not for application to separate periods of training---------- 320

Separate orders constituting more than 20 weeks

Fact that orders directing officer of Army National Guard to report for three phases of continuous rotary wing aviation training to be held at two different locations for period in excess of 20 weeks were revoked to substitute two separate orders of 18 weeks each for training at different locations, with service break in between, does not operate to deny officer entitlement to per diem for entire period of training. Pub. L. 90–168, which is implemented by revised par. M6001–1c(1) of Joint Travel Regs. to provide per diem for members of Reserve components ordered to active duty from home while at permanent duty station for less than 20 weeks, where Govt. quarters or mess, or both, are not available, containing no indication in its legislative history that it is not applicable to separate periods of training---------- 320

Travel status
Requirement

Army officer transferred from Staff College Detachment to truck battalion who when orders were amended to provide for unit's movement to restricted area overseas within 90 days, elected to move his dependents and household goods to designated location, is not entitled to per diem upon cancellation of deployment for 5-month period between battalion assignment and reassignment under permanent change of station orders. Amendment to officer's initial orders to move dependents to designated place as required by par. 7 of Dept. of Army Cir. No. 614–8, did not change character of interim assignment to temporary duty or place of duty to temporary duty station, and officer's travel status having ended when he reported to battalion location, that location became permanent duty station---------- 269

SUBSISTENCE ALLOWANCE
Military personnel
Subsistence at Government expense
Absent

Disenrolled service academy cadet or midshipman who returns home to await reassignment to active duty as enlisted man is entitled to active duty pay and allowances from date his separation is approved and his reassignment orders are issued to date he receives notification of action, cadet or midshipman pursuant to 10 U.S.C. 516(b) "resumes his enlisted status" when separated for any reason other than appointment as commissioned officer or for disability, he is required to complete period of service for which he enlisted or for which he is obligated, unless sooner discharged. As member while at home awaiting orders will not be subsisted at Govt. expense, he is entitled pursuant to 37 U.S.C. 402(d) to basic allowance for subsistence---------- 407

TIME Page

International dateline

Crossing effect on compensation

Under rule that generally employee's pay may not be increased or decreased because of crossing international dateline, employee stationed in Hawaii—3 time zones and 22 hours travel time difference away from 2-week temporary duty assignment in Wake Island, who departed Honolulu Monday at 10:20 a.m. and arrived in Wake Island at 1:15 p.m. on Tuesday properly was paid for 40 hours at regular pay, plus overtime, for first week of his temporary assignment, but incident to second week of assignment when he left Wake Island at 8:45 a.m. on Friday arriving in Honolulu at 3:30 p.m. on Thursday, he should not have been excused from work on Friday, and if he had been directed to work he would not have been entitled to additional pay for that day---------- 329

TRANSPORTATION

Dependents

Military personnel

Discharge and reenlistment

Navy enlisted man who with dependents traveled from duty station within U.S. to Philippines, place of his enlistment and residence, for separation, where he immediately reenlisted and was subsequently transferred to England is entitled to reimbursement for both segments of travel performed by dependents, because par. M7009–5 of Joint Travel Regs. precluding reimbursement for transportation of dependents at Govt. expense when member is discharged and reenlists at same station under continuous service conditions is not for application, as unaware of member's intent to reenlist, he was ordered to Philippines for separation under authority of article C–10105(2), Bur. of Naval Personnel Manual, and subsequent to reenlistment he was transferred to England under permanent change of station orders---------- 291

Dislocation allowance

More than one move in fiscal year

Army officer who incident to overseas transfer orders amended to reassign him within U.S. moves his dependents during fiscal year to selected permanent residence and then to new duty station, for which move he was paid dislocation allowance prescribed by par. M9000 of Joint Travel Regs. to partially reimburse member for expenses incurred in relocating household upon permanent change of station, may not be paid second dislocation allowance. 37 U.S.C. 407, and par. M9002 of JTR limit payment in connection with permanent change of station to one dislocation allowance in fiscal year, unless exigencies of service require more than one change, and 37 U.S.C. 406a, providing additional travel and transportation allowances when orders are amended has no application to dislocation allowance---------- 231

Missing, interned, etc., members

When it is necessary to evacuate dependents of member on active duty who is officially reported as dead, injured, or absent for period of more than 29 days in missing status, pursuant to 37 U.S.C. 554(b), irrespective of member's pay grade, transportation may be provided for dependents, personal effects, and household effects—including packing, crating,

TRANSPORTATION—Continued Page

Dependents—Continued

Military personnel—Continued

Missing, interned, etc., members—Continued

drayage, temporary storage, and unpacking of household effects—to member's official residence, to residence of dependents, or as otherwise provided, but no other allowances are payable incident to evacuation.. 299

Household effects

Military personnel

Weight limitation

Excess cost liability

Circuitous routes

Member of uniformed services whose change-of-station orders are rescinded subsequent to shipment of household goods in excess of permanent change-of-station weight allowance, and reassignment necessitated reshipment of goods, notwithstanding Govt.'s action was beyond his control is nevertheless liable for additional cost incurred for shipment of excess weight over circuitous route. Authority in 37 U.S.C. 406a to reimburse member for expenses incurred prior to effective date of change-of-station orders that are later canceled, revoked, or modified is limited to travel and transportation expenses prescribed in 37 U.S.C. 404, 406, and 409, and, therefore, member may not be relieved of liability imposed by par. M8003 of Joint Travel Regs. to pay cost of shipping excess weight over circuitous route---------- 255

Waiver

Advance collection of excess costs to ship household goods of separated members of uniformed services, excess costs that arise when shipments consist of more than one lot, and authorized distance and/or weight allowance prescribed by par. M8003 of Joint Travel Regs. are exceeded, may not be waived for excess costs of $10 or less, for in absence of statutory authority, waiver would authorize known overpayment. Waiver authority in Title 4 of GAO Policy and Procedures Manual, sec. 55.3, and sec. 3(b) of Federal Claims Collection Act of 1966, that recognizes diminishing returns beyond which further collection efforts are not justified, relates to after determined overpayments. However, uniform regulations may issue to discontinue collection of small excess cost amounts discovered after shipment, where cost of collection would exceed debt---------- 359

Transit privileges

Through rates

Displacement

Concept of stopping shipment in transit and granting of transit privileges rests on fiction that two or more separate shipments may be treated as single through shipment and that through charges assessed will be lower than aggregate of charges applicable to separate shipments and, therefore, when upon expiration of recorded inbound transit credits on outbound shipment of explosives tendered under Sec. 22 Quotation, assessment of through rates results in higher charge than aggregate of rates applicable to separate shipments, Govt. has right to disregard transit fiction, right recognized by Quotation, and upon settlement

TRANSPORTATION—Continued Page
Transit privileges—Continued
Through rates—Continued
Displacement—Continued
pursuant to 49 U.S.C. 66, of payment to carrier on basis of fictional through shipments, U.S. GAO properly used lower aggregate charges and carrier is not entitled to refund ---------- 266
Section 22 quotations authority
Shipment of military communication outfits that moved under Govt. bill of lading from California to N. Carolina and was accorded storage-in-transit privileges at intermediate point, properly was billed and payment made on basis of through rate, notwithstanding absence of through rate in applicable transcontinental tariff. Concept of transit privileges rests on fiction that two or more separate shipments are single shipment on which charges assessed are lower than aggregate of charges on separate shipments, and although concept is only applicable to private shippers when provided by tariff, lower through rate is accorded Govt. on its volume storage-in-transit shipments on practically all commodities by SFA Sec. 22 Quotation Advice A–610–F, as well as others ---------- 352
UNIFORMS
Military personnel
Sale
Removal of military insignia
Item described in surplus sale as "Jumpers, men's: undress, cotton uniform twill white, enlisted men, navy * * *" is considered a distinctive military uniform within contemplation of 10 U.S.C. 771, and, therefore, sale of item is subject to administratively imposed condition requiring mutilation or modification of article by removing military insignia to make uniform nondistinctive. While condition is not based on specific statutory authority, its purpose is to preserve integrity of Navy uniform, purpose that is consistent with 10 U.S.C. 771, which restricts wearing of military uniforms to military personnel ---------- 303
VETERANS ADMINISTRATION
Contracts
Leases
Space in and outside District of Columbia
Veterans Admin. (VA) in contracting for Hospital Administrators Institutes in nongovernmental facilities located in Dist. of Columbia (D.C.) may not have contractor procure room accommodations in D.C. for live-in-participants attending Institutes, 40 U.S.C. 34 restricting rental of space in D.C. for purposes of Govt., in absence of express appropriation. VA appropriations do not provide for rental of space in D.C. and VA may not avoid leasing restriction by inclusion of cost reimbursement type provision in contract. However, hotel services and facilities outside D.C. may be procured as necessary training expenses and furnished in kind to trainees in travel status, and appropriate reduction made in per diem payable ---------- 305
Incident to Veterans Admin. contract for Interagency Hospital Administrators Institutes in nongovernmental facilities in Dist. of Columbia, room accommodations other than in District may be procured and furnished on reimbursable basis to officers of military departments

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Space in and outside District of Columbia—Continued
whose official duty station is Washington metropolitan area, as appropriations chargeable with expenditures provide funds for training expenses of members of military services and commissioned officers of Public Health Service 305
Training
Interagency participation
Authority
Financing of contract by Veterans Admin. (VA) for hospital administrators interagency institute with nongovernmental facility in Dist. of Columbia, cost to be shared by other Federal agency members of Interagency Committee, is precluded by sec. 307 of Pub. L. 90–550, which prohibits use of monies appropriated in act to finance Interdepartmental Boards, Commissions, Councils, Committees, or similar group activities that otherwise would be financed under 31 U.S.C. 691, nor may authority in sec. 601 of Economy Act be used to provide training, as some of agencies of Committee are not enumerated in act. However, interagency arrangement under training act (5 U.S.C. 4101–4118) that would provide more effective or economical training would warrant VA contracting for nongovernmental training facilities 305
WORDS AND PHRASES
"Acceptable"
To categorize thirteen technically acceptable proposals to study development of fire detention system for manned spacecraft by declining degrees of acceptability—"significantly superior," and only group considered to be within competitive range for discussion required by 10 U.S.C. 2304(g), even though discussions seem to have been in order for next group classified as "technically acceptable," and last two groups classified "not apparently adequate for operational spacecraft use," and "marginally acceptable"—diluted usual meaning of word "acceptable" to point of meaningless, and further complicated and made uncertain extent of "competitive range." Use of misleading classifications should be avoided, and written or oral discussions contemplated by 10 U.S.C. 2304(g) conducted with all offerors submitting proposals within competitive range 309
"Actually engaged in business"
Notwithstanding absence of adequate documentation to support that corporate bidder awarded three star route contracts was "actually engaged in business within the county in which part of the route lies or in an adjoining county" as required by 39 U.S.C. 6420, in view of complex problems encountered in qualifying corporate bidder, contracts may be completed. Award of one contract was not without foundation as contractor established business that subjected it to state laws and jurisdiction within rule stated in 35 Comp. Gen. 411. However, other contracts having been awarded on basis of postmaster certification and undocumented evidence, criteria for meeting "actually engaged in business" requirement should be established, and contracting officers informed personal certifications do not qualify corporation to bid on star route contracts 385

WORDS AND PHRASES—Continued Page

"Firm-bid rule"

Requirement for presence of bidder principals to accept award, sign contract, execute bonds and agree to furnish performance and payment bonds within four hours of bid opening under invitation for demolition work that provides for contract award within four hours of bid opening, does not mean presence at bid opening, but merely to be present within four hours of bid opening. Therefore, low bidder who although not present at bid opening complied with requirement was entitled to award, for should he have failed to execute contract or furnish performance and payment bonds, bid bond would have become operative under "firm-bid rule" to effect that except for honest mistake, bid is irrevocable for reasonable time after bid opening---------- 395

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