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TABLE OF DECISION NUMBERS

	Page
B–160591 June 5	833
B–164515 June 25	873
B–165543 June 11	837
B–165973 June 18	853
B–168274 June 11	840
B–168629 June 19	857
B–169035 June 1	819
B–169054 June 11	846
B–169057 June 17	851
B–169091 June 1	821
B–169378 June 2	831
B–169476 June 22	865
B–169522 June 22	867
B–169528 June 1	824
B–169673 June 1	829
B–169747 June 24	871
B–169933 June 30	877

Cite Decisions as 49 Comp. Gen.—.

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

[B-169035]

Awards—Informers—Rewards—By Foreign Governments

The reward monies which represent the values of the proceeds derived from the sale of contraband articles seized by the Republic of Colombia acting upon information furnished by an Air Force officer while temporarily attached to the Colombian Air Force for training purposes are payable not to the officer but to the United States pursuant to the principle of law that the earnings of an employee in excess of his regular compensation gained in the course of, or in connection with, his service belong to the employer, and the monies should be covered into the Treasury. Even if the United States were not entitled to the reward, its acceptance by the officer is precluded, absent congressional consent, by Article 1, Section 9, Clause 8 of the United States Constitution, which prohibits acceptance by public officers of presents, Emoluments, Office, or Title, "of any kind whatever," from a foreign State, and the reward constitutes an "Emolument."

To the Secretary of the Air Force, June 1, 1970:

Reference is made to letter dated February 6, 1970, and enclosures, from the Principal Deputy Assistant Secretary (Financial Management), Department of the Air Force, requesting a decision concerning reward monies offered to Major Bryant Heston, United States Air Force, by the Republic of Colombia. These monies represent the value of a portion of the proceeds derived from the sale of certain contraband articles seized by that Government acting upon information supplied by Major Heston who at the time was temporarily attached to the Colombian Air Force for training purposes.

Your Department's request for decision has been assigned Submission No. SS-AF-1068 by the Department of Defense Military Pay and Allowance Committee.

The record indicates that in April 1960, Major Heston was assigned the command of a small United States military training team in the Republic of Colombia, the mission of which was to train and increase the proficiency of selected aircrews of the Colombian Air Force in special air operations. Those operations included specialized techniques relating to troop and cargo airdrops, assault takeoffs and landings, low-level navigation, loudspeaker operations and civic action. The program was carried out at the Gomez-Nino Base at Villavicencio and conducted through the United States Air Force Mission to Colombia.

During one of the planned training missions, which was intended to practice low-level navigation and parabundle drops, Major Heston, his Colombian Air Force student pilot, and another Colombian officer by chance came upon a C-46 cargo plane unloading cargo onto two trucks, which aroused their suspicions because of the unlikely locale. After further investigation and identification of the plane, which had taken off in an attempt to escape, Major Heston notified, and otherwise assisted, Colombian military authorities, who dis-

patched troops and a plane to the area in a successful effort to seize the unloaded cargo, which was in fact contraband. The smuggler's plane was later captured in Panama. Major Heston was subsequently notified that Colombia law provides that informants who supply information leading to the capture of contraband are entitled to 25 percent of the total value of such contraband, and, therefore, that he was entitled to a share of the value of the captured contraband.

In light of the foregoing the following two questions are presented for our decision:

1. Is the United States entitled to all or any portion of Major Heston's share of the captured contraband since this United States Air Force officer was on active duty and performing military duties at the time ol discovery and capture of the Panamanian aircraft?
2. If the United States is not entitled to all of Major Heston's share, would acceptance by this officer of the value of any portion of the captured contraband violate Article I, Section 9, Clause 8, of the Constitution of the United States which prohibits, without the consent of Congress, the acceptance by government employees of any present or emolument from a foreign state?

It is a well-established principle of law that the earnings of an employee in excess of his regular compensation gained *in the course of*, or in connection with, his services, belong to the employer and in the case of officers and employees of the United States it long has been the rule that amounts so received are, in effect, received for the United States and are to be covered into the Treasury. See 37 Comp. Gen. 29 (1957); 32 *id.* 454 (1953); and the authorities and cases therein cited. Since Major Heston was on active duty and *actually performing military duties* relating to his mission and in his capacity as an officer of the United States when he earned his share of the value of the contraband, the United States is entitled to all of Major Heston's share thereof.

Even if it be held that the United States is not entitled to any portion of Major Heston's share of the reward monies, we are of the opinion that his acceptance of such monies is precluded by the prohibition contained in Article 1, Section 9, Clause 8, of the United States Constitution. That clause provides as follows:

No Title of Nobility shall be granted by the United States: And no Person holding any Office of Profit or Trust under them, shall, *without the Consent of the Congress*, accept of any present, Emolument, Office or Title, *of any kind whatever* from any King, Prince, or foreign State. [Italic supplied.]

It is our view that the reward monies in question constitute an "Emolument" within the meaning of the Constitutional provision. "Emolument" is broadly defined as profit, gain, or compensation received for services rendered. See *Blacks Law Dictionary, Deluxe Fourth Edition.* Reward monies received for the service of supplying information to public authorities would, in our opinion, fall within the above definition.

Further, it seems clear from the wording of the Constitutional provision that the drafters intended the prohibition to have the broadest possible scope and applicability. This is evidenced by the fact that the provision bars the acceptance by public officers of presents, Emoluments, etc., "of any kind whatever" from a foreign State.

Accordingly, you are advised that, in our opinion, Major Heston's acceptance of the reward monies presently being offered by the Colombian Government would violate Article 1, Section 9, Clause 8, of the United States Constitution, absent the consent of the Congress. Accordingly the second question is answered in the affirmative.

Since your Department's letter requests that our decision be sent to the Deputy Comptroller for Accounting and Finance, AFAACFA, Headquarters, United States Air Force, Washington, D.C. 20330, we are sending a copy of this decision to that official.

[B-169091]

Transportation—Dependents—Military Personnel—Emergency, Etc., Conditions—Natural Disasters

The movements of dependents, baggage, and household effects of members of the uniformed services in unusual or emergency circumstances arising at duty stations in the United States, such as Hurricane Camille, may not be authorized under 37 U.S.C. 406(e), notwithstanding the authority is not restricted to overseas locations as is the authority in 37 U.S.C. 406(h), providing for evacuation from disaster areas. The authority in section 406(e) for the movement of dependents, baggage, and household effects from place to place in the United States in unusual or emergency circumstances incident to some military operation or requirement, affords no authority for such movements incident solely to natural disasters, even though the movements may be in the best interest of the member, his dependents, and the United States.

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

In letter received here February 17, 1970, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requested a decision whether section 406(e) of Title 37, U.S. Code, provides authority for the movement of dependents, baggage and household effects of members of the uniformed services in unusual or emergency circumstances arising at duty stations in the United States. The request was assigned Control No. 70–6 by the Pier Diem, Travel and Transportation Allowance Committee.

Section 406(e) of Title 37, U.S. Code, provides that when orders directing a permanent change of station for the member concerned have not been issued, or when they have been issued but cannot be used as authority for the transportation of dependents, baggage and household effects, the Secretaries may authorize the movement of the dependents, baggage, and household effects and prescribe transportation in kind, reimbursement therefor, or a monetary allowance

in place thereof, in cases involving unusual or emergency circumstances including those in which—

(1) the member is performing duty at a place designated by the Secretary concerned as being within a zone from which dependents should be evacuated;
(2) orders which direct the member's travel in connection with temporary duty do not provide for return to the permanent station or do not specify or imply any limit to the period of absence from his permanent station; or
(3) the member is serving on permanent duty at a station outside the United States, in Hawaii or Alaska, or on sea duty.

In his letter the Assistant Secretary says that when Hurricane Camille approached the United States Gulf Coast in August of 1969, military dependents located in the Gulfport and Biloxi, Mississippi, areas as well as elsewhere along the predicted and actual path of that storm were caused to evacuate their homes and to seek shelter at inland locations. And, he states, due to the devastation wrought by the hurricane, reestablishment of permanent residences in those coastal areas has not in all cases been possible.

Also, he says that while allowances for evacuation from overseas areas are authorized by Chapter 12 of the Joint Travel Regulations based upon the provisions of 37 U.S. Code 405a, it appears clear that it was the congressional intent in enacting that law to make the allowances contemplated therein applicable solely to dependents who are located at or are en route to overseas stations and not to dependents evacuated from areas within the United States.

The Assistant Secretary refers to 38 Comp. Gen. 28 (1958), which he says might be interpreted to indicate that the application of section 406(e) with respect to evacuation zones contemplated by subsection (1) thereof, referred to overseas locations only. With respect to this, he says that since the language was rendered in response to an inquiry specifically addressing advance return of dependents from overseas stations, he believes that it was not our intention in the use of that language to impose such a restriction.

The Assistant Secretary's question is not limited to any particular circumstance. His discussion of the problem, however, indicates that he is primarily concerned with the movement of dependents incident to natural disasters such as that resulting from Hurricane Camille.

As a general proposition, section 406 of Title 37 of the United States Code authorizes the transportation of dependents when the member is ordered to make a permanent change of station. As an exception to the orders requirement, subsection (e) of section 406 provides for the movement of dependents, baggage and household effects in unusual or emergency circumstances without regard to the issuance of orders directing a change of station.

Subsection (e) was derived without substantive change from section 303(c) of the Career Compensation Act of 1949, Ch. 681, 63 Stat.

814. In 38 Comp. Gen. 28 (1958) we considered proposed changes in the Joint Travel Regulations relating to the return under unusual or emergency circumstances of dependents and household effects of members of the uniformed services from overseas stations to the United States prior to orders directing return of the members. We said that the term "unusual or emergency circumstances" as used in section 303(c) of the Career Compensation Act of 1949 had reference to conditions of a general nature arising at overseas duty stations which cannot readily be foreseen and which change in an unexpected manner. We said further that the statute is concerned primarily with emergencies deemed to require the movement of dependents, not the member, and that, basically it authorizes the Secretaries to issue regulations providing for the early return of dependents and household effects only because of actual conditions of an emergency nature arising at overseas duty stations which justify such return and which generally could not arise, or are most unlikely to arise in the case of members serving in the United States.

The 1958 decision concerned the applicability of clause 1 of the statute, quoted above, and as stated by the Assistant Secretary, it was rendered in response to an inquiry specifically addressed to advance return of dependents from overseas stations. Section 406(e), however, is not restricted to the movement of dependents located in overseas areas and we have so held.

In 45 Comp. Gen. 159 (1965) we held that under the unusual and emergency circumstance provision of section 406(e) the Joint Travel Regulations could be amended to provide that members attached to ships and staffs deployed away from home port or home yard (contemplated to be for at least 1 year) on operational commitments in the Western Pacific may be authorized transportation for dependents and household effects to a designated place in accordance with paragraph M7005 of the regulations.

In 45 Comp. Gen. 208 (1965) we concluded that under those provisions (406(e)) the Joint Travel Regulations should be amended to permit the movement of dependents, baggage and household effects of members of the uniformed services, in the case of members who are assigned to units which have been alerted for possible deployment overseas, in the same manner and on the same basis as was authorized for members assigned to restricted stations. In arriving at this conclusion we said that while the emphasis of the statutory provision is upon the return of dependents from overseas stations prior to orders, the legislative history indicates an intent to also provide authority in unusual or emergency circumstances for the movement of dependents and household effects between points in the United States.

The unusual or emergency circumstances considered in the 1965 decisions, however, involved circumstances incident to military operations or military need. The movement of dependents for reasons entirely unrelated to any military requirement was not involved.

Natural disasters such as Hurricane Camille would appear to be entirely unrelated to any military operation or need and the question whether any individual should leave the area threatened by such a natural disaster appears, generally, to have been regarded as for determination by the individual concerned in the light of his or her particular circumstances. The military and civilian population are alike in this respect and, when such a disaster has happened, needed assistance has been provided by relief organizations and the Armed Forces to all in need without regard to their military or civilian status. Insofar as we are aware, the statutory provisions relating to the transportation of dependents have never been viewed as authorizing transportation within the continental United States in such cases.

We recognized that, aside from any military requirements, it may be in the interest of the member or his dependents and the United States to evacuate dependents from an area in the United States which has suffered a disaster such as that resulting from Hurricane Camille. Statutory authority for the evacuation of dependents for such reasons, however, is not provided by 37 U.S.C. 406(e) but is contained in 37 U.S.C. 406(h). The provisions of 37 U.S.C. 406(h) apply only in the case of dependents who are located in overseas areas. 47 Comp. Gen. 775 (1968).

In line with the foregoing, it is our opinion that 37 U.S.C. 406(e) provides authority for the movement of dependents and household effects from place to place in the United States in unusual or emergency circumstances incident to some military operation or requirement. We do not, however, find any sound legal basis for concluding that section 406(e) affords authority for such movements incident solely to natural disasters even though the movements may be in the best interest of the member or the dependents and the United States.

Your question is answered accordingly.

[B–169528]

Pay—Retired—Annuity Elections for Dependents—Withdrawal From Participation—Attempt After Retirement to Change Election

A member of the uniformed services who had elected option 3 at one-half reduced retired pay under the Retired Serviceman's Family Protection Plan on May 9, 1967, for wife and children, and who shortly after the election lost his wife and remarried, may not have his request for revocation of his election made before his transfer to the Fleet Reserve on July 7, 1969, considered as the requested change does not "reflect" the changed status in marital or dependency status

contemplated by the 1968 amendment to the Plan, nor may his alternative request made after his transfer to provide only for his children be considered as it was not received within 2 years of the date of his wife's death. However, the member may on the basis of the application made after transfer withdraw from the Plan under 10 U.S.C. 1436(b), effective on the first day of the seventh month after the month in which the application was received.

Pay—Retired—Annuity Elections for Dependents—Revision of Plan—Status Changes

The election of option 3, at one-fourth reduced retired pay, combined with option 4, under the Retired Serviceman's Family Protection Plan by a Navy officer who prior to his placement on the retired list pursuant to 10 U.S.C. 6323, married and acquired a child, may not be changed to option 2, at one-half retired pay with option 4, as the officer's initial election became effective when he acquired eligible beneficiaries and, therefore, the change is not the status change contemplated by the 1968 amendment to the Plan. Moreover, even if the change met the requirements of the 1968 act, the change involving an increase in annuity from one-fourth to one-half of the officer's reduced retired pay would be precluded by 10 U.S.C. 1431(c), which permits an otherwise proper change of election only if such "change does not increase the amount of the annuity."

To Lieutenant H. F. Beerman, Department of the Navy, June 1, 1970:

Further reference is made to your letter dated February 25, 1970, your file XO:JMS:mlo 7220/224 33 90, 470 735, requesting an advance decision as to whether revocation and modification of elections of options under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446, submitted by Thomas M. Allison, BMCS, USNFR, and Lieutenant Commander Harry F. Snyder, USNR (Retired), respectively, may be considered changes in marital or dependency status under 10 U.S.C. 1431(c). Your request was forwarded to this Office by second endorsement of the Director, Navy Military Pay System and has been assigned Number DO–N–1075 by the Department of Defense Military Pay and Allowance Committee.

In your letter it is stated that Mr. Allison was transferred to the Fleet Reserve on July 7, 1969, pursuant to 10 U.S.C. 6330, and that on May 9, 1967, he made a valid election of option 3 at one-half reduced retired pay under the Retired Serviceman's Family Protection Plan. The beneficiaries listed were his wife Joan and his five children. His wife died on June 24, 1967, and on August 17, 1968, he married Mary F. O'Malley. On April 10, 1969, a request for revocation of his election of options of May 9, 1967, was received in the Navy Family Allowance Activity. Mr. Allison stated that his reason for revocation was the death of his wife and financial hardship. By letter dated July 17, 1969, he stated that if revocation was not possible he wished to provide protection for his children only.

It is reported that Lieutenant Commander Snyder was placed on the retired list on July 1, 1969, pursuant to 10 U.S.C. 6323, and that on September 11, 1959, he executed a valid election of option 3 at one-fourth reduced retired pay, combined with option 4, under the

Retired Serviceman's Family Protection Plan. At the time of this election he was not married. On October 8, 1966, he married Betty Lou Ruble and a child was born of this marriage on November 26, 1967. The first notification of his marriage and the birth of the child was on the date of receipt of an election of options form dated June 3, 1969, requesting a change in the prior election to option 2 at one-half retired pay, combined with option 4.

Public Law 90–485, August 13, 1968, 82 Stat. 751, was enacted to amend the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446. The purpose of this amendment was to encourage greater participation in the plan through the liberalization of certain provisions of the law. H. Rept. No. 951, 90th Cong., 1st sess., pages 9–10, on the proposed amendment [H.R. 12323] contains the following pertinent statement:

> To overcome the widespread criticism that participants cannot revoke or modify an election within the preelection period (3 years preceding retirement, under current law; 2 years, under the present proposal), this proposal would permit, in the event of death of the spouse, divorce, or remarriage and the acquisition of a child or children, a change or revocation so long as the amount of the annuity does not exceed that of the original election. As presently constituted, within the preelection period, with option 1 (wife only), should the wife die or be divorced, the children of the marriage may not receive an annuity unless the election option 2 was also in effect. Should the member with option 2 (children only) remarry, he cannot modify his survivor protection plan to provide for the new spouse. The need to liberalize this aspect of the "preelection rule" has long been contended by the participants, and their attitude is reflected in the continuing low rate of participation.

The foregoing statement points out why adjustments were needed and indicates the type of problem which was intended to be remedied by the enactment of the amendment of section 1431(c). The pertinent provisions of that section are:

> * * * The elector may, however, before the first day for which retired or retainer pay is granted, change or revoke his election (provided the change does not increase the amount of the annuity elected) to reflect a change in the marital or dependency status of the member or his family that is caused by death, divorce, annulment, remarriage, or acquisition of a child, if such change or revocation of election is made within two years of such change in marital or dependency status.

It appears that the Congress did not intend that section 1431(c) should provide a means of releasing a member from the commitment of a prior election simply on the occurrence of a change in the marital or dependency status of the elector or his family caused by one or more of the listed factors, but rather, that such section was designed to allow him to make a change or revocation when the change in his family's status renders his prior election inappropriate.

Certain changes in marital or dependency status do not warrant a change in election. For example, a member with option 3 (family option) has a wife and three children and one of the children dies. If the section were interpreted in such a manner as to permit a change

or revocation because of the death of his child, we think this would be contrary to the intent of the Congress. That intent is expressed by the use of the words "to reflect." In our view those words require a reading of section 1431(c) so as to permit a change or revocation indicative of or bearing a close relationship to the actual change in the marital or dependency status of the elector or his family.

Mr. Allison has in fact had two changes in his marital and dependency status. The first occurring on the death of his wife Joan, the second occurring on his remarriage to Mary. Although he, by virtue of his remarriage, had a wife and children at the time of his transfer to the Fleet Reserve, section 1431(c) permits, within 2 years from a change in marital or dependency status, a change of an election to reflect that change in status. Thus, Mr. Allison had 2 years from the date of Joan's death to change his election to indicate that she had died. He had provided an annuity for his wife Joan and on her death or remarriage for his children. A revocation of that election would go far beyond reflecting her death in his election of options.

While Mr. Allison's second attempted change, coverage for his children only, would seem to meet the requirements of section 1431(c) in that it appropriately reflects his change in family status, it presents a question as to the timeliness of the change. His wife Joan died on June 24, 1967. While the attempted revocation of option 3 dated April 7, 1969, was timely made, the alternative proposal, to provide for his children only, was dated July 17, 1969. In the light of the preceding discussion relating to section 1431(c), it appears that Mr. Allison's attempted revocation was an action not open to him, one not authorized by law, and hence must be disregarded in determining the question of whether a change was made within the period of time specified in the statute. His alternative of coverage for his children only clearly is a new and different change. Such alternative was not received by the proper authorities within 2 years of the date of his wife's death, and therefore cannot be considered effective. *Cf.* 34 Comp. Gen. 555 (1955).

Section 303 of the regulations for the Retired Serviceman's Family Protection Plan provides that:

> A member may have a different lawful spouse at the time of retirement from the lawful spouse he had at the time of election. The lawful spouse at the time of retirement is the spouse eligible for an annuity at the time of the member's death. * * *

It thus appears that Mr. Allison did have an eligible spouse and children on the date of his transfer to the Fleet Reserve and that his election of option 3 of May 9, 1967, was still in effect at that time.

The provisions of 10 U.S.C. 1436(b) may be for application in this case. That section provides:

(b) Under regulations prescribed under section 1444(a) of this title, the Secretary concerned may, upon application by the retired member, allow the member—
(1) to reduce the amount of the annuity specified by him under section 1434 (a) and 1434(b) of this title but to not less than the prescribed minimum; or
(2) to withdraw from participation in an annuity program under this title;

* * * * * * *

A retired member may not reduce an annuity under clause (1) of this subsection, or withdraw under clause (2) of this subsection, earlier than the first day of the seventh calendar month beginning after he applies for reduction or withdrawal. * * *.

Section 406 of the regulations for the Retired Serviceman's Family Protection Plan provides in part:

A retired member who is participating in the Plan may revoke his election and withdraw from participation, or he may reduce the amount of the survivor annuity; however, an approved withdrawal or reduction will not be effective earlier than the first day of the seventh month beginning after the date his application is received by the Finance Center controlling his pay record. * * * No amounts by which a member's retired pay is reduced may be refunded to, or credited on behalf of, the member by virtue of an application made by him under this section.

Under the foregoing provisions of law and regulations we think Mr. Allison may withdraw from the plan. Although at the time of his attempted revocation he was not entitled to retainer pay, we see no reason why his application dated July 17, 1969, may not be considered as an application for withdrawal under 10 U.S.C. 1436(b), if he so desires. In that event his application would be effective on the first day of the seventh month after the month in which such application was received.

Lieutenant Commander Snyder by his election of option 3 (family plan) on September 11, 1959, made provision for the possibility that he would marry and acquire children before his retirement. Section 301a of the regulations for the Retired Serviceman's Family Protection Plan provides:

All legal beneficiaries described in Section 102 must be named at the date of retirement pursuant to the option elected. Although a member without dependents may make an election, it will not be effective unless he has eligible dependents at the time of his retirement.

Thus, Lieutenant Commander Snyder by virtue of his marriage and the birth of his child before his retirement acquired the eligible beneficiaries to make his 1959 election of option 3 effective. The birth of the child on November 26, 1967, does not appear to be a change in the marital or dependency status of the elector or his family which could be reflected by a change of his election of option 3 to option 2, for the reason that the change in his marital or dependency status had already been provided for by his initial election.

Also for consideration in this matter is the language of section 1431 (c) which permits an otherwise proper change of election only if such "change does not increase the amount of the annuity." Lieutenant Commander Snyder's proposed change of election would have involved an increase in the annuity from one-fourth to one-half of his reduced retired pay.

[B–169673]

Gratuities—Reenlistment Bonus—Critical Military Skills—Lost Time Periods—Effect on Payment Entitlement

The payment of the third annual installment of the variable enlistment bonus provided by 37 U.S.C. 308(g) to a member who subsequent to his reenlistment on March 2, 1967, for a 6-year period lost 401 days of service in 2 years should be withheld until the member actually performs service sufficient to count as 2 years toward the completion of his reenlistment period. The authority to pay equal yearly installments of a variable reenlistment bonus to members having a critical skill, contemplates that a year of service in the enlistment period will be completed before the next installment is paid. The reenlistment bonus and the variable reenlistment bonus are reenlistment inducements and, therefore, to pay a variable renlistment bonus to a member who had been AWOL for a substantial part of the payment year would be inconsistent with the basis for which the bonus was authorized.

To Major Ronald R. McGee, Department of the Army, June 1, 1970:

Your letter of March 9, 1970, forwarded here by letter of the Office of the Comptroller of the Army (FCISC–FPM) dated April 24, 1970, requests a decision whether the third annual installment of the variable reenlistment bonus may be paid to Private First Class Richard M. Dougherty, 164–34–0352, at this time under the circumstances related below. Your request for decision was assigned D. O. No. A–1078 by the Department of Defense Military Pay and Allowance Committee.

You say that the enlisted man reenlisted on March 2, 1967, for a period of 6 years and was paid the first reenlistment bonus of $1,162.80 and the first installment of the variable reenlistment bonus of $581.40 on March 3, 1967, plus a second installment of $581.40 on December 20, 1968. You say also that since March 2, 1967, the member has 401 days lost time, 276 days since March 2, 1968, and 97 days since March 2, 1969, and that therefore a reasonable doubt exists whether this member will complete his current term of enlistment and whether an overpayment of variable reenlistment bonus could be recovered from the currently accruing pay if he were to receive a discharge prior to the expiration of his enlistment.

You suggest that, since the basic regulation (paragraphs 10913 and 10915, Department of Defense Military Pay and Allowances Entitlements Manual) states that installment payments of the variable reenlistment bonus "are payable on the anniversary date in each year of the reenlistment period" and will be settled upon discharge, a mem-

ber could be absent without leave for the majority of the year and return for the sole purpose of receiving the variable reenlistment bonus payment.

Insofar as is material here, subsection (g) of 37 U.S.C. 308 provides that under regulations prescribed by the Secretary of Defense a member who is designated as having a critical military skill and is entitled to a reenlistment bonus under subsection (a) thereof upon his first reenlistment may be paid an additional amount not more than four times the amount of that bonus and that such additional amount shall be paid in equal yearly installments in each year of the reenlistment period.

In decision of January 4, 1966, 45 Comp. Gen. 379, this Office said that there appears to be nothing in the law which suggests that the Secretary of Defense may, by regulation, deny or curtail payment of the variable reenlistment bonus, or of any part thereof, after the right thereto has vested in the member at the time of reenlistment "nor in any manner curtail the subsequent payment or payments of any portion of such variable reenlistment bonus" by requiring the member to continue to qualify, by tests or otherwise, in the critical military skill or to satisfactorily perform his duties in the specialty for which the variable reenlistment bonus was authorized.

In that decision, however, this Office also held that a member who voluntarily or because of his misconduct does not complete his enlistment and is discharged under such circumstances must refund the unearned portion of the variable reenlistment bonus as provided in subsection (e) of 37 U.S.C. 308 and is not entitled to payment of any remaining unpaid installments thereof. We there said that subsection (e)—

> * * * is the sole statutory authority to curtail the amount of variable reenlistment bonus and since Congress has prescribed no other condition of entitlement or recoupment * * * regulations issued by the Secretary * * * may not preclude the payment of any remaining unpaid installment of variable reenlistment bonus except in accordance with the provisions of subsection (e).

Section 972 of Title 10, U.S. Code, makes enlisted members liable to make good the time lost prior to discharge. If such lost time during an enlistment is not made good before discharge, a pro rata part of any bonus paid must be recouped at the time of discharge. Paragraphs 10923 and 10924, Department of Defense Military Pay and Allowances Entitlements Manual; 33 Comp. Gen. 513 (1954).

The equal yearly installments authorized by subsection (g) of section 308 to be paid "in each year of the reenlistment period" normally would be paid after the member has completed 1, 2, or 3 years of service in his enlistment period and we think that provision contemplates that a year of service in the enlistment period will be completed before the next in-

stallment is authorized to be paid. The reenlistment bonus and the variable reenlistment bonus are authorized as inducements for reenlistment for service and to say that the second variable reenlistment bonus installment, for example, should be paid to a member on the first anniversary of his reenlistment if he has been AWOL for a substantial part of that first year would seem entirely inconsistent with the basis on which the bonus is authorized.

It is our view that in such a case where the enlisted man voluntarily fails to complete a year of service in his enlistment after payment of an installment of the variable reenlistment bonus the next installment should not be paid until he completes that year of service. Hence, payment of the third installment of the variable reenlistment bonus in the present case should be withheld until the member has actually performed service sufficient to count as 2 years toward the completion of his reenlistment period. The voucher is returned herewith.

[B–169378]

Military Personnel—Separation—Concurrent Payment of Per Diem and Mileage Allowance

The payment of per diem to a member of the uniformed services who returned to his permanent duty station from a temporary duty assignment on the day he is separated from the service is not prohibited by the fact that the member incident to his separation is entitled to the mileage allowance prescribed by paragraph M4157–1a of the Joint Travel Regulations, and defined as an allowance intended to cover the cost of transportation, subsistence, lodgings, and other related expenses, notwithstanding paragraph M4151 prohibits the payment of mileage and per diem on the same day. The mileage allowance is not authorized for any specific date but for a prescribed distance, whether or not travel is performed and, therefore, paragraph M4151 may be amended to authorize the payment of per diem incident to temporary duty on the day a member is separated or released from active duty.

To the Secretary of the Navy, June 2, 1970:

By letter of March 3, 1970, the Assistant Secretary of the Navy (Manpower and Reserve Affairs) requested a decision whether paragraph M4151 of the Joint Travel Regulations may be amended to provide that otherwise proper payment of per diem to a member for travel to his permanent station on the day of separation from the service at that station will not be prohibited by reason of the payment of mileage incident to such separation. The request was assigned Control No. 70–12 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says that paragraph M4157–1a of the Joint Travel Regulations provides that a member on active duty who is separated from the service or relieved from active duty will be entitled to mileage from last duty station to home of record or the place from which he was ordered to active duty and that payment of such mileage may be made without regard to the performance of travel.

417–514 O—71——2

The Assistant Secretary says that paragraph M4151 of those regulations defines mileage as an allowance to cover the average cost of first class transportation including sleeping accommodations, cost of subsistence, lodging, and other incidental expenses directly related to the travel. That paragraph further specifies that in no case will mileage and per diem be allowed for the same day.

The Assistant Secretary says that in applying these two provisions confusion exists concerning a member's entitlement to otherwise proper payment of per diem for the day of arrival at his last duty station when the member is separated on the same day and hence paid mileage incident to the separation. He says that since such mileage is paid without regard to performance of travel, it is unrelated to per diem and should have no bearing on the member's entitlement to the latter.

Section 404(a) of Title 37, U.S. Code, provides that under regulations prescribed by the Secretaries a member is entitled to travel and transportation allowances under various circumstances including when away from his designated post of duty, and upon separation from the service or release from active duty, from last duty station to his home or the place from which ordered to active duty. Section 404(f) of the same title provides that travel and transportation allowances for the latter travel may be paid whether or not the member performs the travel involved.

Section 404(d) of Title 37, U.S. Code, provides that the travel and transportation allowances authorized for each kind of travel "may not be more than one of" the following:

(1) transportation in kind, reimbursement therefor, or a monetary allowance in place of the cost of transportation at a rate that is not more than 7 cents a mile based on distances established, over the shortest usually traveled route, under mileage tables prepared under the direction of the Secretary of the Army;
(2) transportation in kind, reimbursement therefor, or a monetary allowance as provided by clause (1) of this subsection, plus a per diem in place of subsistence of not more than $25 a day; or
(3) a mileage allowance of not more than 10 cents a mile based on distances established under clause (1) of this subsection.

That provision was derived without substantial change from section 303(a) of the Career Compensation Act of 1949, 63 Stat. 813, which like prior similar statutes did not authorize payment of both mileage and per diem to members for the same travel status period. It is for that reason that we have held that mileage and per diem are mutually exclusive methods of payment for travel and that the payment of mileage and per diem for the same day, even though not the same part of the day, is precluded. 36 Comp. Gen. 753 (1957), and 47 Comp. Gen. 724 (1968).

Since per diem allowances include costs of quarters, subsistence, and other incidental expenses related thereto, it is evident that the provisions in paragraphs M4151 and M4201 denying authority for payment

of per diem and mileage for the same day have as their purpose the prevention of duplication of allowances. 44 Comp. Gen. 751 (1965).

In the present situation, as we understand it, the member would travel to his permanent station on the day of separation under orders directing his return from temporary duty. Under the provisions of paragraphs M4201–4 and M4205 of the Joint Travel Regulations he would be entitled to per diem for the portion of the day involved in returning to the permanent duty station except for the fact that he will be paid mileage incident to separation or release from active duty on that day. Under paragraph M4157–1 of the Joint Travel Regulations he will be entitled to such mileage from his last station to home of record or the place from which he was ordered to active duty and it is authorized without regard to the performance of travel.

In these circumstances, while such members will, in most cases, depart from their last duty station on the day of separation or release from active duty, the mileage due is not paid for the performance of travel on any specified dates, payment being authorized for the prescribed distance whether or not any travel is performed.

Therefore, the provisions of section 404 of the statute authorizing the payment of a mileage allowance as one of the mutually exclusive methods of payment for travel performed by members do not appear to require the conclusion that the payment of such an allowance accruing on the day of separation or release from active duty, for which no travel is required, precludes the payment of per diem incident to temporary duty on that day.

Accordingly, we would not object to an amendment to paragraph M4151 of the regulations, as proposed.

[B–160591]

Husband and Wife—Divorce—Validity—Foreign

Although 47 Comp. Gen. 286 held that because of the uncertainty of section 250 of the New York State Domestic Relations Laws concerning foreign divorces, after September 1, 1967, the effective date of section 250, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, would no longer be viewed as constituting a judicial determination of a Mexican divorce for the purposes of the payment of quarters allowances, on the basis that in *Rose* v. *Rose* and *Kakarapis* v. *Kakarapis*, the lower New York courts subsequent to the enactment of section 250, followed the *Rosenstiel* case in upholding the validity of a bilateral Mexican divorce, these decisions will be accepted as authoritative judicial determinations that the *Rosenstiel* case is for application in determining the validity of Mexican divorces obtained in like situations both before and after September 1, 1967. 47 Comp. Gen. 286, modified.

To the Secretary of Defense, June 5, 1970:

Further reference is made to letter dated March 26, 1970, from the Deputy Assistant Secretary of Defense (Comptroller) requesting our decision whether the rule stated in 47 Comp. Gen. 286 (1967) has

been affected by subsequent judicial decisions discussed in an enclosed copy of Department of Defense Military Pay and Allowance Committee Action No. 439.

In its discussion of the question the Committee says that it was held in 47 Comp. Gen. 286 (1967) that the decision of the New York Court of Appeals in *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709 (1965), may not be viewed as constituting a judicial determination of the validity of foreign state (usually Mexican) divorces obtained by New York domiciliaries on or after September 1, 1967, the effective date of section 250 of the Domestic Relations Laws of the State of New York, for the purpose of payment of quarters allowances.

In the *Rosenstiel* decision the New York Court of Appeals held that a divorce granted by a Mexican court which conforms to Mexican law should be recognized in New York if the Mexican court acquired jurisdiction of the parties by the plaintiff's signing a municipal register of residents and physically appearing before the court and presenting a petition for divorce and if the defendant appeared by a duly authorized attorney who filed an answer submitting to the court's jurisdiction and admitting the allegations of the petition. The court held the divorce was valid even though it was granted on grounds not accepted in New York and the plaintiff was physically present in Mexico for a brief period of only about 1 hour, and no domicile of either party is shown within the Mexican jurisdiction.

The Committee refers to the decision rendered by the Family Court of Montgomery County, New York, in *Kakarapis* v. *Kakarapis*, 58 Misc. 2d 515, 296 N.Y.S. 2d 208 (1968). The Committee says the court ruled that in view of certain judicial precedents established by the courts prior to September 1, 1967, the validity of a bilateral foreign state divorce of the New York residents obtained on or after that date would not be questioned, i.e., would be deemed valid, even though neither of the parties to the divorce had perfected a bona fide domicile in the foreign nation.

Further, the Committee says that on October 9, 1968, at page 19, column 4, in the New York Law Journal, it is reported that the New York Supreme Court, Queens County, at a Special Term, in a case, *Rose* v. *Rose*, reached a somewhat similar conclusion. Also, the Committee refers to an article appearing in the "Family Law Quarterly," volume 2, June 1968, pages 174–181, by Mr. Elliott L. Biskind, identified as a member of the New York Bar and Editor-in-Chief of Boardman's New York Family Law With Forms (1967).

The Committee states that it appears to be the author's views that section 205 [250] of the Domestic Relations Law of the State of

New York creates merely a rule of evidence in order to simplify the difficulty and expense of a divorced spouse in attempting to obtain a declaratory judgment that he or she remains the spouse of the one who sought the divorce; that under section 250 the presumption of the validity of the divorce still exists and the burden of showing its invalidity is upon its assailant who must establish the foreign country's lack of jurisdiction over the marital status as well as over the parties; and that in enacting section 250 the state legislature had no intention to, and did not, affect the *Rosenstiel* case.

The Committee also states that there have been instances where military members, relying on advice from New York attorneys that foreign state divorces granted on or after September 1, 1967, are recognized under New York law, have in good faith contracted marriages in which one of the parties had been granted an earlier (but on or after September 1, 1967) Mexican divorce. In addition, the Committee says it is understood that it is not uncommon for New York attorneys to arrange such divorces. Nevertheless, the Committee states that under the current rule, the member does not qualify for payment of basic allowance for quarters as a member with dependents.

Our decision 47 Comp. Gen. 286 (1967) considered several questions concerning the validity of Mexican divorces for the purposes of payment of quarters allowances particularly with respect to Mexican divorces obtained by members of the Armed Forces domiciled in the State of New York after the effective date of section 250, Domestic Relations Law, McKinney's Consolidated Laws of New York.

In question 3 we were asked whether the provisions of section 250 of the Domestic Relations Law require the conclusion that on or after September 1, 1967, any service member within its purview who obtains a Mexican divorce must have that divorce decree recognized as valid by a court of competent jurisdiction of the State of New York before he may be considered entitled to basic allowance for quarters in behalf of a wife of a second marriage.

In answering question 3, we stated that the provisions of section 250 were enacted in conjunction with a general revision of the New York divorce law and while their impact on the *Rosenstiel* type case is not clear, they clearly represent a substantial change in State law. We concluded that the *Rosenstiel* case may not be viewed as constituting a judicial determination of the validity of Mexican divorces obtained after September 1, 1967, the effective date of section 250.

The first direct judicial pronouncement concerning the validity of bilateral Mexican divorce decrees procured after the enactment of section 250 of the Domestic Relations Law appears to be the decision

of the New York Supreme Court, Queens County in *Rose* v. *Rose*, N.Y. Law Journal, October 9, 1968. In that case the plaintiff-wife brought an action for divorce based upon cruel and inhuman treatment. A notice of appearance on behalf of the defendant-husband was filed, but the husband did not answer the complaint.

In the course of the trial on June 11, 1968, the plaintiff's attorney introduced in evidence a bilateral Mexican decree of divorce dated March 20, 1968. The defendant husband did not assert the prior action. The court dismissed the complaint, however, stating that it would not permit a judgment for divorce to be entered in the absence of a prerequisite showing of the existence of a valid marriage. The *Rosenstiel* decision was cited as upholding the validity of such Mexican divorces. The court, on its own initiative, granted judgment dismissing the complaint and judgment was entered accordingly.

While the court did not mention section 250 or its effective date, September 1, 1967, it is reasonable to assume that the court considered the statute when reaching its decision. Thus, what appears to have been the first New York decision concerning a Mexican divorce obtained after September 1, 1967, followed the *Rosenstiel* decision in upholding the validity of the bilateral Mexican divorce.

In *Kakarapis* v. *Kakarapis*, 296 NYS 2d 208 (1968), the petitioner instituted a proceeding for support in the Family Court, Montgomery County, New York, alleging in substance that she was then the wife of respondent and mother of respondent's eighteen year old daughter. The respondent conceded legal responsibility for the support of his daughter, but denied responsibility for the support of the petitioner, contending that she was no longer his wife. He contended that a Mexican divorce decree granted on November 7, 1967, dissolved the marriage. The petitioner contended that the Mexican decree of divorce is a nullity because of the provisions of section 250 of the Domestic Relations Law, the respondent having returned to the State of New York to resume his residence following the divorce. In its opinion, the court said the question to be decided was the effect of section 250, if any, on the law of the State of New York as enunciated in the *Rosenstiel* case.

The court pointed out that section 250 was enacted almost two years after the *Rosenstiel* decision was rendered and stated "Surely this landmark decision affecting matrimonial jurisprudence was well-known to the legislature when that section was enacted. Had New York legislators sought to nullify the effect of the *Rosenstiel* decision on foreign divorces, then certainly more decisive and comprehensive language could have been chosen." The court also discussed the decision in *Rose* v. *Rose*, considered above, as supporting the view that section 250 did not affect the *Rosenstiel* decision. The court decided

that section 250 does not overthrow the *Rosenstiel* principle of law that a bilateral Mexican divorce is valid and denied petitioner an order providing for her support.

With respect to the jurisdiction of the Family Court of Montgomery County, New York, to consider the matter of divorce between the parties, under section 115, The Family Court Act, McKinney's Consolidated Laws of New York, the Family Court has exclusive original jurisdiction over substantially all aspects of family life, except actions for separation, annulment or divorce. Jurisdiction over these actions is constitutionally reserved to the Supreme Court.

In the *Kakarapis* case involving a proceeding for support brought by the petitioner as wife of the respondent, it would seem that the Family Court necessarily had the authority to determine whether there was a valid and subsisting marriage, including the question of the validity of the Mexican divorce.

While, as far as we are aware, no appellate decision in New York has as yet been rendered on the validity of bilateral Mexican divorces procured after September 1, 1967, the decisions in lower courts cited above sustaining the validity of bilateral Mexican divorces reflect impressive judicial opinion that section 250 did not modify the *Rosenstiel* decision and that it is still the law in New York. In this connection, see *Butler* v. *Butler*, 239 A. 2d 616, 619, in which the District of Columbia Court of Appeals in an opinion by Judge Kelly written after September 1, 1967, cites the *Rosenstiel* case as the law in New York.

Therefore, in the absence of any judicial determination to the contrary, the decisions in the *Rose* and *Kakarapis* cases will be viewed as authoritative judicial determinations that the *Rosenstiel* case is for application in determining the validity of Mexican divorces obtained in like situations both before and after September 1, 1967.

Our answer to question 3, 47 Comp. Gen. 286 (1967) is modified accordingly.

[B–165543]

Pay—Retired—Annuity Elections for Dependents—Revocation, Etc.—Ineffective

An Army officer who when informed that he may not revoke the reduced annuity provided for his wife under the Retired Serviceman's Family Protection Plan requested on date of retirement, and that he may only further reduce the annuity or withdraw from the Plan pursuant to 10 U.S.C. 1436(b), and that his request would be considered a withdrawal, selects a further annuity deduction with the explanation he was not previously aware of the selections available to him, is considered to have submitted a proper application for a reduced annuity. Where a member's request for a change in election overlooks certain factors, Secretarial approval should be withheld until the doubt is resolved, and if the member was informed that his doubtful request will be considered an application for reduction or withdrawal, such a request is only a "proper application" upon affirmation.

To the Secretary of the Army, June 11, 1970:

Further reference is made to letter of May 4, 1970, from the Assistant Secretary of the Army (Financial Management), requesting a decision in the case of Brigadier General Norman E. Peatfield, as to the treatment to be accorded his request for revocation and subsequent application for a reduction in annuity he elected under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446. The letter states that this request has been assigned submission No. SS–A 1071 by the Department of Defense Military Pay and Allowance Committee.

It is reported that on March 19, 1965, General Peatfield elected Option I with Option IV at one-half reduced retired pay. On September 17, 1965, a change from one-half to one-fourth reduced retired pay was filed by the officer. He retired from active duty on September 1, 1969. Option I at one-fourth of full retired pay was established effective September 1, 1969.

General Peatfield, by letter dated September 1, 1969, requested that his options under the plan be "revoked." Subsequently the Finance Center, U.S. Army, advised the officer by letter of September 23, 1969, that a retired member may not revoke an election but that he can either reduce the amount of the annuity elected or withdraw from participation in the plan under the provisions of 10 U.S.C. 1436(b)(1) or (2). This letter also informed the officer that his letter dated September 1, 1969, would be considered as a request for withdrawal from the plan, and would be effective April 1, 1970, the first day of the seventh month following the month of application. In response General Peatfield in letter dated September 30, 1969, stated that if permitted, rather than withdraw from participation in the plan, he would like to reduce the amount of the annuity to his wife to $200 per month. The stated reason for this action being that he was not previously aware of the selections available to him. In view of the doubt which his reply raised as to the member's intent to request a withdrawal, the application has not been formally approved.

The Assistant Secretary in his letter states:

In a decision of the Comptroller General, 48 Comp. Gen. 353, in response to a Secretarial request based on MPAC Committee Action No. 424, it was held that under the law (PL 90–485) the Secretary was without discretion to allow or disallow an application based on his determination as to whether the withdrawal (or reduction) was in the best interest of the retired member or his beneficiaries. The Comptroller General significantly added that "* * * in the absence of evidence indicating that he has overlooked certain factors or information which should be brought to his attention, his application under the reduction/withdrawal provisions of the new law should be approved as a matter of course."

In the same decision, it was also held that the Secretary could not approve an application (under 10 U.S.C. 1436(b)) and later cancel the approval prior to the effective date; nor could the Secretary properly defer his approval action until the (6 month) waiting period had nearly expired, but must act within a

reasonable time after receiving the application. And finally, that a member may not cancel his application prior to the Secretary's approval of the application nor cancel the application after approval and before the effective date. As to member's attempted cancellation prior to approval, the Comptroller General stated that the six-month waiting period (between application and effective date) was not intended to afford the member a period in which to vacillate between staying in or withdrawing and that "a proper application" for withdrawal (or reduction) received by the proper authority becomes effective the first day of the seventh month after he applies.

In light of the foregoing facts and decision, and due to the language of the request dated September 1, 1969, the Assistant Secretary expresses doubt as to whether it was a valid application, which would require approval.

In 48 Comp. Gen. 353, 355 (1968), it was stated that:

* * * The member involved has the best knowledge of his own financial situation or other circumstances which might motivate him to make an election under 10 U.S.C. 1436(b) (1) or (2) and in the absence of evidence indicating that he has overlooked certain factors or information which should be brought to his attention, his application under the reduction/withdrawal provisions of the new law should be approved as a matter of course.

It seems clear that on September 1, 1969, General Peatfield wanted to get out of the program. However, the fact that he used the term "revoked" raises doubt as to the extent of the information he had at the time of his request, concerning reduction of the annuity and withdrawal from the plan. His letter of September 30, 1969, indicates that he was not aware of the selections open to him at the time of his attempted revocation. We are of the opinion that the record before us indicates that he had "overlooked certain factors or information which should be brought to his attention." Thus, in a case such as this, where doubt exists as to whether the member desires to withdraw under section 1436(b) or is possibly seeking action under a different provision of the law, he should be informed his request may be considered an application for withdrawal, if he so desires, and he should be given a reasonable time to affirm or reject this action, or state his actual intent concerning the withdrawal or reduction provisions, if the evidence indicates he had not previously been aware of these provisions. Until such time, Secretarial approval should be withheld.

Also in 48 Comp. Gen. 353, 355, it was held that:

* * * it is our view that a proper application for a reduction in the amount of an annuity or a withdrawal from participation in the plan received by the proper administrative authority, may not thereafter be changed or revoked and becomes effective on "the first day of the seventh calendar month beginning after he applies for reduction or withdrawal."

In view of the foregoing discussion, it is our view that when a request is received by the proper administrative authority, from which it would appear that the member had overlooked certain factors or information which should be brought to his attention, and the application raises doubt as to his actual intent, Secretarial approval should not be given

as a matter of course, but should be withheld until the doubt is resolved. In the event the administrative authority informs the member that the doubtful request will be considered an application for reduction or withdrawal, it may not be considered a "proper application" until this action is affirmed by the member.

General Peatfield has expressed his desire to purchase a reduced annuity for his wife rather than withdraw from the plan and in the circumstances disclosed we find no reason why his letter of September 30, 1969, should not be accepted as a proper application for reduction of the amount of the annuity under 10 U.S.C. 1436(b)(1) and paragraph 406 of the regulations for the Retired Serviceman's Family Protection Plan, December 18, 1968.

[B-168274]

Contracts—Negotiation—National Emergency Authority—Price Competition

To limit the negotiations of a procurement for electric bomb fuzes to planned producers in order to sustain the mobilization base established and to evaluate quantity combinations for award on a basis that will best serve the interests of the Government to protect the mobilization base, regardless of price, is a proper exercise of administrative authority under 10 U.S.C. 2304(a)(16), which permits the Government to assume additional costs without regard to prices available from other sources. The determination that the contractors selected are essential sources of supply in the event of a national emergency was in accord with paragraph 3-216.2(i) of the Armed Services Procurement Regulation, and the fact that deliveries as yet have not been made under prior contracts with the suppliers does not affect the propriety of the negotiations.

To the Defense Products Division, June 11, 1970:

Reference is made to your letter of February 9, 1970, protesting against the award of a contract to any other offeror under request for proposals (RFP) No. N00019-70-R-0062 for the furnishing of electric bomb fuzes MK 344 Mod 0 and MK 376 Mod 0 and relating data issued by the Naval Air Systems Command on October 27, 1969.

The record shows that this procurement was negotiated pursuant to 10 U.S.C. 2304(a)(16) which provides in part that the head of a military agency may negotiate a purchase or contract if he determines that it is in the interest of national defense to have a plant, mine, or other facility, or a producer, manufacturer or other supplier, available for furnishing property or services in case of a national emergency or the interest of industrial mobilization in case of such an emergency.

This is the fourth procurement since the initial development of the fuzes, all of which have been to develop and then maintain a sound mobilization base. The first contract which was awarded to

F. W. Sickles, Division of General Instrument Corporation (GIC), on November 19, 1968, was pursuant to advertising. In addition a request for proposals had been issued pursuant to 10 U.S.C. 2304(a)(16), *supra*, for an additional quantity of the fuzes. Award under the request for proposals was to be made on the basis of price unless the successful bidder under the advertised procurement was also low on the request for proposals, in which case award would be made to the next low offeror. The purpose of this procedure was to establish a broadened mobilization base of two sources. Award under the request was made to Fairchild Space and Defense Systems (Fairchild). Subsequently, a third source was developed by award of a contract to Varo, Inc. (Varo), on July 14, 1969, also negotiated pursuant to 10 U.S.C. 2304(a)(16).

The administrative office reports that by the above procurements, three sources were made available for the continued production of the fuzes and availability for expansion in the event of mobilization. In addition, geographical dispersal was obtained by setting criteria for a minimum distance of each producer from other producers. This was intended to take into account enemy attack or natural disasters such as floods, hurricanes and the like. The current plans are to maintain the mobilization base of three producers by directing a portion of the annual requirements to the three current producers. Any annual requirements in excess of this directed portion will be procured by formal advertising or by negotiation under another appropriate negotiation exception. In this regard, an invitation for bids was issued for the current requirements in excess of those set forth in the subject RFP, and an award was made on March 3, 1970, to Fairchild as the low bidder thereon.

It is further pointed out that in the RFP under consideration the Naval Air Systems Command stated in paragraph 48 of the Additional Solicitation Instructions and Conditions that the procurement was limited to planned producers in order to sustain the established mobilization base and that in addition, although none of the planned producers was advised of the specific quantity for which it would be considered, the RFP stated on page 3 as follows:

> Award will be made on the combination of the above quantities or portions thereof which best serves the interests of the Government to protect the mobilization base.

It is also reported that award of some quantity of fuzes was required to be made to Sickles and Fairchild in order to maintain their production capacities for mobilization purposes and to provide fuzes necessary for operational use, since it was estimated that their current

contracts would be completed by June or July 1970. The production line of Varo, Inc. was not in jeopardy since it was considered that delivery under Varo's current contract would not be completed until the end of 1970.

The three planned producers were requested to submit proposals on the below-listed total quantities and variations thereof:

Item 1	Total Quantity	362,250 MK 344 Fuzes
Item 2	Total Quantity	40,250 MK 376 Fuzes

Variation

Offer	Item	Quantity
A	1	115,590 each
	2	12,843 each
B	1	162,225 each
	2	18,025 each
C	1	208,860 each
	2	23,207 each
D	1	37,800 each
	2	4,200 each

After review of the offers received, it was concluded that submission of prices for different combinations could well prove advantageous to the Government. Hence, the three offerors were requested on January 16, 1970, to submit their best and final offers on the original basis, also, should they desire to do so, on any combination of the above alternatives.

Revised proposals were received. According to the Navy report, the anticipated delivery schedules of the three offerors' current contracts were combined with the RFP delivery schedule in order to ascertain what contract award quantities would be most advantageous to the Government. This consolidation demonstrated that Varo did not have the capability to deliver a quantity other than Offer D when added to the quantity required under its present contract, completion of which was not anticipated before December 1970, since Varo had not yet submitted first article samples for Government testing and had advised that it was having difficulty with one component.

In view of the above, it was considered most advantageous to the Government that Varo be eligible only for a contract award of 42,000 fuzes, and then only if its price represented the most favorable deal to the Government.

Naval Air Systems Command computed possible combinations of the offers submitted in order to arrive at the best deal for the Government. The first ten combinations were as follows:

Contractor	Fairchild	Sickles	Varo	
3-8-5 Tooling Capability	22, 000	43, 800	43, 800	Amount
Combination No.	Quan	Quan	Quan	
1			402, 500	$24, 311, 000. 00
2	402, 500			24, 753, 750. 00
3		402, 500		24, 834, 250. 00
4	360, 500		42, 000	24, 965, 325. 00
5		360, 500	42, 000	24, 983, 350. 00
6	360, 500	42, 000		25, 059, 825. 00
7	42, 000	360, 000		25, 245, 850. 00
8	170, 433	232, 067		25, 348, 555. 54
9	180, 250	222, 250		25, 371, 920. 00
10	232, 067	170, 433		25, 373, 680. 79

The Counsel, Naval Air Systems Command explains the action taken as follows:

The objective of this procurement was to provide a mobilization capability beginning in 1971 of approximately 110,000 fuzes per month. Any action that eliminated Sickles or Fairchild would not meet this objective since their present production deliveries were projected for completion in July and June 1970 respectively. The deliveries under the Varo contract had been projected by the Contractor to be completed by September 1970 but since the FAS samples have not yet been completed, much less sample testing, the forecast is completion not before December 1970. Therefore, failure to award to Varo will not disturb their mobilization capability as of 1 January 1971. For these reasons combinations 1 through 5 were not acceptable.

Combinations 6 and 7 did not involve Varo but the award of a quantity of only 42,000 to either Fairchild or Sickles would disturb the mobilization base of 1 January 1971 to an alarming degree. Of the 42,000 quantity of Offer D only 17,000 is scheduled for delivery in 1970 over a four month period. This 17,000 quantity is only 75% of one month's production capability for Fairchild and 40% of one month's capability for Sickles. If either Sickles or Fairchild received Offer D and produced the entire 42,000 at the end of their present contracts, their production would be completed in August 1970 and their mobilization capability would be lost. For these reasons combinations 6 and 7 were found to be unacceptable.

Combination 8 is the first combination that meets the requirement of an award to both Fairchild and Sickles so as to protect the mobilization base. Fairchild would be required to average 19,000 per month and Sickles 33,000 per month and these quantities require at least 2-8-5 operation, so the basic base was protected. Combinations 9 and 10 provided similar mobilization base protection but at higher prices.

Varo's offer on the 42,000 quantity (Offer D) was low taken by itself. However, when Varo's price for 42,000 fuzes was combined with the lowest prices submitted by Sickles and Fairchild for the balance of the fuzes required under the solicitation, the total price of the procurement was $299,370 higher than the combined Sickles and Fairchild prices for the total buy of 402,500.

In view of the above, in order to protect the mobilization base at the lowest price to the Government, NAVAIR determined that a split award of a contract quantity of 232,067 fuzes to Sickles and 170,433 fuzes to Fairchild was proper. * * * The two contracts were awarded on 2 February 1970.

You contend that if Varo's offer on item A and D and its offer on item C had been accepted the Government would have saved $484,276.35. In this regard it is well established that where the setting up of several producers or sources of supply is in the interest of national defense, a contract may be negotiated under 10 U.S.C. 2304(a)(16) and under that authority any additional costs involved properly may be assumed by the Government without regard to prices available from other sources. 42 Comp. Gen. 717 (1963).

Additionally, Varo contends that the entire procurement is defective because the awards made are inconsistent with the criteria set forth in Armed Services Procurement Regulation 3-216.2, which reads as follows:

3-216.2 *Application.* The authority of this paragraph 3-216 may be used to effectuate such plans and programs as may be evolved under the direction of the Secretary to provide incentives to manufacturers to maintain, and keep active, engineering and design staffs and manufacturing facilities available for mass production. The following are illustrative of circumstances with respect to which this authority may be used:

(i) when procurement by negotiation is necessary to keep vital facilities or suppliers in business; or to make them available in the event of a national emergency;

(ii) when procurement by negotiation with selected suppliers is necessary in order to train them in the furnishing of critical supplies to prevent the loss of their ability and employee skills, or to maintain active engineering, research, and development work; or

(iii) when procurement by negotiation is necessary to maintain properly balanced sources of supply for meeting the requirements of procurement programs in the interest of industrial mobilization. (When the quantity required is substantially larger than the quantity which must be awarded in order to meet the objectives of this authority, that portion not required to meet such objectives will ordinarily be procured by formal advertising or by negotiation under another appropriate negotiation exception.)

3-216.3 *Limitation.* The authority of this paragraph 3-216 shall not be used unless and until the Secretary has determined, in accordance with the requirements of Part 3 of this Section III, that:

(i) it is in the interest of national defense to have a particular plant, mine, or other facility or a particular producer, manufacturer, or other supplier available for furnishing supplies or services in case of a national emergency, and negotiation is necessary to that end;

(ii) the interest of industrial mobilization, in case of a national emergency would be subserved by negotiation with a particular supplier; or

(iii) the interest of national defense in maintaining active engineering, research, and development, would be subserved by negotiation with a particular supplier.

The basis for your contention is as follows:

(a) With reference to ASPR 3-216.2(i), how can a procurement be justified to . . . "Keep vital facilities or suppliers in business" . . . when current contractors have the *total quantities* under prior contracts undelivered?

(b) Can this procurement be justified to "train" within the meaning of ASPR 3-216.2(ii) the employees of GI and Fairchild? It would seem that the entire undelivered quantities under the prior contract would be sufficient for this purpose.

(c) The quantities awarded unbalance, rather than balance, the sources of

supply. That is, the award of quantities of 232,067 units to GI and 170,433 units to Fairchild result in total awards to the three suppliers that are greatly unbalanced. How then may the awards be shown to . . . "maintain properly balanced sources of supply" . . . as in ASPR 3-216.2(iii)?

It must be noted that each of the three illustrations set out in section 3-216.2 is a separate and distinct basis for use of the negotiating authority, and it therefore is not necessary that more than one be present in any particular case. It is our understanding from the report furnished by the procuring agency that the procurements previously conducted, as well as the one here involved, were based primarily upon a determination that development of the three producing sources to which contracts have been awarded is necessary to have them available in the event of a national emergency. This clearly meets the standard stated in 3-216.2(i), and the fact that no deliveries have yet been made under prior contracts does not appear to affect the propriety of conducting further procurements to attain the desired ends.

As to your question (b), the negotiations in question were not, as above indicated, referred to 3-216.2(ii), and it is not necessary to meet that criterion. It may be noted, however, that the cited section would permit negotiation for the purpose of maintaining active engineering, research and development work, as well as to prevent loss of the skills of already trained employees.

Subsection 3-216.2(iii) refers to "properly" balanced sources of supply. This does not appear necessarily to be equivalent to "equally" balanced, and it is our view that the determination of what is a proper balance is a matter involving a considerable range of administrative discretion. On the record we find no basis for concluding that the balance attained by the awards made is improper, inasmuch as it appears to be reasonably calculated to keep all three sources in operation throughout the remainder of the calendar year. It is also true, of course, that since the procurements in question are based primarily upon the situation embraced by subsection (i) it is not necessary to find conformity with subsection (iii).

Additionally, in its report dated March 26, 1970, the administrative office has advised as follows:

Varo notes in its letter of 9 February 1970 to the Comptroller General that neither Sickles nor Fairchild has passed first article testing. At the time of contract award, the progress of the tests indicated that the first article units woud complete the tests satisfactorily and that both companies would be authorized to proceed with quantity production. Subsequently, Sickles was given a release to full production on 16 March 1970. It is anticipated that Fairchild will also receive approval in the near future. It should be noted that Varo has not yet submitted first article samples for testing and its most recent prognostication of submission is a minimum of four weeks even under the most favorable circumstances.

On the basis of the facts reported we are unable to conclude that the awards were not properly made under the applicable regulations, and under the discretionary authority reserved by the Naval Air Systems Command to make awards on such combinations or portions of the total quantities as might best serve the interest of the Government to protect the mobilization base.

Accordingly, your protest must be denied.

[B-169054]

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

A request for proposals (RFP) to modernize ocean minesweepers and minehunters that contemplated a single contract or not more than two contracts, one for performance on the east coast, the other on the west coast, is not an indivisible solicitation, nor is the Government obliged to make any award and, therefore, cancellation of the west coast portion of the request for the purpose of revising the specifications, and the award of a contract for the east coast to the lowest offeror was proper, even though the offer exceeded the price for west coast performance as adequate competition had been obtained and no abuse of administrative discretion is evidenced. However, although it would have been preferable to amend rather than cancel the RFP, the action taken satisfied the amendment requirement of paragraph 3-805.1(e) of the Armed Services Procurement Regulation, but future RFP revisions should be within the framework of the regulation.

To the Secretary of the Navy, June 11, 1970:

Reference is made to a letter (with enclosures) dated March 28, 1970, from the Commander of the Naval Ship Systems Command (NAVSHIPS), reference 00J:SBG:gw, N00024-69-R-0638(Q), Ser 213, reporting on the protest by Harbor Boat Building Co. against the award of a contract to Todd Shipyards Corporation on the east coast portion of request for proposals (RFP) No. N00024-69-R-0638 (Q) and the cancellation of the west coast portion thereof. We have received additional correspondence with respect to this matter from the Counsel, NAVSHIPS, in letters (with enclosures) dated March 31, 1970, and April 15, 1970, and from the Acting Commander, NAVSHIPS, by letter of May 4, 1970.

The subject RFP was issued on August 13, 1969, by NAVSHIPS, Washington, D.C., for the modernization and repair of 10 ocean minesweepers and minehunters (MSO's), fiscal year 1969 program, and for the preparation of detail working drawings and other data in connection with the work to be performed. Item 1 of the proposal schedule covered five MSO's; a footnote thereto stated that the ships were "limited to East Coast yards including the Great Lakes and the Gulf Coast." Item 2 related to five MSO's which, also by way of a footnote, were restricted to west coast yards including Hawaii. Item

3 listed all 10 MSO's. Footnote "D," which was referenced in conjunction with all three items, stated:

> The Government intends to award a single contract, or no more than two contracts, for a total of ten (10) vessels. Award will be made for the total quantity of vessels each in Item 1 and Item 2, or for ten (10) vessels in Item 3. Therefore, offerors must submit prices for all items in Item 1 or Item 2 or Item 3. Offerors submitting a price for Item 3 must also submit prices for Item 1 and Item 2.

The letter of March 28 from the Commander, NAVSHIPS, summarizes the remainder of the history of this procurement in the following manner:

> A conference of prospective offerors for both the East and West Coasts was held in Washington, D.C. September 3, 1969. Prior to the final date set for submission of proposals two amendments were issued to the RFP, P0001 on September 11 and P0002 on September 25, 1969. After receipt of offers for both Coasts October 13, 1969, discussions were conducted with West Coast offerors between November 12 and 21, and with East Coast offerors between November 21 and 26, 1969. On November 24, Amendment P0003 (corrected by message of November 26) notified both East Coast and West Coast offerors of the closing of negotiations and called for submission of their best and final offers by December 3, 1969, to be subject to acceptance by the Government on or before January 13, 1970 (which date was subsequently extended to March 13, 1970). A significant change made by this Amendment, which will be referred to later, was the deletion of the requirement for repair of the fantail decking on the West Coast vessel MSO 488. For reasons set forth below, Contract N00024-70-C-0240 was awarded February 2, 1970 to Todd Shipyards Corporation, the lowest offeror, for the East Coast work, and on the same date the West Coast procurement was cancelled to be resolicited at a later date after extensive review of the applicable specifications.

The protestant has argued that the RFP was "indivisible," and that a cancellation of the west coast portion together with an award of a contract on the east coast portion was improper and illegal. The protestant focuses on the language of footnote "D," quoted above, in support of this contention.

There is nothing in the nature of the procurement that would require either total cancellation or award for all 10 ships with no other alternatives. It is clear that the east coast work and the west coast work were considered sufficiently separate and distinct as to permit the award of two separate contracts, one for the five MSO's on the east coast, the other for the five west coast MSO's. It is not at all inconceivable that, but for the administrative convenience in handling the procurement by way of a single solicitation, there could have been two separate RFP's, one for each coast.

We do not read footnote "D" as requiring the conclusion urged upon us by the protestant. In our view, the language does no more than express the Government's intent. It merely explains the possible alternative awards. However, it is axiomatic that the Government's issuance of a solicitation does not import an obligation to make an award of a contract thereunder. This is so irrespective of whether or not the solicitation expressly reserves to the Government the right

to reject all offers. 17 Comp. Gen. 554, at 559 (1938). Had NAVSHIPS desired to negate this right, we believe that it would have done so in specific language.

The argument has also been advanced that the amount of the award to Todd Shipyards is unconscionable and that, in view of the disparity in price between protestant's offer on the west coast portion and that of Todd, NAVSHIPS should have negotiated with Todd in order to secure a reduction in price. In view of the fact that Todd's price was the lowest of those received for the east coast work and because its price was in line with the Government's estimate, we are unable to conclude that Todd's contract specifies an unconscionable price. While it is true that the accuracy of the Government estimate may be open to question (see in this regard our report to the Congress dated March 19, 1970, entitled "Weaknesses in Award and Pricing of Ship Overhaul Contracts"), the record available to us indicates that adequate competition existed with respect to the east coast MSO's. See paragraph 3-807.1(b)(1) of the Armed Services Procurement Regulation (ASPR). Inasmuch as Todd's price was the most favorable one received for the east coast work, our Office perceives no legal objection to the award made to Todd. Primarily, the scope of the subject matter for discussion with an offeror in a negotiated procurement is a matter of administrative discretion. See 49 Comp. Gen. 625 (1970). On the record available to our Office, we cannot hold that such discretion was abused by the procurement officials of NAVSHIPS.

The primary objection of the protestant relates to the partial cancellation of the RFP insofar as item 2 was concerned. The text of the notice received by protestant on February 3, 1970, was as follows:

* * * Subject RFP as pertains to MSO Hull Numbers 438, 448, 488, 437 and 490 is hereby cancelled and will be resolicited at a later date after an extensive revision of the specifications is completed.

We note the record contains imputations of a lack of good faith and fair play on the part of the protestant. Such suggestions have been made as lending support to the administrative decision to cancel the west coast portion of the RFP. We can give no credence to such suggestions, for the written record is not consistent with a finding that protestant's actions were improper or were influenced by any unseemly motives. Accordingly, we will review the validity of the cancellation on the sole basis of the asserted need to revise the specifications extensively.

Revision of the specifications is stated to have been made necessary because certain repair work (schedule "B' work) required by the RFP specifications was accomplished on the five west coast MSO's in the last quarter of 1969. All of this work was performed by pro-

testant under four formally advertised purchase orders issued by local NAVSHIPS personnel in Long Beach, California. The Commander of NAVSHIPS reported in his letter of March 28, 1970, that the contracting officer was ignorant of the issuance and content of these four purchase orders until early January 1970. Protestant has argued vigorously and at length that the contracting officer should have and, in fact, did know of the existence of the four purchase orders at a much earlier date. It is not necessary to resolve this factual dispute because the legal question involves the administrative reaction to the admitted fact that certain work covered by schedule "B" was done in late 1969. The date when the contracting officer learned this fact is not critical to the resolution of this issue, as set out below. In addition, the much mooted points concerning how much of the work accomplished in 1969 will not have to be performed again in 1970 and whether the changes to the RFP specifications occasioned by the 1969 repair work are of a substantial nature require the application of special expertise and technical judgment, which our Office does not possess. Consequently, we will defer to the representations of the administrative agency, which has the marine engineering skill that we lack. See 49 Comp. Gen. 156 (1969), and B–167213, September 16, 1969.

The legal issue presented by this procurement is whether any statute or regulation was violated by the cancellation of the RFP in order to effect changes in the specifications, which changes were administratively determined to be necessary in order to eliminate from the statement of requirements certain items considered by NAVSHIPS to be no longer necessary. In this regard, ASPR 3–805.1(e) provides in part:

> (e) When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirements, such change or modification shall be made in writing as an amendment to the request for proposal or request for quotations, and a copy shall be furnished to each prospective contractor. * * *

In light of our decisions, B–165933, August 26, 1969, and B–165012, October 11, 1968, we must resolve the issue against the protestant. In the former decision, two offerors submitted proposals in response to an RFP. Prior to award of any contract thereunder, the procuring agency determined that it would be necessary to increase the number of items being purchased, to revise the specifications, to delete the requirement for first article approval, and to add a provision for qualification testing. These changes were effected by an amendment to the RFP. A third source was considered capable of meeting the revised testing requirements and was accordingly per-

mitted to submit an offer. Upon receipt of best and final offers under the revised solicitation, the new offeror submitted the lowest priced proposal and award was made to that company. The low offeror on an initial proposal basis claimed, *inter alia*, that award should have been made to it on the RFP as initially issued. We held that there was ample justification for the contracting officer's failure to award a contract to the low offeror under the original RFP. In the decision we made the following observations:

> In view of the substantial changes in the specifications and the increased quantity of compressors needed, the contracting officer would have been justified in rejecting all offers pursuant to paragraph 10(b) of the Instructions and Conditions of the RFP and resoliciting proposals on the basis of the new requirements. In this event, he would have been obligated to solicit proposals from the maximum number of qualified sources, which included Stewart-Warner. Armed Services Procurement Regulation 3-101 and 3-102(c). However, rather than cancelling the RFP and issuing a new one incorporating the revised specifications and increased quantity the contracting officer accomplished the same result by issuing amendment No. 1 to the RFP and inviting proposals from the three firms he considered qualified sources. In this connection, ASPR 3-805.1(e), provides: * * *

In B-165012, an RFP was issued in March of 1968. Six proposals were received in response thereto, that of the protesting company being the lowest in price. The results of the July preaward survey performed on the low offeror were favorable. On August 9 the RFP was canceled and was superseded by a second RFP of the same date. This action was taken because of a significant increase in the Government's requirements. The gravamen of the protest was that there was no justification for the cancellation of the original RFP and the issuance of a second solicitation. We adverted to the provision of ASPR 3-805.1(e), quoted above. We then stated:

> There should be no question that changing the requirements from an output minimum of 100 to 197 engines, and the possible monthly output maximum from 65 to 95 engines, with the best estimated quantity increasing from 397 to 697 engines, is a substantial change in the Government's requirement. Therefore, the contracting officer was required by the cited ASPR to amend the request for proposals and furnish a copy to each prospective contractor. B-151886, August 16, 1963. In this case we see no basis for considering the cancellation of the original solicitation and the issuance of replacement as differing in any substantial or material way from the issuance of the same revised solicitation in the form of an amendment to the original.

The protest was accordingly denied. See also, B-164187, July 31, 1968, affirmed on reconsideration October 25, 1968; B-167545, September 29, 1969; B-167364, September 29, 1969; and B-168000, November 26, 1969.

In conformity with our prior expressions, we must regard the NAVSHIPS action in this case as the substantial equivalent of an amendment of the specifications and of the RFP, as prescribed by ASPR 3-805.1(e). We are unable, however, to see any compelling reason why cancellation was considered to be preferable to amendment

of the RFP. In such circumstances, we believe that in the future all necessary revisions to RFP's should be accomplished within the framework established by ASPR.

[B-169057]

Contracts—Specifications—Descriptive Data—Voluntary Submission—Acceptability

Under an invitation for mechanical presses that required the submission of price lists, an unsolicited brochure accompanying the low bid that described both conforming and nonconforming presses which was submitted to make the price list more meaningful and was not intended for evaluation purposes did not qualify the bid as both documents, parallel in format were complementary. The intent of a bid is for determination from its contents, including an unsolicited brochure, and if the literature qualifies the bid or creates an ambiguity, the bid must be rejected as nonresponsive and pursuant to 10 U.S.C. 2305(c) an award made to the low responsible bidder whose bid conforms to the invitation, a statutory requirement that is not negated by paragraph 2-202.5(f) of the Armed Services Procurement Regulation, which presumes a bid to conform or to be unqualified where the intent of the bidder is ambiguous. Modifies B-169057, April 23, 1970.

To the Secretary of the Navy, June 17, 1970:

This concerns a letter dated May 8, 1970, SUP 0232, and subsequent correspondence, requesting reconsideration of our decision B-169057, April 23, 1970, on the protest of Wayne Press Company under invitation for bids No. NOO600-70-B-2213, issued by the Navy Purchasing Office, Washington, D.C.

The facts involved in the procurement and protest were fully set forth in our prior decision. In brief, the contracting officer rejected Wayne's low bid because it was accompanied by an unsolicited descriptive brochure which described several mechanical presses, some of which did not conform to the advertised specifications. In our prior decision, we concluded that the bid should have been considered responsive.

On reconsideration we conclude that based on the facts of the case our prior decision should be sustained. The invitation for bids requested bidders to submit their price lists covering the mechanical presses. Wayne has stated that they submitted the descriptive brochure only to make their price list meaningful. We believe that statement is supported by the physical evidence contained in Wayne's bid. The price list and the brochure are parallel in format and were obviously intended to be complementary. The descriptive brochure describes only those presses contained in the price list. Further, these documents bear evidence that at one time they were in fact stapled together independently of the other related bid documents. For these reasons, we believe the price list and brochure should have been considered as one document, and as furnished for the purposes requested. Since that price list was requested in the solicitation and submitted

by the bidder to illustrate the commercial price of the mechanical presses being procured, not for the purpose of evaluating the offer, we conclude that the brochure describing conforming and nonconforming presses should not be regarded as qualifying the bid. *Cf.* B–147518, January 16, 1962.

While for the above reasons our prior decision B–169057, April 23, 1970, is sustained, there are certain statements in that decision which have apparently lead to considerable confusion respecting our position regarding unsolicited descriptive literature. In our view the intent of the bid must be determined from a reasonable construction of its entire contents including any unsolicited literature. If the circumstances are reasonably susceptible of a conclusion that the literature was intended to qualify the bid or if inclusion of the literature creates an ambiguity as to what the bidder intended to offer, then the bid must be rejected as nonresponsive to the invitation for bids. See B–166284, April 14, 1969, May 21, 1969, and B–167584, October 3, 1969. As we stated in B–166284, April 14, 1969:

> The crux of the matter is the intent of the offeror and anything short of a clear intention to conform on the face of the bid requires rejection.
>
> * * * * * * *
>
> When more than one possible interpretation may reasonably be reached from the terms of a bid a bidder may not be permitted to explain the actual meaning or bid intended since this would afford the bidder the opportunity to alter the responsiveness of his bid by extraneous material.

Award of a contract pursuant to formal advertising may be made under 10 U.S.C. 2305(c) only to the low responsible bidder whose bid conforms to the invitation. We do not believe that statutory requirement may be negated by a regulatory provision, such as Armed Services Procurement Regulations 2–202.5(f), which presumes a bid to conform or be unqualified where the intent of the bidder is ambiguous. *Cf.* B–166284, May 21, 1969. Nor do we believe that the invitation for bids may establish any arbitrary conventions which provide that the clear language of the bid will be ignored unless presented in a particular form.

On page three of our prior decision we stated:

> It is our view that the voluntary furnishing of literature with a bid, with nothing to evidence an intent to qualify the bid or to deviate from the advertised specifications, does not render such a bid nonresponsive.

On page four we stated:

> We believe therefore that the brochure submitted by Wayne with its bid should not be considered as qualifying its bid, and should be disregarded in accordance with the provision of ASPR 2–202.5(f).

These statements were premised upon our conclusion, as set forth on page three of the decision preceding the first statement, that we did not believe Wayne's bid was qualified or ambiguous even taking

into consideration the unsolicited brochure. The statements should not be construed to stand for the proposition that the unsolicited brochure may simply be disregarded and to the extent that such an impression is conveyed by statements in B–169057, April 23, 1970, that decision is modified.

Returned herewith are the enclosures forwarded to this Office on May 19, 1970.

[B–165973]

Contracts—Specifications—Drawings—Amendment Identification

A claim for additional compensation under a contract for the repair and improvement of a GSA Depot submitted on the basis substitute drawings changing the scope of the work were ambiguous and failed to identify dimensional changes, and that a reference omission was misleading, was properly denied by the GSA Board of Contract Appeals. The record evidences the contractor relied on one of two pertinent drawings that should have been interpreted together, and that the replacement of the original drawings *in toto* satisfied the requirement of Federal Procurement Regulations 1–2.207(b) (3) that invitation changes be clearly stated. Therefore, the contractor's failure to correctly compute its bid price was not due to the Government's failure to specifically identify the differences between the original and substitute drawings, and the contractor is not entitled to additional compensation.

To the Southwest Engineering Company, Inc., June 18, 1970:

This is in reply to your request that we consider your claim arising under General Services Administration (GSA) Contract No. GS–06B–10019, which was the subject of your appeal before the GSA Board of Contract Appeals, Docket No. 2347.

The facts, as set forth in the Board's decision denying your appeal, have not been disputed. The solicitation for the subject contract was issued on August 22, 1966, and requested bids for repair and improvement work at the GSA–DMS Depot, Topeka, Kansas, as shown on Drawing Nos. 27–23 and 27–24 and as otherwise specified. Amendment No. 2 to the invitation was issued on September 6 which extended the bid opening date to September 23 and provided, in part, that another amendment changing the scope of the work would issue in approximately 8 days. Amendment No. 3 was issued on September 13 and deleted the initial drawings provided with the solicitation under paragraph 2–01 of the specifications, and replaced them with Drawing Nos. 27–23A and 27–24A. Bids were opened as scheduled on September 23 and you were awarded a contract on October 19, 1966, in the amount of $24,703.

Your claim is for $1,301 as compensation for removing and replacing approximately 30 feet of concrete dock (complete with foundation piers, etc., as shown on Drawing No. 27–24A), adjacent to door No. 29 of warehouse S–102, which work was performed at the direction of the Government but does not appear to have been considered in

the computation of your bid. GSA recognizes the validity of your claim with respect to the cost of installing the four foundation piers involved but denies any additional liability for the cost of removing and replacing the concrete slab. Payment is requested on the basis that the drawings furnished with Amendment No. 3 were ambiguous with respect to the disputed concrete replacement work, and that under the circumstances you were not negligent, but were justified, in failing to include this work in your computations. Moreover, it is your position that the Government should have, but did not, identify on the face of the substituted drawings, or otherwise, wherein those drawings differed from the original drawings.

The initial Drawing No. 27–23, called for the removal and replacement of a portion of the existing concrete slab adjacent to warehouse S–102 for a total of 320 feet. The initial Drawing No. 27–24 included a section entitled "PARTIAL FOUNDATION & PIER PLAN" which showed support piers (previously nonexisting) at 8 foot intervals beneath the 320 feet of concrete slab required to be replaced at warehouse S–102.

The superseding Drawing No. 27–23A showed an increased length of concrete slab to be removed and replaced at warehouse S–102, extending it to a point ten feet beyond door No. 29, and indicating a total distance of 350 feet (plus or minus). The figure "350′ 0″ ±" is set forth clearly on the section of that drawing showing the dock area wherein the concrete was required to be replaced, and the addition is included in the hatch marks on the drawing depicting the concrete replacement areas. The hatch-mark legend on the drawing carries the identification "Concrete to be replaced," and there also appears on drawing 23A just above the hatch-mark area the note "Extend new conc dock 10′–0″ beyond door No. 29," whereas drawing 23 contained no such note but showed replacement of concrete dock for 320 feet–0 inches to a point beyond door No. 28 but not extending to door No. 29. Superseding Drawing No. 27–24A made no change in the above-mentioned pier and foundation work, or the line at the end thereof, shown on Drawing No. 27–24. The Board found no dispute as to the clarity of the requirement in Drawing No. 27–23A for 350 feet of slab replacement, and you state that you overlooked the increased requirement inasmuch as you prepared your bid mainly by using the more detailed Drawing No. 27–24A which showed foundation work for only 320 feet of slab replacement.

It appears, therefore, that under the original drawings the piers and foundation work were specified along the full length of the portion of concrete slab scheduled for replacement. However, while drawing No. 23A showed an extension of the requirement for slab replacement to

approximately 350 feet, Drawing No. 24A did not show any increase in the requirements for piers. Subsequently, you were ordered to place additional piers under the additional 30 feet of replaced concrete slab in dispute. The Government recognizes the additional piers as extra work not covered by the contract, and is prepared to negotiate an equitable adjustment for the cost thereof. Your claim, however, is for the entire cost of the additional 30 feet of concrete dock and piers and foundation, and your appeal to the Board was from the contracting officer's rejection of your claim for the 30 feet of dock. The Board held that Drawing No. 27–23A clearly required the removal and replacement of 350 feet of concrete dock, and that there was no ambiguity in the contract documents as it was equally clear that Drawing No. 27–24A required piers for only 320 feet of the dock. Accordingly, since the Board did not find any basis for relief, it denied the appeal of your claim for additional compensation for the 30 feet of concrete dock.

You argued in your briefs before the Board that your failure to observe the additional length of concrete slab to be replaced according to Drawing No. 27–23A stemmed from and is justified by the fact that Drawing No. 27–24A, the detailed drawing from which the dock construction was computed and performed, showed only 320 feet of both dock and foundation piers. It was submitted that since the Government intended to replace an additional 30 feet of concrete dock, it should also have included four additional supporting piers on Drawing No. 27–24A, and it erred in not correcting that drawing. You explained that you failed to notice the substitution of a "5" on Drawing No. 27–23A for the "2" shown on Drawing No. 27–23, increasing the dimensions for the length of concrete slab to be replaced from 320 feet to 350 feet, and that your attention was not directed to that change either by Amendment No. 3 or by a note on Drawing No. 27-23A. You also contended that even though Drawing No. 27–23A provided that the concrete slab was to be replaced ten feet beyond warehouse door No. 29, calculations could not be based on that statement since dimensions were not given as to the door's location.

In addition to not observing the substitution of a "5" for the "2" it appears that you also failed to observe the addition of the symbol "±". Contrary to your contention that calculations could not be based on the provisions for concrete replacement to ten feet beyond door No. 29, inasmuch as no distance was shown for the door, these revisions changed the requirements for the dock slab replacement from an exact measurement to the existing distance between the building line at the ramp and a point ten feet beyond door No. 29. The 350 feet (plus or minus) shown on Drawing No. 27–23A, was an approximation of that distance. It is also to be observed that all of the drawings

included the admonition "NOTE ALL MEASUREMENTS must be verified at the building by the contractor."

In our opinion your contention, that you were not negligent, but justified, in relying on Drawing No. 27–24A in your computations of the concrete replacement work for the dock, is not valid. As stated by the Board, Drawing No. 27–24A does not designate the length of the concrete dock to be removed and replaced. The "General Notes" on that drawing specifically advises bidders, under the caption "Dock Repairs," to see Drawing No. 27–23 for location of dock repairs, and to remove existing dock and ramp *as shown on Drawing No. 27–23.* Although the "A" was not included in these and other references to Drawing No. 27–23A on Drawing No. 27–24A, the record does not indicate that you believed Drawing No. 27–23 (which shows 320 feet of dock slab replacement) to be still in effect or that you were misled in any manner by such omissions. The "A" was also omitted in the references on Drawing No. 27–23A to Drawing No. 27–24A. In addition, since all drawings were part and parcel of this contract the proper standard of interpretation is the meaning that would reasonably be attached to the documents as a whole, and where two drawings are pertinent, neither may be relied upon to the exclusion of the other. *Hol-Gar Manufacturing Corp.* v. *United States*, 169 Ct. Cl. 384 (1965); *John McShain, Inc. & John McShain* v. *United States*, 97 Ct. Cl. 493 (1942).

With respect to your contention that the contracting agency should have separately and specifically identified, either on the face of Drawing Nos. 27–23A and 27–24A or otherwise, each of the revisions which had been incorporated into those drawings, we are aware of no statute or regulation which imposes such an obligation. While you presented evidence before the Board which appears to have been directed to establishing a custom and usage to that effect in issuing Government drawings, the contracting officer denies that such a practice exists in GSA, and we note that none of the drawings you submitted to illustrate this point was issued by GSA. Additionally, we note that each of the drawings you submitted to illustrate this point was imprinted with informational block forms which included spaces for the insertion of descriptions of the revisions incorporated into the drawing, whereas no similar imprints were included on Drawing Nos. 27–23A and 27–24A. Finally, it would appear that your argument is directed to the existence of a practice when a drawing is issued which *revises* an existing drawing, whereas we are constrained to agree with the position of the contracting officer that under the terms of the subject amendment Drawing Nos. 27–23A and 27–24A must be viewed as drawings which replaced, and were to be substituted *in toto* for, Nos. 27–23 and 27–24. While you have invited our

attention to the provisions of FPR 1-2.207(b)(3), which require amendments to clearly state the changes made in the invitation, we construe that requirement as met in the instant case by the advice that Drawing Nos. 27-23A and 27-24A replaced 27-23 and 27-24. We therefore find no justification, in the Government's failure to specifically identify all differences between Drawing Nos. 27-23 and 27-23A, for your failure to thoroughly examine Drawing No. 27-23A and compute your bid price on the slab work as shown thereon.

For the reasons stated we find no ambiguity in the contract requirement for removal and replacement of 350 feet of concrete slab, and we therefore do not consider the decisions relative to ambiguous drawings which you have cited, including those discussed in your letters of June 5 and 8, 1970, as controlling. We must therefore conclude that as a matter of law the denial of your claim for the cost of construction of 30 feet of such slab was correct.

The documents enclosed with your correspondence are returned as requested.

[B-168629]

Bids—Two-Step Procurement—Technical Proposals—Qualification Requirements

The "Bidder's Technical Qualification Clause" included in the specifications contained in a Letter Request for Technical Proposals, issued as the first step of a two-step formally advertised procurement, that stipulated technical proposals would be accepted only from "those contractors who have manufactured and can demonstrate at an operating airfield a Solid State Conventional Instrument Landing System" due to the unique problems involved in adapting a two-frequency localizer to the system—considered engineering and not development work—was not restrictive of competition because one bidder could not meet the minimum requirements of the procurement, and the contracting agency's determination of its needs is not questionable in the absence of demonstrated fraud or clearly capricious action.

Bids—Two-Step Procurement—Use Basis

The utilization of commercially available components to meet the requirements for an Instrument Landing System stated in a Letter Request for Technical Proposals, issued as the first-step of a two-step advertised procurement, and to adapt a two-frequency localizer to the system, does not make the use of the two-step procurement method improper as the items used were not the "off-the-shelf" items that can be stated sufficiently definite in specifications to permit full and free competition without the technical evaluations contemplated by paragraph 2-502(a)(1) of the Armed Services Procurement Regulation regarding two-step procurement as neither the precise system nor the localizer to be adapted were available commercially. Furthermore, the more conventional form of advertising would delay delivery, and 10 U.S.C. 2304(a) requires a method of formal advertising instead of negotiation when feasible and practicable.

Bids—Multi-Year—Urgency of Procurement

Neither the anticipation by a manufacturer found nonresponsive to the "Bidder's Technical Qualification Clause" contained in the first step of a two-step multi-year procurement for an Instrument Landing System that it could meet the criteria of the clause at an unspecified future date, nor the urgency of the

procurement warrants cancellation of the multi-year procurement and the reissuance of the invitation for the first year's requirements. There is no assurance the manufacturer will qualify in time for the first year's requirements, and the fact that a procurement is urgently needed does not necessarily mean a multi-year procurement is inappropriate, and particularly where the use of the multi-year technique appears to offer more timely delivery than separate single-year contracts.

To Sellers, Conner & Cuneo, June 19, 1970:

Reference is made to letters dated December 10, 1969, and February 17, 1970, from AIL Division of Cutler-Hammer, Incorporated (AIL) and to your letters of March 16 and May 15, 1970, in behalf of AIL, protesting as unduly restrictive the specifications of Letter Request for Technical Proposals No. F33657-70-R-0166 (LRTP-0166) issued by Headquarters, Aeronautical Systems Division, Wright-Patterson Air Force Base, Ohio.

LRTP-0166, issued to six firms on October 9, 1969, as the first step of a two-step formally advertised procurement requested technical proposals for 63 solid-state Instrument Landing Systems (ILS). Paragraph 3 of the solicitation provided:

3. This procurement will be accomplished in two distinct steps: (1) solicitation, submission and evaluation of detailed technical proposals *WITHOUT PRICING* to determine acceptability of the products offered, and (2) issuance of a formal Invitation for Bids *ONLY* to those firms having acceptable technical proposals. Bidders who cannot comply with the attached Bidders Qualification Clause should not submit a Technical Proposal.

BIDDERS TECHNICAL QUALIFICATION CLAUSE
SOLID STATE INSTRUMENT LANDING SYSTEM

Technical proposals will be accepted only from those contractors who have manufactured and can demonstrate at an operating airfield a Solid State Conventional Instrument Landing System. The system must be comprised of at least the following components: A two-frequency (capture effect), dual equipment VHF localizer station; a single-frequency, dual equipment UHF glideslope station; and a VHF marker beacon station. The system must have successfully passed a flight check for Category I signal quality conducted by the FAA or other International Civil Aviation Organization recognized flight checking agency. Inspection of such a system by the Government will be conducted by Government engineers and Technicians. The inspection will be part of the evaluation of technical proposals. Further information on the arrangement for such an inspection is contained in Attachment Nr. 1.

By letter of October 24, 1969, AIL requested a waiver of the requirement that it "have manufactured and can demonstrate" a system which included a two-frequency (capture effect) localizer station. The request was denied by the Air Force on November 5, 1969. On November 20, 1969, AIL formally protested to the Air Force against this requirement. In denying AIL's protest on December 1, 1969, the Air Force replied:

Were the Air Force to remove any of the provisions of this clause, there would be no assurance that the desired systems would be received. In fact, the contract might become a development contract rather than a contract for the purchase of a modified commercial equipment.

On December 10, 1969, AIL protested to our Office contending, as it had contended to the Air Force, that the "Bidders Technical Qualification Clause" unnecessarily restricted competition. It is the position of AIL that the techniques for producing a two-frequency (capture effect) localizer are well-developed and commonly accomplished. Although AIL cannot satisfy the requirement that it "have manufactured and can demonstrate" such a localizer, AIL asserts that it can provide the equipment desired within the contract schedule. Thus, AIL views the qualification clause as a technically invalid requirement which has needlessly restricted competition to two or three firms, only one of which is American.

An ILS consists of three subsystems: a glideslope station; a localizer station and marker beacons. A glideslope station provides vertical guidance to an aircraft during its landing approach. The localizer station provides lateral or horizontal guidance to the aircraft and the marker beacons serve as "checkpoints" for the approach to the airfield. Additionally, a monitor system which samples the guidance signal, upon detecting a fault in the signal, takes appropriate action such as providing an alarm in the control tower or switching a system to a redundant unit. The systems currently in use by the Air Force are 15 years old and are in "Performance Category I." A Category I ILS is capable of safely guiding an aircraft to a decision height of 200 feet, at which the landing is aborted if the pilot cannot see the runway. Since Category I systems were deemed inadequate for use with the C–5A and C–141 aircraft, the instant procurement was initiated for Category II systems, which can guide aircraft to a decision height of 100 feet.

The Air Force also made the determination, with which AIL agrees; that the accuracy of the ILS would be increased if a two-frequency (capture effect) localizer were used instead of the less sophisticated single frequency localizer. However, AIL disagrees with the necessity for the further requirement of the Air Force that prospective bidders must have manufactured and must demonstrate an operating ILS system which includes a two-frequency localizer. The Federal Aviation Administration, with which this procurement was coordinated, advised the Air Force with regard to the demonstration requirement:

> Past experience has clearly demonstrated that the main problems (neglecting the siting) in an ILS are not in achieving individual unit performance, but in achieving overall system performance and stability. The most difficult potential problems such as improper antenna patterns, inadequate monitor response, unstable monitor indications under rain conditions, and rf leakage can only be observed with the signals being radiated and picked up by the monitor system and by flight inspection aircraft.
>
> Recent Federal Aviation Administration experiences in ILS procurement is associated with several contracts for Low Cost ILS equipment, specifically directed toward Category I performance. While we recognize that Category II

requirements are far more stringent, we believe our experience with Category I systems is in many ways representative. We currently have three active contracts for production quantities of ILS. All are for complete systems and one includes contractor installation (turnkey).

The first contract to be awarded was to Wilcox for 19 complete systems and 11 additional partial systems consisting of Localizer and Markers. The contract was awarded on 30 April 1968 with initial delivery specified to be eight months after award. Delays by the contractor delayed delivery until September 1969 when the first system was delivered to Tampa, Florida for FAA acceptance flight testing. Although the electronic equipment "looks good" and apparently meets the required performance, the localizer signal as measured in flight has as yet unexplained difficulties and the system is not yet accepted. We do not know the extent of modification necessary to correct the deficiencies which could not have been determined in any manner except by an installed system flown by a flight inspection aircraft.

A second contract was awarded on 19 February 1969 to AIL for 10 "Turnkey" instrument landing systems with the first installation in September 1969. These systems are commercial quality systems not built to normal government specifications, but are required to meet ICAO Category I performance. Although initial delivery was essentially on schedule the installations have had continuing problems which are associated with both the equipment and the system integration. The field installations have shown the necessity for design changes to achieve the desired performance.

Our third contract was awarded to AIL on 30 June 1969 and is for 99 systems with delivery starting September 1970. These systems are built to FAA specifications, covering Category I performance requirements. It is still too early in the contract to predict any problems; however, it should be noted that 14 months are scheduled to obtain the first delivery.

From the above, we believe that in order to have any hope of achieving an early delivery for Category II systems, the bid requirement for a field demonstration of systems meeting at least Category I requirement is valid.

In addition, there is reason to believe that a two frequency localizer, especially if operated on the quadrature principle, may present unique problems and therefore, demonstration of such a system would be advantageous.

The Air Force initially contemplated purchasing solid-state Category II systems with two-frequency localizers from firms which had manufactured and could demonstrate such systems. This approach was rejected as too restrictive since only two foreign firms, and no American firms, could meet such requirements. Instead, the Air Force concluded that a Category I system with two-frequency localizer would be upgraded to Category II performance through modification of the monitoring system. The requirement for the prior manufacture and demonstration of such a system was incorporated into the "Bidders Technical Qualification Clause." AIL submitted a technical proposal and demonstrated an ILS of its manufacture. By letter of February 10, 1970, the Air Force informed AIL that its proposal was considered nonresponsive since the localizer which was demonstrated was not of the capture effect type.

The initial administrative report of the Air Force, dated February 25, 1970, asserted:

Since the Air Force is not permitted to develop ILS systems [under the Federal Aviation Act of 1958, 72 Stat. 731 (codified in scattered sections of 49 U.S.C.)] it was decided to rely on industry development efforts over the past 15 years and purchase an ILS from one of the sources presently marketing a solid state, Category I ILS with dual frequency localizer. This would insure that no development work would be required on the basic ILS and only the monitor system

would need to be modified to upgrade an existing product to achieve Category I performance.

Your letter of March 16, 1970, responding to the administrative report, contended that the techniques for producing a two-frequency localizer are "a well developed technology that is fully understood and commonly accomplished." You maintained that the manufacture of this equipment required design engineering effort rather than development. We requested the Air Force to comment upon your letter, and in a supplemental report dated April 27, 1970, that Department stated:

> Although differing in language, we agree that the instant procurement action does not involve "development" as normally understood or defined in AFM 11-1. It does require application of qualified design engineering to produce an operating system from existing state-of-the-art components to achieve a stated level of performance.
>
> * * * * * * *
>
> The repeated implication [of your March 16 letter] is that "develop" is connected with the conception of an entirely new principle or technology, while "design" refers to hardware implementation of a known technology. In this sense, the distinction becomes academic when applied to the present procurement. All the technologies in question are then "developed." Capture effect (dual-frequency) localizer generating and radiating systems have been operating for many years; USAF's present AM/MRN-7 uses this principle. Integral monitoring of the type specified in this procurement is in fact being used by Thomson CSF (France) and by Standard Telephone and Cable's Sydney, Australia subsidiary. Far-field localizer monitors are in operation on a test basis in many installations, and are being procured by FAA on a production basis. * * *

On the present record, we must conclude that the Air Force no longer maintains that a development effort would be required of new producers of two-frequency localizer stations. It thus appears that the inclusion of the "Bidders Technical Qualification Clause" may not be justified as being necessary to prevent the Air Force from entering into a development contract prohibited by the Federal Aviation Act of 1958.

However, even if the effort required is characterized as design engineering, rather than development, there remains a substantial disagreement between AIL and the Air Force concerning the extent of the effort required and the necessity for the demonstration of a dual frequency capture effect ILS. You maintain that there is no requirement for a unique or novel localizer antenna design, and you advise that AIL is currently under contract to the Canadian Government to design and demonstrate an ILS which apparently will meet the requirements of the "Bidders Technical Qualification Clause" of LRTP-0166. Although the Canadian system will not be completed within the time permitted by the instant procurement, AIL asserts that its experience with the Canadian contract will enable it to produce a design which will meet the requirements of the Air Force.

The Air Force observes that although the various features of this equipment have been developed on a piecemeal basis, all the features are not available from one source, and the monitoring techniques required have not been previously integrated around one basic ILS system. In regard to the basic generating and radiating system, the Air Force determined that due to the interaction between an ILS and its physical environment, the only way to determine whether a bidder had an operable system of the dual frequency type desired was to require that he demonstrate such a system in actual operation. The instant procurement also required monitors more reliable and sophisticated than those available with any existing commercial ILS. Some minor modifications were also required in the peripheral components such as shelters and air conditioners.

The reported experience of the FAA indicates that even in the case of less sophisticated systems deficiencies in operation, particularly with respect to the localizer signal, have been encountered which could not have been determined in any manner except by testing of an installed system by flight inspection, and which require some measure of design modification. In the light of this, and of the further opinion expressed by the Chief of FAA's Approach and Landing Branch, that there is reason to believe that a two frequency localizer may present unique problems, we do not feel that we would be justified in objecting to the Air Force's conclusion that proposals would be accepted only from offerors who had produced and could demonstrate a system including a dual frequency capture effect localizer.

It is the long-established policy of our Office to accept an agency's determination of its needs, and such determinations will not be questioned by our Office in the absence of demonstrated fraud or clearly capricious action. 17 Comp. Gen. 554 (1938). While we object to the use of specifications which we consider to be unduly restrictive of competition, the fact that a particular bidder may be unable to meet the minimum requirements for supplying the Government's needs is not sufficient to warrant a conclusion that the specifications are unduly restrictive. 33 Comp. Gen. 586 (1954); 30 Comp. Gen. 368 (1951).

For the reasons stated, your protest is denied insofar as it is based upon the inclusion of the "Bidders Technical Qualification Clause" in LRTP–0166.

The Procurement Policy and Management Division, Aeronautical Systems Division, in approving the use of the qualification clause, referred to the procurement as one for "an off-the-shelf commercial ILS system." You contend that if this statement is accurate it was improper to have used two-step formal advertising, because the specifications for an "off-the-shelf" item would be sufficiently definite

to permit full and free competition without technical evaluation. Thus, the requirements of Armed Services Procurement Regulation (ASPR) 2–502(a)(1) for two-step formal advertising were not met and conventional formal advertising should have been used.

It is the administrative position that two-step formal advertising was used because the procurement contemplated various possible combinations of components into various possible system configurations resulting in differing operation and performance which had not been demonstrated by any firm at the time the solicitation was issued. It appears that the systems being procured will utilize commercially available components which are capable of being modified to meet Air Force requirements, but the precise systems being procured are not commercially available as "off-the-shelf" items. This is particularly true with respect to the localizer monitoring system, which has never been incorporated into an operating installation in the form specified by the Air Force. It was the judgment of the Air Force that the delay in delivery from less experienced sources fabricating a new design under conventional formal advertising might exceed the additional time required for the two-step method. It is true, as you point out, that the second step invitation for bids was issued on May 1, 1970, instead of late February 1970 as originally planned. It should be borne in mind, however, that the issuance of the second step invitation, as well as the opening of bids thereunder, was delayed pending possible resolution by our Office of your protest. The Air Force also chose a method of formal advertising instead of negotiation in view of the requirement of 10 U.S.C. 2304(a) that formal advertising be used "in all cases in which the use of such method is feasible and practicable under existing conditions and circumstances." While you agree with this principle, you reassert that the maximum competition contemplated by two-step formal advertising was not obtained in this procurement. In this regard, we have concluded that the required bidder qualifications cannot be considered to be arbitrary or unreasonable, and competition therefore was not unduly restricted. In view of the above, we find no legal basis for objecting to the use of two-step formal advertising in this procurement.

Finally, you maintain that the Air Force erred in procuring the ILS equipment on a multi-year basis. Your letter of May 15, 1970, states:

> * * * AIL has just learned upon issuance of the IFB May 1, 1970, that the present procurement is a 3-year multi-year procurement.

While the implication of this statement is that the multi-year nature of the procurement was not disclosed to prospective contractors until the second step invitation was issued, LRTP –0166, which was issued on October 9, 1969, provides in paragraph 4 thereof:

It is contemplated that the proposed procurement will be a multi-year (FY-70-71-72) procurement pursuant to ASPR 1-322.

This provision, which immediately follows the "Bidders Technical Qualification Clause," (the principal object of your protest) appears in the copy of the letter request which was among the enclosures to AIL's initial letter to our Office dated December 10, 1969. Since the first step solicitation clearly informed bidders of the multi-year character of the procurement, we believe that it would have been appropriate for any objections thereto to have been stated more promptly.

You contend that as a result of its Canadian contract, AIL anticipates being able to meet the criteria of the "Bidders Technical Qualification Clause," and thus to be eligible to bid on the Air Force requirements for Fiscal Years 1971 and 1972, if they were to be open to competitive procurement. Therefore, you request that if our Office determines the qualification clause is not objectionable, that we direct cancellation of the second step invitation and require the issuance of an invitation limited to the first year's requirements.

There is no indication that your assertion that AIL will meet the requirements of the qualifications clause in time for a Fiscal Year 1971 procurement is made in anything but good faith. However, such qualification is not assured, and we do not believe that we would be warranted in disturbing the instant procurement on the basis that on an unspecified future date, AIL may be in a position to compete. *Cf.* 40 Comp. Gen. 35, 38 (1960); 36 Comp. Gen. 809, 813 (1957).

You have also made the following argument:

* * *, it is pointed out that in a similar factual situation to the present one, the Comptroller General, in Comptroller General's Decision B-167386 (unpublished), expressed the view that *despite the urgency of the need for an ILS system, a multi-year procurement contract should be cancelled* upon evidence showing that negotiations with a bidder after due date for the Request for Proposals resulted in a multi-year procurement contract, and that negotiations should have been opened up to other bidders. *Such procedural error justified cancellation of the multi-year procurement contract.* By analogy, and although no contract has been awarded here, AIL asserts that the inconsistency between the Air Force arguments of urgent delivery requirements in attempts to justify the Technical Qualification Clause, while at the same time promulgating multi-year procurements of the ILS system is so patent as to require cancellation of the multi-year method of procurement in this instance unless the restrictive Technical Qualification Clause requirement is removed to permit otherwise qualified bidders to bid on such procurement. [Italic supplied.]

Your discussion implies that in our decision of December 22, 1969, 49 Comp. Gen. 402, our Office directed cancellation of a multi-year contract which resulted from improper procurement procedures. Our conclusion in that decision, however, was as follows:

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 cancelled, 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. [Italic supplied.]

The contract involved in our decision 49 Comp. Gen. 402 was not canceled "despite" the urgent need for the systems. Rather, the urgency of the need for the equipment weighed against cancellation. This contract, which is held by your client AIL, has not been canceled, although our latest information is that the agreement suggested by our decision of December 22, 1969, has not as yet been reached.

Moreover, multi-year procurement may not necessarily be inappropriate for urgently needed items. Paragraph 2 of LRTP–0166 stated in regard to the Government's probable delivery requirements:

Deliveries will begin 330 days after award at the rate of 4 each per month and continue at that rate until deliveries are complete.

Thus, it was anticipated that even those firms which met the "Bidders Technical Qualification Clause" would not commence delivery until approximately 11 months after award. It logically follows that similar delays in delivery would occur with new contractors, such as AIL, under future 1-year contracts. Therefore, the multi-year technique appears to offer more timely delivery than separate single-year contracts. In light of these considerations, we do not find the use of multi-year procurement improper.

Accordingly, your protest is denied.

[B–169476]

Defense Department—Teachers Employed in Overseas Areas—Leaves of Absence

The grant of leave without pay (LWOP) for approximately one year to overseas school teachers to return to the United States to study in an accredited college or university in furtherance of their professional growth may be authorized under 5 U.S.C. 5728, if the requirements of the statute for the completion of prescribed tours of duty and the execution of renewal agreements are complied with, and the Government may assume the expense of household effects storage for the period of the LWOP pursuant to 5 U.S.C. 5726, upon determination the storage is in the public interest or is appropriate for reasons of economy, with provision for recoupment of the expenses paid should a teacher fail to return to the overseas post upon expiration of the LWOP, and may pay the cost of the roundtrip travel for teachers and their dependents under the authority in 5 U.S.C. 5728, providing for the taking of leave.

To the Assistant Secretary of the Navy, June 22, 1970:

Your letter of March 18, 1970, states in effect that the Department of Defense is contemplating the adoption of a program of granting

leave without pay for approximately 1 year to overseas school teachers so they can return to the United States to study in an accredited college or university in furtherance of their professional growth.

In connection with such program questions have arisen as to (1) whether their household effects may be stored at Government expense during the period of absence without pay and (2) whether round-trip travel at Government expense may be authorized for the teachers and their dependents.

Concerning the storage question, you refer to 20 U.S.C. 905 (derived from the act of July 17, 1959), and the applicable regulations of the Department of Defense and Bureau of the Budget which specifically authorize storage of household effects of teachers during the summer recess period when at the end of the school year they agree in writing to serve the next school year. Also, you refer to section 6.7a(2) of Bureau of the Budget Circular No. A-56, Revised October 12, 1966, which quotes the statutory conditions for entitlement to storage and related transportation expenses of household goods and personal effects of employees assigned to permanent duty stations outside the continental United States. Such statutory conditions as set forth in 5 U.S.C. 5726 are as follows:

(1) the duty station is one to which he cannot take or at which he is unable to use his household goods and personal effects; or
(2) the head of the agency concerned authorizes storage of the household goods and personal effects in the public interest or for reasons of economy.

We assume from your letter that it is desired to make a determination under condition (2) quoted above but doubt exists whether this provision would be applicable in view of the specific authorization contained in 20 U.S.C. 905 which limits storage of household effects of overseas teachers to the summer recess period.

The quoted provisions of 5 U.S.C. 5726 above were derived from the act of September 6, 1960, 74 Stat. 796, amending the Administrative Expenses Act of 1946, as amended. The enactment date of such amendment was subsequent to the act of July 17, 1959, 20 U.S.C. 905. Moreover, the 1960 amendment is general in its application and clearly storage could be authorized under circumstances where a duty station outside the continental United States is one to which a teacher could not take or at which he could not use his effects. Our view is that the provisions of 20 U.S.C. 905 do not restrict the head of the agency in making a determination that storage of household effects for an overseas teacher is in the public interest or is appropriate for reasons

of economy. Apparently, a determination of public interest in situations such as here involved would be related to the recruitment of overseas teachers and to their obtaining desirable training for future assignments. And we assume consideration will be given to appropriate provision being made for recoupment by the United States of storage expenses paid in those instances where a teacher might fail to return to his overseas post upon expiration of his period of leave without pay. Accordingly, we see no objection to authorizing the storage under the circumstances described.

Turning now to the question of round-trip travel at Government expense for the teachers granted leave without pay, it is indicated that as a condition to the Government paying such expenses the teachers would be required to execute renewal transportation agreements prior to departure similar to the normal situations where teachers are returning to the United States for the purpose of taking leave after completion of prescribed tours of duty outside the United States (5 U.S.C. 5728).

We understand that ordinarily overseas teachers are authorized to return on leave (leave without pay) to the United States after completion of 2-year tours of duty. However, you point out the directives of the Department of Defense permit round-trip travel at Government expense of teachers after the first school year for the purpose of attending an accredited college in a leave without pay status. Such travel is contingent upon teachers signing a renewal agreement for another 2-year period.

The statute, 5 U.S.C. 5728, and the regulations issued thereunder contain no restrictions as to how much leave may be granted or whether it should be paid leave or leave without pay. As long as the requirements of the statute as to completion of prescribed tours of duty and execution of renewal agreements are complied with, we see no reason why travel expenses may not be authorized for a reasonable grant of leave without pay, such as here. Actually the program for attending an accredited college during the summer recess is similar to the new proposal.

Your questions are answered accordingly.

[B-169522]

Family Allowances—Separation—Necessitated by Military Duties Requirement

An enlisted man serving overseas on an "all others" tour that entitled him to family separation allowances, type I and type II under 37 U.S.C. 427, when

divorced and ordered to pay alimony and to support his former wife and their minor child in her custody and remarried to another service member with whom he resides near his overseas station, is not entitled on the basis of separation from his child to either allowance and any payments on the basis of their separation should be recovered. Although the child continues to be the member's dependent, their separation resulted from the divorce decree granting her custody to the mother and not from his military duties, the requirement for entitlement to the type I allowance, and the type II allowance is not payable to the member as the former wife's household is not subject to his management and control.

To Major J. P. Barrow, Department of the Army, June 22, 1970:

Further reference is made to your letter dated January 9, 1970, with enclosures, forwarded here by letter of March 24, 1970, from the Office of the Comptroller of the Army (Department of Defense Military Pay and Allowance Committee Number D.O. A–1074), in which you request an advance decision as to the propriety of payment of family separation allowance, type I and/or type II, to Sergeant Major Benjamin F. Seago, SSAN 254–32–1418.

Permanent change-of-station orders dated July 14, 1967, reassigned Sergeant Seago from Vietnam to Europe effective August 1, 1967, and indicated that he had elected to serve an "all others" tour, and that travel of dependents to the new duty station was not authorized. The file indicates that this 2-year tour of duty was later extended for 1 year with the original tour election continued in effect.

The member was divorced from his wife, Genevia, by decree of the Superior Court, Whitfield County, Georgia, on September 9, 1968. He was ordered to pay alimony and support to his former wife, in addition to paying for the support of a minor child, Sharon Diane Seago. Custody of the child was awarded to Genevia Seago, with visitation rights granted to her former husband. To substantiate the payment of family separation allowances, on November 15, 1968, Sergeant Seago signed a statement to the effect that his dependents lived in Dalton, Georgia, and that their residence was subject to his management and control.

The member is reported to have married another service member and apparently resides with her near his duty station, Chievres Air Base, APO New York 09088. Memorandum 210–3, Headquarters Command, United States Army Element, Supreme Headquarters Allied Powers Europe, dated October 15, 1969, indicates that suitable quarters do not exist at that station for members of Sergeant Seago's rank.

You say the question involved is the entitlement of family separation allowance, type I and type II, when a member who was previously entitled to these allowances as a result of an obligation to furnish

support and/or a home for a dependent of his former marriage, marries a female member of a uniformed service.

You express the opinion that the current marriage has not altered Sergeant Seago's prior obligation to furnish support and a home for the dependent child of his former marriage. Since the member continues to be unaccompanied by this minor child who lives in the continental United States, you say it appears that Rule 2, Table 3–3–1, and Rule 2, Table 3–3–4 of the Department of Defense Military Pay and Allowance Entitlements Manual would apply. However, since the regulations are not clear regarding this matter, you state that you have suspended Sergeant Seago's entitlement to family separation allowances, pending our decision. You have enclosed a voucher for $372, dated January 13, 1970, for family separation allowances, type I and type II, for the period from September 27, through December 31, 1969, which period presumably is after Sergeant Seago's remarriage.

Section 427(a), Title 37, United States Code, provides as follows:

§ 427. Family Separation Allowance.

(a) In addition to any allowance or per diem to which he otherwise may be entitled under this title, a member of a uniformed service with dependents who is on permanent duty outside of the United States, or in Alaska, is entitled to a monthly allowance equal to the basic allowance for quarters payable to a member without dependents in the same pay grade if—

(1) the movement of his dependents to his permanent station or a place near that station is not authorized at the expense of the United States under section 406 of this title and his dependents do not reside at or near that station; and

(2) quarters of the United States or a housing facility under the jurisdiction of a uniformed service are not available for assignment to him.

In decision B–161781, August 9, 1967, we said as follows:

The legislative history pertaining to family separation allowance discloses that the purpose of the allowance authorized by section 427(a), title 37 U.S.C., is to compensate a member for the expense of procuring public quarters for himself during periods of enforced separation from his dependents, where Government quarters are not available for assignment to him at his overseas station. Although it is not necessary that a member and his dependents reside together immediately prior to his transfer overseas in order to qualify for such allowance, it is our view that the allowance is not authorized if the family separation does not result from military orders. A family separation which is the result of a divorce decree which grants custody of a member's minor children to his divorced wife, does not meet the requirement that the member is separated from his dependents as a result of military orders. See 43 Comp. Gen. 332–350 (1963); 44 *id.* 572–574. (1965).

The member's duty to support his minor child, a dependent as defined in section 401, Title 37, United States Code, is unaffected by his subsequent remarriage. However, Sergeant Seago's former wife was awarded custody of the child, and consequently, he was not entitled to have her live in his household. As the separation results from the divorce decree which granted custody to his former wife, and is not

caused by his military duties, the member is not entitled to family separation allowance, type I, in these circumstances.

Section 427(b)(1), Title 37, United States Code, provides as follows:

(b) Except in time of war or of national emergency hereafter declared by Congress, and in addition to any allowance or per diem to which he otherwise may be entitled under this title, including subsection (a) of this section, a member of a uniformed service with dependents (other than a member in pay grade E-1, E-2, E-3, or E-4 (4 years' or less service)) who is entitled to a basic allowance for quarters is entitled to a monthly allowance equal to $30 if—

(1) the movement of his dependents to his permanent station or a place near that station is not authorized at the expense of the United States under section 406 of this title and his dependents do not reside at or near that station;

The legislative history of section 427(b), Title 37, of the United States Code shows that the purpose of the legislation is to compensate a serviceman for the added household expenses that arise by reason of his separation from his dependents as a result of his military duty assignment. In view of the legislative history, we have held consistently that unless the record shows that the member is maintaining a household for his dependents subject to his management and control, so that the attendant liability and responsibility will rest on him, the $30 monthly family separation allowance is not payable. The residence must be the member's and not that of someone else. 43 Comp. Gen. 332, 350 (1963), answer to question 23; 47 Comp. Gen. 431; *id.* 583 (1968); 48 Comp. Gen. 525 (1969).

Sergeant Seago's statement of November 15, 1968, completed at Chievres Air Base, APO New York 09088, indicated that his dependents in Dalton, Georgia, lived in a residence which was subject to his management and control. The divorce decree terminated the right and duty of the member to maintain a household for Genevia Seago, who was no longer his wife, and for his child, the court having awarded custody of the child to her mother. As the court-ordered financial support provided by Sergeant Seago did not subject his former wife's household to his management and control, and the separation of the member and his daughter was not caused by his military duties, there is no basis for the payment of family separation allowance, type II.

Paragraph 30311b, Department of Defense Military Pay and Allowances Entitlements Manual, appears clear in its statement that—

Unless the records show otherwise, a member's spouse and children are presumed to be a part of his household. Do not consider a dependent as a part of a member's household if:

* * * * * * *

(3) the sole dependent is a wife legally separated, a child in the legal custody of another person, * * *.

There is no entitlement to family separation allowance, type I or type II, as a result of the member's current marriage, as his wife presumably resides with him and is a service member.

Consequently, Sergeant Seago was not entitled to family separation allowance, type I or type II, for the period covered by the voucher presented and it will be retained in this Office.

The statements made in your letter indicate that it was the administrative view that Sergeant Seago was entitled to family separation allowance, type I and type II, and that he was paid these allowances on account of his child from the date of his divorce until his remarriage when payment was suspended. Presumably, that view was predicated on the fact that, as a member serving the all others tour, he was not entitled to transportation of dependents to his overseas duty station.

If, however, the child was in the custody of her mother during that period, as provided by the divorce decree, it is our view that the separation must be viewed as in fact resulting from the divorce decree, the type of tour which Sergeant Seago was serving no longer being material, and as explained above, he was not entitled to these allowances because of his separation from the child during such period. Therefore, any payments that were made on that basis were erroneous and should be recovered.

[B-169747]

Veterans Administration—Contracts—Medical Schools—Services of Medical Specialists

To enable the Veterans Administration to obtain by contract the professional services of scarce medical specialists and thus avoid impairing the effectiveness of the authority in 38 U.S.C. 4117 to contract with medical schools and clinics for such services, the term "clinic" may be interpreted to include any medical organization which is capable of contracting for and furnishing medical specialist services at Veterans Administration facilities, nor are the services of specialists who are not physicians precluded under section 4117, as nothing in the language or legislative history of the section requires the term "medical specialist" to be defined to encompass only physicians, and the term may be construed to include any professional or technician who performs specialist services related to providing medical care and attention.

To the Administrator, Veterans Administration, June 24, 1970:

We refer to your letter of May 4, 1970, requesting our decision on two matters involving the contracting authority of the Veterans Administration under sections 213, 4114(a)(1)(B) and 4117 of Title 38, United States Code.

Your first question concerns section 4117 which provides:

> The Administrator may enter into contracts with medical schools and clinics to provide scarce medical specialist services at Veterans' Administration facilities (including, but not limited to, services of radiologists, pathologists, and psychiatrists).

You point out that neither the law (Public Law 89-785, approved November 7, 1966) nor the legislative history thereof contains a definition of the term "clinic" or an indication of how that term may have been understood and used by the Congress when enacting such provision. You believe that a restrictive definition of the term "clinic"—e.g., an institution equipped for diagnosis and treatment of outpatients—would defeat the objective of securing the personal services of scarce medical specialists to be performed at Veterans Administration facilities. Therefore, you suggest that the term be defined to include any organization which is capable of contracting for the furnishing of scarce medical specialist services.

The purpose of section 4117 is to enable the Veterans Administration to procure the services of medical specialists which, due to scarcity, otherwise would be difficult or impossible to obtain. Since a strict definition of the term "clinic," as set forth in our example above, apparently would impair the effectiveness of such legislation, we believe that the term reasonably may be interpreted to include any *medical* organization which is capable of contracting for and furnishing the services in question.

Your second inquiry concerns subsection 4114(a)(1)(B) of 38 U.S.C. which provides:

> § 4114. Temporary and part-time appointments; residencies and internships.
> (a)(1) The Administrator, upon the recommendation of the Chief Medical Director, may employ, without regard to civil service or classification laws, rules, or regulations—
>
> * * * * * * *
>
> (B) physicians, dentists, nurses, and other professional and technical personnel on a fee basis.

You question whether the authority granted under that subsection may be used in conjunction with the general contracting authority provided by 38 U.S.C. 213 so as to permit the Veterans Administration to contract for the personal services of the professional and technical personnel referred to in subsection 4114(a)(1)(B). We understand that the primary reason for seeking such authority is to enable the Veterans Administration to obtain, by contract, the personal services of various scarce medical specialists who are not physicians. We understand that the Veterans Administration has assumed that the services

of specialists who are not physicians may not be procured under section 4117, discussed above.

We find nothing in the language of section 4117 or the legislative history thereof which requires that the term "medical specialist" be defined to encompass only physicians. Rather, it is our opinion that the term may be construed as including any professional or technician who performs specialist services related to providing medical care and attention. Question 2 is answered accordingly.

[B-164515]

Compensation—Wage Board Employees—Rates—Wage Surveys to Establish

The Monroney Amendment providing for the administration of wage schedules under 5 U.S.C. 5341(c), in authorizing that when insufficient comparable positions exist in private industry in a particular area to establish rates for Federal positions, the rates shall be established *in accordance with* rates paid in the nearest wage area, permits the Civil Service Commission charged with the administration of the amendment considerable latitude in determining how the appropriate accord is to be accomplished. Therefore, the Commission's changed interpretation of the amendment and its implementation by the use of wage data obtained outside a given area as though obtained within the given area to avoid the inequities that result from limiting the use of data to the classes of positions for which sought is acceptable.

To the Chairman, United States Civil Service Commission, June 25, 1970:

By letter of June 1, 1970, you requested our concurrence in regulations which the Civil Service Commission proposed to issue for the administration of wage schedules under 5 U.S.C. 5341(c) added by section 4 of Public Law 90–560, commonly referred to as the Monroney Amendment.

You point out that although the statute has been in effect since October 12, 1968, the required regulations have not been issued and there has been no implementation of its provisions; that is, no wage schedules affected by the statute have been issued.

After receipt of your letter, we received a letter from the Department of Defense on the subject of the proposed regulations. From information contained in the two letters it appears that there is a sharp difference of opinion between the Commission and the Department as to the appropriate rationale for implementing the provisions of the Monroney Amendment, from the standpoint both of legal requirements and practical consequences.

The Amendment, 5 U.S.C. 5341(c), provides that:

(c) When a wage survey is made for the purpose of establishing wage schedules for employees to whom this section applies, the agency or agencies making

the survey shall determine whether there exists in the wage survey area a sufficient number of comparable positions in private industry to establish wage schedules for the principal types of Federal positions for which the survey is made. The determination shall be in writing and shall take into consideration all relevant evidence, including evidence submitted by employee organizations recognized as representative of employees in the area. When it is determined that there is an insufficient number of comparable positions in private industry to establish such wage schedules, the agency or agencies making the survey shall establish rates for such positions in accordance with rates paid for positions in private industry in the nearest wage area which is determined by the agency or agencies involved to be most similar in the nature of its population, employment, manpower, and industry to the wage area for which the survey is being made. The Civil Service Commission shall prescribe regulations necessary for the administration of this subsection.

The basic question at issue is (1) whether the quoted provision either requires or permits wage data obtained outside of a given wage area to be used as though they were obtained within the given area or (2) whether such data obtained outside of an area may properly be used only for purposes of establishing wage rates for the classes of positions for which the data were sought.

You state that the Commission initially assumed that the statute required the establishment of single-position rates identical with the "prevailing rate" for such positions in the outside area. However, upon reconsideration you have concluded that the second alternative posed above is erroneous and that the first is consistent with the intent of the statute. Commission instructions, at paragraph i(4) of Subchapter S–5, section 12, headed "Consideration of Wage Rates from Outside the Wage Survey Area," FPM Supplement 532–1, reflected that initial interpretation, as follows:

(4) Addition to wage schedule. The out-of-area rates thus established are added to the regular wage schedule for the wage area under the heading, Out-of-Area-Rates, showing the rates and the series and grade levels to which applicable.

The Department of Defense contends that this initial interpretation by the Commission correctly reflects the intent of the statute and that to change the interpretation at this date will pose serious problems in implementation and will prove costly. The Commission, however, in connection with the issuance of its formal implementing regulations has discarded its previously held views in the matter, and now is of the opinion that out-of-area "prevailing rates" should be included as part of the data used in arriving at the wage schedule in exactly the same manner as is done with the prevailing rates obtained in a single wage area. The proposed regulations reflect the Commission's currently held views.

We understand from information presented by your office that if the present Commission instructions were applied in Oklahoma City, for example, an aircraft mechanic would receive approximately one dollar

more an hour than for the same level of work elsewhere in Oklahoma City and 40 to 50 cents an hour more than an aircraft mechanic working for the Federal Government in Tulsa, the area from which wage data was obtained. This occurs because the higher Tulsa rate would be applied directly in Oklahoma City but in Tulsa such rate would be used only as one datum along with many others bearing upon pay rates established in the local Tulsa area. It was because of such seemingly gross pay inequities that the Commission realized a different approach is desirable.

Taking into account the fact that the Commission itself initially construed the statute in accordance with the views being put forth by the Department of Defense and recognizing that the legislative history contains ample apparent support for those views with little specifically in support of a contrary view, we would agree that the Department makes out a most persuasive case for concluding that the regulations being proposed by the Commission are contrary to law.

However, for the reasons outlined below, we are not disposed toward concluding that the Commission—which has been directed to prescribe the regulations necessary for administration of the provisions in question—is without authority to issue the regulations as proposed.

The setting of wage schedules is a complex detailed process and the specific overall procedures to be followed in their establishment is nowhere spelled out in the law. Two basic concepts are inherent in the provisions for administrative establishment of Federal employee wage schedules: (1) that Federal wages should be comparable to wages for similar types work being paid by private employers in the area covered by a wage schedule, and (2) that there should be an orderly progression of higher pay within the wage schedule for the increasing difficulty of tasks performed.

While these general concepts may be precisely stated, there is no single precise manner in which accumulated wage data must, or indeed can, be utilized to achieve what might be termed the one proper result. In the final analysis the stated concepts seek fundamentally to provide for equitable treatment of Federal wage board employees. In utilizing collected wage data to establish a workable wage schedule, it is obvious that many compromises are required to arrive at a proper balance of operative factors. As the agency charged with the responsibility for prescribing regulations governing administration of the Monroney Amendment provisions, the Civil Service Commission is entitled to considerable latitude in determining what compromises are required and how they should be effected.

The two procedures for dealing with out-of-area prevailing rates at

issue here are in themselves each a compromise with the basic concepts stated above. To pay a rate for a particular job in one area equivalent to the rate for that job in another area might well be, as shown by the Oklahoma City example mentioned above, a distortion of the local comparability desired. On the other hand, to use the outside rate in the computation of the local wage schedule may similarly distort the desired local comparability.

We are not in a position to determine which of the distortions suggested is the least onerous. We are of the opinion, however, so long as the governing statute does not spell out the precise formula to be followed, that the Commission may properly make the choice.

The statute with respect to this issue provides for two things. First, it authorizes where necessary, the use of data from wage areas outside of the one in which a particular wage schedule is being established. Secondly, it provides that rates for the positions involved shall be established in accordance with the rates paid in the outside area. The exact words of the statute, in pertinent part, are:

> * * * the agency or agencies making the survey shall establish rates for such positions *in accordance with* rates paid for positions in private industry in the nearest wage area * * *. [Italic supplied.]

If the statute were phrased in terms of "establish[ing] rates for such positions" *at* rather than *in accordance with* "rates paid in * * * the nearest wage area," it would have more precisely spelled out the procedure to be followed. However, by requiring only that they be established in accordance with the outside rates, room is provided for the exercise of discretion as to how the appropriate accord is to be determined.

We have recognized elsewhere in this opinion that the legislative history of the Monroney Amendment strongly suggests that the amendment was understood to provide for setting individual pay rates based on out-of-area data. At the same time, however, the history makes clear that the underlying purpose being furthered was to provide a means for dealing with the problem involved in a manner that was equitable, all within the framework, apparently, of a less than perfect understanding of the full procedures under which wage schedules are established.

In this context, we hesitate to insist that a somewhat loosely worded statute must be construed according to what in the final analysis is the secondary intention expressed in its history where such construction would operate to do violence to the basic considerations of equity which underlie the statutory provisions in the first instance.

Accordingly, and with full recognition that there is considerable

basis for the original position of the Commission (the current view of the Department of Defense), we offer no objection to the establishment of wage schedules in the manner set forth in the proposed regulations.

[B–169933]

Pay—Retired—Annuity Elections for Dependents—More Than One Application for Change

The fact that an Army major retired on May 1, 1969, reduced the annuity elected for his wife under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446, on May 5, 1969, does not preclude him from withdrawing from the plan on June 4, 1969, as nothing in the law or legislative history of the act restricts a retired member to one of the options provided in 10 U.S.C. 1436(b). A member may apply for any number of reductions so long as each involves a smaller annuity, and he may withdraw from the plan at any time, a reduction or withdrawal becoming effective the first day of the seventh calendar month after application. Therefore, the annuity reduction under 10 U.S.C. 1436(b)(1) became effective December 1, 1969, and the officer's withdrawal from the plan pursuant to 10 U.S.C. 1436(b)(2) on January 1, 1970.

To Major R. W. Tudor, Department of the Army, June 30, 1970:

Further reference is made to your recent letter which was forwarded here by letter dated May 27, 1970, of the Office of the Comptroller of the Army, requesting an advance decision as to the propriety of payment of a voucher for $224.44 in favor of Colonel Ellis H. Mist, retired, covering deductions for the cost of an annuity under the Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446, for the period from January 1, 1970, through February 28, 1970. Your request has been assigned DO No. A–1080 by the Department of Defense Military Pay and Allowance Committee.

On January 3, 1962, Colonel Mist elected option 1, with option 4, at one-half reduced retired pay to provide an annuity for his wife under the plan. He retired under the provisions of 10 U.S.C. 1201 effective May 1, 1969, and cost deductions of $180.58 per month were established for payment of an annuity in the amount of $514.92 per month.

By letter dated May 5, 1969, Colonel Mist made application for reduction of the annuity to $320 per month pursuant to 10 U.S.C. 1436(b)(1). On June 4, 1969, he applied for withdrawal from participation in the plan.

The application for reduction became effective December 1, 1969, and cost deductions of $112.22 per month have been made from Colonel Mist's retired pay since that date. You say that his request dated June 4, 1969, if valid, would become effective January 1, 1970. You expressed doubt as to whether more than one application is permis-

sible under the reduction and withdrawal provision of 10 U.S.C. 1436(b) and if only one election is authorized, you ask whether Colonel Mist may now be given an opportunity to change his May 5, 1969, election of a reduction to withdrawal to be effective December 1, 1969.

The present provisions of 10 U.S.C. 1436(b) were enacted into law by clause (6) of section 1 of the act of August 13, 1968, Public Law 90 485, 82 Stat. 753. The purpose of that act was to encourage greater participation in the plan by giving it more flexibility as to elections to participate, or modification or revocation of prior elections, and, in the case of retired members, to permit reduction of the amount of the annuity elected or withdrawal from participation in the program. There is nothing in the law or its legislative history which restricts a retired member to only one of the options provided in 10 U.S.C. 1436(b). He may apply for any number of reductions in the annuity so long as each application involves a smaller annuity than the previous one and is not for less than the prescribed minimum. He may file an application to withdraw from further participation in the plan at any time. However, an application for reduction or withdrawal does not become effective until the first day of the seventh calendar month beginning after he applies for a reduction or withdrawal.

The foregoing views are not inconsistent with that expressed in our decision of November 21, 1968, 48 Comp. Gen. 353, that "a proper application for a reduction in the amount of an annuity or a withdrawal from participation in the plan received by proper administrative authority, may not thereafter be changed or revoked." An application for a reduction in the amount of an annuity must be given full effect. However, this does not prevent an application for a further reduction in the amount of the annuity—within the statutory limitation—or for withdrawal from participation in the plan, from taking effect at a later date.

In the case of Colonel Mist, his application dated May 5, 1969, was a valid irrevocable election to reduce the amount of the annuity under 10 U.S.C. 1436(b)(1) and reduced cost deductions were required effective December 1, 1969. His application dated June 4, 1969, for withdrawal from participation in the plan was a valid irrevocable election under 10 U.S.C. 1436(b)(2) which became effective January 1, 1970. Subsequent to that date no deductions for the cost of an annuity under the plan were proper. Accordingly, the voucher, which is returned, may be paid and appropriate action should be taken to refund to him any additional annuity cost deductions which may have been made from his retired pay since March 1, 1970.

TABLE OF DECISION NUMBERS

	Page
B-116314, B-117272, Sept. 22, 1969	189
B-119959, Mar. 9, 1970	545
B-125183, July 22, 1969	44
B-127036, Sept. 3, 1969	150
B-132740, Oct. 2, 1969	219
B-133044, Mar. 11, 1970	572
B-133972, Oct. 14, 1969	233
B-136916, May 28, 1970	806
B-140560, Jan. 7, 1970	416
B-145094, Sept. 23, 1969	202
B-145455, May 5, 1970	755
B-145471, Aug. 15, 1969	101
B-148324, Apr. 9, 1970	687
B-148946, Aug. 19, 1969	104
B-149685, July 14, 1969	32
B-152420, Mar. 30, 1970	621
B-154400, July 14, 1969	38
B-154427, Sept. 5, 1969	162
B-155458, May 26, 1970	800
B-157179, Jan. 5, 1970	411
B-157425, Jan. 9, 1970	425
B-158458, May 18, 1970	782
B-159429, Sept. 16, 1969	171
B-159680, May 27, 1970	804
B-160096, Mar. 20, 1970	611
B-160591, June 5, 1970	833
B-160808, Apr. 2, 1970	656
B-162621, Apr. 17, 1970	700
B-162622, Sept. 19, 1969	173
B-163026, Aug. 5, 1969	59
B-163336, Aug. 22, 1969	113
B-163450, Feb. 24, 1970	510
B-164281, Mar. 23, 1970	618
B-164515, June 25, 1970	873
B-164842, Aug. 8, 1969	80
B-165110, Nov. 21, 1969	329
B-165179, B-165800, Oct. 10, 1969	224
B-165369, B-165947, July 11, 1969	20
B-165484, Aug. 7, 1969	77
B-165542, July 11, 1969	28
B-165543, June 11, 1970	837
B-165795, July 2, 1969	1
B-165852, July 24, Sept. 3, 1969	48, 152
B-165973, June 18, 1970	853
B-166056, Oct. 31, 1969	287
B-166137, Sept. 19, 1969	176
B-166151, July 2, 1969	6
B-166170, Nov. 24, 1969	330
B-166372, July 30, 1969	58
B-166468, July 3, 1969	9
B-166532, Apr. 7, 1970	668
B-166604, Aug. 5, 1969	72
B-166673, July 29, 1969	51
B-166725, Aug. 11, 1969	88
B-166727, July 15, 1969	41
B-166766, Oct. 15, 1969	244
B-166795, July 3, 1969	12
B-166806, Oct. 22, 1969	266
B-166846, Nov. 19, 1969	324
B-166849, Oct. 27, 1969	274
B-166881, Sept. 22, 1969	191
B-166883, July 29, 1969	54
B-166895, Feb. 2, 1970	459
B-166899, Nov. 25, 1969	352
B-166958, July 9, 1969	15
B-166969, Sept. 2, 1969	139
B-166999, Aug. 25, 1969	120
B-167008, July 9, 1969	17
B-167016, Sept. 22, 1969	195
B-167020, Aug. 26, 1969	124
B-167025, Mar. 5, 1970	534
B-167061, July 9, 1969	18
B-167068, Feb. 10, 1970	480
B-167075, Feb. 3, 1970	463
B-167150, Sept. 26, 1969	204
B-167175, Oct. 13, 1969	229
B-167185, Sept. 3, 1969	156
B-167188, Oct. 24, 1969	272
B-167190, Nov. 14, 1969	309
B-167194, Aug. 29, 1969	135
B-167198, Aug. 12, 1969	97
B-167262, Aug. 20, 1969	107
B-167264, Sept. 29, 1969	206
B-167297, Mar. 2, 1970	527
B-167305, Oct. 31, 1969	289
B-167307, Mar. 30, 1970	625
B-167353, Dec. 4, 1969	369
B-167380, Dec. 5, 1969	377
B-167382, Oct. 16, 1969	251
B-167385, Sept. 2, 1969	145
B-167386, Dec. 22, 1969	402
B-167407, Aug. 8, 1969	85
B-167430, Sept. 12, 1969	167
B-167433, Dec. 9, 1969	385
B-167473, Nov. 13, 1969	295
B-167479, Nov. 13, 1969	299
B-167492, Aug. 12, 1969	98
B-167495, Sept. 2, 1969	147
B-167502, Oct. 16, 1969	255
B-167533, Aug. 22, 1969	116
B-167570, Feb. 5, 1970	471
B-167579, Oct. 16, 1969	257
B-167585, Apr. 29, 1970	749
B-167595, Nov. 24, 1969	335

	Page
B-167599, Aug. 26, 1969	129
B-167614, Sept. 30, 1969	209
B-167627, Sept. 22, 1969	199
B-167639, Sept. 19, 1969	186
B-167641, Sept. 11, 1969	164
B-167644, Nov. 17, 1969	311
B-167647, Nov. 25, 1969	356
B-167665, Apr. 20, 1970	702
B-167676, Mar. 17, 1970	588
B-167687, Nov. 13, 1969	303
B-167696, Jan. 20, 1970	437
B-167759, Dec. 1, 1969	359
B-167760, Oct. 2, 1969	222
B-167769, Sept. 30, 1969	211
B-167771, May 14, 1970	768
B-167804, Mar. 11, 1970	577
B-167823, Sept. 30, 1969	216
B-167830, Oct. 31, 1969	291
B-167858, Oct. 23, 1969	269
B-167868, Apr. 22, 1970	718
B-167874, Nov. 13, 1969	305
B-167903, Oct. 13, 1969	231
B-167936, Dec. 19, 1969	398
B-167944, Nov. 24, 1969	347
B-167946, Feb. 17, 1970	496
B-167961, Oct. 16, 1969	263
B-167964, Nov. 17, 1969	315
B-167975, Dec. 8, 1969	383
B-167984, Dec. 3, 1969	364
B-168006, Jan. 19, 1970	431
B-168024, Oct. 27, 1969	284
B-168025, Dec. 15, 1969	395
B-168083, Jan. 23, 1970	450
B-168096, Feb. 9, 1970	476
B-168099, Nov. 17, 1969	320
B-168157, Mar. 3, 1970	532
B-168177, Dec. 29, 1969	407
B-168223, Mar. 10, 1970	550
B-168236, Dec. 1, 1969	361
B-168238, Jan. 20, 1970	440
B-168274, June 11, 1970	840
B-168278, Mar. 30, 1970	639
B-168322, Jan. 19, 1970	434
B-168338, Jan. 28, 1970	453
B-168345, Jan. 13, 1970	427
B-168364, Jan. 20, 1970	444
B-168383, Mar. 5, 1970	538
B-168403, Feb. 19, 1970	507
B-168473, Mar. 5, 1970	541
B-168518, Mar. 10, 1970	553
B-168519, May 14, 1970	772
B-168521, Jan. 7, 1970	417
B-168541, Mar. 11, 1970	578
B-168589, Feb. 11, 1970	489
B-168591, Apr. 21, 1970	707
B-168621, Mar. 18, 1970	596
B-168629, June 19, 1970	857
B-168635, Mar. 20, 1970	613
B-168642, Feb. 17, 1970	499
B-168644, Jan. 21, 1970	446

	Page
B-168646, May 6, 1970	761
B-168650, Mar. 11, 1970	581
B-168661, Mar. 9, 1970	548
B-168667, Jan. 16, 1970	429
B-168669, Mar. 30, 1970	646
B-168674, Feb. 10, 1970	483
B-168686, Mar. 10, 1970	558
B-168697, Mar. 16, 1970	584
B-168708, Mar. 10, 1970	562
B-168733, Mar. 25, 1970	619
B-168756, Feb. 10, 1970	486
B-168758, Feb. 12, 1970	493
B-168760, Mar. 5, 1970	544
B-168761, Apr. 1, 1970	649
B-168768, Feb. 25, 1970	521
B-168772, Feb. 24, 1970	517
B-168791, Mar. 19, 1970	606
B-168828, Mar. 2, 1970	530
B-168830, Feb. 17, 1970	503
B-168853, Feb. 27, 1970	525
B-168863, Feb. 17, 1970	505
B-168880, Apr. 8, 1970	679
B-168917, Mar. 18, 1970	600
B-168958, May 28, 1970	809
B-168968, Apr. 24, 1970	727
B-168971, Mar. 10, 1970	571
B-169020, May 7, 1970	764
B-169026, Apr. 27, 1970	736
B-169035, June 1, 1970	819
B-169054, June 11, 1970	846
B-169057, June 17, 1970	851
B-169083, Apr. 28, 1970	740
B-169091, June 1, 1970	821
B-169095, Apr. 2, 1970	663
B-169098, Apr. 14, 1970	695
B-169099, Apr. 21, 1970	709
B-169106, Apr. 28, 1970	744
B-169138, Apr. 2, 1970	666
B-169170, Apr. 10, 1970	692
B-169234, May 4, 1970	753
B-169248, May 28, 1970	815
B-169262, Apr. 22, 1970	722
B-169265, Apr. 15, 1970	697
B-169309, May 22, 1970	787
B-169368, Apr. 21, 1970	713
B-169372, Apr. 8, 1970	683
B-169378, June 2, 1970	831
B-169450, Apr. 9, 1970	689
B-169454, May 14, 1970	779
B-169469, May 5, 1970	758
B-169473, Apr. 24, 1970	733
B-169476, June 22, 1970	865
B-169522, June 22, 1970	867
B-169528, June 1, 1970	824
B-169562, May 22, 1970	794
B-169673, June 1, 1970	829
B-169738, May 22, 1970	796
B-169747, June 24, 1970	871
B-169933, June 30, 1970	877

LIST OF CLAIMANTS, ETC.

	Page
Aaproved Maintenance Service, Inc	417
Adams, D. F	450
Adams, Paul E	85
Aero-Tech, Inc	244
Aguirre, Henry, Jr	505
Airosol Co., Inc	152
Alaska Railroad, The	768
Alcock, N. C	85, 116, 263, 315, 429
Alejo, Eduardo H	291
Allison, Thomas M	824
American President Lines	58
American Standard, Inc., Wilcox Div	402
American Waste and Wiper Co	303
Ampex Corp	534
Anderson, Louis B	758
Attorney General	577
Barrow, J. P	867
Bartlett Construction Co	395
Barton, Duer & Koch Paper Co	437
Bayes, Steven	434
Beerman, H. F	656, 824
Berkeley Scientific Laboratories, Inc	229
BernzOmatic Corp	809
Bowsher, Charles A	209
Brad's Machine Products, Inc	772
Bransby, John H	782
Breed Corp	619
Briercheck, R. D	744
Brook Manufacturing Co., Inc	499
Building Maintenance Corp	289
Burleson, John B	15
Burns, N. H	173
Bush, James F	663
Cake, Jaureguy, Hardy, Buttler & McEwen	107
Cambridge Waveguide Corp	600
Canadian Commercial Corp	649
Capen, D. E	571
Capital Recording Co., Inc	787
Carino, Anthony J	687
CGS Scientific Corp	377
Chapman, DiSalle and Friedman	224
Chausse Manufacturing Co., Inc	639
Chicago, Milwaukee, St. Paul and Pacific Railroad Co	266
Construction Ltd	446
Cooper, O. B	429
Copeland, August D	753
Crane, William H	416
Crawford, E. C	525
Crowell, Steven S	744
Cutler-Hammer, Inc	857
Daconics, Inc	191
Davis, Ralph	581
Dawes, Michael F	231
Defense Products Div	840
Defense Supply Agency, Director	199, 244
District of Columbia Government, Mayor-Commissioner	700
Dougherty, Richard M	829
Dover Auto Electric, Inc	330
Drexler, Eugene	553
Dunshaw of Puerto Rico, Inc. (N. American Phillips Corp.)	736
Dynamic International, Inc	417
Dynation Corp	496
Eastern Van Lines	588
EFMC Corp	156
Encyclopaedia Britannica, Vice President and General Counsel	727
Engels, R. J	416
EON Corp. (American MARC Div.)	463
Esterday, Clifford R	505
Expert Electric, Inc	120
Fairbanks Morse, Inc	275
Fairfax County Chamber of Commerce	9
Farrall, Harold J	794
Federal Aviation Administration, Administrator	402, 425, 779
Federal Electric Corp	562
Firestone Equipment, Inc	683
Firestone Tire & Rubber Co	129
Fishman, Morris, & Sons, Inc	558
Fitzgerald, T. W	97
Flynn, H. D	51
Flynn, Joseph R	440
Forman, Harry N	532
Forman, Rose C	532
Fort Osage Drainage Dist. of Osage County, Mo	72
Friedman, R. G	206
Fujii and Co., Inc	431
General Dynamics	257
General Services Administration, Administrator	48, 417, 809
Gentry, T. T	709
Gibbs, Frederick H	305
Grimberg, John C., Co., Inc	782
Guimond Farms	733
Gulton Industries, Inc	295
Hamilton Standard	471
Harbor Boat Building Co	846
Harper, Robert A	544
Hasler, F. R	709
Healvilin, William A	206
Hertz Corp	204
Heston, Bryant	819
Hoger, Louis G	505
Honeywell, Inc. (Tampa Div.)	489
Host International, Inc	88
Huffman, William F	545

	Page
Hughes, Paul E	679
Huke, Theodore C	139
Hull, M. H	483
Humphrey, Dwight	222
Idleburg, Roy	58
International Harvester Co	764
Ireland, Stapleton, Pryor & Holmes	88
Israel, Fred	707
Jacobson, Lloyd S	532
Johansen, John J	815
Johnson & Speake, Inc	369, 702
Kaiser Cement & Gypsum Corp	718
Kings Point Industries, Inc	550
Kings Point Mfg. Co., Inc	1, 272
Land-Air, Inc	41, 139
Lane, John M	483
Law Enforcement Administration, Administrator	411
Lee, Curtis D	54
Lenkurt Electric Co., Inc	20
Levy, Edward, Metals, Inc	613
Lewis, Beecher F	753
Lewis, Jack, Inc	12
Lion Recording Services, Inc	787
Lite Industries, Inc	749
Lombard Corp	668
Lord, Day & Lord	463
Lovell, J. A	489
Maryland Casualty Co	758
Mason, L. M	815
Matzkin & Day	480
McDonnell Automation Co	124
McElfresh, R. J., Jr	503
McGee, Ronald R	829
McGowan, Samuel B	263
Medley, J. S	320
Meridian Pine Co	697
Merriam, G. & C., Co	727
Middleton, Harry F	269
Millar, Albert S. C., Jr	538
Miller, Warren C	450
Milot, E. W	544
Minnesota Mining and Manufacturing Co	135
Missing, George T	794
Mist, Ellis, H	877
Moore, C. G	167
Nameroff, Mark A	54
National Aeronautics and Space Administration, Administrator	211, 309, 787, 806
National Graphics, Inc	606
National Metal & Steel Corp	244
New London, Conn., City of	284
Norair Engineering Corp	480
Normile, W. G	503
Office of Emergency Preparedness, Director	104
O'Malley, R. K	663
Oseran and Hahn	431
Panel Corp. of America	224
Peatfield, Norman E	837
Pines, R. H., Corp	553
Poehlein, R. L	38
Postmaster General	145, 287, 385, 689
Prectorius, C. D	505
PREMAC Corp	398
Preuss, R. J	269
Privitt Plastics, Inc	156
Propper International, Inc	364
Qatron Corp	761
Quealy, William H	521
Quinn, David H	320
Radio Corp. of America	625
Red Ball Motor Freight, Inc	6
Rice Cleaning Service	417
Ricker, Richard W	656
Robinson, Freddie L	315
Rockwell Manufacturing Co	347
Rockwell Standard Co	216
Royal Services, Inc	538
Rubber Fabricators, Inc	147
Ryan Contracting Co., Inc	164
Ryan Stevedoring Co., Inc	251
Rydquist, Mary M	15
Sadur, Pelland & Braude	369, 702
Salina Airport Authority, Kansas	104
Salyer, Oswald B	656
Samuel, B. N	434
Scanwell Laboratories, Inc	9
Schlesinger, Sol O., d.b.a., Ideal Uniform Cap Co	44
Schoonmaker, A. G., Co., Inc	324
Schullery, R. J	329
Science Spectrum, Inc	309
Seaboard Coast Line Railroad Co	352
Seago, Benjamin F	867
Seasonair of Virginia, Inc	584
Secretary of Agriculture	17, 510, 530, 697
Secretary of the Air Force	1, 28, 38, 186, 229, 330, 427, 534, 548, 600, 621, 625, 819
Secretary of the Army	101, 129, 216, 251, 255, 299, 347, 377, 446, 453, 527, 541, 550, 578, 639, 668, 687, 692, 749, 772, 837
Secretary of Defense	77, 80, 113, 150, 171, 356, 359, 362, 407, 507, 618, 755, 796, 833
Secretary of Health, Education, and Welfare	202, 398, 722
Secretary of Labor	59
Secretary of the Navy	44, 98, 156, 274, 444, 611, 649, 695, 800, 804, 821, 831, 846, 857
Secretary of the Navy, Asst	865
Secretary of Transportation	162, 476, 581, 768
Secretary of the Treasury	666
Selective Service System, Director	18
Sellers, Conner & Cuneo	562, 857
Shook, Glenn W., Inc	107
Sive, David	496
Small Business Administration, Administrator	32, 219
Smathers, Merrigan & O'Keefe	459
Smith, Currie and Hancock	395
Snyder, Harry F	824
Soares, Manuel A	167
Solberg, Albert	486
Solitron Devices, Inc	459
Southern Lead Co	199
Southwest Engineering Co., Inc	853
Southwest Tool & Die Co., Inc	41
Sparrow, Doris S	18
Sparta Electronic Corp	195

	Page
Spear, W. W	231
Square Deal Trucking Co., Inc	527
Standard Manufacturing Co., Inc	28
Starbard, L	291
Stassen, Kephart, Sarkis & Kostos	364
Stencel Aero Engineering Corp	707
Strasser, Spiegelberg, Fried, Frank & Kampelman	761
Supertechnology Corp	211
Thigpen, John M	116
Tompkins Products	541
Travelers Insurance Co	222
Trio Chemical Works, Inc	48
Trylon, Inc	176
Tudor, R. W	440, 877
Union Carbide Corp	517
United States Civil Service Commission, Chairman	189, 233, 596, 873
United States Coast Guard, Commandant	284
University of Utah	572
Veterans Administration, Administrator	305, 572, 713, 736, 871
Video Engineering Co., Inc	646
Wacaster, Harold	758
Warren, Linda K	51
Wayland Distributing Co	385
Wayne Press Co	851
West Point Research	740
Whalen, Edward E	718
Wheeler Bros., Inc	335
Wilfong, Robert C	145
Williams, Shelby, Industries, Inc	311
Wilson, W. P	383
Wright, B. B	493

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

UNITED STATES STATUTES AT LARGE

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

	Page
1914, Mar. 12, 38 Stat. 305	769
1923, Mar. 4, 42 Stat. 1488	598
1938, June 25, 52 Stat. 1185	358
1944, Feb. 25, 58 Stat. 64	579
1946, Aug. 13, 60 Stat. 1057	358
1952, July 10, 66 Stat. 517	609
1952, July 10, 66 Stat. 537	680
1953, July 30, 67 Stat. 232	219
1953, Aug. 1, 67 Stat. 336	610, 681
1954, June 30, 68 Stat. 355	681
1956, July 2, 70 Stat. 471	682
1957, Aug. 26, 71 Stat. 423	725
1958, May 20, 72 Stat. 123	804
1959, Sept. 23, 73 Stat. 651	725
1960, July 7, 74 Stat. 353	681
1967, Nov. 8, 81 Stat. 418	488
1967, Dec. 16, 81 Stat. 624	798
1968, June 29, 82 Stat. 275	682
1968, Oct. 4, 82 Stat. 956	306
1968, Oct. 17, 82 Stat. 1120	452
1968, Oct. 17, 82 Stat. 1122	309
1968, Oct. 17, 82 Stat. 1132	359, 679
1968, Oct. 17, 82 Stat. 1133	606
1969, Dec. 24, 83 Stat. 428	701
1969, Dec. 29, 83 Stat. 469	609
1970, Apr. 15, 84 Stat. 195	796

UNITED STATES CODE

See, also, U.S. Statutes at Large

	Page
5 U.S. Code Ch. 41	308
5 U.S. Code Ch. 63	239
5 U.S. Code 118h	597
5 U.S. Code 503(b)	667
5 U.S. Code 552	252
5 U.S. Code 904(4)	701
5 U.S. Code 2061a	546
5 U.S. Code 2061(c)(1)	546
5 U.S. Code 2062	598
5 U.S. Code 3101 note	19
5 U.S. Code 3125	817
5 U.S. Code 4101	307
5 U.S. Code 4111	575
5 U.S. Code 4111(b)	576
5 U.S. Code 4118	307
5 U.S. Code 5341(c)	873
5 U.S. Code 5514	363
5 U.S. Code 5515	241
5 U.S. Code 5519	236, 240
5 U.S. Code 5525	97
5 U.S. Code 5527	97
5 U.S. Code 5532	444
5 U.S. Code 5532(b)	444
5 U.S. Code 5533	384
5 U.S. Code 5542(a)	210, 577, 691
5 U.S. Code 5542(b)(2)	505
5 U.S. Code 5542(b)(2)(B)	210
5 U.S. Code 5543(a)(2)	781
5 U.S. Code 5544(a)	210, 691
5 U.S. Code 5551	385, 445, 547
5 U.S. Code 5551(a)	547
5 U.S. Code 5551(b)	546
5 U.S. Code 5584(c)	571
5 U.S. Code 5584(d)	571
5 U.S. Code 5584(e)	19, 571
5 U.S. Code 5702	493, 526, 780
5 U.S. Code 5702(a)	754
5 U.S. Code 5702(b)	795
5 U.S. Code 5724a	146
5 U.S. Code 5726	866
5 U.S. Code 5728	597, 867
U.S. Code 5728(a)	426, 599
5 U.S. Code 5941(a)	597
5 U.S. Code 5941(a)(2)	596
5 U.S. Code 6301	384
5 U.S. Code 6301(2)(x)	546
5 U.S. Code 6301(2)(xi)	546
5 U.S. Code 6302(e)	546
5 U.S. Code 6303(d)	596
5 U.S. Code 6304	384, 599
5 U.S. Code 6304(b)	596
5 U.S. Code 6305	596
5 U.S. Code 6305(a)	598
5 U.S. Code 6305(b)	598
5 U.S. Code 6305(c)	598
5 U.S. Code 6306	445
5 U.S. Code 6311	599
5 U.S. Code 6322	238, 287
5 U.S. Code 6323(a)	236, 445
5 U.S. Code 6323(b)	288
5 U.S. Code 6323(c)	236
5 U.S. Code 6323(c)(2)(B)	240

	Page
5 U.S. Code 8301	81
5 U.S. Code 8332(c)	582
5 U.S. Code 8332(j)	582
5 U.S. Code 8344(a)	583
5 U.S. Code 8347(a)	582
7 U.S. Code 394	512
7 U.S. Code 1692	565
7 U.S. Code 2242	18
7 U.S. Code 2244	17
8 U.S. Code 1353a	577
10 U.S. Code Ch. 61	78, 82
10 U.S. Code Ch. 73	263
10 U.S. Code 81	723
10 U.S. Code 136 note	623
10 U.S. Code 516	408
10 U.S. Code 516(b)	409
10 U.S. Code 517	801
10 U.S. Code 564(a)	83
10 U.S. Code 591	207
10 U.S. Code 593	207
10 U.S. Code 651	408
10 U.S. Code 672(d)	208
10 U.S. Code 771	304
10 U.S. Code 972	830
10 U.S. Code 1035	150
10 U.S. Code 1035(d)	151
10 U.S. Code 1071 note	362
10 U.S. Code 1086	362
10 U.S. Code 1086(d)	362
10 U.S. Code 1171	207
10 U.S. Code 1201	263, 877
10 U.S. Code 1204	687
10 U.S. Code 1204(2)	687
10 U.S. Code 1216	688
10 U.S. Code 1221	82
10 U.S. Code 1293	83
10 U.S. Code 1331	357
10 U.S. Code 1333	357
10 U.S. Code 1333(2)	357
10 U.S. Code 1333(4)	358
10 U.S. Code 1337	357
10 U.S. Code 1372(2)	115
10 U.S. Code 1401	82, 357
10 U.S. Code 1401a(c)	263
10 U.S. Code 1405	358
10 U.S. Code 1431	264, 825, 838, 877
10 U.S. Code 1431 note	263
10 U.S. Code 1431(c)	825
10 U.S. Code 1434	263
10 U.S. Code 1434(a)	264
10 U.S. Code 1434(a)(3)	263
10 U.S. Code 1434(c)	263
10 U.S. Code 1436(b)	838, 839, 878
10 U.S. Code 1436(b)(1)	838, 877
10 U.S. Code 1436(b)(2)	838, 878
10 U.S. Code 1446	825, 838, 877
10 U.S. Code 1475	169
10 U.S. Code 1476	169
10 U.S. Code 1477	168
10 U.S. Code 1482	453
10 U.S. Code 1482(a)(8)	454
10 U.S. Code 1552	80, 441, 659
10 U.S. Code 1552(c)	659
10 U.S. Code 2102	172
10 U.S. Code 2103	171

	Page
10 U.S. Code 2107	679
10 U.S. Code 2107(c)	682
10 U.S. Code 2108(c)	172
10 U.S. Code 2202	735
10 U.S. Code 2301	43
10 U.S. Code 2304	24
10 U.S. Code 2304(a)	863
10 U.S. Code 2304(a)(1)	588
10 U.S. Code 2304(a)(2)	646, 707
10 U.S. Code 2304(a)(10)	27, 157, 471
10 U.S. Code 2304(a)(11)	464
10 U.S. Code 2304(a)(13)	99
10 U.S. Code 2304(a)(16)	772, 840
10 U.S. Code 2304(g)	161, 310, 633, 671, 777
10 U.S. Code 2305	133, 333, 685, 791
10 U.S. Code 2305(b)	278, 350
10 U.S. Code 2305(c)	184, 543, 685, 852
10 U.S. Code 2306(f)	216, 297
10 U.S. Code 2771	316
10 U.S. Code 3036(b)	722
10 U.S. Code 3066	723
10 U.S. Code 3075	409
10 U.S. Code 3687	688
10 U.S. Code 3721	688
10 U.S. Code 3914	440
10 U.S. Code 3963(a)	114
10 U.S. Code 3964	115, 441
10 U.S. Code 3991	83, 441
10 U.S. Code 3992	441
10 U.S. Code 4301(a)	309
10 U.S. Code 4348(b)	408
10 U.S. Code 4779(c)	580
10 U.S. Code 5001(a)(4)	801
10 U.S. Code 5596	208, 802
10 U.S. Code 5596(f)	802
10 U.S. Code 5596(h)	802
10 U.S. Code 5597	208, 802
10 U.S. Code 5597(f)	802
10 U.S. Code 5597(h)	802
10 U.S. Code 6148(a)	688
10 U.S. Code 6151	114
10 U.S. Code 6295	436
10 U.S. Code 6323	83, 358, 657, 825
10 U.S. Code 6323(a)	82
10 U.S. Code 6326(a)	801
10 U.S. Code 6326(b)	801
10 U.S. Code 6327	115
10 U.S. Code 6330	800, 825
10 U.S. Code 6330(b)	801
10 U.S. Code 6330(c)	801
10 U.S. Code 6959(b)	408
10 U.S. Code 8075	409
10 U.S. Code 8963(a)	114
10 U.S. Code 8964	115
10 U.S. Code 8991	83
10 U.S. Code 8992	443
10 U.S. Code 9301(a)	309
10 U.S. Code 9348(b)	408
14 U.S. Code 93(e)	487
14 U.S. Code 93(j)	479
15 U.S. Code 260a	165
15 U.S. Code 631 note	815
15 U.S. Code 633	221
15 U.S. Code 633 note	34
15 U.S. Code 633(d)	33

	Page
15 U.S. Code 634	221
15 U.S. Code 636(a)	32
15 U.S. Code 637(a)	219
15 U.S. Code 637(a)(1)	219
15 U.S. Code 637(a)(2)	219
15 U.S. Code 637(b)(6)	373
15 U.S. Code 637(b)(7)	603
15 U.S. Code 644	43, 220
15 U.S. Code 661	32
15 U.S. Code 684(a)	33
15 U.S. Code 684(d)	33
15 U.S. Code 685(a)	33
15 U.S. Code 685(b)	33
15 U.S. Code 714 note	564
15 U.S Code 1601 note	484
16 U.S. Code 17b-1	92
16 U.S. Code 20d	90
19 U.S. Code 267	577
19 U.S. Code 1202	403
20 U.S. Code 905	866
21 U.S. Code 98	512
21 U.S. Code 468	512
23 U.S. Code 113	163
26 U.S. Code 501 (c)(3)	575
26 U.S. Code 4261	579
26 U.S. Code 6331	151
26 U.S. Code 6331(a)	150
26 U.S. Code 6334	150
26 U.S. Code 6334(a)	152
26 U.S. Code 6334(c)	151
26 U.S. Code 7441	546
26 U.S. Code 7447	524
26 U.S. Code 7447(d)	522
26 U.S. Code 7447(e)	522
26 U.S. Code 7447(g)	522
26 U.S. Code 7448	524
26 U.S. Code 7448(c)	523
26 U.S. Code 7448(d)	523
26 U.S. Code 7448(h)	523
26 U.S. Code 7602	667
26 U.S. Code 7701(a)(1)	668
28 U.S. Code 1821	667
28 U.S. Code 2672	759
31 U.S. Code 71a	619
31 U.S. Code 74	411
31 U.S. Code 82a-2	38
31 U.S. Code 82b	488
31 U.S. Code 82c	488
31 U.S. Code 107	487
31 U.S. Code 203	45
31 U.S. Code 483a	18
31 U.S. Code 484	478
31 U.S. Code 487	478
31 U.S. Code 628	581
31 U.S. Code 638a(a)	203
31 U.S. Code 638c	203
31 U.S. Code 673	306
31 U.S. Code 686	307
31 U.S. Code 691	306
31 U.S. Code 724a	759
31 U.S. Code 952(b)	360
32 U.S. Code 505	816
32 U.S. Code 709	816
32 U.S. Code 709 note	384
37 U.S. Code Ch. 10	103, 300

	Page
37 U.S. Code 12	723
37 U.S. Code 107	724
37 U.S. Code 201(a)	722
37 U.S. Code 203 note	797
37 U.S. Code 203(a)	84
37 U.S. Code 204(b)	410
37 U.S. Code 204(g)	688
37 U.S. Code 204(h)	688
37 U.S. Code 204(i)	688
37 U.S. Code 206	797
37 U.S. Code 206(a)	797
37 U.S. Code 231 note	442
37 U.S. Code 232 note	442
37 U.S. Code 272	316
37 U.S. Code 279	316
37 U.S. Code 302(a)	55
37 U.S. Code 302(b)	57
37 U.S. Code 307	507
37 U.S. Code 308	208
37 U.S. Code 308(a)	52, 436, 830
37 U.S. Code 308(e)	830
37 U.S. Code 308(g)	52, 435, 612, 830
37 U.S. Code 310	428, 507
37 U.S. Code 310(a)	509
37 U.S. Code 310(b)	509
37 U.S. Code 311	442, 618
37 U.S. Code 314	430
37 U.S. Code 401	869
37 U.S. Code 401 note (1952 ed.)	362
37 U.S. Code 402(d)	409
37 U.S. Code 404	49, 257, 270, 323, 456, 665, 692, 711, 746
37 U.S. Code 404(a)	175, 832
37 U.S. Code 404(a)(1)	454
37 U.S. Code 404(a)(4)	323, 622
37 U.S. Code 404(d)	454, 832
37 U.S. Code 404(e)	175
37 U.S. Code 404(f)	832
37 U.S. Code 405	300, 548
37 U.S. Code 405a	822
37 U.S. Code 406	233, 256, 293, 822
37 U.S. Code 406(b)	359, 696
37 U.S. Code 406(e)	696, 821
37 U.S. Code 406(h)	696, 824
37 U.S. Code 406a	233, 257
37 U.S. Code 407	232
37 U.S. Code 408	455, 711
37 U.S. Code 409	233, 257
37 U.S. Code 411	359
37 U.S. Code 411a	427
37 U.S. Code 427(a)	869
37 U.S. Code 427(b)	870
37 U.S. Code 427(b)(1)	870
37 U.S. Code 551	103
37 U.S. Code 551(2)	300
37 U.S. Code 551(3)(F)	300
37 U.S. Code 552	301
37 U.S. Code 552(a)	300
37 U.S. Code 554	101
37 U.S. Code 554(a)	103
37 U.S. Code 554(b)	103, 300
37 U.S. Code 554(c)	103, 302
37 U.S. Code 554(d)	103
37 U.S. Code 558	103
37 U.S. Code 801(c)	85
37 U.S. Code 1007(c)	363

	Page
38 U.S. Code Ch. 37	485
38 U.S. Code 213	871
38 U.S. Code 1818(d)	485
38 U.S. Code 1824	485
38 U.S. Code 3105	317
38 U.S. Code 3203	318
38 U.S. Code 3203(a)	318
38 U.S. Code 3203(a)(1)	316
38 U.S. Code 3203(a)(2)(A)	317
38 U.S. Code 3203(b)(1)	316
38 U.S. Code 3203(b)(2)	316
38 U.S. Code 4103	573
38 U.S. Code 4113	574
38 U.S. Code 4114(a)(1)(B)	871
38 U.S. Code 4115	574
38 U.S. Code 4117	871
39 U.S. Code 3571	211
39 U.S. Code 3571(b)	690
39 U.S. Code 3573(a)	690
39 U.S. Code 6120	386
40 U.S. Code 34	308, 480
40 U.S. Code 276a	163, 187
40 U.S. Code 303b	477
40 U.S. Code 304(c)	479
40 U.S. Code 327	163
40 U.S. Code 332	163
40 U.S. Code 484	246
40 U.S. Code 484(e)(2)	249
40 U.S. Code 486(a)	479
40 U.S. Code 488	246
40 U.S. Code 490(h)(1)	478
41 U.S. Code 10	739
41 U.S. Code 10a	177, 403, 608
41 U.S. Code 10d	177, 608
41 U.S. Code 15	45
41 U.S. Code 35	215, 281
41 U.S. Code 45	215, 281
41 U.S. Code 252(c)(3)	647
41 U.S. Code 253(b)	586
41 U.S. Code 321	154
41 U.S. Code 322	154, 783
41 U.S. Code 351	186
41 U.S. Code 351(a)(1)	187
41 U.S. Code 357	186
42 U.S. Code 11a	724
42 U.S. Code 207(a)	722
42 U.S. Code 218a	309
42 U.S. Code 402	582
42 U.S. Code 1855	104
42 U.S. Code 1855b	104
42 U.S. Code 1855g	104
42 U.S. Code 2000d	64
42 U.S. Code 2000e-2(a)	64
42 U.S. Code 2000e-2(c)	64
42 U.S. Code 2000e-2(j)	65
42 U.S. Code 2000e-4(a)	64
42 U.S. Code 2000e-4(d)	71
42 U.S. Code 2000e-12(a)	64
42 U.S. Code 2902	32
42 U.S. Code 2902(a)	33
42 U.S. Code 3736	411
46 U.S. Code 379	58
46 U.S. Code 1222	757
49 U.S. Code 66	269, 769
49 U.S. Code 1655(i)	771
50 U.S. Code App. 1002	301
50 U.S. Code App. 1012 (1952 ed.)	10

CONSTITUTION OF THE UNITED STATES

	Page
Art. 1, sec. 9, cl. 8	820

PUBLISHED DECISIONS OF THE COMPTROLLER GENERAL

	Page
1 Comp. Gen. 150	76
1 Comp. Gen. 360	203
1 Comp. Gen. 560	76
2 Comp. Gen. 782	288
3 Comp. Gen. 112	288
3 Comp. Gen. 416	76
5 Comp. Gen. 835	351
8 Comp. Gen. 73	52
9 Comp. Gen. 41	76
10 Comp. Gen. 487	578
10 Comp. Gen. 555	351
14 Comp. Gen. 464	40
14 Comp. Gen. 578	41
15 Comp. Gen. 380	76
17 Comp. Gen. 554	160, 585, 685, 768, 848, 862
17 Comp. Gen. 789	400
18 Comp. Gen. 538	288
18 Comp. Gen. 562	76
19 Comp. Gen. 846	176
20 Comp. Gen. 133	287
20 Comp. Gen. 145	287
20 Comp. Gen. 279	242
20 Comp. Gen. 645	725
22 Comp. Gen. 171	725
22 Comp. Gen. 491	598
23 Comp. Gen. 578	40
23 Comp. Gen. 713	40
24 Comp. Gen. 4	725
24 Comp. Gen. 140	578
24 Comp. Gen. 150	205
24 Comp. Gen. 439	40
24 Comp. Gen. 544	487
24 Comp. Gen. 599	286
25 Comp. Gen. 102	691
25 Comp. Gen. 121	691
25 Comp. Gen. 151	239
25 Comp. Gen. 360	545
26 Comp. Gen. 49	585
26 Comp. Gen. 130	780
26 Comp. Gen. 327	118
26 Comp. Gen. 382	286
26 Comp. Gen. 475	53
26 Comp. Gen. 888	242
27 Comp. Gen. 20	76

	Page
27 Comp. Gen. 83	237
27 Comp. Gen. 436	397
27 Comp. Gen. 679	580
28 Comp. Gen. 270	102
29 Comp. Gen. 18	76
29 Comp. Gen. 120	76, 285
29 Comp. Gen. 163	452
30 Comp. Gen. 179	214, 752
30 Comp. Gen. 226	666
30 Comp. Gen. 368	862
31 Comp. Gen. 81	451
31 Comp. Gen. 173	238
31 Comp. Gen. 335	52
31 Comp. Gen. 405	76, 285
31 Comp. Gen. 444	80
31 Comp. Gen. 477	397
32 Comp. Gen. 35	725
32 Comp. Gen. 47	702
32 Comp. Gen. 76	445
32 Comp. Gen. 87	146
32 Comp. Gen. 423	205
32 Comp. Gen. 454	820
32 Comp. Gen. 577	205
33 Comp. Gen. 85	190, 547
33 Comp. Gen. 131	293
33 Comp. Gen. 136	294
33 Comp. Gen. 209	190, 547
33 Comp. Gen. 309	364
33 Comp. Gen. 441	214
33 Comp. Gen. 453	205
33 Comp. Gen. 475	52
33 Comp. Gen. 513	830
33 Comp. Gen. 586	862
33 Comp. Gen. 622	190, 547
34 Comp. Gen. 7	660
34 Comp. Gen. 115	373
34 Comp. Gen. 266	52
34 Comp. Gen. 398	76
34 Comp. Gen. 448	182
34 Comp. Gen. 555	827
35 Comp. Gen. 5	288
35 Comp. Gen. 148	494
35 Comp. Gen. 159	232
35 Comp. Gen. 225	430
35 Comp. Gen. 314	308
35 Comp. Gen. 411	392
35 Comp. Gen. 664	207
35 Comp. Gen. 677	712
36 Comp. Gen. 42	558
36 Comp. Gen. 62	333
36 Comp. Gen. 106	151
36 Comp. Gen. 135	57
36 Comp. Gen. 259	149
36 Comp. Gen. 268	574
36 Comp. Gen. 311	670
36 Comp. Gen. 364	137, 425
36 Comp. Gen. 378	288
36 Comp. Gen. 380	644
36 Comp. Gen. 415	314, 400
36 Comp. Gen. 591	243
36 Comp. Gen. 655	288
36 Comp. Gen. 753	832
36 Comp. Gen. 809	864
37 Comp. Gen. 9	45
37 Comp. Gen. 29	820
37 Comp. Gen. 31	442
37 Comp. Gen. 35	654
37 Comp. Gen. 210	50
37 Comp. Gen. 251	716
37 Comp. Gen. 255	236
37 Comp. Gen. 271	220
37 Comp. Gen. 315	670
37 Comp. Gen. 430	558
37 Comp. Gen. 538	114
37 Comp. Gen. 568	469, 721
37 Comp. Gen. 678	43
37 Comp. Gen. 760	585
37 Comp. Gen. 820	706
37 Comp. Gen. 846	599
37 Comp. Gen. 848	600
38 Comp. Gen. 28	822
38 Comp. Gen. 59	400
38 Comp. Gen. 131	185
38 Comp. Gen. 177	154
38 Comp. Gen. 235	732
38 Comp. Gen. 291	351
38 Comp. Gen. 307	287
38 Comp. Gen. 326	220
38 Comp. Gen. 376	433
38 Comp. Gen. 531	550
38 Comp. Gen. 550	109
38 Comp. Gen. 572	335, 343
38 Comp. Gen. 656	456
38 Comp. Gen. 667	128
38 Comp. Gen. 793	803
38 Comp. Gen. 797	356
38 Comp. Gen. 819	50, 497, 561, 652, 721, 752
39 Comp. Gen. 36	111
39 Comp. Gen. 58	681
39 Comp. Gen. 173	11
39 Comp. Gen. 247	556
39 Comp. Gen. 312	431
39 Comp. Gen. 324	802
39 Comp. Gen. 396	137, 249
39 Comp. Gen. 405	111
39 Comp. Gen. 415	363
39 Comp. Gen. 435	43
39 Comp. Gen. 467	115
39 Comp. Gen. 490	677
39 Comp. Gen. 563	249
39 Comp. Gen. 595	382
39 Comp. Gen. 655	621
39 Comp. Gen. 753	456
39 Comp. Gen. 779	764
39 Comp. Gen. 881	556
40 Comp. Gen. 35	198, 864
40 Comp. Gen. 126	262
40 Comp. Gen. 132	314, 652, 768
40 Comp. Gen. 160	644
40 Comp. Gen. 222	442
40 Comp. Gen. 307	759
40 Comp. Gen. 321	396, 791
40 Comp. Gen. 432	50
40 Comp. Gen. 447	764
40 Comp. Gen. 482	748
40 Comp. Gen. 497	416
40 Comp. Gen. 502	660
40 Comp. Gen. 505	681
40 Comp. Gen. 518	368
40 Comp. Gen. 642	52

	Page
40 Comp. Gen. 666	319
40 Comp. Gen. 671	699
40 Comp. Gen. 679	764
41 Comp. Gen. 47	3, 373
41 Comp. Gen. 76	279, 351
41 Comp. Gen. 100	748
41 Comp. Gen. 106	555
41 Comp. Gen. 148	28
41 Comp. Gen. 165	419, 654
41 Comp. Gen. 252	373
41 Comp. Gen. 289	786
41 Comp. Gen. 363	442
41 Comp. Gen. 424	670
41 Comp. Gen. 460	583
41 Comp. Gen. 484	27
41 Comp. Gen. 531	795
41 Comp. Gen. 555	556
41 Comp. Gen. 588	712
41 Comp. Gen. 599	716
41 Comp. Gen. 661	294
41 Comp. Gen. 709	138, 585
41 Comp. Gen. 719	205
41 Comp. Gen. 737	11
42 Comp. Gen. 1	61
42 Comp. Gen. 6	105
42 Comp. Gen. 17	676
42 Comp. Gen. 27	666
42 Comp. Gen. 96	214
42 Comp. Gen. 219	3
42 Comp. Gen. 246	76
42 Comp. Gen. 255	735
42 Comp. Gen. 346	28
42 Comp. Gen. 502	291
42 Comp. Gen. 508	699
42 Comp. Gen. 582	660
42 Comp. Gen. 598	401
42 Comp. Gen. 653	76
42 Comp. Gen. 717	844
42 Comp. Gen. 746	109
43 Comp. Gen. 15	248, 304
43 Comp. Gen. 39	316
43 Comp. Gen. 131	479
43 Comp. Gen. 193	28, 125
43 Comp. Gen. 209	214
43 Comp. Gen. 257	145
43 Comp. Gen. 268	214
43 Comp. Gen. 275	11
43 Comp. Gen. 293	240
43 Comp. Gen. 298	603
43 Comp. Gen. 317	699
43 Comp. Gen. 332	870
43 Comp. Gen. 412	688
43 Comp. Gen. 425	82
43 Comp. Gen. 525	550
43 Comp. Gen. 537	497
43 Comp. Gen. 579	110
43 Comp. Gen. 690	549
43 Comp. Gen. 697	308
43 Comp. Gen. 707	314
43 Comp. Gen. 761	279
43 Comp. Gen. 817	110
44 Comp. Gen. 43	102
44 Comp. Gen. 144	660
44 Comp. Gen. 160	41
44 Comp. Gen. 333	795
44 Comp. Gen. 373	82, 803
44 Comp. Gen. 392	792
44 Comp. Gen. 493	230
44 Comp. Gen. 561	163
44 Comp. Gen. 574	697
44 Comp. Gen. 577	242
44 Comp. Gen. 584	82, 803
44 Comp. Gen. 708	725
44 Comp. Gen. 715	784
44 Comp. Gen. 746	106
44 Comp. Gen. 751	833
44 Comp. Gen. 774	290
45 Comp. Gen. 1	286
45 Comp. Gen. 4	11
45 Comp. Gen. 27	480
45 Comp. Gen. 30	713
45 Comp. Gen. 47	441, 660
45 Comp. Gen. 159	823
45 Comp. Gen. 208	272, 823
45 Comp. Gen. 257	691
45 Comp. Gen. 379	830
45 Comp. Gen. 417	310
45 Comp. Gen. 451	624
45 Comp. Gen. 462	350
45 Comp. Gen. 499	817
45 Comp. Gen. 599	38
45 Comp. Gen. 613	743
45 Comp. Gen. 631	443
45 Comp. Gen. 682	645
45 Comp. Gen. 800	752
46 Comp. Gen. 1	401
46 Comp. Gen. 15	173
46 Comp. Gen. 17	115
46 Comp. Gen. 42	735
46 Comp. Gen. 142	670
46 Comp. Gen. 156	123
46 Comp. Gen. 194	123
46 Comp. Gen. 205	807
46 Comp. Gen. 210	805
46 Comp. Gen. 261	409
46 Comp. Gen. 307	113
46 Comp. Gen. 315	401
46 Comp. Gen. 400	444
46 Comp. Gen. 418	651, 764
46 Comp. Gen. 689	574
46 Comp. Gen. 745	716
46 Comp. Gen. 885	128
46 Comp. Gen. 898	3
47 Comp. Gen. 25	316
47 Comp. Gen. 59	665
47 Comp. Gen. 221	358
47 Comp. Gen. 223	670
47 Comp. Gen. 252	230
47 Comp. Gen. 279	631
47 Comp. Gen. 286	833
47 Comp. Gen. 336	230
47 Comp. Gen. 373	185
47 Comp. Gen. 386	799
47 Comp. Gen. 409	198
47 Comp. Gen. 414	612
47 Comp. Gen. 431	870
47 Comp. Gen. 448	646
47 Comp. Gen. 477	176
47 Comp. Gen. 496	214, 752
47 Comp. Gen. 549	84

	Page
47 Comp. Gen. 583	870
47 Comp. Gen. 597	461
47 Comp. Gen. 658	778
47 Comp. Gen. 722	618
47 Comp. Gen. 724	832
47 Comp. Gen. 754	157
47 Comp. Gen. 761	236
47 Comp. Gen. 769	651, 763
47 Comp. Gen. 775	824
48 Comp. Gen. 59	735
48 Comp. Gen. 62	198
48 Comp. Gen. 97	667
48 Comp. Gen. 171	541
48 Comp. Gen. 212	190
48 Comp. Gen. 233	329
48 Comp. Gen. 239	82
48 Comp. Gen. 291	11, 282
48 Comp. Gen. 301	323
48 Comp. Gen. 314	311
48 Comp. Gen. 330	344
48 Comp. Gen. 353	839, 878
48 Comp. Gen. 357	497
48 Comp. Gen. 369	529
48 Comp. Gen. 377	77
48 Comp. Gen. 441	276, 350
48 Comp. Gen. 449	635
48 Comp. Gen. 517	324, 622
48 Comp. Gen. 525	870
48 Comp. Gen. 536	101
48 Comp. Gen. 580	659
48 Comp. Gen. 583	631
48 Comp. Gen. 593	519
48 Comp. Gen. 624	611
48 Comp. Gen. 630	287
48 Comp. Gen. 635	556
48 Comp. Gen. 689	521
48 Comp. Gen. 702	468
48 Comp. Gen. 743	6, 15, 111
48 Comp. Gen. 757	149
49 Comp. Gen. 12	112
49 Comp. Gen. 48	153
49 Comp. Gen. 98	632
49 Comp. Gen. 129	561
49 Comp. Gen. 156	405, 849
49 Comp. Gen. 271	350
49 Comp. Gen. 289	539
49 Comp. Gen. 369	764
49 Comp. Gen. 402	639, 864
49 Comp. Gen. 493	526, 754
49 Comp. Gen. 558	721
49 Comp. Gen. 625	848

DECISIONS OF THE COMPTROLLER OF THE TREASURY

	Page
2 Comp. Dec. 375	76
4 Comp. Dec. 116	76
9 Comp. Dec. 181	76
11 Comp. Dec. 629	76
15 Comp. Dec. 231	76
23 Comp. Dec. 386	76
24 Comp. Dec. 45	76

DECISIONS OVERRULED OR MODIFIED

	Page
40 Comp. Gen. 666	320
43 Comp. Gen. 39	320
44 Comp. Gen. 561	163
47 Comp. Gen. 25	320
47 Comp. Gen. 286	837
47 Comp. Gen. 722	619
48 Comp. Gen. 115	15
48 Comp. Gen. 171	541
48 Comp. Gen. 369	530
48 Comp. Gen. 517	621
B-135534, June 5, 1958, unpublished decision	694
B-152420, July 8, 1969, unpublished decision	621
B-163856, Apr. 30, 1968, unpublished decision	15
B-165255, Oct. 24, 1968, unpublished decision	15
B-167248, Aug. 22, 1969, unpublished decision	289
B-169057, Apr. 23, 1970, unpublished decision	853

OPINIONS OF THE ATTORNEY GENERAL

	Page
26 Op. Atty. Gen. 415	
34 Op. Atty. Gen. 232	
41 Op. Atty. Gen. 70	

DECISIONS OF THE COURTS

	Page
Alabama *v.* King and Boozer, 314 U.S. 1	205
Allegheny County, United States *v.*, 322 U.S. 174	76
American Sanitary Rag Co. *v.* United States, 142 Ct. Cl. 293	617
Baker *v.* McCarl, 24 F. 2d 897	363
Banks *v.* United States, 267 F. 2d 535	169
Baumet *v.* United States, 191 F. 2d 194; 344 U.S. 82	170
Beacon Construction Co. of Mass. *v.* United States, 161 Ct. Cl. 1	721
Beaconwear Clothing Co. *v.* United States, 174 Ct. Cl. 40	46
Beasley *v.* United States, 176 Ct. Cl. 491	725
Bentley, United States *v.*, 107 F. 2d 382	224
Berkey *v.* United States, 176 Ct. Cl. 1	316
Binghamton Construction Co., United States *v.*, 347 U.S. 171	189

Page

Brooklyn Waterfront Terminal Corp. *v.* United States, 117 Ct. Cl. 62 ... 533
Brown *v.* Board of Education, 347 U.S. 483; 394 U.S. 294 ... 68
Burnett Construction Co. *v.* United States, 188 Ct. Cl. 958 ... 784
Butler *v.* Butler, 239 A. 2d 616 ... 837
Byrno Organization, Inc. *v.* United States, 152 Ct. Cl. 578 ... 433
Central of Georgia R. Co., United States *v.*, 332 I.C.C. 33 ... 268
Charles *v.* United States, 19 Ct. Cl. 316 ... 661
Chattanooga Wheelbarrow Co. *v.* United States, USDC ED Tenn So. Div., Civil Action No. 4755 ... 46
Clackum *v.* United States, 161 Ct. Cl. 34 ... 661
Cohen, United States *v.*, 389 F. 2d 689 ... 47
Conti, United States *v.*, 119 F. 2d 652 ... 397
Crawford *v.* United States, 179 Ct. Cl. 128 ... 516
Crist *v.* United States, 124 Ct. Cl 825 ... 430
Curran *v.* Laird, U.S. Ct. of App., D.C. Cir., dec. Nov. 12, 1969 ... 756
Davis *v.* Ivey, 112 So. 264 ... 735
Day *v.* United States, 123 Ct. Cl. 10 ... 666
Degermark, Rud., A. B. *v.* Monarch Silk Co., Inc., 85 F. Supp. 535 ... 760
Detroit, City of *v.* Murray Corp. of America, 355 U.S. 489 ... 287
Detroit, City of, United States *v.*, 355 U.S. 466 ... 285
Dobbins *v.* Local 212, 292 F. Supp. 413 ... 67
Duble *v.* Canadian Pacific S. S. Co., Limited, 49 F. 2d 291 ... 735
Duesing *v.* Udall, 121 U.S. App. D.C. 370 ... 516
Dynamics Corp. of America *v.* United States, 182 Ct. Cl. 62 ... 543
Edelman *v.* United States, 117 Ct. Cl. 400 ... 47
Egan *v.* United States, 141 Ct. Cl. 1 ... 661
Empire Ordnance Corp., et al. *v.* United States, 130 Ct. Cl. 719 ... 47
Escote Manufacturing Co. *v.* United States, 144 Ct. Cl. 452 ... 433
Estin *v.* Estin, 334 U.S. 541 ... 120
Fagan, et al. (Gover) *v.* United States, 149 Ct. Cl. 716 ... 442
Ferro *v.* Ferrante, 240 A. 2d 722 ... 533
Ferroline Corp. *v.* General Aniline and Film Corp., 207 F. 2d 912 ... 128
Friestedt *v.* United States, 173 Ct. Cl. 447 ... 114, 618
Garner *v.* United States, 161 Ct. Cl. 73 ... 661
Globe Ticket Co. *v.* International Ticket Co., 104 A 92 ... 128
Gratiot *v.* United States, 40 U.S. 336 ... 45
Grayson *v.* United States, 137 Ct. Cl. 779 ... 114
Griggs *v.* Duke Power, 292 F. Supp. 243 ... 67
Hagar *v.* Reclamation Dist. No. 108, 111 U.S. 701 ... 75
Hammer Contracting Corp., United States *v.*, 331 F. 2d 173 ... 721
Hartford Acc. & I. Insurance Co. *v.* First National Bank and Trust Co. of Tulsa, Okla., 287 F. 2d 69 ... 760
Hathaway, United States *v.*, 242 F. 2d 897 ... 616
Heers, Carol D., et al. *v.* United States, 165 Ct. Cl. 294 ... 397

Page

Helfgott *v.* United States, 250 F. 2d 818 ... 169
Hol-Gar Manufacturing Corp. *v.* United States, 169 Ct. Cl. 384 ... 334, 856
Howell, Viola Richards *v.* William R. Howell 125 S.E. 2d 448 ... 120
Hubbell, United States *v.*, 323 F. 2d 197 ... 47
Hunt Food and Industries, Inc. *v.* Federal Trade Commission, 286 F. 2d 863 ... 516
Huse *v.* Glover, 119 U.S. 543 ... 76
Imperial Chemical Industries Ltd. *v.* National Distillers and Chemical Corp., 342 F. 2d 737 ... 30
International Industries *v.* Warren Petroleum Corp., 99 F. Supp. 907 ... 30
Janice, Inc. *v.* Acme Fast Freight, Inc., 302 I.C.C. 596 ... 7
Jefferson County, United States *v.*, 372 F. 2d 836 ... 67
Jersey Silk & Lace Stores *v.* Best Silk Shops, 235 N.Y.S. 277 ... 533
Johannsen *v.* Acton Construction Co., 119 N.W. 2d 826 ... 688
Johnson *v.* Maryland, 254 U.S. 51 ... 451
Jones *v.* United States, 187 Ct. Cl. 730 ... 114
Junker *v.* Plummer, 67 N.E. 2d 667 ... 474
Kakarapis *v.* Kakarapis, 58 Misc. 2d 515, 296 N.Y.S. 2d 208 ... 834
Kamieniecki, United States *v.*, 261 F. Supp. 683 ... 47
Kansas Flour Mills Corp., United States *v.*, 314 U.S. 212 ... 786
Kearney, Michael M., et al. *v.* United States, 152 Ct. Cl. 202 ... 47
Kemp *v.* United States, 38 F. Supp. 568 ... 261
Kiewit, Peter, Sons' Co., United States *v.*, 345 F. 2d 879 ... 721
Lee *v.* Osceola Improvement Dist., 268 U.S. 643 ... 75
Leyerly *v.* United States, 162 F. 2d 79 ... 170
Lindo Engineering Co., AECBCA #28-6-66, 66-2BCA #6044 ... 433
Lipman, United States *v.*, 122 F. Supp. 284 ... 397
Local 53 of Heat and Frost Insulators *v.* Vogler, 407 F. 2d 1047 ... 67
Local 189, U.P.P. and Crown Zellerbach Corp., United States *v.*, 282 F. Supp. 39 ... 67
Longwill *v.* United States, 77 Ct. Cl. 268 ... 170, 661
Lowry & Co. *v.* S. S. Le Moyne D'Iberville, 253 F. Supp. 396 ... 540
Lynn *v.* Lynn, 342 U.S. 849 ... 120
Madden *v.* United States, 178 Ct. Cl. 121 ... 47
Maryland Casualty Co. *v.* Lincoln Bank & Trust Co., 18 F. Supp. 375 ... 760
Massman Construction Co. *v.* United States, 102 Ct. Cl. 699 ... 249, 699
McCulloch *v.* Maryland, 17 U.S. (4 Wheat) 316 ... 285
McKnight *v.* United States, 98 U.S. 179 ... 45
McShain, John, Inc. & John McShain *v.* United States, 97 Ct. Cl. 493 ... 856
Meister *v.* United States, 162 Ct. Cl. 667 ... 688
Melville *v.* United States, 23 Ct. Cl. 74 ... 364
Metropolitan Life Insurance Co. *v.* Mundy, 167 So. 894 ... 223
Mid-West Construction, Ltd. *v.* United States, 181 Ct. Cl. 774 ... 372

	Page
Miller *v.* United States, 180 Ct. Cl. 872	618
Mil's *v.* Standard Parts Service Co., 131 N.W. 2d 546	688
Montgomery County, United States *v.*, 289 F. Supp. 647	67
Mullen Benevolent Corp. *v.* United States, 290 U.S. 89	76
Munsey Trust Co., United States *v.*, 332 U.S. 234	45
Myers, United States *v.*, 320 U.S. 561	578
Neri *v.* United States, 145 Ct. Cl. 537	114, 618
New York and Porto Rico Steamship Co., United States *v.*, 239 U.S. 88	96
Niewiadomski *v.* United States, 159 F. 2d 683	169
Northwestern National Bank and Trust Co. of Minneapolis, United States *v.*, 35 F. Supp. 484	224
Norwegian Nitrogen Products Co. *v.* United States, 288 U.S. 294	516
Ogden & Dougherty *v.* United States, 102 Ct. Cl. 249	594
Oline *v.* Nebraska Natural Gas Co., 131 N.W. 2d 410	688
Otis Steel Products Corp. *v.* United States, 161 Ct. Cl. 694	375, 764
Pacific Hardware & Steel *Co. v.* United States, 49 Ct. Cl. 327	785
Packet Co. *v.* Keokuk, 95 U.S. 80	76
Patti *v.* Republic Aviation Corp., 248 N.Y.S. 2d 978	689
Penn-Ohio Steel Corp. *v.* United States, 173 Ct. Cl. 1064	433
Pennington, United States *v.*, 228 F. Supp. 374	433
Pennsylvania Casualty Co. *v.* Brooks, 24 So. 2d 262	223
Perrimond *v.* United States, 19 Ct. Cl. 509	666
Peterman Lumber Co. *v.* Adams, 128 F. Supp. 6	46
Philadelphia Television Broadcasting Co. *v.* Federal Communications Commission, 123 U.S. App. D.C. 298	516
Piggly Wiggly *v.* United States, 112 Ct. Cl. 391	47
Pittman *v.* United States, 127 Ct. Cl. 173	47
Porter, United States *v.*, 296 F. Supp. 40	67
Power County, Idaho, United States *v.*, 21 F. Supp. 684	285
Powers *v.* United States, 185 Ct. Cl. 481	618
Prestex Inc. *v.* United States, 162 Ct. Cl. 620	214
Public Utilities Commission of Calif. *v.* United States, 355 U.S. 534	9
Puerto Rico, People of, *v.* United States, 134 F. 2d 267	76
Purcell Envelope Co., United States *v.*, 249 U.S. 313	433
Quarles *v.* Philip Morris, 279 F. Supp. 505	67
Reconstruction Finance Corp. *v.* Peter, 117 F. 2d 716	760
Refining Associates, Inc. *v.* United States, 124 Ct. Cl. 115	396
Ricker, Richard W. and Oswald B. Salyer *v.* United States, 188 Ct. Cl. 1169	657
Roberts *v.* United States, 397 F. 2d 968	667
Rose *v.* Rose, N.Y. Sup. Ct., Queens Co., N.Y. Law Journal, Oct. 9, 1968	834
Rosenstiel *v.* Rosenstiel, 16 N.Y. 2d 64, 209 N.E., 2d 709	834
Ruggiero, Anthony, et al. *v.* United States, 190 Ct. Cl. 327	594
Russell Electric Co., United States *v.*, 250 F. Supp. 2	764
Sabin Metal Corp., United States *v.*, 151 F. Supp. 683	202, 543
Saligman *v.* United States, 56 F. Supp. 505	201, 594
Sands *v.* Manistee River Improvement Co., 123 U.S. 288	76
Satterwhite *v.* United States, 123 Ct. Cl. 342	618
Schlesinger, Sol O. *v.* United States, 182 Ct. Cl. 571	44
Scott, W.A. *v.* United States, 44 Ct. Cl. 524	396
Shelton *v.* Standard Insurance Co., 381 S.W. 2d 356	689
Smith *v.* Dravo Corp., 203 F. 2d 369	30
Smith *v.* Jackson, 241 F. 747; 246 U.S. 388	363
Speedry Chemical Products, Inc. *v.* Carter's Ink Co., 306 F. 2d 328	473
Stamato, Frank, & Co. *v.* City of New Brunswick, 90 A. 2d 34	343
Standard Rice Co., Inc., United States *v.*, 323 U.S. 106	786
State *v.* Taylor, 79 N.E. 2d 127	285
State Bank, United States *v.*, 96 U.S. 30	224
Steiner *v.* Mitchell, 350 U.S. 247	415
Swift and Co., United States *v.*, 270 U.S. 124	433
Thigpen, Anne Corrine *v.* John M. Thigpen Gen. Ct. of Justice, DC Div., Wayne Co., N.C.	117
Thigpen, John M. *v.* Anne Corrine Thigpen 8th Jud. DC Nev. Co. of Clark	117
Thomas *v.* United States, 189 F. 2d 494	169
Transportation Co. *v.* Parkersburg, 107 U.S. 691	76
Udall *v.* Tallman, 380 U.S. 1	516
United Federation of Postal Clerks *v.* Watson, 409 F. 2d 462	690
United States Fidelity & Guaranty Co. *v.* Long, 214 F. Supp. 307	291
United States Fidelity & Guaranty Co. *v.* United States, 164 F. Supp. 703	760
Utah Power and Light Co. *v.* United States, 243 U.S. 389	686
Van Brocklin *v.* State of Tennessee, 117 U.S. 151	75, 285
Vanderbilt *v.* Vanderbilt, 354 U.S. 416	120
Weiner *v.* Cuyahoga Community College Dist., 19 Ohio St. 2d — (July 2, 1969)	69
Wender Presses, Inc. *v.* United States, 170 Ct. Cl. 483	201
Williams *v.* North Carolina, 317 U.S. 287; 325 U.S. 226	119
Wire, Janna Silander, Admin. of estate of John Nicholas Lorimer, United States *v.*, Dist. of Col., Civil Action No. 206-67	316
Wisconsin Central Railroad *v.* United States, 164 U.S. 190	224
Wisconsin Railroad Co. *v.* Price County, 133 U.S. 496	75
Zazove *v.* United States, 156 F. 20	170

INDEX DIGEST

July 1, 1969–June 30, 1970

ABSENCES Page

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

ACCOUNTABLE OFFICERS

Accounts

Credit for waived erroneous payments

In accordance with Pub. L. 90–616, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under authority of act, as payments are deemed valid for all purposes. Therefore, refund to employee of over-payment which he had repaid prior to waiver of erroneous payment by authorized official is regarded as valid payment that may not be questioned in accounts of responsible certifying officer regardless of fact that he may not regard erroneous payment as having been appropriately waived 571

Certification of confidential expenditures

Propriety

Vouchers covering expenses of investigations under 14 U.S.C. 93(e), which were incurred on official business of confidential nature and approved by Coast Guard officer, but nature of expenses are unknown to certifying officer, may not be certified for payment without holding certifying officer accountable for legality of payment. 14 U.S.C. 93(e) contains no provision for certification of vouchers by Commandant of Coast Guard who is authorized to make investigations and, therefore, responsibility for certifying vouchers for payment is governed by act of Dec. 29, 1941, which fixes responsibilities of certifying and disbursing officers, and payment for costs of investigations may only be made in accordance with 1941 act 486

Relief

Lack of due care, etc.

Failed to submit question to General Accounting Office

An accountable officer of uniformed services who authorized per diem payments to members furnished quarters and subsistence on basis of retroactive amendment that deleted provision for group travel and unit movement from temporary duty order failed to exercise due care required by 31 U.S.C. 82a–2 for entitlement to relief. Disbursing officer's reliance on assurance from higher headquarters that unit movement was not involved and that members were entitled to per diem, and his failure to either follow administrative procedures based on Comptroller General decisions to effect that members may not be paid per diem when furnished quarters and subsistence, or to submit doubtful claims to U.S. GAO for settlement, is not due care and contemplated by statute 38

417-514 O—71——6

ADMINISTRATIVE DETERMINATIONS Page

Assumptions

Bid principles

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

Conclusiveness

Contracts

Disputes

Law questions

Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is an error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made 782

General Accounting Office authority

Contract matters

In recommending termination of purported contract that had been awarded to bidder permitted to correct its bid price because it had been erroneously computed on estimated requirements 24 times Govt.'s true estimate and mistake may have affected amount bid, and that correction was tantamount to submission of second bid, U.S. GAO did not exceed its review authority. Standard of review pursuant to Wunderlich Act (41 U.S.C. 321, 322) applies to contract disputes and not to mistakes in bid, and finality of administrative determination does not apply to questions of law. For years GAO decided all questions concerning corrections of bid mistakes, and even with delegation of such authority, Comptroller General is not deprived of right to question administrative determinations, nor bidder of right to request his decision 152

AGENTS Page
Of private parties
Authority
Ministerial duties

Immediate reply to receipt of material amendment to invitation by TWX operator of low bidder, who is not responsible for preparation and submission of bids, and which was only intended as signal that transmission of amendment had been received, is not equivalent to an acceptance of terms of amendment by individual responsible for binding bidder, and under rule of agency that information furnished to clerk or anyone acting in ministerial capacity is not imputed to another, rejection of low bid was proper---------- 459

Evidence
Time for submitting

Low bid signed by president of company in receivership, where power of attorney from receiver authorizing president to sign bid was submitted after bid opening, is nevertheless responsive bid. Rule that evidence of agency must be submitted before bids are opened is too restrictive in view of fact that should principal establish bid was submitted on his behalf by unauthorized individual, Govt. not only would have possible cause of action against that individual, who no doubt would challenge false disavowal of his authority, but in addition has ample means to protect itself against fraudulent practices by bidders. However, evidence of agency submitted before bid opening would avoid challenges of proof of agency. 48 Comp. Gen. 369, modified---------- 527

AGRICULTURE DEPARTMENT
Fees for services to public
Disposition

Cost-of-service fees charged for furnishing data from Current Research Information System (CRIS), a computerized information and retrieval system that maintains scientific and management type information on both federally financed and State supported agricultural research, may not be deposited in special account pursuant to Dept. of Agriculture's 7 U.S.C. 2244 authority and made available for CRIS to draw on to cover costs involved in making research and reproducing data. Exemption authority in section 2244 to requirement for deposit of monies into Treasury as miscellaneous receipts relates to and is limited to bibliographies prepared by Dept.'s library, and to microfilming and other photographic reproductions of books and to other library materials, and CRIS is not part of that library---------- 17

Inspectional services
Reimbursement

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541–5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and over-

AGRICULTURE DEPARTMENT—Continued Page
Inspectional services—Continued
Reimbursement—Continued
time costs from industry to Govt., otherwise responsible for operation of inspection services, and furthermore, no appropriated funds are available to pay cost of overtime and holiday work---- 510
The longstanding interpretation by Dept. of Agriculture that reference in Meat Inspection Act (7 U.S.C. 394), to reimbursement by meat industry for overtime costs incurred by Govt., includes cost of furnishing holiday services, is entitled to great weight in construction of act and, therefore, meat establishments that were rendered inspection services on Friday, Dec. 26, 1969, day declared a holiday by Executive order, may not be relieved of liability to reimburse Dept. for holiday premium pay that was made to inspectors---- 510
Surplus commodities
Procurements based on barter
In evaluation of proposals submitted to construct submarine cable subsystem linking Okinawa to Taiwan, proposals that were solicited on both nonbarter basis and barter basis under Pub. L. 806, 80th Cong., which authorizes disposal by barter and exchange of surplus agricultural commodities for use outside U.S.. addition of 50 percent Balance of Payments Program factor to cost of foreign source items offered in proposals received on both barter and nonbarter basis was proper and was not precluded by barter procedures prescribed in sec. 4, part 5, of Armed Services Procurement Reg. Therefore, it was reasonable to use 50 percent balance of payments factor in evaluating lowest priced barter proposal, even though when added to cost of foreign items the price became the highest offered---- 562
Foreign source items purchased in United Kingdom for use overseas that are offered in proposal submitted on barter basis pursuant to Pub. L. 806, 80th Cong., which authorizes disposal of surplus agricultural commodities overseas, properly were subject to 50 percent Balance of Payments Program evaluation factor upon determination offset credits provided under barter agreements between U.S. and United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of balance of payments penalty, and that balance of payments impact would be adverse. Application of offset credits is not mandatory, nor is application of balance of payments procedure automatically waived when offsets are available---- 562
Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L. 806, 80th Cong., which authorizes disposal by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal. If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors---- 562

ALASKAN RAILROAD Page
Claims
Statutes of limitation

Although Alaska Railroad, a Govt-owned facility operated by Dept. of Transportation under authority delegated by President, is not regulated by Interstate Commerce Commission, it is subject to certain provisions of Interstate Commerce Act pursuant to sec. 3(a) of E.O. No. 11107, Apr. 25, 1963, and functions as common carrier. However, disputed transportation claims that are more than 3 years old will be viewed as not subject to 3-year statute of limitations against consideration of claims by U.S. GAO because of limited number of claims involved and fact that payment has been made by Railroad to connecting carriers for their share of revenue, but future claims for transportation services should be timely filed---------- 768

ALLOWANCES
Family. (*See* Family Allowances)
Military personnel
Dislocation allowance
Members with dependents. (*See* Transportation, dependents, military personnel, dislocation allowance)
Medically unfit

Where medically unfit persons were released on basis of void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. Ch. 61, military records of erroneously released persons may be corrected to show discharge as of date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider aggravation of unfit condition or new or additional unfitting condition acquired while on duty. Absent change in physical condition while on active duty, discharge may be made for convenience of Govt. without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to pay and allowances that accrued prior to release---------- 77

Quarters. (*See* Quarters Allowance)
Station. (*See* Station Allowances)
Subsistence. (*See* Subsistence Allowance)
Temporary lodging allowance
Military personnel. (*See* Station Allowances, military personnel, temporary lodgings)
Travel. (*See* Travel Allowances, military personnel)
ANNUAL LEAVE
(*See* Leaves of Absence, annual)
APPROPRIATIONS
Augmentation
Gifts, etc.

Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope

APPROPRIATIONS—Continued Page
Augmentation—Continued
Gifts, etc.—Continued
of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at meeting. However, pursuant to 5 U.S.C. 4111(b), and Bur. of the Budget Cir. No. A–48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose ---------- 572

Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status, which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations ---------- 572

Where physician employed by Veterans Admin. hospital that is affiliated with medical school of university is authorized travel and per diem to undertake Govt. business for specified period, performs duties for university when in nonpay or annual leave status while traveling, reimbursement by university of expenses incurred by physician during nonduty days should not be construed as supplementing Veterans Admin. appropriations ---------- 572

Availability
Parking space

To reimburse General Services Administration for parking facilities leased in commercial building pursuant to par. 10c, GSA Order PBS 7030.2B, Apr. 18, 1968, for accommodation of employees of agency assigned to building, agency may use appropriations use to reimburse GSA for rental of building ---------- 476

Training
Interagency 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 of 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 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

APPROPRIATIONS—Continued Page

Expenditures

Without regard to law

Legality determinations

Duty imposed on U.S. GAO to audit all expenditures of appropriated funds involving determination of legality of expenditures, includes determination of legality of contracts obligating Govt. to payment of appropriated funds, and authority to render decisions prior to actions involving expenditures of appropriated funds has been exercised by GAO whenever any question of legality of proposed action has been raised, whether by agency head, or by complaint of interested party, or by information acquired in course of other than audit operations, and in passing upon legality of expenditures of appropriated funds for Federal or federally assisted construction programs, propriety of conditions imposed by revised "Philadelphia Plan" will be for consideration. (But see *Contractors Assn. of Eastern Penna., et al.*, v. *Secy. of Labor, et al.*, Civil Action No. 70–18, and B–163026, Apr. 28, 1970.)---------- 59

Federal aid to States. (*See* **States, Federal aid, grants, etc.**)

Federal grants, etc., to other than States. (*See* **Funds, Federal grants, etc., to other than States**)

Limitations

Purchases

Passenger motor vehicles

Purchase of passenger motor vehicles to conduct research and development programs for prevention and control of air pollution is not subject to appropriation authorization requirement of 31 U.S.C. 638a (a), nor maximum price limitation in sec. 638c, as these statutory prohibitions are intended for imposition on purchase of vehicles to be used to carry passengers. Therefore, if certificate to effect that vehicles are necessary to effectuate purpose of research programs contemplated and that they will not be used to carry passengers appears on or accompanies payment voucher, no objection to payment for vehicles will be raised---------- 202

Permanent indefinite for judgments

Several claims arising under one tort

Personal injuries and property damage claims of private insurance policy holder and his subrogee insurer that arose in connection with tort—collision with Govt. vehicle operated by Forest Service employee—although presented separately are not separate and distinct claims, as subrogee's rights grow out of rights and cause of action of his subrogor and, therefore, claims totaling in excess of $2,500, limit prescribed by Federal Tort Claims Act (28 U.S.C. 2672) for payment by administrative agency, payment of claims may not be made by Dept. of Agriculture from its appropriated funds, but are for payment by GAO from appropriation made by 31 U.S.C. 724a for payment of judgments and compromise settlements ---------- 758

Restrictions

Buy American requirement

Notwithstanding cotton from which pads are to be manufactured in Japan for delivery in the U.S. is of domestic origin, pads offered by low bidder are considered of foreign origin and subject to expenditure restriction appearing in Dept. of Defense acts since first introduced in 1953,

APPROPRIATIONS—Continued Page

Restrictions—Continued

By American requirement—Continued

and as restriction was not waived on basis item cannot be procured in U.S., and as item is not for use overseas, low bid was properly rejected. Fact that invitation refers to cotton "grown *or* produced in the United States" does not denote alternative and make place of production irrelevant, in view of legislative history of 1953 act, evidencing congressional intent that any article of cotton may be considered "American" only when origin of fiber as well as each successive stage of manufacturing is domestic---------- 606

Legal education

Tuition charges for legal education of ROTC cadets enrolled during academic year 1968–1969 under 10 U.S.C. 2107, fall within prohibition in sec. 517 of Dept. of Defense Appropriation Act for 1969 and, therefore, payment of charges is precluded, even though prohibition and its implementing regulation, par. 22–900 of Armed Services Procurement Reg., were approved after cadets were enrolled. Restriction against payment of tuition fees for legal training first appeared in DOD Appropriation Act for fiscal year 1953, and exclusion in that act of students in ROTC units was removed in 1954 act, and authority in 10 U.S.C. 2107(c) to pay expenses of ROTC cadets eligible to participate in educational assistance programs does not exempt cadets from legal training restriction contained in annual DOD appropriation acts, including 1969 act---------- 679

Transfers

Limitations

Original purpose of appropriation

Pursuant to 5 U.S.C. 904(4), any Dist. of Columbia reorganization plan proposed under Reorganization Plan No. 3 of 1967, when submitted to Congress for approval must provide for transfer of unexpended balances, and upon transfer funds may only be used for purposes for which appropriation was originally made. Strict application of restriction to both partially and completely transferred functions, will avoid any augmentation of appropriation account, or violation of sec. 3 of Dist. of Columbia Appropriation Act, 1970. Sec. 904(4) requirements also apply to funds appropriated in 1970 act for General Operating Expenses Account, notwithstanding funds appropriated derived from designated sources, for upon appropriation segregation of special funds no longer was maintained---------- 700

AWARDS

Informers

Rewards

By foreign governments

Reward monies which represent value of proceeds derived from sale of contraband articles seized by Republic of Colombia acting upon information furnished by Air Force officer while temporarily attached to Colombian Air Force for training purposes are payable not to officer but to U.S. pursuant to principle of law that earnings of employee in excess of regular compensation gained in course of, or in connection with, his service belong to employer, and monies should be covered into Treasury. Even if U.S. were not entitled to reward, its acceptance by officer is pre-

AWARDS—Continued Page
Informers—Continued
Rewards—Continued
By foreign governments—Continued
cluded, absent congressional consent, by Art. 1, Sec. 9, Cl. 8 of U.S. Constitution, which prohibits acceptance by public officers of presents, Emoluments, Office, or Title, "of any kind whatever," from foreign State, and reward constitutes "Emolument."---------- 819

BALANCE OF PAYMENTS PROGRAM
(*See* Funds, balance of payments program)

BIDDERS
Invitation right
Failure to solicit bids
Automated bidders' list

Where requests for proposals issued under 10 U.S.C. 2304(a)(2) had been synopsized in Commerce Business Daily and had been solicited from many sources, securing adequate competition and reasonable prices, failure to solicit firm on automated bidders list need not be questioned as par. 2-205.4 of Armed Services Procurement Reg. authorizes contracting officers to rotate use of long mailing lists to avoid excessive administrative costs when justified by size and transaction, and record evidences no intent or purpose to exclude bidder---------- 707

Qualifications
"Actually engaged in business" requirement
Mail delivery services

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

Delivery capabilities
Evidence requirements

Assumption in absence of information indicating otherwise, that past delivery delinquencies of low bidder—small business concern—were his fault is not adequate basis for concluding that delinquent deliveries established lack of perseverance or tenacity, and matter of concern's responsibility is for further consideration. If it is found upon review that low bidder on basis of substantial evidence does not possess necessary tenacity or perseverance to do an acceptable job, additional documentation or explanation should be furnished to support conclusion, otherwise nonresponsibility determination should be referred on basis of capacity and credit to Small Business Admin. under Certificate of Competency procedure---------- 600

BIDDERS—Continued Page

Qualifications—Continued

Financial responsibility

Reconsideration

Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for nonresponsible bidder to improve its position after contracting officer's determination of nonresponsibility has been confirmed by Small Business Admin., where low bidder held financially nonresponsible on basis of preaward survey and SBA's adverse findings, has concluded negotiations for technical data rights and patent license contract that involves millions of dollars and provides for immediate substantial advance payment, bidder's responsibility should be reconsidered and if necessary, time permitting, reviewed by SBA, because of mandate in Armed Services Procurement Reg. 1-905.2, that financial resources should be obtained on as current basis as feasible with relation to date of contract award---------- 619

Presence where bid acceptance time is limited

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

Prior unsatisfactory service

Referral to Small Business Administration

Although low bidder had certified itself to be small business concern qualifying for award under labor surplus area set-aside, upon administrative determination of nonresponsibility based in part on belief that bidder's past unsatisfactory record of performance was due to factor not included in elements of capacity and credit, referral of matter to Small Business Administration under small business Certificate of Competency program established under provisions of Small Business Act is not required---------- 139

Tenacity and perseverance

Rejection of low bidder based on determination bidder lacked tenacity and perseverance in obtaining supplies in view of preaward survey showing it had been delinquent 60 percent of time in completing contracts over 8-month period and was delinquent on uncompleted contracts was proper, notwithstanding delivery of suspension lugs to Govt. constituted only minor portion of bidder's total business. Although delay in performing one or two previous contracts would not require determination of unsatisfactory performance within meaning of par. 1-903.1(iii) of Armed Services Procurement Reg., when cumulative effect of delinquencies increase burden of Govt. in administering contracts, determination of prior unsatisfactory performance is reasonable---------- 139

Assumption in absence of information indicating otherwise, that past delivery delinquencies of low bidder—small business concern—were his

BIDDERS—Continued Page
Qualifications—Continued
Prior unsatisfactory service—Continued
Tenacity and perseverance—Continued
fault is not adequate basis for concluding that delinquent deliveries established lack of perseverance or tenacity, and matter of concern's responsibility is for further consideration. If it is found upon review that low bidder on basis of substantial evidence does not possess necessary tenacity or perseverance to do an acceptable job, additional documentation or explanation should be furnished to support conclusion, otherwise nonresponsibility determination should be referred on basis of capacity and credit to Small Business Admin. under Certificate of Competency procedure---------- 600
Tenacity and perseverance
Capacity to perform
Finding by contracting officer that small business concern lacks tenacity and perseverance because insufficiently prepared to accept award relates to concern's capacity and cannot support determination of nonresponsibility under par. 1–705.4(a) of Armed Services Procurement Reg., which defines capacity as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know how,' technical equipment and facilities or the ability to obtain them," factors that are covered by Certificate of Competency procedures---------- 600
Determination review
Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1–903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1–705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600
Responsibility *v.* bid responsiveness
Where provisions of invitation for commercial instrument landing systems required bidders to submit evidence that identical equipment component had previously been installed at least at one location and had achieved level of performance specified are so loosely drawn that it is difficult to determine whether provisions affect responsibility of bidders or responsiveness of bids, award made pursuant to sec. 1–2.407–8(b)(3) of Federal Procurement Regs. before resolution of protest will not be disturbed absent clear and convincing evidence contracting officials' interpretation that not all components of equipment must be situated and checked at single location or their determination that equipment would meet required performance was in error---------- 9
To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after

BIDDERS—Continued Page

Responsibility *v.* bid responsiveness—Continued

opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid---------- 553

Noncompliance at time of bid submission with provision of invitation for steel pipe requirements that stated "when pipe is furnished" from supplier's warehouse, whether supplier is manufacturer or jobber, evidence should be shown that pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to testing standard contractor is obligated to meet required procedure "when pipe is furnished," and failure to do so would be breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by contractor would be absolutely and unquestionably impossible, any rejection of bid for that reason would rest upon determination of nonresponsibility rather than nonresponsiveness of bid-------- 553

Whether low bidder offering Japanese steel can meet its delivery obligations under requirements contract for steel pipe is question of responsibility and, therefore, fact that bidder did not furnish firm written commitment from Japanese manufacturer did not require rejection of bid. Bidder with full knowledge of circumstances concerning its ability to meet delivery schedule agreed to be bound by specified delivery schedule, and Govt. is entitled to rely on this promise---------- 553

In matters of responsibility, questions concerning qualifications of prospective contractor are primarily for resolution by administrative officers concerned, and in absence of showing of bad faith or lack of any reasonable basis for determination that prospective contractor is responsible, U.S. GAO is not justified in objecting to determination made on question of bidder responsibility by administrative agency---------- 553

BIDS

Acceptance time limitation

Failure to comply

Nonresponsiveness of low bid of Canadian firm offering 60-day bid acceptance period under invitation specifying period of "at least 90 days" is not overcome by fact that bid submitted to Canadian Commercial Corp. (CCC), quasi-governmental agency that handles bids of Canadian firms with Dept. of Defense (DOD), was accompanied by CCC form offering to keep bid firm for additional 10 days, or total of 100 days as bidder's intent to be bound by specified bid acceptance period was not submitted to DOD before bid opening. CCC is considered prime contractor and, therefore, subject to ordinary requirements regarding bid responsiveness, and offer to meet bid acceptance terms of invitation not coming within exceptions that permit late bid modifications, low bid is not for consideration, even though Govt. is deprived of lower prices--- 649

BIDS—Continued Page

Acceptance time limitation—Continued

Failure to comply—Continued

Language of covering letter accompanying bid that failed to meet "at least 90 days" acceptance period specified in invitation, which stated bid is "in response to Solicitation No. * * *" is not sufficient to offset failure of bidder to meet bid acceptance terms of invitation. Covering letter failed to cure nonresponsiveness of bid as it did not expressly or impliedly indicate that bidder was offering required bid acceptance period of at least 90 days ---------- 649

Upon contract termination for faulty performance, contractor who after filing timely appeal to termination, alleged award was void *ab initio* because insertion of three dashes (---) in bid acceptance period blank was equivalent to leaving space blank and, therefore, its bid was nonresponsive, may not have contract set aside, and contractor is left to its appeal. While contracting officer had he been aware of bid defect would have been without authority to make award, contractor having failed to take action prior to execution of contract, may not as one benefitting from contract, have contract set aside at its instance, and contract is not void *ab initio*. but is voidable only at option of Govt. Therefore, bid acceptance period intended for benefit of Govt., when provision became inoperative upon contract award, binding contract was consummated ---------- 761

Reasonableness

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

Administrative determinations

Assumptions

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

BIDS—Continued Page

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

Bidding unit measurements ambiguous

Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited, correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements 48

Evaluation. (*See* Bids, evaluation, aggregate *v.* separable items, prices, etc.)

Partial award

Unbalanced bid

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error 588

All or none

Qualified. (*See* Bids, qualified, all or none)

Alternative

Deduction

Base bid error

Where base bid is corrected to reflect intended price for materials and contract is awarded with deduction of alternative item, amount deducted for item should reflect correction in base bid 480

Failure to bid on alternate

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed 639

BIDS—Continued Page
Alternative—Continued
Failure to bid on alternate—Continued
Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1–1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---------- 639
Where bidders under invitation soliciting bids on basis of first article approval and/or waiver of article are advised to submit bids on basis of first article approval even if entitled to waiver of first article in order to make them eligible for consideration should contracting agency determine to make award on basis of first article approval, fact that low bidder did not submit bid on first article waiver alternative did not affect bid responsiveness or bidder's eligibility for award of contract on basis of first article approval, as bidder having complied with terms of invitation did not run risk that its bid on basis of first article approval could not be considered because Govt. elected to accept alternative it did not bid upon, waiver of first article approval---------- 639
Awards. (*See* Contracts, awards)
Bid forms
Initialing bid changes
Failure to initial erasure and correction of unit price in low bid submitted under invitation for indefinite quantity of rods, where there was no doubt of intended bid price and no need to question whether person signing bid effected changes as abstract of bids evidenced price had been corrected prior to bid opening, was minor informality of form that should have been waived pursuant to par. 2–405 of Armed Services Procurement Reg. in interest of Govt. as low bidder responsible for contents of bid submitted would be required to perform at corrected bid price-------- 541
Bid shopping. (*See* Contracts, subcontracts, bid shopping)
Bonds. (*See* Bonds)
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
Buy American Act
Evaluation
Balance of Payments Program restrictions
Surplus agricultural products effect
In evaluation of proposals submitted to construct submarine cable subsystem linking Okinawa to Taiwan, proposals that were solicited on both nonbarter basis and barter basis under Pub. L. 806, 80th Cong., which authorizes disposal by barter and exchange of surplus agricultural commodities for use outside U.S., addition of 50 percent Balance of Pay-

BIDS—Continued Page
Buy American Act—Continued
Evaluation—Continued
Balance of Payments Program restrictions—Continued
Surplus agricultural products effect—Continued
ments Program factor to cost of foreign source items offered in proposals received on both barter and nonbarter basis was proper and was not precluded by barter procedures prescribed in sec. 4, part 5 of Armed Services Procurement Reg. Therefore, it was reasonable to use 50 percent balance of payments factor in evaluating lowest priced barter proposal even though when added to cost of foreign items the price became the highest offered---------- 562

Foreign source items purchased in United Kingdom for use overseas that are offered in proposal submitted on barter basis pursuant to Pub. L. 806, 80th Cong., which authorizes disposal of surplus agricultural commodities overseas, properly were subject to 50 percent Balance of Payments Program evaluation factor upon determination offset credits provided under barter agreements between U.S. and United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of balance of payments penalty, and that balance of payments impact would be adverse. Application of offset credits is not mandatory, nor is application of balance of payments procedure automatically waived when offsets are available.---------- 562

Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L. 806, 80th Cong., which authorizes disposal by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal. If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors---------- 562

Foreign bids

Although procurement of steel towers for installation as part of communication system in West Germany was not subject to Buy American Act, as procurements for use outside U.S. are exempt from restrictions of act, and, therefore, bids of low Canadian bidder—sponsored by Canadian Commercial Corp.—and domestic bidder whose bid exceeded foreign bid by more than 50 percent properly were evaluated on equal competitive basis and award made to low, responsible bidder, procurement should have been made subject to Balance of Payments Program. However, as provisions of Program were inadvertently omitted from invitation, contracting officer had not referred domestic bid that exceeded foreign bid by more than 50 percent to higher authority for approval as required, and absent certainty of approval, cancellation of award made in good faith would not be in best interests of Govt---------- 176

BIDS—Continued Page

Competitive system

Administrative authority to correct bid mistakes

Where correction of bid was improper, fact that correction was permitted by authorized Govt. agent does not estop Govt. from terminating purported contract. Although withdrawal of erroneous bid could have been permitted, correction was precluded as intended bid could not be substantially determined from invitation or bid. Bid protest procedures used having conformed to sec. 20.2, Title 4, Code of Federal Regs., and contractor timely informed its interests could be adversely affected and given opportunity to present its views, termination of partially performed contract was neither prejudicial to contractor nor adverse to best interests of Govt., and was required in order to preserve integrity of competitive bidding system---------- 152

Bid mistake corrections

An obvious discrepancy between unit and total prices in bid for care of remains of deceased personnel submitted under invitation for bids that requested unit and extended prices on estimated quantities of 22 different items and/or subitems of services and supplies and that provided unit price will prevail in case of discrepancy between unit and extended prices, subject to correction in same manner as any other mistake, may not be corrected pursuant to par. 2-406.2 of Armed Services Procurement Reg. as error "apparent on the face of the bid," absent evidence of whether error occurred in unit price or extended price. To permit correction of error would give bidder opportunity to select either unit price or purported extended price, thus adversely affecting confidence in competitive bidding system.---------- 12

Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited, correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements---------- 48

Bidder operations 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

BIDS—Continued Page
Competitive system—Continued
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 sales 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
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 invitatio s should contain sufficient information for intelligent preparation of bids so as to obtain maximum competition contemplated by 10 U.S.C. 2305(b) ---------- 347
Compliance requirement
Contract conditions or stipulations which tend to restrict full and free competition required by procurement laws and regulations are unauthorized unless reasonably requisite to accomplishment of legislative purposes of appropriation act or other law involved, and no administrative authority can lawfully impose any requirements to contravene prohibitions imposed by statute. Therefore, revised "Philadelphia Plan" in imposing affirmative action programs for employment of minorities constitutes discrimination on basis of race or national origin in contravention of prohibition in Civil Rights Act of 1964, and E.O. No. 11246 -- 59

BIDS—Continued Page
Competitive system—Continued
Defective specifications

Low bid to supply requirements for radio program tape duplication and distribution services that furnished only fraction of unit prices solicited on distribution services is nonresponsive bid, even though items not priced had been excluded from evaluation formula and comprised only 2 percent of contemplated contract, for omission left contracting agency without any fixed-unit price commitment for substantial number of possible service combinations. Moreover, bid evaluation formula provided in invitation soliciting basic 1-year contract term and additional option year, permitted submission of unbalanced bids, and did not assure reasonable expectation that lowest evaluated bid would result in lowest actual performance cost that is required under 10 U.S.C. 2305(a) to secure full and free competition and, therefore, defective invitation should be canceled---------- 787

Delivery provisions
Failure to meet not prejudicial

When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive, and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b. origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated "Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system---------- 517

Effect of erroneous awards

Under invitation requiring bidders to cite make and model of refuse collection trucks offered to permit evaluation of bids on basis of descriptive literature on file with procurement officer, determination that low bid was nonresponsive was proper, even though literature indicated it was subject to change. Bidder had not specified in its bid that any modification would be made in equipment to meet invitation requirements, and for officer to inquire after bid opening whether there was other literature available to show that offered model would comply with specifications would have permitted bidder to modify its bid after submission contrary to competitive bidding procedures. Future invitations should, however, show that award will be based upon bidder's unqualified offer to comply with specifications, thus avoiding need for bidders to cite truck make and model---------- 764

Equal bidding basis for all bidders
Lacking

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 prejudi-

BIDS—Continued Page
Competitive system—Continued
Equal bidding basis for all bidders—Continued
Lacking—Continued
cial 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

Oral statements

Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L. 806, 80th Cong., which authorizes disposal by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal. If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors---------- 562

Federal aid, grants, etc.
Equal employment opportunity programs

Revised "Philadelphia Plan" prescribing that no contracts or subcontracts shall be awarded for Federal or federally assisted construction projects unless bidder had submitted acceptable affirmative action program that included specific goals of minority manpower utilization to provide equal employment opportunity, conflicts with intent of Civil Rights Act of 1964, and E.O. No. 11246, making use of race or national origin as basis of employment an unlawful employment practice. Plan directed to correcting past discrimination by labor unions would in establishing quota system for employment of minorities accord preferential treatment in conflict with prohibition in Civil Rights Act, and in passing upon legality of matters involving expenditures of appropriated funds, act will be so construed---------- 59

Impracticable to obtain competition
Negotiation of procurement. (*See* Contracts, negotiation, competition, impracticable to obtain)
Minimum needs requirement

Cancellation and readvertising of invitation for copper superconductor wire upon determination lower resistivity ratio wire offered by lowest bidder equally met minimum needs of Govt. as did higher ratio more costly wire solicited was not required and original invitation should be reinstated. Adequate competition had been obtained under original invitation and only relatively small price difference existed between two lowest bids, and, although revision of specifications is "compelling reason" for rejecting all bids and readvertising procurement, cancellation of invitation should be limited to instances in which award under

BIDS—Continued Page
Competitive system—Continued
Minimum needs requirement—Continued
original specifications would not serve Govt.'s needs, but when as here specifications do, readvertising after exposure of bids would be prejudicial to competitive bidding system ---------- 211
Mistake establishment
Award for dictating equipment to apparent low bidder made on basis of mistake in fact that bidder's offered price was lowest price received, understanding induced by erroneous factual statements inadvertently made by contractor's representative that equipment would not require leasing of dictating trunk lines at monthly rental charge, was erroneous award to other than low, responsive, responsible bidder, and although made in good faith award should be canceled and procurement resolicited, as it is not enough that award be made in good faith. Fact that contractor's representative was unaware that his statements were erroneous is also of no effect as there is no difference between contract entered into under mutual mistake of fact and one in which one party contracts in reliance upon deliberate misrepresentation by other ---------- 736
Unsuccessful offeror's failure to repeat questions raised at time proposals were opened concerning its competitor's ability to fulfill its representations is not considered waiver of any rights to object to award, nor does it preclude offeror from renewing complaints when erroneous basis of contract award is disclosed ---------- 736
Preservation of system's integrity
Interest of Govt. and integrity of competitive bidding system require that, after bids are opened and bidders' prices disclosed, invitations should be canceled only for most cogent and compelling reasons, and fact that one bidder made mistake in bid does not represent cogent or compelling reason for rejecting all bids and readvertising procurement ---------- 417
Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is in error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made ---------- 782
Prices below cost
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

BIDS—Continued Page

Competitive system—Continued

Restrictions on competition legitimacy

Procedure for issuing solicitation packages in number determined by contracting officer, which after obtaining competition by means of automated bidders source file, by publicizing procurement in Commerce Business Daily, and by notice in contractors information center results in insufficient copies to satisfy all mail requests does not achieve maximum competition sought and, therefore, fairness of policy of filling requests on first-come, first-served basis, regardless of whether request is made via mail or in person should be reviewed. Firm should be able to obtain copy of solicitation without being left with belief it must resort to engaging local representative to do business with Govt. agency..... 550

Small business concerns

Self-certification

While bidder's good faith is criterion for determining acceptability of self-certification as to his small business status, determining factor in deciding whether actions after bid opening that affect self-certification are permissible is whether those actions give bidder undue advantage over other bidders by giving him option to remain ineligible or take steps to preserve his small business status for award purposes. To permit firm that had certified itself in good faith as small business concern to terminate after bid opening its management agreement with large business concern for purpose of qualifying for award of set-aside portion of invitation would give bidder just such option and would have a deleterious effect on integrity of bidding system..... 1

Specification conformance

Contract award to low bidder which would have permitted bidder who had deliberately deviated from specification requirements to furnish item neither asked for in invitation nor offered by other bidders would not be contract offered to all bidders and, therefore, rejection of nonconforming low bid was proper, even though deliberately substituted item would have met minimum needs of Govt. To insure benefits of competition to Govt., it is essential that contract awards be made on basis of specification requirements submitted for competition, and deviation to requirements may only be waived if deviation does not go to substance of bid or work injustice on other bidders, and deviation in low bid having been deliberately taken may not be considered trivial or minimal so as to justify waiver as minor irregularity..... 211

Subcontractor utilization

Although generally contracting practices and procedures employed by prime contractors in award of subcontracts are not subject to statutory and regulatory requirements which govern contract procurement by U.S., in view of clause in contract for operation of ammunition plant that provided for Govt. approval prior to award of subcontract, U.S. GAO reviewed cancellation of two Requests for Quotations (RFQ) and issuance of third solicitation by prime contractor, and even though criticizing failure to notify protesting subcontractor of rejection of its bid under first RFQ because of negative Govt. preaward survey and its erroneous use to exclude subcontractor from participating in second RFQ, concluded negotiations under third solicitation based on required revised specifications were not prejudicial to protestant..... 668

BIDS—Continued Page

Competitive system—Continued

Unbalanced bids

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

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

Correction

Initialing requirement

Failure to initial erasure and correction of unit price in low bid submitted under invitation for indefinite quantity of rods, where there was no doubt of intended bid price and no need to question whether person signing bid effected changes as abstract of bids evidenced price had been corrected prior to bid opening, was minor informality of form that should have been waived pursuant to par. 2-405 of Armed Services Procurement Reg. in interest of Govt. as low bidder responsible for contents of bid submitted would be required to perform at corrected bid price---- 541

Delivery provisions

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

Failure to meet

Deviation minor

When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b. origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated "Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system---------- 517

Mistakes

Verification

Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt. and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2-406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous

BIDS—Continued Page
Delivery provisions—Continued
Mistakes—Continued
Verification—Continued
on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it..... 558

Proof of ability to meet

Whether low bidder offering Japanese steel can meet its delivery obligations under requirements contract for steel pipe is question of responsibility and, therefore, fact that bidder did not furnish firm written commitment from Japanese manufacturer did not require rejection of bid. Bidder with full knowledge of circumstances concerning its ability to meet delivery schedule agreed to be bound by specified delivery schedule, and Govt. is entitled to rely on this promise..... 553

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

Discarding all bids

Bidding irregularities

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

Changed conditions, etc.

Affecting price, quantity, or quality

Cancellation of invitation for bids based on determination changes in scope of work and equipment to be furnished constituted substantial deviation from original specifications that affected price, quantity, or quality of procurement, and readvertisement of procurement with award to second low bidder under first invitation was in best interest of Govt. and is proper action under sec. 1-2.404-1(b) of Federal Procurement Regs., even though revision of specifications is not one of examples cited in section for canceling invitation. Examples cited are not intended to be all inclusive, but to be indicative of type of circumstance that justifies cancellation and, therefore, contracting officer's determination to cancel invitation prevails in absence of showing of abuse of administrative discretion..... 584

Procurement no longer needed

Fact that Govt. determined inventory on hand upon termination of contract was surplus to its needs and authorized contractor to dispose of inventory, does not preclude Govt., real party in interest, from assert-

BIDS—Continued Page
Discarding all bids—Continued
Changed conditions, etc.—Continued
Procurement no longer needed—Continued
ing after-discovered need for property and withdrawing it from sale for use under another contract. Rule that a contracting officer not only has right to reject all bids when procurement is no longer needed or wanted but would be derelict in his duty if he failed to do so, should be followed when need arises for surplus property advertised for sale, as determination to dispose of surplus property does not constitute representation that no need exists or may not subsequently arise for property_____ 683
Compelling reasons only
Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1–2.404–1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interest of Govt_____ 135
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 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
Interest of Govt. and integrity of competitive bidding system require that, after bids are opened and bidders' prices disclosed, invitations should be canceled only for most cogent and compelling reasons, and fact that one bidder made mistake in bid does not represent cogent or compelling reason for rejecting all bids and readvertising procurement_____ 417
Question whether difference between nonresponsive bid and lowest acceptable bid is sufficiently substantial to justify rejection of all bids and to readvertise procurement is for determination by contracting officer. Par. 2–404.1(b)(vi) of Armed Services Procurement Reg. permits cancellation of invitations for bids after opening but prior to award where action is consistent with par. 2–404.1(a), which restricts rejection of all bids to situations where reason for cancellation of invitation is compelling, and contracting officer determines in writing that all otherwise acceptable bids received are at unreasonable prices_____ 649
Failure to establish procedures to pick up timber sale bids addressed in accordance with invitation for bids to post office box and Forest Supervisor designated to receive bids, whose office was but short distance from post office, resulted in late delivery of bid that had been timely received

BIDS—Continued Page

Discarding all bids—Continued

Compelling reasons only—Continued

at post office, and bid constructively delivered to Forest Service facility when deposited at post office is for consideration pursuant to sec. 1-2.303-2 of Federal Procurement Regs. on basis mishandling is chargeable to Govt. Considerations of bid may not be avoided by discarding bids received and readvertising timber sale as no cogent or compelling reason exists for such action 697

Prices excessive

Cancellation of invitation for bids that contained total set-aside for small business concerns due to disparity in bid prices evidenced by bid of large business concern who had acquired small business that had been solicited to submit bid having satisfactorily performed under prior contracts, because contracting officer was unaware of concern's changed size status, and readvertisement of procurement on unrestricted basis, was in accord with pars. 1-706.5(a)(1) and 1-706.3(a) of Armed Services Procurement Reg., and withdrawal determination properly considered "courtesy" bid of large business concern submitted at price that was less than half of lowest small business price, even though no formal inquiry was made to establish correctness of large business concern's price as firm was ineligible for award under set-aside 740

Reinstatement

Cancellation of invitation unjustified

Cancellation and readvertising of invitation for copper superconductor wire upon determination lower resistivity ratio wire offered by lowest bidder equally met minimum needs of Govt. as did higher ratio more costly wire solicited was not required and original invitation should be reinstated. Adequate competition had been obtained under original invitation and only relatively small price difference existed between two lowest bids, and, although revision of specifications is "compelling reason" for rejecting all bids and readvertising procurement, cancellation of invitation should be limited to instances in which award under original specifications would not serve Govt.'s needs, but when as here specifications do, readvertising after exposure of bids would be prejudicial to competitive bidding system 211

Sale of surplus property

Procurement principles

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

BIDS—Continued Page
Discarding all bids—Continued
Specification defective
Evaluation basis
Low bid to supply requirements for radio program tape duplication and distribution services that furnished only fraction of unit prices solicited on distribution services is nonresponsive bid, even though items not priced had been excluded from evaluation formula and comprised only 2 percent of contemplated contract, for omission left contracting agency without any fixed-unit price commitment for substantial number of possible service combinations. Moreover, bid evaluation formula provided in invitation soliciting basic 1-year contract term and additional option year, permitted submission of unbalanced bids, and did not assure reasonable expectation that lowest evaluated bid would result in lowest actual performance cost that is required under 10 U.S.C. 2305(a) to secure full and free competition and, therefore, defective invitation should be canceled 787
Information omission
Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1–2.404–1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interests of Govt 135
Performance time
When invitation for bids provides for liquidated damages but omits to state number of days in which work of converting elevators to automatic controls must be completed, question for resolution is not responsiveness of low bid that did not indicate performance time or entitlement to contract award of only other bidder who had indicated performance time in its bid, but whether invitation was defective. Invitation in omitting performance time did not comply with requirement in sec. 1–18.203–1 (b) of Federal Procurement Regs., and in failing to indicate what time, if any, would be acceptable, did not permit bidders to compete on equal basis and, therefore, defective invitation should be canceled and procurement readvertised 713
Discounts
Trade discount
Discount in excess of two percent
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

BIDS—Continued Page

Discounts—Continued

Trade discount—Continued

Discount in excess of two percent—Continued

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

Unbalanced

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 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

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

Evaluation

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

Subitems

Under invitation for bids which listed 30 items, some comprising two or more subitems, but which did not provide that either unit prices or aggregate bid price would govern, rejection of low bid was proper where bidder

BIDS—Continued Page

Evaluation—Continued

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

Subitems—Continued

refused correction of mistake in subtotal of four subitems correctly extended that would increase subtotal, because resultant increase in aggregate bid price would displace low bid, but claimed error in subitem computation and entitlement to contract award on basis of originally submitted total base bid price. No discrepancy having occurred between subitem and extended price, reduction in subitem price was essential for low bid to remain low, and absence evidence of intended subitem price as required by sec. 1-2.406-3(a)(2) of Federal Procurement Regs., rejection of erroneous bid was required to preserve integrity of competitive bidding system 107

Alternate bases bidding

Failure to bid on all bases

Where bidders under invitation soliciting bids on basis of first article approval and/or waiver of article are advised to submit bids on basis of first article approval even if entitled to waiver of first article in order to make them eligible for consideration should contracting agency determine to make award on basis of first article approval, fact that low bidder did not submit bid on first article waiver alternative did not affect bid responsiveness or bidder's eligibility for award of contract on basis of first article approval, as bidder having complied with terms of invitation did not run risk that its bid on basis of first article approval could not be considered because Govt. elected to accept alternative it did not bid upon, waiver of first article approval 639

Basis for evaluation

Descriptive literature on file

Under invitation requiring bidders to cite make and model of refuse collection trucks offered to permit evaluation of bids on basis of descriptive literature on file with procurement officer, determination that low bid was nonresponsive was proper, even though literature indicated it was subject to change. Bidder had not specified in its bid that any modification would be made in equipment to meet invitation requirements, and for officer to inquire after bid opening whether there was other literature available to show that offered model would comply with specifications would have permitted bidder to modify its bid after submission contrary to competitive bidding procedures. Future invitations should, however, show that award will be based upon bidder's unqualified offer to comply with specifications, thus avoiding need for bidders to cite truck make and model 764

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

Delivery provisions

First article approval or waiver

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder

BIDS—Continued Page

Evaluation—Continued

Delivery provisions—Continued

First article approval or waiver—Continued

who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed 639

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1-1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2) 639

F.O.B. origin

Omitted from bid

When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive, and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated "Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system 517

Guaranteed shipping weight

Award of supply contract that failed to include Guaranteed Maximum Shipping Weight and Dimensions Clause (Guarantee Clause) prescribed by pars. 2-201(b) and 19-210 of Armed Services Procurement Reg. (ASPR), and was amended to include clause, will not be disturbed as successful bid remained low after first reevaluation of two lowest bids submitted under invitation requiring bidders to furnish shipping container data. Contract provision holding contractor responsible for costs and damages resulting from loss of goods in transit or some unusual loss attributable to failure to meet packaging requirements cannot substitute for required Guarantee Clause, and future f.o.b origin invitations should incorporate ASPR mandatory Guarantee Clause 129

Award to low bidder who failed to furnish guaranteed shipping weight (GSW) under invitation stating that "Bidder must state weights

BIDS—Continued Page
Evaluation—Continued
Delivery provisions—Continued
Guaranteed shipping weight—Continued
in his bid or it will be rejected," is not precluded because weight applied was one submitted by second low bidder, where invitation in providing for evaluation of bids on f.o.b. origin basis, plus transportation, and for reduction of contract prices should transportation costs exceed those used for bid evaluation, furnishes packing specifications that permit computing highest possible weight, which multiplied by applicable freight rate produces transportation cost that when added to bid price does not displace low bid. Even though failure to state GSW is not minor deviation, one of exceptions to rule is situation such as one involved where there is no real likelihood low bid will exceed second high bid---- 496
Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2-406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it---- 558
Error in cubic displacement of shipment of cement to overseas destination entitles Govt. in accordance with Maximum Guaranteed Shipping Weights and Dimensions clause contained in invitation for bids to contract price reduction between actual transportation costs and costs used to evaluate bid. Contractor's allegation of mistake in calculation of guaranteed cubic displacement in bid preparation is not sustained, even though displacement figure was below Govt.'s estimate, in view of fact that generally bidders deliberately underestimate guaranteed shipping weights and dimensions, and that additional transportation cost, taking into consideration bid price for cement, did not place contracting officer on constructive notice of possibility of error--- 718
Information
Reevaluation after contract award
Second reevaluation of bids after contract award under invitation that required bidders to furnish shipping container data that disclosed fact low bidder's transportation costs on basis of actual shipping experience were in excess of those of second low bidder, does not affect fact that bid was responsive at time of bid opening within meaning of 10 U.S.C. 2305 and par. 2-301 of Armed Services Procurement Reg., and that bid conformed to specifications, which provided considerable leeway in method of packaging and shipping weights, including choice of container dimensions and use. Contracting officer's acceptance of dimensions and weights of containers offered in good faith for evaluation purposes was reasonable as difference in weights offered did not put him on notice of error---- 129

BIDS—Continued Page

Evaluation—Continued

Discount provisions

Trade and prompt payment discounts

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

Method of evaluation defective, etc.

Evaluation factors uncertain

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

Lowest bid not lowest cost

Low bid to supply requirements for radio program tape duplication and distribution services that furnished only fraction of unit prices solicited on distribution services is nonresponsive bid, even though items not priced had been excluded from evaluation formula and comprised only 2 percent of contemplated contract, for omission left contracting agency without any fixed-unit price commitment for substantial number of possible service combinations. Moreover, bid evaluation formula provided in invitation soliciting basic 1-year contract term and additional option year, permitted submission of unbalanced bids, and did not assure reasonable expectation that lowest evaluated bid would result in lowest actual performance cost that is required under 10 U.S.C. 2305(a) to secure full and free competition and, therefore, defective invitation should be canceled---------- 787

Multi-year *v.* single-year procurements

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

BIDS—Continued Page
Evaluation—Continued
Multi-year *v.* single-year procurements—Continued
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

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

Negotiation. (*See* Contracts, negotiation, evaluation factors)
Patent royalty payments

To gain additional experience with preprocurement licensing under which if unlicensed bidder is awarded contract, patent owner receives royalty payment used in bid evaluation, National Aeronautics and Space Admin. may continue previously approved procedure, revised to limit procedure to research and development contracts where potential patent infringement exists; to require patent owner to file timely written notice of request for license; to delay opening of bids to allow evaluation of preprocurement license request; to provide for reasonable royalty rate, which if it exceeds lowest rate to private concern will be documented; to allow demonstration that contract performance will not result in infringement; to exclude any patent that forms basis of unresolved claim; and to provide for inclusion of royalties in bid evaluation where Govt. already is licensee 806

Qualified Bids. (*See* Bids, qualified)
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)
Guaranteed shipping weight, etc.
Evaluation. (*See* Bids, evaluation, delivery provisions, guaranteed shipping weight, etc.)
Labor surplus area performance. (*See* Contracts, awards, labor surplus areas)
Late
Mishandling determination
Bids received at one place for delivery to another place

Failure to establish procedures to pick up timber sale bids addressed in accordance with invitation for bids to post office box and Forest Supervisor designated to receive bids, whose office was but short distance from post office, resulted in late delivery of bid that had been timely received at post office, and bid constructively delivered to Forest Service facility when deposited at post office is for consideration pursuant to sec. 1–2.303–2 of Federal Procurement Regs. on basis mishandling is chargeable to Govt. Consideration of bid may not be avoided by discarding bids received and readvertising timber sales as no cogent or compelling reason exists for such action---------- 697

Modification
Rejection

Nonresponsiveness of low bid of Canadian firm offering 60-day bid acceptance period under invitation specifying period of "at least 90 days" is not overcome by fact that bid submitted to Canadian Commercial Corp. (CCC), quasi-governmental agency that handles bids of Canadian firms with Dept. of Defense (DOD), was accompanied by CCC form offering to keep bid firm for additional 10 days, or total of 100 days, as bidder's intent to be bound by specified bid acceptance period was not submitted to DOD before bid opening. CCC is considered prime contractor and, therefore, subject to ordinary requirements regarding bid responsiveness, and offer to meet bid acceptance terms of invitation not coming within exceptions that permit late bid modifications, low bid is not for consideration, even though Govt. is deprived of lower prices---------- 649

Opening of bid effect

Erroneous opening of late bid does not justify disregarding requirement that contract award be made to lowest, responsible and responsive bidder unless compelling reasons exist to reject all bids. Therefore, bid received and opened after scheduled bid opening time under erroneous assumption lateness was due to delay in mails for which bidder was not responsible, properly was rejected pursuant to par. 2–303.1 of Armed Services Procurement Reg---------- 191

Postal strike effect

Bid, forwarded by regular mail in sufficient time to have been delivered prior to time set for opening of bids but for unprecedented postal strike that commenced in New York City on bid opening day, may not be considered for award by waiving late bid regulations on theory strike was in same realm as act of God, defined as "some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes * * *." But even assuming strike was act of God,

BIDS—Continued Page
Late—Continued
Postal strike effect—Continued
bidder in not forwarding its bid by registered or certified mail, assumed risk of delivery, risk which was not overcome by bid handling instructions to procuring agencies necessitated by strike, as instructions did not suspend late bid rules contained in Armed Services Procurement Reg. 2-303 and invitation---------- 733
Processing and delivery by Government
Bid forwarded by certified mail that reached Air Force Base Branch Post Office in time to be received in bid opening room before opening of bids if bid had been forwarded by regular mail, but which was not timely received due to special administrative handling required for certified mail is nevertheless late bid and lateness may not be waived on basis it was due to delay in mails for which bidder was not responsible, as it is not enough that bid was received at Branch Post Office before bid opening time, sender should have allowed sufficient time for it to reach bid room before bid opening time. Fact that form of mail used is not as fast as expected, or is slower than other types of mail, provides no basis for enlarging exception to requirement for timely submission of bids--- 191
Special delivery service
Rejection of late bid that had been forwarded by certified mail to Air Force Base located 13 miles from nearest post office is not affected by fact bid had been handled airmail special delivery. Special delivery service ceased at post office in neighboring town in accordance with postal regulation limiting special delivery service to within 1-mile perimeter-- 191
Uniform Time Act effect
Under invitation providing for bids to be opened at 11 a.m. central standard time (c.s.t.), on May 28, 1969, bid hand-carried and delivered at 11:20 a.m., c.s.t., after bids had been read was properly rejected as late bid. Contention that because invitation did not indicate "c.s.t." would be interpreted as central daylight savings time, 11 a.m., c.s.t., meant 12 noon, daylight savings time, ignores fact that with enactment of Pub. L. 89-387, effective Apr. 1, 1967, there is no distinction between standard and daylight time, and that within each time zone there is only preestablished standard time regardless that during certain portion of year standard time is advanced 1 hour, thus making standard time and popular reference to "Daylight Saving Time" one and same. To preclude future differences in opinion "local time at place of bid opening" will be substituted for "standard time."---------- 164
Letter Requests for Technical Proposals
Two-step procurement. (*See* Bids, two-step procurement)
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

BIDS—Continued Page
Mistakes—Continued
Actual or constructive knowledge—Continued
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
Allegation after award. (*See* Contracts, mistakes)
Correction
Authority
Where correction of bid was improper, fact that correction was permitted by authorized Govt. agent does not estop Govt. from terminating purported contract. Although withdrawal of erroneous bid could have been permitted, correction was precluded as intended bid could not be substantially determined from invitation or bid. Bid protest procedures used having conformed to sec. 20.2, Title 4, Code of Federal Regs., and contractor timely informed its interests could be adversely affected and given opportunity to present its views, termination of partially performed contract was neither prejudicial to contractor nor adverse to best interests of Govt., and was required in order to preserve integrity of competitive bidding system 152
Base bid and alternative items
Where base bid is corrected to reflect intended price for materials and contract is awarded with deduction of alternative item, amount deducted for item should reflect correction in base bid 480
Contract executed prior to correction
Where record establishes mistake had been made in low bid and that intended bid exceeded bid submitted, and Govt. was on constructive notice of error from time of bid opening and on actual notice within 24 hours of opening, and documentation of mistake established existence, nature, and amount of mistake, which amount when added to bid price does not displace low bidder, fact that contractor signed contract before correction of mistake does not preclude its right to relief. Both Govt. and contractor expected that price would be amended at later date to reflect bid price intended by bidder, price actually known to contracting officer and, therefore, reformation of contract by increasing price by amount of documented mistake is authorized 446
Evidence of error
Omission of price
Bidder who submitted clear and convincing evidence of error in bid due to failure to show extended amount for listed quantity of one item and its unit price, manner in which error occurred, and intended total bid price, established existence of mistake alleged, and satisfied requirements of sec. 1-2.406-3(a)(2) of Federal Procurement Regs. to permit bid correction, even though profit and overhead figure was not increased. Bid may be corrected to reflect omission of direct costs without increase for profit and overhead if so requested by bidder where bid would still remain low bid even if amended to reflect increase for profit and overhead as correction would not be prejudicial to other bidders 480

BIDS—Continued Page
Mistakes—Continued
Correction—Continued
Low bid displacement
Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited, correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements ---------- 48
Telegram received prior to bid opening increasing bid price for janitorial services, which is alleged to have been intended as decrease, and if so considered three lower bids would be displaced to make corrected price lowest submitted, may not be treated as price decrease on basis mistake occurred in transmission of bid amendment, absent showing message delivered originally by telegraph company was not message telephoned by bidder, or certification by telegraph company that would support allegation of error in bid price modification. Therefore, exception to prohibition in sec. 1-2.406-3(a)(2) of Federal Procurement Regs. that permits bid correction that displaces lower bids when error is established through information provided by telegraph company rather than by interested bidder does not apply ---------- 417
Nonresponsive bids
In recommending termination of purported contract that had been awarded to bidder permitted to correct its bid price because it had been erroneously computed on estimated requirements 24 times Govt.'s true estimate and mistake may have affected amount bid, and that correction was tantamount to submission of second bid, U.S. GAO did not exceed its review authority. Standard of review pursuant to Wunderlich Act (41 U.S.C. 321, 322) applies to contract disputes and not to mistakes in bid, and finality of administrative determination does not apply to questions of law. For years GAO decided all questions concerning corrections of bid mistakes, and even with delegation of such authority, Comptroller General is not deprived of right to question administrative determinations, nor bidder of right to request his decision ---------- 152
Evidence of error
Unbalanced bid
Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error ---------- 588

BIDS—Continued Page

Mistakes—Continued

General rule

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

Relief

After execution of contract

Where record establishes mistake had been made in low bid and that intended bid exceeded bid submitted, and Govt. was on constructive notice of error from time of bid opening and on actual notice within 24 hours of opening, and documentation of mistake established existence, nature, and amount of mistake, which amount when added to bid price does not displace low bidder, fact that contractor signed contract before correction of mistake does not preclude its right to relief. Both Govt. and contractor expected that price would be amended at later date to reflect bid price intended by bidder, price actually known to contracting officer and, therefore, reformation of contract by increasing price by amount of documented mistake is authorized---------- 446

Subitems

Under invitation for bids which listed 30 items, some comprising two or more subitems, but which did not provide that either unit prices or aggregate bid price would govern, rejection of low bid was proper where bidder refused correction of mistake in subtotal of four subitems correctly extended that would increase subtotal, because resultant increase in aggregate bid price would displace low bid, but claimed error in subitem computation and entitlement to contract award on basis of originally submitted total base bid price. No discrepancy having occurred between subitem and extended price, reduction in subitem price was essential for low bid to remain low, and absence evidence of intended subitem price as required by sec. 1-2.406-3(a)(2) of Federal Procurement Regs., rejection of erroneous bid was required to preserve integrity of competitive bidding system---------- 107

Telegraphic submissions

Error establishment

Telegram received prior to bid opening increasing bid price for janitorial services, which is alleged to have been intended as decrease, and if so considered three lower bids would be displaced to make corrected price lowest submitted, may not be treated as price decrease on basis mistake occurred in transmission of bid amendment, absent showing message delivered originally by telegraph company was not message telephoned by bidder, or certification by telegraph company that would support allega-

BIDS—Continued Page
Mistakes--Continued
Telegraphic submissions—Continued
Error establishment—Continued
tion of error in bid price modification. Therefore, exception to prohibition in sec. 1-2.406-3(a)(2) of Federal Procurement Regs. that permits bid correction that displaces lower bids when error is established through information provided by telegraph company rather than by interested bidder does not apply ---------- 417
Unit price *v.* extension differences
Not apparent on face of bid
An obvious discrepancy between unit and total prices in bid for care of remains of deceased personnel submitted under invitation for bids that requested unit and extended prices on estimated quantities of 22 different items and/or subitems of services and supplies and that provided unit price will prevail in case of discrepancy between unit and extended prices, subject to correction in same manner as any other mistake, may not be corrected pursuant to par. 2-406.2 of Armed Services Procurement Reg. as error "apparent on the face of the bid," absent evidence of whether error occurred in unit price or extended price. To permit correction of error would give bidder opportunity to select either unit price or purported extended price, thus adversely affecting confidence in competitive bidding system---------- 12
Verification
Government responsibility
Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2-406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous on basis of information contained in Transportation Evaluation clause invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it---------- 558
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

BIDS—Continued Page
Multi-year—Continued
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

Same unit price for "like" items

Fact that low bidder on multi-year procurement for receiver-transmitters to be furnished at four different levels of preservation, packaging, and packing under invitation containing provision "The unit price for each *like* item of total multi-year requirements shall be same for all program years," bid different unit price on each level of packaging does not violate requirement for same unit price on each "like" item. Same unit price was offered for all like packaged items and, therefore, pricing requirements of invitation, which did not preclude separate prices for same items requiring different packaging, and of par. 1-322.2 (c) (iv) of Armed Services Procurement Reg. were met, notwithstanding more expensive packaging was used for some of same packaged items without increase in unit price ---------- 489

Urgency of procurement

Neither anticipation by manufacturer found nonresponsive to "Bidder's Technical Qualification Clause" contained in first step of a two-step multi-year procurement for Instrument Landing System that it could meet criteria of clause at unspecified future date, nor urgency of procurement warrants cancellation of multi-year procurement and reissuance of invitation for first year's requirements. There is no assurance manufacturer will qualify in time for first year's requirements, and fact that procurement is urgently needed does not necessarily mean multi-year procurement is inappropriate, and particularly where use of multi-year technique appears to offer more timely delivery than separate single-year contracts ---------- 857

Negotiation
Generally. (*See* Contracts, negotiation)
Nonresponsive
Allegation after award

Upon contract termination for faulty performance, contractor who after filing timely appeal to termination, alleged award was void *ab initio* because insertion of three dashes (---) in bid acceptance period blank was equivalent to leaving space blank and, therefore, its bid was nonresponsive, may not have contract set aside, and contractor is left to its appeal. While contracting officer had he been aware of bid defect would have been without authority to make award, contractor having

BIDS—Continued Page
Nonresponsive—Continued
Allegations after award—Continued
failed to take action prior to execution of contract, may not as one benefiting from contract, have contract set aside at its instance, and contract is not void *ab initio*, but is voidable only at option of Govt. Therefore, bid acceptance period intended for benefit of Govt., when provision became inoperative upon contract award, binding contract was consummated---------- 761
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 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
Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed---------- 538
Prices in bid
Low bid to supply requirements for radio program tape duplication and distribution services that furnished only fraction of unit prices solicited on distribution services is nonresponsive bid, even though items not priced had been excluded from evaluation formula and comprised only 2 percent of contemplated contract, for omission left contracting agency without any fixed-unit price commitment for substantial number of possible service combinations. Moreover, bid evaluation formula provided in invitation soliciting basic 1-year contract term and additional option year, permitted submission of unbalanced bids, and did not assure reasonable expectation that lowest evaluated bid would result in lowest actual performance cost that is required under 10 U.S.C. 2305(a) to secure full and free competition and, therefore, defective invitation should be canceled---------- 787

BIDS—Continued Page

Omissions—Continued

Prices on amendment acknowledgment

Under invitation for collapsible fabric tanks that was amended to increase total units, award of contract for original quantity solicited on basis of price reduction received prior to issuance of amendment, and cancellation of amendment was proper where amendment acknowledgment by successful bidder had not been priced or related to decreased price and only bid prices received incident to an addenda acknowledgment were unreasonable. Bid submitted in original solicitation and which had not been withdrawn could not and did not become invalid because bid was not submitted on additional quantity, as solicitation and amendment permitted bid to be submitted on all or any part of quantities involved, and award of contract in quantities less than stated in solicitation---------- 147

Failure of bidders in acknowledging amendments to invitation to price increased quantities solicited by amendment may have been due to form of amendment which neither provided space for insertion of prices nor called for prices on additional items. To avoid reoccurrence of situation, future amendments should be formulated to leave no doubt as to what is required---------- 147

State sales tax

Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is in error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made... 782

Options

Effect of "all or none" bid

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

Options

Exercise of option. (*See* Contracts, options)

Patent, etc., items

Preproduction licenses

To gain additional experience with preprocurement licensing under which if unlicensed bidder is awarded contract, patent owner receives royalty payment used in bid evaluation, National Aeronautics and Space Admin. may continue previously approved procedure, revised to limit procedure to research and development contracts where potential patent infringement exists; to require patent owner to file timely written notice of request for license; to delay opening of bids to allow evaluation of preprocurement license request; to provide for reasonable royalty rate, which if it exceeds lowest rate to private concern will be documented; to allow demonstration that contract performance will not result in infringement; to exclude any patent that forms basis of unresolved claim; and to provide for inclusion of royalties in bid evaluation where Govt. already is licensee ---------- 806

Peddling

Subcontracts. (*See* Contracts, subcontracts, bid shopping)

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

Correction

Initialing requirement

Failure to initial erasure and correction of unit price in low bid submitted under invitation for indefinite quantity of rods, where there was no doubt of intended bid price and no need to question whether person signing bid effected changes as abstract of bids evidenced price had been corrected prior to bid opening, was minor informality of form that should have been waived pursuant to par. 2-405 of Armed Services Procurement Reg. in interest of Govt. as low bidder responsible for contents of bid submitted would be required to perform at corrected bid price ---------- 541

Multi-year procurement

Fact that low bidder on multi-year procurement for receiver-transmitters to be furnished at four different levels of preservation, packaging, and packing under invitation containing provision "The unit price for each *like* item of total multi-year requirements shall be same for all program years," bid different unit price on each level of packaging does not violate requirement for same unit price on each "like" item. Same unit price was offered for all like packaged items and, therefore, pricing requirements of invitation, which did not preclude separate prices for same items requiring different packaging, and of par. 1-322.2(c)(iv) of Armed Services Procurement Reg. were met, notwithstanding more expensive packaging was used for some of same packaged items without increase in unit price ---------- 489

BIDS—Continued Page
Prices—Continued
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
Acceptance of bid erroneous

Under invitation for bids that contained provisions for submission of bid samples as part of bid, and for inspection of production samples by Govt. prior to delivery and by contractor to insure that delivered product was "manufactured and processed in careful and workmanlike manner, in accordance with good practice," bid that submitted acceptable samples but took exception to production sample inspection due to lack of standard test equipment in industry to assure finished product would meet Govt.'s test, and offered to measure performance on basis of specifications and to meet workmanship standards inspection was intended to insure, was qualified bid as it eliminated that Govt.'s test results would control and imposed different standard of product acceptability ---------- 534

Telegram by unsuccessful bidder stating intent to protest to U.S. GAO should contract award be made to low bidder alleged to have qualified its bid, and advising supporting letter would follow, should have been treated as protest and award made to low bidder day before receipt of promised letter withheld until dispute was resolved, particularly in view of fact protestant's declaration of intent to file protest with GAO in event of contract award, was sufficient standing alone to require conclusion that telegram constituted protest. However, contract having been substantially performed, it would not be in best interests of Govt. to require cancellation of contract ---------- 534

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
Qualified—Continued
All or none—Continued
Partial award legality

While combination of awards for maximum quantity offered by low bidder and bidder that had submitted "all or none" bid would be in Govt.'s interest pricewise for entire quantity solicited, partial award under qualified bid is precluded, and word "all" in minimum quantity column may not be explained by bidder to mean "all" of any indefinite quantity to be procured under invitation. Eligibility of bid for award is determinable from bid itself without reference to subsequent offers and interpretations by bidder, as formal advertising contemplates receipt of firm offers which can be accepted by Govt.'s unilateral action and, therefore, partial acceptance of qualified bid would not result in legal award, notwithstanding bidder's willingness to accept partial award---------- 499

Bid nonresponsive

Cancellation and readvertising of invitation for copper super-conductor wire upon determination lower resistivity ratio wire offered by lowest bidder equally met minimum needs of Govt. as did higher ratio more costly wire solicited was not required and original invitation should be reinstated. Adequate competition had been obtained under original invitation and only relatively small price difference existed between two lowest bids, and, although revision of specifications is "compelling reason" for rejecting all bids and readvertising procurement, cancellation of invitation should be limited to instances in which award under original specifications would not serve Govt.'s needs, but when as here specifications do, readvertising after exposure of bids would be prejudicial to competitive bidding system---------- 211

Descriptive literature

Under invitation for mechanical presses that required submission of price lists, unsolicited brochure accompanying low bid that described both conforming and nonconforming presses which was submitted to make price list more meaningful and was not intended for evaluation purposes did not qualify bid as both documents, parallel in format were complementary. Intent of bid is for determination from its contents, including unsolicited brochure, and if literature qualifies bid or creates ambiguity, bid must be rejected as nonresponsive and pursuant to 10 U.S.C. 2305(c) award made to low responsible bidder whose bid conforms to invitation, statutory requirement that is not negated by par. 2-202.5(f) of Armed Services Procurement Reg., which presumes bid to conform or to be unqualified where intent of bidder is ambiguous. Modifies B-169057, April 23, 1970---------- 851

Rejection

Deliberate deviation from specifications

Contract award to low bidder which would have permitted bidder who had deliberately deviated from specification requirements to furnish item neither asked for in invitation nor offered by other bidders would not be contract offered to all bidders and, therefore, rejection of nonconforming low bid was proper, even though deliberately substituted item would have met minimum needs of Govt. To insure benefits of competition to Govt., it is essential that contract awards be made on

BIDS—Continued Page

Rejection—Continued

Deliberate deviation from specifications—Continued

basis of specification requirements submitted for competition, and deviation to requirements may only be waived if deviation does not go to substance of bid or work injustice on other bidders, and deviation in low bid having been deliberately taken may not be considered trivial or minimal so as to justify waiver as minor irregularity---------- 211

Propriety

Under invitation for bids which listed 30 items, some comprising two or more subitems, but which did not provide that either unit prices or aggregate bid price would govern, rejection of low bid was proper where bidder refused correction of mistake in subtotal of four subitems correctly extended that would increase subtotal, because resultant increase in aggregate bid price would displace low bid, but claimed error in subitem computation and entitlement to contract award on basis of originally submitted total base bid price. No discrepancy having occurred between subitem and extended price, reduction in subitem price was essential for low bid to remain low, and absence evidence of intended subitem price as required by sec. 1–2.406–3(a)(2) of Federal Procurement Regs., rejection of erroneous bid was required to preserve integrity of competitive bidding system---------- 107

Failure to initial erasure and correction of unit price in low bid submitted under invitation for indefinite quantity of rods, where there was no doubt of intended bid price and no need to question whether person signing bid effected changes as abstract of bids evidenced price had been corrected prior to bid opening, was minor informality of form that should have been waived pursuant to par. 2–405 of Armed Services Procurement Reg. in interest of Govt. as low bidder responsible for contents of bid submitted would be required to perform at corrected bid price ---------- 541

Although rejection of low bid under invitation for indefinite quantity of rods was improper and award of contract to second low bidder was unauthorized, in view of expenses incurred by contractor, minimum quantity ordered under contract may stand and payment made at contract price. However, no additional orders may be placed under contract, even though bid price was computed in anticipation of obtaining orders for maximum quantity stated in contract, and contractor purchased more material than needed to fill minimum quantity ordered, as extent of contractor performance is not for consideration in deciding whether to preclude further performance where Govt. has right not to exercise option to purchase---------- 541

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

BIDS—Continued Page
Rejection—Continued
Questionable—Continued
Reevaluation of bid recommended—Continued
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
Requests for proposal matters. (*See* Contracts, negotiation)
Responsiveness *v.* bidder responsibility
To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid ---------- 553
Noncompliance at time of bid submission with provision of invitation for steel pipe requirements that stated "when pipe is furnished" from supplier's warehouse, whether supplier is manufacturer or jobber, evidence should be shown that pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to testing standard contractor is obligated to meet required procedure "when pipe is furnished," and failure to do so would be breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by contractor would be absolutely and unquestionably impossible, any rejection of bid for that reason would rest upon determination of nonresponsibility rather than nonresponsiveness of bid ---------- 553
Samples. (*See* Contracts, specifications, samples)
Signatures
Agents
Authority. (*See* Agents, of private parties, authority)
Small business concerns. (*See* Contracts, awards, small business concerns)
Solicitation packages
Availability
Procedure for issuing solicitation packages in number determined by contracting officer, which after obtaining competition by means of automated bidders source file, by publicizing procurement in Commerce Business Daily, and by notice in contractors information center results in insufficient copies to satisfy all mail requests does not achieve maximum competition sought and, therefore, fairness of policy of filling requests on first-come, first-served basis, regardless of whether request is made via mail or in person should be reviewed. Firm should be able to obtain copy of solicitation without being left with belief it must resort to engaging local representative to do business with Govt. agency ------ 550
Specifications. (*See* Contracts, specifications)

BIDS—Continued Page

Subcontracts

Applicability of Federal procurement rules

Although generally contracting practices and procedures employed by prime contractors in award of subcontracts are not subject to statutory and regulatory requirements which govern contract procurement by U.S., in view of clause in contract for operation of ammunition plant that provided for Govt. approval prior to award of subcontract, U.S. GAO reviewed cancellation of two Requests for Quotations (RFQ) and issuance of third solicitation by prime contractor, and even though criticizing failure to notify protesting subcontractor of rejection of its bid under first RFQ because of negative Govt. preaward survey and its erroneous use to exclude subcontractor from participating in second RFQ, concluded negotiations under third solicitation based on required revised specifications were not prejudicial to protestant 668

Bid shopping. (*See* Contracts, subcontracts, bid shopping)

Submission

Time limitation

Brand name or equal procurement

Bidding time provided in invitation for bids soliciting brand name or equal equipment of 19 calendar days or 12 working days pursuant to par. 2–202.1 of Armed Services Procurement Reg. that specifies bidding time of not less than 15 days for standard commercial articles and not less than 30 calendar days for other than such articles, was too short a period for manufacturers required to modify their standard equipment, and a 30-day bidding period has been recommended for future use in invitations soliciting modification of brand name or equal equipment. However, under current procurement, shorter bidding period was not prejudicial to bidder who, had he contemplated equipment modification, was not precluded from requesting extension of time 195

Telegraphic submissions

Error in transmission

Establishment

Telegram received prior to bid opening increasing bid price for janitorial services, which is alleged to have been intended as decrease, and if so considered three lower bids would be displaced to make corrected price lowest submitted, may not be treated as price decrease on basis mistake occurred in transmission of bid amendment, absent showing message delivered originally by telegraph company was not message telephoned by bidder, or certification by telegraph company that would support allegation of error in bid price modification. Therefore, exception to prohibition in sec. 1–2.406–3(a)(2) of Federal Procurement Regs. that permits bid correction that displaces lower bids when error is established through information provided by telegraph company rather than by interested bidder does not apply 417

Tie

Procedure for resolving

Although three tie bids stamped received within 5-minute period under Request for Quotations issued pursuant to 41 U.S.C. 252(c)(3) should not have been resolved by awarding contract to firm whose quotation had earliest time stamp, record evidences no favoritism or improper motive

BIDS—Continued Page
Tie—Continued
Procedure for resolving—Continued
for award and, therefore, executed procurement will not be disturbed, even though as a matter of sound judgment matter should have been resolved by giving preference to small business concerns in accordance with policy stated in secs. 1-2.407-6 and 1-3.601 of Federal Procurement Regs. While procedures for breaking ties in advertised procurements (FPR 1-2.407-6) do not apply to small purchases, they will be applied by contracting agency in future when identical price quotations are submitted in order to avoid even appearance of partiality ---------- 646
"Two bites at the apple." (*See* Contracts, specifications, failure to furnish something required, information)
Two-step procurement
Multi-year bids
Propriety
Neither anticipation by manufacturer found nonresponsive to "Bidder's Technical Qualification Clause" contained in first step of a two-step multi-year procurement for Instrument Landing System that it could meet criteria of clause at unspecified future date, nor urgency of procurement warrants cancellation of multi-year procurement and reissuance of invitation for first year's requirements. There is no assurance manufacturer will qualify in time for first year's requirements, and fact that procurement is urgently needed does not necessarily mean multi-year procurement is inappropriate, and particularly where use of multi-year technique appears to offer more timely delivery than separate single-year contracts---------- 857
Negotiation. (*See* Contracts, negotiation, two-step procurement)
Technical proposals
Qualification requirements
"Bidder's Technical Qualification Clause" included in specifications contained in Letter Request for Technical Proposals, issued as first step of two-step formally advertised procurement, that stipulated technical proposals would be accepted only from "those contractors who have manufactured and can demonstrate at an operating airfield Solid State Conventional Instrument Landing System" due to unique problems involved in adapting two-frequency localizer to system—considered engineering and not development work—was not restrictive of competition because one bidder could not meet minimum requirements of procurement, and contracting agency's determination of its needs is not questionable in absence of demonstrated fraud or clearly capricious action ---------- 857
Use basis
Utilization of commercially available components to meet requirements for Instrument Landing System stated in Letter Request for Technical Proposals, issued as first-step of two-step advertised procurement, and to adapt two-frequency localizer to system, does not make use of two-step procurement method improper as items used were not "off-the-shelf" items that can be stated sufficiently definite in specifications to permit full and free competition without technical evaluations contemplated by par. 2-502(a)(1) of Armed Services Procurement Reg. regard-

BIDS—Continued Page

Two-step procurement—Continued

Use basis—Continued

ing two-step procurement as neither precise system nor localizer to be adapted were available commercially. Furthermore, more conventional form of advertising would delay delivery, and 10 U.S.C. 2304(a) requires method of formal advertising instead of negotiation when feasible and practicable 857

Unbalanced

Bid evaluation formula

Low bid to supply requirements for radio program tape duplication and distribution services that furnished only fraction of unit prices solicited on distribution services is nonresponsive bid, even though items not priced had been excluded from evaluation formula and comprised only 2 percent of contemplated contract, for omission left contracting agency without any fixed-unit price commitment for substantial number of possible service combinations. Moreover, bid evaluation formula provided in invitation soliciting basic 1-year contract term and additional option year, permitted submission of unbalanced bids, and did not assure reasonable expectation that lowest evaluated bid would result in lowest actual performance cost that is required under 10 U.S.C. 2305(a) to secure full and free competition and, therefore, defective invitation should be canceled 787

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

Mistake-in-bid relief

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on

BIDS—Continued Page
Unbalanced—Continued
Mistake-in-bid relief—Continued
any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because its bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error ---------- 588
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 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 may authority in sec. 601 of Economy Act be used to provide training, as some 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

BONDS Page

Bid

Individual sureties *v.* corporation

Fact that individual sureties are on bond rather than corporation does not make bond submitted with low bid unacceptable. Individual sureties are permitted pursuant to par. 10–201.2 of Armed Services Procurement Reg., provided they are financially responsible persons, and, therefore, where individual sureties on bid bond furnished by low bidder are solvent and have undertaken to guarantee that principal named in bond will execute contract identified in bond if accepted by Govt., bid bond is considered sufficient on strength of individual sureties---------- 527

Performance

Failure to furnish

Upon failure of bidder awarded timber sales contract to timely furnish performance bond, offer to sell timber to second high bidder and bidder's response by signing bid form and contract, and furnishing bid deposit and performance bond, did not consummate contract, as approval and signature of required contracting authority had not been secured, and acceptance of bidder's documents was subject to outcome of appeal by successful bidder, with whom binding contractual relationship had been created by acceptance of bid and notification of acceptance, even though performance bond had not been furnished, in view of fact invitation provided for execution of formal contract documents and furnishing of performance bond at later date, and prescribed penalty for failure to do so---------- 431

BUY AMERICAN ACT

Applicability

Use outside United States

Although procurement of steel towers for installation as part of communication system in West Germany was not subject to Buy American Act, as procurements for use outside U.S. are exempt from restrictions of act, and therefore, bids of low Canadian bidder—sponsored by Canadian Commercial Corp.—and domestic bidder whose bid exceeded foreign bid by more than 50 percent properly were evaluated on equal competitive basis and award made to low, responsible bidder, procurement should have been made subject to Balance of Payments Program. However, as provisions of Program were inadvertently omitted from invitation, contracting officer had not referred domestic bid that exceeded foreign bid by more than 50 percent to higher authority for approval as required, and absent certainty of approval, cancellation of award made in good faith would not be in best interests of Govt---------- 176

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

Buy American appropriation restriction

Domestic origin requirement

Notwithstanding cotton from which pads are to be manufactured in Japan for delivery in the U.S. is of domestic origin, pads offered by low bidder are considered of foreign origin and subject to expenditure restriction appearing in Dept. of Defense acts since first introduced in 1953, and as restriction was not waived on basis item cannot be procured in U.S., and as item is not for use overseas, low bid was properly rejected. Fact that invitation refers to cotton "grown *or* produced in the

BUY AMERICAN ACT—Continued Page
Buy American appropriation restriction—Continued
Domestic origin requirement—Continued
United States" does not denote alternative and make place of production irrelevant, in view of legislative history of 1953 act, evidencing congressional intent that any article of cotton may be considered "American" only when origin of fiber as well as each successive stage of manufacturing is domestic ---------- 606

CARRIERS
Railroad
Alaska Railroad
Although Alaska Railroad, a Govt-owned facility operated by Dept. of Transportation under authority delegated by President, is not regulated by Interstate Commerce Commission, it is subject to certain provisions of Interstate Commerce Act pursuant to sec. 3(a) of E. O. No. 11107, Apr. 25, 1963, and functions as common carrier. However, disputed transportation claims that are more than 3 years old will be viewed as not subject to 3-year statute of limitations against consideration of claims by U.S. GAO because of limited number of claims involved and fact that payment has been made by Railroad to connecting carriers for their share of revenue, but, future claims for transportation services should be timely filed ---------- 768

CERTIFYING OFFICERS
Accounts
Credit for waived erroneous payments
In accordance with Pub. L. 90-616, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under authority of act, as payments are deemed valid for all purposes. Therefore, refund to employee of overpayment which he had repaid prior to waiver of erroneous payment by authorized official is regarded as valid payment that may not be questioned in accounts of responsible certifying officer regardless of fact that he may not regard erroneous payment as having been appropriately waived ---------- 571
Liability
Certification of vouchers without knowledge of expenditures
Vouchers covering expenses of investigations under 14 U.S.C. 93(e), which were incurred on official business of confidential nature and approved by Coast Guard officer, but nature of expenses are unknown to certifying officer, may not be certified for payment without holding certifying officer accountable for legality of payment. 14 U.S.C. 93(e) contains no provision for certification of vouchers by Commandant of Coast Guard who is authorized to make investigations and, therefore, responsibility for certifying vouchers for payment is governed by act of Dec. 29, 1941, which fixes responsibilities of certifying and disbursing officers, and payment for costs of investigations may only be made in accordance with 1941 act ---------- 486

CITIES, CORPORATE LIMITS

Page

Per diem for military personnel

Escorts for deceased personnel

Members of uniformed services while performing temporary duty as escorts for deceased members within corporate limits of their permanent duty station may not be paid per diem, even though distance traveled to funeral site is over 55 miles. Allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and sec. 408, regarding entitlement generally for travel performed on public business under competent orders. Under sec. 404, per diem for temporary duty is payable only when member is away from designated duty station, and for travel within limits of permanent duty station, member under sec. 408 may only be paid transportation costs. Therefore, Joint Travel Regs. may not be amended to provide per diem for escort duty at permanent duty station 453

CLAIMS

Assignments

Validity

Assignee loan not for contract performance

The right of U.S. as creditor to offset amount owed to contractor is not precluded by assignee and attorney claims where loan by assignee bank pursuant to Assignment of Claims Act of 1940, as amended, had been paid and only outstanding loan is not within orbit of act, not having been made for purpose of performing Govt. contracts, and where attorney's fee is matter between attorney and client, absent statutory provision or agreement based on such provision for payment to attorney by Govt. Therefore, award to contractor on basis that contract termination should have been for convenience and not for default, may be set off against contractor's tax liability 44

Claims under Federal Tort Claims Act. (*See* Torts)

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

Transportation

Seamen returned from overseas

Payment to shipping company for returning destitute American seaman from overseas may not exceed rate agreed upon between consular officer, who certified seaman was unfit to perform duty, and ship's master, absent determination required by 46 U.S.C. 679 that Secretary of State deems payment of additional compensation claimed "equitable and proper," and Dept. of State declining to furnish such determination because master, as company's agent, is considered to have authority to contract in company's name, no additional amount is due shipping company and its claim for additional compensation may not be allowed 58

COLLECTIONS

Debt. (*See* Debt Collections)

COLLEGES, SCHOOLS, ETC.

Reserve Officers' Training Corps programs. (*See* Military Personnel, Reserve Officers' Training Corps, programs at educational institutions)

Teachers employed by Defense Department overseas. (*See* Defense Department, teachers employed in overseas areas)

COMPENSATION Page

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

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

COMPENSATION—Continued Page

International dateline crossings

Under rule that generally employee's pay may not be increased or decreased because of crossing international dateline, employees 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

Military pay. (*See* **Pay**)

Overpayments

Debt collections. (*See* **Debt Collections, waiver, civilian employees**)

Validation

Although upon waiver of collection of erroneous payment resulting from promotion in violation of Whitten Amendment, payment is deemed validated pursuant to Pub. L. 90–616 (5 U.S.C. 5584(e)), erroneous personnel action that gave rise to overpayment is not validated. Therefore, employee whose erroneous promotion on June 2, 1968 from GS–7 to GS–9 position is corrected Jan. 26, 1969, and he is properly promoted to GS–9 on Mar. 23, 1969, may only count period of service from June 2, 1968, to Jan. 26, 1969 for within grade increase purposes in same manner and to same extent as if premature promotion had never been processed, and service for period of erroneous promotion may be counted as GS–7 service and not GS–9 service for step-increase purposes---------- 18

When employee is erroneously promoted from grade GS–7 to grade GS–9 due to Whitten Amendment violation and overpayment is not discovered until after time employee fully met time-in-grade requirement for promotion, no overpayment is considered to have occurred between date employee would have been promoted under agency policy or regulation and date error was discovered and, therefore, waiver action under Pub. L. 90–616 (5 U.S.C. 5584(e)) is not required for period on and after effective date of promotion. If under agency policy or regulation, promotion would not have been made effective until beginning of first pay period after period of eligibility under Whitten Amendment, period between date of eligibility and effective date of promotion is subject to waiver action---------- 18

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

COMPENSATION—Continued Page
Overtime—Continued
Inspectional service employees
Holidays
Executive order, etc.

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541-5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work ---------- 510

Part-time WAE employees

Part-time immigration inspectors employed on intermittent basis at hourly rates regardless of day or time of day they are required to perform service, and who are paid overtime compensation for work performed in excess of 8 hours in day under 5 U.S.C. 5542(a), having no regular hours of duty are not eligible for extra compensation prescribed by act of Mar. 2, 1931 (8 U.S.C. 1353a) for work between 5 p.m. and 8 a.m. However, inspectors are entitled to 2 days extra pay for Sunday and holiday duty pursuant to 1931 act, but since they have no regular tour of duty, they may not receive their regular pay in addition to extra pay ---------- 577

Travel time
Emergencies

Time spent by group of wage board employees to travel on nonworkday to temporary duty station for purpose of immediately repairing gun port shields of ship that had deteriorated by exposure to sun so that ship could meet sailing deadline, does not constitute travel status away from official duty station occasioned by event which could not be scheduled or controlled administratively that is contemplated by 5 U.S.C. 5544 (a) (iv) as basis for payment of overtime. Required repair to gun mounts was not due to sudden emergency or catastrophe, and damage having occurred gradually over period of time, scheduling repair was within administrative control and, therefore, travel time is not compensable as overtime ---------- 209

Ship as temporary duty station

Employee who traveled to overseas port to join ship for underway vibration survey that was completed en route to U.S. was not in work status while deadheading back aboard ship to entitle him to overtime compensation, notwithstanding he was not permitted to leave ship upon completion of assignment. Ship was employee's temporary duty station despite fact that it was moving during survey, and employee's actual travel ended when he reported for duty aboard ship and resumed only when duty was completed, and as there was no performance of work while traveling, or travel incident to travel that involved performance of work while traveling within contemplation of 5 U.S.C. 5542(b)(2), employee's travel time may not be regarded as "hours of employment." -- 503

COMPENSATION—Continued Page

Periodic step-increases

Service credits

Demotions, promotions, reemployment, etc.

Overpayment

Although upon waiver of collection of erroneous payment resulting from promotion in violation of Whitten Amendment, payment is deemed validated pursuant to Pub. L. 90–616 (5 U.S.C. 5584(e)), erroneous personnel action that gave rise to overpayment is not validated. Therefore, employee whose erroneous promotion on June 2, 1968, from GS–7 to GS–9 position is corrected Jan. 26, 1969, and he is properly promoted to GS–9 on Mar 23, 1969, may only count period of service from June 2, 1968, to Jan. 26, 1969, for within grade increase purposes in same manner and to same extent as if premature promotion had never been processed, and service for period of erroneous promotion may be counted as GS–7 service and not GS–9 service for step-increase purposes 18

Postal service

Overtime

Work stoppage effect

Annual rate regular postal employees who incident to participating in work stoppage during which period they were considered to have been AWOL, worked on regularly scheduled days off without completing regular tour of duty are not entitled to overtime compensation under 39 U.S.C. 3573(a) for services performed on regularly scheduled days off, unless they worked in excess of 8 hours a day. Concept in *United Federation of Postal Clerks* v. *Watson*, 409 F. 2d 462, that all hours of work outside of regular work schedules, whether or not in excess of 8 hours in day or 40 hours in week, is compensable as overtime, because employees were temporarily required to shift their workweek for needs of service, has no application to situation where employees were responsible for failure to complete regularly scheduled tour of duty 689

Promotions

Whitten Rider restriction

Violation

When employee is erroneously promoted from grade GS–7 to grade GS–9 due to Whitten Amendment violation and overpayment is not discovered until after time employee fully met time-in-grade requirement for promotion, no overpayment is considered to have occurred between date employee would have been promoted under agency policy or regulation and date error was discovered and, therefore, waiver action under Pub. L. 90–616 (5 U.S.C. 5584(e)) is not required for period on and after effective date of promotion. If under agency policy or regulation, promotion would not have been made effective until beginning of first pay period after period of eligibility under Whitten Amendment, period between date of eligibility and effective date of promotion is subject to waiver action 18

Travel time

Entitlement

Employee who traveled to overseas port to join ship for underway vibration survey that was completed en route to U.S. was not in work status while deadheading back aboard ship to entitle him to overtime compensation, notwithstanding he was not permitted to leave ship upon

COMPENSATION—Continued Page

Travel time—Continued

Entitlement—Continued

completion of assignment. Ship was employee's temporary duty station despite fact that it was moving during survey and employee's actual travel ended when he reported for duty aboard ship and resumed only when duty was completed and as there was no performance of work while traveling, or travel incident to travel that involved performance of work while traveling within contemplation of 5 U.S.C. 5542(b)(2) employee's travel time may not be regarded as "hours of employment"-- 503

Overtime. (*See* Compensation, overtime, travel time)

Wage board employees

Overtime

Travel time

Time spent by group of wage board employees to travel on nonworkday to temporary duty station for purpose of immediately repairing gun port shields of ship that had deteriorated by exposure to sun so that ship could meet sailing deadline, does not constitute travel status away from official duty station occasioned by event which could not be scheduled or controlled administratively that is contemplated by 5 U.S.C. 5544(a)(iv) as basis for payment of overtime. Required repair to gun mounts was not due to sudden emergency or catastrophe, and damage having occurred gradually over period of time, scheduling repair was within administrative control and, therefore, travel time is not compensable as overtime-- 209

Rates

Wage surveys to establish

Monroney Amendment providing for administration of wage schedules under 5 U.S.C. 5341(c), in authorizing that when insufficient comparable positions exist in private industry in a particular area to establish rates for Federal positions, rates shall be established *in accordance with* rates paid in nearest wage area, permits Civil Service Commission charged with administration of amendment considerable latitude in determining how appropriate accord is to be accomplished. Therefore, Commission's changed interpretation of amendment and its implementation by use of wage data obtained outside given area as though obtained within given area to avoid inequities that result from limiting use of data to classes of positions for which sought is acceptable---------- 873

Withholding

Union dues

Discontinuance

Discontinuance of payroll allotment for membership dues in favor of employee organization is subject to 5 U.S.C. 5525 as implemented by Civil Service Regs. and, therefore, such allotment may only be revoked twice a year. A request for revocation received between Mar. 2 and Sept. 1 is discontinued at beginning of first pay period commencing after Sept. 1, and revocation request received between Sept. 2 and Mar. 1 is discontinued effective at beginning of pay period commencing after Mar. 1. Whether employee may have legal claim against employee organization for dues paid under allotment covering periods subsequent to date he resigned his membership is matter between employee and organization-- 97

CONCESSIONS Page

Modification

Reporting to Congress

Where proposed concession contract reported to Congress 60 days before award pursuant to 16 U.S.C. 17b–1 is modified, contract as executed by National Park Service, Dept. of Interior, is not one reported to Congress and, therefore, requirement for reporting proposed concession contract "in detail" 60 days before contract is awarded was not met. However, statute omitting to set forth consequences resulting from failure to comply with requirement, the contract awarded is voidable at option of Govt., option that is within discretion of Secretary of Interior to exercise, U.S. GAO taking action only when contract is considered void, not voidable ---------- 88

Preference to incumbent concessioners

Award of new long term concession contract to supersede existing one to contractor who had satisfactorily performed under successive contracts and who had been permitted to modify his initial proposal for improvement of concession facilities at substantial investments in order to match investment proposal of another bidder will not be disturbed, even though ordinarily modification of initial proposal requires solicitation of new proposals, as 16 U.S.C. 20d in authorizing preference to incumbent concessioner in renewal of contract or in negotiation of new contract for purpose of maintaining continuity of operations and operators, and in not providing bidding procedures, removes concession contracts from normal rules---------- 88

CONTRACTORS

Canadian Commercial Corporation

Status

Nonresponsiveness of low bid of Canadian firm offering 60-day bid acceptance period under invitation specifying period of "at least 90 days" is not overcome by fact that bid submitted to Canadian Commercial Corp. (CCC), quasi-governmental agency that handles bids of Canadian firms with Dept. of Defense (DOD), was accompanied by CCC form offering to keep bid firm for additional 10 days, or total of 100 days, as bidder's intent to be bound by specified bid acceptance period was not submitted to DOD before bid opening. CCC is considered prime contractor and, therefore, subject to ordinary requirements regarding bid responsiveness, and offer to meet bid acceptance terms of invitation not coming within exceptions that permit late bid modifications, low bid is not for consideration, even though Govt. is deprived of lower prices---------- 649

Conflicts of interest

Developmental or prototype items

Under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), award of development contract for experimental engines to contractor proposing to use services of foreign firm who had performed feasibility studies for Govt. to determine practicality of developing engines, does not violate Rule 1 of Dept. of Defense Directive 5500.10, which is intended to prevent organizational conflicts of interest and subsequent unfair competition from hardware producer that provides system engineering and technical direction (SE/TD) without at same time assuming overall

CONTRACTORS—Continued Page
Conflicts of interest—Continued
Developmental or prototype items—Continued
contractual responsibility for production of system. Directive is not self-executing but its application must be negotiated, and neither feasibility studies contract nor development contract provided for its application-- 463

CONTRACTS
Acts of God
What constitutes
Bid, forwarded by regular mail in sufficient time to have been delivered prior to time set for opening of bids but for unprecedented postal strike that commenced in New York City on bid opening day, may not be considered for award by waiving late bid regulations on theory strike was in same realm as act of God, defined as "some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes * * *." But even assuming strike was act of God, bidder in not forwarding its bid by registered or certified mail, assumed risk of delivery, risk which was not overcome by bid handling instructions to procuring agencies necessitated by strike, as instructions did not suspend late bid rules contained in Armed Services Procurement Reg. 2-303 and invitation ---------- 733
Assignments. (*See* Claims, assignments)
Awards
Advantage to Government
Requirement
Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1-2.404-1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interests of Govt---------- 135
Cancellation
Erroneous awards
Cancellation not required
Telegram by unsuccessful bidder stating intent to protest to U.S. GAO should contract award be made to low bidder alleged to have qualified its bid, and advising supporting letter would follow, should have been treated as protest and award made to low bidder day before receipt of promised letter withheld until dispute was resolved, particularly in view of fact protestant's declaration of intent to file protest with GAO in event of contract award, was sufficient standing alone to require conclusion that telegram constituted protest. However, contract having been substantially performed, it would not be in best interests of Govt. to require cancellation of contract---------- 534
Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval

CONTRACTS—Continued Page
Awards—Continued
Cancellation—Continued
Erroneous awards—Continued
Cancellation not required—Continued
and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a) (2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed 639

Request for proposals (RFP) for rocket boosters, issued pursuant to 10 U.S.C. 2304(a)(16) permitting negotiation in interest of national defense or industrial mobilization, and approved by class determination and findings, that solicited offers on three alternative quantities for single or multiple award, which quantities were below known requirements that if disclosed, and disclosure was not prevented by Intensive Combat Rate (production capability) established for procurement, would have obtained lower prices, was defective RFP. Although determination not to consider involuntary offer of larger quantities at lower prices, erroneously based on belief all suppliers would have to be resolicited whereas amendment to RFP would have sufficed, resulted in higher prices, awards made will not be disturbed, but future procurements should permit offers in largest quantities possible within constraint imposed by Intensive Combat Rate 772

Contract performance status

Where correction of bid was improper, fact that correction was permitted by authorized Govt. agent does not estop Govt. from terminating purported contract. Although withdrawal of erroneous bid could have been permitted, correction was precluded as intended bid could not be substantially determined from invitation or bid. Bid protest procedures used having conformed to sec. 20.2, Title 4, Code of Federal Regs., and contractor timely informed its interests could be adversely affected and given opportunity to present its views, termination of partially performed contract was neither prejudicial to contractor nor adverse to best interests of Govt., and was required in order to preserve integrity of competitive bidding system 152

Small business size

Although challenge after contract award to status of successful concern that had certified itself to be small business concern pursuant to sec. 1-1.703-1(a) of Federal Procurement Regs. was made too late to affect validity of award, on basis that prior to award, concern had entered into binding agreement of sale for its acquisition by large business concern, termination of contract would be appropriate. Record evidences valid and enforceable contract for acquisition of small concern had come into existence before award, even though its terms may have been modified subsequent to award and, therefore, BCFR 121.3-15(c)(4), dealing with nature of control through agreements to merge, applies to procurement, and award is considered not to have been made to small business concern 809

CONTRACTS—Continued Page
Awards—Continued
Cancellation—Continued
Invitation ambiguity
Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited, correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements---------- 48
Erroneous
Effect of contract protests
Unsuccessful offeror's failure to repeat questions raised at time proposals were opened concerning its competitor's ability to fulfill its representations is not considered waiver of any rights to object to award, nor does it preclude offeror from renewing complaints when erroneous basis of contract award is disclosed---------- 736
Mistake in fact
Award for dictating equipment to apparent low bidder made on basis of mistake in fact that bidder's offered price was lowest price received, understanding induced by erroneous factual statements inadvertently made by contractor's representative that equipment would not require leasing of dictating trunk lines at monthly rental charge, was erroneous award to other than low, responsive, responsible bidder, and although made in good faith award should be canceled and procurement resolicited, as it is not enough that award be made in good faith. Fact that contractor's representative was unaware that his statements were erroneous is also of no effect as there is no difference between contract entered into under mutual mistake of fact and one in which one party contracts in reliance upon deliberate misrepresentation by other---------- 736
Nonresponsive bidder
In recommending termination of purported contract that had been awarded to bidder permitted to correct its bid price because it had been erroneously computed on estimated requirements 24 times Govt.'s true estimate and mistake may have affected amount bid, and that correction was tantamount to submission of second bid, U.S. GAO did not exceed its review authority. Standard of review pursuant to Wunderlich Act (41 U.S.C. 321, 322) applies to contract disputes and not to mistakes in bid, and finality of administrative determination does not apply to questions of law. For years GAO decided all questions concerning corrections of bid mistakes, and even with delegation of such authority, Comptroller General is not deprived of right to question administrative determinations, nor bidder of right to request his decision---------- 152
Where correction of bid was improper, fact that correction was permitted by authorized Govt. agent does not estop Govt. from terminating purported contract. Although withdrawal of erroneous bid could have been permitted, correction was precluded as intended bid could not be

CONTRACTS—Continued Page

Awards—Continued

Erroneous—Continued

Nonresponsive bidder—Continued

substantially determined from invitation or bid. Bid protest procedures used having conformed to sec. 20.2, Title 4, Code of Federal Regs., and contractor timely informed its interests could be adversely affected and given opportunity to present its views, termination of partially performed contract was neither prejudicial to contractor nor adverse to best interests of Govt., and was required in order to preserve integrity of competitive bidding system 152

Upon contract termination for faulty performance, contractor who after filing timely appeal to termination, alleged award was void *ab initio* because insertion of three dashes (---) in bid acceptance period blank was equivalent to leaving space blank and, therefore, its bid was nonresponsive, may not have contract set aside, and contractor is left to its appeal. While contracting officer had he been aware of bid defect would have been without authority to make award, contractor having failed to take action prior to execution of contract, may not as one benefitting from contract, have contract set aside at its instance, and contract is not void *ab initio*, but is voidable only at option of Govt. Therefore, bid acceptance period intended for benefit of Govt., when provision became inoperative upon contract award, binding contract was consummated 761

Performance

Although rejection of low bid under invitation for indefinite quantity of rods was improper and award of contract to second low bidder was unauthorized, in view of expenses incurred by contractor, minimum quantity ordered under contract may stand and payment made at contract price. However, no additional orders may be placed under contract, even though bid price was computed in anticipation of obtaining orders for maximum quantity stated in contract, and contractor purchased more material than needed to fill minimum quantity ordered, as extent of contractor performance is not for consideration in deciding whether to preclude further performance where Govt. has right not to exercise option to purchase 541

Voidable

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 Govt's. option 369

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

CONTRACTS—Continued Page
Awards—Continued
Labor surplus areas
Determination
After bid opening

Obligation under labor surplus area provisions of invitation to perform at least 30 percent of contract in or near sections of concentrated unemployment relating to bidder's responsibility rather than bid responsiveness, information of compliance with requirement to perform in area of unemployment may be furnished after bid opening. Basis for consideration of bid under invitation being that bidder, or his first-tier subcontractor, has been certified eligible by Dept. of Labor and that bidder agrees to perform "substantial portion," prescribed by invitation as at least 30 percent, in or near sections of concentrated unemployment, only concern satisfying both requirements is entitled to first negotiation for award under labor set-aside portion of invitation---- 1

Set-aside negotiations priority

Information required by pars. 1-706 and 1-804 of Armed Services Procurement Reg. to establish bidder priority for negotiation of small business set-aside and labor surplus area set-aside portions of invitation serves not only to establish bidder responsibility to perform as certified eligible concern, but also is involved in bid responsiveness. Therefore, bidder who mistakenly furnished name of noncertified eligible supplier, which he was not permitted to correct after bid opening, and was declared disqualified from Group 1 priority for set-aside purposes, properly alleged bidder who deliberately listed its certified eligible supplier as furnishing "nylon webbing" in lieu of "polyester webbing" solicited was nonresponsive, even though material deviation does not appear as a substitute elsewhere in the bid and, therefore, ineligible to negotiate for set-asides---------- 749

Negotiation. (*See* Contracts, negotiation, awards)
Original solicitation amended
Amendment canceled

Under invitation for collapsible fabric tanks that was amended to increase total units, award of contract for original quantity solicited on basis of price reduction received prior to issuance of amendment, and cancellation of amendment was proper where amendment acknowledgment by successful bidder had not been priced or related to decreased price and only bid prices received incident to an addenda acknowledgment were unreasonable. Bid submitted in original solicitation and which had not been withdrawn could not and did not become invalid because bid was not submitted on additional quantity, as solicitation and amendment permitted bid to be submitted on all or any part of quantities involved, and award of contract in quantities less than stated in solicitation ---------- 147

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 excercise option and to award new contract to other than

CONTRACTS—Continued Page

Awards—Continued

Propriety—Continued

Upheld—Continued

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

Separable or aggregate

Propriety of single award

While combination awards for maximum quantity offered by low bidder and bidder that had submitted "all or none" bid would be in Govt.'s interest pricewise for entire quantity solicited, partial award under qualified bid is precluded, and word "all" in minimum quantity column may not be explained by bidder to mean "all" of any indefinite quantity to be procured under invitation. Eligibility of bid for award is determinable from bid itself without reference to subsequent offers and interpretations by bidder, as formal advertising contemplates receipt of firm offers which can be accepted by Govt.'s unilateral action and, therefore, partial acceptance of qualified bid would not result in legal award, notwithstanding bidder's willingness to accept partial award... 499

Input of substantial intellectual effort into preparation of specifications for dictionaries, atlases, encyclopedias, and other reference materials does not justify exception to general rule that funds appropriated for purchases by Govt. agencies are available for purchase only of such articles as will meet actual minimum needs of agencies, and that payment of any greater amount for purchase of articles which may be superior, or may for one reason or another be preferred by any individual officer, is not authorized. Therefore, adoption of single award procedure for various types of standard dictionaries in lieu of multiple awards is proper exercise of administrative discretion where specifications adequately meet needs of Govt. with no detrimental effect on quality of items being procured and at savings to Govt---------- 727

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 Govt's. option---------- 369

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Certifications
Competency
Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1-903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1-705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600
Finding by contracting officer that small business concern lacks tenacity and perseverance because insufficiently prepared to accept award relates to concern's capacity and cannot support determination of nonresponsibility under par. 1-705.4(a) of Armed Services Procurement Reg., which defines capacity as "the overall ability of a prospective small business contractor to meet quality, quantity, and time requirements of a proposed contract and includes ability to perform, organization, experience, technical knowledge, skills, 'know how,' technical equipment and facilities or the ability to obtain them," factors that are covered by Certificate of Competency procedure---------- 600
Assumption in absence of information indicating otherwise, that past delivery delinquencies of low bidder—small business concern—were his fault is not adequate basis for concluding that delinquent deliveries established lack of perseverance or tenacity, and matter of concern's responsibility is for further consideration. If it is found upon review that low bidder on basis of substantial evidence does not possess necessary tenacity or perseverance to do an acceptable job, additional documentation or explanation should be furnished to support conclusion, otherwise nonresponsibility determination should be referred on basis of capacity and credit to Small Business Admin. under Certificate of Competency procedure---------- 600
Withdrawal of application by Government
Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed---------- 639

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Certifications—Continued
Withdrawal of application by Government—Continued
Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1-1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---------- 639
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
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
Eligibility
Reconsideration
Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for nonresponsible bidder to improve its position after contracting officer's determination of nonresponsibility has been confirmed by Small Business Admin., where low bidder held financially nonresponsible on basis of preaward survey and SBA's adverse findings, has concluded negotiations for technical data rights and patent license contract that involves millions of dollars and pro-

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Eligibility—Continued
Reconsideration—Continued
vides for immediate substantial advance payment, bidder's responsibility should be reconsidered and if necessary, time permitting, reviewed by SBA, because of mandate in Armed Services Procurement Reg. 1-905.2, that financial resources should be obtained on as current basis as feasible with relation to date of contract award---------- 619
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, it not void *ab initio*, but is voidable at option of Govt------- 369
Price reasonableness
Cancellation of invitation for bids that contained total set-aside for small business concerns due to disparity in bid prices evidenced by bid of large business concern who had acquired small business that had been solicited to submit bid having satisfactorily performed under prior contracts, because contracting officer was unaware of concern's changed size status, and readvertisement of procurement on unrestricted basis, was in accord with pars. 1-706.5(a)(1) and 1-706.3(a) of Armed Services Procurement Reg., and withdrawal determination properly considered "courtesy" bid of large business concern submitted at price that was less than half of lowest small business price, even though no formal inquiry was made to establish correctness of large business concern's price as firm was ineligible for award under set-aside---------- 740
Self-certification
"Good faith" certification
While bidder's good faith is criterion for determining acceptability of self-certification as to his small business status, determining factor in deciding whether actions after bid opening that affect self-certification are permissible is whether those actions give bidder undue advantage over other bidders by giving him option to remain ineligible or take steps to preserve his small business status for award purposes. To permit firm that had certified itself in good faith as small business concern to terminate after bid opening its management agreement with large business concern for purpose of qualifying for award of set-aside portion of invitation would give bidder just such option and would have a deleterious effect on integrity of bidding system---------- 1
Set-asides
Priority of negotiation
Information required by pars. 1-706 and 1-804 of Armed Services Procurement Reg. to establish bidder priority for negotiation of small business set-aside and labor surplus area set-aside portions of invitation serves not only to establish bidder responsibility to perform as certified eligible concern, but also is involved in bid responsiveness. Therefore, bidder who mistakenly furnished name of noncertified eligible supplier, which he was not permitted to correct after bid opening, and was declared disqualified from Group 1 priority for set-aside purposes,

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Set-asides—Continued
Priority of negotiation—Continued
properly alleged bidder who deliberately listed its certified eligible supplier as furnishing "nylon webbing" in lieu of "polyester webbing" solicited was nonresponsive, even though material deviation does not appear as a substitute elsewhere in the bid and, therefore, ineligible to negotiate for set-asides---------- 749

Size
Affiliates of large business concerns

Although challenge after contract award to status of successful concern that had certified itself to be small business concern pursuant to sec. 1–1.703–1(a) of Federal Procurement Regs. was made too late to affect validity of award, on basis that prior to award, concern had entered into binding agreement of sale for its acquisition by large business concern, termination of contract would be appropriate. Record evidences valid and enforceable contract for acquisition of small concern had come into existence before award, even though its terms may have been modified subsequent to award and, therefore, BCFR 121.3–15(c)(4), dealing with nature of control through agreements to merge, applies to procurement, and award is considered not to have been made to small business concern---------- 740

Appeal

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 Govt.'s option---------- 369

Classification propriety

Small Business Size Appeals Board in classifying collection and disposal of refuse as service falling within $1 million small business size standard, to be applied in future as appeal had not been timely taken, rather than as transportation activity within contemplation of $3 million size standard used by procuring agency, disregarded Small Business Admin. Reg. 121.3–1(b)(1) making consideration of Standard Industrial Classification (SIC) mandatory in defining industries for purpose of establishing small business size standards—regulation that has force and effect of law. Result in size appeal, therefore, was inconsistent with SIC definition of involved refuse services as transportation and pursuant to sec. 121.3–8(f) of SBA regulation, $3 million small business size standard should apply to services---------- 702

CONTRACTS—Continued Page
Awards—Continued
Small business concerns—Continued
Subcontracting authority

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

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

Subcontracting limitation

Notwithstanding that small business concern awarded 100 percent set-aside contract for lift plugs subcontracted major portion of manufacturing process to large business firm, only performing painting, dipping, and packaging of plugs, cancellation of contract is not required, as small business concern is considered to have made significant contribution to production of "end item" within terms of contract issued pursuant to par. 1-706.5 of Armed Services Procurement Reg., which does not define term "end item." Absent promulgation of regulations to limit extension of large business subcontracting in order to further spirit and intent of statutes affecting small business participation in Govt. contracting, there is no basis to object to extent of large business subcontracting ---------- 41

Validity
Bid nonresponsive

Upon contract termination for faulty performance, contractor who after filing timely appeal to termination, alleged award was void *ab initio* because insertion of three dashes(---) in bid acceptance period blank was equivalent to leaving space blank and, therefore, its bid was nonresponsive, may not have contract set aside, and contractor is left to its appeal. While contracting officer had he been aware of bid defect would have been without authority to make award, contractor having failed to take action prior to execution of contract, may not as one benefitting from contract, have contract set aside at its instance,

CONTRACTS—Continued Page
Awards—Continued
Validity—Continued
Bid nonresponsive—Continued
and contract is not void *ab initio*, but is voidable only at option of Govt. Therefore, bid acceptance period intended for benefit of Govt., when provision became inoperative upon contract award, binding contract was consummated ---------- 761
Bid shopping. (*See* Contracts, subcontracts, bid shopping)
Bids, generally. (*See* Bids)
Concessions. (*See* Concessions)
Data, rights, etc.
Disclosure
Unsolicited proposals
Similarity between procurement specifications soliciting electric lift truck designed to install, transport, and remove bombs and missiles from igloos and revetments and unsolicited proposal submitted to furnish item that contained restrictive legends raises presumption offeror's proprietary data was improperly disclosed, and contracting officer unable to identify sources of material used in writing specifications, their use by Govt. to consummate competitive procurement without developer's consent would violate obligation of Govt. not to divulge proprietary data and, therefore, sole-source contract should be negotiated with offeror of proprietary data, or competitive proposals should be resolicited on basis of specifications which do not use proprietary data---------- 28
Status of information furnished
Government participation in development costs
Software and related programs developed partially at Govt. expense solely for operation of computer service program "Legal Information Through Electronics" (LITE) when contractor experienced difficulty in performing, properly was used to solicit benchmark tests to create competition. Not only did Rights in Data clause of contract provide that data become sole property of Govt., but when mixture of private and Govt. funds are used to develop data, rights are not allocatable on investment percentage basis and Govt. acquires unlimited rights to data. Former contractor delayed unreasonably in waiting until after award of a new LITE contract to object to use of data, and as GAO has never ordered cancellation of contract for improper disclosure of proprietary data, it will not do so when cancellation is not justified---------- 124
Unsolicited proposals
Although line-of-sight (LOS) telecommunications system data submitted as unsolicited proposal under first step of two-step negotiated procurement that stipulated if data was used offeror would be entitled to award on sole-source basis was significant in causing Air Force upon consideration of feasibility study and funding data submitted to procure total LOS system rather than LOS/troposcatter system originally planned incident to relocation of NATO, offeror is not entitled to award on basis of improper use of proprietary data. Feasibility study, a research and development effort, subject only to confidential treatment,

CONTRACTS—Continued Page
Data, rights, etc.—Continued
Status of information furnished—Continued
Unsolicited proposals—Continued
and technical data consisting of well-known scientific principles, only unsolicited information requiring protection was funding data, and its use not constituting violation of proprietary data restriction, there is no justification to support sole-source procurement---------- 20
Use by Government
Internal use
Data submitted under requests for proposals having been obtained properly, lost its proprietary nature and Govt., therefore, may accept data and use proprietary data previously purchased to verify accuracy of data. Restrictive legend on proprietary specification is intended to prohibit Govt. from using data for in-house manufacture or disclosure outside Govt., and fact that legend does not restrict use of data for internal purposes is evidenced by clarification of restrictive data clause in par. 9-203(b) of Armed Services Procurement Reg. to limit restriction to procurements entailing disclosure outside Govt., and by right reserved to Govt. to use similar or identical data, which implies use of restricted data for comparison purposes---------- 471
Disputes
Administrative determinations
Exhaustion of remedies
Where dispute is pending before contracting officer on propriety of unilateral price reduction by Govt. of difference between actual transportation costs and costs used in evaluation of bid on cement for shipment overseas, made pursuant to Maximum Guaranteed Shipping Weights and Dimensions clause in invitation for bids, matter is properly not for consideration by U.S. GAO as both contractor and Govt. are bound to follow procedures set out in contract for administrative settlement of disputes arising out of contract, and contractor must exhaust its remedies under disputes clause before resorting either to GAO or courts ---------- 718
Equal employment opportunity requirements. (*See* Contracts, labor stipulations, nondiscrimination)
Escalation clauses
Wage increases
Service Contract Act of 1965
Wage determinations issued under Service Contract Act of 1965, 41 U.S.C. 351-357, to establish currently prevailing wage rates may not include provision for escalation of wages on definite future dates at specified rates in view of fact phrase "as determined by the Secretary * * * in accordance with prevailing rates" in sec. 2(a)(1) of act means same as "based upon wages that will be determined by the Secretary of Labor to be prevailing" in sec. 1(a) of Davis-Bacon Act, which has been held to mean prevailing rates are rates existing at time contract is advertised. Therefore, as escalation provision in wage determination would have no legal effect, it should not be included in contracts subject to Service Contract Act---------- 186
Forms. (*See* Forms)

CONTRACTS—Continued Page

Government property

Disposal

Inventory of terminated contract

Fact that Govt. determined inventory on hand upon termination of contract was surplus to its needs and authorized contractor to dispose of inventory, does not preclude Govt., real party in interest, from asserting after-discovered need for property and withdrawing it from sale for use under another contract. Rule that a contracting officer not only has right to reject all bids when procurement is no longer needed or wanted but would be derelict in his duty if he failed to do so, should be followed when need arises for surplus property advertised for sale, as determination to dispose of surplus property does not constitute representation that no need exists or may not subsequently arise for property 683

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

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed 538

Increased costs

Additional work or quantities

Specifications

Interpretation erroneous

Claim for additional compensation under contract for repair and improvement of GSA Depot submitted on basis substitute drawings changing scope of work were ambiguous and failed to identify dimensional changes, and that reference omission was misleading, was properly denied by GSA Board of Contract Appeals. Record evidences contractor relied on one of two pertinent drawings that should have been interpreted together, and that replacement of original drawings *in toto* satisfied requirement of Federal Procurement Regs. 1-2.207(b)

CONTRACTS—Continued Page

Increased costs—Continued

Additional work or quantities—Continued

Specifications—Continued

Interpretation erroneous—Continued

(3) that invitation changes be clearly stated. Therefore, contractor's failure to correctly compute its bid price was not due to Govt.'s failure to specifically identify difference between original and substitute drawings, and contractor is not entitled to additional compensation---------- 853

Labor stipulations

Federally financed projects

Jurisdiction

Funds withheld from federally aided or financed construction contracts to which U.S. is not party for wage underpayments that normally would be distributed by States or other recipients who are parties to contracts and have primary responsibility for administration of labor stipulations of contracts, but for fact that workers cannot be located, should not be transmitted to U.S. GAO as Federal-aid labor standard statutes do not confer on GAO authority similar to that contained in Davis-Bacon Act and Work Hours Act of 1962, to make direct payments to laborers and mechanics from withheld contract earnings as restitution for wage underpayments. However, claims for undistributed holdings which cannot be settled administratively may be submitted to GAO Claims Division. 44 Comp. Gen. 561, modified---------- 162

Nondiscrimination

Affirmative action programs

Revised "Philadelphia Plan" prescribing that no contracts or subcontracts shall be awarded for Federal or federally assisted construction projects unless bidder had submitted acceptable affirmative action program that included specific goals of minority manpower utilization to provide equal employment opportunity, conflicts with intent of Civil Rights Act of 1964, and E. O. No. 11246, making use of race or national origin as basis of employment an unlawful employment practice. Plan directed to correcting past discrimination by labor unions would in establishing quota system for employment of minorities accord preferential treatment in conflict with prohibition in Civil Rights Act, and in passing upon legality of matters involving expenditures of appropriated funds, act will be so construed---------- 59

Contract conditions or stipulations which tend to restrict full and free competition required by procurement laws and regulations are unauthorized unless reasonably requisite to accomplishment of legislative purposes of appropriation act or other law involved, and no administrative authority can lawfully impose any requirements to contravene prohibitions imposed by statute. Therefore, revised "Philadelphia Plan" in imposing affirmative action programs for employment of minorities constitutes discrimination on basis of race or national origin in contravention of prohibition in Civil Rights Act of 1964, and E. O. No. 11246----- 59

Duty imposed on U.S. GAO to audit all expenditures of appropriated funds involving determination of legality of expenditures, includes determination of legality of contracts obligating Govt. to payment of appropriated funds, and authority to render decisions prior to actions

CONTRACTS—Continued Page
Labor stipulations—Continued
Nondiscrimination—Continued
Affirmative action programs—Continued
involving expenditures of appropriated funds has been exercised by GAO whenever any question of legality of proposed action has been raised, whether by agency head, or by complaint of interested party, or by information acquired in course of other than audit operations, and in passing upon legality of expenditures of appropriated funds for Federal or federally assisted construction programs, propriety of conditions imposed by revised "Philadelphia Plan" will be for consideration. (But see *Contractors Assn. of Eastern Penna., et al.* v. *Secy. of Labor, et al.*, Civil Action No. 70–18, and B–163026, Apr. 28, 1970.)---------- 59
Service Contract Act of 1965
Minimum wage, etc., determinations
Prospective wage rate increases
Wage determinations issued under Service Contract Act of 1965, 41 U.S.C. 351–357, to establish currently prevailing wage rates may not include provision for escalation of wages on definite future dates at specified rates in view of fact phrase "as determined by the Secretary * * * in accordance with prevailing rates" in sec. 2(a)(1) of act means same as "based upon wages that will be determined by the Secretary of Labor to be prevailing" in sec. 1(a) of Davis-Bacon Act, which has been held to mean prevailing rates are rates existing at time contract is advertised. Therefore, as escalation provision in wage determination would have no legal effect, it should not be included in contracts subject to Service Contract Act---------- 186
Wage adjustments
Jurisdiction
Funds withheld from federally aided or financed construction contracts to which U.S. is not party for wage underpayments that normally would be distributed by States or other recipients who are parties to contracts and have primary responsibility for administration of labor stipulations of contracts, but for fact that workers cannot be located, should not be transmitted to U.S. GAO as Federal-aid labor standard statutes do not confer on GAO authority similar to that contained in Davis-Bacon Act and Work Hours Act of 1962, to make direct payments to laborers and mechanics from withheld contract earnings as restitution for wage underpayments. However, claims for undistributed holdings which cannot be settled administratively may be submitted to GAO Claims Division. 44 Comp. Gen. 561, modified---------- 162
Labor surplus areas. (*See* Contracts, awards, labor surplus areas)
Leases. (*See* Leases)
Mistakes
Acceptance of contract with knowledge of mistake
Where record establishes mistake had been made in low bid and that intended bid exceeded bid submitted, and Govt. was on constructive notice of error from time of bid opening and on actual notice within 24 hours of opening, and documentation of mistake established existence, nature, and amount of mistake, which amount when added to bid price does not displace low bidder, fact that contractor signed contract

CONTRACTS—Continued Page
Mistakes—Continued
Acceptance of contract with knowledge of mistake—Continued
before correction of mistake does not preclude its right to relief. Both Govt. and contractor expected that price would be amended at later date to reflect bid price intended by bidder, price actually known to contracting officer and, therefore, reformation of contract by increasing price by amount of documented mistake is authorized---------- 446
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
All-or-none bids
Prorated
Mistake alleged after award in bid price of item in all-or-none bid on scrap which has been prorated to determine high bidder on each item is not for solution under unilateral mistake rule holding bidder bound unless mistake is obvious. Although substantial differences in bid prices on surplus property are not sufficient to place contracting officer on notice of mistake as would similar differences in bid prices on new equipment, contracting officer was obliged to consider prorated prices as if bidder had inserted them in his bid, and contracting officer failing to verify prorated unit price that was 32 percent higher than second high bid and 57 percent higher than current market appraisal, award on erroneously priced item may be rescinded without liability to bidder---------- 199
Allegation before award. (*See* Bids, mistakes)
Cancellation
Erroneous award
Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited, correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements---------- 48

CONTRACTS—Continued Page

Mistakes—Continued

Contracting officer's error detection duty

Guaranteed shipping weights and dimensions

Error in cubic displacement of shipment of cement to overseas destination entitles Govt. in accordance with Maximum Guaranteed Shipping Weights and Dimensions clause contained in invitation for bids to contract price reduction between actual transportation costs and costs used to evaluate bid. Contractor's allegation of mistake in calculation of guaranteed cubic displacement in bid preparation is not sustained, even though displacement figure was below Govt.'s estimate, in view of fact that generally bidders deliberately underestimate guaranteed shipping weights and dimensions, and that additional transportation cost, taking into consideration bid price for cement, did not place contracting officer on constructive notice of possibility of error..... 718

Notice of error

Unbalanced bid

Under invitation for procurement of intra-city or intra-area transportation services that was divided into four schedules consisting of various service items and zones in which services were to be performed, and that provided for award under each zone of each schedule to low bidder on any schedule bid on who offered unit prices on all items, contractor receiving partial award under each schedule who alleges financial loss because it bid was balanced in anticipation that award would be made on entire schedule, and because its item prices were computed on basis total price for schedule would be competitive, is not entitled to relief on mistake-in-bid theory as nothing on face of bid placed contracting officer on actual or constructive notice of possibility of error.. 588

Government's fault

Correction

Error made in slope percentage factor used in computing redetermined stumpage rates under timber sale contract may be corrected retroactively and contractor credited with overpayment that resulted from Govt.'s unilateral error, as no disagreement exists concerning correct slope percentage to subject correction to limitations of disputes clause of contract, nor is retroactive modification of contract subject to regulation that timber sale contracts may be modified only when modification applies to unexecuted portions of contract and will not be injurious to U.S., as exception to rule that contract may not be modified except in Govt.'s interest may be made to correct unilateral error by Govt..... 530

Mutual

Mutual mistake *v.* misrepresentation

Award for dictating equipment to apparent low bidder made on basis of mistake in fact that bidder's offered price was lowest price received, understanding induced by erroneous factual statements inadvertently made by contractor's representative that equipment would not require leasing of dictating trunk lines at monthly rental charge, was erroneous award to other than low, responsive, responsible bidder, and although made in good faith award should be canceled and procurement resolicited, as it is not enough that award be made in good faith.

CONTRACTS—Continued Page
Mistakes—Continued
Mutual—Continued
Mutual mistake *v.* misrepresentation—Continued
Fact that contractor's representative was unaware that his statements were erroneous is also of no effect as there is no difference between contract entered into under mutual mistake of fact and one in which one party contracts in reliance upon deliberate misrepresentation by other---------- 736
Unit price
All-or-none bids
Mistake alleged after award in bid price of item in all-or-none bid on scrap which had been prorated to determine high bidder on each item is not for solution under unilateral mistake rule holding bidder bound unless mistake is obvious. Although substantial differences in bid prices on surplus property are not sufficient to place contracting officer on notice of mistake as would similar differences in bid prices on new equipment, contracting officer was obliged to consider prorated prices as if bidder had inserted them in his bid, and contracting officer failing to verify prorated unit price that was 32 percent higher than second high bid and 57 percent higher than current market appraisal, award on erroneously priced item may be rescinded without liability to bidder- 199
Negotiation
Administrative determination
Finality
Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weathershield—method widely used in industry for several years—administrative position is upheld---------- 156
Awards
Erroneous
Price competition
Request for proposals (RFP) for rocket boosters, issued pursuant to 10 U.S.C. 2304(a)(16) permitting negotiation in interest of national defense or industrial mobilization, and approved by class determination and findings, that solicited offers on three alternative quantities for single or multiple award, which quantities were below known requirements that if disclosed, and disclosure was not prevented by Intensive Combat Rate (production capability) established for procurement, would have obtained lower prices, was defective RFP. Although determination not to consider involuntary offer of larger quantities at lower prices, erroneously based on belief all suppliers would have to be resolicited whereas amendment to RFP would have sufficed, resulted in higher

CONTRACTS—Continued Page
Negotiation—Continued
Awards—Continued
Erroneous—Continued
Price competition—Continued
prices, awards made will not be disturbed, but future procurements should permit offers in largest quantities possible within constraint imposed by Intensive Combat Rate ---------- 772
Changes, etc.
Oral v. written
Although in negotiating contract under 10 U.S.C. 2304(a)(10), mandate of 10 U.S.C. 2304(g) for discussions with all responsible offerors within competitive range was met by providing opportunity for price and technical proposal changes, oral notice of significant delivery changes did not meet standards of par. 3-805.1(e) of Armed Services Procurement Reg. that significant changes in requirements must be by written amendment and that oral notice should be used only in very limited circumstances. Failure to observe regulation was serious deficiency in negotiation process, but all offerors having been given ample opportunity to respond to oral advice, legal objection to validity of award would not be justified. However, corrective action should be taken to prevent repetition of deficiency ---------- 156
Price revision after close of negotiations
Award made of multi-year contracts for operation and maintenance of three warning systems—DEWLine, WACS, and BMEWS—under letter requests contemplating two steps to accomplish procurement—technical and price proposals—was not improper because manning level for DEWLine was revised, a factual question for technical evaluation by contracting agency, or because of failure to discuss phase-over costs to be added to price proposed by nonincumbent offeror, reasonable administrative determination on basis of noncompetitive nature of procurement. Furthermore, discussions with protestant satisfied requirements of Armed Services Procurement Reg. 3-804 and 3-805, and even though permitting successful offeror only to revise prices after close of negotiations violated ASPR 3-805.1(b)—procedure to be corrected—no significant detriment having resulted to competitive system, objection to award is not warranted ---------- 625
Written amendment requirement
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

CONTRACTS—Continued Page
Negotiation—Continued
Changes, etc.—Continued
Written amendment requirement—Continued
Request for proposals (RFP) to modernize ocean minesweepers and minehunters that contemplated single contract or not more than two contracts, one for performance on east coast, other on west coast, is not indivisible solicitation, nor is Govt. obliged to make any award and, therefore, cancellation of west coast portion of request for purpose of revising specifications, and award of contract for east coast to lowest offeror was proper, even though offer exceeded price for west coast performance as adequate competition had been obtained and no abuse of administrative discretion is evidenced. However, although it would have been preferable to amend rather than cancel RFP, action taken satisfied amendment requirement of par. 3-805.1(e) of Armed Services Procurement Reg., but future RFP revisions should be within framework of regulation ---------- 846
Competition
Cancellation of sole source procurement
When sole-source procurement solicited under 10 U.S.C. 2304(a)(13) to assure standardization and interchangeability of equipment parts is broadened to permit submission of other proposals, adding $40,000 evaluation factor to proposals other than proposal of sole-source offeror to cover costs resulting from furnishing units different than sole-source design without providing opportunity to discuss evaluation factor would be disadvantageous to Govt. in making award. Presence or absence of evaluation factor and amount of factor can have a price impact and, therefore, proponent whose offer was conditioned upon discussion of evaluation factor and possible price reduction should be given opportunity for discussion and another round of price revisions permitted ---------- 98
Changes in price, specifications, etc.
Award of new long term concession contract to supersede existing one to contractor who had satisfactorily performed under successive contracts and who had been permitted to modify his initial proposal for improvement of concession facilities at substantial investments in order to match investment proposal of another bidder will not be disturbed, even though ordinarily modification of initial proposal requires solicitation of new proposals, as 16 U.S.C. 20d in authorizing preference to incumbent concessioner in renewal of contract or in negotiation of new contract for purpose of maintaining continuity of operations and operators, and in not providing bidding procedures, removes concession contracts from normal rules ---------- 88
Competitive range formula
Although in negotiating contract under 10 U.S.C. 2304(a)(10), mandate of 10 U.S.C. 2304(g) for discussions with all responsible offerors within competitive range was met by providing opportunity for price and technical proposal changes, oral notice of significant delivery changes did not meet standards of par. 3-805.1(e) of Armed Services Procurement Reg. that significant changes in requirements must be by written amendment and that oral notice should be used only in very limited circum-

CONTRACTS—Continued Page

Negotiation—Continued

Competition—Continued

Competitive range formula—Continued

stances. Failure to observe regulation was serious deficiency in negotiation process, but all offerors having been given ample opportunity to respond to oral advice, legal objection to validity of award would not be justified. However, corrective action should be taken to prevent repetition of deficiency 156

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 meaninglessness, 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

Impracticable to obtain

Administrative determination conclusiveness

Determination whether it would be in interests of Govt. to negotiate contract to assure availability of particular mobilization base is vested in head of military department involved, and par. 3-216 of Armed Services Procurement Reg., which implements 10 U.S.C. 2304(a)(10), provides for Secretary to determine when it is in interests of national defense to negotiate with particular manufacturer to assure availability of property or services during national emergency. Therefore, in absence of convincing evidence of abuse of discretion by procuring agency, its determination of needs of Govt., and method of accommodating such needs is conclusive, especially where procurement is for equipment of highly specialized nature that must be based on expert technical opinion 463

Production methods selection

[illegible]ministrative choice of one of two possible methods of producing [illegible]tic weathershields for gun mounts authorized to be procured by nego[illegible]tion under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weathershield—method widely used in industry for several years—administrative position is upheld 156

CONTRACTS—Continued Page
Negotiation—Continued
Conflicts of interest prohibition

Under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), award of development contract for experimental engines to contractor proposing to use services of foreign firm who had performed feasibility studies for Govt. to determine practicality of developing engines, does not violate Rule 1 of Dept. of Defense Directive 5500.10, which is intended to prevent organizational conflicts of interest and subsequent unfair competition from hardware producer that provides system engineering and technical direction (SE/TD) without at same time assuming overall contractual responsibility for production of system. Directive is not self-executing but its application must be negotiated, and neither feasibility studies contract nor development contract provided for its application--- 463

Cost, etc., data
Adequate competition effect

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

"Truth-in-Negotiation"
Exceptions to cost or pricing data

When negotiated prices are based on established catalog or market prices of commercial items sold in substantial quantities to general public and price differences can be identified and justified without resort to cost analysis, determination to apply exemption in par. 3-807.1(2) of Armed Services Procurement Reg. to requirement in "truth-in-negotiations" act (10 U.S.C. 2306(f)) that certified cost or pricing data must be furnished on contracts and subcontracts that exceed $100,000, is discretionary and requires exercise of sound judgment. Where decision that "based on" concept should not apply to subcontractor prices on axles and transfer cases is reached after extensive and careful review of factual matters involved, decision is considered proper exercise of discretion and judgment, and subcontractor must furnish cost and pricing data requested---------- 216

Cut-off date
Disregard

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 cutoff date with low offeror under original request for proposals that led to award of multi-year contract which was not contemplated under orig-

CONTRACTS—Continued Page

Negotiation—Continued

Cut-off date—Continued

Disregard—Continued

inal 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

Evaluation factors

Competitive advantage precluded

When sole-source procurement solicited under 10 U.S.C. 2304(a)(13) to assure standardization and interchangeability of equipment parts is broadened to permit submission of other proposals, adding $40,000 evaluation factor to proposals other than proposal of sole-source offeror to cover costs resulting from furnishing units different than sole-source design without providing opportunity to discuss evaluation factor would be disadvantageous to Govt. in making award. Presence or absence of evaluation factor and amount of factor can have a price impact and, therefore, proponent whose offer was conditioned upon discussion of evaluation factor and possible price reduction should be given opportunity for discussion and another round of price revisions permitted 98

Criteria

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

Estimated cost higher than factor used

Use of $40,000 evaluation factor, when factor estimated by contracting office as $41,000 can be supported by reliable experience cost data would be inappropriate. In using lesser evaluation factor, difference of $1,000 in close price competition could have material bearing in determining low offer 98

Manning requirements

Award made of multi-year contracts for operation and maintenance of three warning systems—DEWLine, WACS, and BMEWS—under letter requests contemplating two steps to accomplish procurement—technical and price proposals—was not improper because manning level for DEWLine was revised, a factual question for technical evaluation by contracting agency, or because of failure to discuss phase-over costs to be added to price proposed by nonincumbent offeror, reasonable administrative determination on basis of noncompetitive nature of procurement.

CONTRACTS—Continued Page
Negotiation—Continued
Evaluation factors—Continued
Manning requirements—Continued
Furthermore, discussions with protestant satisfied requirements of Armed Services Procurement Reg. 3–804 and 3–805, and even though permitting successful offeror only to revise prices after close of negotiations violated ASPR 3–805.1(b)—procedure to be corrected—no significant detriment having resulted to competitive system, objection to award is not warranted ---------- 625
Point rating
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 and minimum evaluation standards and degree of importance to be accorded to particular factors in relation to each other ---------- 229
Propriety of evaluation
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
Letter requests for proposals. (*See* Contracts, negotiation, two-step procurement, letter requests for proposals)
National emergency authority
Conclusiveness
Determination whether it would be in interests of Govt. to negotiate contract to assure availability of particular mobilization base is vested in head of military department involved, and par. 3–216 of Armed Services Procurement Reg., which implements 10 U.S.C. 2304(a)(10), provides for Secretary to determine when it is in interests of national defense to negotiate with particular manufacturer to assure availability of property or services during national emergency. Therefore, in absence of convincing evidence of abuse of discretion by procuring

CONTRACTS—Continued Page

Negotiation—Continued

National emergency authority—Continued

Conclusiveness—Continued

agency, its determination of needs of Govt., and method of accommodating such needs is conclusive, especially where procurement is for equipment of highly specialized nature that must be based on expert technical opinion ---------- 463

Price competition

To limit negotiations of procurement for electric bomb fuzes to planned producers in order to sustain mobilization base established and to evaluate quantity combinations for award on basis that will best serve interests of Govt. to protect mobilization base, regardless of price, is proper exercise of administrative authority under 10 U.S.C. 2304(a)(16), which permits Govt. to assume additional costs without regard to prices available from other sources. Determination that contractors selected are essential sources of supply in event of national emergency was in accord with par. 3-216.2(i) of Armed Services Procurement Reg., and fact that deliveries as yet have not been made under prior contracts with suppliers does not affect propriety of negotiations ---------- 840

Prices

Based on quantity solicited

Requests for proposals (RFP) for rocket boosters, issued pursuant to 10 U.S.C. 2304(a)(16) permitting negotiation in interest of national defense or industrial mobilization, and approved by class determination and findings, that solicited offers on three alternative quantities for single or multiple award, which quantities were below known requirements that if disclosed, and disclosure was not prevented by Intensive Combat Rate (production capability) established for procurement, would have obtained lower prices, was defective RFP. Although determination not to consider involuntary offer of larger quantities at lower prices, erroneously based on belief all suppliers would have to be resolicited whereas amendment to RFP would have sufficed, resulted in higher prices, awards made will not be disturbed, but future procurements should permit offers in largest quantities possible within constraint imposed by Intensive Combat Rate ---------- 772

Public exigency

Advertised procurement initially

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed ---------- 639

CONTRACTS—Continued Page
Negotiation—Continued
Public exigency—Continued
Advertised procurement initially—Continued
Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1–1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a)(2)---------- 639
Request for proposals
Cancellation
Request for proposals (RFP) to modernize ocean minesweepers and minehunters that contemplated single contract or not more than two contracts, one for performance on east coast, other on west coast, is not indivisible solicitation, nor is Govt. obliged to make any award and, therefore, cancellation of west coast portion of request for purpose of revising specifications, and award of contract for east coast to lowest offeror was proper, even though offer exceeded price for west coast performance as adequate competition had been obtained and no abuse of administrative discretion is evidenced. However, although it would have been preferable to amend rather than cancel RFP, action taken satisfied amendment requirement of par. 3–805.1(e) of Armed Services Procurement Reg., but future RFP revisions should be within framework of regulation ---------- 846
Failure to solicit
Where request for proposals issued under 10 U.S.C. 2304 (a)(2) had been synopsized in Commerce Business Daily and had been solicited from many sources, securing adequate competition and reasonable prices, failure to solicit firm on automated bidders list need not be questioned as par. 2–205.4 of Armed Services Procurement Reg. authorizes contracting officers to rotate use of long mailing lists to avoid excessive administrative costs when justified by size of transaction, and record evidences no intent or purpose to exclude bidder---------- 707
Sole source basis
Broadening competition
When sole-source procurement solicited under 10 U.S.C. 2304(a)(13) to assure standardization and interchangeability of equipment parts is broadened to permit submission of other proposals, adding $40,000 evaluation factor to proposals other than proposal of sole-source offeror to cover costs resulting from furnishing units different than sole-source design without providing opportunity to discuss evaluation factor would be disadvantageous to Govt. in making award. Presence or absence of evaluation factor and amount of factor can have a price impact and,

CONTRACTS—Continued Page
Negotiation—Continued
Sole source basis—Continued
Broadening competition—Continued
therefore, proponent whose offer was conditioned upon discussion of evaluation factor and possible price reduction should be given opportunity for discussion and another round of price revisions permitted---- 98
Justification
Although line-of-sight (LOS) telecommunications system data submitted as unsolicited proposal under first step of two-step negotiated procurement that stipulated if data was used offeror would be entitled to award on sole-source basis was significant in causing Air Force upon consideration of feasibility study and funding data submitted to procure total LOS system rather than LOS/troposcatter system originally planned incident to relocation of NATO, offeror is not entitled to award on basis of improper use of proprietary data. Feasibility study, a research and development effort, subject only to confidential treatment, and technical data consisting of well-known scientific principles, only unsolicited information requiring protection was funding data, and its use not constituting violation of proprietary data restriction, there is no justification to support sole-source procurement---- 20
Similarity between procurement specifications soliciting electric lift truck designed to install, transport, and remove bombs and missiles from igloos and revetments and unsolicited proposal submitted to furnish item that contained restrictive legends raises presumption offeror's proprietary data was improperly disclosed, and contracting officer unable to identify sources of material used in writing specifications, their use by Govt. to consummate competitive procurement without developer's consent would violate obligation of Govt. not to divulge proprietary data and, therefore, sole-source contract should be negotiated with offeror of proprietary data, or competitive proposals should be resolicited on basis of specifications which do not use proprietary data---- 28
Subcontracts
Propriety of negotiation
Although generally contracting practices and procedures employed by prime contractors in award of subcontracts are not subject to statutory and regulatory requirements which govern contract procurement by U.S., in view of clause in contract for operation of ammunition plant that provided for Govt. approval prior to award of subcontract, U.S. GAO reviewed cancellation of two Requests for Quotations (RFQ) and issuance of third solicitation by prime contractor, and even though criticizing failure to notify protesting subcontractor of rejection of its bid under first RFQ because of negative Govt. preaward survey and its erroneous use to exclude subcontractor from participating in second RFQ, concluded negotiations under third solicitation based on required revised specifications were not prejudicial to protestant---- 668
Two-step procurement
Letter requests for proposals
Award made of multi-year contracts for operation and maintenance of three warning systems—DEWLine, WACS, and BMEWS—under letter requests contemplating two steps to accomplish procurement—technical and price proposals—was not improper because manning level for DEW-

CONTRACTS—Continued Page
Negotiation—Continued
Two-step procurement—Continued
Letter requests for proposals—Continued
Line was revised, a factual question for technical evaluation by contracting agency, or because of failure to discuss phase-over costs to be added to price proposed by non-incumbent offeror, reasonable administrative determination on basis of noncompetitive nature of procurement. Furthermore, discussions with protestant satisfied requirements of Armed Services Procurement Reg. 3–804 and 3–805, and even though permitting successful offeror only to revise prices after close of negotiations violated ASPR 3–805.1(b)—procedure to be corrected—no significant detriment having resulted to competitive system, objection to award is not warranted ---------- 625
Offer and acceptance
Contract execution
What constitutes
Upon failure of bidder awarded timber sales contract to timely furnish performance bond, offer to sell timber to second high bidder and bidder's response by signing bid form and contract, and furnishing bid deposit and performance bond, did not consummate contract, as approval and signature of required contracting authority had not been secured, and acceptance of bidder's documents was subject to outcome of appeal by successful bidder, with whom binding contractual relationship had been created by acceptance of bid and notification of acceptance, even though performance bond had not been furnished, in view of fact invitation provided for execution of formal contract documents and furnishing of performance bond at later date, and prescribed penalty for failure to do so---------- 431
Firm offer for unilateral acceptance
While combination of awards for maximum quantity offered by low bidder and bidder that had submitted "all or none" bid would be in Govt.'s interest pricewise for entire quantity solicited, partial award under qualified bid is precluded, and word "all" in minimum quantity column may not be explained by bidder to mean "all" of any indefinite quantity to be procured under invitation. Eligibility of bid for award is determinable from bid itself without reference to subsequent offers and interpretations by bidder, as formal advertising contemplates receipt of firm offers which can be accepted by Govt.'s unilateral action and, therefore, partial acceptance of qualified bid would not result in legal award, notwithstanding bidder's willingness to accept partial award---------- 499
Options
Criteria for exercise of option
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

CONTRACTS—Continued Page

Options—Continued

Not to be exercised

Although rejection of low bid under invitation for indefinite quantity of rods was improper and award of contract to second low bidder was unauthorized, in view of expenses incurred by contractor, minimum quantity ordered under contract may stand and payment made at contract price. However, no additional orders may be placed under contract, even though bid price was computed in anticipation of obtaining orders for maximum quantity stated in contract, and contractor purchased more material than needed to fill minimum quantity ordered, as extent of contractor performance is not for consideration in deciding whether to preclude further performance where Govt. has right not to exercise option to purchase---------- 541

Payments

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

Set-off. (*See* **Set-Off, contract payments**)

Price adjustment

Base price erroneously stated

State taxes

Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is in error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made---------- 782

Prices

Catalog items

Sale to public exemption to cost data submission

When negotiated prices are based on established catalog or market prices of commercial items sold in substantial quantities to general public and price differences can be identified and justified without resort to cost analysis, determination to apply exemption in par. 3-807.1(2) of Armed Services Procurement Reg. to requirement in "truth-in-negotiations" act (10 U.S.C. 2306(f)) that certified cost or pricing data must be furnished on contracts and subcontracts that exceed $100,000, is discretionary and requires exercise of sound judgment. Where decision that "based on" concept should not apply to subcontractor prices on axles and transfer cases is reached after extensive and careful review of factual matters involved, decision is considered proper exercise of discretion and judgment, and subcontractor must furnish cost and pricing data requested---------- 216

"Truth-in-Negotiation." (*See* **Contracts, negotiation, cost, etc., data, "Truth-in-Negotiation"**)

CONTRACTS—Continued Page
Proprietary, etc., items. (*See* Contracts, data, rights, etc.)
Protests
Award approved
Prior to resolution of protest

Where provisions of invitation for commercial instrument landing systems required bidders to submit evidence that identical equipment component had previously been installed at least at one location and had achieved level of performance specified are so loosely drawn that it is difficult to determine whether provisions affect responsibility of bidders or responsiveness of bids, award made pursuant to sec. 1-2.407-8(b)(3) of Federal Procurement Regs. before resolution of protest will not be disturbed absent clear and convincing evidence contracting officials' interpretation that not all components of equipment must be situated and checked at single location or their determination that equipment would meet required performance was in error---------- 9

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

Consideration mandatory

Telegram by unsuccessful bidder stating intent to protest to U.S. GAO should contract award be made to low bidder alleged to have qualified its bid, and advising supporting letter would follow, should have been treated as protest and award made to low bidder day before receipt of promised letter withheld until dispute was resolved, particularly in view of fact protestant's declaration of intent to file protest with GAO in event of contract award, was sufficient standing alone to require conclusion that telegram constituted protest. However, contract having been substantially performed, it would not be in best interests of Govt. to require cancellation of contract---------- 534

General Accounting Office authority

Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1-903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin., to whom determination was submitted, did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1-705.4(c)(vi) of ASPR, because although provision was revised to impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600

CONTRACTS—Continued Page

Protests—Continued

Notice

To contractors

Failure of contracting officer to notify low bidder, whose bid was rejected for failure to acknowledge material amendment to invitation, of protest prior to contract award to lowest responsive bidder, was neither prejudicial to bidder nor in derogation of sec. 1-2.407-8 of Federal Procurement Regs. The section is not specific that bidder affected by protest is to be notified in every case, but speaks only of "appropriate cases," and states example that contemplates situations where award might not be consummated within acceptance period provided by offer, and not situations where bid is not eligible for award 459

Timeliness

Unsuccessful offeror's failure to repeat questions raised at time proposals were opened concerning its competitor's ability to fulfill its representations is not considered waiver of any rights to object to award, nor does it preclude offeror from renewing complaints when erroneous basis of contract award is disclosed 736

Valid

Delay of contract awards

Although bid protest proceedings should not be permitted to be used to delay contract awards to gain time for nonresponsible bidder to improve its position after contracting officer's determination of nonresponsibility has been confirmed by Small Business Admin., where low bidder held financially nonresponsible on basis of preaward survey and SBA's adverse findings, has concluded negotiations for technical data rights and patent license contract that involves millions of dollars and provides for immediate substantial advance payment, bidder's responsibility should be reconsidered and if necessary, time permitting, reviewed by SBA, because of mandate in Armed Services Procurement Reg. 1-905.2, that financial resources should be obtained on as current basis as feasible with relation to date of contract award 619

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

Requests for quotations. (*See* **Purchases**)

Requirements

Estimated amounts basis

Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited, correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements 48

CONTRACTS—Continued Page

Requirements—Continued

Maximum limitations

What constitutes

Under General Services Administration requirements contract for carbonless transfer paper that contained $7,500 maximum order limitation, combination of requisitions received from different supply depots within same zone for same item that exceeds limitation and issuance of new procurement, does not violate terms of requirements contract. Each requisition received by ordering activity from depot is internal document and ordering office has right to combine two or more requisitions, and should combination exceed dollar limitation, procuring activity is obliged to obtain supplies under separate procurement to enable Govt. to explore possibility of securing lower prices for larger quantities, but future procurements should state what will constitute order within maximum limitation clause of contract ---------- 437

Unpriced

Low bid to supply requirements for radio program tape duplication and distribution services that furnished only fraction of unit prices solicited on distribution services is nonresponsive bid, even though items not priced had been excluded from evaluation formula and comprised only 2 percent of contemplated contract, for omission left contracting agency without any fixed-unit price commitment for substantial number of possible service combinations. Moreover, bid evaluation formula provided in invitation soliciting basic 1-year contract term and additional option year, permitted submission of unbalanced bids, and did not assure reasonable expectation that lowest evaluated bid would result in lowest actual performance cost that is required under 10 U.S.C. 2305 (a) to secure full and free competition and, therefore, defective invitation should be canceled ---------- 787

Research and development

Conflicts of interest prohibitions

Under request for proposals issued pursuant to 10 U.S.C. 2304(a)(11), award of development contract for experimental engines to contractor proposing to use services of foreign firm who had performed feasibility studies for Govt. to determine practicality of developing engines, does not violate Rule 1 of Dept. of Defense Directive 5500.10, which is intended to prevent organizational conflicts of interest and subsequent unfair competition from hardware producer that provides system engineering and technical direction (SE/TD) without at same time assuming overall contractual responsibility for production of system. Directive is not self-executing but its application must be negotiated, and neither feasibility studies contract nor development contract provided for its application ---------- 463

Sales, generally. (*See* Sales)

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

Service Contract Act. (*See* Contracts, labor stipulations, Service Contract Act of 1965)

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

CONTRACTS—Continued Page

Specifications

Addenda acknowledgment

By other than authorized personnel

Immediate reply to receipt of material amendment to invitation by TWX operator of low bidder, who is not responsible for preparations and submission of bids, and which was only intended as signal that transmission of amendment had been received, is not equivalent to an acceptance of terms of amendment by individual responsible for binding bidder, and under rule of agency that information furnished to clerk or anyone acting in ministerial capacity is not imputed to another, rejection of low bid was proper 459

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

Unpriced

Under invitation for collapsible fabric tanks that was amended to increase total units, award of contract for original quantity solicited on basis of price reduction received prior to issuance of amendment, and cancellation of amendment was proper where amendment acknowledgment by successful bidder had not been priced or related to decreased price and only bid prices received incident to an addenda acknowledgment were unreasonable. Bid submitted in original solicitation and which had not been withdrawn could not and did not become invalid because bid was not submitted on additional quantity, as solicitation and amendment permitted bid to be submitted on all or any part of quantities involved, and award of contract in quantities less than stated in solicitation 147

Failure of bidders in acknowledging amendments to invitation to price increased quantities solicited by amendment may have been due to form of amendment which neither provided space for insertion of prices nor called for prices on additional items. To avoid reoccurrence of situation, future amendments should be formulated to leave no doubt as to what is required 147

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

CONTRACTS—Continued Page

Specifications—Continued

Administrative determination conclusiveness

General Accounting Office function

Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weathershield—method widely used in industry for several years—administrative position is upheld---------- 156

Ambiguous

Bid responsiveness *v.* bidder responsibility

Where provisions of invitation for commercial instrument landing systems required bidders to submit evidence that identical equipment component had previously been installed at least at one location and had achieved level of performance specified are so loosely drawn that it is difficult to determine whether provisions affect responsibility of bidders or responsiveness of bids, award made pursuant to sec. 1-2.407-8(b)(3) of Federal Procurement Regs. before resolution of protest will not be disturbed absent clear and convincing evidence contracting officials' interpretation that not all components of equipment must be situated and checked at single location or their determination that equipment would meet required performance was in error------ 9

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 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.

Affecting price, quantity, or quality

Cancellation of invitation for bids based on determination changes in scope of work and equipment to be furnished constituted substantial deviation from original specifications that affected price, quantity, or quality of procurement, and readvertisement of procurement with award to second low bidder under first invitation was in best interest

CONTRACTS—Continued Page
Specifications—Continued
Changes, revisions, etc.—Continued
Affecting price, quantity, or quality—Continued
of Govt. and is proper action under sec. 1–2.404–1(b) of Federal Procurement Regs., even though revision of specifications is not one of examples cited in section for canceling invitation. Examples cited are not intended to be all inclusive, but to be indicative of type of circumstance that justifies cancellation and, therefore, contracting officer's determination to cancel invitation prevails in absence of showing of abuse of administrative discretion ---------- 584
Amendment requirement
Under invitation for collapsible fabric tanks that was amended to increase total units, award of contract for original quantity solicited on basis of price reduction received prior to issuance of amendment, and cancellation of amendment was proper where amendment acknowledgment by successful bidder had not been priced or related to decreased price and only bid prices received incident to an addenda acknowledgment were unreasonable. Bid submitted in original solicitation and which had not been withdrawn could not and did not become invalid because bid was not submitted on additional quantity, as solicitation and amendment permitted bid to be submitted on all or any part of quantities involved, and award of contract in quantities less than stated in solicitation ---------- 147
Failure of bidders in acknowledging amendments to invitation to price increased quantities solicited by amendment may have been due to form of amendment which neither provided space for insertion of prices nor called for prices on additional items. To avoid reoccurrence of situation, future amendments should be formulated to leave no doubt as to what is required ---------- 147
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
Request for proposals (RFP) to modernize ocean minesweepers and minehunters that contemplated single contract or not more than two contracts, one for performance on east coast, other on west coast, is not indivisible solicitation, nor is Govt. obliged to make any award and, therefore, cancellation of west coast portion of request for purpose of revising specifications, and award of contract for east coast to lowest offeror was proper, even though offer exceeded price for west coast performance as adequate competition had been obtained and no abuse of administrative discretion is evidenced. However, although it would have

CONTRACTS—Continued Page
Specifications—Continued
Changes, revisions, etc.—Continued
Amendment requirement—Continued
been preferable to amend rather than cancel RFP, action taken satisfied amendment requirement of par. 3-805.1(e) of Armed Services Procurement Reg. but future RFP revisions should be within framework of regulation---------- 846

Drawings

Claim for additional compensation under contract for repair and improvement of GSA Depot submitted on basis substitute drawings changing scope of work were ambiguous and failed to identify dimensional changes, and that reference omission was misleading, was properly denied by GSA Board of Contract Appeals. Record evidences contractor relied on one of two pertinent drawings that should have been interpreted together, and that replacement of original drawings *in toto* satisfied requirement of Federal Procurement Regs. 1-2.207(b) (3) that invitation changes be clearly stated. Therefore, contractor's failure to correctly compute its bid price was not due to Govt.'s failure to specifically identify difference between original and substitute drawings, and contractor is not entitled to additional compensation---------- 853

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

Responsiveness fixed at time of bid opening

Second reevaluation of bids after contract award under invitation that required bidders to furnish shipping container data that disclosed fact low bidder's transportation costs on basis of actual shipping experience were in excess of those of second low bidder, does not affect fact that bid was responsive at time of bid opening within meaning of 10 U.S.C. 2305 and par. 2-301 of Armed Services Procurement Reg., and that bid conformed to specifications, which provided considerable leeway in method of packaging and shipping weights, including choice of container dimensions and use. Contracting officer's acceptance of dimensions and weights of containers offered in good faith for evaluation purposes was reasonable as difference in weights offered did not put him on notice of error---------- 129

CONTRACTS—Continued Page

Specifications—Continued

Conformability of equipment, etc., offered—Continued

Technical deficiencies

Administrative determination conclusiveness

Determination that bid did not meet special design features specified in invitation for bids on cartridge tape equipment solicited on brand name or equal basis that set forth salient features of brand name pursuant to par. 1–1206.1(a) of Armed Services Procurement Reg. is within jurisdiction of procuring activity responsible for drafting specifications to meet requirements of Govt., determination that is acceptable, notwithstanding differences in expert technical opinions, absent evidence of abuse of discretion, or that administrative judgment is clearly and unmistakably in error. Therefore, where evidence shows design features used were material requirement and not duly restrictive, rejection of nonconforming bid was proper 195

Where contracting agency in "brand name or equal" purchase description goes beyond make and model of brand name and specifies particular design features, such features must be presumed to have been regarded as material and essential to needs of Govt., at least at time specifications were drawn and bids solicited. Therefore, as acceptance of bid that did not conform to material and essential design features specified in invitation for bids could only be accomplished by waiver of advertised specifications, administrative determination of bid nonresponsiveness to solicitation and bidder ineligibility for award was proper and will not be questioned 195

Defective

Cancellation of invitation

Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1–2.404–1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interests of Govt 173

When invitation for bids provides for liquidated damages but omits to state number of days in which work of converting elevators to automatic controls must be completed, question for resolution is not responsiveness of low bid that did not indicate performance time or entitlement to contract award of only other bidder who had indicated performance time in its bid, but whether invitation was defective. Invitation in omitting performance time did not comply with requirement in sec. 1–18.203–1(b) of Federal Procurement Regs., and in failing to indicate what time, if any, would be acceptable, did not permit bidders to compete on equal basis and, therefore, defective invitation should be canceled and procurement readvertised 713

CONTRACTS—Continued Page
Specifications—Continued
Defective—Continued
Contracting officers interpretation acceptance

Where provisions of invitation for commercial instrument landing systems required bidders to submit evidence that identical equipment component had previously been installed at least at one location and had achieved level of performance specified are so loosely drawn that it is difficult to determine whether provisions affect responsibility of bidders or responsiveness of bids, award made pursuant to sec. 1-2.407-8 (b) (3) of Federal Procurement Regs. before resolution of protest will not be disturbed absent clear and convincing evidence contracting officials' interpretation that not all components of equipment must be situated and checked at single location or their determination that equipment would meet required performance was in error---------- 9

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

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

Delivery provisions
Proof of ability to meet

Whether low bidder offering Japanese steel can meet its delivery obligations under requirements contract for steel pipe is question of responsibility and, therefore, fact that bidder did not furnish firm written commitment from Japanese manufacturer did not require rejection of bid. Bidder with full knowledge of circumstances concerning its ability to meet delivery schedule agreed to be bound by specified delivery schedule, and Govt. is entitled to rely on this promise---------- 553

CONTRACTS—Continued Page

Specifications—Continued

Descriptive data

Evaluation

Propriety

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

Subject to change

Under invitation requiring bidders to cite make and model of refuse collection trucks offered to permit evaluation of bids on basis of descriptive literature on file with procurement officer, determination that low bid was nonresponsive was proper, even though literature indicated it was subject to change. Bidder had not specified in its bid that any modification would be made in equipment to meet invitation requirements, and for officer to inquire after bid opening whether there was other literature available to show that offered model would comply with specifications would have permitted bidder to modify its bid after submission contrary to competitive bidding procedures. Future invitations should, however, show that award will be based upon bidder's unqualified offer to comply with specifications, thus avoiding need for bidders to cite truck make and model 764

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

CONTRACTS—Continued Page
Specifications—Continued
Descriptive data—Continued
Unnecessary—Continued
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
Voluntary submission
Acceptability
Under invitation for mechanical presses that required submission of price lists, unsolicited brochure accompanying low bid that described both conforming and nonconforming presses which was submitted to make price list more meaningful and was not intended for evaluation purposes did not qualify bid as both documents, parallel in format, were complementary. Intent of bid is for determination from its contents, including unsolicited brochure, and if literature qualifies bid or creates ambiguity, bid must be rejected as nonresponsive and pursuant to 10 U.S.C. 2305(c) award made to low responsible bidder whose bid conforms to invitation, statutory requirement that is not negated by par. 2-202.5(f) of Armed Services Procurement Reg., which presumes bid to conform or to be unqualified where intent of bidder is ambiguous. Modifies B-169057, April 23, 1970---------- 851
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
Delivery provisions
Waiver
When shipping point information needed to determine transportation costs in evaluation of bids is shown in several places of low bid submitted under invitation requiring bids to be on f.o.b. origin basis (shipping point), failure of bidder to insert information in column provided in invitation does not render bid nonresponsive, and deviation may be waived as minor, for bid read as whole shows compliance with f.o.b. origin requirements and legally obligates bidder to make deliveries from point shown in several places of bid, even though variously designated "Production Point," "Inspection Point," and "f.o.b. origin point." Deviation is not substantive one that affects price, quantity, or quality and, therefore, waiver of omission is not prejudicial to other bidders and competitive bidding system---------- 517
Informal *v.* substantive
Choice to furnish information
Low bid that describes receiver-transmitters to be furnished as "Electronic equipment. Freight classification not previously established by this facility" in response to Freight Classification Description clause of invitation, which states description is to be "same one bidder uses for commercial shipment," is responsive bid. Clause does not invite freight classification *if* bidder has not had any previous commercial shipment, and in providing for use of other information to determine

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Informal *v.* substantive—Continued
Choice to furnish information—Continued
classification description most appropriate and advantageous to Govt., clause neither binds bidder nor Govt. Therefore, failure of bidder to submit classification data may be waived as minor deviation, notwithstanding imperative language to contrary---------- 489

Deliberate deviation

Contract award to low bidder which would have permitted bidder who had deliberately deviated from specification requirements to furnish item neither asked for in invitation nor offered by other bidders would not be contract offered to all bidders and, therefore, rejection of nonconforming low bid was proper, even though deliberately substituted item would have met minimum needs of Govt. To insure benefits of competition to Govt., it is essential that contract awards be made on basis of specification requirements submitted for competition, and deviation to requirements may only be waived if deviation does not go to substance of bid or work injustice on other bidders, and deviation in low bid having been deliberately taken may not be considered trivial or minimal so as to justify waiver as minor irregularity---------- 211

Failure to return 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---------- 289

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed---- 538

Guaranteed shipping weight

Award to low bidder who failed to furnish guaranteed shipping weight (GSW) under invitation stating that "Bidder must state weights in his bid or it will be rejected," is not precluded because weight applied was one submitted by second low bidder, where invitation in providing for evaluation of bids on f.o.b. origin basis, plus transportation, and for re-

CONTRACTS—Continued Page

Specifications—Continued

Deviations—Continued

Informal *v.* substantive—Continued

Guaranteed shipping weight—Continued

duction of contract prices should transportation costs exceed those used for bid evaluation, furnishes packing specifications that permit computing highest possible weight, which multiplied by applicable freight rate produces transportation cost that when added to bid price does not displace low bid. Even though failure to state GSW is not minor deviation, one of exceptions to rule is situation such as one involved where there is no real likelihood low bid will exceed second high bid..... 496

Technical proposals under two-step procurement

"Bidder's Technical Qualification Clause" included in specifications contained in Letter Request for Technical Proposals, issued as first step of two-step formally advertised procurement, that stipulated technical proposals would be accepted only from "those contractors who have manufactured and can demonstrate at an operating airfield Solid State Conventional Instrument Landing System" due to unique problems involved in adapting two-frequency localizer to system—considered engineering and not development work— was not restrictive of competition because one bidder could not meet minimum requirements of procurement, and contracting agency's determination of its need is not questionable in absence of demonstrated fraud or clearly capricious action... 857

Priority status for negotiating set-asides

Information required by pars. 1–706 and 1–804 of Armed Services Procurement Reg. to establish bidder priority for negotiation of small business set-aside and labor surplus area set-aside portions of invitation serves not only to establish bidder responsibility to perform as certified eligible concern, but also is involved in bid responsiveness. Therefore, bidder who mistakenly furnished name of noncertified eligible supplier, which he was not permitted to correct after bid opening, and was declared disqualified from Group 1 priority for set-aside purposes, properly alleged bidder who deliberately listed its certified eligible supplier as furnishing "nylon webbing" in lieu of "polyester webbing" solicited was nonresponsive, even though material deviation does not appear as a substitute elsewhere in the bid and, therefore, ineligible to negotiate for set-asides..... 749

Waiver

Unsolicited literature

Under invitation for mechanical presses that required submission of price lists, unsolicited brochure accompanying low bid that described both conforming and nonconforming presses which was submitted to make price list more meaningful and was not intended for evaluation purposes did not qualify bid as both documents, parallel in format, were complementary. Intent of bid is for determination from its contents, including unsolicited brochure, and if literature qualifies bid or creates ambiguity, bid must be rejected as nonresponsive and pursuant to 10 U.S.C. 2305(c) award made to low responsible bidder whose bid conforms to invitation, statutory requirement that is not negated by par. 2–202.5(f) of Armed Services Procurement Reg., which presumes bid

CONTRACTS—Continued Page
Specifications—Continued
Deviations—Continued
Waiver—Continued
Unsolicited literature—Continued
to conform or to be unqualified where intent of bidder is ambiguous. Modifies B–169057, April 23, 1970 ---- 851
Drawings
Amendment identification
Claim for additional compensation under contract for repair and improvement of GSA Depot submitted on basis substitute drawings changing scope of work were ambiguous and failed to identify dimensional changes, and that reference omission was misleading, was properly denied by GSA Board of Contract Appeals. Record evidences contractor relied on one of two pertinent drawings that should have been interpreted together, and that replacement of original drawings *in toto* satisfied requirement of Federal Procurement Regs. 1–2.207(b) (3) that invitation changes be clearly stated. Therefore, contractor's failure to correctly compute its bid price was not due to Govt.'s failure to specifically identify difference between original and substitute drawings, and contractor is not entitled to additional compensation ---- 853
Failure to furnish something required
Addenda acknowledgment
Bid nonresponsive
Immediate reply to receipt of material amendment to invitation by TWX operator of low bidder, who is not responsible for preparation and submission of bids, and which was only intended as signal that transmission of amendment had been received, is not equivalent to an acceptance of terms of amendment by individual responsible for binding bidder, and under rule of agency that information furnished to clerk or anyone acting in ministerial capacity is not imputed to another, rejection of low bid was proper ---- 459
Blanket offer to conform to specifications
Language of covering letter accompanying bid that failed to meet "at least 90 days" acceptance period specified in invitation, which stated bid is "in response to Solicitation No. * * *" is not sufficient to offset failure of bidder to meet bid acceptance terms of invitation. Covering letter failed to cure nonresponsiveness of bid as it did not expressly or impliedly indicate that bidder was offering required bid acceptance period of at least 90 days ---- 649
Freight classification description
Low bid that describes receiver-transmitters to be furnished as "Electronic equipment. Freight classification not previously established by this facility" in response to Freight Classification Description clause of invitation, which states description is to be "same one bidder uses for commercial shipment," is responsible bid. Clause does not invite freight classification *if* bidder has not had any previous commercial shipment, and in providing for use of other information to determine classification description most appropriate and advantageous to Govt., clause neither binds bidder nor Govt. Therefore, failure of bidder to submit classification data may be waived as minor deviation, notwithstanding imperative language to contrary ---- 489

CONTRACTS—Continued Page

Specifications—Continued

Failure to furnish something required—Continued

Information

Choice to furnish

Failure to furnish cost differentials for different modes of transportation, types of vehicle, or places of delivery Govt. may specify at time of shipment, does not require rejection of low bid under invitation for procurement of receiver-transmitters which provides that "differentials *if* specified below will be considered in evaluation of bids." Bidder had choice to offer differentials and failure to do so evidences none were intended to be offered ---------- 489

Delivery, etc., information

Verification of bidder's failure to state guaranteed maximum shipping weights and cubic foot dimensions for containers to be shipped overseas, information needed to determine lowest transportation cost to Govt., and use of Govt.'s estimates with bidder's consent to evaluate bid was proper. Verification of suspected error required by par. 2-406.3 of Armed Services Procurement Reg. was not prejudicial to other bidders, nor were bidders prejudiced because guarantee clause was shown to be erroneous on basis of information contained in Transportation Evaluation clause of invitation, in view of practice of permitting bidders to deliberately understate guaranteed weights, and fact successful bidder did not have opportunity to elect to stand on clause most advantageous to it ---------- 558

Descriptive data sufficiency

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

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

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising

CONTRACTS—Continued Page
Specifications—Continued
Failure to furnish something required—Continued
Information—Continued
Invitation to bid attachments—Continued
IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed---------- 538
Points of production and inspection
To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites at the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid---------- 553
Submission time specified
Noncompliance at time of bid submission with provision of invitation for steel pipe requirements that stated "when pipe is furnished" from supplier's warehouse, whether supplier is manufacturer or jobber, evidence should be shown that pipe was manufactured in accordance with American Society for Testing Materials requirements, does not affect bid responsiveness. As no exception was taken to testing standard contractor is obligated to meet required procedure "when pipe is furnished," and failure to do so would be breach of contract rather than evidence of contract invalidity. Even if it were possible to determine in advance that performance by contractor would be absolutely and unquestionably impossible, any rejection of bid for that reason would rest upon determination of nonresponsibility rather than nonresponsiveness of bid------ 553
Minimum needs requirement
Administrative determination
Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304 (a) (10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weathershield—method widely used in industry for several years—administrative position is upheld---------- 156

CONTRACTS—Continued Page
Specifications—Continued
Minimum needs requirement—Continued
Administrative determination—Continued
Determination whether it would be in interests of Govt. to negotiate contract to assure availability of particular mobilization base is vested in head of military department involved, and par. 3-216 of Armed Services Procurement Reg., which implements 10 U.S.C. 2304(a)(10), provides for Secretary to determine when it is in interests of national defense to negotiate with particular manufacturer to assure availability of property or services during national emergency. Therefore, in absence of convincing evidence of abuse of discretion by procuring agency, its determination of needs of Govt., and method of accommodating such needs is conclusive, especially where procurement is for equipment of highly specialized nature that must be based on expert technical opinion ---------- 463
Cancellation and reinstatement of invitation
Cancellation and readvertising of invitation for copper superconductor wire upon determination lower resistivity ratio wire offered by lowest bidder equally met minimum needs of Govt. as did higher ratio more costly wire solicited was not required and original invitation should be reinstated. Adequate competition had been obtained under original invitation and only relatively small price difference existed between two lowest bids, and, although revision of specifications is "compelling reason" for rejecting all bids and readvertising procurement, cancellation of invitation should be limited to instances in which award under original specifications would not serve Govt.'s needs, but when as here specifications do, readvertising after exposure of bids would be prejudicial to competitive bidding system ---------- 211
Erroneously stated
Contract award to low bidder which would have permitted bidder who had deliberately deviated from specification requirements to furnish item neither asked for in invitation nor offered by other bidders would not be contract offered to all bidders and, therefore, rejection of nonconforming low bid was proper, even though deliberately substituted item would have met minimum needs of Govt. To insure benefits of competition to Govt., it is essential that contract awards be made on basis of specification requirements submitted for competition, and deviation to requirements may only be waived if deviation does not go to substance of bid or work injustice on other bidders, and deviation in low bid having been deliberately taken may not be considered trivial or minimal so as to justify waiver as minor irregularity ---------- 211
Exceeded
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

CONTRACTS—Continued Page
Specifications—Continued
Minimum needs requirement—Continued
Reference materials

Input of substantial intellectual effort into preparation of specifications for dictionaries, atlases, encyclopedias, and other reference materials does not justify exception to general rule that funds appropriated for purchases by Govt. agencies are available for purchase only of such articles as will meet actual minimum needs of agencies, and that payment of any greater amount for purchase of articles which may be superior, or may for one reason or another be preferred by any individual officer, is not authorized. Therefore, adoption of single award procedure for various types of standard dictionaries in lieu of multiple awards is proper exercise of administrative discretion where specifications adequately meet needs of Govt. with no detrimental effect on quality of items being procured and at savings to Govt---------- 727

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 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 component 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
Ability to meet requirements

"Bidder's Technical Qualification Clause" included in specifications contained in Letter Request for Technical Proposals, issued as first step of two-step formally advertised procurement, that stipulated technical proposals would be accepted only from "those contractors who have manu-

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Ability to meet requirements—Continued
factured and can demonstrate at an operating airfield Solid State Conventional Instrument Landing System" due to unique problems involved in adapting two-frequency localizer to system—considered engineering and not development work—was not restrictive of competition because one bidder could not meet minimum requirements of procurement, and contracting agency's determination of its needs is not questionable in absence of demonstrated fraud or clearly capricious action ---------- 857
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 invitation 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 name 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
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

CONTRACTS—Continued Page
Specifications—Continued
Restrictive—Continued
Particular make—Continued
Special design features

Where contracting agency in "brand name or equal" purchase description goes beyond make and model of brand name and specifies particular design features, such features must be presumed to have been regarded as material and essential to needs of Govt., at least at time specifications were drawn and bids solicited. Therefore, as acceptance of bid that did not conform to material and essential design features specified in invitation for bids could only be accomplished by waiver of advertised specifications, administrative determination of bid nonresponsiveness to solicitation and bidder ineligibility for award was proper and will not be questioned ---------- 195

Bidding time provided in invitation for bids soliciting brand name or equal equipment of 19 calendar days or 12 working days pursuant to par. 2–202.1 of Armed Services Procurement Reg. that specifies bidding time of not less than 15 days for standard commercial articles and not less than 30 calendar days for other than such articles, was too short a period for manufacturers required to modify their standard equipment, and 30-day bidding period has been recommended for future use in invitations soliciting modification of brand name or equal equipment. However, under current procurement, shorter bidding period was not prejudicial to bidder who had he contemplated equipment modification, was not precluded from requesting extension of time---------- 195

Technically deficient

Determination that bid did not meet special design features specified in invitation for bids on cartridge tape equipment solicited on brand name or equal basis that set forth salient features of brand name pursuant to par. 1–1206.1(a) of Armed Services Procurement Reg. is within jurisdiction of procuring activity responsible for drafting specifications to meet requirements of Govt., determination that is acceptable, notwithstanding differences in expert technical opinions, absent evidence of abuse of discretion, or that administrative judgment is clearly and unmistakably in error. Therefore, where evidence shows design features used were material requirement and not duly restrictive, rejection of nonconforming bid was proper---------- 195

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

CONTRACTS—Continued Page

Specifications—Continued

Restrictive—Continued

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

Revisions. (*See* Contracts, specifications, changes, revisions, etc.)

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 of fabrics 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

Preproduction sample requirement

Delivery date

Under invitation soliciting bids on basis of first article approval and/or waiver, when need for procurement became urgent, award of contract to second low bidder who had submitted bids on both first article approval and waiver, on basis first article waiver bid offered earlier delivery, and withdrawal of request for Certificate of Competency, which had been informally approved on low responsive bidder who had submitted bid on first article approval basis only, overlooked eligibility of low bidder for contract award. Although award on basis of urgency should not have been accomplished under invitation and proper action would have been to cancel invitation and negotiate contract pursuant to public exigency procedures of 10 U.S.C. 2304(a) (2), corrective action would not be in Govt.'s interest, however, procedures should be reviewed ---------- 639

Withdrawal of Certificate of Competency referral to Small Business Admin. after advice certificate would issue was not legally effective to remove low bidder from consideration for award, even though its bid was submitted on first article approval basis only, as invitation solicited bids on both first article approval and/or waiver basis. Therefore, when urgency for procurement developed, contracting officer in awarding contract to second low bidder on basis of first article waiver to obtain

CONTRACTS—Continued Page
Specifications—Continued
Samples—Continued
Preproduction sample requirement—Continued
Delivery date—Continued
shorter delivery schedule, overlooked restriction in Armed Services Procurement Reg. 1-1903(a) that any difference in delivery schedules resulting from waiver of first article approval is not evaluation factor, and that alternative to award to low bidder would have been cancellation of invitation and negotiation of contract pursuant to public exigency procedures of 10 U.S.C. 2304(a) (2)---------- 639
Where bidders under invitation soliciting bids on basis of first article approval and/or waiver of article are advised to submit bids on basis of first article approval even if entitled to waiver of first article in order to make them eligible for consideration should contracting agency determine to make award on basis of first article approval, fact that low bidder did not submit bid on first article waiver alternative did not affect bid responsiveness or bidder's eligibility for award of contract on basis of first article approval, as bidder having complied with terms of invitation did not run risk that its bid on basis of first article approval could not be considered because Govt. elected to accept alternative it did not bid upon, waiver of first article approval---------- 639
Tests to determine product acceptability
Under invitation for bids that contained provisions for submission of bid samples as part of bid, and for inspection of production samples by Govt. prior to delivery and by contractor to insure that delivered product was "manufactured and processed in careful and workmanlike manner, in accordance with good practice," bid that submitted acceptable samples but took exception to production sample inspection due to lack of standard test equipment in industry to assure finished product would meet Govt.'s test, and offered to measure performance on basis of specifications and to meet workmanship standards inspection was intended to insure, was qualified bid as it eliminated that Govt.'s test results would control and imposed different standard of product acceptability---------- 534
Tests
Benchmark
Proprietary data
Software and related programs developed partially at Govt. expense solely for operation of computer service program "Legal Information Through Electronics" (LITE) when contractor experienced difficulty in performing, properly was used to solicit benchmark tests to create competition. Not only did Rights in Data clause of contract provide that data become sole property of Govt., but when mixture of private and Govt. funds are used to develop data, rights are not allocatable on investment percentage basis and Govt. acquires unlimited rights to data. Former contractor delayed unreasonably in waiting until after award of a new LITE contract to object to use of data, and as GAO has never ordered cancellation of contract for improper disclosure of proprietary data, it will not do so when cancellation is not justified---- 124

CONTRACTS—Continued Page

Subcontracts

Administrative approval

Review by United States General Accounting Office

Although generally contracting practices and procedures employed by prime contractors in award of subcontracts are not subject to statutory and regulatory requirements which govern contract procurement by U.S., in view of clause in contract for operation of ammunition plant that provided for Govt. approval prior to award of subcontract, U.S. GAO reviewed cancellation of two Requests for Quotations (RFQ) and issuance of third solicitation by prime contractor, and even though criticizing failure to notify protesting subcontractor of rejection of its bid under first RFQ because of negative Govt. preaward survey and its erroneous use to exclude subcontractor from participating in second RFQ, concluded negotiations under third solicitation based on required revised specifications were not prejudicial to protestant ---------- 668

Bid shopping

Bidder listed as subcontractor

Low bidder awarded contract for modernization of a Govt. hospital under invitation specifying listing of subcontractors for electrical work category of project only, who although not manufacturer listed itself in bid as subcontractor for electrical work consisting of such off-the-shelf items as substations, switch gear, and transformers, had submitted responsive bid. Requirement for listing subcontractors is intended to discourage bid shopping and encourage competitive market among construction subcontractors, and does not apply to firms assembling off-the-shelf items but to manufacturers and fabricators who are required to meet particular invitation specifications. Therefore, construction project is subject to invitation provision that contracting officer approve electrical equipment to be installed and not to provision for listing subcontractors ---------- 120

Small business set-asides

Notwithstanding that small business concern awarded 100 percent set-aside contract for lift plugs subcontracted major portion of manufacturing process to large business firm, only performing painting, dipping, and packaging of plugs, cancellation of contract is not required, as small business concern is considered to have made significant contribution to production of "end item" within terms of contract issued pursuant to par. 1-706.5 of Armed Services Procurement Reg., which does not define term "end item." Absent promulgation of regulations to limit extension of large business subcontracting in order to further spirit and intent of statutes affecting small business participation in Govt. contracting, there is no basis to object to extent of large business subcontracting ---------- 41

Tax matters

Sales, etc.

Tax inclusion or exclusion

Reimbursement

Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract

CONTRACTS—Continued Page

Tax matters—Continued

Sales, etc—Continued

Tax inclusion or exclusion—Continued

Reimbursement—Continued

price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is in error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made---------- 782

Termination

Bid alleged nonresponsive

Upon contract termination for faulty performance, contractor who after filing timely appeal to termination, alleged award was void *ab initio* because insertion of three dashes (---) in bid acceptance period blank was equivalent to leaving space blank and, therefore, its bid was nonresponsive, may not have contract set aside, and contractor is left to its appeal. While contracting officer had he been aware of bid defect would have been without authority to make award, contractor having failed to take action prior to execution of contract, may not as one benefitting from contract, have contract set aside at its instance, and contract is not void *ab initio*, but is voidable only at option of Govt. Therefore, bid acceptance period intended for benefit of Govt., when provision became inoperative upon contract award, binding contract was consummated---------- 761

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

"Truth-in-Negotiation." (*See* **Contracts, negotiation, cost, etc., data, "Truth-in-Negotiation"**)

COURTS Page

Court of Claims

Decisions

Effect given by General Accounting Office

Payment of retired pay computed at pay of higher grade in which member or former member of Armed Forces had served satisfactorily, without regard to whether higher grade was of temporary or permanent status, may be authorized, or credit passed in accounts of disbursing officers for payments made, in view of judicial rulings so holding, even though Armed Force in which individual held higher grade is not service from which he retired, subject of course to statute of limitation contained in act of Oct. 9, 1940, 31 U.S.C. 71a, and administrative approval that service at higher grade was satisfactorily performed, if such determination is required by statute. 47 Comp. Gen. 722, modified------ 618

Decisions

Jones *v.* United States, 187 Ct. Cl. 730. (*See* Pay, retired, advancement on retired list, permanent *v.* temporary grade)

Judges

Leaves of absence

Earned in executive branch of Government

Judges of Tax Court who were removed from executive branch of Govt. by virtue of enactment of sec. 951, Pub. L. 91–172, approved Dec. 30, 1969, which established Court as constitutional court, may not be regarded as separated from service within contemplation of 5 U.S.C. 5551, in absence of such indication in legislative history of act, so as to permit lump-sum payments for accrued annual leave pursuant to act of Dec. 21, 1944, as amended, for Pub. L. 83–102, under which judges were credited with leave when appointed to court from classified civil service position authorizes payment for credited leave only upon separation from service or upon return to position subject to Annual and Sick Leave Act of 1951, as amended. However, entitlement of judges to payment for accrued annual leave to their credit remains undisturbed---------- 545

Retirement

Termination prior to eligibility

Upon termination of services of judge of U.S. Tax Court prior to eligibility for retirement under 26 U.S.C. 7447, judge who had prior service subject to civil service retirement laws may again acquire coverage under civil service retirement system if upon reemployment in position subject to system, he redeposits to Civil Service Retirement and Disability Fund any refunds received from fund and under sec. 7448, with interest from date of refunds to date of redeposit, and service involved may be recredited for civil service retirement purposes, but in no case may deposit exceed that normally required under Civil Service Retirement System. In absence of reemployment, question of reinstating coverage under system is for submission to Civil Service Commission ---------- 521

Survivorship benefits

Deposits in Civil Service Retirement and Disability Fund

Judge of U.S. Tax Court with prior Govt. service who elects to receive retired pay under 26 U.S.C. 7447(d), may not have payments he made into Civil Service Retirement and Disability Fund form basis

COURTS—Continued Page
Judges—Continued
Survivorship benefits—Continued
Deposits in Civil Service Retirement and Disability Fund—Continued
for survivor's annuity under sec. 7448(h) of Internal Revenue Code should he not apply for refund of deposits to fund that is authorized in sec. 7447(g)(2)(C), in view of his statutory entitlement to refund upon election of retired pay under Internal Revenue Code and provisions in statute, Pub. L. 91–172, which amends 26 U.S.C. 7447(g), that exclude him from entitlement to civil service retirement annuity, including survivor's annuity, and from requirement to contribute to Civil Service Retirement and Disability Fund 521
Procedure to obtain
Judge of U.S. Tax Court with prior Govt. service who elects retired pay under 26 U.S.C. 7447(e), may obtain immediate survivor's protection under sec. 7448 of Internal Revenue Code upon making at time of his election applicable deposits in Tax Court survivor's annuity fund for 5-year period immediately preceding date of election—period to include all service he performed as judge plus so much of prior service subject to civil service retirement system that is necessary to complete 5-year period. However, to obtain maximum survivor protection, judge must make deposit to fund for all service for which he claims credit, and any service in excess of 5 years for which he does not make deposit, survivor's annuity must be reduced in accordance with sec. 7448(d) 521
Judgments, decrees, etc.
Acceptance as precedent by General Accounting Office
Berkey *v.* United States, 176 Ct. Cl. 1
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

COURTS—Continued Page
Judgments, decrees, etc.—Continued
Acceptance as precedent by General Accounting Office—Continued
Jones *v.* United States, 187 Ct. Cl. 730

Rule in *Jones* v. *U.S.* (187 Ct. Cl. 730) holding retired enlisted member was entitled to be advanced on retired list under 10 U.S.C. 6151 to grade of chief warrant officer, W–3, highest permanent grade formerly held by him and in which he served satisfactorily, even though statute only authorized advancement to grade of warrant officer, W–1, highest grade in which he served satisfactorily under temporary appointment, should be applied to all advancements under sec. 6151, as well as advancements under 10 U.S.C. 3963(a), 3964, 8963(a), and 8964, providing that amount of retired pay depends upon service in "highest temporary grade," in view of fact that court based its ruling on earlier *Grayson*, *Friestedt*, and *Neri* decisions and considered all arguments advanced in *Jones* case against conclusion reached---------- 113

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 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
Civilian employees
Compensation overpayments
Accountable officers accounts

In accordance with Pub. L. 90–616, an accountable officer is entitled to full credit in his accounts for erroneous payments that are waived under authority of act, as payments are deemed valid for all purposes. Therefore, refund to employee of overpayment which he had repaid prior to waiver of erroneous payment by authorized official is regarded as valid payment that may not be questioned in accounts of responsible certifying officer regardless of fact that he may not regard erroneous payment as having been appropriately waived---------- 571

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

DEBT COLLECTIONS—Continued Page
Waiver—Continued
Known *v.* after determined overpayments—Continued
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

DECEDENTS' ESTATES
Pay, etc., due military personnel
Amounts withheld from hospitalized veterans
Retired pay *v.* pensions, etc.
Insane and incompetent members

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

Conflicting claims

Six months' death gratuity authorized in 10 U.S.C. 1477 that is payable incident to death of enlisted member of uniformed services and which is claimed by decedent's natural father and cousin designated to receive gratuity who is claiming loco parentis relationship—one in which parental obligations are assumed without legal adoption—may not be paid to either claimant, absent more conclusive evidence or judicial determination of entitlement. Evidence presented by both claimants is in conflict, as are numerous court decisions respecting determination of term "in loco parentis," and although close relationship existed between decedent and family of person alleging loco parentis relationship, member prior to enlistment was self-supporting and lived where he chose---------- 167

DEFENSE DEPARTMENT Page

Teachers employed in overseas area

Leaves of absence

Grant of leave without pay (LWOP) for approximately one year to overseas school teachers to return to U.S. to study in accredited college or university in furtherance of their professional growth may be authorized under 5 U.S.C. 5728, if requirements of statute for completion of prescribed tours of duty and execution of renewal agreements are complied with, and Govt. may assume expense of household effects storage for period of LWOP pursuant to 5 U.S.C. 5726, upon determination storage is in public interest or is appropriate for reasons of economy, with provision for recoupment of expenses paid should teacher fail to return to overseas post upon expiration of LWOP, and may pay cost of round-trip travel for teachers and their dependents under authority in 5 U.S.C. 5728, providing for taking of leave---------- 865

DEPARTMENTS AND ESTABLISHMENTS

Administrative determinations. (*See* Administrative Determinations)

Regulations. (*See* Regulations)

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 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

Territories and possessions. (*See* Territories and Possessions)

DISBURSING OFFICERS

Lack of due care, etc.

Unfamiliarity with procedure

An accountable officer of uniformed services who authorized per diem payments to members furnished quarters and subsistence on basis of retroactive amendment that deleted provision for group travel and unit movement from temporary duty orders failed to exercise due care required by 31 U.S.C. 82a–2 for entitlement to relief Disbursing officer's reliance on assurance from higher headquarters that unit movement was not involved and that members were entitled to per diem, and his failure to either follow administrative procedures based on Comptroller General decisions to effect that members may not be paid per diem when furnished quarters and subsistence, or to submit doubtful claims to U.S. GAO for settlement, is not due care contemplated by statute------ 38

DISCHARGES AND DISMISSALS Page

Military personnel

Discharge effect

Reenlistment bonus

Payment of variable reenlistment bonus authorized in 37 U.S.C. 308(g) to Navy petty officer discharged pursuant to 10 U.S.C. 6295 on Nov. 4, 1968, 3 months prior to expiration of enlishment, who on Nov. 5, 1968, reenlisted in rating of hospital corpsman, is not precluded by removal of rating from list of critical military skills effective Jan. 1, 1969, and prohibition effective Sept. 1, 1968, against payment of bonus incident to an early discharge for purpose of immediate reenlistment. Sec. 6295 discharge is considered to be same as discharge issued at expiration of term of service, except for nonentitlement to pay and allowances for period not served, and reenlistment, whether immediate or otherwise, is, therefore, separate contract and obligation, and discharge and reenlistment of member occurring prior to Jan. 1, 1969, is entitled to variable reenlistment bonus ---------- 434

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

Reorganization Plan No. 3 of 1967

Implementation

The language in Reorganization Plan No. 3 of 1967 concerning District of Columbia to effect that "There are hereby established in the Corporation so many agencies and offices * * * as the Commissioner shall from time to time determine" indicates no specific time limits apply to Commissioner's implementation of Plan ---------- 700

Pursuant to 5 U.S.C. 904(4), any Dist. of Columbia reorganization plan proposed under Reorganization Plan No. 3 of 1967, when submitted to Congress for approval must provide for transfer of unexpended balances, and upon transfer funds may only be used for purposes for which appropriation was originally made. Strict application of restriction to both partially and completely transferred functions, will avoid any

DISTRICT OF COLUMBIA—Continued Page
Reorganization Plan No. 3 of 1967—Continued
Implementation—Continued
augmentation of appropriation account, or violation of sec. 3 of Dist. of Columbia Appropriation Act, 1970. Sec. 904(4) requirements also apply to funds appropriated in 1970 act for General Operating Expenses Account, notwithstanding funds appropriated derived from designated sources, for upon appropriation segregation of special funds no longer was maintained---------- 700
DOCUMENTS
Incorporation by reference. (*See* Contracts, incorporation of terms by reference)
DONATIONS
Legality
Authority requirement
Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status, which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations---------- 572
EDUCATION
Legal
Prohibition
Tuition charges for legal education of ROTC cadets enrolled during academic year 1968–1969 under 10 U.S.C. 2107, fall within prohibition in sec. 517 of Dept. of Defense Appropriation Act for 1969 and, therefore, payment of charges is precluded, even though prohibition and its implementing regulation, par. 22–900 of Armed Services Procurement Reg., were approved after cadets were enrolled. Restriction against payment of tuition fees for legal training first appeared in DOD Appropriation Act for fiscal year 1953, and exclusion in that act of students in ROTC units was removed in 1954 act, and authority in 10 U.S.C. 2107(c) to pay expenses of ROTC cadets eligible to participate in educational assistance programs does not exempt cadets from legal training restriction contained in annual DOD appropriation acts, including 1969 act---------- 679
Reserve Officers' Training Corps
Programs at educational institutions. (*See* Military Personnel, Reserve Officers' Training Corps, programs at educational institutions)
Teachers overseas
Return to United States for study
Grant of leave without pay (LWOP) for approximately one year to overseas school teachers to return to U.S. to study in accredited college or university in furtherance of their professional growth may be authorized under 5 U.S.C. 5728, if requirements of statute for completion

EDUCATION—Continued Page
Teachers overseas—Continued
Return to United States for study—Continued
of prescribed tours of duty and execution of renewal agreements are complied with, and Govt. may assume expense of household effects storage for period of LWOP pursuant to 5 U.S.C. 5726, upon determination storage is in public interest or is appropriate for reasons of economy, with provision for recoupment of expenses paid should teacher fail to return to overseas post upon expiration of LWOP, and may pay cost of round-trip travel for teachers and their dependents under authority in 5 U.S.C. 5728, providing for taking of leave---------- 865
EQUAL EMPLOYMENT OPPORTUNITY
Contract provision. (*See* Contracts, labor stipulations, nondiscrimination)
EVIDENCE
Substantial new evidence rule
Military matters
Late receipt of retirement orders
Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued---------- 429
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" requirements should be established, and contracting officers informed personal certifications do not qualify corporation to bid on star route contracts---------- 385

FAMILY ALLOWANCES Page

Separation

Necessitated by military duties requirement

Enlisted man serving overseas on "all others" tour that entitled him to family separation allowances, type I and type II under 37 U.S.C. 427, when divorced and ordered to pay alimony and to support former wife and minor child in her custody and remarried to another service member with whom he resides near his overseas station, is not entitled on basis of separation from his child to either allowance and any payments on basis of their separation should be recovered. Although child continues to be member's dependent, their separation resulted from divorce decree granting her custody to mother and not from his military duties, requirement for entitlement to type I allowance, and type II allowance is not payable to member as former wife's household is not subject to his management and control ---------- 867

FEES

Parking

Equalization of fees charged in two buildings

Plan to equalize parking fees of agency employees located in two buildings, one a Federal building, the other a leased building, under management of commercial parking firm ignores that in proposed "single facility" concept, space is principal ingredient of plan and not management services, and that parking fees to be collected go beyond realistic charge for management services. Contemplated agreement would confer interest in Federal property in contravention of 40 U.S.C. 303b, which requires that leasing of Federal property shall be for money consideration only, and monies so derived deposited into Treasury as miscellaneous receipts, and overlooks that in absence of statutory authority use of Federal property to help finance procurement of private services is unauthorized. Therefore, parking equalization plan may not be approved ---------- 476

Physicians

State license fees

Reimbursement

Air Force medical officer, licensed in Texas, who while in residency at military hospital in Mississippi is assigned for 6 months to New Orleans civilian hospital, may not be reimbursed cost of fees paid in connection with reciprocity licensure in State of Louisiana. Statute prescribing fees, exempts physicians and surgeons in military service practicing in discharge of official duties, and officer while assigned to special medical training is considered to have been performing military duties, and in absence of statutory authority for payment of State fees, appropriated funds may not be used to impose burden on Govt. in conduct of its official business ---------- 450

Witnesses

Administrative proceedings

"Person" defined

Word "person" as used in 26 U.S.C. 7602, which authorizes issuance of summons incident to inquiry into "liability of any person for any internal revenue tax," means, as defined in sec. 7701(a)(1), "an individual, a trust, estate, partnership, association, company or corpora-

FEES—Continued Page
Witnesses—Continued
Administrative proceedings—Continued
"Person" defined—Continued
tion" and, therefore, when summons is directed to corporation or unincorporated association to compel attendance as witness at hearing before internal revenue officer, witness fees and allowances authorized in 5 U.S.C. 503(b) for appearances at agency hearings and prescribed in 28 U.S.C. 1821, to compensate persons appearing as witnesses, are payable directly to business organization and not to individual appearing on its behalf, as organization incurs same costs to comply with summons as does natural person 666

FOREIGN GOVERNMENTS
Contributions to United States personnel
Reward monies
Prohibition
Reward monies which represent value of proceeds derived from sale of contraband articles seized by Republic of Colombia acting upon information furnished by Air Force officer while temporarily attached to Colombian Air Force for training purposes are payable not to officer but to U.S. pursuant to principle of law that earnings of employee in excess of regular compensation gained in course of, or in connection with, his service belong to employer, and monies should be covered into Treasury. Even if U.S. were not entitled to reward, its acceptance by officer is precluded, absent congressional consent, by Art. 1, Sec. 9, Cl. 8 of U.S. Constitution, which prohibits acceptance by public officers of presents, Emoluments, Office, or Title, "of any kind whatever," from foreign State, and reward constitutes "Emolument" 819

FORMS
Standard forms
33
"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 referenced documents. Overrules any prior inconsistent decisions 289

FUNDS Page

Appropriated. (*See* Appropriations)

Balance of Payments Program

Failure to utilize

Although procurement of steel towers for installation as part of communication system in West Germany was not subject to Buy American Act, as procurements for use outside U.S. are exempt from restrictions of act, and, therefore, bids of low Canadian bidder—sponsored by Canadian Commercial Corp.—and domestic bidder whose bid exceeded foreign bid by more than 50 percent properly were evaluated on equal competitive basis and award made to low, responsible bidder, procurement should have been made subject to Balance of Payments Program. However, as provisions of Program were inadvertently omitted from invitation, contracting officer had not referred domestic bid that exceeded foreign bid by more than 50 percent to higher authority for approval as required, and absent certainty of approval, cancellation of award made in good faith would not be in best interests of Govt---------- 176

Offset credits under barter agreements

Foreign source items purchased in United Kingdom for use overseas that are offered in proposal submitted on barter basis pursuant to Pub. L. 806, 80th Cong., which authorizes disposal of surplus agricultural commodities overseas, properly were subject to 50 percent Balance of Payments Program evaluation factor upon determination offset credits provided under barter agreements between U.S. and United Kingdom were not available for application, that insufficient dollar savings did not warrant payment of balance of payments penalty, and that balance of payments impact would be adverse. Application of offset credits is not mandatory, nor is application of balance of payments procedure automatically waived when offsets are available---------- 562

Elementary principle of competitive procurement that awards are to be determined according to rules set out in solicitation rather than on basis of oral statements of procurement officials to individuals is for application when proponent offering foreign components under Pub. L. 806, 80th Cong., which authorizes disposal by barter of agricultural commodities for use outside U.S., is orally informed that barter offset credits would be available to preclude application of 50 percent balance of payments factor in evaluation of foreign supplies offered in its barter proposal. If information was considered essential by contracting agency, or lack of such information would be prejudicial, it should have been furnished to all prospective offerors---------- 562

Restrictions

Bid evaluation. (*See* Bids, Buy American Act, evaluation, Balance of Payments Program restrictions)

Federal grants, etc., to other than States

Labor stipulations in contracts

Funds withheld from federally aided or financed construction contracts to which U.S. is not party for wage underpayments that normally would be distributed by States or other recipients who are parties to contracts and have primary responsibility for administration of labor stipulations of contracts, but for fact that workers cannot be located, should not be transmitted to U.S. GAO as Federal aid labor standard statutes do

FUNDS—Continued Page
Federal grants, etc., to other than States—Continued
Labor stipulations in contracts—Continued
not confer on GAO authority similar to that contained in Davis-Bacon Act and Work Hours Act of 1962, to make direct payments to laborers and mechanics from withheld contract earnings as restitution for wage underpayments. However, claims for undistributed holdings which cannot be settled administratively may be submitted to GAO Claims Division. 44 Comp. Gen. 561, modified 162
Miscellaneous receipts. (*See* Miscellaneous Receipts)
Nonappropriated
Civilian employee activities
Transportation request use
Use of Govt. transportation requests, Standard Form 1169, by Army and Air Force Exchange Service—nonappropriated fund activity, even though considered Govt. instrumentality for some purposes, as appropriated funds are not made available for its operations—in order to procure air transportation for civilian employees and avoid payment of 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. Travel of Exchange employees concerned with recreation, welfare, and morale of members of uniformed services is not travel for account of U.S., nor on official business, two prerequisites in GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, sec. 2000, for use of Govt. Transportation Requests to procure passenger transportation 578
GENERAL ACCOUNTING OFFICE
Jurisdiction
Contracts
Awards
Finality of determinations
In recommending termination of purported contract that had been awarded to bidder permitted to correct its bid price because it had been erroneously computed on estimated requirements 24 times Govt.'s true estimate and mistake may have affected amount bid, and that correction was tantamount to submission of second bid, U.S. GAO did not exceed its review authority. Standard of review pursuant to Wunderlich Act (41 U.S.C. 321, 322) applies to contract disputes and not to mistakes in bid, and finality of administrative determination does not apply to questions of law. For years GAO decided all questions concerning corrections of bid mistakes, and even with delegation of such authority, Comptroller General is not deprived of right to question administrative determinations, nor bidder of right to request his decision 152
Bidders' qualifications
Determination by contracting officer that low bidder, small business concern, is nonresponsible for lack of tenacity and perseverance within meaning of par. 1-903.1(iii) of Armed Services Procurement Reg. (ASPR), which was based on negative preaward survey of prior performance and preparation for award under current solicitation, is for consideration by U.S. GAO on merits, notwithstanding Small Business Admin. to whom determination was submitted did not appeal determination to Head of Procuring Activity within 5 days prescribed in par. 1-705.4(c)(vi) of ASPR, because although provision was revised to

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Contracts—Continued
Bidders' qualifications—Continued
impose further restrictions and safeguards upon use of "perseverance or tenacity" exception to Certificate of Competency procedure, existing bid protest procedures remain unaffected---------- 600
Specification evaluation
Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of methods selected to produce weathershield—method widely used in industry for several years—administrative position is upheld---------- 156
Void *v.* voidable
Where proposed concession contract reported to Congress 60 days before award pursuant to 16 U.S.C. 17b–1 is modified, contract as executed by National Park Service, Dept. of Interior, is not one reported to Congress and, therefore, requirement for reporting proposed concession contract "in detail" 60 days before contract is awarded was not met. However, statute omitting to set forth consequences resulting from failure to comply with requirement, the contract awarded is voidable at option of Govt., option that is within discretion of Secretary of Interior to exercise, U.S. GAO taking action only when contract is considered void, not voidable ---------- 88
Labor stipulations
Equal employment opportunity programs
Duty imposed on U.S. GAO to audit all expenditures of appropriated funds involving determination of legality of expenditures, includes determination of legality of contracts obligating Govt. to payment of appropriated funds, and authority to render decisions prior to actions involving expenditures of appropriated funds has been exercised by GAO whenever any question of legality of proposed action has been raised, whether by agency head, or by complaint of interested party, or by information acquired in course of other than audit operations, and in passing upon legality of expenditures of appropriated funds for Federal or federally assisted construction programs, propriety of conditions imposed by revised "Philadelphia Plan" will be for consideration. But see *Contractors Assn. of Eastern Penna., et al.* v. *Secy. of Labor, et al.*, Civil Action No. 70–18, and B–163026, Apr. 28, 1970---------- 59
Subcontracts
Although generally contracting practices and procedures employed by prime contractors in award of subcontracts are not subject to statutory and regulatory requirements which govern contract procurement by U.S., in view of clause in contract for operation of ammunition plant

GENERAL ACCOUNTING OFFICE—Continued Page
Jurisdiction—Continued
Subcontracts—Continued
that provided for Govt. approval prior to award of subcontract, U.S. GAO reviewed cancellation of two Requests for Quotations (RFQ) and issuance of third solicitation by prime contractor, and even though criticizing failure to notify protesting subcontractor of rejection of its bid under first RFQ because of negative Govt. preaward survey and its erroneous use to exclude subcontractor from participating in second RFQ, concluded negotiations under third solicitation based on required revised specifications were not prejudicial to protestant 668

GRANTS
To other than States. (*See* Funds, Federal grants, etc., to other than States)
To States. (*See* States, Federal aid, grants, etc.)

GRATUITIES
Reenlistment bonus
Critical military skills
Early discharge from enlistment

Payment of variable reenlistment bonus authorized in 37 U.S.C. 308 (g) to Navy petty officer discharged pursuant to 10 U.S.C. 6295 on Nov. 4, 1968, 3 months prior to expiration of enlistment, who on Nov. 5, 1968, reenlisted in rating of hospital corpsman, is not precluded by removal of rating from list of critical military skills effective Jan. 1, 1969, and prohibition effective Sept. 1, 1968, against payment of bonus incident to an early discharge for purpose of immediate reenlistment. Sec. 6295 discharge is considered to be same as discharge issued at expiration of term of service, except for nonentitlement to pay and allowances for period not served, and reenlistment, whether immediate or otherwise, is, therefore, separate contract and obligation, and discharge and reenlistment of member occurring prior to Jan. 1, 1969, is entitled to variable reenlistment bonus 434

Lost time periods
Effect on payment entitlement

Payment of third annual installment of variable enlistment bonus provided by 37 U.S.C. 308(g) to member who subsequent to reenlistment on Mar. 2, 1967, for 6-year period lost 401 days of service in 2 years should be withheld until member actually performs service sufficient to count as 2 years toward completion of reenlistment period. Authority to pay equal yearly installments of variable reenlistment bonus to members having critical skill, contemplates that year of service in enlistment period will be completed before next installment is paid. Reenlistment bonus and variable reenlistment bonus are reenlistment inducements and, therefore, to pay variable reenlistment bonus to member who had been AWOL for substantial part of payment year would be inconsistent with basis for which bonus was authorized 829

Training leading to a commission
Reenlistment prior to approval of training

Eligibility criteria established in par. 7d(2) of Bur. of Naval Personnel Instruction 1133.18B, dated Dec. 1968, to effect that petty naval officers who reenlist to meet minimum service requirements for Navy

GRATUITIES—Continued Page

Reenlistment bonus—Continued

Critical military skills—Continued

Training leading to a commission—Continued

Reenlistment prior to approval of training—Continued

Enlisted Scientific Education Program (NESEP) or for other programs leading to commissioned status are not eligible for variable reenlistment bonus authorized pursuant to 37 U.S.C. 308(g), does not preclude additional eligibility requirement in par. 7d(2), deferring payment of bonus to members who reenlist subsequent to applying for NESEP training, pending results of their application, and providing for payment only to members not selected for training, as subsection is in accord with par. V.A. 6 of Dept. of Defense Instruction No. 1304.13, which implements 37 U.S.C. 308(g)---------- 611

Erroneous payments

De facto rule

Additional or special pay authorized for members of uniformed services payable only upon compliance with statutory and regulatory provisions, *de facto* rule which permits retention of erroneous payments of pay and allowances received in good faith by member while in *de facto* status may not be extended to erroneous payments of reenlistment bonus and variable reenlistment bonus. Member who prior to discharge preceding reenlistment was erroneously advanced to Specialist Six, promotion subsequently corrected, was not serving in grade E–6 when discharged and, therefore, payments of reenlistment bonus and variable reenlistment bonus computed on basis of pay grade E–6 were made contrary to requirements of 37 U.S.C. 308 (a) and (g), and overpayments of additional pay may not be waived under *de facto* rule---------- 51

Extension of enlistment

Simultaneously with acceptance of Reserve officer appointment

Regular Army enlistment man who prior to expiration of term of service is discharged in order to reenlist next day and under orders dated same day is discharged from enlisted status and appointed as Reserve officer and assigned to active duty to which he is to report shortly thereafter, is not entitled to reenlistment bonus provided in 37 U.S.C. 308. Discharge, reenlistment, and reporting for active duty as officer was substantially simultaneous transaction, and as officer had no enlistment in effect to complete if active duty as officer was terminated, Govt. received no benefit from reenlistment that had not been entered into with bona fide intention of serving thereunder for any substantial period, and, therefore, payment of bonus may not be authorized---------- 206

Six months' death

Conflicting claims

Parents and person in loco parentis

Six months' death gratuity authorized in 10 U.S.C. 1477 that is payable incident to death of enlisted member of uniformed services and which is claimed by decedent's natural father and cousin designated to receive gratuity who is claiming loco parentis relationship—one in which parental obligations are assumed without legal adoption—may not be paid to either claimant, absent more conclusive evidence or judicial determination of entitlement. Evidence presented by both claimants is in con-

GRATUITIES—Continued Page
Six month's death—Continued
Conflicting claims—Continued
Parents and person in loco parentis—Continued
flict, as are numerous court decisions respecting determination of term "in loco parentis," and although close relationship existed between decedent and family of person alleging loco parentis relationship, member prior to enlistment was self-supporting and lived where he chose---------- 167
Divorce
Invalid
Legal status of spouse of an officer of uniformed services who had been granted divorce by State of Nevada that was not recognized by wife's matrimonial domicile, State of N. Carolina, in court proceedings in which she was also granted support and custody of child born of marriage, and at which husband was present and consented to decree, remained that of officer's wife. Therefore, upon death of officer, wife having maintained her status as lawful spouse is entitled to payment of 6 months' death gratuity, and fact that officer had consented to decree of N. Carolina court is assurance Govt. will receive good acquittance by payment of gratuity to deceased officer's widow---------- 116
GUAM
Employees of the Federal Government
Registration to vote effect
Registering to vote in Guam does not deprive civilian employee of benefits prescribed for overseas service where neither acts involved nor their legislative histories indicate intent that employee be denied entitled benefits because of registration. Therefore, termination of employee's entitlement to non-foreign post differential authorized in 5 U.S.C. 5941 (a)(2) and E.O. No. 10,000 as recruitment incentive; to home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside U.S.; to up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to "place of actual residence" established at time of employee's appointment or travel overseas, is not required ---------- 596
HAWAII
Taxes
Car rentals
Government liability
Hawaii General Excise Tax imposed on motor vehicle rental agency, which although in nature of sales or gross receipts tax levied on lessor is by tradition, custom, and usage passed on to lessee as separate item in billing and added to rental price of vehicle, is not tax within scope of exemption contained in sec. 237–25(a)(3) of Hawaii Revised Statutes pertaining to sale of vehicles to U.S. and Federal Govt. is liable to lessor of cars for excise tax unless rental agreement provides otherwise. Determination of U.S. liability to pay State sales tax depends on whether incidence of tax is on the vendor or vendee, and when imposed on vendor, U.S. under its constitutional prerogative is not immune from liability unless expressly exempt---------- 204

HOLIDAYS

Page

Created by Executive order

Inspectional services

Reimbursement

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541–5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work---------- 510

HUSBAND AND WIFE

Divorce

Validity

Foreign

Legal status of spouse of an officer of uniformed services who had been granted divorce by State of Nevada that was not recognized by wife's matrimonial domicile, State of N. Carolina, in court proceedings in which she was also granted support and custody of child born of marriage, and at which husband was present and consented to decree, remained that of officer's wife. Therefore, upon death of officer, wife having maintained her status as lawful spouse is entitled to payment of 6 months' death gratuity, and fact that officer had consented to decree of N. Carolina court is assurance Govt. will receive good acquittance by payment of gratuity to deceased officer's widow---------- 116

Although 47 Comp. Gen. 286 held that because of uncertainty of sec. 250 of New York State Domestic Relations Laws concerning foreign divorces, after Sept. 1, 1967, effective date of sec. 250, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, would no longer be viewed as constituting judicial determination of Mexican divorce for purposes of payment of quarters allowances, on basis that in *Rose* v. *Rose* and *Kakarapis* v. *Kakarapis*, lower New York courts subsequent to enactment of sec. 250, followed *Rosenstiel* case in upholding validity of bilateral Mexican divorce, these decisions will be accepted as authoritative judicial determinations that *Rosenstiel* case is for application in determining validity of Mexican divorces obtained in like situations both before and after Sept. 1, 1967. 47 Comp. Gen. 286, modified---------- 833

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

INSANE AND INCOMPETENTS—Continued Page

Military personnel—Continued

Hospitalization, etc., in veterans facilities—Continued

Retired pay disposition—Continued

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

INTERSTATE COMMERCE COMMISSION

Jurisdiction

Alaska Railroad

Although Alaska Railroad, a Govt-owned facility operated by Dept. of Transportation under authority delegated by President, is not regulated by Interstate Commerce Commission, it is subject to certain provisions of Interstate Commerce Act pursuant to sec. 3(a) of E. O. No. 11107, Apr. 25, 1963, and functions as common carrier. However, disputed transportation claims that are more than 3 years old will be viewed as not subject to 3-year statute of limitations against consideration of claims by U.S. GAO because of limited number of claims involved and fact that payment has been made by Railroad to connecting carriers for their share of revenue, but, future claims for transportation services should be timely filed---------- 768

JUSTICE DEPARTMENT

Law enforcement

Discretionary grants-in-aid

Reservation in sec. 306 of title I of Omnibus Crime Control and Safe Streets Act of 1968 of 15 percent of funds appropriated to Law Enforcement Admin., Dept. of Justice, for purpose of making discretionary grants in aid of law enforcement programs is interpreted to permit grants to units of general local government as well as State planning agencies on basis that language of section is not precise and that reference to only detailed legislative history of section contained in Senate floor debates evidences intent to authorize direct grants to units of local government, and this fact is more relevant factor of persuasiveness in interpretation of sec. 306 than fact that legislation originated in House ---------- 411

LEASES Page

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

Parking space

Appropriations. (*See* Appropriations, availability, parking space)

Status

Plan to equalize parking fees of agency employees located in two buildings, one a Federal building, the other a leased building, under management of commercial parking firm ignores that in proposed "single facility" concept, space is principal ingredient of plan and not management services, and that parking fees to be collected go beyond realistic charge for management services. Contemplated agreement would confer interest in Federal property in contravention of 40 U.S.C. 303b, which requires that leasing of Federal property shall be for money consideration only, and monies so derived deposited into Treasury as miscellaneous receipts, and overlooks that in absence of statutory authority use of Federal property to help finance procurement of private services is unauthorized. Therefore, parking equalization plan may not be approved 476

Repairs and improvements

Government's obligation

The repair of window breakage by vandals and otherwise in building occupied as post office under 30-year lease that exempted lessee, Govt., from liability to repair damages caused by "acts of a stranger" is responsibility of lessor, even if lease does not provide affirmatively that lessor shall be liable for such repairs. On basis of absence of "Federal law" on issue, conflict in State court decisions as to legal liability of lessee, length of lease term, purpose for which premises were leased and lease provisions relating to repairs, exceptions to Govt.'s liability for repairs should be strictly applied and Govt. as lessee exempted from liability to make repairs, except for breakage not caused by vandalism .. 532

LEAVES OF ABSENCE

Adjustments

Transfers between different leave systems

Employee who prior to ruling in 48 Comp. Gen. 212, dated Oct. 18, 1968, transferred to different leave system to which he was allowed to transfer only part of his annual leave is entitled to transfer of any untransferred leave with corresponding adjustment in his leave ceiling, which is to be determined in accordance with Oct. 18, 1968, decision, or to receive lump-sum payment for untransferred leave at time he is separated from service, subject to applicable statutory regulations 189

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 Na-

LEAVES OF ABSENCE—Continued Page
Administrative leave—Continued
Activity in the public interest—Continued
tional 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
Forfeiture 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

Transfers
Different leave system

When employee who carried his leave credit with him upon transfer to position under another leave system returns to position subject to leave system in which transferred leave was earned, retransfer may be regarded as separation for lump-sum leave payment purposes and employee compensated for annual leave, subject to such limitations as are applicable to position from which he transfers, which is rule applicable to transfers from position subject to annual leave system to position that has no system to which annual leave can be transferred, and sec. 630.501(d) of Civil Service Regs. may be discontinued 189

Entitlement of Federal employees to additional lump-sum payment for annual leave they were not permitted to transfer either in part or not at all from one leave system to another upon transferring positions is for determination on individual case basis and any claim for payment may be transmitted to U.S. GAO for consideration and direct settlement 189

LEAVES OF ABSENCE—Continued Page

Civilians on military duty

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 perform 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 Reserves 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

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 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 employee 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

LEAVES OF ABSENCE—Continued Page

Civilians on military duty—Continued

Civil disorders—Continued

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 officers 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

Compensatory time

Per diem entitlement

Although generally compensatory time off from duty pursuant to 5 U.S.C. 5543(a)(2) in lieu of overtime that is granted to employee in travel status is regarded as leave of absence within purview of sec. 6.3 of Standardized Govt. Travel Regs. and requires suspension of subsistence allowance during leave of absence, when compensatory time is granted or ordered in interest of Govt., such as granting compensatory time to technical personnel performing work aboard FAA aircraft away from their duty station to cover normal duty hours interrupted by contingencies during which they cannot be assigned to useful work, suspension of per diem is not required, "prescribed hours of duty" essential to application of sec. 6.3 having no significance to duty hours required on extended flight inspection trips 779

LEAVES OF ABSENCE—Continued Page

Court

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

Home leave travel of overseas employees

Minimum service requirement

What constitutes

To be eligible for home leave travel allowances prescribed for employee who satisfactorily completes agreed upon period of service as provided in sec. 1.3c of Bur. of Budget Cir. No. A–56, Revised, Oct. 12, 1966, employee must have completed minimum of 12 months of service following date on which he arrives at or returns to his overseas post of duty, and, therefore, agency may not regard agreed upon period of overseas service as commencing on date employee is assigned to training or temporary duty in U.S. immediately following completion of home leave and credit employee with time spent in training toward fulfillment of agreed upon period of service 425

Lump-sum payments

Additional amounts

Transfers between different leave systems

Entitlement of Federal employees to additional lump-sum payment for annual leave they were not permitted to transfer either in part or not at all from one leave system to another upon transferring positions is for determination on individual case basis and any claim for payment may be transmitted to U.S. GAO for consideration and direct settlement 189

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

LEAVES OF ABSENCE—Continued Page
Lump-sum payments—Continued
Military duty
Retired military personnel

Retired Regular naval officer serving in civilian position subject to retired pay reduction under 5 U.S.C. 5532, and ineligible for military leave granted reservists and National Guard members pursuant to 5 U.S.C. 6323(a), when ordered to 2 weeks of active naval duty is entitled to receive lump-sum payment for annual leave or to elect to have leave remain to his credit until return from active duty in accordance with 5 U.S.C. 5552, which authorizes active duty in Armed Forces for civilian employees without separation. If retired officer elects lump-sum leave payment, should he return to civilian position prior to expiration of period covered by payment, he will be subject to same adjustment required in case of reemployment following separation—refund of amount equal to unexpired period---------- 444

Transfers
Executive to judicial branch of Government

Judges of Tax Court who were removed from executive branch of Govt. by virtue of enactment of sec. 951, Pub. L. 91–172, approved Dec. 30, 1969, which established Court as constitutional court, may not be regarded as separated from service within contemplation of 5 U.S.C. 5551, in absence of such indication in legislative history of act, so as to permit lump-sum payments for accrued annual leave pursuant to act of Dec. 21, 1944, as amended, for Pub. L. 83–102, under which judges were credited with leave when appointed to court from classified civil service position authorizes payment for credited leave only upon separation from service or upon return to position subject to Annual and Sick Leave Act of 1951, as amended. However, entitlement of judges to payment for accrued annual leave to their credit remains undisturbed----- 545

Positions exempt from leave act

When employee who carried his leave credit with him upon transfer to position under another leave system returns to position subject to leave system in which transferred leave was earned, retransfer may be regarded as separation for lump-sum leave payment purposes and employee compensated for annual leave, subject to such limitations as are applicable to position from which he transfers, which is rule applicable to transfers from position subject to annual leave system to position that has no system to which annual leave can be transferred, and sec. 630.501(d) of Civil Service Regs. may be discontinued---------- 189

Employee who prior to ruling in 48 Comp. Gen. 212, dated Oct. 18, 1968, transferred to different leave system to which he was allowed to transfer only part of his annual leave is entitled to transfer of any untransferred leave with corresponding adjustment in his leave ceiling, which is to be determined in accordance with Oct. 18, 1968 decision or to receive lump-sum payment for untransferred leave at time he is separated from service, subject to applicable statutory regulations-------- 189

Entitlement of Federal employees to additional lump-sum payment for annual leave they were not permitted to transfer either in part or not at all from one leave system to another upon transferring positions is for determination on individual case basis and any claim for payment may be transmitted to U.S. GAO for consideration and direct settlement. 189

LEAVES OF ABSENCE—Continued Page

Military personnel

Cancellation of leave

Travel expenses

When leave of absence granted members of uniformed services is canceled due to emergency conditions brought about by actual contingency operations or emergency war operations, members may be returned to their permanent duty station at Govt. expense by most expeditious means available, regardless of days of leave authorized or number of days members had been in leave status, and par. M6601–1 of Joint Travel Regs. amended accordingly. Need to recall members to duty cannot be contemplated at time leave is authorized, and as element of public business is present in emergency return of members to their permanent duty station, payment to members of cost of ordered return travel is justified.. 804

Convalescent

Travel from convalescent leave site

Member of uniformed services who travels from convalescent leave site to medical treatment facility other than one that granted convalescent leave incident to illness or injury incurred while receiving hostile fire pay under 37 U.S.C. 310, may be authorized return transportation at Govt. expense pursuant to sec. 9(1) of Pub. L. 90–207, approved Dec. 16, 1967 (37 U.S.C. 411a). To restrict member's return to facility from which he departed is not required in view of apparent beneficial intent of 1967 act to relieve member of travel expenses incurred incident to convalescent leave, and governing regulations may be amended accordingly ---------- 427

Payments of unused leave on discharge, etc.

Adjustment on basis of record correction

Pursuant to "Stipulation of Settlement" agreement, naval officers who were considered to have been illegally retired on July 1, 1965, having been awarded in 188 Ct. Cl. 1169, specific amounts to finalize lump-sum leave payments received by them upon release from active duty on June 30, 1965, and to cover period July 1, 1965, to June 14, 1968, date of judgment in which officers were awarded active duty pay and allowances, leave accrual for consideration in determining pay and allowances due officers upon correction under 10 U.S.C. 1552, of retirement date from July 1, 1965, to Aug. 1, 1969, is leave that had accrued from June 14, 1968, to July 31, 1969, as officer's leave balance in accordance with settlement agreement had been reduced on date of judgment award to zero ---------- 656

Travel expenses. (*See* Travel Expenses, military personnel, leaves of absence)

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 of 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

LEAVES OF ABSENCE—Continued Page
Sick—Continued
Recredit of prior leave—Continued
Break in service—Continued
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
Transfers
Different leave system
Post Office to National Guard
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
Teachers employed by Defense Department overseas. (*See* Defense Department, teachers employed in overseas areas, leaves of absence)
Transfers
Different leave systems. (*See* Leave of Absence, annual, transfers, different leave system)
Without pay
Effect on overtime compensation
Annual rate regular postal employees who incident to participating in work stoppage during which period they were considered to have been AWOL, worked on regularly scheduled days off without completing regular tour of duty are not entitled to overtime compensation under 39 U.S.C. 3573(a) for services performed on regularly scheduled days off, unless they worked in excess of 8 hours a day. Concept in *United Federation of Postal Clerks* v. *Watson*, 409 F. 2d 462, that all hours of work outside of regular work schedules, whether or not in excess of 8 hours in day or 40 hours in week, is compensable as overtime, because employees were temporarily required to shift their workweek for needs of service, has no application to situation where employees were responsible for failure to complete regularly scheduled tour of duty---------- 689
LEGISLATION
Construction. (*See* Statutory Construction)
LOANS
Government insured
Authority
Authority of small business investment companies (SBIC) to provide equity capital for incorporated small-business concerns under sec. 304(a) of Small Business Investment Act, and to make long-term loans (sec. 305(a)) to finance growth, modernization, and expansion of incorporated and unincorporated small-business concerns does not include authority for companies to participate as lending institutions in guaranteed loan

LOANS—Continued Page
Government insured—Continued
Authority—Continued
programs with Small Business Administration (SBA), authorized under sec. 7(a) of Small Business Act to make loans either directly or in cooperation with banks or other lending institutions, and to guarantee loans to small concerns in distressed areas, or owned by low-income individuals under sec. 402(a) of Economic Opportunity Act of 1964 and, therefore, SBA may not guarantee SBIC loans to disadvantaged small concerns 32

MARITIME MATTERS
Vessels
Cargo preference
American vessels. (*See* **Transportation, vessels, American, cargo preference**)

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 exceed 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

MILEAGE
Military personnel
Per diem and mileage allowance concurrently

Payment of per diem to member of uniformed services who returned to permanent duty station from temporary duty assignment on day he is separated from service is not prohibited by fact that member incident to separation is entitled to mileage allowance prescribed by par. M4157–1a of Joint Travel Regs., and defined as allowance intended to cover cost of transportation, subsistence, lodgings, and other related expenses, notwithstanding par. M4151 prohibits payment of mileage and per diem on same day. Mileage allowance is not authorized for any specific date but for prescribed distance, whether or not travel is performed and, therefore, par. M4151 may be amended to authorize payment of per diem incident to temporary duty on day member is separated or released from active duty 831

MILITARY PERSONNEL Page

Acceptance of foreign presents, emoluments, etc.

Reward monies

Prohibition

Reward monies which represent value of proceeds derived from sale of contraband articles seized by Republic of Colombia acting upon information furnished by Air Force officer while temporarily attached to Colombian Air Force for training purposes are payable not to officer but to U.S. pursuant to principle of law that earnings of employee in excess of regular compensation gained in course of, or in connection with, his service belong to employer, and monies should be covered into Treasury. Even if U.S. were not entitled to reward, its acceptance by officer is precluded, absent congressional consent, by Art. 1, Sec. 9, Cl. 8 of U.S. Constitution, which prohibits acceptance by public officers of presents, Emoluments, Office, or Title, "of any kind whatever," from foreign State, and reward constitutes "Emolument"---------- 819

Allowances

Family allowances. (*See* Family Allowances)

Quarters. (*See* Quarters Allowance)

Station allowances. (*See* Station Allowances)

Subsistence allowance. (*See* Subsistence Allowance)

Uniforms. (*See* Uniforms)

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

MILITARY PERSONNEL—Continued Page

Cadets, midshipmen, etc.—Continued

Disenrolled from service academy—Continued

Status—Continued

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

Injured while stationed in United States

Transportation rights

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S. whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status 101

Reservists. (*See* **Military Personnel, reservists, 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

Deceased

Estates. (*See* **Decedents' Estates, pay, etc., due military personnel**)

***De facto* status**

What constitutes

Additional or special pay authorized for members of uniformed services payable only upon compliance with statutory and regulatory provisions, *de facto* rule which permits retention of erroneous payments of pay and allowances received in good faith by member while in *de facto* status may not be extended to erroneous payments of reenlistment bonus and variable reenlistment bonus. Member who prior to discharge preceding reenlistment was erroneously advanced to Specialist Six, promotion subsequently corrected, was not serving in grade E-6 when discharged and, therefore, payments of reenlistment bonus and variable reenlistment bonus computed on basis of pay grade E-6 were made contrary to requirements of 37 U.S.C. 308 (a) and (g), and overpayments of additional pay may not be waived under *de facto* rule 51

MILITARY PERSONNEL—Continued Page
Dependents
Annuity elections option. (*See* Pay, retired, annuity elections for dependents)
Dislocation allowance. (*See* Transportation, dependents, military personnel, dislocation allowance)
Divorce. (*See* Husband and wife, divorce)
Enlisted *v.* officer status
Temporary officer status
Although 10 U.S.C. 5001(a)(4) excludes member holding permanent enlisted grade and temporary appointment in commissioned or warrant officer grade from term "enlisted member," such member's enlisted status was not prejudiced by fact that he held temporary officer appointment and he may apply for transfer to Fleet Reserve under 10 U.S.C. 6330 while serving as temporary officer. 10 U.S.C. 6330(c) does not require member actually to be paid on basis of enlisted grade on day of transfer to Fleet Reserve, and payment as temporary officer on that day does not change fact that retainer pay is for computation on basis of member's enlisted grade. If member is advanced to pay grade E–8 or E–9 at time of reverting to enlisted grade for simultaneous transfer to Fleet Reserve, he may be paid at higher grade, as limitation imposed on number of such grades has reference to active duty members ---------- 800
Erroneous payments. (*See* Payments, erroneous, military pay and allowances)
Escort duty
Per diem. (*See* Subsistence, per diem, military personnel, escort duty)
Family separation allowances. (*See* Family Allowances, separation)
Gratuities. (*See* Gratuities)
Hostile fire pay. (*See* Pay, additional, hostile fire pay)
Indebtedness
Pay withholding. (*See* Pay, withholding)
Insane and incompetent. (*See* Insane and Incompetent, military personnel)
Leaves of absence. (*See* Leaves of Absence, military personnel)
Legal education
Prohibition
Tuition charges for legal education of ROTC cadets enrolled during academic year 1968–1969 under 10 U.S.C. 2107, fall within prohibition in sec. 517 of Dept. of Defense Appropriation Act for 1969 and, therefore, payment of charges is precluded, even though prohibition and its implementing regulation, par. 22–900 of Armed Services Procurement Reg., were approved after cadets were enrolled. Restriction against payment of tuition fees for legal training first appeared in DOD Appropriation Act for fiscal year 1953, and exclusion in that act of students in ROTC units was removed in 1954 act, and authority in 10 U.S.C. 2107(c) to pay expenses of ROTC cadets eligible to participate in educational assistance programs does not exempt cadets from legal training restriction contained in annual DOD appropriation acts, including 1969 act------ 679

MILITARY PERSONNEL—Continued Page

Medical officers

Internship training

Army Reserve officer designated as having military occupational specialty of general medical officer, who neither before nor after entering into service had completed internship training prescribed by par. 10503b of Dept. of Defense Military Pay and Allowances Entitlements Manual is, nevertheless, entitled from date of entering on active duty to special pay prescribed by 37 U.S.C. 302(a) for medical and dental officers. The statute does not require internship in every case before entitlement to special pay, and Army Surgeon General had determined that officer met educational and professional requirements for appointment to Army Medical Corps, and that he was not required to undergo internship training to perform duties assigned to him as research physician.... 54

License fees

Air Force medical officer, licensed in Texas, who while in residency at military hospital in Mississippi is assigned for 6 months to New Orleans civilian hospital, may not be reimbursed cost of fees paid in connection with reciprocity licensure in State of Louisiana. Statute prescribing fees, exempts physicians and surgeons in military service practicing in discharge of official duties, and officer while assigned to special medical training is considered to have been performing military duties, and in absence of statutory authority for payment of State fees, appropriated funds may not be used to impose burden on Govt. in conduct of its official business..... 450

Medical treatment. (*See* Medical Treatment)

Medically unfit

Status

The holding in 48 Comp. Gen. 377 that inductees into military service who because they did not meet medical fitness or retention medical fitness standards were released from service are entitled to basic pay for period of induction, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, is applicable to inductees released on basis of void induction prior to decision. Decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, provisions of pars. 1-8d and 1-11a(1) of Army Reg. 635-40, to effect that disease or injury that is not recorded at time of entrance on duty is presumed to be service connected—any doubt to be resolved in favor of member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377..... 77

Mileage. (*See* Mileage, military personnel)

Missing, interned, etc., persons

Applicability of Missing Persons Act

Member injured while stationed in United States

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenact-

MILITARY PERSONNEL—Continued Page

Missing, interned, etc., persons—Continued

Applicability of Missing Persons Act—Continued

Member injured while stationed in United States—Continued

ment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status---------- 101

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**)

Overpayments

***De facto* rule**

Additional or special pay authorized for members of uniformed services payable only upon compliance with statutory and regulatory provisions, *de facto* rule which permits retention of erroneous payments of pay and allowances received in good faith by member while in *de facto* status may not be extended to erroneous payments of reenlistment bonus and variable reenlistment bonus. Member who prior to discharge preceding reenlistment was erroneously advanced to Specialist Six, promotion subsequently corrected, was not serving in grade E–6 when discharged and, therefore, payments of reenlistment bonus and variable reenlistment bonus computed on basis of pay grade E–6 were made contrary to requirements of 37 U.S.C. 308(a) and (g), and overpayments of additional pay may not be waived under *de facto* rule------ 51

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

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

Proficiency pay. (*See* **Pay, additional, proficiency**)

MILITARY PERSONNEL—Continued Page

Quarters allowance. (*See* Quarters Allowance)

Record correction

Discharge change as entitlement to pay, etc.

Medically unfit persons

Where medically unfit persons were released on basis of void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, military records of erroneously released persons may be corrected to show discharge as of date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider aggravation of unfit condition or new or additional unfitting condition acquired while on duty. Absent change in physical condition while on active duty, discharge may be made for convenience of Govt. without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to pay and allowances that accrued prior to release 77

Retirement and advancement on retired list

Upon correction of military records on Apr. 17, 1969, pursuant to 10 U.S.C. 1552, to show retirement under 10 U.S.C. 3914 of private E 1 on Dec. 1, 1945, with over 20 years of service, in lieu of discharge from Regular Army, and advancement on retired list effective Feb. 2, 1955, to 1st lieutenant based on 30 years of active duty and inactive time on retired list as provided in 10 U.S.C. 3964, retired pay of member for period Feb. 2, 1955, to Apr. 16, 1969, is not subject to recomputation under 10 U.S.C. 3992 at rate "applicable on date of retirement," but in accordance with act of May 20, 1958, at rates prescribed in sec. 511 of Career Compensation Act of 1949. Although on Oct. 1, 1949, member's retired pay was greater under sec. 511(a), recomputation is permitted under sec. 511(b) to provide greater amount of retired pay prescribed by section, on basis advancement on retired list constituted changed condition 440

Payment basis

Interim civilian earnings

Naval officers whose retirement on July 1, 1965, was found to be illegal in judgment awarded June 14, 1968, are on basis of record correction on Sept. 17, 1969, making their retirement effective Aug. 1, 1969, with grade of captain under 10 U.S.C. 6323, entitled to pay and allowances for period subsequent to judgment, June 15, 1968, to July 31, 1969, reduced first by any retired pay received and then by interim civilian compensation earned, method used in computing amount due under Court of Claims judgment, which method is in accord with Dept. of Defense directive and implementing naval regulations 656

Leave accrual

Pursuant to "Stipulation of Settlement" agreement, naval officers who were considered to have been illegally retired on July 1, 1965, having been awarded in 188 Ct. Cl. 1169, specific amounts to finalize lump-sum leave payments received by them upon release from active duty on June 30, 1965, and to cover period July 1, 1965, to June 14, 1968, date of judgment in which officers were awarded active duty pay and allow-

MILITARY PERSONNEL—Continued Page

Record correction—Continued

Payment basis—Continued

Leave accrual—Continued

ances, leave accrual for consideration in determining pay and allowances due officers upon correction under 10 U.S.C. 1552, of retirement date from July 1, 1965, to Aug. 1, 1969, is leave that had accrued from June 14, 1968, to July 31, 1969, as officer's leave balance in accordance with settlement agreement had been reduced on date of judgment award to zero ---- 656

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

Reserve Officers' Training Corps

Programs at educational institutions

Legal education

Tuition charges for legal education of ROTC cadets enrolled during academic year 1968–1969 under 10 U.S.C. 2107, fall within prohibition in sec. 517 of Dept. of Defense Appropriation Act for 1969 and, therefore, payment of charges is precluded, even though prohibition and its implementing regulation, par. 22–900 of Armed Services Procurement Reg., were approved after cadets were enrolled. Restriction against payment of tuition fees for legal training first appeared in DOD Appropriation Act for fiscal year 1953, and exclusion in that act of students in ROTC units was removed in 1954 act, and authority in 10 U.S.C. 2107(c) to pay expenses of ROTC cadets eligible to participate in educational assistance programs does not exempt cadets from legal training restriction contained in annual DOD appropriation acts, including 1969 act ---- 679

Phase-out of programs

Members of Senior Reserve Officers' Training Corps (ROTC) who complete both third and fourth years of military training during third year at institutions where ROTC program is being phased-out and continue to participate in program may be paid monetary benefits during fourth academic year—payment approval limited to Senior ROTC participants. Member who in 3 years completes 4-year course of military instruction has fully performed under ROTC enrollment contract and he is entitled to benefits provided by contract, and also under 10 U.S.C. 2108(c) Secretary of Defense is authorized to excuse member from portion of ROTC prescribed course of military instruction when found qualified on basis of previous education, military experience, or both ---- 171

Reservists

Death or injury

Inactive duty training, etc.

Disability determination

Army reservist who while on weekend training left post of duty for lunch and was involved in automobile accident that seriously injured him, and was found by medical board to be mentally incompetent because of brain injury, and by physical evaluation board as unfit for military duty, may be considered eligible for disability retirement if Secretary of Army determines member's disability is proximate result of performing active or inactive-duty training within meaning of 10 U.S.C. 1204(2). Broad authority granted to Secretaries in 10 U.S.C.

MILITARY PERSONNEL—Continued Page
Reservists—Continued
Death or injury—Continued
Inactive duty training, etc.—Continued
Disability determination—Continued
1204 was not involved in decisions of Comptroller General concerned with 10 U.S.C. 6148(a)—*Meister* case, 162 Ct. Cl. 667- and other similar statutes and, therefore, such decisions are not controlling in reaching determinations under 10 U.S.C. 1204, as well as 10 U.S.C. 1216, although they may be considered 687

Training duty
Per diem

To equalize entitlement of members of National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in temporary duty status are entitled to per diem, subject to exception in legislative reports with respect to sec. 3 of Pub. L. 90-168 (37 U.S.C. 404(a)), that no member of Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at military installation where quarters and mess are available. 48 Comp. Gen. 517, and B-152420, July 8, 1969, modified 621

Retired
Civilian service
Concurrent military duty

Retired Regular naval officer serving in civilian position subject to retired pay reduction under 5 U.S.C. 5532, and ineligible for military leave granted reservists and National Guard members pursuant to 5 U.S.C. 6323(a), when ordered to 2 weeks of active naval duty is entitled to receive lump-sum payment for annual leave or to elect to have leave remain to his credit until return from active duty in accordance with 5 U.S.C. 5552, which authorizes active duty in Armed Forces for civilian employees without separation. If retired officer elects lump-sum leave payment, should he return to civilian position prior to expiration of period covered by payment, he will be subject to same adjustment required in case of reemployment following separation—refund of amount equal to unexpired period 444

Contracting with Government
Liaison activities

The activities of retired Regular Air Force officer as self-employed small business representative to secure information concerning needs of aerospace industry for companies manufacturing components used by industry are liaison activities with view toward ultimate consummation of sale, which activities coupled with contacts for purpose of negotiating or discussing changes in specifications, prices, cost allowances, or other terms of contract, and possibly settling disputes concerning performance of contract, constitute "selling" within contemplation of Defense Dept. Directive 5500.7, dated Aug. 8, 1967, and under 37 U.S.C. 801(c) payment of retired pay to officer so engaged would be precluded for period of 3 years after retirement 85

MILITARY PERSONNEL—Continued Page

Retired—Continued

Fleet reservists

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

Pay. (*See* Pay, retired)

Retirement

Effective date

Late receipt of orders

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued ---------- 429

Savings deposits

Tax indebtedness

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S. and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions ---------- 150

Separation

Concurrent payment of per diem and mileage allowance

Payment of per diem to member of uniformed services who returned to permanent duty station from temporary duty assignment on day he is separated from service is not prohibited by fact that member incident to separation is entitled to mileage allowance prescribed by par. M4157–1a of Joint Travel Regs., and defined as allowance intended to cover cost of transportation, subsistence, lodgings, and other related expenses, notwithstanding par. M4151 prohibits payment of mileage and per diem on same day. Mileage allowance is not authorized for any specific date but for prescribed distance, whether or not travel is performed and, therefore, par. M4151 may be amended to authorize payment of per diem incident to temporary duty on day member is separated or released from active duty ---------- 831

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

MILITARY PERSONNEL—Continued Page
Severance pay. (*See* Pay, severance)
Six months' death gratuity. (*See* Gratuities, six months' death)
Station allowances. (*See* Station Allowances, military personnel)
Subsistence allowance. (*See* Subsistence Allowance)
Survivorship benefits. (*See* Pay, retired, annuity elections for dependents)
Tax debts
Federal
Liquidation. (*See* Pay, withholding, debt liquidation, Federal taxes)
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

Transportation
Baggage. (*See* Transportation, baggage, military personnel)
Dependents. (*See* Transportation, dependents, military personnel)
Household effects. (*See* Transportation, household effects, military personnel)
Travel expenses. (*See* Travel Expenses, military personnel)
Uniforms. (*See* Uniforms, military personnel)

MISCELLANEOUS RECEIPTS
Special account *v.* miscellaneous receipts
Federally and State supported projects

Cost-of-service fees charged for furnishing data from Current Research Information System (CRIS), a computerized information and retrieval system that maintains scientific and management type information on both federally financed and State supported agricultural research, may not be deposited in special account pursuant to Dept. of Agriculture's 7 U.S.C. 2244 authority and made available for CRIS to draw on to cover costs involved in making research and reproducing data. Exemption authority in section 2244 to requirement for deposit of monies into Treasury as miscellaneous receipts relates to and is limited to bibliographies prepared by Dept.'s library, and to microfilming and other photographic reproductions of books and to other library materials, and CRIS is not part of that library---------- 17

MISSING PERSONS ACT Page

Military personnel

Members injured while stationed in United States

Transportation rights

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status ---------- 101

NATIONAL GUARD

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

NATIONAL GUARD—Continued Page
Civilian employees—Continued
Conversion to Federal positions—Continued
Effect on part-time, etc., Federal employment—Continued
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

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 of 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

Employees of Federal Government
Training
Per diem

National Guard technican—employee of U.S. pursuant to 32 U.S.C. 709—who electing to attend service school in civilian Federal employee status rather than in military status signs agreement that should he not utilize Govt. quarters and mess facilities if available, he would accept reduced per diem as though he had occupied Govt. quarters at no cost, is entitled to prescribed per diem without reduction notwithstanding that he lived off military installation. Agreement signed is invalid absent determination required by Pub. L. 88-459, implemented by par. C1057, Joint Travel Regs., Vol. II, that use of Govt. quarters by technician was required in order to render necessary service or to protect Govt. property..... 815

OFFICERS AND EMPLOYEES
Accountable officers. (*See* Accountable Officers)
Compensation. (*See* Compensation)
Contributions from sources other than United States
Acceptance

Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at meeting. However, pursuant to 5 U.S.C. 4111(b), and Bur. of the Budget Cir. No. A-48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose..... 572

When Veterans Admin. physician employed by hospital affiliated with medical college of university is authorized both travel to attend medical meeting to conduct Govt. business for portion of meeting, and to

OFFICERS AND EMPLOYEES—Continued Page

Contributions from sources other than United States—Continued

Acceptance—Continued

be absent without charge to leave to attend remainder of meeting, and he is reimbursed by Govt. for travel costs and per diem incurred on Govt. business and by university for balance of his expenses, contribution by university pursuant to its tax exempt status under 26 U.S.C. 501(c)(3), and authority under 5 U.S.C. 4111, may be retained by employee ---------- 572

Where physician employed by Veterans Admin. hospital that is affiliated with medical school of university is authorized travel and per diem to undertake Govt. business for specified period, performs duties for university when in nonpay or annual leave status while traveling, reimbursement by university of expenses incurred by physician during nonduty days should not be construed as supplementing Veterans Admin. appropriations---------- 572

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 leopardizing 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**)

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

Official business

What constitutes

Employee authorized to travel away from his duty station to undergo physical examination to determine if he is qualified to perform duties of his position who is hospitalized immediately and remains away from his duty station 9½ days is only entitled to 1½ days' per diem considered normal time to travel and receive required physical examination. Per diem authorized by sec. 6.5 of Standardized Govt. Travel Regs. for employee incapacitated due to illness beyond his control does not include hospitalization for personal convenience while in travel status. Therefore, travel of employee not involving official business in usual sense and absent urgency for immediate hospitalization, employee is not considered incapacitated while away from his duty station and he is not entitled to per diem for period of hospitalization---------- 794

Overpayments

Waiver

Debt collections. (*See* **Debt Collections, waiver, civilian employees, compensation, overpayments**)

OFFICERS AND EMPLOYEES—Continued Page

Overseas

Home leave

Travel expenses. (*See* Travel Expenses, overseas employees home leave)

Registration to vote

Effect on benefits

Registering to vote in Guam does not deprive civilian employee of benefits prescribed for overseas service where neither acts involved nor their legislative histories indicate intent that employee be denied entitled benefits because of registration. Therefore, termination of employee's entitlement to non-foreign post differential authorized in 5 U.S.C. 5941(a)(2) and E.O. No. 10,000 as recruitment incentive; to home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside U.S.; to up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); to travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to "place of actual residence" established at time of employee's appointment or travel overseas, is not required 596

Overtime. (*See* Compensation, overtime)

Parking fees. (*See* Fees, parking)

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

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

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

Retirement. (*See* Retirement, civilian)

Strikes

Effect on compensation

Annual rate regular postal employees who incident to participating in work stoppage during which period they were considered to have been AWOL, worked on regularly scheduled days off without completing regular tour of duty are not entitled to overtime compensation under 39 U.S.C. 3573(a) for services performed on regularly scheduled days off, unless they worked in excess of 8 hours a day. Concept in *United Federation of Postal Clerks* v. *Watson*, 409 F. 2d 462, that all hours of work outside of regular work schedules, whether or not in excess of 8 hours in day or 40 hours in week, is compensable as overtime, because employees were temporarily required to shift their workweek for needs of service, has no application to situation where employees were responsible for failure to complete regularly scheduled tour of duty 689

Transfers

Relocation expenses

Housetrailer

Expense reimbursement

Sale of trailer

The June 26, 1969 revision of sec. 4.1b of Bur. of Budget Cir. No. A-56 prescribing that housetrailer is within scope of terms "residence" or "dwelling" as those terms are used in Circular, brokerage fee paid by transferred employee to sell mobile home at old duty station may be reimbursed to him. Although fee of 15 percent of actual sales price paid is

OFFICERS AND EMPLOYEES—Continued Page
Transfers—Continued
Relocation expenses—Continued
Housetrailer—Continued
Expense reimbursement—Continued
Sale of trailer—Continued
normal commission charged incident to sale of residence by dealers in area from which employee transferred, reimbursement to him is limited under sec. 4.2h to fee that does not exceed 10 percent of actual sales price, section authorizing reimbursement in amount not to exceed 10 percent or $5,000, whichever is smaller amount. 48 Comp. Gen. 115; B–163856, Apr. 30, 1968; B–16255, Oct. 24, 1968, modified---------- 15
Time limitation
Sale and lease of houses
Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89–516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A–56, may not be waived—Circular a statutory regulation having force and effect of law---------- 145
Truth in Lending Act effect
What constitutes a finance charge
Prohibition in sec. 4.2d of Bur. of Budget Cir. No. A–56 against reimbursement of any fee, cost, charge, or expense determined to be finance charge under Truth in Lending Act, as implemented by Regulation Z issued by Board of Governors of Federal Reserve System, precludes reimbursing employee who purchased residence incident to permanent change of station not only for loan charge that is finance charge within meaning of act, but also for VA funding fee paid as condition precedent to securing VA loan guarantee, and for tax service paid incident to extension of credit. However, recording fee, and costs of obtaining credit report and lender's title policy are not finance charges and these items of cost are reimbursable---------- 483
Transportation
Dependents. (*See* Transportation, dependents)
Household effects. (*See* Transportation, household effects)
Travel expenses. (*See* Travel Expenses)
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

OFFICERS AND EMPLOYEES—Continued Page

Travel time—Continued

International dateline crossings—Continued

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

Overtime. (*See* Compensation, overtime, travel time)

Wage board

Compensation. (*See* Compensation, wage board employees)

ORDERS

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

Effective date

New evidence

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued 429

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

ORDERS—Continued Page
Canceled, revoked, or modified—Continued
Expenses prior to change—Continued
Excess weight of household goods—Continued
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

PATENTS
Devices, etc., used by the Government
Preprocurement licenses

To gain additional experience with preprocurement licensing under which if unlicensed bidder is awarded contract, patent owner receives royalty payment used in bid evaluation, National Aeronautics and Space Admin. may continue previously approved procedure, revised to limit procedure to research and development contracts where potential patent infringement exists; to require patent owner to file timely written notice of request for license; to delay opening of bids to allow evaluation of preprocurement license request; to provide for reasonable royalty rate, which if it exceeds lowest rate to private concern will be documented; to allow demonstration that contract performance will not result in infringement; to exclude any patent that forms basis of unresolved claim; and to provide for inclusion of royalties in bid evaluation where Govt. already is licensee---------- 806

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 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

PAY—Continued Page
Active duty—Continued
Effective date
Cadets and midshipmen reversion to enlisted status

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, as 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

Grade and rank
Assimilation provisions

Provision in sec. 206(a) of Public Health Service Act (1944) that Surgeon General of Public Health Service (PHS) "during period of his appointment as such, shall be same grade, with same pay and allowances, as Surgeon General of Army" does not require promotion of PHS Surgeon General to pay grade 09 (lieutenant general) on basis Army Surgeon General was advanced by Pub. L. 89-288 (1965) to grade of lieutenant general and assigned to pay grade 09, as assimilation requirement of 1944 act was impliedly repealed by assignment of PHS officer to pay grade 08 by sec. 201(b) of Career Compensation Act of 1949. Codification of 1949 act then eliminated phrase "with same pay and allowances" from sec. 206(a) of 1944 act and term "grade" no longer relating to "pay grade," there is no basis for promoting PHS officer to pay grade 09..... 722

Medically unfit personnel

The holding in 48 Comp. Gen. 377 that inductees into military service who because they did not meet medical fitness or retention medical fitness standards were released from service are entitled to basic pay for period of induction, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, is applicable to inductees released on basis of void induction prior to decision. Decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, provisions of pars. 1–8d and 1–8.1a(1) of Army Reg. 635–40, to effect that disease or injury that is not recorded at time of entrance on duty is presumed to be service connected—any doubt to be resolved in favor of member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377..... 77

Where medically unfit persons were released on basis of void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, military records of erroneously released persons may be corrected to show discharge as of date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider aggravation of unfit condition or new or additional unfitting condition acquired while on duty. Absent change in physical condition while on active duty, discharge may be made for convenience of Govt. without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to pay and allowances that accrued prior to release..... 77

PAY—Continued Page

Active duty—Continued

Period between date of retirement and receipt of orders

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949, is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued---- 429

Additional

Hostile fire pay

Hospitalization for treatment of injuries, etc.

Entitlement to special pay determinations

The terms "hostile fire," "explosion of a hostile mine," or "other hostile action" as used in 37 U.S.C. 310(a)(3) authorizing 3 additional months of hostile fire pay for member of uniformed services hospitalized for treatment of injury or wound, have reference to "battle casualties," which is defined in casualty regulations as including persons wounded or injured "in action," even if wounded mistakenly or accidentally by friendly fire, and excluding one who is ill from illness or medical cause or receives injuries resulting from noncombatant accident, felonious assault, attempted suicide, or self-inflicted wounds. Therefore, only when member is classified as casualty as result of hostile action may be paid hostile fire pay for period not to exceed 3 months while hospitalized---- 507

Overpayments

***De facto* rule**

Additional or special pay authorized for members of uniformed services payable only upon compliance with statutory and regulatory provisions, *de facto* rule which permits retention of erroneous payments of pay and allowances received in good faith by member while in *de facto* status may not be extended to erroneous payments of reenlistment bonus and variable reenlistment bonus. Member who prior to discharge preceding reenlistment was erroneously advanced to Specialist Six, promotion subsequently corrected, was not serving in grade E–6 when discharged and, therefore, payments of reenlistment bonus and variable reenlistment bonus computed on basis of pay grade E–6 were made contrary to requirements of 37 U.S.C. 308(a) and (g), and overpayments of additional pay may not be waived under *de facto* rule---- 51

Proficiency

Award retroactively prohibited

Award of proficiency pay to members of uniformed services from date of eligibility, which was administratively overlooked, may not be retroactively approved. Entitlement to proficiency pay prescribed in 37 U.S.C. 307 is subject to par. 10811 of Dept. of Defense Military Pay and Allow-

PAY—Continued Page
Additional—Continued
Proficiency—Continued
Award retroactively prohibited—Continued
ances Entitlements Manual, which provides that award of proficiency pay for members meeting requirements in Table 1–8–1 may be awarded proficiency pay and that such pay "starts on date award is made unless later date is specified. Awards may not be made retroactively"---------- 505
Assimilation
Surgeons General of the Army and Public Health Service
Provision in sec. 206(a) of Public Health Service Act (1944) that Surgeon General of Public Health Service (PHS) "during period of his appointment as such, shall be same grade, with same pay and allowances, as Surgeon General of Army" does not require promotion of PHS Surgeon General to pay grade 09 (lieutenant general) on basis Army Surgeon General was advanced by Pub. L. 89–288 (1965) to grade of lieutenant general and assigned to pay grade 09, as assimilation requirement of 1944 act was impliedly repealed by assignment of PHS officer to pay grade 08 by sec. 201(b) of Career Compensation Act of 1949. Codification of 1949 act then eliminated phrase "with same pay and allowances" from sec. 206(a) of 1944 act and term "grade" no longer relating to "pay grade," there is no basis for promoting PHS officer to pay grade 09---------- 722
Civilian employees. (*See* Compensation)
Disability retired pay. (*See* Pay, retired, disability)
Increases
Comparable to classified employees
Adjustment
Retroactive application of comparable upward adjustment authorized by Pub. L. 90–207, in monthly basic pay of members of uniformed services having been prescribed for members "on active duty on the date of enactment" of any compensation increase received by Federal classified employees, adjustment is not authorized for members of National Guard or Reserve component performing drills and other inactive duty compensable under 37 U.S.C. 206. Therefore, retroactive effective date of Jan. 1, 1970 prescribed by E.O. No. 11525 for application of compensation increase authorized for civilians by Pub. L. 91–231, enacted Apr. 15, 1970, to members of uniformed services, does not apply to member in drill status on that date who had performed in status different than prescribed in 37 U.S.C. 206 prior to that date, or to member who performed drills during retroactive period but was not in drill status on Apr. 15, 1970---------- 796
Retired pay. (*See* Pay, retired, increases)
Medical and dental officers
Internship payment prohibition
Army Reserve officer designated as having military occupational specialty of general medical officer, who neither before nor after entering into service had completed internship training prescribed by par. 10503b of Dept. of Defense Military Pay and Allowances Entitlement Manual is nevertheless, entitled from date of entering on active duty to special pay prescribed by 37 U.S.C. 302 (a) for medical and dental officers. The statute does not require internship in every case before entitlement to

PAY—Continued Page
Medical and dental officers—Continued
Internship payment prohibition—Continued
special pay, and Army Surgeon General had determined that officer met educational and professional requirements for appointment to Army Medical Corps, and that he was not required to undergo internship training to perform duties assigned to him as research physician ---------- 54
Retainer pay. (*See* Pay, retired, fleet reservists)
Retired
Advancement on retired list
Evidence of satisfactory service in another service
Payment of retired pay computed at pay of higher grade in which member or former member of Armed Forces had served satisfactorily, without regard to whether higher grade was of temporary or permanent status, may be authorized, or credit passed in accounts of disbursing officers for payments made, in view of judicial rulings so holding, even though Armed Force in which individual held higher grade is not service from which he retired, subject of course to statute of limitation contained in act of Oct. 9, 1940, 31 U.S.C. 71a, and administrative approval that service at higher grade was satisfactorily performed, if such determination is required by statute. 47 Comp. Gen. 722, modified ---------- 618
Highest pay benefits
Upon correction of military records on Apr. 17, 1969, pursuant to 10 U.S.C. 1552, to show retirement under 10 U.S.C. 3914 of private E–1 on Dec. 1, 1945, with over 20 years of service, in lieu of discharge from Regular Army, and advancement on retired list effective Feb. 2, 1955, to 1st lieutenant based on 30 years of active duty and inactive time on retired list as provided in 10 U.S.C. 3964, retired pay of member for period Feb. 2, 1955, to Apr. 16, 1969, is not subject to recomputation under 10 U.S.C. 3992 at rate "applicable on date of retirement," but in accordance with act of May 20, 1958, at rates prescribed in sec. 511 of Career Compensation Act of 1949. Although on Oct. 1, 1949, member's retired pay was greater under sec. 511(a), recomputation is permitted under sec. 511 (b) to provide greater amount of retired pay prescribed by section, on basis advancement on retired list constituted changed condition ---------- 440
Permanent *v.* temporary grade
Rule in *Jones* v. *U.S.* (187 Ct. Cl. 730) holding retired enlisted member was entitled to be advanced on retired list under 10 U.S.C. 6151 to grade of chief warrant officer, W-3, highest permanent grade formerly held by him and in which he served satisfactorily, even though statute only authorized advancement to grade of warrant officer, W–1, highest grade in which he served satisfactorily under temporary appointment, should be applied to all advancement under sec. 6151, as well as advancements under 10 U.S.C. 3963 (a), 3964, 8963 (a), and 8964 providing that amount of retired pay depends upon service in "highest temporary grade," in view of fact that court based its ruling on earlier *Grayson*, *Friestedt*, and *Neri* decisions and considered all arguments advanced in *Jones* case against conclusion reached ---------- 118

PAY—Continued Page
Retired—Continued
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

More than one application for change

Fact that Army major retired on May 1, 1969, reduced annuity elected for his wife under Retired Serviceman's Family Protection Plan, 10 U.S.C. 1431–1446, on May 5, 1969, does not preclude him from withdrawing from plan on June 4, 1969, as nothing in law or legislative history of act restricts retired member to one of options provided in 10 U.S.C. 1436 (b). Member may apply for any number of reductions so long as each involves smaller annuity, and he may withdraw from plan at any time, reduction or withdrawal becoming effective first day of seventh calendar month after application. Therefore, annuity reduction under 10 U.S.C. 1436(b) (1) became effective Dec. 1, 1969, and officer's withdrawal from plan pursuant to 10 U.S.C. 1436(b) (2) on Jan. 1, 1970---------- 877

Revision of plan
Status changes

Election of option 3, at one-fourth reduced retired pay, combined with option 4, under Retired Serviceman's Family Protection Plan by Navy officer who prior to placement on retired list pursuant to 10 U.S.C. 6323, married and acquired child, may not be changed to option 2, at one-half retired pay with option 4, as officer's initial election became effective when he acquired eligible beneficiaries and, therefore, change is not status change contemplated by 1968 amendment to Plan. Moreover, even if change met requirements of 1968 act, change involving increase in annuity from one-fourth to one-half of officer's reduced retired pay would be precluded by 10 U.S.C. 1431 (c), which permits otherwise proper change of election only if such "change does not increase the amount of the annuity."---------- 824

Revocation, etc.
Ineffective

Army officer who when informed that he may not revoke reduced annuity provided for his wife under Retired Serviceman's Family Protection Plan requested on date of retirement, and that he may only further reduce annuity or withdraw from Plan pursuant to 10 U.S.C. 1436 (b), and that his request would be considered withdrawal, selects

PAY—Continued Page

Retired—Continued

Annuity elections for dependents—Continued

Revocation, etc.—Continued

Ineffective—Continued

further annuity deduction with explanation he was not previously aware of selections available to him, is considered to have submitted proper application for reduced annuity. Where member's request for change in election overlooks certain factors, Secretarial approval should be withheld until doubt is resolved, and if member was informed that his doubtful request will be considered application for reduction or withdrawal, such request is only "proper application" upon affirmation ---------- 837

Withdrawal from participation

Attempt after retirement to change election

Member of uniformed services who had elected option 3 at one-half reduced retired pay under Retired Serviceman's Family Protection Plan on May 9, 1967, for wife and children, and who shortly after election lost his wife and remarried, may not have request for revocation of election made before transfer to Fleet Reserve on July 7, 1969, considered as requested change does not "reflect" changed status in marital or dependency status contemplated by 1968 amendment to Plan, nor may alternative request made after transfer to provide only for his children be considered as it was not received within 2 years of date of wife's death. However, member may on basis of application made after transfer withdraw from Plan under 10 U.S.C. 1436(b), effective on first day of seventh month after month in which application was received ---------- 824

Disability

Effective date

Member of uniformed services who is eligible to retire July 1, 1968, effective date of basic pay increase, either for disability retirement under 10 U.S.C. ch. 61, by virtue of Uniform Retirement Date Act, or voluntarily for years of service under 10 U.S.C. 6323, is entitled to retired pay computed at higher rates of active duty pay prescribed by E.O. No. 11414, not on basis of disability retirement—as rate applicable to disability retirement would be rate in effect as if retirement had not occurred under act—but on basis that sec. 6323 retirement, which neither subject to Uniform Retirement Date Act nor Formula 4 of 10 U.S.C. 1401, that requires computation of retired pay at rate in effect day before retirement, is "other provision of law" most favorable to member prescribed by sec. 1401, and he, therefore, is entitled to retired pay computed at higher rate of active duty basic pay in effect July 1, 1968 ---------- 80

Effective date

Late receipt of retirement orders

Late receipt by enlisted member of uniformed services of retirement orders that placed him on Temporary Disability Retired List provided no basis for revocation and reissuance of retirement orders under substantial new evidence rule, as late receipt of orders did not prevent retirement of member from becoming effective on day following receipt of orders. Therefore, member continued on active duty until delivery of orders, and pursuant to sec. 514 of Career Compensation Act of 1949.

PAY—Continued Page

Retired—Continued

Effective date—Continued

Late receipt of retirement orders—Continued

is entitled to active duty pay and allowances from July 17, 1969, effective retirement date stated in initial orders, to and including July 24, 1969, date member received notice of orders, and to retired pay from July 25, 1969, date member's retirement became effective, to and including Aug. 14, 1969, date he was released from active duty under new orders mistakenly issued ---------- 429

Election of pay computation method

Most favorable formula

Upon correction of military records on Apr. 17, 1969, pursuant to 10 U.S.C. 1552, to show retirement under 10 U.S.C. 3914 of private E–1 on Dec. 1, 1945, with over 20 years of service, in lieu of discharge from Regular Army, and advancement on retired list effective Feb. 2, 1955, to 1st lieutenant based on 30 years active duty and inactive time on retired list as provided in 10 U.S.C. 3964, retired pay of member for period Feb. 2, 1955, to Apr. 16, 1969, is not subject to recomputation under 10 U.S.C. 3992 at rate "applicable on date of retirement," but in accordance with act of May 20, 1958, at rates prescribed in sec. 511 of Career Compensation Act of 1949. Although on Oct. 1, 1949, member's retired pay was greater under sec. 511(a), recomputation is permitted under sec. 511(b) to provide greater amount of retired pay prescribed by section, on basis advancement on retired list constituted changed condition ---------- 440

Fleet reservists

Enlisted member temporary officer

Although 10 U.S.C. 5001(a) (4) excludes member holding permanent enlisted grade and temporary appointment in commissioned or warrant officer grade from term "enlisted member," such member's enlisted status was not prejudiced by fact that he held temporary officer appointment and he may apply for transfer to Fleet Reserve under 10 U.S.C. 6330 while serving as temporary officer. 10 U.S.C. 6330(c) does not require member actually to be paid on basis of enlisted grade on day of transfer to Fleet Reserve, and payment as temporary officer on that day does not change fact that retainer pay is for computation on basis of member's enlisted grade. If member is advanced to pay grade E–8 or E–9 at time of reverting to enlisted grade for simultaneous transfer to Fleet Reserve, he may be paid at higher grade, as limitation imposed on number of such grades has reference to active duty members ---------- 800

Grade, rank, etc., at retirement

Service in higher rank than at retirement

Rule in *Jones* v. *U.S.* (187 Ct. Cl. 730) holding retired enlisted member was entitled to be advanced on retired list under 10 U.S.C. 6151 to grade of chief warrant officer, W–3, highest permanent grade formerly held by him and in which he served satisfactorily, even though statute only authorized advancement to grade of warrant officer, W–1, highest grade in which he served satisfactorily under temporary appointment, should be applied to all advancements under sec. 6151, as well as advancements under 10 U.S.C. 3963(a), 3964, 8963(a), and 8964, providing

PAY—Continued Page
Retired—Continued
Grade, rank, etc., at retirement—Continued
Service in higher rank than at retirement—Continued
that amount of retired pay depends upon service in "highest temporary grade," in view of fact that court based its ruling on earlier *Grayson*, *Friestedt*, and *Neri* decisions and considered all arguments advanced in *Jones* case against conclusion reached ---------- 113

Payment of retired pay computed at pay of higher grade in which member or former member of Armed Forces had served satisfactorily, without regard to whether higher grade was of temporary or permanent status, may be authorized, or credit passed in accounts of disbursing officers for payments made, in view of judicial rulings so holding, even though Armed Force in which individual held higher grade is not service from which he retired, subject of course to statute of limitation contained in act of Oct. 9, 1940, 31 U.S.C. 71a, and administrative approval that service at higher grade was satisfactorily performed, if such determination is required by statute. 47 Comp. Gen. 722, modified ------ 618

Increases
Entitlement

To determine if Uniform Retirement Date Act (5 U.S.C. 8301) is applicable to Army and Air Force officers who if they first qualify for retirement upon completion of 20, 30, or 40 years of service prior to June 1968, would be entitled to retired pay computed under Formula B of 10 U.S.C. 3991 or 8991, subject to footnote 2, on basis of monthly active duty pay rates applicable on date of retirement, or if officers are entitled to retired pay computed at higher rates of active duty pay prescribed by E. O. No. 11414, effective July 1, 1968, time of qualification for retirement is element for consideration ---------- 80

Retirement on effective date of increase

Member of uniformed services who is eligible to retire July 1, 1968, effective date of basic pay increase, either for disability retirement under 10 U.S.C. ch. 61, by virtue of Uniform Retirement Date Act, or voluntarily for years of service under 10 U.S.C. 6323, is entitled to retired pay computed at higher rates of active duty pay prescribed by E.O. No. 11414, not on basis of disability retirement—as rate applicable to disability retirement would be rate in effect as if retirement had not occurred under act—but on basis that sec. 6323 retirement, which neither subject to Uniform Retirement Date Act nor Formula 4 of 10 U.S.C. 1401, that requires computation of retired pay at rate in effect day before retirement, is "other provision of law" most favorable to member prescribed by sec. 1401, and he, therefore, is entitled to retired pay computed at higher rate of active duty basic pay in effect July 1, 1968 ---------- 80

The fact that member of uniformed services had not requested voluntary retirement based on years of service when qualifying for retirement prior to July 1, 1968, does not defeat right to retired pay computed under any "other provision of law" most favorable to him as prescribed by 10 U.S.C. 1401 when he retires on July 1, 1968, effective date of basic pay increases provided by E. O. No. 11414, dated June 13, 1968, and member, therefore, is entitled to retired pay computed at higher rate of pay made effective July 1, 1968 ---------- 80

PAY—Continued Page
Retired—Continued
Increases—Continued
Under Public Law 89–132

Retired pay of member of uniformed services retired under 10 U.S.C. 1293, effective September 1, 1965, who had also qualified for voluntary retirement for years of service under 10 U.S.C. 6323, may be computed on basis of increased rate of basic pay prescribed by Pub. L. 89–132 (37 U.S.C. 203(a)), effective Sept. 1, 1965. The act silent as to whether or not members whose retirements became effective on its effective date were authorized to compute their retired pay on basis of increased rates, principles in 43 Comp. Gen. 425 and 44 Comp. Gen. 373; *id.* 584, apply---- 80

Waiver for civilian retirement benefits
Revocation

Regular enlisted member of uniformed services who subsequent to retirement was employed as a civilian in Federal Govt. and waived his retired pay to have his military service credited for civilian retirement purposes may not if reemployed in civil service revoke waiver of retired pay. Revocation of waiver would not terminate former member's status as an annuitant or terminate his eligibility to receive an annuity, which pursuant to 5 U.S.C. 8344(a) would be deducted from civilian compensation payable to annuitant while reemployed in order to avoid double benefit based upon same period of military service. Therefore, reemployed annuitant is entitled to continue to receive his annuity and to be paid by employing agency only difference between annuity due and salary payable to him---- 581

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

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 withholdings 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

PAY—Continued Page

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

Severance

Disability retirement

Medically unfit personnel at time of induction

The holding in 48 Comp. Gen. 377 that inductees into military service who because they did not meet medical fitness or retention medical fitness standards were released from service are entitled to basic pay for period of induction, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, is applicable to inductees released on basis of void induction prior to decision. Decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, provisions of pars. 1–8d and 1–8.1a(1) of Army Reg. 635–40, to effect that disease or injury that is not recorded at time of entrance on duty is presumed to be service connected—any doubt to be resolved in favor of member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377 ... 77

Where medically unfit persons were released on basis of void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, military records of erroneously released persons may be corrected to show discharge as of date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider aggravation of unfit condition or new or additional unfitting condition acquired while on duty. Absent change in physical condition while on active duty, discharge may be made for convenience of Govt. without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to pay and allowances that accrued prior to release 77

Withholding

Debt liquidation

Federal taxes

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal

PAY—Continued Page

Withholding—Continued

Debt liquidation—Continued

Federal taxes—Continued

Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions ---------- 150

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 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

Absence or unenforceability of contracts

Quantum meruit

Payment in lieu of taxes

An invoice bearing interest presented by State Drainage District to Federal Govt. in amount assessed against Govt. for rehabilitation of drainage ditch that is computed in same manner as taxes levied against property owners other than Federal Govt. imposes a tax, and U.S. exempted by Constitution from State taxation, tax may not be collected by designating tax an invoice or statement for services. While payment of tax may not be authorized, claim for amount representing fair and reasonable value of services received may be presented on *quantum meruit* basis, and utility type service agreement entered into for future services, agreement to provide for compensation to cover fair and reasonable value of services to be furnished---------- 72

PAYMENTS—Continued Page
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

Military pay and allowances
Lack of due care in making payment

An accountable officer of uniformed services who authorized per diem payments to members furnished quarters and subsistence on basis of retroactive amendment that deleted provision for group travel and unit movement from temporary duty orders failed to exercise due care required by 31 U.S.C. 82a–2 for entitlement to relief. Disbursing officer's reliance on assurance from higher headquarters that unit movement was not involved and that members were entitled to per diem, and his failure to either follow administrative procedures based on Comptroller General decisions to effect that members may not be paid per diem when furnished quarters and subsistence, or to submit doubtful claims to U.S. GAO for settlement, is not due care contemplated by statute------ 38

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

Waiver. (*See* Debt Collections, waiver)

POST EXCHANGES, SHIP STORES, ETC.
Employees
Government transportation request use

Use of Govt. transportation requests, Standard Form 1169, by Army and Air Force Exchange Service—nonappropriated fund activity, even though considered Govt. instrumentality for some purposes, as appropriated funds are not made available for its operatons—in order to procure air transportation for civilian employees and avoid payment of 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. Travel

POST EXCHANGES, SHIP STORES, ETC.—Continued Page
Employees—Continued
Government transportation request use—Continued
of Exchange employees concerned with recreation, welfare, and morale of members of uniformed services is not travel for account of U.S., nor on official business, two prerequisites in GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, sec. 2000, for use of Govt. Transportation Requests to procure passenger transportation---------- 578

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

Transfers
Transportation and relocation expenses
Effect of delayed authorization

Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89-516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A-56, may not be waived—Circular a statutory regulation having force and effect of law---------- 145

Work stoppage

Annual rate regular postal employees who incident to participating in work stoppage during which period they were considered to have been AWOL, worked on regularly scheduled days off without completing regular tour of duty are not entitled to overtime compensation under 39 U.S.C. 3573(a) for services performed on regularly scheduled days off, unless they worked in excess of 8 hours a day. Concept in *United Federation of Postal Clerks* v. *Watson*, 409 F. 2d 462, that all hours of work outside of regular work schedules, whether or not in excess of 8 hours in day or 40 hours in week, is compensable as overtime, because employees were temporarily required to shift their workweek for needs of service, has no application to situation where employees were responsible for failure to complete regularly scheduled tour of duty---------- 689

POST OFFICE DEPARTMENT—Continued Page

Leases

Damages

Government's liability

The repair of window breakage by vandals and otherwise in building occupied as post office under 30-year lease that exempted lessee, Govt., from liability to repair damages caused by "acts of a stranger" is responsibility of lessor, even if lease does not provide affirmatively that lessor shall be liable for such repairs. On basis of absence of "Federal law" on issue, conflict in State court decisions as to legal liability of lessee, length of lease term, purpose for which premises were leased and lease provisions relating to repairs, exceptions to Govt.'s liability for repairs should be strictly applied and Govt. as lessee exempted from liability to make repairs, except for breakage not caused by vandalism ---------- 532

Mails

Postal strike effect on delivery

Bid, forwarded by regular mail in sufficient time to have been delivered prior to time set for opening of bids but for unprecedented postal strike that commenced in New York City on bid opening day, may not be considered for award by waiving late bid regulations on theory strike was in same realm as act of God, defined as "some inevitable accident which cannot be prevented by human care, skill, or foresight, but results from natural causes * * *." But even assuming strike was act of God, bidder in not forwarding its bid by registered or certified mail, assumed risk of delivery, risk which was not overcome by bid handling instructions to procuring agencies necessitated by strike, as instructions did not suspend late bid rules contained in Armed Services Procurement Reg. 2-303 and invitation ---------- 733

Star route contracts

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 Page

Private

Automobile damages. (*See* **Vehicles, private**)

Public

Contractor use. (*See* **Contracts, Government property**)

Damage, loss, etc.

Repair, replacement, etc., costs

Recovery

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

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

Private use

Authority

Plan to equalize parking fees of agency employees located in two buildings, one a Federal building, the other a leased building, under management of commercial parking firm ignores that in proposed "single facility" concept, space is principal ingredient of plan and not management services, and that parking fees to be collected go beyond realistic charge for management services. Contemplated agreement would confer interest in Federal property in contravention of 40 U.S.C. 303b, which requires that leasing of Federal property shall be for money consideration only, and monies so derived deposited into Treasury as miscellaneous receipts, and overlooks that in absence of statutory authority use of Federal property to help finance procurement of private services is unauthorized. Therefore, parking equalization plan may not be approved 476

Surplus

Disposition

Sale. (*See* **Sales**)

PUBLIC HEALTH SERVICE Page

Commissioned personnel

Pay, etc.

Assimilation to Armed Services

Provision in sec. 206(a) of Public Health Service Act (1944) that Surgeon General of Public Health Service (PHS) "during period of his appointment as such, shall be same grade, with same pay and allowances, as Surgeon General of Army" does not require promotion of PHS Surgeon General to pay grade 09 (lieutenant general) on basis Army Surgeon General was advanced by Pub. L. 89–288 (1965) to grade of lieutenant general and assigned to pay grade 09, as assimilation requirement of 1944 act was impliedly repealed by assignment of PHS officer to pay grade 08 by sec. 201(b) of Career Compensation Act of 1949. Codification of 1949 act then eliminated phrase "with same pay and allowances" from sec. 206(a) of 1944 act and term "grade" no longer relating to "pay grade," there is no basis for promoting PHS officer to pay grade 09 ---------- 722

PUBLIC UTILITIES

Contracts

In lieu of taxation

An invoice bearing interest presented by State Drainage District to Federal Govt. in amount assessed against Govt. for rehabilitation of drainage ditch that is computed in same manner as taxes levied against property owners other than Federal Govt. imposes a tax, and U.S. exempted by Constitution from State taxation, tax may not be collected by designating tax an invoice or statement for services. While payment of tax may not be authorized, claim for amount representing fair and reasonable value of services received may be presented on *quantum meruit* basis, and utility type service agreement entered into for future services, agreement to provide for compensation to cover fair and reasonable value of services to be furnished ---------- 72

PURCHASES

Tie

Resolution

Although three tie bids stamped received within 5 minute period under Request for Quotations issued pursuant to 41 U.S.C. 252(c)(3) should not have been resolved by awarding contract to firm whose quotation had earliest time stamp, record evidences no favoritism or improper motive for award and, therefore, executed procurement will not be disturbed, even though as matter of sound judgment matter should have been resolved by giving preference to small business concerns in accordance with policy stated in secs. 1–2.407–6 and 1–3.601 of Federal Procurement Regs. While procedures for breaking ties in advertised procurements (FPR 1–2.407–6) do not apply to small purchases, they will be applied by contracting agency in future when identical price quotations are submitted in order to avoid even appearance of partiality ---------- 646

QUARTERS ALLOWANCE Page

Dependents

Proof of dependency

Divorce validity

Although 47 Comp. Gen. 286 held that because of uncertainty of sec. 250 of New York State Domestic Relations Laws concerning foreign divorces, after Sept. 1, 1967, effective date of sec. 250, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, would no longer be viewed as constituting judicial determination of Mexican divorce for purposes of payment of quarters allowances, on basis that in *Rose* v. *Rose* and *Kakarapis* v. *Kakarapis*, lower New York courts subsequent to enactment of sec. 250, followed *Rosenstiel* case in upholding validity of bilateral Mexican divorce, these decisions will be accepted as authoritative judicial determinations that *Rosenstiel* case is for application in determining validity of Mexican divorces obtained in like situations both before and after Sept. 1, 1967. 47 Comp. Gen. 286, modified---------- 833

REGULATIONS

Force and effect of law

Budget Bureau circulars

Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89–516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A–56, may not be waived—Circular a statutory regulation having force and effect of law---------- 145

Waiver

Small Business Size Appeals Board in classifying collection and disposal of refuse as service falling within $1 million small business size standard, to be applied in future as appeal had not been timely taken, rather than as transportation activity within contemplation of $3 million size standard used by procuring agency, disregarded Small Business Admin. Reg. 121.3–1(b)(1) making consideration of Standard Industrial Classification (SIC) mandatory in defining industries for purpose of establishing small business size standards—regulation that has force and effect of law. Result in size appeal, therefore, was inconsistent with SIC definition of involved refuse services as transportation and pursuant to sec. 121.3–8(f) of SBA regulation, $3 million small business size standard should apply to services---------- 702

Implementing procedures

Monroney Amendment

Wage schedules administration

Monroney Amendment providing for administration of wage schedules under 5 U.S.C. 5341(c), in authorizing that when insufficient comparable positions exist in private industry in a particular area to establish rates for Federal positions, rates shall be established *in accordance with* rates paid in nearest wage area, permits Civil Service Commission charged

REGULATIONS—Continued Page
Implementing procedures—Continued
Monroney Amendment—Continued
Wage schedules administration—Continued
with administration of amendment considerable latitude in determining how appropriate accord is to be accomplished. Therefore, Commission's changed interpretation of amendment and its implementation by use of wage data obtained outside given area as though obtained within given area to avoid inequities that result from limiting use of data to classes of positions for which sought is acceptable 873

Propriety

Instructions by Defense Contract Audit Agency authorizing per diem rate of $20, and up to $25 maximum where employee incurs actual expenses in excess of $20, that were issued to put into effect Pub. L. 91–114, approved Nov. 10, 1969, and implementing Joint Travel Regs., increasing per diem from $16 to $25 for travel within continental U.S., may not be basis for retroactive approval of additional per diem for employees issued orders prior to statutory increase, or for reducing rate prescribed by statute. There is no authority when taking required administrative action to effect statutory increase to apply increase retroactively, and per diem may only be reduced in special circumstances prescribed by JTR establishing mandatory rate increase. Also combination of per diem and actual expenses provided in instructions is improper 493

Although utility charges ordinarily are included in price of hotel or motel room, inclusion by employee who rented apartment while in travel status of separate charge for electricity as part of lodging expenses appears proper under administrative regulation giving effect to Pub. L. 91–114, which increased daily maximum per diem rate and actual subsistence allowance payable within continental U.S. However, regulation in requiring actual expenses of lodgings supported by receipts to be added to flat amount for food and other subsistence expenses goes too far in use of actual expenses to determine employee's per diem entitlement under sec. 6.12 of Standardized Govt. Travel Regs., and regulation should be corrected 753

Retroactive

Administrative error correction

The general rule that regulations may not be made retroactively effective when law has been previously construed or proposed regulations amend regulations previously issued, does not apply to reinstatement of properly issued regulations. Therefore, upon reinstatement of regulations that authorized per diem to reservists ordered to active duty for less than 20 weeks where quarters and mess are available, no objection will be raised to per diem payments heretofore or hereafter made for any period on or after Jan. 1, 1968, and prior to effective date of new regulations to give effect to per diem entitlement, if such payments are in accordance with par. M6001 of Joint Travel Regs., issued Apr. 1, 1968, to implement sec. 3 of Pub. L. 90–168 621

RESERVE OFFICERS' TRAINING CORPS
(*See* Military Personnel, Reserve Officers' Training Corps)

RETIREMENT Page

Civilian

Contributions

Former employees serving as judges

Judge of U.S. Tax Court with prior Govt. service who elects to receive retired pay under 26 U.S.C. 7447(d), may not have payments he made into Civil Service Retirement and Disability Fund form basis for survivor's annuity under sec. 7448(h) of Internal Revenue Code should he not apply for refund of deposits to fund that is authorized in sec. 7447 (g)(2)(C), in view of his statutory entitlement to refund upon election of retired pay under Internal Revenue Code and provisions in statute, Pub. L. 91-172, which amends 26 U.S.C. 7447(g), that exclude him from entitlement to civil service retirement annuity, including survivor's annuity, and from requirement to contribute to Civil Service Retirement and Disability Fund ---------- 521

Judge reemployed upon termination of judicial services

Upon termination of services of judge of U.S. Tax Court prior to eligibility for retirement under 26 U.S.C. 7447, judge who had prior service subject to civil service retirement laws may again acquire coverage under civil service retirement system if upon reemployment in position subject to system, he redeposits to Civil Service Retirement and Disability Fund any refunds received from fund and under sec. 7448, with interest from date of refunds to date of redeposit, and service involved may be recredited for civil service retirement purposes, but in no case may deposit exceed that normally required under Civil Service Retirement System. In absence of reemployment, question of reinstating coverage under system is for submission to Civil Service Commission ---------- 521

Reemployment

Annuity deduction

Federal employment requirement

Regular enlisted member of uniformed services who subsequent to retirement was employed as civilian in Federal Govt. and waived his retired pay to have his military service credited for civilian retirement purposes may not if reemployed in civil service revoke waiver of retired pay. Revocation of waiver would not terminate former member's status as an annuitant or terminate his eligibility to receive an annuity, which pursuant to 5 U.S.C. 8344 (a) would be deducted from civilian compensation payable to annuitant while reemployed in order to avoid double benefit based upon same period of military service. Therefore, reemployed annuitant is entitled to continue to receive his annuity and to be paid by employing agency only difference between annuity due and salary payable to him ---------- 581

SALES

Bids

Discarding all bids

After-discovered need for property

Fact that Govt. determined inventory on hand upon termination of contract was surplus to its needs and authorized contractor to dispose of inventory, does not preclude Govt., real party in interest, from asserting after-discovered need for property and withdrawing it from

SALES—Continued Page
Bids—Continued
Discarding all bids—Continued
After-discovered need for property—Continued
sale for use under another contract. Rule that a contracting officer not only has right to reject all bids when procurement is no longer needed or wanted but would be derelict in his duty if he failed to do so, should be followed when need arises for surplus property advertised for sale, as determination to dispose of surplus property does not constitute representation that no need exists or may not subsequently arise for property ---------- 683
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 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
Late
Agency handling
Failure to establish procedures to pick up timber sale bids addressed in accordance with invitation for bids to post office box and Forest Supervisor designated to receive bids, whose office was but short distance from post office, resulted in late delivery of bid that had been timely received at post office, and bid constructively delivered to Forest Service facility when deposited at post office is for consideration pursuant to sec. 1-2.303-2 of Federal Procurement Regs. on basis mishandling is chargeable to Govt. Consideration of bid may not be avoided by discarding bids received and readvertising timber sale as no cogent or compelling reason exists for such action---------- 697

SALES—Continued Page
Bids—Continued
Mistakes
All or none bids

Mistake alleged after award in bid price of item in all-or-none bid on scrap which had been prorated to determine high bidder on each item is not for solution under unilateral mistake rule holding bidder bound unless mistake is obvious. Although substantial differences in bid prices on surplus property are not sufficient to place contracting officer on notice of mistake as would similar differences in bid prices on new equipment, contracting officer was obliged to consider prorated prices as if bidder had inserted them in his bid, and contracting officer failing to verify prorated unit price that was 32 percent higher than second high bid and 57 percent higher than current market appraisal, award on erroneously priced item may be rescinded without liability to bidder ---------- 199

Disclaimer of warranty
Removal difficulties

High bidder under sales contract disposing of cranes who inspected surplus property to check size, location, condition, and circumstances affecting removal is not entitled to rescission of contract because cranes, with or without dismantling, can only be removed at prohibitive cost. Sale record evidences actions of Govt. were taken in good faith, and sale having been made on "as is" and "where is" basis without recourse against Govt. and without guaranty, warranty, or representation as to quantity, kind, character, quality, weight, or size, contractor assumed risk of conditions which impaired removal, and fact that it was economically unfeasible, or even too dangerous, to remove cranes does not relieve contractor from his contractual obligations---------- 613

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

Timber. (*See* Timber Sales)

SAVINGS DEPOSITS
Set-off
Tax indebtedness
Military personnel

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The

SAVINGS DEPOSITS—Continued Page
Set-off—Continued
Tax indebtedness—Continued
Military personnel—Continued
1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions---------- 150

SET-OFF
Contract payments
Tax debts

The right of U.S. as creditor to offset amount owed to contractor is not precluded by assignee and attorney claims where loan by assignee bank pursuant to Assignment of Claims Act of 1940, as amended, had been paid and only outstanding loan is not within orbit of act, not having been made for purpose of performing Govt. contracts, and where attorney's fee is matter between attorney and client, absent statutory provision or agreement based on such provision for payment to attorney by Govt. Therefore, award to contractor on basis that contract termination should have been for convenience and not for default, may be set off against contractor's tax liability---------- 44

SICK LEAVE
(*See* Leaves of Absence, sick)

SMALL BUSINESS ADMINISTRATION
Contracts
Award to small business concerns. (*See* Contracts, awards, small business concerns)
Determinations
Failure to conform to regulations

Small Business Size Appeals Board in classifying collection and disposal of refuse as service falling within $1 million small business size standard, to be applied in future as appeal had not been timely taken, rather than as transportation activity within contemplation of $3 million size standard used by procuring agency, disregarded Small Business Admin. Reg. 121.3–1(b)(1) making consideration of Standard Industrial Classification (SIC) mandatory in defining industries for purpose of establishing small business size standards—regulation that has force and effect of law. Result in size appeal, therefore, was inconsistent with SIC definition of involved refuse services as transportation and pursuant to sec. 121.3–8(f) of SBA regulation, $3 million small business size standard should apply to services---------- 702

Investment companies
Participation in guaranteed loan programs

Authority of small business investment companies (SBIC) to provide equity capital for incorporated small-business concerns under sec. 304(a) of Small Business Investment Act, and to make long-term loans (sec. 305(a)) to finance growth, modernization, and expansion of incorporated and unincorporated small-business concerns does not include authority for companies to participate as lending institutions in guaranteed loan

SMALL BUSINESS ADMINISTRATION—Continued Page
Investment companies—Continued
Participation in guaranteed loan programs—Continued
programs with Small Business Administration (SBA), authorized under sec. 7(a) of Small Business Act to make loans either directly or in cooperation with banks or other lending institutions, and to guarantee loans to small concerns in distressed areas, or owned by low-income individuals under sec. 402(a) of Economic Opportunity Act of 1964 and, therefore, SBA may not guarantee SBIC loans to disadvantaged small concerns..... 32

STATE DEPARTMENT
Destitute seaman transportation
Liability
Payment to shipping company for returning destitute American seaman from overseas may not exceed rate agreed upon between consular officer, who certified seaman was unfit to perform duty, and ship's master, absent determination required by 46 U.S.C. 679 that Secretary of State deems payment of additional compensation claimed "equitable and proper," and Dept. of State declining to furnish such determination because master, as company's agent, is considered to have authority to contract in company's name, no additional amount is due shipping company and its claim for additional compensation may not be allowed..... 58

STATE LAWS
Maryland
Sales tax
Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is in error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made..... 782

New York
Marital status
Divorce
Although 47 Comp. Gen. 286 held that because of uncertainty of sec. 250 of New York State Domestic Relations Laws concerning foreign divorces, after Sept. 1, 1967, effective date of sec. 250, *Rosenstiel* v. *Rosenstiel*, 16 N.Y. 2d 64, 209 N.E. 2d 709, would no longer be viewed as constituting judicial determination of Mexican divorce for purpose of payment of quarters allowances, on basis that in *Rose* v. *Rose* and *Kakarapis* v. *Kakarapis*, lower New York courts subsequent to enactment of sec. 250, followed *Rosenstiel* case in upholding validity of bilateral Mexican divorce, these decisions will be accepted as authoritative judicial determinations that *Rosenstiel* case is for application in determining validity of Mexican divorces obtained in like situations both before and after Sept. 1, 1967. 47 Comp. Gen. 286, modified..... 833

STATES Page

Federal aid, grants, etc.

Construction projects

Labor stipulations in contracts

Funds withheld from federally aided or financed construction contracts to which U.S. is not party for wage underpayments that normally would be distributed by States or other recipients who are parties to contracts and have primary responsibility for administration of labor stipulations of contracts, but for fact that workers cannot be located, should not be transmitted to U.S. GAO as Federal-aid labor standard statutes do not confer on GAO authority similar to that contained in Davis-Bacon Act and Work Hours Act of 1962, to make direct payments to laborers and mechanics from withheld contract earnings as restitution for wage underpayments. However, claims for undistributed holdings which cannot be settled administratively may be submitted to GAO Claims Division. 44 Comp. Gen. 561, modified---------- 162

Disaster relief

Eligibility as public facility

The phrase "essential public facilities" as used in so-called Federal Disaster Act (42 U.S.C. 1855-1855g), which authorizes assistance in any major disaster to States and local governments for emergency repairs to and temporary replacements of public facilities, does not mean all public facilities. To hold otherwise would make the word "essential" superfluous or void, contrary to rule of statutory construction. Phrase may be defined as relating to those essential public facilities that are designed to serve public at large, but limited to extent of public entity responsibility, so that when contract between public entity and private entity exists, essential public facility involved shall be regarded as whatever public entity's responsibilities are under contract---------- 104

Discretionary authority

Reservation in sec. 306 of title I of Omnibus Crime Control and Safe Street Act of 1968 of 15 percent of funds appropriated to Law Enforcement Admin., Dept. of Justice, for purpose of making discretionary grants in aid of law enforcement programs is interpreted to permit grants to units of general local government as well as State planning agencies on basis that language of section is not precise and that reference to only detailed legislative history of section contained in Senate floor debates evidences intent to authorize direct grants to units of local government, and this fact is more relevant factor of persuasiveness in interpretation of sec. 306 than fact that legislation originated in House-- 411

Leased property

Damages

Disaster assistance

Cost of emergency repairs occasioned by tornado damage to municipal airport buildings that are 80 percent leased and rental income used to maintain facilities which are available for use by U.S. military and naval aircraft may be reimbursed under so-called Federal Disaster Act (42 U.S.C. 1855–1855g), authorizing assistance to States and local governments to repair or provide replacements of essential public facilities damaged during major disaster, to involved municipal airport authority to extent of its responsibility under lease to repair leased buildings or terminate lease---------- 104

STATES—Continued Page

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 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

Taxes. (*See* **Taxes, State**)

STATION ALLOWANCES

Military personnel

Excess living costs outside United States, etc.

Dependents military dependent status

Member of uniformed services who incident to permanent change of station to restricted area overseas to which dependents are not authorized to accompany him, elects to move dependents from old duty station in United States (U.S.) to designed place in Alaska, Hawaii, Puerto Rico, or any territory or possession of U.S.-- in fact to any place outside U.S.—may not be paid station allowances—temporary lodging, housing, and cost-of-living allowances—as dependents move overseas would be personal choice, separate and apart from member's overseas duty. Dependents while residing overseas would not be in military dependent status and, therefore, increased living costs incurred by member would not be within contemplation of 37 U.S.C. 405 for reimbursement purposes. 548

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 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

STATION ALLOWANCES—Continued Page
Military personnel—Continued
Temporary lodgings—Continued
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

STATUTES OF LIMITATION
Claims
Transportation
Waiver

Although Alaska Railroad, a Govt-owned facility operated by Dept. of Transportation under authority delegated by President, is not regulated by Interstate Commerce Commission, it is subject to certain provisions of Interstate Commerce Act pursuant to sec. 3(a) of E.O. No. 11107, Apr. 25, 1963, and functions as common carrier. However, disputed transportation claims that are more than 3 years old will be viewed as not subject to 3-year statute of limitations against consideration of claims by U.S. GAO because of limited number of claims involved and fact that payment has been made by Railroad to connecting carriers for their share of revenue, but, future claims for transportation services should be timely filed---------- 768

STATUTORY CONSTRUCTION
Administrative construction weight

The longstanding interpretation by Dept. of Agriculture that reference in Meat Inspection Act (7 U.S.C. 394), to reimbursement by meat industry for overtime costs incurred by Govt., includes cost of furnishing holiday services, is entitled to great weight in construction of act and, therefore, meat establishments that were rendered inspection services on Friday, Dec. 26, 1969, day declared a holiday by Executive order, may not be relieved of liability to reimburse Dept. for holiday premium pay that was made to inspectors---------- 510

General and special words

The phrase "essential public facilities" as used in so-called Federal Disaster Act (42 U.S.C. 1855–1855g), which authorizes assistance in any major disaster to States and local governments for emergency repairs to and temporary replacements of public facilities, does not mean all public facilities. To hold otherwise would make the word "essential" superfluous or void, contrary to rule of statutory construction. Phrase may be defined as relating to those essential public facilities that are designed to serve public at large, but limited to extent of public entity responsibility, so that when contract between public entity and private entity exists, essential public facility involved shall be regarded as whatever public entity's responsibilities are under contract-- 104

STATUTORY CONSTRUCTION—Continued Page

Legislative history, title, etc.

Examination

Establishments that received meat and poultry inspection services on Friday, Dec. 26, 1969, declared holiday by Executive order, notwithstanding inadequacy of notice concerning holiday status of 26th, may not be relieved of obligation imposed by 21 U.S.C. 468 and 7 U.S.C. 394, to reimburse Dept. of Agriculture for holiday pay received by inspection employees at premium rates prescribed in 5 U.S.C. 5541-5549, as there is no indication in legislative histories of Poultry Products Inspection Act and Meat Inspection Act of intent to shift holiday and overtime costs from industry to Govt., otherwise responsible for operation of inspection services, and, furthermore, no appropriated funds are available to pay cost of overtime and holiday work ---------- 510

History and origin of legislation in different houses

Reservation in sec. 306 of title I of Omnibus Crime Control and Safe Streets Act of 1968 of 15 percent of funds appropriated to Law Enforcement Admin., Dept. of Justice, for purpose of making discretionary grants in aid of law enforcement programs is interpreted to permit grants to units of general local government as well as State planning agencies on basis that language of section is not precise and that reference to only detailed legislative history of section contained in Senate floor debates evidences intent to authorize direct grants to units of local government, and this fact is more relevant factor of persuasiveness in interpretation of sec. 306 than fact that legislation originated in House ---------- 411

Legislative intent

Buy American requirement

Notwithstanding cotton from which pads are to be manufactured in Japan for delivery in the U.S. is of domestic origin, pads offered by low bidder are considered of foreign origin and subject to expenditure restriction appearing in Dept. of Defense acts since first introduced in 1953, and as restriction was not waived on basis item cannot be procured in U.S., and as item is not for use overseas, low bid was properly rejected. Fact that invitation refers to cotton "grown *or* produced in the United States" does not denote alternative and make place of production irrelevant, in view of legislative history of 1953 act, evidencing Congressional intent that any article of cotton may be considered "American" only when origin of fiber as well as each successive stage of manufacturing is domestic ---------- 606

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

STATUTORY CONSTRUCTION—Continued Page
Repeals
Implied

Provision in sec. 206(a) of Public Health Service Act (1944) that Surgeon General of Public Health Service (PHS) "during period of his appointment as such, shall be same grade, with same pay and allowances, as Surgeon General of Army" does not require promotion of PHS Surgeon General to pay grade 09 (lieutenant general) on basis Army Surgeon General was advanced by Pub. L. 89-288 (1965) to grade of lieutenant general and assigned to pay grade 09, as assimilation requirement of 1944 act was impliedly repealed by assignment of PHS officer to pay grade 08 by sec. 201(b) of Career Compensation Act of 1949. Codification of 1949 act then eliminated phrase "with same pay and allowances" from sec. 206(a) of 1944 act and term "grade" no longer relating to "pay grade," there is no basis for promoting PHS officer to pay grade 09 ---------- 722

SUBSISTENCE
Per diem
Actual expenses
Combination with per diem
Improper

Instructions by Defense Contract Audit Agency authorizing per diem rate of $20, and up to $25 maximum where employee incurs actual expenses in excess of $20, that were issued to put into effect Pub. L. 91-114, approved Nov. 10, 1969, and implementing Joint Travel Regs., increasing per diem from $16 to $25 for travel within continental U.S., may not be basis for retroactive approval of additional per diem for employees issued orders prior to statutory increase, or for reducing rate prescribed by statute. There is no authority when taking required administrative action to effect statutory increase to apply increase retroactively, and per diem may only be reduced in special circumstances prescribed by JTR establishing mandatory rate increase. Also combination of per diem and actual expenses provided in instructions is improper ---------- 493

Determination

Although utility charges ordinarily are included in price of hotel or motel room, inclusion by employee who rented apartment while in travel status of separate charge for electricity as part of lodging expenses appears proper under administrative regulation giving effect to Pub. L. 91-114, which increased daily maximum per diem rate and actual subsistence allowance payable within continental U.S. However, regulation in requiring actual expenses of lodgings supported by receipts to be added to flat amount for food and other subsistence expenses goes too far in use of actual expenses to determine employee's per diem entitlement under sec. 6.12 of Standardized Govt. Travel Regs., and regulation should be corrected ---------- 753

SUBSISTENCE—Continued Page

Per diem—Continued

Compensatory leave

Although generally compensatory time off from duty pursuant to 5 U.S.C. 5543(a)(2) in lieu of overtime that is granted to employee in travel status is regarded as leave of absence within purview of sec. 6.3 of Standardized Govt. Travel Regs. and requires suspension of subsistence allowance during leave of absence, when compensatory time is granted or ordered in interest of Govt., such as granting compensatory time to technical personnel performing work aboard FAA aircraft away from their duty station to cover normal duty hours interrupted by contingencies during which they cannot be assigned to useful work, suspension of per diem is not required, "prescribed hours of duty" essential to application of sec. 6.3 having no significance to duty hours required on extended flight inspection trips 779

Hours of departure, etc.

Rendezvous location

Employee who drove his privately owned automobile to rendezvous location from where he traveled in privately owned automobile of another employee to their temporary duty station may be paid per diem computed on basis of travel from time of departure from home to his return pursuant to sec. 6.9c(2) of Standardized Govt. Travel Regs., even though section does not precisely apply to situation, for had employee driven his automobile entire distance to temporary duty station or been picked up at his residence, per diem would have begun to run from time of departure from his residence. Per diem payable is for computation under par. C8101-2c of Joint Travel Regs. at $11.80 rate prescribed for travel for period of less than 24 hours but more than 10 hours where use of lodgings was not required 525

Illness, etc.

Hospitalized for personal convenience

Employee authorized to travel away from his duty station to undergo physical examination to determine if he is qualified to perform duties of his position who is hospitalized immediately and remains away from his duty station 9½ days is only entitled to 1½ days' per diem considered normal time to travel and receive required physical examination. Per diem authorized by sec. 6.5 of Standardized Govt. Travel Regs. for employee incapacitated due to illness beyond his control does not include hospitalization for personal convenience while in travel status. Therefore, travel of employee not involving official business in usual sense and absent urgency for immediate hospitalization, employee is not considered incapacitated while away from his duty station and he is not entitled to per diem for period of hospitalization 794

Increases. (*See* **Subsistence, per diem, rates, increases**)

Military personnel

At permanent post

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

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
At permanent post—Continued
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

Officer occupying quarters on post at Quantico who is ordered to perform temporary duty at Marine Corps Headquarters, Washington, D.C., and to travel daily by privately owned car between two points, distance of 70 miles, is subject to par. M4201–14 of Joint Travel Regs. (JTR), which precludes payment of per diem to member traveling daily from his residence to temporary duty station on basis member incurs no change in living conditions or additional subsistence expenses, and restriction is for application even though Marine officer is absent from permanent duty station in excess of 10 hours and would but for par. M4201–14 receive partial per diem under Chapter 4, Part E, of JTR. However, pursuant to par. M4203–3, officer is entitled to rate per mile prescribed for required travel---------- 709

Concurrent payment of per diem and mileage allowance

Payment of per diem to member of uniformed services who returned to permanent duty station from temporary duty assignment on day he is separated from service is not prohibited by fact that member incident to separation is entitled to mileage allowance prescribed by par. M4157–1a of Joint Travel Regs., and defined as allowance intended to cover cost of transportation, subsistence, lodgings, and other related expenses, notwithstanding par. M4151 prohibits payment of mileage and per diem on same day. Mileage allowance is not authorized for any specific date but for prescribed distance, whether or not travel is performed and, therefore, par. M4151 may be amended to authorize payment of per diem incident to temporary duty on day member is separated or released from active duty---------- 831

Escort duty

At permanent duty station

Members of uniformed services while performing temporary duty as escorts for deceased members within corporate limits of their permanent duty station may not be paid per diem, even though distance traveled to funeral site is over 55 miles. Allowances prescribed in 10 U.S.C. 1482 for escort duty may only be considered in conjunction with 37 U.S.C. 404 and sec. 408, regarding entitlement generally for travel performed on public business under competent orders. Under sec. 404, per diem for temporary duty is payable only when member is away from designated duty station, and for travel within limits of permanent duty station, member under sec. 408 may only be paid transportation costs. Therefore, Joint Travel Regs. may not be amended to provide per diem for escort duty at permanent duty station---------- 453

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Fractional days
Less than ten hours

Members of uniformed services attached to Fleet Tactical Support Squadron, Naval Air Station, Norfolk, Va., who, ordered to perform two flights to Cecil Field, Fla., and return to carry passengers and cargo, depart at 3:40 p.m. on first flight, returning at 11:20 p.m. (7 hours, 40 minutes), and at 1:15 a.m. next day depart on second flight, returning to Norfolk at 6:40 a.m. (5 hours, 25 minutes) are not entitled to any per diem incident to mission. Although on continuous mission, members are not in continuous travel status, having returned to permanent duty station for performance of duty—passenger and cargo discharge—thus interrupting their travel and separating travel into two distinct periods of less than 10 hours to preclude payment under par. M4205-4 of Joint Travel Regs---------- 173

Group travel

Although payment of per diem to Army members traveling together as group of Govt. conveyance from same point of origin to same destination under orders dated May 28, 1969, that failed to designate travel as group travel was contrary to par. M4100 of Joint Travel Regs., payment having been based on erroneous instructions contained in par. 2-2, Army Regulation 310-10, no exception will be taken to payments under involved orders, or similar orders, but if Govt. meals were furnished and no deduction made from per diem authorized, value of meals should be recovered. However, Army instructions should be changed to agree with Navy and Air Force regulations implementing par. M4100 to require group travel to be so designated in orders, and until so changed, travel of 3 or more Army members will be viewed as group travel, whether or not so designated. B-135534, June 5, 1958, modified-- 692

Maneuvers, etc.
Amendatory orders for per diem

An accountable officer of uniformed services who authorized per diem payments to members furnished quarters and subsistence on basis of retroactive amendment that deleted provision for group travel and unit movement from temporary duty orders failed to exercise due care required by 31 U.S.C. 82a-2 for entitlement to relief. Disbursing officer's reliance on assurance from higher headquarters that unit movement was not involved and that members were entitled to per diem, and his failure to either follow administrative procedures based on Comptroller General decisions to effect that members may not be paid per diem when furnished quarters and subsistence, or to submit doubtful claims to U.S. GAO for settlement, is not due care contemplated by statute---------- 38

Reservists

To equalize entitlement of members of National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in temporary duty status are entitled to

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Reservists—Continued
per diem, subject to exception in legislative reports with respect to sec. 3 of Pub. L. 90–168 (37 U.S.C. 404(a)), that no member of Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at military installation where quarters and mess are available. 48 Comp. Gen. 517, and B–152420, July 8, 1969, modified---- 621

The general rule that regulations may not be made retroactively effective when law has been previously construed or proposed regulations amend regulations previously issued, does not apply to reinstatement of properly issued regulations. Therefore, upon reinstatement of regulations that authorized per diem to reservists ordered to active duty for less than 20 weeks where quarters and mess are available, no objection will be raised to per diem payments heretofore or hereafter made for any period on or after Jan. 1, 1968, and prior to effective date of new regulations to give effect to per diem entitlement, if such payments are in accordance with par. M6001 of Joint Travel Regs., issued Apr. 1, 1968, to implement sec. 3 of Pub. L. 90–168---- 621

Where due to unforeseen circumstances, it is impossible for reservist to complete ordered duty within scheduled 20-week period, per diem payments may be continued for short additional periods and regulations amended accordingly---- 621

Temporary duty
Continuous mission *v.* noncontinuous travel

Members of uniformed services attached to Fleet Tactical Support Squadron, Naval Air Station, Norfolk, Va., who, ordered to perform two flights to Cecil Field, Fla., and return to carry passengers and cargo, depart at 3:40 p.m. on first flight, returning at 11:20 p.m. (7 hours, 40 minutes), and at 1:15 a.m. next day depart on second flight, returning to Norfolk at 6:40 a.m. (5 hours, 25 minutes) are not entitled to any per diem incident to mission. Although on continuous mission, members were not in continuous travel status, having returned to permanent duty station for performance of duty—passenger and cargo discharge—thus interrupting their travel and separating travel into two distinct periods of less than 10 hours to preclude payment under par. M4205–4 of Joint Travel Regs---- 173

Mileage allowance and per diem concurrently

Payment of per diem to member of uniformed services who returned to permanent duty station from temporary duty assignment on day he is separated from service is not prohibited by fact that member incident to separation is entitled to mileage allowance prescribed by par. M4157–1a of Joint Travel Regs., and defined as allowance intended to cover cost of transportation, subsistence, lodgings, and other related expenses, notwithstanding par. M4151 prohibits payment of mileage and per diem on same day. Mileage allowance is not authorized for any specific date but for prescribed distance, whether or not travel is performed and, therefore, par. M4151 may be amended to authorize payment of per diem incident to temporary duty on day member is separated or released from active duty---- 831

SUBSISTENCE—Continued Page

Per diem—Continued

Military personnel—Continued

Temporary duty—Continued

Near permanent duty station

Officer occupying quarters on post at Quantico who is ordered to perform temporary duty at Marine Corps Headquarters, Washington, D.C., and to travel daily by privately owned car between two points, distance of 70 miles, is subject to par. M4201–14 of Joint Travel Regs. (JTR), which precludes payment of per diem to member traveling daily from his residence to temporary duty station on basis member incurs no change in living conditions or additional subsistence expenses, and restriction is for application even though Marine officer is absent from permanent duty station in excess of 10 hours and would but for par. M4201–14 receive partial per diem under Chapter 4, Part E, of JTR. However, pursuant to par. M4203–3, officer is entitled to rate per mile prescribed for required travel---------- 709

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 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

Reservists

To equalize entitlement of members of National Guard with members of Regular components, regulations may be amended to provide so-called "residual" per diem for reservists ordered to duty for periods of less than 20 weeks when quarters and mess are available, not only to attend service schools, but in all cases similar to those where Regular members performing like duty in temporary duty status are entitled to per diem, subject to exception in legislative reports with respect to sec.

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Training duty periods—Continued
Reservists—Continued
3 of Pub. L. 90–168 (37 U.S.C. 404(a)), that no member of Reserve component should receive any per diem for performance of 2 weeks of annual active duty for training at military installation where quarters and mess are available. 48 Comp. Gen. 517, and B–152420, July 8, 1969, modified 621

The general rule that regulations may not be made retroactively effective when law has been previously construed or proposed regulations amend regulations previously issued, does not apply to reinstatement of properly issued regulations. Therefore, upon reinstatement of regulations that authorized per diem to reservists ordered to active duty for less than 20 weeks where quarters and mess are available, no objection will be raised to per diem payments heretofore or hereafter made for any period on or after Jan. 1, 1968 and prior to effective date of new regulations to give effect to per diem entitlement, if such payments are in accordance with par. M6001 of Joint Travel Regs., issued Apr. 1, 1968, to implement sec. 3 of Pub. L. 90–168 621

Where due to unforeseen circumstances, it is impossible for reservist to complete ordered duty within scheduled 20-week period, per diem payments may be continued for short additional periods and regulations amended accordingly 621

Travel status

Although payment of per diem to Army members traveling together as group by Govt. conveyance from same point of origin to same destination under orders dated May 28, 1969, that failed to designate travel as group travel was contrary to par. M4100 of Joint Travel Regs., payment having been based on erroneous instructions contained in par. 2–2, Army Regulation 310–10, no exception will be taken to payments under involved orders, or similar orders, but if Govt. meals were furnished and no deduction made from per diem authorized, value of meals should be recovered. However, Army instructions should be changed to agree with Navy and Air Force regulations implementing par. M4100 to require group travel to be so designated in orders, and until so changed, travel of 3 or more Army members will be viewed as group travel, whether or not so designated. B–135534, June 5, 1958, modified 692

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—Continued Page

Per diem—Continued

Rates

Increases

Administrative implementation

Instructions by Defense Contract Audit Agency authorizing per diem rate of $20, and up to $25 maximum where employee incurs actual expenses in excess of $20, that were issued to put into effect Pub. L. 91–114, approved Nov. 10, 1969, and implementing Joint Travel Regs., increasing per diem from $16 to $25 for travel within continental U.S., may not be basis for retroactive approval of additional per diem for employees issued orders prior to statutory increase, or for reducing rate prescribed by statute. There is no authority when taking required administrative action to effect statutory increase to apply increase retroactively, and per diem may only be reduced in special circumstances prescribed by JTR establishing mandatory rate increase. Also combination of per diem and actual expenses provided in instructions is improper..... 493

Increase in maximum per diem rate for travel within limits of continental U.S. from $16 to $25 that is authorized by Pub. L. 91–114, approved Nov. 10, 1969, and prescribed by pars. 8101–1 and 8101–2 of Joint Travel Regs. is mandatory increase and $25 rate may only be reduced by administrative action under special circumstances provided in par. C8051 of regulations, and, therefore, agency rates of per diem that are in contravention of those prescribed by regulations are ineffective..... 525

Although utility charges ordinarily are included in price of hotel or motel room, inclusion by employee who rented apartment while in travel status of separate charge for electricity as part of lodging expenses appears proper under administrative regulation giving effect to Pub. L. 91–114, which increased daily maximum per diem rate and actual subsistence allowance payable within continental U.S. However, regulation in requiring actual expenses of lodgings supported by receipts to be added to flat amount for food and other subsistence expenses goes too far in use of actual expenses to determine employee's per diem entitlement under sec. 6.12 of Standardized Govt. Travel Regs., and regulation should be corrected..... 753

Temporary duty

Computation

Employee who drove his privately owned automobile to rendezvous location from where he traveled in privately owned automobile of another employee to their temporary duty station may be paid per diem computed on basis of travel from time of departure from home to his return pursuant to sec. 6.9c(2) of Standardized Govt. Travel Regs., even though section does not precisely apply to situation, for had employee driven his automobile entire distance to temporary duty station or been picked up at his residence, per diem would have begun to run from time of departure from his residence. Per diem payable is for computation under par. C8101–2c of Joint Travel Regs. at $11.80 rate prescribed for travel for period of less than 24 hours but more than 10 hours where use of lodgings was not required..... 525

SUBSISTENCE—Continued Page
Per diem—Continued
Temporary duty—Continued
Leaves of absence
Effect on per diem

Although generally compensatory time off from duty pursuant to 5 U.S.C. 5543(a)(2) in lieu of overtime that is granted to employee in travel status is regarded as leave of absence within purview of sec. 6.3 of Standardized Govt. Travel Regs. and requires suspension of subsistence allowance during leave of absence, when compensatory time is granted or ordered in interest of Govt., such as granting compensatory time to technical personnel performing work aboard FAA aircraft away from their duty station to cover normal duty hours interrupted by contingencies during which they cannot be assigned to useful work, suspension of per diem is not required, "prescribed hours of duty" essential to application of sec. 6.3 having no significance to duty hours required on extended flight inspection trips---------- 779

Training periods
Government-owned quarters availability

National Guard technician—employee of U.S. pursuant to 32 U.S.C. 709—who electing to attend service school in civilian Federal employee status rather than in military status signs agreement that should he not utilize Govt. quarters and mess facilities if available, he would accept reduced per diem as though he had occupied Govt. quarters at no cost, is entitled to prescribed per diem without reduction notwithstanding that he lived off military installation. Agreement signed is invalid absent determination required by Pub. L. 88-459, implemented by par. C1057, Joint Travel Regs., Vol. II, that use of Govt. quarters by technician was required in order to render necessary service or to protect Govt. property---------- 815

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

TAXES
Contracts. (*See* Contracts, tax matters)
Federal
Indebtedness
Military personnel

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966,

TAXES—Continued Page

Federal—Continued

Indebtedness—Continued

Military personnel—Continued

which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions---------- 150

State

Government immunity

Assessment for local improvements

An invoice bearing interest presented by State Drainage District to Federal Govt. in amount assessed against Govt. for rehabilitation of drainage ditch that is computed in same manner as taxes levied against property owners other than Federal Govt. imposes a tax, and U.S. exempted by Constitution from State taxation, tax may not be collected by designating tax an invoice or statement for services. While payment of tax may not be authorized, claim for amount representing fair and reasonable value of services received may be presented on *quantum meruit* basis, and utility type service agreement entered into for future services, agreement to provide for compensation to cover fair and reasonable value of services to be furnished---------- 72

Governmental function, etc.

Air Force medical officer, licensed in Texas, who while in residency at military hospital in Mississippi is assigned for 6 months to New Orleans civilian hospital, may not be reimbursed cost of fees paid in connection with reciprocity licensure in State of Louisiana. Statute prescribing fees, exempts physicians and surgeons in military service practicing in discharge of official duties, and officer while assigned to special medical training is considered to have been performing military duties, and in absence of statutory authority for payment of State fees, appropriated funds may not be used to impose burden on Govt. in conduct of its official business---------- 450

Rented equipment

Hawaii General Excise Tax imposed on motor vehicle rental agency, which although in nature of sales or gross receipts tax levied on lessor is by tradition, custom, and usage passed on to lessee as separate item in billing and added to rental price of vehicle, is not tax within scope of exemption contained in sec. 237-25(a)(3) of Hawaii Revised Statutes pertaining to sale of vehicles to U.S. and Federal Govt. is liable to lessor of cars for excise tax unless rental agreement provides otherwise. Determination of U.S. liability to pay State sales tax depends on whether incidence of tax is on the vendor or vendee, and when imposed on vendor, U.S. under its constitutional prerogative is not immune from liability unless expressly exempt---------- 204

TAXES—Continued Page
State—Continued
Sales
Maryland

Where invitation for bids on construction project indicated applicability of Maryland sales tax had not been formally resolved by courts and invitation and contract provided tax was to be included in contract price, when court held tax was inapplicable to Federal construction projects, Govt. became entitled to price adjustment, notwithstanding tax had not been included in bid price—for to permit showing after award of omission would impinge upon integrity of competitive bidding system—and that Govt. had delayed in seeking refund. Decision of Armed Services Board of Contract Appeals that "the contract placed the onus of correctly determining the applicability of the state tax on the contractor" is in error as matter of law and, therefore, decision is not final and payment to contractor directed by Board should not be made... 782

TERRITORIES AND POSSESSIONS
Registration to vote
Effect on civilian employee benefits

Registering to vote in Guam does not deprive civilian employee of benefits prescribed for overseas service where neither acts involved nor their legislative histories indicate intent that employee be denied entitled benefits because of registration. Therefore, termination of employee's entitlement to non-foreign post differential authorized in 5 U.S.C. 5941(a)(2) and E. O. No. 10,000 as recruitment incentive; to home leave provided in 5 U.S.C. 6305(a) after 24 months of continuous service outside U.S.; to up to 45 days accumulation of unused leave under 5 U.S.C. 6304(b); to travel time without charge to leave under 5 U.S.C. 6303(d); and to payment of travel and transportation expenses pursuant to 5 U.S.C. 5728(a), incident to vacation leave to "place of actual residence" established at time of employee's appointment or travel overseas, is not required ---------- 596

TIMBER SALES
Bids
Contract consummation

Upon failure of bidder awarded timber sales contract to timely furnish performance bond, offer to sell timber to second high bidder and bidder's response by signing bid form and contract, and furnishing bid deposit and performance bond, did not consummate contract, as approval and signature of required contracting authority had not been secured, and acceptance of bidder's documents was subject to outcome of appeal by successful bidder, with whom binding contractual relationship had been created by acceptance of bid and notification of acceptance, even though performance bond had not been furnished, in view of fact invitation provided for execution of formal contract documents and furnishing of performance bond at later date, and prescribed penalty for failure to do so---------- 431

Late

Failure to establish procedures to pick up timber sale bids addressed in accordance with invitation for bids to post office box and Forest Supervisor designated to receive bids, whose office was but short distance

TIMBER SALES—Continued Page
Bids—Continued
Late—Continued
from post office, resulted in late delivery of bid that had been timely received at post office, and bid constructively delivered to Forest Service facility when deposited at post office is for consideration pursuant to sec. 1-2.303-2 of Federal Procurement Regs. on basis mishandling is chargeable to Govt. Consideration of bid may not be avoided by discarding bids received and readvertising timber sale as no cogent or compelling reason exists for such action 697
Rate redetermination
Erroneous
Error made in slope percentage factor used in computing redetermined stumpage rates under timber sale contract may be corrected retroactively and contractor credited with overpayment that resulted from Govt.'s unilateral error, as no disagreement exists concerning correct slope percentage to subject correction to limitations of disputes clause of contract, nor is retroactive modification of contract subject to regulation that timber sale contracts may be modified only when modification applies to unexecuted portions of contract and will not be injurious to U.S., as exception to rule that contract may not be modified except in Govt.'s interest may be made to correct unilateral error by Govt 530
TIME
Daylight saving *v.* Standard
Uniform Time Act of 1966
Application
Under invitation providing for bids to be opened at 11 a.m. central standard time (c.s.t.), on May 28, 1969, bid handcarried and delivered at 11:20 a.m., c.s.t., after bids had been read was properly rejected as late bid. Contention that because invitation did not indicate "c.s.t." would be interpreted as central daylight savings time, 11 a.m., c.s.t., meant 12 noon, daylight savings time, ignores fact that with enactment of Pub. L. 89-387, effective Apr. 1, 1967, there is no distinction between standard and daylight time, and that within each time zone there is only preestablished standard time regardless that during certain portion of year standard time is advanced 1 hour, thus making standard time and popular reference to "Daylight Saving Time" one and same. To preclude future differences in opinion "local time at place of bid opening" will be substituted for "standard time" 164
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

TORTS Page

Claims under Federal Tort Claims Act

Private property damage, etc.

Settlement

Personal injuries and property damage claims of private insurance policy holder and his subrogee insurer that arose in connection with tort—collision with Govt. vehicle operated by Forest Service employee—although presented separately are not separate and distinct claims, as subrogee's rights grow out of rights and cause of action of his subrogor and, therefore, claims totaling in excess of $2,500, limit prescribed by Federal Tort Claims Act (28 U.S.C. 2672) for payment by administrative agency, payment of claims may not be made by Dept. of Agriculture from its appropriated funds, but are for payment by U.S. GAO from appropriation made by 31 U.S.C. 724a for payment of judgments and compromise settlements ---------- 758

TRANSPORTATION

Ambulance services

Reimbursement

Employee who incident to permanent change of duty station has mother-in-law moved by ambulance from nursing home located at his old station to one in vicinity of his new station so wife could continue to handle affairs of her mother, who although not dependent for income tax purposes depends on daughter to handle financial and other affairs, may not be reimbursed cost of ambulance service. Even though mother-in-law could be regarded as member of employee's household notwithstanding she receives domiciliary care elsewhere, she is not "dependent" within meaning of sec. 1.2d of Bur. of Budget Cir. No. A-56, as employee does not contribute to her support, and fact that parent relies on daughter for other than financial support does not constitute her dependent ---------- 544

Automobiles

Ferry fares

English channel

Where charges for crossing English channel via hovercraft are imposed for transportation of motor vehicle and not for transportation of driver and passengers, officer of uniformed services who drove his privately owned vehicle incident to permanent change of station, accompanied by his dependents, and incurred ferry expenses to cross channel may not be reimbursed on basis of applying percentage of vehicle fare assessed for transportation across English channel to transportation of driver and passengers in vehicle, officer having paid no fare for his or his dependents' transportation via hovercraft ---------- 416

Military personnel

Injured while stationed in United States

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to

TRANSPORTATION—Continued Page

Automobiles—Continued

Military personnel—Continued

Injured while stationed in United States—Continued

those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status ---------- 101

Baggage

Military personnel

Emergency, etc., conditions

Natural disasters

Movements of dependents, baggage, and household effects of members of uniformed services in unusual or emergency circumstances arising at duty stations in U.S., such as Hurricane Camille, may not be authorized under 37 U.S.C. 406(e), notwithstanding authority is not restricted to overseas locations as is authority in 37 U.S.C. 406(h), providing for evacuation from disaster areas. Authority in sec. 406(e) for movement of dependents, baggage, and household effects from place to place in U.S. in unusual or emergency circumstances incident to some military operation or requirement, affords no authority for such movements incident solely to natural disasters, even though movements may be in best interest of member, his dependents, and U.S ---------- 821

Bills of lading

Description

"Freight all kinds"

Claim for refund of transportation overcharges recovered on shipment described on bill of lading as "Freight all kinds" (FAK) which is based on conjecture shipment may have contained contraband articles because unrelated FAK shipment had contained contraband is denied, conjecture being insufficient to overcome presumption of correctness of bill of lading description prepared pursuant to applicable quotation, and carrier having failed to exercise right provided by tariff to inspect shipment or to require other evidence of nature of lading at time of shipment, U.S. GAO has no legal obligation to investigate contents of FAK shipment and is entitled to rely on bill of lading description for settlement of freight charges ---------- 6

A major advantage to shipper and carrier alike in use of "Freight all kinds" (FAK) rates is elimination of necessity to describe and rate many various articles comprising mixed-truckload shipments, advantage that would be negated if long after shipment had moved U.S. GAO was required to investigate every FAK lading reached in audit of Govt. transportation accounts, because administrative burden would be out of all proportion to any benefits accruing from use of FAK rates and, therefore, questions concerning FAK lading should be raised by carrier's agent at time shipment is accepted for transportation ---------- 6

Cargo preference. (*See* Transportation, vessels, American, cargo preference)

TRANSPORTATION—Continued Page

Dependents

Military personnel

Availability of Government transportation

Commercial means

Army officer returning to new permanent duty station in Hawaii from temporary duty assignment in U.S. who is erroneously furnished transportation by commercial vessel to accompany his dependents authorized this mode of transportation to travel to new station prior to issuance of temporary duty orders, is indebted for cost of commercial vessel transportation, less cost of transportation by military air. Transportation officer limited under member's orders to authorizing transportation by commercial air if military aircraft was not available, exceeded his authority and did not exercise sound traffic judgment in furnishing transportation by commercial vessel, and member returning to his station under temporary duty orders, his travel is not within scope of par. M4159–4 of Joint Travel Regs, authorizing commercial vessel travel concurrently with dependents under permanent change of station orders___ 744

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

Emergency, etc., conditions

Natural disasters

Movements of dependents, baggage, and household effects of members of uniformed services in unusual or emergency circumstances arising at duty stations in U.S., such as Hurricane Camille, may not be authorized under 37 U.S.C. 406(e), notwithstanding authority is not restricted

TRANSPORTATION—Continued Page
Dependents—Continued
Military personnel—Continued
Emergency, etc., conditions—Continued
Natural disasters—Continued
to overseas locations as is authority in 37 U.S.C. 406(h), providing for evacuation from disaster areas. Authority in sec. 406(e) for movement of dependents, baggage, and household effects from place to place in U.S. in unusual or emergency circumstances incident to some military operation or requirement, affords no authority for such movements incident solely to natural disasters, even though movements may be in best interest of member, his dependents, and U.S. 821

Injured while stationed in United States

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status 101

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, 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

Parents
Financial support requirement

Employee who incident to permanent change of duty station has mother-in-law moved by ambulance from nursing home located at his old station to one in vicinity of his new station so wife could continue to handle affairs of her mother, who although not dependent for income tax purposes depends on daughter to handle financial and other affairs, may not be reimbursed cost of ambulance service. Even though mother-in-law could be regarded as member of employee's household notwithstanding she receives domiciliary care elsewhere, she is not "dependent" within meaning of sec. 1.2d of Bur. of Budget Cir. No. A-56, as employee does not contribute to her support, and fact that parent relies on daughter for other than financial support does not constitute her dependent 544

TRANSPORTATION—Continued Page
Dependents—Continued
Transfers
Subsequent travel of dependents

Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89–516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A–56, may not be waived—Circular a statutory regulation having force and effect of law---------- 145

Household effects
Military personnel
Injured while stationed in United States

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status---------- 101

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, 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

Reshipment of effects without a station change

When member of uniformed services incident to his transfer overseas is authorized movement of dependents and household effects, but after shipment of effects, his dependents are unable to join him because of illness or other personal reasons, and his tour is changed to unaccompanied tour, return of member's household effects at Govt. expense from overseas duty station to designated place in U.S., Alaska, Hawaii, Puerto Rico, or territory or possession of U.S. may not be authorized. Transportation of household effects of member at Govt. expense may be authorized pursuant to 37 U.S.C. 406(b) only in connection with duty station change, except in unusual or emergency circumstances (subsection 406(e)) or if in best interests of member, his dependents, or U.S. (subsection 406(h))---------- 695

TRANSPORTATION—Continued Page
Household effects—Continued
Military personnel—Continued
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

Time limitation

Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89-516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A-56, may not be waived—Circular a statutory regulation having force and effect of law---------- 145

Modes of travel

Administrative determination

Army officer returning to new permanent duty station in Hawaii from temporary duty assignment in U.S. who is erroneously furnished transportation by commercial vessel to accompany his dependents authorized this mode of transportation to travel to new station prior to issuance of temporary duty orders, is indebted for cost of commercial vessel

TRANSPORTATION—Continued Page
Modes of travel—Continued
Administrative determination—Continued
transportation, less cost of transportation by military air. Transportation officer limited under member's orders to authorizing transportation by commercial air if military aircraft was not available, exceeded his authority and did not exercise sound traffic judgment in furnishing transportation by commercial vessel, and member returning to his station under temporary duty orders, his travel is not within scope of par. M4159–4 of Joint Travel Regs. authorizing commercial vessel travel concurrently with dependents under permanent change of station orders ---------- 744
Rates
Mixed shipments
"Freight all kinds"
Claim for refund of transportation overcharges recovered on shipment described on bill of lading as "Freight all kinds" (FAK) which is based on conjecture shipment may have contained contraband articles because unrelated FAK shipment had contained contraband is denied, conjecture being insufficient to overcome presumption of correctness of bill of lading description prepared pursuant to applicable quotation, and carrier having failed to exercise right provided by tariff to inspect shipment or to require other evidence of nature of lading at time of shipment, U.S. GAO has no legal obligation to investigate contents of FAK shipment and is entitled to rely on bill of lading description for settlement of freight charges---------- 6
A major advantage to shipper and carrier alike in use of "Freight all kinds" (FAK) rates is elimination of necessity to describe and rate many various articles comprising mixed-truckload shipments, advantage that would be negated if long after shipment had moved U.S. GAO was required to investigate every FAK lading reached in audit of Govt. transportation accounts, because administrative burden would be out of all proportion to any benefits accruing from use of FAK rates and, therefore, questions concerning FAK ladings should be raised by carrier's agent at time shipment is accepted for transportation---------- 6
Section 22 quotations
Storage-in-transit privileges
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

TRANSPORTATION—Continued Page

Requests

Issuance, use, etc.

Nonappropriated fund activity

Use of Govt. transportation requests, Standard Form 1169, by Army and Air Force Exchange Service—nonappropriated fund activity, even though considered Govt. instrumentality for some purposes, as appropriated funds are not made available for its operations—in order to procure air transportation for civilian employees and avoid payment of 5-percent tax imposed by 26 U.S.C. 4261, may not be approved. Travel of Exchange employees concerned with recreation, welfare, and morale of members of uniformed services is not travel for account of U.S., nor on official business, two prerequisites in GAO Policy and Procedures Manual for Guidance of Federal Agencies, Title 5, sec. 2000, for use of Govt. Transportation Requests to procure passenger transportation..... 578

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 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

Vessels

American

Cargo preference

Applicability

Where service is available in U.S. vessels for entire distance between ports of origin in U.S. and destination port overseas, and freight charges by such vessels are not excessive or otherwise unreasonable, to permit transportation by sea of containerized military supplies in U.S.-flag

TRANSPORTATION—Continued Page
Vessels—Continued
American—Continued
Cargo preference—Continued
Applicability—Continued
ship for major portion of voyage and in foreign-flag feeder ship for minor portion of voyage would violate prohibition in 1904 Cargo Preference Act and, therefore, appropriated funds may not be expended for transportation by sea of defense cargo in containership service provided by U.S. lines which use foreign-feeder ships for part of service--- 755

TRAVEL ALLOWANCES
Military personnel
Per diem and mileage allowance concurrently
Payment of per diem to member of uniformed services who returned to permanent duty station from temporary duty assignment on day he is separated from service is not prohibited by fact that member incident to separation is entitled to mileage allowance prescribed by par. M4157–1a of Joint Travel Regs., and defined as allowance intended to cover cost of transportation, subsistence, lodgings, and other related expenses, notwithstanding par. M4151 prohibits payment of mileage and per diem on same day. Mileage allowance is not authorized for any specific date but for prescribed distance, whether or not travel is performed and, therefore, par. M4151 may be amended to authorize payment of per diem incident to temporary duty on day member is separated or released from active duty---------- 831

TRAVEL EXPENSES
Contributions from private sources
Acceptance by employee
Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at meeting. However, pursuant to 5 U.S.C. 4111(b), and Bur. of the Budget Cir. No. A–48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose---------- 572
When Veterans Admin. physician employed by hospital affiliated with medical college of university is authorized both travel to attend medical meeting to conduct Govt. business for portion of meeting, and to be absent without charge to leave to attend remainder of meeting, and he is reimbursed by Govt. for travel costs and per diem incurred on Govt. business and by university for balance of his expenses, contribution by university pursuant to its tax exempt status under 26 U.S.C. 501(c)(3), and authority under 5 U.S.C. 4111, may be retained by employee------ 572
Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status,

TRAVEL EXPENSES—Continued Page

Contributions from private sources—Continued

Acceptance by employee—Continued

which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations 572

Illness

Other than employee

Employee who incident to permanent change of duty station has mother-in-law moved by ambulance from nursing home located at his old station to one in vicinity of his new station so wife could continue to handle affairs of her mother, who although not dependent for income tax purposes depends on daughter to handle financial and other affairs, may not be reimbursed cost of ambulance service. Even though mother-in-law could be regarded as member of employee's household notwithstanding she receives domiciliary care elsewhere, she is not "dependent" within meaning of sec. 1.2d of Bur. of Budget Cir. No. A–56, as employee does not contribute to her support, and fact that parent relies on daughter for other than financial support does not constitute her dependent 544

Military personnel

Ferry fares

Charges assessed for motor vehicle transportation

Where charges for crossing English channel via hovercraft are imposed for transportation of motor vehicle and not for transportation of driver and passengers, officer of uniformed services who drove his privately owned vehicle incident to permanent change of station, accompanied by his dependents, and incurred ferry expense to cross channel may not be reimbursed on basis of applying percentage of vehicle fare assessed for transportation across English channel to transportation of driver and passengers in vehicle, officer having paid no fare for his or his dependents' transportation via hovercraft 416

Leaves of absence

Cancellation

When leave of absence granted members of uniformed services is canceled due to emergency conditions brought about by actual contingency operations or emergency war operations, members may be returned to their permanent duty station at Govt. expense by most expeditious means available, regardless of days of leave authorized or number of days members had been in leave status, and par. M6601-1 of Joint Travel Regs. amended accordingly. Need to recall members to duty cannot be contemplated at time leave is authorized, and as element of public business is present in emergency return of members to their permanent duty station, payment to members of cost of ordered return travel is justified 804

TRAVEL EXPENSES—Continued Page
Military personnel—Continued
Leaves of absence—Continued
Convalescent
Travel from convalescent leave site

Member of uniformed services who travels from convalescent leave site to medical treatment facility other than one that granted convalescent leave incident to illness or injury incurred while receiving hostile fire pay under 37 U.S.C. 310, may be authorized return transportation at Govt. expense pursuant to sec. 9(1) of Pub. L. 90-207, approved Dec. 16, 1967 (37 U.S.C. 411a). To restrict member's return to facility from which he departed is not required in view of apparent beneficial intent of 1967 act to relieve member of travel expenses incurred incident to convalescent leave, and governing regulations may be amended accordingly 427

Official business requirement

Entitlement of member of uniformed services to travel at Govt. expense is for determination on basis of whether travel is performed on public business—that is that travel relates to activities or functions of member's service—or is performed solely for personal reasons. If before completing temporary assignment, member's assignment is changed by competent orders, as defined in par. M3001 of Joint Travel Regs., because of bona fide needs of service, fact that change might also be beneficial to, or in accordance with needs of member, would not defeat his entitlement to travel authorized incident to change in assignment ... 663

Use of other than Government facilities
Reimbursement basis

Army officer returning to new permanent duty station in Hawaii from temporary duty assignment in U.S. who is erroneously furnished transportation by commercial vessel to accompany his dependents authorized this mode of transportation to travel to new station prior to issuance of temporary duty orders, is indebted for cost of commercial vessel transportation, less cost of transportation by military air. Transportation officer limited under member's orders to authorizing transportation by commercial air if military aircraft was not available, exceeded his authority and did not exercise sound traffic judgment in furnishing transportation by commercial vessel, and member returning to his station under temporary duty orders, his travel is not within scope of par. M4159-4 of Joint Travel Regs. authorizing commercial vessel travel concurrently with dependents under permanent change of station orders 744

Official business
Interruption due to illness or death in family
Military personnel

Enlisted member of uniformed services who upon arrival at temporary duty station learns of death of father-in-law and is orally informed that his temporary duty orders will be canceled, that he may depart on leave, at end of which period he should return to his permanent duty station, is not entitled to reimbursement for travel expenses incurred, even though subsequently he is returned to temporary duty station, or that formal orders issued to support oral directions. Travel

TRAVEL EXPENSES—Continued Page

Official business—Continued

Interruption due to illness or death in family—Continued

Military personnel—Continued

expenses did not relate to activities or functions of member's service and, therefore, were not incurred on public business, and having been induced by personal needs of member, reimbursement of travel expenses may not be authorized---------- 663

Medical treatment

Employee authorized to travel away from his duty station to undergo physical examination to determine if he is qualified to perform duties of his position who is hospitalized immediately and remains away from his duty station 9½ days is only entitled to 1½ days' per diem considered normal time to travel and receive required physical examination. Per diem authorized by sec. 6.5 of Standardized Govt. Travel Regs. for employee incapacitated due to illness beyond his control does not include hospitalization for personal convenience while in travel status. Therefore, travel of employee not involving official business in usual sense and absent urgency for immediate hospitalization, employee is not considered incapacitated while away from his duty station and he is not entitled to per diem for period of hospitalization---------- 794

Military personnel

Emergency conditions

When leave of absence granted members of uniformed services is canceled due to emergency conditions brought about by actual contingency operations or emergency war operations, members may be returned to their permanent duty station at Govt. expense by most expeditious means available, regardless of days of leave authorized or number of days members had been in leave status, and par. M6601-1 of Joint Travel Regs. amended accordingly. Need to recall members to duty cannot be contemplated at time leave is authorized, and as element of public business is present in emergency return of members to their permanent duty station, payment to members of cost of ordered return travel is justified---------- 804

Participation in private conventions, etc.

When Veterans Admin. physician employed by hospital affiliated with medical college of university is authorized both travel to attend medical meeting to conduct Govt. business for portion of meeting, and to be absent without charge to leave to attend remainder of meeting, and he is reimbursed by Govt. for travel costs and per diem incurred on Govt. business and by university for balance of his expenses, contribution by university pursuant to its tax exempt status under 26 U.S.C. 501(c)(3), and authority under 5 U.S.C. 4111, may be retained by employee------- 572

Veterans Admin. physician authorized to be absent without charge to leave to attend professional activities whose travel expenses are paid by or from funds controlled by university whose medical college is affiliated with hospital employing physician may retain contributions received from university, which is tax exempt organization within scope of 26 U.S.C. 501(c)(3) and, therefore, authorized under 5 U.S.C. 4111 to make contributions covering travel, subsistence, and other expenses incident to training Govt. employee, or his attendance at meeting. How-

TRAVEL EXPENSES—Continued Page
Official business—Continued
Participation in private conventions, etc.—Continued
ever, pursuant to 5 U.S.C. 4111(b), and Bur. of the Budget Cir. No. A–48, for any period of time for which university makes contribution there must be appropriate reduction in amounts payable by Govt. for same purpose---------- 572

Funds received by Veterans Admin. physician from university whose medical school is affiliated with VA hospital employing physician, to permit him to undertake university business while in travel status, which funds are in addition to travel and per diem authorized to conduct Govt. business for entire period of medical meeting, seminar, etc., may not be retained by physician, and under rule that employee is regarded as having received contribution on behalf of Govt., amount of contribution is for deposit into Treasury as miscellaneous receipts, unless employing agency has statutory authority to accept gifts, thus avoiding unlawful augmentation of appropriations---------- 572

Where physician employed by Veterans Admin. hospital that is affiliated with medical school of university is authorized travel and per diem to undertake Govt. business for specified period, performs duties for university when in nonpay or annual leave status while traveling, reimbursement by university of expenses incurred by physician during nonduty days should not be construed as supplementing Veterans Admin. appropriations---------- 572

Overseas employees
Home leave
Minimum service requirement
Training or temporary duty in United States

To be eligible for home leave travel allowances prescribed for employee who satisfactorily completes agreed upon period of service as provided in sec. 1.3c of Bur. of Budget Cir. No. A–56, Revised, Oct. 12, 1966, employee must have completed minimum of 12 months of service following date on which he arrives at or returns to his overseas post of duty, and, therefore, agency may not regard agreed upon period of overseas service as commencing on date employee is assigned to training or temporary duty in U.S. immediately following completion of home leave and credit employee with time spent in training toward fulfillment of agreed upon period of service---------- 425

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

UNIONS Page

Federal service

Dues

Deduction discontinuance

Discontinuance of payroll allotment for membership dues in favor of employee organization is subject to 5 U.S.C. 5525 as implemented by Civil Service Regs. and, therefore, such allotment may only be revoked twice a year. A request for revocation received between Mar. 2 and Sept. 1 is discontinued at beginning of first pay period commencing after Sept. 1, and revocation request received between Sept. 2 and Mar. 1 is discontinued effective at beginning of pay period commencing after Mar. 1. Whether employee may have legal claim against employee organization for dues paid under allotment covering periods subsequent to date he resigned his membership is matter between employee and organization ---------- 97

VEHICLES

Parking fees. (*See* Fees, parking)

Private

Damages by Government vehicle

More than one claim

Personal injuries and property damage claims of private insurance policy holder and his subrogee insurer that arose in connection with tort—collision with Govt. vehicle operated by Forest Service employee—although presented separately are not separate and distict claims, as subrogee's rights grow out of rights and cause of action of his subrogor and, therefore, claims totaling in excess of $2,500, limit prescribed by Federal Tort Claims Act (28 U.S.C. 2672) for payment by administrative agency, payment of claims may not be made by Dept. of Agriculture from its appropriated funds, but are for payment by U.S. GAO from appropriation made by 31 U.S.C. 724a for payment of judgments and compromise settlements---------- 758

Purchases

Passenger motor vehicles

Purchase of passenger motor vehicles to conduct research and development programs for prevention and control of air pollution is not subject to appropriation authorization requirement of 31 U.S.C. 638a(a), nor maximum price limitation in sec. 638c, as these statutory prohibitions are intended for imposition on purchase of vehicles to be used to carry passengers. Therefore, if certificate to effect that vehicles are necessary to effectuate purpose of research programs contemplated and that they will not be used to carry passengers appears on or accompanies payment voucher, no objection to payment for vehicles will be raised ---------- 202

VESSELS Page

Cargo preference. (*See* Transportation, vessels, American, cargo preference)

Crews

Destitute seaman

Liability for transporting

Payment to shipping company for returning destitute American seaman from overseas may not exceed rate agreed upon between consular officer, who certified seaman was unfit to perform duty, and ship's master, absent determination required by 46 U.S.C. 679 that Secretary of State deems payment of additional compensation claimed "equitable and proper," and Dept. of State declining to furnish such determination because master, as company's agent, is considered to have authority to contract in company's name, no additional amount is due shipping company and its claim for additional compensation may not be allowed---- 58

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 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

Medical schools

Services of medical specialists

To enable Veterans Admin. to obtain by contract professional services of scarce medical specialists and thus avoid impairing effectiveness of authority in 38 U.S.C. 4117 to contract with medical schools and clinics for such services, term "clinic" may be interpreted to include

VETERANS ADMINISTRATION—Continued Page
Contracts—Continued
Medical schools—Continued
Services of medical specialists—Continued
any medical organization which is capable of contracting for and furnishing medical specialist services at VA facilities, nor are services of specialists who are not physicians precluded under sec. 4117, as nothing in language or legislative history of section requires term "medical specialist" to be defined to encompass only physicians, and term may be construed to include any professional or technician who performs specialist services related to providing medical care and attention..... 871

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

VOUCHERS AND INVOICES
Certifications
Confidential expenditures
Vouchers covering expenses of investigations under 14 U.S.C. 93(e), which were incurred on official business of confidential nature and approved by Coast Guard officer, but nature of expenses are unknown to certifying officer, may not be certified for payment without holding certifying officer accountable for legality of payment. 14 U.S.C. 93(e) contains no provision for certification of vouchers by Commandant of Coast Guard who is authorized to make investigations and, therefore, responsibility for certifying vouchers for payment is governed by act of Dec. 29, 1941, which fixes responsibilities of certifying and disbursing officers, and payment for costs of investigations may only be made in accordance with 1941 act..... 486

WITNESSES
Administrative proceedings
Corporation, etc., summoned
Word "person" as used in 26 U.S.C. 7602, which authorizes issuance of summons incident to inquiry into "liability of any person for any internal revenue tax," means, as defined in sec. 7701(a)(1), "an individual, a trust, estate, partnership, association, company or corporation" and, therefore, when summons is directed to corporation or unincorporated association to compel attendance as witness at hearing before internal revenue officer, witness fees and allowances authorized

WITNESSES—Continued Page
Administrative proceedings—Continued
Corporation, etc., summoned—Continued
in 5 U.S.C. 503(b) for appearances at agency hearings and prescribed in 28 U.S.C. 1821, to compensate persons appearing as witnesses, are payable directly to business organization and not to individual appearing on its behalf, as organization incurs same costs to comply with summons as does natural person---------- 666
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 meaninglessness 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 subject 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
"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

WORDS AND PHRASES—Continued Page

"In compliance with the above"

Five of eight bids received under invitation for bids (IFB) to perform cleaning services which were not accompanied by complete IFB and did not specifically identify and incorporate all of documents comprising IFB are, nevertheless, responsive bids and low bid must be considered for award. Bidders signed and returned facesheet of invitation in which phrase "In compliance with the above" has reference to listing of documents that comprise IFB and operates to incorporate all of invitation documents by reference into bids and, therefore, award to low bidder will bind him to performance in full accordance with terms and conditions of IFB. To extent prior holdings are inconsistent with 49 Comp. Gen. 289 and this decision, they no longer will be followed..... 538

"Person"

Word "person" as used in 26 U.S.C. 7602, which authorizes issuance of summons incident to inquiry into "liability of any person for any internal revenue tax," means, as defined in sec. 7701(a)(1), "an individual, a trust, estate, partnership, association, company or corporation" and, therefore, when summons is directed to corporation or unincorporated association to compel attendance as witness at hearing before internal revenue officer, witness fees and allowances authorized in 5 U.S.C. 503(b) for appearances at agency hearings and prescribed in 28 U.S.C. 1821, to compensate persons appearing as witnesses, are payable directly to business organization and not to individual appearing on its behalf, as organization incurs same costs to comply with summons as does natural person..... 666

"Public facilities"

The phrase "essential public facilities" as used in so-called Federal Disaster Act (42 U.S.C. 1855–1855g), which authorizes assistance in any major disaster to States and local governments for emergency repairs to and temporary replacements of public facilities, does not mean all public facilities. To hold otherwise would make the word "essential" superfluous or void, contrary to rule of statutory construction. Phrase may be defined as relating to those essential public facilities that are designed to serve public at large, but limited to extent of public entity responsibility, so that when contract between public entity and private entity exists, essential public facility involved shall be regarded as whatever public entity's responsibilities are under contract..... 104

"Two bites at the apple"

To permit low bidder under invitation for steel pipe requirements to furnish production point and source inspection point information after opening of bids did not give bidder "two bites of the apple" as such information concerns responsibility of bidder rather than responsiveness of bid, and information intended for benefit of Govt. and not as bid condition therefore properly was accepted after bids were opened. Bidder unqualifiedly offered to meet all requirements of invitation, and as nothing on face of bid limited, reduced, or modified obligation to perform in accordance with terms of invitation, contract award could not legally be refused by bidder on basis that bid was defective for failure to furnish required information with bid..... 553

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