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TABLE OF DECISION NUMBERS

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

[B-169234]

Subsistence—Per Diem—Actual Expenses—Determination

Although utility charges ordinarily are included in the price of a hotel or motel room, the inclusion by an employee who rented an apartment while in a travel status of a separate charge for electricity as part of his lodging expenses appears proper under an administrative regulation giving effect to Public Law 91-114, which increased the daily maximum per diem rate and actual subsistence allowance payable within the continental United States. However, the regulation in requiring the actual expenses of lodgings supported by receipts to be added to a flat amount for food and other subsistence expenses goes too far in the use of actual expenses to determine an employee's per diem entitlement under section 6.12 of the Standardized Government Travel Regulations, and the regulation should be corrected.

To Beecher F. Lewis, United States Department of the Interior, May 4, 1970:

This is in reply to your letter of February 26, 1970, reference SPA-FMF, requesting our decision as to the allowability of a voucher for $14.21 in favor of Mr. August D. Copeland, an employee of your agency, for electricity for the apartment he rented while in travel status.

The record indicates that for the period January 1-31, 1970, Mr. Copeland submitted a travel voucher in the amount of $433.21, $279 for food (31 days at the rate of $9 per day) and $154.21 for lodging. The voucher was paid with the exception of an item of $14.21 representing the amount of an electric bill for 13 days.

While the travel authorization was not forwarded, you indicate that there is for application the per diem rates prescribed in Southwestern Power Administration Manual, Part 347.3.1 Appendix 2. The regulations, as amended effective November 18, 1969, provide, in pertinent part, as follows:

A. Subject to the provisions of the Standardized Government Travel Regulations, unless travel is authorized on an actual subsistence expense basis as provided in 347.4.1, the per diem allowance for temporary duty travel of SPA employees within the Continental United States shall be as follows:

1. For travel within the six-state area of SPA operations (Arkansas, Kansas, Louisiana, Missouri, Oklahoma, and Texas) the allowance in lieu of subsistence shall be $9.00 per day for food and other subsistence expenses, *plus* not to exceed $12.00 per day for actual lodging expenses, including tax. Receipts for lodging expenses shall be attached to the traveler's reimbursement voucher to document lodging expenses.

The electric bill was administratively disallowed due to doubt as to whether it could be considered lodging expense. Mr. Copeland reclaims the item on the ground that the electric service was used to furnish heat, lights, and hot water for the rented apartment.

You recognize that the administrative regulation cited permits the payment of lodging expense, but you express the opinion that it may be in conflict with section 6.12 of the Standardized Government Travel Regulations (SGTR). You request our decision as to whether the present voucher may be paid and, if so, whether other utility bills

should be considered as part of Mr. Copeland's lodging expense provided lodging does not exceed $12 per day.

The Director, Bureau of the Budget, amended SGTR by Transmittal Memorandum No. 9, November 10, 1969, to give effect to Public Law 91-114, November 10, 1969, 5 U.S.C. 5702(a), which increased the daily maximum per diem rate and actual subsistence allowance payable within the continental United States to $25 and $40, respectively. The amending memorandum stresses the fact that the increased rates are maximum rates and that the regulations place the responsibility on each department and agency to authorize only such per diem allowances as are justified by the circumstances affecting the travel. The memorandum also cites several factors to be considered in setting per diem rates, such as established cost experience in the localities where lodging and meals will be required. The administrative regulation in question was apparently considered a practical method of complying with the criteria in the memorandum without prescribing rates for each and every locality where travelers might perform temporary duty. Your doubt as to the propriety of the administrative regulation apparently stems from the fact that it provides for a variable subsistence allowance based on actual costs of lodging. The Standardized Government Travel Regulations (section 6.2, SGTR) provides for subsistence in the form of a definite rate of per diem or reimbursement of actual expenses (section 6.12, SGTR). The latter requires an itemization of all lodging and subsistence expenses.

We have recognized that a per diem rate may be determined by reference to an employee's average lodging cost while in a travel status performing temporary duty. See copy of our regulations in that respect (CGO 1.17) which do not require receipts for lodging. Also note that the lodging is rounded off to the next highest dollar. However, see our decision of February 12, 1970, 49 Comp. Gen. 493, wherein we questioned the validity of a regulation which proposed to combine actual expenses with per diem. In that case the regulation stated that an amount up to $25 per day would be approved where the traveler incurs actual cost in excess of $20, but not in excess of $25 per day.

In the instant case the regulation requires the actual expenses of lodging supported by receipts (with no averaging or rounding off) to be added to a flat amount for food and other subsistence expenses. This in our opinion goes too far in the use of actual expenses to determine an employee's per diem rate and is objectionable on the same grounds as the regulation disapproved of in our decision of February 12, 1970, above. While we will not interpose any objection to payment of per diem in accordance with travel orders prepared under such regulation, we suggest that this decision be brought to the attention

of the proper administrative official so that the regulation may be corrected.

As to the primary question of whether a separate charge for electricity should be included in lodging expenses, we point out that certain utility charges such as electricity are ordinarily included in the price of a hotel or motel room and have otherwise been regarded as a necessary part of the total cost of quarters or lodging. In view of this the inclusion of the electricity charge as a part of lodging expenses appears proper.

The voucher is returned herewith and may be certified for payment if otherwise proper.

[B-145455]

Transportation—Vessels—American—Cargo Preference—Applicability

Where service is available in United States vessels for the entire distance between ports of origin in the United States and the destination port overseas, and freight charges by such vessels are not excessive or otherwise unreasonable, to permit the transportation by sea of containerized military supplies in a U.S.-flag ship for the major portion of a voyage and in a foreign-flag feeder-ship for a minor portion of the voyage would violate the prohibition in the 1904 Cargo Preference Act and, therefore, appropriated funds may not be expended for the transportation by sea of defense cargo in containership service provided by United States lines which use foreign-feeder ships for part of the service.

To the Secretary of Defense, May 5, 1970:

We refer to letter of March 4, 1970, from the Assistant Secretary of Defense (Installations and Logistics), asking for our decision on the question whether appropriated funds properly may be expended for the transportation by sea of Department of Defense cargo in containership service provided by United States lines which use foreign-flag feeder ships for part of the service. The question as presented relates to circumstances where ocean carriers are available to transport the cargo the entire distance in U.S.-flag vessels.

The problem is said to arise from the increased use of containers and containerships for transportation of cargo by sea and the increasingly common practice of large transoceanic containerships to serve only one or two major ports. Assembly and distribution of container cargo from and to ports a relatively short distance away from these major ports ordinarily is performed in auxiliary ships operated under foreign flags. These auxiliary ships are referred to as foreign-flag feeder ships and their service has been called foreign-flag feeder service. Some examples of the geographic relationship of the containership and feeder-served ports include service to Korea by transshipment at a Japanese port and service to the United Kingdom and Scandinavia by transshipment at continental ports.

The Department of the Navy has indicated that it believes feeder ships will play an important role in extending container-ship services to the smaller ports and in insuring the growth and well-being of the U.S.-flag Merchant Marine. Also, counsel for the Military Sea Transportation Service (MSTS) is of the opinion that MSTS properly may utilize a carrier which uses foreign-flag feeder ships to pick up or deliver cargo within a so-called "geographic area of origin or destination" provided the cargo is transported between the geographic area of origin and the geographic area of destination in U.S.-flag ships.

The 1904 Cargo Preference Act, as amended, reads:

> Only vessels of the United States or belonging to the United States may be used in the transportation by sea of supplies bought for the Army, Navy, Air Force, or Marine Corps. However, if the President finds that the freight charged by those vessels is excessive or otherwise unreasonable, contracts for transportation may be made as otherwise provided by law. Charges made for the transportation of those supplies by those vessels may not be higher than the charges made for transporting like goods for private persons. Act of April 28, 1904, ch. 1766, 33 Stat. 518, as amended, Act of August 10, 1956, ch. 1041, 70A Stat. 146, 10 U.S.C. 2631.

It may be noted that the statutory mandate requiring transportation of military supplies in United States vessels is not limited to transportation of such supplies on the high seas but includes all transportation by sea, including transportation performed within territorial waters if by sea.

The statutory mandate is not absolute and is subject to two exceptions, one express and the other implied. If the President finds that the freight charged by United States vessels is excessive or otherwise unreasonable, the statute explicitly provides that contracts for transportation may be made as otherwise provided by law. So far as we know, there has been no executive finding under the statute respecting any current transportation of military supplies by sea.

The second exception arises by necessary implication in circumstances where United States vessels are not available to perform the transportation by sea that is required. In such circumstances, foreign-flag vessels may be used. This exception was recognized in 1907 by the Attorney General of the United States, 26 Op. Atty. Gen. 415, 419, and the view has been followed administratively since that time.

The implied exception also has been recognized by the United States Court of Appeals for the District of Columbia Circuit, sitting *en banc*, in the case of *Curran* v. *Laird*, decided November 12, 1969. The court there held the 1904 Cargo Preference Act to be subject to an implied exception that foreign ships may be used when American ships are not available and that this implied exception does not require a finding by the President himself but may be invoked upon a finding made by other officials in the Executive Department (slip opinion, p. 9).

In the circumstances presented to us, neither of the exceptions dis-

cussed above is applicable. Service is said to be available in United States vessels for the entire distance between ports of origin and destination and freight charges by such vessels have not been found to be excessive or otherwise unreasonable. The question therefore is whether a third exception can be read into the act to permit transportation by sea of containerized military cargo in a U.S.-flag ship for the major portion of a voyage and in a foreign-flag feeder ship for a minor portion of the voyage. And if the act can be read to permit such transportation, a further question arises whether preference must be given to a carrier which will transport the cargo the entire distance in a U.S.-flag ship over a carrier which will transport the cargo in part by foreign-flag feeder ship.

We fail to see how the plain words of the 1904 Cargo Preference Act can be read to permit transportation of military supplies by sea in part in United States vessels and in part in foreign-flag vessels, absent circumstances justifying invocation of one or the other of the two recognized exceptions. If the Congress had intended this result, some qualifying language manifesting this intention undoubtedly would have been included in the act at the time it was debated and passed or at the time it was codified by the 1956 act. The manifest purpose of the act was to accord a preference to United States shipping lines in the carriage by sea of military supplies for the Government but only upon condition that United States vessels be used. Carriage of such supplies in foreign-flag ships, even though owned or chartered by United States shipping lines, would not qualify for the preference and thus could not be used by the Government shipping agencies where United States vessels were available at charges not excessive or otherwise unreasonable.

It is said, however, that use of feeder ships is essential to the attainment of the full economic benefits of containership services and that it would not be desirable to impede the establishment and use of feedership services by U.S.-flag carriers where such impediments do not exist for their foreign-flag competitors. The argument might be a compelling one were it not for the fact that the situation here involved is one where service is available entirely in United States vessels, service which the act manifestly was designed to protect, and thus to extend the protection of the act to another class of service, performed in part in foreign-flag vessels, could only be done at the expense of those carriers ready, willing and able to provide through service in United States vessels.

Furthermore, the 1904 act imposes no restriction on competition for commercial cargo. Absent partial statutory restrictions, such as contained in section 804, Merchant Marine Act, 1936, 46 U.S.C. 1222, United States carriers apparently would be free to utilize foreign-flag feeder service for commercial cargo.

414-926 O - 71 - 2

It is said also that containership service in conjunction with foreign-flag feeder service could not possibly have been contemplated by the Congress that passed the 1904 act since at that time there was no indication of the subsequent development of present containership service. The argument seems to be that this fact makes it questionable whether the act was intended to prohibit use of foreign-flag feeder ships in light of the evolution of modern containership service. But the possibility of transshipment of cargo from large ocean-going vessels to smaller coastwise vessels for further transportation by sea from a major port to a smaller port certainly existed at the time the act was passed, and such service would seem to be analogous to containership-feedership services. There is no indication in the act that transshipment of military cargo to foreign ships for further transportation by sea would be permissible, where American ships were available for through service at charges not excessive or otherwise unreasonable.

Finally, the concept has been advanced that feeder-ship service in effect transforms a major port into a complex of ports and that the call of a transoceanic containership at the major port is in reality a call at every port within the complex. Thus, the only transportation by sea that should be considered in applying the act would be that provided by the containership between the port complexes. The concept is a novel one, but the transformation of the major port into the complex of ports which the concept envisions is effected by use of feeder ships engaged in transportation of cargo by sea. In the case of military supplies, such service, if used and if provided by foreign-flag feeder ships, would deprive those carriers operating United States vessels directly to ports within the complex of their rightful share of defense cargo.

For the reasons stated, we believe appropriated funds may not be properly expended for transportation of military supplies by sea in part in United States containerships and in part in foreign-flag feeder ships where United States vessels are available for carriage of the cargo the entire distance at freight charges not found to be excessive or otherwise unreasonable.

[B–169469]

Torts—Claims Under Federal Tort Claims Act—Private Property Damage, Etc.—Settlement

The personal injuries and property damage claims of a private insurance policy holder and his subrogee insurer that arose in connection with a tort—a collision with a Government vehicle operated by a Forest Service employee—although presented separately are not separate and distinct claims, as a subrogee's rights grow out of the rights and the cause of action of his subrogor and, therefore, the claims totaling in excess of $2,500, the limit prescribed by the Federal Tort Claims Act (28 U.S.C. 2672) for payment by an administrative agency, payment

of the claims may not be made by the Department of Agriculture from its appropriated funds, but are for payment by the United States General Accounting Office from the appropriation made by 31 U.S.C. 724a for payment of judgments and compromise settlements.

To Louis B. Anderson, Department of Agriculture, May 5, 1970:

Your letter of March 31, 1970, requests a decision as to whether you may certify for payment two vouchers covering the tort claim of a private party and his insurer subrogee. The two vouchers combined involve a total amount in excess of $2,500 but less than $100,000, and a question arises as to whether under the Federal Tort Claims Act, 28 U.S.C. 2672, payment should be made by the Forest Service from its appropriations or by this Office from the appropriation made by 31 U.S.C. 724a.

The record discloses that as a result of a collision with a Government vehicle operated by a Forest Service employee, Harold Wacaster, as claimant, and Maryland Casualty Company, as subrogee of Mr. Wacaster, filed separate claims with your Department under the Federal Tort Claims Act, 28 U.S.C. 2672, for personal injuries and property damage in the amount of $54,143.48. On October 23, 1969, settlement was approved by your Office of General Counsel in the amount of $2,000 to Mr. Wacaster, and $893.48 to Maryland Casualty Company, as subrogee, for a total of $2,893.48. However, in approving the settlement, Mr. Kaye, Acting Assistant General Counsel, took the position that the claims of Mr. Wacaster and his subrogee are one claim, and that since the total award exceeds the $2,500 limit on amounts which can be paid by administrative agencies under 28 U.S.C. 2672, payment cannot be made by your Department but rather must be made by the General Accounting Office from the appropriation made by 31 U.S.C. 724a.

Subsequently, our Claims Division declined to make payment and returned the claims to your Department for payment. The Claims Division cited 40 Comp. Gen. 307 (1960) in support of its action, and stated that since the total amount of the settlement in this case is comprised of individual awards, each for less than $2,500, which have been combined in one settlement agreement, the claims were for payment by the Department of Agriculture from its appropriations.

Section 2672, Title 28, United States Code, provides, in pertinent part, as follows:

Any award, compromise, or settlement in an amount of $2,500 or less made pursuant to this section shall be paid by the head of the Federal agency concerned out of appropriations available to that agency. Payment of any award, compromise, or settlement in an amount in excess of $2,500 made pursuant to this section or made by the Attorney General in any amount pursuant to section 2677 of this title shall be paid in a manner similar to judgments and compromises in like causes and appropriations or funds available for the payment of such judgments and compromises are hereby made available for the payment of awards, compromises, or settlements under this chapter.

We agree with your Office of General Counsel that, for purposes of determining whether a tort claim should be paid by the Federal agency involved or by this Office, the claims of an insurance policy holder and his insurer subrogee should be considered one claim, and that where the total amount awarded in such cases exceeds $2,500 payment may not be made by the administrative agency. In 41 Op. Atty. Gen. 70 (1950) the Attorney General ruled that the interests of a subrogor and subrogee are only interests in the same single claim, and that therefore it would be unwarranted to permit administrative settlement of a loss exceeding the jurisdictional amount provided for in 28 U.S.C. 2672 merely because a subrogee files a claim separately for its share of the claim.

Nothing in 40 Comp. Gen. 307 requires a contrary view. In that case, we held only that individual awards under $100,000 each, but aggregating more than $100,000, rendered to several plaintiffs joined in one action, were separate judgments, and were therefore payable by this Office under 31 U.S.C. 724a, which provides for payment of judgments "not in excess of $100,000 in any one case." We observed that the joining of several parties in one action is merely for convenience, each having a separate cause of action, and viewed the statutory phrase "in any one case" as relating to the amount of the judgment due each party and not to the total of all individual judgments involved in a single court case.

The instant situation, while similar, differs fundamentally from that presented in the above-cited case in that one of the two parties presenting a claim is doing so as subrogee of the other party. A subrogee's rights are not based on a separate and distinct cause of action from that of his subrogor, but rather grow out of the rights and the cause of action of the latter. Subrogation places the party subrogated in the shoes of the creditor, and constitutes a substitution of the subrogee for the subrogor. *Reconstruction Finance Corporation* v. *Teter*, 117 F. 2d 716, 729 (1941); *Maryland Casualty Co.* v. *Lincoln Bank & Trust Co.*, 18 F. Supp. 375, 377 (1937). A subrogee occupies exactly the same position as the party for whom he is substituted, and acquires no greater rights than those held by the subrogor. *Hartford Acc. & I. Insurance Co.* v. *First National Bank and Trust Co. of Tulsa, Okla.*, 287 F. 2d 69, 72 (1961); *Maryland Casualty Co., supra.* Moreover, the rights and claims to which he succeeds are taken subject to the limitations and burdens incident to them in the hands of the subrogor. *Hartford Acc. & I. Ins. Co., supra; United States Fidelity & Guaranty Co.* v. *United States*, 164 F. Supp. 703, 706 (1958). In other words, if the subrogor has no rights, the subrogee can have none. *Rud. Degermark A.-B.* v. *Monarch Silk Co., Inc.*, 85 F. Supp. 535 (1949).

In view of the foregoing, the ruling of the Attorney General, *supra*, would appear sound. In our judgment, the claims—arising in connection with a tort—of a private insurance policy holder and his subrogee insurer, though presented separately, may not be considered as separate and distinct claims, but rather must be regarded as interests in one and the same claim for purposes of determining whether the administrative agency involved may make payment under the Federal Tort Claims Act from its appropriations.

Accordingly, the rationale of 40 Comp. Gen. 307 is not applicable to the instant situation. In the present case since only one distinct claim is involved and the total award exceeds $2,500, you may not certify the vouchers for payment by your Department under authority of 28 U.S.C. 2672; rather the awards in question are for payment by this Office from the appropriation made by 31 U.S.C. 724a. Therefore, the vouchers transmitted with your letter are being sent today to our Claims Division with instructions to make payment of the claims of Harold Wacaster and his subrogee, Maryland Casualty Company, in accordance with the foregoing.

[B–168646]

Contracts—Termination—Bid Alleged Nonresponsive

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

To Strasser, Spiegelberg, Fried, Frank & Kampelman, May 6, 1970:

Reference is made to your letters of December 16, 1969, and February 13, 1970, on behalf of Qatron Corporation, Rockville, Maryland, protesting against the Department of the Navy's Naval Electronics Systems Command entering a default termination on Contract No. N00039-69-C-2550, which was awarded your client under invitation for bids (IFB) N00039-69-B-2017.

The referenced solicitation, issued on October 15, 1968, was a 100 percent small business set aside, and it called for bids by November 15, 1968, for 30 PP4473( ) UG Power Supply, Teletype 12 amperes at 150 volts d.c. (FSC 6130), associated data requirements, together with an

option quantity for 15 additional units of the power supplier. In accordance with the solicitation, delivery of the first article test report was to have been made by June 20, 1969, and preproduction deliveries of 5 units by April 20, 1970, 10 units by May 20, 1970, and 15 units by June 20, 1970.

Twelve bids were received by the invitation opening date of November 15, 1968. Qatron's bid of $17,160, exclusive of option items, was the lowest bid and the corporation was requested and did confirm its bid price on November 25, 1968. Following a preaward survey, award was made to the corporation on December 20, 1968, in the amount of $25,740, which included the award of the option item.

Following award and without raising any questions concerning nonresponsibility, Qatron Corporation proceeded with performance of the contract.

The procuring activity states that their files disclose the following events, which they state are not all inclusive. On April 22, 1969, Qatron requested a clarification of the specifications regarding voltmeters. On April 29, 1969, the test program was submitted. On May 26, 1969, nonstandard parts information on the voltmeter was submitted. On June 3, 1969, Qatron submitted a revised delivery schedule for the first article. On June 30, 1969, Qatron submitted nonstandard parts information for the power transformer. On August 5, 1969, and on August 19, 1969, additional nonstandard parts information was submitted. On August 26, 1969, Qatron requested that technical manuals for packing with each equipment be supplied in accordance with the contract. On October 13, 1969, DCASD Baltimore submitted a Production Progress Report which indicated that mechanical assembly of the first article was complete with final assembly wiring in process and foresaw October 20, 1969, as the date for the start of first article tests. On November 21, 1969, your firm submitted a letter to the Naval Electronics Systems Command in Qatron's behalf listing four items of Government action or inaction under the contract which might be the subject of an equitable adjustment in the contract price, but suggesting that termination of the contract for convenience would result in lower costs to the Government than payment of the equitable adjustment. The letter also took the position for the first time, after 11 months of attempted performance by Qatron, that the corporation's bid was nonresponsive and that the contract was therefore void *ab initio*. You attribute such delay to the fact that only after consultation with counsel did the corporation realize the invalidity of the purported award and cease performance on the contract.

Subsequent to the submission of your question to this Office, the Department of the Navy terminated Qatron's contract for default, and Qatron has filed a timely appeal from such termination which is

presently pending before the Armed Services Board of Contract Appeals.

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

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

In section I of the schedule, entitled "Evaluation and Award Factors" the procuring activity imposed the following condition:

(1) OFFER ACCEPTANCE PERIOD (APR. 1960): Offers offering less than 90 days for acceptance by the Government from the date set for opening of offers will be considered nonresponsive and will be rejected.

Qatron inserted no time period in the blank space provided in the "Offer" portion of Standard Form 33, but instead put three dashes (———) in the space.

Your protest contends that Qatron submitted a nonresponsive bid, and since a contract awarded to a nonresponsive bidder does not create valid obligations and liabilities between the parties, you believe the contract must be considered void *ab initio*. You emphasize that in 47 Comp. Gen. 769 (1968), this Office was faced with the identical question of whether a bid could be accepted when the invitation required a 90-day bid acceptance period, the Standard Form 33 in the invitation indicated that a 60-day bid acceptance period would result unless a different period was inserted by the bidder and the bidder left blank the block on his bid with regard to the bid acceptance period. You correctly state that our Office found the failure to submit any bid acceptance period, thus automatically resulting in a 60-day bid acceptance period, made for a nonresponsive bid which could not be considered for award.

You next contend that, since Qatron's bid was nonresponsive, " 'it is elementary that a purported award of a contract to a nonresponsive bidder does not create valid obligations and liabilities between the parties.' Comptroller General Unpublished Decision No. B–162631 (December 28, 1967)." B–162631 was a mistake in bid claim, which concerned a bid from a protestant offering the brand name equipment specified in the invitation. It was later discovered that the brand name manufacturer had stated in his bid that the equipment it intended to furnish would not meet the requirements of a particular clause of the invitation, so that this Office found the bids of both firms were nonresponsive and therefore not for consideration in making an award.

We will agree with your contention that the insertion of dashes in the bid acceptance period block was the equivalent of leaving the block blank so that under 47 Comp. Gen. 769, discussed above, the bid could have been found nonresponsive. Nonetheless, it should be emphasized that 47 Comp. Gen. 769, together with 46 Comp. Gen. 418 (1966) and 39 Comp. Gen. 779 (1960), the other two cases you cited in support of your position that Qatron's bid was nonresponsive and therefore could not properly be accepted, all involved situations in which the question was raised prior to award. In such circumstances both the rights of competing bidders and the fact that the contracting officer is on notice of possible defect in the low bid is for consideration. Thus, while there can be no doubt that a contracting officer would be without authority to award a binding contract to a low bidder if he was put on notice prior to award by either the low bidder or any other bidder of a material defect in the low bid, it is our opinion that any such right on the part of the low bidder must be exercised prior to award.

The award of the contract to one who does not state a bid acceptance period when the solicitation requires such a period to be stated, cannot be set aside at the instance of the one receiving the benefit on the ground that he is not entitled to it. This is a ground available only to those injured by the award action, not to the party who benefits by it. Such a contract is not void *ab initio* but is voidable only at the option of the Government. See *Otis Steel Products Corporation* v. *United State*s, 161 Ct. Cl. 694, 316 F. 2d 937, 941 (1963); 49 Comp. Gen. 369 (1969), and cases cited therein. In this respect, 40 Comp. Gen. 447 (1961) and 40 Comp. Gen. 679 (1961), the cases you have cited as supporting the void *ab initio* concept, concerned cases in which the Government was the party canceling the contract. In the instant case, Qatron's mistake must be considered as one which deals with a clause that was enacted for the benefit of the Government and, so far as the bidder who receives the award is concerned, becomes inoperative when the contract is awarded. See *United States* v. *Russell Electric Co.*, 250 F. Supp. 2, 22 (1965).

For the above reasons we must conclude that the award to Qatron consummated a contract which was binding upon Qatron, and its protest must therefore be denied.

[B–169020]

Bids—Evaluation—Basis for Evaluation—Descriptive Literature on File

Under an invitation requiring bidders to cite make and model of the refuse collection trucks offered to permit the evaluation of bids on the basis of the descriptive literature on file with the procurement officer, the determination that

the low bid was nonresponsive was proper, even though the literature indicated it was subject to change. The bidder had not specified in its bid that any modification would be made in the equipment to meet the invitation requirements, and for the officer to inquire after bid opening whether there was other literature available to show that the offered model would comply with the specifications would have permitted the bidder to modify its bid after submission contrary to competitive bidding procedures. Future invitations should, however, show that award will be based upon the bidder's unqualified offer to comply with specifications, thus avoiding the need for bidders to cite truck make and model.

To the International Harvester Company, May 7, 1970:

Reference is made to your letter of February 4, 1970, protesting the rejection of International Harvester's low bid for 45 refuse collection trucks under invitation 23–148–0–0272–R issued by the Government of the District of Columbia on October 16, 1969.

The invitation solicited bids for furnishing 40 refuse collection trucks with 16-cubic-yard compactor bodies (item 1) and 5 with 20-cubic-yard compactor bodies (item 2). The specifications in the invitation provided in pertinent part:

> The following items shall be in accordance with the applicable provisions of Interim Federal Specification KKK–T–701b and the following minimum requirements:
>
> ITEM NO. 1—16 CU. YD. REFUSE COLLECTION
>
> Truck Chassis
>
> 1. G.V.W.: 32,000 lb. minimum
>
> * * * * * * *
>
> 5. Axles: Front, 12,000 lb. min. on tires at ground.
> Rear, to be full floating double reduction type 22,000 lb. min. on tires at ground.

These same requirements applied to the truck chassis for item 2.

The specifications required bidders to submit with their bids descriptive literature on the garbage compactors. There was no requirement for descriptive literature on the truck chassis.

Bids were opened on November 14, 1969. The bids received were as follows:

	Item 1 40 Units	Item 2 5 Units	Discount	Delivery
International Harvester Co.	$13, 680. 12	$13, 946. 21	$25/unit 20 days	108 days
Ford Division, Ford Motor Co.	14, 254. 84	14, 452. 78	$25/unit 30 days	240 days
GMC Truck and Coach Division	14, 505. 00	14, 762. 00	Net	210–240 days

The bid form provided in pertinent part:

ITEM NO.	ARTICLE OR SERVICE	QUANTITY	UNIT	UNIT PRICE	AMOUNT
1.	TRUCK, REFUSE COLLECTION, COMPACTOR 16 cu yd body, as specified herein. MAKE & MODEL: ___	40	EA.		
2.	TRUCK, REFUSE COLLECTION, COMPACTOR 20 cu yd body, as specified herein. MAKE & MODEL: ___	5	EA.		

In the space provided for "MAKE & MODEL," International Harvester stated "International VCO-190." Ford designated its model CH-C-907 in its bid and submitted a questionnaire form indicating what it intended to furnish. GMC did not specify any make and model.

The bid from International Harvester was rejected on the grounds that the specifications of the VCO-190 do not conform to the invitation specifications as to gross vehicle weight (GVW) and rear axle capacity. The procurement officer based this determination on the International VCO-190 specification sheet AD 4650-W5 11-15 which had been filed with the District Government some time before bids were opened. In that regard, we have been advised that it is the common practice of the individual truck manufacturers to supply the District Government on a regular basis with printed data on their equipment. The VCO-190 specification sheet indicates that the standard GVW for model VCO-190 is 26,000 pounds with an optional GVW of 30,500 pounds available, whereas the invitation specifications require a GVW of 32,000 pounds. Further, the VCO-190 specification sheet indicates a rear axle capacity of 18,500 pounds, whereas the invitation specifications require a 22,000-pound capacity.

An award to the Ford Motor Company was concurred in by the District Contract Review Committee. The award was made on January 14, 1970.

In the letter of February 4, 1970, protesting the rejection of your company's bid, you stated:

1. Our proposed Model VCO-190 truck meets the specifications in bid 23-148-0-0272-R. The gross vehicle weight of Model VCO-190 can vary from 26,000 pounds to 34,000 pounds.
2. Mr. Wessell based his opinions on literature that is subject to change without notice.
3. We have previously supplied our commercial Model VCO-190 trucks to Federal Government Agencies with gross vehicle weight specifications and axle sizes that are equal to, or exceed, those specified in IFB 23-148-0-0272-R.

* * * * * * *

4. * * * A procurement officer based his opinions on one sheet of "changeable" specifications. As manufacturers of this truck we have thousands of com-

binations of axles, engines, transmissions and tires that are commercially available on this model. All of this data is so voluminous it is kept on IBM tapes. We contend that the procurement officer relied on information in his possession that was not complete, and was subject to change.

With your letter you submitted a copy of an IBM printout sheet to show that International Harvester has a double reduction rear axle that would comply with the specifications. Accordingly, you believe that your company was the lowest responsive bidder and that it should have been awarded the contract under the invitation. Award of the contract to International Harvester for the 45 vehicles under the procurement would have resulted in a saving of approximately $25,000.

Bidders were requested to cite the make and model in the bid in order that it could be ascertained before award whether the bidder intended to furnish equipment in full compliance with the specifications.

As indicated above, you have contended that the procurement officer's determination of the nonresponsiveness of your company's bid was based upon published literature in his possession that was not complete and which was subject to change. You state that information showing that the VCO–190 could be equipped to conform to the specifications was available and could have been provided upon request. With regard to this contention the record shows that at the time the bids were evaluated the published literature available to the procurement officer, and upon which he based his decision, clearly showed the VCO–190 did not comply with the specifications and there was nothing on the face of the published literature to indicate to him that the VCO–190 could meet the requirements of the specifications. The procurement officer has advised our Office that literature was not requested to be furnished with the bids because literature was on file with the procurement agency and that it was the practice of the truck manufacturers to keep it up to date. Although the literature indicated that it was subject to change, the procurement officer could not be certain that the equipment would meet the invitation specifications since International Harvester did not specify in its bid that any modifications would be made to the VCO–190 model to bring it up to the invitation requirements. Further, it would not have been appropriate for the procurement officer to inquire of your company after the opening of bids whether there was other literature available which would show that the VCO–190 would comply with specifications or to attempt to ascertain whether it intended to furnish a VCO–190 which would comply with the specifications. To obtain information from a bidder after the opening of bids as to the compliance of the make and model offered would permit the bidder to modify the bid after its submission. This would be contrary to the competitive bidding procedures required by

the advertising statutes. 17 Comp. Gen. 554, 558 (1938); 40 *id.* 132, 134–135 (1960); B-167057, July 23, 1969.

While, in specifying the VCO–190 in the bid, there may have been an intention to offer that model in accordance with the specifications, there was no statement in the bid that it would be modified to comply with the invitation specifications. Thus, if the procurement officer had accepted the bid, your company would have been in the position to argue that the District would have been entitled to receive only the standard VCO–190, whether or not it conformed fully to the specifications.

Accordingly, we find no legal basis to object to the rejection of the International Harvester bid. We believe the situation could have been avoided if the invitation had indicated the purpose for citing make and model number in the bid, how such information was to be utilized in the evaluation of bids and how bidders were to indicate in their bids an intention to comply. In fact, we believe that in future procurements of this kind, it would be preferable for invitations for bids to be drafted to show that the award will be based upon the Government's specifications and the bidder's unqualified offer to comply with them without any requirement for bidders furnishing a citation to make and model number. We are so recommending to the Commissioner of the District of Columbia.

[B–167771]

Alaska Railroad—Claims—Statutes of Limitation

Although the Alaska Railroad, a Government-owned facility operated by the Department of Transportation under authority delegated by the President, is not regulated by the Interstate Commerce Commission, it is subject to certain provisions of the Interstate Commerce Act pursuant to section 3(a) of Executive Order 11107, April 25, 1963, and functions as a common carrier. However, disputed transportation claims that are more than 3 years old will be viewed as not subject to the 3-year statute of limitations against the consideration of claims by the United States General Accounting Office because of the limited number of claims involved and the fact that payment has been made by the Railroad to connecting carriers for their share of the revenue, but, future claims for transportation services should be timely filed.

To the Secretary of Transportation, May 14, 1970:

We have considered letters of April 30, 1970, and August 14, 1969, from J. Glen Cassity, Chief Counsel, The Alaska Railroad, asking for our review of the settlement issued December 13, 1968, in claim TK–880531, disposing of claims aggregating $515.63 on six bills of lading. In that settlement, two claims were allowed in the total amount of $139.62; four claims were not considered on their merits because they accrued more than 3 years prior to receipt in this Office. Our decision on these four claims will affect some other claims being held by the

Railroad. We have concluded that the four claims may be considered on the merits and, if otherwise correct, may be allowed.

It is urged that the 3-year statute of limitations against the consideration of claims by the General Accounting Office, Public Law 85–762, August 26, 1958, 72 Stat. 860, 49 U.S.C.A. 66, does not apply to the Alaska Railroad, a Government-owned facility, stated by the Attorney General in 1924 to be an arm of the Federal Government performing a governmental function and not a common carrier subject to the Interstate Commerce Act, 34 Op. Atty. Gen. 232. It is also pointed out that we long ago held the Alaska Railroad to be entitled to payment for services furnished other Government departments. Decision A–10659, January 28, 1926. The Railroad has already paid over to its connecting carriers their proportions of the revenues earned on these items; there is then no possibility that common carriers subject to the Interstate Commerce Act and thus to the 3-year barring act would share in any sums allowed on these items.

There is no question of the Railroad's entitlement to payment for services performed for other Government agencies. The disposition of your claims by the settlement in TK–880531 rested solely upon their timeliness: those received here before the lapse of 3 years from the date of accrual were paid; those received here after the 3-year lapse were not considered at all. The real question here is whether transportation performed by the Alaska Railroad for the United States may be regarded as being within the purview of section 322 of the Transportation Act of 1940, as amended by Public Law 85–762, and thus subject to the 3-year limitation on claims cognizable by the General Accounting Office contained in that section.

The Alaska Railroad was created by the act of March 12, 1914, 38 Stat. 305, which, in the interest of the national defense, territorial development, and commerce generally, authorized the President of the United States to acquire, construct and operate a railroad or railroads in Alaska and, among other things, "to receive compensation for the transportation of passengers and property, and to perform generally all the usual duties of a common carrier by railroad." The act further provided that after completion of the railroad, the President might in his discretion lease it for no more than 20 years, in which case it should be "operated under the jurisdiction and control of the provisions of the interstate commerce laws." If the President did not lease the Railroad, the statute provided that he should continue to operate it until further action of the Congress.

The act also authorized the President to appoint or employ officers, agents or agencies to perform any or all of the duties imposed on him under the act and to do all additional things necessary to accom-

plish its purposes and objectives. Pursuant to this authority, the President, by Executive Order No. 3861, June 8, 1923, delegated to the Secretary of the Interior the authority to operate and control the Alaska Railroad.

Thereafter the Secretary of the Interior asked the Attorney General for the answers to several questions about the issuance of passes for transportation over the lines of the Alaska Railroad. As the Attorney General pointed out, section 1 of the act of March 12, 1914, provided that "no free transportation or passes shall be permitted except that the provisions of the interstate commerce laws relating to the transportation of employees and their families shall be in force as to the lines constructed under this Act." The Interstate Commerce Act authorizes common carriers subject thereto to provide free transportation to employees and their families, among others.

Under the 1914 act as the Attorney General interpreted it, the Secretary of the Interior could issue passes for free transportation over the lines of the Alaska Railroad only to employees of that Railroad and their families. To reach this conclusion and respond to the Secretary's questions, it was unnecessary to determine the common carrier status of the Railroad. The Attorney General's comments on that point in 1924 seem, therefore, to be *obiter dicta*. In any event there has been no formal decision on the question whether the Alaska Railroad may properly be regarded as a common carrier subject to the Interstate Commerce Act so as to bring it within the ambit of the 3-year limitation in the 1958 act on the consideration of transportation claims by the General Accounting Office.

As authorized by the 1914 statute, the Railroad performs "the usual duties of a common carrier by railroad." Like other common carriers, the Railroad holds itself out in tariffs which it publishes to transport the goods of all who apply; it participates in transportation in interstate and foreign commerce with other common carriers by rail and with common carriers by water; however, it remained free from regulation by the Interstate Commerce Commission. This situation prevailed even though the Railroad entered into joint through rates and through routes with other common carriers subject to the act which were published in tariffs filed with the Interstate Commerce Commission and, where appropriate, with the Federal Maritime Commission. The Railroad has not been leased but has continued to be operated by the Government.

President Kennedy, by Executive Order No. 11107, April 25, 1963, 28 F.R. 4225, authorized the Secretary of the Interior to operate the Railroad (section 1), to allocate a portion of the Railroad's capital investment to the national public purposes which largely inspired its construction (section 2(a)), and to fix, change and modify rates, with

due regard for actions of the Interstate Commerce Commission under section 3, (section 2(b)). Section 3(a) of the Executive order provides that, as to rates filed, the Interstate Commerce Commission may act as though the Alaska Railroad were subject to various sections of the Interstate Commerce Act, with certain exceptions as to safety regulations, motor carriage for the Railroad, or motor carriage incidental to rail carriage. Section 3(b) of the Executive order provides that the Interstate Commerce Commission, in determining the justness and reasonableness of the Railroad's rates and charges, shall exclude for valuation and cost finding purposes the portion of capital investment allocated to public purposes under section 2(a).

When the Department of Transportation was established, the enabling act contained a provision transferring to the Secretary the administrative control of the Alaska Railroad which had been delegated to the Secretary of the Interior in Executive Order No. 11107. Public Law 89–670, October 15, 1966, 80 Stat. 931, 941, 49 U.S.C. 1655(i). Authority delegated to the Commission in section 3 of Executive Order No. 11107, however, has not been disturbed and the Commission continues to be empowered to act as though the Railroad were subject to those sections of the act enumerated above.

For all practical purposes, it would seem then, that the Alaska Railroad functions as a common carrier in relation to the geographical area and to the customers it serves and is administered as a common carrier subject to possible rate regulation by the Interstate Commerce Commission. The railroad functions as a common carrier by direction of the 1914 act. And Executive Order No. 11107 maintained the distinction: section 3(a) provides that, as to rates filed, the Commission *may act as though the railroad were subject to certain provisions of the Interstate Commerce Act.*

As indicated, certain provisions of the Interstate Commerce Act may be applied to the operations of the Alaska Railroad. The Railroad files tariffs with the Interstate Commerce Commission, as well as copies of so-called section 22 quotations tendered to Government shipping agencies; in addition, its bills are paid upon presentation without prior audit by our Office and are subject to the same overcharge notice and collection treatment, including setoff where voluntary refund of overcharges is not made, afforded other common carrier accounts under the provisions of 49 U.S.C. 66.

Nevertheless, in view of the limited number of claims that are more than 3 years old, it is doubtful that any substantial purpose will be served by applying a 3-year limitation to reject otherwise valid Alaska Railroad claims particularly where payments have been made to connecting carriers in settlement of their share of the revenue. Therefore, in the light of the background of the legislative and administrative

history of the Railroad, and in the absence of contradictory judicial precedent, statutory prohibitions, or other compelling reasons, the disputed and similar claims will not be viewed as subject to the 3-year limitation in 49 U.S.C. 66. This conclusion is not to be regarded as encouraging undue delay in presenting claims for transportation services, and it is assumed that the Railroad will make every reasonable effort to timely file any bill which it has for services furnished other Government agencies.

The four items which were excluded from consideration in the settlement made in claim TK–880531 will now be considered on their merits. Notice of a revised settlement will be sent to the Railroad in due course. Other claims which, according to Mr. Cassity's letter of April 30, 1970, will be submitted following our review of the settlement on claim TK–880531, should bear reference to the number and date of this decision.

[B–168519]

Contracts—Negotiation—Prices—Based on Quantity Solicited

A request for proposals (RFP) for rocket boosters, issued pursuant to 10 U.S.C. 2304(a)(16) permitting negotiation in the interest of national defense or industrial mobilization, and approved by a 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 the Intensive Combat Rate (production capability) established for the procurement, would have obtained lower prices, was a defective RFP. Although the determination not to consider an involuntary offer of larger quantities at lower prices, erroneously based on the belief all suppliers would have to be resolicited whereas an amendment to the RFP would have sufficed, resulted in higher prices, the awards made will not be disturbed, but future procurements should permit offers in the largest quantities possible within the constraint imposed by the Intensive Combat Rate.

To the Secretary of the Army, May 14, 1970:

By letter dated January 27, 1970, the Deputy Director for Procurement, Directorate of Requirements and Procurement, Headquarters, United States Army Materiel Command, furnished our Office with a report on the protest of Brad's Machine Products, Inc. (BMP), under request for proposals (RFP) DAAA09–70–R–0049.

The subject RFP, for M125A1 Boosters, was issued pursuant to 10 USC 2304(a)(16), as implemented by Armed Services Procurement Regulation (ASPR) 3–216, permitting negotiation where purchases are to be made in the interest of national defense or industrial mobilization, and was authorized by a properly executed class determination and findings. The objectives of the instant procurement, as listed in the January 27 report, were to:

a. Meet a monthly production rate of 1.3 million
b. Support an ICR (Intensive Combat Rate) of 2.4 million
c. Maintain metal parts production continuity
d. Buy at the lowest cost consistent with the objectives

While not specifically defined in the administrative file, "Intensive Combat Rate," or ICR, apparently is the maximum production capability of a given contractor, or group of contractors, as determined by the contracting officials.

To meet the stated objectives, the RFP solicited offers on three alternative quantities of the subject boosters to be delivered within an 8-month period commencing January 1, 1970, as follows:

	Total Quantity	Delivery Rate
Alternate 1A	1,600,000	200,000 per month
Alternate 1B	2,400,000	300,000 per month
Alternate 1C	3,200,000	400,000 per month

The RFP also contained an option provision reserving to the Government the right to increase the total quantity of any item awarded by 50 percent at any time from the date of award at the lower of the scheduled prices or the prices quoted separately by the offeror for the option quantities, and provided that deliveries of the option quantities would commence upon completion of deliveries of the basic quantities unless otherwise agreed by the parties.

With respect to the method of award of the three alternates, page 5 of Part A of the RFP, as amended, stated as follows:

* * * Proposals for quantities other than the total quantities listed below for each alternative 1A, 1B, and 1C will not be considered for award.

Notice to Offerors: (Possible Combinations of Awards) This solicitation and the range of quantities and delivery rates proposed are for the purpose of allowing the Government to select a single award, or combination of multiple awards which will satisfy the current production requirements and at the same time retain one or more suppliers in an active state with capability to accelerate production to a higher production rate at some future date, if required. The Government expects that one or more offerors participating in this competitive procurement action will be unsuccessful and may not receive any award as a result of this solicitation. It is possible that not more than three awards will result from this solicitation and the quantities and delivery schedules awarded may vary between those offerors who are selected for awards with some receiving larger quantities than others, based on the alternate quantities, alternate delivery schedules, and prices submitted in response to the solicitation. *The Government reserves the right to make that combination of awards determined to be in the best interest of the Government, price and other factors considered. Principal among such other factors will be the potential quantitative mobilization production requirement for the supply item involved and the ability of firms selected for award to respond to such potential future demands* by the Government for increased production beyond the quantities initially awarded as a result of this solicitation.

Offeror(s) submitting proposal(s) on alternative 1C must submit proposals on alternative 1A and 1B. Offeror(s) submitting proposal(s) on alternative 1B must submit a proposal on alternative 1A. Offeror(s) submitting proposal(s) on alternative 1A only are not required to submit proposal(s) on alternative 1B or 1C. Failure to comply with the above procedure will be cause for the rejection of proposal.

The amended date for proposal submission was October 6, 1969, by which time 16 proposals had been received. The proposal submitted by BMP by that date quoted prices for the three listed alternates and

also, according to the attorneys for BMP, the company, by letter dated September 24, 1969, submitted an alternate proposal for 8,000,000 units (1,000,000 per month) at a price of $1.579 each with duty free certificates or $1.624 without duty free certificates. This initial alternate proposal was not included in the administrative file furnished us and it now appears that the September 24 letter was withdrawn before the October 6 proposal submission date. By teletype dated October 13, 1969, the date of October 17, 1969, was set as the closing date for proposal modifications, and each of the 16 offerors was requested to "give your final offer on each of the alternatives on which your firm originally submitted an offer."

By letter dated October 16, 1969, BMP quoted the following prices on the three RFP alternates:

Alternate 1A	Alternate 1B	Alternate 1C
(200,000 per month)	(300,000 per month)	(400,000 per month)
$1.520 each	$1.512 each	$1.493 each

In addition, BMP submitted an alternate proposal for quantities of 600,000 per month, 800,000 per month, and 1,000,000 per month as follows:

600,000 per month	800,000 per month	1,000,000 per month
$1.466 each	$1.451 each	$1.433 each

A second letter dated October 16 also quoted a price of $1.433 each for monthly quantities of 800,000, 1,000,000, and 1,375,000 per month and offered to "build our machine and tooling capacity to a maximum of 2.4 million per month" in order to meet the Government's Intensive Combat Rate in the event awards in excess of 800,000 per month were to be made to BMP. The unexpanded Intensive Combat Rate of BMP is reportedly 1.25 million per month, approximately 52 percent of the rate required (2.4 million per month).

Also, by letter dated November 4, 1969, after the closing date for proposal modification, BMP modified its alternate proposal both in terms of price and quantity, allegedly at the request of the procuring activity, as follows:

500,000 per month	600,000 per month	700,000 per month
$1.422 each	$1.417 each	$1.408 each
800,000 per month	900,000 per month	1,000,000 per month
$1.401 each	$1.396 each	$1.388 each

In the same letter BMP again offered to expand its Intensive Combat Rate capability, this time to 2.5 million units per month.

Before receipt of the November 4 BMP late proposal modification, the contracting officer, by letter dated November 6, 1969, advised BMP that its unsolicited alternate proposals had "been reviewed

and found not to be in the best interest of the Government, with all factors considered."

Although the protest of BMP was made before awards were accomplished, awards were nevertheless made, on the basis of urgency, on December 4, 1969. Awards were not made, however, until the proposed actions were approved by the Director, Materiel Acquisition, Office of the Assistant Secretary, and until our Office was notified pursuant to ASPR 2–407.9. Awardees, the quantities awarded, and the respective prices are set out below:

Contractor	Quantity	
BMP	1,600,000	(200,000 per mo.)
I.D. Precision Components	2,400,000	(300,000 per mo.)
Etowah Mfg. Co.	3,200,000	(400,000 per mo.)
D.V.A. Corporation	3,200,000	(400,000 per mo.)

Price	Total Price
$1.52 each	$2,432,000
$1.46 each	$3,504,000
$1.452 each	$4,662,400
$1.435 each	$4,592,000
	$15,190,400

We have been informally advised by the Department of the Army that the Intensive Combat Rates for the successful offerors are as follows:

Contractor	ICR
BMP	1,250,000 per month
I.D. Precision Components	300,000 per month
Etowah Mfg. Co.	500,000 per month
DVA Corporation	750,000 per month

The protest of BMP initially requested that the contracts awarded be terminated for the convenience of the Government on the ground that the RFP terms as amended encouraged the submission of offers for quantities in excess of those contained in the three listed alternates and that since such offers were permitted by the RFP terms, there was no requirement that the RFP be amended or that resolicitation be accomplished in order that the same opportunity be extended to the other offerors after receipt of the BMP alternative proposal for larger quantities. Alternatively, BMP argues that if offers in larger quantities were not in strict accord with the RFP terms, good procurement practice required further negotiation where such offers were in the Government's interest because of their significantly lower cost.

As an indication of the potential lower costs that would be realized

by award to BMP in higher quantity ranges, the briefing prepared by the Army Materiel Command for presentation to members of the staff of the Office of the Assistant Secretary of the Army (Installations and Logistics), Directorate of Materiel Acquisition, indicated that an award of a monthly production quantity of 1,000,000 per month to BMP at its quoted price for that quantity and an award of a quantity of 300,000 per month to DVA Corporation at its quoted price for that quantity would have resulted in a savings of some $606,983 over the actually awarded prices. The recommendation of the briefing, subsequently approved by the Director, Materiel Acquisition, however, was that award on the higher quantity ranges was not feasible. The reasons for this recommendation are discussed below.

By letter dated February 26, 1970, submitted by BMP's attorneys in rebuttal of the January 27, 1970, administrative report, the termination request was withdrawn in view of the time elapsed since awards were made and in its place it was requested "that the Army be instructed in future negotiated procurements to solicit and consider proposals on larger monthly quantities, as the best interests of the Government dictate that the total price paid on this type of procurement be the lowest prices submitted by responsible offerors."

The position taken in the administrative report is that while the BMP offers in the upper quantity ranges would have provided the Government with lower prices, such offers could not have been considered under the RFP terms without a resolicitation of all 41 suppliers originally solicited. It was estimated that such resolicitation would take 5 weeks, but it was concluded that such period would be unacceptable because of urgency. The report also postulates additional cost figures which would theoretically be incurred if the current contract were extended to allow resolicitation, which theoretical costs are said to be in excess of any cost savings to be gained by acceptance of BMP's lower offers in the higher ranges. Finally, the report maintains that the awards as made were necessary to maintain the ICR rate of 2.4 million per month, and that resolicitation for offers on higher production quantities would probably violate the adequate price competition provisions of ASPR 3-807.1(b)(1)(b)(i).

While we agree with BMP's attorneys that the awards as made should not be questioned at this date, it is our opinion, for reasons set out below, that the RFP was deficient in that it failed to advise offerors of the quantities needed to satisfy the Government's known requirements (i.e., a monthly production rate of 1.3 million) and also failed to solicit offers on those quantities. In this regard, the statute and regulations governing negotiated procurement clearly contemplate awards at the lowest possible prices, all other relevant factors considered. See

10 U.S.C. 2304(g) and ASPR 3-804. Since lower prices generally result when larger quantities of a production item are purchased, a request for proposals, as here, limiting offers to quantity ranges significantly lower than the Government's known requirements can be expected to result in higher prices, especially when multiple awards are made for less than the known requirements, contrary to the expressed intent of the governing regulations.

In the instant case, mobilization requirements dictated that a production capacity for quantities in excess of present needs be maintained and it was necessary that this requirement be met even if it resulted in higher prices. However, neither the class D&F justifying negotiation under the industrial mobilization exception to the formal advertising rules nor the RFP itself states that the maintenance of the needed production capacity necessarily requires current production by more than one contractor. In fact, the RFP specifically reserves to the Government the right to make either a single award or various combinations of multiple awards. Additionally, while the administrative report maintains that the awards as made were necessary to support the required ICR, there is no indication in the RFP or in the administrative file that individual awards in excess of 400,000 units a month would defeat the requirement for an Intensive Combat Rate of 2.4 million units per month or that there was any correlation between the production quantities awarded and the Intensive Combat Rate capacity. With regard to the latter point, the fact that the specific Intensive Combat Rate capacities assigned to the successful offerors did not bear any relation to the quantities awarded (i.e., BMP was awarded the smallest production quantity while being possessed of an ICR significantly larger than its competitors) would seem to support the proposition that no such correlation in fact existed. Therefore, so long as the Government was assured that awards made to one or more offerors would support the ICR capacity of 2.4 million units per month, we are aware of no justifiable basis for failing to advise offerors in the RFP of the 1.3 million monthly production rate which was stated to be an objective of this procurement, and for soliciting offers on the basis of that monthly production rate.

Additionally, there appears to be no basis for the inclusion in the RFP of the provision limiting offers to the total quantities listed for each of the alternates in view of the reservation of the right to the Government to make a single award or multiple awards and in view of the RFP requirement that offerors quote individual prices on various combinations of alternates (e.g., an offer for alternate 1C required offers also on alternates 1A and 1B). This provision, if read literally, would preclude offers of lower prices for the award of more than one alternate, or of all alternates, even though the right was expressly

reserved to make award on such combination basis if determined to be in the Government's interest. See 47 Comp. Gen. 658 (1968). The objective of the Government, though unexpressed in the RFP, was to award monthly production quantities in excess of the total monthly production quantities set out in the RFP. With this objective in mind a provision limiting offers to lesser quantities coupled with the failure to advise offerors of total monthly production quantities desired would seem to assure higher rather than lower prices.

Apart from the fact that the RFP was deficient, there was no justification, in our opinion, for failing to conduct negotiations with all competitively situated offerors for quantities in excess of those listed in the RFP once an alternative offer for larger quantities was received from BMP. While admitting that awards in higher production ranges, as proposed by BMP, would have resulted in lower costs than the awards as made, the administrative report takes the position that time did not permit solicitation of alternative proposals from offerors other than BMP because to have done so would have required resolicitation of all 41 suppliers originally solicited. It is maintained that such solicitation would have consumed 5 weeks thereby requiring extension of current contracts with attendant additional cost. This position appears to be bottomed on the assumption that the Government's first indication that offers of higher production quantities were feasible was the receipt of the October 16, 1969, letters of BMP containing alternative proposals in higher quantity ranges which were submitted in response to the Government's request for final proposal modifications by October 17.

While the administrative report states that a 5-week period would be required for the resolicitation of even those suppliers who did not respond to the RFP, no reasons are advanced in substantiation of this position. Inasmuch as ASPR 3-805.1(e) requires only an RFP amendment where an increase in the statement of requirements is desired, we can perceive of no reason why a simple RFP amendment issued to the 6 offerors who responded to the RFP requesting prices on quantities up to the desired monthly production rate would not have sufficed. This procedure, in all probability, could have been accomplished within a relatively short time after receipt of the October 16 modifications. In this regard, the attorneys for BMP point out that the time allowed for initial proposal preparation was only 4 weeks and contend that the solicitation for amended proposals should not logically have taken more than 2 weeks. The attorneys also state that:

> With regard to the time necessary to resolicit offerors on a change in quantity, the same procurement agency (APSA) recently modified RFP No. DAAA09-70-R-0123 to give offerors *eight days* in which to respond with revised prices on a change in quantity. It is difficult to understand how APSA tells your office

that five weeks is needed to resolicit offerors on changed quantities when it recently resolicited and evaluated offers on changed quantities in less than two weeks on a comparable procurement proposal.

ASPR 3-807.1(b)(1)(b)(i), cited in justification for the refusal to extend the opportunity to submit revised offers on larger production quantities than called for by the RFP, provides that adequate price competition will be held not to exist where "the solicitation was made under conditions that unreasonably deny to one or more known and qualified offerors an opportunity to compete." The position of the administrative report is that "Resolicitation at higher ranges could have eliminated some of the present suppliers from competing in the higher rate because of limited capacity," and that this circumstance apparently would be a violation of the above-quoted ASPR provision.

We find this position untenable. In the first place, amendment of the RFP would have merely provided the opportunity for the submission and evaluation of higher production quantity offers and would not have affected offers relating to the alternates as set out in the RFP. Secondly, the purpose of the quoted ASPR section clearly is to assure the lowest practicable prices through competition, a purpose which an amendment to the RFP would, in our opinion, have accomplished.

While we recognize that the availability of funds for this procurement was uncertain at the time of RFP issuance and that, therefore, it was necessary to retain as much flexibility as possible with regard to production quantities in the drafting of the RFP provisions, we doubt the propriety of the judgment exercised in drafting and interpreting the RFP in such a way that less rather than more flexibility was attained, and in the refusal to give all offerors a chance by RFP amendment to quote on higher monthly quantities along the lines proposed by BMP.

Accordingly, we suggest that future similar procurement actions should be undertaken in a manner which will permit offers in the largest quantities possible within the constraint imposed by the Intensive Combat Rates and care should be taken to assure that adequate timely response by means of appropriate RFP amendments is made to alternate proposals which provide different but more favorable terms than those contained in the unamended RFP.

[B-169454]

Subsistence—Per Diem—Compensatory Leave

Although generally the compensatory time off from duty pursuant to 5 U.S.C. 5543(a)(2) in lieu of overtime that is granted to an employee in a travel status is regarded as leave of absence within the purview of section 6.3 of the Standardized Government Travel Regulations and requires the suspension of subsistence allowance during the leave of absence, when the compensatory time is granted or ordered in the interest of the Government, such as granting compen-

satory time to technical personnel performing work aboard FAA aircraft away from their duty station to cover the normal duty hours interrupted by contingencies during which they cannot be assigned to useful work, a suspension of per diem is not required, the "prescribed hours of duty" essential to the application of section 6.3 having no significance to the duty hours required on extended flight inspection trips.

To the Administrator, Federal Aviation Administration, May 14, 1970:

This is in reference to your letter of March 30, 1970, requesting a decision on whether, under the limited circumstances described therein, payment of per diem in lieu of subsistence can be authorized, pursuant to 5 U.S.C.A. 5702 and pertinent regulations, to an employee traveling on official business and who is on compensatory time off granted or ordered in the interest of the agency.

You state that you are aware of the decision of this Office, 26 Comp. Gen. 130 (1946), which held that compensatory time off from duty in lieu of overtime compensation granted to an employee in a travel status is to be regarded as "leave of absence" within the purview of the Standardized Government Travel Regulations (SGTR), requiring the suspension of subsistence allowances during leave of absence. However, you have a question as to its applicability to situations such as described in your letter where the compensatory time off is granted to facilitate the work of the agency, and results in a more efficient and economical and safer operation.

Your inquiry concerns situations involving flight standards technical personnel operating or performing work aboard an FAA aircraft away from their duty station for the purpose of checking from the air the correct functioning of navigational aids. In these operations, as stated, it is unavoidable that flying is at times interrupted during normal duty hours because of such contingencies as necessary maintenance work on the aircraft, or weather conditions, or limitations on continuous flight time applicable to flight crews in the interest of safety and, during these interruptions of operations, the employees cannot be assigned to any useful work.

The following examples of typical schedules are set forth in your letter:

(1) Flight inspection personnel stationed at Oklahoma City and working on an 8:00 to 4:30 p.m. schedule may be required to perform flight inspection work enroute to the Azores. They travel on a highly instrumented KC 135 flight inspection aircraft. Having reported for duty at 8:00 a.m. they leave Oklahoma City on that aircraft at 9:00 a.m., working enroute, and arrive at Atlantic City, N.J., at 1:30 p.m. for necessary servicing and refueling of the aircraft under supervision of crew members, etc. They take off from Atlantic City at 3:30 p.m. and arrive at Lajes, Azores, at 10:00 p.m. They then secure the aircraft, complete logs and reports, and go off duty at midnight, having been on duty for 16 hours. Midnight Central Standard Time is 6:00 a.m. Azores local time. If Lajes must be overflown because of weather or some ground emergency condition, they fly on to Madrid, Spain, arriving at 1:00 a.m., and go off duty at 3:00 a.m., which is 11:00 a.m. Madrid local time. In this case they have been on duty for 19 hours,

In either case the aircraft needs servicing before taking off again; the crew needs rest in order to fly safely in conformity with FAA regulations, and in order to perform efficiently the technical flight inspection functions required of them. Since they are unable to work while the aircraft is being serviced and/or they need rest, all the personnel would be given compensatory time off for the balance of the workday, and they would resume flight inspection work the next morning.

(2) In other instances the flight inspection crew may be required to perform continuously for long hours aboard the specially equipped aircraft because unanticipated problems are encountered in testing or adjusting the ground equipment being checked at a particular location. The flight inspection crew must continue at its work until the job is satisfactorily completed, since the equipment must finally be checked out for the highest degree of aviation safety with the least possible delay.

It is pointed out that in these situations personnel will have accumulated amounts of irregular overtime and since their pay is usually in excess of the maximum rate of basic pay for GS–10, they can be required to take compensatory time off pursuant to 5 U.S.C. 5543(a) (2). Employees whose pay is less than that rate may consent to such compensatory time off. You say that it is in the interest of the agency to grant such time off so as to cover normal duty hours during those interruptions of the flight. This compensates for the overtime in a manner most economical and satisfactory to the Government. It is urged, however, that it is not equitable to cut off per diem during periods of time off, when the employee is distant from his residence and duty station and subject to the extra costs which per diem normally is intended to cover. The alternative is to retain the employees in duty status wherein there would be no question of per diem being allowable and overtime would be compensated for in money.

Although we have held that compensatory time off is to be treated like other leave of absence insofar as per diem in lieu of subsistence payments are concerned, we would not require for reasons hereinafter stated that the provisions of section 6.3 of the SGTR be applied to the situation described in your letter.

Section 6.3, *supra*, requires an adjustment of per diem in lieu of subsistence during periods of leave. Essential to the application of this section is a determination of whether leave begins or terminates "within the traveler's prescribed hours of duty," or, where fractional leave of absence wholly within a day is involved, whether leave is less than or exceeds half of the "prescribed working hours."

In the situation explained in your letter the prescribed hours of duty, i.e., 8 a.m. to 4:30 p.m., which are applicable to the employees at their official station loses its significance insofar as the hours of duty requirements on extended flight inspection trips are concerned. Therefore, compensatory time off granted during periods normally falling within an employee's prescribed hours of duty, but not during periods in which duty is required to be performed on his particular assignment while in a travel status, should not adversely affect an employee's

entitlement to payment of per diem in lieu of subsistence. Accordingly, we would not in the circumstances here considered require a suspension of per diem during periods of compensatory time off granted to flight inspection personnel.

[B-158458]

Contracts—Tax Matters—Sales, Etc.—Tax Inclusion or Exclusion—Reimbursement

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

To John H. Bransby, Department of the Army, May 18, 1970:

In letter NABCT-F of February 25, 1970, you advise that the Armed Services Board of Contract Appeals (ASBCA) has rendered a 3-2 decision No. 12783, dated January 22, 1970, in the appeal of the John C. Grimberg Co., Inc., under construction contract DA-18-020-ENG-3098, and you request our decision whether payment may be made to the contractor since the ASBCA decision conflicts with our decision B-158458 of March 28, 1966, involving the same issue in the case of another construction contractor.

You indicate that our decision will be important beyond the immediate case because it will have an impact upon a number of other like cases.

In B-158458, *supra*, at the time of bid opening, a petition for a writ of certiorari was pending before the United States Supreme Court to consider a decision of the Maryland Court of Appeals holding that the Maryland sales tax was inapplicable to projects constructed for the Federal Government. The Supreme Court denied the petition after bid opening and before award of the contract. In our decision it was held that since the contract provided specifically that the Maryland sales tax was included in the contract price and that, if the contractor was not required to pay the tax, the contract price would be correspondingly reduced, recovery from the contractor of the amount of the tax was required, notwithstanding the contractor's contention that it did not include the tax in its bid price upon which the contract was based. That holding was reinforced by reference to the well-established principles of law that no officer of the Government is authorized to

relinquish a vested contract right and that no contractor is entitled to relief for a unilateral error as to which the contracting officer had neither actual nor constructive notice at the time of award.

The contract considered in the ASBCA decision was awarded while application for a writ of certiorari was pending before the United States Supreme Court. Subsequent to the award the Supreme Court denied the writ of certiorari. The State tax provisions included in the Instructions to Bidders of the invitation for bids and the general provisions of the contract are essentially the same provisions which we considered in B-158458.

The contract considered in the ASBCA decision was in the amount of $1,042,000 and was $105,789 less than the next lowest bid. In its decision, the Board found as a fact that the contractor's bid price did not include any allowance for Maryland sales taxes. The contractor's explanation for omitting the tax was that its bid was submitted 6 months after the decision of the Maryland Court of Appeals which held the tax to be inapplicable. The findings of fact in the Board's decision show that the contractor furnished the Corps of Engineers District Comptroller evidence of the omission and did not hear from that office again until 2½ years later when the District Comptroller wrote to the contractor, citing our decision of March 28, 1966, and advising that the Government was required to recover the amount of the tax that would have been paid but for the Maryland Court of Appeals decision. The District Comptroller requested a best estimate of what the taxes would have been if included by the contractor. When the contractor did not furnish the estimate, the contracting officer estimated that $13,926.30, based on the value of the material incorporated into the construction, represented the applicable cost of the Maryland tax. Thereupon, a contract modification was issued reducing the contract price by that amount. Also, at the same time, the contracting officer issued his final decision that the reduction was made because the contract provided for such relief to the Government in the event the contractor was relieved of the burden of the tax included in the contract price.

You advise that the foregoing facts are not disputed and that the only question is whether the ASBCA decision is correct as a matter of law. We agree that the sole question to be resolved here is one of law. That being the case, the decision of the ASBCA is not and cannot be considered as final. 41 U.S.C. 322.

The Board held that the reduction in the contract price because of the nonpayment of Maryland sales tax was improper and inequitable. It concluded that the Maryland tax was not applicable; that the tax provisions required the contractor to include in its contract price only such Maryland sales taxes as were applicable; that the contractor did

not include anything in the contract price for the tax; and that if the Government is allowed to prevail it will, in effect, reap a windfall. The Board observed that the contracting officer having satisfied himself that the contractor had not included any amount in the contract price for the tax desisted from collecting for over 2½ years until our Office ruled otherwise with respect to another contract. Additionally, it is contended that in view of the amount of the tax ($13,926.30) and the difference between the two low bids ($105,789), the inclusion or non-inclusion of an amount for tax could have had no effect on the determination of the awardee and could have had no effect on the integrity of the competitive bidding system. Finally, the ASBCA decision stated that *Burnett Construction Company* v. *United States*, 188 Ct. Cl. 958, 413 F. 2d 563 (1969), is controlling in the appeal.

Although the Maryland Court of Appeals had held that the sales tax was not applicable before the contractor bid on the project, its decision was not final since a petition for a writ of certiorari was then pending before the United States Supreme Court. Certiorari was denied after the contract was awarded. Whatever the contractor's intentions may have been concerning the tax at the time of bidding, the invitation for bids provided that "The Department of the Army contemplates litigation contesting the legality of application of these taxes to construction contractors of the United States on the grounds that they discriminate against the United States and those with whom it deals." Thus, the invitation clearly indicated to bidders that the applicability of the tax had not been finally resolved by the courts. Further, both the invitation for bids and the contract specifically provided that the tax was included in the contract price. The invitation for bids provided that the tax was "included in the contract price as State Taxes in *effect and applicable*." Further, the "Maryland Sales and Use Taxes" clause in the contract provided that "The contract price *includes* the Maryland sales and use tax." However, the legal applicability of the tax was not the sole consideration. Even more significant is the fact that it was specifically provided and agreed upon by the parties that the taxes would be treated as being applicable to the contract and included in the contract price. In that connection, our Office has held that even if a contractor is itself contesting the validity of a tax in the courts, it is not excused from failing to include the tax in its bid price where the tax clause in its bid provides that applicable taxes are included. See 44 Comp. Gen. 715, 716–717 (1965). [Italic supplied.]

In view of the foregoing, the statement in the ASBCA decision that "The contract placed the onus of correctly determining applicability of state taxes on the contractor" is incorrect. The provisions

quoted above from the invitation for bids and the contract indicated that for purposes of the procurement, the State taxes were to be considered applicable and included. Therefore, the contractor had no burden to determine whether the State taxes were applicable. If the contract placed any burden on the contractor it was the burden of including the tax. If the contractor chose to disregard the instructions that were provided in that regard, that was the contractor's risk, but that should not deprive the Government of the adjustment provided for in the contract for the State tax which was represented as being included in the contract price.

Further, although the ASBCA decision directs relief for the contractor because it did not include the tax in preparing its bid price for the contract and the courts have annulled the tax, the decision indicates that the contractor would not have a valid claim against the Government for increased compensation if the tax was upheld by the courts. We agree with the latter result because the invitation and the contract provided that the tax was included in the contract price. Since the contractor should be denied relief where the tax is upheld, it is inconsistent for the contractor to prevail where the tax is abrogated, especially where the contract provides for an adjustment if the contractor is not required to pay the tax.

Where parties have made a valid contract, it is enforceable as made. *The Pacific Hardware & Steel Co.* v. *United States*, 49 Ct. Cl. 327 (1914). The State tax provisions state that "if the Contractor is not required to pay * * * these taxes, the contract price shall be correspondingly decreased," and that "If the Contractor is not required to pay * * * these taxes, the contract price shall be decreased by the amount of such relief." Therefore, in seeking recovery of the taxes, the Government is not obtaining a "windfall" as the ASBCA decision holds, but rather is seeking what it is rightfully entitled to under the contract.

The fact that the contracting officer originally required no adjustment in the contract price is not fatal to the Government's rights under the contract. Payments of public money made by officials under a mistake of law are recoverable. 5 Williston on Contracts (revised edition) section 1590, and 3 Corbin on Contracts section 617.

While the omission of the tax did not affect the standing of bidders, the tax provisions obviously were included in the invitation for bids to place all bidders on an equal footing with respect to the Maryland sales tax. To permit a bidder to come in after the contract is awarded and show that it did not include the tax when its bid stated no exception to the tax seriously impinges upon the integrity of the competitive bidding system especially where, as here, the contracting officer

was not otherwise on notice of the possibility of the omission at the time of award.

Had the contractor submitted the bid on a tax-exclusive basis, the bid would have been rejected as nonresponsive to the invitation even though the difference between the bid and the next low bid would have been more than sufficient to cover any tax excluded from the bid price. 41 Comp. Gen. 289 (1961). Having avoided rejection of its bid and achieved award by bidding on a tax-included basis, the contractor should not be allowed to show after award that the bid was actually prepared on a tax-excluded basis. To hold to the contrary would allow such a contractor who alone had knowledge of his nonresponsive tax-exclusion status to rely upon such knowledge at a later date to avoid his responsibilities under a contract awarded on the tacit understanding that the award would result in a contract identical to that advertised.

Further, this case is distinguishable from the *Burnett* case, *supra*. The latter case involved a change made in Davis-Bacon rates under the contract "Changes" clause providing for "equitable" adjustment where there is a change in "specifications." The immediate case does not involve a change within the meaning of the "Changes" clause. Also, the contract here is specific in that the contract price was required to be decreased if the contractor was not required to pay or bear the burden of the tax. Such a price adjustment clause specifically applicable to wage rate changes was not included in the contract which was involved in the *Burnett* case.

In that connection, in *United States* v. *Kansas Flour Mills Corporation*, 314 U.S. 212 (1941), the United States Supreme Court considered a contract which contained a tax clause providing for a change in the contract price in the event of a change in certain described taxes. The Court held, at page 214, that the tax clause shows that the tax was specifically in the minds of the parties for it was stipulated that it was included in the price bid. The contractor contended that it could not be said how much of the tax it was willing to absorb in order to obtain the contracts; that it may have been making the sale at an actual loss; and that no adjustment should therefore have been made when the tax was determined to be unconstitutional. However, the Court held that when the parties provided for a contract adjustment in the event of a change in the tax, it did not mean that the amount of the adjustment was an unknown quantity to be made definite by proof. The Court indicated that the adjustment should be made as provided in the contract.

Further, in *United States* v. *Standard Rice Co., Inc.*, 323 U.S. 106 (1944), the Supreme Court denied any adjustment in the contract

price where a tax was found unconstitutional when the contract did not provide for a reduction. The Court indicated, at pages 109–110, that the vital difference between the *Kansas Flour* case and the *Standard Rice* case was that the contract in the former case contained a provision providing for a decrease in the contract price.

Although the contractor relied upon the decision of the Maryland Court of Appeals in not including the tax in its contract price as required, it was a mistake not to do so in view of the advertised tax provisions and the fact that a petition for a writ of certiorari was pending. To justify equitable relief, mistake must not be the result of inattention or personal negligence of the party applying for relief. 27 Am. Jur. 2d, Equity section 34. Further, even in equity parties may not be relieved from bargains merely because they are hard, harsh, unwise, improvident, oppressive or unprofitable. 27 Am. Jur. 2d, Equity section 25.

In view of the foregoing and for the reasons previously stated in B–158458 of March 28, 1966, we are of the opinion that the ASBCA decision is in error as a matter of law. Accordingly, the decision is not final and the payment directed by the Board should not be made.

[B–169309]

Bids—Evaluation—Method of Evaluation Defective, Etc.—Lowest Bid Not Lowest Cost

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

To the Administrator, National Aeronautics and Space Administration, May 22, 1970:

By letters KDA–2 and KDA dated April 1 and April 15, 1970, respectively, the Director of Procurement furnished our Office with basic and supplemental reports on the protests of Lion Recording Services, Inc., and Capital Recording Company, Inc., under NASA Headquarters Contracts Division invitation for bids No. DHC–5–10–7529K, issued on February 16, 1970. Award has been withheld pending resolution of the protests.

The subject invitation called for "services, supplies, and equipment to duplicate, label, pack and mail taped NASA Headquarters radio

programs, and for the production and associated activities involved in the radio/audio production functions of the NASA Headquarters." The invitation contemplated an indefinite quantities type contract, and stipulated minimum and maximum orders for supplies and services of $5,000 and $100,000.

The invitation statement of work divided the required duties between "Production Services" and "Distribution" and requested prices under those headings for a basic 1-year contract term and an additional optional year. The instant protests involve only the "Distribution" portion of the invitation. Paragraph 24 of the Additional Solicitation Instructions and Conditions, entitled "Frequency of Requirements," stated:

> The following represent the estimated levels of volume and frequency of NASA's regular and continuing production, duplication, packing, and shipping requirements.
>
> A. Each week, approximately one 4½-minute program will be produced, and approximately 2600 4½-minute programs must be duplicated, label, packed and shipped.
>
> B. Each month, approximately one 14½-minute program will be produced, and 1600 14½-minute programs must be duplicated, labeled and shipped.
>
> C. Prior to each manned space flight, approximately 10 audio news features (interviews), 1 to 4 minutes each will be produced, and 1700 30-45 minute programs must be duplicated, labeled, packed, and shipped during the same week as the above 4½ and 14½-minute programs.
>
> D. Every three months 10 one-minute informational announcements (NASA space notes) will be produced and 1500 ten-minute programs must be duplicated, labeled, packed and shipped. This requirement may, or may not fall within a week in which B. and C. above, will be required.

In addition to the regular program requirements contemplated by the above quoted paragraph, bidders were advised in the "Distribution" section of the invitation that "the contractor shall also perform 'special' duplication and distribution requirements, as special events occur."

The invitation provided a matrix, called "Attachment B," for pricing the distribution services. The matrix set out tape times in 1 minute increments from 0 to 30 minutes, 5 minute increments from 30 to 60 minutes, and 10 minute increments from 60 to 90 minutes. It also set out 24 order sizes for the various time increments ranging from 1 to 5 copies per order through 2000 plus copies per order. An identical pricing document was included for the additional optional year. A total of 1872 prices for the basic and optional year were required to be stated in the Attachment B matrix. A provision preceding the matrix stated, "The contractor shall be reimbursed in accordance with the rates specified below."

Paragraph 26 of the Additional Solicitation Instructions and Conditions, entitled "Evaluation of Bids," stated that the option prices quoted by bidders would be considered in the evaluation; that any bid "materially unbalanced as to prices for basic and option quantities may be rejected as non-responsive;" and that the estimated require-

ments set out in the evaluation schedules are estimates only not to be interpreted as a "guarantee or representation as to actual quantities of work that will be ordered under the resulting contract." With respect to the prices required of bidders, paragraph 26 stated that "Bids should contain prices for all items as set forth in Attachments A and B" (Attachment A referring to the "Production Services" portion of the invitation).

Annexes 1 and 2 were included in the invitation for evaluation of the first and second year prices. These evaluation schedules contained estimated requirements based upon paragraph 24, quoted above, and also contained random time and size of order increments to cover orders for "special" distribution requirements. The latter was done on a random basis because the "special" ordering requirements would not comprise a significant portion of the duplication and distribution services required under the contract and it was not known which of the various time and size of order increments would actually be purchased under the contract.

For each time and size of order increment listed in the evaluation schedules, there was an estimate of the number of tapes that the contractor might be called upon to duplicate during the year. These estimates, entitled "Bid Computation Quantities," were to be multiplied by the unit prices quoted by bidders in order to determine the total price for each item. The evaluation schedules for basic and option portions together contained 76 estimated total prices, as compared to the 1872 unit prices required of bidders in the Attachment B matrix. The contracting officer's statement, with regard to the 38 items comprising each evaluation schedule, states that "Five of these 38 selections represent approximately 98% of NASA's anticipated needs." It should be mentioned, however, that, while the "special" services constitute only 2% of anticipated needs, those services are essential in order to achieve the ends sought by the contract as one of those ends is the publicizing of special events as they occur. Therefore, while it may be that the length and number of special event tapes cannot be forecast with any degree of accuracy, it is apparently anticipated that there will be a need for them during the contract term.

Bids were received from 3 of the 23 sources solicited. The bidders and their corrected evaluated bid prices (all contained correctable arithmetical errors) are set out below:

Lion Recording Services, Inc.	$112,681.64
Rodel Audio Services	$120,231.00
Capital Recording Company, Inc.	$120,890.00

The bid of Lion Recording Services, Inc., was incomplete in that, while prices were quoted for all items in attachment A ("Production

Services") and for the Attachment B evaluation schedule discussed above (Annexes 1 and 2), the Attachment B matrix, except for 16 of the 1872 unit prices requested, was not completed. On the ground that this omission by Lion constituted a material deviation from the invitation terms, the Lion bid was rejected as nonresponsive.

This action was protested by Lion by letter dated March 11, 1970. Additionally, a protest against an award to Rodel was received on March 16, 1970, from Capital Recording Company, Inc., on the ground that the Rodel bid was "unbalanced" contrary to the invitation prohibition against unbalancing quoted above. Capital also questioned the inclusion in the "Production" portion of the invitation of several items for which no prices are required because of the uncertainty whether a need for those items would arise during the contract term with regard to which the invitation provides, with one exception, that prices will be negotiated if and when the need arises. Finally, Capital complains that the second year option prices should not properly have been considered in bid evaluation.

On the question of the unbalancing complained of by Capital, it should be stated initially that the invitation provision with regard to unbalancing refers to unbalancing between the basic or first year bid prices and those quoted for the second year option. Inasmuch as Rodel quoted option prices identical to the prices quoted for the basic portion of the bid, the unbalancing provision in the invitation is not for application.

With regard to the consideration of the second year option portion of the invitation in bid evaluation, it is observed that the evaluation of options clause set out in the instant invitation is identical to the one set out at Armed Services Procurement Regulation 1–1504(d)(ii), which permits such evaluation in order to preclude "buy in" bidding, i.e., the submission of unrealistically low prices for the basic portion coupled with unrealistically high prices for the option portion. Also, the mention of items for which no prices are requested would not appear to be prejudicial as such mention in effect merely advises bidders of the possibility of a later contract modification if the need for those items arises.

With respect to the Lion bid, we believe that the contracting officer was correct in rejecting it as nonresponsive. The invitation contemplated a requirements contract in which the unit prices for the tapes would depend upon the number of minutes of tape and the quantity ordered each time. In this regard, as noted above, the invitation advised bidders to bid on all items in the matrix and that the contractor would be reimbursed in accordance with the rates quoted in the matrix. By not quoting prices as required, Lion left the con-

tracting agency without any fixed-unit price commitment for almost 1,800 out of the 1,872 combinations upon which prices were solicited.

As indicated above, the selection for the special services in the bid evaluation sheets was made on a random basis with no real assurance that the number of minutes of tape or the number of copies of tape per order selected for evaluation would be the same under the contract. It is conceivable that the number of minutes of tape and the number of copies per order for special services under the contract could vary from the numbers included in the evaluation sheets, in which event combinations might be required for which no price was stated. Thus, there is a real likelihood that several thousand tapes may be ordered in the special category if the evaluation schedules are followed, and these may come within any of the numerous combinations of tape times and size of orders included in the matrix, but not in the evaluation schedules. Further, it should be noted that, while the "frequency of requirements" provision with respect to the regular distribution estimated that approximately 1,600 14½-minute programs would have to be duplicated each month, the evaluation sheets did not provide for evaluation on that category, but rather upon a category of 1,001 to 1,500 copies per order to cover the 19,200 copies that it was estimated might be required in the course of a year.

The total estimated quantity on each evaluation sheet for the five combinations said to represent 98 percent of the agency's needs is 165,600 units. The 19,200 units for which there are no prices for 1,600 copies per order represent more than 11 percent of that total.

NASA Procurement Regulation 2.405 provides for the waiver of defects in bids when their significance as to price, quantity, quality or delivery is trivial or negligible when contrasted with the total cost or scope of the supplies or services being procured. However, as demonstrated above, the omission in the Lion bid affects a substantial quantity of the tapes which, it is contemplated, will be purchased. With respect to the orders for the special services not included in the evaluation schedules, see 40 Comp. Gen. 321 (1960) where there was upheld the responsiveness of a bid omitting a price for one isolated and inconsequential item not included in the bid evaluation for a requirements contract. However, in that decision, we indicated that we had serious reservations that a bid omitting prices for all items excluded from evaluation would be responsive.

Another question for resolution is whether the evaluation method used in the invitation comports with the statutory and regulatory requirement for free and open competition. In this regard 10 U.S.C. 2305(a) requires that "specifications and invitations for bids shall permit such free and full competition as is consistent with the procure-

ment of the property and services needed by the agency concerned." Implicit in this statutory provision is, we think, the requirement that in an indefinite quantity procurement care be taken to assure that any bid evaluation basis be designed so as to assure that a reasonable expectation exists that an award to the lowest evaluated bidder will result in the lowest cost to the Government in actual performance.

Thus, our Office has held an evaluation basis which encourages the submission of unbalanced bids, i.e., "bids based on speculation as to which items are purchased more frequently or in greater quantity than others," is inappropriate. 44 Comp. Gen. 392, 396 (1965). In this vein, we have sustained the cancellation of an invitation where the evaluation basis employed would have resulted in paying higher prices to the low bidder as evaluated than would have been secured from the evaluated second low bidder. B-162389, December 19, 1967. 44 Comp. Gen. 392, cited above, involved a contract for various printing services in which prices were required for 328 bid items but instead of stating estimated quantities for those items, the invitation advised bidders that a model printing job comprised of only a few of the priced items and not provided to bidders would be used for evaluation. While the primary reason for finding the invitation faulty in that case was the fact that bidders were not sufficiently advised of the evaluation bases, a secondary, and in our opinion equally important, reason for directing that the invitation be canceled was that "there would be no assurance that award would be made to the lowest aggregate bidder since a bidder could be low on the basis of the 'model job' evaluation and yet be high in the aggregate."

For reasons set out below, we must conclude that the evaluation formula as contained in Annexes 1 and 2 permitted unbalancing of bids to the extent that there is doubt that an award to Rodel would result in the lowest ultimate cost to the Government. As indicated above, Annexes 1 and 2, in addition to setting out estimated quantities for the five frequently ordered items mentioned in the contracting officer's statement, also set out estimated quantities for 33 items in each annex representing random examples from the Attachment B matrix of the various time and size of order increments for infrequently ordered, or "special" items. There is no indication in the file furnished us or in the invitation that the 33 infrequent or "special" items for which estimated quantities are set out in the Annex 1 and 2 evaluation schedules will actually be ordered or that they will be ordered any more frequently than the combinations in the Attachment B matrix for which no prices are quoted on the evaluation schedules. In fact, we have been informally advised that while 33 combinations were included in the evaluation schedules in order to provide some repre-

sentation for purposes of evaluation of the "special" combinations to be ordered from time to time under the contract, their inclusion in the evaluation schedule is not an indication that they will in fact be ordered in preference to other items not so included.

An analysis of the prices quoted by Rodel in the Attachment B matrix reveals that significantly lower prices are offered for time increments of Attachment B matrix combinations included in the evaluation schedule as opposed to prices offered for time increments of the same size order not included in the evaluation schedule. For example, for an order of 601 to 700 copies of an 18 to 19 minute program, a nonevaluated item, the Rodel unit price is $0.58 and the Rodel unit price for 601 to 700 copies of a 20 to 21 minute program, also a nonevaluated item, is $0.62. The Rodel unit price for 601 to 700 copies of a 19 to 20 minute program, an evaluated item with an estimated number of orders of 650, however, is $0.18. The Capital unit prices for 601 to 700 copies show a price progression as the time increments increase in that its prices are $0.25 for the 18 to 19 and 19 to 20 minute programs and $0.30 for the 20 to 21 minute programs. Similarly, Rodel unit prices for 801 to 900 copies of a nonevaluated 28 to 29 minute program, an evaluated 29 to 30 minute program, and a nonevaluated 30 to 35 minute program run $0.60, $0.22, and $0.62, respectively, while Capital's prices are $0.30, $0.30, and $0.40. If the Rodel unit prices to be evaluated for the two examples set out above were computed on the basis of the lowest price for the nonevaluated program lengths immediately preceding and succeeding the item to be evaluated, the evaluated Rodel bid price would be increased by some $583. If we similarly compare the Rodel prices quoted on the matrix for each combination just above or just below the combination provided for evaluation in the annex, the evaluated Rodel price would be increased by more than $1,000. In other words, if the Government's needs with regard to program length of infrequent, or "special," programs were to vary by as little as one minute from the program lengths randomly picked for evaluation, and if the evaluation estimates of the number of orders for those items proved accurate, the Government's cost would be increased by more than $1,000. Inasmuch as only the amount of $659 separates the Rodel and Capital bids and the infrequent services were selected from the matrix for the evaluation schedule on a random basis which would not necessarily conform to the actual requirements, we conclude that the evaluation schedule does not provide reasonable assurance that the evaluated low bidder will actually provide the Government with the lowest ultimate price.

In reaching this conclusion, we are not unmindful of the fact that purchase orders for "special" items under the current contract totaled

approximately $400 last year and that the contracting officer has reported that the amount to be ordered under the instant invitation next year will probably be slightly less. However, if that is a correct statement, then the evaluation schedule would be further defective for failing to provide a proper estimate, since, at the bid prices listed by Rodel, the cost of the infrequent services totals some $1,200.

In view of the foregoing, the invitation should be canceled as not complying with 10 U.S.C. 2305(a).

As requested, the file is returned herewith.

[B-169562]

Subsistence—Per Diem—Illness, Etc.—Hospitalized for Personal Convenience

An employee authorized to travel away from his duty station to undergo a physical examination to determine if he is qualified to perform the duties of his position who is hospitalized immediately and remains away from his duty station 9½ days is only entitled to the 1½ days' per diem considered the normal time to travel and receive the required physical examination. The per diem authorized by section 6.5 of the Standardized Government Travel Regulations for an employee incapacitated due to illness beyond his control does not include hospitalization for personal convenience while in a travel status. Therefore, the travel of the employee not involving official business in the usual sense and absent an urgency for immediate hospitalization, the employee is not considered incapacitated while away from his duty station and he is not entitled to per diem for the period of hospitalization.

To Harold J. Farrall, United States Department of the Interior, May 22, 1970:

This is in reply to your letter of April 10, 1970, reference 7–360, requesting a decision as to whether you may certify for payment a voucher for $237.50 in favor of Mr. George T. Missing, an employee of your agency, under the circumstances stated below.

Mr. Missing was directed to proceed by Government vehicle from his duty station at Salida, Colorado, to Denver, Colorado, to receive a physical examination to determine if he was qualified to perform the duties of his position. Mr. Missing traveled to Denver on March 2, 1970. He received his examination that day and ordinarily would have returned to his duty station the following day. However, the examining doctor sent him to surgery. As a result thereof he was hospitalized and did not return to his duty station until March 11, 1970. Section 6.5 of the Standardized Government Travel Regulations permits payment of per diem up to 14 days when an employee is incapacitated due to illness and Mr. Missing is claiming per diem for the full 9½ days he was away from his permanent duty station. You question the propriety of paying the amount claimed since Mr. Missing normally would have been allowed only 1½ days per diem.

An agency may use appropriated funds to defray the costs of physical examinations of its employees when such examinations are primarily for the benefit of the Government rather than for the benefit of the employees. 41 Comp. Gen. 531 (1962), and B–155489, December 10, 1964. Also, when physical examinations are primarily for the benefit of the Government, the employees may be granted administrative leave for reasonable amounts of time required for such examinations but not for periods of hospitalization resulting therefrom. 44 Comp. Gen. 333 (1964). Likewise travel expenses and per diem may be allowed when travel is required in connection with physical examinations of employees primarily for the benefit of the Government.

Section 6.5 of the Standardized Government Travel Regulations stems from the provisions of Public Law 482, 81st Congress, approved April 26, 1950, now codified at 5 U.S.C. 5702(b) which reads as follows:

> Under regulations prescribed under section 5707 of this title, an employee who, while traveling on official business away from his designated post of duty, becomes incapacitated by illness or injury not due to his own misconduct is entitled to the per diem allowances, and transportation expenses to his designated post of duty.

In explaining the quoted provisions the House Committee on Expenditures in the Executive Departments stated in H. Rept. No. 1332, August 25, 1949, that:

> It is not contemplated that civilian officers and employees should be deprived of per diem allowances and transportation expenses because they have had the misfortune to become ill or injured, not due to their own misconduct, while traveling on official business and away from their designated posts of duty. * * *

Inherent in the law and its explanation is the concept that the absence from duty on account of illness or injury while in a travel status must be an absence over which the employee reasonably has no control. The statute speaks in terms of one who "becomes incapacitated by illness or injury." Section 6.5 of the regulation likewise is restricted to situations of incapacity. It is not consistent with this concept to allow per diem to an employee who chooses for reasons of personal convenience to hospitalize himself while in a travel status, but who reasonably would be expected to attend to his medical needs at his designated post of duty.

In the instant case, while the travel was performed for an official purpose, it was not performed to transact official business in the usual sense of carrying out a work assignment, but rather was for the express purpose of ascertaining the employee's physical condition. The record does indicate that the surgery involved was "urgent," but there is no indication that it was required as an immediate emergency measure due to circumstances that arose after Mr. Missing arrived in Denver and that it could not reasonably have been postponed. In short,

it does not appear that Mr. Missing was incapacitated while in Denver in the sense contemplated by the governing authorities. Under such circumstances we are of the opinion that there is no authority to pay per diem after 1½ days which you state is the normal time to travel and receive the required physical examination.

In view of the above, the voucher which is returned herewith should be adjusted and certified for payment in accordance with the above.

[B-169738]

Pay—Increases—Comparable to Classified Employees—Adjustment

The retroactive application of the comparable upward adjustment authorized by Public Law 90-207, in the monthly basic pay of members of the uniformed services having been prescribed for members "on active duty on the date of enactment" of any compensation increase received by Federal classified employees, the adjustment is not authorized for members of the National Guard or a Reserve component performing drills and other inactive duty compensable under 37 U.S.C. 206. Therefore, the retroactive effective date of January 1, 1970 prescribed by Executive Order No. 11525 for application of the compensation increase authorized for civilians by Public Law 91-231, enacted April 15, 1970, to members of the uniformed services, does not apply to a member in a drill status on that date who had performed in a status different than prescribed in 37 U.S.C. 206 prior to that date or to a member who performed drills during the retroactive period but was not in a drill status on April 15, 1970.

To the Secretary of Defense, May 22, 1970:

Reference is made to letter dated May 1, 1970, from the Assistant Secretary of Defense (Comptroller) concerning two questions which have arisen in the implementation of the military pay increase of 1970. The questions, together with a discussion pertaining thereto, are set forth in Department of Defense Military Pay and Allowance Committee Action No. 441 which was enclosed.

The questions presented are as follows:

1. Is a member who was in a "drill pay status" on April 15, 1970, and who performed active duty or active duty for training prior to that date but subsequent to December 31, 1969, entitled to a retroactive increase in basic pay for such active duty or active duty for training?
2. Is a member who was on active duty or active duty for training on April 15, 1970 but who was not in a drill pay status on that date entitled to a retroactive increase for drills performed after December 31, 1969 but prior to April 15, 1970?

Section 2(a)(1) of the Federal Employees Salary Act of 1970, Public Law 91-231, April 15, 1970, 84 Stat. 195, authorized a 6 percent increase in the rates of compensation for general schedule Federal classified employees, and other employees there mentioned. The increase was made retroactive to the first day of the first pay period which began on or after December 27, 1969, as provided in section 9(a) of that act. Section 5(a) of the 1970 act provides as follows:

(a) *Retroactive pay, compensation, or salary shall be paid by reason of this Act only in the case of an individual in the service of the United States (includ-*

ing service in the Armed Forces of the United States) or the municipal government of the District of Columbia on the date of enactment of this Act, except that such retroactive pay, compensation, or salary shall be paid—

(1) to an officer or employee who retired, during the period beginning on the first day of the first pay period which began on or after December 27, 1969, and ending on the date of enactment of this Act, for services rendered during such period; and

(2) in accordance with subchapter VIII of chapter 55 of title 5, United States Code, relating to settlement of accounts, for services rendered, during the period beginning on the first day of the first pay period which began on or after December 27, 1969, and ending on the date of enactment of this Act, by an officer or employee who died during such period.

Such retroactive pay, compensation, or salary shall not be considered as basic pay for the purposes of subchapter III of chapter 83 of title 5, United States Code, relating to civil service retirement, or any other retirement law or retirement system, in the case of any such retired or deceased officer or employee. [Italic supplied.]

A comparable upward adjustment in the monthly basic pay of members of the uniformed services, whenever the general schedule of compensation for Federal classified employees is adjusted upward, is authorized by section 8(a) of the act of December 16, 1967, Public Law 90–207, 81 Stat. 649, 654, 37 U.S.C. 203 note. Section 8(b)(2) provides that any such adjustment shall carry the same effective date as that applying to the compensation adjustments provided general schedule employees. It is indicated that, computed under the formula in section 8, the "comparable upward adjustment" in basic pay for members of the uniformed services amounts to 8.1 percent. Section 7 of the 1967 act provides as follows:

SEC. 7. *This Act becomes effective as of October 1, 1967.* However, a member, except as provided in section 6 of this Act, *is not entitled to any increases in his pay and allowances* under section 1 or section 4 for any period before the date of enactment of this Act *unless he is on active duty on the date of enactment of this* Act. In addition, a member of the National Guard or a member of a Reserve component of a uniformed service *who is in a drill pay status on the effective date of this Act is entitled to have any compensation to which he has become entitled under section 206 of title 37, United States Code, after September 30, 1967, computed under the rates of basic pay prescribed by section 1(1) of this Act.* [Italic supplied.]

Section 206 of Title 37, U.S. Code, referred to in section 7 of the 1967 act, authorizes pay for inactive duty training (drills or other equivalent periods of training, instruction, duty, or appropriate duties) for members of the National Guard and of the Reserve components of the uniformed services. Section 206(a) provides as follows:

Reserves; members of National Guard: inactive-duty training

(a) Under regulations prescribed by the Secretary concerned, and to the extent provided for by appropriations, a member of the National Guard or a member of a reserve component of a uniformed service who is not entitled to basic pay under section 204 of this title, is entitled to compensation, at the rate of 1/30 of the basic pay authorized for a member of a uniformed service of a corresponding grade entitled to basic pay, for each regular period of instruction, or period of appropriate duty, at which he is engaged for at least two hours, including that performed on a Sunday or holiday, or for the performance of such other equivalent training, instruction, duty, or appropriate duties, as the Secretary may prescribe.

In implementing the 1970 act, in conjunction with the 1967 act, the President adjusted upwards the rates of monthly basic pay for members of the uniformed services, the new rates being set forth in section 1 of Executive Order No. 11525 dated April 15, 1970, effective January 1, 1970. Section 2 of the same Executive order provides as follows:

(a) A person who became entitled after December 31, 1969, but before the date of enactment of the Federal Employees Salary Act of 1970, to payment for items such as lump-sum leave, reenlistment and variable reenlistment bonus, continuation pay, any type of separation pay, or six months death gratuity, shall not be entitled to any increase in any such payment by virtue of this order.

(b) Authority to prescribe other rules for payment of retroactive compensation shall be exercised for the uniform services by the Secretary of Defense. Entitlement to retroactive pay under such rules shall be subject to the provisions of section 5 of the Federal Employees Salary Act of 1970, and shall conform as nearly as may be practicable to the provisions of Section 7 of the Act of December 16, 1967, 81 Stat. 654.

Pursuant to section 2(b) of Executive Order No. 11525, the Deputy Secretary of Defense in a memorandum for the Assistant Secretary of Defense (Comptroller) dated April 21, 1970, prescribed certain rules implementing that order. Rule 2 in the Deputy Secretary's memorandum reads, in pertinent part, as follows:

2. A person is not entitled to any increase in his basic pay by virtue of that Order for any period before April 15, 1970 unless he was on active duty on that date. * * * In addition, a member of the National Guard or a member of a reserve component of a uniformed service who was in a drill pay status on April 15, 1970 is entitled to have any compensation to which he became entitled under section 206 of title 37, United States Code, after December 31, 1969, computed under the rates of basic pay prescribed by section 1 of that Order.

It is stated in the committee action discussion that as to members in a "drill pay status" on April 15, 1970, doubt has arisen as to whether such members also are entitled to a retroactive adjustment for active duty or active duty for training performed after December 31, 1969, but before April 15, 1970. It is pointed out that under section 7 of the 1967 act, a member in a drill pay status was entitled to a retroactive adjustment in any compensation to which he became entitled "under section 206 of Title 37, United States Code," which relates to inactive duty training drills. The view is expressed that the reference to "section 206" was not intended as a limitation but rather was merely intended to identify the provision of law under which a member if in a drill pay status was paid.

The phrase "in the service of the United States * * * on the date of enactment of this Act" as used in section 5(a) of the Federal Employees Salary Act of 1970 is substantially the same as the language used in section 218(a) of the Federal Salary Act of 1967, Public Law 90-206, approved December 16, 1967, 81 Stat. 624, 638. In this connection and in support of the committee's view that the questions preseuted should be answered in the affirmative, there is cited 47 Comp.

Gen. 386 (1968), involving the case of a civilian employee who resigned from one agency on Friday, December 15, 1967, and entered on duty with another agency on Monday, December 18, 1967.

In that decision we concluded that in view of the intervening period of nonworkdays between separation in one agency by resignation and appointment in another, the employee may be considered "in the service of the United States" within the purview of section 218(a) of the 1967 act. Since the holding in 47 Comp. Gen. 386 (1968) was not concerned with the specific provisions of section 7 of the 1967 Military Pay Act, we find little in that decision which would form a basis for deciding the questions in the committee action.

As pointed out above, section 2(b) of Executive Order No. 11525 requires that entitlement to retroactive pay shall be subject to the provisions of section 5 of the 1970 act and "shall conform as nearly as may be practicable to the provisions of Section 7 of the Act of December 16, 1967, 81 Stat. 654." Under section 7 of the 1967 act and rule 2 of the memorandum of the Deputy Secretary of Defense, dated April 21, 1970, a member of the National Guard or a member of a Reserve component who was in a "drill pay status" on April 15, 1970, is entitled to have any compensation to which he became entitled under "section 206 of Title 37, United States Code," after December 31, 1969, computed under the rates of basic pay prescribed by section 1 of Executive Order No. 11525.

Section 206 of Title 37 does not provide for payment of compensation or basic pay for the performance of "active duty or active duty for training." Rather, that section authorizes the payment of basic pay for inactive duty training drills, etc., performed in compliance with regulations issued under its provisions. It seems to us that had Congress intended to enlarge the scope of section 7 of the 1967 act to include a pay increase for members of the National Guard or Reserve components who performed active duty or active duty for training after October 1, 1967, and before December 15, 1967 (December 31, 1969, and before April 15, 1970, under the 1970 act) and who were in a "drill pay status" on December 15, 1967 (here April 15, 1970), appropriate language would have been used to accomplish such a result. Such increase in basic pay for active duty was authorized only when the member involved was "on active duty on the date of enactment of this Act."

In support of the above conclusion see the remarks of the Chairman of the House Armed Services Committee on page 5434 of committee hearings (No. 27) dated October 17, 1967, on H.R. 8197 and H.R. 13510—which became the act of December 16, 1967—that "There has also been included language which will make clear that reservists will

be entitled to drill pay computed at the higher basic pay tables for drills performed on or after October 1, 1967." See, also, the analysis of section 8 [7] on page 35 of H. Rept. No. 787 dated October 17, 1967, to accompany H.R. 13510, and the analysis of section 7 on page 21 of S. Rept. No. 808 dated November 28, 1967, on the same bill.

In the light of the above, it is our view that in the absence of some other specific statutory authority, there is no basis to authorize a retroactive increase in basic pay, other than that received under section 206 of Title 37, for a member of the National Guard or a member of a Reserve component who was in a "drill pay status" on April 15, 1970, but who performed active duty prior to that date (January 1 to April 14, 1970) in a status different from that prescribed in section 206 of Title 37. Accordingly, question 1 is answered in the negative. For the same reasons, and since the member in question 2 was not in a "drill pay status" on April 15, 1970, that question is also answered in the negative.

[B-155458]

Pay—Retired—Fleet Reservists—Enlisted Member Temporary Officer

Although 10 U.S.C. 5001(a)(4) excludes a member holding a permanent enlisted grade and a temporary appointment in a commissioned or warrant officer grade from the term "enlisted member," such a member's enlisted status was not prejudiced by the fact that he held a temporary officer appointment and he may apply for transfer to the Fleet Reserve under 10 U.S.C. 6330 while serving as a temporary officer. 10 U.S.C. 6330(c) does not require a member actually to be paid on the basis of his enlisted grade on the day of transfer to the Fleet Reserve, and payment as a temporary officer on that day does not change the fact that retainer pay is for computation on the basis of a member's enlisted grade. If a member is advanced to pay grade E-8 or E-9 at the time of reverting to his enlisted grade for simultaneous transfer to the Fleet Reserve, he may be paid at the higher grade, as the limitation imposed on the number of such grades has reference to active duty members.

To the Secretary of the Navy, May 26, 1970:

Further reference is made to letter dated February 10, 1970, from the Office of the Assistant Secretary of the Navy, Financial Management, requesting a decision on several questions concerning the rights of temporary officers who revert to a permanent enlisted grade on the date of transfer to the Fleet Reserve under the provisions of 10 U.S.C. 6330.

It is stated that the Chief of Naval Personnel accepts applications for transfer to the Fleet Reserve and retainer pay entitlement under 10 U.S.C. 6330 from temporary officers with permanent enlisted grades. In this connection, it is stated that orders are issued by the Chief of Naval Personnel directing that the temporary appointments of these members terminate and that the members revert to their permanent enlisted status at 2400 hours on the date of transfer to the Fleet

Reserve. In some of the cases, it is pointed out, members have been advanced (from the permanent enlisted grades held immediately prior to their temporary appointments) to higher enlisted grades, effective on the date of transfer to the Fleet Reserve. It is also stated that the majority of these cases involve advancements from pay grades E–7 to pay grades E–8 or E–9.

As a result of these actions, it is reported that the members have received active duty pay and allowances based on their temporary officer ranks through the date of transfer to the Fleet Reserve but have been so transferred in the highest enlisted grades. In this connection, it is said that they merely held those grades while concurrently serving as a temporary commissioned or warrant officer on active duty.

The letter refers to the term "enlisted member" as defined in 10 U.S.C. 5001(a)(4), to mean "a member of the naval service serving in an enlisted grade or rating. It excludes, unless otherwise specified, a member who holds a permanent enlisted grade and a temporary appointment in a commissioned or warrant officer grade." It is pointed out that unlike section 6326 (a) and (b) of Title 10, which governs the voluntary retirement of enlisted members after completing 30 or more years of active service, section 6330(b) does not specifically include an enlisted member of the Regular Navy who holds a permanent enlisted grade and a temporary appointment in a commissioned or warrant officer grade.

It is also stated that while it does not appear to be the intent of 10 U.S.C. 6330(c), a literal interpretation of that law would mean that the retainer pay of the members discussed above should be based on the basic pay that they were receiving as temporary officers on the date of transfer to the Fleet Reserve. Also, we are asked to consider the statutory limitation imposed in 10 U.S.C. 517 on the number of persons who can hold the two highest enlisted grades.

The following questions are asked:

a. In view of the restriction in 10 USC 5001(a)(4), can a member whose permanent status is enlisted apply for transfer to the Fleet Reserve while serving as a temporary officer?

b. Is it necessary that a member actually be paid the active duty basic pay of his permanent enlisted grade in the Fleet Reserve on the day of transfer to same in order to receive retainer pay based on that grade?

c. Are the limitations contained in 10 USC 517 a factor to be considered in determining the rate of basic pay to be used in the computation of retainer pay for members who have been promoted to pay grades E–8 and E–9?

Section 6330(b) of Title 10—which was derived from section 204 of the Naval Reserve Act of 1938, 52 Stat. 1179, as amended—provides that "An enlisted member of the Regular Navy or the Naval Reserve who has completed 20 or more years of active service in the armed forces may, at his request, be transferred to the Fleet Reserve." This provision also applies to enlisted members of the Regular Marine Corps

or the Marine Corps Reserve. The term "enlisted member" is defined in 10 U.S.C. 5001(a)(4) for purposes of subtitle C of Title 10, which includes section 6330(b), as follows:

(4) "Enlisted member" means a member of the naval service serving in an enlisted grade or rating. It excludes, unless otherwise specified, a member who holds a permanent enlisted grade and a temporary appointment in a commissioned or warrant officer grade.

It would seem from the definition in section 5001(a)(4) that in the absence of a specific provision in section 6330(b) to include a member who holds a permanent enlisted grade and a temporary appointment in a commissioned or warrant officer grade, there would be no authority for an enlisted member to apply for transfer to the Fleet Reserve while serving as a temporary officer. However, such a construction would tend to nullify the provisions of 6330(b) insofar as enlisted members holding such a dual status are concerned and we doubt that Congress intended such construction. It seems that a prerequisite for transfer to the Fleet Reserve under section 6330(b) is that the member have an enlisted status at the time of transfer. *Cf.* 39 Comp. Gen. 324, 328 (1959).

The situation described above indicates that the member continues to hold his enlisted status while serving as a temporary officer. The mere fact that he is serving as a temporary officer would not abridge his rights as an enlisted member. In this connection, while the submission does not show under what authority the temporary appointments as officers were made, there is for noting that if temporary appointments are made under 10 U.S.C. 5596 or 5597, the law provides in subsections (f) and (h) of those sections, respectively, that such appointments "do not change the permanent, probationary or acting status of members so appointed, prejudice them in regard to promotion or appointment, or abridge their rights or benefits." For these reasons, we see no basis to conclude that 10 U.S.C. 5001(a)(4) was intended to preclude an otherwise qualified member whose permanent status is enlisted from applying for transfer to the Fleet Reserve while serving as a temporary officer. Question "a" is answered in the affirmative.

For the purpose of computing retainer pay of enlisted members who transferred to the Fleet Reserve the law provides in 10 U.S.C. 6330(c), as amended by section 3(4) of the act of December 16, 1967, 81 Stat. 653, in pertinent part as follows:

(c) Each member who is transferred to the Fleet Reserve or the Fleet Marine Corps Reserve under this section is entitled when not on active duty, to retainer pay at the rate of 2½ percent of the basic pay that he received at the time of transfer multiplied by the number of years of active service in the armed forces, except that in the case of a member who has served as senior enlisted advisor of the Navy or sergeant major of the Marine Corps, retainer pay shall be computed on the basis of the highest basic pay to which he was entitled while so serving, if that basic pay is higher than the basic pay received at the time of transfer. * * *.

While a literal interpretation of section 6330(c) would seem to lend some support to the view that retainer pay should be computed on

the basis of the basic pay that "he received at the time of transfer," which, in the situation here involved, would be the pay of his temporary officer grade, it is quite obvious that the law never intended that retainer pay be computed, except as there stated, on other than the enlisted grade he held at the time of transfer. The enlisted member is transferred to the Fleet Reserve solely in his enlisted status and had Congress intended that retainer pay be computed on other than the pay of his enlisted grade, we believe appropriate language would have been used to express that intent.

It has long been the established administrative practice to pay enlisted members of the Navy and Marine Corps active duty pay and allowances to and including the date of transfer to the Fleet Reserve. In line with that practice we held in 44 Comp. Gen. 584 (1965), in answer to question 3, commenting on our holding in 44 Comp. Gen. 373 (1965), that for a member transferred to the Fleet Reserve or Fleet Marine Corps Reserve who, incident to such transfer, last received active duty pay on September 1, 1964, retainer pay should be computed on the basis of the rates of pay prescribed in the 1964 pay act. In such circumstances, we said that it would seem that the person there considered did not become a member of the Fleet Reserve or the Fleet Marine Corps Reserve until September 2, 1964.

We have held, however, in the case of a Marine Corps Reserve enlisted man in an inactive duty nonpay status at the time of his transfer to the Fleet Reserve, that 10 U.S.C. 6330 does not specifically require as a condition of transfer that the member be then serving on active duty. In construing the provisions of section 6330 we said in 38 Comp. Gen. 793, 795 (1959) that:

> * * * The statute does not provide that the retainer pay be computed at the rates in effect on the date of his last discharge, or his last day of active duty, rather, the statute clearly provides that such pay be computed "at the rate * * * that he received at the time of transfer." While the language of the statute appears to suggest that, generally, regular members and career reservists would be serving on active duty at the time of transfer, the statute does not specifically require as a condition of transfer that the member be then serving on active duty. Considering the purpose of the 1958 act to make reservists eligible for the same retainer and retired pay benefits as regulars, and that by that act it first made reservists eligible therefor, it follows that the Congress intended that such pay should be based on the rate of active-duty pay in effect at the time of transfer, even though the member was not then serving on active duty.

In line with the above decision, it would not be necessary that a member actually be paid active duty basic pay of his permanent enlisted grade in the Fleet Reserve on the date of transfer—the member having been paid active duty pay as a temporary officer through the date of transfer as stated in the submission. Accordingly, question "b" is answered in the negative.

With respect to question "c," 10 U.S.C. 517 provides as follows:

> Except as provided in section 307 of title 37, the authorized daily average number of enlisted members on active duty (other than for training) in an armed force in pay grades E–8 and E–9 in a calendar year may not be more than 2 per-

cent and 1 percent, respectively, of the number of enlisted members of that armed force who are on active duty (other than for training) on January 1 of that year.

The above law prescribes a percentage limitation on the number of enlisted members on "active duty" in pay grades E–8 and E–9. These new pay grades and the percentage limitations were first added by section 1 of the act of May 20, 1958, Public Law 85–422, 72 Stat. 123, 124. Accompanying the letter from the Assistant Secretary's Office there was enclosed a copy of an opinion by the Judge Advocate General of the Navy dated December 29, 1969, concerning the effect of the percentage limitation and, after considering the law and its legislative history, he concluded in part that:

* * * Their reversion to enlisted status would have no effect whatsoever on the balance of the enlisted structure in the ranks of E–8 and E–9 envisioned by the limitations imposed by 10 USC 517 inasmuch as they would not perform in their enlisted capacity and, by excluding them from the computations involved, the frustration of purpose of the E–8/9 legislation described above would be avoided. Accordingly, it is not necessary to include in the daily averages of E–8 and E–9's on active duty, as provided by 10 USC 517, those individuals who revert from temporary officer status to their permanent enlisted status solely for the purpose of a simultaneous transfer to the Fleet Reserve.

We agree with the conclusion that those individuals who revert from their temporary officer status to their permanent enlisted status solely for the purpose of a simultaneous transfer to the Fleet Reserve are not to be considered as coming within the daily average limitation prescribed in 10 U.S.C. 517. For this reason, and since the transferred members are not on "active duty," we do not believe that the percentage limitation should be considered a factor in determining the rate of basic pay to be used in computing the retainer pay for members promoted to pay grades E–8 and E–9 in the circumstances disclosed. Question "c" is answered in the negative.

[B–159680]

Leaves of Absence—Military Personnel—Cancellation of Leave—Travel Expenses

When the leave of absence granted members of the uniformed services is canceled due to emergency conditions brought about by actual contingency operations or emergency war operations, the members may be returned to their permanent duty station at Government expense by the most expeditious means available, regardless of the days of leave authorized or the number of days the members had been in a leave status, and paragraph M6601–1 of the Joint Travel Regulations amended accordingly. The need to recall members to duty cannot be contemplated at the time the leave is authorized, and as an element of public business is present in the emergency return of members to their permanent duty station, payment to the members of the cost of ordered return travel is justified.

To the Secretary of the Navy, May 27, 1970:

Further reference is made to letter of March 31, 1970, from the Assistant Secretary of the Navy, requesting a decision whether paragraph M6601–1, Joint Travel Regulations, may be amended to provide for return of members of the uniformed services on authorized

leave to permanent duty stations at Government expense under the circumstances presented. The request has been assigned Control No. 70–20, by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says that paragraph M6601–1, Joint Travel Regulations, provides authority for reimbursement of travel expenses incurred by a member when on authorized leave of 5 days or more, who is required to return to his permanent duty station for duty within 24 hours after departure therefrom in a leave status because of urgent unforeseen circumstances which require that his leave be canceled. It is proposed to amend that paragraph to provide for the return of members of the uniformed services on authorized leave to permanent duty stations at Government expense when recalled because of actual contingency operations or emergency war operations, regardless of the number of days the members have been in a leave status.

The Assistant Secretary explains that in order to meet the established force generation rates during periods of advanced readiness conditions involving contingency operations or emergency war operations, it is necessary to recall the combat crew members and maintenance personnel from leave status by the most expeditious means available. In those situations he believes that the return of these members should be at Government expense regardless of the number of days of leave authorized or the number of leave days that have elapsed at the time of recall.

Paragraph M6601–1 of the Joint Travel Regulations provides as follows:

> When a member departs from his permanent duty station for the purpose of taking an authorized leave of absence of 5 days or more and, because of an urgent unforeseen circumstance, it is necessary to cancel the member's authorized leave status and recall him to duty at his permanent duty station within 24 hours after his departure therefrom, travel and transportation allowances will be authorized as provided in this Part. Competent travel orders directing return to the permanent station for duty and subsequent return to leave point, if applicable, will be issued in accordance with administrative instructions of the Service concerned.

In 46 Comp. Gen. 210 (1966), we considered the legal propriety of adding the quoted paragraph M6601–1 to the Joint Travel Regulations. In approving the regulations, we stated that travel at Government expense is authorized only for the conduct of public business and that the element of public business has normally been considered as lacking when members of the uniformed services travel primarily for convenience or pleasure in circumstances such as in connection with authorized leave of absence from the performance of military duty. We pointed out, however, that when such leave has been interrupted for the performance of temporary duty away from their permanent station, travel under orders from the leave point or place of receipt of orders to temporary duty station and return to the leave point or to

the permanent duty station, as authorized by paragraphs M4207 and M4257, Joint Travel Regulations, has been regarded as travel on public business.

We stated further that:

> The payment of expenses of travel incurred by the member in returning to his station at the conclusion of the authorized leave period for the resumption of his regular duties clearly is a personal obligation. However, in the circumstances set forth in the proposed amendment to the regulations, where the authorized leave is interrupted and the member required to return to his duty station for the performance of a duty under circumstances not contemplated when the leave of absence was granted, we see little difference between his situation and that of another member whose leave is interrupted for the purpose of performing temporary duty at a point removed from his regular duty station insofar as the presence of the element of public business in the performance of the required travel is concerned.

The emergency conditions brought about by actual contingency operations or emergency war operations as described by the Assistant Secretary requiring the recall of members of the uniformed services on authorized leave to their permanent station by the most expeditious means available would appear to involve circumstances not contemplated when the leave of absence was granted and clearly the element of public business would be present in any travel required to be performed by the members in returning to their duty stations in such cases. Thus, the basis for our approval of the regulations considered in 46 Comp. Gen. 210 is equally applicable to the present proposal and we perceive no justification for denying payment of the cost of the ordered travel to the members who would be covered by the changed regulations contemplated by the present proposal.

Accordingly, we have no objection to the amendment to the regulations as proposed.

[B-136916]

Patents—Devices, Etc., Used by the Government—Preprocurement Licenses

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

To the Administrator, National Aeronautics and Space Administration, May 28, 1970:

Reference is made to your letter of May 6, 1970, enclosing proposed revised regulations dealing with the procurement of patented items by NASA (the so-called preprocurement licensing procedure).

As you indicate the current regulations in this area were issued in October 1966 (NASA PRD No. 66–10 dated October 24, 1966) after consultation with our Office. See 46 Comp. Gen. 205 (1966). In brief, the regulations provide that if a privately owned patent which meets certain requirements of enforceability and commercial acceptance will be infringed by a specific NASA procurement, NASA may take a license under the patent, effective only for the particular procurement involved, and consider the royalty in evaluating competing bids. If an unlicensed bidder is awarded the contract, the patent owner would receive the royalty payment which was considered in evaluating the bids.

In 46 Comp. Gen. 205, cited above, we approved the use of the preprocurement licensing procedure on a trial basis. Thereafter, in a letter to our Office dated March 26, 1968, you reported that NASA experience with the procedure as of that date was limited, consisting of only four specific requests for preprocurement licenses, all of which, for various reasons, had been denied. However, you stated that you proposed to continue with the trial of the licensing procedure for at least an additional year in order to gain more conclusive data on its effectiveness. We indicated no objection, and expressed a desire to receive a further report on the matter. B–136916 dated April 15, 1968.

You now report that since March 1968, four additional requests for preprocurement licenses have been received, one of which has resulted in an executed license agreement. Although you acknowledge that your overall experience with the preprocurement license policy has been quite limited, you nevertheless conclude that it has merit, providing certain changes are made. To this end, you are proposing to make several revisions, the most significant of which are as follows:

(A) Limit the applicability of the procurement license in the area of research and development contracts to those R & D contracts wherein the delivery of hardware or the use of a specific process is contemplated at the time that the proposals are solicited. Proposed Paragraph 9.102–2(d)(2).

The purpose of this is to effectively narrow the applicability of the procedures to those negotiated procurements wherein potential patent infringement exists, excluding such areas as study contracts and other efforts not relevant to patentable subject matter.

We agree with this proposed revision. Case history II in Attachment B to your letter illustrates the difficulty of attempting to apply the preprocurement license policy to a study contract.

(B) A requirement that the initial filing of a request for a license be in writing. The patent owner must file timely *written* notice. Proposed Paragraph 9.102–2(a).

The purpose of this proposed revision is to avoid ambiguities in the initial filing of the license request. We fully indorse this proposal.

(C) A provision that the contracting officer in his discretion may delay bid opening for a period of time to allow evaluation of a preprocurement license request. Proposed Paragraph 9.102–2(c).

You state that such a provision is necessary in those cases where an application for a license is received just prior to bid opening. In some cases the contracting officer may decide it is not in the best interest of the Government to delay bid opening, and he would be required to document his reasons therefor and notify the patent owner. However, the proposed revision would permit the contracting officer to delay the procurement in those cases where he decides that the license request should be investigated. You anticipate that this delay would be on the order of 1 or 2 weeks. We approve of the proposed revision.

(D) A change in the regulation to provide that the royalty rate proffered be "reasonable under the circumstances." Proposed Paragraph 9.102-2(a)(3).

The initial regulation provided as a prerequisite that the patent owner must offer to license NASA for the proposed procurement at a royalty which in no event could exceed the lowest rate at which he had licensed a private concern. You feel that this requirement is too harsh in some cases. As an example, you cite the case where a number of companies enter into "cross-licensing" agreements whereby a number of patents are interlicensed among the parties executing the agreement at a very low royalty rate. You state that the low rate is generally attributable to the benefits conferred, the number of patents involved, and the desire of the respective companies to cooperate with certain segments of their industry. Further, you report that many private license agreements exist which involve very large numbers of patented items, and that in such instances it is common to negotiate a lower royalty rate per item than would be the case if only a few items were involved, such as in a NASA procurement. In the above examples, you see no good reason why the patent owner must be forced to accept a reduced royalty which was negotiated under different circumstances. You conclude that the only fair criterion in all cases is that of "reasonableness" as now proposed in the revised procedures.

For the reasons set forth, we agree with the proposed 9.102-2(a)(3). However, we recommend further language in (a)(3) as italicized below:

(a)(3) The patent owner agrees to license NASA for the proposed procurement at a rate which is reasonable under the circumstances. *Generally such rate should not exceed the lowest rate at which the patent owner has licensed a private concern. If the contracting officer agrees to a higher rate, he should document the reasons therefor.*

(E) A statement in the regulations that before patent royalties are considered as a factor in contract award, each bidder/offeror will have an opportunity to demonstrate that performance of the contract in accordance with his bid or offer will not result in infringement of the asserted patent. Proposed Paragraph 9.102-2(c).

You state that evidence so submitted will be considered by NASA patent counsel in evaluation of the license request; but that the final

determination on the issue of infringement will be in the hands of your agency. We have no objections to this proposed change.

(F) An amendment in the regulations to exclude from consideration any patent which forms the basis of an unresolved administrative claim against any Government agency. Proposed Paragraph 9.102–2(a)(1).

The reason for this proposed revision is self-evident, and we have no objection.

In addition to the above, other revisions are proposed, but these are relatively minor in nature and with one exception need not be mentioned. The one exception is covered in Proposed Paragraph 9.102–1 and in Part I of the proposed "Patent Royalties" clause and deals with the situation wherein the Government is already a licensee under a patent at the time a solicitation is issued. The proposed revision properly makes it clear that the royalties applicable to the proposed procurement which the Government will be required to pay under an existing patent license agreement will be included as an evaluation factor. See also Armed Services Procurement Regulation 1–304.3 to the same effect.

We appreciate the opportunity to review this proposed coverage.

[B–168958]

Contracts—Awards—Small Business Concerns—Size—Affiliates of Large Business Concerns

Although a challenge after contract award to the status of the successful concern that had certified itself to be a small business concern pursuant to section 1–1.703–1(a) of the Federal Procurement Regulations was made too late to affect the validity of the award, on the basis that prior to award, the concern had entered into a binding agreement of sale for its acquisition by a large business concern, termination of the contract would be appropriate. The record evidences a valid and enforceable contract for the acquisition of the 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 the nature of control through agreements to merge, applies to the procurement, and the award is considered not to have been made to a small business concern.

To the Administrator, General Services Administration, May 28, 1970:

By letter dated February 25, 1970, the General Counsel furnished our Office with a report on the protest of the BernzOmatic Corporation against the award of a contract to the Turner Corporation under invitation for bids No. FPNTP–A8–70628–A–10–22–69, issued by the Federal Supply Service, Region 3, Washington, D.C. The Small Business Administration (SBA) reported to our Office concerning this matter on February 26, 1970, and again on April 10, 1970.

The invitation was issued on October 1, 1969, and bids were opened on October 22, 1969. Two items were covered by the invitation, the second being a propane gas torch kit used for soldering and other purposes. The contemplated contract or contracts were to be of the

requirements type for the period from March 1, 1970, or the date of award (whichever was later) through January 31, 1971. With respect to item 2, the quantity estimated by the Government for the contract period was 35,200; the guaranteed minimum quantity was 5,000 units. Paragraph 21 of the invitation reserved both items for small business participation exclusively. That paragraph also contained the following "NOTICE CONCERNING SIZE STATUS":

Any bidder who has a question as to whether he is or is not a small business concern shall contact the nearest office of the Small Business Administration for guidance and assistance.

The Small Business Representation appearing on page 2 of the solicitation is a material representation of fact upon which the Government relies when making award. If it is later determined that the Small Business Representation was erroneous, and the contractor was not a small business concern on the date of award of this contract, the contract may be canceled by the Government and the contractor charged with any damages sustained by the Government as a result of such cancellation.

Of the five bids received as to item 2, Turner's was the lowest at $4.32 per kit, while the protestant's offered unit price was $4.38. The two low bidders specified identical discount terms. Turner certified itself, on page 2 of standard form (SF) 33, to be a small business concern. In addition, pursuant to item 5 of SF 33, "AFFILIATION AND IDENTIFYING DATA," Turner represented that it was not "owned or controlled by a parent company." Immediately after the last-quoted language is the notation "See par. 16 on SF 33A.)." The cited paragraph on SF 33A states as follows:

A parent company for the purpose of this offer is a company which either owns or controls the activities and basic business policies of the offeror. To own another company means the parent company must own at least a majority (more than 50 percent) of the voting rights in that company. To control another company, such ownership is not required; if another company is able to formulate, determine, or veto basic business policy decisions of the offeror, such other company is considered the parent company of the offeror. This control may be exercised through the use of dominant minority voting rights, use of proxy voting, *contractual arrangements*, or otherwise. [Italic supplied.]

Turner was awarded a contract for item 2 on November 5, 1969. The next day, BernzOmatic's Washington representative raised a question with an official of the General Services Administration (GSA) relative to Turner's status as a small business. By letter dated December 1, 1969, GSA requested the Chicago Regional Director of SBA "to determine the validity of Turner Corporation certification as a small business concern and the date that the firm became large business if in fact it is determined to be large business." The Chicago regional office issued its determination on December 16, 1969, in a letter to GSA. The operative portion was as follows:

It was found that the Turner Corporation had less than 500 employees, including its affiliates; was independently owned and operated; and was not dominant in its field of operations at the time of award of the contract for item 2 on solicitation No. FPNTP-A8-70628-A-10-22-69 which was awarded November 5, 1969.

It was also determined that as of November 7, 1969, with the acquisition of the assets of Turner Corporation by Olin Mathieson Chemical Corporation, 460 Park Avenue, New York, N.Y., that Turner Corporation became other than small busi-

ness for the purposes of Government procurement, including any future procurements involving classification 3439.

GSA advised BernzOmatic of this determination in a letter dated December 24, 1969.

The Federal Procurement Regulations (FPR) provide that, unless the SBA determines pursuant to specified procedures that a given bidder is not a small business concern, the bidder's representation that it is a small business shall be accepted by the contracting officer as conclusive. FPR 1–1.703–1(a). Protest of a bidder's size status may be made by any other bidder by sending a written protest to the contracting officer, who is then obligated to forward the protest to the SBA regional office having responsibility for the area in which the protested concern is located. FPR 1–1.703–2(a). A "protest" is defined by FPR 1–1.703–2(b) as "a challenge in writing," containing "the basis for the protest, together with specific detailed evidence supporting the protestant's claim." It is further provided that:

* * * Such protest must be received by the contracting officer prior to the close of business on the 5th working day after bid opening date * * * A protest received after award of a contract, even though timely, will not be considered a "protest" and will be returned to the sender with an explanation of why it could not be acted upon.

Inasmuch as the actions of the contracting officer appear to have been taken in conformity with applicable regulations, since no timely protest was made by BernzOmatic, and because, in any event, no appeal of the December 16 determination was filed within the period permitted by FPR 1–1.703–2(f), there is no basis for our Office to interpose legal objection to the contract awarded to Turner. See, e.g., B–166583, August 18, 1969, and B–167021, August 19, 1969. However, we believe that the record before our Office constitutes sufficient justification for the administrative termination of the Turner contract for the convenience of the Government. In this connection, we are enclosing a copy of the April 10 letter together with copies of the three SBA opinions cited therein from the General Counsel of SBA to our Office.

The history of the relationship between Turner and the Olin Corporation may be sketched as follows. On July 24, 1969, Turner's Board of Directors adopted resolution No. 416, concerning "A STOCK FOR ASSETS REORGANIZATION PLAN." In brief, the resolution recommended to the corporate shareholders that, subject to a favorable vote of the shareholders and subject also to the negotiation of a definite agreement between Turner and Olin, the corporation sell to Olin substantially all of its assets, business, and goodwill, in consideration of Olin's assumption of Turner's liabilities and of the transfer of Olin common stock to Turner shareholders. In addition, the president and chairman of the board of Turner were authorized and directed:

* * * to execute and deliver in the name and on behalf of the corporation a certain preliminary letter of intent substantially in the letter form dated July —, 1969, from Olin to the corporation, circulated among the Directors providing for

the sale of substantially all of the assets, business and good will of the corporation, for the consideration described hereinabove, and that the proper officers of the corporation are further authorized and directed to execute and deliver in the name and on behalf of the corporation any and all papers and documents necessary or desirable and to take all proceedings and do all acts or things that may be necessary or desirable to comply with the provisions of that letter of intent or which otherwise may be necessary or desirable to carry out and complete this transaction * * *

It was also resolved that such sale would be submitted to a vote at the annual shareholder meeting in September 1969. Moreover, resolution No. 417, relating to the question of the dissolution of Turner Corporation, was adopted by the board of directors on July 24, 1969; however, the record in our Office does not include a copy of that resolution.

It further appears that on August 12, 1969, Turner's president executed a letter of intent setting forth in general terms the "tentative understanding" of Turner and Olin as to the proposed sale. This action was ratified by the board of directors on September 10, 1969.

On October 17, 1969, the Turner Board of Directors unanimously consented to a resolution in which it was deemed advisable to proceed with the proposed sale on a modified basis. The board also recommended the sale and directed the submission thereof to a vote of the shareholders at the annual meeting "on October 29, 1969, or any adjournment thereof." The October 17 resolution also authorized either the chairman of the board or the president "to negotiate and execute *a definitive agreement* on behalf of the corporation in accordance with the foregoing and that the authority granted * * * in Resolution 416 is hereby confirmed." It was also resolved that the question of dissolution be presented to a vote of the shareholders at the October 29 meeting; furthermore, the authority granted to the officers by resolution 417 was confirmed. [Italic supplied.] Finally, it was resolved by the board of directors that:

* * * subject to the completion of the closing of the transaction contemplated by the above resolutions, the Board of Directors directs the submission of the following resolution to a vote of the shareholders at the same meeting * * *

RESOLVED, that Article FIRST of the Articles of Incorporation of Turner Corporation be amended to read:

"The name of the corporation is HVE Corporation."

The minutes of the 1969 annual shareholder meeting of the Turner Corporation disclose that the meeting took place on October 29, 1969. Three pertinent resolutions were unanimously adopted by the shareholders on that occasion. Each is set forth herein only insofar as is necessary. The first of the three began with a recitation of the facts as outlined above. It then states:

WHEREAS, *such Agreement* and Plan of Reorganization *was executed on behalf of Turner on October 28, 1969*, and has been delivered to Olin on the condition that Olin act thereon *no later than October 30, 1969* * * *

* * * * * * *

IT IS HEREBY RESOLVED, that Turner Corporation sell substantially all of its assets to Olin Corporation on the terms and conditions set forth in a cer-

tain Agreement and Plan of Reorganization dated as of October 28, 1969, between Turner and Olin and Harold V. Engh, as Guarantor Shareholder for [deleted] shares of Olin Common Stock $5.00 par value (adjusted to account for cash to be withheld by Turner) and an assumption by Olin of substantially all of the liabilities of Turner; and

IT IS FURTHER RESOLVED, that the Board of Directors may, in its discretion authorize the President or the Chairman of the Board of Directors to agree to modify any of the terms and considerations of such Agreement and Plan of Reorganization as the Board may deem to be in the interests of the shareholders of Turner Corporation as a whole.

IT IS FURTHER RESOLVED, that the proper officers of the corporation be, and they hereby are, authorized to execute and file all documents and do all other acts required to effectuate the purposes of the above resolutions. [Italics supplied.]

The second resolution reads in material part as follows:

WHEREAS, *such Agreement* and Plan of Reorganization *was executed on behalf of Turner on October 28, 1969*, and has been delivered to Olin on the condition that Olin act thereon no later than October 30, 1969 * * *

* * * * * * *

IT IS THEREFORE RESOLVED, that promptly after receipt of the shares of Olin Common stock to which Turner shall be entitled at the closing of the purchase by Olin and sale by Turner of substantially all of Turner's property and assets, all such newly acquired Olin shares, other than such as are placed in escrow, be distributed to the shareholders of Turner in the ratio of the number of shares owned by any shareholder who does not have such rights bears to the total number of outstanding shares of Turner ([deleted]); and

IT IS FURTHER RESOLVED, that a Plan of Liquidation be, and it hereby is, formulated to effect liquidation of the assets and dissolution of Turner, as follows: * * * [Italic supplied.]

The last resolution includes the following relevant language:

IT IS THEREFORE RESOLVED: provided that Olin and Turner shall have completed the closing contemplated by the Agreement and Plan of Reorganization dated as of October 28, 1969, that Article First of the Articles of Incorporation of Turner Corporation be, and they are hereby amended, effective as at the completion of the closing, to read as follows:

"The name of the corporation is
HVE Corporation."

The agreement dated October 28, 1969, is a 46-page typewritten document. Certain handwritten modifications thereto have been made; these alterations are initialed, but are undated. The first paragraph of the agreement reads:

AGREEMENT AND PLAN OF REORGANIZATION, dated as of October 28, 1969, among TURNER CORPORATION, an Illinois corporation (herein called Turner), and HAROLD V. ENGH, being a shareholder and Chairman of the Board of Directors of Turner (herein called Guarantor Shareholder), and OLIN CORPORATION, a Virginia corporation (herein called Olin).

The signature page is signed and attested by officials of Turner and Olin; the signatures appear immediately beneath this language:

IN WITNESS WHEREOF, the parties hereto have caused this Agreement to be *executed and delivered as of the date first above written.* [Italic supplied.]

In a letter dated December 11, 1969, to an official of the Chicago regional office of SBA, the person who was president of the Turner Corporation during the period involved here advanced two reasons why he believed Turner had not yet become large business as of No-

vember 5, 1969: the agreement was not a "merger," and the agreement was not in fact executed until late in the afternoon of November 7. Specifically, the letter made these two points:

> Firstly, the Agreement attached is not an agreement to merge Turner and Olin; it is an Agreement whereby Turner was to sell substantially all of its assets to Olin in consideration for common stock of Olin and the assumption by Olin of certain Turner liabilities. The transaction was not a "merger" in any legal sense. * * *
>
> Secondly, although the Agreement was dated as of October 28, 1969, it was in fact not finally executed until early in the afternoon of November 7, just prior to the closing on that date. Thus, in a real sense, neither Olin nor Turner had an enforceable agreement until November 7. * * *

Turner then emphasized two facets of the agreement which were were "not finally resolved" until the morning of November 7.

In a letter to our Office dated May 1, 1970, Olin argued only the latter proposition. This might be construed as an abandonment of the earlier position that the transaction was not, in a technical legal sense, a "merger." If in fact Olin and Turner no longer urge that argument as supporting the SBA regional office determination, we consider the position properly abandoned. The real issue under 13 CFR 121.3-2(a) defining the term "affiliates" and 121.3-15(c)(4) dealing with the nature of control through agreements to merge is whether as a substantive matter Olin, by virtue of the October 28 agreement, directly or indirectly controlled Turner on November 5, 1969, the date of award. The letters of December 11 and May 1 both give explicit recognition to this fact. The formal identification of the transaction described above is of no consequence, provided the October 28 agreement would serve as a basis for the power to control which will convert an otherwise small business into a large one. In this regard, 13 CFR 121.3-15(c)(4) reads as follows:

> *Stock options, convertible debentures, and agreements to merge.* Stock options and convertible debentures exercisable at the time of, or within a relatively short time after a size determination, and agreements to merge in the future, are considered as having a present effect on the power to control the concern. Therefore, in making a size determination, such options, debentures, and agreements are treated as though the rights held thereunder had been exercised prior to the date of the determination.
>
> *Example.* If, on the date of the determination, Company A holds an option to purchase a controlling interest in Company B and such option can be exercised at any time by Company A, the situation is treated as though Company A had exercised its rights and had become owner of a controlling interest in Company B prior to the determination. Further, if, as of the date of a determination, Company A has entered into an agreement to merge with Company B in the future, the situation is treated as though the merger had taken place prior to the date of the determination.

The other contention is that, although the agreement was dated October 28, 1969, it was in fact not finally executed until November 7, 1969. As Olin put it on the May 1 letter, "neither Olin nor Turner had an enforceable agreement until November 7, 1969." You will note that the SBA General Counsel has concluded that he cannot concur in this view of the facts. We are in substantial agreement with this opinion of the SBA General Counsel. However, the General Counsel also states

that he is unable to say that the Chicago regional office determination lacks the support of substantial evidence. In our view, the great preponderance of the evidence in this record indicates that execution of the Turner-Olin agreement occurred on October 28. Correspondingly, we regard the evidence that execution took place on November 7 to be without any significant weight, and we therefore must disagree to this extent with the SBA General Counsel.

An exhaustive analysis of the evidence is not necessary. We will only illustrate by referring to the October 30, 1969 edition of "Olin News of the Week." See page 4 of the enclosed letter. This publication is fully consistent with the quoted portions of the 46-page contract and the terms of the resolutions adopted at the Turner shareholder meeting on October 29, 1969. In addition, the publication indicates that the last act necessary to the creation of an agreement fully binding on both corporations was performed by the Olin Board of Directors on October 30, several days before the award of the contract. On the other hand, we have only the statements of Turner and Olin that execution did not take place until November 7. Neither corporation undertook to explain the basis for such a representation in light of the consistent documentary evidence to the contrary.

In our opinion, there was in existence no later than October 30, 1969, a valid and enforceable contract between Turner and Olin for the acquisition of Turner by Olin. While it is conceivable that certain modifications to the agreement were made subsequent to the award of the contract here in question, with the result that the terms of the November 7 transaction were perhaps slightly different from the terms as contained in the October 28 agreement, there was nevertheless *an* agreement in existence on the critical date. Consequently, we believe that 13 CFR 121.3–15(c)(4) is applicable to this case and that Turner was not a small business for purposes of the instant procurement.

In view of the circumstances set out above and in order to effectuate the intent of the Congress as expressed in the Small Business Act 15 U.S.C. 631 note, and implementing regulations, we believe that termination of the Turner contract for the convenience of the Government would be appropriate. Advice as to the action taken would be appreciated.

[B–169248]

National Guard—Employees of Federal Government—Training—Per Diem

A National Guard technician—an employee of the United States pursuant to 32 U.S.C. 709—who electing to attend a service school in a civilian Federal employee status rather than in a military status signs an agreement that should he not utilize Government quarters and mess facilities if available, he would accept reduced per diem as though he had occupied Government quarters at no cost, is entitled to the prescribed per diem without reduction notwithstanding that he lived off the military installation. The agreement signed is invalid absent the

determination required by Public Law 88–459, implemented by paragraph C1057, Joint Travel Regulations, Volume II, that the use of Government quarters by the technician was required in order to render necessary service or to protect Government property.

To Lieutenant Colonel L. M. Mason, Department of the Army, May 28, 1970:

Your memorandum of September 29, 1969, reference AKBAAFA, forwarded here on March 4, 1970, by the Per Diem, Travel and Transportation Allowance Committee, requests a decision on the appropriate per diem payable to John J. Johansen, a National Guard technician, while attending a service school in a civilian Federal employee status rather than in a military status under the circumstances described below.

As you point out by way of background information, Public Law 90–486, 32 U.S.C. 709, provided that effective January 1, 1969, National Guard technicians are employees of the United States.

The Chief, National Guard Bureau in letter NG–TP, dated March 13, 1969, set forth administrative instructions pertaining to Army and Air National Guard technicians attending schools and participating in special exercises. That letter reviews the National Guard policy prior to January 1, 1969, of placing all members attending service schools under military orders based on the authority of 32 U.S.C. 505. It is stated that in those instances where the military education was also related to the job requirements of an individual in his technician employment, a differential was paid; but that after Public Law 90–486 established the National Guard technicians as Federal employees, it became legally impossible to continue such differential pay. As a result thereof those technicians then in school were permitted to elect between continuing in a military status or having new orders issued to place them in a civilian technician status so as to permit receipt of the highest compensation possible.

The above cited National Guard letter further states in pertinent part:

4c. It is still the policy of the National Guard Bureau that Guardsmen, including technicians, attend service schools in their military status, and participate fully in all non-academic training required by the school with respect to active Army and Air Force students. The latter duties would include physical training, attendance at commanders call lectures, instruction in military justice, and acting as charge of quarters, or in other capacities appropriate to their military grade.

d. However, to encourage attendance at service schools and to minimize the financial loss that might be sustained by technicians in the lower enlisted and commissioned grades, it is the National Guard Bureau policy to permit a technician to attend a service school of the Army or Air Force in a technician status if all of the following conditions are met.

(1) The course of instruction is related to the duties he is expected to perform in his capacity as a National Guard technician (ref para 4–5, NGR 51/ANGR 40–01),

(2) The military pay and allowances he would be entitled to receive is less than his technician compensation,

(3) He is informed of the benefits of which he and his dependents will lose if he attends in civilian status (e.g., medical care, military retirement point credit, commissary and most post exchange privileges), and

(4) He agrees to comply with all of the customs of the service, including wearing of the uniform, to the same extent as if he were attending in his National Guard military status. This will include utilization of Government quarters and mess facilities if available, participation in all activities required of other members of the class, and performance of administrative duties during other than classroom hours.

5. To preclude any misunderstanding regarding implementation of the above, future applicants who meet the criteria of paragraph 4(d) will be counselled and offered an opportunity to attend service schools in a military status. If this is declined, they may then be offered an option to attend in a technician status. Applicants will be counselled on the conditions of attendance in a technician status as outlined on attached agreement. If after being counselled a technician agrees to attend under the stated conditions, he will then be required to sign the agreement in the presence of his unit commander or his authorized representative.

Paragraph 3d of the agreement referred to above states:

I will utilize government quarters and mess facilities when made available by the installation Commander. However, if school authorities permit and I elect to live off the installation when quarters are made available, I will apply for and receive reduced per diem as though I had occupied government quarters.

We understand that "at no cost" has been added before the last period to clarify that per diem in such cases would be governed by Joint Travel Regulations (JTR), Volume II, paragraph C8101e.

You submitted a voucher for Mr. Johansen who is claiming 5 days per diem at $16 a day even though he signed the agreement discussed above which provides for a reduced per diem.

Your primary question is whether the signed agreement should be regarded as valid so as to permit payment of a reduced per diem where Government quarters are available but not utilized as indicated in such agreement.

As set forth in 45 Comp. Gen. 499 (1966) at page 500, Public Law 88–459, 5 U.S.C. 3125, provides that a civilian officer or employee may not be required to use available Government quarters unless the head of the agency or his designated representative determines that necessary service cannot be rendered or that Government property cannot be protected otherwise.

Paragraph C1057, JTR, Volume II, in implementing Public Law 88–459 states in part:

1. PRACTICABLE USE OF AVAILABLE QUARTERS. When adequate Government quarters are available, and their use would not be impracticable or interfere with the accomplishment of the purpose of a mission, employees performing temporary duty at an activity will be encouraged by their supervisors to use such quarters. Except as provided in subpars. 2 and 3, mandatory use of Government quarters while in a temporary duty status will not be required, nor will per diem allowances be subject to reduction on the basis of availability alone of such quarters. * * *

Subparagraphs 2 and 3 of C1057 provide:

2. TRAINING COURSE REQUIREMENT. Officials responsible for the administration of training programs are delegated authority to determine when the use of available adequate Government quarters by employees attending a training course is required as a necessary adjunct to the successful completion of the training involved or necessary to the proper protection of Government property or documents. Such determinations will be made on a school-to-school basis and if need be, on a course-to-course basis. Mere administrative or academic con-

venience or desire for uniformity with members of the Uniformed Services is not sufficient reason in itself to require use of Government facilities. Likewise, shortage of training funds and full utilization of transient quarters are not to be used as a basis for required use of such facilities. When it is determined that specific courses and locations require the use of available Government quarters, such requirement will be published in an appropriate training course announcement, catalog, or in some other medium by the department concerned, and will be binding on all attendees. Determinations which require the use of available Government quarters may be made when:

1. highly valuable Government equipment is issued to students and the commander of the training facility determines that such equipment should remain in the personal possession of the student during the course but that such equipment not be taken off the military installation,
2. classified materials are issued to students for their use the security of which is unduly endangered if transported to quarters off the military installation,
3. the nature of the course is such that the ready accessibility of the students to the training site is required on an around-the-clock basis or classes are held on such an erratic schedule that commuting to and from local commercial quarters would severely lessen the effectiveness of the training,
4. commercial quarters are so far removed from the training site that their use would be considered impracticable,
5. frequent changes of clothing are required on short notice so that travel to and from commercial quarters away from the training site for that purpose would not be feasible.

The per diem allowances payable when the use of available Government quarters is necessary under the conditions in this subparagraph will be determined as provided in Chapter 8 as though such quarters were actually used.

3. SPECIAL PROJECTS AND MISSIONS. Employees assigned to special projects or missions may be required to occupy available Government quarters when a determination is made by the Secretary of a separate military department or the head of an agency of the Department of Defense that the exigencies of the service require occupancy of such quarters to assure accomplishment of the project or mission. Travel orders will include citation of the determination and applicable conditions and limitations.

Paragraph C8101 of JTR, Volume II, in effect during the period covered by the voucher here involved prescribed a per diem in lieu of subsistence rate of $16 per day for all travel and temporary duty unless a reduced rate is applicable because of the conditions set forth therein including attendance at training courses as explained in C1057 quoted above.

From informal discussion with representatives of the National Guard Bureau as well as papers of record our view is that the technicians have little or no choice so far as signing the above-mentioned agreement is concerned. Attendance at service schools is necessary to retention and advancement in both their military status and civilian technician status. Moreover, even if such an agreement be signed it would be at variance with Public Law 88-459 unless a special determination be made as provided in such act or unless a particular training course otherwise falls within paragraph 2 of C1057, JTR, Volume II.

We understand in the case of Mr. Johansen that no special determination was made nor did the training course which he attended require use of Government quarters. In view thereof and assuming his per diem was not otherwise for deduction under paragraph C8051; JTR, Volume II, the voucher is returned herewith for payment.