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TABLE OF DECISION NUMBERS

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[B-132740]

Contracts—Awards—Small Business Concerns—Construction Contracts

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

Statutory Construction—Omission of Express Language

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

To the Administrator, Small Business Administration, October 2, 1969:

Reference is made to a letter dated September 5, 1969, from Mr. Leonard S. Zartman, General Counsel, requesting an opinion with respect to a proposed extension into construction contracts of the procurement activities of the Small Business Administration under section 8(a) of the Small Business Act, as amended, 15 U.S.C. 637(a).

Public Law 85-536, H.R. 7963, approved July 18, 1958, 72 Stat. 384, known as the Small Business Act, completely revised the Small Business Act of 1953, Title II of Public Law 163, 83d Congress, 67 Stat. 232, as amended. Section 8(a)(1) of the new act, 15 U.S.C. 637(a)(1), authorizes the Small Business Administration to enter into contracts with the United States Government and any department, agency or officer thereof having procurement powers obligating the Administration to furnish articles, equipment, supplies or materials to the Government. Section 8(a)(2), 15 U.S.C. 637(a)(2), authorizes the Small Business Administration to arrange for the performance of such contracts by negotiating or otherwise letting subcontracts to small business concerns or others for the manufacture, supply, or assembly of such articles, equipment, supplies or materials, or parts thereof, or servicing or processing in connection therewith, or such management

services as may be necessary to enable the Administration to perform such contracts.

Section 15 of the act, 15 U.S.C. 644, provides in part that:

> To effectuate the purposes of this Act, small-business concerns within the meaning of this Act shall receive any award or contract or any part thereof * * * as to which it is determined * * * (3) to be in the interest of assuring that a fair proportion of the total purchases and contracts for property and services for the Government are placed with small-business concerns * * *.

Sections 207(c) and 207(d) and section 214 of the Small Business Act of 1953 contain somewhat similar provisions. The 1953 and 1958 statutes also contain in sections 202 and 2(a), respectively, similar declarations of policy except that the former does not include any indication that the Congress intended to make the provisions of section 214 applicable to contracts for construction, whereas the policy declaration of the 1958 statute states in part that—

> * * * It is the declared policy of the Congress that the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small-business concerns in order to preserve free competitive enterprise, to insure that a fair proportion of the total purchases and contracts for property and services for the Government (including but not limited to contracts for maintenance, repair, and construction) be placed with small-business enterprises * * *.

The General Counsel's letter states that the exercise of the section 8(a) authority has been limited to supply and service contracts, that it is now proposed to extend those activities to construction contracts and that some of the Government agencies with which the Small Business Administration proposes to contract have questioned whether section 8(a) applies to construction contracts. Although section 8(a) does not specifically list construction contracts, the view is expressed that section 8(a) could be interpreted as including construction contracts on the basis of the parenthetical phrase appearing in section 2(a)—"including but not limited to contracts for maintenance, repair, and construction." The letter cites court cases and section 4703, Sutherland Statutory Construction, Third Edition, to the effect that all parts of a statute should be considered together in determining the legislative intent. The letter also cites H. Rept. No. 555, 85th Cong., 1st sess., accompanying H.R. 7963, and decisions of our Office dated October 23, 1957, and October 22, 1958, 37 Comp. Gen. 271, 38 *id.* 326.

In 37 Comp. Gen. 271 we expressed doubt that section 214 of the Small Business Act of 1953 was intended to apply to construction contracts since the act contained no reference to such contracts and contracts for construction of public buildings and works have traditionally been treated as separate and distinct subjects in statutes, regulations, and decisions of accounting officers. Subsequently, it was concluded in 38 Comp. Gen. 326, on the basis of the policy declaration in section 2(a) of the 1958 statute and a review of its legislative history, that a set-aside of a fair proportion of construction projects for small business

contract award purposes under section 15 would not be legally objectionable.

Section 2(a) of the new Small Business Act could be considered in itself as evidencing an intention of the Congress that a fair proportion of various types of contracts, including contracts for services and construction, should be awarded to small business concerns in accordance with regulations issued pursuant to section 15 of the act. That this was, in fact, the intention of the Congress is evidenced by the statement at page 5 of H. Rept. No. 555, *supra*, which is quoted in the General Counsel's letter and in 38 Comp. Gen. 326 (1958). In that statement, the language of section 2(a) of H.R. 7963 was referred to as a proposed revision of the policy declaration of the Small Business Act of 1953 "to make absolutely clear that it is the intent of Congress that small-business concerns shall obtain a fair proportion of all types of Government contracts."

The cited decisions of our Office do not consider the extent to which the Small Business Administration is authorized to enter into contracts with other Government agencies and to subcontract the complete performance thereof. The decisions related to Capehart Housing construction contracts to which the Small Business Administration was not and did not intend to become a party.

Section 8(a) of the new Small Business Act provides a method for furnishing additional assistance to small business concerns capable of performing supply contracts or portions thereof instead of relying solely upon section 15 and applicable regulations which concern the making of contract awards directly to responsible small business concerns by procuring agencies. The section does not include any specific authority on the part of the Small Business Administration to enter into service and construction contracts and to make the necessary arrangements for their performance. It is nevertheless apparent that the Congress did not intend to limit the section 8(a) authority to supply contracts. Under sections 2(a) and 15 small business concerns were intended to obtain a fair proportion of "all types of Government contracts."

In our opinion, there is no valid reason for supposing that the Congress would not have included in section 8(a) a grant of authority to the Small Business Administration to enter into service and construction contracts with other agencies of the Government to obtain for small business concerns a fair proportion of "all types of Government contracts." It would be unreasonable to conclude that the Small Business Administration does not have the authority under section 4(a), 15 U.S.C. 633, and regulations issued pursuant to section 5(b)(6) of the Small Business Act, 15 U.S.C. 634, to enter into all types

of contracts with procuring agencies for the purpose of providing assistance to small business enterprises so long as the method of contracting and performing such contracts does not conflict with the provisions of section 8(a) or with any special statutory provisions governing the award of contracts for services or construction other than giving preferential treatment to small business enterprises.

With reference to the omission of any reference to service contracts and construction contracts in section 8(a), and to the maxim that the statement of one thing is the exclusion of others, section 4915, Sutherland Statutory Construction, Third Edition, states in part that "there is an inference that all omissions were intended by the legislature." However, in section 4917, it is stated that "where an expanded interpretation will accomplish beneficial results, serve the purpose for which the statute was enacted, is a necessary incidental to a power or right, or is the established custom, usage or practice," the maxim forming the basis for an inference that all omissions were intended by the legislature "will be refuted, and an expanded meaning given."

It appears that an "expanded interpretation" of the statute here involved would be proper. We therefore agree with the position taken by the General Counsel of your Administration that, for all practical purposes, it may properly be concluded that the parenthetical phrase appearing in the section 2(a) policy declaration of the Small Business Act was intended by the Congress to be equally applicable to the making of direct contract awards to responsible small business concerns under the provisions of section 15 and to the contracting activities of the Small Business Administration under section 8(a).

However, since the contracting activities of your Administration under section 8(a) of the Small Business Act already include the entering into and performing supply and service contracts with other Government agencies, and it is now proposed to extend such activities to the performance of construction contracts with other Government agencies, it appears that sections 124.8–1 and 124.8–2 of title 13, Code of Federal Regulations, should be modified so as to show clearly that the authorized activities under section 8(a) include the entering into and performance of all types of Government contracts for the purpose of protecting the interests of small business concerns.

[B–167760]

Payments—Erroneous—Restitution by Government

The payment to the Government by an insurance company to cover damages to Government property by a car insured by the company where the date of the accident was erroneously shown as falling within the period of the policy coverage may be reimbursed to the company. The rule that an insurance company may recover payments made under a mistake of fact, which was due to its own

negligence or forgetfulness, unless the payee has so changed his position that it would be inequitable to require restitution is applicable to the Government, as persons receiving erroneous payments from the Government acquire no rights to the payments, and it is only fair and equitable that when the Government is the recipient of an erroneous payment that the money be returned. The Government was not prejudiced in the matter and may still recover the cost of the damage repair from the tortfeasor.

To Dwight Humphrey, Department of the Army, October 2, 1969:

Reference is made to your letter of August 4, 1969 (NAOCT-F), requesting an advance decision as to the propriety of payment of a voucher in favor of The Travelers Insurance Company to reimburse it for payment erroneously made to the Government.

On July 24, 1968, a car driven by Mr. Lloyd C. Cook failed to negotiate a curve and damaged Government property. Mr. Cook did not report the accident and it was only through the efforts of the Assistant District Counsel, Norfolk District, Corps of Engineers, that Travelers learned of it. When the insurance company's regional office in Richmond sent the file to the local office in Norfolk, the date of the accident was erroneously noted as July 27, 1967. This date fell within the period of coverage of the policy, which was May 17, 1967, to May 17, 1968. Travelers willingly and fully cooperated in the initial investigation of the accident and agreed to pay the cost of the repair work.

Therefore, when on March 13, 1969, a letter of demand was sent to Mr. Cook with a copy to Travelers, the insurance company paid promptly. The letter of demand cited the correct date of the accident but the discrepancy was not detected until after payment was made. Upon discovery of its error, the insurance company requested a refund of its money. The company has submitted evidence showing that the date of the accident was outside the initial period of the policy and that the policy was not renewed.

It has been said that when an insurance company is negligent in investigating and making payment on a claim, it is barred from recovery of its money. See *Pennsylvania Casualty Co.* v. *Brooks*, 24 So. 2d 262 and *Metropolitan Life Insurance Co.* v. *Mundy*, 167 So. 894.

The better rule, however, is that an insurance company may recover payments made under a mistake of fact, which was due to its own negligence or forgetfulness, unless the payee has so changed his position that it would be inequitable to require restitution. In the subject matter the Government has not been so prejudiced and it may still recover from the tortfeasor. See 167 A.L.R. 470 Annotation "Right of Insurer to Restitution of Payments Made Under Mistake"; 44 Am. Jur. "Insurance," section 1806; and 46 CJS "Insurance," section 1203.

We do not believe the fact the Government is a party of this transaction should affect the application of this rule. See, for example,

United States v. *State Bank*, 96 U.S. 30, 35. It is well settled that persons who receive erroneous payments from the Government acquire no rights to such payments. The courts consistently hold that such persons are bound in equity and good conscience to make restitution. See B–164330, dated October 30, 1968; *United States* v. *Northwestern National Bank and Trust Co. of Minneapolis*, 35 F. Supp. 484, 486; *Wisconsin Central Railroad* v. *United States*, 164 U.S. 190; *United States* v. *Bentley*, 107 F. 2d 382, 384. Therefore, when the Government is the recipient of erroneous payments, it is only fair and equitable for it to return the money.

Accordingly, the voucher which is returned herewith may be certified for payment if otherwise correct.

[B–165179, B–165800]

Contracts—Specifications—Qualified Products—Changes in Machinery, Product, Etc.

The placement of a manufacturer's name on the Qualified Products List indicates ability to manufacturer a particular product according to certain specifications, even though the qualification of the product is not relied on or used as a substitute for strict compliance with the specifications of a particular contract, notwithstanding the contract specifications are the same as those used in the qualification tests, and entitles the manufacturer to submit bids or proposals until its name is removed from the list or requalification of the product is required. Therefore, the fact the qualification of tow target honeycombs, a critical component of the aerial gunnery tow targets being procured, and the production item were dissimilar did not disqualify the low offeror from submitting a proposal and receiving an award. However, should a qualification product be misrepresented, corrective administrative action could result in the manufacturer being removed from the Qualified Products List or placed on the Debarred Bidders List.

To Chapman, DiSalle and Friedman, October 10, 1969:

Reference is made to letters dated August 28, 1968, and August 29, 1968, each with enclosures, from PANCOA, Panel Corporation of America, your letters of October 8, November 13, and December 5 and 12, 1968, other correspondence, enclosures, conferences held, exhibits and affidavits submitted, protesting awards of contracts to the Ellinor Corporation of Dallas, Texas, under solicitation No. F42600–69–B–0005, and solicitation No. F42600–68–R–2238. Both solicitations were issued at the Hill Air Force Base, Utah, and sought the negotiated procurement of tow targets, aerial dart, gunnery rocket, Type TDU–10/B.

Solicitation F42600–68–R–2238, issued October 16, 1967, under negotiated procurement procedures, invited proposals for the furnishing of 3926 tow targets as applicable to the A/A 37U–15 tow systems and in accordance with specification MIL–T–9918A. This is a qualified product and only Panel Corporation of America's (Pancoa) name

was on the Qualified Products List. The Ellinor Corporation was in the process of qualifying its product. Both Pancoa and Ellinor were invited to submit proposals under this solicitation. In the meantime, Ellinor submitted wing panels for the tow target to the Service Engineering Division, Ogden Air Material Area for qualification under specification MIL–T–9918A. Concurrently, with the qualification panels, Ellinor submitted a process specification describing the use of its own honeycomb core in the panels. The panels performed satisfactorily in the flight tests and the physical properties of the core were sufficient to consider the cores as "equal" to the cores described in the specification. The wing panels met the qualification requirements of specification MIL–T–9918A and Ellinor was notified on November 28, 1967, that its equipment was qualified and that its name was being added to the Qualified Products List for this equipment. Both contractors submitted proposals and an award was made to Ellinor as the low bidder on January 16, 1968.

By letter dated August 29, 1968, directed to the Director of Procurement and Production, Ogden Material Area, a copy of which was forwarded here, Pancoa protested the award to Ellinor. It was contended that the contract product (tow targets) "as manufactured and to be manufactured by Ellinor was wrongfully placed on the applicable Qualified Products List late in the calendar year 1967, under such representations, circumstances and conditions as to make the qualification testing thereof and the placement and listing of said product on the applicable Qualified Products List void and of no effect." It is alleged that Ellinor, although stating that it manufactured all components of the tow targets used in the qualification tests, did not in fact manufacture the honeycomb core, a critical component, in the wing sections of the targets.

Subsequent letters, exhibits and affidavits and additional protests on solicitations Nos. F42600–69–B–1241, F42600–69–B–1431, F42600–69–B–3765 all relate to the argument that the production target may be manufactured in its entirety by Ellinor, but that its honeycomb core differs from that for which Ellinor received qualification. In other words, the production product is allegedly not the same as that which had received testing and has not received the testing required for qualified products listing. In sum, it is Pancoa's position that (1) Ellinor has never truly "qualified" its tow targets under the specifications and is accordingly not eligible to receive an award for the production of such tow targets, and (2) Ellinor is producing and furnishing the Government under the award in protest a type of tow target for which Ellinor never received qualification approval.

We are advised that a further solicitation, scheduled for opening

on September 11, 1969, was, in fact, opened on September 11, 1969, but that award is being delayed pending our decision or until October 10, 1969, whichever is earlier.

The Air Force in its report here has stated, and has submitted documents in support of its statement, that it has no evidence to support Pancoa's allegation that the honeycomb cores of Ellinor's qualification wing panels were manufactured by another firm. The report states the process specification Ellinor submitted with its qualification panels specified the use of its own honeycomb cores, and also, that the president of Ellinor, when questioned on this matter stated that all honeycombs used in all panels were of his manufacture. In regard to the *production* quantities delivered under the contract both the Defense Contract Administration Service Region at Dallas, and the Chemical Analysis Section, at Ogden Air Material Area, confirm that the honeycomb cores are manufactured by Ellinor. The Chemical Analysis Section also evaluated certain of the characteristics of the honeycomb samples from the qualification wing panels and the production models and concluded that the production models are equal to or better than the qualification models. With regard to the contention that the production models are so inferior in workmanship and materials as to constitute a nonconforming product, the administrative office concedes that some production articles delivered were deficient but after manufacturing procedures were corrected, production articles now equal or exceed specifications, and the contractor has agreed to replace, at no cost to the Government, the deficient targets.

In rebuttal to the administrative reports, Pancoa submits that Ellinor did not have the necessary machinery to fabricate the honeycomb core at the time of qualification; that a visual examination of the samples submitted here shows the dissimilarity between the qualification and production cores and quality of manufacture; and that the affidavits evidence Ellinor's purchase of another manufacturer's honeycomb for use in the qualification wing panels.

Solicitation F42600-69-B-0005 also was for tow targets under the same specifications. Pancoa protested this solicitation after bid opening when it appeared that Ellinor was again the low bidder. The reasons are substantially the same as in the earlier solicitation. The difference between the two solicitations is that protest was after award in the earlier case and prior to award in the latter case. In any event the -0005 solicitation was canceled on September 4, 1968, due to restrictive specification requirements. We are advised that changes in specification requirements will not require requalification testing of either Pancoa or Ellinor. However, our decision herein would be equally applicable

to the –0005 solicitation, had the solicitation not been canceled and the question rendered moot.

Although we have viewed the wing panel samples and noted the dissimilarities pointed out in your letters and in conferences, we must advise that the conclusion requested that the qualification core and production core are of different manufacture, requires a technical or engineering opinion.

In this connection a supplementary report received from the Air Force states that the Ellinor Corporation had been manufacturing paper honeycomb core since August 1966; that Mr. Ellinor designed his own paper honeycomb manufacturing machine; that the Ellinor Corporation possessed equipment to dip process the core after manufacture, or to impregnate the paper before being manufactured into core material; and that Mr. Ellinor readily admitted obtaining honeycomb core from another manufacturer but for the purpose of duplicating it in his own plant and not for use in the construction of tow targets. The report also contains the following quotation from a report of Headquarters, Air Force Logistics Command, with which we agree:

> While the information available does not clearly refute the protester's allegation that the panel which was qualified as a QPL item contained another company's honeycomb section, it is also apparent that the allegation cannot be confirmed. The OOAMA comments indicate that it could not be determined whether or not the two honeycomb core materials were manufactured by the same manufacturer. The net result is that the Air Force, after diligent investigation, has been unable to find any evidence to support the protester's allegation that the honeycomb cores for Ellinor's qualification samples were manufactured by another firm. There appears to be no substantive evidence of misrepresentation or other wrongdoing by Ellinor concerning the materials in question.

Notwithstanding the above, we forwarded to our Los Angeles Regional Office two samples of honeycomb core—one of known Wickes' Industries, Incorporated, manufacture and one taken from a tow target submitted by Ellinor for qualification tests—to be identified as to whether either sample or both were of their manufacture. Officials of Wickes were not able to positively identify the honeycomb in either sample as being of their manufacture. Subsequently, two larger segments of qualification test wing panels were obtained by our Regional Office from Wendover Air Force Base, Utah. The lamination materials, i.e., aluminum skin and adhesive, were removed from these samples to expose the core so that Aircomb Division, Aerospace Technology Corporation (successors to Aircomb Division, Wickes Industries) officials could examine the core characteristics.

Our representatives report they were advised that the core from these two samples of wing panel resembled the core produced on the Aircomb Division's honeycomb machine. The bases of similarity were (1) the uniformity of cell structure, (2) type and appearance of the paper

and glue, and (3) the width of the core panel which was not in excess of 15 inches. Our representatives also reported they were advised that there are two other machines capable of producing similar core, one in Japan and one in Mexico, and that absolute identification would require chemical analysis of the grade of paper, impregnation materials and type of glue used.

In your letter dated May 22, 1969, you state that the report "substantiates without question Pancoa's position in the subject protests." We cannot agree. Neither Wickes nor Aerospace Technology would positively identify any of the samples as of its own manufacture. At best, their conclusion was that there were "similarities" and a "resemblance," which is far short of substantiation of the allegation made.

Provisions governing the qualification of products are contained in Appendix IV–A of Defense Standardization Manual 4120.3M, and in pertinent part provide:

100 Purpose of Qualification. Since most specifications are based on performance requirements the possible variation in design and quality and the nature of the requirements and tests for certain classes of products are such that it is impractical to procure products solely on acceptance tests without unduly delaying delivery. To obtain products of requisite quality in such cases, qualification of specific products is required prior to the opening of bids or the award of negotiated contracts. Testing of a product for compliance with the requirements of a specification in advance of, and independent of any specific procurement action, is known as qualification testing. The entire process by which products are obtained from manufacturers, examined and tested, and then identified on a list of qualified products is known as qualification. To establish a Qualified Products List, a specification must exist which requires qualification and sets forth the qualification examinations and tests.

101 Significance of listing on QPL. The fact that a product has been examined and tested and placed upon a QPL signifies only that at the time of examination and test the manufacturer *could* make a product which met specification requirements. Inclusion on a Qualified Products List does not in any way relieve the manufacturer or distributor of his contractual obligation to deliver items meeting all specification requirements. Nor does the inclusion of a product on a QPL guarantee acceptability under a contract since the products must conform to specification requirements. Qualification does not constitute waiver of the requirement for either in-process or other inspection or for the maintenance of quality control measures satisfactory to the Government. [Italic supplied.]

* * * * * * *

111 Removal of a product from a Qualified Products List.

111.1 Reasons for removal. A product may be removed from the list for reasons considered sufficient, among which are the following:

(a) The product offered under contract does not meet the requirements of the specification.

(b) The manufacturer has discontinued manufacture of the product.

(c) The manufacturer or distributor requests that the product be removed from the list.

(d) The conditions under which qualification was granted have been violated.

(e) The requirements of a revised or amended specification differ sufficiently from the previous issue that existing test data are no longer applicable for determining compliance of the product with the specification.

(f) The product is that of a contractor, firm or individual whose name appears on the "Consolidated List of Debarred, Ineligible, and Suspended Contractors."

(g) Failure of manufacturer to notify qualifying activity of design change.

A careful reading of the rules and regulations relating to the qualification of manufacturers for the Qualified Products List indicates that qualification relates to the ability of the applicant concern to manufacture a particular product according to certain specifications. The placing of the name of a manufacturer on the Qualified Products List cannot be relied on or used as a substitute for strict compliance with the specifications of a particular contract, even though the contract specifications are the same as those used in qualification tests.

Although we are persuaded that the qualification tow target honeycomb and the production tow target honeycomb are dissimilar and serious questions arise as a result, the fact remains that the Ellinor Corporation was placed on the Qualified Products List of tow target manufacturers, and until removed therefrom, or until requalification is required, is eligible to submit bids or proposals on tow target procurements.

Should it be determined at any time that the qualification product was misrepresented in any way, corrective action is an administrative matter, and in a proper case may form a basis for removal from the Qualified Products List or for placement of the offender on the Debarred Bidders List. We do not have to decide, on the basis of the facts in the present case, whether this would render a contract award illegal.

There is no evidence in the present case that the contracting officer acted in an improper manner or that he failed to display good judgment. Accordingly, we will not disturb the awards, and your protests are denied.

[B-167175]

Contracts—Negotiation—Evaluation Factors—Point Rating—Propriety of Evaluation

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

To the Secretary of the Air Force, October 13, 1969:

Reference is made to a report dated August 25, 1969, by the Chief, Procurement Operations Division, relative to the protest by Berkeley

Scientific Laboratories, Inc., against the award of a contract under request for proposals (RFP) F41609-69-R-0036, issued January 6, 1969, by the Aerospace Medical Division, Brooks Air Force Base, Texas. The referenced RFP solicited proposals on a cost-plus-fixed-fee basis for a 9 months feasibility study of automating the 74 Armed Forces Entrance and Examination Stations (AFEES), plus a prototype system plan with estimated cost.

Berkeley Scientific Laboratories, Inc., has protested against "the manner in which technical evaluation of proposals in this highly technical field was performed" as well as "the wisdom of this procurement and whether or not it is in the best interests of the government as the objectives of this project are now understood."

Enclosed is a copy of a letter of today to the protestant. While for the reasons stated we find no basis for interfering with the procurement in this instance, we believe, as indicated therein, that the request for proposals should have contained a clearer indication of just what offerors were expected to include in their proposals, and of the details of the evaluation process.

Armed Services Procurement Regulation (ASPR) 3-501(b) requires that "Solicitations shall contain the information necessary to enable a prospective offeror to prepare a proposal or quotation properly." As to the evaluation process, we have several times stated that when a point evaluation formula is to be used, sound procurement policy dictates that offerors should be informed as to the evaluation factors and the relative weight or importance to be attached to each factor. See B-166213(2), July 18, 1969; B-166052(2), May 20, 1969; 44 Comp. Gen. 493 (1965); 47 *id.* 252 (1967); *id.* 336 (1967).

The record of the subject procurement indicates that, while the amended RFP in paragraph 33 stated the Government's requirements in broad, general terms, the technical reasons advanced for rejection of Berkeley Scientific Laboratories, Inc., proposal appear to indicate the application of rather detailed and rigid requirements. It is our view that the mere statement in paragraph 33 that "Greatest emphasis shall be placed on the following criteria in the order listed," does not suffice to inform offerors of the actual evaluation factors used, or of the relative weights attached to each factor. While we have never held, and do not now intend to do so, that any mathematical formula is required to be used in the evaluation process, we believe that when it is intended that numerical ratings will be employed offerors should be informed of at least the major factors to be considered and the broad scheme of scoring to be employed. Whether or not numerical ratings are to be used, we believe that notice should be given as to any minimum standards which will be required as to any particular element

of evaluation, as well as reasonably definite information as to the degree of importance to be accorded to particular factors in relation to each other. We therefore suggest that appropriate action be taken to assure that offerors in future procurements are advised of the relative importance of evaluation factors, as set out above.

The file forwarded with the report of August 25 is returned.

[B-167903]

Transportation—Dependents—Military Personnel—Dislocation Allowance—More Than One Move in Fiscal Year

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

To Major W. W. Spear, Defense Supply Agency, October 13, 1969:

Further reference is made to your letter of August 18, 1969 (Ref: DCRS-FO), forwarded here by the Per Diem, Travel and Transportation Allowance Committee, requesting a decision of the Comptroller General as to whether Captain Michael F. Dawes, USA, 05 322 785, is entitled to a second dislocation allowance under the circumstances described. Your request for decision was assigned PDTATAC Control No. 69-34.

Special Orders 288 dated December 12, 1968, Headquarters, U.S. Army Quartermaster Center and Fort Lee, Fort Lee, Virginia, assigned Captain Dawes to WOBR, Vietnam Transit Detachment, APO San Francisco 96384, for further assignment if indicated, with the availability date shown as January 30, 1969. By Special Orders 23 dated January 31, 1969, Letterman General Hospital, San Francisco, California, the orders of December 12, 1968, were amended to change the reassignment of Captain Dawes from the Vietnam organization to the Defense Contract Administration Service Region, St. Louis, Missouri, to report there February 21, 1969.

It is stated in your letter of August 18, 1969, that acting on the orders of December 12, 1968, Captain Dawes moved his dependent from Fort Lee to Greenville, South Carolina, and after establishing a permanent residence, he proceeded to Travis Air Force Base for transportation to his overseas assignment; that he later returned to Green-

ville and moved his dependent from the designated location to St. Louis; and that dislocation allowance was paid to him on May 29, 1969, after completion of the move to St. Louis.

You refer in your letter to paragraph M9000 of the Joint Travel Regulations which states that the purpose of the dislocation allowance is to partially reimburse a member for the expenses incurred in relocating his household upon a permanent change of station. You quote from the decision of September 29, 1955, 35 Comp. Gen. 159, as follows:

> * * * that when dependents are moved to a designated place under authority of Chapter 7, paragraph 7005, Joint Travel Regulations, incident to a member's assignment under permanent change of station orders to a place to which his dependents are not permitted to accompany him, and later are moved to the new station when conditions permit such travel, but one dislocation allowance, payable upon completion of travel to the designated place, is authorized even though two dislocations are involved. Similarly, two dislocations, one in moving dependent to a designated place and a second in moving them to a new duty station, occur when a member's dependents are not moved to an initial overseas station but are later moved to a subsequently assigned overseas station or to a new station in the United States. * * *

You say in the first instance that it appears the member's duty station was not changed while in the second instance the member was assigned to a new duty station and the move was made in a subsequent fiscal year.

You also say that while it is recognized the statutory limitation provides for payment of only one dislocation allowance within a given fiscal year, a question does arise as to the propriety of denying a member reimbursement for the expenses incurred in relocating his household a second time upon permanent change of station orders which were amended. It is pointed out by you that Captain Dawes in complying with his original and amended orders was required to establish two residences and incur the related expenses.

On the basis of these facts, you request a decision as to whether the voucher claiming a second dislocation allowance within the same fiscal year may be paid.

Section 407 of Title 37, United States Code, provides that under regulations prescribed by the Secretary concerned, a member of a uniformed service whose dependents make an authorized move in connection with his change of permanent station is entitled to a dislocation allowance but, with exceptions not involved here, he is not entitled to more than one dislocation allowance during a fiscal year unless the Secretary concerned finds that the exigencies of the service require the member to make more than one such change of station during that fiscal year.

Under the law an ordered change of permanent station is a condition precedent to entitlement to the dislocation allowance. And, para-

graph M9002 of the Joint Travel Regulations, promulgated pursuant to the statute, provides that the dislocation allowance will not be paid more than once in connection with any one permanent change of station.

Captain Dawes' orders as amended involved only one change of permanent station from Fort Lee, Virginia, to St. Louis, Missouri. Since he has been paid a dislocation allowance incident to that move, there is no authority under the law and regulations to pay him a second dislocation allowance.

Section 406a of Title 37, United States Code, provides authority for additional travel and transportation allowances under sections 406 and 409 of Title 37 for travel performed before the effective date of orders that direct a member to make a change of station and that are later modified to direct him to make a different change of station. However, the dislocation allowance is authorized by section 407 of Title 37 and does not come within the provisions of section 406a. Thus section 406a, if applicable in Captain Dawes' case, affords no authority for payment of a dislocation allowance to him.

Your question is answered in the negative.

The voucher and accompanying papers forwarded with your letter of August 18, 1969, will be retained by our Office.

[B-133972]

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Leave in Lieu of Public Law 90-588 Leave

A Federal employee who as a member of a Reserve component of the Armed Forces as described in 10 U.S.C. 261, or the National Guard as described in 32 U.S.C. 101 is entitled to 22 workdays of leave in a calendar year pursuant to 5 U.S.C. 6323(c) for additional periods of active Federal service in aid of law enforcement may be granted annual leave or unused military leave under 5 U.S.C. 6323(a) when his section 6323(c) leave is exhausted, but only if the leave is exhausted. Under section 6323(c), the employee entitled "to leave without loss of or reduction in * * * leave" may not elect to use, nor may he voluntarily be charged annual leave, or any other type of leave for periods of service in aid of law enforcement if he has section 6323(c) leave available for use, even to avoid a forfeiture of leave.

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Administrative Leave

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Overtime Earned in Civilian Position

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Charging Leave in Units of Hours

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—"Full Time Military Service" Defined

The term "full-time military service for his State" contained in 5 U.S.C. 6323(c) and used in connection with the 22 additional workdays of leave in a calendar year provided under section 6323(c) for Federal employees performing active service in aid of law enforcement as members of a Reserve component of the Armed Forces or the National Guard, includes the time from reporting when ordered by competent authority to serve in the active military service of the State until relieved by proper orders, which time embraces the standby status necessitated by the need to take over or perform when active service or skill is needed as well as actual engagement in law enforcement duties.

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Services Due to Natural Disaster

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Adjustments of Civilian Compensation, Retirement, Tax, and Insurance

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

has been credited, and any tax questions are for determination by the Internal Revenue Service.

Compensation—Adjustment—Military Duty to Enforce the Law

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Appropriation Effect

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Adjustments of Civilian Compensation, Retirement, Tax, and Insurance

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

Pay—Withholding—Member's Consent Requirement—Law Enforcement Services

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

Leaves of Absence—Civilians on Military Duty—Civil Disorders—Civilian and Military Duties on Same Day

A Federal employee who having performed all the duties of his civilian position on the day he reported for law enforcement duty with his National Guard unit as provided in 5 U.S.C. 6323(c) for members of the National Guard, as well as Reserve components of the Armed Forces, is entitled to receive both civilian compensation and military pay for the day. The rule that civilian compensation and military pay may not be paid for the same day because the performance of

civilian duties is incompatible with the requirements of active military service has no application to the day involved, and neither does 5 U.S.C. 5519 which authorizes crediting military pay to the civilian compensation entitlement of the individual who performs law enforcement services.

To the Chairman, United States Civil Service Commission, October 14, 1969:

Your letter of July 31, 1969, presents for our consideration several questions concerning the application of subsection 6323(c) and section 5519 of Title 5, United States Code, as added by section 2 of Public Law 90–588, approved October 17, 1968.

Subsection 6323(c) provides as follows:

(c) Except as provided by section 5519 of this title, an employee as defined by section 2105 of this title (except a substitute employee in the postal field service) or an individual employed by the government of the District of Columbia, permanent or temporary indefinite, who—

(1) is a member of a Reserve component of the Armed Forces, as described in section 261 of title 10, or the National Guard, as described in section 101 of title 32; and

(2) performs, for the purpose of providing military aid to enforce the law—

(A) Federal service under section 331, 332, 333, 3500, or 8500 of title 10, or other provision of law, as applicable, or

(B) full-time military service for his State, the District of Columbia, the Commonwealth of Puerto Rico, the Canal Zone, or a territory of the United States;

is entitled, during and because of such service, to leave without loss of, or reduction in, pay, leave to which he otherwise is entitled, credit for time or service, or performance or efficiency rating. Leave granted by this subsection shall not exceed 22 workdays in a calendar year.

Questions 1(a) through 1(f) concern the matter of granting other types of leave in lieu of or in addition to the leave authorized by subsection 6323(c). Your specific questions are as follows:

(a) When an employee performing active Federal service has exhausted his leave under 5 U.S.C. 6323(c), is he still entitled to use his annual leave or unused military leave under 5 U.S.C. 6323(a) for the same type of duty?

Prior to the enactment of Public Law 90–588 we held that employees who are required to perform active duty as military reservists or as members of federalized National Guard units in connection with the control of civil disorders may be granted military leave under 5 U.S.C. 6323(a), if available, and/or annual leave for the period of such absence. 37 Comp. Gen. 255 (1957); 47 *id.* 761 (1968). Where an employee has exhausted the leave authorized by 5 U.S.C. 6323(c), we see no reason why he may not be granted annual leave or unused military leave under 5 U.S.C. 6323(a) when ordered to perform additional periods of active Federal service in aid of law enforcement.

(b) Would the answer be different if he has not exhausted his leave under 5 U.S.C. 6323(c)?

Subsection 6323(c), quoted above, specifically provides that the employee is entitled to "leave without loss of or reduction in * * * leave to which he otherwise is entitled * * *." We construe such language to

mean that an employee who is ordered to perform the type of duty contemplated by subsection 6323(c) may not elect to use nor may he involuntarily be charged annual leave or any other type of leave for such absence if he has leave under 6323(c) available for his use. *Cf.* 27 Comp. Gen. 83 (1947) and B–119969, May 20, 1954. We believe that our construction of the statute comports with the intent of the Congress as evidenced by the following statement appearing on page 7 of H. Rept. No. 1560, 90th Cong., 2d sess.:

> The granting of leave and the reduction in civilian pay under these provisions are mandatory, and neither the agency nor the employee will have any discretion in this regard as to the application of the provisions involved.

The next question is—

> (c) If annual leave or military leave is available to an employee who has not exhausted his leave under 5 U.S.C. 6323(c), is the employing agency entitled to require that the leave under 5 U.S.C. 6323(c) be used instead?

As indicated in connection with our discussion of question 1(b), above, the employee must be charged leave under subsection 6323(c).

> (d) Would it make a difference with respect to annual leave in any of these instances if the active duty were near the end of the year and the annual leave would be forfeited if not used?

As discussed above, the provisions of the statute are mandatory and, therefore, annual leave may not be substituted for leave under subsection 6323(c) even to avoid a forfeiture thereof. *Cf.* B–119969, May 20, 1954.

> (e) When a National Guardsman's active service is for a State, may a reasonable amount of administrative leave be authorized if he has exhausted his leave under 5 U.S.C. 6323(c)?

In our decision 47 Comp. Gen. 761 we held that civilian employees of the Government who are called to perform short periods of active duty as military reservists or as members of federalized National Guard units in connection with the control of civil disorders may not be excused from duty without loss of pay or charge to leave for more than the 15 days in a calendar year authorized by 5 U.S.C. 6323(a). We pointed out that by enacting subsection 6323(a) the Congress had specifically provided for excused absence without loss of pay or charge to leave for certain types of Reserve and National Guard duty. We then went on to say:

> * * * We do not believe that the discretionary authority which agency heads have to excuse employees when absent without charge to leave may be used to increase the number of days an employee is excused for the purpose of participating in Reserve and National Guard activities which otherwise are covered by 5 U.S.C. 6323. * * *

We believe that the rationale of that decision is equally applicable in the case of leave authorized by subsection 6323(c). Accordingly, when an employee has exhausted his leave under 6323(c) he may not be further excused from duty without loss of pay or charge to leave

for the purpose of performing duty which otherwise would be covered by subsection 6323(c). In this regard, see our answer to question 1(a).

(f) Assuming that the employee has a choice in any instance, when a particular kind of leave has been applied for and used, is any retroactive change possible?

This question is too general to permit of a categorical answer. Questions 2(a) through 2(e) of your submission are as follows:

(a) Is an employee who is on such leave paid for overtime hours which he would have served if he had not been on leave?

(b) If he is paid for such overtime, which might be as little as two hours, is a nonworkday on which overtime would have been performed charged against the maximum 22 days?

(c) In the case of an uncommon tour of duty, such as four ten-hour days, is leave charged on a day-for-day basis without regard to the number of hours?

(d) What charges are proper for a 24-hour tour, starting one calendar day and ending the next?

(e) Is leave charged for a holiday which is included within a period of leave under 5 U.S.C. 6323(c)?

Subsection 6323(c) provides that the compensation of an employee granted leave under that subsection shall not be reduced by reason of such absence. Similar language appears in 5 U.S.C. 6322 (court leave) and 5 U.S.C. 6323(a) (military leave). Under those provisions we have held that an employee is entitled to the same compensation, including overtime, he would have received had he rendered service in his civilian position on the days he was required to be absent on court or military leave. 31 Comp. Gen. 173 (1951). The same rule is for application in the case of leave granted under subsection 6323(c). Question 2(a) is answered accordingly.

Subsection 6323(c) provides that the leave granted thereunder shall not exceed 22 workdays in a calendar year. The term "workdays" is not defined in the statute nor in the legislative history thereof. However, the following statements appear on pages 6 and 7 of H. Rept. No. 1560, 90th Cong., 2d sess.:

The maximum amount of leave to be granted is limited to not in excess of 22 workdays in a calendar year, which ordinarily corresponds with a calendar month of 30 days except in the case of postal field service employees.

The new subsection (d) provides similar leave benefits for substitute employees in the postal field service who are called to duty with the Reserve or the National Guard. However, the new provision will apply only to a substitute employee who has worked at least 1,040 hours as a substitute during the immediate preceding calendar year. The amount of leave to be granted may not exceed 160 hours in a calendar year. Such benefits will accrue to substitute employees on the basis of 1 hour of leave for each period aggregating 13 hours of service performed. The 1,040 hours represent one-half of an ordinary work year of 2,080 hours for postal employees. The 160 hours, or 20 8-hour days, is a little less than the 22 working days provided for the full-time employee under subsection (c).

It is evident from the above-quoted statements that the Congress envisioned a workday as consisting of 8 hours. However, it must be recognized that many Government employees have uncommon tours of duty with workdays of other than 8 hours. While the statute limits

the granting of leave to 22 workdays, the granting of the leave in units of days would create a disparity between the leave benefits of those employees who work a normal tour of duty consisting of five 8-hour days and those who work uncommon tours of duty. Therefore, it is our view that the leave authorized under subsection 6323(c) should be converted into hours and charged in units of hours rather than days. *Cf.* 25 Comp. Gen. 151 (1945). Thus, an employee who works a normal 40-hour week would be entitled to a maximum of 176 hours of leave in a calendar year under subsection 6323(c).

Furthermore, in the absence of anything in the legislative history of Public Law 90–588 indicating a contrary intent, we believe that leave under 6323(c) should be charged on the same basis that annual and sick leave is charged under chapter 63 of 5 U.S. Code. In that regard subparagraph 2–4(a) of chapter 630, Federal Personnel Manual, reads as follows:

a. *Leave days.* Both annual and sick leave are charged to an employee's account only for absence on regular workdays, that is, days on which he would otherwise work and receive pay at straight-time rates. Leave is not charged for absence on days for which overtime rates would be paid, holidays, or other nonworkdays.

Employees with uncommon tours of duty such as those who work 24-hour shifts may have the leave authorized by subsection 6323(c) adjusted in the same manner as their annual and sick leave under section 630.210 of the Commission's regulations. In that regard see FPM Supplement 990–2, Book 630, Subchapter 2, paragraph S2–6. Questions 2(b) through 2(e) are answered accordingly.

Your third question is:

What is the meaning of "full-time military service for his State" in 5 U.S.C. 6323(c)(2)(B)? May it include either a regular portion of each day or a regular schedule of only certain days in a week?

The term "full-time military service for his State" is construed to include the time from reporting when ordered by competent authority to serve in the active military service of the State until relieved by appropriate orders. By necessity the member would have to be available for full-time service and thus, standby status to take over or perform when active service or skill is needed would be included in the meaning of full-time military service as well as actual engagement. In the absence of specific cases it appears unnecessary to determine whether apparent lesser periods than full-time, as indicated in the question, meet the requirements of the statute.

Your fourth question consists of 4 subquestions as follows:

4(a) Is National Guard duty in cases of disaster such as floods, earthquakes and hurricanes, which we understand generally include duties of preventing looting and other criminal offenses, covered by the term "military aid to enforce the law"?

It is our understanding that where the National Guard is used for the purpose of alleviating the results of disaster, that maintenance of law and order is a prime function of the assigned military duties. Therefore question 4(a) is answered in the affirmative.

4(b) What would be acceptable evidence that duty was to be performed "for the purpose of providing military aid to enforce the law"?

A copy of military orders issued by competent authority or a statement by the members' commanding officer showing the authority, extent and nature of the service would be sufficient. See 43 Comp. Gen. 293 (1963).

4(c)(1) If disaster duty is not covered by 5 U.S.C. 6323(c), may agencies cover required absences by granting administrative leave?

In view of our answer to 4(a) above, no answer is required.

4(c)(2) If the leave authorized by 5 U.S.C. 6323(c) is available for this duty and is exhausted, may agencies then grant administrative leave? May they authorize administrative leave instead of leave under 5 U.S.C. 6323(c) for a short period of absence in order to avoid the complications involved in applying the provisions of 5 U.S.C. 5519?

Both questions are answered in the negative in accordance with our answers to questions 1(e) and 1(b), above.

In question 5 you ask whether the military leave provided by 5 U.S.C. 6323(c) or that provided by former 39 D.C. Code 608 (restated in Public Law 90–623 with erroneous code designation of 5 U.S.C. 6323(c)) is appropriate when the D.C. National Guard is assembled on all day basis for civil disturbance duty.

Since 5 U.S.C. 6323(c)(2)(B) specifically refers to service for "the District of Columbia" we believe that when the D.C. National Guard is ordered to duty to perform the kind of services for which military leave is provided by 5 U.S.C. 6323(c) the military leave should be charged to the leave specified therein and an appropriate adjustment made in civilian pay as provided in 5 U.S.C. 5519.

Questions 6(a) through 6(i) are as follows:

(a) Is this offset of military pay on a day-for-day basis?
(b) Is it to represent gross pay, or net pay?
(c) If deductions have already been made from military pay, how is credit against civilian pay to be handled? For example, if income tax is withheld from military pay, must adjustment to normal withholding be made for civilian pay? Or, if FICA tax is withheld from military pay, how is civilian pay to be calculated, since civil service retirement withholding must be against normal base pay for the civilian position; or, how can the employee be reimbursed for the FICA deduction?
(d) In view of the potential difficulty in ascertaining proper pay amounts for credit, does the responsibility lie with the military for furnishing needed information, or may the civilian agency base offset credit on information supplied by the employee?
(e) Because of lag in receipt of pay information, offset will in most cases have to be made in pay periods subsequent to those during which military service is performed. Under such circumstances, may cash collection action be substituted for payroll offset, in a manner similar to that for handling State jury fees?
(f) How are offsets (or collections) to be recorded, with regard to agency appropriations?

(g) Should the military pay exceed the civilian pay for the period of leave involved, is the employee entitled to retain the excess military pay? If not, how is collection to be accomplished? Also, if there is no remaining civilian pay due or the amount is insufficient to satisfy the full withholdings normally required from the civilian pay (e.g., taxes, group life insurance, retirement, etc.), is the employee indebted for the shortage?

(h) Since title 38 employees are paid on a 7-day a week basis, with two administrative non-duty days weekly, must offset of military pay be made against civilian pay for these non-duty days?

(i) Under the law can appropriate payroll personnel of the National Guard or the Reserves withhold from military pay that portion of such pay which is subject to offset against civilian pay, and transfer this amount to the civilian agency? This would eliminate the necessity for offset against civilian pay in subsequent payroll periods, or the necessity for collection (particularly should the funds have already been spent or the employee have been separated), and may eliminate certain of the deduction problems.

Those questions deal with problems which may arise in implementing 5 U.S.C. 5519, as added by Public Law 90–588, which provides:

An amount (other than a travel, transportation, or per diem allowance) received by an employee or individual for military service as a member of the Reserve or National Guard for a period for which he is entitled to leave under section 6323 (c) or (d) of this title shall be credited against the pay payable to the employee or individual with respect to his civilian position for that period.

The wording of that section is similar to that contained in 5 U.S.C. 5515 which requires that pay received by a Federal employee for jury service in a State court be credited against the pay payable by the United States. The decisions we have rendered with regard to the implementation of that section are given some weight in determining the rules to be applied under section 5519. However, the differences between jury fees and military pay do not permit the application of the rules established under section 5515 in all cases. Further, the legislative history of Public Law 90–588 must be considered in arriving at a determination of what procedures must be followed with regard to the crediting of military pay against civilian pay. The following excerpts from page 7 of H. Rept. No. 1560, 90th Cong., 2d sess. are relevant:

Section 2(b) adds a new section 5519 to title 5, United States Code, to require that the amount received by an employee for military service as a member of the Reserve or the National Guard on any workday for which he is entitled to leave under the new subsections (c) or (d) of section 6323, shall be credited against his civilian pay. It is to be noted that the leave is to be granted only for workdays, and that the civilian pay of the employee will be reduced only by the amount that he receives for military service on the workday. The civilian pay will not be reduced by any amount the individual may receive for military service for days that are not workdays. Nor will civilian pay be reduced by any amounts received for Travel transportation or per diem allowance incident to the military service.

* * * * * * *

The Committee believes, however, that the additional cost that will be incurred will be of no great significance in view of the requirement that the amount received for such military service be credited toward civilian pay on workdays for the employees who receive the benefit of the additional leave under this legislation when serving with the Reserve or the National Guard.

In view of the above, military pay for a day on which the employee is excused from civilian duty under 5 U.S.C. 6323(c) should be deducted from the civilian pay for the period during which he is so excused. Military pay received for service for days on which the employee does not receive civilian pay need not be credited against civilian pay received during the period of military service. *Cf.* 26 Comp. Gen. 888 (1947). Question 6(a) is answered accordingly.

Regarding question 6(b) the gross amount received by an employee on account of military duty must be credited to his civilian pay. *Cf.* 44 Comp. Gen. 577 (1965).

Question 6(c) relates primarily to tax matters which are within the jurisdiction of the Internal Revenue Service, Treasury Department. Therefore, we are not in a position to provide you a complete answer to that question. However, regarding the deduction of civil service retirement contributions, we believe that it would be more in keeping with the intent of section 5519 to compute such deductions on the basis of the civilian pay due the employee after crediting his military pay. We recognize that a contrary conclusion was reached with regard to crediting of jury fees received from State courts in 20 Comp. Gen. 279 (1940). Although we do not believe that a change in that rule with regard to court leave is required, in view of the different conditions which apply in cases arising under section 5519, we believe it is the better view that military pay received by an individual on leave authorized by 5 U.S.C. 6323(c) reduces his entitlement to civilian pay and also his required contribution to the civil service retirement fund in the same manner as nonpay status reduces such contribution. If that view were not taken, an employee whose military pay was almost equal to or exceeded his civilian pay would be in debt to the Government for retirement contributions based on his full normal salary.

Concerning question 6(d), specific information as to the military pay entitlement of employees should be obtained from the military organization concerned if the employee is unable to produce specific and documented information from which his civilian pay entitlement may be determined.

If a civilian payroll for the period during which the employee is on military duty and entitled to leave under 5 U.S.C. 6323(c) cannot be adjusted to account for the military pay credit before payment is made to the employee, collection of the gross amount of military pay may be made by offset against subsequent civilian pay or in cash. Question 6(e) is answered accordingly.

Regarding question 6(f), amounts credited on account of military pay received by an employee may remain in agency appropriations and amounts collected in cash may be deposited in the appropriation from

which the employee's civilian pay was paid. *Cf.* 36 Comp. Gen. 591 (1957).

Regarding question 6(g), we find no indication in section 5519 or in the history thereof which requires the forfeiture of military pay. Accordingly, an employee is entitled to retain his daily military pay to the extent that it exceeds his civilian pay entitlement for any day or part of a day he is excused from civilian duty under 5 U.S.C. 6323(c). Further, in line with our answers to prior questions, employees concerned are considered to receive reduced civilian pay as a result of the crediting of military pay. Thus, retirement and presumably taxes will be deducted only to the extent of the reduced civilian pay, if any, due the individual. Health and life insurance deductions should be made to the extent required by the Commission's regulations which are applicable in case civilian pay due it not sufficient to cover all deductions.

Question 6(h) is too general to permit an answer at this time. We suggest, however, that full details of this matter be submitted here prior to application of the other rules stated herein to the case covered by this question.

As indicated above the provisions of section 5519 do not affect the employee's entitlement to military pay. In the circumstances it does not appear that the military organization concerned would have authority to withhold military pay otherwise due for purposes of crediting it to civilian pay without the consent of the individual. Further, the Internal Revenue Service rules might require withholding of appropriate taxes on the basis of the employee's entitlement to military pay without regard to the amount withheld for credit to the civilian pay of the employee. Question 6(i) is answered accordingly.

The additional question presented in the letter of your Assistant General Counsel dated August 1, 1969, involves an employee who was required to perform National Guard duty covered by 5 U.S.C. 6323(c) beginning at 7 p.m. on a regular workday (April 3) and ending at midnight April 5 (a Saturday and nonworkday). The employee performed all the duties of his civilian position before reporting for duty with his military unit and under the rules and procedures applicable to military pay, he was entitled to a full day's military pay for that day. An individual is normally not entitled to receive both civilian and military pay for the same day because the performance of civilian duties is considered to be incompatible with the requirements of active military service. However, in the case presented the individual had performed his civilian duties before he entered on active military duty. We do not believe that the provisions of 5 U.S.C. 5519 regarding the crediting of military pay to the individual's civilian pay entitlement

need be applied in the circumstances on April 3 since the employee concerned was not excused from his civilian duties or subject to military control while performing such duties. While the guard duty pay is for deduction from his civil service pay for April 4 (Friday), no deduction is to be made for April 5, a nonworkday for which he received no civil service pay.

[B-166766]

Sales—Bids—Discarding All Bids—Full and Free Competition Restricted

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

Contracts—Specifications—Restrictive—Techniques, Methods, or Operations Restricted

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

To the Director, Defense Supply Agency, October 15, 1969:

Reference is made to a letter dated May 15, 1969, DSAH-G, with enclosures, from the Assistant Counsel, Defense Supply Agency, submitting a report on the protest of National Metal & Steel Corporation (National Metal) against the rejection of its bid; and, the protest of Aero-Tech, Incorporated (Aero-Tech) against the cancellation of all bids, both protests relating to sales invitation for bids No. 46-9105, issued by the Defense Surplus Sales Office, San Diego, California.

The sales invitation offered 30 items consisting of a total of 281 units, aircraft carcasses, to be sold as scrap aluminum, by unit price bid, with the added requirement that demilitarization and sweating would be accomplished prior to removal from the Davis-Monthan Air

Force Base. Bids were opened as scheduled on April 17, 1969. National Metal submitted a bid on a "per pound" basis rather than on a "unit" basis. In addition, National Metal included the following modification as a part of its bid:

MODIFICATION OF BID SALE #46-9105

This is in regard to item 2 under Article FA termed DEMILITARIZATION page 16 of IFB 46-9105.
Precedent or procedure for modifications.

ARTICLE AC page 12

* * * However, a modification which makes the terms of the otherwise successful bid more favorable to the Government will be considered at any time it is received prior to award and may be accepted * * *

ARTICLE AE page 12

The contract will be awarded to that responsible bidder whose bid conforming to the Invitation will be most advantageous to the Government, price and other factors considered. * * *

ARTICLE EE page 15

The Sales Contracting Officer may, at any time, by written order and with notice only to the person or firm to whom the contract was awarded, make changes in the method by or the extent to which the property is to be scrapped, mutilated, or demilitarized; the method by or the extent to which Government property is to be stripped from the subject matter of the contract (to include the addition or deletion of property to be stripped); or the disposition to be made of the stripped property. * * *

Having quoted the above and being fully cognizant of the air pollution problems created by and inherent to the utilization of sweating furnaces we believe with reasonable certainty that we can accomplish the processing of the aircraft carcasses contingent with the requirement that they be mutilated and destroyed by systems now available and owned by us that will totally preclude the necessity for sweating.

We believe that coincidental with the government's established policy for beautification and the elimination of hazards emanating from the incidents of air pollution that such processing as we intend to use will further the principles of government policy.

Our bid is therefore contingent upon an amendment of said clause that will permit us to demilitarize, strip, clean these aircraft at their location by manual or mechanical devices and then removing fuselages, wings, etc. in their then existing form having been only compressed, flattened or otherwise treated to enable us to establish pay loads for trucks designated to remove the material.

At the same time though with reasonable certainty as to the feasibility of our project we require flexibility that will enable us to revert to the use of portable sweaters on the base as has consistently represented past procedure should our suggested process not be feasible for reasons presently unforeseeable. We must then have the right to revert to sweating.

National Metal's "per pound" bid, evaluated on the basis of the Government's estimated weights, was the highest in the amount of $1,172,765.97. However, the contracting officer announced after bid opening that National Metal's bid was nonresponsive in that the bid was on a "per pound" basis rather than on a "unit" basis as clearly required by the invitation. In view thereof, it was announced that award would be processed on the basis of the high responsive bid submitted by Aero-Tech, in the amount of $1,105,000.

The chronological facts as set forth in the administrative report show that on April 15, 1969, two days prior to bid opening, a repre-

sentative of Davis-Monthan Air Force Base advised the sales office that a representative of National Metal was at the base to inspect the aircraft carcasses. At that time, the representative of National Metal indicated that the firm desired to submit a bid in such a manner as to eliminate the necessity for on-base sweating. On April 16, 1969, the sales contracting officer advised National Metal by telephone that such a qualified bid would be considered to be nonresponsive. Notwithstanding this advice, the firm submitted the qualified bid referred to above. By confirming letter dated April 17, 1969, National Metal was advised that its bid was nonresponsive on two grounds—(1) that the firm had taken exception to the on-base sweating requirements, and (2) that it had bid on a "pound" basis when the aircraft were offered on an "each" basis.

On April 22, 1969, National Metal requested that the award be delayed pending a decision from higher headquarters. The sales office replied on April 23, 1969, that the award of contract would not be delayed. Its reason was that it had to obtain antitrust advice from the Attorney General prior to award in accordance with section 207 of the Federal Property and Administrative Services Act of 1949, as amended, 40 U.S.C. 488, and had reason to believe that the protest would be resolved prior to obtaining such advice which was requested by letter dated April 21, 1969. National Metal protested to our Office by letter dated April 23, 1969, that its bid should have been considered responsive on the basis of language in the invitation, as set out in its modification above. On April 29, 1969, as a result of information developed in the preparation of the administrative report, the sales office determined to reject all bids and readvertise. Based on this decision, National Metal withdrew its protest on April 30, 1969. Aero-Tech, by letter dated May 1, 1969, from its counsel, protested the cancellation of the invitation.

National Metal's protest against the rejection of its bid relies on provisions in the General Sale Terms and Conditions of the invitation applying to bids which conform to the invitation requirements. Article AE, allows the acceptance of modifications which make the terms of the "otherwise successful bid" more favorable. Article AC and Article EE apply to changes made or directed by the contracting officer subsequent to the award of the contract. The statutory authority pursuant to which the sale was advertised is 40 U.S.C. 484, and under this statute, a legal award of a contract for surplus property offered for sale by formal sales invitation can be made only to a responsive bidder, that is, one who has submitted a bid in conformance with the advertised terms and conditions. A bid which deviates in any material respect from those terms and conditions may not properly be considered

for award since, in legal effect, such a bid is a counteroffer which the Government may not accept.

We have held that a nonresponsive bid, such as was submitted here, may not be accepted but must be regarded as contrary to the conditions of the sales invitation which required—without exception—"unit bids" only. For comparison see B–140335, August 17, 1959 and B–161894, September 1, 1967. We therefore concur with the contracting officer that no "legal award" could have been made to National Metal under its original bid on a "per pound" basis.

It is administratively reported that certain background information is necessary to understand the basis for the decision to reject all bids under the invitation. The overall policy with respect to the disposal of military aircraft was reviewed in detail by the Department of Defense in 1963. In response to developing policy concerning the location at which such aircraft had to be sweated, the Department of the Air Force took a very firm stand that Air Force military aircraft had to be sweated on-base in lieu of on-base demilitarization with off-base processing.

The Air Force policy was adopted by DSSO in June 1963 by writing contract provisions requiring on-base sweating. Since July 1964 a single manager operating agency has had charge of aircraft storage, reclamation, and disposal operations. This agency operates under the jurisdiction of the Department of the Air Force and was assigned the responsibility to provide complete technical guidance to the Defense Surplus Sales Office with special emphasis on demilitarization requirequirements and providing the sales office with any special conditions or provisions of sale considered to be necessary. The Department of the Air Force through its Regional Environmental Health Laboratory conducted a comprehensive evaluation of the air pollution potential of the aircraft reclamation. As a result of this report, the Air Force by letter dated January 21, 1965, advised its single manager operating agency of the very critical problem concerning air pollution in the Tucson area and instructed that agency to offer aircraft carcasses under an alternate provision which would allow the contractor to demilitarize the aircraft carcasses on-base and then remove the carcasses for off-base processing. It was believed that such an alternative might minimize the air pollution problem. As the result, apparently, of a misunderstanding by the single manager operating agency at Davis-Monthan, the Defense Surplus Sales Office was told to permit off-base processing on the next sale, in May 1965, but was told to require on-base sweating in subsequent sales.

It is further reported that the Defense Logistics Services Center, the DSA activity which administers the surplus property program of the

Department of Defense, first became aware on April 29, 1969, of the Air Force policy permitting on-base demilitarization of aircraft with off-base processing. After consultation with the Air Force, the sales contracting officer and DLSC concluded that all bids should be rejected and the aircraft carcasses readvertised giving the purchaser the option of either on-base sweating or on-base demilitarization with off-base processing. The decision to reject all bids was based on two factors, (1) on-base demilitarization with off-base processing would help to alleviate a critical air pollution problem, and (2) from a legal standpoint, since the aircraft had been offered for sale under more restrictive provisions than those necessary to assure the protection of the Government's interest, the full and free competition contemplated by the provisions of the Federal Property and Administrative Services Act of 1949, as amended, which govern the disposition of such property, was not obtained.

The invitation No. 46–0010, readvertising the aircraft carcasses was issued with a provision that after demilitarization is performed the material may be removed off Government premises for further processing at the option of the purchaser. The opening date for the readvertised bids, as amended, was July 24, 1969. By amendment No. 2 dated July 1, 1969, 444 landing wheels were deleted from the list of accessories to be saved for the Government and will remain in the purchaser's possession. Five responsive bids were received under the invitation as follows:

National Metal & Steel Corp.	$1,019,852
Aero-Tech	1,463,000
Engineer Associates of Phoenix	1,308,600
National Aircraft, Division of National Metals of Tucson	1,250,000
Allied Aircraft	1,000,000

Aero-Tech, through its attorney's letter dated June 4, 1969, forcibly protests the "rejection of all bids" under invitation 46–9105 on the ground that the contracting officer's determinations were so grossly erroneous as to constitute an arbitrary rejection contrary and detrimental to the Government's interest in maintaining the integrity of the competitive bidding system.

The procuring activity cites 43 Comp. Gen. 15 (1963) of the reasons for rejection of all bids, wherein we stated:

We have held that generally conditions in Government procurement contracts which may increase the cost of performance are improper unless authorized by statute. 20 Comp. Gen. 836, 845, and cases cited therein. We believe this principle applies with equal force to contract stipulations or conditions which tend to reduce the return to the Government in sales of surplus property.

The foregoing principle is a valid rule, in our opinion, but the probable adverse monetary impact on prices due to restrictions in specifications must be weighed against other factors, if present, such as preservation of the integrity of the competitive bidding system. In the case at 43 Comp. Gen. 15 the question as to restrictive specifications was raised by the contractor after a contract had been awarded, so the factor of possible prejudice to bidders by readvertising after bid prices had been exposed was not present. In the present case there is another principle for consideration. As was stated by the Court of Claims in *Massman Construction Company* v. *United States*, 102 Ct. Cl. 699, 719:

> To have a set of bids discarded after they are opened and each bidder has learned his competitor's price is a serious matter, and it should not be permitted except for cogent reasons.

Our Office recognizes that the authority vested in the contracting officer to reject any or all bids and readvertise is extremely broad, and ordinarily such action will not be questioned by our Office. However, we have ruled, in proper cases, that the integrity of the competitive bidding system would suffer less from the making of an award under an imperfect invitation than from readvertising a procurement. See 39 Comp. Gen. 396 (1959); *id.* 563 (1960). We realize that these cases involve procurements, but the principle of the *Massman* case is, we believe, equally applicable to surplus sales. We, therefore, examine the given determinations in the context of the statutory requirement. As in the case of the procurement of supplies and services by Government agencies pursuant to the statutory requirements governing formal advertising, the statute governing the disposition of surplus Government property, 40 U.S.C. 484(e)(2) requires that the terms and conditions for bids "shall permit that full and free competition" which is consistent with the value and nature of the property involved, and that:

> Award shall be make with reasonable promptness by notice to the responsible bidder whose bid, conforming to the invitation for bids, will be most advantageous to the Government, price and other factors considered: Provided, That all bids may be rejected when it is in the public interest to do so.

The basic issue in the present case is whether the reasons given for the discretionary action taken by the contracting officer constitute cogent or compelling reasons to justify rejection of all bids, as being in the public interest. Here, because of the nature of the property involved, the Government's actual need is to have the aircraft carcasses, after demilitarization, reduced to scrap form for future reduction of the metal content. While we do not question that the job can, and should, be performed without creating significant air pollution "a circumstance inimical to, and at variance with," the national public health, we do not believe that such an issue is for other than secondary

consideration in measuring the Government's needs herein; especially where the readvertised invitation allows on-base sweating.

Concerning the contention by Aero-Tech, that on-base sweating has proven the most economical process, we are of the opinion that, whether or not economies may be effected by an individual prospective contractor in performing a particular job, can be best determined by that contractor rather than by the procurement officials. When drafting specifications or invitations for bids which restrict the application of techniques, methods or operations to a single, or administratively preferred, process under which prospective contractors are required to perform the work, the criterion for inclusion of such restrictions is whether a valid justification has been established for prohibiting bidders from basing their bids on the use of any customary methods of operation which, in their considered judgment, provide the most economical means available to them and thus will result in the highest return to the Government. The determination or opinion that a particular operation cannot be economically employed in the work performance by a bidder, or by all bidders, provides no valid basis for prohibiting such operations, since determinations as to the operational areas in which economies may be effected by an individual prospective contractor in performing a particular job reside more properly with the individual contractor, and constitute an essential element to his competing freely and fully for the material as intended by 40 U.S.C. 484.

The remaining question which must be regarded as the basic factor for the determination to reject all bids concerns the alternate off-base processing proscription which was not in fact necessary to the Government's purposes. The clear mandate of 40 U.S.C. 484 is that invitations "shall permit" that full and free competition which is consistent with the value and nature of the property involved. The Government's actual needs, as stated hereinbefore, are to have the aircraft carcasses, after demilitarization, reduced to scrap form for future reduction of the metal content. There is no need that any of the aircraft carcasses be sweated on-base as designated in the specifications, nor is it inconsistent with the sales policy for the material to be processed off-base. We find nothing in 40 U.S.C. 484 to indicate that such statute contemplates that a bidder's right, as provided therein, to compete freely and fully may be administratively restricted or controlled by procurement officials in the drafting of sales invitation for bids to the extent that any bidder is precluded from computing his bid price on the maximum utilization of his own property, facilities and equipment. Accordingly, we hold that such administrative restrictions in the areas of a bidder's internal operations is basically inimical to *free* and

full competition by the individual bidder, and may be condoned only where it is clearly required in order to secure the actual needs of the Government.

Although it is regrettable that the mistaken policy of the sales agency in drafting sales invitations so as to not allow responsive bidding on off base processing by the contractor was not known prior to bid opening, that policy does not permit bidders to compete freely and fully in situations such as that at hand for the needs actually required by the Government and to the extent that such policy conflicts with 40 U.S.C. 484 the statute must prevail.

For the reasons stated we conclude that the invitation in question was properly canceled.

[B-167382]

Bids—Discarding All Bids—Bidding Irregularities

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

To the Secretary of the Army, October 16, 1969:

We refer to reports dated August 18 and 29, 1969, file reference: MA-S, from your Director of Materiel Acquisition, on the protest of Ryan Stevedoring Company, Inc. (Ryan), against the proposed award of a contract to International Terminal Operating Company, Inc. (ITO), for stevedore and related terminal services at Military Ocean Terminal, Sunny Point, Southport, North Carolina, under Department of the Army invitation for bids No. DAHC 21-68-B-0224. Bids on the subject solicitation were opened on June 11, 1969, and ITO was determined to be low with Ryan being second-low.

The protest is premised on the grounds that Ryan, the incumbent contractor, was prejudiced in its competitive position by the misconduct of one of your Department's civilian employees at the installation, in that such employee made known to ITO certain secret, confidential, and proprietary information concerning Ryan's particular methods of operation and efficiency in performing similar work requirements under its contract. Ryan submitted numerous affidavits to your Department in support of its allegations as to the improper and unauthorized ac-

tivities of the particular employee, and requested an investigation of such allegations.

After an investigation by your Department, based upon charges of conduct contrary to the provisions of paragraph 3, AR 600–50 and Executive Order No. 11222, prescribing standards of ethical conduct for Government officers and employees, and specifically of representing himself in a manner as to appear to be an agent for ITO, and providing an ITO representative with information relative to transportation operating data at Sunny Point, the employee was given a separation notice. A formal grievance hearing was held pursuant to an appeal of the separation, and the appeal was denied by the commanding officer of the installation. We understand that a further appeal of the separation is now pending in the Office of the Secretary of the Army.

It is reported in the findings of the contracting officer that ITO denied all allegations of any wrongful action or connection with the employee in question except that it admitted receiving cargo weight and cube data, and type of cargo information, from the employee. The contracting officer states that such data is not secret, confidential or proprietary and, while the data was not requested from the contracting officer, it would have been made available had it been requested by ITO, or by any other bidder, from the contracting officer. It is further reported that the other information allegedly imparted to ITO by the employee (number of tons of cargo loaded by Ryan per hour, and the performance, makeup and efficiency of Ryan's stevedore gangs) could have been formulated by ITO through information properly available to ITO from other sources. The contracting officer also states that "the information allegedly made available does not come within the specific categories of matters which are exempt from public disclosure under Public Law 89–487."

Insofar as Ryan's hourly loading rate and the performance, makeup and efficiency of its gangs are concerned, we consider the view advanced by the contracting officer (that Government data or knowledge concerning Ryan's cost elements and performance in connection with its contract could properly be disclosed to the public by Government personnel) to be seriously questionable. Paragraph 1–329.3(c)(4)(a) of the Armed Services Procurement Regulation, issued in implementation of Public Law 89–487, 5 U.S.C. 552, specifically exempts from public disclosure information including "statistical data or information concerning contract performance, income, profits, losses and expenditures received from contractors or potential contractors." Additionally, the contracting officer's views that such information could be formulated by the experience of competitive contractors in such work, union information, and on-site inspection, is emphatically disputed by

Ryan on the basis that the number of contractors with experience in ammunition stevedoring is very small; that no other competing contractor (and ITO in particular) has comparable experience in ammunition handling and loading such as Ryan possesses; that the operations at Sunny Point are unique and Ryan has held the contract for the last 5 consecutive years; that a major cost factor is the carpenters used with the stevedore gangs in the holds of the ships which cannot be determined from a gang composition or an on-site inspection of the facilities; and that different types of ammunition require different gang sizes from those specified in collective bargaining agreements.

Whether ITO could have accurately estimated Ryan's cost elements and tons of cargo loaded per hour, does not negate the fact that representatives of ITO did contact a source other than that specified in the invitation, and not otherwise authorized, for additional information which was considered necessary for bidding purposes. If such additional information was, in fact, essential to, or helpful in, the submission of an intelligent bid, and if such information could properly have been made available to ITO, it should have been furnished to all concerned under paragraph 3 of the Solicitation Instructions and Conditions (SF-33A, July 1966) which requires that "Any information given to a prospective offeror concerning a solicitation will be furnished to all prospective offerors as an amendment of the solicitation, if such information is necessary to offerors in submitting offers on the solicitation or if the lack of such information would be prejudicial to uninformed offerors."

An affidavit has been submitted to this Office by the representative of ITO who contacted (and thereafter received various calls from) the civilian employee in question at Sunny Point. It is stated therein that, while the representative had known the employee during prior years, he was not aware that the employee was at Sunny Point, and that the call to obtain technical manuals containing shipping information on the various types of ammunition was made at the suggestion of an Army official at the Port of Baltimore, Maryland, who also knew the employee and that he was employed at Sunny Point. It is further stated that the representative asked the employee only for packaging information with respect to ammunition, and that he never asked the employee to obtain any information relating in any way to Ryan and its performance at Sunny Point. In such connection, however, we cannot ignore the affidavit submitted by Ryan's General Counsel, submitted as Exhibit No. 13 of the protest, stating that during the course of a telephone conversation on June 26, 1969, the employee admitted to having given information to ITO, prior to bidding, concerning the number of tons of cargo loaded by Ryan per hour, the types of cargo

loaded, the cube of the cargo loaded, and the performance, makeup and efficiency of Ryan's stevedore gangs.

We also consider it pertinent to note that in another affidavit submitted to this Office by the ITO official who received the material from the employee, it is stated that the transmittal envelope also included a sheet containing some twelve or thirteen pricing items which were not specifically identified, and appended to that sheet was a note which the official remembers as having stated in substance "Maybe this will be of some use to you." It is further stated that the items were assumed by the recipient to have been copied from the 1967 Ryan contract with the Government, and inasmuch as ITO had received a copy of the contract from the contracting officer such items were not forwarded to the ITO personnel engaged in preparing its bid.

In addition to assuring that essential information is supplied to all concerned, another purpose for designating in a solicitation that prospective bidders shall call a designated official for information concerning the procurement is to prevent any suspicion of favoritism and to maintain the integrity of the competitive bidding system. When a Government employee, who by virtue of his employment is in a position to obtain confidential information concerning a contractor's operations which would prejudice its competitive position for a procurement, is determined to be guilty of improper actions with a competing bidder in matters regarding that procurement, the suspicion of favoritism immediately arises, and the integrity of the competitive bidding system is placed in jeopardy.

While we form no judgment in this decision as to whether ITO did, in fact, receive confidential information from the Government employee at Sunny Point concerning Ryan's operations which put ITO in an advantageous and unfair position over Ryan in the computation of bids, we believe the record adequately demonstrates that an award to ITO pursuant to the subject solicitation could only be made under such a cloud of suspicion and mistrust as to be clearly detrimental to, and result in a lack of confidence in, the competitive bidding system.

Accordingly, the procurement should be readvertised with special efforts being made to assure that the invitation contains all essential information needed by bidders for intelligently computing their bids. In this connection we have been informally advised by representatives of Ryan that such firm would not advance its belief that confidential information was released in the instant procurement as the basis for a further protest in the event the procurement is readvertised.

The files forwarded with the reports of August 18 and 29, and letter of September 22, 1969, from Chief, Procedures and Regulations Division, are returned.

[B-167502]

Transportation—Household Effects—Military Personnel—Weight Limitation—Excess Cost Liability—Circuitous Routes

A member of the uniformed services whose change-of-station orders are rescinded subsequent to the shipment of his household goods in excess of his permanent change-of-station weight allowance, and his reassignment necessitated the reshipment of the goods, notwithstanding the Government's action was beyond his control is nevertheless liable for the additional cost incurred for the shipment of the excess weight over the circuitous route. The authority in 37 U.S.C. 406a to reimburse a member for the expenses incurred prior to the effective date of change-of-station orders that are later canceled, revoked, or modified is limited to the travel and transportation expenses prescribed in 37 U.S.C. 404, 406, and 408, and, therefore, the member may not be relieved of the liability imposed by paragraph M8003 of the Joint Travel Regulations to pay the cost of shipping the excess weight over the circuitous route.

To the Secretary of the Army, October 16, 1969:

Further reference is made to letter dated June 30, 1969, from the Assistant Secretary of the Army (Manpower and Reserve Affairs) requesting a decision whether a member of the uniformed services is required to pay the cost of shipping excess weight of household goods circuitously when orders are amended. The submission has been assigned Control No. 69-28 by the Per Diem, Travel and Transportation Allowance Committee.

In his letter the Assistant Secretary refers to paragraph M8014 of the Joint Travel Regulations which provides that shipment of household goods made after receipt of competent permanent change-of-station orders will be forwarded or returned to proper destination at Government expense in case such orders are subsequently canceled, amended, or revoked. He also refers to paragraph M8007 of the regulations which provides that any excess costs resulting from shipment of household goods in excess of the member's permanent change-of-station weight allowance prescribed in paragraph M8003 shall be borne by the member.

The Assistant Secretary says that in applying these provisions, some doubt exists as to the excess cost properly chargeable to the member in a situation such as follows:

A member was ordered PCS from Barksdale AFB, La., to MacDill AFB, Fla., by orders dated 7 June 1966 with an EDCSA of 25 July 1966. In reliance on this order his household goods, weighing in excess of his allowance prescribed in JTR, par. M8003, were shipped to MacDill AFB, Fla. On July 7, 1966, subsequent to the date the household goods were shipped, but prior to reporting to MacDill AFB, Fla., the orders were rescinded and the member was reassigned to USAFPMC, Randolph AFB, Tex. The household goods were shipped on through to MacDill AFB, Fla. and then transshipped to Randolph AFB, Texas.

The Assistant Secretary requests our decision whether the member should be required to reimburse the Government for the cost of shipping the excess weight from Barksdale Air Force Base, Louisiana, to

MacDill Air Force Base, Florida, thence to Randolph Air Force Base, Texas. He states that it is quite clear that the member is responsible for cost of shipping household goods in excess of his maximum weight allowance from old to new station or between other points requested by the member. He says, however, that when shipment is made circuitously because of an action of the Government which is beyond the control of the member, the added cost resulting from such action gives rise to doubt as to whether the member should have any responsibility for such added cost.

The Assistant Secretary says further that it appears that Congress, in enacting Public Law 88–238, 77 Stat. 475, intended that a member would not suffer a personal financial disadvantage by reason of the cancellation of the change-of-station order after movement of the household goods from the old station but prior to the effective date of the orders. Apparently it is his view that in such circumstances the member should not be required to reimburse the Government for the cost of shipping the excess weight circuitously.

Section 406 of Title 37, United States Code, provides for the transportation (including packing and crating) of household effects of members of the uniformed services in connection with a change of station to and from such locations and within such weight allowances as may be prescribed by the Secretaries concerned. Paragraph M8002 of the Joint Travel Regulations provides that household effects within specified weight allowances, designated as net weights, are authorized for shipment at Government expense. Such weights for the various ranks and grades are set forth in paragraph M8003. Paragraph M8002–1 provides the method for establishing the net weight when the actual net weight of unpacked and uncrated household goods is not known.

Paragraph M8007–2 provides that the Government's maximum transportation obligation is the cost of a through household goods movement of a member's prescribed weight allowance (paragraph M8003) in one lot between authorized places at a valuation equivalent to the lowest applicable rate established in the carrier's tariffs. It provides further that the member will bear all transportation costs arising from shipment in more than one lot, for distance in excess of that between authorized places, and for weights in excess of the maximum allowance prescribed in paragraph M8003.

In our opinion the foregoing regulations properly reflect the intent of the law and contemplate the shipment at Government expense of household goods, as packed for shipment at not to exceed an overall weight allowance of net weight plus an allowance for packing and crating. Weights exceeding the maximum overall weight are properly chargeable to the shipper.

Section 1 of the act of December 23, 1963, Public Law 88-238, 77 Stat. 475, added section 406a of Title 37, U.S. Code, which provides:

> Under uniform regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances under section 404 of this title, and to transportation of his dependents, baggage, and household effects under sections 406 and 409 of this title, if otherwise qualified, for travel performed before the effective date of orders that direct him to make a change of station and that are later—
> (1) canceled, revoked, or modified to direct him to return to the station from which he was being transferred; or
> (2) modified to direct him to make a different change of station.

The purpose of section 406a is to reimburse a member for expenses as provided in sections 404, 406 and 409 of Title 37 of the United States Code for travel performed by himself and the transportation of his dependents, baggage, and household effects when it is shown that such expenses were incurred prior to the effective date of the orders directing him to make a change of station which were later canceled, revoked, or modified to direct him to return to the station from which he was transferred, or the orders were modified to direct him to make a different change of station. Thus the entitlement of the member under that section is limited to travel and transportation allowances specified in sections 404, 406 and 409 of Title 37, United States Code, and the implementing regulations. See decision B-153872, July 24, 1964.

Since weights exceeding the maximum overall weight are properly chargeable to the shipper, and cannot be considered an obligation of the Government, the shipment of excess weight is not one of the "travel and transportation allowances" authorized under sections 404, 406 and 409 of Title 37, United States Code. See decision B-153932, July 16, 1964.

Therefore, it is our view that section 406a is not for application in a situation such as is here involved and the member should be required to pay the cost of shipping the excess weight over the circuitous route.

The question is answered accordingly.

[B-167579]

Bids—Multi-year—Amendment—Propriety

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

Contracts—Specifications—Multi-year Procurements—Procedural Deviations

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

To the General Dynamics, October 16, 1969:

We refer to your letter of August 5, 1969, with enclosures, and other correspondence, protesting award to any other firm under invitation for bids No. F34601–69–B–0519, March 14, 1969, issued by the Department of the Air Force, Tinker Air Force Base, Oklahoma.

The procurement calls for the furnishing of multiplex equipment, for use in various Army, Navy and Air Force Communication Systems located throughout the world. These systems provide performance for voice, high speed teletype, or digital data over line or radio, and are designed to transmit several messages simultaneously on the same circuit or channel. The equipment was developed by Lenkurt Electric, Incorporated, and that firm so far has been the sole producer of the equipment for the military. Drawings were made available by the Air Force to industry for review and comment in preparation for the current procurement.

The invitation was issued March 14, 1969, as a multi-year procurement. In this connection, the Air Force reports that while a substantial portion of the electronic components that compose each system is the same or similar, each system in the procurement has a different configuration based on the site and type of communication involved, as well as the number of customers to be served. As a result, it was anticipated that no two systems procured during the multi-year period would have the same unit price. Although the multi-year method of procurement as set forth in Armed Services Procurement Regulation (ASPR) requires that the unit price of each item shall be the same for all program years, the Air Force reports that a deviation from the ASPR multi-year policy was authorized for this procurement.

The invitation called for the submission of prices for the first-program year as well as for the multi-year requirement. The invitation stated that although a multi-year award was contemplated, the Government reserved the right to make a single year award in the event only one responsive bid was received on the multi-year requirement.

The bidders were advised that bids submitted solely on a multi-year basis would be considered nonresponsive.

Bid opening was held on July 17, 1969, and 5 bids were received. The two low bids on the multi-year requirement were as follows:

Firm	Multi-Year Price
Dynatronics Division of General Dynamics	$11,417,416
Honeywell, Inc.	14,441,531

It was noted, however, that a difference of $3,657,143 existed between the line item prices bid by General Dynamics and the next low bidder for item 4 of fiscal year 1970, on page 18 of the bid schedule. (General Dynamics bid $296,162 for item 4 as compared to the next low bid of $3,953,305.) The contracting officer was informed by General Dynamics that it discovered its low bid on item 4 resulted because it had failed to include the quantities of equipment called for in a rack chart mailed out by the Air Force with a letter dated May 15, 1969. General Dynamics advised that it had never received the May 15 letter and attached rack chart.

Item 4 in question covers the fiscal year 1970 requirements for a multiplex system in accordance with Purchase Request Army-4 dated January 15, 1969. Paragraphs 1 and 2 of that Purchase Description (which was furnished to potential bidders with the invitation) provide as follows:

1. This Enclosure consists of:
a. A chart showing the number of racks of each numbered configuration required for each station, and the number of individual components to be installed in existing racks where applicable.
b. Nineteen (19) Rack Configuration Drawings, most of which are used repeatedly throughout the program.
2. Key to H710 Rack Configuration Drawing Numbers.

The Air Force reports that the rack chart referred to in paragraph 1 a., was inadvertently omitted when the solicitation was mailed to prospective bidders on March 14, but the chart was subsequently mailed with a letter dated May 15, 1969, to all potential sources. It is this letter which General Dynamics alleges was not received.

The contracting officer concluded that under the circumstances General Dynamics' low bid for the multi-year requirements was nonresponsive. He further concluded that General Dynamics was nonresponsive to the first year requirement as well. It appears that General Dynamics bid only one set of prices applicable to fiscal year 1969 in the bid schedule. By a letter dated July 11, 1969, sent to all the potential bidders, the Air Force requested that two sets of prices be listed in the bid schedule for fiscal year 1969, with the first dollar figure to represent the multi-year requirement and the second dollar figure, indicated by an asterisk, to represent the amount offered only for the first year

requirement. You report that this letter also was not received by General Dynamics, but that the one set of prices in the General Dynamics bid for fiscal year 1969 is intended for both the multi-year requirement and the single year requirement.

The Air Force proposes to make award to Honeywell for the multi-year requirement as the lowest responsive bidder. You protest such an award. You believe that no multi-year award should be made under this invitation. In your view the only proper award which could be made is to General Dynamics, as the low bidder for the single year requirement, at its bid price of $3,115,446.

You reach this conclusion on the theory that the quantities called for under the rack chart to Army-4 were never effectively incorporated into the invitation multi-year requirement due to the failure to issue a formal amendment to the invitation to include the rack chart. You cite ASPR 2-208, which provides that:

> (a) If after issuance of an invitation for bids, * * * it becomes necessary to * * * change * * * or to correct a defective or ambiguous invitation, such changes *shall* be accomplished by issuance of an amendment to the invitation for bids, using Standard Form 30 (see 16-101). * * * The amendment *shall* be sent to everyone to whom invitations have been furnished and *shall* be displayed in the bid room. [Italic supplied.]

You believe that it was particularly important for the Air Force to observe the requirements of ASPR 2-208 for this procurement. To begin with, you state that the invitation requirements were very confusing to bidders. You note that the required multiplex equipment is for use in 32 existing communication systems, each system consisting of from 1 to 36 sites, involving 153 different drawers of equipment used in varying quantities and combinations in each site. You state that the detailed requirements were contained on approximately 9,000 drawings, 32 different Purchase Descriptions each from 8 to 158 pages in length, and in some fifteen (15) different specifications; but that nowhere was there a summary of the total numbers of equipments required to be furnished. Adding to your confusion, you found that the Purchase Descriptions were in varying formats, presumably as a result of having been prepared by different requiring agencies.

You report that after issuance of the invitation the Air Force issued a total of 8 formal amendments, some of which significantly changed the requirements (some 108 schedule pages were deleted by these 8 amendments and new pages substituted). In addition, you report that the Air Force sent some 15 letters and telegraphic messages amending and clarifying the invitation to various potential bidders, but that at least 5 of these informal letters were not received by General Dynamics, including the letters of May 15 and July 11, 1969.

You further report that on May 27, 1969, General Dynamics wrote

to the contracting office seeking clarification of certain matters in the specification. Included as attachments to this letter were matrices which stated General Dynamics' understanding of the total equipment requirements for both the single year and multi-year requirements. You state that these matrices, of course, did not include the quantities shown on the rack chart. On June 13, 1969, the contracting officer replied to the May 27 letter. He responded to the various questions submitted, but returned the General Dynamics' matrices stating that "sufficient time is not available to completely review these matrices and offer valid engineering opinion."

You insist that if the Air Force had either replied to General Dynamics' understanding of the requirements as expressed in its letter of May 27, or issued a formal amendment to the invitation to include the rack chart and posted this amendment in the bid room, as required by ASPR 2-208, General Dynamics would have been made aware of the actual quantities required, and would have bid accordingly. In light of these circumstances, you question the propriety of a multi-year award.

The Air Force is of the opinion that the rack chart was clearly referenced in the invitation by paragraph 1a of Purchase Description Army-4, quoted above. It believes that a prudent bidder would have detected the omission of the chart in preparing his bid. Thus, the Department concludes that General Dynamics was not a prudent bidder in this case, and should suffer the consequences.

You dispute that the chart was clearly referenced, stating as follows:

> The Purchase Description received by us *did* contain a chart on pages 31 through 34 meeting the description of subparagraph (a) above, as well as Rack Configuration Drawings, pages 2 through 30. Nowhere was there any indication to a reasonable and prudent contractor that a second set of charts also formed a part of the Purchase Description. If, as the Government now insists, the chart intended to be incorporated in the Purchase Description by paragraph 1(a) thereof was the chart transmitted to some of the bidders by letter of 15 May 1969, what is the legal effect of the chart originally sent to the bidders?

We note that the chart on pages 31 through 34, which was originally sent to bidders, is the "H-710 Rack Configuration Drawing Numbers" chart referenced in paragraph 2 of Army-4, quoted above. We understand that this H-710 chart served as a summary of standard configurations for use in conjunction with the other information contained in paragraph 2 of Purchase Description Army-4. In any case, we find no information on the H-710 chart to indicate the required number of racks of each numbered configuration. It seems to us that in the absence of the omitted rack chart there are no specified quantities of rack configurations on which to bid. In this regard, we understand that Honeywell was able to detect that the rack chart referenced in paragraph 1a was omitted from the original bid package prior to May 15.

Be that as it may, we agree with you that the omitted rack chart should have been furnished to potential bidders by formal amendment to the invitation rather than by the format used. Enclosed is a copy of our letter of today to the Secretary of the Air Force on this subject. However, the fact remains that the chart was mailed to potential bidders, and all the other four bidders did bid on the basis of the rack chart quantities. It may be that General Dynamics would have discovered before bid opening that the rack chart was missing from the bid package if ASPR 2–208 had been followed. But in our opinion this is not a sufficient reason for canceling the multi-year part of the invitation. The interests of the Government must be our primary consideration. Thus we have held that a bid which is nonresponsive only because the administrative office inadvertently neglected to send a copy of the amendment to the bidder, must nevertheless be rejected. 40 Comp. Gen. 126 (1960). We believe the same reasoning applies to the present case.

We also find that, despite certain ambiguities which you have cited in the complete Purchase Description Army–4, the other bidders were able to determine the quantities of equipment required based on the rack chart listings.

You have further alleged that the multi-year provisions of the invitation for bids are in violation of ASPR 1–322 and, for that reason, the multi-year portion of the invitation should be canceled. You point out that the invitation does not call for uniform unit prices for each year of the multi-year program and does not contain criteria for comparison of first-year versus multi-year requirements.

As previously indicated, the Air Force recognized that this multi-year procurement would deviate from the ASPR multi-year procurement policy, but considered that these deviations had, in effect, been authorized by the Department of Defense. We have reviewed the record in this respect, and find that multi-year procurement of multiplexer equipment was approved by the Department of Defense on the basis that such method of procurement should result in a lower cost per unit and would facilitate standardization of the equipment within the Defense Communications System. Also as previously indicated, this approval necessarily included authorization to deviate from the ASPR multi-year procurement policy because of the nature of the requirement to be solicited. It simply was not feasible to provide for 1-year versus multi-year evaluation in this case. Under the circumstances, we believe a multi-year award as contemplated would be proper.

In view of our conclusions, there is no need to discuss your contentions regarding the responsiveness of the General Dynamics' bid on the first year requirement. Your protest against the proposed award to Honeywell is denied.

[B-167961]

Pay—Retired—Annuity Elections for Dependents—Automatic Pay Restoration Feature—Savings Clause

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

To Major N. C. Alcock, Department of the Air Force, October 16, 1969:

Further reference is made to your letter of September 8, 1969 (file reference ALRA), requesting an advance decision as to the propriety of making payment on a voucher in the amount of $886.39 in favor of Colonel Samuel B. McGowan, USAF, retired, representing retired pay for the month of August 1969 after deduction of $94.96 for Retired Serviceman's Family Protection Plan coverage elected under chapter 73, Title 10, U.S. Code. Your letter was forwarded here under date of September 19, 1969, by the Deputy Assistant Comptroller for Accounting and Finance and has been assigned Air Force Request No. DO-AF-1052 by the Department of Defense Military Pay and Allowance Committee.

It is indicated in your letter and enclosures that Colonel McGowan was retired from the Air Force on September 7, 1968, under 10 U.S.C. 1201 by reason of physical disability. At the time of his retirement he had a disability rating of 20 percent and had 28 years, 2 months and 13 days of active service for retirement purposes. You say that at the time of retirement, the officer's gross retired pay (prior to deduction for Retired Serviceman's Family Protection Plan) was $961.17 a month which amount was increased to $981.35 effective February 1, 1969, by 2.1 percent under 10 U.S.C. 1401a(c).

You state that on February 25, 1958, the officer elected option 3 to provide an annuity of one-half reduced retired pay for his survivors under 10 U.S.C. 1434(a)(3) but that he did not elect option 4, the pay restoration feature—which at that time was optional at the member's election under 10 U.S.C. 1434(c). Under this election, you say that the monthly deduction for RSFPP was $94.96 for a reduced retired pay of $866.21 and an annuity of $433.11. You state, however, that under section 1(3) and section 3 of Public Law 90-485, approved August 13, 1968, 82 Stat. 751, 10 U.S.C. 1434, and 1431 note, the pay

restoration feature appears to be automatic for personnel retiring on or after August 13, 1968. By using the cost tables in effect on September 7, 1968, containing the option 4 feature, you say that the cost to Colonel McGowan for this election would be increased to $103.81 a month. The officer's retired pay would then have been $857.36 for an annuity of $428.68 a month.

You further state that the officer does not desire the pay restoration feature of the coverage elected and he believes that the last sentence in section 6 of the act of August 13, 1968, permits him to elect to remain under the provisions of law in effect before August 13, 1968. You express the view, however, that section 6 of Public Law 90-485, appears to pertain only to the 18-year and 3-year rule for making elections, or modifying or revoking prior elections, rather than to the option 4 factor.

In expressing doubt in the matter, you ask whether the correct retired pay entitlement for Colonel McGowan (after deduction for RSFPP) should be $886.39 ($981.35 less $94.96) as shown on the submitted voucher, or $877.54 ($981.35 less $103.81).

Accompanying your submission is a memorandum of the Deputy Director Secretary of the Air Force Personnel Council dated September 13, 1968, to the effect that the Secretary of the Air Force approved Colonel McGowan's request of September 3, 1968, to remain under the provisions of the Retired Serviceman's Family Protection Plan in effect prior to the enactment of Public Law 90-485, August 13, 1968.

Prior to the act of August 13, 1968, a member could elect, under 10 U.S.C. 1431, to provide an annuity for his survivors provided the election was made prior to completing 18 years of service or at least 3 years before the first day for which retired or retainer pay was granted. The types of annuity which the member may elect are enumerated in 10 U.S.C. 1434(a). Under subsection (c) of section 1434 the so-called pay restoration option (option 4)—when an eligible beneficiary no longer exists—had to be specifically elected by the member to be effective. An election of the pay restoration option (option 4) in combination with any of the other 3 options mentioned in 1434(a) resulted in an increase to the member in the cost of the annuity.

Section 1434(c) of Title 10 was amended by clause 3 of section 1 of the act of August 13, 1968, to provide that no reduction shall be made in a member's retired or retainer pay after the last day of the month in which there is no beneficiary who would be eligible for an annuity following the member's death. Section 3 of the act of August 13, 1968, provides as follows:

> Sec. 3 for members to whom section 1431 of title 10, United States Code, applies on the date of enactment of this Act, the provisions of section 1434(c) of that title, as amended by this Act, are effective immediately and automatically.

In explaining the purpose of section 3, it is stated on page 11 of S. Rept. No. 1480, dated July 26, 1968, to accompany H.R. 12323, which became the act of August 13, 1968, that:

> Section 3 provides that in the case of those members who, on the date of enactment have elected an annuity under section 1431 or title 10, United States Code, and have not yet retired, the provisions of section 1434(c) of title 10, United States Code, as amended by clause (3) of section 1, are immediately and automatically effective. The effect of this section will be to insure that in the case of all members retired after the date of enactment of this act, reductions in retired pay to provide an annuity under chapter 73 of title 10, United States Code, will cease automatically whenever there is no surviving eligible beneficiary.

While the pay restoration feature of section 3 by its plain terms is effective immediately and automatically to those members to whom section 1431 of Title 10 applied on August 13, 1968, section 6, of the same law expressly provides, in pertinent part, that:

> * * * However, notwithstanding any other provision of this act, any member to whom section 1431 of title 10, United States Code, applies on the date of enactment of this Act may, before the first day of the thirteenth calendar month beginning after the date of enactment of this Act, submit a written application to the Secretary concerned requesting that an election or a change or revocation of election made by such member prior to the date of enactment of this Act shall continue to be governed by the provisions of section 1431 (b) or (c) of title 10, United States Code, as in effect on the date before the date of enactment of this Act.

In explaining the savings clause provision in section 6, it is stated on page 6 of S. Rept. No. 1480, mentioned above, that:

> *Savings clause—Members not yet retired may elect to remain under law in effect prior to enactment.*
>
> The committee amendment provides that, before the first day of the 13th month beginning after the date of enactment of the bill, a member not yet retired may submit a written application requesting the effective date of his RSFPP election be determined under the law applicable prior to the date of enactment.
>
> Purpose of this savings clause is, for example, to allow an active duty member who retires within 1 year of enactment, to avoid acceleration under the bill of the effective date of a change or revocation of election. Such a member may have since changed his mind regarding the desirability of that change or revocation of election, and could be relying in good faith on retirement before such change or revocation could become effective under the law in effect prior to enactment of this bill.

See, also, the remarks on page 12 of the same report concerning the effect of section 6.

While section 6 and its legislative history supports the view that the savings provision was added by the Senate Committee on Armed Services for the purpose of allowing an active duty member covered thereby to avoid acceleration of the effective date of election or change or revocation of an election, we find nothing in the law or its legislative history which would limit the scope of the savings provision to exclude therefrom an otherwise valid election made under the law in effect prior to August 13, 1968, which election did not include the pay restoration feature of option 4.

An election made under the former provisions of section 1431 of Title 10 was governed by the type of annuity and the options elected

by the member under section 1434. In other words, the provisions of section 1431 are considered in conjunction with section 1434 and the latter section at that time gave the member the option to elect or not to elect the pay restoration feature of option 4.

To hold a member in Colonel McGowan's situation to the pay restoration feature now provided in section 3 of the 1968 act, would not only be contrary to the member's prior election, but would be contrary to section 6 of that act which is applicable "notwithstanding any other provision of this Act," and which saves to the member who has made an election before August 13, 1968, and not yet retired, the right to have such "an election * * * continued to be governed by the provisions of section 1431 (b) or (c) of title 10," in effect prior to August 13, 1968. In this connection, regulations implementing the law provide in section 604d that:

d. Any member who has filed an election, modification, or revocation prior to 13 August 1968 may before 1 September 1969 submit a written application to the Secretary concerned requesting that such election, modification, or revocation remain under the time-of-election provisions of the law applicable on the date it was filed.

Since it appears that Colonel McGowan made a valid election in 1958 without the pay restoration feature of option 4, and since the Secretary of the Air Force has approved his request that his election be governed by the provisions of law in effect prior to August 13, 1968, it is our view that he is entitled to have the cost of his annuity based on his election in 1958 without the pay restoration feature.

Accordingly, the voucher and supporting papers are returned herewith, payment being authorized thereon if otherwise correct.

[B-166806]

Transportation—Transit Privileges—Through Rates—Displacement

The concept of stopping a shipment in transit and the granting of transit privileges rests on the fiction that two or more separate shipments may be treated as a single through shipment and that through charges assessed will be lower than the aggregate of the charges applicable to the separate shipments and, therefore, when upon the expiration of recorded inbound transit credits on an outbound shipment of explosives tendered under a Section 22 Quotation, the assessment of through rates results in a higher charge than the aggregate of the rates applicable to the separate shipments, the Government has a right to disregard the transit fiction, a right recognized by the Quotation, and upon settlement pursuant to 49 U.S.C. 66, of the payment to the carrier on the basis of fictional through shipments, the United States General Accounting Office properly used the lower aggregate charges and the carrier is not entitled to a refund.

To the Chicago, Milwaukee, St. Paul and Pacific Railroad Company, October 22, 1969:

We refer to your letters of September 23, 1968, file USG-G-260403, December 13, 1968, file USG-G-260437, and December 24, 1968, file

USG-G-260401, protesting settlements issued here denying your reclaims for $38.10 or $37.07 per shipment for deductions authorized to recover overcharges paid to your company for transportation services covered by bills of lading AT-079814, AT-079813, AT-079922 and AT-079923. These were Government transit bills of lading covering shipments of explosives moving outbound from Fort Estill, Kentucky, to Crane, Indiana, and each of the bills of lading bears reference to inbound transit credits surrendered at Fort Estill, representing shipments originating at Cowan, Virginia, which moved inbound to Fort Estill and were recorded for transit.

Each of the Government transit bills of lading, in the space provided for showing tariff or special rate authorities, bears reference to the term "A1606B," thus indicating that the shipment covered thereby was tendered pursuant to the terms and conditions of Southern Freight Association (SFA) Section 22 Quotation Advice No. A-1606-B, a quotation which applies to transit arrangements on domestic and export shipments of ammunition, explosives and other ordnance. Also, each of the Government transit bills of lading shows that the tonnage covered thereby was recorded for transit at Crane.

Charges for the transportation services covered by the Government transit bills of lading in question were billed by your company on the basis of the through tariff rate applicable on explosives from Cowan, Virginia, to Crane, Indiana, less the inbound charges to Fort Estill, which had been paid on the basis of a rate provided in Southern Freight Association Section 22 Quotation A-2497, applicable from Cowan to Fort Estill, plus a transit charge of 22½ cents per 100 pounds, as provided in the transit quotation, No. A-1606-B. In the audit here, notices of overcharge for $38.10 or $37.07 per shipment were issued, based on the rate provided in SFA Section 22 Quotation No. A-2497, applicable from Cowan to Fort Estill, plus the rate provided in SFA Section 22 Quotation A-1998-A, applicable from Fort Estill to Crane.

In your protests you state that once the Government has tendered transit billing at Fort Estill and the shipments have been billed on the basis of the balance of the through rate applicable from Cowan to Crane, the Government may not thereafter rescind such billing and void the initial transportation contract by attempting to substitute separate or local Section 22 Quotations in combination over the initially declared transit station. Also, you state that once the transit *billing* was tendered at Fort Estill, the transportation contract required that a through rate from Cowan to Crane be protected and, because of that choice, the prohibition contained in Section 22 Quota-

tions not permitting their use in combination to defeat through rates was applicable.

In addition, you refer to the case of *United States* v. *Central of Georgia R. Co.*, 332 I.C.C. 33, wherein the Interstate Commerce Commission held a complaint raising the question of the reasonableness of a tariff rate applicable from Lathrop, California, to Fort Benning, Georgia, to be fatally defective because the shipment had moved inbound to Lathrop under a Section 22 transit arrangement and the complaint failed to bring into issue the charges for the through movement. We do not believe that case is relevant to the problem raised by the subject shipments. No question of the applicability of the charges due under the transit quotation was before the Commission, or within its jurisdiction. The holding merely stands for the proposition that the Commission will refuse to consider, in a section 1 (of the Interstate Commerce Act) proceeding, the reasonableness of an outbound tariff rate applied to a shipment accorded transit under a Section 22 quotation unless the charges for the entire movement are brought into issue.

The entire concept of stopping in transit and the granting of transit privileges rests on the fiction that two or more separate shipments may be treated as a single through shipment and through charges assessed which are lower than the aggregate of the charges otherwise applicable to the separate shipments. When the explosives in question were tendered for shipment from Fort Estill to Crane, there was no election on the part of the transportation officer to subject the shipments to the provisions of the transit quotation for settlement of the transportation charges on the basis of a fictitious through movement from Cowan to Crane. If this were true, the transportation officer could be said to have opted for a transit liability, rather than a transit privilege, because the charges applicable to the fictional through shipments would have exceeded the aggregate of the charges applicable to the separate shipments.

When the shipments in question were tendered for transportation from Fort Estill to Crane, if the intention had been to terminate the shipments at Crane, the transportation officer could have canceled the inbound transit credits at Fort Estill and could have shipped to Crane under standard Government bills of lading. In that case, the applicable charges on the separate shipments unquestionably would have been those based on the Section 22 rates applicable to and from Fort Estill.

This was not done because the intention at the time was to ship to Crane under the transit quotation, to record the shipments for transit at Crane, and to reship from Crane to some other destination. This intention was frustrated because the transit credits recorded at Crane

expired. In these circumstances, the question arises whether the Government was bound to settle the charges on a transit basis applicable to fictional through shipments from Cowan to Crane or whether it had the election to disregard the transit fiction and to settle the charges on the basis of the rates applicable to the separate shipments.

The transit quotation (No. A–1606–B) itself seems to recognize this problem, for it provides, in part, in Item No. 27:

> This Quotation, when accepted by the Government by making any shipment *or settlement* under the terms hereof *or otherwise*, will constitute an agreement between the parties hereto as to the transportation services herein described. * * * [Italic supplied.]

Thus the quotation expressly recognizes that settlement may be made for the transportation services covered thereby otherwise than under the terms of the quotation.

Although the charges for the shipments in question were billed and paid on the basis of transit balances applicable to fictional through shipments, such payments were not settlements because they were required by law to be made upon presentation of the bills for payment prior to audit or settlement by the General Accounting Office. 49 U.S.C. 66. The settlements were made here, on the basis of the charges applicable to the separate shipments, and the right to settle the charges otherwise than under the transit basis was provided in the quotation itself.

For the reasons stated, the settlements issued here are sustained, and your refund claims accordingly are denied.

[B–167858]

Subsistence—Per Diem—Military Personnel—Travel Status—Requirement

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

To Lieutenant Colonel R. J. Preuss, Department of the Army, October 23, 1969:

Further reference is made to your letter of August 11, 1969, (Ref: FINFA–F), with enclosures, forwarded here by the Office of the Comptroller of the Army, requesting a decision of the Comptroller

General as to the entitlement of Lieutenant Colonel Harry F. Middleton, 078980, to per diem under the circumstances described. Your request for decision was assigned PDTATAC Control No. 69-33 by the Per Diem, Travel and Transportation Allowance Committee.

By Special Order 76 dated April 11, 1966, Colonel Middleton was transferred from the Student Detachment, Armed Forces Staff College, Norfolk, Virginia, to the 519th Transportation Battalion (Truck), Fort George G. Meade, Maryland, to report not later than July 10, 1966. The order gave him the option of moving his dependents to the new duty station on a normal permanent change of station or moving them to a designated location. In the event he moved them to a designated location, his order was to be amended in accordance with paragraph 38a(9) of Army Regulations 310-10 to include the appropriate restrictive clause contained in paragraph 7 of Department of the Army Circular 614-8.

First indorsement dated May 20, 1966, amended Special Order 76 to provide that the officer was relieved from duty at the Armed Forces Staff College, Norfolk, Virginia, and assigned to the 519th Transportation Battalion (Truck), Fort George G. Meade, Maryland, for further move to a restricted area overseas. Transportation of his dependents and household goods was authorized to a designated location with advice that they could be moved to the vicinity of Fort Meade only as a move to a designated location.

You say in your letter of August 11, 1969, that Colonel Middleton moved his dependents to a designated location, Annandale, Virginia, and received payment of dependent travel allowances and dislocation allowance. Also you say that on July 11, 1966, he arrived at Fort Meade for duty with the 519th Transportation Battalion and through no fault of his own, the unit was not deployed to a restricted overseas area within 90 days but departed from Fort Meade on a permanent change of station on December 10, 1966.

On a voucher enclosed with your letter Colonel Middleton claims per diem for the period July 11 through December 10, 1966, less the time he was in an authorized leave status and refund of BOQ fees. As a basis for his claim he says in a letter of May 29, 1969, that he has been informed that orders such as his, which provide for further movement to a restrictive area and limit the movement of dependents to a designated place, may provide for temporary duty at the intermediate station, in his case Fort Meade. He says he understands that per diem has been paid to two others with similar orders.

Section 404 of Title 37, United States Code, provides that under regulations prescribed by the Secretaries concerned, a member of a uniformed service is entitled to travel and transportation allowances

for travel performed under orders upon a change of permanent station, or otherwise, or when away from his designated post of duty regardless of the length of time he is away from that post.

Paragraph M3050 of the Joint Travel Regulations, promulgated pursuant to that authority, provides that members are entitled to travel and transportation allowances only while in a travel status, and that they shall be deemed to be in a travel status while performing travel away from their permanent duty station, upon public business, pursuant to competent travel orders, including periods of necessary temporary or temporary additional duty. Paragraph M3003–2a and c of the regulations provided during the period involved that the term "temporary duty" meant duty at a location other than the permanent station to which a member was ordered to temporary duty under orders which provided for further assignment to a new permanent station or for return to the old permanent station, and that except when specifically authorized a temporary duty assignment was limited to 6 months.

Paragraph 38a(9) of Army Regulation 310–10 authorizes field commanders to publish amendments to orders as may be specifically authorized by other Army regulations and directives.

Paragraph 7 of Department of the Army Circular No. 614–8 dated November 3, 1965, in effect during the period involved, provided:

> Orders assigning personnel to units that are deploying to short tour unaccompanied areas will include a statement as follows: "(Name) is relieved from duty at current unit and station and is assigned to (unit) (new station) for further move to a restricted area overseas. Transportation of dependents and movement of household goods authorized to designated location. Movement of dependents and household goods to vicinity of (new station) is not authorized except as a move to a designated place." Individual orders will not be classified because of this statement.

Those provisions and the provisions of paragraph 7 of Department of the Army Circular No. 614–8 dated May 26, 1967, relate to the provisions to be included in orders assigning personnel to units that are scheduled for deployment to tours in unaccompanied areas and do not affect the temporary or permanent character of the member's duty assignment.

With respect to this case a permanent station is defined in paragraph M1150–10a of the Joint Travel Regulations as the post of duty to which a member is assigned or attached for duty other than temporary duty or temporary additional duty, the limits of the station being the reservation, station, etc., within which the post of duty is located. Since Colonel Middleton's basic orders assigned him to the 519th Transportation Battalion (Truck) for duty, that unit was his post of duty and the orders were permanent change of station orders to Fort Meade. As he was advised in the orders he was entitled to normal permanent

change of station dependent and household effects transportation allowances to Fort Meade on the basis of such orders.

Since, however, the unit to which Colonel Middleton was assigned had been alerted for overseas movement to a restricted area within 90 days it was concluded that, in addition to the normal change of permanent station dependent and household effects transportation allowances, he was entitled, if he so desired, to move his dependents and household effects to a designated place on the basis of the unit alert notice. See 45 Comp. Gen. 208. He was also advised of this entitlement in the basic orders and afforded the opportunity to elect either the normal change of permanent station entitlement or the designated place entitlement.

Upon his election to move his dependents to a designated place it was necessary to amend his basic orders to make them agree with the requirements of paragraph 7 of Department of the Army Circular No. 614–8. This amendment, however, did not change his assignment to the 519th Transportation Battalion (Truck) to a temporary duty assignment or constitute Fort Meade a temporary duty station.

The 519th Transportation Battalion (Truck) was Colonel Middleton's basic post of duty under his orders of April 11, 1966, and when he reported there his travel status under those orders ended. Upon reporting for duty with the unit Fort Meade became his permanent station. Any subsequent travel from there to Vietnam would be incident to the unit movement orders and not pursuant to his orders to Fort Meade. Since he was not away from his basic post of duty during the period covered by his claim he is not entitled to per diem for any of that period under the law and regulations.

Accordingly, payment on the voucher enclosed with your letter is not authorized and the voucher and supporting papers will be retained in this Office.

Any payments of per diem that may have been made in circumstances like those of Colonel Middleton's were erroneous and steps should be taken to recoup such payments.

[B–167188]

Contracts—Mistakes—Actual or Constructive Notice

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

ing officer responsible to determine that prices offered are improvident on factors that are not ascertainable from the bid or offer itself.

To Kings Point Mfg. Co., Inc., October 24, 1969:

By letter dated June 5, 1969, with enclosures, you requested an increase in the price stipulated in contract No. N00600-69-C-0881, because of an error alleged after award in your offered price under request for proposals (RFP) No. N00600-69-R-5197, upon which the contract is based.

RFP N00600-69-R-5197 was issued on March 24, 1969, for the procurement of 25 sets of ballistic nylon canopies. On April 9, 1969, the day before the closing date for proposals and after three proposals had already been received, an amendment was issued which extended the closing date for proposals until April 17, 1969, increased the quantity required to 95 sets, and reduced the time for delivery. On April 17, 1969, all proposals for 95 sets were abstracted. Prices per set were $1,492, $1,684.12, and $1,929, with Kings Point's offer being low. Accordingly, Kings Point was awarded the contract in the amount of $141,740 on April 21, 1969. Shortly thereafter, you notified the contracting officer that an error had been made and submitted substantiating worksheets which clearly showed the erroneous mathematical computation alleged.

Your claim was denied on the grounds that the alleged mistake was not apparent on the face of your proposal and that there was no basis for a finding that the contracting officer should have had constructive notice of your error. On this latter point, the contracting officer advised you that there was only a difference of approximately 14 percent between each of the three proposals submitted and that the cost of a vinyl set of blankets would be less than your proposed price. (The Naval Ship Research Center had quoted a price of $1,383.17 per vinyl ballistic canopy set to the contracting officer.)

Taking these facts into consideration, that is, the percentage difference between proposals; the fact that the contracting officer had been furnished with a vinyl set price lower than your proposed price; and the absence of apparent error in your offer, we concur with the contracting officer's decision denying your request for relief.

In the absence of actual or constructive knowledge of the alleged error, we do not believe that the contracting officer was, as you contend, required to examine a prior procurement involving a lesser quantity of smaller blankets or the proposals submitted for 25 sets. The initial RFP covering 25 sets was effectively eliminated from consideration by the amendment which substantially changed the concept of the procurement. Furthermore, in view of the substantial differences between these prior procurement actions and the instant procurement,

it would be unreasonable to hold that the contracting officer had the burden of minutely ascertaining the respective cost relationships of the above factors to assure that you had not offered an improvident price. The same may be said of your contention to the effect that the contracting officer should have extracted material costs from the proposals before a percentage comparison was made. Not only is your contention based upon the dubious assumption that the material costs of the offerors were the same, but it introduces into the price comparison a factor which is not ascertainable from the offer itself. The following comment from B-164845, January 27, 1969, is particularly pertinent here:

> Mistake-making contractors will naturally seek to impose upon contracting officers a rather high level of brilliance for the purpose of detecting error. See *Wender Presses, Inc.* v. *United States*, 170 Ct. Cl. 483, 486. However, the test is whether under the facts and circumstances of "the particular case there were any factors which reasonably should have raised the presumption of error in the mind of the contracting officer" (Welch, Mistakes in Bid, 18 Fed. B. J. 75, 83) without making it necessary for the contracting officer to assume the burden of examining every bid for possible error by the bidder. See *Saligman* v. *United States*, 56 F. Supp. 505, 508. * * *

For the above reasons, we find no basis upon which to allow your request for price adjustment.

[B-166849]

Contracts—Specifications—Restrictive—Particular Make—Salient Characteristics

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

Contracts—Specifications—Restrictive—Particular Make—Use Limited to Unavailability of Adequate Specifications

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

Contracts—Specifications—Restrictive—Particular Make—Modification of Brand Name

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

To the Secretary of the Navy, October 27, 1969:

Reference is made to a letter (with enclosures) dated July 30, 1969, from the Director of Contract Administration, and to a further letter (with enclosure) dated September 11, 1969, from the Counsel, Naval Facilities Engineering Command, reporting on the protest of Fairbanks Morse Inc., against the award of contract No. N62578-69-C-0069 to Stewart and Stevenson Services, Inc.

The contract was awarded on May 5, 1969, pursuant to invitation for bids No. N62578-69-B-0069, which was issued by the Naval Facilities Engineering Command (NAVFAC), Davisville, Rhode Island, on November 29, 1968. Six amendments were made between the date the invitation was issued and the date of opening, March 18, 1969, at which time five bids were received. The low bid ($2,082,190.50) was submitted by Stewart and Stevenson Services, Inc. (S&S), and the bid of Fairbanks Morse Inc. (Fairbanks) was second low in the total amount of $2,194,454.

The item for procurement was a complete electric generating plant of 2,000 kilowatt capacity, the control house and generator all to be in accordance with specification provisions and technical and special requirements which were attached to and made a part of the invitation. The amended invitation permitted bids on the following bases: (a) one complete plant with one control house and four generators; (b) one, two, or three complete plants, each consisting of one control house and three generators; or (c) one complete plant consisting of a control house and two generators. The award was made under alternate (b) for three complete plants, each having a control house and three generators.

The NAVFAC specification which was referred to in the bidding schedule is No. 29-69-0069, the text of which is 85 pages long. At page 56 thereof, in paragraph 2A.3.5, there appears the following language:

Each generating plant shall be General Motors Corporation, Electromotive Division, Model MU 20E 720 or Fairbanks Morse Incorporated, Power Systems Di-

vision, Model HPP 4–961 or equal in quality, manufacturing and proven service performance *with modifications as specified herein.* [Italics supplied.]

The "brand name or equal" clause, included at page 40 of the specification, stated in full:

Brand Name or Equal (1961 Nov.). As used in this clause, the term "brand name" includes identification of products by make and model.

a. If items called for by this Invitation for Bids have been identified in the Specification by a "brand name or equal" description, such identification is intended to be *descriptive*, but not *restrictive*, and is to indicate the equality and characteristics of products that will be satisfactory. Bids offering "equal" products will be considered for award if such products are clearly identified in the bids and are determined by the Government to be equal in all material respects to the brand name products referenced in the Invitation for Bids.

b. Unless the bidder clearly indicates in his bid that he is offering an "equal" product, his bid shall be considered as offering a brand name product referenced in the Invitation for Bids.

c. (1) If the bidder proposes to furnish an "equal" product, the brand name, if any, of the product to be furnished shall be inserted in the space provided in the Invitation for Bids, or such product shall be otherwise clearly identified in the bid. The evaluation of bids and the determination as to equality of the product offered shall be the responsibility of the Government and will be based on information furnished by the bidder or identified in his bid, as well as other information reasonably available to the purchasing activity.

CAUTION TO BIDDERS: The purchasing activity is not responsible for locating or securing any information which is not identified in the bid and reasonably available to the purchasing activity. Accordingly, to insure that sufficient information is available, the bidder must furnish as a part of his bid all descriptive material (such as cuts, illustrations, drawings, or other information) necessary for the purchasing activity to (i) determine whether the product offered meets the requirements of the Invitation for Bids and (ii) establish exactly what the bidder proposes to furnish and what the Government would be binding itself to purchase by making an award. The information furnished may include specific references to information previously furnished or to information otherwise available to the purchasing activity.

(2) If the bidder proposes to modify a product so as to make it conform to the requirements of the Invitation for Bids, he shall (i) include in his bid a clear description of such proposed modifications and (ii) clearly mark any descriptive material to show the proposed modifications.

(3) Modifications proposed after bid opening to make a product conform to a brand name product referenced in the Invitation for Bids will not be considered.

With respect to procurement of goods on a "brand name or equal" basis, paragraph 1–1206.2(b) of the Armed Services Procurement Regulation (ASPR) provides in part:

"Brand name or equal" purchase descriptions should set forth those salient physical, functional, or other characteristics of the referenced products which are essential to the needs of the Government. * * *

In our recent decision, December 26, 1968, 48 Comp. Gen. 441, we had occasion to quote from B–157857, January 26, 1966, the following well-established rule:

* * * Bidders offering "equal" products should not have to guess at the essential qualities of the brand name item. Under the regulations they are entitled to be advised in the invitation of the particular features or characteristics of the referenced item which they are required to meet. An invitation which fails to list all the characteristics deemed essential, or lists characteristics which are not essential, is defective. 41 Comp. Gen. 242, 250–51; B–154611, August 28, 1964. See, also, 38 Comp. Gen. 345 and B–157081, October 18, 1965.

A matter preliminary to a consideration of the issues raised by the protest is the apparent absence of a list of salient characteristics. It should be emphasized that paragraph 2A.3.5 of the NAVFAC specification requires generating plants to be the equal of either the General Motors or Fairbanks products "with modifications as specified herein." The specification contains numerous paragraphs, each of which may constitute either a description of or a modification to a specific feature of the named brands. We are without the engineering know-how required to make the distinction regarding any of the specification's provisions. However, we believe that it is quite possible than many, if not most of the numerous provisions are descriptive of the characteristics of the named brands. To the extent that the specification is in fact descriptive, it may be said that the Government's intent was to advise bidders of the characteristics of the brand name generating plants deemed essential to the Government's needs.

However, we have been informally advised by NAVFAC personnel that the characteristics that are considered salient by the procurement officials are to be found in the NAVFAC specification at paragraph 1A.28, which is entitled "Operational Experience Requirement and Information Certificate" (OERIC). That paragraph provides as follows:

Operational Experience Requirement and Information Certificate.

a. Bidders must furnish with their bids a properly executed certificate by an official of the firm manufacturing the equipment to be furnished hereunder. *Failure to furnish the certificate may result in rejection of the bid.* The certificate shall certify that the equipment meets all of the operating experience requirements and shall contain supplementary information, all as delineated below.

b. The certificate must affirm that the engine model offered must have performed successfully in two separate installations. Each engine shall have operated successfully not less than 6,000 hours in stationary electric generating service at two separate installations within a two year period, or shall have operated successfully not less than 2000 hours in stationary electric generating service in two separate installations within a two year period plus not less than 6000 hours on each of two separate installations in marine or locomotive service with a period of two years and in addition to foregoing alternatives, the complete fully assembled power plant shall have operated successfully not less than 2000 hours in stationary electric generating service in two separate locations within a period of two years on equipment identical to the specifications or slightly modified if approved by the Contracting Officer. In determining this experience:

(1) Only experience on the same engine model is acceptable. Engine model is considered to be a given series or class of identical bore and stroke and of the same type of engine such as in-line or V. In-line and V engines with identical bore and stroke are considered as two separate models of engines. The experience on an engine with an engine with a given number of cylinders is considered satisfactory for engines of the same or smaller number of cylinders but not satisfactory for a larger number of cylinders.

(2) Only experience at the identical or higher rotative speed as that which is offered is acceptable.

(3) Only experience at the same or higher brake mean effective pressure as that which is offered is acceptable.

(4) Only experience at the same or higher maximum firing pressure as that which is offered is acceptable.

(5) Only experience with oil and dual fuel engines is acceptable as such experience.

(6) Only experience in either 50-cycle or 60-cycle alternating current service is acceptable as such experience.

c. Information to be contained in the certificate shall include:

(1) A list of at least two engine installations.

(2) Owner and location of each such installation.

(3) Date and initial operation at each such installation.

(4) Number of hours of operation completed by a designated date at each such installation.

(5) Horsepower, kilowatt, and rotative speed of the unit at each such installation.

(6) Brake mean effective pressure rating of the engine at each such installation."

However, in our opinion the first four criteria listed do not state characteristics of the brand names. The first requires the experience certificate to relate to experience on the same engine model *as offered.* Similarly, the criteria concerning rotative speed, brake mean effective pressure and maximum firing pressure include the express language "as that which is offered." These criteria concern the relationship between the product actually offered and the operating plants listed in the certificate; but these criteria do not state nor indicate the relationship between the brand names and an acceptable equivalent. By way of illustration: suppose a bidder offers to supply a generating plant whose engine has a rotative speed of 700 r.p.m.; suppose also that both brand names operate at 720 r.p.m.; further, assume that the bidder's experience certificate lists installations operating at 710 r.p.m. The rotative speed criterion of paragraph 1A.28 is satisfied. Nevertheless, if a rotative speed of 720 r.p.m. is indeed a salient characteristic of the named brands, the product offered in the example above is materially different from the brand name products.

While it is arguable that the last two items listed are salient characteristics, they are not identified by the language as pertaining to either of the brand name models. In short, we find nothing in this invitation which clearly sets forth those particular features of the two named brands which have been determined by the administrative officials to be essential to the needs of the Government. This deficiency falls within the proscription of the previously cited decisions of our Office, in that a bidder is required to guess at the essential qualities of the brand name items. The fact that firms in the industry may have understood exactly what the Government required is not relevant to the legal issue concerning the sufficiency of the written advertised invitation. See, in this regard, 10 U.S.C. 2305(b), which provides:

(b) The specifications in invitations for bids must contain the necessary language and attachments, and must be sufficiently descriptive in language and attachments, to permit full and free competition. If the specifications in an invitation for bids do not carry the necessary descriptive language and attachments, or if those attachments are not accessible to all competent and reliable bidders, the invitation is invalid and no award may be made.

Had the procurement not reached its present advanced stage, we would be obligated to object to any award made on the basis of this

invitation. See, for example, 41 Comp. Gen. 76 (1961) where, in a preaward situation, we concluded that the information available to bidders was insufficient to advise them of all the salient characteristics of the named make and model. We held in the cited decision that, "since the full and free competition required by the statutes has not been obtained, no valid award may result from this invitation." In that decision, we recognized that while procurement on a "brand name or equal" basis is sometimes necessary, it is "generally undesirable and should be reserved for exceptional cases where the needs of the Government cannot otherwise be adequately described." This instant procurement, like the ones at 41 Comp. Gen. 76 and 43 *id.* 761 (1964), is "an example of the difficulties all too frequently encountered in procurement utilizing brand name or equal purchase descriptions." 43 Comp. Gen. 761, at 767.

However, the contract has been substantially performed and no bidder has complained of the absence of a list of salient characteristics. Therefore, we do not consider that a cancellation at this date would serve the Government's best interests. We recommend that every effort be made to insure that, in future procurements conducted on a "brand name or equal" basis, the salient characteristics of the brand name item be identified with clarity and precision.

Furthermore, the propriety of using a brand name or equal method of solicitation is open to serious question. ASPR 1–1206.1(a) provides that "This technique should be used only when an adequate specification or more detailed description cannot feasibly be made available by means other than reverse engineering (see 1–304) in time for the procurement under consideration." It is appropriate to observe that the "Technical Requirements" section of NAVFAC specification 29–69–0069 consists of 36 pages, containing 116 numbered sections. There are references therein to 10 Federal specifications, 14 military specifications, 5 military standards and 17 technical publications of various nongovernmental societies, associations and institutes. The technical requirements appear to us to be very detailed. In the midst of this welter of provisions is the brand name or equal provision in paragraph 2A.3.5. The stated justification for use of this provision was included in the letter of September 11, 1969, as follows:

* * * The brand name or equal solicitation was used to permit possible suppliers to understand the concept of a completely packaged power plant as currently supplied by General Motors and Fairbanks Morse. * * *

This is not, in our opinion, a sufficient basis for procurement on a brand name or equal basis. In view of the complete and detailed description of the agency's requirements in the NAVFAC specification, we find it difficult to conceive of any necessity for the inclusion of a brand name or equal clause in the solicitation. Accordingly, we suggest that the

NAVFAC specification be carefully reviewed to determine its technical adequacy insofar as brand name or equal procurement is concerned.

The main argument of Fairbanks is that S&S's bid was not responsive for either of two reasons: first, assuming that S&S intended to offer the brand name item as modified, the information supplied on its OERIC did not meet the requirements of paragraph 1A.28 of the NAVFAC specification, quoted above; or second, S&S intended to supply a power plant equivalent to the two brand name products (in which event the S&S bid should have been rejected for failure to supply the descriptive material required by the "brand name or equal" clause, also quoted above). Resolution of each of these contentions ultimately depends upon the proper interpretation to be given to the OERIC clause.

It is apparent that S&S did not furnish with its bid the information required by subparagraph "c" of the "brand name or equal" clause and, in consonance with subparagraph "b" thereof, it was to be considered as offering one of the brand name products referenced in the invitation. We note in passing that the S&S bid did not affirmatively indicate which of the two named brands was being offered. The September 11 NAVFAC letter comments that this fact "did not offer any problems inasmuch as Stewart and Stevenson is a distributor of General Motors diesel engines as indicated by their letterhead, and the OICC [Officer in Charge, Contracts] was well aware of this fact and naturally assumed that General Motors engines would be furnished." It is fundamental under the principles of formal advertising that the determination of what a bidder is offering depends not upon an administrative assumption but upon the contents of the bid as submitted. It is clear that the administrative assumption was made necessary in this case because of a failure to comply with the provisions of ASPR 1-1206.3(a), which require:

> (a) Except as provided in (c) below, when a "brand name or equal" purchase description is included in an invitation for bids, the following shall be inserted after each item so described in the invitation, for completion by the bidder:
> Bidding on:
> Manufacturer's Name _____ Brand _____
> No. _____

Pursuant to the requirement of paragraph 1A.28, S&S submitted as its OERIC the following letter (dated March 17, 1969) to the Officer in Charge at Davisville:

> This shall certify that the equipment meets all of the operating experience requirements and further certify to be true and accurate the following supplementary information.
>
> Installation Site No. 1
>
> (Five fully assembled power plants with slight modifications to the specifications of the Solicitation. Engines are the same model as proposed in our offer.)

Barbados Power & Light
Spring Gardens, Barbados
In Service April, 1967
Unit No. 1—3,442 operating hours as of November, 1968
Unit No. 2—4,338 operating hours as of November, 1968
Unit No. 3—4,195 operating hours as of November, 1968
Unit No. 4—4,507 operating hours as of November, 1968
Unit No. 5—4,516 operating hours as of November, 1968
HP—3050; KW—2100; RPM—750
BMEP—125 psi

Installation Site No. 2

(Four fully assembled power plants with slight modifications to the specifications of the Solicitation. Engines are the same model as proposed in our offer.)

Jamaica Public Service
Montego Bay, Jamaica
In Service September, 1967
Unit No. 1—3,710 operating hours as of November, 1968
Unit No. 2—6,045 operating hours as of November, 1968
Unit No. 3—3,256 operating hours as of November, 1968
Unit No. 4—5,414 operating hours as of November, 1968
HP—3050; KW—2100; RPM—750
BMEP—125 psi

The engine proposed in our offer had a total quantity of 437 locomotive installations as of June, 1968. Experience shows accumulative operating hours for this service to be an average of 500 hours per month. We safely estimate 50% of this quantity to have achieved at this time in excess of 6,000 hours in a two year period.

Railroad Owners
Chicago & Northwestern
D & RGW
Erie
Great Northern
Norfolk & Western
Northern Pacific
Pennsylvania
Southern Pacific

Sincerely,
STEWART & STEVENSON SERVICES, INC.
J. Carsey Manning, Director
Government and National Contracts

We informally posed to NAVFAC personnel the question whether above letter satisfies that portion of paragraph 1A.28 which requires the certificate to be executed "by an official of the firm manufacturing the equipment to be furnished hereunder." The response was affirmative. We observe that S&S represented itself on page 2 of standard form 33 to be a "manufacturer" of the supplies offered for purposes of the Walsh-Healey Act (41 U.S.C. 35–45). However, as was indicated previously, the S&S letterhead denominates the company a "distributor" of General Motors diesel engines. It has been informally represented to us by responsible NAVFAC officials that the General Motors generating plant specified in paragraph 2A.3.5 must be modified in numerous respects in order to meet the specification requirements. The same point was made in the letters of July 30 and September 11, 1969; the latter clearly stated that the "specifications were so written that neither General Motors nor Fairbanks Morse could meet our specific requirement with their standard package." Therefore,

S&S in order to comply with the specification must perform certain modification work on the basic General Motors unit. In addition, the language of paragraph 1A.28 was drafted by knowledgeable agency personnel, and thus their statements as to the meaning of the word "manufacuring" should be given appropriate consideration. Furthermore, another bidder, Hunt Engine and Equipment Co., offered to supply a General Motors engine. Its letter submitted in response to the OERIC clause is signed by Hunt's Vice President and General Manager. Hunt's interpretation of this aspect of the OERIC clause therefore conforms to that of NAVFAC. In the light of all the facts and circumstances, the fact that S&S's letterhead indicates that it is a distributor of General Motors diesel engines is not of critical significance. Accordingly, the signing of the experience certificate by an S&S official appears proper under the clause.

Reduced to its essentials, the Fairbanks' argument is this: assuming that S&S intended to supply the General Motors generating plant exactly as modified in the NAVFAC specification, the OERIC is defective in that the Barbados and Jamaica installations are not examples of "the complete fully assembled power plant * * * identical to the specifications or slightly modified if approved by the Contracting Officer." Paragraph 1A.28 of the NAVFAC specification. On the other hand, if it be presumed that the Barbados and Jamaica generating stations are indeed "identical" or slightly modified versions of what S&S intended to furnish, S&S must be considered as having proposed an equivalent product in which event, under the "brand name or equal" clause quoted above, the bid should have been rejected for nonresponsiveness for the reason that S&S failed to supply any descriptive data with its bid.

We consider that the first alternative contention raises a question of responsiveness under our holding in 48 Comp. Gen. 291, November 6, 1968. That decision (also involving diesel engine generating plants) contained a somewhat similar experience clause. We held, agreeing with the position of the Army Corps of Engineers, that the experience requirements concerned the "reliability of the item offered" and thus went to the responsiveness of the bid, not to the responsibility of the bidder.

The specific contentions of Fairbanks regarding the OERIC are:

1. Neither the Barbados nor the Jamaica installations can be considered "identical to the specifications or slightly modified," because the engine's rotative speed, brake mean effective pressure and cycle are different from those specified in the invitation, and because they both utilize outdoor switchgear instead of the required control unit;

2. Experience from four separate locations is required to meet the OERIC clause since the clause states that experience on the complete

fully assembled power plant must be "in addition to the foregoing alternatives";

3. The S&S certificate, insofar as it relates to marine or locomotive experience, provides insufficient information, that is, only an estimate of the number of hours of operation, and no information at all on horsepower, rotative speed, brake mean effective pressure, etc.

We note that Fairbanks' OERIC is in consonance with at least the second portion of the above interpretation, in that four separate locations are cited, two of which are specifically said to be "representative of complete fully assembled power plants."

We disagree with the third Fairbanks' argument. A careful reading of paragraph 1A.28 reveals that the required certificate consists of two parts: certification that the listed operating experience requirements have been met, and certain supplementary information, "all as delineated below." Subparagraph "b" states the experience to which the bidder must certify without requiring supporting information. Subparagraph "c" sets forth the supplementary information which must also be contained in the certificate but no certification with reference thereto is required. An examination of the S&S certificate with reference to subparagraph "c" clearly shows that all the required items of information were included for both the Barbados and Jamaica locations. It is true that no such information was provided with respect to the locomotive experience related in the certificate, but such information was not required under paragraph 1A.28. The only requirement in paragraph 1A.28 as to locomotive service was that the bidder certify that in each of two separate installations the engine had operated successfully for not less than 6,000 hours within a 2-year period. We construe the first sentence of S&S's certificate, together with the last paragraph thereof, to constitute the required certification.

The second contention advanced by Fairbanks hinges upon the phrase "in addition to foregoing alternatives" as used in subparagraph "b" of paragraph 1A.28. However, we are not convinced that such language was meant to exclude the possibility that the same two installations could fulfill more than one of the experience requirements. Nor do we think that such a construction is necessarily implied. Accordingly, it was proper for S&S to refer to the Barbados and Jamaica installations in satisfaction of both of the stationary electric generation requirements.

However, we believe that there is merit to Fairbanks' first contention. The NAVFAC response thereto was included in the letter of September 11, 1969, and is as follows:

3. Finally, the Barbados and Jamaica example power plants were considered to be sufficiently close to the specification so that these installations met the requirement for equipment which was either identical or *slightly modified*. In this regard it is noted that the specification expressly permits rotative speeds,

brake mean effective pressure, firing pressure, and cycles (50 or 60) of the engine used in the installations listed to establish experience to be of higher or different values than those set forth in the specification as is the case with the engines cited in the OERIC. With regard to the control unit, it is noted that Stewart and Stevenson took no exception to the type of control unit indicated in the specification, and the type defined therein will be supplied.

The root issue concerns the degree of similarity between the complete, fully assembled power plants at Barbados and Jamaica and the General Motors brand name generating plant as specifically modified by NAVFAC specifications 29–69–0069. The administrative officials state that the Barbados and Jamaica plants were considered "sufficiently close" whereas Fairbanks contends that they were not sufficiently similar under the OERIC.

The dispute is not a technical one; rather, it is one of definition. The clause did not indicate what degree of modification would be considered "slight." The language, in our opinion, accords to the contracting officer too much interpretive leeway for a formally advertised procurement. (For that matter, it appears that the meaning of "successful" performance could have been spelled out with greater clarity.) It is evident that S&S construed the Barbados and Jamaica locations as being sufficiently similar to qualify under the words "slightly modified." The absence of an appropriate standard does not appear, however, to have inhibited the "full and free competition" required by 10 U.S.C. 2305(b). On the other hand, the language of paragraph 1A.28, if utilized in the future, should be redrafted by NAVFAC to eliminate all areas of vagueness.

Fairbanks has also alleged noncompliance with ASPR 2–407.9(b). That bidder protested to the contracting officer approximately 1 month prior to award, and it specifically requested the contracting officer, if the protest were not upheld, to forward the matter for our review before any award was made. On May 2, 1969, we were informally advised by NAVFAC of this protest. We were also informed that urgency precluded further delay in award, which was subsequently made on May 5, 1969. We therefore do not feel that the cited ASPR provision was compromised here.

We must reiterate that the invitation was poorly drafted in that it lacked a list of salient characteristics and contained an OERIC clause which was vague and confusing. We urge that corrective actions be taken to prevent recurrences.

[B–168024]

States—Municipalities—Services to Federal Government—Service Charge *v.* Tax

A city ordinance that establishes charges on tax exempt properties for sewer services, refuse incineration and disposal services, and police, fire and emergency

ambulance services, charges that are included in real estate taxes and not directly assessed on taxable property, levies a tax however labeled, and the United States exempt from local taxation unless Congress affirmatively provides otherwise, has no legal obligation to pay for protective services a municipality has the duty to provide. Therefore, the Coast Guard Academy, located within the city limits of New London, Connecticut, and entitled to the protective services of the municipality, may not use appropriated funds to pay for service charges imposed by a city ordinance unless extra protection is provided for special events such as football games.

To the Commandant, United States Coast Guard, October 27, 1969:

Reference is made to your letter of September 26, 1969, and enclosures (your reference F–2), concerning an ordinance adopted by the City Council of New London, Connecticut, on August 4, 1969, establishing service charges for tax exempt properties in the City of New London for sewer services, refuse incineration and disposal services, and police, fire and emergency ambulance services. The Coast Guard Academy has been assessed service charges for the period August 19, 1969, to June 30, 1970, totaling $37,765, payable in two installments of $15,897 (August 19, 1969) and $21,868 (January 1, 1970).

The question here is whether the Federal Government is liable for payment of the service charges assessed by the City of New London, pursuant to the ordinance adopted by the City Council on August 4, 1969, or whether such service charges are actually a tax on the Federal Government.

It is clear that the United States is exempt from local taxation unless Congress affirmatively provides otherwise. That doctrine is treated as axiomatic. It was first enunciated in *McCulloch* v. *Maryland*, 17 U.S. (4 Wheat) 316 (1819), and it has been consistently followed. See also *Van Brocklin* v. *Tennessee*, 117 U.S. 151 (1886); *United States* v. *Power County, Idaho*, 21 F. Supp. 684 (1937); and *United States* v. *City of Detroit*, 355 U.S. 466, 469 (1958). In addition to the above-cited court decisions, Connecticut has, by statute, exempted property belonging to the United States from taxation. General Statutes of Connecticut, Volume II, Sec. 12–81.

The City of New London takes the position that the amount billed is not in any way a tax, but is a service charge for services rendered. The ordinance in question establishes a service charge for sewer service, refuse incineration and disposal, and police, fire and emergency ambulance service. It has been held that the constitutional immunity of the Federal Government from State and local taxation does not extend to payment of charges for sewer services where the amount thereof is determined pursuant to the quantity of water furnished or the amount of sewage disposed of, since such charges are regarded as the price of the product or service rendered. *State* v. *Taylor*, 79 N.E. 2d 127 (1948); 29 Comp. Gen. 120 (1949); 31 Comp. Gen. 405 (1952). This same principle would be applicable to a charge for refuse, incineration and dis-

posal. The difficulty in the instant case is that the ordinance in question authorizes the City Manager to charge the owners of "tax exempt federal, non-church affiliated educational institutions, federal institutions, medical institutions and public utilities" a service charge for the above-mentioned services while the individual taxpayers of New London pay indirectly for these services through their property taxes. In other words the taxpayers of New London are not charged a separate service charge for these services based on the quantum of services rendered, instead the assessment for such services is included in the City's property tax. In a letter to the Superintendent of the Coast Guard Academy, dated August 19, 1969, the City Manager of New London pointed out that:

> Property owners in New London have carried the burden of the cost of local government almost exclusively. The time has come to seek new revenues * * * for paying for the services that we all need and use. * * *

We have held that where charges for sewage disposal are included in real estate taxes levied on a city-wide basis rather than a quantum basis for services rendered, such charges constitute a tax from which the Federal Government is immune. See 31 Comp. Gen. 405 (1952). This principle would apply with equal force to the other charges under the ordinance.

In addition, regarding the charge for fire, police, and emergency ambulance service, we have consistently held that a charge against appropriated funds for firefighting services rendered by a municipality is precluded where there is no legal obligation upon the United States to pay for such services. This is based upon the premise that a municipality is required by law to render fire protection or firefighting services to property within its limits, without cost to the property owners. We believe that such duty extends to protecting the property of the United States located within such limits and, consequently, since the Government thus is legally entitled to fire protection or firefighting service there is no authority to charge appropriated funds with the cost thereof. See our decisions of February 7, 1945, 24 Comp. Gen. 599, and of December 2, 1946, 26 Comp. Gen. 382.

The principles set forth in the decisions cited above and in others are summarized in our decision of July 2, 1965, 45 Comp. Gen. 1. While we recognized in this latter decision that there is some doubt that local fire departments have an obligation to furnish fire protection services to what are described therein as "Federal enclaves" there is nothing of record here to indicate that the Federal institution in question is such a Federal enclave.

The rationale of the decisions cited above concerning firefighting services would also apply to police protection and emergency ambulance service. The City of New London does not meet the expense of police and fire protection and emergency ambulance service by use of

service charges and it cannot levy direct charges on the Coast Guard Academy, for these protective services, since the Academy is located within the New London city limits, and, hence, is legally entitled to such protection. One exception to the above-stated principle would be where the Academy has occasion to require extra number of police for special events such as football games. In this instance, a charge would be proper under Connecticut law. See General Statutes of Connecticut, Volume IA, section 7–284. However, such a charge is not justified for ordinary fire and police protection.

In determining whether the Federal Government's constitutional immunity to taxation has been violated, one must look through form and behind labels to substance. *City of Detroit* v. *Murray Corporation of America*, 355 U.S. 489 (1958). The practical effect of the service charges involved here is to tax the Federal Government in that the Government would be forced to pay directly for services provided to other citizens of New London without a direct service charge.

In summary, on the facts presented, we conclude that the ordinance in question does, in effect, levy a tax from which the United States is exempt, and therefore, the Coast Guard Academy is not liable for, and may not pay such service charges.

[B–166056]

Leaves of Absence—Court—Jury Duty—Substitute Employees

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

To the Postmaster General, October 31, 1969:

By letter dated July 16, 1969, the Assistant Postmaster General, Bureau of Personnel, requested to be advised whether our decision of March 21, 1969, 48 Comp. Gen. 630, is applicable to substitute employees in the postal service. In the cited decision we held that temporary employees of the Government are entitled to court leave for the performance of jury duty under 5 U.S.C. 6322.

Prior to the decision cited above we had held that temporary, substitute, and when-actually-employed personnel were not entitled to leave with pay for the purpose of performing jury duty. See 20 Comp. Gen. 133 (1940); *id.* 145 (1940); 38 *id.* 307 (1958). Upon further consideration of the matter we concluded in the decision of March 21, 1969, that the language of 5 U.S.C. 6322 was sufficiently broad to encompass temporary employees. Also, we have held that permanent part-time employees who have a regular tour of duty are entitled to jury leave.

36 Comp. Gen. 378 (1956). Of course, that holding would now embrace temporary part-time employees.

The appointments of substitute employees, whether career or temporary, appear to be similar to appointments on an intermittent "when-actually-employed" basis even though some may work an average of 40 or more hours per week. They are compensated at an hourly rate for services rendered and have no established work schedules. The number of hours of employment as well as the time of day during which work is performed may vary considerably. Thus, the conditions of substitute employment differ significantly from those of temporary employment authorized under Part 316 of the Civil Service Commission's regulations. See 36 Comp. Gen. 655 (1957).

This Office consistently has held the view that "when-actually-employed" personnel and substitute postal employees are not entitled to leave-with-pay benefits unless specifically authorized by statute. 2 Comp. Gen. 782 (1923); 18 *id.* 538 (1938); 35 *id.* 5 (1955). In 3 Comp. Gen. 112 (1923) we stated:

> When the terms of an employment are such that continuous service and continuous pay are not contemplated there can be no occasion for the granting of leave with pay and it must be assumed that the law was not intended to provide for leave with pay in such cases. The nature of a substitute employee's employment is such as to preclude the view that the provision of law relative to military leave is applicable in such a case.

The fact that substitute postal employees now are entitled to military leave with pay under 5 U.S.C. 6323(b) does not warrant a change in our views regarding court leave for such employees. In that regard we point out that postal substitutes must work at least 1,040 hours during the preceding calendar year to be entitled to military leave under the statute. The necessity for such requirement is explained on pages 2 and 3 of H. Rept. No. 1861, 84th Cong., 2d sess., as follows:

> The formula as set forth in the committee amendment is believed to be necessary because substitute employees of the postal field service work irregular hours. Some employees work only a few days in a calendar year, whereas other substitute employees may work as much as or more than a regular employee. The committee believed it to be equitable to require a substitute employee to work at least half time before being entitled to the benefits of the act. A regular employee who works 8 hours per day for 5 days a week works a total of 2,080 hours in a calendar year. Consequently, the committee amendment requires a substitute employee to work 1,040 hours, which is one-half of the time worked by a regular employee, before he becomes entitled to the military leave of absence with pay authorized by the bill. * * *

It is apparent that the Congress recognized that the then existing military leave provisions which were applicable to all permanent and temporary indefinite employees of the Government were unsuitable for application to substitute employees in the postal service in all respects.

In view of the foregoing we believe that specific statutory authority is necessary in order to extend the benefits of 5 U.S.C. 6322 to substitute employees in the postal service. Accordingly, we adhere to the

view that such employees are not entitled to leave for jury duty under current provisions of law.

[B-167305]

Contracts—Specifications—Failure to Furnish Something Required—Information—Invitation To Bid Attachments

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

To the Building Maintenance Corporation, October 31, 1969:

Reference is made to your letter of June 19, 1969, and subsequent correspondence protesting against award to any other bidder under invitation for bids (IFB) No. DABC21-69-B-0100, issued by Fort Bragg, North Carolina, on May 26, 1969, for the procurement of custodial services at the installation for the period July 1, 1969 (or date of award subsequent thereto) through June 30, 1970.

The invitation was issued on Standard Form 33 which, in the portion headed "Solicitation" advised bidders in pertinent part as follows:

All offers are subject to the following:
1. The attached Solicitation Instructions and Conditions SF 33A.
2. The General Provisions, SF 32 *Jun 64* edition, which is attached or incorporated herein by reference.
3. The Schedule included below and/or attached hereto.
4. Such other provisions, representations, certifications, and specifications as are attached or incorporated herein by reference. (Attachments are listed in the Schedule.)

Page 2 of the Schedule Continuation Sheet (Standard Form 36) of the solicitation, carried the following language:

COMPOSITION: This solicitation consists of the following: Standard Form 33-Solicitation, Offer and Award; Standard Form 33A—Solicitation Instructions and Conditions (as amended); Notice of Total Small Business Set-Aside; Standard Form 36—Continuation Sheet (6 pages); Special Provisions, Paragraphs 1 thru 18; Technical Provisions, Paragraphs 1 thru 20; Custodial Performance Schedule Part 1; Custodial Performance Schedule Part 2; Custodial Performance Schedule Part 3; Custodial Performance Schedule Part 4 (2 pages); Custodial Performance Schedule Part 5; Custodial Performance Schedule Part 6; FB Form 1470R—Partnership and Corporate Certificate; Standard Form 32—General Provisions Numbered 1 thru 42 (as amended); and Wage Determination Number 69-199, dated 16 May 1969.

When bids were opened and examined on June 17, 1969, it was noted that the two lowest bidders, Royal Services, Inc., and Amcor, Inc., had failed to submit several pages of specifications, including the General Provisions (Standard Form 32), the Custodial Performance Schedule,

the Technical Provisions, and the Special Provisions of the IFB, all of which had been attached to the solicitation by the procuring activity. These provisions stated, *inter alia*, where, when and in what manner the janitorial services were to be performed, so that a bid could not be considered responsive if it did not evidence an intent to bind the bidder to the terms of these specifications. You contend that both the low bid and the second lowest bid were nonresponsive by reason of the failure to return these specifications and therefore an award should be made to you as the third lowest bidder, since you attached to your bid all the documents referenced on page 2 of the Schedule Continuation Sheet.

There is no requirement in the procurement laws, in the applicable regulations, or in the provisions of the standard invitation for bid forms that bidders must return with their bids all portions of, and attachments to, the invitation in order to be eligible for award of a contract. In the absence of such a requirement this Office has held that the question to be decided, when a bidder fails to return all documents with his bid which were attached to the invitation, is whether the bidder has submitted his bid in such a form that acceptance would create a valid and binding contract requiring the bidder to perform in accordance with all of the material terms and conditions of the invitation. Thus, we have held that bids submitted in the form of a letter could be accepted, B–128399, July 19, 1956; B–113920, February 27, 1953; that a bid consisting only of the face sheet of Standard Form 33 and the Company Identification Information form could be accepted, B–148548, April 17, 1962; and that a bid which failed to return those pages of the invitation containing the General Provisions of the contract could be accepted since the bid as submitted referred to the General Provisions, and thus evidenced an intent to be bound by their terms. 44 Comp. Gen. 774 (1965). In the latter case we stated as follows:

* * * Moreover, there would appear to be for application here the rule of law that where a writing refers to another document, that other document, or so much of it as is referred to, is to be interpreted as part of the writing. 4 Williston on Contracts, 3rd edition, section 628. In the case of *Ray* v. *William G. Eurice & Bros.*, 93 A. 2d 272 (1952), the court held at page 279:

The lower court seemingly attached significance to the fact that the plans and specifications were not physically fastened to the contract document which was executed, although it specifically and explicitly referred to both. In this situation physical attachment has not the significance so attributed to it. It is settled that where a writing refers to another document that other document, or so much of it as is referred to, is to be interpreted as part of the writing.

(Numerous authorities cited.)

The court further stated:

* * * In *New England Iron Co.* v. *Gilbert Elevated R. Co.*, 91 N.Y. 153, the contract required that the work to be done should conform "in all particulars to the plans and specifications approved by (E.H.T.) and (H.A.S.) a copy of which specifications is declared to be annexed to and to form a part of the contract." In answer to the argument that the specifications had not been attached and so had no force, the Court said: "The annexation of the copy (of the) specifications

was not a condition on which the validity of the agreement depended. If annexed the identification might have been more satisfactory, but without that, the contents of the plans and specifications, so far as referred to in the agreement executed, became constructively a part of it, and in that respect made one instrument."

See, also, *United States Fidelity & Guaranty Company* v. *Long*, 214 F. Supp. 307 (1963).

In the present case, the bid was submitted on Standard Form 33 in the following form:

OFFER (Note: Reverse Must Also Be Fully Completed by Offeror)

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.

The phrase, "In compliance with the above" in this form of offer refers to that portion of the Solicitation quoted above which provides that all offers shall be subject to the Solicitation Instructions and Conditions, the General Provisions, the Schedule, and such other provisions, representations, certifications, and specifications as are incorporated by reference or listed in the Schedule as attachments. Since that portion of the Schedule which was titled "Composition" was submitted with the low bid in the instant case, and it identified in detail all of the various conditions, provisions, schedules, certificates and other documents comprising the terms of the contract to be awarded, it is our opinion that such references in the bid submitted by the low bidder clearly operated to incorporate all of the invitation documents into the bid, and that an award to the low bidder will therefore bind him to performance in full accord with the conditions set out in the referenced documents. In this connection, it should be noted that this case is readily distinguishable from 42 Comp. Gen. 502 (1963), in which the *bid* form (as distinguished from the *invitation* for bids) advised that "* * * subject to the Schedule and the Special Provisions which are attached hereto, * * * the undersigned offers and agrees to furnish * * *."

We are therefore advising the Secretary of the Army that the bid must be considered responsive to the invitation, and that prior decisions of this Office which may be inconsistent with the foregoing should no longer be followed. *Cf.* B–167248, August 22, 1969.

Accordingly, your protest must be denied.

[B–167830]

Transportation—Dependents—Military Personnel—Discharge and Reenlistment

A Navy enlisted man who with his dependents traveled from a duty station within the United States to the Philippines, the place of his enlistment and

residence, for separation, where he immediately reenlisted and was subsequently transferred to England is entitled to reimbursement for both segments of the travel performed by his dependents, because paragraph M7009–5 of the Joint Travel Regulations precluding reimbursement for the transportation of dependents at Government expense when a member is discharged and reenlists at the same station under continuous service conditions is not for application, as unaware of the member's intent to reenlist, he was ordered to the Philippines for separation under the authority of article C–10105(2), Bureau of Naval Personnel Manual, and subsequent to his reenlistment he was transferred to England under permanent change of station orders.

To L. Starbard, Department of the Navy, October 31, 1969:

Further reference is made to your letter of June 25, 1969, NAVACT SUK: A152A: jb 7200, with enclosures, requesting a decision whether payment is authorized on two vouchers in favor of SD2 Eduardo H. Alejo, 544 19 10, USN, for reimbursement for travel of his dependents from Norfolk, Virginia, to Subic Bay, Philippines, and from that place to London, England. The request was assigned PDTATAC Control No. 69–31 by the Per Diem, Travel and Transportation Allowance Committee.

By orders No. 01–69, dated January 10, 1969, the member was detached from duty at Naval Air Station, Norfolk, Virginia, and directed to proceed to the Naval Station, Subic Bay, Philippines, for separation. The orders show that this is where he had been accepted for enlistment and that his home of record was Cavite City, Philippines. He was separated at Subic Bay on February 5, 1969, and reenlisted the next day at the same place. By orders No. 0298–69, dated April 8, 1969, the member was ordered from Subic Bay to London, England, as a permanent change of station.

His dependents (wife and son) traveled with him from Norfolk, Virginia, to Subic Bay, Philippines, during the period January 16 to February 3, 1969, and from Subic Bay to London, England, during the period April 16 to 21, 1969. They were furnished transportation at Government expense from Travis Air Force Base, California, to Clark Air Force Base, Philippines; from Clark Air Force Base to Travis Air Force Base; from San Francisco, California, to Philadelphia, Pennsylvania, and from McGuire Air Force Base to London, England. Reimbursement is claimed on the submitted vouchers for the other portions of the travel.

You say that since paragraph M7009–5 of the Joint Travel Regulations precludes transportation of dependents upon discharge and reenlistment under continuous service conditions, you question whether the member is entitled to transportation for his dependents from Norfolk, Virginia, to Subic Bay, Philippines, and thence to London, England.

You further say that the then Commander, Carrier Division Two (currently Deputy Commander in Chief, U.S. Navy Europe), had requested his staff to investigate the legality of permitting Petty Of-

ficer Alejo to travel to Subic Bay with his dependents "for reenlistment and reassignment"; that Mr. Alejo was advised he could do so and would be entitled to travel allowances for his dependents; that the problem lies in the fact that the reenlistment was under continuous service conditions and that Mr. Alejo was not informed of the consequences of this at the place of his reenlistment.

The Per Diem, Travel and Transportation Allowance Committee in forwarding your request expressed the opinion that paragraph M7009–5 of the Joint Travel Regulations denies entitlement to dependent travel only in those cases where the member upon reenlistment remains at the station where separated, and that 33 Comp. Gen. 131 (1953) appears to provide a precedent for payment.

Section 406 of Title 37, United States Code, provides that a member of a uniformed service who is ordered to make a change of permanent station is entitled to transportation in kind for his dependents, to reimbursement therefor, or to a monetary allowance in place of transportation in kind, subject to such conditions and limitations, and to and from such places as prescribed by the Secretaries concerned. Paragraph M3003–1 of the Joint Travel Regulations, promulgated pursuant to that authority, provides that the term "permanent change of station" includes the change from home or from the place from which ordered to active duty, to first permanent station upon enlistment, and from last duty station to home or the place from which ordered to active duty upon separation from the service.

Paragraph M7000 of the Joint Travel Regulations provides that members of the uniformed services are entitled to transportation of dependents at Government expense upon a permanent change of station for travel performed from the old station to the new permanent station or between points otherwise authorized in those regulations.

Paragraph M7009–5 of the Joint Travel Regulations (Change 192, January 1, 1969), provides that a member who is separated from the Service or relieved from active duty by reason of expiration of enlistment or prescribed term of service and who, on the following day, reenters the Service at the station at which separated or relieved from active duty, with no change of station, is not entitled to transportation of dependents in connection therewith. Thus, where the member is discharged and reenlisted at the same station under continuous service conditions there is no entitlement to transportation of dependents incident to discharge and reenlistment when there is no change of station involved. Entitlement does arise, however, if the member is ordered to a new station upon reenlistment.

Although you say that the travel of the member and his dependents from Norfolk to Subic Bay was "for reenlistment and reassignment,"

there is no indication of either reenlistment or reassignment in the orders of January 10, 1969, which directed the member to report to the U.S. Naval Station at Subic Bay "for separation" under authority of article C–10105, Bureau of Naval Personnel Manual, and stated that his final destination was his home of record.

Article C–10105(2), Bureau of Naval Personnel Manual, provides that enlisted personnel who are citizens of the Republic of the Philippines whose home of record is in the Philippines and whose separation is authorized or directed, "except those reenlisting or extending their enlistment," shall be transferred to the U.S. Naval Station, Subic Bay, Philippines, for temporary duty pending separation. Thus, if it were known that the member intended to reenlist immediately upon discharge and that he would be reassigned there would have been no proper authority under that regulation to order him to Subic Bay for discharge. In those circumstances he presumably should have been discharged and reenlisted at Norfolk and upon reassignment the authorized travel of his dependents would have been from Norfolk to London.

In the case involved in the decision cited by the Committee, 33 Comp. Gen. 131, there was a break in service and thus that case differs from the present case in which there was no break in service. See, also, 33 Comp. Gen. 136 (1953), and compare 41 Comp. Gen. 661 (1962) and B–119374 of August 5, 1954, copy enclosed.

While the orders of January 10, 1969, appear questionable in view of the circumstances mentioned by you, they were issued pursuant to the cited Navy regulation to direct a permanent change of station from last duty station to home of record for separation, and travel was completed thereunder. The record does not establish that the dependents traveled with the intention of visiting but rather that they returned to the member's home country incident to his discharge. In the circumstances it is concluded that the member was entitled to transportation for his dependents from Norfolk to Subic Bay incident to the orders of January 10, 1969.

The member's reenlistment on February 6, 1969, following his separation on February 5 was effected with no change of permanent station directed, his assignment apparently then being at Subic Bay. Therefore, no right to transportation of dependents arose by reason of his reentry into the service within the contemplation of paragraph M7009–5 of the Joint Travel Regulations. However, thereafter the orders of April 8, 1969, directed a permanent change of station from Subic Bay to London, England, incident to which the member was entitled to transportation for the movement of his dependents.

Accordingly, if otherwise correct, payment is authorized on the vouchers which are returned herewith.