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[B-166969]

Bidders—Qualifications—Prior Unsatisfactory Service—Tenacity and Perseverance

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

Bidders—Qualifications—Prior Unsatisfactory Service—Referral to Small Business Administration

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

To Theodore C. Huke, September 2, 1969:

Reference is made to your letter dated July 22, 1969, on behalf of Land-Air, Incorporated, Grand Prairie, Texas, protesting against the rejection of its bid submitted in response to advertised solicitation No. F42600-69-B-3051, issued March 6, 1969, by the Ogden Air Materiel Area, Hill Air Force Base, Utah, for the procurement of 181,921 suspension lugs, Federal Stock No. 13251164452AQ, including a labor surplus area set-aside quantity of 90,960 units.

Due to a reportedly urgent need for suspension lugs, it was determined by the Department of the Air Force that an award under the advertised solicitation of March 6, 1969, should be made prior to submitting a report to our Office on the protest of Land-Air, Incorporated. An award was made on June 4, 1969, to Duty Manufacturing, Incorporated, the third lowest "B" bidder, or prior producer, who could proceed with production without obtaining a "First Article" approval. The low bid was considered nonresponsive. The second lowest bid, submitted by Land-Air, Incorporated, was rejected on the basis of a determination by the contracting officer that Land-Air, Incorporated, could not be considered under the standards of part 9, section 1, of the Armed Services Procurement Regulation (ASPR), as a responsible prospective contractor for the procurement involved because of an unsatisfactory record of performance which, in the opinion of the contracting officer, was due to a failure of the company to apply necessary tenacity or perseverance to do an acceptable job.

Since you had requested in a telegram dated June 9, 1969, that you be furnished a copy of the administrative report on the protest of Land-Air, Incorporated, we forwarded to you by letter dated July 9, 1969, a copy of a letter dated June 24, 1969, from the Department of the Air Force, reporting on the protest, together with copies of two statements of the contracting officer dated May 27, 1969, and a copy of his May 12, 1969, determination of nonresponsibility on the part of Land-Air, Incorporated. This record of the case shows that, during a period of 8 months prior to May 1969, Land-Air, Incorporated, completed 47 Government contracts of which 28, or nearly 60 percent, were not completed within the contract performance periods, and that, as of May 1969, Land-Air, Incorporated, was engaged in performing 33 Government contracts on 20 of which delinquencies in performance had occurred. The 20 contracts included Air Force contract No. F42600–69–C–2187 and Navy contract No. N00104–69–C–0160, covering the production of MS 3314 suspension lugs similar to those described in advertised solicitation No. F42600–69–B–3051.

The contracting officer's determination of nonresponsibility shows various causes for the delinquencies relating to 20 of the 33 then current contracts with Land-Air, Incorporated, and the departmental letter of June 24, 1969, contains the following general comments concerning the preaward survey which was conducted by the Defense Contract Administrative Service Region (DCASR), Dallas, Texas:

> The PAS (Preaward Survey) report of April 22 was negative. It recommended that the contract not be awarded to Land-Air in view of its poor delivery performance on other defense contracts. While it acknowledged that Land-Air had the necesary equipment and production personnel, it pointed out that over the previous eight months 60 percent of the completed contracts were delinquent. Land-Air was also then delinquent on two uncompleted contracts for the identical lug under consideration. These shortcomings were caused primarily by the late issuance of purchase orders by Land-Air and the lack of monitoring of its vendors. The Contracting Officer was unable to make an affirmative determination within the meaning of ASPR 1–902 that Land-Air was a responsible contractor for this particular procurement as required by ASPR 1–904. He, therefore, made a finding that Land-Air was non-responsive in this instance based upon the negative PAS and prepared to make the award to Duty Mfg., Inc.

A copy of the preaward survey report was not furnished to you in view of restrictions placed on the use of such reports. See ASPR 1–907. However, in view of the contentions made in your letter of July 22, 1969, it is considered appropriate to advise you specifically with respect to the statements in the preaward survey report concerning Land-Air's record of performance as of the time the preaward survey was conducted.

After referring to delinquencies in performance on 28 completed contracts and 20 uncompleted contracts, which latter included two current contracts for the production and delivery of suspension lugs, the report states that show-cause letters were issued concerning delinquen-

cies on five current contracts, that one contract was terminated for default and the administrative contracting officer recommended termination of five additional contracts for default. It is stated that many of the delivery schedules were extended and had again become delinquent; that all current and previous delinquencies were directly attributable to the contractor and were the result of late issuance of purchase orders for materials and services and ineffective follow-up with vendors; and that the contractor's order and/or subcontractor follow-up system was totally unsatisfactory, inadequate and, in fact, practically non-existent. It is also stated that, despite repeated efforts by preaward survey teams of Defense Contract Administrative Services, the contractor had shown little improvement; that extreme difficulty was experienced in securing information from the contractor relative to the production status of contracts being performed; and that on many occasions the information furnished proved to be totally unreliable.

You state that no distinction has been made in this case as to the nature of the contracts and their relationship to the total business of Land-Air, Incorporated, and that your client believes that any determination of tenacity or perseverance should be based not only upon the delinquent contracts but should be predicated upon Land-Air's entire record for the period 1967–1969. You indicate that during this period Land-Air, Incorporated, produced over 4.8 million suspension lugs for the Government at a value of approximately $5,712,000, that there are currently under contract orders over 3 million lugs to be shipped, and that the records establish that Land-Air, Incorporated, shipped 90 percent of ordered suspension lugs on or ahead of schedule. You provided a recapitulation of the contracts or orders for suspension lugs received by Land-Air, Incorporated, which includes a listing of 78,751 lugs required for delivery under Air Force contract No. F42600–69–C–2187, and a listing of 102,000 lugs required for delivery under Navy contract No. N00104–69–C–0160. You also provided a recapitulation of the other 18 contracts being performed at the time the preaward survey of Land-Air, Incorporated, was made and as to which there had been reported delinquencies in performance. You stated that those contracts represented a total cost of $69,419.73, an amount which is less than 1 percent of the total business of Land-Air, Incorporated, during the period 1967–1969.

In regard to the reported delinquencies in performance of the then current contracts Nos. F42600–69–C–2187 and N00104–69–C–0160, your letter sets forth the following information:

Contract No. F42600–69–C–2187 required delivery of 12,500 parts per month for 6 months starting January 25, 1969. The first quantity

ready for shipment was verbally requested to be shipped other than to the scheduled delivery point and Land-Air, Incorporated, was advised that the shipment should be given priority over a shipment to be made to the Navy under contract No. N00104–69–C–0160. This made the Navy contract delinquent and it took 4 months for Land-Air, Incorporated, to get back on schedule. Contract No. F42600–69–C–2187 was, however, completed ahead of schedule, or 26 days before the completion date of the contract.

The Navy contract was scheduled for delivery on or before April 3, 1969, but Land-Air, Incorporated, was subsequently authorized to make shipment by June 30, 1969, and, in the meantime, the Navy Parts Control Center had requested that shipment be made to Metals Engineering Company, instead of to the originally specified place of destination. When the preaward survey of Land-Air, Incorporated, was being made the authority for this diversion in shipment had been received but the "paper work supporting the fact that Land-Air was not delinquent had not been received."

You state the position of Land-Air, Incorporated, to be that it cannot be held responsible for delinquencies in performing the cited two contracts with the Air Force and the Navy because it acted on the Government's behalf in diverting shipments based upon instructions of Government officials and, further, that there is no past unsatisfactory record on its part in performing contracts with the Government for the production and delivery of suspension lugs. With reference to the remaining 18 "current" contracts covering the furnishing of other supply items, you indicate that difficulties had been experienced in obtaining necessary supplies from subcontractors under eight of the prime contracts due to unique problems such as bankruptcy, death of the owner, breakdowns of equipment, and that, while the Government has noted that purchase orders were not issued to vendors in some cases, this refers only to written purchase orders, whereas, in most instances involving the delinquencies under the eight prime contracts, vendors or subcontractors were requested verbally to proceed within a week or 10 days after the prime contracts were awarded to Land-Air, Incorporated.

It is contended that there was no failure on the part of Land-Air, Incorporated, to proceed diligently with its management function of conducting a preaward evaluation of each subcontract facility and prompt placement of orders after award of the prime contracts, and that most of the vendor or subcontractor delinquencies were beyond the control of and without the fault or negligence of Land-Air, Incorporated.

At page 5 of your letter it is emphasized that the major part of the business of your client has in the past involved the manufacture of suspension lugs, and it is argued that such factor should have been given considerable weight in the Government's evaluation of the company's capability and responsibility, particularly since the invitation for bids under consideration concerned a proposed procurement of MS–3314 suspension lugs. You stated that one cannot understand how the Government can ignore the most significant aspect of Land-Air's operation and base its findings upon a small fraction of Land-Air's total business; and that the delinquent contracts do not appear to be placed in the proper prospective as they relate to Land-Air's total "tenacity and perseverance."

Complete information concerning the then current Air Force and Navy contracts for the production and delivery of suspension lugs, contracts Nos. F42600–69–C–2187 and N00104–69–C–0160, was not furnished in the preaward survey report or in the contracting officer's May 12, 1969, determination of nonresponsibility on the part of Land-Air, Incorporated. Both documents show January 5, 1969, as the date of delinquency under the Air Force contract, whereas you indicate that the delivery of the first quantity increment under that contract (12,500 suspension lugs), was due on or before January 25, 1969, or possibly during the month beginning on that date. Both documents show May 15, 1969, as the anticipated or approximate recovery date for meeting the delivery schedule of the Air Force contract, and this presumably was meant to indicate that Land-Air, Incorporated, was capable of producing and delivering a sufficient quantity of suspension lugs under the Air Force contract to meet current delivery requirements and to make up for a past delinquency, shown in the contracting officer's determination of nonresponsibility as having amounted to 7,400 units on April 22, 1969, the date of the preaward survey report. Both documents also show April 3, 1969, as the date of delinquency under the Navy contract and April 30, 1969, as the anticipated or approximate date of recovery.

Since the Air Force contract reportedly was delinquent as of January 5, 1969, and it appears that the delivery schedule of that contract had not been met as of April 22, 1969, it is not readily apparent how a request of the Navy during April 1969 to divert the shipment due under the Navy contract, which shipment apparently was made during the month of June 1969, or a diversion of the first shipment due under the Air Force contract, or any priority given to that contract, could be said to have caused delinquencies under both contracts. Furthermore, we do not agree with your apparent belief that Land-Air, Incorporated, would have been justified in disregarding the deliv-

ery schedule of the Air Force contract without having been advised of any priority with respect thereto, so long as Land-Air, Incorporated, had a reasonable expectation that it would be able to deliver all of the suspension lugs required for delivery under the Air Force contract on or before its final completion date. We do not have any information concerning the company's record of performance under prior Government contracts for the manufacture and delivery of suspension lugs but there is nothing in the record before us other than to indicate that the two contracts for the manufacture and delivery of suspension lugs, current at the time of making the preaward survey, were not being satisfactorily performed so far as the delivery requirements of those contracts were concerned.

The determination of nonresponsibility may have been based upon what you state to be a small fraction of the total business of Land-Air, Incorporated, during the period 1967–1969. That does not necessarily require a conclusion that the determination was unreasonable since a determination regarding a prospective contractor's responsibility should be based upon the most current information available and we doubt that your client would have been considered as not having a satisfactory record of performance if it had been performing satisfactorily under its then current contracts with the Government or a reasonable proportion of such contracts. In view of the anticipated or approximate dates of recovery under the two current contracts for the production and delivery of suspension lugs, we also doubt that a determination of nonresponsibility would have been made in this case if there had not been any serious delinquencies in performing 18 other current contracts with the Government, since it does not necessarily follow that a delay in performing one or two previous contracts would require a determination that the prospective contractor has an unsatisfactory record of performance within the meaning of paragraph ASPR 1–903.1(iii).

However, it is our opinion that the reported delinquencies under the 18 contracts properly were considered by the contracting officer in conjunction with the reported delinquencies under the two contracts for the production and delivery of suspension lugs when he made his determination of nonresponsibility on the part of Land-Air, Incorporated. The delinquencies under the 18 contracts may have been minor from the standpoint of a comparison of the amounts payable under the contracts with the total business of Land-Air, Incorporated, over a period of 2 or 3 years, but it appears that more weight should have been given in the contracting officer's determination of nonresponsibility to such delinquencies than you have suggested since they apparently had a cumulative effect of increasing to a considerable

extent the burden of the Government in administering the contracts with Land-Air, Incorporated.

Our Office has consistently taken the position that the question whether a prospective contractor is to be considered responsible should be a matter primarily for determination by the contracting agency and that the administrative determination should be accorded finality absent a clear showing of bad faith or lack of a reasonable basis therefor. We believe that the contracting officer's determination in this case that your client did not have a satisfactory record of performance was reasonable and that his further determination that such unsatisfactory record of performance was due to a failure to apply necessary tenacity or perseverance was also reasonable in view of the high percentage of the then current contracts with Land-Air, Incorporated, on which delivery schedules were not being met.

Although Land-Air, Incorporated, certified itself to be a small business concern, since the contracting officer's determination of nonresponsibility was based in part on a belief that the bidder's past unsatisfactory record of performance was due to a factor not included in the elements of capacity and credit, it was not necessary to refer the case to the Small Business Administration for consideration under the small business certificate of competency program established under the provisions of the Small Business Act. See 43 Comp. Gen. 257.

Accordingly, the protest made to our Office in the matter is hereby denied.

[B-167385]

Post Office Department—Employees—Transfers—Transportation and Relocation Expenses—Effect of Delayed Authorization

A postal employee who upon appointment to the position of postal service officer effective December 17, 1966, after a training period during which he had been paid per diem, is advised not to move to his new duty station in anticipation of a rearrangement of territories—a plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized the transportation of dependents and household effects, and the benefits of Public Law 89-516, as the time limitations pertaining to the movement of dependents and household effects, and the reimbursement of expenses incident to the sale of a dwelling at a former station contained in Bureau of the Budget Circular No. A-56, may not be waived—the Circular a statutory regulation having the force and effect of law.

To the Postmaster General, September 2, 1969:

This is in reply to letter of June 27, 1969, from the Regional Counsel, Dallas Regional Office, Post Office Department, reference 10-RC:JRS:cb, requesting our opinion as to the eligibility of Mr. Robert C. Wilfong, an employee of the Department, for reimbursement of transfer expenses under the circumstances stated below.

Mr. Wilfong, an employee of the post office in Alexandria, Louisiana, was selected for training and subsequently given a permanent appointment to the position of postal service officer effective December 17, 1966. Accompanying the POD Form 50 promoting him was a letter from the Director, Postal Service Officers, Dallas Regional Office, which reads in pertinent part as follows:

> As discussed with you over the telephone, although the Form 50 shows Baton Rouge as your duty station, you should make no plans at this time to move. It is hoped that by January the territories can be arranged to best suit the needs of the Service, and that I can advise you definitely of your permanent domicile.
>
> Beginning December 17, you will no longer be entitled to per diem when in Baton Rouge, as that is your official duty station, and you are not entitled to per diem in Alexandria since that is your residence.

In this regard the record indicates that under existing policy it is not customary to domicile a postal service officer in his "home office" or the territory in which that office is located.

Mr. Wilfong has lived and worked away from his residence since July 1965, when he was appointed as a trainee, and has not been authorized per diem in lieu of subsistence at Baton Rouge since December 16, 1966. Mr. Wilfong has requested permission to move to Baton Rouge and states that the present situation is working a financial and personal hardship on him. The Dallas Regional Office is considering granting his request inasmuch as it is presently intended that he remain at his present job and present duty station indefinitely. Your regional office counsel asks whether Mr. Wilfong may be authorized transportation of his dependents and household effects and the benefits of Public Law 89–516, 5 U.S.C. 5724a, if his request is granted. In this connection he points out that the transportation of the employee's dependents and household effects would not be within 2 years after the date of his transfer, and that expenses incident to the sale of his residence would be incurred more than 12 months after his transfer.

An employee's official or permanent duty station is the place at which he actually is stationed; that is, the place where the employee expects, and is expected, to spend the greater part of his time on official business. 32 Comp. Gen. 87, 88 (1952).

In the instant case Mr. Wilfong was specifically advised not to move to Baton Rouge at the time of his appointment to the position of postal service officer; also he was not issued travel and transportation orders. The reasons for such action are reported to have been (1) Mr. Wilfong's desire not to move to Baton Rouge at the time of his transfer and (2) plans of the Dallas Regional Office to increase the postal service officer complement and rearrange the territories to achieve a better balanced load. Due to budgetary restrictions, it has not been possible to carry out such plans.

The Post Office Department advises that subsequent to his assignment to Baton Rouge, Mr. Wilfong performed the major portion of his duties in the territory associated with the Baton Rouge domicile. This territory does not include the Alexandria, Louisiana, office. Until he was promoted to PFS–15 in July 1968, Mr. Wilfong was technically in a training status. However, the record also shows that since July 1966, he has had full postal service officer territorial responsibilities.

On the basis of the entire record and in line with 32 Comp. Gen. 87, cited above, we must conclude that Baton Rouge has been Mr. Wilfong's domicile, which term is used in the Post Office Department interchangeably for "station," since his permanent appointment to the position of postal service officer on December 17, 1966.

The time limitations pertaining to the transportation of an employee's dependents and household effects and the reimbursement of expenses incident to the sale of a dwelling at the employee's former station are contained in Bureau of the Budget Circular No. A–56, sections 1.3d and 4.1e (formerly 4.1d). The Circular is a statutory regulation which has the force and effect of law and, therefore, the time limitations therein may not be waived in an individual case.

In view of the above Mr. Wilfong may not be authorized transportation of his dependents and household effects and reimbursement of expenses of a sale of his home in Alexandria, without regard to the time limitations applicable thereto, in connection with his transfer from Alexandria to Baton Rouge.

[B–167495]

Contracts—Awards—Original Solicitation Amended—Amendment Canceled

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

Contracts—Specifications—Addenda Acknowledgment—Unpriced

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

To Rubber Fabricators, Incorporated, September 2, 1969:

Reference is made to your letter dated July 11, 1969, with enclosure, protesting the failure to award the total procurement to Rubber Fabricators, Incorporated, under solicitation No. DSA700-69-B-3237, issued by the Defense Construction Supply Center, Columbus, Ohio.

The solicitation was issued on April 21, 1969, inviting bids on Item 1 which consisted of 30 each collapsible fabric tanks, 3,000 gallon capacity, FSN 5430-835-3351, and Item 2 covering data for Item 1. The invitation invited bids on the basis of delivery f.o.b. Port Hueneme, California. On May 2, 1969, Amendment No. 1 was issued modifying the specifications to permit use of precured fabric and pressed seam construction. On May 9, 1969, Amendment No. 2 was issued to extend the closing date to May 29, 1969. Amendment No. 3 was issued on May 19, 1969, amending the solicitation by adding Item 3 calling for the delivery of 24 tanks, f.o.b. Davisville, Rhode Island, Item 4 for 32 tanks, f.o.b. Gulfport, Mississippi, Item 5 for 64 tanks, f.o.b. Port Hueneme, California, and Item 6 covering data for these items.

Bids received in response to the solicitation were opened on May 29, 1969. All bidders with the exception of one failed to price the amendment covering the 120 additional tanks, although all bidders acknowledged receipt of the amendment.

By telegram dated May 15, 1969, Rubber Fabricators reduced the unit price of Item 1 by $298 and deleted the price previously entered for Item 2, stating that Item 2 would be supplied at no charge. The contracting officer considered that the bid of Rubber Fabricators covered only Items 1 and 2. Award was made to Rubber Fabricators on Items 1 and 2 on June 30, 1969. The contracting officer also reports that since the bid from the only firm pricing Items 3, 4, 5, and 6 was approximately $300 higher per unit than that offered by Rubber Fabricators for Item 1, it was determined that Items 3, 4, 5, and 6 should be canceled because of unreasonable prices, and that these items should be resolicited.

It is your contention that since Amendment No. 3 changed only the number of units required, and you intended no change in price, there was no action required on your part to register a bid on the additional quantity other than to acknowledge receipt of the amendment. In support of your position you cite the provision in each amendment stating that "Failure of your acknowledgment to be received at the issuing office prior to the hour and date specified may result in rejection of your offer." You also cite paragraph 7 of the Solicitation Instructions and Conditions, which provides the method for modifying bids or offers. In addition you cite a number of our decisions in support of your position that your unit price offer on Item 1 is applicable to Items 3, 4, and 5, by the mere acknowledgment of Amendment No. 3.

Your reference to decision B–152232, October 21, 1963, is not well taken since this decision concerned "late" telegraphic modifications. The acknowledgment of the amendment specifically stated the unit price and total price of the additional items.

In decision B–153262, February 19, 1964, we stated:

> * * * we do not agree that an addendum which adds an item to an invitation for bids may be considered as requiring only that the bidder acknowledge its receipt in order to make his bid fully responsive to the amended invitation, assuming that the bidder has quoted prices for and taken no exception to the requirements of the original item of the invitation.

Decision 36 Comp. Gen. 259, dated October 1, 1956, is not relevant since it concerned the evaluation of a bid that contained a condition as to the number of radiographs to be furnished and the adjustment of price to be made in the event a greater or lesser number should be required.

Your fourth cited decision 48 Comp. Gen. 757, May 27, 1969, while resembling your situation, is easily distinguished. In this case the bidder inserted in the price column, beside the items, the mark "– – –." We held that:

> Absent a specific requirement that if an item is to be furnished at no cost it should be stated in so many words (see B–165549, February 12, 1969), we do not think that the Renick bid was nonresponsive per se because of the "– – –" next to the data items.
>
> The entry of a "– – –" is certainly less clear an indication of intent than either a dollar price entry or a statement like "No charge." But it is a more meaningful expression of intent than a mere blank space. The "– – –," it seems to us, shows two things. First, the bidder was aware of the necessity to insert *something* next to the item; in other words, the bidder had not overlooked the item. Second, after considering the matter, the bidder decided *not* to insert a price for the item. The affirmative corollary is that the bidder obligated itself to furnish the data without cost to the Government. Therefore, while there is no explicit indication that the data was to be supplied at no cost, the bidder's intent to do so was clear and the failure to state this intent in a more positive fashion did not render the bid nonresponsive.

In your case, however, no indication or affirmative action was made or taken other than acknowledgment of the amendment. Three alternatives were thus presented: (1) as you suggest, the bid was modified to supply not only the tanks for Item 1, but also for Items 3, 4, and 5, plus data Item 6, at the unit price stated for Item 1; (2) at the other extreme, that you would supply all items for the aggregate price stated for Item 1; and (3) the view of the contracting officer, that you acknowledged receipt of the amendment but that you were only interested in bidding on Items 1 and 2. The first and second alternatives cannot be considered reasonable since no affirmative action was taken to relate the unit price or aggregate price of Items 1 and 2 to the additional Items 3, 4, 5, and 6. The contracting officer's interpretation is reasonable and consistent with provisions of the solicitation.

The bid submitted in the original solicitation and not withdrawn (Items 1 and 2) could not and did not become invalid because you did not submit a bid on the additional quantities in Items 3, 4, 5, and 6, since the solicitation and amendments permitted a bid on all or any part of the quantities involved, and award by the contracting officer in quantities less than stated in the solicitation.

In view of the above, your protest must be denied.

We have noted that all but one of the other offerors also failed to price the amendments. This failure may well have been due to the form of Amendment No. 3 which provided no space for the insertion of prices, nor did it specifically call for prices on the additional items to be set out in the bid form. We think this situation could have been prevented by so formulating the amendment as to leave no doubt about what was required. We are calling this situation to the attention of the contracting agency to preclude any recurrence.

[B-127036]

Savings Deposits—Set-Off—Tax Indebtedness—Military Personnel

The status of savings deposits as part of the salary and wages of enlisted members of the United States is not affected by the act of August 14, 1966, which amended 10 U.S.C. 1035, to provide a new savings deposit program and to exempt the deposits from liability for debt, including any indebtedness to the United States, and the deposits, therefore, are subject to levy by the Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect the provisions of an earlier act than the 1954 Internal Revenue Code under which a member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in the enumeration of property exempted from tax levy in the Internal Revenue Code, the Federal tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions.

To the Secretary of Defense, September 3, 1969:

Further reference is made to letter dated August 5, 1969, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether savings deposits, including interest thereon, authorized under 10 U.S.C. 1035, are to be considered a part of a member's salary and wages which are subject to levy by the Internal Revenue Service. The question was discussed in Department of Defense Military Pay and Allowance Committee Action No. 431.

Section 6331(a) of the Internal Revenue Code, 26 U.S.C. 6331(a), provides that if any person liable to pay any tax neglects or refuses to pay the same within 10 days after notice and demand, it shall be lawful for the Secretary of the Treasury or his delegate to collect such tax by levy upon all property and rights to property (except such property as is exempt under section 6334) belonging to such person. It is further provided in subsection 6331(a) that:

* * * Levy may be made upon the accrued salary or wages of any officer, employee, or elected official, of the United States, the District of Columbia, or any agency or instrumentality of the United States or the District of Columbia, by serving a notice of levy on the employer (as defined in section 3401(d) of such officer, employee, or elected official. * * *

Subsection 6334(a) exempts from levy certain property there enumerated, none of which includes the property here involved. Subsection 6334(c) provides that:

Notwithstanding any other law of the United States, no property or rights to property shall be exempt from levy other than the property specifically made exempt by subsection (a).

In our decision of August 10, 1956, 36 Comp. Gen. 106, we held in effect that subsection 6334(c) nullified all previous special exemption provisions and superseded any exemption previously recognized by the accounting officers and only the property enumerated in subsection 6334(a) shall be exempt from levy. Therefore, it was our view that savings deposits under the former program for enlisted members (10 U.S.C. 1035) were subject to levy under 26 U.S.C. 6331.

The act of August 14, 1966, Public Law 89–538, 80 Stat. 347, amending 10 U.S.C. 1035, virtually abolished the former enlisted members' deposits system and substituted a program whereby a member of the Armed Forces who is on permanent duty outside the United States or its possessions may deposit during that tour of duty not more than his unallotted current pay and allowances in amounts of $5 or more with any branch, office or officer of a uniformed service and receive interest on such deposits at a rate prescribed by the President not to exceed 10 per centum a year on such deposits up to a maximum amount of $10,000. By Executive Order No. 11298, dated August 14, 1966, the President prescribed that such deposits shall accrue interest at the rate of 10 percent per annum computed quarterly.

As provided by the act of August 14, 1966, 10 U.S.C. 1035(d) was amended to read as follows:

(d) An amount deposited under this section, with interest thereon, is exempt from liability for the member's debts, including any indebtedness to the United States or any instrumentality thereof, and is not subject to forfeiture by sentence of a court-martial.

Since the act of August 14, 1966, specifically provides that members' savings deposits are "exempt from liability for the member's debts, including any indebtedness to the United States or any instrumentality thereof," and the law was enacted subsequent to the approval of the Internal Revenue Code of 1954, it is indicated that doubt exists as to the effect of 26 U.S.C. 6331 on such deposits under established rules of statutory construction.

The present subsection (d) of 10 U.S.C. 1035, enacted in 1966, merely continues in effect a similar subsection (d) that appeared in the former section 1035 relating to enlisted members' deposits. Such

former subsection (d) was a codification of section 3 of the act of July 15, 1954, ch. 513, 68 Stat. 485, enacted prior to the Internal Revenue Code of 1954, which was approved August 16, 1954. There is nothing in the legislative history of the 1966 law which indicates that the Congress had any intention of exempting a member's deposits from levy for taxes.

Under the plain terms of subsection 6334(c), only the property or rights to property specifically enumerated in subsection (a) are exempt from levy. While the 1966 act (including the current form of 10 U.S.C. 1035(d)) was enacted after the Internal Revenue Code of 1954, the earlier subsection 1035(d) covered exemptions other than exemption from levy for taxes and, since that subsection, in and before 1966, did not authorize exemption from tax levy, it is believed that in continuing that subsection in 1966 in substantially its then existing form, the Congress did not intend to enlarge its coverage to include exemption from levy for taxes. In that connection there is for noting that section 104(c) of the Federal Tax Lien Act of 1966, approved November 2, 1966, 80 Stat. 1125, 1137, enacted subsequent to the act of August 14, 1966, added categories (6) and (7) to the enumeration of property exempt from levy under 26 U.S.C. 6334(a). Had the Congress intended members' savings deposits to be exempt from levy, it would seem that a specific provision therefor would have been made in the act of November 2, 1966, or in section 812 of the act of June 21, 1965, Public Law 89-44, 79 Stat. 170, or section 406 of the act of August 28, 1958, Public Law 85-840, 72 Stat. 1047, which added categories (5) and (4), respectively.

In view of the foregoing, the question presented is answered in the affirmative.

[B-165852]

Bids—Mistakes—Correction—Nonresponsive Bids

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

Contracts—Awards—Erroneous—Nonresponsive Bidder

Where the correction of a bid was improper, the fact that the correction was permitted by an authorized Government agent does not estop the Government from terminating the purported contract. Although withdrawal of the erroneous

bid could have been permitted, correction was precluded as the intended bid could not be substantially determined from the invitation or bid. The bid protest procedures used having conformed to section 20.2, Title 4, Code of Federal Regulations, and the contractor timely informed its interests could be adversely affected and given an opportunity to present its views, termination of the partially performed contract was neither prejudicial to the contractor nor adverse to the best interests of the Government, and was required in order to preserve the integrity of the competitive bidding system.

To the Airosol Company, Inc., September 3, 1969:

Further reference is made to a letter dated August 15, 1969, from your attorney in support of a request for reconsideration of our decision of July 24, 1969, 49 Comp. Gen. 48, wherein we advised the Administrator, General Services Administration, to terminate a purported contract awarded to Airosol under invitation for bids No. FPNGC–A–70283.

In brief, we held in our decision that there was a reasonable basis for concluding that Airosol's action, in erroneously computing its bid price on estimated requirements 24 times the Government's true estimate, may have affected the amount of the bid the company otherwise would have made. We felt that the Government's action in permitting correction of the bid after opening, to apply the same indicated unit rate to the Government's true estimated requirements which were only 1/24th of the quantity on which your bid was based was tantamount to permitting a second bid. This, of course, cannot be allowed under competitive bidding procedures since the statutes requiring advertisements for bids and the award of contracts to the lowest responsible bidders are designed to assure to the Government the benefits of full and free competition, and therefore are to be applied so as to avoid any partiality or favoritism to, or any prejudice against, any bidder. We have in pursuance of these principles established the rule that the rights of other bidders require denial of a downward correction of any bid which would displace a lower bidder, except where the correct bid can be ascertained substantially from the invitation and the bid itself. See the cases cited in our first decision in this matter.

Your attorney submits that you are entitled to retain your contract and has requested that we rescind our decision because of any or all of the following:

(1) The Comptroller General has reversed the Administrative Procuring Office's determination in a manner that is beyond the scope of his review authority.

(2) In the circumstances of this case, the principle of estoppel should be applied against the Government.

(3) The Airosol contract should not be disturbed since there has been partial performance thereunder and the parties cannot be restored to their status quo.

(4) The termination of Airosol's contract is completely adverse to the best interests of the Government.

The position taken by your attorney, that we have exceeded our authority to review and reverse the administrative action in this case, is based upon the contention that we are precluded from deciding *de novo* whether a mistake should have been corrected, unless the administrative decision does not measure up to the standards of review established by the Wunderlich Act of May 11, 1954, 68 Stat. 81 (41 U.S.C. 321, 322).

The cited act applies only to administrative decisions rendered pursuant to a contractual provision relating to the finality or conclusiveness thereof. Under section 2 of the act (41 U.S.C. 322) administrative decisions on questions of *law* may not be made final. Since mistakes in bids are not disputes arising under a contract there is no basis for applying "Wunderlich" standards to the instant matter. Historically, questions concerning corrections of mistakes in bids were for a number of years all decided in this Office, until authority to make such corrections was expressly granted by this Office to various agencies and departments of the Government. For example, see B–101323, March 21, 1951, and 38 Comp. Gen. 177 (1958). Such authority was granted subject to the express condition that the procedure authorized cannot operate to deprive a bidder of his right to have the matter determined by this Office. Moreover, 1–2.406–3(e), Federal Procurement Regulations, section provides that nothing contained in the regulatory provisions which permit administrative correction of mistakes, FPR 1–2.406–3, shall deprive the Comptroller General of his right to question the correctness of any administrative determination made thereunder nor deprive any bidder of his right to have the matter determined by the Comptroller General should he so request. Accordingly, we do not agree with the position taken that we have exceeded our review authority in this matter.

Secondly, it is argued that the Government is estopped from terminating Airosol's contract since an authorized Government agent acted positively in permitting correction of Airosol's bid and Airosol relied to its detriment upon the amended contract by setting aside manufacturing space in its plant as well as making commitments for various items required in the performance of this contract.

While GSA took the position that Airosol's mistake was obvious and its price for one twenty-fourth of the estimated quantity contemplated in its bid could be ascertained substantially from the bid by simply dividing by 24, we believe it is plain that the bid in no way indicates either that Airosol intended to bid for the Government's true estimated requirements, or what its bid therefor would have been in view of the reasonable probability that Airosol's bid was based in some degree upon a quantity discount, the amount of which obviously

could not be determined from the bid itself. Although withdrawal of your bid under these circumstances could have been permitted, the regulations preclude correction if such action would result in displacement of one or more low acceptable bids unless the correct bid was determinable substantially from the invitation and bid itself. Since it is our view that the correction in question was improper, we do not believe the Government either can or should be estopped from terminating the purported contract with Airosol upon recognition of its impropriety.

In this regard we note the objection raised by your attorney to the effect that Airosol should have been notified of the protest when filed. However, it was not until sometime after receipt of the administrative report on April 17, 1969, that we were able to consider the merits of this protest. When it was determined that the protest might require action by this Office which would adversely affect Airosol's interests we immediately advised you thereof and provided you with an opportunity to present your views, which were in fact considered prior to our decision. We believe therefore that such action did not result in any prejudice to your position, and was strictly in accordance with the provisions of section 20.2, Title 4, Code of Federal Regulations, which govern bid protest procedures in this Office.

With respect to the point raised that the Airosol contract should not be disturbed because there has been partial performance thereunder and the parties involved cannot be restored to their *status quo*, we cannot agree since we find no legal basis for authorizing additional purchases of the subject items from Airosol under an unauthorized contract. We believe the action suggested would seriously jeopardize the integrity of the competitive bidding system, and, further, that the *status quo* can best be restored by awarding a contract for the remainder of the term to the bidder who would have received the award but for the unauthorized correction made to your bid.

The argument is also made that termination of Airosol's contract is completely adverse to the best interests of the Government since the Administration might find itself without a contract source should Trio decide at this time not to accept a contract. In this regard it is our view that the position taken by Trio throughout this protest that the Airosol contract was invalid and that award should be made to Trio, constitutes a manifestation of Trio's intent to extend its offer during the pendency of the protest and would preclude any effort on its part to reject an award.

Finally, we have noted your attorney's agreement with the analysis in our decision concerning the invitation's lack of clarity in stating the bidding units for these items, and the further argument that since

you did not draft the language you should not be held responsible for any losses resulting therefrom. As a general rule, we would agree that a party who drafted ambiguous contract language could not hold the other contracting party to the drafter's interpretation of ambiguous language if such other party possessed a contrary, but reasonable, understanding of the agreement. However, such is not the posture of this case since both parties were fully aware of the Government's true estimate and bidding unit prior to award of the purported contract. Moreover, the losses, if any, occurred not because of a contract entered into without a mutual understanding of its terms, but rather from the unauthorized acceptance of what amounted to a new bid after opening based upon the Government's true estimated requirements.

For the reasons stated above, we must adhere to our previous decision.

[B-167185]

Contracts—Specifications—Administrative Determination Conclusiveness—General Accounting Office Function

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

Contracts—Negotiation—Changes, Etc.—Oral *v.* Written

Although in negotiating a contract under 10 U.S.C. 2304(a)(10), the mandate of 10 U.S.C. 2304(g) for discussions with all responsible offerors within a competitive range was met by providing opportunity for price and technical proposal changes, the oral notice of significant delivery changes did not meet the standards of paragraph 3-805.1(e) of the Armed Services Procurement Regulation that significant changes in requirements must be by written amendment and that an oral notice should be used only in very limited circumstances. The failure to observe the regulation was a serious deficiency in the negotiation process, but all offerors having been given ample opportunity to respond to the oral advice, a legal objection to the validity of the award would not be justified. However, corrective action should be taken to prevent a repetition of the deficiency.

To the Secretary of the Navy, September 3, 1969:

Reference is made to a letter dated July 18, 1969, from the Deputy Commander, Purchasing, Naval Supply Systems Command, forwarding a report on the protests by EFMC Corporation and Privitt Plastics, Inc., against the award of a contract to Swedlow, Inc., under request

for proposals No. N00197-69-R-0021, issued by the Naval Ordnance Station, Louisville, Kentucky. We also make reference to letters dated August 6 and 19, 1969, from the Acting Deputy Commander and the Deputy Commander, Purchasing, Naval Supply Systems Command, furnishing relevant documents which had not been included as part of the original report.

The request for proposals (RFP) was issued on March 7, 1969, covering 12 plastic weathershields for gun mounts. Negotiation was authorized under 10 U.S.C. 2304(a)(10) which permits negotiation of a contract when it is impracticable to obtain competition. Proposals were required to be submitted in two separate sections, the first relating to all the technical aspects of the procurement, the second covering all the cost aspects thereof. Page 11 of the RFP admonished prospective offerors that the Government required delivery of the first weathershield 270 days after the date of the contract and one every 30 days thereafter until the entire quantity had been delivered. Offerors were authorized to submit accelerated delivery schedules. The method of evaluating offers in terms of delivery schedules was stated as follows:

> Offerors offering delivery of each quantity within the applicable delivery period specified above will be evaluated equally as regards time of delivery. Offerors offering delivery of a quantity under such terms or conditions that delivery will not clearly fall within the applicable delivery period specified above will be considered nonresponsive and will be rejected. Where an offeror offers an earlier delivery schedule than that called for above, the Government reserves the right to award either in accordance with the REQUIRED schedule or in accordance with the schedule offered by the offeror. If the offeror offers no other delivery schedule, the delivery schedule stated above shall apply.

On page 17 of the RFP appeared provisions concerning first article approval. It was therein specified that one weathershield was to be delivered to the Naval Ordnance Station at Louisville within 210 calendar days from the date of the contract.

On March 13, 1969, amendment No. 1 was issued, adding to the RFP a list of Government-furnished property, offered on an "as is" basis, and providing that such property was being made available subject to applicable clauses of the Armed Services Procurement Regulation (ASPR).

On March 20, 1969, a briefing conference for the benefit of interested companies was conducted at the Naval Ordnance Station in Louisville. Representatives from all three of the involved companies were present. Minutes of the meeting indicate that Navy personnel revealed the following information:

> * * * On page 10, item m, where we give a choice of two means of attaching reinforcing beams inside the shield structure, you can either mold them separately and bond them in as in method two or lay them up in place over foam. We are going to delete method two. You must lay up over foam. We are not going to allow secondary bonding. We have had a lot of trouble with bond lines be-

tween the shield and beam. There is beam tooling available which probably would be available for you to use to make foam molds.

The referenced portion of the original RFP provided as follows:

(m) Note 7 of drawing calls for the beams to be bonded to the shell with adhesive per MMM–A–132, in accordance with Mil–A–9067. This documentation is being revised to specify that assembly of the beams to the shell is to be accomplished by either of the methods listed below. Vendor will be required to notify the procurement agency which method has been selected. This method shall then become mandatory and will be a part of the contract when it becomes final.

Method 1

Fabrication of the beams over pre-forms of foam (Mil–C–8087, Type II, Class 2) directly in the shell. This will eliminate all secondary bonds.

Method 2

Separate fabrication of the beams and the shell with secondary bonding of the beams to the shell with adhesive (Film type) per MMM–A–132, Type I, Class 3.

On April 4, 1969, amendment No. 2 was issued. It extended the date set for receipt of proposals to April 14 (confirming a telegram dated March 27, 1969), and also made certain changes in the technical aspects of the procurement. Included in these changes was this:

During the Vendor Briefings of 20 March 69 "Method 2" of Note (M) was deleted. "Method 2" is hereby reinstated as follows:

Separately molded reinforcing beams may be assembled to the shell utilizing secondary bonding methods with adhesive per MMM–A–132, Type I, Class 3, in accordance with MIL–A–9067. All such joints shall have the minimum mechanical properties listed in Table 1 of MM–A–132 under Type I, Class 3.

Three proposals were received on April 14, 1969, from the following companies in the stated amounts:

Company	Unit Price
Privitt Plastics, Inc. (Privitt)	$18,876.30, less ½%, 10 days
Swedlow, Inc. (Swedlow)	20,542.50, net
EFMC Corporation (EFMC)	26,598.24, less ¼%, 10 days

The technical section of each offeror's proposal was submitted to technical personnel for evaluation. It is reported that in connection with such evaluation, Navy personnel visited each of the offerors. The memorandum of the visits states:

BACKGROUND—Due to the need to resolve technical proposal problems and *the need to establish positive delivery schedule dates*, Mr. Homer Sparks and Mr. John Doering visited the three subject companies. [Italic supplied.]

The Navy officials conducted the visits of the three companies between May 12 and 15, 1969. The conclusions reached were as follows:

5. *SUMMARY*—No positive decision as to award of contract can be made at this time until we receive confirmation of the information requested as a result of these visits. Keeping this fact in mind, the writers have come to the following conclusions:

a. A great deal more confidence in the beam layup on foam concept has been generated. Both Swedlow and Privitt stated that this concept is not pushing the state of the art and that this was not considered an R&D effort on their part regardless of the fact that this has not been done on weathershields in the past.

b. All three companies are capable of producing the requirements of this procurement. It is pointed out that Swedlow, Inc., has adequate facilities and a more than adequate amount of engineering talent, production talent and experience in the field of GRP structures.

c. Although somewhat smaller in all respects than Swedlow, EFMC has produced this requirement in the past; therefore, has the beginning experience necessary and knowledge of the tooling which will greatly assist them if they should be awarded a contract for this requirement.

d. Privitt Plastics is a small, new, but very aggressive company. They demonstrated that they have some knowledge of the complexity of this requirement but their talent in the manufacturing of components of this size is very limited. It is our opinion that, given a sufficient amount of time (more than available for this contract), Privitt would be able to produce this requirement.

6. The Navy's requirement for these shields will be the key to the placing of the contract. Based on a contract award by 1 June and delivery of 30 December, it is the opinion of the writers at this point in time that EFMC is in the most favorable position to meet delivery requirements. However, it is also believed that if Swedlow desires to put forth the effort required and experiences no major problems, they could also make timely deliveries. It is most important that cognizant personnel give full consideration to our requirements and all possible time available be allowed for the delivery of this requirement.

It is reported that as a result of these visits, Swedlow and Privitt revised their technical proposals, which made them technically qualified. The administrative report further states:

* * * They also indicated that they could meet the new delivery schedule, and revised their price proposals as follows:

Privitt Plastics	$22,875.00
Swedlow, Inc.	22,989.00

The contracting officer's statement of facts relates, in addition:

* * * All three offerors were apprised during the visits that the delivery schedule had been changed to delivery of the prototype in October 1969 and delivery of production units to start in December 1969.

In a letter dated May 20, 1969, Privitt submitted a revised cost breakdown indicating, among other things, a rather substantial increase in manufacturing man-hours required.

A telegram dated May 29, 1969, from Swedlow was received at the contracting office on June 2, 1969, and read, in part:

CONFIRMING THE VERBAL ADVICE OF MESSRS GREGG AND SULLIVAN ON 5/29/69; IF AWARDED A CONTRACT UNDER RFP N00197-69-R-0021, SWEDLOW CAN NOW ASSURE DELIVERY OF TWO WEATHERSHIELDS BY 12/3/69 BASED ON AWARD BY 6/2/69.

On June 2, 1969, telephone calls were made from the contracting office to all three offerors. The calls were followed on June 3, 1969, by nearly identical telegrams to the offerors, stating as follows:

CONFIRMING TELECON OF 2 JUNE 1969 BETWEEN * * * AND MR. SPARKS CLOSING OF NEGOTIATIONS ON RFP N00197-69-R-0021 IS CLOSE OF BUSINESS ON 3 JUNE 1969. ALL OFFERORS ARE HEREBY GIVEN THE OPPORTUNITY TO SUBMIT A BEST AND FINAL OFFER BY THAT DATE. THE GOVERNMENT, HOWEVER, RESERVES THE RIGHT TO REOPEN NEGOTIATIONS IF ONE OR MORE OFFERORS ARE SUBSEQUENTLY FOUND NON-RESPONSIBLE OR IF THEIR OFFERS ARE FOUND TO BE UNACCEPTABLE.

In response thereto, EFMC lowered its unit price to $23,964, while neither Privitt nor Swedlow altered its offer. The relative standing of the offers became:

Privitt	$22,875
Swedlow	22,989
EFMC	23,964

On June 4, 1969, award was made to Swedlow. Privitt was not awarded the contract for the following reason:

Privitt Plastics, Inc. notwithstanding their offer to meet the new delivery schedule, was unanimously determined by technical personnel and the Contracting Officer as being unable to meet the October 1969 prototype delivery. * * *

The administrative report elaborates:

2. The Master Program Schedule submitted by Privitt Plastics in their original offer shows that prototype fabrication (first article) would require twenty-four (24) weeks plus shipping time. As a result of the visit made to Privitt Plastics, Privitt reduced prototype fabrication time by two weeks, to twenty-two (22) weeks plus shipping time. Their new delivery schedule is short by two weeks of meeting the October 1969 delivery of the prototype.

EFMC has raised a series of questions concerning the total contract cost, none of which appears to pose legal problems. The factual answers that have been included as part of the administrative report are being forwarded separately to EFMC by letter of this date. These responses adequately dispose of this portion of the protest.

A second matter covered in EFMC's letter of June 9, 1969, to the contracting officer, is entitled "Ambiguous Requirements and Specifications in RFP." However, that company's complaint seems not to be that the RFP was ambiguous, but rather that award on the basis of the "undesigned, untested" layup-over-foam method of production permitted by the RFP will expose the Government to certain "pitfalls." These are alleged to be: no acceptable production method; no acceptable quality assurance method not involving extended and costly inprocess inspection; and no approved design.

In response, the contracting officer has stated:

* * * It was the opinion of technical personnel that the layup over foam method of fabrication is both feasible and practical. Industry has widely used this method of fabrication for several years, not on the particular item involved but on other items as large and complex. It will be noted in enclosure (3) that both Swedlow and Privitt stated that the layup over foam concept is not pushing the state of the art and that layup over foam was not considered an R&D effort on their part regardless of the fact that this had not been done on weathershields in the past.

The issue presented is of a technical nature. The responsible Government officials, possessing in this regard the expertise that we lack, have determined the layup-over-foam method of production to be a satisfactory way of manufacturing an acceptable product. It has been the consistent position of our Office that in such matters we must defer to the judgment of the administrative agency in the absence of evidence that the agency has acted arbitarily. B-164615, August 26, 1968, and cases cited therein. We find no such evidence here. Moreover, it is well established that the drafting of specifications adequate to meet the minimum needs of the Government is the proper function of the procuring agency which is not subject to legal objection by this Office. 17 Comp. Gen. 554 (1938).

A third question, raised both by EFMC and Privitt, concerns the conduct of negotiations. EFMC contended in its June 9, 1969, letter to the contracting officer:

> Negotiation or discussions were not conducted with EFMC, although EFMC was within a "competitive range"—Reference U.S.C. 2304(G).

EFMC has further stated:

> Total communication with EFMC was *one* telegram asking for best and final offer (which had to be answered within 3 hours by EFMC), on 3 June 1969. * * *

Privitt stated in its letter of June 10, 1969, to this Office:

> Privitt Plastics, Incorporated quoted a 150 day delivery schedule but should have been EVALUATED on 270 day delivery schedule which was set forth on page 11, paragraph 11 of the RFP. This requested delivery requirement was never amended, so far as we are aware, other than in informal conversations.
>
> * * * * * * *
>
> Privitt would call to the attention of the General Accounting Office the complete lack of "negotiations" on the part of the Navy. If there were questions concerning our ability to meet delivery schedules we strongly feel that we should have been offered the opportunity to discuss these questions and present additional information on our behalf.

In our opinion, the administrative record as summarized above amply demonstrates that all offerors were given opportunities to alter their price proposals and that both Privitt and Swedlow were asked to (and did) amend their original technical proposals. Inasmuch as there were discussions with all responsible offerors within a competitive range pursuant to the mandate of 10 U.S.C. 2304(g), the protests do not state a legal basis for objection in this regard. Moreover, EFMC's complaint concerning the time allowed for submission of a best and final offer does not appear to present grounds for us to question the actions of the Government officers. EFMC was given telephone notice the previous day of the imminent closing of negotiations and was in fact able to respond with a timely price reduction of almost $32,000. Further, it is reported that during the visit to EFMC in May 1969 certain questions relating to its cost proposal were raised. However, EFMC did not at that time choose to change its initial price offer.

However, a serious deficiency in the negotiation process was the failure of the procurement officials to observe the requirements of Armed Services Procurement Regulation (ASPR) 3-805.1(e) which provides as follows:

> (e) When, during negotiations, a substantial change occurs in the Government's requirements or a decision is reached to relax, increase or otherwise modify the scope of the work or statement of requirement, such change or modification *shall be made in writing* as an amendment to the request for proposal or request for quotations, and a copy shall be furnished to each prospective contractor. See 3-505 and 3-507. Oral advice of change or modification may be given if (i) the changes involved are not complex in nature, (ii) all prospective contractors are *notified simultaneously* (preferably by meeting with the contracting officer), and (iii) *a record is made of the oral advice given.* In such

instances, however, the oral advice should be *promptly followed by a written amendment verifying such oral advice previously given.* The dissemination of oral advice of changes or modifications separately to each prospective bidder during individual negotiation sessions should be avoided unless preceded, accompanied, or immediately followed by a written amendment to the request for proposal or request for quotations embodying such changes or modifications. [Italic supplied.]

No written amendment to the RFP relative to the more urgent delivery requirements was ever issued, and no explanation or justification has been presented to our Office with reference to this deficiency.

The record does indicate, however, that all offerors were given oral advice of the significant change in the Government's delivery requirements. Oral notice of a substantial change in the Government's requirements is permitted under ASPR 3-805.1(e) only in very limited circumstances, and even then the oral notice is required to be "promptly followed by a written amendment verifying such oral advice previously given." Additionally, when under the circumstances oral advice is justified by the regulation, such advice is required to be given to all offerors "simultaneously." The benefits to be derived from issuance of a written amendment are evident. The procurement officials of the agency are assured that notice of the complete change is in fact communicated to the proper officials of all competitive offerors and that all the aspects of the change referenced to the applicable RFP provisions are included in the notice. The possibility of charges of fraud or favoritism is thereby eliminated or reduced. Also, the written amendment and acknowledgment of its receipt provide a firm basis for reviewing and justifying a challenged procurement action. Moreover, the Government is assured that the resulting contract, as a legal document, will embody the new changed terms rather than the old terms.

Because EFMC and Privitt were given oral notice of the change in delivery requirements and ample opportunity to respond to this change, we do not think we would be justified in interposing a legal objection to the validity of the award made to Swedlow. Accordingly, the protests of EFMC and Privitt are denied.

However, we think the above-noted deficiency in the negotiation process is a serious one, and we strongly recommend that corrective action be taken to prevent repetitions.

[B-154427]

Contracts—Labor Stipulations—Federally Financed Projects—Jurisdiction

The funds withheld from federally aided or financed construction contracts to which the United States is not a party for wage underpayments that normally would be distributed by States or other recipients who are parties to the contracts and have the primary responsibility for the administration of the labor

stipulations of the contracts, but for the fact that the workers cannot be located, should not be transmitted to the United States General Accounting Office (GAO) as the Federal-aid labor standards statutes do not confer on GAO authority similar to that contained in the Davis-Bacon Act and the Work Hours Act of 1962, to make direct payments to laborers and mechanics from withheld contract earnings as restitution for wage underpayments. However, those undistributed holdings which cannot be settled administratively may be submited to the GAO Claims Division. 44 Comp. Gen. 561, modified.

To the Secretary of Transportation, September 5, 1969:

Reference is made to the letter dated May 23, 1969 (Reference 26–50), from the Chief Counsel, Federal Highway Administration, requesting our decision on a matter involving the distribution of underpayments of wages to aggrieved workers under Federal-aid labor standards statutes which do not confer upon the General Accounting Office specific distribution authority.

As pointed out in the submission, the Davis-Bacon Act, 40 U.S.C. 276a, and the Work Hours Act of 1962 (Contract Work Hours Standards Act), 40 U.S.C. 327, *et seq.*, provide authority for the General Accounting Office to make direct payments to laborers and mechanics from amounts withheld from contract earnings of wages due them under Government contracts, but our Office does not have similar authority with respect to federally assisted construction contracts.

The Chief Counsel states that since 1962, in connection with the Federal Aid Highway Program, amounts withheld under the Contract Work Hours Standards Act, and 23 U.S.C. 113, have been separated by the Federal Highway Administration as follows:

(a) Amounts due for straight time pay for all hours worked (23 U.S.C. 113); and

(b) Amounts due for the overtime increment for overtime hours worked (40 U.S.C. 327–332).

He further states that only the overtime increments which could be disbursed by our Office under its statutory authority have been forwarded here.

He says that, as the Administration understands the decision reported at 44 Comp. Gen. 561, March 16, 1965, our Office will undertake distribution of restitution wages for straight time hours worked under Federal-aid labor standards statutes which do not confer upon us specific distribution authority, when the withholdings forwarded to the General Accounting Office are accompanied by a document evidencing the employer's acquiescence in the withholding and consent to the subject distribution. The Chief Counsel says that he would appreciate being advised if this understanding is correct, in which event the Federal Highway Administration would proceed forthwith to institute appropriate procedures.

The pertinent language contained in the 1965 decision, referred to above, reads as follows in part on pages 563 and 564:

> In regard to the instructions contained in our circular letter of March 19, 1957 (B–3368), we wish to point out that the "withheld funds" which that letter advises should be transmitted to our Office are those funds which are withheld under contracts specifically covered by the Davis-Bacon Act. Although our Office has disbursed wage underpayments under the Eight Hour Law as well as under labor standards provisions of other laws governing federally-aided or financed programs, such disbursements have been specifically limited to cases where the funds to cover wage underpayments were remitted *voluntarily* by the offending contractor or were withheld with his full acquiescence and consent to their distribution. Disbursements by our Office in such cases is based upon considerations of courtesy and cooperation with the wage law enforcement agencies in the matter of disbursing funds turned over to the Government for a specific use, and not upon legal jurisdiction to adjudicate disputed claims.

While the above decision does refer to underpayments under labor standards provisions of "other laws governing federally aided or financed programs," in actual practice there have been few, if any, instances in which we have in the past distributed funds withheld or remitted on account of wage underpayments under labor standards laws which do not give us specific distribution authority other than the Eight-Hour law. Since the passage of the Contract Work Hours Standards Act this practice has been virtually discontinued.

As we understand the matter, the States or other recipients of Federal assistance, who are parties to the contracts involved, are primarily responsible for the administration of the labor stipulations of the contracts, including the withholding and distribution of wage underpayments, and the Highway Administration's concern is only with respect to balances due workers who cannot be located, the amounts of which are deducted from the Federal-aid payments. We assume that reasonable efforts are made in the first instance to locate these workers through their last-known addresses, and that any efforts which might be made by our Office would merely duplicate those already made.

In these circumstances we believe that there is no substantial reason for our intervention in the distribution of amounts withheld to cover wage underpayments of employees of contractors on federally aided or financed contracts, to which the United States is not a party, and we therefore do not favor the institution of procedures by the Highway Administration for transmittal of such funds to this Office. Any claims against balances remaining in the hands of the Government by reason of such undistributed withholdings may be submitted to our Claims Division if they are not capable of administrative settlement.

[B–167641]

Bids—Late—Uniform Time Act Effect

Under an invitation providing for bids to be opened at 11 a.m. central standard time (c.s.t.), on May 28, 1969, a bid hand-carried and delivered at 11:20 a.m.,

c.s.t., after bids had been read was properly rejected as a late bid. The contention that because the invitation did not indicate "c.s.t." would be interpreted as central daylight savings time, 11 a.m., c.s.t., meant 12 noon, daylight savings time, ignores the fact that with the enactment of Public Law 89–387, effective April 1, 1967, there is no distinction between standard and daylight time, and that within each time zone there is only the preestablished standard time regardless that during a certain portion of the year standard time is advanced 1 hour, thus making standard time and the popular reference to "Daylight Saving Time" one and the same. To preclude future differences in opinion "local time at place of bid opening" will be substituted for "standard time."

To the Ryan Contracting Co., Inc., September 11, 1969:

Reference is made to your letters of June 26, August 6 and 12, 1969, protesting against the refusal of the contracting officer to consider your bids submitted in response to invitation for bids No. DA–CW–66–69–B–0081.

The subject invitation was issued on May 2, 1969, by the Memphis District, Corps of Engineers, requesting bids for stone dike construction at Island No. 1, Kentucky, and Campbell, Kentucky, and provided for opening of bids at 11 a.m., c.s.t., May 28, 1969, at Memphis, Tennessee. Six bids were received and opened at the hour stated in the invitation. At 11 :20 a.m., after the reading of bids had been completed, a representative of your company presented a bid which the Government representative refused to accept on the ground that it was tendered late. On June 12, 1969, award of contract under the invitation was made to the low bidder, Patton-Tully Transportation Company.

In your letter of June 26, 1969, you contend that your bid was the lowest submitted and that the refusal to accept your bid was neither fair nor equitable. You state that the invitation indicated that bids were to be received until 11 a.m., c.s.t., and that your bid was presented prior to that time because 11 a.m., c.s.t., is the same as 12 noon, daylight savings time. You point out that there was no indication in the invitation that c.s.t would be interpreted to mean central daylight savings time. Hence, you contend that the invitation was ambiguous and misleading insofar as the bid opening time is concerned.

Public Law 89–387, effective April 1, 1967, 15 U.S.C. 260a, provides in pertinent part, as follows:

Sec. 3(a) During the period commencing at 2 o'clock antemeridian on the last Sunday of April of each year and ending at 2 o'clock antemeridian on the last Sunday of October of each year, *the standard time of each zone* established by the Act of March 19, 1918 (15 U.S.C. 261–264), as modified by the Act of March 4, 1921 (15 U.S.C. 265), *shall be advanced one hour and such time as so advanced shall* for the purposes of such Act of March 19, 1918, as so modified, be the standard time of such zone during such period;

* * * * * * *

In all statutes, orders, rules, and regulations relating to the time of performance of any act by any officer or department of the United States, whether in the legislative, executive, or judicial branches of the Government, or relating to the time within which any rights shall accrue or determine, or within which any act shall or shall not be performed by any person subject to the jurisdiction of the United States, it shall be understood and intended that the time shall

insofar as practicable (as determined by the Interstate Commerce Commission) be the United States standard time of the zone within which the act is to be performed. [Italic supplied.]

Having regard for the above-quoted provisions of law, it seems clear that there is no longer a distinction to be made between standard time and daylight time. Rather, within each time zone there is, since the enactment of Public Law 89–387, only the preestablished standard time regardless of the fact that during a certain portion of the year that standard time is advanced 1 hour. Hence, the standard time of the various zones and the popular reference to "Daylight Saving Time" must be considered as one and the same. This being true, there can be no doubt that your bid, which you hand delivered at 11:20 a.m. central standard time was late and, therefore, properly not for consideration for award of a contract. See paragraph 7(a) of the instructions to bidders (construction contract), Standard Form 22.

While you contend that after the effective date of the Uniform Time Act of 1966, other Corps of Engineer districts and also other Government agencies have, notwithstanding the provisions of the act, distinguished between standard time and daylight savings time, that fact affords no legal basis for ignoring or waiving the specific provisions of the law and the invitation for bids.

In that connection our Office in a decision dated October 4, 1967, B–162430, concerning a similar issue as here involved, held that a strict interpretation of the Uniform Time Act of 1966, was not required under the facts involved in that case. However, the factual situation in that case was substantially different from the facts involved in the instant case. Under the facts of our prior decision, a telegraphic bid modification was transmitted at a time when such bid modification could not have been based on knowledge of the other bids. In the instant case, knowledge of the other bids was possible since your bid was tendered 20 minutes after the bids were publicly opened. In such circumstances, the integrity of the competitive bidding system required that your bid be rejected. See paragraph 2–303.5 of the Armed Services Procurement Regulation. Another important factual difference is that under the facts of our prior decision, the bid opening occurred in Omaha, Nebraska, at a time when the Department of Transportation had deferred enforcement of the Uniform Time Act in Nebraska pending administrative proceedings concerning the relocation of time zone boundaries in Nebraska and certain other States. In the instant case, the act was in effect in Tennessee during the period pertinent to your protest and no question of time zone boundaries was involved. In addition to the factual difference, it is reported that the records show that on four previous occasions in 1968, invitations from the District Office involved were issued with provisions that bids would

be opened at a certain time which was specified as "C.S.T." It is further reported that you submitted timely bids in response to these invitations and that you apparently had your representatives attending the bid openings. Hence, it appears that you should have been well aware of the fact that central standard time was 1 hour advanced.

In view of the foregoing your protest is denied. For your information it is administratively reported that the field offices of the Corps of Engineers have been instructed to use the phrase, "local time at the place of bid opening" in lieu of "standard time" in all future solicitations to preclude future controversies similar to the one here involved.

Regarding the request in your letter of August 12, as to what steps you may take to appeal an adverse decision by our Office, you may be advised that our decision is final insofar as the administrative office is concerned. Any legal proceeding which you may desire to pursue in the courts is a matter for your determination and we cannot advise you with respect thereto.

[B–167430]

Gratuities—Six Months' Death—Conflicting Claims—Parents and Persons in Loco Parentis

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

To First Lieutenant C. G. Moore, United States Marine Corps, September 12, 1969:

Reference is made to your letter of April 16, 1969, submitting for our determination the question whether and to whom payment should be made of the 6 months' death gratuity in the case of Lance Corporal Manual A. Soares, USMC, who died on October 8, 1968.

The decedent is not survived by a widow or children. Claims for the gratuity have been received from John C. Gonsalves, the decedent's cousin, residing at 109 Robeson Street, Fall River, Massachusetts, and Joseph (Jose) A. Soares, the decedent's natural father, residing at 223 Davis Street, in the same city. Mr. Gonsalves, the decedent's cousin, was designated by him to receive the gratuity and is claiming as a person who stood in loco parentis to him.

The file shows that at the time of his enlistment on August 8, 1967, the decedent stated that he resided at 223 Davis Street, his father's address, from 1961 until March 1967, and that from March 1967 to the date of his enlistment, he resided at 109 Robeson Street, the address of Mr. Gonsalves. The file shows further that he had been continuously employed from December 1962, until his enlistment, apparently was self-supporting and was free to come and go as he pleased during this period.

In an affidavit in support of his claim for the 6 months' death gratuity, Mr. Gonsalves stated that on or about February 1, 1966, the decedent came to live in his home because his father threw him out and that he continued to live with him until March 26, 1968. In a further affidavit submitted by Mr. Gonsalves and his wife it is stated that he had stayed with them since December 1964; that they assisted him financially when he needed it; consulted with him about his entry into the service; and that they regarded him as a member of the family and he regarded their home as his home. Affidavits by others are to the effect that he had lived with Mr. Gonsalves since 1964 and was treated as a son by them.

Evidence submitted by the father of the decedent is to the effect that except for a period of 2 months in early 1966, when his son resided temporarily with the Gonsalves family, he lived with him and turned over all his wages to him. This evidence shows that he and the decedent had a common savings account which was closed out by his son in February 1967. In explanation of his son's close association with the Gonsalves family the father stated that his son had been keeping company with Mr. Gonsalves' daughter and that they planned to marry. Also, he said that his son paid board while residing with the Gonsalves family. Affidavits furnished by the father's friends are to the effect that when they visited in his home his son was living there and support his statement that his son had been keeping company with Mr. Gonsalves' daughter.

In a report dated January 30, 1969, the Marine Corps officer who investigated these conflicting claims stated that there is no concrete evidence that either of them is legally entitled to the gratuity. He expressed the opinion, however, that the father has a provable claim. By endorsement of February 19, 1969, the officer recommended that payment be made to the father.

Section 1477 of Title 10, United States Code, provides in pertinent part as follows:

(a) A death gratuity payable upon the death of a person covered by section 1475 or 1476 of this title shall be paid to or for the living survivor highest on the following list:

* * * * * * *

(3) If designated by him, any one or more of the following persons:
(a) His parents or persons in loco parentis, as prescribed by subsection (c)

* * * * * * *

(4) His parents or persons in loco parentis, as prescribed by subsection (c), in equal shares.

* * * * * * *

(c) Clauses (3) and (4) of subsection (a), so far as they apply to parents and persons in loco parentis, include fathers and mothers through adoption, and persons who stood in loco parentis to the decedent for a period of not less than one year at any time before he acquired a status described in section 1475 and 1476 of this title. However, only one father and one mother, or their counterparts in loco parentis, may be recognized in any case, and preference shall be given to those who exercised a parental relationship on the date, or most nearly before the date, on which the decedent entered that status.

Section 1475 of Title 10 of the Code has reference to members who die while in certain duty or travel statuses and section 1476 relates to certain persons who die within 120 days after discharge or release from active duty or inactive duty training.

In decision of May 9, 1962, B–148095, we said that—

The term "in loco parentis" as used in the cited statutory provisions (10 U.S.C. 1475), and in a similar provision appearing in the National Service Life Insurance Act of 1940, 38 U.S.C. 701, is considered as referring to a person who has put himself in the situation of a lawful parent by actually assuming the obligations incident to the parental relationship without going through the formalities necessary to legal adoption. B–144905, April 17, 1961; *Niewiadomski* v. *United States*, 159 F. 2d 683. It embodies the two ideas of assuming the parental status and discharging the parental duties. It clearly embodies more than furnishing material help to a close relative in need, such as the added elements of custody, control, care, and management of the individual concerned. See also *Jensen* v. *United States*, 78 F. Supp. 974, and *Helfgott* v. *United States*, 250 F. 2d. 818.

The decisions cited in that decision as a basis for the rule stated therein followed, according to the courts, the established recognized common law meaning of the term "in loco parentis." It is doubtful that on the basis of the facts as set out above and as presently understood, Mr. Gonsalves could be regarded as having stood in loco parentis to the decedent at any time under the rule of those decisions.

However, in the case of *Banks* v. *United States*, 267 F. 2d 535, involving the question whether a person could stand in loco parentis to an adult, the court declined to follow the rule of the *Niewiadomski* case and its own decision in the *Helfgott* case, pointing out that the rationale of *Niewiadomski* had been disavowed by the deciding court in the later case of *Thomas* v. *United States*, 189 F. 2d 494, where the court concluded that there never was any generally accepted common law meaning of the term "in loco parentis," and that the statute should be liberally construed to carry out the intention of the insured.

The court said in the *Banks* case that the assumption of the in loco parentis relationship is primarily a question of intention, to be shown by the acts, conduct and declaration of the person alleging to stand in that relationship. It said further that the very nature of the rela-

tionship is such that it must reside in the minds and hearts of the parties involved. To provide proof of the existence of the relationship the court remarked that objective manifestations of the feelings must, of course, appear and that generally these are to be looked for not only in things done and given to each other, but more especially in the kind of services done and the kind of things given. It held expressly that the lack of a common residence or the absence of financial support did not negate the relationship in circumstances where a requirement for the existence of those conditions did not otherwise exist.

While the decedent was not an adult until after the date of his enlistment, he was self-supporting and apparently lived where he chose. Neither of the claimants was required to support him and he was capable of providing his own living quarters. Also, a close relationship appears to have existed between him and the Gonsalves family and he designated Mr. Gonsalves as beneficiary of the gratuity payment. Under the rule of the *Banks* case those factors tend to support the conclusion that Mr. Gonsalves stood in loco parentis to him. See also *Zazove* v. *United States*, 156 F. 20, 24, and *Leyerly* v. *United States*, 162 F. 2d 79.

While the courts have held the statute should be liberally construed to carry out the intention of the insured that payment should be made to a designated beneficiary, they have stated that the designee has the burden of proving that an in loco parentis status existed in fact for the period required by the statute. This is especially so when a natural parent of the service member is a party to an action in which an in loco parentis relationship is asserted by a designated beneficiary. In such cases the evidence must be carefully weighed in arriving at a determination as to the proper party entitled to the proceeds. See *Baumet* v. *United States*, 191 F. 2d 194, reversed in part on other grounds in *Baumet* v. *United States*, 344 U.S. 82.

Aside from the conflict of opinion shown by the above-cited decisions, the evidence submitted by the conflicting claimants is diametrically opposed in many respects and we agree with the view of the investigating officer that such evidence does not clearly establish the right of either claimant to the gratuity payment. And, as was said in *Longwill* v. *United States*, 77 Ct. Cl. 288, at page 291, it is the duty of the accounting officers to reject those claims "as to the validity of which they are in doubt." Accordingly, this Office may not authorize payment of the gratuity to either claimant in the absence of more conclusive evidence or a judicial determination of the person entitled thereto.

Inasmuch as only copies of claims and supporting papers were submitted, they will be retained for our files.

[B-159429]

Military Personnel—Reserve Officers' Training Corps—Programs at Educational Institutions—Phase-Out of Programs

Members of the Senior Reserve Officers' Training Corps (ROTC) who complete both the third and fourth years of military training during the third year at institutions where the ROTC program is being phased-out and continue to participate in the program may be paid monetary benefits during the fourth academic year—the payment approval limited to the Senior ROTC participants. A member who in 3 years completes a 4-year course of military instruction has fully performed under the ROTC enrollment contract and he is entitled to the benefits provided by the contract, and also under 10 U.S.C. 2108(c) the Secretary of Defense is authorized to excuse a member from a portion of the ROTC prescribed course of military instruction when found qualified on the basis of previous education, military experience, or both.

To the Secretary of Defense, September 16, 1969:

Reference is made to letter of August 27, 1969, from the Assistant Secretary of Defense (Comptroller) requesting a decision as to whether members of the Senior Reserve Officers' Training Corps may be paid monetary benefits during the fourth academic year if both the third and fourth years of military training are completed by the members during the third academic year, obviating the requirement of any formal military training under the program during the fourth academic year although they continue otherwise a participant in the program.

The question, together with a discussion relating thereto, is contained in Committee Action No. 434 of the Department of Defense Military Pay and Allowance Committee.

The Committee Action states that as a matter of policy the Department of the Army has determined that it is desirable that the ROTC programs, both scholarship and nonscholarship, be terminated at certain educational institutions and that the plan for withdrawal is based on the provisions of paragraph 2–13c, AR 145–1, which provides for a 1 academic year phase-out.

The problem arises in connection with those students with whom the Army has contracted as authorized by law and who are undertaking the third year of military training in the fall of 1969. Normally, the military training would require 2 academic years to complete. However, because of the decision to terminate the program at the institution within 1 year, the normal procedure cannot be followed. While a student may receive his military training at another institution under 10 U.S.C. 2103, it is stated that in at least one instance such an arrangement would be completely impracticable, there being no ROTC unit reasonably available.

Although the ROTC program will be terminated at the institutions referred to above, the Department of the Army not only wishes to

fulfill its obligations under the enrollment contracts, but it also desires to retain the select personnel and permit them to complete their academic training at their chosen institutions. As to the 4-year scholarship members, funds have already been expended for 2 years.

To meet this problem the Department of the Army proposes that enrolled members will be offered the program of undertaking both the third and fourth year of military training during their third academic year, but the Department will pay all the entitlements during the fourth year in the same manner and to the same extent it would have paid under the normal program even though there is no longer an ROTC unit at the institution and the student is not a member of an ROTC unit. He will remain a member of the ROTC, however, will remain enlisted in the USAR assigned to the USAR Control Group (ROTC) under the appropriate United States Army area commander (paragraph 3–19, AR 145–1) and will be under the administrative supervision of a designated Professor of Military Science at another institution for purposes of monitoring academic progress, verifying vouchers and counseling.

The Committee Action suggests that membership in an ROTC unit during a participant's fourth academic year does not affect his entitlements, either scholarship or nonscholarship, inasmuch as the statute does not require membership in an ROTC unit as a prerequisite, but requires only membership in the program. In each case the student continues to be a participant in the program, having met all statutory eligibility requirements, and in each case the institution had entered a contract with the Department establishing and maintaining an ROTC program, and has and does currently offer as part of its curriculum "a four-year course of military instruction or a two-year course of advanced training of military instruction, or both, which the Secretary of the military department concerned prescribed and conducts." 10 U.S.C. 2102.

The Committee Action further states that the 4-year or 2-year courses are as prescribed by the Secretary, provide the military training deemed necessary for the purpose, are offered in yearly units of study, and that it is apparent that the number of years prescribed in the law refers to the scope of the training, not calendar years, although historically and normally the courses would be taken over the appropriate number of calendar years. It is suggested that the interpretation of the word "years" as not meaning only calendar "years" of actual training under the ROTC program, but rather the scope of training which normally require a given number of calendar years, is supported by the provision in 10 U.S.C. 2108(c) authorizing the Secretary to excuse a member from a portion of the prescribed

course of military instruction when found qualified on the basis of his previous education, military experience, or both. Presumably, the above use of the word "calendar" was due to inadvertence and reference to academic years was actually intended.

The Committee Action therefore considers it appropriate to conclude that if a member has completed the entire "prescribed course of military instruction," the law would not bar a participant from receiving all the entitlements to which entitled by so performing his part of the contract, citing our decision of July 7, 1966, 46 Comp. Gen. 15, as in effect, adopting that principle, although that case involved "excuse" from training rather than accelerated completion as here proposed. It also states that in an opinion dated July 8, 1969, The Judge Advocate General of the Army concluded that the proposed payments are legally authorized.

In view of the provisions of 10 U.S.C. 2108(c) this Office will not be required to object to the above-described payments in the circumstances stated in Committee Action No. 434. It is to be understood, however, that the affirmative answer to the question presented is to be limited to participants in the Senior ROTC program at institutions which are withdrawing from the ROTC program under the circumstances described.

[B–162622]

Subsistence—Per Diem—Military Personnel—Temporary Duty—Continuous Mission *v.* Noncontinuous Travel

Members of the uniformed services attached to a Fleet Tactical Support Squadron, Naval Air Station, Norfolk, Virginia, who, ordered to perform two flights to Cecil Field, Florida, and return to carry passengers and cargo, depart at 3:40 p.m. on the first flight, returning at 11:20 p.m. (7 hours and 40 minutes), and at 1:15 a.m. the next day depart on the second flight, returning to Norfolk at 6:40 a.m. (5 hours and 25 minutes) are not entitled to any per diem incident to the mission. Although on a continuous mission, the members were not in a continuous travel status, having returned to their permanent duty station for the performance of duty—passenger and cargo discharge—thus interrupting their travel and separating the travel into two distinct periods of less than 10 hours to preclude payment under paragraph M4205–4 of the Joint Travel Regulations.

To Lieutenant N. H. Burns, Department of the Navy, September 19, 1969:

Further reference is made to your letter of April 4, 1969, file reference 40G30:NJB:pew, 4650/1, forwarded here by 1st Indorsement dated June 25, 1969, of the Per Diem, Travel and Transportation Allowance Committee, requesting a decision as to the propriety of payment on two vouchers submitted by two officers and two enlisted members, respectively, attached to Fleet Tactical Support Squadron

ONE, Naval Air Station, Norfolk, Virginia, for per diem incident to a mission performed on July 17 and 18, 1968. Your request was assigned PDTATAC Control No. 69–17.

The papers submitted with your request show that pursuant to Naval Air Logistic Control Office, U.S. Atlantic Fleet, message 171601Z July 1968, a flight order was issued on July 17, 1968, authorizing Lieutenant Commander Robert R. Roehren and crew members Lieutenant William G. Clements, ADR1 R. Hannewald, and ABE1 L. C. Vineyard, of Fleet Tactical Support Squadron ONE, Naval Air Station, Norfolk, Virginia, to perform two flights to Cecil Field, Florida, and return to Norfolk, for passenger and cargo pickup, with scheduled time of departure as 2 p.m., July 17, 1968, and expected time of return upon completion of the mission as 4 a.m., on the following day.

After completion of their mission, two travel vouchers to cover per diem for the members incident to that mission were submitted for payment. The itinerary shown on those vouchers is as follows:

Depart Norfolk	3:40	p.m.,	July	17
Arrive Cecil Field	6:10	"	"	"
Depart Cecil Field	8:40	"	"	"
Arrive Norfolk	11:20	"	"	"
Depart Norfolk	1:15	a.m.,	July	18
Arrive Cecil Field	3:40	"	"	"
Depart	4:15	"	"	"
Arrive Norfolk	6:40	"	"	"

It appears from the above itinerary that the duration of the mission was 15 hours and that 1 hour and 55 minutes of that time was spent at the members' permanent duty station, Norfolk. It also appears that on July 17 the members returned to Norfolk after having been away therefrom for 7 hours and 40 minutes and on July 18 they returned to that station after having been away therefrom for 5 hours and 25 minutes.

The question concerning the entitlement of the subject members to the per diem allowance was initially posed by the Commanding Officer, Fleet Tactical Support Squadron ONE, in a letter dated October 28, 1968, to the Office of the Navy Comptroller. In this connection, he says that the Regional Finance Center, Naval Base, Norfolk, has denied payment of per diem on travel vouchers covering such flights on the contention, based on paragraph M4205–4 of the Joint Travel Regulations, that each stop at Norfolk terminated the flight for the purposes of per diem. Also, in expressing the belief that the entitlement to per diem in such cases should not end until the completion of the "temporary additional duty" at the completion of the flight, he says that:

Many flight advisories issued by COMNAVAIRLANT direct that the aircraft return to Norfolk enroute to the next stop, or to provide a shuttle service between Norfolk and other stations. Normally these flights are in excess of ten (10) hours in the calendar day, or extend into the next calendar day. All stops at Norfolk during the flight are directed for the purpose of embarking or debarking personnel and/or cargo and are on the ground less than two (02) hours. All stops at Norfolk are incident to the flight and do not terminate either the flight, or the order to conduct the flight.

In your letter dated April 4, 1969, you referred to paragraph M4205–4 of the Joint Travel Regulations and you requested our decision as to whether or not members attached to Fleet Tactical Support Squadrons are entitled to per diem when a flight is required to return them to the permanent station within a 10-hour period in the same calendar day prior to completion of the mission or whether the total time required to complete the mission should be used without regard to the intervening return to the permanent station.

In commenting on the issue in this matter, the Per Diem, Travel and Transportation Allowance Committee stated that the situation contemplated in paragraph M4205–4 of the Joint Travel Regulations is directed to a member who departs from his permanent duty station and returns thereto within a 10-hour period in the same calendar day with no further travel to be performed away from that station in that calendar day and, therefore, it was not intended that the provisions of that paragraph should apply to the situation presented in this case.

Section 404(a) of Title 37, U.S. Code, authorizes, under regulations prescribed by the Secretaries, the payment of travel and transportation allowances to a member for travel performed under competent orders "when away from his designated post of duty" regardless of the length of time he is away from that post. Subsection (e) provides that a member who is on duty with, or is undergoing training for, the Military Airlift Command, the Marine Corps Transport Squadrons, the Fleet Tactical Support Squadrons, or the Naval Aircraft Ferrying Squadrons, and who is away from his permanent station, may be paid a per diem in lieu of subsistence in an amount not more than the amount to which he would be entitled if he were performing travel in connection with temporary duty without, in either case, the issuance of orders for specific travel.

Paragraph M5150 of the Joint Travel Regulations, promulgated pursuant to the foregoing statutory authority, provides that members of the Uniformed Services on duty with or under training for the above-named military air transport organizations while on duty away from their permanent stations are authorized per diem allowances as contained in chapter 4, parts E and F, of the regulations, without the issuance of orders for specific travel. Paragraph M3050 of the regulations provides that members shall be deemed to be in a travel

status only while performing travel away from their permanent duty station on public business pursuant to competent orders, such status to commence with departure from the permanent duty station and to terminate with return thereto.

In decision dated March 4, 1968, 47 Comp. Gen. 477, we said that while members of the military organizations named in 37 U.S.C. 404(e) are not in a travel status within the contemplation of paragraph M3050 when away from their permanent station, that section expressly assimilates them to members in a travel status for per diem purposes in certain cases when absent from their duty stations. Such members, however, have no greater rights for per diem purposes upon return to their duty stations than members under section 404(a) whose travel status terminates, under the express provisions of paragraph M3050 of the regulations, upon return to the permanent duty station. Also, paragraph M4205–4 of the regulations, made applicable to the members by paragraph M5150, provides that no per diem allowance is authorized for a round trip performed entirely within a 10-hour period of the same calendar day.

As indicated above, prior to the completion of their mission and final return to Norfolk at 6:40 a.m., July 18, 1968, Commander Roehren and the three crew members returned to Norfolk for passenger and cargo discharge in compliance with their flight order. Therefore, while their mission may have been continuous, their travel status was not since they were required to return to their permanent duty station for the performance of duty. We are of the opinion that the directed return to the permanent duty station interrupted the members' travel, resulting in two separate periods of travel away from their permanent duty station in the performance of the mission.

Since the members were away from their permanent duty station for round trips of less than 10 hours each on the days of July 17 and 18, 1968, the payment of per diem for those periods is precluded by paragraph M4205–4 of the Joint Travel Regulations. *Cf.* 19 Comp. Gen. 846 (1940).

Your question is answered accordingly. The vouchers and supporting papers will be retained here.

[B–166137]

Buy American Act—Applicability—Use Outside United States

Although the procurement of steel towers for installation as part of a communication system in West Germany was not subject to the Buy American Act, as procurements for use outside the United States are exempt from the restrictions of the act, and, therefore, the bids of the low Canadian bidder—sponsored by the Canadian Commercial Corporation—and the domestic bidder whose bid exceeded the foreign bid by more than 50 percent properly were evaluated on an equal competitive basis and award made to the low, responsible

bidder, the procurement should have been made subject to the Balance of Payments Program. However, as the provisions of the Program were inadvertently omitted from the invitation, the contracting officer had not referred the domestic bid that exceeded the foreign bid by more than 50 percent to higher authority for approval as required, and absent the certainty of approval, the cancellation of the award made in good faith would not be in the best interests of the Government.

To Trylon, Incorporated, September 19, 1969:

We refer to your protest by telegram dated February 7, 1969, as supplemented by briefs submitted by your attorneys on March 17 and June 2, against award by the Department of the Air Force of a contract to Canadian Commercial Corporation (CCC) based on a bid submitted by Dynamic Industries, Inc. (Dynamic), Quebec, Canada, under invitation for bids (IFB) F34601-69-B-0207, issued October 29, 1968, by Oklahoma City Air Materiel Area (OCAMA).

The procurement items are 12 structural steel towers, four small and eight large, which are to be installed by the Government as part of a communications system in West Germany. Bids were solicited on an f.o.b. origin basis subject to inspection and final acceptance by the United States at point of origin prior to shipment from such point to Germany.

Incorporated into the contract terms was the Buy American Act (41 U.S.C. 10a–d) clause set forth in Armed Services Procurement Regulation (ASPR) 6–104.5 which reads as follows:

BUY AMERICAN ACT (MAY 1964)

(a) In acquiring end products, the Buy American Act (41 U.S.C. 10a–d) provides that the Government give preference to domestic source end products. For the purpose of this clause:

(i) "components" means those articles, materials, and supplies, which are directly incorporated in the end products;

(ii) "end products" means those articles, materials, and supplies, which are to be acquired under this contract for public use; and

(iii) a "domestic source end product" means (A) an unmanufactured end product which has been mined or produced in the United States and (B) an end product manufactured in the United States if the cost of the components thereof which are mined, produced, or manufactured in the United States or Canada exceeds 50 percent of the cost of all its components. For the purposes of this (a)(iii)(B), components of foreign origin of the same type or kind as the products referred to in (b)(ii) or (iii) of this clause shall be treated as components mined, produced, or manufactured in the United States.

(b) The Contractor agrees that there will be delivered under this contract only domestic source end products, except end products:

(i) which are for use outside the United States;

(ii) which the Government determines are not mined, produced, or manufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality;

(iii) as to which the Secretary determines the domestic preference to be inconsistent with the public interest; or

(iv) as to which the Secretary determines the cost to the Government to be unreasonable.

(The foregoing requirements are administered in accordance with Executive Order No. 10582, dated December 17, 1954. So as to alleviate the impact of Department of Defense expenditures on the United States balance of international

payments, bids offering domestic source end products normally will be evaluated against bids offering other end products by adding a factor of fifty percent (50%) to the latter, exclusive of import duties. Details of the evaluation procedure are set forth in Section VI of the Armed Services Procurement Regulation.)

On December 16, 1968, bids were opened as scheduled. The lowest bid, in the amount of $164,756.55, was submitted by Dynamic through CCC. The second bid, in the amount of $165,600, was submitted by Tower Communications Company, Ltd. (Tower), of Canada, also through CCC. Your bid, in the amount of $260,000, was third.

In a telegram dated December 18, 1968, you requested OCAMA to disqualify all Canadian companies bidding under CCC sponsorship. You complained that the general provisions of the IFB did not include ASPR 6-501 through 507 (relating to purchases from Canadian sources under an administratively prescribed exception to the Buy American Act) and ASPR 6-104.6 (relating to contract administration) and asserted that absent an "or equal" clause in the IFB only United States made steel would meet the specifications. In a telephone conversation of December 27 with the procuring activity you also urged that the Dynamic bid price was below cost for either American or Canadian produced steel and therefore must be based on providing foreign made steel.

The contracting officer denied your protest in a letter dated January 31, 1969, reading as follows:

1. Your company's Protest Before Award received 23 Dec 1968 and clarified by telcon of 27 Dec 1968 has been extensively reviewed. The undersigned Contracting Officer finds that the protest is not valid for the following reasons:

a. First Issue of Protest: "GENERAL PROVISIONS OF SUBJECT IFB DO NO INCLUDE ASPR PARAGRAPHS 6-501 THRU 507 AUTHORIZING C.C.C. TO PARTICIPATE IN SUBJECT BID AS PRIME CONTRACTOR."

The referenced ASPR paragraphs deal mainly with Canadian purchases made through the Canadian Commercial Corporation (C.C.C.). They provide information as well as contracting procedures for Canadian purchases. It is the Contracting Officer's Determination that there is no legal requirement that the General Provisions of the subject IFB include ASPR paragraphs 6-501 through 6-507 and that no statement in the IFB or other notice to the bidders to the effect that C.C.C. is authorized to participate in the bidding as prime contractor is necessary.

b. Second Issue of Protest: "SINCE ASPR PARAGRAPH 6-104.6 IS NOT INCLUDED IN GENERAL PROVISIONS OF SUBJECT IFB CANADIAN COMPANIES CANNOT BE EXTENDED SPECIAL BENEFITS THIS PARAGRAPH PERMITS UNDER BUY AMERICAN ACT."

(1) ASPR 6-104.6 has no application to the solicitation. It is merely concerned with advice by contract administration personnel, after award, as to the effect of the Buy American Act in appropriate cases.

(2) The type of supplies called for in this procurement have been determined to be not applicable to Buy American restrictions if considered as Canadian end products.

(3) The Buy American Act is not applicable to this procurement inasmuch as the structural steel towers called for are to be installed by GEEIA in West Germany.

c. Third Issue of Protest: "ALL STEEL USED FOR MANUFACTURE OF TOWER PRODUCTS MUST BE U.S. MADE TO COMPLY WITH GEEIA EXHIBIT TITLED GEEIA-A-4005B 69 JAN 19 FOR STRUCTURAL STEEL. SINCE 'OR EQUAL' CLAUSE IS NOT INCLUDED IN SUBJECT IFB ANY

SUBSTITUTION OF STEEL MATERIAL WILL PROVIDE DIFFERENT END PRODUCT THAN THAT SPECIFIED. IN TELECON 27 DEC 1968 BETWEEN MR. SEVERINSON OF TRYLON AND MR. CLONCE OF OCPWDA THE FOLLOWING FURTHER INFORMATION ON THIS ISSUE WAS PROVIDED BY TRYLON. THE LOW BIDDER'S PRICE IS CONSIDERED TO BE 'BELOW COST' FOR EITHER CANADIAN OR AMERICAN PRODUCED STEEL. IT MUST THEREFORE LOGICALLY BE ASSUMED THAT THE STEEL THE LOW BIDDIERS PROPOSE TO UTILIZE IS FOREIGN MADE. TRYLON'S ENGINEERING EXPERIENCE AND JUDGMENT MAINTAINS THAT NO FOREIGN MADE STEEL CAN MEET THE RESTRICTIVE SPECIFICATIONS REQUIRED BY GEEIA EXHIBIT GEEIA-A-4005B."

This issue in fact challenges the low bidder's responsibility. Any resultant contract would be between the C.C.C. and the U.S. Government. The fact that C.C.C. has confirmed its bid and certified the low Canadian companies is tantamount to a determination of contractor's responsibility. In accordance with International agreement as expressed by ASPR 6-503, the Canadian Government would guarantee to the United States Government all commitments, obligations and covenants of the C.C.C. It is therefore determined that Trylon's concern as to the responsibility of the Canadian subcontractor's ability to perform this contract is not relevant (although understood and appreciated) to any award made to C.C.C.

2. Pursuant to the foregoing your protest is determined to be invalid and is denied in its entirety.

Your protests to our Office takes exception to various statements in a Department of the Air Force report dated May 16, 1969, to our Office. The report reads, in pertinent part, as follows:

On February 7, 1969, Trylon telegraphed a protest to your office and stated that a brief would follow. The detailed Trylon contentions accompanying letter dated March 17, may be outlined as follows:

a. The award is contrary to the Buy American Act.
b. The award is in violation of ASPR 6, Part 8 (Balance of Payments Program).
c. Dynamic Industries cannot perform the contract.
d. Indications of collusive bidding among the Canadian bidders.
e. Because of the above, the contract with CCC should be terminated and the award given to Trylon.

We do not consider the above to be well founded.

The Buy American Act was promulgated in 1875 to give preferential treatment of American material in contracts for public improvements in the United States, and was further strengthened in 1933. The Balance of Payments Program set forth in ASPR Section 6, Part 8 is an internal DOD program which applies similar preferences to overseas purchases. In order to simplify the administrative determination of whether this program or the Buy American Act is to apply, items which are purchased and delivered within the United States or Canada are considered to be under the Buy American Act, even though some of them may eventually find their way overseas. Because of this administrative determination, the supplies involved there were procured under the Buy American Act, as implemented by ASPR Section 6, Part 1.

Pursuant to a provision of the Buy American Act, the Secretaries of the Armed Services have determined that it would be inconsistent with the public interest to apply the Act to certain Canadian supplies of a military character or those involved in programs of mutual interest to the United States and Canada. The list of Air Force items so excepted is published in Air Force Procurement Instruction (AFPI) 6-103.5 and includes communication equipment. Therefore, Canadian-proposed end products were evaluated on an equal competitve basis with domestic source end products, with award made to that bidder submitting the lowest responsive competitive offer. ASPR Section 6, Part 8 (Balance of Payments Program) does not apply in this instance. Moreover, it is unlikely that a different contractor would have been selected had the bids been evaluated under the Balance of Payments Program, in view of the exception provided by 6-805.2 (a) (xi).

Trylon's allegations regarding the inability of Dynamic Industries to satisfactorily perform are not valid. Recent inquiry discloses that all of the steel has been

purchased and though Canadian-made, meets required specifications. It should also be noted that the award has been made to CCC which sponsored Dynamic Industries and is responsible for contract performance. Similarly, the Trylon allegation as to possible collusion of the two lowest Canadian bidders merely because of price similarity, is viewed as without merit. It seems most likely that the price similarity is due to solicitation of the same subcontractor by the two low Canadian bidders.

In consideration of all the above circumstances we recommend the protest of Trylon be denied and the award to CCC be permitted to remain undisturbed.

You contend that the procurement is excepted from the restrictions of the Buy American Act by reason of the fact that the towers are to be used outside the United States, and that the administratively prescribed exception relating to Canadian purchases therefore does not apply, such exception being based on the public interest determination language in 41 U.S.C. 10a.

You further contend that the procurement is subject to the Balance of Payments Program procedures as set forth in ASPR 6–800 through 6–807, which, you state, contain no exception giving Canadian firms an opportunity to bid on procurements for items to be used overseas except as to Canadian end products for use in Canada as provided in ASPR 6–805.2(a)(x). In addition, although your bid price exceeds Dynamic's bid price by more than 50 percent, you assert that the award cannot be justified under the unreasonably priced domestic source exception in ASPR 6–805.2(a)(xi) since the procedures prescribed therein (i.e., presolicitation estimates of domestic cost versus foreign cost and, where the domestic cost exceeds the foreign cost by 50 percent of the foreign cost, submission to the Secretary of Defense for determination) were not followed.

You also claim that even if the ASPR 6–805.2(a)(xi) procedures had been observed, Dynamic would not have been solicited since its price is far below the Government's estimate of the cost of the towers (which you understand to be $16,200 for each of the small towers and $29,400 for each of the large towers). Proceeding one step further, you assert that even if Dynamic's bid were considered, a favorable decision by the Secretary of Defense under ASPR 6–805.2(a)(xi) may not be assumed because the responsiveness of the bid is open to question.

The charge of nonresponsiveness of Dynamic's bid is based on your view that Dynamic's price is absurdly low and not sufficient for the contract thereby suggesting a mistake in bid or the likelihood that the contract contemplated by Dynamic differs from the contract desired by the Government. In this connection, you state that Dynamic's bid is 37 percent lower than your bid and over 40 percent lower than the Government's estimates for the towers, which you claim your bid approximates. You also urge that the wide variance between Dynamic's unit prices of $9,628 and $15,273 for the towers and the unit prices of

$23,600 and $37,800 quoted by the original designer and manufacturer of the towers, who competed for the procurement, should be considered in evaluating the realism of Dynamic's bid. As further evidence that the bid is absurdly low, you state that Dynamic's total price, covering material, labor, overhead and profit, is only $1,200 more than you found to be the cost of the raw materials for the small towers and only $1,500 more than the cost of the raw materials for the large towers.

Dynamic's low price, you further urge, alerts the contracting officer to the danger that the contract cannot be completed as proposed and is indicative that the contract as contemplated by Dynamic differs from the contract desired by the Government. Such considerations, you assert, require at the very least a complete investigation of Dynamic's bid pricing and of its ability to perform notwithstanding the guarantee by CCC as to performance and protection of the United States from pecuniary loss.

With respect to CCC's role as prime contractor, you charge that the acceptance of an unreasonably priced Canadian bid solely because an agency of the Canadian Government has offered to make good any loss discourages bona fide bidders and discredits the competitive system. In this case, you state, the award has gone to a contractor who cannot perform and thus the proper contractor has been deprived of the contract.

With further reference to the responsibility of Dynamic, you imply collusion on the part of Dynamic and Tower in preparing their bids. Aside from the closeness of the total bid prices, you state that both bidders quoted the identical price of $15,273 on the major procurement item, the eight large towers, a matter which you claim should be reported to the Attorney General pursuant to ASPR 1-114 relating to identical bids.

The Buy American Act provides, in pertinent part, as follows:

§ 10a. American materials required for public use.

Notwithstanding any other provision of law, and unless the head of the department or independent establishment concerned shall determine it to be inconsistent with the public interest, or the cost to be unreasonable, only such unmanufactured articles, materials, and supplies as have been mined or produced in the United States, and only such manufactured articles, materials, and supplies as have been manufactured in the United States substantially all from articles, materials, or supplies mined, produced, or manufactured, as the case may be, in the United States, shall be acquired for public use. This section shall not apply with respect to articles, materials, or supplies for use outside the United States, or if articles, materials, or supplies of the class or kind to be used or the articles, materials, or supplies from which they are manufactured are not mined, produced, or manufactured, as the case may be, in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality.

* * * * * * *

§ 10c. Definition of terms used in sections 10a and 10b.

When used in sections 10a and 10b of this title—
(a) The term "United States," when used in a geographical sense, includes the United States and any place subject to the jurisdiction thereof;
(b) The terms "public use," "public building," and "public work" shall mean use by, public building of, and public work of, the United States, the District of Columbia, Puerto Rico, American Samoa, the Canal Zone, and the Virgin Islands.

§ 10d. Clarification of Congressional intent regarding sections 10a and 10b(a).

In order to clarify the original intent of Congress, hereafter, section 10a of this title and that part of section 10b(a) of this title preceding the words *"Provided, however,"* shall be regarded as requiring the purchase, for public use within the United States, of articles, materials, or supplies maufactured in the United States in sufficient and reasonably available commercial quantities and of a satisfactory quality, unless the head of the department or independent establishment concerned shall determine their purchase to be inconsistent with the public interest or their cost to be unreasonable.

Under such provisions, this Office has held that procurements of items for use outside the United States are exempt from the restrictions of the Buy American Act. 34 Comp. Gen. 448 (1955); B–161895, December 29, 1967; B–144361, February 9, 1961. It follows, therefore, that the exemptions which the act permits pursuant to administrative determinations of nonavailability of items in the United States, unreasonable domestic cost, or inconsistency with the public interest, apply only to procurements which would otherwise be subject to the restrictions of the act; that is, procurements of items for public use within the United States as defined in the statute.

In light of the foregoing, the instant procurement, which from its inception has clearly indicated that the procurement items are to be used in West Germany, comes within the statutory exception to the restrictions of the Buy American Act. Accordingly, neither the Buy American Act clause nor the provisions of the statute and the implementing provisions of ASPR 6–103.2 through 6–605.5, relating to administrative exemptions of certain procurements of items for use within the United States, may be invoked to bring the instant procurement under the act in direct contravention of the statutory provisions. Therefore, we concur with your view that the Canadian purchase exemptions set out in ASPR have no application to this procurement. In view of such conclusion, we see no need to discuss whether the towers are communication equipment, as listed in AFPI 6–103.5, for the purposes of the administrative exemption.

Turning now to the Balance of Payments Program, which has as its purpose the reduction of dollar expenditures outside the United States, ASPR 6–800 states that the related ASPR provisions are issued in implementation of the program with respect to all procurements of supplies and services required for use outside the United States, except petroleum and Military Assistance Program procurements, and

to procurements of scientific and technical knowledge outside the United States and Canada. Accordingly, the instant procurement, being for items to be used outside the United States and not coming within the prescribed exceptions, must be regarded as subject to the provisions of ASPR 6–800 through 6–807.

ASPR 6–805.1 states that, except as provided in ASPR 6–805.2, proposed procurement of supplies for use outside the United States shall be restricted to United States end products. Of pertinence to your protest is that portion of ASPR 6–805.2(a) which reads as follows:

6–805.2 Procurement Limitations.
(a) Except as provided in (c) below, procurements of foreign end products (including construction materials) and services for use outside the U.S. may be made only in the following cases:

* * * * * * *

(xi) *Unreasonable cost*—procurements, other than those covered in (i) through (x) above, where United States end products or services are available, the domestic cost is not estimated to exceed $10,000, and the difference between the domestic cost and the foreign cost is determined to be so large as to make procurement of foreign end products and services clearly desirable. Such determinations shall be made by the individuals designated in (b) below. Where the domestic cost is estimated to exceed $10,000, and the difference between the domestic cost and the foreign cost exceeds 50% of the foreign cost, the matter will be forwarded to the Secretary of Defense for determination.

(ASPR 6–805.2(c) relates to procurements of scientific and technical knowledge resulting in expenditures outside the United States and Canada.)

ASPR 6–806.1 requires, except as to procurements set forth in ASPR 6–805.2(a) and (c), where the domestic cost is estimated to exceed $10,000, that cost estimates be made of United States and foreign end products or services prior to solicitation and that where the estimated domestic cost does not exceed the foreign cost by more than 50 percent of the foreign cost, the solicitation be restricted to United States end products and services. Under ASPR 6–806.1(b), as constituted at the time of contract award, however, in a procurement in which the domestic cost was in excess of $10,000 the matter was required to be forwarded to the Secretary of Defense for a determination if *after* bid opening, or receipt of proposals or quotations, the contracting officer had knowledge that domestic cost exceeded foreign cost by more than 50 percent of the foreign cost.

Pursuant to such provisions, absent a presolicitation determination by proper authority under ASPR 6–805.2 exempting the procurement from the restrictions of the Balance of Payments Program, the United States products certificate prescribed by ASPR 6–806.3 and the Balance of Payments contract clause prescribed by ASPR 6–806.4 were required to be included or incorporated in the IFB. To the extent, therefore, that the IFB did not include or incorporate such provisions,

it was deficient and the procuring activity failed to comply with the Balance of Payments Program procedures. We do not believe, however, that either this lapse on the part of the procuring activity, or its failure to make the required presolicitation comparison between estimated foreign and domestic costs, or its failure to refer the bids to appropriate authority for a determination of reasonableness of cost, requires that your bid be accepted, as you urge, without regard to price. Not only is there no provision in the regulations authorizing award to a United States source for United States end items merely on the basis that the procuring activity has failed to comply with the Balance of Payments Program procedures, but under ASPR 6-806.1 (b) (1) the contracting officer is without authority to accept a domestic bid which exceeds a foreign bid by more than 50 percent of the foreign bid without referral to, and approval by, higher authority. Such provisions, which are in keeping with the requirement in 10 U.S.C. 2305(c) that award be the most advantageous to the United States, price and other factors considered, preclude the making of an award in such circumstances without consideration of price. Accordingly, the variation between Dynamic's price and your price was required to be considered in making award under the IFB, and an award based upon your bid would have been improper in the absence of a determination by the Secretary of Defense that payment of the involved price differential would be in the interest of the Government.

As to the issues of the reasonableness of Dynamic's bid and its adequacy for performance of the contract, we do not believe that such matters may be resolved by comparison of the bid with your domestic item price or with a Government estimate based on domestic cost. Rather, we believe that the proper comparison to be made is with other foreign bids including bids of bidders in the same area as Dynamic. Dynamic's price compares favorably with the second low bid of Tower, another Canadian bidder. Further, investigation by the Defense Contract Administration Services Office in Ottawa of the status of the contract following receipt by the Air Force of your complaint that Dynamic's price is too low has revealed that Dynamic has already purchased the necessary steel from Canadian sources and has made no claim of mistake in bid. In our view, therefore, the record does not support your assertions respecting the reasonableness of Dynamic's bid and its effect on Dynamic's responsiveness and responsibility.

Concerning the question of possible collusion between Dynamic and Tower in the preparation of their respective bids, examination of the abstract of bids reveals that Tower bid a unit price of $9,833 for the four small towers, or a total of $820 more than Dynamic bid for the four units. On the eight large towers, however, the prices were not identical, as you have stated. Dynamic bid a unit price of $15,273.88

each, total $122,191.04, whereas Tower bid a unit price of $15,243.50, total $121,948, or $243.04 less than Dynamic for the eight units. In addition, Dynamic's lot prices of $2,303.13 and $1,750.38 for the data items numbered 4AA and 4AB were lower by $216.87 and $49.62, respectively, than Tower's prices of $2,520 and $1,800 therefor. Further, the abstract does not reflect identical prices on any item by any of the eight bidders.

In light of the information disclosed by the abstract of bids, we cannot conclude that a report to the Attorney General is required under the identical bid provisions of ASPR 1–114. Therefore, absent any indication in the record of irregularity in the submission of Dynamic's bid, we are compelled to view as reasonable the opinion of the Department of the Air Force that the similarity in the two low Canadian bid prices is attributable to solicitation of the same subcontractor.

As to the basis on which Dynamic was determined to be responsible, we direct your attention to the fact that under ASPR 1–901 in its existing form the procedures for normally determining the responsibility of prospective Government contractors are not for application to procurements from CCC. Accordingly, while we adhere to the view which was stated in 47 Comp. Gen. 373, 378 (1968), that ASPR is deficient in furnishing to contracting officers procedures or guidelines for determining the responsibility of Canadian firms, we nevertheless are unable to conclude that there has been a violation of the procurement regulations in this case.

With respect to your suggestion that our Office check on Dynamic with regard to its responsibility, you are advised that it is primarily the function of the contracting agency concerned to determine the responsibility of a prospective contractor, and our Office will not question such a determination absent any indication of arbitrariness, bad faith or lack of sufficient evidence. 38 Comp. Gen. 131, 133 (1958). We find nothing of record other than your unsubstantiated statements which would warrant questioning of Dynamic's capability. Accordingly, and in view of the fact that CCC as the prime contractor is responsible for the performance of the contract, we are unable to concur with your view that the award has been made to a contractor who cannot perform.

Concerning investigation by our Office of the possibility of steel dumping practices by the Canadian bidders, we have no reason to question the statement by the Defense Contract Administration Services Office in Ottawa as to the identity of the Canadian sources of steel for the towers, or the report that such steel complies with or exceeds the IFB requirements. Therefore, absent any evidence to indicate any

irregularity in obtaining the steel, we do not believe that any action by our Office is indicated.

In line with the foregoing, while we find that the determination by the Department of the Air Force that the procurement was not subject to the Balance of Payments Program procedures was contrary to the ASPR provisions, we see no evidence of record that such determination, and the award to CCC, were made in other than good faith. In the circumstances, and since it is not certain that your bid, which exceeded the low Canadian bid by more than 50 percent, would have been approved for award had the prescribed procedures been followed, we are unable to conclude that cancellation of the award to CCC would be in the interest of the United States. Accordingly, your protest is denied.

[B-167639]

Contracts—Labor Stipulations—Service Contract Act of 1965—Minimum Wage, Etc., Determinations—Prospective Wage Rate Increases

Wage determinations issued under the Service Contract Act of 1965, 41 U.S.C. 351–357, to establish currently prevailing wage rates may not include a provision for the escalation of wages on definite future dates at specified rates in view of the fact the phrase "as determined by the Secretary * * * in accordance with prevailing rates" in section 2(a)(1) of the act means the same as "based upon the wages that will be determined by the Secretary of Labor to be prevailing" in section 1(a) of the Davis-Bacon Act, which has been held to mean prevailing rates are the rates existing at the time the contract is advertised. Therefore, as an escalation provision in a wage determination would have no legal effect, it should not be included in contracts subject to the Service Contract Act.

To the Secretary of the Air Force, September 19, 1969:

Reference is made to the letter of August 1, 1969 (reference AFSPPMA), with enclosure, from the Chief, Industrial Labor Relations, Contract Management Division, Directorate, Procurement Policy, requesting our decision as to the propriety of wage determinations issued under the Service Contract Act of 1965, Public Law 89–286, 41 U.S.C. 351–357, which in addition to establishing currently prevailing wage rates also purport to provide for escalation on definite future date at specified rates. The determinations in question are issued by the Administrator, Wage and Hour and Public Contract Divisions (WHPC), Department of Labor, in the exercise of authority delegated to him by the Secretary of Labor under 29 CFR 4.3.

Enclosed with the letter is a copy of Wage Determination Number 65–225 (Rev. 2) dated July 16, 1969, relating to the Vandenberg Air Force Base in Santa Barbara County, California. It is explained that the determination was requested in contemplation of soliciting and

awarding a food service contract to replace one then current which expires on September 30, 1969.

The Chief, Industrial Labor Relations, says that the wage determination was issued by WHPC after several discussions between their representatives and those of his headquarters; that these discussions pertained, in part, to the inclusion of a schedule of rates held by WHPC to be those which will be prevailing at a future date or dates corresponding to the dates of union negotiated increases, and that the enclosed determination typifies the WHPC practice of issuing rates intended to be effective in the future.

It is further stated that during the discussions with WHPC, it was learned that something in excess of 100 determinations containing prospective rates have been issued and are presumably still in effect; that in order to prevent delay of a procurement necessary to the operation of a major Air Force installation the enclosed wage determination was included in the solicitation in question; but that our opinion is requested as to the propriety of such rates and the action to be taken in the event others are received in the future.

Section 2(a)(1) of the Service Contract Act of 1965, 41 U.S.C. 351(a)(1), provides that "every contract (and any bid specification therefor)," with certain exceptions, entered into by the United States or the District of Columbia the principal purpose of which is to furnish services through the use of service employees shall contain "a provision specifying the minimum monetary wages to be paid the various classes of service employees * * * as determined by the Secretary [of Labor] * * * in accordance with prevailing rates for such employees in the locality * * *."

Similar language is employed in the Davis-Bacon Act, as amended, 40 U.S.C. 276a, section 1(a) of which provides that the advertised specifications for every construction contract to which the United States or the District of Columbia is a party shall contain provisions stating the minimum wages to be paid various classes of laborers and mechanics, which shall be based upon the wages "that will be determined by the Secretary of Labor to be prevailing for the corresponding classes of laborers and mechanics" employed on similar projects in the city, town, village, or civil subdivision in which the work is to be performed. No provision is made for any modification or adjustment of such advertised minimum wage rates, and since there is no authority for considering as "prevailing" a rate which is not in fact being paid at the time a contract specification is advertised in a solicitation of bids, and since the minimum rates are required to be fixed in the advertised specifications for a contract, we held in 47 Comp. Gen. 754 (1968) that the Davis-Bacon Act requires such rates to be based

on the prevailing rates *existing at the time the contract is advertised.*

We are of the view that the words "as determined by the Secretary * * * in accordance with prevailing rates," which appear in section 2(a)(1) of the Service Contract Act, were intended by the Congress to have exactly the same effect as the words "based upon the wages that will be determined by the Secretary of Labor to be prevailing" as appearing in section 1(a) of the Davis-Bacon Act. This view finds support in the statement made by the then Solicitor of Labor, Charles Donahue, as reported on page 11 of the Hearing before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare, 89th Congress, 1st session, on H.R. 10238, which was subsequently enacted as Public Law 89-286. That statement, in part, reads as follows:

> At the threshold I have been told that there is some curiosity as to why we did not simply take the Davis-Bacon Act and extend it so that it would cover service contracts as well as construction contracts.
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> * * * * * * *
>
> Another answer to that question is, that in principle, without mentioning it, we have followed the Davis-Bacon Act. I address myself to the provisions on page 2 of the bill as it was reported in the House of Representatives, paragraph No. 2, which provides for the determination of prevailing wage rates by the Secretary of Labor on the basis of those prevailing for service employees in the locality.

Further, the Department of Labor's own regulations implementing the Service Contract Act clearly contemplate that even where, because of union agreements, it is anticipated that increases in prevailing rates will be effective at specific future dates, wage rate determinations must only reflect rates current at the time the determinations are made. These regulations (29 CFR 4.162) read, in part, as follows:

> (a) *Information considered.* The minimum monetary wages and the fringe benefits set forth in determinations of the Secretary are based on information as to wage rates and fringe benefits *in effect at the time the determination was made.* The Department considers all pertinent information regarding prevailing wage rates and fringe benefits in the locality for the classes of service employees for which determinations are made.
>
> Such information may be derived from area surveys made by the Bureau of Labor Statistics or other Department personnel, from Government contracting officers, and from other available sources including employees and their representatives and employers and their associations. The determinations may be based on the wage rates and fringe benefits contained in union agreements where such have been determined to prevail in a locality for a specified occupational group.
>
> (b) *Provision for consideration of currently prevailing wage rates and fringe benefits.* (1) Determinations will be reviewed periodically and *where prevailing wage rates or fringe benefits have changed, such changes will be reflected in new determinations.* In a locality where it is determined that the wage rate which prevails for a particular class of service employees is the rate specified in a collective bargaining agreement or agreements applicable in that locality, and such agreement or agreements specify increases in such rates to be effective on specific dates, the *prior determinations would be modified to reflect such changes when they become effective,* and the revised determinations would apply to contracts entered into *after* the modification * * *. [Italic supplied.]

In view of the foregoing we must conclude that the Service Contract Act does not authorize the Department of Labor to issue wage rate determinations which, in addition to establishing currently prevailing wage rates, also purport to provide for escalation at definite future dates at specified rates. Therefore, such escalation provisions are of no legal effect, and should not be included in contracts subject to the act. In other words, only the rates included in the specifications upon which bids or proposals are solicited (or substituted by amendment prior to the opening of bids or proposals) pursuant to determinations of the Secretary of rates currently prevailing, have any legal effect during the life of a contract awarded on such solicitation. In this connection, while it is recognized that the correctness of a wage rate determination under the Service Contract Act is not open to review (see *United States* v. *Binghamton Construction Co.*, 347 U.S. 171), we do not construe the principle of that case to be applicable to a determination which on its face does not purport to determine wage rates actually prevailing at the time of the determination.

A copy of this letter has been forwarded to the Secretary of Labor.

[B-116314, B-117272]

Leaves of Absence—Annual—Transfers—Different Leave System

When an employee who carried his leave credit with him upon transfer to a position under another leave system returns to a position subject to the leave system in which the transferred leave was earned, the retransfer may be regarded as a separation for lump-sum leave payment purposes and the employee compensated for the annual leave, subject to such limitations as are applicable to the position from which he transfers, which is the rule applicable to transfers from a position subject to an annual leave system to a position that has no system to which the annual leave can be transferred, and section 630.501(d) of the Civil Service Regulations may be discontinued.

Leaves of Absence—Adjustments—Transfers Between Different Leave Systems

An employee who prior to the ruling in 48 Comp. Gen. 212, dated October 18, 1968, transferred to a different leave system to which he was allowed to transfer only a part of his annual leave is entitled to the transfer of any untransferred leave with a corresponding adjustment in his leave ceiling, which is to be determined in accordance with the October 18, 1968 decision, or to receive a lump-sum payment for the untransferred leave at the time he is separated from the service, subject to applicable statutory regulations.

Leaves of Absence—Lump-Sum Payments—Additional Amounts—Transfers Between Different Leave Systems

The entitlement of Federal employees to an additional lump-sum payment for the annual leave they were not permitted to transfer either in part or not at all from one leave system to another upon transferring positions is for determination on an individual case basis and any claim for payment may be transmitted to the United States General Accounting Office for consideration and direct settlement.

To the Chairman, United States Civil Service Commission, September 22, 1969:

We refer to your letter of September 4, 1969, wherein you indicate that our answers to four questions arising out of our decision of October 18, 1968, 48 Comp. Gen. 212, are necessary to enable the Commission to determine what changes are appropriate in the Commission's leave regulations.

In our decision of October 18, 1968, we held that an employee transferring from a position subject to a leave system to a position subject to a different leave system may transfer all of the accumulated and currently accrued annual leave to his credit as of the date of such transfer even though the amount thereof may be in excess of the annual leave ceilings applicable generally to the leave system to which he transfers.

Your specific questions are as follows:

(1) Under section 630.501(d) of the Commission's regulations, an employee who transfers to a position not under an annual leave system is entitled to a recredit of any untransferred leave if he returns to the leave system under which it was earned. At the time this regulation was originally issued it appeared to be the only protection the Commission's regulations could provide in that situation. Is this regulation still necessary, or may an employee be given a lump-sum payment at the time of transfer? If it cannot be given at that time, is he entitled to lump-sum payment for the leave if he is finally separated without returning to the leave system under which it was earned?

(2) If a lump-sum payment is allowed by your decision regarding questions (1), would such a decision be retroactive to protect those employees who have already transferred to a position not under an annual leave system?

(3) May an employee who, prior to your decision of October 18, 1968, B 116314, B-117272, transferred to a different leave system to which he was allowed to transfer only a part of his annual leave

(a) transfer any untransferred leave with a corresponding adjustment in his leave ceiling; or

(b) receive a lump-sum payment for the untransferred leave at the time he separates from Federal service?

(4) If a former Federal employee transferred from one leave system to another (either to a leave system to which he was allowed to transfer only a part of his annual leave or to a position not under an annual leave system) and was subsequently separated from the Federal service, is he entitled to a lump-sum payment for the untransferred leave?

Concerning your first question, the current regulation of the Commission—630.501(d)—is consistent with the holding in our decision 33 Comp. Gen. 209 (1953)—question 3(b). However, without specifically modifying 33 Comp. Gen. 209, subsequent decisions held that when an employee transfers from a position subject to an annual leave system to a position that has no such system to which his annual leave may be transferred then such transfer may be regarded as a separation for lump-sum leave payment purposes and the employee may be compensated for the annual leave to his credit at that time, subject to such limitations as are applicable to the position from which he transfers. See 33 Comp. Gen. 622 (1954) and unpublished decision dated May 21, 1969, B-166640. *Cf.* 33 Comp. Gen. 85 (1953).

Accordingly, we are aware of no necessity for continuation in the Commission's regulations of section 630.501(d).

Since the answer to question No. 1 merely affirms the principle enunciated in certain prior Office decisions which represented a departure from the holding in 33 Comp. Gen. 209, the question of retroactivity does not appear material. Question No. 2 is answered accordingly.

Question No. 3 (both parts) are answered in the affirmative. We note that upon the employee's subsequent separation from the position to which he transfers he would be entitled to payment for the annual leave then to his credit subject to applicable statutory limitations (his annual leave ceiling being for determination in accordance with the October 18, 1968 decision).

Pursuant to an informal understanding with a representative of your staff, no decision is being rendered upon the fourth question being presented in your letter, it being deemed appropriate to consider claims of former employees for additional lump-sum leave payments on an individual case basis. Any such claims may be transmitted here for consideration and direct settlement.

[B-166881]

Bids—Late—Processing and Delivery by Government

A bid forwarded by certified mail that reached an Air Force Base Branch Post Office in time to be received in the bid opening room before the opening of bids if the bid had been forwarded by regular mail, but which was not timely received due to the special administrative handling required for certified mail is nevertheless a late bid and the lateness may not be waived on the basis it was due to a delay in the mails for which the bidder was not responsible, as it is not enough that the bid was received at the Branch Post Office before bid opening time, the sender should have allowed sufficient time for it to reach the bid room before bid opening time. The fact that the form of mail used is not as fast as expected, or is slower than other types of mail, provides no basis for enlarging the exception to the requirement for the timely submission of bids.

Bids—Late—Special Delivery Service

The rejection of a late bid that had been forwarded by certified mail to an Air Force Base located 13 miles from the nearest post office is not affected by the fact the bid had been handled airmail special delivery. The special delivery service ceased at the post office in the neighboring town in accordance with the postal regulation limiting special delivery service to within a 1-mile perimeter.

Bids—Late—Opening of Bid Effect

The erroneous opening of a late bid does not justify disregarding the requirement that a contract award be made to the lowest, responsible and responsive bidder unless compelling reasons exist to reject all bids. Therefore, a bid received and opened after the scheduled bid opening time under the erroneous assumption the lateness was due to a delay in the mails for which the bidder was not respon-

sible, properly was rejected pursuant to paragraph 2-303.1 of the Armed Services Procurement Regulation.

To Daconics, Inc., September 22, 1969:

Further reference is made to your letter of May 2, 1969, protesting the award of a contract to a company other than your firm under invitation for bids No. F34650-69-B-0106, issued by the Department of the Air Force, Tinker Air Force Base, Oklahoma. Receipt is also acknowledged of your letter dated August 15, 1969.

The invitation issued January 3, 1969, requested bids for a data-processor, and related equipment on a brand name or equal basis. At the scheduled bid opening time, 2 p.m., c.s.t., on February 4, 1969, the only bid received, from Hewlett-Packard Corporation, was opened.

On February 5, 1969, at 12:52 p.m., a sealed bid from your company was received in the Base Procurement Division. The markings on the bid envelope showed that it was sent airmail special delivery by certified mail and postmarked Sunnyvale, California. On February 7, 1969, you were notified that since your bid was received after the scheduled opening, it could not be considered for award unless you established that the late receipt was due to delay in the mail for which you were not responsible. In response to the notification, you furnished a copy of certified mail receipt No. 204826 bearing a postmark "Sunnyvale, Ca USPO Feb 3, 1969" above which the time "4:15" was handwritten. In addition the Sunnyvale Superintendent of Mails verified that the bid package was mailed in sufficient time to be transported by truck from Sunnyvale to the San Francisco Post Office at the airport, processed and sent on the 1:30 a.m., February 4, 1969, flight to Oklahoma City, with scheduled arrival at 7:45 a.m. on the day of bid opening. From the foregoing, the contracting officer determined that the failure of the bid to arrive prior to opening was due solely to a delay in the mail for which the bidder was not responsible and that the bid should, therefore, be considered. Your low bid was then opened and recorded and during evaluation your firm was requested to furnish additional information.

The administrative report states that the matter was then submitted to the Judge Advocate General's Office (JAG) for review prior to release. The JAG view was that more specific information should be required of the Oklahoma City Post Office and the Tinker Air Force Base Post Office as to the normal time of mail delivery. The evidence prescribed in Armed Services Procurement Regulation (ASPR) 2-303.3 pertains to the establishment of the time of mailing and obtaining information concerning the normal time for mail delivery. By letter dated April 14, 1969, the Oklahoma City Postmaster submitted the following:

. . .

Airmail arriving at the Will Rogers World Airport at 7:45 AM is picked up at 8:40 AM arriving at the Main Post Office at 9:05 AM for processing. This mail would be dispatched to Tinker Air Force Base Branch Post Office leaving the Main Office at 12:50 PM and arriving at the Branch Post Office at 1:10 PM.

By letter dated April 16, 1969, the Administrative Communications Branch furnished the schedules showing pick-up and delivery times for both certified and regular or airmail as follows:

CERTIFIED MAIL	
Arrives at TAFB Branch Post Office	1310
Picked up by OCBACS messenger at	1345
Arrives at OCBACS for processing	1500
Delivered to Procurement	1530
REGULAR MAIL or AIRMAIL	
Arrives at TAFB Branch Post Office	1310
Picked up by OCBACD messenger at	1320
Arrives at OCBACM for processing	1330
Delivered to OCBACD	1345
BACD delivers to Procurement	1350

The above information showed that even if your bid had arrived at the Tinker Air Force Base Branch Post Office at 1:10 p.m. on the day of bid opening, it would not have been delivered to the Procurement mail room before 3:30 p.m., therefore, the contracting officer determined that you bid was not mailed in sufficient time to arrive at opening time, 2:00 p.m., February 4, 1969, and was nonresponsive under the provisions of ASPR 2-303.1.

It is your contention that the delay in receipt of your bid was directly attributable to improper handling by the post office since special delivery mail going to Tinker Air Force Base is processed in the same manner as regular mail. You also note the time differential in delivery of regular and certified mail between the Tinker Base Post Office and the Base Procurement Division.

Information furnished by the Oklahoma City Postmaster indicates that airmail arriving at Will Rogers World Airport at 7:45 a.m. would normally be dispatched on a regular delivery to the Tinker Branch Post Office at 12:50 p.m. and arrive there at 13:10 p.m. Special delivery certified mail is also dispatched on the regular delivery. Additional information furnished states that after interception at the pouch or sack opening unit and passing through the Special Delivery Section to the Military Distribution Unit, a *certified* special delivery article is withheld from normal separation, as is all accountable mail, and dispatched to the superintendent at the Branch Post Office at Tinker Air Force Base and the next scheduled dispatch. In this instance, your bid normally would have arrived at the Branch Post Office at 13:10 p.m. Special delivery mail addressed to Tinker Air Force Base is expedited only to the extent that it receives special delivery handling from the time it is mailed until it is taken to the Military Distribution Unit at the Main Post Office.

As to the order of processing in the Branch Post Office, all registered and certified mail must be date stamped and entered on postal bills for each activity concerned. Due to the volume of such mail received at Tinker Air Force Base, this procedure requires additional time to process. Normally, such accountable mail is ready to be picked up by messenger not later than 1 hour after receipt. In this instance, the messenger assigned to the Document Security Section picked up such mail at 13:45 p.m. for delivery to OCBACS in building 3001C for proper processing and final delivery to the addressee using form 12 (AF Form) as the delivery receipt. This process is reported to take so much longer than processing regular or special delivery mail that special delivery certified, certified, or registered mail received from Branch Post Office at 13:45 p.m. will normally be delivered to the Procurement Section at 15:30 p.m.

ASPR 2-303.2 provides that a late bid shall be considered for award only if:

(i) it is received before award; and either
(ii) it was sent by registered mail, or by certified mail for which an official dated post office stamp (postmark) on the original Receipt for Certified Mail has been obtained, or by telegraph if authorized, and it is determined that the lateness was due solely to a delay in the mails (based on evidence pursuant to 2-303.3), or to a delay by the telegraph company for which the bidder was not responsible; or
(iii) if submitted by mail (or by telegram where authorized), it was received at the Government installation in sufficient time to be received at the office designated in the invitation by the time set for opening and, except for delay due to mishandling on the part of the Government at the installation, would have been received on time at the office designated. The only evidence acceptable to establish timely receipt at the Government installation is that which can be established upon examination of an appropriate date or time stamp (if any) of such installation, or of other documentary evidence of receipt at such installation (if readily available) within the control of such installation or of the post office serving it.

Since your bid was delivered late by the Main Post Office to the Tinker Branch Post Office, section (iii) above is not applicable. The question presented therefore is whether the late receipt can be said to be due solely to a delay in the mails as contemplated by section (ii). Under existing procedures the bid would have arrived late at the bid room even without any delay in the mails. In this connection, it is not enough that the bid should have been received from the Main Post Office at the Branch Post Office before bid opening time. The sender has to allow sufficient time for it to reach the bid room by the bid opening time. B-157770, December 13, 1965. Further, it was observed in B-149288, July 31, 1962, that all mail to military installations which is marked special delivery and for which a fee for special delivery is paid is not in fact delivered specially. In this instance, Tinker Air Force Base is 13 miles from Oklahoma City, Oklahoma, clearly outside to delivery perimeter of 1 mile requiring special delivery service as prescribed under Part 166 of the Postal Manual.

In our judgment the applicable regulation, previously quoted, requires that a late bid may be considered only if it was sent by the proper form of mail in time to be received within the deadline in the ordinary course of the mails. The fact that the form of mail used is not as fast as might be expected or slower than other types of mail provides no basis for enlarging the exception to the requirement for timely submission of bids. In general it is the bidders absolute responsibility to see that his bid is received at the place of the opening on or before the time specified in the invitation. An exception is permitted only in those cases where despite the bidder's diligence in utilizing the proper form of mail and promptness in dispatching the bid considering that form of mail, the bid is late solely by virtue of a delay in the mails for which the bidder is not responsible. In this case it was determined that your bid was not mailed on time to be timely delivered in the ordinary course of the form of mail utilized.

In your letter you also state that undue pressure was applied in an effort to award the contract to Hewlett-Packard. In this regard the contracting officer requested the technical information in evaluating your bid to determine if you were offering an item equivalent in all material respects to the named brand. It is regrettable that you were subjected to furnishing this additional information inasmuch as your bid should not have been opened but disregarded as a late bid. The erroneous opening of a late bid, however, will not alone justify disregarding the requirement that award be made to the lowest responsible and responsive bidder unless compelling reasons exist to reject all bids. B–155568 dated January 4, 1965.

Accordingly, your protest is denied.

[B–167016]

Contracts—Specifications—Restrictive—Particular Make—Technically Deficient

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

Contracts—Specifications—Restrictive—Particular Make—Special Design Features

Where the contracting agency in a "brand name or equal" purchase description goes beyond the make and model of the brand name and specifies particular

design features, such features must be presumed to have been regarded as material and essential to the needs of the Government, at least at the time the specifications were drawn and the bids solicited. Therefore, as the acceptance of a bid that did not conform to the material and essential design features specified in the invitation for bids could only be accomplished by a waiver of the advertised specifications, the administrative determination of bid nonresponsiveness to the solicitation and bidder ineligibility for an award was proper and will not be questioned.

Bids—Submission—Time Limitation—Brand Name or Equal Procurement

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

To the Sparta Electronic Corporation, September 22, 1969:

Reference is made to your letters dated May 19 and July 15, 1969, with enclosures, protesting the award of a contract to another bidder under invitation for bids No. DAAG08-69-B-1421, issued by the Sacramento Army Depot on February 27, 1969.

The invitation requested bids for cartridge tape equipment on a brand name or equal basis, which the procuring agency reports was used because adequate specifications were not available and the equipment was not a recurring procurement item. Salient features of the brand name were set forth in the solicitation pursuant to Armed Services Procurement Regulation (ASPR) 1-1206.1(a). As you are aware, your bid was rejected as nonresponsive to the stated requirement that the equipments' head assemblies be mounted on machined aluminum castings, whereas your equipment incorporates sheet metal head mounting assemblies.

Essentially, your protest is based on the ground that the requirement for a machined aluminum casting is unnecessarily restrictive and prohibits effective competition.

The report to this Office by the Department of the Army, a copy of which was previously provided your company, states that the requirement for a machined aluminum casting has been determined to be a minimum need of the Government. It is stated that inexperienced military personnel will use the subject equipment in the operations of the Armed Forces Radio and Television (AFRT), and past experience with sheet metal head mounting assemblies in such heavy duty broadcast applications, has demonstrated that critical head adjustments are

not maintained for any predictable period of time. It is stated by the Chief Engineer, AFRT, that upon applying light pressure with one's finger, sheet metal head mountings will flex causing the head to move, and in the daily use of such equipment the heads will move out of the required precise alignment originally established. This, in turn, results in poor frequency response since the azimuth adjustment will not permit proper high frequency performance. Accordingly, it has been determined that a completely rigid mount is essential to maintain precise head adjustment over a long period of time to insure professional performance on a day-to-day basis. It is stated that the head readjustment problem has never occurred with the same inexperienced personnel in using machined cast aluminum head mounting assemblies and that this has resulted in considerable saving to the Government in maintenance time, loss of recorded program time and loss of prerecorded base announcements.

While both the procurement personnel and AFRT engineers could identify only one brand name item which would satisfy the requirement, solicitations were issued to all known possible sources of supply in an attempt to obtain competition. It was believed that manufacturers willing to meet the minimum needs of the Government as specified in the invitation could have furnished such equipment.

The validity of the decision by the Government's engineers to insist upon machined aluminum casting has been challenged by your firm because, you state, many well known cartridge tape equipment manufacturers utilized a head mount that is other than a machined aluminum casting. You question the accuracy of the Government's statement regarding its unfavorable past experiences with sheet metal head mounting assemblies in view of the engineering and technical capabilities of the persons employed by the many firms engaged in the broadcast industry. You also point out that the instruction book of the subject brand name manufacturer states that "with any quality tape equipment, frequent checks of head alignment, condition and cleanliness are imperative of maximum performance and trouble-free operation."

In addition, it is your position that it is not reasonable for the Government to expect other companies to modify their existing equipments or to supply equipment with a machined aluminum casting head mount. You state that such castings are not commercially available and that a manufacturer would be required to spend considerable time and expense in: (1) engineering a cast aluminum head mount; (2) seeking quotations on such a design; (3) incurring expenses for tooling—normally in the $300 to $500 range; (4) procuring a small number of such castings, which is not economically feasible.

In the past our Office has had occasion to consider similar protests and we have observed that the drafting of proper specifications, including the use of "brand name or equal" purchase descriptions, to meet the requirements of the Government, and the factual determination as to whether any product offered thereunder conforms to the specifications, are matters primarily within the jurisidiction of the procuring activity. 47 Comp. Gen. 409 (1968) and B-165131, October 9, 1968. We do not undertake to substitute our judgment for that of the agency in the absence of a clear showing of abuse of the descretion permitted it, and as a matter of policy, we will accept the judgment of the technical personnel of the agency involved where there is a difference of expert technical opinion, unless such judgment is shown to be clearly and unmistakably in error. 40 Comp. Gen. 35 (1960) and 48 Comp. Gen. 62 (1968).

With respect to brand name or equal procurements, Armed Services Procurement Regulation 1-1206.1(a), provides, in pertinent part, that purchase descriptions shall not be written so as to specify a product, or a particular feature of a product, peculiar to one manufacturer and thereby preclude consideration of a product manufactured by another company, unless it is determined that the particular feature is essential to the Government's requirements, and that similar products of other companies lacking the particular feature would not meet the minimum requirements for the item. While, generally, the minimum acceptable purchase description is the identification of a requirement by use of brand name followed by the words "or equal," ASPR 1-1206.1(b) provides in pertinent part, that the words "or equal" should not be added when it has been determined that only a particular product meets the essential requirements of the Government.

In the present case we are unable to say that the agency's requirement for a machined aluminum casting was erroneous since, based upon reported actual past experience with equipments incorporating this feature, as well as others having the features offered in your equipment, there appears to be a reasonable basis for the requirement. We therefore conclude that the requirement was material and not unduly restrictive. Moreover, since it was believed that manufacturers willing to meet this requirement could have furnished complying equipment and there is no evidence to suggest the possession of contrary information by the procuring activity, we have no objection to the attempt to obtain competition even though, in the final analysis, it was a futile attempt.

Where, as here, the contracting agency, in a "brand name or equal" purchase description, goes beyond the make and model of the brand name and specifies particular design features, we have held that such

features must be presumed to have been regarded as material and essential to the needs of the Government, at least at the time the specifications were drawn and bids solicited. In this instance it is not merely a presumption but an unqualified administrative determination. Since the equipment offered in your bid did not conform to a design feature specified to be material and essential, it was not equal in all material respects and the acceptance of your bid could only have been accomplished by a waiver of the advertised specifications. Since this action would have been patently improper under long established rules governing the advertised procurement of supplies, we are of the opinion that the contracting officer's determination that your bid was not responsive to the solicitation—and was therefore ineligible for award—was proper, and not subject to question by our Office.

We also note that your letter of July 15, 1969, takes the position that the period of time between the date of distribution of the solicitation and the date set for opening of bids, that is, the bidding time, was insufficient for preparing a bid which required a modification to standard equipment.

The bidding time provided in the subject solicitation was 19 calendar days or 12 working days. In this regard ASPR 2–202.1 provides that, as a general rule, bidding time shall not be less than 15 calendar days when procuring standard commercial articles and not less than 30 calendar days when procuring other than standard commercial articles. Inasmuch as the Army attempted to obtain competition from manufacturers who might have been required to modify their standard equipment, we believe a 30-day bidding time should have been allowed here. Nevertheless, we do not feel you were prejudiced by the shortened bidding time since you did not consider the expressly required modification to your standard equipment to be economically feasible for the small number of units involved. In addition, we know of no reason which would have precluded you from requesting a time extension from the contracting officer if you intended to undertake the required modification. In this regard, however, we have recommended to the Secretary of the Army by letter of today that he take appropriate action to insure a minimum 30-day bidding period in future brand name or equal procurements wherein modifications to manufacturer's standard equipment may be required to meet specification requirements.

For the reasons stated, your protest must be denied.

[B–167627]

Contracts—Mistakes—Unit Price—All-or-None Bids

A mistake alleged after award in the bid price of an item in an all-or-none bid on scrap which had been prorated to determine the high bidder on each item

is not for solution under the unilateral mistake rule holding the bidder bound unless the mistake is obvious. Although substantial differences in bid prices on surplus property are not sufficient to place the contracting officer on notice of a mistake as would similar differences in bid prices on new equipment, the contracting officer was obliged to consider the prorated prices as if the bidder had inserted them in his bid, and the contracting officer failing to verify a prorated unit price that was 32 percent higher than the second high bid and 57 percent higher than the current market appraisal, the award on the erroneously priced item may be rescinded without liability to the bidder.

To the Director, Defense Supply Agency, September 22, 1969:

Reference is made to a letter (your reference DSAH-G) dated August 15, 1969, with enclosures, from your Assistant Counsel, submitting a report concerning the request of the Southern Lead Company (Southern) for rescission of Items 46 and 56 awarded to it under sales contract No. 11-9100-15 because of a mistake in bid alleged after award of the contract.

IFB 11-9100 offered for sale 71 items of surplus Government property. Southern's request for rescission concerns Items 46, 56 and 59, which were described in the invitation as follows:

46. LEAD BATTERIES SCRAP: Including truck, bus, tractor and other types. With hard rubber and plastic cases. Drained and vented. Outside—No allowance for water, moisture or acid in the total weight_____30,000 Pound
56. ELECTRONIC SCRAP: Consisting of cannibalized computer and electronic equipment. Inside_____20,000 Pound
59. LEAD BATTERIES, SCRAP: Aircraft, forklift and vehicle, with hard rubber, steel and aluminum cases. Drained. Outside—No allowance for moisture, water or acid content_____50,000 pound
Article EQ, Dangerous Property is applicable.

The following bids were recorded at the bid opening on March 25, 1969:

BIDDER	UNIT PRICE (Per Pound)	EXTENDED PRICE
Item 46		
L. Sanderow	$. 04761	$1428. 30
Greenville Parts and Metal Co., Inc.	: 0403	1209. 00
Nicholas J. Goetter, Jr.	. 01	300. 00
The current market appraisal for Item 46 was $.04 per pound.		
Item 56		
Michael Vital_____	$. 011	$220. 00
The current market appraisal for Item 56 was $.015 per pound.		
Item 59		
L. Sanderow	$. 04211	$2105. 50
Davis Iron & Metal	: 0411	2055. 00
Lowe & Moniodis, Inc.	: 0381	1905. 00
Greenville Parts & Metal Co., Inc.	: 0378	1890. 00
Norart Corp.	: 0251	1255. 00
Nicholas J. Goetter, Jr.	: 01	500. 00

The current market appraisal for Item 59 was $.035 per pound.

Page 8 of the IFB incorporated by reference portions of Defense Logistics Services Center pamphlet "Sale by Reference—Instructions, Terms and Conditions Applicable to Department of Defense Surplus Personal Property" (April 1968). Article AD of the pamphlet permits the submission of "all-or-none" bids and provides in pertinent part:

> If it becomes necessary for the purpose of contract administration to arrive at line item prices, such prices will be determined by prorating the "all-or-none" bid among the items involved based on the high responsive individual bids submitted for those items including any such bid submitted by the Purchaser. * * *

Southern submitted the following bid:

> .46
> .56
> Items 46 and 56 are to be based on "ALL OR NONE" price of $2,180.00

In accordance with Article AD of the Sale by Reference pamphlet, quoted above, Southern's "all-or-none bid" was prorated. The prorated unit price for Item 46 was $.062968 per pound for an extended price of $1,889.04; and the prorated price for Item 56 was determined to be $.014548 with an extended price of $290.96. Thus, as prorated under the contract, Southern's bid on Item 46 was $.062968 per pound, where other bids ranged from $.01 to $.0476 and the current market appraisal was $.04. On Item 56, Southern's prorated bid was $.014548 per pound, the only other bid was $.011, and the current market appraisal was $.015 per pound.

On March 28, 1969, awards for Items 46 and 56 were made to Southern and, upon receipt of notices of award, Southern alleged error in that it had intended to bid on Items 46 and 59, but not on Item 56. Southern submitted worksheets in support of its allegation that its intended bid was $.044 per pound on Item 46 and $.043 per pound on Item 59. By letters dated July 11 and 29, 1969, the Defense Supply Agency denied the claim of mistake, from which Southern has appealed to this Office.

As a general rule, if a bidder makes a unilateral mistake, he is bound by the contract awarded unless the contracting officer knew, or should have known, of the mistake at the time of award. *Saligman* v. *United States*, 56 F. Supp. 505. If the contracting officer was actually or constructively aware of the mistake, the contract is voidable at the purchaser's option. *Kemp* v. *United States*, 38 F. Supp. 568; *Wender Presses, Inc.* v. *United States*, 170 Ct. Cl. 483, 343 F. 2d 961. In determining whether the contracting officer should have known of error, or had "constructive" notice thereof in surplus sales cases, this Office has considered a number of factors, among which are: (1) the relationship of the amount of the allegedly erroneous high bid and the second highest bid; (2) comparison of the high bid and the current market

appraisal of the property; and (3) the nature of the property being sold. Generally, in sales of surplus property, the existence of a substantial discrepancy between the erroneous bid and the second high bid or the current market appraisal would not necessarily be sufficient to place the contracting officer on notice of mistake, as would similar differences in the prices bid on new equipment. *United States* v. *Sabin Metal Corp.*, 151 F. Supp. 683, affirmed 253 F. 2d 956. However, this Office has recognized that wide price variations normally are not encountered in the sale of scrap metals because of the established market for this material and the limited uses to which it may be put. B–160704, February 16, 1967; B–158334, January 21, 1966; B–149660, September 21, 1962.

In the instant case the terms of the invitation required the contracting officer to make a proration of Southern's "all-or-none" bid. Under such circumstances it is our opinion that the contracting officer is required to consider such prorated unit prices in the same manner as if the bidder had actually inserted them in his bid. Southern's prorated unit price of $.062968 per pound on Item 46, as determined by the contracting officer, was 32 percent higher than the second high bid and 57 percent higher than the current market appraisal of the item. In other sales of scrap metal our Office has found that similar disparities between the erroneous bid and the second high bid and between the erroneous bid and the current market appraisal have placed the contracting officer on constructive notice of the possibility of error. B–160704, February 16, 1967; B–160520, December 23, 1966.

Accordingly, we must conclude that a bona fide mistake was made as alleged, that the contracting officer should have been aware of the possibility of error, and that verification of the bid should have been requested before acceptance. The awards for Items 46 and 56 should therefore be rescinded without liability to Southern Lead Company.

The file transmitted with the Assistant Counsel's letter is returned.

[B–145094]

Vehicles—Purchases—Passenger Motor Vehicles

The purchase of passenger motor vehicles to conduct research and development programs for the prevention and control of air pollution is not subject to the appropriation authorization requirement of 31 U.S.C. 638a(a), nor the maximum price limitation in section 638c, as these statutory prohibitions are intended for imposition on the purchase of vehicles to be used to carry passengers. Therefore, if a certificate to the effect that the vehicles are necessary to effectuate the purpose of the research programs contemplated and that they will not be used

to carry passengers appears on or accompanies the payment voucher, no objection to payment for the vehicles will be raised.

To the Secretary of Health, Education, and Welfare, September 23, 1969:

This is in reference to letter dated September 8, 1969, from the Assistant Secretary, Comptroller, requesting a decision on whether the purchase of passenger motor vehicles by the National Air Pollution Control Administration (NAPCA) for research purposes is subject to the authorization requirements of 31 U.S.C. 638a(a), and the maximum purchase price limitation of 31 U.S.C. 638c.

The Assistant Secretary explains the matter as follows:

> The Secretary of Health, Education, and Welfare is authorized by Sections 103 and 104 of the Clean Air Act, 42 U.S.C. 1857b, 1857b–1, to conduct research and development programs for the prevention and control of air pollution and, in particular, air pollution resulting from the combustion and emission of fuels from motor vehicles. In carrying out such research, it will be necessary for NAPCA to purchase passenger motor vehicles and to make extensive tests on such vehicles of various exhaust control devices, engine modifications, power sources, fuels, and fuel additives. In the course of such research, NAPCA estimates that 90 percent of the time that the vehicles are in use will be devoted to laboratory dynamometer tests on the vehicles. In order to perform tests on the vehicles under actual road conditions, they will be driven on public roads for about 10 percent of the time they are in use by the technicians or project engineers working on the tests. The vehicles will not be used to transport passengers or supplies and will be used only in furtherance of research on motor vehicle fuel emissions, either in the laboratory or on public roads.
>
> We recognize that there is a statutory prohibition on the purchase of passenger motor vehicles unless authorized by the appropriation concerned or other law. 31 U.S.C. 638a(a). We believe, however, that that prohibition was not intended to apply to the purchase of vehicles to be used solely for research purposes. While, as the Comptroller General pointed out in a decision to this Department, 40 Comp. Gen. 205, 207, the "statute makes no mention of the use to be made of the vehicle, whether to carry passengers or to carry materials," it is not likely that Congress intended the prohibition to be applicable to vehicles purchased for research and testing purposes only, with but minimal use on the road, and then only in furtherance of such research purposes.

It was held in 1 Comp. Gen. 360 (1922), that purchase of an automobile to be equipped and used solely for testing and laboratory purposes, and in no sense for service as a means of passenger carrying, is not within the statutory prohibition as to the purchase of motor-propelled passenger carrying vehicles without specific authority of Congress therefor. Also, in an unpublished decision of this Office to the Secretary of Agriculture, B–81562, December 1, 1948, it was held that the purchase of an automobile for research and testing on the use of alcohol as a motor fuel was not subject to the maximum statutory price limitation if it be administratively determined that the purchase of the vehicle was necessary to effectuate the purposes of research program, and a certificate to the effect that such vehicle would not be

used for passenger carrying purposes would appear upon or accompany the voucher upon which payment was to be made.

If the passenger motor vehicles proposed to be purchased by NAPCA are to be used solely for research purposes and a certificate to such effect supports the procurement, no objection to payment therefor will be raised by this Office.

[B-167150]

Taxes—State—Government Immunity—Rented Equipment

The Hawaii General Excise Tax imposed on a motor vehicle rental agency, which although in the nature of a sales or gross receipts tax levied on the lessor is by tradition, custom, and usage passed on to the lessee as a separate item in the billing and added to the rental price of the vehicle, is not a tax within the scope of the exemption contained in section 237-25a(a)(3) of the Hawaii Revised Statutes pertaining to the sale of vehicles to the United States and the Federal Government is liable to the lessor of the cars for the excise tax unless the rental agreement provides otherwise. The determination of United States liability to pay a State sales tax depends on whether the incident of the tax is on the vendor or vendee, and when imposed on the vendor, the United States under its constitutional prerogative is not immune from liability unless expressly exempt.

To the Hertz Corporation, September 26, 1969:

Your letter of September 11, 1969, concerns the applicability of the Hawaii General Excise Tax to the rental of motor vehicles by the United States.

You advise that the Hawaii General Excise Tax, although in the nature of a sales or gross receipts tax levied on the vendor (here, the lessor), is by tradition, custom, and usage passed on to the renter (or lessee). You state that the amount of the tax, which is at a 4 percent rate presently, is separately stated and is in effect added to the rental price of the motor vehicle; and that the amount of the tax is collected from the renter (or lessee) but that the Federal Government is not paying the tax and considers itself not taxable.

You report that the State of Hawaii has recently concluded an audit, and has held Hertz International liable for those taxes, and takes the position that the rentals to the Federal Government are taxable. Presumably—according to your letter—the State is relying on section 117-21.5(4)(c) and does not treat a rental within the meaning of the term "sold" as referred to in section 117-21.5(3). (The cited statutory provisions are apparently codified as sections 237-25(c) and 237-25(a)(3), Hawaii Revised Statutes.)

You state that Hertz is caught in the middle—in that Hawaii measures its excise tax by its gross receipts and, when it is added to the bill, the Federal Government renter does not pay it—with the effect

that Hertz is obliged to absorb this 4 percent tax which is added to the rental price.

You request a decision as to whether Federal Government renters in Hawaii should pay the amount of the tax added to the rental price.

Concerning the payment of State sales taxes generally, our Office has held that the question of whether the United States is required to pay for an item procured in a State at a price inclusive of the sales tax imposed by that State rests upon a determination of whether the incidence of the tax is on the vendor or on the vendee. Where the incidence of the tax is on the vendor, the United States has no right—apart from State law or State statutory regulations promulgated thereunder by State authorities—to purchase (or lease) items within the territorial jurisdiction of the State on a tax free basis. See *Alabama* v. *King and Boozer*, 314 U.S. 1; 24 Comp. Gen. 150; 32 *id.* 423 (1953); *id.* 577 (1953); 33 *id.* 453 (1954); and 41 *id.* 719 (1962). On the other hand where the incidence of the tax is on the vendee, the United States in purchasing or leasing items for official use is entitled under its constitutional prerogative to make purchases or to lease free from State taxes and to recover any amount of such taxes which may have been paid by it.

It is clear from a reading of section 237–13, Hawaii Revised Statutes, that the Hawaii General Excise Tax is a business privilege tax imposed on persons in the business of selling property, furnishing services or otherwise engaged in a business in the State and that the amount of the tax is measured by the gross income or gross proceeds of sale of the business. Moreover, we found nothing in the Hawaii General Excise Tax Law which requires a vendor or a person furnishing services to collect the amount of the tax from the vendee or the person being furnished the service. Thus, the legal incidence of the tax involved here is on the vendor or the person furnishing a service. Hence, the United States would not be constitutionally immune from such tax absent an exemption provision in the State law or regulations promulgated pursuant thereto.

Section 237–25(a)(3), Hawaii Revised Statutes, exempts from the tax in question "sales" and "gross proceeds of sales" of tangible personal property to the United States. However, section 237–25(c) provides that nothing in section 237–25:

* * * shall be deemed to *exempt any person engaging or continuing in a service business or calling from any part of the tax imposed upon him for such activity,*

and he shall not be entitled to deduct any amount for tangible property furnished in conjunction therewith even though he separately bills or otherwise shows the amount of the gross income of such business derived from the furnishing of such property. [Italic supplied.]

Further, section 237–7, Hawaii Revised Statutes, defines "Service business or calling" as including all nonprofessional activities engaged in for other persons for a consideration which involves the rendering of a service "*as distinguished from the sale of tangible property.*" [Italic supplied.]

In light of the provisions of section 237–25(c) and section 237–7 it is our opinion that "rentals" to the United States may not be considered within the scope of the tax exemption contained in 237–25(a)(3). Therefore car rentals (or the proceeds from car rentals) to the Federal Government in Hawaii would be subject to the Hawaii General Excise Tax. Whether the United States would be required to pay the amount of the tax to the lessor of the cars would depend on the terms of the rental agreement. In other words the United States is not constitutionally immune from the economic burden of the State tax involved here if by contract or otherwise it is liable to the vendor or lessor for the amount of the tax.

[B–167264]

Gratuities—Reenlistment Bonus—Extension of Enlistment—Simultaneously With Acceptance of Reserve Officer Appointment

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

To Major R. G. Friedman, Department of the Army, September 29, 1969:

Further reference is made to your letter of March 6, 1969, enclosing a voucher in favor of Staff Sergeant William A. Heaivilin, RA 17 619 091, for reenlistment bonus, and requesting a decision whether payment is authorized in the circumstances set forth in your letter. The request was assigned D.O. No. A–1040 by the Department of Defense Military Pay and Allowance Committee.

The circumstances shown are that on May 1, 1968, Staff Sergeant Heaivilin, Regular Army, made application for appointment as second lieutenant, MI-U.S. Army Reserve. The application for appointment was tentatively approved by Department of the Army message of January 28, 1969. He was ordered to active duty as a second lieutenant, U.S. Army Reserve by U.S. Army Japan Letter Order 2–12 dated February 3, 1969, effective February 7, 1969. That order also directed that he be discharged from his enlisted status.

You say that under the provisions of paragraph 5–10, Army Regulations 635–200, Sergeant Heaivilin requested discharge prior to expiration of his term of service (March 4, 1969) in order to reenlist in his current enlisted status. By orders also dated February 3, 1969, his discharge and reenlistment were made effective on February 2 and 3, 1969, respectively, and on February 7, 1969, he accepted appointment and was sworn in as a commissioned officer.

You further say that Sergeant Heaivilin had full knowledge of the tentative approval of his appointment as an officer and requested discharge and reenlistment prior to the expiration of the enlistment in which he was serving for the sole purpose of collecting a reenlistment bonus. In this connection you point out that both the orders effecting his discharge and reenlistment and the orders to active duty as an officer were dated the same day. You say that since his discharge and reenlistment were not required in the interest of the Government you question whether the reenlistment bonus may be paid.

It appears that you were advised by Army Finance Center, Indianapolis, Indiana, that payment is authorized, citing 35 Comp. Gen. 664. You contend, however, that that decision is not applicable for the reason that the member there involved reenlisted subsequent to the expiration of his prior enlistment.

The record shows that in February 1969, when Sergeant Heaivilin was discharged and reenlisted for 6 years he was serving overseas, that his tour of duty would not expire until September 1969, and that the enlistment from which he was being discharged would expire on March 4, 1969. Paragraph 5–10, Army Regulations 635–200, implementing 10 U.S.C. 1171, provides that discharge for the purpose of reenlistment may be accomplished at any time during the last 90 days of current enlistment for various specified purposes.

Heaivilin was appointed a Reserve commissioned officer of the Army pursuant to 10 U.S.C. 591 and 593. Section 593 provides that appointments of reserves in commissioned grades "are for an indefinite

term and are held during the pleasure of the President." He was ordered to active duty under 10 U.S.C. 672(d) which provides that a member of a Reserve component may be called to active duty at any time with his consent. Heaivilin applied for and was appointed a Reserve officer with concurrent active duty.

Section 308 of Title 37 U.S. Code, provides that a member of the uniformed services who reenlists in a Regular component of the service concerned, or who voluntarily extends his enlistment for at least 2 years is entitled to a reenlistment bonus as computed therein.

As you point out, orders of February 3 provided for Heaivilin's reenlistment effective that date and his discharge the preceding day. Separate orders of the same day ordered him to active duty as a Reserve officer on February 7, 1969, and directed that he be discharged from his enlisted status. In these circumstances, the discharge, reenlistment and reporting for active duty as an officer was substantially a simultaneous transaction.

Both the member and the Army headquarters that issued the orders knew that he would not serve on extended active duty under his reenlistment of February 3 since his discharge was directed by orders of the same date and effected on February 6, 1969, the day before he accepted his appointment and entered on active duty as an officer. Thus, he has no enlistment in effect while serving as an officer and which he could be required to complete if his active duty as an officer were terminated, such as would be the case when enlisted members in the Navy and Marine Corps are appointed officers under 10 U.S.C. 5596 or 5597. Compare decisions of January 17, 1967, and October 1, 1968, B–160311.

Our decision of May 22, 1956, 35 Comp. Gen. 664, concerns questions whether payment of reenlistment bonus is authorized (1) if a member otherwise entitled to receive it knows, or has reason to believe, that he may be called to active duty as a commissioned officer or warrant officer shortly after reenlistment, or (2) if a member, prior to discharge, files an application for a commission or warrant and reenlists prior to receipt of the appointment as an officer and thereafter is called to active duty under such appointment. These questions were answered in the affirmative.

In those circumstances, however, orders to active duty as an officer were not issued concurrently with the member's reenlistment and we said that it was primarily a matter under the control of the Gov-

ernment whether the member would be required to complete his enlistment or would later be called to active duty as an officer.

In the case of Heaivilin, the Government had determined at the time of his reenlistment that he would not serve any substantial period under that enlistment but concurrently directed his discharge and ordered him to active duty as an officer. It seems obvious that the Government received no benefit from the reenlistment and that it was not entered into by Heaivilin with the bona fide intention of serving thereunder for any substantial period. In these circumstances, we are of the opinion that payment of a reenlistment bonus is not authorized and the voucher will be retained in this Office.

[B–167614]

To Charles A. Bowsher, Department of the Navy, September 30, 1969:

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

To Charles A. Bowsher, Department of the Navy, September 30, 1969:

We have received from the Commander, Navy Accounting and Finance Center, Washington, reference NAFC–3121, a request dated July 17, 1969, for a decision on claims for overtime made by four employees of the Naval Ordnance Station, Louisville, Kentucky 40214. The question is whether such overtime is compensable under the facts and circumstances hereinafter related. We note there is administrative disagreement thereon. Since the record shows that the request for decision on the claims was referred to your office by the originating office, referred to above, we are directing our reply in the matter to you.

The record shows that on January 13, 1969, NAVORDSTALOU received a telephone call from a Mr. Capolla, Code 05, Philadelphia Naval Shipyard, stating that a ship (Hull # LPH–11) with two gun mounts furnished by NAVORDSTALOU would be available for repair of gun port shields deteriorated by the sun. It was stated that the repair work was mandatory prior to January 24, 1969, as the ship was scheduled to sail that day. The team of employees qualified to make

such repairs were in Pascagoula, Mississippi, on temporary duty. The file indicates they were directed to return to Louisville, Friday, January 17. On January 18, a Saturday, and nonworkday, the employees worked from 7 a.m. until 10:30 a.m., apparently at Louisville, for the purpose of getting tooling and equipment ready for the job in Philadelphia. They commenced travel to Philadelphia in a privately owned vehicle at 10:30 a.m. on the same day. The record shows that it was administratively determined that the work of making the repairs must begin on Sunday, January 19, in order to meet the mandatory deadline. We note the claims are only for 4½ hours overtime, while traveling January 18, 1969, which period of time would complete an 8-hour tour of duty. It is administratively stated that work would have been required for the full 8 hours on Saturday, presumably at Louisville, had the employees not been required to proceed to Philadelphia.

The employees involved appear to be under a wage board system and their travel in this instance is governed by the language in 5 U.S.C. 5544(a), reading, in pertinent part, as follows:

> * * * Time spent in a travel status away from the official duty station of an employee subject to this subsection is not hours of work unless the travel (i) involves the performance of work while traveling, (ii) is incident to travel that involves the performance of work while traveling (iii) is carried out under arduous conditions, or (iv) results from an event which could not be scheduled or controlled administratively.

The specific language thereof requiring interpretation here reads:

> * * * (iv) results from an event which could not be scheduled or controlled administratively.

In our decision, B–163654, April 19, 1968, to the Chairman, National Transportation Safety Board, Department of Transportation, we were requested to interpret language identical to that specifically quoted above but which was contained in 5 U.S.C. 5542(b)(2)(B) governing General Schedule and certain other employees. A copy thereof is enclosed for your information. You will note that the first three questions concern travel to the site of an accident or to another location as part of the initial phase of the investigation of the accident. With respect to the three questions, we stated that our opinion thereon was that there must have existed an immediate official necessity occasioned by the unscheduled and administratively uncontrollable event for travel by the employee during hours outside his scheduled workweek before such travel time constitutes hours of employment within the meaning of the exception.

The language of 5 U.S.C. 5544(a) quoted above was added by sub-

section (d) of section 222 of Public Law 90–206, approved December 16, 1967. Under subsection (b) and (a) of section 222 the same language was added to 39 U.S.C. 3571 (postal service) and 5 U.S.C. 5542 (b) (2) (B), respectively, thus, equalizing the pay treatment for travel time in the case of employees subject to those separate provisions. S. Rept. No. 801, 90th Cong., 1st sess. 31, contains the following statement concerning travel by employees:

> * * * An employee should not be required to travel on his offday in order to be at work at a temporary duty station early Monday morning to attend a meeting. It is an imposition upon his private life that should not be made. Nevertheless, pay for travel status should not be made so attractive that employees would seek to travel on their offdays in order to receive overtime pay. Proper scheduling and administrative planning is the answer to the problems of travel pay in many cases. When emergencies occur or when events cannot be controlled realistically by those in authority, traveltime must be paid for.
>
> The committee also believes that agencies should utilize the most expeditious means of transportation practicable, commensurate with the nature and purpose of an employee's duties. * * *

We are aware of the examples and instructions contained in FPM LTR. No. 550–52, February 5, 1969, issued by the United States Civil Service Commission, which are stated not to be mandatory with respect to employees in trades or labor occupations (wage board employees).

The damage requiring repair consisted of deterioration due to the exposure of the gun mounts to the rays of the sun and occurred gradually over a period of time rather than from any particular event. Thus, it may not reasonably be considered to have resulted from a sudden emergency or catastrophe, or an event which could not be scheduled or controlled administratively. The time for scheduling of the repair was completely within the administrative control of the Department of the Navy. Under the circumstances, we are of the opinion that the travel officially directed to be performed on Saturday, January 18, 1969, a day outside the scheduled tour of duty of the claimants, is not considered to be work under the above-quoted specific language of condition "iv" of 5 U.S.C. 5544(a). Compare decision of April 19, 1968, B–163654, cited above. Accordingly, the administrative denial of overtime for the period of such travel was proper.

[B–167769]

Contracts—Specifications—Minimum Needs Requirement—Cancellation and Reinstatement of Invitation

The cancellation and readvertising of an invitation for copper superconductor wire upon determination the lower resistivity ratio wire offered by the lowest

bidder equally met the minimum needs of the Government as did the higher ratio more costly wire solicited was not required and the original invitation should be reinstated, as adequate competition had been obtained under the original invitation and only a relatively small price difference existed between the two lowest bids. Although a revision of specifications is a "compelling reason" for rejecting all bids and readvertising a procurement, cancellation of an invitation should be limited to instances in which an award under the original specifications would not serve the Government's needs, but when as here the specifications do, readvertising after the exposure of bids would be prejudicial to the competitive bidding systems.

Contracts—Specifications—Minimum Needs Requirement—Erroneously Stated

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

To the Administrator, National Aeronautics and Space Administration, September 30, 1969:

Reference is made to letter dated September 5, 1969, from the Director of Procurement furnishing a report on the protest of Supertechnology Corporation against the opening of bids and award of a contract under readvertised solicitation No. C–404597–(Re-Ad), dated July 29, 1969.

The record shows that invitation No. C–404597, issued on May 23, 1969, by the National Aeronautics and Space Administration, Lewis Research Center, requested bids for furnishing a quantity of 130,000 feet of superconductor wire, as follows:

Niobium-Titanium-Copper Composite Superconductor material shall be in accordance with Specification No. C–404597 dated May 7, 1969 (2 pages), which is attached hereto.

Paragraph "B" of the specifications stated that "The copper shall be OFHC grade with a minimum resistance ratio of R300°K/R4.2°K =200" (hereinafter referred to as 200 ratio). The following bids were received at bid opening on June 12, 1969:

Name	Amount
Cryomagnetics	$96,590.00
Supertechnology	97,256.25
Norton Company	99,450.00
Airco Air Reduction Co.	117,000.00

However, Cryomagnetics proposed to supply superconductor wire with twisted filaments having a resistance ratio of 180 as against the 200 ratio called for in the specifications. Consequently, its bid was determined to be nonresponsive. The next low bidder, Supertechnology Corporation, was determined to be nonresponsible because it had been in business only a short time. The matter of Supertechnology's responsibility was referred to the Small Business Administration and that agency determined Supertechnology to be a responsible bidder under its certificate of competency procedures. In the meantime, Cryomagnetics, the low bidder, protested against the rejection of its bid as nonresponsive and the Government technical personnel concluded that stabilized superconductor of OFHC copper with a resistivity ratio of 180 offered by Cryomagnetics met or exceeded the requirements of the invitation. Additionally, and perhaps more importantly, Avco Everett Research Laboratory, the intended user of the superconductor, advised NASA-Lewis on August 21, 1969, with reference to the acceptability of 180-ratio wire that:

* * * Frankly, I do not know of any significant differences in the behavior of a high field coil when the resistance ratio is 200 versus 180, namely 10% different. By the time the magnito-resistance is added, the two resistance ratio values should make only a negligibly small difference in the conductor stability. I therefore believe that we would be hard pressed to observe any real differences in coils between RR 180 and 200.

However, because copper having a 200 ratio is higher in price (approximately $373) for the quantity involved than copper having a 180 ratio, it was concluded by the contracting agency that a contract award to Cryomagnetics would be prejudicial to the other bidders who bid in good faith on 200-grade material as specified. Accordingly, a decision was made on July 29, 1969, to cancel the invitation and readvertise the requirement because the specifications of the invitation did not specify the minimum needs of the Government.

By letter of August 20, 1969, the attorneys for Supertechnology have protested against the opening of the readvertisement scheduled for September 26, 1969, and have requested that the first invitation be reinstated and that award of a contract be made to Supertechnology Corporation as the lowest responsive bidder thereunder.

Insofar as the low bid of Cryomagnetics is concerned, we agree with the contracting officer that the bid must be rejected as nonresponsive. It is a recognized rule that a contract awarded to a bidder must be the same contract offered to all bidders. 42 Comp. Gen. 96, 97 (1962). It is obvious that a contract awarded to Cryomagnetics which would permit the furnishing of copper material of 180 ratio, which was neither asked for in the invitation nor offered by the other three bidders, would not be the contract offered to all. Furthermore, to insure to the Government the benefits of competition, it is essential that awards of contracts be made upon the basis of the requirements of the specifications submitted for competition. See NASA Procurement Regulations, 41 C.F.R. 18–2.301. Any deviation by a bidder from the invitation requirements may only be waived if it does not go to the substance of the bid or work an injustice to other bidders. See 33 Comp. Gen. 441 (1954); 30 *id.* 179 (1950); *Prestex Inc.* v. *United States*, 162 Ct. Cl. 620. In the instant case it is clear that the deviation from the advertised requirements by Cryomagnetics was deliberately taken and, therefore, may not be considered trivial or minimal so as to justify waiver as a minor irregularity. 47 Comp. Gen. 496, 499 (1968). See 41 C.F.R. 18–2.404–2.

Regarding the question as to whether the second low bid of Supertechnology should have been accepted rather than canceling the solicitation, the attorneys for the Norton Company, the third low bidder, contend that the cancellation was proper. In support of their contention several of our decisions are cited. Those decisions hold that cancellation and readvertisement is proper in cases where the administrative officials of the Government determine that the purchase of an item which is not responsive to the specifications would be in the interest of the Government (43 Comp. Gen. 209 (1963)); where the initial invitation solicited an excess over its minimal requirements (B–153229, February 5, 1964); and where it became apparent that a substantial reduction in cost would accrue to the Government by readvertisement of the procurement. (43 Comp. Gen. 268 (1963); B–151910, August 20, 1963; B–143263, December 22, 1960; B–103380, July 3, 1951.) We have carefully considered these prior decisions in the light of the circumstances of the instant case but we do not feel that they support the rejection and readvertisement action contemplated. It is also urged that the cost saving to the Government through readvertising cannot be determined by computing the difference be-

tween the nonresponsive bid of the low bidder and the next responsive low bidder. Hence, it is contended that reinstatement of the initial solicitation should not be made unless there is cogent evidence that the dollar savings to result from the readvertising will be *de minimis*. In addition, the contention is made that Supertechnology is neither a "regular dealer" nor a "manufacturer" within the meaning of the Walsh-Healey Act, 41 U.S.C. 35–45. It is stated that in a letter of August 4, 1969, Supertechnology advised that Defense Contract Administration Services Region (DCASR) determined that it was not a regular dealer or a manufacturer within the meaning of the Walsh-Healey Act.

While our Office has recognized in the decisions cited above that the administrative authority to reject all bids and readvertise is extremely broad and that ordinarily we will not question such action, it is our view that the rejection of all bids and the readvertisement of the procurement was not based on a "compelling reason." Although a revision in specifications is, in some instances, a "compelling reason" to cancel an invitation, it would seem that cancellation on that ground should be limited to instances in which an award under the original specifications would not serve the Government's actual needs.

We can appreciate that the Government's needs, at a minimum, might be satisfied by specifying 180-ratio wire at a slightly lesser cost but we feel that readvertising the procurement after bids have been exposed would be far more prejudicial to the competitive bidding system than an award under the 200-ratio specification. While the attorneys for Norton argue that reinstatement of the initial solicitation would be improper unless there is cogent evidence to show that the dollar savings on readvertisement would be relatively small, we are of the view that the savings possible on readvertisement which, at the best, are purely speculative, are not for consideration under circumstances such as involved here. Rather, the primary consideration in this type of situation should be the cost to the Government in the event of an award under the initial solicitation. Since adequate competition was obtained in this case; since the difference between the two low bids is relatively small; and since there is no evidence to indicate that the requirement for wire of 200 ratio precluded other potential bidders from submitting responsive bids, we believe that the circumstances require an award under the initial solicitation.

Insofar as Supertechnology's status under the Walsh-Healey Act is concerned, we note that Supertechnology merely stated in its letter of August 4, 1969, that DCASR presumably, under the Walsh-Healey

Act, "failed to classify us either as a manufacturer or a dealer." We do not construe this as a finding that Supertechnology does not so qualify. In any event, the Walsh-Healey eligibility of Supertechnology is for determination in accordance with NASA Procurement Regulations, 41 C.F.R. 18–1.218 and .228.

Accordingly, the invitation should be reinstated and award made to the lowest responsive, responsible bidder, if proper in other respects. The bids received under the readvertisement should be returned to the bidders unopened.

The file forwarded with the Director's letter is returned herewith as requested.

[B–167823]

Contracts—Negotiation—Cost, Etc., Data—"Truth-in-Negotiation"—Exceptions to Cost or Pricing Data

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

To the Secretary of the Army, September 30, 1969:

Reference is made to a letter dated August 29, 1969, with enclosures, from the Assistant Secretary of the Army (Installations and Logistics), requesting our decision on the applicability of Public Law 87–653, 10 U.S.C. 2306(f), commonly referred to as the "truth-in-negotiations" law, to subcontracts of Rockwell Standard Company, North American Rockwell Corporation, for furnishing axles and transfer cases to Diamond Reo Division of White Motors Corporation and Cadillac Gage Company.

Rockwell has refused demands of the prime contractors and the Government for certified cost or pricing data in connection with the subject subcontracts These two subcontracts have a total value of approximately $5,750,000. While the administrative report is concerned primarily with the two subcontracts referred to above, the magnitude of the problem is indicated by the fact that there are approximately $49.5 million of subcontracts with Rockwell for axles and transfer cases and the controversy over submission of cost or

pricing data has continued for more than 34 months. It is reported that most of these subcontracts with Rockwell have been negotiated with a clause deferring the question of furnishing cost or pricing data. It is also reported that recently Rockwell has refused to accept purchase orders from the Cadillac Gage Company for axles needed for production of the XM 706E1 armored car unless the provisions requiring the submission of cost or pricing data are deleted.

The demand upon Rockwell for submission of cost or pricing data is made pursuant to that part of the "truth-in-negotiations" act which provides that a contractor or subcontractor shall be required to submit such data and certify as to its accuracy, completeness and currency prior to the award of a negotiated contract where the price is expected to exceed $100,000.

Rockwell contends that it is not required to submit cost or pricing data in view of that part of the act, as implemented by Armed Services Procurement Regulation 3-807.1(2), which provides that the requirements thereof "need not be applied to contracts or subcontracts where the price negotiated is based on * * * established catalog or market prices of commercial items sold in substantial quantities to the general public * * *" The regulation cited above provides, in part, that—

> A price may be considered to be "based on" established catalog or market prices of commercial items sold in substantial quantities to the general public if the item being purchased is sufficiently similar to such a commercial item to permit the difference between the prices of the items to be identified and justified without resort to cost analysis.

In this connection, Rockwell contends that its military axles and transfer cases are "sufficiently similar" to its commercial SQD tandem series axle and T-226 transfer case, which are sold to the general public in sufficient quantities, "to permit the difference between the prices of the items to be identified and justified without resort to cost analysis." Therefore, Rockwell contends that a price analysis in accordance with the provisions of ASPR 3-807.2(b) may be performed to determine the reasonableness of its price.

In an effort to resolve this matter, Army personnel, with the cooperation of Rockwell personnel, undertook a comprehensive technical and price analysis of the differences between the military and commercial axles and transfer cases selected by Rockwell for comparison to determine whether the "based on" concept could be accepted in lieu of a cost analysis. The Army's report was issued on September 14, 1968. As a result of the findings therein, Mr. Robert A. Brooks, then

Assistant Secretary of the Army (Installations and Logistics), advised Rockwell on December 27, 1968, of his determination that the price analysis technique could be accepted to determine the reasonableness of its price for the 5-ton rear axle, but that cost or pricing data must be submitted in connection with its prices for the 5-ton front axle and transfer case and the 2½-ton axle and transfer case. However, Rockwell has remained adamant in its refusal to submit such data.

The requirement of 10 U.S.C. 2306(f) for the submission of certified cost or pricing data is couched in mandatory terms, using the phrase "shall be required," whereas the proviso of the statute excepting the submission of such data states that the "requirements of this subsection *need not* be applied" in the circumstances listed therein. This language makes it clear that the exceptions are permissive, not mandatory, permitting the exercise of discretion and judgment on the part of procurement personnel. In this connection, on August 1, 1963, Congressman F. Edward Hébert, who sponsored the "truth-in-negotiations" law as originally passed by the House of Representatives, introduced a bill (H.R. 7909, 88th Cong.) to amend the law. He proposed, among other things, to *prohibit*, rather than leave discretionary, the obtaining of data and certificates when the price was based on price competition or established catalog or market prices. This bill was vigorously opposed by both our Office and the Department of Defense. On the discretionary right to require data under the statutory exceptions, we contended that such discretion was desirable; otherwise, in the borderline cases, there would be endless arguments on the administrative level whether the law was applicable. Furthermore, we felt that the contracting office should be permitted to require the data and certificate in special cases even though a statutory exception might be applicable. H.R. 7909 never was reported out of the Committee. [Italic supplied.]

It should also be noted that ASPR 3-807.1(b)(2), concerning the statutory exception for established catalog or market prices, provides that application of this "exception also requires judgment and analysis on a case-by-case basis."

Accordingly, it is our view that whether a statutory exception applies is a discretionary matter requiring the exercise of sound judgment on the part of procurement personnel. Where, as here, a decision that the "based on" concept should not apply has been reached after an extensive and careful review of the factual matters involved, there has been a proper exercise of the discretion and judgment permitted and certified cost or pricing data must be furnished by the contractor or subcontractor, as the case may be.

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Disposition—Continued

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APPROPRIATIONS—Continued Page
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Bidding unit measurements ambiguous—Continued
fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406-3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements---------- 48
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Bid mistake corrections
An obvious discrepancy between unit and total prices in bid for care of remains of deceased personnel submitted under invitation for bids that requested unit and extended prices on estimated quantities of 22 different items and/or subitems of services and supplies and that provided unit price will prevail in case of discrepancy between unit and extended prices, subject to correction in same manner as any other mistake, may not be corrected pursuant to par. 2-406.2 of Armed Services Procurement Reg. as error "apparent on the face of the bid," absent evidence of whether error occurred in unit price or extended price. To permit correc-

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Contract conditions or stipulations which tend to restrict full and free competition required by procurement laws and regulations are unauthorized unless reasonably requisite to accomplishment of legislative purposes of appropriation act or other law involved, and no administrative authority can lawfully impose any requirements to contravene prohibitions imposed by statute. Therefore, revised "Philadelphia Plan" in imposing affirmative action programs for employment of minorities constitutes discrimination on basis of race or national origin in contravention of prohibition in Civil Rights Act of 1964, and E.O. No. 11246---- 59
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Minimum needs requirement
Cancellation and readvertising of invitation for copper superconductor wire upon determination lower resistivity ratio wire offered by lowest bidder equally met minimum needs of Govt. as did higher ratio more costly wire solicited was not required and original invitation should be reinstated, as adequate competition had been obtained under original invitation and only relatively small price difference existed between two lowest bids. Although revision of specifications is "compelling reason" for rejecting all bids and readvertising procurement, cancellation of invitation should be limited to instances in which award under original specifications would not serve Govt.'s needs, but when as here specifications do, readvertising after exposure of bids would be prejudicial to competitive bidding system---- 211

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Small business concerns

Self-certification

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

Specification conformance

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

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Delivery provisions

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

Discarding all bids

Compelling reasons only

Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1–2.404–1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interests of Govt..... 135

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

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Evaluation

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

Subitems

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

Delivery provisions

Guaranteed shipping weight

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

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Reevaluation after contract award

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

Labor surplus area performance. (*See* Contracts, awards, labor surplus areas)

Late

Opening of bid effect

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

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Processing and delivery by Government

Bid forwarded by certified mail that reached Air Force Base Branch Post Office in time to be received in bid opening room before opening of bids if bid had been forwarded by regular mail, but which was not timely received due to special administrative handling required for certified mail is nevertheless late bid and lateness may not be waived on basis it was due to delay in mails for which bidder was not responsible, as it is not enough that bid was received at Branch Post Office before bid opening time, sender should have allowed sufficient time for it to reach bid room before bid opening time. Fact that form of mail used is not as fast as expected, or is slower than other types of mail, provides no basis for enlarging exception to requirement for timely submission of bids---- 191

Special delivery service

Rejection of late bid that had been forwarded by certified mail to Air Force Base located 13 miles from nearest post office is not affected by fact bid had been handled airmail special delivery. Special delivery service ceased at post office in neighboring town in accordance with postal regulation limiting special delivery service to within 1-mile perimeter---- 191

Uniform Time Act effect

Under invitation providing for bids to be opened at 11 a.m. central standard time (c.s.t.), on May 28, 1969, bid hand-carried and delivered at 11:20 a.m., c.s.t., after bids had been read was properly rejected as late bid. Contention that because invitation did not indicate "c.s.t." would be interpreted as central daylight savings time, 11 a.m., c.s.t., meant 12 noon, daylight savings time, ignores fact that with enactment of Pub. L. 89–387, effective Apr. 1, 1967, there is no distinction between standard and daylight time, and that within each time zone there is only preestablished standard time regardless that during certain portion of year standard time is advanced 1 hour, thus making standard time and popular reference to "Daylight Saving Time" one and same. To preclude future differences in opinion "local time at place of bid opening" will be substituted for "standard time"---- 164

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Correction

Authority

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

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Under invitation soliciting bids on insecticides requirements over 1-year period, award to be made in aggregate for each of 13 groups solicited correction of bid by reducing stated unit prices by one twenty-fourth—bid having been computed on 24-can carton basis instead of on per can basis—not only displaced lower acceptable bid on several groups contrary to sec. 2.406–3(a)(2) of Federal Procurement Regs., which prescribes correction only when existence of mistake and bid actually intended are ascertainable from invitation, but was tantamount to letting bidder submit second bid. Award should be canceled and unfilled requirements reawarded, and future procurements should more specifically state bidding unit measurements ---------- 48
Nonresponsive bids
In recommending termination of purported contract that had been awarded to bidder permitted to correct its bid price because it had been erroneously computed on estimated requirements 24 times Govt.'s true estimate and mistake may have affected amount bid, and that correction was tantamount to submission of second bid, U.S. GAO did not exceed its review authority. Standard of review pursuant to Wunderlich Act (41 U.S.C. 321, 322) applies to contract disputes and not to mistakes in bid, and finality of administrative determination does not apply to questions of law. For years GAO decided all questions concerning corrections of bid mistakes, and even with delegation of such authority, Comptroller General is not deprived of right to question administrative determinations, nor bidder of right to request his decision ---------- 152
Subitems
Under invitation for bids which listed 30 items, some comprising two or more subitems, but which did not provide that either unit prices or aggregate bid price would govern, rejection of low bid was proper where bidder refused correction of mistake in subtotal of four subitems correctly extended that would increase subtotal, because resultant increase in aggregate bid price would displace low bid, but claimed error in subitem computation and entitlement to contract award on basis of originally submitted total base bid price. No discrepancy having occurred between subitem and extended price, reduction in subitem price was essential for low bid to remain low, and absence evidence of intended subitem price as required by sec. 1–2.406–3(a)(2) of Federal Procurement Regs., rejection of erroneous bid was required to preserve integrity of competitive bidding system ---------- 107
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An obvious discrepancy between unit and total prices in bid for care of remains of deceased personnel submitted under invitation for bids that requested unit and extended prices on estimated quantities of 22 different items and/or subitems of services and supplies and that provided unit price will prevail in case of discrepancy between unit and extended prices, subject to correction in same manner as any other mistake, may not be corrected pursuant to par. 2–406.2 of Armed Services Procurement Reg. as error "apparent on the face of the bid," absent evidence of whether error occurred in unit price or extended price. To permit correction of error would give bidder opportunity to select either unit price or purported extended price, thus adversely affecting confidence in competitive bidding system ---------- 12

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Omissions

Prices on amendment acknowledgment

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

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

Rejection

Deliberate deviation from specifications

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

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

Submission

Time limitation

Brand name or equal procurement

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

BUY AMERICAN ACT

Applicability

Use outside United States

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

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

CLAIMS

Assignments

Validity

Assignee loan not for contract performance

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

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Transportation

Seamen returned from overseas

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

COLLEGES, SCHOOLS, ETC.

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

COMPENSATION

Overtime

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Emergencies

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

Periodic step-increases

Service credits

Demotions, promotions, reemployment, etc.

Overpayment

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

Promotions

Whitten Rider restriction

Violation

When employee is erroneously promoted from grade GS-7 to grade GS-9 due to Whitten Amendment violation and overpayment is not discovered until after time employee fully met time-in-grade requirement for promotion, no overpayment is considered to have occurred

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Promotions—Continued
Whitten Rider restriction—Continued
Violation—Continued
between date employee would have been promoted under agency policy or regulation and date error was discovered and, therefore, waiver action under Pub. L. 90–616 (5 U.S.C. 5584(e)) is not required for period on and after effective date of promotion. If under agency policy or regulation, promotion would not have been made effective until beginning of first pay period after period of eligibility under Whitten Amendment, period between date of eligibility and effective date of promotion is subject to waiver action---------- 18
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Awards

Advantage to Government

Requirement

Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1–2.404–1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interests of Govt..... 135

Cancellation

Invitation ambiguity

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

Erroneous

Nonresponsive bidder

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

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

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Awards—Continued

Labor surplus areas

Determination

After bid opening

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

Original solicitation amended

Amendment canceled

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

Small business concerns

Self-certification

"Good faith" certification

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

Subcontracting limitation

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

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Bid shopping. (*See* **Contracts, subcontracts, bid shopping**)
Bids, generally. (*See* **Bids**)
Concessions. (*See* **Concessions**)
Data, rights, etc.
Disclosure
Unsolicited proposals
Similarity between procurement specifications soliciting electric lift truck designed to install, transport, and remove bombs and missiles from igloos and revetments and unsolicited proposal submitted to furnish item that contained restrictive legends raises presumption offeror's proprietary data was improperly disclosed, and contracting officer unable to identify sources of material used in writing specifications, their use by Govt. to consummate competitive procurement without developer's consent would violate obligation of Govt. not to divulge proprietary data and, therefore, sole-source contract should be negotiated with offeror of proprietary data, or competitive proposals should be resolicited on basis of specifications which do not use proprietary data 28
Status of information furnished
Government participation in development costs
Software and related programs developed partially at Govt. expense solely for operation of computer service program "Legal Information Through Electronics" (LITE) when contractor experienced difficulty in performing, properly was used to solicit benchmark tests to create competition. Not only did Rights in Data clause of contract provide that data become sole property of Govt., but when mixture of private and Govt. funds are used to develop data, rights are not allocatable on investment percentage basis and Govt. acquires unlimited rights to data. Former contractor delayed unreasonably in waiting until after award of a new LITE contract to object to use of data, and as GAO has never ordered cancellation of contract for improper disclosure of proprietary data, it will not do so when cancellation is not justified 124
Unsolicited proposals
Although line-of-sight (LOS) telecommunications system data submitted as unsolicited proposal under first step of two-step negotiated procurement that stipulated if data was used offeror would be entitled to award on sole-source basis was significant in causing Air Force upon consideration of feasibility study and funding data submitted to procure total LOS system rather than LOS/troposcatter system originally planned incident to relocation of NATO, offeror is not entitled to award on basis of improper use of proprietary data. Feasibility study, a research and development effort, subject only to confidential treatment, and technical data consisting of well-known scientific principles, only unsolicited information requiring protection was funding data, and its use not constituting violation of proprietary data restriction, there is no justification to support sole-source procurement 20
Equal employment opportunity requirements. (*See* **Contracts, labor stipulations, nondiscrimination**)

CONTRACTS—Continued Page

Escalation clauses
Wage increases
Service Contract Act of 1965

Wage determinations issued under Service Contract Act of 1965, 41 U.S.C. 351–357, to establish currently prevailing wage rates may not include provision for escalation of wages on definite future dates at specified rates in view of fact phrase "as determined by the Secretary * * * in accordance with prevailing rates" in sec. 2(a)(1) of act means same as "based upon wages that will be determined by the Secretary of Labor to be prevailing" in sec. 1(a) of Davis-Bacon Act, which has been held to mean prevailing rates are rates existing at time contract is advertised. Therefore, as escalation provision in wage determination would have no legal effect, it should not be included in contracts subject to Service Contract Act ---------- 186

Labor stipulations
Federally financed projects
Jurisdiction

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

Nondiscrimination
Affirmative action programs

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

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

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Labor stipulations—Continued

Nondiscrimination—Continued

Affirmative action programs—Continued

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

Service Contract Act of 1965

Minimum wage, etc., determinations

Prospective wage rate increases

Wage determinations issued under Service Contract Act of 1965, 41 U.S.C. 351–357, to establish currently prevailing wage rates may not include provision for escalation of wages on definite future dates at specified rates in view of fact phrase "as determined by the Secretary * * * in accordance with prevailing rates" in sec. 2(a)(1) of act means same as "based upon wages that will be determined by the Secretary of Labor to be prevailing" in sec. 1(a) of Davis-Bacon Act, which has been held to mean prevailing rates are rates existing at time contract is advertised. Therefore, as escalation provision in wage determination would have no legal effect, it should not be included in contracts subject to Service Contract Act---------- 186

Labor surplus area awards. (*See* Contract, awards, labor surplus area)

Mistakes

Allegation before award. (*See* Bids, mistakes)

Cancellation

Computation of bid price

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

CONTRACTS—Continued Page
Mistakes—Continued
Unit price
All-or-none bids
Mistake alleged after award in bid price of item in all-or-none bid on scrap which had been prorated to determine high bidder on each item is not for solution under unilateral mistake rule holding bidder bound unless mistake is obvious. Although substantial differences in bid prices on surplus property are not sufficient to place contracting officer on notice of mistake as would similar differences in bid prices on new equipment, contracting officer was obliged to consider prorated prices as if bidder had inserted them in his bid, and contracting officer failing to verify prorated unit price that was 32 percent higher than second high bid and 57 percent higher than current market appraisal, award on erroneously priced item may be rescinded without liability to bidder--- 199
Negotiation
Administrative determinations
Finality
Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weathershield—method widely used in industry for several years—administrative position is upheld---------- 156
Changes, etc.
Oral *v.* written
Although in negotiating contract under 10 U.S.C. 2304(a)(10), mandate of 10 U.S.C. 2304(g) for discussions with all responsible offerors within competitive range was met by providing opportunity for price and technical proposal changes, oral notice of significant delivery changes did not meet standards of par. 3-805.1(e) of Armed Services Procurement Reg. that significant changes in requirements must be by written amendment and that oral notice should be used only in very limited circumstances. Failure to observe regulation was serious deficiency in negotiation process, but all offerors having been given ample opportunity to respond to oral advice, legal objection to validity of award would not be justified. However, corrective action should be taken to prevent repetition of deficiency---------- 156
Competition
Changes in price, specifications, etc.
Award of new long term concession contract to supersede existing one to contractor who had satisfactorily performed under successive contracts and who had been permitted to modify his initial proposal for improvement of concession facilities at substantial investments in order

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Negotiation—Continued

Competition—Continued

Changes in price, specifications, etc.—Continued

to match investment proposal of another bidder will not be disturbed, even though ordinarily modification of initial proposal requires solicitation of new proposals, as 16 U.S.C. 20d in authorizing preference to incumbent concessioner in renewal of contract or in negotiation of new contract for purpose of maintaining continuity of operations and operators, and in not providing bidding procedures, removes concession contracts from normal rules 88

Cost, etc., data

"Truth-in-Negotiation"

Exceptions to cost or pricing data

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

Evaluation factors

Competitive advantage precluded

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

Estimated cost higher than factor used

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

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Negotiation—Continued

Sole-source basis

Justification

Although line-of-sight (LOS) telecommunications system data submitted as unsolicited proposal under first step of two-step negotiated procurement that stipulated if data was used offeror would be entitled to award on sole-source basis was significant in causing Air Force upon consideration of feasibility study and funding data submitted to procure total LOS system rather than LOS/troposcatter system originally planned incident to relocation of NATO, offeror is not entitled to award on basis of improper use of proprietary data. Feasibility study, a research and development effort, subject only to confidential treatment, and technical data consisting of well-known scientific principles, only unsolicited information requiring protection was funding data, and its use not constituting violation of proprietary data restriction, there is no justification to support sole-source procurement---------- 20

Similarity between procurement specifications soliciting electric lift truck designed to install, transport, and remove bombs and missiles from igloos and revetments and unsolicited proposal submitted to furnish item that contained restrictive legends raises presumption offeror's proprietary data was improperly disclosed, and contracting officer unable to identify sources of material used in writing specifications, their use by Govt. to consummate competitive procurement without developer's consent would violate obligation of Govt. not to divulge proprietary data and, therefore, sole-source contract should be negotiated with offeror of proprietary data, or competitive proposals should be resolicited on basis of specifications which do not use proprietary data-- 28

Nondiscrimination. (*See* Contracts, labor stipulations, nondiscrimination)

Payments

Assignments. (*See* Claims, assignments)

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

Prices

Catalog items

Sale to public exemption to cost data submission

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

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Proprietary, etc., items. (*See* **Contracts, data, rights, etc.**)

Protests

Award approved

Prior to resolution of protest

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

Requirements

Estimated amounts basis

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

Service contracts

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

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

Specifications

Addenda acknowledgment

Unpriced

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

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

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Administrative determination conclusiveness
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Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weathershield—method widely used in industry for several years—administrative position is upheld---------- 156
Ambiguous
Bid responsiveness *v.* bidder responsibility
Where provisions of invitation for commercial instrument landing systems required bidders to submit evidence that identical equipment component had previously been installed at least at one location and had achieved level of performance specified are so loosely drawn that it is difficult to determine whether provisions affect responsibility of bidders or responsiveness of bids, award made pursuant to sec. 1-2.407-8(b)(3) of Federal Procurement Regs. before resolution of protest will not be disturbed absent clear and convincing evidence contracting officials' interpretation that not all components of equipment must be situated and checked at single location or their determination that equipment would meet required performance was in error---------- 9
Brand name or equal. (*See* Contracts, specifications, restrictive, particular make)
Conformability of equipment, etc., offered
Responsiveness fixed at time of bid opening
Second reevaluation of bids after contract award under invitation that required bidders to furnish shipping container data that disclosed fact low bidder's transportation costs on basis of actual shipping experience were in excess of those of second low bidder, does not affect fact that bid was responsive at time of bid opening within meaning of 10 U.S.C. 2305 and par. 2-301 of Armed Services Procurement Reg., and that bid conformed to specifications, which provided considerable leeway in method of packaging and shipping weights, including choice of container dimensions and use. Contracting officer's acceptance of dimensions and weights of containers offered in good faith for evaluation purposes was reasonable as difference in weights offered did not put him on notice of error---------- 129
Technical deficiencies
Administrative determination conclusiveness
Determination that bid did not meet special design features specified in invitation for bids on cartridge tape equipment solicited on brand name or equal basis that set forth salient features of brand name pursuant to par. 1-1206.1(a) of Armed Services Procurement Reg. is within jurisdiction of procuring activity responsible for drafting specifications to meet requirements of Govt., determination that is acceptable, notwithstanding differences in expert technical opinions, absent evidence of abuse of discretion, or that administrative judgment is clearly and

CONTRACTS—Continued Page
Specifications—Continued
Conformability of equipment, etc., offered—Continued
Technical deficiencies—Continued
Administrative determination conclusiveness—Continued
unmistakably in error. Therefore, where evidence shows design features used were material requirement and not duly restrictive, rejection of nonconforming bid was proper 195
Where contracting agency in "brand name or equal" purchase description goes beyond make and model of brand name and specifies particular design features, such features must be presumed to have been regarded as material and essential to needs of Govt., at least at time specifications were drawn and bids solicited. Therefore, as acceptance of bid that did not conform to material and essential design features specified in invitation for bids could only be accomplished by waiver of advertised specifications, administrative determination of bid nonresponsiveness to solicitation and bidder ineligibility for award was proper and will not be questioned 195
Defective
Cancellation of invitation
Failure of invitation for purchase, lease-purchase, or rental of microfiche reader-printer units to provide for evaluation of and request delivery date for copy paper needed for units on which information and prices were solicited, or to establish lease period, is "compelling" reason contemplated by sec. 1-2.404-1 of Federal Procurement Regs. for cancellation of invitation after bid opening. Although cancellation of invitation after disclosure of bid prices is regrettable, invitation in not providing for consideration of all factors of cost was defective invitation, and to award contract for reader-printer units without regard to cost of paper would not be in best interests of Govt 135
Contracting officers interpretation acceptance
Where provisions of invitation for commercial instrument landing systems required bidders to submit evidence that identical equipment component had previously been installed at least at one location and had achieved level of performance specified are so loosely drawn that it is difficult to determine whether provisions affect responsibility of bidders or responsiveness of bids, award made pursuant to sec. 1-2.407-8(b)(3) of Federal Procurement Regs. before resolution of protest will not be disturbed absent clear and convincing evidence contracting officials' interpretation that not all components of equipment must be situated and checked at single location or their determination that equipment would meet required performance was in error 9
Minimum needs requirement
Administrative determination
Administrative choice of one of two possible methods of producing plastic weathershields for gun mounts authorized to be procured by negotiation under 10 U.S.C. 2304(a)(10), as item was impracticable to obtain by competition, is not subject to legal objection, absent evidence contracting agency acted arbitrarily in determining that lay-up over foam concept selected was feasible and practical. On issues of technical nature, U.S. GAO must rely on judgment of contracting officials possessing expertise GAO lacks—officials who have responsibility of drafting specifications that are adequate to meet minimum needs of Govt. Therefore, in dispute concerning technical aspects of method selected to produce weather-shield—method widely used in industry for several years—administrative position is upheld 156

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Minimum needs requirement—Continued
Cancellation and reinstatement of invitation
Cancellation and readvertising of invitation for copper superconductor wire upon determination lower resistivity ratio wire offered by lowest bidder equally met minimum needs of Govt. as did higher ratio more costly wire solicited was not required and original invitation should be reinstated, as adequate competition had been obtained under original invitation and only relatively small price difference existed between two lowest bids. Although revision of specifications is "compelling reason" for rejecting all bids and readvertising procurement, cancellation of invitation should be limited to instances in which award under original specifications would not serve Govt.'s needs, but when as here specifications do, readvertising after exposure of bids would be prejudicial to competitive bidding system---------- 211
Erroneously stated
Contract award to low bidder which would have permitted bidder who had deliberately deviated from specification requirements to furnish item neither asked for in invitation nor offered by other bidders would not be contract offered to all bidders and, therefore, rejection of nonconforming low bid was proper, even though deliberately substituted item would have met minimum needs of Govt. To insure benefits of competition to Govt., it is essential that contract awards be made on basis of specification requirements submitted for competition, and deviation to requirements may only be waived if deviation does not go to substance of bid or work injustice on other bidders, and deviation in low bid having been deliberately taken may not be considered trivial or minimal so as to justify waiver as minor irregularity---------- 211
Restrictive
Particular make
Special design features
Where contracting agency in "brand name or equal" purchase description goes beyond make and model of brand name and specifies particular design features, such features must be presumed to have been regarded as material and essential to needs of Govt., at least at time specifications were drawn and bids solicited. Therefore, as acceptance of bid that did not conform to material and essential design features specified in invitation for bids could only be accomplished by waiver of advertised specifications, administrative determination of bid nonresponsiveness to solicitation and bidder ineligibility for award was proper and will not be questioned---------- 195
Bidding time provided in invitation for bids soliciting brand name or equal equipment of 19 calendar days or 12 working days pursuant to par. 2-202.1 of Armed Services Procurement Reg. that specifies bidding time of not less than 15 days for standard commercial articles and not less than 30 calendar days for other than such articles, was too short a period for manufacturers required to modify their standard equipment, and 30-day bidding period has been recommended for future use in invitations soliciting modification of brand name or equal equipment. However, under current procurement, shorter bidding period was not prejudicial to bidder who, had he contemplated equipment modification, was not precluded from requesting extension of time---------- 195

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Particular make—Continued
Technically deficient
Determination that bid did not meet special design features specified in invitation for bids on cartridge tape equipment solicited on brand name or equal basis that set forth salient features of brand name pursuant to par. 1-1206.1(a) of Armed Services Procurement Reg. is within jurisdiction of procuring activity responsible for drafting specifications to meet requirements of Govt., determination that is acceptable, notwithstanding differences in expert technical opinions, absent evidence of abuse of discretion, or that administrative judgment is clearly and unmistakeably in error. Therefore, where evidence shows design features used were material requirement and not duly restrictive, rejection of nonconforming bid was proper 195
Tests
Benchmark
Proprietary data
Software and related programs developed partially at Govt. expense solely for operation of computer service program "Legal Information Through Electronics" (LITE) when contractor experienced difficulty in performing, properly was used to solicit benchmark tests to create competition. Not only did Rights in Data clause of contract provide that data become sole property of Govt., but when mixture of private and Govt. funds are used to develop data, rights are not allocatable on investment percentage basis and Govt. acquires unlimited rights to data. Former contractor delayed unreasonably in waiting until after award of a new LITE contract to object to use of data, and as GAO has never ordered cancellation of contract for improper disclosure of proprietary data, it will not do so when cancellation is not justified 124
Subcontracts
Bid shopping
Bidder listed as subcontractor
Low bidder awarded contract for modernization of a Govt. hospital under invitation specifying listing of subcontractors for electrical work category of project only, who although not manufacturer listed itself in bid as subcontractor for electrical work consisting of such off-the-shelf items as substations, switch gear, and transformer, had submitted responsive bid. Requirement for listing subcontractors is intended to discourage bid shopping and encourage competitive market among construction subcontractors, and does not apply to firms assembling off-the-shelf items but to manufacturers and fabricators who are required to meet particular invitation specifications. Therefore, construction project is subject to invitation provision that contracting officer approve electrical equipment to be installed and not to provision for listing subcontractors 120
Small business set-asides
Notwithstanding that small business concern awarded 100 percent set-aside contract for lift plugs subcontracted major portion of manufacturing process to large business firm, only performing painting, dipping, and packaging of plugs, cancellation of contract is not required, as small business concern is considered to have made significant contribution to production of "end item" within terms of contract issued pursuant to par. 1-706.5 of Armed Services Procurement Reg., which does not define term "end item." Absent promulgation of regulations to

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limit extension of large business subcontracting in order to further spirit and intent of statutes affecting small business participation in Govt. contracting, there is no basis to object to extent of large business subcontracting 41
"Truth-in-Negotiation." (*See* Contracts, negotiation, cost, etc., data, "Truth-in-Negotiation")
COURTS
Judgments, decrees, etc.
Acceptance as precedent by General Accounting Office
Jones *v.* United States, 187 Ct. Cl. 730
Rule in *Jones* v. *U.S.* (187 Ct. Cl. 730) holding retired enlisted member was entitled to be advanced on retired list under 10 U.S.C. 6151 to grade of chief warrant officer, W–3, highest permanent grade formerly held by him and in which he served satisfactorily, even though statute only authorized advancement to grade of warrant officer, W–1, highest grade in which he served satisfactorily under temporary appointment, should be applied to all advancements under sec. 6151, as well as advancements under 10 U.S.C. 3963(a), 3964, 8963(a), and 8964, providing that amount of retired pay depends upon service in "highest temporary grade," in view of fact that court based its ruling on earlier *Grayson*, *Friestedt*, and *Neri* decisions and considered all arguments advanced in *Jones* case against conclusion reached 113
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Compensation
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Although upon waiver of collection of erroneous payment resulting from promotion in violation of Whitten Amendment, payment is deemed validated pursuant to Pub. L. 90–616 (5 U.S.C. 5584(e)), erroneous personnel action that gave rise to overpayment is not validated. Therefore, employee whose erroneous promotion on June 2, 1968 from GS–7 to GS–9 position is corrected Jan. 26, 1969, and he is properly promoted to GS–9 on Mar. 23, 1969, may only count period of service from June 2, 1968, to Jan. 26, 1969, for within grade increase purposes in same manner and to same extent as if premature promotion had never been processed, and service for period of erroneous promotion may be counted as GS–7 service and not GS–9 service for step-increase purposes 18
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Although procurement of steel towers for installation as part of communication system in West Germany was not subject to Buy American Act, as procurements for use outside U.S. are exempt from restrictions of act, and, therefore, bids of low Canadian bidder—sponsored by Canadian Commercial Corp.—and domestic bidder whose bid exceeded foreign bid by more than 50 percent properly were evaluated on equal competitive basis and award made to low, responsible bidder, procurement should have been made subject to Balance of Payments Program. However, as provisions of Program were inadvertently omitted from invitation, contracting officer had not referred domestic bid that exceeded foreign bid by more than 50 percent to higher authority for approval as required, and absent certainty of approval, cancellation of award made in good faith would not be in best interests of Govt..... 176
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In recommending termination of purported contract that had been awarded to bidder permitted to correct its bid price because it had been erroneously computed on estimated requirements 24 times Govt.'s true estimate and mistake may have affected amount bid, and that correction was tantamount to submission of second bid, U.S. GAO did not exceed its review authority. Standard of review pursuant to Wunderlich Act (41 U.S.C. 321, 322) applies to contract disputes and not to mistakes in bid, and finality of administrative determination does not apply to questions of law. For years GAO decided all questions concerning corrections of bid mistakes, and even with delegation of such authority, Comptroller General is not deprived of right to question administrative determinations, nor bidder of right to request his decision. 152

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

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

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

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Extension of enlistment
Simultaneously with acceptance of Reserve officer appointment

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

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Legal status of spouse of an officer of uniformed services who had been granted divorce by State of Nevada that was not recognized by wife's matrimonial domicile, State of N. Carolina, in court proceedings in which she was also granted support and custody of child born of marriage, and at which husband was present and consented to decree, remained that of officer's wife. Therefore, upon death of officer, wife having maintained her status as lawful spouse is entitled to payment of 6 months' death

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MILITARY PERSONNEL

Death or injury

Injured while stationed in United States

Transportation rights

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status 101

Deceased. (*See* **Decedents' Estates, pay, etc., due military personnel**)

***De facto* status**

What constitutes

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

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Medical officers

Internship training

Army Reserve officer designated as having military occupational specialty of general medical officer, who neither before nor after entering into service had completed internship training prescribed by par. 10503b of Dept. of Defense Military Pay and Allowances Entitlements Manual is, nevertheless, entitled from date of entering on active duty to special pay prescribed by 37 U.S.C. 302(a) for medical and dental officers. The statute does not require internship in every case before entitlement to special pay, and Army Surgeon General had determined that officer met educational and professional requirements for appointment to Army Medical Corps, and that he was not required to undergo internship training to perform duties assigned to him as research physician---------- 54

Medically unfit

Status

The holding in 48 Comp. Gen. 377 that inductees into military service who because they did not meet medical fitness or retention medical fitness standards were released from service are entitled to basic pay for period of induction, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, is applicable to inductees released on basis of void induction prior to decision. Decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, provisions of pars. 1–8d and 1–8.1a(1) of Army Reg. 635–40, to effect that disease or injury that is not recorded at time of entrance on duty is presumed to be service connected—any doubt to be resolved in favor of member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377--- 77

Missing, interned, etc., persons

Applicability of Missing Persons Act

Member injured while stationed in United States

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status---------- 101

Overpayments

De facto **rule**

Additional or special pay authorized for members of uniformed services payable only upon compliance with statutory and regulatory provisions, *de facto* rule which permits retention of erroneous payments of pay and allowances received in good faith by member while in *de facto* status may not be extended to erroneous payments of reenlistment bonus and variable reenlistment bonus. Member who prior to discharge preceding reenlistment was erroneously advanced to Specialist Six, pro-

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motion subsequently corrected, was not serving in grade E–6 when discharged and, therefore, payments of reenlistment bonus and variable reenlistment bonus computed on basis of pay grade E–6 were made contrary to requirements of 37 U.S.C. 308(a) and (g), and overpayments of additional pay may not be waived under *de facto* rule---------- 51
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Medically unfit persons
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Reenlistment bonus. (*See* Gratuities, reenlistment bonus)
Reserve Officers' Training Corps
Programs at educational institutions
Phase-out of programs
Members of Senior Reserve Officers' Training Corps (ROTC) who complete both third and fourth years of military training during third year at institutions where ROTC program is being phased-out and continue to participate in program may be paid monetary benefits during fourth academic year—payment approval limited to Senoir ROTC participants. Member who in 3 years completes 4-year course of military instruction has fully performed under ROTC enrollment contract and he is entitled to benefits provided by contract, and also under 10 U.S.C. 2108(c) Secretary of Defense is authorized to excuse member from portion of ROTC prescribed course of military instruction when found qualified on basis of previous education, military experience, or both--- 171
Retired
Contracting with Government
Liaison activities
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MILITARY PERSONNEL—Continued Page

Savings deposits

Tax indebtedness

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions 150

Severance pay. (*See* Pay, severance)

Six months' death gratuity. (*See* Gratuities, six months' death)

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

MISSING PERSONS ACT

Military personnel

Members injured while stationed in United States

Transportation rights

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status 101

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Compensation. (*See* **Compensation**)

Transfers

Relocation expenses

Housetrailer expense reimbursement

Sale of trailer

The June 26, 1969 revision of sec. 4.1b of Bur. of Budget Cir. No. A–56 prescribing that housetrailer is within scope of terms "residence" or "dwelling" as those terms are used in Circular, brokerage fee paid by transferred employee to sell mobile home at old duty station may be reimbursed to him. Although fee of 15 percent of actual sales price paid is normal commission charged incident to sale of residence by dealers in area from which employee transferred, reimbursement to him is limited under sec. 4.2h to fee that does not exceed 10 percent of actual sales price, section authorizing reimbursement in amount not to exceed 10 percent or $5,000, whichever is smaller amount. 48 Comp. Gen. 115; B–163856, Apr. 30, 1968; B–165255, Oct. 24, 1968, modified 15

Time limitation

Sale and lease of houses

Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89–516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A–56, may not be waived—Circular a statutory regulation having force and effect of law 145

Travel time

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

PAY

Active duty

Medically unfit personnel

The holding in 48 Comp. Gen. 377 that inductees into military service who because they did not meet medical fitness or retention medical fitness standards were released from service are entitled to basic pay for period of induction, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, is applicable to inductees released on basis of void induction prior to decision. Decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, provisions of pars. 1–8d and 1–8.1a(1) of Army Reg. 635–40, to effect that disease or injury that is not recorded at time of entrance on duty is presumed to be service connected—any doubt to be resolved in favor of member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377 77

Where medically unfit persons were released on basis of void induction prior to 48 Comp. Gen. 377 holding that physically or mentally unqualified inductees into military service are entitled to basic pay, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, military records of erroneously released persons may be corrected to show discharge as of date of release from military custody and control, any disability retirement or severance pay determination effected under 10 U.S.C. 1552 to consider aggravation of unfit condition or new or addi-

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Active duty—Continued

Medically unfit personnel—Continued

tional unfitting condition acquired while on duty. Absent change in physical condition while on active duty, discharge may be made for convenience of Govt. without disability retirement or severance pay, and all discharged persons may be informed of their entitlement to pay and allowances that accrued prior to release---------- 77

Additional

Medical and dental officers. (*See* **Pay, medical and dental officers**)

Overpayments

De facto **rule**

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

Medical and dental officers

Internship payment prohibition

Army Reserve officer designated as having military occupational specialty of general medical officer, who neither before nor after entering into service had completed internship training prescribed by par. 10503b of Dept. of Defense Military Pay and Allowances Entitlements Manual is, nevertheless, entitled from date of entering on active duty to special pay prescribed by 37 U.S.C. 302(a) for medical and dental officers. The statute does not require internship in every case before entitlement to special pay, and Army Surgeon General had determined that officer met educational and professional requirements for appointment to Army Medical Corps and that he was not required to undergo internship training to perform duties assigned to him as research physician------ 54

Retired

Advancement on retired list

Permanent *v.* temporary grade

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

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Increases
Entitlement
To determine if Uniform Retirement Date Act (5 U.S.C. 8301) is applicable to Army and Air Force officers who if they first qualify for retirement upon completion of 20, 30, or 40 years of service prior to June 1968, would be entitled to retired pay computed under Formula B of 10 U.S.C. 3991 or 8991, subject to footnote 2, on basis of monthly active duty pay rates applicable on date of retirement, or if officers are entitled to retired pay computed at higher rates of active duty pay prescribed by E. O. No. 11414, effective July 1, 1968, time of qualification for retirement is element for consideration 80
Retirement on effective date of increase
Member of uniformed services who is eligible to retire July 1, 1968, effective date of basic pay increase, either for disability retirement under 10 U.S.C. ch. 61, by virtue of Uniform Retirement Date Act, or voluntarily for years of service under 10 U.S.C. 6323, is entitled to retired pay computed at higher rates of active duty pay prescribed by E.O. No. 11414, not on basis of disability retirement—as rate applicable to disability retirement would be rate in effect as if retirement had not occurred under act—but on basis that sec. 6323 retirement, which neither subject to Uniform Retirement Date Act nor Formula 4 of 10 U.S.C. 1401, that requires computation of retired pay at rate in effect day before retirement, is "other provision of law" most favorable to member prescribed by sec. 1401, and he, therefore, is entitled to retired pay computed at higher rate of active duty basic pay in effect July 1, 1968 80
The fact that member of uniformed services had not requested voluntary retirement based on years of service when qualifying for retirement prior to July 1, 1968, does not defeat right to retired pay computed under any "other provision of law" most favorable to him as prescribed by 10 U.S.C. 1401 when he retires on July 1, 1968, effective date of basic pay increases provided by E.O. No. 11414, dated June 13, 1968, and member, therefore, is entitled to retired pay computed at higher rate of pay made effective July 1, 1968 80
Under Public Law 89–132
Retired pay of member of uniformed services retired under 10 U.S.C. 1293, effective September 1, 1965, who had also qualified for voluntary retirement for years of service under 10 U.S.C. 6323, may be computed on basis of increased rate of basic pay prescribed by Pub. L. 89–132 (37 U.S.C. 203(a)), effective Sept. 1, 1965. The act silent as to whether or not members whose retirements became effective on its effective date were authorized to compute their retired pay on basis of increased rates, principles in 43 Comp. Gen. 425 and 44 Comp. Gen. 373; *id.* 584, apply 80
Severance
Disability retirement
Medically unfit personnel at time of induction
The holding in 48 Comp. Gen. 377 that inductees into military service who because they did not meet medical fitness or retention medical fitness standards were released from service are entitled to basic pay for period of induction, and if qualified to disability retirement or separation under 10 U.S.C. ch. 61, is applicable to inductees released

PAY—Continued Page
Severence—Continued
Disability retirement—Continued
Medically unfit personnel at time of induction—Continued
on basis of void induction prior to decision. Decision relating to persons whose disability was dormant or overlooked and not to persons whose disability existed prior to induction, provisions of pars. 1–8d and 1–8.1a(1) of Army Reg. 635–40, to effect that disease or injury that is not recorded at time of entrance on duty is presumed to be service connected—any doubt to be resolved in favor of member—are not applicable to cases for consideration pursuant to 48 Comp. Gen. 377__ 77

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

What constitutes
Savings deposit

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposits program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions---------- 150

PAYMENTS
Erroneous payments
Military pay and allowances
Lack of due care in making payment

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

POST OFFICE DEPARTMENT Page

Employees

Transfers

Transportation and relocation expenses

Effect of delayed authorization

Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89–516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A–56, may not be waived—Circular a statutory regulation having force and effect of law 145

PUBLIC UTILITIES

Contracts

In lieu of taxation

An invoice bearing interest presented by State Drainage District to Federal Govt. in amount assessed against Govt. for rehabilitation of drainage ditch that is computed in same manner as taxes levied against property owners other than Federal Govt. imposes a tax, and U.S. exempted by Constitution from State taxation, tax may not be collected by designating tax an invoice or statement for services. While payment of tax may not be authorized, claim for amount representing fair and reasonable value of services received may be presented on *quantum meruit* basis, and utility type service agreement entered into for future services, agreement to provide for compensation to cover fair and reasonable value of services to be furnished 72

SAVINGS DEPOSITS

Set-off

Tax indebtedness

Military personnel

The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions 150

SET-OFF

Contract payments

Tax debts

The right of U.S. as creditor to offset amount owed to contractor is not precluded by assignee and attorney claims where loan by assignee bank pursuant to Assignment of Claims Act of 1940, as amended, had been paid and only outstanding loan is not within orbit of act, not having been made for purpose of performing Govt. contracts, and where attor-

SET-OFF—Continued Page
Contract payments—Continued
Tax debts—Continued
ney's fee is matter between attorney and client, absent statutory provision or agreement based on such provision for payment to attorney by Govt. Therefore, award to contractor on basis that contract termination should have been for convenience and not for default, may be set off against contractor's tax liability ---------- 44
SMALL BUSINESS ADMINISTRATION
Investment companies
Participation in guaranteed loan programs
Authority of small business investment companies (SBIC) to provide equity capital for incorporated small-business concerns under sec. 304(a) of Small Business Investment Act, and to make long-term loans (sec. 305(a)) to finance growth, modernization, and expansion of incorporated and unincorporated small-business concerns does not include authority for companies to participate as lending institutions in guaranteed loan programs with Small Business Administration (SBA), authorized under sec. 7(a) of Small Business Act to make loans either directly or in cooperation with banks or other lending institutions, and to guarantee loans to small concerns in distressed areas, or owned by low-income individuals under sec. 402(a) of Economic Opportunity Act of 1964 and, therefore, SBA may not guarantee SBIC loans to disadvantaged small concerns ---------- 32
STATE DEPARTMENT
Destitute seaman transportation
Liability
Payment to shipping company for returning destitute American seaman from overseas may not exceed rate agreed upon between consular officer, who certified seaman was unfit to perform duty, and ship's master, absent determination required by 46 U.S.C. 679 that Secretary of State deems payment of additional compensation claimed "equitable and proper," and Dept. of State declining to furnish such determination because master, as company's agent, is considered to have authority to contract in company's name, no additional amount is due shipping company and its claim for additional compensation may not be allowed -- 58
STATES
Federal aid, grants, etc.
Construction projects
Labor stipulations in contracts
Funds withheld from federally aided or financed construction contracts to which U.S. is not party for wage underpayments that normally would be distributed by States or other recipients who are parties to contracts and have primary responsibility for administration of labor stipulations of contracts, but for fact that workers cannot be located, should not be transmitted to U.S. GAO as Federal-aid labor standard statutes do not confer on GAO authority similar to that contained in Davis-Bacon Act and Work Hours Act of 1962, to make direct payments to laborers and mechanics from withheld contract earnings as restitution for wage underpayments. However, claims for undistributed holdings which cannot be settled administratively may be submitted to GAO Claims Division. 44 Comp. Gen. 561, modified ---------- 162

STATES—Contniued Page

Federal aid, grants, etc.—Continued

Disaster relief

Eligibility as public facility

The phrase "essential public facilities" as used in so-called Federal Disaster Act (42 U.S.C. 1855–1855g), which authorizes assistance in any major disaster to States and local governments for emergency repairs to and temporary replacements of public facilities, does not mean all public facilities. To hold otherwise would make the word "essential" superfluous or void, contrary to rule of statutory construction. Phrase may be defined as relating to those essential public facilities that are designed to serve public at large, but limited to extent of public entity responsibility, so that when contract between public entity and private entity exists, essential public facility involved shall be regarded as whatever public entity's responsibilities are under contract..... 104

Leased property

Damages

Disaster assistance

Cost of emergency repairs occasioned by tornado damage to municipal airport buildings that are 80 percent leased and rental income used to maintain facilities which are available for use by U.S. military and naval aircraft may be reimbursed under so-called Federal Disaster Act (42 U.S.C. 1855–1855g), authorizing assistance to States and local governments to repair or provide replacements of essential public facilities damaged during major disaster, to involved municipal airport authority to extent of its responsibility under lease to repair leased buildings or terminate lease..... 104

SUBSISTENCE

Per diem

Military personnel

Maneuvers, etc.

Amendatory orders for per diem

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

Temporary duty

Continuous mission *v.* noncontinuous travel

Members of uniformed services attached to Fleet Tactical Support Squadron, Naval Air Station, Norfolk, Va., who, orderd to perform two flights to Cecil Field, Fla., and return to carry passengers and cargo, depart at 3:40 p.m. on first flight, returning at 11:20 p.m. (7 hours, 40 minutes), and at 1:15 a.m. next day depart on second flight, returning to Norfolk at 6:40 a.m. (5 hours, 25 minutes) are not entitled to any per diem incident to mission. Although on continuous mission, members were not in continuous travel status, having returned to permanent

SUBSISTENCE—Continued Page
Per diem—Continued
Military personnel—Continued
Temporary duty—Continued
Continuous mission *v.* noncontinuous travel—Continued
duty station for performance of duty—passenger and cargo discharge—thus interrupting their travel and separating travel into two distinct periods of less than 10 hours to preclude payment under par. M4205–4 of Joint Travel Regs 173
TAXES
Federal
Indebtedness
Military personnel
The status of savings deposits as part of salary and wages of enlisted members of uniformed services is not affected by act of Aug. 14, 1966, which amended 10 U.S.C. 1035, to provide new savings deposit program and to exempt deposits from liability for debt, including any indebtedness to U.S., and deposits, therefore, are subject to levy by Internal Revenue Service (26 U.S.C. 6331(a)) for unpaid taxes. The 1966 act merely continued in effect provisions of earlier act than 1954 Internal Revenue Code under which member's deposits were not exempt from levy for unpaid taxes, and savings deposits are not included in enumeration of property exempted from tax levy in Internal Revenue Code, Federal Tax Lien Act of 1966, or other legislative provisions prescribing tax levy exemptions .. 150
State
Government immunity
Assessment for local improvements
An invoice bearing interest presented by State Drainage District to Federal Govt. in amount assessed against Govt. for rehabilitation of drainage ditch that is computed in same manner as taxes levied against property owners other than Federal Govt. imposes a tax, and U.S. exempted by Constitution from State taxation, tax may not be collected by designating tax an invoice or statement for services. While payment of tax may not be authorized, claim for amount representing fair and reasonable value of services received may be presented on *quantum meruit* basis, and utility type service agreement entered into for future services, agreement to provide for compensation to cover fair and reasonable value of services to be furnished 72
Rented equipment
Hawaii General Excise Tax imposed on motor vehicle rental agency, which although in nature of sales or gross receipts tax levied on lessor is by tradition, custom, and usage passed on to lessee as separate item in billing and added to rental price of vehicle, is not tax within scope of exemption contained in sec. 237–25(a)(3) of Hawaii Revised Statutes pertaining to sale of vehicles to U.S. and Federal Govt. is liable to lessor of cars for excise tax unless rental agreement provides otherwise. Determination of U.S. liability to pay State sales tax depends on whether incident of tax is on the vendor or vendee, and when imposed on vendor, U.S. under its constitutional prerogative is not immune from liability unless expressly exempt 204

TIME Page

Daylight saving *v.* Standard

Uniform Time Act of 1966

Application

Under invitation providing for bids to be opened at 11 a.m. central standard time (c.s.t.), on May 28, 1969, bid hand-carried and delivered at 11:20 a.m., c.s.t., after bids had been read was properly rejected as late bid. Contention that because invitation did not indicate "c.s.t." would be interpreted as central daylight savings time, 11 a.m., c.s.t., meant 12 noon, daylight savings time, ignores fact that with enactment of Pub. L. 89–387, effective Apr. 1, 1967, there is no distinction between standard and daylight time, and that within each time zone there is only preestablished standard time regardless that during certain portion of year standard time is advanced 1 hour, thus making standard time and popular reference to "Daylight Saving Time" one and same. To preclude future differences in opinion "local time at place of bid opening" will be substituted for "standard time"---------- 164

TRANSPORTATION

Bills of lading

Description

"Freight all kinds"

Claim for refund of transportation overcharges recovered on shipment described on bill of lading as "Freight all kinds" (FAK) which is based on conjecture shipment may have contained contraband articles because unrelated FAK shipment had contained contraband is denied, conjecture being insufficient to overcome presumption of correctness of bill of lading description prepared pursuant to applicable quotation, and carrier having failed to exercise right provided by tariff to inspect shipment or to require other evidence of nature of lading at time of shipment, U.S. GAO has no legal obligation to investigate contents of FAK shipment and is entitled to rely on bill of lading description for settlement of freight charges---- 6

A major advantage to shipper and carrier alike in use of "Freight all kinds" (FAK) rates is elimination of necessity to describe and rate many various articles comprising mixed-truckload shipments, advantage that would be negated if long after shipment had moved U.S. GAO was required to investigate every FAK lading reached in audit of Govt. transportation accounts, because administrative burden would be out of all proportion to any benefits accruing from use of FAK rates and, therefore, questions concerning FAK ladings should be raised by carrier's agent at time shipment is accepted for transportation---------- 6

Dependents

Military personnel

Injured while stationed in United States

Members of uniformed services, regardless of pay grade, who incur an injury by any means while stationed inside U.S.—whether or not they are in a duty, leave, or en route status—are entitled to transportation of dependents, household and personal effects, and one automobile pursuant to 37 U.S.C. 554, and Joint Travel Regs. may be revised accordingly. Amendments to sec. 12 of Missing Persons Act and its reenactment as 37 U.S.C. 554 removed restriction that act applies only to those members injured outside U.S. However, absence reference in 37 U.S.C. 554 to disease or illness, section does not apply to member who becomes ill or contracts disease which does not result in death while in active duty status---------- 101

TRANSPORTATION—Continued Page
Dependents—Continued
Transfers
Subsequent travel of dependents
Postal employee who upon appointment to position of postal service officer effective Dec. 17, 1966, after training period during which he had been paid per diem, is advised not to move to new duty station in anticipation of rearrangement of territories—plan which was not accomplished due to budgetary restrictions—may not nearly 3 years after promotion be authorized transportation of dependents and household effects, and benefits of Pub. L. 89–516, as time limitations pertaining to movement of dependents and household effects, and reimbursement of expenses incident to sale of dwelling at former station contained in Bur. of Budget Cir. No. A–56, may not be waived—Circular a statutory regulation having force and effect of law ---------- 145
Rates
Mixed shipments
"Freight all kinds"
Claim for refund of transportation overcharges recovered on shipment described on bill of lading as "Freight all kinds" (FAK) which is based on conjecture shipment may have contained contraband articles because unrelated FAK shipment had contained contraband is denied, conjecture being insufficient to overcome presumption of correctness of bill of lading description prepared pursuant to applicable quotation, and carrier having failed to exercise right provided by tariff to inspect shipment or to require other evidence of nature of lading at time of shipment, U.S. GAO has no legal obligation to investigate contents of FAK shipment and is entitled to rely on bill of lading description for settlement of freight charges ---------- 6
UNIONS
Federal service
Dues
Deduction discontinuance
Discontinuance of payroll allotment for membership dues in favor of employee organization is subject to 5 U.S.C. 5525 as implemented by Civil Service Regs. and, therefore, such allotment may only be revoked twice a year. A request for revocation received betwen Mar. 2 and Sept. 1 is discontinued at beginning of first pay period commencing after Sept. 1, and revocation request received between Sept. 2 and Mar. 1 is discontinued effective at beginning of pay period commencing after Mar. 1. Whether employee may have legal claim against employee organization for dues paid under allotment covering periods subsequent to date he resigned his membership is matter between employee and organization ---------- 97
VEHICLES
Purchases
Passenger motor vehicles
Purchase of passenger motor vehicles to conduct research and development programs for prevention and control of air pollution is not subject to appropriation authorization requirement of 31 U.S.C. 638a(a), nor maximum price limitation in sec. 638c, as these statutory prohibitions are intended for imposition on purchase of vehicles to be used to carry passengers. Therefore, if certificate to effect that vehicles are necessary to effectuate purpose of research programs contemplated and

VEHICLES—Continued Page
Purchases—Continued
Passenger motor vehicles—Continued
that they will not be used to carry passengers appears on or accompanies payment voucher, no objection to payment for vehicles will be raised 202
VESSELS
Crews
Destitute seamen
Liability for transporting
Payment to shipping company for returning destitute American seaman from overseas may not exceed rate agreed upon between consular officer, who certified seaman was unfit to perform duty, and ship's master, absent determination required by 46 U.S.C. 679 that Secretary of State deems payment of additional compensation claimed "equitable and proper," and Dept. of State declining to furnish such determination because master, as company's agent, is considered to have authority to contract in company's name, no additional amount is due shipping company and its claim for additional compensation may not be allowed 58
WORDS AND PHRASES
"Public facilities"
The phrase "essential public facilities" as used in so-called Federal Disaster Act (42 U.S.C. 1855–1855g), which authorizes assistance in any major disaster to States and local governments for emergency repairs to and temporary replacements of public facilities, does not mean all public facilities. To hold otherwise would make the word "essential" superfluous or void, contrary to rule of statutory construction. Phrase may be defined as relating to those essential public facilities that are designed to serve public at large, but limited to extent of public entity responsibility, so that when contract between public entity and private entity exists, essential public facility involved shall be regarded as whatever public entity's responsibilities are under contract 104