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[B-171781]

Compensation—Overtime—Inspectional Service Employees—Skyjacking Prevention

Customs inspectors who conduct predeparture inspection of air passengers bound for overseas as a deterrent to skyjacking in accordance with a Presidential program are not entitled to the payment of overtime compensation under 19 U.S.C. 267, but rather under the Federal Employees Pay Act of 1945 (5 U.S.C. 5542), even though the inspections are necessary for the safety of passengers and for the protection of air carriers against air piracy, as the inspection duties involved would not be the custom duties prescribed by 19 U.S.C. 267, which are duties performed in connection with lading on Sundays, holidays, or at night of merchandise or baggage entered for transportation under bond or for exportation with the benefit of drawback, or other merchandise or baggage required to be laden under customs supervision.

To the Secretary of the Treasury, April 5, 1971:

This is in reply to letter of January 25, 1971, from the Assistant Secretary (Enforcement and Operations), reference CC 191.11 G, requesting our decision as to whether customs inspectors may receive overtime at the rate specified in section 5 of the act of February 13, 1911, as amended, 19 U.S.C. 267, when they are assigned to conduct predeparture inspection of passengers embarking on selected aircraft bound for overseas destinations in accordance with part of a Presidential program to deal with the problem of air piracy. The inspection is carried out pursuant to a memorandum of understanding between the Department of the Treasury and the Department of Transportation.

The letter of the Assistant Secretary reads in part as follows:

> Customs has in the past paid 1911 Act overtime, and obtained reimbursement therefor, when overtime night, Sunday or holiday services were performed in connection with the clearance of vessels and aircraft pursuant to the provisions of 46 U.S.C. 91 and 49 U.S.C. 1509. Also, it appears that the services in connection with predeparture inspections may properly be requested by a Government agency as well as by the public, since heretofore Customs has obtained reimbursement from the Department of Commerce appropriation for inspectional services in connection with the Export Control Regulations (15 CFR 368.1, et seq.). The Federal Aviation Agency has agreed in general to reimburse the Bureau of Customs out of its appropriated funds for predeparture inspections of air passengers and their baggage (although they have not been asked specifically to agree to payments for overtime services at 1911 Act rates).
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> * * * * * * *
>
> The actual predeparture inspectional operation performed by the individual inspector is essentially similar to that performed on passengers and baggage arriving from overseas. At times, the same Customs officer performing inspectional services at nights or on Sundays or holidays for passengers and baggage on flights arriving from overseas may also be detailed to perform inspectional services on a departing flight as a deterrent to skyjacking; at other times, one inspector may be assigned during the entire overtime period to overseas arrivals while another performs predeparture inspections.

Although 19 U.S.C. 267 does not by its own terms limit its application to merchandise, passengers, or cargo arriving from overseas, our

decision has been requested since the implication in certain of our prior decisions has been that purely enforcement functions may, perhaps, not be subject to the rates in such statute. The Assistant Secretary also returned the claim of Mr. Lebron H. Herring (Z-2437593), who performed overtime work in connection with the air security program, for the difference in overtime paid him under the provisions of 5 U.S.C. 5542 and that payable under 19 U.S.C. 267, which was forwarded to the Bureau of Customs by our Claims Division.

Section 267 of Title 19 reads in part as follows:

> The Secretary of the Treasury shall fix a reasonable rate of extra compensation for overtime services of inspectors, storekeepers, weighers, and other customs officers and employees who may be required to remain on duty between the hours of five o'clock postmeridian and eight o'clock antemeridian, or on Sundays or holidays, to perform services in connection with the lading or unlading of cargo, or the lading of cargo or merchandise for transportation in bond or for exportation in bond or for exportation with benefit of drawback, or in connection with the receiving or delivery of cargo on or from the wharf, or in connection with the unlading, receiving, or examination of passengers' baggage such rates to be fixed on the basis of one-half day's additional pay for each two hours or fraction thereof of at least one hour that the overtime extends beyond five o'clock postmeridian (but not to exceed two and one-half days' pay for the full period from five o'clock postmeridian to eight o'clock antemeridian), and two additional days' pay for Sunday or holiday duty. * * *

Sections 1451 and 1452 of Title 19 provide for the payment of overtime to customs officers and employees in accordance with the provisions of 19 U.S.C. 267 when they are assigned to duty in connection with the lading on Sundays, holidays, or at night of merchandise or baggage entered for transportation under bond or for exportation with the benefit of drawback, or other merchandise or baggage required to be laden under customs supervision.

While the inspection procedure here involved is necessary for the safety of air passengers and for the protection of air carriers against air piracy, it is not made incident to the lading of merchandise or baggage for transportation under bond or for exportation with the benefit of drawback, or other merchandise or baggage required to be laden under customs supervision. In other words such duties are not regarded as pertaining to Customs functions required by law. Therefore, it is our view that customs inspectors are not entitled to overtime compensation under 19 U.S.C. 267 when they perform inspections under the Presidential program to deal with the air piracy problem. Rather, any overtime compensation would be payable under the Federal Employees Pay Act of 1945, now 5 U.S.C. 5542.

Mr. Herring is being furnished a copy of this decision with advice that his claim is denied in accordance therewith.

[B-171058]

Transportation—Household Effects—Military Personnel—Weight Limitation—Minimum for Audit Purposes

A proposed procedure to establish a minimum weight of 300 pounds for the examination of shipping documents of household goods shipments to determine if there are excess costs on account of members of the uniformed services exceeding their authorized weight allowances would not satisfy the audit requirements of the United States General Accounting Office and may not be approved as there is no legal basis for disregarding shipments weighing less than 300 pounds in determining whether excess costs are involved when to do so could serve to permit shipment at Government expense of weights in excess of those prescribed by the Joint Travel Regulations implementing 37 U.S.C. 406 authorizing shipment. Moreover, departments have the responsibility to maintain adequate controls in order to determine when shipments involving excess costs have been made and to take appropriate action to recover the amount of any excess costs.

To the Secretary of the Army, April 6, 1971:

Further reference is made to letter of September 29, 1970, from the Assistant Secretary of the Army, requesting our opinion relative to a proposed procedure pertaining to the examination of shipping documents for the purpose of determining excess costs resulting from shipments in excess of the weight allowance of household effects authorized for military personnel under the Joint Travel Regulations. The request has been assigned PDTATAC Control No. 70-49, by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says that a staff study was made at the Army Finance Center, Indianapolis, Indiana, of the shipments of household goods of military personnel under its jurisdiction. As a result of the study, the Finance Center is requesting approval of a proposed procedure which would establish a minimum weight of 300 pounds for the examination of shipping documents of household goods shipments to determine if there are excess costs on account of members exceeding their authorized weight allowances. The Assistant Secretary therefore requests our opinion as to whether the proposed procedure would satisfy the audit requirements of our Office.

In the letter from the Finance Center, it is explained that under current procedures EAM (electronic accounting machine) data cards are prepared for all shipments of personal property moved on Government bills of lading. These cards are then processed on a computer system which accumulates the data for each member by Social Security Account Number. When the accumulated weights exceed the authorized allowance, a potentially excess cost report is printed out for adjudication. If the potentially excess case is determined to be excess, and the related excess cost is greater than $10, then a claim is initiated by issuance of a pay adjustment authorization form (DD 139).

It was stated that for the purpose of the study, assumptions were made that the primary objective of the mission is to effect the greatest possible savings to the Government. The secondary objective is to act as a deterrent, inducing members not to exceed their authorized weight allowance when shipping household effects. The study was to show that the effective accomplishment of the twofold objectives of the mission does not require examination of all household goods shipments and that maximum recoupment of excess claims at prohibitive processing costs is contrary to the primary objective.

The study is said to have utilized a random sampling technique under which 513 case folders were selected from the 1969 case files. Of those cases, 76 were discovered to involve billable excess costs. On the basis of the excess claims amounts and the weights of the shipments, there was estimated the dollar amount of claims by 100-pound weight groups. In order to compute adjudication costs, a subsample of 274 cases was then selected from the 513 cases and arranged by weight groups in 100-pound intervals. The data showed the estimated loss of claims which would not be discovered or be billed and, also, the processing cost savings, with a projected net savings to the Government for each weight cutoff.

The study also contains a graph comparing the average billable excess cost with average processing cost on the basis of the projected sampling data. This shows that in weights in excess of 300 pounds, the cost of processing a case breaks sharply downward and the billable amount breaks sharply upward, with a break-even point at 348 pounds. It was therefore determined that the data, which was said to be representative and which may be used to project future results, demonstrates that a weight cutoff of 300 pounds would be feasible and desirable, resulting in a net savings to the Government, including personnel savings of several spaces.

Section 406 of Title 37, United States Code, authorizes in connection with a change of temporary or permanent station, the transportation and storage of baggage and household effects of military personnel within such weight allowances as prescribed by the Secretaries concerned.

Paragraph M8003–1, Joint Travel Regulations, promulgated pursuant to the authority cited above, provides a table of weight allowances on a graduated weight scale for temporary and permanent changes of stations, according to grade or rank of military personnel commencing with aviation cadets and then enlisted members in grade E–4, having the specified service requirements. A footnote to the table cites section 616 of the Defense Department Appropriation Act, 1970, Public Law 91–171, 83 Stat. 483, which limits the members to a

maximum net weight of 13,500 pounds in any one shipment chargeable to funds appropriated by that act. A similar limitation is contained in the 1971 appropriation act (Sec. 816, Public Law 91-668, January 11, 1971, 84 Stat. 2033). Paragraph M8003-2, prescribes a restriction of 2,000 pounds or 25 percent of the maximum change-of-station weight allowance prescribed in subparagraph 1, for shipment of household goods and personal effects of members to and from overseas stations where quarters are furnished with Government-owned furnishings.

Paragraph M8007-2 of the regulations provides that the Government's maximum transportation obligation is the cost of a through household goods movement of a member's prescribed allowance in one lot between authorized places at a valuation equivalent to the lowest applicable rate established in the carrier's tariffs. The member will bear all transportation costs arising from shipment in more than one lot, for distances in excess of that between authorized points, and for weights in excess of the maximum allowances prescribed in paragraph M8003-1. Paragraph M8008-1 of the regulations provides that for members for whom no weight allowance has been prescribed, not more than 200 pounds of baggage may be shipped at Government expense to a new station.

Our review of the statistical sampling plan appears to indicate that because of the small sample sizes on which the estimates are based, the dollar projections for "loss of claims" are subject to very large sampling errors. And, while the study indicates a savings to the Government under the proposed change in procedure, such proposal does not take into account the savings to the Government because of the deterrent effect in assembling data as to the total weight of goods shipped by members with a view to recovery of excess costs, and the increased costs that would likely result if this deterrent were removed.

The proposal obviously would have the effect of increasing the authorized weight allowance of 200 pounds prescribed for members in the applicable grades, to 299 pounds, since any shipment weighing less than 300 pounds would be excluded from further consideration in determining excess costs.

Likewise, the proposal would have the effect of increasing the weight allowance for all members whose goods are moved in multiple shipments, where the weight of a single shipment is less than 300 pounds, as the weight of that shipment would be excluded in determining the total weight shipped. This could result in expenditures for shipments in excess of the weight limitations fixed by statute as well as the limitations set forth in the Joint Travel Regulations.

Under the above-mentioned regulations and statutory provisions, it is the responsibility of the departments to maintain adequate controls

in order to determine when shipments involving excess costs have been made and to take appropriate action to recover the amount of excess costs in such cases. While the method used to identify such excess shipments is primarily for administrative determination, any such method must be consistent with the requirements of the governing laws and regulations; and we are of the opinion that there is no legal basis for disregarding shipments weighing less than 300 pounds in determining whether excess costs are involved when to do so could serve to permit the shipment at Government expense of weights in excess of those authorized by law and regulations. Therefore, the proposed procedure would not satisfy audit requirements and we may not give it our approval.

[B-163422]

Officers and Employees—Hours of Work—Administrative Determination—Uncommon Tours of Duty

The establishment of the first 40 hours of duty as the basic workweek of Government quality control inspectors due to the release from work of contractor employees when unpredictable interruptions and delays occur in the checkout of missiles prior to launch—countdown—was in accord with 5 U.S.C. 6101 and Civil Service Regulation 610.111, which authorize uncommon tours of duty to maintain efficient operations and prevent cost increases. Therefore, the determination of an arbitration board under Executive Order No. 10988 procedures that the new work schedule was in violation of the collective bargaining contract requires no compensation and leave adjustments. Moreover, the Executive order provides that arbitration "shall be advisory in nature with any decision or recommendation subject to the approval of the agency head."

To the Secretary of the Air Force, April 8, 1971:

This refers to letter of February 5, 1971, from the Acting Assistant Secretary, Manpower and Reserve Affairs, requesting a decision concerning the effect of an arbitration award under the provisions of Executive Order No. 10988, dated January 17, 1962, when it conflicts with action taken by the head of a Federal agency under statutory authority.

The information furnished shows that the situation involved in the arbitration award is peculiar to the mission of the Patrick Air Force Base Test Site office which is responsible for quality control of missile launches at the Air Force and National Aeronautics and Space Administration in the Cape Kennedy area. The quality control standards are developed and applied by contractor employees under the review of Government Space Systems Quality Control representatives usually called quality control inspectors. The missile contractor established a timetable for the checkout of missiles prior to launch—the countdown. The complex makeup of missile components and the experimental nature of launches frequently result in malfunctions which

cause downtime; i.e., unpredictable interruptions and delays. As these occur, the countdown stops, and the contractor responsible for the countdown releases his employees.

It is stated that until the malfunction is corrected, neither contractor employees nor Government inspectors who oversee their work are needed. When the countdown resumes, it may be necessary to reschedule work for periods of 8 to 12 or more hours within the same 24-hour period, sometimes for several consecutive days, sometimes on alternate days. Under regularly scheduled tours of duty employees not needed during countdown time still must be gainfully employed for 8 consecutive hours; e.g., 8 a.m.–4:30 p.m., regardless of any additional work they may be required to perform later on during the same 24-hour period when launch activities are resumed. Employees working under such conditions will be forced eventually by sheer fatigue to take time off. For this reason, the Commander, Patrick Air Force Base Test Site, determined he could best accomplish his mission and more effectively utilize his work force by the establishment of tours of duty consisting of the first 40 hours of work performed within the administrative workweek.

Under the authority of 5 U.S.C. 6101 and Civil Service Regulation 610.111, first 40-hour tours of duty were duly scheduled for quality control inspectors effective December 2, 1968. The employees were paid overtime compensation for work performed in excess of 40 hours a week, night differential for work scheduled in advance and performed on successive nights between the hours of 6 p.m. and 6 a.m., and they earned and were charged leave under appropriate regulations.

One of the employees so scheduled filed a grievance against the Commander, Patrick Air Force Base Test Site, protesting the new work schedule and in accordance with the Patrick Air Force Base—Lodge 2480 American Federation of Government Employees agreement, an arbitrator was designated to resolve the matter. A hearing was held in June 1969 at which time representatives of both union and management were heard. The arbitrator's advisory award rendered November 7, 1969, concluded that although there was no evidence that employees had not been paid properly, first 40-hour tours of duty were in violation of the collective bargaining contract in that the work schedule was not discussed with the union before it was implemented; and management had failed to show in the hearing that the work requirements of the missile launch activity were met more efficiently by the use of the new work schedule.

The arbitration award is quoted in the letter as follows:

The Arbitrator finds that the establishment and application of the First Forty Hour schedule was in violation of the collective bargaining contract between

parties. The grievant, and all other Quality Assurance Inspectors similarly situated having joined in the grievance, are therefore to be made whole for any losses suffered as a consequence of the application of the First Forty Hour schedule including overtime, premium pay, night differential as well as adjustments to annual and sick leave.

It is stated that the arbitration was based on the following governing directives:

Executive Order 10988, Section 8(b). Procedures established by an agreement which are otherwise in conformity with this section may include provisions for the arbitration of grievances. Such arbitration shall be advisory in nature with any decisions or recommendations subject to the approval of the agency head. Air Force Regulation 40–702, paragraph 10 (Air Force implementation of Executive Order 10988). The arbitrator is an impartial third party from outside the Air Force. The arbitrator investigates the facts, conducts a hearing, if necessary, and renders an advisory decision to the Secretary of the Air Force.

Memorandum of Agreement, Patrick Air Force Base, Florida, and Lodge No. 2480 American Federation of Government Employees, AFL–CIO: Article IV, Section 1. "It is agreed that matters appropriate for consultation and negotiation between the parties shall include personnel policies and practices and working conditions, including but not limited to such matters as safety, training, labor-management cooperation, employee services, methods of adjusting grievances and appeals, granting leave, promotion plans, demotion practices, pay practices, reduction-in-force practices and hours of work which are within the discretion of the Base Commander." *Article XI, Section 2. "Uncommon tours of duty may be established when necessary for efficient operations when the cost of operations can thus be reduced without imposing undue hardships on employees."* [Italic supplied.]

It is stated that the acceptance of the arbitrator's award raises the question whether work schedules properly established by management under applicable regulations and under which work was performed by employees during tours of duty consisting of the first 40 hours of work performed in the administrative workweek, can legally be set aside as an artificial regular 8-hour daily work schedule constructed and used as a basis to recompute retroactively employees' pay and leave accounts.

The following questions are submitted:

Is there any authority which will permit the Air Force to comply with the arbitration award made under the provisions of Executive Order 10988 by setting aside a tour of duty established under statutory and regulatory authorities and establishing an artificial tour of duty retroactively for the same period for the purpose of adjusting employees' pay and leave?

If there is such authority, what procedure may be used to recompute an employee's pay and leave on the basis of a regular 8-hour daily tour of duty when he actually worked and was paid on the basis of a first 40-hour tour of duty?

Section 8 of Executive Order No. 10988, effective during the period here involved, authorizes procedures to be established by agreement which may include provisions for the arbitration of grievances. Such arbitration "shall be advisory in nature with any decisions or recommendations subject to the approval of the agency head." Also, section 10 of AFR 40–702, in effect at the time, provided that any decision rendered by an arbitrator is an advisory decision to the Secretary of the Air Force. Black's Law Dictionary, Fourth Edition, defines ad-

visory as "Counselling, suggesting, or advising, but not imperative or conclusive." Thus, any advisory opinion rendered by a duly appointed arbitrator under procedure provided for in Executive Order No. 10988 must necessarily be viewed as merely an opinion of the arbitrator and not binding on the agency except when approved by the head thereof.

However, it appears questionable whether the matter was proper in the first instance for arbitration.

Section 7 of Executive Order No. 10988 provides as follows:

> Sec. 7. Any basic or initial agreement entered into with an employee organization as the exclusive representative of employees in a unit must be approved by the head of the agency or an official designated by him. All agreements with such employee organizations shall also be subject to the following requirements, which shall be expressly stated in the initial or basic agreement and shall be applicable to all supplemental, implementing, subsidiary or informal agreements between the agency and the organization:
>
> (1) In the administration of all matters covered by the agreement officials and employees are governed by the provisions of any existing or future laws and regulations, including policies set forth in the Federal Personnel Manual and agency regulations, which may be applicable, and the agreement shall at all times be applied subject to such laws, regulations and policies;
>
> (2) Management officials of the agency retain the right, in accordance with applicable laws and regulations, (a) to direct employees of the agency, (b) to hire, promote, transfer, assign, and retain employees in positions within the agency, and to suspend, demote, discharge, or take other disciplinary action against employees, (c) to relieve employees from duties because of lack of work or for other legitimate reasons, (d) to maintain the efficiency of the Government operations entrusted to them, (e) to determine the methods, means and personnel by which such operations are to be conducted; and (f) to take whatever actions may be necessary to carry out the mission of the agency in situations of emergency.

The above-quoted section provides among other things that any agreement entered into with an employee organization shall be governed by the provisions of any existing or future laws or regulations. Under 5 U.S.C. 6101(a)(3) the first 40 hours of duty performed within a period of not more than 6 days of the administrative workweek may be established as the basic workweek when it is determined that the organization would be seriously handicapped in carrying out its functions or that costs would be substantially increased. Also, see paragraph 610.111(b) of the Civil Service Commission's regulations contained in Title 5, Code of Federal Regulations. Moreover, under Article XI, section 2, of the Memorandum of Agreement, management specifically retained authority to establish uncommon tours of duty when necessary for efficient operations when the cost of operations can thus be reduced without imposing undue hardships on employees.

Since, as above indicated, the management officials of the agency retained the right in accordance with applicable laws and regulations to maintain the efficiency of the Government operations entrusted to them and to determine the methods and means by which such opera-

tions are to be conducted, it does not appear that the matter of the workweek which was administratively established in accordance with existing law and regulations in order to efficiently accomplish the organization's mission would be subject to arbitration.

The first question is therefore answered in the negative which renders unnecessary any answer to question two.

[B-167006]

District of Columbia—Federal City College—Investments

Since the Federal City College is a land grant college within the purview of the "First Morrill Act" as provided by the District of Columbia Education Act, the land grant funds available to the college are exempted from 47 D.C. Code 135, which directs investment in United States Treasury securities, and the Congress in the education act approved investment in accordance with the land grant act in "bonds of the United States or of the States or some other safe bonds." "Other safe bonds" are the obligations of various Federal agencies, other than Treasury securities, that are guaranteed by the U.S., industrial bonds approved for investment by fiduciaries under the Rules of the U.S. District Court, and certificates of deposit in federally insured banks, but not savings accounts in banks or savings and loan associations. Furthermore, deficiencies from investments may be made up from appropriations, and to minimize losses, bonds may be sold before maturity.

To the Mayor-Commissioner, District of Columbia, April 8, 1971:

Reference is made to your letter of January 18, 1971, with enclosures, concerning the investment of the land-grant endowment to Federal City College, pursuant to the provisions of Public Law 90-354, approved June 20, 1968, 82 Stat. 241.

Public Law 90-354 amended title I of the District of Columbia Public Education Act, Public Law 89-791, to provide that the Federal City College, an educational institution of the District of Columbia, shall be considered to be a land-grant college in accordance with the provisions of the act of July 2, 1862, as amended, known as the "First Morrill Act," 7 U.S.C. 301-305, 307, 308. In lieu of the donation of public lands or land scrip for the endowment and maintenance of the college, the act authorized appropriations in the amount of $7,241,706 and provided that amounts appropriated shall be considered to have been granted to the District subject to those provisions of the First Morrill Act applicable to the proceeds from the sale of land or land scrip. The act also provided that the term "State" as used in the First Morrill Act, as well as other applicable legislation, shall include the District of Columbia. In May 1970, pursuant to this act, the college was the recipient of a land-grant award of $7,240,000 which was invested, in accordance with the longstanding policy of the District, in United States Treasury securities.

In order to achieve a higher rate of return than that normally afforded by Treasury securities, the District of Columbia Board of

Higher Education proposes to invest a portion of these funds in other than Treasury securities. Specifically, you state the Board proposes to invest in:

1. Certificates of deposit in District of Columbia banks;
2. In a black-oriented savings and loan association in the District;
3. In industrial bonds which are on the list approved for investments by the District of Columbia fiduciaries, and;
4. U.S. Government investments other than U.S. Treasury Securities.

As noted in your letter, section 4 of the First Morrill Act, 7 U.S.C. 304, provides, in pertinent part:

* * * All moneys derived from the sale of lands * * * and from the sale of land scrip shall be invested in *bonds of the United States or of the States or some other safe bonds;* or the same may be invested by the States having no State bonds in any manner after the legislatures of such States shall have assented thereto and engaged that such funds shall yield a fair and reasonable rate of return, to be fixed by the State legislatures, and that the principal thereof shall remain forever unimpaired: Provided, that the moneys so invested or loaned shall constitute a perpetual fund, the capital of which shall remain forever undiminished * * * [Italic supplied.]

You enclosed a letter dated September 2, 1970, to the District Board of Higher Education, in which the Associate Commissioner for Higher Education, United States Department of Health, Education, and Welfare advised that the proposed investments "would in our view be legally permissible investments of Land-Grant funds under section 4 of the First Morrill Act (7 U.S.C. 304) to the extent that each is fully insured by an agency of the United States or is a permissible investment of trust funds by fiduciaries under Rule 23 of the Local Rules of the U.S. District Court for the District of Columbia."

While you note that the opinion of the Associate Commissioner "cannot control any restrictions, legal or otherwise, which might exist insofar as investments by the District of Columbia are concerned," in view of this opinion and the above quoted portions of the First Morrill Act, you raise the following four questions:

Question 1: May the District of Columbia invest land grant funds in other than United States Government Securities?

Question 2: If the answer to Question 1 is in the affirmative, do certificates of deposit, passbook savings accounts and/or industrial bonds fall within the investment intent of Section 304, Title 7, U.S. Code?

Question 3: What constitutes "other safe bonds" or "investments in any manner" as stated in Section 304, Title 7, U.S. Code?

Question 4: Would investment in Federal Land Bank Bonds, Banks for Cooperative Debentures, Federal National Mortgage Issues, and Government National Mortgage Association Participation Certificates constitute "investment in bonds of the United States" or "other safe bonds?"

You further quote from section 5 of the First Morrill Act, as amended, 7 U.S.C. 305, which provides, in pertinent part:

* * * If any portion of the fund invested, as provided by Section 304, of this title, or any portion of the interest thereon, shall, by any action or contingency, be diminished or lost, it shall be replaced by the State to which it belongs, so that the capital of the fund shall remain forever undiminished * * *

Since engagement in an investment program such as that proposed could result in loss of principal, you ask:

Question 5: Would appropriations of the District of Columbia be available to offset a loss or shortage in the principal or interest, as required by Section 305, Title 7, U.S. Code?

In our view the land-grant endowment funds received by the District may be invested in other than United States Treasury securities. Section 1 of Public Law 90–354 grants to the District of Columbia the status of a "State" as that term is used in the First Morrill Act, as well as other applicable law. The purpose of Public Law 90–354 is to provide to the citizens of the District the same educational opportunities available to the citizens of the 50 States, each of which already has a land-grant college, by creating in the District a land-grant college. The District is to be treated as though it were a State and the financial benefits inuring under the act to Federal City College, including the $7.2 million capital grant, are calculated as though the District were a State. There are no specific restrictions in Public Law 90–354 on the types of investments in which the District may invest this money.

Public Law 90–354 provides, in part, that the amounts appropriated pursuant to the authorization therein to appropriate the sum of $7,241,706 shall be held and considered to have been granted to the District of Columbia subject to those provisions of the 1862 act applicable to the proceeds from the sale of land or land scrip. Section 305 of Title 7, United States Code, provides in effect, that before a Morrill Act grant may be made to a State, the State, by legislative act, must signify its assent to the provisions set out in 7 U.S.C. 301–304, as well as to the conditions set forth in 7 U.S.C. 305. In this connection, insofar as the District of Columbia is concerned, section 110 of title I of the District of Columbia Public Education Act, as amended by Public Law 90–354, 31 D.C. Code 1610, provides that the enactment of sections 107 and 109 of title I, 31 D.C. Code 1607 and 1609, shall, as respects the District of Columbia, be deemed to satisfy any requirement of State consent contained in any of the laws or provisions of law referred to in such sections. The legislative history of Public Law 90–354 discloses the purpose of section 110 to be as follows (H. Rept. No. 1465, 90th Cong., page 11):

Section 110 of the amendment conforms to the requirements of the First Morrill Act, which provides that the provisions of that Act shall not become effective as to any State until the legislature of the jurisdiction signifies its acceptance of the terms and conditions of the Act. The Congress, as the legislature for the District of Columbia, provides the necessary acceptance of the terms and conditions of the Act in this section, which, coupled with the enabling authority in sections 107 and 109, provides for the full participation by the District of Columbia.

Thus, it may reasonably be said that the Congress has accepted, or assented to, for the District of Columbia, the provisions of 7 U.S.C. 304, including the investment of the moneys "in bonds of the United States or of the States or some other safe bonds."

Also, while there is no specific mention of this matter in the legislative history available to us, it appears from the reports of both the House and Senate Committees on the District of Columbia that the Congress assumed that the funds might be invested in other than Treasury securities. Thus, on page 3 of House Report No. 1465, which accompanied H.R. 15280, 90th Congress, it is stated that the funds are "* * * to be an endowment to be invested in bonds * * *." There is no indication that the bonds must be bonds of the United States. In addition, the same report states that the principal may not be impaired and "* * * if diminished would have to be restored by the District." Since the principal would presumably not be impaired if invested in Government securities, the clear implication of this language is that it is expected that the moneys might be invested in bonds other than bonds of the United States. Similar language is employed in Senate Report No. 888, which accompanied S. 1999, 90th Congress.

Considering the foregoing, it is our opinion that these land-grant endowment funds do not come within the purview of section 135 of Title 47, D.C. Code, which authorizes, with approval of the Secretary of the Treasury, the investment in United States Government securities, of * * * general, special, or trust funds, of the District of Columbia, not needed to meet current expenses * * *." It is our view that the District of Columbia may invest Morrill Act land-grant endowment funds in "bonds of the United States or of the States or some other safe bonds." However, investments in any other manner must be assented to by the legislature of the District of Columbia; i.e., the Congress of the United States. Your first question is answered accordingly.

The second, third and fourth questions you present relate to the interpretation of the phrase "bonds of the United States or of the States or some other bonds" and will be answered in relation to the proposed investment program quoted earlier.

One of the proposed investments is in obligations of various Federal agencies, other than Treasury securities, such as Federal Land Bank bonds. Those obligations which are guaranteed both as to principal and interest by the full faith and credit of the United States may, in our opinion, be considered to be "bonds of the United States" under the First Morrill Act. In this regard we note that certain agency issues, including Federal Land Bank bonds, are not so guaranteed.

450-539 O—71——3

However, if the Department of Health, Education, and Welfare (HEW), which administers the First Morrill Act, determines that such agency obligations are "other safe bonds," we will have no objection to your investing the District's land-grant funds in them.

The Board of Higher Education also proposes to invest some of the land-grant funds in industrial bonds, in certificates of deposit in federally insured District of Columbia banks, and in savings accounts in federally insured District savings and loan associations. The issue presented here is whether these types of investments qualify as bonds within the meaning of the phrase "other safe bonds." The legislative history indicates that the phrase is intended to assure "an absolutely safe investment, with no fluctation, bringing in a certain amount of revenue." See 67 Cong. Rec. 6529, containing the House floor debate of March 29, 1926, on the act of April 13, 1926, ch. 130, 44 Stat. 247. This phrase, as enacted by the act of April 13, 1926, represents a slight modification of the language enacted in the act of July 2, 1862, the First Morrill Act. It is apparently HEW's view that within the context of safe investments, the phrase "other safe bonds" should be given a liberal interpretation.

In regard to the proposed investment in industrial bonds, it appears from the letter of September 2, 1970, from the Associate Commissioner for Higher Education, quoted in part above, that HEW considers bonds approved for investments by fiduciaries by Rule 23 of the Rules of the United States District Court for the District of Columbia to be "other safe bonds." We agree with HEW's determination that bonds approved for investments by fiduciaries may be considered "other safe bonds." Therefore, it is our view that the District may invest its land-grant funds in industrial bonds which are approved for investment by fiduciaries under Rule 23 of the Rules cited above.

In support of the proposed investments in savings accounts and certificates of deposit, Mr. Charles A. Horsky of the Board of Higher Education stated in his letter of June 18, 1970, to the Deputy Commissioner of Education, HEW, as follows:

> Again, when a deposit, such as in a black-oriented savings and loan association, is insured by an agency of the United States, it would appear again unless the word "bonds" is to be read hypertechnically, that the Congressional intention expressed in Section 304 is met. The form is different, but the United States is behind the investment.
>
> Finally, the certificates of deposit also appear proper. Up to a certain amount—which could if necessary mark the ceiling on this type of investment—they stand in the same posture as the savings and loan, backed by Federal insurance. Moreover, while they may not be *called* "bonds" any more than Treasury bills are, they are of the same character as the usual industrial bonds.

We understand informally from HEW that their letter of September 2, 1970, was intended to approve investments in savings accounts and certificates of deposit, to the extent each is insured by an agency of the Federal Government.

Certificates of deposit create a contractual relationship of debtor-creditor between the bank and the certificate holder, since the legal effect of a deposit is that of a loan to the bank. See 10 Am. Jur. 2d Banks 340, 455, and *Blakey* v. *Brinson*, 286 U.S. 254 (1932). The certificate is similar to a bond in that the essence of each is an unconditional promise to pay a sum certain, including interest, in return for a loan of money. Most certificates, like most bonds, are freely transferable and the certificate is generally considered to be a negotiable instrument. See *Basket* v. *Haswell*, 107 U.S. 602 (1882), and section 3–104(1), (2)(c), of the Uniform Commercial Code. See generally 10 Am. Jur. 2d Banks, section 455 *et seq.* There are also some distinctions between certificates and bonds. However, it is our view that certificates of deposit have enough of the essential characteristics of bonds that we will not question a determination by HEW that, for the purposes of the First Morrill Act, certificates of deposit may be considered bonds.

We also agree with the view of HEW that certificates of deposit, in and of themselves, do not give depositors a sufficient degree of security to qualify them as "other safe bonds." The holder of a certificate has, generally, no special security interest in the bank's assets and stands in substantially the same shoes as the bank's other general creditors. Thus, HEW considers certificates of deposit to be "other safe bonds" only to the extent to which they are insured by an agency of the Federal Government. We concur in this view.

Passbook savings accounts are in most respects similar to certificates of deposit. The legal effect of a savings account deposit is that of a loan to the bank and the depositor is generally considered to be a creditor of the bank. See 10 Am. Jur. 2d Banks, section 340. While savings accounts are transferable, in contrast to most certificates of deposit and bonds, they are not considered negotiable instruments. See *Ornbaun* v. *First National Bank of Cloverdale*, 8 P. 2d 470 (1932). Moreover, they differ from both certificates of deposits and bonds in that the bank generally is not contractually liable to pay a set rate of interest and thus may unilaterally raise and lower the interest rates payable on savings accounts. While a federally insured savings account is generally a secure investment, we believe that the differences, noted immediately above, between a savings account and a bond are so substantial that we are unable to conclude that such accounts may be considered within the definition of "bonds" for Morrill Act purposes. Thus, it is our view that the District may not invest the land-grant funds in savings accounts in banks or savings and loan associations. Your second, third, and fourth questions are answered accordingly.

Your fifth question concerns the availability of District appropriations to replace a loss or shortage in the principal or interest (of Mor-

rill Act land-grant endowment funds) as required by 7 U.S.C. 305. Section 301(a) of the District of Columbia Public Education Act, Public Law 89–791, 80 Stat. 1433, authorizes appropriations of not to exceed $50 million to carry out the purposes of titles I and II of such act. Since as indicated above, Federal City College was, in effect, made a land-grant college by title I of the District of Columbia Public Education Act, as amended by Public Law 90–354, appropriations made pursuant to the authority contained in section 305 of such act would be available to make up deficiencies in principal or interest in the land-grant endowment funds which occur for reasons beyond the District's control. In this connection, we would like to point out that it has been held that securities purchased with Morrill Act land-grant endowment funds may not be sold prior to maturity for less than their purchase price or face value. See *In Re Montana Trust and Legacy Fund*, 388 P. 2d 366 (1964). Of course, in the interest of good management it is our view that the District may sell such securities at less than the purchase price or face value (i.e., at a loss) where it reasonably appears such action is necessary in order to avoid a greater loss of principal. Your fifth question is answered accordingly.

[B–171936]

Military Personnel—Record Correction—Deposits Retroactively in the Uniformed Services Savings Deposit Program—Missing, Interned, Etc., Persons

When as a result of the correction of records under 10 U.S.C. 1552 a member of the uniformed services in a missing status becomes entitled to an item of pay or allowance retroactively, the amount due the member may be deposited retroactively in the Uniformed Services Savings Deposit Program established by Public Law 90–122 (10 U.S.C. 1035(e)), in the same manner as if his original records had shown the same information contained in the corrected records, and the record as corrected should show the amounts and dates of all deposits made pursuant to the corrected record.

Savings Deposits—Retroactive Deposits—Military Personnel—Administrative Error Adjustments—Missing, Interned, Etc., Persons

Additional amounts due a missing member of the uniformed services not as a result of correction of records pursuant to 10 U.S.C. 1552, but simply because the amounts due were not credited through administrative oversight, may be retroactively deposited in the Uniformed Services Savings Deposit Program (10 U.S.C. 1035(e)) commensurate with the date a deposit accrued, for it would be contrary to congressional intent in enacting the Savings Deposit Program to prevent deposits from being made as they accrued merely because of administrative errors.

To the Secretary of Defense, April 8, 1971:

Further reference is made to the letter dated February 13, 1971, from the Assistant Secretary of Defense (Comptroller), requesting decision on two questions which have arisen in the administration of 10 U.S.C. 1035(e), concerning the effective date of deposits of allotments made from the pay and allowances of service members in a "missing status" to the Uniformed Services Savings Deposit Program

(USSDP), when such deposits are made as a result of retroactive increases in the members' pay or allowances.

The questions presented are contained in Department of Defense Military Pay and Allowance Committee Action No. 449, as follows:

1. When as a result of correction of records under 10 U.S.C. 1552 a member in a missing status becomes entitled to an item of pay or allowances retroactively may the amount be deposited in USSDP retroactively commensurate with the date that it accrued under records as corrected?
2. When a missing member's pay account is adjusted retroactively (such as for longevity adjustment or promotion, etc.), not as a result of correction of records, may the additional amount be deposited in USSDP commensurate with the month or months the additional amount accrued or is the cumulative amount for deposit effective on the date the adjustment is made?

The law authorizing the allotment of pay to the USSDP of a member in a missing status, contained in the act of November 3, 1967, Public Law 90–122, 81 Stat. 361, 10 U.S.C. 1035(e), provides:

(e) The Secretary concerned, or his designee, may in the interest of a member who is in a missing status (as defined in section 551(2) of title 37) or his dependents, initiate, stop, modify, and change allotments, and authorize a withdrawal of deposits, made under this section, even though the member had an opportunity to deposit amounts under this section and elected not to do so. Interest may be computed from the day the member entered a missing status, or September 1, 1966, whichever is later.

In regard to the correction of military records 10 U.S.C. 1552(a) and (c) provide in pertinent part:

(a) The Secretary of a military department, under procedures established by him and approved by the Secretary of Defense, and acting through boards of civilians of the executive part of that military department, may correct any military record of that department when he considers it necessary to correct an error or remove an injustice. Under procedures prescribed by him, the Secretary of the Treasury may in the same manner correct any military record of the Coast Guard. Except when procured by fraud, a correction under this section is final and conclusive on all officers of the United States.

* * * * * * *

(c) The department concerned may pay, from applicable current appropriations, a claim for the loss of pay, allowances, compensation, emoluments, or other pecuniary benefits, or for the repayment of a fine or forfeiture, if, as a result of correcting a record under this section, the amount is found to be due the claimant on account of his or another's service in the Army, Navy, Air Force, Marine Corps, or Coast Guard, as the case may be. * * *

It is well settled that when a member's records are corrected pursuant to 10 U.S.C. 1552 he becomes entitled to all the benefits due him on the basis of the facts as shown by the corrected records, and his rights are determined in the same manner as if his original records had shown the information contained in the corrected records. See 32 Comp. Gen. 242 (1952); 34 *id.* 7 (1954); and 44 *id.* 143, 146 (1964), and cases cited therein.

Therefore, in line with these decisions, the answer to question 1 is that the missing member's pay and allowances which become due him retroactively as a result of a correction of his records pursuant to 10 U.S.C. 1552 may be deposited in the USSDP retroactively in the same manner as if his original records had shown the same information contained in the corrected records. The record as corrected should

show the amounts and dates of all deposits made pursuant to the record correction.

In regard to question 2, the discussion received with Military Pay and Allowance Committee Action No. 449 says in part—

> * * * There is no question but that entitlement accrued at the proper time. The amounts simply were not credited through administrative oversight.

We have generally approved the retroactive correction of administrative or clerical errors to increase or decrease allowable benefits. See 46 Comp. Gen. 595, 597 (1967); 37 *id.* 300 (1957); 34 *id.* 380 (1955).

Here the retroactive correction of the member's record entails not only the correction of his pay and allowances, but also the retroactive correction of the amounts deposited in the USSDP. Since the legislative history of Public Law 90–122 clearly shows that that legislation was meant to be beneficial to those service members in a missing status, and was made retroactive with respect to personnel in a captured or missing status prior to the date it was enacted, in our opinion it would be contrary to the congressional intent to prevent the deposits in question from being made as they accrued merely because of administrative errors. Accordingly, question 2 is answered by saying that when a missing member's pay account is adjusted retroactively as a result of a correction of an administrative error, the additional amount may be deposited in the USSDP commensurate with the date it accrued.

[B–171088]

Contracts—Labor Stipulations—Davis-Bacon Act—Applicability—Maintenance Contracts

Contracts for repainting mailboxes at their stationary positions, work that is regular, continuous and recurring, and is performed in accordance with the Post Office Department's Letter Box Maintenance Handbook approximately every 36 months, are subject to the Davis-Bacon Act, 40 U.S.C. 276a, an act that is applicable to contracts in excess of $2,000 for the painting and decorating of public buildings and works, whether performed in conjunction with the original construction or as regular maintenance, and the mailboxes are within the contemplation of the term "public works," which term encompasses any Government-owned facility necessary for carrying on community life and to cover any article or structure that is placed, either permanently or temporarily, at a particular location to serve a public purpose.

To the Postmaster General, April 9, 1971:

Reference is made to letter of October 20, 1970, from the General Counsel requesting our views on the applicability of the Davis-Bacon Act, 40 U.S.C. 276a (Davis-Bacon) to contracts for the repainting of letter boxes. Our views are desired because of the varying positions which have been stated by the General Counsel, Post Office Department, and the Office of the Solicitor, Department of Labor.

It is reported that the work involved consists of the usual activities in connection with repainting of equipment that has been exposed to the elements, including surface preparation, primer application and final painting. The boxes are painted at their stationary positions rather than carried to a shop for this purpose. The work is stated to be regular, continuous and recurring and is performed in accordance with the Department's Letter Box Maintenance Handbook. The handbook specifies that the repainting frequency cycle should be every 36 months with provision for variation because of different climatic conditions. As a result of this continuing maintenance program we are advised that the life of this equipment can be extended for decades.

The current difference of opinion arises because the Director, Division of Wage Determinations, Department of Labor, advised the Postmaster, Milwaukee, Wisconsin, in response to that official's notice of intent to make a service contract, that the Davis-Bacon Act rather than the Service Contract Act, 41 U.S.C. 351 note, applied to the contract in issue for the painting of mailboxes. In this connection Post Office cites the current enforcement of the Service Contract Act by Labor in contracts for this work under essentially identical circumstances, together with its general practice in this area, as raising substantial questions as to the propriety of now disturbing the established method of contracting subject to the Service Contract Act.

The Davis-Bacon Act provides, in pertinent part, that:

> * * * The advertised specifications for every contract in excess of $2,000 * * * for construction, alteration and/or repair, including painting and decorating, of public buildings or public works of the United States * * * and which requires or involves the employment of mechanics and/or laborers shall contain a provision 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 projects of a character similar to the contract work in the city, town, village, or other civil subdivision of the State in which the work is to be performed * * * and every contract based upon these specifications shall contain a stipulation that the contractor or his subcontractors shall pay all mechanics and laborers employed directly upon the site of the work * * * the full amounts accrued at time of payment, computed at wage rates not less than those stated in the advertised specifications * * *.

While numerous arguments have been advanced by your Department and by the Department of Labor as to why the Davis-Bacon Act should, and should not, be applied to contracts of the type here involved, it is our opinion that only two basic questions are presented. First, whether only such painting contracts as may complement the construction, alteration or repair of a public building or a public work are subject to the Davis-Bacon Act. Second, whether mailboxes, while secured at assigned street locations, can properly be considered as public works.

As enacted, the Davis-Bacon Act did not include a reference to painting and decorating of public buildings or works. In fact, in our decision dated August 7, 1931, 11 Comp. Gen. 57, we held that the act was limited to the employment of laborers or mechanics in the construction, alteration, and/or repair of public buildings as provided in the act, and therefore was not applicable to the painting of an existing public building. The act as amended August 30, 1935, 49 Stat. 1011, contained certain changes among which were those to include public works and the painting and decorating of public buildings and works within the coverage of the act. The purpose of these changes is explained in the following manner at page 2 of Senate Report No. 1155, 74th Congress:

> The principal substantive changes which this bill proposes to make in the present statute are contained in section 1. A brief summary of these proposals follows:
> (a) The application of the Davis-Bacon Act is extended so as to cover public works as well as public buildings and so as to include all contracts in excess of $2,000. The present act covers only contracts for public buildings in excess of $5,000.
> (b) The definition of construction, alteration, and repair is amended so as to include contracts for painting and decorating. The purpose of this language was to fill a conspicuous gap in the present statute which has been construed as not applying to contracts for the painting of existing buildings. (See 11 Comp. Gen. 57.) * * *

From the above we are persuaded that all contracts in excess of $2,000 for painting of a public building or public work, whether performed in conjunction with the original construction or as regular maintenance, is subject to the Davis-Bacon Act.

The remaining criterion for determining applicability of the act to the contract here involved is whether the contract essentially or substantially contemplates the performance of work described by the enumerated items on the objects or for the purpose stated; i.e., whether the subject is "public work."

With respect to whether the mailboxes in question are public works, the definitions supplied by Labor's regulation at 29 CFR 5.2(f) provide that the terms "building" or "work" include without limitation buildings, structures and improvements of all types, such as bridges, dams, plants, highways, parkways, streets, subways, tunnels, sewers, mains, power lines, pumping stations, railways, airports, terminals, docks, piers, wharves, ways, lighthouses, buoys, jetties, breakwaters, levees, canals, dredging, shoring, rehabilitation and reactivation of plants, scaffolding, drilling, blasting, excavating, clearing, and landscaping. These illustrations appear to contemplate that the term "public work" should encompass any Government-owned facility necessary for carrying on community life and to cover any article or structure which is placed, either permanently or temporarily, at

a particular location to serve a public purpose. We find no reason to disagree with this concept, and any attempt to further distinguish between manufactured and constructed items in these circumstances (as contended by your General Counsel) would therefore be unwarranted, since it is our opinion that a manufactured object may, upon being installed at a specific location for a public use or purpose, become a public work.

In view of the foregoing, we must conclude that the provisions of the Davis-Bacon Act are applicable to the contract described in your General Counsel's letter.

[B–171983]

Subsistence—Per Diem—Military Personnel—Temporary Duty—At Home Port of Submarine Off-Duty Crew

A naval officer detached from duty aboard a vessel who pending separation is placed on temporary duty with a Commander, Submarine Flotilla Two, which although at home base has a flagship, and assigned to an ashore staff position at the home port of the off-crew of the submarine may be paid per diem since the temporary duty was not performed aboard a Government vessel within the meaning of paragraph M4250–8 of the Joint Travel Regulations. The assignment of the flagship is of no consequence since the temporary duty was performed ashore, and the fact that the temporary duty location was at the home port of the off-crew, or that no additional subsistence cost was incurred by the member, does not affect his entitlement as the temporary duty was not in connection with the training and rehabilitation of the crew, and per diem is a commutation of expenses payable regardless of expenses incurred.

To Lieutenant J. Collins, Department of the Navy, April 9, 1971:

Reference is made to your letter dated July 13, 1970, requesting a decision as to the legality of payment of per diem to Lieutenant Frederick H. Flor, Jr., USN, for periods of temporary duty at Commander, Submarine Flotilla Two, under the circumstances presented. The request has been assigned PDTATAC Control No. 71–2 by the Per Diem, Travel and Transportation Allowance Committee.

By orders dated March 6, 1970, the Commanding Officer, USS *Will Rogers* (SSBN 659), Gold, advised Lieutenant Flor of Bureau of Naval Personnel Order No. 050896, detaching him from duty on board that vessel and directing him to report to the Commander, Submarine Flotilla Two, for temporary duty and for further assignment to duty by the Chief of Naval Personnel. Endorsement to the orders shows that the officer was detached March 6, 1970, from duty aboard the vessel and reported at 0800 hours on that date for temporary duty to Commander, Submarine Flotilla Two.

Bureau of Naval Personnel Order No. 048220, dated March 9, 1970, advised Lieutenant Flor that his resignation of his commission had

been accepted; that when directed in June 1970 he was detached from the ordered temporary duty and should proceed and report to the appropriate activity for temporary duty in connection with his separation processing. Memorandum endorsement dated June 10, 1970, stated that his temporary duty was completed that date and directed him to carry out the remainder of his basic orders.

The officer says that while on the involved temporary duty he was assigned an ashore staff position requiring no sea duty. He says further that he was on leave from 0800 May 10 to 0800 May 13, 1970, and claims per diem at the rate of $4.50 for the period from March 7 to May 9 and from May 13 to June 9, 1970.

As a basis for doubt in the matter you say that the temporary duty station, although located aboard the Submarine Base, New London, had been assigned a flagship and doubt arises as to whether per diem is payable for periods of temporary duty in such circumstances within the meaning of paragraph M4250–8, Joint Travel Regulations, which precludes per diem for temporary duty aboard a Government vessel. The Director, Navy Military Pay System, expresses doubt about the legality of payment because part of the staff of Submarine Flotilla Two was aboard various submarines afloat and part was stationed ashore.

The Commander, Submarine Flotilla Two, says that the temporary additional duty performed by Lieutenant Flor was at the same location as the home port of the off-crew of the submarine from which he was detached and there should be no increase in the cost of subsistence to the member. The Chief of Naval Personnel expresses the opinion that since no increase in subsistence cost should have been incurred by the member while performing the temporary duty, payment of a per diem should be precluded.

The Executive Officer of the Per Diem, Travel and Transportation Committee, however, takes the position that the fact that the temporary duty station had an assigned flagship is of no consequence, since the temporary duty was performed ashore. With respect to the location being that of the home port of the off-crew of the submarine, it is the Committee Executive's view that since the temporary duty was not in connection with training and rehabilitation of the off-crew as provided in paragraph 4061, Navy Travel Instructions, that paragraph did not bar the payment of a per diem at the home port of the vessel. In this regard he points out that there are numerous decisions of our Office holding that per diem is payable for temporary duty at the home port of a vessel, even in cases where the member is still attached to the vessel.

Paragraph M1150–10a, of the Joint Travel Regulations defines a permanent station as the post of duty or official station (including the home port or home yard of a vessel or of a ship-based staff insofar as transportation of dependents and household goods is concerned) to which a member is assigned or attached for duty other than "temporary duty" or "temporary additional duty." And, we held in 46 Comp. Gen. 263 that members assigned on change of permanent station to a ship-based staff must be viewed as attached to a vessel for the purpose of such transportation allowances. This case, however, is not concerned with change of permanent station transportation allowances and that decision is not for application.

Under the provisions of 37 U.S.C. 404(a) and implementing regulations contained in part E, chapter 4 of the Joint Travel Regulations members are entitled, with 14 specific exceptions, to a per diem while performing temporary duty and, temporary duty so far as here concerned, is defined in paragraph M3003–2a of the regulations as duty at one or more locations other than the permanent station, at which a member performs temporary duty under orders which provide for further assignment. Paragraph M4201, item 8, one of the specific exceptions, provides that per diem allowances are not payable for any period of temporary duty or training duty aboard a Government vessel, when both Government quarters and mess are available. Paragraph M4250, item 8, makes similar exceptions for temporary duty performed outside the United States.

The orders in this case do not direct the performance of duty on board a vessel and it has been administratively reported that the staff to which Lieutenant Flor was assigned when he reported for temporary duty at Commander, Submarine Flotilla Two, was physically located ashore at the Submarine Base, New London, Connecticut. Also, the temporary duty was performed at a location other than the permanent station and since the officer had been detached from duty on board the vessel, it is clear that the temporary duty directed by the orders was not in the nature of training and rehabilitation as a member of an off-crew group. Under those circumstances, we concur with the views expressed by the Executive Officer of the Per Diem Committee, that the fact Commander Submarine Flotilla Two had an assigned flagship, is of no consequence in determining entitlement to per diem to the extent that the temporary duty was not performed on board a vessel. Per diem is a commutation of expenses and is payable without regard to whether the expenses which it is designed to reimburse are actually incurred. Hence, the fact, if established, that the costs involved may not have been more than those incurred by members of an off-crew of a two-crew submarine on temporary duty for training and re-

habilitation at the home port of that submarine does not preclude payment of per diem in this case.

Accordingly, the travel voucher, with supporting papers, is returned for payment in the amount properly due, if otherwise correct.

[B-172359]

Officers and Employees—Severance Pay—Eligibility—"Definite Time Limitation" Employees

Executive secretaries of local Selective Service boards who are given career or career-conditional appointments with a 10-year time limitation, subject to reappointment for another 10-year term, separation, or reassignment to another position pursuant to 50 U.S.C. App. 460(b)(4), hold positions of a permanent continuing nature and their appointments are considerd to be in the competitive service, making them eligible upon the termination of their employment to the severance pay provided under 5 U.S.C. 5595(a)(2) for the temporary relief of employees separated from the Federal service since the exclusion of employees serving under an appointment with a "definite time limitation" from entitlement to severance pay does not apply to the executive secretaries.

To the Director, Selective Service System, April 9, 1971:

This refers to your letter of March 24, 1971, with enclosure, requesting a decision from our Office whether employees of local Selective Service boards may be considered eligible for severance pay although they are serving under appointments having a 10-year time limitation. You submit the personnel file of Mrs. Joyce R. Lawson, a former executive secretary of a local board whose claim is indicative of the issue raised.

You say that executive secretaries of local boards are given career or career-conditional appointments with a 10-year time limitation. Upon completion of the 10-year term an employee may be reappointed to an additional 10-year term, or be separated, or reassigned to another position. These employees are, however, in tenure groups I and II and, if separated prior to the termination of the 10-year term are subject to adverse action procedures. It is because the positions are of a permanent continuing nature that the Selective Service System and the United States Civil Service Commission consider these appointments to be in the competitive service.

50 U.S.C.A. App. 460(b)(4) of the Selective Service System provides in part:

* * * That an employee of a local board having supervisory duties with respect to other employees of one or more local boards shall be designated as the "executive secretary" of the local board or boards: *and provided further*, That the term of employment of such "executive secretary" in such position shall in no case exceed ten years except when reappointed;

As stated by you the purpose of severance pay is to provide temporary relief for employees who, through no fault of their own, become

separated from the Federal service. With respect to entitlement to severance pay 5 U.S.C. 5595(a)(2) provides in pertinent part that the section shall not include:

* * * * * * *

(ii) an employee serving under an appointment with a definite time limitation, except one so appointed for full-time employment without a break in service of more than 3 days following service under an appointment without time limitation;

Neither the statute nor the regulations issued by the Civil Service Commission define the term "definite time limitation." However, we note that such regulations (5 CFR 550.704(b)(4)(iii)) do indicate that a person serving under an indefinite appointment in an agency due to expire by operation of law or Executive order after a period in excess of 5 years would be eligible for severance pay; also, we note that the Civil Service Commission is of the view that employees serving under 10-year appointments such as here are eligible for severance pay. We see no reason to disagree with that view.

Accordingly, severance pay may be authorized to employees serving under 10-year appointments as described herein if otherwise eligible. The personnel file of Mrs. Lawson is returned.

[B–159429]

Military Personnel—Reserve Officers' Training Corps—Scholarship Benefits—Military Training

A student currently enrolled at an educational institution but not in a Reserve Officers' Training Corps (ROTC) program during his freshman or sophomore year may be selected for a scholarship under 10 U.S.C. 2107 if he possesses prerequisites for excusal from the General Military Course under 10 U.S.C. 2108(c) and receive the benefits of the scholarship, for according to the legislative history of section 2107, scholarship assistance may be provided for the minimum of 1 year or maximum of 4 years, comments which were the basis of the conclusion in 50 Comp. Gen. 486, which is affirmed, and, therefore, the student who does not participate in an educational institution's Senior ROTC training program for 4 years may receive the financial assistance authorized in section 2107 if he is excused by the Secretary concerned from portions of the 4-year program on the basis of having performed equivalent military training.

To the Secretary of Defense, April 12, 1971:

In letter of March 25, 1971, the Assistant Secretary of Defense (Comptroller) requested a decision as to whether a student currently enrolled at an institution but *not* in an ROTC program during his freshman or sophomore year may be selected for a scholarship under 10 U.S.C. 2107 if he possesses prerequisites for excusal from the General Military Course under 10 U.S.C. 2108(c) and receive the benefits of the scholarship.

It appears that the question here involved is the same as that which was intended to be stated as question 2c in Committee Action No. 447 approved by the Department of Defense Military Pay and Allowance Committee on October 30, 1970. The word "not" was inadvertently omitted from question 2c.

The omission of the word "not" from question 2c made the discussion in Committee Action No. 447 approved by the Committee on October 30, 1970, seem somewhat obscure, as a result of which we stated in decision to you of January 13, 1971, 50 Comp. Gen. 486, that—

> There is nothing in the language of subsection 2108(c) or in its legislative history to suggest that its application is limited to the scholarship program provided in 10 U.S.C. 2107. Consequently we must view the provisions of subsection 2108(c) as reaching the advanced training program provided in 10 U.S.C. 2104 as well as the scholarship program authorized in 10 U.S.C. 2107. Therefore we are not aware of any statutory basis for denying a student—who is eligible for excusal under 10 U.S.C. 2108(c) from the General Military Course (GMC)—admission to the advanced course provided in 10 U.S.C. 2104 simply because of such excusal. In our opinion a student who is eligible for such excusal "on the basis of his previous education, military experience, or both," insofar as the Reserve Officers' Training Corps Vitalization Act of 1964 is concerned, is eligible for the financial benefits provided either in 10 U.S.C. 2104 or in 10 U.S.C. 2107, if he otherwise is qualified therefor.

It is stated in Committee Action No. 447 approved on February 26, 1971, that, in view of the above discussion in our decision of January 13, it appears that the answer to the corrected question is in the affirmative, but that, since the question was incorrectly stated in the original submission, reconsideration is considered appropriate.

While subsection (a) of 10 U.S.C. 2107 provides that a member whose enrollment in the Senior Reserve Officers' Training Corps program contemplates less than 4 years of participation in the program may not be appointed a cadet or midshipman under that section, or receive any financial assistance authorized by that section, the legislative reports of both the House of Representatives and the Senate on the then proposed legislation (which included section 2107) specifically stated that the scholarship assistance provided in section 2107 may be provided for a minimum of 1 year or maximum of 4 years. On the basis of such legislative comments, we concluded in our decision of January 13 that the minimum "four years of participation in the program" specified in section 2107, refers to participation in the 4-year military service and training program and equivalent portions thereof previously received as determined by the cognizant Secretary and that, consequently, a student who does not in fact participate in the educational institution's Senior ROTC training program for 4 years may receive the financial assistance there authorized if he is excused by the Secretary concerned from portions of the 4-year program on the basis of his having performed equivalent military training.

Upon reconsideration the foregoing answer in our decision of January 13, 1971, 50 Comp. Gen. 486, is affirmed and the present question is answered in the affirmative.

[B–170964]

Subsistence—Per Diem—Military Personnel—Temporary Duty—En Route to New Duty Station

A Marine officer detached from his permanent duty station who before reporting to his permanent overseas duty station is ordered to perform temporary duty at a location approximately 6 miles from his residence located at the old station where he continued to reside as no Government quarters were available at the temporary duty station may be paid per diem for the period of the temporary duty since privately procured quarters at or in the vicinity of a member's duty station are to be regarded as a part of his station only by reason of his assignment at that station. Therefore, the officer detached from his permanent duty station entered a travel status when he proceeded to his temporary duty station outside the corporate limits of his old station and is entitled to per diem for the period of temporary duty performed en route to his new permanent station, notwithstanding he traveled daily from his old residence. 35 Comp. Gen. 547, modified.

To Lieutenant Colonel I. L. Ray, United States Marine Corps, April 14, 1971:

Further reference is made to your letter dated September 22, 1970, file reference ILR/de 7200.4, forwarded here by first endorsement of the Commandant of the Marine Corps dated October 20, 1970, requesting decision as to the entitlement of Major John M. Solan, 074102, U.S. Marine Corps, to per diem while performing temporary duty at the Marine Corps Air Station, El Toro (Santa Ana), California, during the period February 10 to April 27, 1970, under the circumstances described. Your request was approved and assigned Control No. 70–53 by the Department of Defense Per Diem, Travel and Transportation Allowance Committee.

By permanent change-of-station orders dated September 29, 1969, Headquarters, United States Marine Corps, Washington, D.C., Major Solan was detached from his duty station, Chapman College, Orange, California, and directed to proceed to Marine Corps Air Station, El Toro (Santa Ana), California, for temporary duty of about 12 weeks. Upon completion he was directed to proceed to his new duty station overseas. He reported as directed and his orders were endorsed that Government facilities were not available at Santa Ana, California.

While on permanent duty at Chapman College, Major Solan resided in Santa Ana, California, and commuted daily between his residence and the college, a one way distance of approximately 2 miles. While performing temporary duty at the Marine Corps Air Station, El Toro

(Santa Ana), he maintained the same residence and continued to commute daily between his residence and the temporary duty station, a one way distance of approximately 6 miles.

In your letter you say it appears that Major Solan was performing temporary duty at his permanent duty station and you ask whether he is entitled to per diem for the period February 10 to April 27, 1970. In first endorsement dated October 20, 1970, the Commandant of the Marine Corps invites attention to 35 Comp. Gen. 547 (1956) as supporting payment of the claim for the period after Major Solan was first absent from his residence in excess of 10 hours, but since he was absent from his residence in excess of 10 hours on only four of the days involved, doubt is expressed as to his entitlement.

The pertinent statute, 37 U.S.C. 404(a), provides that under regulations prescribed by the Secretaries concerned, members of the uniformed services shall be entitled to receive travel and transportation allowances for travel performed under competent orders upon a permanent change of station, or otherwise, or when away from their designated post of duty.

Paragraph M1150–10a of the Joint Travel Regulations defines a permanent duty station in pertinent part as the post of duty or official station to which a member is assigned or attached for duty other than for "temporary duty" or "temporary additional duty," the limits of which will be the corporate limits of the city or town in which the member is stationed.

The concept that a member's designated post of duty includes the place from which he commutes daily to his station is for application in situations where a member is ordered to perform temporary duty without being detached from his designated post of duty, to determine whether such member who travels from his place of abode outside his duty station to his temporary duty station and return was in fact away from his designated post of duty for a period in excess of 10 hours and, hence, entitled to per diem. 34 Comp. Gen. 549 (1955). In such circumstances, a member's entitlement to per diem or other travel allowances under the temporary duty orders cannot exceed that which would necessarily be due for travel from his official duty station to the temporary duty station. B–156199, April 16, 1965.

In our decision of April 5, 1956, 35 Comp. Gen. 547, involving members who were detached from their old duty stations and directed to perform temporary duty at nearby locations before reporting to their new permanent duty stations, we also applied the concept that the place of abode at the old station was a part of the duty station for purposes of per diem. None of the members changed his residence during the period of temporary duty. We held that when the members

were detached from their old stations and traveled to the designated temporary duty station for the performance of such duty which required an absence from their old stations for a period in excess of 10 hours, they entered a travel status and were entitled to per diem for the temporary duty performed thereafter.

Upon further consideration of the matter, we have concluded that privately procured quarters at or in the vicinity of a member's duty station are to be regarded as a part of his station only by reason of his assignment at that station. Hence, we are now of the opinion that when a member is detached from his duty station and thereafter proceeds to his temporary duty station outside the corporate limits of his old station, he enters a travel status and is entitled to the per diem prescribed in the regulations for ordered temporary duty en route to a new permanent station.

Under existing regulations we are required to hold that even though such member continues to occupy the same quarters at his old station and travels to and from his temporary duty station each weekday his right to per diem will no longer be regarded as affected.

To the extent that 35 Comp. Gen. 547 (1956) and other decisions are inconsistent with the views expressed above, such decisions will no longer be followed.

Therefore when Major Solan was detached from duty at Chapman College, Orange, California, and reported for temporary duty at the Marine Corps Air Station, El Toro (Santa Ana), California, en route to his permanent duty station overseas, he entered into a travel status entitling him to per diem commencing on February 10, 1970, notwithstanding that he continued to reside at his old residence.

Accordingly, payment on the submitted vouchers, returned herewith, is authorized on the basis indicated above if otherwise correct. The original orders are also returned.

[B–164786, B–171785]

Postal Service, United States—Authority—Relieve, Compromise, or Settle Relief Cases

The new section 39 U.S.C. 2601(b), which places the responsibility to relieve, compromise, or otherwise settle relief cases concerning the postal matters in the Postal Service and removes the United States General Accounting Office (GAO) from the process does not have the effect of setting aside the decisions already made by GAO on relief matters under 31 U.S.C. 82a–1 or 39 U.S.C. 2401. Although procedural or remedial statutes such as 39 U.S.C. 2601(b) are not subject to the general rule against retroactive application and they apply to all accrued, pending, and future actions, the steps already taken, the pleadings, and all things done under an old law stand, unless a contrary intent is manifested. Since the change in the procedural law does not operate retroactively, the new authority of 39 U.S.C. 2601(b) does not extend to affect, change, or modify actions taken by GAO on postal relief matters prior to the effective date of the section.

To the Postmaster General, April 15, 1971:

Our audit staff has advised that a decision has been made by Department officials that upon the effective date of the new section 2601(b) of Title 39 of the United States Code, the Postal Service will have authority to relieve, compromise or otherwise settle relief cases that have previously been denied by our Office. As you know, the current provisions of 39 U.S.C. 2401 provide for the removal of disability or the compromise, release or discharge of claims stated in connection with postal operators upon the determination of the Comptroller General with the written consent of the Postmaster General. The new subsection 2601(b) removes our Office from the process of granting relief in these matters and places that responsibility solely in the Postal Service. This section was enacted in order to "reflect the full responsibility of the Postal Service for its own financial management." See H. Rept. No. 91–1104, 44. We recognized as much in our decision to you, 50 Comp. Gen. 253, October 8, 1970, in which we held that, in view of the provisions of the new 39 U.S.C. 2601(b), upon the effective date of that section, the Postal Service will not be required to submit cases of losses for our approval. That decision should not be construed or interpreted, however, to hold that with the effective date of 39 U.S.C. 2601(b) the Postal Service under its new authority can in effect set aside decisions already made by our Office on relief matters under 31 U.S.C. 82a–1 or 39 U.S.C. 2401.

As a matter of law, procedural or remedial statutes such as 39 U.S.C. 2601(b) are not subject to the general rule against retroactive applications and they apply to all accrued, pending, and future actions. In applying such statutes, however, a recognized exception is that steps already taken, the pleadings, and all things done under the old law stand, unless an intent to the contrary is plainly manifest. See Sutherland, Statutory Construction, 3d ed., vol. 2, sec. 2212, page 136. Our search of the legislative history of 39 U.S.C. 2601(b) does not disclose any intent that the section shall operate to set aside acts taken and decisions made under the old law.

In *Belanger* v. *Great American Indemnity Co. of New York*, 188 F. 2d 196, 198 (1951), the United States Court of Appeals for the fifth circuit had occasion to apply the rules as set out above from *Sutherland* in ruling on a proposition that a procedural remedial right that became effective by law on July 26, 1950, was for application to a case disposed of in the trial court on April 5, 1950. The Court of Appeals held that a direct action on a liability insurance policy was not authorized under a State statute effective when the judgment was entered in the trial court and that the adjudication could not be annulled by subsequent legislation. On the precise question, the Court of Appeals held that "This

contention [for retroactive application] is unsound for the reason that it misapplies the principle which permits a change of procedure to affect pending proceedings from the effective date of the change and in the subsequent course of litigation to an entirely different situation where the litigation has been terminated and closed in accordance with then existing law prior to the change and enlargement of remedy. In such latter case, a change in the procedural law does not operate retroactively so as to affect a proceeding which had already been terminated by judgment before the enactment of the amendment."

Accordingly, under the law as stated by the treatise writers and accepted by the courts, the new authority of 39 U.S.C. 2601(b) does not extend to affect, change, or modify actions taken by our Office on postal relief matters prior to the effective date of 39 U.S.C. 2601(b).

[B-171938]

Bids—Qualified—Interest on Past Due Invoices

The rejection of a bid under a solicitation issued for a Federal Supply Schedule contract to furnish wood office furniture because of the inclusion of the qualifying provision "1½% interest per month on past due invoices," which the contracting officer refused to delete, was proper under section 1-2.404-2(b)(5) of the Federal Procurement Regulations. The regulation provides for the rejection of a bid if the bidder imposes conditions which would modify the requirements of an invitation, or limit his liability or the rights of the Government to his advantage, and although objectionable conditions may be deleted if they do not go to the substance of a bid—that is, that they only have a trivial or negligible effect on price, quantity, quality, or delivery—the condition imposed affected price and could not be deleted. Furthermore, a contracting officer is without authority to obligate the Government to pay interest on unpaid invoices. 5 Comp. Gen. 649, modified.

To H. Edward Chozick, April 15, 1971:

Further reference is made to your letter of February 17, 1971, protesting on behalf of Warren Furniture, Incorporated, against rejection of its bid under solicitation No. FPNFO-S3-28063-A-11-16-70, issued by the General Services Administration, a formally advertised procurement.

The solicitation was issued on October 6, 1970, for a Federal Supply Schedule contract to supply various groups of wood office furniture in 10 zones. Bids were opened on November 16, 1970, and Warren was the low bidder for group No. 1, furniture for zone 3, and group No. 2, furniture for zones 2, 3, 5 and 7 through 10.

However, Warren's bid was rejected as nonresponsive because in block 16 of Standard Form 33 it had inserted, "* * * 1½ interest per month on past due invoices." By letter dated December 15, 1970, Warren requested that this language be deleted. GSA advised Warren that modification could not be permitted since its bid as submitted

was nonresponsive. This decision was affirmed by GSA on February 9, 1971.

It is your contention that the language in question should not be considered a qualification of the bid, but rather a minor irregularity which should be either waived under article 10(b) of Standard Form 33A or deleted as a modification under article 8(a) of Standard Form 33A. In support of the contention that Warren should be permitted to delete the inserted language as it has offered to do, you cite 5 Comp. Gen. 649 (1926).

In the cited case, we held that in the absence of specific statutory authority no contracting officer could obligate the Government to pay interest on invoices not paid within a specified time. We went on to say that if the low bidder insisted upon such provision in any contract awarded, its bid should be rejected. It has long been our position that a nonresponsive bid does not constitute an offer which may properly be accepted; and to permit a bidder to make his bid responsive by changing, adding to, or deleting a material part of the bid after opening would be tantamount to permitting a bidder to submit a new bid. 38 Comp. Gen. 819 (1959). Insofar as our holding in 5 Comp. Gen. 649 implies that a bid nonresponsive as submitted may be corrected, after opening, it is inconsistent with the foregoing and is modified accordingly.

Under section 1-2.404-2(b)(5) of the Federal Procurement Regulations (FPR), a bid must be rejected where the bidder imposes conditions which would modify requirements of the invitation for bids or limit his liability to or limit the rights of the Government so as to give him an advantage over other bidders. Objectionable conditions may be deleted under the regulation where they do not go to the substance, as distinguished from the form, of the bid. A condition goes to the substance of the bid when it affects price, quantity, quality, or delivery of the items offered. FPR 1-2.405 provides that a bidder shall either be given an opportunity to cure any deficiency resulting from a minor informality or irregularity, or the contracting officer shall waive such deficiency. However, this provision defines a minor informality or irregularity as an immaterial and inconsequential defect when its significance as to price, quantity, quality, or delivery is trivial or negligible, the correction or waiver of which would not be prejudicial to other bidders.

Since Warren's bid included a condition affecting price, the above regulations prohibit its deletion or waiver and require rejection of the bid. 30 Comp. Gen. 179 (1950). Furthermore, a contracting officer is without authority to obligate the Government to pay interest on unpaid invoices. 5 Comp. Gen. 649 (1926).

So far as concerns your position that the inclusion of the demand for interest on past due invoices should be treated as a reverse prompt payment, in addition to the fact that its consideration would be contrary to 5 Comp. Gen. 649, the solicitation form has no provision for reverse prompt payment discounts and to consider such discounts could well add a substantial conjectural factor to the evaluation process to the detriment of the competitive bid system's integrity.

Accordingly, Warren's bid was properly rejected.

[B-172138]

Postal Service, United States—Rural Mail Carriers—Equipment Maintenance Allowance—"Scheduled" Work Requirement

The equipment maintenance allowance to rural mail carriers authorized under 39 U.S.C. 3543(f) would not be payable to carriers on the five Monday national holidays established by Public Law 90-363, approved June 28, 1968, if the carriers were not scheduled to work on those days and so notified in advance. Applying the construction of the act of February 28, 1925, the former similar authority for paying the allowance, to the effect the allowance is payable "in the same manner as payment for regular compensation" and on the basis of miles "scheduled," it follows the United States Postal Service is not required to pay the allowance if the rural mail carriers are notified in advance that they will not be scheduled or required to deliver mail on their routes on a particular day when they otherwise normally would do so.

To the Postmaster General, April 15, 1971:

A letter of March 2, 1971, from the Assistant Postmaster General, Bureau of Operations, requests a decision concerning payment of equipment maintenance allowance to rural mail carriers on five national holidays which, by reason of Public Law 90-363, approved June 28, 1968, 5 U.S.C. 6103, will be observed on Monday each year.

The letter states that, although no decisions have been made to change any basic services provided on or around holidays, it is appropriate to review employee scheduling during such periods.

Subsection 3543(f) of Title 39, U.S. Code, provides in addition to the compensation provided in the Rural Carrier Schedule prescribed in subsection (a) of that section, each rural carrier shall be paid for equipment maintenance on a mileage or per diem basis (plus additional compensation for servicing heavily patronized routes), and that payment for equipment maintenance "shall be made at the same periods and in the same manner as payments of regular compensation."

The letter states that such provision does not differ in substance from the provisions of section 8 of the act of February 28, 1925, ch. 368, 43 Stat. 1063, construed in our decisions of March 14, 1925, 4 Comp. Gen. 769, and May 24, 1926, 5 Comp. Gen. 931.

In the latter decision we said that under the statute the equipment maintenance allowance is payable "in the same manner as payments for regular compensation" and on the basis of miles "scheduled," and that there is no authority to establish administratively any other basis. We said further that—

> * * * If for any reason a carrier fails to serve a route or portion of a route under conditions that justify or require the deduction of the whole or any portion of his compensation during said period, in accordance with postal law and regulations, there must be deducted a corresponding amount of equipment maintenance allowance which would have accrued during the same period. On the other hand, if the reason for failure to serve the route was such as not to justify or require a deduction of the whole or any portion of the regular compensation, there may not be deducted a corresponding amount of equipment maintenance allowance which would have accrued during the same period.

In decision 4 Comp. Gen. 769, 772, answer to question 8, we said that the basis for computing the maintenance equipment allowance should be on the service "scheduled," which was 306 scheduled days of service per annum: 365 days a year less 52 Sundays (mail carriers worked 6 days a week then, including Saturdays) and 7 holidays. We concluded in effect that the equipment maintenance allowance was not payable for holidays since service was not scheduled on holidays.

Since the statute there construed is substantially the same as in the current law, 39 U.S.C. 3543(f), it follows that the U.S. Postal Service is not required to pay rural carriers the equipment maintenance allowance if they have been notified in advance that they will not be scheduled or required to deliver mail on their routes on a particular day when they otherwise normally would do so. Accordingly, if the rural mail carriers are not scheduled to deliver mail on the 5 Monday holidays, they are not entitled to the equipment maintenance allowance on those days.

[B–171596]

Boards, Committees, and Commissions—Members—Appointment Limitations

An attorney in private practice serving a 3-year term as a member of the Advisory Council on Urban Transportation, Department of Transportation, established by Public Law 89–670, and which meets only a few days each year, who is paid per diem on a "when-actually-employed basis" and travel expenses is ineligible to serve on the National Water Commission, even if different days are devoted to the intermittent service for each agency, as the Council member is considered to have a status similar to that of an intermittent consultant employed and compensated on a daily basis and held to be an officer or employee of the United States, and, therefore, is prohibited from accepting an appointment with the Commission by the language of the National Water Commission Act that "no member of the Commission, during his period of service on the Commission, hold any other position as an officer or employee of the United States * * *."

To the Executive Director, National Water Commission, April 16, 1971:

Your letter of December 21, 1970, requests our decision as to whether an individual who is serving as a member of the Advisory Council on Urban Transportation, Department of Transportation, may also serve as a member of the National Water Commission, where different days are devoted to service for each agency.

You enclose for our consideration a copy of the legal opinion rendered by the Legal Counsel, National Water Commission, to the effect that he is unable to conclude that a member of the Advisory Council is ineligible to serve as a National Water Commissioner under section 2(b) of the National Water Commission Act, approved September 26, 1968, 82 Stat. 868, 42 U.S.C. 1962a note. You also enclose a copy of a legal opinion by the General Counsel, Department of Transportation, to the same effect and to which is attached a copy of Order DOT 1100.32A, dated November 7, 1969, of that Department setting forth the composition of the Advisory Council and its sponsorship, organization, and procedures.

The record indicates that Mr. James Reed Ellis, an attorney in private practice in Seattle, Washington, was appointed to the National Water Commission. Mr. Ellis is also a member of the Advisory Council of the Department of Transportation which was created for the purpose of identifying requirements for and improvements in urban transportation systems. The Council maintains contact and coordination with appropriate State, local and city officials and key members of private industry and other interested groups so that they may comment on Government urban transportation programs and proposals and supply meaningful information regarding the urban transportation needs of the nation. The Council consists of Government officials and other members individually selected by the Secretary of Transportation to serve 3-year staggered terms. Mr. Ellis was appointed to serve a 3-year term on the Council as an authority in the field outside the Government. The council meets only on a few days each year at the call of its chairman, the Secretary or Under Secretary of Transportation. Such staff and secretarial support as are needed are provided by the Department. The Council members selected from State, local and city government, private industry and the academic community receive per diem on a "when-actually-employed basis" (stated to be in the form of honoraria) and reimbursement of travel expenses. Apparently, the National Water Commission would also meet intermittently but the number of meetings anticipated each year is not reflected in the record.

Subsections 2 (b) and (d) of the National Water Commission Act read as follows:

(b) The Commission shall be composed of seven members who shall be appointed by the President and serve at his pleasure. No member of the Commission shall, during his period of service on the Commission, hold any other position as an officer or employee of the United States, except as a retired officer or retired civilian employee of the United States.

(d) Members of the Commission may each be compensated at the rate of $100 for each day such member is engaged in the actual performance of duties vested in the Commission. Each member shall be reimbursed for travel expenses, including per diem in lieu of subsistence, as authorized by 5 U.S.C., sec. 5703, for persons in the Government service employed intermittently.

Section 9 of Public Law 89-670, approved October 15, 1966, 49 U.S.C. 1657 (Supp. V), pertains to the administration of the Department of Transportation. Subsection (o) of this section provides as follows:

(o) Advisory committees; appointment, compensation.

The Secretary is authorized to appoint, without regard to the civil service laws, such advisory committees as shall be appropriate for the purpose of consultation with and advice to the Department in performance of its functions. Members of such committees, other than those regularly employed by the Federal Government, while attending meetings of such committees or otherwise serving at the request of the Secretary, may be paid compensation at rates not exceeding those authorized for individuals under subsection (b) of this section, and while so serving away from their homes or regular places of business, may be allowed travel expenses, including per diem in lieu of subsistence, as authorized by section 5703 of Title 5 for persons in the Government service employed intermittently.

Subsection (b) referred to above concerns appointment and compensation of experts and consultants.

The question for determination is whether a member of an advisory council created under section 9 above holds a "position as an officer or employee of the United States" within the meaning of that language as used in section 2(b) of the National Water Commission Act.

It appears to us that the status of a member of the advisory council here involved is similar to that of an intermittent consultant employed and compensated on a daily basis. We have held, generally, that an intermittent consultant is an officer or employee of the United States. 27 Comp. Gen. 547 (1948); 26 *id.* 720 (1947); 23 *id.* 17 (1943). One exception to that rule was our decisions to the effect that an intermittent consultant did not hold an "office" within the meaning of the Dual Employment Act of 1894 (now repealed). However, in the 1894 statute the prohibition was merely against holding "any other office" (5 U.S.C. 62, 1958 ed.) whereas here the prohibition extends to holding a "position as an officer or employee of the United States."

We assume that a member of the advisory council is appointed and takes an oath of office similar to an intermittent consultant. The statute states that such a member may be paid compensation similar to an expert or consultant. An intermittent consultant renders advice as

does a member of the advisory council and the supervision from a regular officer or employee of the United States in either case could be expected to be rather meager. See 5 U.S.C. 2104–2105 as to the definition of an officer or employee of the United States.

We note that any arguments that a member of the Advisory Council on Urban Transportation does not hold a position as an officer or employee of the United States might also be applicable to a member of the National Water Commission.

We have found no indication in the legislative history of the National Water Commission Act that a member of an advisory council appointed by an officer of the United States or one performing similar services is not to be regarded as holding a position as an officer or employee of the United States. In the absence thereof our view is that Mr. Ellis, as a member of the Advisory Council on Urban Transportation, does hold a "position as an officer or employee of the United States" as prohibited by the National Water Commission Act. This is so regardless of the fact that services in the two capacities may be rendered on different days.

[B–171663]

Contracts—Negotiation—Competition—Changes Subsequent to Negotiation—"Source Selection" Concept

In the negotiation under 10 U.S.C. 2304(a)(11) of a cost-plus-incentive-fee research and development contract for radar sets where the contracting agency left the choice of one of three power tubes to be used to the offerors, the selection of other than the low offeror on the basis of a change in the tube preferred and the acceptance of a price reduction, although the selected offeror was not the "successful offeror" contemplated by paragraph 3–506(b) of the Armed Services Procurement Regulation (ASPR), and the business clearance required by ASPR 1–403 had not been satisfied, without giving all offerors within a competitive range an opportunity to compete on the basis of its preference was inconsistent with the concept of competitive negotiation, as the time for negotiating price and technical aspects is during the source selection competitive phase of the negotiating process and, therefore, negotiations should be reopened to afford all offerors an opportunity to revise their technical and price proposals.

To the Secretary of the Navy, April 19, 1971:

We refer to letters, with enclosures, dated February 5, 26 and March 19 and 30, 1971, from Counsel, Naval Air Systems Command (NAVAIR), furnishing our Office with reports on the protests of Sylvania Electronics Products, Inc., and General Dynamics against the proposed award of a contract under NAVAIR's request for quotations (RFQ) N00019–70–Q–0195.

Since the proposed awardee and contending offerors are aware of each other's identity and of certain general technical aspects of the procurement, our recitation of the pertinent facts reflects this knowledge.

The request for quotations was issued pursuant to the authority of 10 U.S.C. 2304(a)(11), as implemented by paragraph 4–101(a)(6) of the Armed Services Procurement Regulation (ASPR), to negotiate contracts contemplating experimental, developmental or research work. Technical proposals were requested for the development, fabrication and installation of two UHF coherent radar systems (CRS); price proposals were required to be on a cost-plus-incentive-fee (CPIF) basis.

Under the evaluation procedures utilized, technical proposals were referred to a Source Selection Evaluation Board (SSEB); cost proposals were forwarded to a contract negotiator for analysis. SSEB was charged with the responsibility of rating the proposals and reporting its findings to the Source Selection Advisory Council (SSAC). Results of the cost analysis also were to be supplied to the SSAC. SSAC was to report its recommendation to the Source Selection Authority (SSA). Since the Assistant Commander for Contracts was responsible for reviewing the selection procedure and making the final determination, the SSA was to present findings to him in the form of a recommendation.

Four proposals were received by July 7, 1970, one of which was subsequently determined to be technically unacceptable and was not further considered. Thereafter, discussions were held with Sylvania, Raytheon Company and General Dynamics. These discussions culminated in letters dated August 20, 1970, to each offeror, which identified and requested clarification of specific deficiencies in each proposal. In addition, each letter provided, in part, as follows:

> To conclude the competition with several sources with respect to the procurement covered by RFQ No. N00019–70–Q–0195 it is requested that you clarify, support, correct, improve or revise your technical, management and cost proposals as necessary to provide your best and final offer * * *.
>
> * * * Any reply received after * * *[close of business on September 21, 1970] will be treated as a late quotation in accordance with the "LATE QUOTATION" provisions of the RFQ.
>
> Failure to respond to this letter will be considered to mean that you do not wish to be further considered for award of a contract under the RFQ and may be grounds for disqualification. Unless this Command finds it necessary or desirable to contact you further, no additional information will be furnished until an award is made. * * *

The August 20 letters adequately advised offerors of the closing of negotiations. 48 Comp. Gen. 536 (1969); *id.* 381 (1968). Timely replies were thereafter received from all three firms.

On October 1, 1970, the SSEB formally reported the results of its technical evaluation to the SSAC. Thereafter, the SSAC received an oral briefing from a contract negotiator on the results of the cost analysis. On October 22, 1970, SSAC reported the results of its deliberations to the SSA. By memorandum dated October 29, 1970, to the

Assistant Commander for Contracts, NAVAIR, SSA recommended that award be made to Raytheon. With respect to the Assistant Commander's decision, the record contains the following memorandum dated February 25, 1971:

> 1. Some few days before * * * [SSA] sent me the memorandum referred to above, he met with me and I reviewed with him the recommendation he was making at that time to select the Raytheon Company as Contractor * * *.
> 2. At that time, having reviewed the factors which led to his recommendation and having discussed those factors with him, I approved, upon the advice of my staff, and in my capacity as a Contracting Officer, that recommendation.
> 3. Therefore, upon receipt of * * * [the memorandum], having previously approved * * * [SSA's] recommendation, I directed my staff to take the necessary action to enter into a contract with the Raytheon Company.

On November 13, 1970, at a meeting of the SSAC, the SSA announced the Assistant Commander's decision. Present at the meeting was a project manager, Instrumentation Ships Project, Naval Ship Systems Command (NAVSHIPS), whose role is explained in the NAVAIR's counsel's letter of February 26, 1971. It appears therefrom that NAVAIR was requested by the project manager to prepare the procurement package, obtain proposals, select the best offer and award the contract. An examination of the Ship Project Directive dated October 14, 1969, also indicates that any changes in the scope of work, schedules, or funding would require the approval of the project manager. A memorandum dated November 23, 1970, from the Commander, NAVAIR, to the Commander, NAVSHIPS, states that at the conclusion of the November 13 meeting the project manager requested that negotiations leading to contract award be held up pending review of the entire program, of which this system is a part. This review, we understand, involved a consideration of whether to eliminate or cut back the entire program.

By letter of November 17, 1970, Raytheon submitted a modification reducing its cost proposal. NAVAIR accepted this modification in accordance with the "Late Proposals" provision of ASPR 3-506(b), contained in the RFQ, which provides that:

> * * * a modification of an offer which makes the terms of the otherwise successful offer more favorable to the Government will be considered at any time it is received and may thereafter be accepted.

On January 7, 1971, NAVAIR sent a business clearance to the Naval Material Command for approval. Navy Procurement Directives 1-403.50 defines a "business clearance" as the required approval by the Chief of Naval Material of the business aspects of proposed contractual actions pursuant to 10 U.S.C. 5082.

By telegram dated January 11, 1971, and subsequent correspondence, Sylvania, by its counsel, Sellers, Conner & Cuneo, protested the proposed award to our Office. By letters dated February 23 and March 11,

1971, General Dynamics joined in Sylvania's protest. In accordance with our protest procedures Raytheon was afforded an opportunity to comment on the allegations raised and it responded through its counsel, Matzkin & Day, by letter dated March 15, 1971.

On January 22, 1971, the Naval Material Command approved the business clearance. Award is now being withheld pending our decision on the merits of the protests.

Three basic contentions are raised and are considered below under their respective captions.

Technical Evaluation of Proposals

Offerors were advised in paragraph (9) of the RFQ's Instructions and Conditions that the following criteria would be used in technical evaluation and source selection:

a. The following evaluation criteria, ranked in order to relative importance, will be used in evaluating each Offeror's proposal submitted in response to this procurement:

(1) The contractor's understanding of the scope of the work as shown by the scientific or technical approach proposed, with particular emphasis on the transmitter, receiver and data digitizing sub-systems in that order.

(2) The extent to which the design details, performance requirements, test procedures, etc., outlined in the Offeror's Specification meet the requirements of Specification CRS–70.

(3) The soundness of the approach to this project and to the solution of such problem(s) as may be involved in satisfactory performance thereof.

(4) The functional and operational suitability of equipment which will meet specifications and provide flexibility for future modification.

(5) The reliability of the proposed design.

(6) The simplicity of the proposed design with due consideration to standardization and minimum operational costs.

(7) The ease of maintenance of the proposed design.

(8) Quality commensurate with the mission of the equipment.

(9) The use of materials which will result in best ease of operation and maintenance in all types of conditions.

(10) The availability and competence of experienced engineering, management, scientific or other technical personnel.

(11) The contractor's experience or pertinent novel ideas in the specific branch of science or technology involved.

(12) The availability, from any source, of necessary research, test and production facilities.

(13) The contractor's willingness to devote his resources to the proposed work with appropriate diligence.

(14) The proposed assignment of personnel.

(15) The over-all management of the proposed program.

b. In addition to the preceding evaluation criteria, a confidence factor as indicated by past performance in meeting contractual obligations and credibility of the statements made in the Offeror's proposal will be applied in the evaluation of proposals submitted hereunder.

The foregoing criteria encompass both technical and management aspects of the proposals and were assigned a total weight of 75 percent (50 percent technical; 25 percent management). Insofar as technical evaluation is concerned, we are dealing essentially with the first six factors, which, among others, relate to the power system of the transmitter.

We understand that three types of power tubes are available for use in transmitter design: the Klystron; the Coaxitron; the Traveling Wave Tube (TWT). The importance of tube selection in transmitter design is indicated in NAVAIR's counsel's letter of February 5, 1971:

> * * * The high risk area in this procurement has always been recognized to be the achievement of the rather high transmitter sustained average power output requirements. Since the transmitter tube selected governs transmitter power capabilities, the tube's characteristics are of obvious concern. * * *

No limitation was placed on the use of any tube type in transmitter design by the RFQ. Counsel's letter of February 5 advises that when the RFQ was issued only the Klystron and Coaxitron were known to be suitable power sources and, of the two, the Coaxitron was preferred. Sylvania elected to offer a Coaxitron-based design, while specifically rejecting the TWT as a suitable power source for CRS. General Dynamics based its design on a Klystron but also submitted an alternate proposal (as it was permitted to do by the RFQ) based on the use of a Coaxitron. Raytheon based its proposal on a TWT approach. Counsel's letter terms Raytheon's offer as "unexpected" and states that NAVAIR was not aware of a suitable approach to transmitter design based on a TWT until proposed by Raytheon.

Against this background both Sylvania and General Dynamics assert that NAVAIR was "predisposed" to the use of a TWT power tube in transmitter design, which was ultimately the basis for the selection of Raytheon, and that NAVAIR improperly failed to disclose this predisposition to all offerors. In Sylvania's submission of March 3, 1971, it is asserted that the advantages of using a TWT power source reveal corresponding disadvantages in the use of a Coaxitron, which, in effect, were deficiencies in Sylvania's proposal that NAVAIR should have drawn to its attention during the course of negotiation.

The RFQ is silent as to the particular type of power source to be used. To us, the latitude afforded by the RFQ underscores the fact that tube selection was left to the technical judgment of each offeror. Given the developmental nature of the procurement, Sylvania's and General Dynamics' complaint is, in our view, basically that after initial evaluation of technical proposals, NAVAIR had established a judgmental hierarchy with the TWT rated first, and that NAVAIR was required to make this preference known. Raytheon, in response, maintains in its letter of March 15 that "to now allow any of the other offerors to negotiate on the basis of Raytheon's competitive technical approach creates the forbidden auction technique in a technical sense rather than the oftentimes quoted sense of price."

In our view, the propriety of disclosing Raytheon's technical approach to the use of the TWT is not in issue here, for the argument is not that Raytheon's technical approach should have been discussed,

but rather that NAVAIR should have revealed its preferences relative to the three known power sources.

From our review of the technical evaluation memoranda made available to us, it appears that the tube selected made a significant evaluative difference between the proposals. The predominance of the tube offered in the evaluation of technical proposals is expressed in terms of the technical risks involved in concurrent tube and system development. An assessment of the technical risks involved obviously requires a balancing of the advantages and disadvantages of the power source selected. We believe that both Sylvania and General Dynamics should have been given an opportunity during the course of negotiations to address the question of the risks associated with the use of a Coaxitron. In this regard, Sylvania's submissions have raised a number of technical factual disputes relative to the merits of the Coaxitron vis-a-vis the TWT, and while we are not prepared to resolve these matters, NAVAIR's responses indicate that completely accurate information was not in NAVAIR's possession at the time of evaluation. Moreover, since the three power sources were known to the offerors, discussion of their relative merits would have been appropriate.

Failure to Give Cost Proper Consideration

Sylvania alleges that its final cost proposal was the lowest received and that Raytheon's cost proposal was substantially higher. Sylvania maintains that once a determination is made that two or more offerors are technically acceptable, the consideration of technical merit should cease, and the governing criterion should be cost.

Assuming the accuracy of Sylvania's allegation, the application of the cost factor was not controlling, since cost was assigned a weight of only 25 percent. We have recognized that in the context of negotiated cost-reimbursement-type research and development contracts, proposed cost or price is not necessarily controlling in determining which proposal is most advantageous to the Government. B–170374, March 2, 1971; B–165471, January 24, 1969. There is, however, merit in Sylvania's position for, as we stated in 50 Comp. Gen. 246, October 6, 1970:

Where * * * two offerors are essentially equal as to technical ability and resources to successfully perform a research and development effort, the only consideration remaining for evaluation is price. In such a situation, we believe that the lower priced offer represents an advantage to the Government which should not be ignored. Indeed, ASPR 4–106.4 makes it clear that awards should not be for capabilities that exceed those determined to be necessary for successful performance of the work. We view the award to TI as evidencing a determination that the cost premium involved in making an award to

SRL, based on its slight technical superiority over TI, would not be justified in light of the acceptable level of effort and accomplishment expected of TI at a lower cost. The concepts expressed in ASPR 3–805.2 and 4–106.5(a) that price is not the controlling factor in the award of cost-reimbursement and research and development contracts relate, in our view, to situations wherein the favored offeror is significantly superior in technical ability and resources over lower priced, less qualified offerors. * * *

NAVAIR's counsel's letter of February 5, 1971, stated that cost was not ignored and suggested that, in retrospect, it may have been too heavily weighted. From our review of the record initially submitted with counsel's letter, it appeared to us that the consideration given to cost was limited to the mathematical apportionment of evaluation points among the cost proposals. In response to our informal inquiry, counsel's letter of March 30 transmitted an enclosure indicating the extent of cost and price analysis. The enclosure indicates that after initial quotations were received, the cost and pricing information contained on the DD Form 633's submitted by the offerors was abstracted and analyzed by comparing the quotations received with the costs incurred in connection with a prior dissimilar system. On the basis of this analysis, an oral presentation was made to the SSAC where it was pointed out that differences between CRS and the prior system made an exact comparison impossible. During discussions each offeror was requested to furnish additional information. Since the best and final offers differed little from the initial quotations, SSAC was simply informed of their dollar value. After source selection, Raytheon's cost proposal was again analyzed and the contract negotiator planned to discuss it with the offeror with a view toward negotiating a reduction. This action was found to be unnecessary in view of Raytheon's voluntary cost reduction. The contract negotiator further states that: "At no time prior to the selection of Raytheon as the winner did I hold out or infer to the SSAC or anyone else that I could get Raytheon to reduce its price if allowed to do so." Accepting the contract negotiator's statement, the fact remains that cost negotiations with Raytheon were contemplated. That such action was rendered unnecessary by Raytheon's cost reduction does not obscure the basic point: the time for exploring the cost aspects of a proposal—that is, *all* proposals within a competitive range—is during the course of negotiations and not at some time after the receipt of best and final offers. We believe that the negotiation techniques evident from the record, as exemplified by the contemplated cost negotiations with Raytheon, are inconsistent with the concept of competitive negotiation. In this connection, ASPR 3–804 provides that:

Evaluation of offerors' or contractors' proposals, including price revision proposals, by all personnel concerned, with the procurement, as well as subsequent

negotiations with the offeror or contractor, shall be completed expeditiously. Complete agreement of the parties on all basic issues shall be the objective of contract negotiations. Oral discussions or written communications shall be conducted with offerors to the extent necessary to resolve uncertainties relating to the purchase or the price to be paid. Basic questions should not be left for later agreement during price revisions or other supplemental proceedings. Cost and profit figures of one offeror or contractor shall not be revealed to other offerors or contractors.

While we object to the negotiation techniques employed here, we do not intend to suggest that cost is controlling. However, since the record demonstrates that notwithstanding the technical evaluation of proposals, cost was advanced as a potential basis for making award, a clear understanding of the validity of each cost proposal was and is essential.

Acceptance of Modification to Raytheon Proposal After "Best and Final" Offers

Focusing on the SSA's memorandum of October 29, 1970, and the concurrent approval of the Assistant Commander for Contracts, it is NAVAIR's position that it had arrived at a final determination to contract with Raytheon some 2 weeks before Raytheon submitted its cost reduction. Sylvania, on the other hand, urges in its letter of March 3, 1971, that the term "otherwise successful offeror" as used in ASPR 3-506(g) goes to the question of whether a particular offeror would "unquestionably receive the award if in fact the award were made," for the following reasons:

Sylvania does not believe that the term "otherwise successful offeror" involves whether or not an award itself will be made since there are many reasons why an award may not be made that have no bearing on the selected offeror at all, *e.g.*, availability of funds or discontinuance of the requirement. However, assuming that an award will be made, in order for an offeror to be "the successful offeror" all the legal and regulatory actions, directory and judgmental, prerequisite to making an award must have been executed in that offeror's favor. That is the point at which, based upon the unamended proposal, a binding contractual commitment could be made to such offeror.

It is Sylvania's position that Raytheon was not an "otherwise successful offeror" at the time it submitted its cost reduction proposal. The Navy admits in its report dated February 26, 1971 (page 5) that no business clearance had been granted by NavMat at the time Raytheon submitted its cost reduction. Indeed, a business clearance was not even requested from NavMat until some two months after Raytheon's cost reduction proposal. Sylvania submits that under the applicable law and regulations Raytheon was not an "otherwise successful offeror" at least until business clearance had been granted by NavMat.

* * * * * * *

First, a business clearance is a *mandatory legal requirement which must be complied with* before an award can be made to a desired source. ASPR Section 1-400 states:

"This part . . . imposes limitations upon the authority to enter into . . . contracts."

ASPR Section 1–403 states as follows:

"*Requirements to be Met Before Entering Into Contracts.* No contract shall be entered into unless all applicable requirements of law and of this Regulation . . ., *including business clearance and approval, have been met.*" [Italic supplied.]

ASPR Section 3–102(b) states:

"(b) No contract shall be entered into as a result of negotiation unless or until the following requirements have been satisfied:

* * * * * * *

"(iii) such business clearance or approval as is prescribed by applicable Departmental procedures has been obtained . . ."

Second, the Navy Procurement Directives implementing ASPR *make it unmistakably clear that no award may be made to an offeror without a business clearance.* Section 1–403.50 of NPD prescribes the conditions for award as follows:

"*Business clearance* is the required approval by the Chief of Naval Material of business aspects of proposed contractual actions. Such clearance is required pursuant to statute (10 U.S.C. 5082) and authority derived from the Secretary of the Navy. Request for business clearance is submitted on a business clearance memorandum. . . .

* * * * * * *

"(b) Post-Negotiation Business Clearance.

* * * * * * *

. . . upon completion of negotiation, the post-negotiation business clearance memorandum shall set forth in detail the negotiation results obtained. . . . NO COMMITMENT SHALL BE MADE TO A PROSPECTIVE CONTRACTOR PRIOR TO OBTAINING THE CHIEF OF NAVAL MATERIAL'S APPROVAL OF THE POST-NEGOTIATION BUSINESS CLEARANCE MEMORANDUM." [Emphasis in original] [numerous pages of detailed requirements for business clearance follow]

Based upon the plain meaning of the foregoing regulations, which implement statutory requirements, it is Sylvania's position that a business clearance of Raytheon was a legal prerequisite to Raytheon being an "otherwise successful offeror" in accordance with ASPR 3–506(g). By the Navy's own admission, a business clearance of Raytheon by NavMat had not been made at the time Raytheon's cost reduction proposal was submitted and indeed was not requested until some two months after Raytheon's cost reduction proposal was submitted. As no award could be made to Raytheon without NavMat approval, Raytheon was not a "successful offeror" at the time the Navy accepted its cost reduction proposal.

We approach this question from the standpoint of the prejudicial effect, if any, to the competing offerors resulting from acceptance of the modification—an inquiry which will turn on the particular facts of each case. By definition, the acceptance of a modification from an otherwise successful offeror will not result in prejudice to the other offerors. It also assumes that the reduction was voluntary and there has been no suggestion that Raytheon's modification was solicited. From this viewpoint, we agree generally that the approval of the Assistant Commander for Contracts, concluding the source selection process, is a determination of the "otherwise successful" offeror, since NAVAIR was charged with the selection of the contractor. This presumes that in effecting the selection all requirements of ASPR 3–800, governing the conduct of negotiations, have been complied with.

Here, however, further negotiations were contemplated with the "successful" offeror with a view to seeking a price reduction. The resulting implication is clear: the previous selection might fail absent a price reduction. Therefore, in our view, Raytheon was something less than the "successful offeror" at the time of source selection.

Accordingly, we believe that all of the defects discussed above require that negotiations be reopened and all offerors within a competitive range be afforded an opportunity to revise their technical and price proposals.

[B-168541]

Transportation—Requests—Issuance, Use, Etc.—Official Business Requirement

The use of the reduced Category Z fares offered by commercial airlines to the United States under Government Transportation Requests (GTRs) pursuant to tariffs filed with the Civil Aeronautics Board is limited by agreement to transportation payable from public funds for official travel only, and the special fares may not be made available to contractor employees or nonappropriated fund agencies in Europe or elsewhere, whether payment is made from nonappropriated funds, or appropriated funds on a reimbursable basis. The restrictions on the use of GTRs prescribed in the General Accounting Office Policy and Procedures Manual for the Guidance of Federal Agencies, Title 5, sections 2020.10 and 2020.80 maintain the integrity of travel appropriation obligations, and the GTRs serve to identify that the travel performed was on official business in accord with the special arrangements for reduced fares and, therefore, Army regulations in conflict with the purpose of the Category Z fares should be amended.

To the Secretary of the Army, April 23, 1971:

By letter dated February 4, 1971, file LOG/TM-PMB-T-I, addressed to the Director of our Transportation Division, the Office of the Deputy Chief of Staff for Logistics requests our determination on a request made by the Commander in Chief, United States Army, Europe (USAREUR) that our decision 49 Comp. Gen. 578, March 11, 1970, not be applied to nonappropriated fund agencies in Europe.

It is indicated that nonappropriated fund agencies supported by USAREUR are treated by NATO host countries the same as U.S. Forces proper so far as transportation is concerned, including recognition of Government Transportation Requests (GTRs), among other documents used by the Army, issued to U.S. and foreign flag carriers for service within or from the USAREUR area. Continuance of the privileges regarding the use of these forms is said to be desirable for USAREUR supported nonappropriated fund agencies "since it permits better USAREUR control over procurement, accounting and audit of such travel and at less cost to the Government."

In 49 Comp. Gen. 578 we said that the use of Government transportation requests (GTR) by civilian employees of the Army and Air

Force Exchange Service (AAFES) would be in conflict with our decisions and applicable laws and regulations. Although the Commander in Chief, USAREUR, would have nonappropriated funds cited on all GTRs issued for Category Z travel of USAREUR supported nonappropriated fund agencies, our decision applies whether payment for services furnished is from nonappropriated funds or from appropriated funds followed by reimbursement. On the basis of that decision, GTRs should not be issued for the procurement of Category Z air transportation of any USAREUR supported nonappropriated fund agency personnel even though chargeable directly against nonappropriated funds.

The policy expressed in sections 2020.10 and 2020.80 of Title 5 of the GAO Policy and Procedures Manual (4 CFR 51.15 and 51.22), restricting the use of GTRs to travel authorized at Government expense (see 33 Comp. Gen. 434 (1954)), maintains the integrity of travel appropriation obligations; and the GTR serves to identify the travel insofar as it may be required by any special agreements made between the Government and the carriers on transportation provided for the account of the Government.

Category Z fares are offered by scheduled commercial airlines to procure transportation for the United States on regularly scheduled flights upon the presentation of GTRs. The conditions under which such travel is allowed are set forth in tariffs filed with the Civil Aeronautics Board (CAB). We are aware that such fares may be about 50 percent of economy fares; however, savings from such use of GTRs would not accrue to the United States Government because the cost of commercial air transportation incident to nonofficial business cannot be charged to appropriations of the United States Government.

We understand that CAB concurrence in Category Z fares was based on representations that they would be limited to transportation payable from public funds, and unless the CAB agrees to enlarge the authority now covering Category Z fares, their application to transportation paid from nonappropriated funds would be illegal. The fact that GTRs may be used would not sanction the application of Category Z fares, if in fact the transportation is not for the account of the United States and the cost is not absorbed by the United States Treasury.

Our decision in 49 Comp. Gen. 578 was rendered in response to a request for determination of the propriety of a proposal to change appropriate regulations for the purpose of authorizing what appeared to be the future use of GTRs in the procurement of transportation by air for civilian employees of the AAFES. The stated purpose of the pro-

posed use was to avoid payment of a 5 percent tax on transportation of persons by air as imposed by section 4261 of the Internal Revenue Code, 26 U.S.C. 4261.

The letter of February 4, 1971, indicates that members of nonappropriated fund agencies in USAREUR have been using GTRs for the procurement of Category Z air transportation, and information available in this Office shows that GTRs have been used under similar circumstances by the Department of the Army in areas other than Europe. A message, dated December 9, 1970, LOG/TM-PMB-T-2-37b, from DA to AJG 7401, suggests that air carriers may have complained that GTRs were being issued to procure transportation, primarily Category Z, for nonappropriated fund agencies (and contractor personnel). This message, based on 49 Comp. Gen. 578, however, indicates renewed enforcement of the prohibition against unauthorized use of GTRs. We appreciate the difficulties that might be caused by discontinuing the unauthorized use of GTRs to obtain Category Z transportation in the case of nonappropriated fund agencies supported by USAREUR, and we regret that the situation requires such action.

We trust that appropriate amendments will be made to various provisions of Army regulations which appear to encourage procurement of Category Z air transportation by nonappropriated fund agencies and establish "cost charge" procedures incident to the use of GTRs in apparent conflict with the understanding of the carriers which have agreed to the application of such fares in cases of Government travelers on official business covered by GTRs and in apparent violation of 31 U.S.C. 628. See 48 Comp. Gen. 773 (1969). We refer to such provisions as paragraph 1-46 of AR 230-1 and paragraph 309035 of AR 55-355, DSAR 4500.3.

[B-171019]

States—Federal Aid, Grants, Etc.—Restrictions Imposed by Law—Removal—Retroactive Application

The 1970 amendment to the Omnibus Crime Control Act of 1968, which makes clear that personnel compensation limitation only apply to restrict the use of grant funds for the payment of police and other regular law-enforcement personnel and not to support services, may be retroactively applied to the unobligated and unspent block grants awarded for the fiscal years 1969 and 1970 on a matching basis by the Law Enforcement Assistance Administration under the 1968 act to the States for subgranting, as well as to the "discretionary" grants made to States or directly to cities and counties, as the rule against the retroactive application of statutes—absent clear intent to the contrary—pertains to an enactment that would prejudicially affect vested rights, or the legal character of past transactions, whereas the 1969 and 1970 fiscal year grant funds committed by the Government are yet to be obligated by the States.

To the Associate Administrator, Law Enforcement Assistance Administration, April 26, 1971:

By letter dated February 22, 1971, you and Associate Administrator Coster requested our decision in the following matter.

Under part C of title I of the Omnibus Crime Control Act of 1968, Public Law 90–351, approved June 19, 1968, 82 Stat. 200, 42 U.S.C. 3731 *et seq.*, the Law Enforcement Assistance Administration (LEAA) makes annual population-based block grants to the States for law enforcement improvement programs. Each State is required to subgrant a percentage of these funds to cities and counties and the remainder may be spent by the State for statewide programs. All of these funds must be spent in accordance with a comprehensive statewide law enforcement plan developed by the State and approved annually by LEAA. These plans do not contain individual project or program specifications as such specifications are left to the discretion of the States within the general framework of the comprehensive plan and subject to the limitations and requirements of the act. LEAA also makes "discretionary" grants to States or directly to cities and counties. Block grants and discretionary grants are awarded on a matching basis; that is, the ultimate grantee must pay a specified part of the cost of funded programs.

Your Administration has thus far been required to award part C funds before the end of the fiscal year for which they were appropriated. However, because of the necessary delays due to suballocation, subgranting and contracting States and cities have been permitted two additional fiscal years during which to expend funds. Thus, some of the States and cities still have unobligated or unspent funds awarded by LEAA in fiscal years 1969 and 1970.

Subsection 4(4) of the Omnibus Crime Control Act of 1970, Public Law 91–644, approved January 2, 1971, 84 Stat. 1892, amended subsection 301(d) of Public Law 90–351, 42 U.S.C. 3731(d), so as to make clear that personnel compensation limitations heretofore prescribed shall only apply to restrict the use of grant funds for the payment of the salaries of police and other regular law-enforcement personnel. It was the intention of this amendment that the use of block grant funds for the salaries of personnel whose primary responsibility is to promote assistance, maintenance, or auxiliary services or administrative support to the regular operational components of law-enforcement agencies shall not be subject to the limitations of section 301 of Public Law 90–351 that not more than one-third of any grant for law-enforcement purposes may go for the compensation of personnel. See H. Rept. No. 91–1174, 11 and S. Rept. No. 91–1253, 45.

In addition to the personnel limitation amendment above described, subsection 4(3) of Public Law 91–644 amended Public Law 90–351, 42

U.S.C. 3731(c), so as to allow up to a 75 Federal 25 nonfederal matching formula for law enforcement programs. Before this amendment the matching formulas depended on the nature of the program funded and while most programs were subject to a 60–40 matching formula, there was authority to fund programs on a 75–25 and 50–50 formulas as well.

In your submission you point out that while the effective date of neither of these amendments is specified, the legislative history of Public Law 91–644 makes it clear that the amendment to the matching ratios made by section 4(3) applies to all fiscal year 1971 funds but not to funds granted from prior fiscal years' appropriations. The legislative history referred to are statements to this effect by the House and Senate managers on the Conference bill; i.e., the remarks of Chairman Celler, Mr. Poff, Mr. Rodino and Senator Hruska in the Congressional Record of December 17, 1970, H11889, H11892 and S20475 respectively. It is therefore your view that the amendment made by section 4(4) must operate prospectively from January 2, 1971, the date the President signed Public Law 91–644.

You go on to state that if this conclusion is correct, it raises the question of whether the liberalized salary support provision applies to grant funds awarded by LEAA from the current fiscal year appropriation or may be construed to apply also to grant funds awarded by LEAA from prior fiscal years' appropriation but not yet obligated for specific programs and projects by the States. You believe that the latter construction may be adopted as: (1) this construction is consistent with the nature of the block grant since block grant funds are awarded by LEAA on a population basis pursuant to a general statewide plan, (2) they are then obligated for specific programs and projects by the States, and (3) specifications relating to matching ratios and salary payments are not introduced until the point of obligation by the States. You emphasize that the construction suggested will not increase the expenditures of the Federal Government, it will merely affect the purposes for which the States may spend a fixed amount of Federal dollars, and that you believe the Congress would prefer a construction of the 1970 act that facilitates rather than discourages the expenditure by the States of their full 1969 and 1970 block grants for the high priority purposes set out in the 1968 act.

Central to the question presented is whether the general rule against retroactive application of statutes—absent clear intent to the contrary—would preclude the application of the more liberal personnel compensation provisions of the 1970 act to unspent 1970 and 1969 funds. We do not think such application pertains. It has been said that:

It is chiefly where the enactment would prejudicially affect vested rights, or the legal character of past transactions, that the rule in question applies. Every

statute, it has been said, which takes away or impairs vested rights acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability in respect of transactions or considerations already past, must be presumed, out of respect to the Legislature, to be intended not to have a retrospective operation.

See *People* v. *Dilliard*, 298 N.Y.S. 296, 302 (1937).

By allowing the more liberal 1970 personnel restrictions to apply to 1969 and 1970 fiscal year funds not yet obligated by the States and local governments, none of the evils above described would result. The statement from the *Dilliard* case is particularly for application here because (1) the Federal commitments have already been made and will not be increased; (2) no vested rights are taken away or impaired vis-a-vis the States and local governments because, as of this time, no specifications—including those concerned with personnel compensation—have been agreed to by the States and their local governments; and (3) the Federal Government cannot require the States and local governments to enter into specific programs and projects.

Accordingly, we would not object to the application of the more liberal 1970 personnel limitations to 1969 and 1970 grant funds yet to be obligated by the States and local governments.

[B–171343]

Contracts—Protests—Persons Qualified to Protest

The discarding of all bids for the movement or storage of personal property by a naval installation upon discovering that an item in one of three service schedules was 100 percent overstated in the invitation for bids was a proper administrative determination pursuant to paragraph 2–404.1(b) of the Armed Services Procurement Regulation, notwithstanding the protesting bidder may not be a qualified bidder, as any bidder may properly bring to the attention of the concerned Government officials any factor indicating that a particular procurement action is defective. Also, since the reissued invitation contained an erroneous weight estimate and misstated the actual operating authorities necessary to perform the solicited services, this second invitation, too, may be canceled.

Bidders — Qualifications — License Requirement — Bidders Not Licensed Prior to Bidding

A bidder who could not certify that it had or could obtain prior to award, the necessary ICC authority in its own name as required by the invitation for bids (IFB) for the movement or storage of household effects and therefore would have to rely on subcontractors to furnish the services it could not perform is a nonresponsive bidder, notwithstanding the subcontracting clause of the IFB permits a qualified bidder after obtaining an award to subcontract with the prior approval of the contracting officer as the subcontracting clause does not purport to modify the requirement that the prospective contractor possess the necessary operating authority prior to award. However, since award is recommended to the bidder unable to comply with the 100 percent operating authority requirement, the requirement appears unessential and unduly restrictive of competition and, therefore, the IFB should be canceled and resolicited.

To the Secretary of the Navy, April 26, 1971:

Reference is made to a letter dated February 1, 1971, SUP 0232, from the Deputy Commander, Purchasing, Naval Supply Systems Command, furnishing our Office a report relative to the protest of American Moving and Storage Company of Marin (American), in

connection with the cancellation of a portion of IFB No. N66314-71-B-0528 and readvertisement under IFB No. N66314-71-B-1148, both of which were issued by the Naval Regional Procurement Office, Naval Supply Center, Oakland, California.

It is reported that the initial invitation, issued on September 4, 1970, requested bids for the preparation of personal property for moving or storage, drayage and related services as ordered by seven different Government activities during calendar year 1971. The services were divided into three schedules: Schedule I—Outbound Services; Schedule II—Inbound Services; and Schedule III—Intra-Area and Inter-Area Moves. Listed under each of the schedules were seven different geographic areas of performance and numerous items of service. Paragraph D1(a) of the invitation provided that bids would be evaluated on the basis of total aggregate price of all items within an area of performance under a given schedule. It is further reported that the estimated quantities for each area were obtained by the procuring activity from the seven ordering activities.

Invitations to bid were sent to 51 firms, of which number 14 submitted bids by the date set for opening on October 2, 1970. However, only American and Goodwin Moving & Storage (Goodwin) submitted bids for Area II (on an all or none basis), which were as follows:

Goodwin:	
Schedule I	$70,910.00
Schedule II	23,176.50
Schedule III	175,200.00
	269,286.50
Discount 0.50 of 1.00% 20 days	—1,346.44
	$267,940.06
American:	
Schedule I	$48,932.20
Schedule II	14,508.00
Schedule III	200,190.00
	263,630.20
Discount 1.00% 20 days	—2,636.30
	260,993.90

While the total aggregate prices were very close, under Item 1a(1) of Area II, Schedule I, American bid 10 cents per cwt., while Goodwin's bid for the same item was $5 per cwt. Because of this wide difference in unit prices, American was asked to verify its bid for that item. By an undated letter received at the procuring activity on No-

vember 16, 1970, American verified its bid price on this and all other items. At about the same time, Goodwin advised the Supply Center that its research disclosed that under the existing contract for calendar year 1970, held by American, Item 1a(1) of Area II was not being used, especially since June 1970, and the reason for American's current bid of 10 cents on this item was that it apparently did not intend to do any volume of work thereunder. Since Hamilton Air Force Base was the primary user of Area II, that activity was requested to verify its estimated quantity for Item 1a(1). In a letter dated November 25, 1970, Hamilton requested that the quantity for that item be corrected from 330,000 pounds to 150,000 pounds and in the same letter verified the estimated quantities previously furnished for the other items in its area.

For information purposes, bid prices were then recomputed by the procurement activity using the corrected quantity. Assuming that the same bid prices would have been offered had the proper estimate been used for Item 1a(1), Goodwin would have displaced American as the low bidder. In view of these circumstances, and since the quantity shown in the invitation was more than 100 per cent higher than the revised estimate, and because both American and Goodwin had bid "all or none" for Area II, it was determined by the contracting officer, pursuant to section 2-404.1(b) of the Armed Services Procurement Regulation (ASPR), to cancel Area II from all three schedules of the invitation and readvertise.

The second invitation, with a revised estimate for Item 1a(1), Schedule I, was issued on December 4, 1970. During a telephone conversation with the procuring activity on December 9, 1970, American advised that it believed the quantity of 2050 gross hundredweight listed for Item 1b(1) of Area II, Schedule I, to be incorrect. Hamilton Air Force Base subsequently advised that its estimate on this item was also in error, and by amendment the estimate was changed to 50 gross hundredweight.

The bids under the second invitation were opened on December 17, 1970, even though American had protested on December 14, 1970, to the contracting officer against the cancellation of Area II in the first invitation and his failure to award a contract to American under that invitation. Again, American and Goodwin, both quoting on an "all or none" basis were the only two bidders. Their bids, as evaluated, were as follows:

Goodwin:	
Schedule I	$48,094.00
Schedule II	13,733.75
Schedule III	175,200.00
	237,027.75

Discount 0.50 of 1.00% 20 days	−1,185.14
	$235,842.61
American:	
Schedule I	$48,901.50
Schedule II	11,217.00
Schedule III	181,490.00
	241,608.50
Discount 1.00% 20 days	−2,416.09
	$239,192.41

For Item 1a(1) Goodwin had reduced its unit price from $5 to $4 per cwt., while American raised its unit price for this item from 10 cents to $5 per cwt.

Before American's protest of December 14, 1970, on the first IFB was resolved, it filed with the contracting officer on December 21, 1970, a protest against the second invitation, a copy of which was furnished our Office by the attorney for American. In the December 14 protest American contended that during the calendar years 1969 and 1970, for which period it was the holder of the contract, there had been no "fluctuation" between the estimated amounts and the amounts ordered, and that the quantities which might be ordered for Item 1a(1) could substantially exceed the estimate of 330,000 pounds in the canceled IFB, if the successful bidder's bid was low enough for that particular item.

In support of this contention it was pointed out that for the years 1969 and 1970 American performed pack and crate services under its Government contracts on 36,885 pounds and 94,467 pounds of household goods, respectively, for Hamilton Air Force Base and also performed such services during those years on household goods from that base in the amounts of 242,565 pounds and 175,143 pounds as origin agent for thru-bill-of-lading carriers. It was alleged that it could be more beneficial to the Government to order all of the services thru a Government pack and crate contractor at an exceptionally low price, and that other installations, in addition to Hamilton, could place orders for the services and receive the benefit of the low price. While the activity states that it is impossible to determine whether American's contention would have proved to be true, the activity notes that American's 1970 contract price of $1.50 per cwt. for Item 1a(1) was considerably lower than the thru-bill-of-lading method under which American performed most of such services.

In the December 21 protest letter, which formed the basis of American's protest before our Office, the cancellation of Area II of the first invitation is again questioned. Additionally, it is urged that the sec-

ond invitation should be canceled. We have been informed that the existing contract which American holds has been extended pending a resolution of the instant protest.

Concerning cancellation of the first invitation, American argues that the procuring activity honored a protest from a disqualified bidder, in that Goodwin did not hold the necessary Interstate Commerce Commission (ICC) operating authority for the areas involved, which the invitation required a bidder to hold "in his own name." In response to this argument the administrative report to our Office states:

> As shown in Exhibit A attached to American's protest letter of 21 December 1970, Goodwin holds I.C.C. Authority for points within 50 miles of Vallejo, California. That 50 mile radius covers all of Marin County and more than half of Sonoma County. By volume, more than 90% of Area II requirements would fall within the area covered by Goodwin's I.C.C. Authority. Geographically, Goodwin's I.C.C. Authority covers about 75% of Area II. Further, the contract clause entitled "Subcontracting" indicates that requirements may be subcontracted, provided the subcontract is approved by the Contracting Officer. By letter of 28 December 1970, enclosure * * *, Goodwin requested authority to subcontract for any tonnage outside the scope of their I.C.C. Authorization. It is the opinion of Counsel for this activity that Goodwin meets the requirements of the invitation with respect to the I.C.C. Operating Authority.

Without deciding, for the present, whether Goodwin was, or was not, a qualified bidder, we think that any bidder may properly bring to the attention of the concerned Government officials any factor indicating that a particular procurement action is defective. We have repeatedly observed that the rejection of bids after they are opened and each bidder or prospective bidder has learned his competitor's prices is a serious matter and such action should not be taken except for compelling or cogent reasons. However, in the instant case we believe there was a proper basis for cancellation of Area II in the first invitation, since the purpose of the cancellation was to make a substantial reduction in an incorrect estimate of the Government's needs on which the bids were to be based. In addition, since American's claim in its December 21 letter (that items 3a(1), 3b(2), 29a and 29b of Schedules I and II of Area II in the second invitation contained substantial inaccuracies in the estimated quantities) has been verified, it appears that the same cogent reason also exists for cancellation of the second invitation. See 49 Comp. Gen. 584 (1970).

With respect to whether Goodwin is qualified for an award, the first invitation required a bidder to certify that he possessed the necessary ICC authority in his own name, and the second invitation provides:

> Operating Authorities
>
> The bidder represents that he holds, or will obtain *prior to award*, all necessary operating authorities (Federal, State, and Local) in his own name. [Italic supplied.]

As indicated above, Goodwin's ICC operating authority covers only about 75 percent of the geographical area of Area II, and only

about 90 percent by volume of the anticipated requirements. Goodwin proposes to subcontract those services outside the scope of its ICC authority, and it is the opinion of the procuring activity that the subcontracting provisions of the IFB should be construed to permit Goodwin to qualify in this manner. In this connection, paragraph C47 of the second invitation states:

> The contractor shall not subcontract without the prior written approval of the Contracting Officer. The facilities of any approved subcontractor shall meet the minimum standards required by this contract.

It is our opinion that the representation as to possession of "all necessary operating authorities * * * in his own name" in the Operating Authorities clause quoted above, leaves no room for construction. The phrase is specific and, although the subcontract clause permits a qualified bidder who has been awarded a contract to subcontract with the prior approval of the contracting officer, that clause does not purport to modify the provision requiring a prospective contractor to possess the necessary operating authority prior to award. We believe that the Operating Authorities clause can be reasonably interpreted only to mean that the prospective contractor must hold, in his own name at the time of award, all necessary operating permits as may be required for that contractor to completely and fully perform all of the services required by the contract. See 36 Comp. Gen. 649 (1957). The qualifications of a prospective contractor are a matter of responsibility, and ASPR 1-904.1 provides that no contract shall be awarded to any person or firm unless the contracting officer first makes an affirmative determination that the prospective contractor is responsible. Under the provisions of the IFB as set out above, it is our opinion that Goodwin could not properly be determined to be a responsible bidder unless Goodwin then held adequate ICC operating authority.

With respect to whether an award can be made to American, we note that although the invitations required the prospective contractors to have all necessary ICC and other authority at the time of award, the contracting officer recommended the award on the second invitation be made to Goodwin even though Goodwin does not have the ICC authority necessary to perform all of the services required by the invitation, and intends to subcontract those services for which it does not have the necessary authority. It therefore appears that the possession of full ICC authority by the contractor cannot be considered essential by the procuring activity to satisfactory performance of the contract. It follows that the requirement for such authority, as set out in the IFB, must be regarded as unduly restrictive of competition as to any prospective bidder who neither has such authority nor proposes to obtain it prior to award. In the circumstances, it is our view that the second invitation (No. N66314-71-B-1148)

must also be canceled, and new bids solicited for Area II under an invitation which includes the best estimates available and such modifications or amendments to the invitation as may be necessary to advise bidders of Navy's actual requirements concerning ICC and other operating authority for the services covered by the invitation.

The documents furnished with the report of February 1 are returned.

[B–171548, B–171912]

Contracts—Awards—Small Business Concerns—Set-Asides—Performance in Foreign Country

The use of a small business set-aside issued pursuant to paragraph 1–706.5(a)(1) of the Armed Services Procurement Regulation (ASPR) for the procurement of dairy products overseas, on the basis of a reasonable expectation of competition, was proper procedure, even though ASPR 1–700 does not include foreign areas in the geographical areas listed for the performance of set-asides, as the intent of the Small Business Act is to benefit small business concerns and the place of performance *per se* has no bearing other than to require consideration of the greater complexities involved in performing a contract in a foreign area in selecting a responsible offeror. Moreover, proper procedures were also followed in not referring the expectation of receiving proposals at reasonable prices to higher authority, in providing for the possible submission of a Certificate of Current Cost or Pricing Data by the successful offeror; and in the manner of soliciting "courtesy bids" from large concerns.

To Miller, Groezinger, Pettit & Evers, April 30, 1971:

Further reference is made to your protests on behalf of Foremost-McKesson, Inc. (Foremost), against the use of 100 percent small business set-asides under request for proposals (RFP) Nos. N00189–71–R–0035 and N00189–71–R–0090, both of which were issued by the Naval Supply Center, Norfolk, Virginia (NSC NORVA).

Both solicitations invited competitive offers covering requirements type contracts for numerous items of recombined filled-milk and related dairy products for delivery to various ashore and afloat Naval activities at Naples, Italy, and Rota, Spain, respectively.

The instant RFP's were issued pursuant to section 1–706.5(a)(1) of the Armed Services Procurement Regulation (ASPR), on a 100 percent small business set-aside basis, the contracting officer and Small Business Specialist having made a prior joint determination that there was reasonable expectation of receiving proposals under both solicitations from two or more responsible small business firms so to assure that awards could be made at fair and reasonable prices. Specifically, the small business firms originally expected to submit proposals were:

(a) Old Dominion Dairy Products, Inc.	(Old Dominion)
(b) United Dairy Equipment Company	(United)
(c) Servrite International, Ltd.	(Servrite)
(d) Sterile Food Products	(Sterile)

Since it would appear from the administrative reports furnished our Office, copies of which were furnished your office, that there was every reasonable expectation to believe that the aforementioned companies would submit offers on the Rota, Spain, procurement (RFP N00189–71–R–0090), and since your complaints concerning both procurements are essentially the same, we will direct our comments principally to the facts and circumstances surrounding the Naples, Italy, procurement (RFP N00189–71–R–0035).

The joint determination to totally set aside the Naples procurement for 100 percent small business participation was based in part on the fact that except for Sterile, all of the above listed small business firms had submitted competitive proposals under a somewhat similar procurement in October 1970 which was totally set aside for small business, covering a dairy products contract at Guantanamo Bay Naval Base, Cuba. Additionally, Sterile had previously advised NSC NORVA of its intent to compete under the protested procurement. However, of the four small business firms from which proposals were originally anticipated, United and Sterile completely withdrew all interest in the procurement after its issuance, and Servrite furnished conflicting information of its intentions covering submission of a proposal. Consequently, on November 23, 1970, the contracting officer determined that since Old Dominion was the only known remaining small business concern interested in making an offer, to continue the procurement as a total small business set-aside would be violative of ASPR 1–706.5(a)(1), which provides that total set-asides shall not be made unless a reasonable expectation exists that proposals will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices.

The contracting officer's determination was referred to the Contract Review Board on November 24, 1970, for approval, and for subsequent referral to the Small Business Specialist (SBS) for concurrence. Concurrence of the SBS could not be obtained on the same day the Board approved the determination to cancel the set-aside, since the SBS had been verbally informed earlier that day by Servrite that it *did* intend to submit a proposal, and it was the opinion of the SBS that proposals from two small business firms would satisfy the requirements of ASPR 1–706.5(a). Thereafter, there was considerable discussion, both formally and informally, among the cognizant Naval personnel as to how to best resolve the controversy. On December 4, 1970, a conference telephone call was held among all of the interested Navy officials, at the conclusion of which NSC NORVA was advised that it was the opinion of the Assistant Secretary of the Navy (I&L) for small business that the RFP should remain a total set-aside for small business. The contracting officer accepted the advice and recommendation of higher authority and chose not to cancel the set-aside.

In this connection, you complain that the dispute should have been settled by decision of the head of the procuring activity, rather than by the Assistant Secretary of the Navy, and you refer to the provisions of ASPR 1–706.3(f) and 1–704.3(a). Paragraph 1–704.3(a) of ASPR provides that the head of the procuring activity for the Department of the Navy shall appoint the small business specialists, who are responsible directly to such appointing authority. In those cases where the small business specialist and the contracting officer disagree regarding a withdrawal or modification of a set-aside determination, ASPR 1–706.3(f) provides that the *small business specialist may* appeal in writing to the appointing authority for decision, which decision shall be final. As disclosed under the reported facts, the contracting officer finally chose not to disagree with the small business specialist. It would therefore appear that the cited regulations did not come in to play regardless of the informal manner in which this dispute was handled, and we fail to see how these factors would in any way affect the validity of the decisions made. At best, it is evidence to be considered in our resolution of the issues raised in your second argument discussed below.

Aside from the issue discussed above, your protests against the set-asides under both procurements are premised on the following arguments:

I

A small business set-aside is neither authorized nor appropriate for the proposed contract(s), a substantial portion of which is to be performed outside the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands.

In support of this argument, you cite ASPR 1–700, which provides in fact:

1–700 Scope of Part. This Part, which applies only in the United States, its possessions, Puerto Rico, and the Trust Territory of the Pacific Islands * * *.

You contend that the manifest intent of this provision is to limit small business set-asides to contracts that are to be performed within the specified geographical areas. We have considered most carefully the arguments you have advanced to support such a reading of the quoted ASPR paragraph, but we are convinced that the intent of the Small Business Act, 15 U.S.C. 631, *et seq.*, and the regulations promulgated thereunder is to benefit American small business concerns, and the place of performance of the contracts awarded such firms in the furtherance of this intent has no bearing *per se* on the legality of the determination as to whether a particular procurement should be set aside in whole or in part, for small business concerns. For instance, ASPR 1–701(a)(1) provides in part:

"Concern" means any business entity organized for profit with a place of business in the United States, its possessions, Puerto Rico, or the Trust Territory of the Pacific Islands * * *.

We agree with your observation, as supported by an affidavit of the Vice President of Foremost, that contracts to be performed abroad ordinarily involve greater complexity and require greater financial resources and depth of management than those to be performed in the United States, especially in the Naples procurement, which will require a major financial investment by the successful offeror to establish a contractor-operated plant on Italian soil to commence production. However, these facts alone would not be justification, in our view, for not setting the procurement aside, assuming all of the conditions precedent have been met; rather, they would be additional factors for the procurement activity to consider in selecting a responsible offeror who could meet such requirements.

We have no reason to believe that the Navy will not properly take all of these facts into account in its final selection of a contractor, and consequently we can perceive of no legal basis to interpose an objection to a small business set-aside that is awarded within, but is to be performed outside, the geographical areas enumerated in ASPR 1-700. The fact that the history of small business set-asides is devoid of previous set-asides to be performed on foreign soil in no way affects such a conclusion or operates to properly classify this solicitation as a "foreign" set-aside. In this regard, it is reported that the cost and pricing data furnished by offerors indicates that approximately 75 percent of the cost of performance will be incurred in the United States.

II

The contracting officer had no basis for a reasonable expectation that bids would be obtained from a sufficient number of responsible small business concerns so that award would be made at a reasonable price.

Aside from the reported facts related above, you contend that this second argument is supported by the fact that the RFP's *requested* that offerors submit a DD Form 633, and provided that the successful offeror *may* be required to execute a Certificate of Current Cost or Pricing Data; that ASPR 3-807.3 (as revised by DPC 74) provides that such documents are required in contracts of this type "unless the price negotiated is based on adequate price competition * * *." Thus, such documents need not have been requested by the contracting officer unless he felt there would be inadequate competition.

Such requests for cost and pricing data are required in all negotiated procurements over $100,000 unless there is reason to believe in advance that there will be adequate price competition. If after negotiations are commenced it appears that there will not be adequate price competition, the contractor would then be required to execute the required certificate. However, we do not feel that a request for such information as a matter of form affects the standard of reasonable expectation imposed upon the contracting officer under ASPR 1-706.5, which is

required to be made in advance of the issuance of the solicitation. ASPR 1–706.5, provides in pertinent part as follows:

1–706.5 Total Set-Asides

(a) (1) Subject to any applicable preference for labor surplus area set-asides as provided in 1–803(a) (ii), the entire amount of an individual procurement or a class of procurements, including but not limited to contracts for maintenance, repair, and construction, shall be set aside for exclusive small business participation (see 1–701.1) if the contracting officer determines that there is reasonable expectation that bids or proposals will be obtained from a sufficient number of responsible small business concerns so that awards will be made at reasonable prices. Total set-asides shall not be made unless such a reasonable expectation exists. * * *

Our Office has held that the determination as to whether such a reasonable expectation exists is within the ambit of administrative discretion, and we will not substitute our judgment for that of the contracting officer in the absence of a clear showing of abuse of the discretion permitted him. 45 Comp. Gen. 228 (1965). In view thereof, and since offers were received from two responsible small business concerns, we see no valid basis for disagreeing with the determination to set the procurements aside for small business concerns.

III

Bidders other than small businesses, particularly those known to be interested in this type of contract, have not been afforded an opportunity to prepare a proposal on an informed basis.

You submit in support of this argument that a "courtesy bid" submitted by a large firm may be used to determine whether the low bid submitted by a small business concern is reasonable, and you cite 49 Comp. Gen. 740, April 28, 1970, as support for such a proposition. However, you contend it was impossible for any large firm (and, indeed, difficult for any firm) to submit a proposal on an informed basis since the solicitation was announced in the Commerce Business Daily on November 17, 1970, providing for a preproposal conference in Norfolk on November 20, 1970, and set the due date for proposals as January 5, 1971.

In 49 Comp. Gen. 740, April 28, 1970, we held that a courtesy bid is a *factor* to be considered in determining whether bid prices received from small business concerns were unreasonable. That decision did not overrule 45 Comp. Gen. 228 (1965), in which we held that the fact that lower bids may be expected from large business concerns is not a *significant* factor in determining whether a procurement should be set aside for small business participation only.

While courtesy bids may be a factor in determining whether prices offered are reasonable, we also believe that the receipt of lower prices from firms which are ineligible for award is insufficient evidence standing alone to require a conclusion that the prices submitted by eligible bidders are unreasonable. 46 Comp. Gen. 102, 106 (1966);

B-168534(1)(2), January 16, 1970. We agree that the scheduling of the preproposal conference only 3 days after announcement of the solicitation was perhaps too brief a period, but since it is admitted that one of your subsidiaries was promptly furnished a solicitation package for the Naples procurement and attended the preproposal conference for the Rota procurement, it would appear that your firm was given just as much opportunity to submit proposals on an informed basis as any of the other potential offerors.

In view of the foregoing, we see no valid basis for objection to the procedures followed in these procurements, or to any awards which may be made thereunder to the low responsible offerors.

Accordingly, your protests on behalf of Foremost are denied.

[B-171700]

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

Since under 10 U.S.C. 703(b) members of the uniformed services are only authorized transportation at the expense of the United States to and from the place of leave selected for the 30 days' special leave provided for the voluntary extension of a tour of duty in a hostile area, reimbursement for travel to and from the place of leave in addition to the actual round-trip transportation costs is restricted to taxicab or other public carrier fares for transportation to and from carrier terminals utilized in performing the authorized travel, as such fares constitute a part of the actual transportation costs, as well as those tips that are within the limitations of paragraph M4402-4 of the Joint Travel Regulations, and the members may not be reimbursed for miscellaneous expenses that are not related to transportation costs, such as the cost of checking and transferring baggage, or passport and visa fees.

To the Secretary of the Air Force, April 30, 1971:

Further reference is made to letter of January 11, 1971, from the Assistant Secretary of the Air Force (Manpower and Reserve Affairs) requesting a decision whether a member of the uniformed services who is authorized a special 30-day period of leave under Public Law 89-735 as extended by Public Law 91-302, and is furnished transportation from a hostile fire pay area to a leave place of his choice and return, may be reimbursed for certain miscellaneous expenses including passport and visa fees on the basis described. The request was assigned Control No. 70-57 by the Per Diem, Travel and Transportation Allowance Committee.

The Assistant Secretary says that question has arisen whether members may be reimbursed pursuant to the cited statutes and implementing regulations, for certain miscellaneous expenses incurred in connection with such travel which are normally reimbursable when incurred in connection with official travel in accordance with the Joint Travel Regulations, volume 1, chapter 4, part I. Such expenses include taxicab, bus, street car, subway, or other public carrier fares for trans-

portation to and from carrier terminals; allowable tips, and the cost of checking and transfer of baggage.

In addition, the Assistant Secretary says that since, under the statute, members may select a leave place which will require them to obtain a passport or visa, the question arises as to whether the expenses incurred for obtaining such documents may be considered as a part of the authorized transportation expenses.

Public Law 89–735, approved November 2, 1966, added section 703(b) to Title 10, United States Code. That section as extended by Public Law 91–302, approved July 2, 1970, provides in pertinent part as follows:

> (b) Under regulations prescribed by the Secretary of Defense, and notwithstanding subsection (a), a member who is on active duty in an area described in section 310(a)(2) of title 37 and who, by reenlistment, extension of enlistment, or other voluntary action, extends his required tour of duty in that area for at least six months, may be—
>
> (1) Authorized not more than thirty days of leave, exclusive of travel time, at an authorized place selected by the member; and
>
> (2) transported at the expense of the United States to and from that place.
>
> * * * The provisions of this subsection shall be effective only in the case of members who extend their required tours of duty on or before June 30, 1972.

The language contained in section 703(b) of Title 10, United States Code, clearly provides that members entitled to leave "at an authorized placed selected by the member" may be "transported at the expense of the United States to and from that place." The legislative history of Public Law 89–735 shows that the purpose of that provision was to provide for only necessary transportation to and from a selected location at no expense to the member, or, as stated in the hearings, that the member would get "free transportation." 47 Comp. Gen. 405 (1968). The legislative history also shows that the selected location "in most cases could be expected to be in the United States," thus indicating that in some cases it was expected that travel would be to foreign countries. See Senate Report No. 1691, 89th Congress, 2d Session, on H.R. 15748, which was enacted as Public Law 89–735.

Paragraph M5501 of the Joint Travel Regulations promulgated pursuant to section 703(b) provides that a member who is entitled to transportation under this authority of law will be furnished Government transportation or Government-procured transportation to the maximum extent practicable. It further provides that when Government or Government-procured transportation is not utilized and the member procures transportation at personal expense, he will be reimbursed:

1. For transoceanic travel, in accordance with par. M4159–4;
2. For land travel by surface means, at the cost actually paid by the member;

3. For overland air travel, on the same basis as for transoceanic air travel under item 1.

Payment of mileage, monetary allowances in lieu of transportation, or per diem allowances is not authorized.

Where, as here, a statute provides for furnishing transportation only, it long has been the view that reimbursement for travel at personal expense may not exceed the cost of necessary transportation. 23 Comp. Gen. 875 (1944). A similar construction was placed on the phrase "transported at the expense of the United States" contained in 10 U.S. Code 1040, providing for transportation of dependents of members stationed overseas to and from medical facilities, 47 Comp. Gen. 743 (1968).

By way of contrast, 37 U.S. Code 404 authorizes both "travel and transportation allowances" to members of the uniformed services performing travel under orders and subparagraph "d" thereof specifically sets forth the travel and transportation allowances for each kind of travel. It is on the basis of such statutory provisions that the Joint Travel Regulations, volume 1, chapter 4, part I, authorize reimbursement of miscellaneous expenses of travel including passport or visa fees. Likewise, since 10 U.S. Code 1040, also provides for "round-trip transportation and travel expenses" for necessary attendants accompanying dependents traveling to and from medical facilities, in the 1968 decision we further held that such attendants would be entitled to travel and transportation allowances.

"transported at the expense of the United States to and from that place" we are of the opinion that reimbursement may be authorized for the cost of taxicab or other public carrier fares for transportation to and from carrier terminals utilized in performing the authorized travel as such fares would constitute a part of the actual transportation costs. Also, since tips ordinarily are regarded as part of the cost incurred when taxicabs or airport limousines are used to and from carrier terminals we would not be required to object to reimbursement for such tips as a transportation cost within the limitations of paragraph M4402-4 of the Joint Travel Regulations.

Since, however, the statute does not provide for the payment of expenses other than the cost of transportation, there is no basis for reimbursement of miscellaneous travel expenses such as the cost of checking and transfer of baggage. And, while the legislative history of the act shows that it was expected that in some cases travel would be to foreign countries, no provision was made for payment of costs other than for transportation and, therefore, there is no basis for reimbursement of passport and visa fees. The questions are answered accordingly.

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